

**7 October 2015**

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**Advice Note**  
**National Park Partnerships LLP**  
**Limited Company and Limited Liability Partnership**  
**Structures**

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## 1. **Introduction**

- 1.1. We have been asked to prepare this note on behalf of National Parks UK Limited in relation to the proposed incorporation of National Park Partnerships Limited Liability Partnership.
- 1.2. The purpose of the note is to provide:
  - 1.2.1. **Key Features:** a relatively brief, high-level summary of the key features of a Limited Liability Partnership (an "**LLP**");
  - 1.2.2. **Specific LLP Issues:** to highlight those issues which the proposed members of National Park Partnerships LLP will need to discuss and upon which agreement will need to be reached in order for the LLP to be established and an accompanying LLP Agreement to be drafted; and
  - 1.2.3. **LLP vs Limited Company:** a brief comparison table of the key differences between an LLP structure and a limited company structure, with which National Parks UK Limited and the National Park Authorities may be more familiar.

## 2. **Key Features**

### **An LLP is a separate legal entity**

- 2.1. An LLP is a legal entity separate from its members (in the same way a limited company is separate from its members). As with a limited company an LLP is incorporated by registration at Companies House.
- 2.2. An LLP is a hybrid structure in that it has the flexibility of a general partnership but the benefit of being a separate legal entity offering the members of the LLP the limited liability with regard to the LLP.

### **The Capacity of an LLP**

- 2.3. As an LLP has unlimited capacity, the doctrine of ultra vires does not apply. An LLP can do anything that a natural person can do, including that it may:
  - 2.3.1. hold property.
  - 2.3.2. enter into contracts.
  - 2.3.3. sue and be sued.
- 2.4. Note however that as the LLP is being established by National Park Authorities under their general powers under the Environment Act 1995 (as amended), the capacity of the LLP is not unlimited as the activities of the LLP must be "tied back" to the statutory purposes of the National Park Authorities at all times. In other words, National Park Authorities must be able to reasonably show that the activities of the LLP further, or are ancillary/incidental to the statutory purposes of National Park Authorities. The statutory authority position may well be different for Welsh and Scottish National Park Authorities to that of National Park Authorities based in England.

- 2.5. I understand that Queen's Counsel has been instructed to advise the National Park Authorities in England as to the scope of their existing statutory powers and has concluded that the establishment and operation of an LLP in the manner proposed would be viable. We have not been asked to advise further on this point following receipt of this advice.

### **The importance of an LLP Agreement**

- 2.6. LLPs are not required to put in place any form of publically available written constitution. However, it is strongly recommended that the LLP and its members enter into a private contract, called an LLP Agreement in order to agree in writing the governance and financial arrangements of the LLP.
- 2.7. Without an LLP Agreement in place the applicable LLP legislation sets a default position on only the most basic of matters and these "default" provisions will likely be inappropriate or inadequate given the unique composition and relationship of the proposed members of National Park Partnerships LLP.

### **Liability of the LLP Members**

- 2.8. LLP members have limited liability in that, generally, they do not need to meet the LLP's liabilities in the same way as partners in a general partnership do. However, in some circumstances a member may have to contribute to the LLP's assets. For example, if a member:
- 2.8.1. is guilty of misfeasance or falls within special clawback provisions under the Insolvency Act 1986 (such as wrongful trading when technically insolvent);
  - 2.8.2. must contribute by agreement between the members (in an LLP Agreement or otherwise);
  - 2.8.3. is a sole member of the LLP trading as such for more than six months; or
  - 2.8.4. they enter into an agreement with a third party in connection with the LLP under which the LLP member(s) accept personal liabilities.

### **Tax and Financial Position**

- 2.9. Whilst we cannot advise on tax or accounting matters, one key feature of an LLP, as opposed to a limited company, is that an LLP (despite being a separate legal entity) is taxed as if it were a general partnership. An LLP is tax transparent so that profits are assessed for tax in the year during which they are made on the individual members, meaning that reserves built up in an LLP are therefore post-tax which can create issues between members of differing tax statuses.
- 2.10. An LLP has the organisational flexibility of a general partnership. The members are free to agree:
- 2.10.1. how to share profits of both an income and capital nature;
  - 2.10.2. who is responsible for management and how decisions are made;
  - 2.10.3. when and how new members are appointed;

- 2.10.4. the circumstances in which members retire; and
  - 2.10.5. who shall contribute capital to the LLP.
- 2.11. An LLP's accounting and filing requirements are broadly the same as those of a limited company.

### **LLP Members**

- 2.12. There is no legal definition of a member's "share" or "interest" in an LLP and LLPs do not issue share certificates.
- 2.13. The default rules with regard to LLPs contemplate LLP members having an "interest" in the LLP. There is no absolute right of a member to sell its interest in an LLP although this can be permitted under the LLP Agreement. Members generally resign from the LLP and withdraw their capital, rather than sell their "interest" in the LLP.
- 2.14. Under an LLP Agreement, the members will usually have:
- 2.14.1. financial rights and obligations, for example, a right to a share in capital and profits or (depending on the terms of the LLP Agreement) an obligation to contribute capital; and
  - 2.14.2. administrative rights and obligations, for example, the right to attend and vote at meetings and the obligation to fulfil statutory obligations.
- 2.15. In the case of National Park Partnerships LLP, the administrative rights and obligations will be as agreed in respect of the previous limited company model proposed for the company. However, in respect of the financial rights and obligations, these are specific to LLPs and will need to be discussed and agreed between the LLP members.

### **Appointing "Designated Members" of an LLP**

- 2.16. An LLP must have at least two "designated members" who have particular responsibilities and functions within the LLP. Members can be designated either on incorporation or in accordance with an LLP Agreement.
- 2.17. If there are either no designated members or only one, then every member is deemed to be a designated member. If a designated member ceases to be a member, he automatically ceases to be a designated member.
- 2.18. The administrative duties of designated members of an LLP are those that would normally be carried out by a company director or secretary and include:
- 2.18.1. appointing an auditor (where appropriate);
  - 2.18.2. signing the accounts and delivering them to Companies House;
  - 2.18.3. preparing, signing and delivering the annual return to Companies House;
  - 2.18.4. notifying Companies House of any changes to the LLP's membership, name or registered office address; and
  - 2.18.5. acting on the LLP's behalf if it is wound up and dissolved.

## **Financial Rights of LLP Members**

- 2.19. The LLP Agreement will need to set out the financial arrangements agreed between the parties in a manner which would not be necessary in the case of a limited company. In particular, the LLP Agreement needs to set out the following:
- 2.19.1. how any profits (and possibly losses) of the LLP will be allocated between the LLP Members;
  - 2.19.2. how any profits of a capital nature in the LLP will be allocated and distributed between the parties; and
  - 2.19.3. how and when members of the LLP may be entitled to be paid a sum to account for its share in the LLP's profits.
- 2.20. The default provisions in the LLP legislation provide that all LLP members are entitled to share equally in the LLP's capital and profits. This applies to both the initial capital contributed to the LLP (if any) and future capital contributions. If, as is usual, any unequal division of capital contributions or capital profits is proposed, this should be provided for in the LLP agreement.

## **Management of an LLP**

- 2.21. The default position is that an LLP is operated for and by each of its members. However, it is common for an LLP, under the LLP Agreement, to provide for a "management board" consisting of a number of individuals approved or appointed by the LLP members to manage the day to day affairs of the LLP.
- 2.22. It is proposed that the LLP Agreement for National Park Partnerships LLP should create a management board which has the same constitution and structure as that which was agreed by the National Park Authorities in respect of the limited company structure, previously proposed.

## **Closing an LLP**

- 2.23. The LLP will remain in existence until such time as it is wound-up (as with a limited company) or the LLP is dissolved voluntarily under the procedure set out in the Companies Act 2006.

### 3. **Specific LLP Issues**

In addition to those matters which the National Park Authorities considered and agreed in relation to the previously proposed limited liability company, an LLP gives rise to a number of additional points for discussion and debate which will need to be agreed before the LLP Agreement can be finalised. To give National Park Authorities an idea of those areas that will need to be discussed and agreed, we have set out the following list of key issues:

#### **Capital**

- How much capital will be required by the LLP at the outset? In what proportions will the members provide capital? Will profits of the LLP be apportioned in the same proportions?
- Will interest be paid on capital or undrawn profits?
- Will the members' initial investment be in cash or contribution of assets?
- What arrangements will there be for future funding? Will each member be required, or entitled, to contribute, pro rata to their original investment or otherwise? How will additional working capital requirements be fulfilled?
- How will the capital contributions of ingoing/outgoing members be handled?
- Should the LLP's assets be revalued from time to time and any relevant adjustments made to the members' capital accounts?
- Will any of the members be making a loan to the LLP in addition to their capital contribution and, if so, what will be the interest rate on the sum loaned?

#### **LLP Property**

- What are the LLP's assets? Will the trademark "Britain's Breathing Spaces" be placed within the LLP? If so, how (lease, licence, outright transfer) and on what terms? If property is to be used by the LLP but is not to be LLP property, this fact and the terms of use should be specified, including what will happen if/when an LLP member ceases to be a member.
- How are contributed assets to be valued, and how will any adjustments be made for any shortfall or excess in relation to any member's capital contribution?

#### **Profits and Losses**

- On what basis are profits to be calculated for the purposes of allocating them to the members? Default provisions state that all of the members of an LLP are entitled to share equally in the capital and profits of the LLP, but the members may decide to allocate profits differently, through the terms of an LLP agreement.
- Will the LLP bear its own losses, or will losses be allocated to members through an LLP agreement?
- How will incoming/outgoing members affect the division of profits and losses? If there are likely to be frequent changes of members consider devising a system to deal with this rather than leaving it to be dealt with on an ad hoc basis.

### **Drawings**

- How much will members be entitled to draw on account of profits?
- When and how should drawings be made? Will this be agreed in advance or as and when necessary?
- What will happen if there is an overpayment/underpayment of drawings in relation to the profit share as finally calculated?
- Is interest to be paid on undrawn profits?

### **Outgoing Members**

- Will designated members (see section above regarding the same) be entitled to resign their designation and, if so, on what notice and according to what procedure?
- Will members be able to choose to leave the LLP and, if so, on what notice and according to what procedure?

### **Suspension/Expulsion**

- Will the LLP be entitled to suspend a member? This may not be appropriate but it is an option, the same question should be asked with regard to expulsion of the member.

#### 4. Comparison: LLP vs Limited Company

Issue	Limited Liability Partnership	Limited Company
<i>Legal Status</i>	An LLP is a separate legal entity. It can enter into contracts, hold property and is separate from its members in that regard. However, for tax purposes the treatment of an LLP is different to that of a limited company.	A limited company is a separate legal entity. It can enter into contracts, hold property and is separate from its members in that regard. The members/shareholders of a company ultimately own the company and it is with regard to their interests that the directors of the company must manage and direct the affairs of the company.
<i>Constitution</i>	<p>An LLP is not required to have any constitutional document. A very limited set of default provisions in the LLP apply in the absence of a constitution but are often inappropriate and insufficient.</p> <p>An LLP Agreement is usually entered into between the LLP and its members (similar to a shareholders' agreement in that it is a private contract not a public constitution), to govern the relationship between the members and thereby the business of the LLP.</p>	<p>A limited company must have a constitution called its "articles of association". This document must be filed at Companies House and is therefore publically available. Limited companies are also subject to the Companies Act 2006, as are the members/shareholders and directors of a limited company.</p> <p>The members/shareholders of a limited company may enter into a separate, private contract which supplements the company's articles of association.</p>
<i>Management</i>	<p>The default position is that the LLP is owned and managed by the LLP Members.</p> <p>The LLP may create via the LLP Agreement a body of individuals to whom the management of the LLP is delegated. This body is created by contract and those on the management body are not directors or subject to the requirements of the Companies Act 2006.</p>	The day to day affairs of the Company are managed by the directors of the company. Directors are subject to statutory and common law duties.
<i>Ownership</i>	The LLP is owned by the LLP Members (i.e. each of the National Park Authorities). The rights and obligations of each LLP Member is set out in the LLP Agreement.	The Company is owned by its members. The rights of members are set out in the Company's articles of association and often include a right to vote and receive dividends (or other distributions) amongst other things.



		Members also have statutory rights under the Companies Act 2006 which, in many cases, cannot be restricted or extinguished.
<i>Financial Return</i>	<p>The LLPs each hold a financial interest in the LLP. This should be defined in the LLP Agreement. The ability of each LLP member to draw from its current account or receive profits on its capital whilst a member of the LLP also needs to be set out in the LLP Agreement. Furthermore, the financial consequences of a member leaving or joining the LLP also need to be set out in the LLP Agreement. Different mechanisms/valuations may apply in different contexts e.g. good/bad leaver provisions.</p> <p>The default provisions in the LLP legislation provide that all LLP members are entitled to share equally in the LLP's capital and profits. This applies to both the initial capital contributed to the LLP (if any) and future capital contributions. If, as is usual, any unequal division of capital contributions or capital profits is proposed, this should be provided for in the LLP agreement.</p>	Members/shareholders may receive a return on their interest or shareholding in a company by way of dividend or another form of distribution by the company to its members/shareholders. This is usually the principle means of returning profit of the company to its members/shareholders.
<i>LLP Assets/Liabilities</i>	<p>LLP Members have limited liability in that, generally, they do not need to meet the LLP's liabilities. However, in some instances (including where the LLP Agreement provides for this) a member may have to contribute to an LLP's assets (see section 2 of this report for more information on this point).</p> <p>The LLP holds its own assets but an LLP member may be entitled to a return of certain assets or a financial entitlement under the LLP Agreement, this is usually the case where an LLP member leaves the LLP.</p>	The liability of the members/shareholders of a company is limited to the amount that member guaranteed (company limited by guarantee) or the nominal amount of the shareholders' shares (in the case of a company limited by shares). The assets and liabilities of the company are separate from those of its members/shareholders.