

Review of the Limited Partnerships Act 1907

Submission to the Department of Business, Enterprise and Innovation

1 March 2019

Introduction

This is a submission on behalf of McCann FitzGerald, Riverside One, Sir John Rogerson's Quay, Dublin 2 D02 X576.

McCann FitzGerald is pleased to make this submission to the Department of Business, Enterprise and Innovation in respect of the Department's Review of the Limited Partnerships Act 1907 (the "1907 Act")

Queries in respect of this submission should be directed to either of the following:

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In this submission we abbreviate limited partnership under the 1907 Act as "LP".

Question 1

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

We are familiar with and endorse the submission that Irish Funds has made in response to this Review. As the Irish Funds submission explains in detail and for the reasons that Irish Funds cites, there is a strong appetite among overseas investors to hold Irish assets through LPs. This includes private equity firms, investment funds and the European Investment Bank. It seems to us that the Irish economy should benefit from the continued availability of LPs, subject to certain updates to the 1907 Act, because LPs facilitate investment in the Irish 'real economy' and consequently an indirect increase through the tax revenue generated by servicing these LPs in Ireland.

Question 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.

Yes, notwithstanding the developments in the law governing business activity since 1907 we believe strongly that there remains a continuing need for LPs to be available as a form of business organisation. However, the 1907 Act needs to be updated in important ways for the LP to succeed as a model of business organisation as it is succeeding in other jurisdictions such as Luxembourg, England and Wales, Scotland and France.

Question 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.

As the Department's consultation document highlights, the number of LPs has more than doubled since 2015. This is likely to be a result of the recent significant increase in the number of transactions involving the acquisition and funding of Irish assets by international firms and, while there are significant constraints and difficulties with using 1907 Act LPs, nonetheless some clients have availed of them. However, doing so under the current Act entails considerable expense in providing detailed

advice to clients about the pitfalls of using the 1907 Act LP and to enable them to understand the related uncertainty in using the 1907 Act structure. In this regard certain key updates to the legislation (see our response to Question 11 and the Irish Funds submission generally) could provide much-needed clarity in order to ensure that Ireland maintains its world class business environment underpinned by appropriate regulation and legislation.

Question 4

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

Apart from potential confusion (see the next paragraph), we do not have any concern with any proposal that an LP should be required to use either the term “Limited Partnership” (or the abbreviation “LP”) in its business name.

In this regard the Department will be aware that, under section 125 of the Legal Services Regulation Act 2015, if (as the Legal Services Regulatory Authority is proposing to do) limited liability is introduced for law firms, the names of such law firms would have to include the expression “limited liability partnership” or the abbreviation “LLP”. The Department may wish to consider whether there is any potential for confusion between the term for an LP and that for a (law firm) limited liability partnership and between the abbreviation “LP” and (for a law firm) “LLP”.

Question 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.

As a complement to the long-existing requirement for the registration of an LP it would be sensible that an LP should have a registered office in the State so that (as with most other forms of business organisation) an LP can be served formally with notices and (for example) with judicial processes.

However, subject to the observations regarding Alternative Investment Funds (“AIFs”) in the Irish Funds submission, we believe that an LP (other than one established as an AIF) should not be required to maintain a principal place of business in the State (or anywhere). Partnerships (like companies) might not have a physical place of business and indeed in the case of many asset-holding or otherwise passive LPs it would be difficult to determine where the principal place of business is, while not adding anything in terms of (for example) creditor protection.

Question 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.

We do not express any opinion on this question.

Question 7

Please set out your views on how the annual return should be made and who should be responsible for making it.

We do not express any opinion on this question.

Question 8

Please set out your views on whether all limited partnerships should be required to file financial statements.

In our view no change to the current law is required or appropriate.

Financial disclosure and transparency is a creditor-protection feature which is appropriate in the case of limited liability. However, with the exception of an LP in which the general partner has limited liability (and in which case under current law financial statements must be filed), a creditor of an LP always has recourse to a general partner of the LP and that general partner will have unlimited liability.

Question 9

What are your views on giving the Registrar powers to remove and strike-off limited partnerships from the register?

We do not express any opinion on this question.

Question 10

What factors do you think should be considered in removing or striking-off limited partnerships from the register?

We do not express any opinion on this question.

Question 11

Please provide any other comments you wish to inform the development and direction of policy on limited partnership law.

- (A) Key jurisdictions (such as Luxembourg) have updated their limited partnership model by providing for (for example) a 'safe harbour' or 'whitelist' of activities in which a limited partner of an LP may engage or participate without the limited partner being considered to be taking part in the management of the partnership business (the most important consequence of a limited partner taking part in the management of the partnership business is that the limited partner is liable for the LP's debts as though the limited partner is a general partner). Such clarity of 'safe harbour' activities would be extremely important in the attractiveness of the LP as an investment vehicle in Ireland.
- (B) We recommend that the 1907 Act is amended to remove the current, generally accepted construction that a failure to notify the Registrar of any of the matters to which section 9(1) of the 1907 Act applies results in the loss of each limited partner's limited liability. This

currently is a significant, disproportionate and highly anomalous consequence of what would be a modest failure by an LP. Indeed, such a disproportionate consequence to an entirely innocent limited partner does considerable reputational harm to the LP as a form of business organisation and is a significant impediment to the use of the LP in transactions and in business generally.

- (C) We endorse the proposal in the Irish Funds submission that section 9(g) of the 1907 Act should no longer require that the sum contributed by each limited partner is filed in the CRO (although the aggregate contribution of all limited partners should be).
- (D) We recommend that section 4(3) of the 1907 Act is deleted. Currently, if during the continuance of the relevant LP a limited partner (directly or indirectly) draws out or receives back any part of the capital that he, she or it has contributed to the LP, that limited partner loses the protection of limited liability up to the amount so drawn out or received back. This provision is anomalous and unnecessary: for example, under the summary approval procedure in the Companies Act 2014 (sections 202, 204 and 210), it now is possible for most types of limited liability company to return capital to the member(s), based on (for example) declarations of solvency and the availability of harsh sanctions in the event that such a declaration is not made on reasonable grounds.

We are grateful for the opportunity to provide these responses in the course of the Review and we do not comment on any other matter relating to the 1907 Act.

McCann FitzGerald
1 March 2019