Submission for Public Consultation on the operation and implementation of the Industrial and Provident Societies 1893 – 2014

The Department of Jobs, Enterprise and Innovation is carrying out a review of the Industrial and Provident Societies Acts, 1893 – 2014 . These are the Acts under which co-operative societies in Ireland are formed and operate. The objective of the review is "to consolidate and modernise the existing legislation to ensure an effective legislative framework suitable for the diverse range of businesses using the co-operative model in Ireland". As part of the review, the Department has organised a public consultation in which submissions from interested parties have been invited, by 31 January 2017, "on any aspect of the existing legislative framework as well as suggestions for reform".

The author of this submission has worked on aspects of the Industrial and Provident Societies Acts (the "IPS Acts") during the course of his career in the Department of Industry and Commerce and its successor Departments. As Registrar of Friendly Societies in 1980 – 1985, he was responsible for administering that legislation as well as legislation relating to other forms of mutual organisation (building societies, credit unions, friendly societies and trade unions). He also served in the Commerce, Consumers and Competition Division of the Department in the period 2000 – 2011, during which he carried out legislative review work on the IPS Acts. His retirement interests include Legal History and Modern Jurisprudence, in connection with which he published an article "Legislating for Co-operatives" (Public Affairs Ireland, December/January 2012). The present submission expands on the ideas set out in that article.

Need for Review of the IPS Acts

The legislation is clearly in need of an overhaul. The Principal Act is still that of 1893. Not that the age of any legislation, in itself, is a problem. The difficulty is that a statute enacted in 1893 reflects the conditions of that time and can hardly be expected to do duty for modern conditions. Secondly, any system of public legislation which is allowed to dilapidate can pose risks to the public. Such risks have materialised in the case of the IPS Acts. The most striking example perhaps was the situation which developed in the 1970's following the tightening of bank licensing requirements in Ireland in 1971. Under certain provisions of the IPS Act 1893, a small fringe banking or deposit-taking sector came into existence and it required rather draconian legislative action in 1978 to deal with the situation. Thirdly, insofar as the IPS Acts have a public policy purpose, it is to facilitate the establishment and operation of co-operative societies. That purpose, which is not very evident from the Acts themselves, continues to be important and worthwhile today from many perspectives, be it enterprise policy, freedom of association or specific beliefs in co-operative values and principles. If that is so, then surely that purpose and rationale should, at the very least, not be obscured in the public legislation providing for it and indeed should be appropriately reflected in it.

The Irish Paradox – Co-operatives without "Co-operative Legislation"

In Ireland, we have "co-operatives" of all shapes and sizes and have had since the 19th century and perhaps earlier. Irish co-operatives are most active in the agriculture/food sector but they are also associated with housing, fishing, group water schemes, community development and other activities. Yet, it is also true to say that the concept of "co-operative" is largely unknown to Irish law. The word "co-operative" is nowhere to be found in the Act of 1893. The IPS Acts contain no definition of the term "co-operative" or any other meaningful provision relating to co-operative identity or any restrictions on the use of the term "co-operative". A 2010 EU Study relating, inter alia, to national co-operative legislation across Europe, described Ireland as "perhaps" exceptional in not having "a specific legislation on co-operatives"; the IPS Act (of 1893) "cannot be exactly considered a co-operative law" (p.112 of Study).

The reality in Ireland is that when a group of persons wish to establish an enterprise on a co-operative basis and wish to do so using a legal entity with incorporated status and having the protection of limited liability, they normally will register either as an "industrial and provident society" or, less commonly it is believed, as a company. Their "co-operative" status will be expressed primarily in their rules (or memorandum and articles), in their name, and possibly in other materials. If they are affiliated to a co-operative representative body, they may use or draw on model rules prescribed by those bodies. Those bodies, in turn, may be influenced by statements of "Co-operative Principles" published from time to time by international co-operative organisations, notably the International Co-operative Alliance based in Geneva. In all of this, the instrument of critical legal importance is the Rules (or Memo/Articles) of the individual co-operative entity itself. That is the nearest thing we have in Ireland to "co-operative law". It is a good example of

what is referred to in Jurisprudence as "Legal Pluralism", a view of Law which extends beyond the "formal product of the State" to "other non-official, often unwritten, normative orders operating in society" (Jurisprudence, Themes and Concepts, 2nd Edition, p/248 by Scott Veitch et al.)

Does the paradox matter? We have co-operatives on the ground, doing their thing, without much State interference (other than the administration of a relatively light regulatory framework). No law or State official tells an Irish co-operative how to be a co-operative eg. whether voting should be on a one person – one vote basis and, if not, with what exceptions; whether the interest on shares should be limited to a certain amount and what that amount should be; how open the co-operative must be to new members; or how any other matter relating to co-operative self-expression should be provided for or implemented. All these matters are decided now primarily at the level of the co-operative and its members. From the point of view of subsidiarity, laissez-faire and minimising regulatory burdens, this situation seems rather admirable. It looks more like an achievement than a problem!

There are down-sides. There is a major information deficit about co-operatives in Ireland. Since there is no official definition of what a co-operative is, we can have no reliable aggregate official statistical information about the "co-operative" sector. (Individual co-operative representative bodies will of course keep their own statistical information about their membership.) It is not possible to estimate with any confidence the number of registered industrial and provident societies which are genuine co-operatives or, by corollary, the number which are not. Nor are statistics kept, as far as I know, concerning co-operatives which are registered companies. We have no clear picture of the overall pattern of co-operative constitutive elements in Ireland i.e. a picture showing just how "co-

operative" our co-operatives actually are. It has also been suggested that the absence of clarity in our law about co-operative identity militates against efforts to promote and encourage this form of organisation. Another downside concerns the wider coherence of our system of Corporation Law generally. If entities other than genuine co-operatives are able to register under the IPS Acts, that points to the possibility both of the misuse (albeit lawful) of those Acts and of possible circumvention of the Companies Acts.

Towards a new Legislative and Operational Framework for Co-operatives

In the words of the notice announcing the present review of the IPS Acts, the review "aims to provide an operational framework for the co-operative sector to ensure that its full potential can be realised while ensuring good corporate governance practice and transparency." The regulatory needs of a co-operative are two-fold, those relating to its nature as an economic or business undertaking simpliciter and those relating to its status as a co-operative. In the case of the first, those needs can be met by applying the prevailing norms of the general economic order, as represented by the Companies framework which itself has recently been consolidated and modernised. I do not mean by that that every sub-section of the Companies Act, and every excruciating detail, should be thrown at co-operatives; rather that the general approach, the principles, of the Companies framework should be applied. There is no principled reason why the approach taken by the Companies Act on matters such as incorporation, limited liability, public registration, financial reporting and auditing, registration of charges and winding up should not also apply to enterprises and firms using the co-operative model.

That leaves us with the task of identifying the regulatory needs of co-operatives qua co-operatives, that is those relating to the "co-operative" nature or identity of the enterprise. For this, at least a working understanding of the term "co-operative" is needed. Without that, discussion cannot proceed at all. We do not need a legal-type definition, certainly not at this stage. I would suggest something along these lines – any organisation or association, however legally constituted, which follows or claims to follow, generally recognised co-operative principles and values, such as those promulgated by the International Co-operative Alliance. That is, admittedly, rather general and no doubt would admit some entreprises which not everybody would regard as genuine co-operatives.

I think that the essential first step is to address the major information deficit about co-operatives in Ireland. We must equip ourselves with a clear understanding and knowledge of the body of "co-operative law" which we already have; built up and developed over a century by Irish co-operators, co-operatives and the co-operative movement; using the considerable latitude made available to them by the IPS Acts (and, where applicable, the Companies Acts); with little direct assistance by the State and its agencies. I suggest that a study be undertaken to survey and assess this body of accumulated law and practice; by an independent body (such as the E.S.R.I.) supported by appropriate legal, economic, business and co-operative expertise; and perhaps funded by the co-operative movement itself (for this purpose, I include in the co-operative movement, enterprises which have evolved out of co-operatives and which may be prepared to invest something back). The terms of reference of the study would have to be carefully drawn and in particular would need to capture not just the content of written rules, but also practices, arrangements and behaviours which bear on the issues of co-operative identity, principles and values. The EU Study referred to above provides a useful conceptual framework which could be drawn on. The results of such a study would provide an objective and reliable description of the current state of Irish "co-operative law" as well as providing the base-line for any

significant move forward from that line. That description and information does not currently exist. To legislate on co-operative identity without it would, in my opinion, be shooting in the dark.

A second study should be carried out to examine the co-operative legislative experience of other countries. It could start with the 2010 EU Study mentioned above which examined and compared the national co-operative legislation of 30 European countries, including Ireland. The picture it paints is one of considerable diversity among national legislations and it also indicates that Ireland is not alone in placing reliance on the internal legal order of co-operatives for the purpose of defining many of the elements of co-operative identity. (The main focus of the study was a review of the implementation of the European Cooperative Society legislation, something of a cautionary tale). We also should look outside Europe, particularly at countries with well established and successful co-operative sectors such as the US, Canada and New Zealand. This study could proceed in parallel with the first.

Considerations

The carrying out of these two studies will not relieve us of the burden of difficult decision-making in due course, but they should make those decisions more sound, more evidence-based and more likely to lead to legislation which will endure. It goes without saying, that any legislative proposals will require a very full consultative and deliberative process involving all relevant interests. In that context, I offer a few considerations here which I think are important.

1. The making of law is essentially a practical business; it has to work; it should improve things; it should make life easier for people; it should help to reduce the risks of mischief and injury to the public; it should avoid unnecessary upheavals and should fit in to a reasonable extent with what has gone before. Law, in my view, is not for sending "messages", proclaiming beliefs or trying to convert people (despite a certain impulse for doing so).

2. Historically, the IPS Acts developed "in response to the practical needs and problems of co-operatives as business enterprises". The legislative move in the UK away from the 1893 position to the concept of "bona fide co-operative" in 1939 "was not done to encourage co-operation but to prevent the abuse of the legal form in question for the purpose of investment fraud" (Ian Snaith in "Co-operative Principles and Co-operative Law in the United Kingdom").

3. The State should observe neutrality as between the different forms of business organisation. The co-operative is not a morally superior form of organisation. It is just a different way of organising ownership and control and is, incidentally, a form of private ownership. What matters is what they do; what goods and services they produce; which are judged in the public market-market like any others. Simplistic

contrasts between the generality of "companies" and the generality of "co-operatives" are just that – simplistic.

4. Since we are starting from what is effectively a blank page, the range of legislative policy options is very wide. At one extreme, there is the present "subsidiarity/laissez-faire" model which requires hardly any legislating at all. At the other, there is the full-fledged bells and whistles Co-operative Societies Act, with a new "co-operative" legal form, statutory definition (or criteria of equivalent effect) and its own legislative system. In between, there are many other possibilities, one key variable being the "division of labour" between public and private law. Whatever option is selected, it should seek to build in as much autonomy as possible for the co-operative and its members in relation to the constituent elements of co-operative identity. This is not just because subsidiarity is a good in itself, which it is, but because all of those elements pertain to the relations of the members inter se. Those elements are largely a set of "self-denying ordinances" voluntarily undertaken by each member of the co-operative to advance a common enterprise; they do not much concern the external world.

5. The position of co-operative hybrids will need special consideration. These are the international agri-food businesses, starting with Kerry, which evolved out of dairy co-operatives but are now complex corporate structures with international Stock Exchange listings. It would be stretching things to describe them as "co-operatives" now or to include their business results with data attributable to "the co-operative sector". The only point here is to bear their special position in mind in any amending action to the IPS Acts. Indeed, there may be a case for preserving intact the entire IPS legislative system for certain limited purposes such as this.

Eamonn Carey

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Contact details:

email: eamonnjjcarey@hotmail.com

phone: 00353 87 903 7675