



An Roinn Gnó,
Fiontar agus Nuálaíochta
Department of Business,
Enterprise and Innovation

Submission

on the Industrial and Provident Societies (Amendment) Bill 2018

Responses to the Joint Committee on Business, Enterprise and Innovation

PART A: Policy and Legislative Analysis

The ‘policy issue’ and the policy and legislative context

The following addresses questions 2, 3, 6, 7, 8 and 10.

2. What is the current policy and legislative context, including are there any proposed Government Bills or general schemes designed to address the issue? Have there been previous attempts to address the issue via legislation?

3. Is there a wider EU/international context?

6. Are there Government-sponsored Bills (or General Schemes) which are related to and/or broadly aim to address the same issue? Are there merits in combining them?

7. What are the specific policy implications of each proposal contained within the Bill (environmental / economic / social / legal)?

Has an impact assessment (environmental/ economic /social / legal) been published (by Government or a third party) in respect of each proposal contained within the Bill?

8. Could the Bill, as drafted, have unintended policy consequences, if enacted?

10. How would the Bill, if enacted, be implemented?

Background

The Industrial and Provident Societies Acts 1893-2014 provide the statutory regulatory framework for the formation and general operation of industrial and provident societies in Ireland.

There are currently 933 (as of February 2019) registered industrial and provident societies in Ireland and these are primarily co-operatives, mainly comprised of various agricultural co-operatives, group water schemes and housing co-operatives (a breakdown of the Industrial and Provident societies by category is provided in Annex 1). There is no data available on the number of co-operatives using the company legal form. The Registry of Friendly Societies (RFS) is a statutory office of the Department of Business, Enterprise and Innovation which is responsible for the assessment and registration of applications and any subsequent amendment of rules relating to Industrial and Provident Societies.

A co-operative is an association or body which is organised and which operates on the basis of co-operative principles, such as “democratic member control” (one person one vote).

The term “co-operative” is not itself defined in legislation and it does not denote, in this jurisdiction, any particular statutory form of association.

Root and Branch Review of the legislation

The Industrial and Provident Societies legislative framework is a largely Victorian statutory code. Various piecemeal amendments have been introduced over more than 120 years, most recently in 2018¹, and as a result, the legislation is fragmented. For that reason, the Department is currently undertaking a root and branch review of the legislation. As a first step of the all-encompassing review of the industrial and provident societies legislation, the Department conducted a public consultation on the operation and implementation of the Industrial and Provident Societies Acts 1893 – 2014 and published the results of this consultation on its website in April 2018. A total of ten responses were received to the consultation. The submissions highlighted the need for a consideration of a wide range of issues, including providing co-operative societies with a distinct legislative identity reflecting the co-operative ethos, reducing the minimum number of members to form a co-operative, facilitating online/electronic filing, introducing audit exemptions, revising the provisions on debentures, allowing for a consolidated rule book registration and electronic attendance and voting. In addition to the issues identified in the submissions received to the consultation process, the Department is considering other issues, including modernising the language, removing references to other jurisdictions, governance and the powers of the Registrar of Friendly Societies (RFS).

Following the completion of the comprehensive review of the legislative framework, which is taking into account the stakeholder views and the issues identified by the Department, it is proposed that a General Scheme for modernised and consolidated legislation will be brought forward later this year. The General Scheme will be wider ranging and consider, among many others, the measures proposed in the Private Members’ Bill. It will consolidate into one statute all existing industrial and provident societies legislation and modernise and align it with the realities of the 21st century business and regulatory environment. This will ensure a level playing field between co-operatives and the other legal options for structuring enterprise activities and provide a conducive framework for realising the full potential of the diverse range of organisations using the co-operative model.

¹ Sections 55 to 61 and section 68 of the Companies (Statutory Audits) Act 2018

The root and branch review project is well underway and as part of it the Department has examined, among many others, the measures proposed in the Private Members' Bill. The Department considers that a comprehensive reform of the Industrial and Provident Societies Acts 1893-2014 leading to a consolidated, modernised and effective legislative framework is required. This will benefit the diverse range of organisations using the co-operative model.

Industrial and Provident Societies (Amendment) Bill 2018

The Private Members' Bill consists of 3 main elements and the Department's views on these elements are outlined below:

Section 2 of the Private Members' Bill proposes to reduce the number of members as a condition of registration of industrial and provident societies. The Second Stage debate of the Bill in the Dáil indicated that the sponsors' rationale for reducing the membership criterion to 3 is based on the following calculations: in 2014, there were 237,753 small and medium enterprises (SMEs), in Ireland, employing almost a million workers. Those SMEs have an average of 3.87 employees per business, just over three. The sponsors also noted that the proposed minimum membership criterion prevails in the rest of Europe.

As part of the comprehensive review of the Industrial and Provident Societies legislation, the Department has analysed the submissions to the public consultation published in 2018, conducted research on the practice across Europe (Annex 2) and is engaging in bilateral discussions with stakeholders to explore the various policy options in relation to the optimum minimum number of members required to form a co-operative. While three out of the ten submissions to the public consultation have suggested a reduction in the minimum number of members, there was no consensus on what this minimum number should be. In addition, recent submissions to the Department from two of the co-operative umbrella organisations, the Irish Co-operative Organisation Society (ICOS) and the National Federation of Group Water Schemes (NFGWS) do not indicate support for reducing the minimum number of members to 3. NFGWS considered that 3 is low given the community nature of these societies and the vital importance of proportional representation particularly when a society is being established. ICOS were strongly of the view that the current requirement of 7 members has never acted as an impediment to the establishment of a sustainable co-operative. ICOS noted that the purpose of a co-operative is to bring together like-minded individuals to help them achieve economies of scale and any number less than 7 would undermine the "economies of scale" principle.

EU context

Although the majority of national co-operative legislative frameworks in Europe and internationally are based on the co-operative traditions and principles, attempts to coordinate the regulation of cooperatives across jurisdictions are rare and there is a significant divergence in the way each country deals with the issues the subject of the provisions of the Private Members' Bill.

In relation to the proposal to reduce the minimum number of members from 7 to 3 as a condition of registration of industrial and provident societies, different approaches have been taken across Europe regarding the minimum number of members to form a co-operative, ranging from 1 in Finland to 10 in Poland. According to the Study on the implementation of Regulation 1435/2003 on the Statute for European Cooperative Society (SCE), 2010, fifteen countries (Bulgaria, Cyprus, Czech Republic, Greece, Hungary, Ireland, Iceland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania and Slovakia) require 5 or more natural persons to form a co-operative. Nine countries (Belgium, Spain, Germany, Finland, UK, Sweden, Slovenia, Latvia, and Italy²) require 3 natural persons to form a co-operative. Seven countries (Austria, Denmark, Estonia, France, Netherlands, Liechtenstein and Norway) require 2 members. The same research indicates a trend in cooperative law to reduce this minimum number, which in Europe is currently of 3 members on average (Annex 2).

Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society requires 5 or more natural persons resident in at least two Member States for setting up a cooperative spanning more than one EU country.

In considering the provision to reduce the minimum number of members to form a co-operative from 7 to 3, regard must be had to the need to ensure that the reduction in the minimum number of members does not act as an impediment to the establishment of viable and sustainable co-operatives with members who have the necessary skills to run these entities. ICOS's concern that reducing the number of members will prevent co-operatives from achieving economies of scale and NFGWS's view that a minimum membership of 3 is low given the community nature of these societies and the vital importance of proportional representation are also valid.

² Italy allows a minimum membership of 3 natural persons in a co-operative which has adopted the rules of a limited liability company

It is also noted that the recent European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 require every Irish company (apart from those listed on a regulated market) and Industrial & Provident society to file their beneficial owners' details on the Register of Beneficial Ownership (RBO) within 5 months of it opening. Failure to file within this 5-month period can result in the company or industrial and provident society being fined and prosecuted. Any person who holds or controls 25% or more of the shares or voting rights of a company or Industrial and Provident Society (whether directly or indirectly) is a beneficial owner and is required to be registered with the RBO. Therefore, reducing the current minimum membership requirement for co-operatives may have unintended consequences for co-operatives with a smaller number of members.

The Department, while fully recognising the importance of creating favourable conditions for encouraging a range of start-ups, including co-operatives, is of the view that the optimum number to establish sustainable co-operatives will need to be carefully considered to avoid any unintended consequences.

Section 5 of the Private Members' Bill provides for the Minister to exempt by regulations specified classes of societies to file annual returns or certain specified classes of documents that would otherwise be required to be included as part of an annual return. The Bill provides that these exemptions, may correspond to exemption provisions applying to companies.

It should be noted that no response to the public consultation on the operation and implementation of the Industrial and Provident Societies Acts 1893 – 2014, requested exemptions from filing annual returns, as the Private Members' Bill proposes. However, some responses (five out of ten), requested the introduction of audit exemptions for co-operatives in line with the approach taken in the Companies Act 2014.

In the course of a prior consultation process on the Industrial and Provident Societies Acts 1893 – 2005, held in 2009, some responses also sought the application of the company law audit exemption to industrial and provident societies. Others, however, considered that societies are not comparable to companies, and that the level of membership of societies (minimum 7 members, ranging up to thousands) as compared to that of companies (mostly 1-2 members) warranted different treatment. It was considered that in dealing with membership-based organisations the audit requirement provides a level of protection to members who may not have expert financial skills. While a consideration of the issue was

given during the drafting of the Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Bill, 2013, it was decided that this is an area which would be best served by further consideration in the context of a wider review of the legislation, and a comprehensive review of the nature of registered industrial and provident societies would provide a stronger basis for the development of a possible industrial and provident societies-specific exemption.

In relation to exempting co-operatives from filing annual returns, it is understood from research into the Member States' co-operative legislative frameworks that generally the law requires co-operative societies to file an annual return, but the format of the return and accompanying documents vary from country to country and depend on the size of the co-operative.

EU company law does not provide for exemptions from filing annual returns (the exception being investment companies, which are regulated by the Central Bank in Ireland, and which, while being exempt from filing annual returns, must deliver financial statements to the Companies Registration Office (CRO)). Limited companies must file financial statements annually. Filing of financial statements annually is a central tenet of transparency. The only total exemption from annexing financial statements to the annual return of a company applies to unlimited companies. The governing principle is that public disclosure, including disclosure of financial statements, is a quid pro quo for limited liability.

The concept of an audit exemption applicable to companies derives from EU law, and the threshold criteria which apply are set down by the EU. Private companies which satisfy certain conditions can be exempted from the requirement to have their financial statements audited.

Currently, under EU Law Member States can exempt small and micro companies from the requirement to have a statutory audit. Companies qualify as small companies and are not required to have an audit if they satisfy two of the following criteria:

Turnover does not exceed	€12m
Balance sheet does not exceed	€6m
Average number of employees does not exceed	50

Micro sized companies can also submit abridged financial statements subject to satisfying two of the three following conditions:

Turnover does not exceed	€700,000
Balance sheet does not exceed	€350,000
Average number of employees does not exceed	10

There is no similar regime on audit exemptions at EU level in respect of co-operatives. The available information indicates that Member States provide audit exemptions which could be based on the exemption thresholds applying in EU Company Law or nationally set thresholds.

The co-operatives that are formed and registered in Ireland are “limited liability” entities. In return for the advantages of limited liability, the law requires them to disclose their financial statements to the public. This is a very important protection for employees. It is also an important protection for other entities doing business with co-operatives as those other entities have employees and suppliers of their own. Without knowing the financial position of a co-operative, employees and others have no visibility of the financial status of the co-operative, including if it can pay their wages or its bills. The exemption, as proposed in the Private Members’ Bill, undermines transparency and trust which are essential elements for the effective functioning of co-operative societies and which underpin the co-operatives’ principles of open membership and members’ economic participation.

In addition, the proposed provisions, if implemented, could create an uneven playing field between co-operative societies on the one hand, which will be in a position to benefit from the proposed exemptions, and companies on the other hand, which will continue to face the obligation to file annual returns.

With regard to the principles and policy test, the Department is concerned that Section 5 does not provide sufficient guidance for the Minister to assist her in making regulations to provide for exemptions. The Bill would benefit from greater clarity on what factors the Minister should have regard to in providing for exemptions for the classes of societies and documents that would be subject to the exemption as provided for in Section 5. Clarity is also required on the scope of the Minister’s powers and the limitations placed on them.

The issue of introducing audit exemptions for co-operatives is being considered under the current comprehensive review.

Section 6 of the Private Members' Bill provides for the registration of industrial and provident societies and filing by electronic means. While the proposed provisions for electronic filing are very positive, they have been overtaken by events. On 13 September 2018 Minister Humphreys signed the Industrial and Provident Societies (Forms) Regulations 2018, which provide for the introduction of electronic filing for the most frequently filed RFS forms. On 6 December 2018 Minister Humphreys launched the RFS Online facility, which allows for the registration of new entities online and filing by electronic means of annual returns, amendments, including partial and full rule amendments, making online payments for filings and ordering documents online. The electronic forms are available on an optional basis as there is no provision in any of the relevant primary legislation to allow the Registrar to require documents to be filed electronically. The fees for the RFS submissions were also changed in August 2018 to bring them in line with similar fee types used by the CRO. The new regulations included a provision for the reduction in fees for documents filed online.

With regard to an impact assessment, no impact assessment has been published in respect of the proposals contained in the Bill.

11. Are there appropriate performance indicators which the Department, or whoever is ultimately charged with implementing the Bill, can use to assess the extent to which it meets its objective? Does it include formal review mechanisms?

In introducing the Bill at First Stage, the sponsors indicated that the Bill is designed to amend the regulations relating to the establishment of co-operative societies to make the process of registering a co-operative much easier. While the number of co-operatives registered in the last number of years has remained relatively static (Annex 1), it would be difficult to assess if reducing the minimum membership number will lead to a marked increase in the registered co-operatives. Other factors, such as the cost of establishing and operating co-operatives also influence the decisions around setting up co-operatives. As indicated above, the fees for the RFS submissions were changed in August 2018 to bring them in line with similar fee types used by the CRO and the introduction of electronic filing in December 2018 also reduced the financial and administrative burden associated with registration and running co-operatives.

In terms of formal review mechanisms, Dáil Standing Order 164A and Seanad Standing Order 168 of 2016 require that “Twelve months following the enactment of a Bill, save in the case of the Finance Bill and the Appropriation Bill, the member of the Government or Minister of State who is officially responsible for implementation of the Act shall provide a report which shall review the functioning of the Act and which shall be laid in the Parliamentary Library.”

Cost evaluation

The following addresses questions 12, 13 and 14.

12. Will there be enforcement or compliance costs?

13. What are the likely financial costs of implementing the proposals in the Bill, and what is the likely overall fiscal impact on the exchequer?

14. Have cost-benefit analyses (CBA) been provided / published (by Government or a third party) in respect of each proposal contained within the Bill? Will benefits /costs impact on some groups / stakeholders more than others?

The Department considers that if implemented, the Bill will involve compliance costs for the RFS. It is likely that additional costs for the RFS would derive in three ways:

- Reduction in income due to reduced filing requirements
- Additional IT development and testing costs
- Additional staff for data entry.

The proposed Section 5 provides that the Minister shall make regulations exempting one or more specified class of society from filing an annual return or certain types of documents that might otherwise be included in an annual return. To achieve this section 5 provides that the Minister may:

- provide for alternative procedures to be complied with in relation to the preparation of information that would otherwise be required to be included in an annual return
- provide different procedures for different classes of registered societies

Exempting any societies from the obligation to file an annual return would result in a reduction of fee income to the RFS. The fee for filing an annual return is currently €20 for an electronically filed return and €40 for a manually filed return. As the facility to file annual returns online was introduced relatively recently, most returns are filed manually meaning

the income lost to the RFS through such exemptions is likely to be €40 per return. As there is no indication of the number of societies that it is envisaged would be exempted, it is not possible to accurately estimate the loss of income that would arise. However, it should be noted that there are over 900 societies, each of which has to file an annual return. The fees paid by societies for filing annual returns are the major part of the RFS annual income.³ Depending on the scale of the exemption proposed, the RFS income could be significantly reduced. It should be noted that the income generated by the RFS does not cover the running costs of the Office.

The current IT system on which the RFS operates, which only went live on 6th December 2018, treats all societies in the same way when it comes to procedures, in line with the current legislation. If there was a change in legislation which required alternative procedures to be devised, that would involve changes to the RFS IT system which would require development work and testing. This would mean a significant cost to the RFS. It should be noted that the new online portal, which has been live for only 5 months, took almost a year of development to put in place.

There is currently no classification system applied to industrial and provident societies and it is not clear from the Bill what classification system might be applied. It appears that societies could only be classified on three grounds: type, size and activity. Unlike companies, there is only one society type. The Department does not have information on the size of societies, so it would be difficult to estimate the number of societies that might be affected if different size thresholds were suggested as a means of classification. In relation to activity, the RFS has divided societies into different classes such as agricultural societies, group water schemes etc. This is for administrative purposes only and is not a legal requirement. In recent times the RFS has asked newly registering societies to indicate their area of activity but this affects very few societies, most of which were registered before this question was added to the application form for registration. As there is no current classification system, the introduction of one as envisaged in the draft legislation would require further IT development on the RFS database and subsequent testing and would lead to further costs for the RFS.

In addition, Section 6 of the Bill provides that electronic mail must be one of the electronic means by which filings can be delivered to the RFS. The RFS recently introduced its RFS Online filing portal which complements the existing postal delivery system. It is not

³ The total income for RFS in 2017 was €57,000 approximately. There were 927 societies on the register at the end of 2017 so the potential income from filing annual returns by societies was €37,080 i.e. 927 by €40.

intended that an electronic mail filing facility be introduced as it will create additional administrative burden for the RFS and diminish the efficiency associated with online filing. If it were to be introduced it would mean that additional data entry would have to be done within the RFS which would require additional resources of at least one Clerical Officer at an annual cost of €40,000 approximately.

The cost implications would be in the first instance on the RFS itself but ultimately on the Exchequer. As regards benefits for stakeholders, clearly those societies who are classified in a way which would exempt them from the obligation to file an annual return would benefit from this as it would reduce their administrative burden. However, from the point of view of the general public, the impact would be to reduce the information available to it relating to exempted societies. It should also be noted that many societies are in receipt of grant funding from the State or other grant giving bodies and would be required to produce audited accounts for their funders so an exemption from filing with the RFS would only give them a very small cost saving.

With regard to cost-benefit analyses, the Government/Department has not prepared cost-benefit analyses in respect of the proposals contained in the Bill. A cost-benefit analysis was not published with the Bill. It should be noted that the Department will be preparing a Regulatory Impact Assessment as part of the comprehensive review of the Industrial and Provident Societies Acts 1893-2014.

PART B - Legal Analysis

The following addresses questions 15 to 20

- 15. Is the draft PMB compatible with the Constitution (including the 'principles and policies' test)?**
- 16. Is the draft PMB compatible with EU legislation and human rights legislation (ECHR)?**
- 17. Is there ambiguity in the drafting which could lead to the legislation not achieving its objectives and/or to case law down the line?**
- 18. Are there serious drafting deficiencies or technical drafting errors (e.g. incorrect referencing to Acts etc.)?**
- 19. Are there potential unintended legal consequences which may stem from the PMB as drafted?**

20. Are appropriate administrative and legal arrangements necessary for compliance and enforcement of the provisions of the Bill included? (e.g. if draft Bill contains a prohibition, whether the necessary criminal sanctions – including the class of fine – are included)

The compatibility of the Bill with the Constitution, EU legislation and human rights legislation (ECHR) is ultimately a matter for the Irish Courts and the European Court of Justice.

In the Department's view Section 5 of the Bill does not set out the principles and policies necessary for the Minister to make decisions regarding exemptions provided for in Section 5. No detail is provided on what factors the Minister must take into account or have regard to in making a decision on such exemptions.

The Bill would benefit from greater clarity on the classes of societies and documents that would be subject to the exemption as provided for in Section 5. Clarity is also required on the scope of the Minister's powers and the limitations placed on them.

Annex 1**Societies by category**

	2014	2015	2016	2017
Agricultural Supply Societies	36	34	33	32
Dairy Societies	49	46	44	44
Deposit Taking Industrial and Provident Societies	2	2	1	1
Egg and Poultry Societies	8	6	6	6
Farm Relief Societies	10	10	10	10
Fishing Societies	39	34	34	34
Forestry Societies	8	8	8	8
Group Water Scheme (Public Utility B)	345	321	325	328
Horticultural Societies	4	3	4	3
Housing (Public Utility A)	40	39	37	36
Investment Societies	32	33	38	54
Livestock Marketing Societies	44	43	43	43
Meat Processing Societies	5	4	4	4
Miscellaneous Societies	138	123	135	138
Other Distributive Societies	6	6	6	4
Other Productive Societies	8	8	7	7
Pig and Lamb Fattening (Livestock Breeding B)	13	12	12	12
Promotional (Livestock Breeding A)	38	38	37	36
Promotional Development and Advisory Service Societies	126	123	120	120
Turf Societies	6	7	7	7
Total	957	900	911*	927

Source: Registry of Friendly Societies Annual Report 2017

** 2 societies were entered twice on annual report for 2016, in error, so figure at end of year 2016 should read 909 and not 911.*

Annex 2**Minimum number of members to form a co-operative**

Country	Minimum number of members
Austria	2 (there is no explicit provision, implicitly 2)
Belgium	3
Bulgaria	7
Cyprus	12 natural persons or 5 cooperatives for secondary cooperatives
Czech Republic	5 natural persons or 2 companies
Germany	3
Denmark	2 (taxable cooperatives have at least 10 members)
Estonia	2 natural or legal persons
Greece	Rural co-operatives: 7 natural persons and legal entities, if the statutes provide so; Civil co-operatives: 15 natural persons (100 for consumer cooperatives) and legal entities, if statutes provide so
Spain	3 natural or legal persons; 2 for second degree cooperatives
Finland	3 natural or legal persons
France	2 (in cooperatives with the status of a limited liability company); 7 (in cooperatives with the status of a joint stock company)
Hungary	7, natural or legal persons, the latter may not exceed half of total members
Ireland	7
Iceland	15 (exceptions may be decided by the Minister of economic affairs)
Italy	9 natural persons or legal entities; 3 for a cooperative adopting the rules of the limited liability company. 3 for secondary cooperatives
Liechtenstein	2 (implicitly)
Lithuania	5, natural or legal persons
Luxembourg	7
Latvia	3

Malta	5 individuals; 2 societies in secondary cooperatives
Netherlands	2, natural or legal persons (if only 1 member left, this does not lead to dissolution)
Norway	2 natural persons and 2 legal entities
Poland	10 (natural and legal persons); 3 (legal persons); 5 (in agricultural producer- and in social cooperatives)
Portugal	5; 2 in cooperative unions, federations and confederations
Romania	5
Sweden	3, natural or legal persons
Slovenia	3, natural or legal persons
Slovakia	5, or 2 legal entities
UK	3, natural or legal persons, or 2 registered societies

Source: Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE), 2010