

**SUBMISSION TO THE PUBLIC CONSULTATION ON  
THE REVIEW OF THE LIMITED PARTNERSHIPS ACT 1907**

**4 MARCH 2019**

## **SUBMISSION TO THE PUBLIC CONSULTATION ON THE REVIEW OF THE LIMITED PARTNERSHIPS ACT 1907**

We refer to the consultation paper in respect of the public consultation on the Limited Partnerships Act 1907 (the “**1907 Act**”). In this submission, we address the issues raised in questions 4 and 11 of the consultation paper with a focus on some of our principal competitor countries including Jersey, Luxembourg and the UK.

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

### Limited Partnership Name

We note that limited partnerships formed under the laws of England and Wales<sup>1</sup> and limited partnerships formed under the laws of Jersey<sup>2</sup> are required either to use the term “limited partnership” or to use its abbreviated form in the name of the partnership.

In our view, introducing an equivalent requirement for limited partnerships formed under the laws of Ireland to use similar words would not be inconsistent with international best practice. Such a requirement could be framed as follows:

*The name of a limited partnership shall end with:*

- (a) *the words “limited partnership” or “comhpháirtíocht theoranta” (upper or lower case, or any combination), or*
- (b) *the abbreviation “LP” or “CT” (upper or lower case, or any combination, with or without punctuation).*

### Business Name

If such a naming requirement was introduced then, in our view, the current requirement for a limited partnership to separately register its partnership name as a business name, using a Form RBN1A under section 3 of the Registration of Business Names Act 1963, should be reviewed.

The position of a limited partnership trading under its legally regulated partnership name would, in such a case, be directly comparable to that of a limited company trading under its company name.

### Company Names

It is common practice to include the words “limited partner” or “LP” within the name of a company which is incorporated for the purpose of becoming a limited partner in a limited partnership.

In our view, it is important that any new rules with respect to the names of limited partnerships do not prejudice the ability of promoters to continue to incorporate companies whose names include the words “limited partner” or “LP” for use as limited partners in limited partnerships.

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<sup>1</sup> **England and Wales:** Section 8B of the UK Limited Partnerships Act 1907. Available at: <https://www.legislation.gov.uk/ukpga/Edw7/7/24/section/8B>

<sup>2</sup> **Jersey:** Article 7 of the Limited Partnerships (Jersey) Law 1994. Available at: [https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#\\_Toc367967601](https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#_Toc367967601)

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

**1 “MANAGEMENT”**

The question of “management” by limited partners is, in our view, the single most important issue to be addressed as part of the development of policy on limited partnership law in Ireland.

**1.1 The current position under Irish law**

This issue centres on the current lack of clarity around the actions which a limited partner can take with respect to the partnership and the serious consequences for any limited partner who is found to have engaged in “management”.

The relevant provision is section 6(1) of the 1907 Act, which states that:

*6.—(1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:*

*Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.*

*If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.*

In summary, if a limited partner engages in “management”, he risks incurring unlimited liability for the debts of the partnership. Given this risk, limited partners are invariably keen to understand what actions do or do not constitute “management”.

However, the term “management” is not defined in statute and there is little judicial guidance to be found on the interpretation of this term.

The 1907 Act does not define what “management” means, it only provides two examples of actions which will be held not to constitute “management”. So, as one of the leading commentators on partnership law in Ireland notes:<sup>3</sup>

*[I]t is unclear where the line is between the ‘management of the partnership business’ which is prohibited and the right of the limited partner to ‘inspect the books of the firm and examine into the state and prospects of the partnership business’ and ‘advise with the partners thereon’.*

There are few reported decisions of the Irish courts to help a limited partner to understand what constitutes “management”. The English High Court has only considered the meaning of this term on a small number of occasions and given only limited guidance on actions which would or would not “management”.<sup>4</sup>

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<sup>3</sup> Michael Twomey, “*Twomey on Partnership*” (Bloomsbury Professional, 2<sup>nd</sup> edition, 2019) at p.875.

<sup>4</sup> Norris J in *Inversiones Frieira SL and another v Colyzeo Investors II LP and another* [2011] EWHC 1762 (Ch) at p.1150. Although the law of partnership in England and Wales has been reformed, an Irish court may still look on the commentary of the English court as persuasive.

Notwithstanding this guidance, the English High Court acknowledged that a “grey area” still existed.<sup>5</sup>

As a result of all of these factors, the limited partners in Irish limited partnerships are advised not to take any action that would constitute “management” (or risk incurring unlimited liability) but without clear legal guidance as to what that term means.

This position is clearly undesirable for limited partners. It is out of step with international best practice in Ireland’s competitor countries and it has resulted in Ireland losing out as a location for limited partnership formation.

## 1.2 Possible solutions

A survey of Ireland’s competitor countries shows a range of helpful approaches which have been adopted to solve the “management” question. These approaches include:

- (a) drawing a distinction between permissible acts of internal management and prohibited acts of external management vis-à-vis third parties;
- (b) changing the focus to third parties and, in particular, to considering whether third parties believe they are dealing with a general partner engaged in management; and
- (c) drawing up a of a “white list” of specific actions which will be held not to constitute “management”.

These approaches are not mutually exclusive. They can and, in some countries, are used in combination with each other.

## 1.3 Possible solutions: “internal management v external management”

The legal framework adopted by Luxembourg for its equivalent limited partnership vehicle (*société en commandite spéciale*) does contain restrictions on the management actions which limited partners can take. However, the framework draws an important distinction between acts of internal management and act of external management.

The specific prohibition on limited partners is not to engage in “management vis-à-vis third parties” (*Il ne peut faire aucun acte de gestion à l’égard de tiers*).<sup>6</sup>

As a result, the limited partners in a Luxembourg limited partnership are expressly permitted to be involved in internal acts of management (including, for example, assuming an advisory or supervisory role) without risking their limited liability status.

In our view, this is a helpful and sensible distinction. It supports a policy objective which focuses on the protection of third parties dealing with the limited partnership. The specific internal workings of a limited partnership should not be of concern for a third party. A third party will know the partner with whom it is transacting and can calculate the risk of doing business with that entity. The risk calculation should not be impacted by internal management arrangements of which the third party will not and cannot be aware.

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<sup>5</sup> Cooke J in *Certain Limited Partners in Henderson PFI Secondary Fund II LP (a firm) v Henderson PFI Secondary Fund II LP (a firm) and others* [2012] EWHC 3259 at p.1314. This “grey area” has, in the UK, since been made clearer to an extent through subsequent legal reforms and the creation of a “white list”. See paragraph 0.

<sup>6</sup> **Luxembourg:** Art. 320-4. of the Law of 10 August 1915. Unofficial English translation available at: <https://www.elvingerhoss.lu/sites/default/files/documents/publications/EHP-Law-of-10th-August-1915-on-commercial-companies.pdf>

## 1.4 Potential solutions: “third party belief”

The question of “management” can also be answered by changing the focus of the law to consider the position of an innocent third party as the primary driver of liability.

Similar to the internal management approach adopted by Luxembourg, this approach is also based on a policy which recognises that the purpose of the law is the protection of third parties. Limited partners should only be liable where the third party holds an expectation that it would have recourse against that partner (thinking it was a general partner).

An example of this approach can be seen in the Jersey limited partnership. A limited partner who engages in management in a Jersey limited partnership does not automatically assume unlimited liability to the world at large. Instead, the limited partner is only liable only to a person who transacts with the limited partnership with actual knowledge of the participation of the limited partner in the management of the limited partnership and who then reasonably believed the limited partner to be a general partner.<sup>7</sup>

A further example of this approach can be seen in the New Zealand limited partnership.<sup>8</sup> A limited partner in a New Zealand limited partnership is liable, to the same extent as a general partner, to a person who deals with the limited partnership if, at the time that the debt or liability of the limited partnership to the person was incurred, all of the following applied: (a) the limited partner took part in the management of the limited partnership; and (b) the person knew that the limited partner took part in the management of the limited partnership; and (c) the person believed on reasonable grounds that the limited partner was a general partner.<sup>9</sup>

In our view, this approach also has merit for many of the same policy reasons as the internal v external management solution discussed in paragraph 1.3. This approach has the benefit of giving commercial certainty on matters of recourse and liability to a third party who deals with a limited partnership. The third party will always know that it has recourse to the partner with whom it is dealing, without the need to review partnership documents to determine the technical legal status of that partner.

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<sup>7</sup> **Jersey:** Article 19(4) of the Limited Partnerships (Jersey) Law 1994. Available at: [https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#\\_Toc367967601](https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#_Toc367967601)

<sup>8</sup> Although we do not consider New Zealand to be a direct competitor country of Ireland for the purpose of European limited partnership formation, looking at the approach taken by New Zealand in its recent overhaul of its limited partnership legislation is illustrative of the prevailing international trends in limited partnership law.

<sup>9</sup> **New Zealand:** Section 30 of the Limited Partnerships Act 2008. Available at: <http://www.legislation.govt.nz/act/public/2008/0001/latest/whole.html#DLM1139138>

## 1.5 Potential solutions: a “white list”

In addition to the solutions considered in paragraphs 1.3 and 1.4 above, a common approach in many countries has been the introduction of a “white list” of actions which can be taken by a limited partner and which will not constitute “management” by that limited partner.

The length and content of the white list varies between countries, but such lists commonly permit limited partners to take actions such as offering opinions and advise to the general partner or exercising voting rights on specified matters which would otherwise lie in the “grey area” noted by the English High Court.

Country	Number of white listed actions
Jersey	7 actions (in addition to the “third party belief” test discussed in paragraph 1.4 above) <sup>10</sup>
Luxembourg	7 actions (in addition to the ability to engage in internal management discussed in paragraph 1.3 above). <sup>11</sup>
New Zealand	17 actions (in addition to the “third party belief” test discussed in paragraph 1.4 above). <sup>12</sup>
UK	14 actions (for private fund limited partnerships). <sup>13</sup>

## 1.6 Recommendation

In our view, Irish law should follow the approach adopted by Luxembourg. Drawing a distinction between internal and external management provides the best answer to the question of “management” because it is the most effective way of giving limited partners a clear and legally certain description of the actions which are and are not permitted.

The approach adopted by Jersey and New Zealand would also represent a welcome improvement on the current position under Irish law. However, in our view, these approaches are less desirable than the Luxembourg approach. While they do bring welcome certainty to the allocation of liability when “management” is carried out, they do not answer the underlying question of what constitutes “management”.

The introduction of a “white list” of permitted actions has become an international standard and any reform of Irish limited partnership law must consider the introduction of a “white list”. However, in our view, the use of a “white list” alone without further supporting measures would not be sufficient to achieve the stated policy goal of “maintain[ing] our world class business environment underpinned by appropriate regulation and legislation”.

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<sup>10</sup> **Jersey:** Article 19(5) of the Limited Partnerships (Jersey) Law 1994. Available at: [https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#\\_Toc367967601](https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#_Toc367967601)

<sup>11</sup> **Luxembourg:** Art. 320-4. of the Law of 10 August 1915. Unofficial English translation available at: <https://www.elvingerhoss.lu/sites/default/files/documents/publications/EHP-Law-of-10th-August-1915-on-commercial-companies.pdf>

<sup>12</sup> **New Zealand:** Section 31(3) of the Limited Partnerships Act 2008. Available at: <http://www.legislation.govt.nz/act/public/2008/0001/latest/whole.html#DLM1139138>

<sup>13</sup> **UK:** Section 6A(2) of the Limited Partnerships Act 1907. Available at: <https://www.legislation.gov.uk/ukpga/Edw7/7/24/section/6A>

## 2 NUMBER OF PARTNERS

### 2.1 The current position under Irish law

As the consultation paper notes, with some exceptions, a limited partnership formed under the laws of Ireland may have up to 20 partners.<sup>14</sup>

This limit was set when the 1907 Act was first enacted some 112 years ago and it has remained unchanged since that time. While this limit may have had merit in the industrial world of late nineteenth-century England, in our view, this is no longer an effective or appropriate restriction for the modern, open economy of the Ireland of 2019. In particular, we note that this restriction:

(a) is not consistent with international best practice; and

(b) can be effectively worked around, but at the cost of professional advisory fees.

A limit on the number of persons who may be partners in a limited partnership is out of step with international best practice among Ireland's competitor countries. For example, in 2002 the UK reformed its limited partnership law to remove the 20 member limit in partnerships.<sup>15</sup>

There is no stated maximum number of partners in a limited partnership which may be formed under the laws of Jersey.<sup>16</sup>

Luxembourg does not limit the number of persons who may be partners in its equivalent forms of limited partnership.<sup>17</sup>

A New Zealand limited partnership may have any number of general partners and limited partners.<sup>18</sup>

In addition, this limit no longer operates as an effective block on the number of people who may be concerned in a business as work arounds, such as parallel partnerships, can be employed. However, such work around entail costs which do not arise in Ireland's competitor countries and serve to make Ireland less attractive jurisdiction.

### 2.2 Recommendation

In our view, in line with international norms, the restriction on the number of people who may become partners in a limited partnership should be abolished.

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<sup>14</sup> **Ireland:** Section 1435 of the Companies Act 2014.

<sup>15</sup> **UK:** Article 3 of The Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002. Available at: <https://www.legislation.gov.uk/ukSI/2002/3203/article/3/made>

<sup>16</sup> **Jersey:** Section 3 of the Limited Partnerships (Jersey) Law 1994. Available at: [https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#\\_Toc367967601](https://www.jerseylaw.je/laws/revised/Pages/13.500.aspx#_Toc367967601)

<sup>17</sup> **Luxembourg:** Art. 320-1. of the Law of 10 August 1915. Unofficial English translation available at: <https://www.elvingerhoss.lu/sites/default/files/documents/publications/EHP-Law-of-10th-August-1915-on-commercial-companies.pdf>

<sup>18</sup> **New Zealand:** Section 8(3) of the Limited Partnerships Act 2008. Available at: <http://www.legislation.govt.nz/act/public/2008/0001/latest/whole.html#DLM1139138>

## **About Mason Hayes & Curran**

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We have significant experience in the area of Irish limited partnership law. Senior partner David O'Donnell, who leads our limited partnership team, has advised on the creation of limited partnerships for over 25 years. We advise Irish and international general partners and limited partners on the structuring of venture capital funds and the investment by those funds in investee companies.

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