An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Public Consultation

on Reform and Modernisation of Legislation regarding

Co-operative Societies

Response Template

As set out in the Public Consultation paper, the Department of Enterprise, Trade and Employment is seeking views on a number of specific issues prior to finalising legislative proposals for the reform and modernisation of legislation regarding co-operative societies. Please include your response in the space underneath each question and set out/ explain your views. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.
Respondents have the opportunity to comment more generally in Question 12 should they wish.
When responding please indicate whether you are providing views as an individual or representing the views of an organisation.

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Respondents are requested to return their completed templates by email to coopconsultation@enterprise.gov.ie by **5pm on Friday, 25 February 2022**.

Responses

Matters relating to Registration

Transition period **Question 1.** Do you consider that the proposed transition period of 18 months is sufficient to enable existing industrial and provident societies to either register as co-operatives or pursue an alternative option? If not, please suggest an alternative timeframe and provide a supporting rationale.
Response: We support the general principle that the Co-operative Society legal form must be reserved exclusively for the use of bona fide co-operatives, and that the new Act shall require existing registered societies to either register as a co-operative society under the new Act, or register as an alternative legal form more suited to their particular purpose. In regards to the proposed length of the transition period, we do wish to raise with the department the risks associated with too short a transition period. Co-operative Housing Ireland is one of the larger co-operative societies in Ireland, and we undertook a reform of our Rules in 2017 in which we introduced a number of rules to modernise our governance rules, many of which are anticipated in the new legislation. Reviewing the public consultation document CHI expects that we will require additional legal support to ensure that our new Rulebook is drafted in accordance with the requirements of the new legislation and our sectoral governance codes as set down by the Approved Housing Bodies Regulatory Authority. We therefore submit that 18 months may be too short to undertake the required work on our new Rules. We will be required to have the Rules professionally drafted, reviewed and approved by our board, potentially consult with members and finally arrange and hold a Special General Meeting with adequate notice to consider, and if thought fit, approve the proposed rule change.

We would suggest that 24 months would be sufficient time for a larger society to be reassured that it can undertake all the necessary legal and compliance steps to manage their registration as a co-operative society under the new Act.

We would recommend that during the transition period, the provisions of the Industrial and Provident Societies Act 1893 would continue to apply to any society that had yet to register under the new legislation, but that no other rule amendments, amalgamations or transfers of engagement could be filed with the Registrar during that time.

We are aware that a number of co-operative federations[1], including CHI, maintain Model Rules registered with the Registrar but we wish to highlight the challenge that co-operative federations will have in producing a new suite of model rules by the conclusion of the transition period.

Expanding the categories of members who can set up co-operative societies

Question 2.
Please set out your views on the proposal to expand the categories of members who can form a co-operative society to include companies? If not in agreement, please set out your reasoning.

Response:

CHI welcomes the proposal to broaden the scope of the legal form beyond *any industry, business or trade* into *any lawful purpose*. As highlighted by the Department this will better reflect the activities of many existing co-operatives and encourage other founders to consider incorporating as a co-operative in future.

We have no principled objections to specifically provide for companies registered under the Companies Acts to become members and shareholders in a co-operative, but would advise that thought should be given to the safeguards that must be in place to avoid the frustration of the democratic nature of a co-operative society.

[1] ICOS maintain general purpose model rules for both distributive and non-distributive co-operative societies, machinery sharing co-operatives, group water scheme co-operatives and a host of others.

We would also suggest that membership in a co-operative should be open to any body corporate, with any limitations on membership provided by the Rules of the society.

We would recommend the Department consider the Rules of society being required to make explicit provision for whether any body corporate, other than another co-operative society, can become a member of the society and the conditions related to this membership.

Content of rules

Question 3.
Are there any other matters that should be included in the list of matters set out in legislation that must be dealt with by the rules of a co-operative society? Please provide supporting rationale for any such additions.

Response:

Representation by Delegates

It is common within larger, geographically spread co-operative societies in Ireland to provide for regional representative structures which includes representation of members by delegates at General Meetings.

Unclearly defined delegative representative structures have the opportunity to become undemocratic in practice over time, and we therefore submit that such representative structures, if required, must be defined to a minimum standard in the co-operatives Rules, or Supplemental Rules.

We have drawn on the Canada Co-operatives Act 1998, as amended, as an example:

16 (2) The [Supplemental Rules] of a cooperative may provide for

- **(a)** the representation of members by delegates and, if so,
    - **(i)** the designation of the classes or regional groups of members, if any, who may be represented by delegates,
    - **(ii)** the procedure for altering classes or regional groups of members, if applicable, and
    - **(iii)** the powers, duties, selection, voting rights and procedures for the removal of delegates;
- **(b)** the division of members into classes or regional groups and, if so,

- **(i)** the qualifications for membership in each class or regional group,
- **(ii)** the conditions precedent to membership in each class or regional group,
- **(iii)** the method, time and manner of withdrawing from a class or regional group or transferring membership from one class or regional group to another and any applicable conditions on a transfer, and
- **(iv)** the conditions on which membership in a class or regional group ends;

Treatment of Reserves and Accumulated Surplus at Wind-up

The Department anticipates that '(l) the mode of distribution of the surplus', would be specified and defined in a co-operative's rules and we welcome this requirement.

We would recommend that a co-operative's rules should also explicitly define the treatment of any unrestricted reserves and accumulated surplus not otherwise provided for under the rules relating to the indivisible reserve (see Question 4. response) and/or regarding an optional non-distributable capital surplus (see Question 12. response).

Matters relating to Shares

Legal Reserve

Question 4.
Please set out your views on the proposed approach to the legal reserve.

Response:

We welcome the Department providing a statutory requirement for a 'legal reserve', commonly termed an indivisible reserve.

The International Co-operative Alliance and its constituent regional[2], national and sectoral federative members representing co-operatives across the world have clarified that a meaningful, indivisible reserve is an essential part of a co-operative without which a co-operative cannot be said to be a bona fide co-operative.[3]

The requirement for an indivisible reserve must be significant enough to be meaningful in fulfilling its function to safeguard the aims of the co-operative, provide financial stability, build solidarity and mitigate against asset stripping whilst recognising that different co-operatives will wish to have the reserve set at different levels to meet their own particular needs.

We would recommend that the legislation should use the language 'indivisible reserve' in place of 'legal reserve' in order to align with the internationally defined terminology agreed by the ICA and implemented using that term in most countries around the world including the majority of other EU countries.

[2] CHI is a member of Co-operative Europe, regional federative member of the ICA.
[3] Co-operative Statement of Identity, ICA, 1995 Principle 3. Member Economic Participation: Members contribute equitably to, and democratically control, the capital of their cooperative. At least part of that capital is usually the common property of the cooperative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their cooperative, possibly by **setting up reserves, part of which at least would be indivisible**; benefiting members in proportion to their transactions with the cooperative; and supporting other activities approved by the membership.

We would submit that the legislation should, in principle, require co-operatives to set a minimum level of annual surplus (net annual surplus after interest, taxes, depreciation, and amortisation) which must be applied to the indivisible reserve.

We would submit that a co-operative may set this at a higher percentage than any statutory minimum, but that this would be an optional provision set out in the rules of the society.

We would submit that the legislation should explicitly **prohibit the use** of the accumulated indivisible reserve for the payment of dividends and share interest to shareholder members and **explicitly provide for:**

- working capital, investment in the development of the co-operative, investment in the securities of other societies (subject to Rules) and the satisfaction of any outstanding liabilities of the co-operative.
- for the actualisation of the 5th co-operative principle to provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives, and inform the general public - particularly young people and opinion leaders - about the nature and benefits of co-operation.

Otherwise, the use of the rules of the co-operative may specify additional uses and restrictions on the indivisible reserve.

By way of international comparison:

- Spanish Co-operative Law[4] mandates that 20% of annual surplus be applied to the indivisible reserve, while the autonomous community of the Basque Country (the region with one of the highest concentrations of co-operative enterprises in the world) requires all co-operatives to commit 30% of annual surplus to its indivisible reserve;[5]
- The provincial co-operative legislation in the Canadian provinces of Québec[6], Newfoundland and Labrador and Prince Edward Island require 10% of net annual surplus to be applied to a statutory indivisible reserve;
- South Africa requires 5% of annual surplus to be applied to the indivisible reserve[7], and explicitly include this requirement within Section 3 of their Co-

[4] Law 27/1999 Of 16 July, Cooperatives, Article 58
[5] Law 4/1993, 24 June, Cooperatives of Basque Country
[6] C-67.2 - COOPERATIVES ACT
[7] No. 14 of 2005: Co-operatives Act, 2005

operative Act which deals with the minimum requirements for a co-operative to meet the statement of co-operative identity.

- The co-operative laws of France, Italy, Portugal and Netherlands also mandate a minimum contribution to an indivisible reserve;
- The United Kingdom and Ireland are among the five European states yet to legislate for an indivisible reserve in line with the ICA statement of co-operative identity.[8]

We will submit elsewhere in favour of a statutory optional provision in relation to a 'non-distributive capital surplus' (see Question 4. response), and legislation providing for this. The requirements for an indivisible reserve will need to be drafted to ensure compatibility between the two distinct concepts.

South African Co-operatives Act 2005[9]

Compliance with co-operative principles

3. (1) For the purposes of this Act, a co-operative complies with co-operative principles if-

(a) membership of that co-operative is open to persons who can use the services of that co-operative and who are able to accept the responsibilities of membership;
(b) in the case of a primary co-operative, each member has only one vote;
(c) to the extent feasible, members provide the capital required by that co-operative;
(d) the return paid on member capital is limited to the maximum percentage fixed in accordance with the constitution of that co-operative;
(e) at least five per cent of the surplus is set aside as a reserve in a reserve fund and is not divisible amongst its members.
(f) it provides education and training to its members and employees.

[8] https://www.feps-europe.eu/attachments/publications/who_owns_europw_2020.pdf
[9] No. 14 of 2005: Co-operatives Act, 2005

Nomination regarding transfer of property in the event of death of a member

Question 5.
Are the provisions on nomination regarding the transfer of property in the event of the death of a member considered useful and worth retaining in the proposed legislation? Please provide rationale in support of your response.

Response:

CHI would welcome the retention of modernised provisions related to the transfer of property in the event of death or bankruptcy.

The distinctive provisions related to co-operative societies recognise the distinct nature of the rights and obligations that attach to co-operative shares, and in particular that co-operative member shares impart political as well as property rights and obligations on members.

The distinctive provisions referenced allow for co-operative societies to avoid becoming entangled in probate or insolvency proceedings, whereby the legislation in relation to each are drafted on the basis of assets which have more clearly identifiable monetary value, are more easily fungible and most importantly do not carry political rights and obligations that a member of a co-operative takes on **voluntarily by subscribing to a co-operative's rules.**

The nomination process provides an avenue whereby the nominee has **consented** to the rights and obligations as a subscriber to the Rules of a co-operative, otherwise if the shares in a co-operative were vested in an individual through the probate or insolvency proposes, there would be at the very least ambiguity in relation to that person having consented and subscribed to the Rules of the co-operative – breaching Principle 1. of the principles set out in Statement of Co-operative Identity agreed by the ICA, open and **voluntary** membership.

We therefore submit that the distinct provisions in relation to the treatment of shares on death or insolvency are transposed into the new legislation, in line with modernising developments in the Credit Union Acts and co-operative law in other jurisdictions generally.

Matters relating to Corporate Governance

Minimum number of directors

Question 6.
Do you support the proposal in relation to the minimum number of directors (at least one director for co-operatives with less than 10 members and at least three directors for larger co-operatives)? Please provide a rationale in support of your response.

Response:

We welcome the reduction in founding members of a society from 7 to 3 as a progressive step that will make it easier for those considering the co-operative society as a vehicle for their enterprise or association.

We support three members as the lower limit on the basis that three is the minimum number of people that could meaningfully constitute a democratic endeavour - by comparison one person would function as a sole trader and two persons the minimum for a commercial partnership.

On this same basis, while we welcome the principle at the heart of the current proposal regarding director numbers (reducing administrative barriers to establishing new co-operatives) we would recommend that the minimum number of directors should be set at three for all co-operatives, regardless of scale, on the basis of protecting the essential democratic nature of co-operatives.

We would recommend that the Department give consideration to providing very small co-operatives the power to dispense with the need to elect directors for one year by unanimous written resolution, with all members to be deemed directors under the Act, assuming all the rights and obligations therein and to allow General Meetings to incorporate all the functions and powers of a directors' meeting.

The members would still be required to appoint the officers of the co-operative including a Chairperson and a Secretary.

This would eliminate a significant amount of administration and red tape for micro societies with membership that overlaps with its directors.

It would eliminate the necessity of holding separate meetings and passing separate resolutions at board and general meeting level for decisions requiring a General Meeting resolution (approving financial statements, raising borrowing limits, setting investment policies, applications for membership, rule amendments and so forth).

We see this as potentially beneficial for very small housing co-operatives which wish to operate using a flat structure (in which all members are included in all aspects of governance).

We are aware from our discussions within the wider movement in Ireland that many small agricultural co-operatives (local machinery sharing co-operatives) in addition to small worker co-operatives (artist co-operatives, consulting co-operatives, grocery co-operatives) often function using a flat structure in practice with one layer of governance.

A legislative framework for this reality would make the co-operative society legal form that much more easily operable and attractive for founders in more sectors. It would also align with the stated aim of the original proposed minimum number of directors - reducing administrative barriers to establishing new co-operatives.

We do recommend that this model should be restricted for co-operatives with exceptional low membership numbers, and therefore propose this provision would be applicable only to societies with a membership lower than 12 natural persons.

Provisions of this nature are provided for in a number of jurisdictions, and we have attached specimen text for the operative legislation in Quebec, the Co-operatives Act 1982, as amended.

DIVISION III

AGREEMENT ON ADMINISTRATION BY THE MEETING OF THE MEMBERS

2003, c. 18, s. 36.

61.

If a cooperative has fewer than 25 members, they may agree not to elect directors for one year.

The agreement must be made annually in writing and be approved by at least 90% of the members.

1982, c. 26, s. 61; 1995, c. 67, s. 41; 2003, c. 18, s. 37.

62.

The members shall then administer the business of the cooperative as if they were the directors; they have the rights of the directors and assume their obligations.

They must, however, designate a president, a vice-president and a secretary from among their number. They are not bound to hire a general manager or a manager.

1982, c. 26, s. 62; 1995, c. 67, s. 42.

62.1.

Sections 92 to 98, adapted as required, apply to the meetings of the members.1995, c. 67, s. 43.

Approval of Special Resolutions

Question 7.
Do you support the proposal to provide for a single general meeting for the consideration of special resolutions, subject to the approval of at least 75% of members entitled to vote at the meeting? Please provide a rationale in support of your response.

Response:

In contrast to the majority of the provisions of the current IPS legislation, which are cumbersome and antiquated due to the absence of any ongoing reform and modernisation over the last 100 years, the special resolution (particularly in the areas of transfers of engagement, conversion to a company and voluntary winding up) was explicitly and intentional designed to be cumbersome and difficult to execute in order to avoid its use by those seeking to opportunistically asset strip the co-operative.

The risk of demutualisation is ever present in any co-operative society in which the underlying assets of the co-operative begin to diverge from the value of the member share capital.

There are historical examples of opportunistic demutualisation in Ireland, and many recent examples of such demutualisation attempts in other countries - with a recent failed demutualisation attempt of Liverpool Victoria in the United Kingdom, and the successful demutualisation of MEC in Canada.

The Liverpool Victoria example[10] is particularly instructive as their board had persuaded their members to converted to a company limited by guarantee some years before, which removed the 'cumbersome' special resolution that applied when they were a registered society making it easier to execute an attempted demutualisation. This attempt ultimately failed due to a widespread public campaign against the demutualisation and the well-publicised cross-party consensus on the inadequacy of demutualisation protections in UK legislation.[11]

We submit that the legislation should provide for three different meeting resolutions:

[10] Text of debate from the House of Commons in the United Kingdom, which set out the context of the demutualization attempt. https://hansard.parliament.uk/commons/2021-09-15/debates/62335CFB-FC9E-47F8-969F-43A9F3467B19/DemutualisationOfLiverpoolVictoria#:~:text=The%20board%20of%20Liverpool%20Victoria,a%20company%20limited%20by%20guarantee.&text=In%20LV%3D's%20rulebook%2C,voti

[11] Mutuo press release following failed demutualisation attempt. https://www.mutuo.coop/news/

- ordinary resolution - a resolution passed by a simple majority of the votes cast by the members, entitled to vote, to be voted in person or by proxy at a general meeting of the company. *Applicable to any matter not otherwise provided for below.*
- special resolution - a special resolution requires 75% majority of the votes cast by the members entitled to vote. *Applicable to amalgamation, transfer of engagements or change of name.*
- demutualisation resolution – a demutualisation resolution requires 75% majority of the votes cast by the members entitled to vote **and** the decision must then be confirmed by simple majority of the members at a subsequent general meeting. Applicable to conversion of a society into a company or a voluntary winding up.

The provision of three distinct resolutions would reduce the administrative burden for decisions other than those which could be used by opportunistic boards seeking to execute an opportunistic demutualisation.

Matters relating to Financial Statements, Annual Returns and Audit

Audit exemption criteria

Question 8.
Do you agree with the approach set out in relation to eligibility for audit exemption and the proposed thresholds? If not, please set out your proposal, together with a rationale for same.

Response:

We welcome the introduction of an audit exemption for smaller co-operatives.

We would submit that the financial thresholds are much lower compared to those applicable to co-operatives in other jurisdictions, and significantly lower than those applicable to companies in Ireland.

While we appreciate and acknowledge the value of an audit where it is of value to the membership and wider public interest, an audit represents a significant burden in

time and cost to a co-operative and may place a co-operative at a disadvantage to a company operating in a similar sector.

While we would support the principle that the financial thresholds should be somewhat lower than those for companies, particularly at the early stages of implementing this significant albeit overdue reform in the Irish context.

We would recommend that the financial threshold should be periodically reviewed by the Department based on factors such as the risk to the member and public interest, the evidence available since commencement of the Act, inflation and consultation with stakeholders.

We would therefore recommend that provision is made in the legislation for this periodic review, and that the Minister be given the power to amend the thresholds by statutory instrument.[12]

The current proposal that co-operatives with 50 or more shareholders will required to be audited should be reconsidered

With regard to the membership number criteria threshold, while we understand and appreciate the principle of a maximum membership threshold to avail of the exemption, we advise that it will have serious unintended consequences.

When one seeks to define an appropriate limit that is applicable to all sectors and co-operative types, no universally applicable number can be defined as each type of co-operative (producer, consumer, community, worker, solidarity, consortium) has very different levels of typical membership and membership involvement.

CHI represents a number of housing co-operatives with very limited turnover and balance sheets, which would meet the financial thresholds but as **consumer co-operatives with large average memberships** would not be able to avail of the exemption with this additional threshold in place.

[12] The United Kingdom has adopted this approach successfully, beginning with lower thresholds and periodically raising this thresholds based on the evidence and consultation with stakeholders. The latest increase in thresholds took place in 2017 based on evidence and stakeholder consultation which concluded in the relevant department bringing the thresholds for co-operatives into line with those of companies. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663684/Increasing_audit_thresholds_for_co-operatives_and_community_benefit_societies_-_response_to_the_consultation.pdf

We believe that the Department is seeking to relieve the burden of an audit on exactly this kind of small co-operative, and by introducing a membership criteria will be unintentionally excluding the vast majority of intended beneficiaries of this much awaited reform.

Similarly, through our engagement with others in the co-operative movement, we are aware of many cases of community co-operatives operating essential community services with small turnovers and small balance sheets but with large memberships.

We are also familiar with start-up co-operatives which will accumulate their start-up capital through member drives thereby hitting the membership threshold but will remain with very small turnover and balance sheets for many years as they development their co-operative.

The cases cited above are likely the intended recipients of this reform, and would be excluded from accessing this exemption by this membership number.

We agree with the approach of the Department to provide general purpose legislation applicable to all types of co-operatives, and we submit that there is no objective and universally suitable number of members to set as a threshold for an audit exemption.

We therefore recommend that this criteria be removed from the legislation in its entirety.

We also wish to share that our review of legislation in other jurisdictions could not find the same or similar criteria being used anywhere else, and we therefore submit that the perceived risk that the Department is attempting to defray through this particular mechanism has not manifested itself elsewhere, and that other mechanisms such as a member requisition of an audit and provision in rulebooks are adequate safeguards in addition to the financial thresholds.

Decisions regarding Audit Exemption

Question 9.
Do you support the proposal to require eligible co-operatives to provide for audit exemption in their rules? Do you support the proposal that a decision to avail of audit exemption can be reversed if supported by at least 10% of the members, entitled to vote at a general meeting? Please provide a rationale in support of your responses.

Response:

We support the general principle that whether or not an audit exemption can be sought, under the relevant provisions of the Act, should be provided for explicitly in the rules of the society.

We would recommend that this be set out as an optional provision in the legislation, that a co-operative can apply in its rules.

We would support the general principle that members should have the capability to requisition an audit through a members' motion at a General Meeting, and that the level of support required for such a resolution need not be as high as a simple majority.

We would submit that we have concerns that 10% of members is a very low bar to compel the majority of members to bear the cost and burden of an audit - which they do through the co-operative having a lower distributable surplus, reduced services to members and/or increased membership fees.

We would there advise that 20% of members is a more appropriate number to balance the interests and needs of all members.

Abridged financial statement criteria

Question 10.
Do you agree with the proposal to provide for the filing of abridged financial statements with the Registrar in relation to small co-operatives and, if so, the eligibility thresholds set out? If not, please set out your proposal, together with a rationale for same.

Response:

In line with our response to Question 8. we support co-operatives having equivalent exemptions to companies.

In line with our response to Question 8. we would recommend the removal of any membership threshold in its entirety, and that the financial thresholds would be subject to periodic review on the same basis including changes being made by statutory instrument.

We would recommend that this power be provided for explicitly in the rules of the society, and that an optional provision to this effect be provided in the legislation.

Certain exemptions in relation to financial statements

Question 11.
Do you agree with the proposal to provide for certain exemptions in relation to financial statements for small co-operatives and, if so, the eligibility thresholds set out? If not, please set out your proposal, together with a rationale for same.

Response:

In line with our response to Question 8. we support co-operatives having equivalent exemptions to companies.

In line with our response to Question 8. we would recommend that the financial thresholds would be subject to periodic review on the same basis including changes being made by statutory instrument.

We would recommend that this power apply these exemptions be provided for explicitly in the rules of the society, and that an optional provision to this effect be provided in the legislation.

Opportunity to provide additional observations

Question 12.
Please provide any additional comments you may wish to make to inform the completion of the legislation regarding Co-operative Societies.

Response:

Partial Transfer of Engagement

We welcome the modernisation and elaboration of processes like amalgamation and transfers of engagement as distinctive processes for co-operatives to restructure their affairs while accounting for the nature and centrality of membership within a co-operative.

We were surprised to see reference to a narrowing of 'transfer of engagements' to exclude 'partial' transfer of engagements.

While we have not needed to undertake amalgamation or transfers of engagement in our history, in line with our governance codes[13], our board must periodically review our governance arrangement both as co-operative and a co-operative federation composed of regional co-operatives.

Our board does not have any immediate plans or proposals with regard to our future structure, but at present we could not rule out proposing to our members a restructuring that could include amalgamation of our federative members (resulting in an amalgamated national co-operative with regional representation), or partial transfers of engagement between Co-operative Housing Ireland and other federative

[13] Charities Governance Code: 1.8

members to situate assets, liabilities and members within the most appropriate regional co-operatives.

We would therefore recommend that partial transfers of engagement should be retained, and that the legislation should provide particular clarity in relation to how the assets and liabilities being transferred must be specified in the special resolution and the assumption by the transferee of all associated liabilities.

Standard Provisions and Optional Provisions

We welcome the approach in the legislation to provide a suite of standard and optional provisions in the legislation, and would submit that the legislation should in effect provide for a default set of model rules based on a default application of the standard provisions and the election to apply certain optional provisions.

As we suggested in Question 1. this would provide relief for existing societies that are required to register under the new legislation, and as the Department outlined, would provide founders with an affordable and straightforward rule for the founders of new societies which could be adapted as the co-operative develops and matures.

Non-distributive capital surplus

We recommend that the legislation should provide for an optional provision defining a 'non-distributive capital surplus' which would provide that the capital surplus (reserves minus members equity plus share interest) would not be distributed to members on voluntary wind up, or otherwise transferred via amalgamation, conversion to a company or through transfers of engagement to another body corporate without a 'non-distributive capital surplus' in place.

As a not-for-profit housing co-operative and federation of not-for-profit housing co-operatives, we understand that a non-distributive capital surplus is essential to the operation of our model for a number of reasons including, but not limited to;

- reassuring stakeholders (including the State, impact and community investors) that the underlying assets of the co-operative are protected and will continue to be applied to the objective of providing housing;
- reducing the risk of demutualisation based on the divergence of the value of underlying assets and member shareholding.

Many not-for-profit housing co-operatives such as CHI already have a non-distributive capital surplus provided in their rules, but co-operatives across sectors would benefit

from a standardised and more legally certain provision that would be provided under the legislation as an **optional provision.**

Furthermore, it is essential that this optional provision, once added to the rules of a society cannot be removed by amending the rules, ensuring that future members cannot negate the original purpose of the provision.

Non-user investor members and public offering of securities

We welcome the commitment to legislate on non-user investor members, as we understand that such members could provide an additional source of at-risk capital to co-operatives, including housing co-operatives.

Housing co-operatives not providing social and affordable housing as an AHB must raise at least 30% of the cost of purchasing properties in equity (member shareholdings) with the remainder often available through debt via a credit union or other financial institution.

However, the members and future tenants of that co-operative will often struggle to accumulate that much capital themselves, particularly with the ever-increasing cost of building and land prices.

The provision for non-user investor members, with appropriate safeguards, would provide an additional source of equity for housing co-operatives, and indeed other co-operatives.

We submit that appropriate safeguards should be put in place for non-user investor members including:

- specific provision for non-user investor members in a co-operative's rules;
- specific provision for the terms of the shares that non-user investor members may subscribe to;
- specific limits to the voting rights of non-user investor members, with a statutory limit of 25% of voting rights at General Meeting and if reserved board seats are provided for in the co-operative's rules, no more than 25% of board members being reserved for non-user investor members.

Finally, we wish to flag a potential issue in relation to non-user investor members and a blanket prohibition on the public offering of securities as currently signalled in the consultation document.

The logical conclusion of having the capacity to have non-user investor members is that the co-operative would need to publicly advertise the possibility of non-members becoming non-user investor members. In so doing, it would likely be required to articulate the conditions, advantages and risks associated with becoming a non-user investor member.

We are not clear what the boundary between a 'non-user investor membership drive' and 'public offering of securities' would be in this case, and wish to highlight with the department, the scenario whereby a co-operative legitimately seeks to attract non-user investment and falls afoul of a prohibition on the public offering of securities.

We are aware of the international context, in which co-operatives in most jurisdictions are either totally exempted from the prohibition on the public offering of securities or are provided with a proportionate regulation of their ability to do so, acknowledging the much lower risk to the public interest of the public offering of co-operative securities.

We would submit that the Department consider either exempting co-operatives from this blanket prohibition on the public offering of securities, or provide a proportionate regulation of the same that balances the inherently public nature of co-operative capital raising with the need to protect the public interest.

Freedom of Information Act 2014 and Publication of Submissions

The Department will make public on its website all submissions received under this consultation. Your attention is also drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Act 2014. Therefore, should you consider that any information you provide is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with you regarding information identified by you as sensitive before publishing or otherwise disclosing it.

General Data Protection Regulation

Respondents should note that the General Data Protection Regulation ('GDPR') entered into force in Ireland on 25th May 2018 and it is intended to give individuals more control over their personal data. The key principles under the Regulation are as follows:

- Lawfulness, fairness and transparency;
- Purpose limitation;
- Data minimisation;
- Accuracy;
- Storage limitation;
- Integrity and confidentiality;
- Accountability.

The Department of Enterprise, Trade and Employment is subject to the provisions of the Regulation in relation to personal data collected by it from 25 May 2018. Any personal information which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 to 2018.

February 2022