

Irish Co-operative Organisation Society Ltd
2016 Co-operative Legislation Review

January 2017

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A review of the Industrial and Provident Societies Acts (the “IPS Acts”) is being initiated within the Department of Jobs, Enterprise and Innovation (“the Department”) with a view to consolidating the Act of 1893 and its subsequent amendments.

ICOS welcomes the review and the opportunity to express our views in relation to the legislation and suggest changes which will allow our co-operative members to grow their businesses and serve their respective members into the future.

We recognise the Department’s stated objective of reviewing the legislation so as to “consolidate and modernise” and make more effective the statutory framework in which co-operative businesses can operate and grow. We note the Department’s desire to address corporate governance, shares, membership and regulatory matters within the review process.

The co-operative model is unique and inherently distinct from the company model. For that reason, ICOS wishes to give full legislative recognition and legal support to the co-operative concept i.e. that co-operatives are created to serve people not capital.

To that end your Department will be aware of the 7 Co-operative Principles enunciated by the ICA (International Co-operative Alliance) which guide and define co-operatives worldwide:

- Voluntary and open membership
- Democratic member control
- Member economic participation
- Autonomy and independence
- Education, training and information
- Co-operation among co-operatives
- Concern for community

ICOS supports and recommends the incorporation of these Principles in the New Act including their application for matters such as the decision to register a co-operative and for that co-operative to maintain its registered status.

For the purposes of safeguarding and sustaining the co-operative model ICOS now makes the following initial observations:

A. EFFICIENCY

The co-operative structure distinguishes itself from other models on several bases. These bases include democratic control (achieved through the principle of ‘One Member, One Vote’ enshrined in a co-operative’s rulebook) and to serve its members (achieved through restrictions on the transfer and withdrawal of shares). These features are not fundamental to other corporate models.

There are however several impediments to groups establishing as a co-operative which could be ameliorated with relative ease:

1. The necessity for an audit of financial statements is recognised by ICOS. Solid financial management and reporting are critical to members' interests – both in the sense of securing their initial funding contribution and the continued existence of an organisation that guarantees them access to a vital service or market. In short, the requirement for an audit should be retained in the New Act. However, co-operatives should be given the option to avail of an audit exemption provided that certain conditions are satisfied (i.e. as is the case for a company).

As an aside ICOS also requests that the term 'public auditor' be replaced by 'statutory auditor'.

2. The filing of the Annual Return is an important obligation. One that ICOS impresses on its members through its education function. Instances do arise where the operating year end for a co-operative does not correspond with its financial year end. ICOS requests that, as is provided for companies (S.288 of the Companies Act 2014), co-operatives would thus be afforded the flexibility to move their year-end date within a range of 7 days.
3. ICOS requests that administrative requirements (whether in respect of fees or document submissions) for co-operatives be no more burdensome than they are for companies and that where reduced obligations are available for companies meeting stipulated criteria (e.g. of turnover) that those reduced obligations be made available to co-operatives. Aside from fees and document submissions, ICOS also seeks confirmation that any registrations (e.g. of a co-operative's incorporation or a rule amendment) submitted by a co-operative (or intending co-operative) be processed within the same time window as would be the case for a company.
4. Finance and Security - Any business requires finance to make operational activity a reality. For co-operatives the very necessary restrictions on share activity make debt finance all the more important; access to debt finance (in all its forms) must be preserved as an accessible funding tool.

For clarification, ICOS requests that any and all forms of finance and security (including the guarantee of subsidiaries) available to companies be equally available to co-operatives.

For example, ICOS notes the existence of outdated legislation (Agriculture Co-Operative Societies (Debentures) Act, 1934) requiring the registration of certain debt instruments (debentures) with the Minister and/or Department of Agriculture and Food. ICOS submits that such provisions lack justification and should be removed as an anachronism.

For the sake of clarity ICOS's submission on this point refers not only to debentures – but to all forms of debt finance the security for which may be perfected by registration under Irish law.

5. As the governing legislation for a co-operative, it is crucial that the New Act is named in a manner that is more relevant and is easily identifiable. ICOS submits that the name of the New Act be "the Co-operative Societies Act" and accordingly that a co-operative (currently an "Industrial and Provident Society") become a "Co-operative Society".

Existing CRO guidelines stipulate that:

'words such as "Society", "co-op" or "co-operative" cannot be used unless prior permission has been sought from and granted by the Registrar of Friendly Societies.'

ICOS strongly recommends that a similar provision be given legislative basis in order to preserve the integrity of the co-operative as a distinct business model. It is important to existing co-operatives (both within and outside the ICOS affiliation network) that the concept of a co-operative not be misrepresented or abused.

B. DEMOCRACY

As stated earlier in this submission, the principle of member ownership and control is fundamental in a co-operative; as is member participation. In its purest form, a co-operative's membership will be comprised of producers or service users who have a day-to-day 'stake' in the activities of the co-operative. Whether that interest is a market for their livestock or access to treated water, the point is clear: A member's interest in his/her co-operative runs deeper than a financial investment; it is an investment in their livelihood.

Consequently, certain principles and practises have evolved to reflect that very unique reality. These include "one member, one vote", the ability of a critical mass of members to 'requisition a meeting', the adoption of rules governing the removal of executives and specific voting thresholds to effect a rule amendment or pass a special resolution.

ICOS is firmly of the view that the existing special resolution threshold levels be retained for the various circumstances outlined in the existing legislation (e.g. conversion to a company, dissolution, etc). ICOS also requests that the requirement for rulebook clarity on notice periods in respect of meetings (both of members and committees) be retained.

With a view to safeguarding the very fundamental principles surrounding member control, ICOS also proposes the following:

1. The committee/board of a co-operative must maintain a register of members. This existing requirement is most typically administered by the Secretary at the committee/board's behest.

In 2014, section 17 of the 1893 ISP Act was amended (by section 10 of the 2014 ISP Act) such that any individual (whether a member of the co-operative or not) shall:

"be allowed to inspect the books of a registered society containing the names of the members, and their holdings in shares, at all reasonable hours at the registered office of the society,..."

While ICOS appreciates the need for transparency in respect of share ownership in corporate entities this current requirement presents problems for the democratic functioning of co-operatives. Part and parcel to the governance and decision making within a co-operative is that all members, irrespective of the size of their shareholding, have the

same voting rights. The rationale is understandable: that they each have a day to day 'stake' in the affairs of the co-operative. In the case of a company, this is not necessarily the case: investment and return are often the sole concern.

It is ICOS's experience, that to permit the release of information so detailed as to itemise the breakdown of respective shareholdings provides no benefit to the members vis-à-vis their relationship with their co-operative, whilst (regrettably) the disclosure of such information can lead to internal division and dilute the egalitarian ideal fundamental to co-operative ethos.

ICOS requests that there be a requirement for the committee/board to hold and maintain a record of both members and their respective shareholdings but that there be no requirement for that latter information (i.e. shareholding) to be disclosed to any person other than to the Registrar.

ICOS is aware that legislation regulating the collection, maintenance and use of data on shareholders has been, and continues to be, transposed from E.U. law. To the extent that such legislation can be modified to account for the democratic engagement and control needs of those organising as a co-operative, ICOS asks that serious consideration be given to such modification.

2. Central to the governance of any co-operative are the rules of that co-operative. The rulebook is the constitution of an "Industrial and Provident Society"; it is also the primary contract both between the members inter se and between them and their co-operative.

As is the case for companies, commercial realities necessitate changes to that constitutional document. The current procedure for effecting such a 'rule amendment' involves the circulation of the proposed rule change (by notice), the approval of such change at a special general meeting called for that purpose and finally the registration of the change with the Registry.

ICOS proposes no change to the steps outlined above. What ICOS does feel would simplify the process is the acceptance by the Registry of a 'consolidated set of rules' and recognition through registration thereof. Currently, in the case of a change to a single rule, the resolution amending the specific rule is lodged with and registered by the Registry.

The objective of co-operative engagement (by and with members, management and elected board/committee members) could be significantly improved on the very basic subject of consolidated (and therefore, simplified) rulebook registration. ICOS are willing to engage with the Department and indeed the Registry in exploring ways to make that happen.

3. Part and parcel of a person being a member in a co-operative is the requirement that they hold shares in the entity. On this point the co-operative model possesses a feature unique to its corporate counterparts: shares in a co-operative are more akin to a commitment to participate with and in the co-operative, as opposed to a pure financial investment.

Intrinsic to that principle (and its underlying purpose of having a business to bring goods/services to market) are long adhered to restrictions on transfer and withdrawal of

shares in a co-operative. ICOS submits that the protections in the existing IPS Acts be retained.

Side by side with those restrictions, sit an important common law principle. Together they safeguard the underlying purpose of a co-operative.

This principle stipulates that the nature and extent of shareholder rights are to be ascertained by reference to the contract such member has entered into with the society whose terms are contained in the society's rules.

This principle has been applied in the context of interpreting the rights of members where over time the activities of a member and the activities of their co-operative diverge. At the risk of over-stating the point: a member's involvement in a co-operative hinges solely on the purpose of realising a service (whether that's to sell livestock or connect to a sustainable water supply) not for profit on sale of shares. The terms of his/her engagement with the co-operative are clearly outlined in the rules; rules he/she has power with others to amend over time. An example of where such rulebook primacy was applied is the case of Kerry Co-operative Creameries Ltd v Bord Baine Co-operative Ltd (1990), where the rules governing dilution of shareholding were upheld on the logic of the above-mentioned principle.

ICOS submits that this principle be enshrined in the New Act.

C. TRANSPARENCY

When corporate failure strikes, weak governance is very often a strong contributing factor. Governance protects not only the entity; it protects the stakeholders in that entity. Of chief importance in a co-operative is the very unique dependence of the members on the co-operative for their day-to-day trade and supply requirements.

In approaching governance – whether through drafting rules, advising boards on policy formulation or delivering training – ICOS prioritises the implementation of strong 'co-operative governance' principles and practises amongst our affiliate network. By way of example, The Plunkett Institute Co-operative Society Limited has been established to promote and accredit the training of co-operative board members in terms of their role, responsibilities and overall management of the co-operative business.

To safeguard the special dependence of producer-members in their co-operative and simultaneously create conditions whereby co-operatives can compete and be sustained this review of the IPS Acts should address the following:

1. The original 1893 Act permitted an Inspector to be assigned to a co-operative, by appointment of the Registry, on the application of not less than ten members of the co-operative.

The Inspector was empowered to "inspect the books" of the co-operative and "to report thereon". The legislation obliges the "Registrar" to "communicate the results" of the inspection to the co-operative and the ten applicants.

Where there exists suspicion of either illegality or fraud, it is important that avenues exist for co-operative members to be able to raise their concerns and take steps to address the situation. ICOS wishes to discuss and explore in greater detail with your Unit how this function can best be incorporated into the New Act and how this will work in an effective and proportionate manner.

2. Central to the process of review must be a commitment to make the New Act as user-friendly as is feasible. From a governance perspective, co-operatives function best when doubt is minimised.

Certain provisions in the existing IPS Acts are, in ICOS experience, effectively obsolete. These should be removed from the legislative framework (example S.25 and S.26 – the “power of nomination”). Others require careful consideration in light of the statute book and common law. Examples include: S.32 – “membership of minors” in the context of capacity to contract; S.53 – “Transfer of Engagement” and the need for a workable and clear definition).

Other provisions are very applicable today, however, their current interpretation can only be deduced by consulting several Acts in the IPS Acts sequence and evolution. ICOS supports the streamlining of these provisions into a “one stop shop” facility under the New Act. These include: special resolutions (with detail on the procedures specific to the various transactions a co-operative may engage with); and shareholding limits for individual members.

FINAL THOUGHTS

ICOS recognises the temptation of legislators to imitate and import concepts from company law, which are not always appropriate to co-operatives. While some elements of company law are necessarily applicable to a co-operative, to use a blanket approach would subvert the unique characteristics and ethos of a co-operative. ICOS believes any changes to the IPS Acts must protect and respect both the principles and practises of the co-operative model.

ICOS is available and very much open to participate in any discussion on any aspect of the legislation. We hope this submission will be seen as the first step in an open and collaborative dialogue.

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