



**An Bille um Chomhpháirtíochtaí Teoranta Infheistíochta
(Leasú), 2019**

Investment Limited Partnerships (Amendment) Bill 2019

Meabhrán Mínitheach
Explanatory Memorandum



**AN BILLE UM CHOMHPHÁIRTÍOCHTAÍ TEORANTA
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INVESTMENT LIMITED PARTNERSHIPS (AMENDMENT) BILL
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EXPLANATORY MEMORANDUM

Introduction

An Investment Limited Partnership (ILP) is a regulated common law partnership structure that does not have a separate legal personality. ILPs are tailored specifically for investment in a collective investment fund. An ILP is formed under the Investment Limited Partnership Act 1994 and established on receiving authorisation by the Central Bank of Ireland (Central Bank). An ILP is constituted according to the limited partnership agreement entered into by one or more general partner(s), who manage the business of the partnership, and any number of limited partners.

An ILP is “tax transparent”, preventing double taxation and ensuring that the fund or its investors will not be in a worse-off position after investing through the fund than they would have been if they invested in the underlying company or asset directly. The assets and liabilities are deemed to be held directly by the investors in proportion to their individual investment and the investors are subject to the tax rules in their home jurisdiction in respect of any tax charge, relief or allowances available as they arise.

In an ILP, the general partner is responsible for managing the business of the ILP and is ultimately liable for the debts and obligations of the ILP to the extent the ILP does not have sufficient assets. The general partner must: (i) be authorised by the Central Bank to act as a general partner; or (ii) avail of the right to manage an Irish alternative investment fund (AIF) on a cross-border basis under the Alternative Investment Fund Managers Directive (AIFMD).

The ILP Act has been in use since 1994 and it is widely acknowledged that it is needs to be updated to fit the environment and clientele to which it is aimed. There have been huge changes in the financial area in the past 25 years and this revision is aimed both at modernising the legislation and also achieving the Government’s aim set out in “IRELAND FOR FINANCE - *Strategy for the development of Ireland’s international financial services sector to 2025*” to make Ireland a global location for private equity funds.

Part 1 – Preliminary and General

Section 1 provides in standard form for the short title and commencement.

Section 2 provides in a standard form the collective citation.

Section 3 is a standard form for clarifying the Acts referred to in the Bill.

Part 2 – Amendment of Act of 1994

Section 4 amends section 3 of the Act of 1994 to update and add definitions of new terms – these relate to ‘alternative foreign name’, ‘depository’, and ‘limited partner’. The section also transfers responsibility for the Act from the Minister for Enterprise, Business, and Innovation to the Minister for Finance.

Section 5 replaces the word “custodian” with “depository” throughout the Act of 1994 to align it with other funds legislation.

Section 6 amends section 5(3) of the Act of 1994 by updating the wording ‘fair market value of the property’ to ‘fair and appropriate value of the property’ in order to track the language in Article 71 of AIFMD Level 2. This amendment also inserts 5(5) and 5(6) to permit the establishment of umbrella funds (see *section 35*, below).

Section 7 amends section 6(4) of the Act of 1994 to permit a limited partner to participate on boards and committees related to an investment limited partnership. This adds board participation to the “White List,” a list of activities which, if undertaken by a limited partner, will be deemed not to be taking part in the conduct of the business and so do not result in loss of liability for a limited partner. This “White List” concept is common to limited partnership regimes in other jurisdictions like the *Legislative Reform (Private Fund Limited Partnerships) Order 2017* in the UK, which clearly sets out the actions that are not regarded as taking part in the management of the partnership business for the Limited Partner.

Section 8 amends section 8(4) of the Act of 1994 to correct the reference to the fee prescribed under the Central Bank Act 1942. This is to correct a typographical error.

Section 9 amends section 8(4A) of the Act of 1994 correcting a cross reference, adding reference to the ‘alternative foreign name’, changing the ‘Companies Act 1963’ reference to the ‘Companies Act 2014’ and deleting the reference to ‘and address’.

Section 10 adds a new section 8(4B) to the Act of 1994 to allow the use of an alternative foreign name in the case of foreign Investment Limited Partnerships whose name consist of letters, characters, script, accents or other diacritical marks outside the Roman alphabet.

Section 11 amends section 8 of the Act of 1994 by adding a new section 8A to give the Bank the power to refuse to authorise an Investment Limited Partnership (ILP) where the name, or alternative foreign name, of the ILP is deemed undesirable.

Section 12 substitutes section 10 of the Act of 1994 with new requirements for the Central Bank to maintain records of all Investment Limited Partnerships authorised. This is to align the requirements with records maintained with other funds legislation.

Section 13 amends section 11(1) of the Act of 1994. 11(1A) sets out the requirements for amending a partnership agreement, requiring all partners to be notified prior to an alteration and provides for alterations in writing via the agreement of the *majority* of partners, provided the *existing* partnership agreement allows for changes via majority. 11(1B) allows for alterations to the partnership agreement to be implemented if the depository certifies in writing that the alteration does not prejudice the interests of the limited partnerships, provided that the alteration is not one which the Bank stipulates must be made via 11(1), and that the partnership agreement provides that the depository has the power to certify that the alteration does not prejudice the interests.

Section 14 adds two new subsections to section 11 to the Act of 1994. 11(5) creates a statutory transfer of assets and liabilities on the admission or replacement of a general partner, so that all rights or property of the Investment Limited Partnership shall vest in the incoming partner or existing general partners. 11(6) sets out a similar provision on the withdrawal of a general partner, wherein all rights or property of the Investment Limited Partnership shall vest in the remaining partner or existing partners.

Section 15 amends section 12(2) of the Act of 1994 to stipulate that the words ‘investment limited partnership’ or ‘ILP’, or ‘Comhpháirtíocht Theoranta Infheistíocta’, or ‘CTI’ must be used at the end of the name of every investment limited partnership. It also states that where an investment limited partnership is permitted to use an alternative foreign name, it must use the words ‘investment limited partnership’ at the end of the name in the same language as the alternative foreign name.

Section 16 amends section 13 of the Act of 1994 as regards the maintenance of a register by the general manager of the investment limited partnership. It also sets out the information to be recorded in the register along with details of access to it.

Section 17 provides further amendments to section 13 of the Act of 1994 setting out details of penalties in the event of non-compliance with the requirements regarding the maintenance of the register. Procedures for the rectification of errors or omissions and rights of those affected by errors are also set out.

Section 18 deletes section 14(3) of the Act of 1994.

Section 19 inserts a new subsection 19A to the Act of 1994 setting out the meaning of ‘majority of limited partners’ for different purposes (e.g. in relation to rights or interests of a majority of the limited partners) and also in relation to its use for a simple majority.

Section 20 replaces section 20 of the Act of 1994 and sets out how capital contributions by limited partners and liability of limited partners for partnership debts operates.

Section 21 rewords and expands section 22(2) of the Act of 1994 for greater clarification.

Section 22 amends section 23 of the Act of 1994 by renumbering and inserts section 23(2) clarifying that section 30 of the Bankruptcy Act 1988 only applies where the general partner adjudicated bankrupt is the sole general partner.

Section 23 amends section 24(4) of the Act of 1994 inserting two subsections to permit the investment limited partnership to purchase insurance for a general partner or auditor (or former general partner or former auditor) to indemnify him against any liability in the event of a case of negligence or default where the general partner or auditor is found not be negligent or in default.

Section 24 amends sections 24(5) and 24(6) of the Act of 1994 to ensure that if the partnership agreement provides that where a partner fails to perform any of its obligations under or otherwise breaches the partnership agreement, the sanctions applicable for the failure of performance or breach will not be unenforceable solely because they are penal in nature. This is because courts in Ireland and other common law jurisdictions have previously determined that provisions in an agreement which impose additional obligations on a party in the event of a breach or a default may be unenforceable if they are subsequently adjudicated to be penal in nature.

Section 25 amends section 25 subsections 1 and 4 of the Act of 1994, substituting ‘a general partner’ for ‘every general partner’ in subsection 1 and ‘subsidiary’ for ‘associated undertaking’ in subsection 4.

Section 26 amends section 27 of the Act of 1994 to provide greater clarification of the subsection being referenced and rewording of text.

Section 27 amends section 29 of the Act of 1994 by deleting subsection (3), to remove the requirement for the Bank to publish notice of revocation of authorisation in *Iris Oifigiúil*.

Section 28 amends section 31(1) of the Act of 1994 inserting the words ‘or depository’ after ‘proposed new general partner’.

Section 29 amends section 33(3) of the Act of 1994. It is a technical amendment to require the general partner to notify the limited partners of a direction from the Bank immediately upon receipt.

Section 30 amends section 35 of the Act of 1994 to correct a typographical error: section 35 subsections (7) and (8) are updated to refer to “officer of such a general partner” rather than “officer of the investment limited partnership.”

Section 31 amends section 37 of the Act of 1994. Section 37 subsection (1) is amended to clarify that there must be at least one general partner, so as to avoid conflict with section 5(1)(b) of the Act of 1994. Section 37 subsections (2) and (3) are amended so that the partnership is not immediately dissolved in the case of death, but within a time period as specified by the Bank.

Section 32 amends section 38 of the Act of 1994 by removing the requirement to be published in *Iris Oifigiúil* and in section 38 subsection (4) by clarifying that the limited partner does not have unlimited liability for the debts of the partnership once the partnership is dissolved unless the limited partner purports to carry on the business of the partnership after the dissolution.

Section 33 amends section 39 of the Act of 1994 to ensure that limited partners who do not take any part in the conduct of the business of the partnership cannot be prosecuted for any offences committed in the management of the partnership.

Section 34 amends the Act of 1994 by adding section 42A after section 42. 42A seeks to align the ability of an Investment Limited Partnership to indemnify against liability with those in the ICAV Act 2015 and the Companies Act 2014. This reflects the changes that were introduced under AIFMD, which provides for a liability regime for depositories set out under European legislation. The amendment also enables the ILP to purchase liability insurance for any auditor or general partner of the ILP, which aligns with similar provisions under the Companies Act and the ICAV Act.

Section 35 introduces the use of “Umbrella” or sub-funds in Investment Limited Partnerships. These sub-funds permit the establishment of a fund with several distinct sub-funds that are traded as individual investment funds but are not liable for the debts of the other sub-funds under the umbrella. These funds will share a general partner but are ring fenced from each other in the event of insolvency. This “umbrella” framework also exists in other investment fund vehicles, including ICAVs and Common Contractual Funds.

Part 3 – Amendments to ICAV Act 2015

Section 36 amends section 2 of the act of 2015 by adding a new definition of “Category 4 offence” to the definitions (see *sections 46 and 51*, below).

Section 37 adds a new section 2A to the Act of 2015 providing supplemental interpretation provisions regarding ordinary and special resolutions.

Section 38 amends sections 5 and 6 of the Act of 2015 to provide that the sole object in an ICAV constitutional document reflects Regulation 4(3) (a) of the UCITS Regulations (European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (S.I. No. 352 of 2011))

Section 39 adds a new section 8A to the Act of 2015 to ensure that the validity of an act done by an ICAV shall not be called into question on the ground of lack of capacity by reason of anything contained in the ICAV's instrument of incorporation, without affecting the duty of the directors of an ICAV to observe any limitation on their powers.

Section 40 adds a new section 8B to the Act of 2015 after section 8A (inserted by *Section 39*, above) to provide that a contract entered into outside the vires of an ICAV is nevertheless enforceable.

Section 41 amends section 14(2) of the Act of 2015 to require the bank to update the register following the change of name of an ICAV.

Section 42 amends section 30 of the Act of 2015 to require the Bank to alter the copy of the registration order and notify the ICAV of the same following the change of name of an ICAV.

Section 43 amends section 32 of the Act of 2015 by deleting subsection (7), removing the requirement for the director of an ICAV acting on behalf of various ICAVs to sign an agreement multiple times in respect of the various ICAVs to which that agreement relates.

Section 44 amends section 33 of the Act of 2015 by inserting a new subsection (4) after subsection (3), clarifying the requirements for affixing or attesting to the affixing of the seal in circumstances where an ICAV has a seal.

Section 45 adds a new section 85A to the Act of 2015 to allow an officer of an ICAV to make an application to the court in anticipation of apprehended proceedings.

Section 46 adds Part 5A after Part 5 of the Act of 2015, containing three new sections 91A, 91B, and 91C regarding written resolutions. This is to align the Act with the similar provisions in sections 193 – 195 of the Companies Act 2014. This change will provide for written resolutions by members of an ICAV in relation to the ICAV itself or a sub-fund as well as the existing ordinary and special resolutions at a general meeting.

Section 47 amends section 96 of the Act of 2015 by substituting in a new subsection (8) clarifying that where an investment company converts to be an ICAV, the priority of pre-existing charges should remain unchanged.

Section 48 amends section 140 of the Act of 2015 to correct a typographical error by substituting “waived” for “varied” to reflect the language used in section 1490 of the Companies Act 2014.

Section 49 amends section 141(1) of the Act of 2015 by inserting “being the debts identified for the purposes of subsection (2)(b)” after “debts”. This is to bring the Act into line with section 1415(1) of the Companies Act 2014, which requires that directors making a declaration of solvency declare that they have formed an opinion that the applicant company is able to pay its debts as they fall due.

Section 50 amends section 154(2) of the Act of 2015 by the substitution in paragraph (h) of “sections 599 and 609” for “sections 600 and 609”. This is to correct a typographical error.

Section 51 amends section 186 of the Act of 2015 by inserting a new subsection after subsection (3) stating that a person guilty of a Category 4 offence under the Act shall be liable to a class A fine. This is required because of the new provisions regarding written resolutions (*Section 46*, above).

*An Roinn Airgeadais,
Meitheamh, 2019.*