



Replies to DETE Consultative Document

INTRODUCTION

As a broad outcome to this process of reviewing current IPS legislation, ICOS would wish to ensure that;

- Any revised legislation would recognise co-operatives as a distinct corporate form of business organisation with a separate identity and with a number of separate values and principles from companies.
- Any proposed legislative enactments do not place co-operatives at a competitive disadvantage when individuals or communities are selecting a particular corporate form for organising their business.
- The costs of registration, filing returns, making rule amendments and other compliance costs do not place an unfair burden on co-operatives.
- Government and government Departments are more pro-active in ensuring that their staff are aware of and understand the advantages of the co-operatives model for certain forms of business organisation.

Q 1. Registration under the IPS Acts is confined to societies, which carry on any “industries, businesses, or trades”.

Has this restricted the scope of activities, which may be undertaken by societies?

Not to any major extent.

In our experience, the terms ‘any industry, business or trade specified in or authorised by its rules’ in Section 4 of the Act has been broadly interpreted by the Registry of Friendly Societies as permitting Societies to be registered, which provides their members with a wide range of goods and services. Banking activity is the only service specifically prohibited.

Q2. Should societies, which pursue other activities, be permitted to register under the Acts? Give reasons for your views?

Yes. While acknowledging that the current definition of Section 4 has been broadly interpreted, the question arises; is there any need to have a definition?

ICOS would prefer that any co-operative society carrying out an activity, which is lawful, should be registered without the need to have that activity ‘specified in or authorised by its rules.’

Q 3. Have the provisions in the Acts relating to transferability and (since 1978) non-withdrawability of shares operated in practice? Are any changes to these provisions considered necessary or desirable?

The provisions in respect of the non-withdrawability of shares have not proved a hindrance. The ICOS model rules contained this as a standard provision even prior to the amendment of the 1978 Act.

This provision may even be helpful in the context of International Accounting Standard 32, which inter alia established principles for the classification of equity instruments. Under this standard, shares that are seen as withdrawable are classified as a liability rather than as equity.

The provisions contained in Clause 7 of the Second Schedule to the 1893 Act refers to the need **‘for the consent of the committee’** to any share transfer. This provision has the benefit of giving boards



and Committees the option of adopting a transfer/transmission policy only to persons who are likely to use the services of the society. Thus, it sanctions a policy that is supportive of the co-operative principle that members should be active users of the co-operatives services and ICOS believes this provision should be retained.

Q 4. Should there continue to be a statutory limit on individual shareholdings in societies or should this be left to individual societies to decide for themselves?

In either event, please give reasons for your view.

With the inclusion in the 1978 amendments to the 1893 Act of a provision prohibiting withdrawable shares, the existing purpose of a statutory financial limit on shareholding is not evident to ICOS.

The determinant of the amount of share capital each person (natural or legal) may subscribe to a co-operative business should be a function of the business plan and circumstances of that co-operative.

Accordingly, it is best left to each co-operative society rather than to legislation to determine what level of capital investment per member is appropriate.

While the current financial limits at present satisfy the needs of the vast majority of natural persons who are members, there may be a circumstance where a particular co-operative economic activity would involve a small number of individuals and requires a very high share capital contribution per member.

Further consultation may be necessary with the Registry of Friendly Societies and the DETE as to whether there is a regulatory or other reason for the retention of this provision.

Q 5. In the event of there continuing to be a statutory limit:

- (a) Should there be one single limit for all societies or different limits for different classes of society? How should classes of society be defined for this purpose?**
- (b) What should the actual limit or limits be?**
- (c) How should the limit(s) be up-dated? Should this be a matter for primary or secondary legislation? Should co-operative representative bodies have a role in this?**

Please give reasons for your views.

- (a) Should there be one single limit for all societies or different limits for different classes of society? How should classes of society be defined for this purpose?**

If a decision is made to continue with a statutory limit, there should only be one financial limit for all classes of society, as classes are now defined.

- (b) What should the actual limit or limits be?**

The current limit applies to all classes of society and appears satisfactory for existing co-operative societies but should be kept under review.

Part of the current formula, which links the financial limit to '1% of the total assets of the Society', may give rise to problems in the future, in that if a society relies on that part of the formula to permit a financial limit per member or company in excess of €150,000 and it transpires that in succeeding years the total asset values on its balance sheet falls, some of its members may find themselves inadvertently, in breach of the statutory financial limits provisions. It may be appropriate to clarify or confirm that a shareholding, which was lawful at any time by reference to a certain level of total assets of a society, would not cease to be lawful by reference to a subsequent reduction in that level.

- (c) How should the limit(s) be up-dated? Should this be a matter for primary or secondary legislation?**



Changes to the financial limits should be a matter for secondary legislation.

(d) *Should co-operative representative bodies have a role in this?*

Yes.

Question 6; Should the restrictions on the raising of funds by societies, as summarised in paragraphs 18-21 above be retained, varied, or removed.
Give reasons for your views.

The facility given to agricultural and fishing co-operatives to raise funds without a financial limit is valued and to ICOS's knowledge has not been subject to any mis-use.

The general practice of agricultural and fishing co-operatives has been to confine share drives to potential user members rather than to seek to make an offering to the wider public.

ICOS believes that the existing discretion given to agricultural and fishing co-operatives in this respect should be made available to all co-operative societies who abide by the Co-operative Principles.

Q 7. Should exemption from the Bills of Sale Acts be extended to all societies and if so, why?

Yes.

The problem of not being able to issue debentures secured on personal property ("floating charges") arises from the provisions of the Bills of Sale Act 1883, which exempts companies issuing debentures from its provisions but provides no such exemption for societies. Such an exemption should now apply to co-operative societies. It should be noted that under the provisions of the 1997 Credit Union Act that credit unions are exempt from this provision.

Q 8. What arrangements should be made in relation to the registration of charges by societies?

The 1934 Agricultural Co-operative Societies (Debentures Act) provided inter alia for the creation of a public register of charges which facilitated lending secured on debentures for agricultural and fishing co-operatives but not for other types of co-operative.

This facility for registering charges should be extended to all co-operative societies.

The 1934 Act should be reviewed to ensure that its provisions in respect of the registering of charges accords with best current practice.

Q 9. How are the financial reporting obligations as summarised in paragraph 24 above operating in practice?

Most auditors find the format and content requested in the current annual return archaic and out of line with modern day reporting requirements.

Subject to this clarification the annual return format could be simplified by the removal of the requirement to duplicate in the return, data, already contained in the annual accounts.



If the only basis for a Triennial Return were as a means of policing the 'shareholding financial limits' of the Act, then its retention would only be justified if these financial limits were to be retained.

Alternatively, a certificate from a society's secretary, countersigned by the auditor confirming that no member exceeded the shareholding financial limit thresholds during the relevant period might be an administratively simpler way of achieving the same outcome.

Q 10. Are they causing difficulties for societies or any categories of society? If so, please describe the difficulties concerned.

In addition to the observations under Q9, many societies that have an accounting year-end of the 31st December cannot in practical terms meet the statutory deadline of the 31st March for submission of Annual Returns.

Some smaller societies complain that the costs and time associated with a full annual audit of their books and records are onerous and expensive and would like an exemption for societies with a turnover and/or net worth below a specified financial threshold. However, Societies however are not comparable to companies in respect of their average membership with most private companies seeking audit exemptions having as little as one or two shareholders whereas co-operatives will have at least seven and frequently more shareholders. ICOS would welcome further discussion on this issue. See also last paragraph in answer to Q11.

Q 11. Do you think that any changes should be made to the present arrangements? If so, please indicate the changes, which you would like to see and give reasons for each suggestion.

There are a number of societies for whom the statutory period for making up their annual return is not suitable and who would favour having the freedom to make their return outside this period.

The date for the submission of annual returns should be related each society's accounting year and a period of 6 months after the year-end date should be provided for.

The ambiguity that exists in respect of whether accounts presented to an AGM should be audited and the requirement that audited accounts must be filed with the Registrar, requires clarification.

For societies below a specified turnover and net worth threshold and where the membership of the society is relatively small, consideration should be given to allowing them complete a different annual return, which might, provided they met certain conditions, exempt them from the requirement of having to complete an annual audit.

Q12: How are the provisions of the IPS Acts in relation to governance working in practice?

Our experience is that the provisions in relation to corporate governance (as defined) work well and that co-operative societies using ICOS model rules respect and appreciate the freedom that the existing statutory provisions give them to make and amend their rules in respect of the internal regulation of their society.

In fact, the flexibility provided by the existing legislation in not being over prescriptive in this area, has been of considerable assistance in permitting some agricultural co-operative societies expand from small parish business to major national and international businesses.



ICOS would advocate continuing to permit co-operative societies to regulate their own internal affairs in a democratic manner, as they currently do.

Q 13: Are any changes to these provisions necessary or desirable? If so give reasons for your view.

Q 14: Outline the types of changes, which you would like to see giving reasons for each suggestion.

As already indicated, the structure of the Act in respect of internal governance, particularly the provisions of Schedule 2 of the act are seen by most co-operators as being attractive in the flexibility they give to co-operatives.

The part in Clause 6 of Schedule 2 dealing with whether the society may contract loans, requires inter alia that there be a determination as to 'what limits and amounts' loans may be contracted. This wording has been queried by banks as to its intent and as to what form of words is necessary in rule to meet the requirements of this clause in Schedule 2. ICOS would wish to discuss this matter further with the DETE.

Q 15: How much use is made in societies of these provisions?

Societies make extensive use of the 'intestacy' provision as it arises but generally now seek a higher standard of evidence than heretofore as to who the 'person appearing to be entitled by law' to receive the property of an intestate member is. The underlying concept of having a 'small claims procedure', for facilitating inheritance of small shareholding amounts using proper but comparatively less onerous or expensive procedures, remains valid both in the case of intestacy and where wills have been drawn up but may not have been subject to Probate.

In respect of the 'nomination' provisions, historically this provision has not been used to a great extent, however, the last number of years has seen a growing effort on the part of societies to update their share registers and in consequence a renewed interest in using the nomination provisions.

Q16: Are the powers conferred on committees by the IPS Acts regarding the property of members appropriate today?

What arguments might be made for their continuance or otherwise?

Because the focus of a co-operative is on providing services to its user members, the powers conferred on the committee of management to determine if shareholding (and membership) should be transferred to the beneficiary of a will or to the person entitled, in the case of intestacy is a very important one and should be retained.

For certain types of society, the statutory limits of €15,000 for nominations may be too low.

Question 17: Do you wish to offer views or observations on?

- a) Any other provisions of the IPS Acts.
- b) Whether any of the mechanisms of the Companies Act not currently available to industrial and provident societies should be made available to them.
- c) Any other matters relevant to this review of the IPS Acts.

- There is a need for a provision in the Act that will ensure that societies have access to Examinership.



- The current charges for filing returns and registering new societies and rule changes is much higher than similar charges for companies and acts as a disincentive to persons seeking to determine what corporate form they should use for their business.
- Many of the more common forms used by the Registry of Friendly Societies have been updated to reflect changes in laws, regulations and reporting requirements, others still require updating.
- There is still a valid case for arguing the exemption of certain classes of mutual society from corporation tax. Where a co-operative activity solely involves the pooling of resources by members for the purchase of goods and services for themselves, no “profit” arises and any excess of returns over outlay is properly a “surplus” belonging to the members.
- While this Act may have been predominantly intended for the registration of co-operatives, the low recognition factor arising from the use of the words ‘industrial’ and ‘provident’ and the absence of the word Co-operative in the Act suggest that the use of a new title such as the Co-operative Societies Act would be more appropriate.
- There is no legal prohibition in the IPS Act or Companies Act as to the use of the term co-operative by any business organisation. There should be a provision corresponding to the existing provisions in the Credit Union Act requiring Co-operative Societies to include as part of their registered name the title ‘Co-operative’ while simultaneously prohibiting the use of this title to any other corporate form.
- No time period is specified within which the Registrar has to permit or refuse registration and there is no explicit requirement that the Registrar explain a refusal to register a Society. While it is noted that the more general concepts of fair procedures and judicial review would make it almost certain that an explanation of refusal would be given, and that an application would be considered in a reasonable time, it might be appropriate too spell out the position?
- Unlike in company law, there is no ‘administrative remedy’ open to societies whose registration has been cancelled. As an alternative to having to apply to the Court for restoration, as is now the case, there should be the option of an administrative remedy for the first year after cancellation as is the case with a company.
- Provisions in the Act in respect of the costs of supplying rules require updating to reflect their real costs.
- The merits of the requirement that ‘balance sheets’ be displayed in a conspicuous place in the registered office of the Society need to be re-evaluated.
- The justification for requiring that all societies be registered under the provisions of the Data Protection Acts 1988 and 2003 requires review.

ICOS Ltd

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