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RESEARCH ARTICLE

Regulating the very limited partnership

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Abstract

Limited partnerships (LPs) have received considerable press and policy attention over the past five years, culminating in legal reforms which provide an ability to align LP law more closely to company law. This paper challenges the wisdom of exercising this ability without prior analysis. It draws on historical, conceptual, and empirical methodologies to make three arguments. First, the LP is conceptually different from the company, with LPs being a legal transplant copied from other legal systems, and remaining distinctive: with (mostly) one manager which is meant to have unlimited liability. Secondly, LPs have clear policy aims which are different to those in company law. I use limited liability of an illustration of a policy issue that will be missed by aligning LP law to company law. Thirdly, the LP is overwhelmingly a Scottish vehicle. Recent company law reforms have been argued to be dissonant to Scottish company law, questioning the wisdom of aligning the LP's regulation to companies.

Keywords: limited partnership law; partnership law; company law

Introduction

The UK limited partnership (LP) has a long history.[1] It is not a corporate vehicle, but instead a partnership vehicle.[2] It has recently been subject to multiple legislative reforms. The most recent outlines in explanatory notes that many changes 'establish provisions which broadly mirror provisions that apply to companies',[3] including powers to 'make regulations which apply company law to limited partnerships with suitable modifications'.[4] It generally 'provides a mechanism' to ensure that LP law 'can keep up with developments in company law reforms'.[5]

This mechanism is the addition[6] of section 7A of the Limited Partnership Act 1907, which allows the Secretary of State to amend that Act, to 'make provision in relation to limited partnerships that

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[1]The UK form dates to 1907, with the Limited Partnerships Act 1907 (LPA 1907).

[2]RW Hillman 'The bargain in the firm: partnership law, corporate law, and private ordering within closely-held business associations' [2005] University of Illinois Law Review 171.

[3]Economic Crime and Corporate Transparency Act 2023 Explanatory Notes, para 97, available at https://www.legislation.gov.uk/ukpga/2023/56/notes/division/5/index.htm.

[4]Ibid, para 98.

[5]Ibid.

[6]By the Economic Crime and Corporate Transparency Act 2023, s 149.

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corresponds or is similar to any provision relating to companies or other corporations'.[7] This power can also change the Partnership Act 1890 or the Companies Act 2006.[8] This section was entirely unamended during its parliamentary passage.[9] In the Bill's first draft, this clause was justified with '[i]ntroducing this will mean that it is easier to keep the law for companies and limited partnerships aligned, which it is currently not'.[10] This point was reiterated by Kevin Hollinrake MP, the minister overseeing the Bill, who stated that the clause 'will ensure that when company law is amended over time, the corresponding limited partnership law can be amended alongside it, making it easier to keep company law and limited partnership law aligned'.[11] The UK has, of course, had a change of government since then. Yet the new government has not changed approach. It is not likely to – Hollinrake's counterpart in parliamentary debates was Seema Malhotra MP, representing the Labour Party (now in government). She stated that the clause 'sets out provision for regulations to be made by the Secretary of State to facilitate the continuing alignment of partnership law with general company law. We support this.'[12] Both sides of the UK's major political divide agreed to the new section 7A as a mechanism to align LP law to company law. The message is clear – the legislative trajectory of LP law is increasing alignment to company law, and this new section is a facilitative mechanism to achieve this.

The purpose of this paper is to challenge the wisdom of unreflexively aligning LP law to company law, and in particular to argue that the new power in section 7A should be used sparingly. The decision to align LP law to company law needs to be made on an item-by-item basis, to evaluate the appropriateness of the rule in the LP context. For both political parties, the alignment of LP law to company law per se is seen as beneficial. This paper presents a case to use this new power sparingly as the two are fundamentally different types of entities. The argument is not that company law rules can *never* be relevant for LPs. Both are business vehicles, and so will share some similarities for legal reform. To conclude that they should be relevant, though, involves considerable analytical work on a case-by-case basis. I set out reasons in this paper to assume that alignment will not be desirable, and therefore that the default presumption in the new section is misguided.

These arguments arise because companies and LPs are different types of legal vehicle. Most jurisdictions tend to respond to new policy challenges with new forms of legal vehicle.[13] For example, jurisdictions tend to allow for the creation of limited liability partnerships (an entirely different type of vehicle with a confusingly similar name to the LP) due to pressures from particular industries.[14] Thus non-corporate vehicles tend to arise due to a particular policy issue that the corporate form does not adequately cater for. Aligning reforms of non-company vehicles to company law means ignoring the weaknesses of the corporate vehicle that required a different vehicle in the first place. It can also mean that commentators can miss the specialities of a non-corporate vehicles. UK LPs have their own issues that need to be resolved, which are often very different from company law concerns.[15] It has been argued that there are doctrinal and conceptual differences between LPs and companies – for example, the Scottish LP's separate legal personality comes from a different conceptual basis than the company's.[16]

[7]LPA 1907, s 7A(1)(a).

[8]Ibid, s 7A(2).

[9]Introduced as cl 131 on 22 September 2022: https://publications.parliament.uk/pa/bills/cbill/58-03/0154/220154.pdf.

[10]Economic Crime and Corporate Transparency Bill 2022 Explanatory Notes, para 508, https://publications.parliament.uk/pa/bills/cbill/58-03/0154/en/220154en.pdf.

[11]HC Official Report (Public Bill Committee), col 443, 17 November 2022.

[12]Ibid, col 445, 17 November 2022.

[13]H Hansmann et al 'The new business entities in evolutionary perspective' in JA McCahery et al (eds) *Private Company Law Reform: International and European Perspectives* (The Hague: TMC Asser Press, 2009).

[14]UK auditors: J Freedman and V Finch 'Limited liability partnerships: have accountants sewn up the "deep pockets" debate?' [1997] Journal of Business Law 387; the US legal profession: H Wells 'The unexpected origins of the US limited liability partnership' in V Barnes and J Hardman (eds) *The Origins of Company Law* (Oxford: Hart Publishing, 2024).

[15]JA McCahery and EPM Vermeulen 'Limited partnership reform in the United Kingdom: a competitive, venture capital orientated business form' (2004) 5 European Business Organization Law Review 61.

[16]J Hardman 'Reconceptualising Scottish limited partnership law' (2021) 21 Journal of Corporate Law Studies 179.

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Starting from the company risks the exacerbation of any underlying issues in a non-corporate legal form by deliberately ignoring any conceptual difference in basis between that form and the company. This paper outlines identifies differences between LPs and companies in conceptual origin, management of the vehicle, limited liability, permanence, and capital maintenance.

Such risk arises because corporate law regulation has historically focused on larger companies.[17] It has been argued that for small business forms, we frequently need to draw from a wider toolkit of bespoke legal considerations rather than from a narrow list of pre-existing corporate tools.[18] This paper adds historical and empirical insights into this argument, to conclude that rather than trying to align the regulation of LPs to companies, we should instead try to ensure that regulation is focused on the specific issues arising within LPs. LPs have two categories of constituent: limited partners, who receive limited liability on their investment but cannot be involved in the management of the partnership; and general partners, whose liability for the failure of the partnership is unlimited but who manage the partnership.[19] This is a common approach in common law jurisdictions.[20] Yet the LP considerably pre-dates its common law adoption and was a transplant from other legal traditions. This is discussed further in Section 1 below.

This paper makes three arguments as to why automatically aligning LP law to company law is misguided. First, the nature of the two vehicles is different. As shown below, the UK LP is a transplant from Mediterranean trade forms, and unconnected to the corporate form. This argument is not purely conceptual and historic in nature; it draws on empirical insights into the overall nature of all UK LPs that have ever existed. Exercising the new section 7A of the LPA 1907 will therefore push LP law to align to the laws of a legal form which is conceptually different, which can cause overcomplications which fail to meet policy needs for LPs. This can be seen in respect of current attempts to make LPs more transparent – by using the same tools as company law in an LP context, we make the way by which we seek transparency more complicated than it needs to be.

Secondly, it argues that focusing on alignment with company law misses limitations in current rules that allow the ostensible policy balances within LPs to be circumvented. Debates in respect of limited liability are complex and unending, and there are clearly benefits and downsides of limited liability. Whatever the objectively correct normative approach may be in respect of limited liability, LPs ostensibly operate an age-old international model: limited liability for passive investors, and unlimited liability for active managers. Yet the ability to have a newly established thinly-capitalised special purpose vehicle as the only general partner, with a management agreement appointing a different entity without any liability to manage the LP, demonstrates how easily this model is avoided. This argument is verified by use of a simple case study of the legal structure of the recently closed Eighth Cinven Fund. This issue is that an apparent policy balance is easily avoided in practice. The mix of limited and unlimited liability is LP-specific, and therefore company law cannot provide guidance in this respect.

Thirdly, it empirically demonstrates the disproportionately high percentage of Scottish LPs, which means that aligning their regulation to those of companies – which are predominantly English – would be a mistake. Indeed, as outlined in Section 3 below, I have previously argued that recent company law legislation ignores Scots law specific issues and needs, and thus fails to achieve policy aims. Aligning LP law to company law risks compounding this: not only will such legislation miss nuances of the LP form, it will miss nuances of the Scottishness of the LP. Missing such nuances may undermine the policy aims advanced, whilst harming the LP.

[17]R Harris 'The private origins of the private company: Britain 1862–1907' (2013) 33 Oxford Journal of Legal Studies 339.

[18]W Callison et al 'Corporate disruption: the law and design of organizations in the twenty-first century' (2018) 19 European Business Organization Law Review 737.

[19]LPA 1907, s 4(2).

[20]Eg Guernsey – The Limited Partnerships (Guernsey) Law, 1995, s 2; Jersey – Limited Partnerships (Jersey) Law 1994, s 3; Australia – Partnership Act 1891, s 49; New Zealand – Limited Partnerships Act 2008, s 8; Ontario – Limited Partnerships Act 1990, s 2(2). Irish limited partnerships pre-date other common law jurisdictions: see JJ Henning 'The first limited partnership Act' (2015) 36 Company Lawyer 192. For the US, see A Kessler 'Limited liability in context: lessons from the French origins of the American limited partnership' (2003) 32 Journal of Legal Studies 511.

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Each argument, then, comprises conceptual and empirical components. I use the empirical components in this paper to provide verification/support of the conceptual arguments raised, and also to inform them: the notions that LPs are different to companies, and that limited liability can be easily sidestepped by legal structuring of general partner vehicles, are intuitions widely suspected by commentators in the field. That these are empirically verifiable is important evidence in translating these intuitions into policy.[21] The notion that the LP is disproportionately Scottish, though, arises purely from data and provides important additional policy considerations. Empirical evidence thus plays two important roles in this paper. First, it lets us 'test our basic assumptions about the world',[22] and verify 'hunches' about the operation of LP law.[23] The result of combining the two 'provides another approach to understanding the role of law… one that is more grounded in real-life economic activity than purely analytical qualitative analysis'.[24] This lets us utilise intuitions more deeply in legal design. This is the traditional use of empirical evidence in UK corporate legal analysis.[25] Secondly, though, it provides insights for us to analyse which might otherwise have been missed.

This paper draws on two different forms of empirical evidence in respect of its claims. First, it includes a quantitative analysis based on an overview of all LPs on the UK register. LPs register at Companies House to exist.[26] Companies House records, therefore, contain details of all LPs in existence. Indeed, until secondary legislation enacts certain parts of the Economic Crime and Corporate Transparency Act 2023,[27] it is impossible for an LP to *leave* the corporate register. The most that they can do is file a form LP6 with Companies House notifying a change in the LP, noting the dissolution.[28] Such LPs remain, though, on the corporate register with the details that they held prior to their dissolution, and so remain counted in the quantitative analysis outlined in this paper.

Companies House releases a snapshot of all entries on the corporate registers once a month.[29] This data has been subject to empirical legal study in respect of companies.[30] Yet it also contains details of all LPs, which have not yet been empirically studied. As noted above, this should include all LPs that have ever been registered. If they have a prefix 'LP' then they are English, if 'SL' they are Scottish and if 'NL' then they are Northern Irish. This product downloaded as at 1 April 2024 unveiled a total of 58,503 LPs in total on the UK public register – including currently live and defunct LPs. This paper draws on this for insights into the typical UK LP. It also utilises an individual case study to illustrate points. This approach is usual in business history.[31] Such an approach is less extrapolatable than quantitative insights, but demonstrates that the analytical risks raised are not purely theoretical.

The rest of this paper proceeds as follows. Section 1 explores the LP's roots, and identifies that the conceptual origins of the UK LP are different to the company form. Empirical data verifies this hunch for the modern day – most LPs have one limited partner and one general partner. Section 2 explores limited liability in the LP, and argues that the current rules allow for the bypassing of liability regimes, which will only be exacerbated by automatically aligning LP law to company law. It uses an empirical case study to illustrate its points. Section 3 explores the Scottishness of the LP, and the reasons why such Scottishness provides further reasons to resist aligning LP law to company law. A conclusion ends the paper.

[21]J Hardman and G Ramírez Santos 'Empirical evidence for the need to "think small first" in UK company law' (2023) 24 European Business Organization Law Review 117.

[22]A Dignam and PB Oh 'Disregarding the Salomon principle: an empirical analysis, 1885–2014' (2019) 39 Oxford Journal of Legal Studies 16 at 19.

[23]LM LoPucki 'A rule-based method for comparing corporate laws' (2018) 94 Notre Dame Law Review 263.

[24]Hardman and Ramírez Santos, above n 21, at 147.

[25]Eg HT Wu et al '"Say on pay" regulations and director remuneration: evidence from the UK in the past two decades' (2020) 20 Journal of Corporate Law Studies 541.

[26]LPA 1907, s 5.

[27]Economic Crime and Corporate Transparency Act 2023, s 144 and s 219.

[28]Eg Sulcom Group LP form LP6 filed on 26 June 2019: https://find-and-update.company-information.service.gov.uk/company/LP018324/filing-history.

[29]See https://download.companieshouse.gov.uk/en_output.html.

[30]Hardman and Ramírez Santos, above n 21.

[31]Eg JW Cortada 'Viewing corporations as information ecosystems: the case of IBM, 1914–1980s' (2022) 23 Enterprise & Society 99.

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1. The very limited partnership

(a) Non-corporate origins and basis

First, then, we should not automatically aim to align LP regulation with company regulation because they are fundamentally different vehicles. This means that the ends of company law regulation may not be appropriate, or need different means to be achieved, for LPs. The corporate form was originally chartered by the state, until incorporation by registration was passed in the UK in 1844,[32] with limited liability becoming available in 1855,[33] and aligned fully to a single company law regime in 1856.[34] This regime had a clear separation from partnerships – entities with over 20 'partners' were forced to use the company form (precluding larger partnerships), and seven persons were needed to form a company (precluding the smallest of companies).[35] Law therefore treated the company form and the partnership form as alternatives with limited potential for overlap.

The presence of the company form, with limited liability for passive investors, drew attention to the fact that partnership vehicles did not enjoy similar rights.[36] Sir Frederick Pollock drafted the UK's Partnership Act 1890,[37] and attempted to allow for LPs.[38] He argued in 1882 that:

> The institution of partnership *en commandite*, or limited partnership, as we may call it in English, is unknown in the United Kingdom, and in these kingdoms alone, or almost alone, among all the civilized countries of the world.… The essence of *commandite* partnership is the conjunction of at least one managing partner who is liable without limitation for the partnership debts… with one or more contributing partners who do not take an active part in the business, and are liable only to the extent of what they contribute… to its capital. This form of partnership has been known on the Continent for many centuries. The Mediterranean trade of the middle ages was carried on principally by its means.[39]

Such a vehicle was provided in the UK in 1907. Three important insights arise here, though, in respect of the intellectual drive for the introduction of the UK LP. First, the intention was to provide a feature available in a different legal form to a partnership form, rather than holistic alignment. Thus the drive for the creation of LPs was not to generally align partnership law to company law, but instead to be able to cherry pick the most advantageous features available to a particular set of facts arising in a partnership. This drive was not even to apply to all partners, merely some of them. This is discussed further below. Secondly, the policy considerations were focused on the facilitation of trade. The UK's early general incorporation regime was introduced due to a concern about difficulties in suing large partnerships, and so ensuring third party protection.[40] Pollock's drive for LPs was based, instead, on the notion that trade was commonly carried out through such a vehicle. The reason for introducing LPs into the UK was not

[32]HN Butler 'General incorporation in nineteenth century England: interaction of common law and legislative processes' (1986) 6 International Review of Law and Economics 169.

[33]C Mackie 'From privilege to right – themes in the emergence of limited liability' [2011] Juridical Review 294; HA Shannon 'The coming of general limited liability' (1931) 41 The Economic Journal 267.

[34]R Harris 'A new understanding of the history of limited liability: an invitation for theoretical reframing' (2020) 16 Journal of Institutional Economics 643.

[35]J Hardman 'On mistakes and trajectories: using history in normative company law' in V Barnes and J Hardman (eds) *The Origins of Company Law* (Oxford: Hart Publishing, 2024).

[36]J Saville 'Sleeping partnership and limited liability, 1850–1856' (1956) 8 Economic History Review 418.

[37]H Wells 'The personification of the partnership' (2021) 74 Vanderbilt Law Review 1835 at 1844; RM Mersky 'The literature of partnership law' (1963) 16 Vanderbilt Law Review 389.

[38]E Apps 'Limited partnerships and the control prohibition: assessing the liability of limited partners' (1991) 70 Canadian Bar Review 611 at 618–619.

[39]F Pollock *Essays on Jurisprudence and Ethics* (London: Macmillan, reprint, 1961) p 100.

[40]H Bellenden Ker *Report on the Law of Partnership with an Appendix Thereto* (London, 1837); W Gladstone et al *First Report of the Select Committee on Joint Stock Companies; together with the Minutes of Evidence (Taken in 1841 and 1843)* (London: 1844).

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only not-corporate, but based on different policy considerations to the introduction of the corporate regime.

Thirdly, the desire to introduce the LP was comparative. Pollock's argument is that other jurisdictions had forms of it, known as the partnership *en commandite*, or the *commenda* contract.[41] Such financial arrangements led to economic success where they were embraced,[42] and were a common way to trade overseas, including between Europe and Crusader States in the 1200s.[43] Indeed, their legal form is indistinguishable from the Islamic forms of trade known as the *qirad*.[44] At the very least these legal features migrated along trade routes,[45] although it is usually argued that the European *commenda* was based on the Islamic *qirad*.[46] These types of business arrangement all focused on allocating risk and reward between managers and passive investors.[47]

Islamic legal traditions did not develop the equivalent of a 'company' from such a legal form.[48] The modern company originated in Western Europe with the English East India Company,[49] and the Dutch Vereenigde Oostindische Compagnie, known as 'VOC'.[50] It arose because of the need for permanent capital within an organisation for trade at scale.[51] The popularity of the company form arose because of the need for more complicated business structures, including intergenerational transfers across family firms,[52] and due to state commitment to segregating the company's assets.[53] The *qirad*, *commenda*, and UK LP do not have permanent capital. In addition to such capital, one of the advantages of the corporate form is stated to be the ability to lock such capital into the business venture.[54] These rules are mandatory and cannot be circumvented.[55] Such restrictions on what can be distributed and to what extent are lacking from LPs. Partners can withdraw capital from LPs unless they bind themselves not to,[56] but any limited partner who does so is liable for the debts of the LP up to the amount so withdrawn.[57] There is thus a fundamental difference in basis for any restriction on capital withdrawal under the two different business forms: one is an absolute prohibition, the other is a permission with a consequence.

[41]JH Prior 'The origins of the *commenda* contract' (1977) 52 Speculum 5.

[42]Y González de Lara 'The secret of Venetian success: a public-order, reputation-based institution' (2008) 12 European Review of Economic History 247.

[43]RK Berlow 'The sailing of the "Saint Esprit"' (1979) 39 Journal of Economic History 345.

[44]Indistinguishable in turn from the 'mudaraba': see NHD Foster 'Islamic perspectives on the law of business organisations: part 1: an overview of the classical Sharia and a brief comparison of the Sharia regimes with Western-style law' (2010) 11 European Business Organization Law Review 3 at 22.

[45]R Harris *Going the Distance: Eurasian Trade and the Rise of the Business Corporation, 1400–1700* (Princeton: Princeton University Press, 2020).

[46]A Udovitch 'At the origins of the Western *commenda:* Islam, Israel, Byzantium?' (1962) 37 Speculum 198; RW Hillman 'New forms and new balances: organizing the external relations of the unincorporated firm' (1997) 54 Washington and Lee Law Review 613.

[47]RL Reynolds 'Origins of modern business enterprise: medieval Italy' (1952) 12 Journal of Economic History 350.

[48]T Kuran 'The absence of the corporation in Islamic law: origins and persistence' (2005) 53 American Journal of Comparative Law 785.

[49]SM Watson *The Making of the Modern Company* (Oxford: Hart Publishing, 2022) chs 3 and 4; H Bowen 'The "Little Parliament": the general court of the East India Company, 1750–1784' (1991) 34 The Historical Journal 857.

[50]D D'Alvia 'From the VOC to the SPAC: at the root of the corporation's soul' (2024) 35 European Business Law Review 779; O Gelderblom et al 'The formative years of the modern corporation: the Dutch East India Company VOC, 1602–1623' (2013) 73 Journal of Economic History 1050.

[51]G Dari-Mattiacci et al 'The emergence of the corporate form' (2017) 33 Journal of Law, Economics & Organization 193; Watson, above n 49, chs 12 and 13; Harris, above n 45, chs 10–12.

[52]A Greif 'The study of organizations and evolving organizational forms through history: reflections from the late medieval family firm' (1996) 5 Industrial and Corporate Change 473.

[53]T Zhang and J Morley 'The modern state and the rise of the business corporation' (2023) 132 Yale Law Journal 1970.

[54]MM Blair 'Locking in capital: what corporate law achieved for business organizers in the nineteenth century' (2003) 51 UCLA Law Review 387.

[55]*Averling Barford Ltd v Perion Ltd* [1989] 4 WLUK 159.

[56]LPA 1907, s 7 applies partnership law unless otherwise stated; Partnership Act 1890, s 24 allows equal sharing in the capital of the partnership. See also RI Banks *Lindley & Banks on Partnership* (London: Sweet & Maxwell, 21st edn, 2022) para 31-28.

[57]LPA 1907, s 4(3).

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Differences between the UK LP and its company form run considerably deeper. Unlike companies, English LPs have no separate legal personality.[58] This has long caused conceptual differences between the corporate and partnership form: whilst the former can hold its own property, the latter cannot.[59] In general partnerships, this means that the partnership's assets are legally held by the partners individually for use in the partnership.[60] In LPs, partnership property will be held by the general partner.[61] So not only is there no permanent capital in an English LP, partnership property will be held in the name of the general partner, rather than in the name of the entity itself. In an LP one category of constituent (the general partner(s)) holds property that they manage for the benefit of another category of constituent (the limited partner(s)). Scottish LPs do enjoy separate legal personality,[62] but a very weak form of it.[63] Whilst the Scottish LP can hold assets in its own name, such personality is not perpetual as in companies, and therefore traditionally treated as less-than-corporate.[64] In particular, the concept of the Scottish partnership (general or limited) owning property is conceptually challenging.[65] Companies have perpetual existence from their incorporation until dissolved, regardless of the change of the individuals involved in the company.[66] LPs, on the other hand, technically end whenever a general partner changes, and are re-constituted by a new LP.[67] This makes them particularly attractive for business forms that are not intended to be permanent.[68]

Overall, then, the LP and the company conceptually originated in different ways, driven by different needs into different directions and have different legal features. This weakens the argument to align LP law to company law. Given such conceptual differences between the two vehicles, the notion of automatically aligning LP law to company law therefore is inappropriate.

(b) The very limited partnership today

Yet historical antecedence only goes so far. To review features of modern LPs we can look at the snapshot of all LPs registered on the UK corporate database as at April 2024. Figure 1 shows the number registered by year, demonstrating a severe spike between 2009 and 2018, with a peak of 6,226 LPs registered in 2015. Thus most LPs are newer – increasing the possibility that the modern use of the LP has deviated from its historical origins.

However, drilling into the detail of the modern LP unveils that the characteristics of the modern LP have stayed close to their original conceptual roots. Table 1 sets out the number of limited general partners in each LP on the UK's corporate register.

Table 1 demonstrates that of the 58,503 LPs on the UK's corporate register, 41,355, or 70.69%, have one limited partner and one general partner. The majority of LPs, therefore, fall squarely into the historical *commenda* dynamic by which one partner without limited liability manages the money, with a sleeping partner with limited liability; 74.2% of LPs only have one limited partner; 89.52% of LPs only

[58] *Re Barnard* [1932] 1 Ch 269 at 272.

[59] JH Drake 'Partnership entity and tenancy in partnership: the struggle for a definition' (1917) 15 Michigan Law Review 609.

[60] Partnership Act 1890, s 20.

[61] For US: LE Ribstein 'Fiduciary duties and limited partnership agreements' (2004) 37 Suffolk University Law Review 927.

[62] See Hardman, above n 16.

[63] L Macgregor 'Partnerships and legal personality: cautionary tales from Scotland' (2020) 20 Journal of Corporate Law Studies 237.

[64] J Brown 'On partnerships, promises and succession' [2023] Juridical Review 121; L Macgregor 'The impact of dissolution on partnership contracts: NHBC v Gavin Henderson Joiner and Building Contractors and Others' (2023) 27 Edinburgh Law Review 414.

[65] GL Gretton 'Who owns partnership property?' [1987] Juridical Review 163.

[66] AA Schwartz 'The perpetual corporation' (2012) 80 George Washington Law Review 764.

[67] *BCM Cayman LP v Revenue & Customs Comrs* [2023] EWCA Civ 1179, especially at paras [42]–[44]. This causes added complication in Scotland, where LPs have legal personality: see Macgregor, above n 63.

[68] Eg for debt in agricultural holdings: see National Farms Union of Scotland et al 'Limited partnerships – planning for the future' (June 2015), https://www.nfus.org.uk/userfiles/images/Policy/Ag%20Holdings/Joint%20Guidance%20on%20Limited%20Partnerships.pdf.

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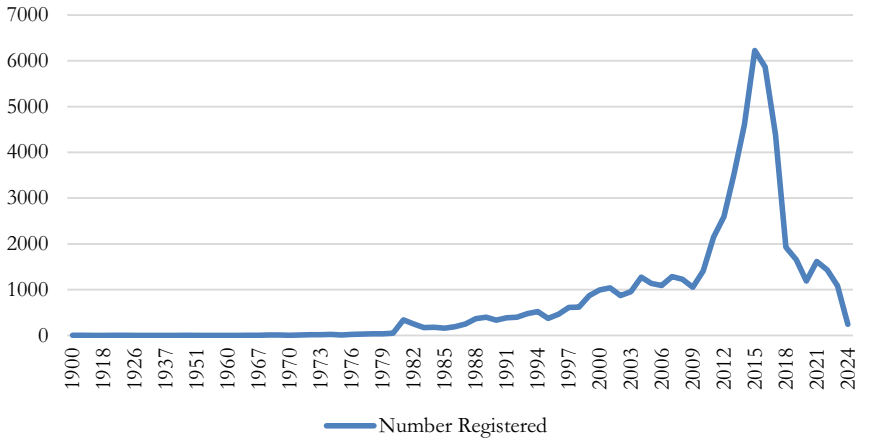


Figure 1. Registered LPs by year.

Table 1. Number of LPs per number of general partners and limited partners

		General partners							
Limited partners		**0**	**1**	**2**	**3–5**	**6–10**	**11+**	**Total**	**%**
	0	1,794	84	7	4	0	0	*1,889*	*3.23*
	1	11	41,355	1,661	328	27	27	*43,409*	*74.20*
	2	3	2,983	779	69	4	3	*3,841*	*6.57*
	3–5	3	2,658	372	67	5	2	*3,107*	*5.31*
	6–10	0	1,700	207	27	4	1	*1,939*	*3.31*
	11+	0	3,591	672	45	2	8	*4,318*	*7.38*
	Total	*1,811*	*52,371*	*3,698*	*540*	*42*	*41*	*58,503*	
	%	*3.10*	*89.52*	*6.32*	*0.92*	*0.07*	*0.07*		

have one general partner. Given that 3.10% of LPs are listed with no general partners,[69] only 4,321 LPs, or 7.39% of total LPs, have more than one general partner. As noted above, this general partner is the only partner able to undertake management activity for the LP, and has unlimited liability for its debts. As set out further below, this demonstrates that aligning LP law to company law will overcomplicate matters and risk missing policy aims.

Most company law reforms recently have focused on transparency. This originally targeted finding the underlying beneficial owners behind assets,[70] and restrictions on overseas control of strategically important businesses.[71] Yet the 2023 reforms – passed but not yet fully in force – focus on the management of the entity, such as preventing disqualified directors from becoming directors of subsequent companies,[72] ensuring that directors have their identity verified,[73] and ensuring that the

[69]Normally as a result of general partners and limited partners resigning before winding up the LP.
[70]Small Business, Enterprise and Employment Act 2015, Part 7.
[71]National Security and Investment Act 2021, Part 1.
[72]Economic Crime and Corporate Transparency Act 2023, s 40.
[73]Ibid, s 44.

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company's registered office is fit for purpose.[74] The last of these will be applied to LPs – requiring them to have a registered office that is appropriate and at which the LP can be reached.[75] For the 89.52% of LPs with only one general partner able to manage the business, this is misguided.

A requirement for a registered office has been longstanding in UK company law: it appeared in the first Act to allow for UK general incorporation.[76] Here, promoters of any company would need to register their own personal places of business, and the intended place of business of the company,[77] and then register a deed of settlement setting out the principal place of business of the company, and every branch office.[78] The report preceding general incorporation set out that there were some risks of businesses pretending to do business in places that they did not.[79] To remedy such concern it recommended publication of everywhere that the company undertakes business.[80] This is predicated upon it mattering who ran the business and where it was carried out, with the assumption that the two will be based in different places. This regime continues today – directors must publicly register service addresses,[81] and the company must have a registered office.[82] The preparatory work for the most recent full restatement of the Companies Act[83] is very cursory on the point, merely noting these requirements as part of the restatement.[84] Modern academic discussion of the registered office tends to focus on flexibility to move them across borders,[85] leaving the core need for a registered office for corporate forms as axiomatically assumed. It remains predicated upon the notion that the business activity of the company is carried out at a different place to the location of those tasked with carrying out that activity.

LPs have traditionally had 'principal places of business' rather than registered offices,[86] a factual confirmation updated at the register ex post rather than to be updated ex ante.[87] This, too, presupposes some autonomous business activity carried out at a place different to where they are based. We should immediately question this concept in respect of LPs – limited partners cannot carry out any activity on behalf of the LP, and so only general partners can. For English LPs, *neither* a registered office nor principal place of business is relevant when there is only one general partner, as LP activity must be carried out by the general partner, or contracted by that general partner to a third party. Registered offices exist for companies because the activity of the company is thought to be different from those who undertake the activity – historically, at least two directors were required for any individual company,[88] and so finding those who bind the company would not necessarily be sufficient to find the activity of the company.

Yet the empirical data show that this is not the case for the vast majority of LPs: 89.52% have only one general partner: find the general partner, you find the activity of the LP. For such LPs, the best way to achieve transparency is to go straight to the sole general partner, the only partner which can manage the vehicle, and with unlimited liability for its debts. We do not need the added complication of identifying a registered office. Starting from the presumption that LP law should align to company law results in unnecessary complication, and an additional compliance burden. The same is true of new requirements

[74]Ibid, ss 28.
[75]Ibid, s 113.
[76]See Butler, above n 32.
[77]Joint Stock Companies Act 1844, s IV.
[78]Ibid, s VIII.
[79]Gladstone et al, above n 40, p 4.
[80]Ibid, p 12.
[81]Companies Act 2006, s 167J.
[82]Ibid, s 86.
[83]R Goddard '"Modernising company law": the Government's White Paper' (2003) 66 Modern Law Review 402.
[84]Department of Trade and Industry *Company Law Reform*, Cm 6456, March 2005, p 56.
[85]Eg C Gerner-Beuerle et al 'Cross-border reincorporations in the European Union: the case for comprehensive harmonisation' (2018) 18 Journal of Corporate Law Studies 1.
[86]LPA 1907, s 8.
[87]See Hardman, above n 16.
[88]Until 2006, the Companies Act 1985, s 282.

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for email addresses being introduced for companies.[89] This is also being applied to LPs.[90] Here, the requirement is not that there is an email address at which the LP can be reached, but that those setting up the LP must 'specify the intended registered email address of the limited partnership', and that 'the general partners in a limited partnership must ensure that its registered email address is at all times an appropriate email address'.[91] For 89.52% of LPs, this is unnecessary – we simply need to be able to contact the general partner. Such requirement is only necessary where there is more than one general partner. Such additional requirements are more than mere additional hassle – they are actively harmful. Legitimate LPs will incur an additional compliance burden in having to follow such rules for no public benefit. Illegitimate LPs can use this extra superfluous compliance layer to their advantage by hiding behind it. A general partner intent on wrongdoing could operate themselves from one address, yet claim that somehow the LP operates from another, adding complexities for tracing and law enforcement. Indeed, aligning LP law to company law here may actively obfuscate: we must work out the address at which the general partner carries out partnership business, rather than targeting transparency directly at the general partner.

Empirical data thus demonstrates that the LP today follows its historical antecedents as mostly having one passive investor and one active manager, and that attempting to align LP law to company law over-complicates the picture in the vast majority of cases. Only where there is more than one general partner will it ever be necessary to utilise more complicated methods to achieve transparency into the affairs of the LP. If transparency laws were targeted purely at finding out more about the general partner, then transparency could be achieved for 89.52% of LPs in a simpler and more direct way.

This seems to have been tacitly acknowledged. The 2023 reforms will, when fully enacted, change the law so that anyone who is a disqualified director cannot be a general partner,[92] and that any corporate general partner must identify a natural person whose identity has been verified and who is not disqualified.[93] This focus on ensuring the general partner is traceable is the best way to ensure transparency in LPs. It happens to align to the approach taken in respect of directors.[94] However, for transparency in LPs, attempting to focus on anything over and above the general partner is misguided – rather than reforming LPs using company law methods to improve their transparency, we should be focusing on finding out as much as we can about their general partners. Presuming that LP law should be aligned to company law will miss this. The new power to align LP law to company law needs to be carefully exercised, as company law may provide subpar means to achieve the same ends in LPs.

2. Limited limited liability

(a) Limited liability

Focus on the general partner also demonstrates further differences between LPs and companies. I noted above that limited liability was the primary driver for the introduction of the LP. Yet limited liability in an LP is fundamentally different from that in the company. For a company, all shareholders enjoy limited liability,[95] and directors do other than in a small number of factually-specific circumstances.[96] Yet for an LP, silent partners enjoy limited liability as long as they stay out of management, and those partners who manage the firm have unlimited liability for the firm's debts.[97]

[89]Economic Crime and Corporate Transparency Act 2023, s 29.
[90]Ibid, s 116.
[91]Ibid.
[92]Ibid, s 118.
[93]Ibid, s 119.
[94]Ibid, s 40 and s 44.
[95]Insolvency Act 1986, ss 74–76.
[96]Eg wrongful trading: Insolvency Act 1984, s 214; K van Zwieten 'Director liability in insolvency and its vicinity' (2018) 38 Oxford Journal of Legal Studies 382.
[97]LPA 1907, s 4(2).

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Limited liability has many benefits, especially in respect of passive investors. First, it fixes the amounts that a party will have to pay to the relevant fund. As such, it allows investors to diversify, knowing that they can interact with multiple funds without the financial difficulty of one acting as a cross-contagion to all their assets.[98] Secondly, it decreases monitoring costs[99] that limited partners suffer from those managing the vehicle.[100] If parties do not have limited liability, then they have to incur considerable costs watching those controlling the fund to ensure that they correctly quantify, and minimise, the risk of their assets being called on. Thirdly, a lack of limited liability for limited partners would mean they would need to monitor each other. This is because, without limited liability, the risk of having to pay into the fund is inherently linked to the wealth of each other limited partner. By way of simple illustration, imagine if two parties (A and B) have unlimited liability for a firm's debts. A's risk of having to pay into the fund on the fund's insolvency depends on the comparative wealth of B. Imagine A has £100. If B is insolvent, A is likely to be called upon in the event of the fund's insolvency. If B is a billionaire, A is very unlikely to be required to contribute in the event of B's insolvency as creditors will save recovery costs by pursuing the easier target.[101] Limited liability thus avoids A and B needing to care about each other's wealth.

But limited liability is also highly controversial. The ability to split assets into different silos, each with limited liability for the other's debts, is said to encourage excessive risk.[102] In particular, it encourages overinvestment into high-risk industries, and using higher risk methods within those industries.[103] Goodhart and Lastra argued that it creates a 'moral hazard' – whatever the equilibrium of risk may be, limited liability pushes actual risk levels above it because shareholders are insulated from the downside of corporate failure whilst enjoying its upside.[104] *The Times* thundered in 1824 that

> [n]othing can be so unjust as for a few persons abounding in wealth to offer a portion of their excess for the information of a company, to play with that excess – to lend the importance of their whole name and credit to the society, and then should the funds prove insufficient to answer all demands, to retire into the security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish.[105]

Limited liability, then, has many advantages but some large downsides. To resolve the downsides, Goodhart and Lastra propose that it should not apply to shares held by 'insiders', those who are able to direct the business' activity.[106] This is effectively the LP model. Indeed, a number of the concerns in respect of limited liability generally were thought not to occur in the case of LPs: limited liability only applied to passive investors, and not those who managed the firm. This meant that those in control had no incentive to push for excessive risk, and those with such incentive had no control to do anything about it. Saville states that John Stuart Mill thought that limited liability for companies was a more difficult case to argue than it was for an LP form, and generally it was thought that limited liability for sleeping partners and unlimited liability for those who managed the vehicle solved the majority of issues with limited liability generally.[107] Overall, then, whatever the objective rights and wrongs of limited liability may be, the LP seems to reflect a nuanced policy balance between the two extremes, one that others would like to

[98]HG Manne 'Our two corporation systems: law and economics' (1967) 53 Virginia Law Review 259; TH Kaisanlahti 'Extended liability of shareholders?' (2006) 6 Journal of Corporate Law Studies 139.

[99]See FH Easterbrook and DRR Fischel 'Limited liability and the corporation' (1985) 52 University of Chicago Law Review 89.

[100]SE Woodward 'Limited liability in the theory of the firm' (1985) 141 Journal of Institutional and Theoretical Economics 601.

[101]S Blankenburg et al 'Limited liability and the modern corporation in theory and in practice' (2010) 34 Cambridge Journal of Economics 821.

[102]AJ Casey 'The new corporate web: tailored entity partitions and creditors' selective enforcement' (2015) 124 Yale Law Journal 2680; J Hardman 'Fixing the misalignment of the concession of corporate legal personality' (2023) 43 LS 443.

[103]H Hansmann and R Kraakman 'Towards unlimited shareholder liability for corporate torts' (1991) 100 Yale Law Journal 1879.

[104]CAE Goodhart and RM Lastra 'Equity finance: matching liability to power' (2021) 6 Journal of Financial Regulation 1.

[105]The Times, 25 May 1824.

[106]Goodhart and Lastra, above n 104.

[107]Saville, above n 36, at 422.

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emulate, and one which has strong historical antecedence in ancient trade regimes. Yet this is not so in practice. This is because there are very few requirements in respect of general partners. Whilst companies must have at least one director who is a natural person,[108] general partners can be purely corporate. A general partner can be a private company, and private companies have no requirement to have any meaningful economic presence at all.[109] I noted above that 2023 reforms will require general partners to identify at least one individual who manages the general partner.[110] Yet increased access to named individuals above will not create any requirement that the general partner be a meaningful entity. It is perfectly legitimate under the current regime for a company with a large capital base which wishes to run an LP to set up a new, thinly capitalised special purpose vehicle (with limited liability) as a wholly owned subsidiary to be its general partner, which then signs a management agreement appointing the company with the large capital base as the manager of the LP's assets. Here, the manager is insulated from the LP's liabilities because it is managing the LP's assets under an arms' length, third-party management agreement, whilst the general partner (with unlimited liability) is a shell subsidiary of the managers. Doing so neatly sidesteps the nuanced position reached in respect of limited liability in LPs. This is a distinct issue for the policy balance struck within LP law – and demonstrates a conceptual issue that will be missed by merely aligning to company law, as each at times has different policy ends that need to be achieved.

(b) Liability bypassed

LPs are frequently utilised in venture capital and private equity funds,[111] and regulation of LPs has been driven heavily by this industry.[112] Most academic attention on private equity focuses on its process for acquiring portfolio companies,[113] its effect on them,[114] and a need to regulate the process of fundraising.[115] These funds have a finite life – normally approximately 10 years.[116] They are set up on the understanding that funds will be provided for finite periods, and then investments will be liquidated and value returned to limited partners.[117] Managers establish fund after fund, with the new one raised on the reputation of the previous fund's successes. The complex structuring utilised in such funds provides a way to achieve de facto limited liability for managers of such funds.

For example, in January 2024, famous[118] UK private equity firm Cinven finished its fundraising for the Eighth Cinven Fund, raising $14.5 billion.[119] The name indicates that there have previously been seven such funds raised, generating profit, then wound up. Managers now increasingly aim to sell assets

[108]Companies Act 2006, s 155.

[109]A single share can be issued for a nominal value: see E Ferran 'Revisiting legal capital' (2019) 20 European Business Organization Law Review 521.

[110]Economic Crime and Corporate Transparency Act 2023, s 119.

[111]RJ Gilson 'Engineering a venture capital market: lessons from the American experience' (2003) 55 Stanford Law Review 1067; D Rosenberg 'Venture capital limited partnerships: a study in freedom of contract' [2002] Columbia Business Law Review 363; K Litvak 'Venture capital limited partnership agreements: understanding compensation arrangements' (2009) 76 University of Chicago Law Review 161.

[112]E Berry 'Limited partnership law and private equity: an instance of legislative capture' (2019) 19 Journal of Corporate Law Studies 105.

[113]BV Reddy 'Deconstructing private equity buyout valuations' [2022] Journal of Business Law 629.

[114]MC Jensen 'Eclipse of the public corporation' (1989) 67 Harvard Business Review 61; N Block et al 'Do private equity owned firms have better management practices?' (2015) 105 American Economic Review 442; J Brodmann et al 'The value added by private equity in merges and acquisitions by financial institutions' (2021) 53 Applied Economics 5898.

[115]J Payne 'Private equity and its regulation in Europe' (2011) 12 European Business Organization Law Review 559; E Ferran 'After the crisis: the regulation of hedge funds and private equity in the EU' (2011) 12 European Business Organization Law Review 379.

[116]S Whitney *Corporate Governance and Responsible Investment in Private Equity* (Cambridge: Cambridge University Press, 2020) p 32.

[117]Reddy, above n 113.

[118]R Jelic 'Staying power of UK buy-outs' (2011) 38 Journal of Business Finance & Accounting 945.

[119]See https://www.cinven.com/news-insights/cinven-raises-14-5-billion-for-the-eighth-cinven-fund/.

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from a previous fund which needs to be wound up to a newly launched fund, so-called 'continuation funds' – causing tensions between the old fund and the new fund (it is in the interest of the old fund to obtain the highest price possible and the interests of the new fund to obtain the lowest price possible).[120] There are five Cinven English LPs registered at Companies House, with names from 'Eighth Cinven Fund (No. 1) Limited Partnership' (registered number LP022357) to '(No. 5)'.[121] More LPs may be established offshore. It is usual to split a fund into a number of LPs, as it allows for specialisation across LPs within the fund with slightly different investment polices: LP number 1 may, for example, have an investment policy focusing on buying portfolio companies between $50 and $100 million; LP 2 may, for example, have a policy focusing on buying European companies.[122] That means that if a European target company which would cost $60 million is found, both LPs could contribute.

Cinven Limited's accounts state that it had shareholder equity of over £86 million as at 31 December 2023,[123] following turnover in 2023 of over £275 million.[124] Cinven Limited is therefore, by most metrics, a very strong company with a meaningful economic presence. Filings in the US indicate that Cinven Limited is the manager of the Eighth Cinven Fund.[125] The overall picture, then, is that Cinven has raised a new fund, involving getting $14.5 billion from passive investors – limited partners – on the basis of Cinven's experience managing private equity investments. It therefore seems as if funds have been raised from passive investors for management by an experienced manager with unlimited liability for the debts of the various partnerships – functionally the same as the *commenda* upon which the LP under UK law is based, and reflecting the policy balance reached on a contentious topic.

Yet Cinven Limited is not a general partner in these LPs. Since 27 May 2022, one general partner of Eighth Cinven Fund (No. 1) Limited Partnership has been Cinven UK F8 General Partner.[126] This entity is an unlimited company, whose unaudited accounts filed on 30 October 2024 demonstrate that it has no liabilities and its only asset is one share of £1.[127] Its shareholder is Cinven UK F8 GP Holdco,[128] another private unlimited company with the same financial position, which is wholly owned by Cinven Capital Management (VIII) General Partner Limited.[129] This appears to be a Guernsey limited company.[130] It is famously difficult to access corporate information in respect of Guernsey companies.[131] This means that should the LP have fewer assets than its liabilities, a disgruntled creditor would need to first proceed against the LP's general partner. As this has negligible assets and unlimited liability, such creditor would need to proceed against its parent company, in the same position. The end of the chain is a Guernsey company. It is likely that it similarly has minimal assets, but the use of the word 'limited' in its name means that its shareholders have limited liability.[132] The fund will be managed by Cinven Limited pursuant to a management agreement, in exchange for a fee.[133] Cinven's

[120]K Kastiel and Y Nili 'The rise of private equity continuation funds' (2024) 172 University of Pennsylvania Law Review 1601.

[121]See https://find-and-update.company-information.service.gov.uk/search?q=Eighth+Cinven+Fund.

[122]G Aragon et al 'Onshore and offshore hedge funds: are they twins?' (2014) 60 Management Science 74.

[123]Available at https://find-and-update.company-information.service.gov.uk/company/02192937/filing-history, p 15.

[124]Ibid, p 16.

[125]See https://www.sec.gov/Archives/edgar/data/1927203/000192720322000001/xslFormDX01/primary_doc.xml.

[126]Form LP6 filed on 25 May 2022, available at https://find-and-update.company-information.service.gov.uk/company/LP022357/filing-history?page=2. It also appears to have a second general partner, Cinven Capital Management (VIII) Limited Partnership, about which no information appears to be publicly available.

[127]Available at https://find-and-update.company-information.service.gov.uk/company/LP022357/filing-history?, p 5.

[128]Ibid.

[129]Accounts made up to 31 December 2022 filed on 14 October 2023, available at https://find-and-update.company-information.service.gov.uk/company/14078025/filing-history.

[130]See https://find-and-update.company-information.service.gov.uk/officers/1CYwJIYATBaYNsP8TdqOZC1UkY4/appointments.

[131]L-C Wolff 'Offshore holdings for global investments of multinational enterprises: just evil?' [2015] Journal of Business Law 445; P Yeoh 'Financial secrecy business offshore and onshore' (2018) 39 Company Lawyer 279; J Harris 'Crown dependencies commit to greater transparency on beneficial ownership information' (2024) 45 Company Lawyer 95.

[132]The Companies (Guernsey) Law, 2008, s 21 and s 24(1).

[133]L Gullifer and J Payne *Corporate Finance Law: Principles and Policy* (Oxford: Hart Publishing, 3rd edn, 2020) p 810.

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carry and co-invest vehicles[134] will likely be undertaken through Scottish LPs.[135] The result is that Cinven can deploy its name in gathering investors, and profit from the success of the fund, but not be at risk meaningfully for the downside should the fund fail to be successful. Such strategic deployment of liability is commonly deployed by sophisticated corporate actors.[136]

Not, of course, that the Eighth Cinven Fund will fail. The emphasis in such a fund is a return on its investment, so it will be an unmitigated failure if it fails to return $14.5 billion to its investors, and so the notion that it may leave external creditors unsatisfied is incredibly remote. However, private equity assets, being shares in private companies, are famously illiquid.[137] Upon financial difficulty, it may be difficult to sell assets at their worth (as buyers reduce their offers at the slightest signs of desperation). More importantly, it unveils an issue in the legal structuring of the LP. Its form is meant to provide some partners with limited liability in exchange for those who manage the LP being liable should partnership assets not suffice. The structure of the Eighth Cinven Fund demonstrates how easy it is to circumvent the latter part of this trade off, to utilise a minimally capitalised corporate group structure to effectively bypass this liability.[138]

Thus a case study demonstrates the hunch identified above – that whilst the partial liability noted above is seen as an important part in the societal palatability of LPs, it is easily side-stepped in practice. The risk here is not the highly-regulated Cinven.[139] The risk is those LPs which have been argued to be of doubtful legality.[140] A proper liability regime for general partners, requiring a meaningful entity to be the general partner, would deter illegality in LPs by providing the ability to meaningfully hold them to account for wrongdoing. Indeed, this is a key area of LPs where law-on-the-books does not align to law-in-action.[141] Yet to fix it requires the LP insight noted above, that we should focus on general partners. Drawing from the company law toolkit,[142] which as noted above embraces limited liability wholesale for all parties other than in exceptional circumstances, will not do so. Company law, of course, has also had a changing approach to limited liability. The famous case[143] of *Salomon* in 1897 upheld limited liability structures with one dominant shareholder,[144] upending the received wisdom as to how limited liability would be treated towards a more liberal interpretation.[145] It is therefore tempting to dismiss ease of isolated general partners as part of this wider trend. Yet not only is the starting point for limited liability different between LPs and companies, so is its trajectory of limited liability. Limited partners obtain limited liability so long as they are not involved in the management of the LP.[146] A 2013 case held that, should such happen, then the limited partners become liable for all of the LP's debts, even those incurred before the commencement or after the cessation of such management involvement.[147] This seems harsh,

[134]JA McCahery and EPM Vermeulen 'Conservatism and innovation in venture capital contracting' (2014) 15 European Business Organization Law Review 235 at 248.

[135]For separate legal personality see Hardman, above n 16.

[136]R Squire 'Strategic liability in the corporate group' (2011) 78 University of Chicago Law Review 605.

[137]JAC Hetherington and MP Dooley 'Illiquidity and exploitation: a proposed statutory solution to the remaining close corporation problem' (1977) 63 Virginia Law Review 1.

[138]P Blumberg 'Limited liability and corporate groups' (1986) 11 Journal of Corporation Law 573.

[139]Cinven Limited is authorised by the Financial Conduct Authority: https://register.fca.org.uk/s/search?q=Cinven&type=Companies.

[140]Department for Business, Energy & Industrial Strategy 'Limited partnerships: reform of limited partnership law' (30 April 2018), ch 1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703603/limited-partnerships-review-of-limited-partnership-law.pdf.

[141]P Selznick '"Law in context" revisited' (2003) 30 Journal of Law and Society 177.

[142]See critiques in Callison et al, above n 18.

[143]P Ireland 'Triumph of the company legal form 1856–1914' in J Adams (ed) *Essays for Clive Schmitthoff* (Abingdon: Professional Books, 1983).

[144]*Salomon v A Salomon & Co Ltd* [1897] AC 22.

[145]Anon 'Notes' (1897) 13 Law Quarterly Review 6.

[146]LPA 1907, s 6(1).

[147]*Certain Partners in Henderson PFI Secondary Fund II LLP v Henderson PFI Secondary Fund II LP* [2013] QB 934.

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and demonstrates a different trajectory to company law in treatments of limited liability for participants in the vehicle.

This is another illustration of the need for reticence in exercising the new power of the Secretary of State to align LP law to company law. Section 1 above demonstrated that we may need to deploy different means to achieve the same ends between company law and partnership law. This section has demonstrated that there can be different ends that need to be focused on between company law and LP law. Too readily aligning the two will miss such nuance. Aligning LP law to company law so far results in: (a) overcomplications to obtain transparency into LPs; and (b) missing issues in the policy balance of limited liability. More such issues will arise if section 7A is widely deployed.

The issue illustrated in this section transcends limited liability – whilst having a shell general partner is common, general partner structuring within an LP can also be utilised to avoid other requirements. For example, LPs with only limited companies as general partners have to file accounts for the LP along with the general partner accounts.[148] This requirement was introduced to follow an EU Directive, and ensure 'that limited partnerships which have as general partners only limited liability entities… must prepare and publish accounts'.[149] Yet the precise wording means that such requirements do not apply where general partners are limited liability partnerships, which also provide limited liability.[150] Having a limited liability partnership as general partner, then, achieves the same benefits as a corporate general partner (as set out above) without the corresponding downsides of increased publication.[151] As companies have their own, complicated, accounting requirements,[152] these issues are purely LP specific, and such issues and others like them will be missed by utilising the new power to align LP law to company law without further analysis.

3. The tartan LP

The third empirical insight into LPs is their geographical split. This section demonstrates that the LP is mostly a Scottish vehicle, and that recent company law reforms have missed Scottish nuances. Utilising section 7A to align LP law to company law is likely to miss these nuances, to the detriment of the intended reform. LPs were historically unpopular in England,[153] verified by LP's modernity, noted above. They were more popular in Scotland because their separate legal personality provided the ability to structure more complicated funds – a Scottish LP can be a limited partner of another LP, allowing for multiple tiers of ownership.[154] When partnerships were capped at 20 members,[155] this was particularly helpful in not 'using up' this number – a Scottish LP with seven limited partners could, due to its separate legal personality, be a limited partner in another LP and utilise one 'slot', whilst an identical English LP would utilise seven.

This cap has been removed. But the utility of separate legal personality remains. It is often minimised as a mere convenience, and so rather trivial on its own, its only role to minimise transaction costs,[156]

[148]Partnerships (Accounts) Regulations 2008, SI 2008/569, regs 3 and 4, as amended.

[149]Explanatory Memorandum to The Companies and Partnerships (Accounts and Audit) Regulations 2013, para 7.1, available at https://www.legislation.gov.uk/uksi/2013/2005/pdfs/uksiem_20132005_en.pdf.

[150]Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5 and sch 3.

[151]Eg the general partner of PE2 LP (SL011887) (https://find-and-update.company-information.service.gov.uk/company/SL011887) is GPMS GP 2 LLP (SO305096) (https://find-and-update.company-information.service.gov.uk/company/SO305096).

[152]Companies Act 2006, Part 15.

[153]RR Drury 'Legal structures of small businesses in France and England compared' (1978) 27 International and Comparative Law Quarterly 510; J Payne 'Limiting the liability of professional partnerships: in search of this Holy Grail' (1997) 18 Company Lawyer 81.

[154]Hardman, above n 16.

[155]See J Freedman 'Limited liability: large company theory and small firms' (2000) 63 Modern Law Review 317 at 321.

[156]OE Williamson 'Comparative economic organization: the analysis of discrete structural alternatives' (1991) 36 Administrative Science Quarterly 269.

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Table 2. Jurisdictional split of UK LPs

Jurisdiction	Number	Percentage (to 2 DPs)
England	20,828	35.6%
Northern Ireland	893	1.53%
Scotland	36,782	62.87%
Total	*58,503*	*100%*

which has implications for the regulation of companies generally.[157] Yet this tacitly concedes *some* utility for separate legal personality, even if merely to reduce costs. Indeed, the Law Commission found considerable practical benefit in the provision of separate legal personality.[158] Given that the Scottish and English LP are almost identical, with the former enjoying separate legal personality and the latter not, the comparative popularity between the two lets us see how much separate legal personality is valued in practice. The overall geographical distribution of all LPs on the register are set out in Table 2.

Nearly two-thirds of all LP that have been created are Scottish. This is a very different picture to companies, with concerns in Scotland in respect of this shrinking over time.[159] In contrast, the LP is a Scottish vehicle. Once more, this demonstrates core differences between the company and LP as legal vehicles, meaning that each requires careful legal analysis, rather than automatically aligning the latter to the former.

The limitation on the maximum number of partners was removed in 2002,[160] and so for the last 20 years the only advantage of utilising a Scottish LP over an English LP has been the practicality of separate legal personality. This data seems to demonstrate that separate legal personality is valued in practice for its utility. Figure 2 sets out the percentage of LPs registered in each year which are Scottish.

We see here that the LP was almost exclusively Scottish for its first 80 years. From 1976 we see a gradual decrease in the proportion of newly registered LPs which were Scottish, until to a low point of 19% in 2005. Yet this is still dramatically higher than its corporate equivalent – as at 31 March 2024, Companies House statistics show Scottish companies represent 4.89% of UK companies.[161] To talk of a low point in respect of Scottish LPs at 19% is therefore rather material, and demonstrates that even at the nadir of its comparative popularity, Scotland was still considerably more dominant in the LP than it was in its corporate form. Since 2005, the proportion of LPs registered that were Scottish gradually rose to a peak of 88.9% in 2016, the year of the most registrations. It has now reduced to the approximate halfway mark (2020 saw a dip to 41.44%, and 2023 a rise to 52.39%).

There are many aspects that could explain the volatility in the percentage of Scottish LPs created in any year. The dominance of the Scottish form could well be a matter of path dependency[162] from the legal and financial professions that choose LP jurisdiction.[163] Alternatively, it could be driven by international

[157]F Easterbrook and DRR Fischel 'The corporate contract' (1989) 89 Columbia Law Review 1416.

[158]The Law Commission and Scottish Law Commission 'Partnership law' (Law Com 283, Scot Law Com 192) November 2003, ch 5.

[159]J Hardman 'The slow death of the Scottish plc listed in London: an empirical study' [2022] Journal of Business Law 118.

[160]The Regulatory Reform (Reform of 20 Member Limit in Partnerships etc) Order 2002, SI 2002/3203, reg 2. See N Stolwy and S Schrameck 'The contribution of European law to national legislation governing business law' [2011] Journal of Business Law 614 at 621.

[161]See https://www.gov.uk/government/statistics/companies-register-activities-statistical-release-april-2023-to-march-2024.

[162]L Bebchuk and M Roe 'A theory of path dependence in corporate ownership and governance' (1999) 52 Stanford Law Review 127; JC Coffee Jnr 'Future as history: the prospects for global convergence in corporate governance and its implications' (1999) 93 Northwestern University Law Review 641.

[163]DS Lund and E Pollman 'The corporate governance machine' (2021) 121 Columbia Law Review 2563. Tax advantages also exist through the LP: see https://www.bvca.co.uk/static/90e9def1-753f-4da5-98135fd3d7f740c9/Use-of-LPs-as-PE-VC-funds.pdf.

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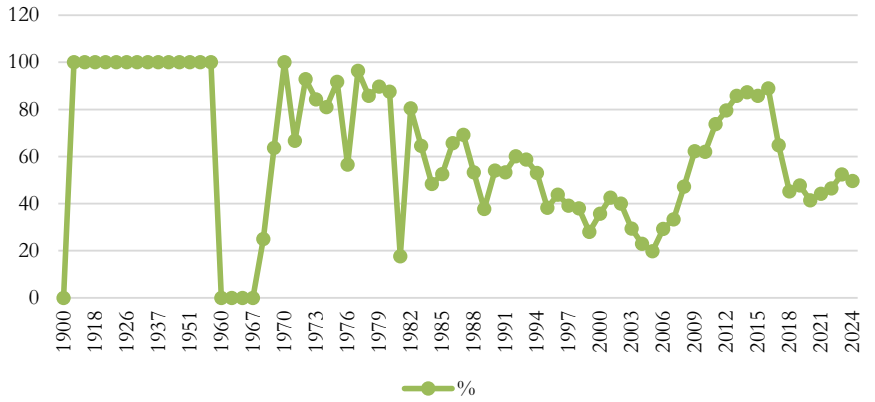


Figure 2. Percentage of total LPs registered in any year which are Scottish.

criminal organisations touting the Scottish LP as an easy way of doing business.[164] If the advantages of the Scottish LP are mostly acknowledged in complex financial structuring (such as private equity funds), then this decline could represent the ebbing and flowing of the comparative importance of the Scottish financial industry.[165] The 'why' is less important than the 'is' – a jurisdiction with approximately 8% of the UK's population[166] contains most of its LPs, which is a materially different position than applies to companies.

There is little evidence of such LPs leaving the relevant jurisdiction once registered. Companies House data also include the principal place of business of the LP.[167] Table 3 sets out the percentage of LPs whose principal place of business has moved into another UK jurisdiction, outside the UK, and are incomplete.

This does not show a mass exodus of Scottish LPs – 0.17% transferred their principal place of business to another UK jurisdiction, 0.95% outside the UK, and data was incomplete for 1.29%. This reflects 2018 UK government statistics.[168] The obligation to update your principal place of business is an ex post

Table 3: Principal places of business outside the jurisdiction

Jurisdiction	Total	Number with PPB in another UK jurisdiction	% with PPB in another UK jurisdiction	Number with PPB outside UK	% with PPB outside UK	Number with incomplete data	% with incomplete data
England	20,828	42	0.20	1363	6.54	515	2.47
Northern Ireland	893	45	5.04	0	0	3	0.34
Scotland	36,782	64	0.17	348	0.95	475	1.29
Total	58,503	151	0.26	1711	2.92	993	1.70

[164]Transparency International and Bellingcat 'Offshore in the UK: analysing the use of Scottish limited partnerships in corruption and money laundering' (June 2017), pp 4–6, https://www.transparency.org.uk/publications/offshore-in-the-uk/. The peak in registrations in 2016 would seem to arise due to transparency requirements introduced to combat this.

[165]Eg Hansard HC Deb, vol 516, col 171, 14 October 2010.

[166]See https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2022.

[167]LPA 1907, s 9.

[168]DBEIS, above n 140, pp 27–31.

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reflection of factual circumstances.[169] A number of principal places of business could have factually changed without the register being informed. Nevertheless, the data does not demonstrate a large number of Scottish LPs moving out of Scotland. This reinforces the thesis of this paper – LPs are distinct from companies, and so require their own policy analysis and tailored legislation. In this case, it demonstrates that the LP is primarily a Scottish vehicle.

The Scottishness of LPs provides further reasons to be reticent to align LP law to company law too freely. This is because modern company law developments have been damaging to the Scottish form by missing nuances of Scots law. Companies and LPs are not devolved subjects, so they are regulated at Westminster alone.[170] Yet these business forms are very difficult to disentangle from private law: after all 'shares' in companies, and partnership interests, each represent intangible property under English law and incorporeal property under Scots law.[171] As such, there are provisions of the Scotland Act 1998 that allow the Scottish Parliament to make incidental amendments whilst making general private law changes,[172] although the Scottish government seems reticent to utilise this provision.[173]

Company law is generally the same in England and Scotland.[174] Yet the method of taking a fixed security over shares varies between the jurisdictions – unlike the ability to take an equitable fixed charge in England by delivery of the signed, undated stock transfer form and stock transfer form,[175] in Scotland shares need to be transferred to the creditor.[176] This requirement means that it has always been less advantageous to have a Scottish subsidiary in a corporate group with a widespread security package than an English subsidiary.[177] Recent reforms initiated by the Scottish Parliament may change this, but they have only just come into force.[178]

Recent Westminster changes to UK company law have exacerbated this issue, and so harmed the Scottish form. The taking of a real right in security over shares has always been carved out of a 'subsidiary' test – one party is a subsidiary of the other if the latter holds certain rights in the former, and rights held in security are ignored for these purposes.[179] This changed in 2015 with legislation which provided legal obligations on 'persons of significant control' in a company.[180] The test for a person of significant control was taken from the subsidiary test, with an additional limb being added – that the sheer holding of shares was sufficient to trigger these requirements.[181] As a result, a secured creditor holding a Scottish share pledge became a person of significant control. This formulation was copied again in the National Security and Investment Act 2021,[182] which I have previously called a 'legislative assault' by Westminster on the Scottish company form.[183] At the same time, the Scottish corporate form has become comparatively less likely to list on the London Stock Exchange.[184]

Recent company law changes, then, have been seen as being damaging to the Scottish company form by missing nuances of Scots law. At the very least, particular points of Scots law have been ignored in legislative considerations, causing harm to the Scottish company form. LPs are predominantly Scottish, with 62.87% of all LPs being Scottish. They also have larger differences in law between England and

[169]LPA 1907, s 9.

[170]Scotland Act 1998, sch 5, Section C1.

[171]Companies Act 2060, s 541; RR Pennington 'Can shares in companies be defined?' (1989) 10 Company Lawyer 140.

[172]Scotland Act 1998, s 29 and s 126(4).

[173]J Hardman 'Shares and the Scottish statutory pledge' [2024] Juridical Review 258.

[174]N Grier *Company Law* (Edinburgh: W Green, 5th edn, 2020) para 1-29.

[175]F Tregear 'Taking shares in companies as collateral: an uncalculated risk' [2016] Journal of International Banking and Financial Law 205.

[176]*Enviroco v Farstad* [2011] UKSC 16, [2011] WLR 921.

[177]J Hardman 'Some legal determinants of external finance in Scotland: a response to Lord Hodge' (2017) 21(1) Edinburgh Law Review 30.

[178]Moveable Transactions (Scotland) Act 2023.

[179]Companies Act 2006, s 1159.

[180]Ibid, sch 1A paras 2–6.

[181]Ibid, sch 1A para 23.

[182]National Security and Investment Act 2021, s 8 and sch 1 para 7.

[183]J Hardman 'The legislative assault on the Scottish subsidiary' (2022) 26 Edinburgh Law Review 117.

[184]Hardman, above n 159.

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Scotland – with Scottish LPs having separate legal personality which English LPs do not enjoy. These provide further reasons to avoid automatically aligning LP law more closely to company law. Company law has been set in a way that, at best, has ignored Scots law considerations. Law in respect of a conceptually different vehicle, that is predominantly Scottish and has larger legal differences between England and Scotland, should be very reticent to align to company law without analysing strongly the reasons for doing so on a case-by-case basis. Our presumption should be against alignment, unless we can identify strong and clear reasons to align.

Conclusion

This paper has combined conceptual, historical and empirical methodology to argue that the new power to align LP law to company law[185] should be used sparingly and probably not exist at all. First, the historical and conceptual basis for the LP is different from that of a company. It is historically more akin to one person funding another's trade, with ancient allocations of risk arising under it. This is borne out empirically: 89.52% of LPs have only one general partner. Thus, rather than attempting to align LP law to company law, it appears more apposite to focus on the general partner for any future regulation. Only in the limited situations with more than one general partner does any additional complication need to arise.

Secondly, the historical basis for differential limited liability within an LP is easily undercut in practice. Whilst this hunch has been held for a long time, a case study of the Eighth Cinven Fund demonstrates how easy it is to set up a shell general partner with minimal assets that effectively provides limited liability to the manager on insolvency. Aligning LPs to companies will miss that any such issue could arise.

Thirdly, UK LPs are predominantly Scottish, and company law reforms have been seen to be harmful to Scottish companies. In a legal vehicle which is conceptually different, is primarily Scottish, and where there are bigger differences between English and Scottish law, aligning LP law more to company law creates bigger risks of unintentional damage to the LP vehicle, particularly the Scottish LP. This vehicle is legitimately deployed in a vast number of corporate and fund structures.[186]

These insights have key policy implications. LP law reform would be best to focus on the general partner – as a focus of transparency, and possibly requiring a meaningful business presence in a general partner. It should be aware of differences between Scots and English private law, and take them seriously when reforming LP law. In other words, it should focus on the specific legal features of the LP rather than automatically recommending alignment to company law.

This is not to say that we should never align LP law to company law. It is, though, to argue that doing so unreflexively, without adequate analysis, risks danger. It risks focusing reforms in the wrong area, missing issues with the LP form, and accidentally damaging the most common deployment of the LP for limited benefit. Section 1 demonstrated that we may need to use different means to achieve the same ends; Section 2 demonstrated that we may need to identify different ends; and Section 3 demonstrated the need to keep in mind the 'Scottishness' of the LP, and cater for nuances of Scots law which company law has recently failed to do. Any alignment needs to be properly conceptualised and worked through, following adequate consultation. There have been criticisms of the excessive inclusion in primary legislation of the ability to simply decide what is best in secondary legislation.[187] Section 7A of the Limited Partnerships Act 1907 is subject to the same issues, and should be utilised sparingly.

[185]LPA 1907, s 7A.

[186]Eg C Bock and M Schmidt 'Should I stay or should I go? How fund dynamics influence venture capital exit decisions' (2015) 27 Review of Financial Economics 68.

[187]E Ryder 'Justice in a crisis' (2022) 138 Law Quarterly Review 259; K Ewing 'Covid-19: government by decree' (2020) 31 King's Law Journal 1.

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