

LAW SOCIETY SUBMISSION



PUBLIC CONSULTATION ON THE LIMITED PARTNERSHIPS ACT 1907

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION (DBEI)

MARCH 2019

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

The Law Society of Ireland (the “Law Society”) welcomes the consultation by the Department of Business, Enterprise and Innovation on the Limited Partnerships Act 1907 (the “**1907 Act**”). In our view, limited partnerships serve an important economic purpose, but Ireland’s limited partnership framework requires modernisation both for the benefit of domestic limited partnerships, and to ensure that Ireland remains an attractive jurisdiction in which to do business for global investors who favour limited partnership structures, in particular in the areas of investment funds, private equity and venture capital.

1. What are the benefits of limited partnerships for the Irish economy?

1.1 Job creation – limited partnerships:

- (i) operated from Ireland by large scale funds (which are established as limited partnerships) from an operational and regulatory perspective, require a physical presence and “boots on the ground”;
- (ii) facilitate efficient investment by venture capital and private equity funds in indigenous businesses, leading to job creation and tax revenues; and
- (iii) drive work for the Irish financial and professional service industry.

1.2 The activity of limited partnerships spans the entire economy, from venture capital, renewable energy, agri-food and forestry to manufacturing, technology, engineering, construction and property development. The benefit of limited partnerships as a collective investment structure is evident from the range of businesses and people using it as their investment vehicle. The use of limited partnerships as fund and investment or asset holding vehicles domiciled in Ireland attracts foreign businesses to Ireland, brings economic opportunities and creates employment. Ireland has a large, established, advanced and world renowned financial services and fund service provider industry. Many job opportunities are currently being lost to Luxembourg and the Channel Islands due to antiquated Irish legislation governing Limited Partnerships (the 1907 Act). The jurisdictions which Ireland is losing out to have updated and modernised their limited partnership framework. The Irish framework has, for the most part, remained untouched since 1907.

1.3 The limited partnership also serves an important economic purpose in providing financing to the real economy by enabling people and entities to come together to make an investment and contractually agree between them, under a limited partnership agreement, how the investment will be made and how the profits and losses will be shared. Nevertheless, the level of investment activity taking place through Irish 1907-limited partnerships remains low in comparison to other jurisdictions such as the UK or Luxembourg. This is largely due to the fact that the 1907-limited partnership, in its current form, is often unsuitable for use as an investment vehicle. There is an opportunity to rectify this and to ensure that no further business opportunities are lost because there is a better alternative in another jurisdiction.

1.4 Given that all investment funds and investment vehicles require service providers (e.g. fund administrators, accountants, company secretaries, depositary services), the use of limited partnerships and developing a fit for purpose limited partnership structure in Ireland, which could be used for fund and investment vehicles domiciled in Ireland, would further increase the demand for the service provider industry in Ireland. While funds established as limited partnerships also target global investments, developing a fit for purpose limited partnership structure in Ireland

would further create potential for domestic usage and for attracting inward investment. A best in class limited partnership framework would be a vital addition to the Irish offering in terms of attracting business to Ireland.

- 1.5 The UK is historically one of the main centres for the formation, structuring and operation of limited partnerships worldwide particularly where limited partnerships are used as fund or investment vehicles. As a consequence of Brexit, English limited partnerships are not as attractive a legal structure for fund managers and investors, given that they will no longer constitute EU AIFs falling under the AIFMD regime and therefore will not benefit from the marketing passport operating under the AIFMD.
- 1.6 With the UK leaving the European Union, there is a gap in the market for another common law limited partnership vehicle within the European Union. Given that English and Irish limited partnership legislation has the same origin, there is interest among UK fund sponsors and fund sponsors that are traditionally familiar with English limited partnerships to use the Irish limited partnership as a fund vehicle. In order for Ireland to maximise this opportunity, it is essential that the Limited Partnerships Act 1907 is updated in line with recent UK reforms and proposals arising from consultation, which provide a clear path to developing a modern, fit for purpose Irish limited partnership structure. UK limited partnership reform exercises in 2009 and 2017 / 2018 were intended to eliminate many of the uncertainties and challenges associated with existing English limited partnership law.
- 1.7 There is a significant opportunity now for Ireland as a result of Brexit.

2. Given developments in the law governing business activity since 1907 is there a continued need for limited partnerships? Please set out any reasons or evidence for your opinion.

- 2.1 There is clearly an important and ongoing business need for limited partnerships.
- 2.2 Globally, almost all venture capital and private equity funds are structured as limited partnerships and there is no reason to think that this will change or lessen. As Irish funds continue to grow in size and in success, attracting an ever-increasing number of limited partners from outside Ireland, including for example the European Investment Fund, it is essential that Ireland continues to provide a legislative framework that supports and encourages such growth and investment.
- 2.3 Our experience shows that Irish limited partnerships are a key feature in international corporate structures with a presence in Ireland and/or in structuring transactions based out of Ireland or which have a link to Ireland. Luxembourg and the Channel Islands have substantially updated and modernised their respective limited partnership legislation in recent years. After considering Ireland, we are seeing more large scale investment firms, which historically have chosen English limited partnerships as their preferred vehicle, migrating to, and establishing new partnership entities in, Luxembourg and the Channel Islands due to those jurisdictions' more flexible, clearer and modern limited partnership legislation. Irish law firms have partaken in various jurisdiction "beauty parades" for this type of work and have seen first-hand how Ireland is losing out to those jurisdictions based on our "no longer fit for purpose" limited partnerships legislation.
- 2.4 Limited partnerships are a more appropriate structure than a corporate vehicle for certain investment vehicles. A limited partnership framework provides contractual flexibility free from corporate law restrictions in respect of the management structure and the terms upon which partners associate in business. The vast differences in the

size and nature of Irish limited partnerships illustrate the flexibility of limited partnerships as a business entity and, therefore, its continuing relevance in the Irish marketplace. It is therefore important to continue to support the valuable economic activity conducted through limited partnerships. Other jurisdictions across the world maintain and update their limited partnership legislation because they see the commercial and economic benefits of doing so. In addition to the above, there is investor familiarity with limited partnerships globally and Ireland needs to have an offering in this space.

3. Please set out your views on the possible reasons why there has been an increase in limited partnership registrations since the end of 2015.

3.1 The Law Society does not have experience of a vastly higher increase in work resulting in a significant increase in registrations for limited partnerships.

4. Please set out your views on whether limited partnerships should be required to use the term “Limited Partnership” in the business name.

4.1 A limited partnership should be required to use “Limited Partnership” or the abbreviated “LP” in its name (or the Irish equivalents) to make it easily identifiable as a limited partnership, similar to the position under Irish law in respect of a limited liability company. The abbreviation “LP” is also commonly recognised throughout the international business community as meaning a limited partnership.

4.2 A different naming convention could apply depending on whether the limited partnership has separate legal personality or not (we suggest that limited partnerships should have the ability to choose). Luxembourg has recently adopted a new limited partnership law which provides for both options (and a different naming convention).

5. Please set out your views on whether limited partnerships should be required to maintain a principal place of business and a registered office in the State.

5.1 The principle of publicising an address in Ireland for a limited partnership ought to be driven by the valid requirement that there be a place in the State at which third parties may serve notices on the limited partnership and not by anything further.

5.2 Given the cross-border nature of the investor base and commercial activity of limited partnerships, there should not be a need under the 1907 Act (or any replacement) for a limited partnership to also have an ongoing “principal place of business” in the State in order that the partnership continue to be an Irish limited partnership and the limited partners continue to have the benefit of limited liability.

5.3 References in Section 8 of the 1907 Act to effecting registration by sending the required statement to “the registrar in that part of [Ireland] in which the principal place of business of partnership is situated or proposed to be situated” are archaic and out of place in the Ireland of 2019.

- 5.4 They ought to be replaced by an express reference to and requirement of sending the necessary statement to the CRO and setting out in that statement the service address in the State of the limited partnership.
- 5.5 In that regard, we would note that a company formed under the Companies Acts is required to have a registered office in the State, however, the Companies Acts do not require that any particular amount of business of a company be conducted at its registered office. The same ought to apply to limited partnerships.
6. Please set out your views on whether limited partnerships should be required to make an annual return to the Registrar similar to obligations on companies.
- 6.1 A limited partnership should have to make some type of basic annual filing (such as a confirmation statement) to the Registrar so that it can be determined that a limited partnership is still active (“**Annual CS**”).
- 6.2 The annual confirmation statement filing should contain the following information concerning the limited partnership:
- (a) the name under which the limited partnership is registered;
 - (b) the date on which the partnership was registered as a limited partnership;
 - (c) the name and address of each general partner;
 - (d) the aggregate amount of capital contributions made by partners (broken down by limited and general partners) without specifying the level for each individual limited partner);
 - (e) its status (for example, active, cease carrying on business, in the course of dissolution etc.); and
 - (f) the address of the service office.
- 6.3 The 1907 Act should be updated to require a general partner to make a filing when it enters into a liquidation process.
7. Please set out your views on how the annual return should be made and who should be responsible for making it.
- 7.1 The general partner of the limited partnership should be responsible for making and filing the Annual CS. It should be capable of being filed electronically with the Registrar. The Annual CS should contain the names and address of all of the general partners.
- 7.2 General partners should be fully responsible for the registration formalities and should have the authority to sign the original registered particulars and any amendments, and where applicable, authorised managers should have the same responsibility and authority except for signing the original application for registration. Where there is default of registration formalities, the general partner(s) should be liable for daily fines similar to those which apply to companies. Default in registration formalities should not of itself remove the limited liability of the limited partners.

- 7.3 On day-to-day matters, experience shows that limited partnerships are finding it increasingly difficult to set up bank accounts with certain Irish banks due to the lack of an active, electronic LP register (supported by annual filings) available through online authorised providers (which is available for companies). The listing of limited partnerships maintained by the Registrar of limited partnerships and published on the Companies Registration Office (“CRO”) website is only updated monthly and is not accepted by banks and professional services firms as offering proof of the existence of a registered limited partnership. For those that do accept it as a form of evidence, the time lag can mean waiting a month after registration for that list to be updated. There should also be an ability to get a letter of status/printout from the CRO as regards a limited partnership in the same manner as is possible for a company.
8. Please set out your views on whether all limited partnerships should be required to file financial statements.
- 8.1 The current obligations on a limited partnership to file accounts in certain circumstances do not need to be increased.¹ In the UK Government’s response to its Department of Business, Energy & Industrial Strategy’s April 2018 consultation on Limited Partnerships: Reform of Limited Partnership Law, it signalled that it did “*not consider the case has been made for all LPs to prepare accounts and reports in line with limited companies*”.²
9. What are your views on giving the Registrar powers to remove and strike-off limited partnerships from the register?
- 9.1 The question of strike off needs careful consideration. Whatever may be decided, a strike-off, if that is what may happen, must not operate to remove the limited partners’ limited liability. If a company is struck off, the liability of its members is unaffected.
10. What factors do you think should be considered in removing or striking-off limited partnerships from the register?
- 10.1 As above, the key consideration must be protection of limited partner limited liability (for example if it turned into a general partnership).
11. Please provide any other comments you wish to inform the development and direction of policy on limited partnership law.
- 11.1 The 1907 Act is clearly in need of significant and urgent revision. In light of the fact that the original 1907 Act is also the core legislation in place in the UK, we believe that the recent UK limited partnership law reform and the “Limited Partnerships: Reform of Limited Partnership Law, The Government response to the consultation December 2018” provide a solid basis on which to update it along with the legislation in Luxembourg relating to unregulated limited partnerships (“SCSps”).

¹ See European Communities (Accounts) Regulations 1993

² At paragraph 23 (on page 12) of the UK Government’s response.

11.2 Key Changes Required

- 11.2.1 The Irish economy has lost out on, and continues to lose out on, significant employment opportunities and tax revenue due to the antiquated limited partnership legislation currently in place in Ireland, which dissuades funds from establishment in Ireland. Ireland needs to have partnership legislation at least equal to the competitive jurisdictions, including the UK, Luxembourg and the Channel Islands. It also needs bespoke legislative provisions for large funds established as limited partnerships such as contained in the UK's Private Fund Limited Partnership (PFLP) legislation.
- 11.2.2 There is a basic prohibition relating to a limited partner engaging in "management" and so losing limited liability protection. The rule, as it currently stands, affords limited partners with a significantly lower level of protection when compared the limited partnership regime in our competitor countries. As there is a lack of clarity surrounding what activities a limited partner can carry out without risking the limited partner losing limited liability, similar to what now exists in other jurisdictions, there needs to be a "white list" of "safe harbour" activities which a limited partner is allowed to undertake without being regarded as taking part in management of the partnership. Equivalent limited partnership structures in the UK, Luxembourg and the Channel Islands contain similar "white lists" or "safe harbour" lists, which give the limited partner a role advising and supervising the activities of the general partner, without compromising the status of the limited partner. There is almost no Irish judicial guidance as to what constitutes "management" by a limited partner in an Irish limited partnership.
- 11.2.3 The 20 partner limit (or 50 for certain partnerships) on the number of persons who may become partners in a limited partnership should be removed (to mirror an equivalent reform made in the UK), or at a minimum increased. This is a critical point requiring immediate action. The requirement to limit a partnership to 20 limited partners is an outdated and redundant requirement designed to facilitate suing each partner individually. As a limited partnership can be sued in the name of the firm, such a requirement is unnecessary and prohibitive. We would note that this requirement was removed in the UK under article 2 of the Regulatory Reform (Removal of 20 Member Limited in Partnerships etc.) Order 2002/3203.
- 11.2.4 There is a divergence of opinion on the current position under the 1907 Act as to limited partners potentially losing the benefit of their limited liability due to non or late filing of LP related forms in the CRO in addition to the existing statutory liability of the general partner for a fine for non or late filing. It should be clarified in legislation that a loss of limited liability will not occur on a late filing. The matter has been clarified in England in 2009 where legislation was introduced to clarify the position by declaring that failure to deliver changes would not affect the status of the limited partnership.
- 11.2.5 Limited partnerships need to be able to opt to have separate legal personality (similar to what is possible under Scots law and Luxembourg law), while maintaining tax transparency.
- 11.2.6 Limited partnerships with separate legal personality should be able to own property of any kind in their own name (similar to what is possible for a private company limited by shares) unless statutory rules exclude them from doing so.

- 11.2.7 The 1907 Act requires limited partners to make capital contributions to the limited partnership which the limited partner cannot withdraw until the end of the life of the partnership. As a result, the market practice in the private fund industry has been to utilise a “loan capital split”, whereby a limited partner makes a small capital contribution to the partnership (0.01% of its commitment), with the bulk of the partner’s commitment being advanced as an interest-free loan (99.99%). The PFLP in the UK no longer requires this, partners are not required to make a capital contribution and the requirement to potentially return any capital contributions withdrawn prior to the end of the life of the partnership does not apply. This is further consistent with the Luxembourg SCSp and other limited partnership vehicles in Delaware and the Cayman Islands. These changes should be made to the 1907 Act.
- 11.2.8 We suggest that a limited partnership not be required to make publicly available details of the limited partners (or the individual amounts of any capital contributions made by them). We suggested the Annual CS instead require confirmation of the aggregate amount of the capital contributions made by the limited partners (not broken down on a per-limited partner basis).

11.3 Administrative Type Changes

- 11.3.1 It should be a default rule that a limited partnership continues when a partner joins the partnership or withdraws from the partnership, provided that there remain at all times at least two partners (including always one general partner) in the limited partnership.
- 11.3.2 The administratively cumbersome requirement that any assignments of limited partnership interests are to be advertised in the Gazette should be removed.
- 11.3.3 An exemption from certain statutory duties imposed on limited partners not to compete with the limited partnership and to render accounts and information of things affecting the partnership to any limited partner should be removed. Where appropriate, partners can agree to include such provisions in the limited partnership agreement.
- 11.3.4 Any requirements to update information in relation to the limited partnership (typically it is 7 days), should be amended to extend the notification timelines to be more in line with that of companies⁷ (typically 14 or 21 days).
- 11.3.5 The Irish courts should have a specific power, where it is just and equitable to do, so to order the removal of a partner or the wind up of a partnership. The Registrar should have power to de-register a limited partnership on certain limited grounds, but this should not change the liability of parties.
- 11.3.6 The CRO should be provided with the resources to facilitate the digitisation of limited partnership filings, in the same manner as company filings. Currently it is only possible to obtain hard copies of limited partnership filings by requesting photocopies from the CRO. The (relatively new) administrative requirement of the Companies Registration Office that a limited partner, which is a non-Irish company, must provide a certified copy of its constitutional documents should be removed. There is no legal basis for this and it is cumbersome and results in significant delays to partnership registrations where international investors are joining Irish limited partnerships. This obligation has the potential to be a barrier to Ireland becoming a “best in class” destination for international fund establishment.

- 11.3.7 Precise dissolution provisions should be provided in reformed legislation. The ability for limited partners to appoint a person to wind up the partnership, if the general partner is unable or unwilling to do so, should be provided for.
- 11.3.8 Generally, the legislation requires amendment to consolidate all changes made to the 1907 Act via other legislation (e.g. references to the United Kingdom which should be to the State or Ireland, references to lunatics, etc.).
- 11.3.9 The principal aims for reform of Irish limited partnership law should be:
- (a) to preserve limited partnerships as flexible business vehicles;
 - (b) to encourage business by facilitating use of a modern “fit for purpose” limited partnership structure; and
 - (c) to provide a modern, jurisdictionally competitive, law of partnership based on consistent and straightforward concepts, which are clear and understandable.

12. Conclusion

- 12.1 The Law Society welcomes the Government’s stated commitment to legislative reform in the area of partnership law. The proposed changes outlined in this submission are urgent given the competitive situation Ireland finds itself in. In that regard, we believe that our proposals at Paragraphs 5 and 11.2.4 above should be promptly enacted (which would require minimal drafting). This would give a proper and appropriate legal certainty to limited partners that their limited liability status will not be imperilled by matters over which they will have no control and (in the case of on-going filings) of which they may have no knowledge.
- 12.2 The Law Society believes that there is no time to wait for a Law Reform Commission analysis on the totality of Irish partnership law (general partnerships, limited partnerships and investment limited partnerships) before addressing the matters relating to limited partnerships (set out in this submission) as such a review might take many years. It could, however, be something to consider in future with the goal to bring Irish partnership law to the status of best international practice.
- 12.3 The Law Society hopes that the Department will find the above comments constructive and helpful and is available to engage further with the Department if required.

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