

# WILLIAM FRY

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Company Law: Accounting and Audit Policy  
Department of Business, Enterprise and Innovation  
Earlsfort Centre  
Lower Hatch Street  
Dublin 2 D02 PW01

FAO: Ms Orla O'Brien ([orla.obrien@dbei.gov.ie](mailto:orla.obrien@dbei.gov.ie))

## Response to consultation on the review by the Department of Business, Enterprise and Innovation of the Limited Partnerships Act 1907 (the "1907 Act")

Dear Ms O'Brien

We refer to the request for submissions made by the Department of Business, Enterprise and Innovation (the "**Department**") in the context of its review of the Limited Partnerships Act 1907.

We welcome the steps being taken by the Department and the opportunity, which we take in this letter, to respond to the request for submissions.

### Description of William Fry interest in the matter

The Department in its request for submissions asks that respondents identify their interest in the matter.

William Fry is a corporate law firm which is closely associated with the Irish and international business communities and operates across all industry sectors. The Firm is regularly involved in advising clients in relation to a variety of available forms of structure to conduct business or engage in investment activities. As concerns structures such as partnerships, this includes partnerships established under the Partnership Act 1890, limited partnerships registered under the Limited Partnerships Act 1907 and the Investment Limited Partnerships Act 1994 as well as other contractually based arrangements such as European Economic Interest Groupings and Common Contractual Funds.

As well as day-to-day business activities, and legal and tax inputs in that regard, our Firm's investment funds practice has extensive experience of all forms of collective investment scheme. This includes the use of limited partnerships as fund vehicles.

Our Firm has had a long association with the Irish investment funds industry associations. It includes Irish Funds and the Irish Venture Capital Association. As concerns private equity and venture capital fund structures, and how fund sponsors and institutional investors make use of the 1907 Act, we are aware of the submissions being made by each of Irish Funds and the Irish Venture Capital Association. We support the commentary in those submissions.

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We anticipate that the comments made in this letter will also be generally aligned with submissions from the other leading corporate law firms. As legal and tax service providers, the Department's engagement here, as well as the separate on-going consultations on updating the Investment Limited Partnerships Act 1994 is welcomed.

### Responses

We respond to the questions raised in the Department's document in the Annex attached to this letter.

### Contacts

The request for submission suggests the inclusion of contact details. If there is a need to follow-up on any of the points raised, please feel free to contact any of:

- Mark Quealy – [mark.quealy@williamfry.com](mailto:mark.quealy@williamfry.com)
- Eoin Caulfield – [eoin.caulfield@williamfry.com](mailto:eoin.caulfield@williamfry.com)
- Kate Harnett – [kate.harnett@williamfry.com](mailto:kate.harnett@williamfry.com)
- John Aherne – [john.aherne@williamfry.com](mailto:john.aherne@williamfry.com)

Yours faithfully

  
William Fry

## ANNEX

We respond to the individual questions posed by the Department as follows:

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

As a law firm, we confine ourselves to the elements as concern structuring and, for example, fund formation matters. However, in this regard, it does appear to us that limited partnerships allow a form of business activity which is not otherwise catered for through the other available regimes. We would suggest it strikes a necessary "middle ground" – e.g. relative to the forms of company under the Companies Act 2014 or collective investment schemes which are subject to authorisation by the Central Bank of Ireland (such corporate, trust or contractually based forms of investment fund vehicle which may be authorised as UCITS or pursuant to the Central Bank of Ireland's AIF Rulebook).

As stated above, we see the structure as continuing to be a highly common choice for many of our clients ranging across the various sectors of the economy from property development to family investments. Limited partnerships are extensively used by the funds industry and have proved popular with Irish venture capital enterprises.

For private equity, real estate, infrastructure and other similar asset classes, limited partnerships are the predominant form used by asset managers and institutional investors (including pension funds, sovereign wealth funds and insurance companies) to conduct investment activities and channel private and public capital into the real economy on a global basis. While there has been a degree of domestic use of the limited partnership structure in Ireland, this is relatively modest compared to the other European jurisdictions which have modernised and tailored the legal regime to support these structures. We agree with the potential economic benefits for Ireland highlighted by Irish Funds in particular if reforms are made to the 1907 Act to provide for a modern and fit for purpose legal regime to support real economy investment on an international basis.

**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, as above, a limited partnership is an appropriate legal structure for many forms of business which is evidenced in its extensive use. Among the advantages of a limited partnership are that:

- it is a familiar and generally well recognised legal structure which is relatively easy to establish;
- as it is based upon the 1907 Act as originally enacted in the United Kingdom, or some very similar variants, it is ubiquitous throughout common law jurisdictions and is familiar to international asset managers and institutional investors as a preferred means to efficiently conduct investment activities in private equity, real estate and related asset classes. If Ireland did not recognise such a structure in its law this would be incongruous and place Ireland at a disadvantage to other common law jurisdictions with regard to organising and structuring business and investment arrangements;
- it is tax transparent which means that the partnership itself is not taxed on its gains and profits but rather the partners are taxed on an individual basis; and
- it offers limited liability for the limited partner.

There has been a quick adoption of new structures as they have become available in Ireland – e.g. in the regulated investment funds area. Were there new approaches such that there is no longer a business need for the limited partnership structure we expect this would be evident – i.e. were the need for the 1907 Act redundant, one would have reduced usage. This is not the case in our experience.

We would note also that a number of the recent European Union regulatory developments, such as the European Venture Capital Regulation (EuVECA) or permitting "sub-threshold" AIFMD registered structures, have been created to allow, for example, the SME sector have more ready access to alternative sources of capital. They also meet the aims of the EU's "Capital Markets Union" initiative and a movement away from excessive dependence on the more traditional sources of funding (banks etc.).

It would seem to us that mandating a need to use alternatives to a 1907 Act structure in Ireland (e.g. requiring use of an investment limited partnership under the 1994 Act, with a depositary etc.) – at least if there is not some substitute introduced – may only mean areas such as venture capital, and indeed other commercially beneficial activities, become no longer viable. We would point out also that there are well established and readily accessible alternative private fund options in the United Kingdom, Luxembourg or other jurisdictions which are familiar to the global asset management industry.

**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.**

Our general comment here would be that, as a Firm, we had noticed an appreciable tail-off in the use of 1907 Act structures with the Irish economic downturn. However, in recent years, we have seen a material increase. As concerns our direct dealings with clients, we consider – relative to perhaps a decade ago – that new funders are an increasing segment of the market. For example, the number of venture capital promoters in the Irish market has increased. This in turn, has led to increased numbers bearing in mind that limited partnerships are internationally accepted as venture capital / private equity industry norm.

Separately, our experience would indicate a greater use of limited partnerships in relevant structuring transactions. For example, syndicated property transactions, joint ventures as concern relevant underlying asset classes, and secured lending arrangements would seem increasingly to feature use of 1907 Act partnerships. Again, we would see this as broadly aligned with the increases in economic activity in Ireland since the downturn and the broader range of international investors operating in the market – e.g. investors beyond traditional credit institutions / banks.

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

As concerns registered name, we would consider the designation "Limited Partnership" or "LP" etc. an international norm. In the same manner as corporate entities, we do not see particular difficulty with its inclusion and there are presumably public policy benefits in highlighting the limited liability status.

There seems to us a duplication in the requirement on a limited partnership to also register the limited partnership's registered name as a business name and it seems an unnecessary administrative burden, at least as the default requirement under the 1907 Act, that should be removed.

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

We would confine ourselves to supporting generally the Irish Funds and other submissions in this respect.

**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.**

From a transparency perspective, we are supportive of the concept of an annual return. Many of the structures we encounter would include a general partner (or general partners) with limited liability status (e.g. a limited company or a DAC) meaning one falls within the European Communities (Accounts) Regulations 1993 (S.I. No. 396/1993) and a potential accounts filing requirement anyway.

We would however suggest that there may need to be distinctions between, for example, the approach to a "standard" limited partnership under any filings regime and one existing as a collective investment scheme (e.g. an alternative investment fund under the AIFMD regime).

It appears to us that there needs to be a distinction made between the nature and form of the returns required for fund structures versus other forms of limited partnership and this is particularly so given that fund structures have existing and detailed transparency obligations under AIFMD.

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

If a filing should be made, then it would seem to follow that the general partner(s) should be responsible for it. It would appear to us that, as occurs with appointments to the role of director or company secretary under the Companies Act 2014, responsible officers could acknowledge an awareness of duties in a similar manner.

We might draw the analogy between the failure of a limited partnership to comply with filing requirements and the failure of a branch of an EEA and non-EEA company to file financial statements. We note the latter would result in the EEA or non-EEA company being guilty of a category 3 offence under the Companies Act 2014.

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

Please see our comments in response to Question 6 above.

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

We agree with the points we have seen in other submissions in draft form that the strike off procedure used in respect of companies under the Companies Act 2014 does not translate easily into partnership law. For example, mere de-registration would not necessarily cause the partnership to cease as it would continue under the Partnership Act 1890 and as otherwise relevant. It may also be compromising to limited partners whilst not necessarily due to any action or inaction of their own.

However, we agree in principle that the Registrar of Companies should have enforcement capabilities to procure compliance with filing obligations.

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

Consideration should be given to the consequences of any enforcement action for the limited partner and, in particular, the limited liability of the limited partner should be safeguarded in such an event. Other safeguards include the provision of reasonable warnings to the limited partnership (to the general and limited partners) and a process for restoration to the register in the case of a strike off in error.

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

As mentioned above, we have seen the submissions of other interested parties in draft form (e.g. Irish Funds, Irish Venture Capital Association) and broadly agree with their suggestions to clarify, update and simplify the relevant provisions of the 1907 Act.

We are aware of the recent changes to the similar 1907 Act in the jurisdictions of the United Kingdom and, for example, the contents of the English and Scottish Law Reform Commission report on the area. It would appear to us that what was laid out in that report, and the ultimate changes made in the United Kingdom (e.g. including the distinct "private fund limited partnership" elements) translates well to the Irish jurisdiction. Our suggestion is that a similar approach to that taken in the United Kingdom could be followed in Ireland.

On some specific elements, we would elaborate as follows:

**"White List" as concerns the concept of "management"**

Section 6(1) of the 1907 Act, as concerns the potential loss of the protections of limited liability for a limited partner where it "takes part in the management of the partnership" and the provisos therein on potential activities not so causing loss of limited liability are unclear and outmoded.

We would support the inclusion in the 1907 Act of some form of "white list", similar as one sees in the Investment Limited Partnerships Act 1994 or in the limited partnership regimes of other common law jurisdictions and thereby allowing greater comfort to limited partners in regard to day-to-day involvements known more clearly not to compromise limited liability status.

In our dealings with, for example, limited partners in venture capital funds, this is a key issue. However, we also see it beyond fund structures. For example, the same point comes up where one has an investor which, separate from its monetary contribution (through its limited partnership interest), will have some managerial role or a lesser form of advisory input or veto rights. We see this regularly, e.g. joint ventures, syndicated property ownership or limited partnerships used for development of commercial property or land.

The "white list" might also address broader incongruities – e.g. the law requires two signatories to sign financial statements of a limited partnership. As it currently stands, a limited partner which has only one general partner therefore, may request the limited partner to sign the financial statements also. While in doing so, the limited partner would be complying with a legal requirement, there is a risk of exposure to unlimited liability for the debts and obligations of the partnership as a consequence.

## **Capital**

### *Prohibition on return of capital*

Section 4(3) of the 1907 Act specifies that a limited partner may not during the continuance of the partnership either directly or indirectly draw out or receive back its capital. However, having laid-out such a prohibition it then continues to say that, if such does occur, a continued liability for the debts and obligations remains up to the amount so drawn out or received back. We suggest that this text is unclear as to meaning or effect. Furthermore, we would suggest the contingent exposures for a person so receiving back capital should be revisited by the Department as part of its review.

As concerns fund structuring (although it also arises more broadly), the necessity for a capital maintenance provision similar to what one might see in a corporate context does not necessarily exist to the same extent. Many other existing types of Irish fund structures may be variable capital and no par value. Such structures do not need a minimum working capital amount to guard against, for example, detriment to third party creditors.

### *Use of a "loan/equity split" and difficulties for certain investors*

In our experience, the existing capital contribution requirement presents a particular difficulty for certain types of regulated funds which are prohibited from providing loans save where their principal activity is loan origination.

The practice currently in Ireland, in part to avoid the contingent repayment liability caused by Section 4(3) is that limited partners tend to only make a nominal capital contribution (e.g. of €1.00) and each then provides any additional committed amount by way of an interest free loan.

However, in some scenarios, this work-around is not possible. For example, where a relevant form of AIFMD/UCITS fund is an investor as a limited partner in an Irish limited partnership (e.g. becoming an investor in an Irish venture capital fund) under, for example, the AIF Rulebook it can only do it through a capital payment. A loan commitment to the limited partnership is not permitted.

The consequence of this is usually that one cannot mix the interests of individual investors with some putting in capital and others loan. One is thus wedded to use solely of capital and these potential contingent liability exposures then end up extending to all investors.

## **Requirement to limit the partnership to 20 limited partners**

Generally, limited partnerships must not have more than 20 partners under the 1907 Act. This may be extended to 50 partners where the limited partnership is formed for the purpose of providing investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities and there is also a broad exemption for bloodstock.

The requirement to limit a limited partnership to 20 limited partners seems to us outdated requirement that arose from the now defunct rule that, in order to sue a partnership, a person had to sue each partner individually. We would instance also that private limited companies can now have up to 150 shareholders. For the various types of Irish fund structures, there are no restrictions at all.

One simply ends up structuring around it through use of parallel partnerships or nominee arrangements.

We note also that this limitation was removed in Great Britain in 2002 and in Northern Ireland in 2003.

### **Advertisement in Gazette**

Section 10(1) requires that any arrangement or transaction under which any person will cease to be a general partner in any limited partnership and will become a limited partner in that LP, or under which the interests of a limited partner in an limited partnership will be assigned to any person, shall be forthwith advertised in the Gazette and, until notice of the arrangement or transaction is so advertised, the arrangement or transaction shall not take effect. This is dissimilar to the position in company law whereby there is no requirement to advertise a share transfer and it is not in line with general partnership law either. The requirement for advertisement may also become redundant where a return is published annually as is considered at Question 6 above. We recommend the removal of this requirement as it is unduly burdensome.

### **Failures as concern registrations**

The failure of a general partner (or general partners) to register the partnership as a limited partnership will result in the partnership being deemed to be a general partnership and the limited partners shall be deemed to be general partners and thus exposed to unlimited liability.

Losing the protection of limited liability seems to be a disproportionate penalty for failure to register and we would suggest that, similar to the United Kingdom, this penalty should be removed.

### **Time frames**

The notification timelines in the 1907 Act of 7 days seem short by comparison to time limits in the Companies Act 2014 and should perhaps be extended.

### **Similar "private fund limited partnership" concepts**

We would again reference the updating of the similar legislation in the other main common law jurisdictions including the United Kingdom, which included its private fund limited partnership concept ("PFLP").

It would seem to us, for example, that the concept of the PFLP might apply in this jurisdiction to any entity existing as an alternative investment fund under the AIFMD regime (note: both those with "authorised" AIFMs but also sub-threshold AIFMs with a "registration").