



RESEARCH ON LEGAL FORM FOR SOCIAL ENTERPRISES

Research completed by
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LIST OF ACRONYMS

CIC	Community Interest Company
CLG	Company limited by guarantee
CSP	Community Service Programme
CSR	Corporate social responsibility
DAC	Designated Activity Company
DRCD	Department of Rural and Community Development
EMES	European social enterprise research network
HSE	Health Service Executive
ICOS	Irish Co-operative Organisation Society
IPS	Industrial and Provident Society
LEO	Local Enterprise Office
SDGs	Sustainable Development Goals
SFF	Social Finance Foundation
WISEs	Work Integration Social Enterprises

SUMMARY

BACKGROUND TO RESEARCH AND METHODS

In 2019, the Department of Rural and Community Development published its *National Social Enterprise Policy for Ireland* in 2019. The national policy defines social enterprise as:

A Social Enterprise is an enterprise whose objective is to achieve a social, societal, or environmental impact, rather than maximising profit for its owners or shareholders.

It pursues its objectives by trading on an ongoing basis through the provision of goods and/or services, and by reinvesting surpluses into achieving social objectives.

It is governed in a fully accountable and transparent manner and is independent of the public sector. If dissolved, it should transfer its assets to another organisation with a similar mission.

It includes 26 actions under the following three objectives:

- Building awareness of social enterprise
- Growing and strengthening social enterprise
- Achieving better policy alignment

The issue of legal structures for social enterprises arose in research undertaken in the development of the national policy. This report, *Social Enterprise in Ireland: Research Report to support the development of a National Social Enterprise Policy*, which was undertaken by the Department of Rural and Community Development and Social Finance Foundation, indicated that just over half of those consulted in the research (51%) were in favour of the introduction of a new legal form that is specific to social enterprises. Subsequently, the national social enterprise policy made the commitment that 'Government, in collaboration with relevant stakeholders, will conduct further research and analysis on the operation of social enterprises within existing legal structures and assess the potential value of a distinct legal form for social enterprises'.¹

This research report has been commissioned as part fulfilment of this action. It is commissioned by Rethink Ireland and funded by the Department of Rural and Community Development.

The objectives of the research are to consider:

- What barriers are experienced by social enterprises in Ireland as they relate to legal form?
- Whether a dedicated legal form would benefit the sector and, if so, what form should it take?
- Whether a dedicated legal form would be necessary for the sector.

The methods used in completing the research comprised desk research, a survey of social enterprises in Ireland (179 responses), semi-structured interviews with 32 individuals from 27 organisations² and two focus groups (10 participants).

SURVEY OF SOCIAL ENTERPRISES

An online survey of social enterprises, adhering to the national definition of social enterprises (as articulated in the national policy), was undertaken including all four sub-groups of social enterprise activity as outlined in the national policy, namely, work integration social enterprises³ (WISEs), 'deficient demand' social enterprises⁴, enterprise

¹ Policy measure 19.

² Comprising policymakers, social enterprises, network and advocacy organisations, academics, local development organisations, social finance/social impact investors, regulators, and funders.

³ WISE support disadvantaged people to prepare for, and participate in, the labour market.

⁴ Deficit demand social enterprises seek to meet a demand for goods and services within a community where there is insufficient demand for the operation of a regular market due to inherent economic and social disadvantage or low density of population.

development social enterprises, environmental social enterprises, and social enterprises contracted with the public sector to deliver public services in disadvantaged areas and communities.

In total, 179 responses to the survey were received from social enterprises engaged in a wide range of activities⁵ and located in all counties throughout Ireland.

The majority (71.8%) of the social enterprises were incorporated as a company limited by guarantee without share capital (CLG) and the second most prevalent form (5.7%) was that of co-operative (Industrial and Provident Society).⁶ Almost three-quarters (73.4%) were standalone local organisations, and 19.7% were part of or associated with 'parent' organisations.

Most respondents had applied for charitable status (60.3%) to access grants and social investment funding, to safeguard the social enterprises' social mission, to gain charitable tax exemption, and to safeguard their reputation.

In terms of finances, 26.6% of respondents reported an annual turnover (2019) of 'less than €50,000' (which was the most frequent response).

SUITABILITY OF LEGAL FORM

The majority of respondents believed that the legal form of their social enterprise met their current or future requirements (59%). However, close to one-quarter believed that it did not. Two-thirds of respondents (66.9%) believed that a distinct legal form was required for the social enterprise sector. In terms of the constraints that a distinct legal form could address, the following were identified by respondents:

- Provide clarity and set boundaries on social enterprise activity (including the degree of trading activity, distribution of surplus and dividends, private shareholding, etc).
- Recognition of the sector and of social enterprise activities.
- Facilitate management staff to participate in decision-making and governance structures (e.g., board membership).
- Offer an alternative to charitable status, while safeguarding the social mission (e.g., through an 'asset lock'), thereby validating the social credentials of the social enterprise.
- Enable access to equity finance and investor capital and payment of dividends (by facilitating private shareholding).
- Enable employees to benefit in the form of a limited shareholding.
- Overcome compliance issues – there was a view that current reporting and compliance requirements (charitable and company) were too onerous, and deterred volunteerism on governance structures, and that a new legal form could mitigate these.
- Enable directors to receive payment for their participation (charitable status precludes directors' remuneration).⁷
- Provide tax benefits through a designated social enterprise status.

As regards the features of a dedicated legal form, there was broad consensus that it should ensure that the

⁵ Activities that social enterprises were engaged in included education and training services, health and wellbeing services, community centres, enterprise development, tourism/heritage services, services for people with disabilities, arts activities, sports and leisure, IT and technology, environmental activities, catering and cafés, retail, eldercare, childcare, re-use, recycling and green economy, community transport, social finance provision, Irish language promotion, recreation, and housing.

⁶ With a small number of co-operatives incorporated as CLG.

⁷ For organisations with charitable status, no director can be an employee or receive any remuneration other than in very specific circumstances (as set out in Section 89 of the Charities Act, 2009).

assets of the social enterprise are dedicated to social benefit (an ‘asset lock’); that it should require annual reporting of social outcomes; and that it should place limits on distribution of profits/surpluses. As regards other features, the majority believed that directors should not be permitted to financially benefit (even though this was identified by some as a significant constraint given current legal forms), and that private shareholding should not be facilitated in a dedicated legal form.

Responses to attitudinal statements in the survey:

- 80.8%⁸ agreed or strongly agreed that a distinct legal form for social enterprises would provide clarity and boundaries on what constitutes social enterprise activity (while 4.9% disagreed/strongly disagreed)
- 41.9% agreed or strongly agreed that current legal forms could be used to accommodate the governance and ownership needs of social enterprises (while 23.5% disagreed/strongly disagreed)
- 51.1% agreed or strongly agreed that a distinct legal form could provide for private shareholding in social enterprises while safeguarding the social/environmental mission (while 13.7% disagreed/strongly disagreed)
- 59.3% disagreed/strongly disagreed with the statement that the social enterprise sector is still developing in Ireland and it is premature to consider a distinct legal form (while 22.2% agreed/strongly agreed)
- 77.2% agreed or strongly agreed that a distinct legal form would enable social enterprises to attract donors, grants, and investors (while 2.8% disagreed/strongly disagreed)
- 54.3% disagreed or strongly disagreed with the statement that existing legal structures are sufficient, and no distinct legal structure is required.

WIDER CONSULTATIONS

The themes and views expressed in the wider consultations are summarised below.

Summary of themes and issues in consultations

Theme	Summary of finding and issues
Clarity on enterprise activity	<ul style="list-style-type: none"> - Different views on how broadly social enterprise can be interpreted by the public (perception of entities which have limited traded income; or enterprises closer to private sector/corporate social responsibility operations). - Some emphasised the importance of inclusive governance (participatory or democratic decision making structures). - A view that the broad definition of social enterprise as articulated in national policy facilitates the development of the sector. - A view that formalising the sector (in a legal form) should follow from sector-wide discussion on principles and criteria that underpin social enterprise.⁹ - For others, issues of definition and identity are not the primary consideration.
Recognition, validation, and charitable status	<ul style="list-style-type: none"> - Validation is key for generating trust and safeguarding social mission – a dedicated legal form could potentially offer this to distinguish social enterprise from mainstream enterprise and to enhance awareness among the public and funders. - A perception that validation (in the form of charitable status) is a requirement of some State funding¹⁰ but precludes access to others (e.g., enterprise-related supports).

⁸ Of those who answered the question.

⁹ For example, with reference to the criteria developed by EMES (the European research network for social enterprise) and also the principles of co-operation.

¹⁰ It is important to note that State funding incorporates a wide range of funders, some of which may not be familiar with social enterprise as a concept. Funding bodies that were engaged as part of this research (that were familiar with social enterprise) confirmed that charitable status is not a requirement to access funding.

	<ul style="list-style-type: none"> - The need for an alternative to charitable status identified (as it is not suited to some social enterprises). - General agreement that an ‘asset lock’ is important safeguard the social mission. - A dedicated legal form could provide validation while enabling flexibility in some areas: e.g., enabling the executive function to participate on governance structures (precluded under charitable status). Others assert governance risks associated with this (e.g., manager-dominated governance structures). - A dedicated legal structure could enable directors to be paid (precluded under charitable status) – some oppose this. - Other forms of certification and validation (and standards) were emphasised, other than legal form. Standards or certification were viewed as crucial.
Social enterprise life-cycle issues	<ul style="list-style-type: none"> - Early stage social enterprises/promoters need to be supported (as legal incorporation may be too onerous) – support mechanisms needed (e.g., ‘incubation’ initiatives for social enterprise ideas). - Need for reporting and compliance which is graduated (depending on turnover). - Scaling of social enterprise activity through equity investment is not possible through CLG and necessitates the establishment of subsidiaries (to facilitate the issuing of shares). A dedicated legal form could facilitate private shareholding to enable access to equity while maintaining an asset lock¹¹. - A co-operative structure could facilitate equity finance, although the co-operative model is not fully utilised as a form of social enterprise¹² (limited use, and understanding, of the co-op model).
Feasibility of a dedicated legal form and risks	<ul style="list-style-type: none"> - Establishing a dedicated legal form would be a significant undertaking by the State, as evidenced with the scale of the legislation involved in the Companies Act 2014 and the current task of revising the Industrial and Provident Society legislation (the law that applies to co-operatives). - If a dedicated legal form was pursued, a high threshold of need would be required. Some of the issues may be resolved by using existing legal forms. - Projecting the future needs of the sector and a clear vision for its potential could make the case for a dedicated legal form (regardless of current situation). - A view was expressed that the sector is evolving, and future needs may not be known. - A risk that a dedicated legal form would become a default or expected legal form for social enterprises.

¹¹ Similar to the UK’s Community Interest Company (CIC) with shareholding.

¹² Notwithstanding a view by some that the co-operative form, inclusive of private shareholding, diverges from the national definition of social enterprise.

CONCLUSIONS

This research focused on the following three questions, which are addressed below.

Question 1. What are the barriers experienced by social enterprises in Ireland as they relate to legal form?

The key barriers identified in the research process included:

- Lack of recognition (principally – although not exclusively – among State agencies) for social enterprise activity and difficulties in securing State funding owing to a limited awareness or acceptance of social enterprise as a legitimate activity for funding.
- A perception that charitable status is a requirement to gain support from some funders, which presents difficulties in cases where it is not an appropriate model for some social enterprises (e.g., with regards to managers' participation on boards, remuneration of directors). At the same time, having charitable status may preclude social enterprises from gaining support from other funders.
- Compliance issues that can arise from legal forms, which act as disincentives for voluntary directors, or for promoters of social enterprises (e.g., early-stage or small-scale social enterprises).
- Difficulties in securing equity finance arising from the CLG legal form as this form does not facilitate private shareholding (i.e. no share capital).

Question 2. Would a dedicated legal form benefit the sector and, if so, what form should it take?

For many, the benefits that a dedicated legal form could provide would include:

- Recognition of social enterprise as a legitimate form of enterprise, which is distinct from both the private and broader not-for-profit sector.
- An alternative to charitable status, but which establishes the sector's credentials among funders, establishes trust with stakeholders, and safeguards the social mission of social enterprises (e.g., through an 'asset lock').
- Support for the development of the sector through limiting compliance requirements for voluntary directors (particularly social enterprises with a small turnover), while facilitating the scaling of social enterprises through enabling some private shareholding (and access to equity finance).
- The above benefits would attract individuals to promote, develop, work in and volunteer in social enterprises.

Some survey respondents advocated for a dedicated legal form to derive from an adaptation of the co-operative (as in the case of some EU countries), but the predominant view referenced CIC in the UK, which is derived from company law. The broad consensus arising in the survey was that there should be limits on the distribution of profits, and an asset lock.

If access to equity is a key requirement for the development of the sector, and if a dedicated legal form was to be established on this basis, this would require some provision of private shareholding. This, and the ability of board members to gain financial benefit, were points of divergence in the research.

There was also a view that a dedicated legal form might not benefit the sector as it would involve placing boundaries on a sector which is evolving and where there are different views on the concept of social enterprise and the principles underpinning it.

There was a concern that a dedicated legal form could present a risk of becoming the default or expected legal form for social enterprises, even if its characteristics were at odds with the predominant structure and governance of social enterprises currently constituted. If a dedicated legal form is the means by which recognition and support for the sector is advanced, it is logical that social enterprises not adopting this form would be disadvantaged in terms of

this recognition.¹³ This perspective maintains that any potential dedicated legal form should reflect a sectoral agreement on principles of social enterprise activity.

QUESTION 3. WOULD A DEDICATED LEGAL FORM BE NECESSARY FOR THE SECTOR?

Many of the barriers identified in the consultation were less to do with legal form, and more to do with recognition, policy, governance issues, and awareness of social enterprise. Some constraints identified by survey respondents and some interviewees related to charitable status rather than legal form (it should also be noted that charitable status was regarded as essential for many social enterprises).

Charitable status is not suitable nor applicable for some social enterprises, and where this is the case, it points to the need for alternative means of validating social enterprise activity. The need for regulation or standards was identified and, while safeguarding the social mission (and assets) and establishing trust and recognition among stakeholders is important, a dedicated legal form may not be necessary or the only way to achieve these.

The argument for a dedicated legal form makes the point that a legal form could provide a framework for the future development of the sector, to facilitate its advancement and scaling. This is a strong argument, but there remains a lack of consensus about what this legal form should facilitate, and this was reflected in the differing opinions about what features a dedicated legal structure, if one was pursued, should comprise. This points to the wide range of views and interpretations of social enterprises – reflecting the ‘spectrum’ of social enterprise activity and definitions.

Some of the barriers identified could be alleviated by greater use of existing legal forms, and it is noted that the predominant form of legal form (CLG) does not preclude the payment of directors, including managers. The establishment of wholly owned subsidiaries could be used to acquire equity finance, even though it was the view of a number of people consulted that these can be viewed negatively (or suspiciously) by some State agencies. The forming of such structures can be expensive, and legally complex, and may require specific supports. Likewise, the awareness among funding bodies or State agencies of these structures and their purposes may need to be enhanced.

Even if a dedicated legal form for social enterprises is to be pursued, the above issues would still need to be addressed (outside of a dedicated legal form). The recommendations in the research point to the need for greater engagement and support on these issues, rather than pursuing a dedicated legal form, at least in the short-term.

SUMMARY OF RECOMMENDATIONS

While a dedicated legal form might benefit the social enterprise sector, the successful pursuit of one would require a compelling argument, and a high threshold of necessity. The research finds that the argument for a dedicated legal form (at this point in time) is not sufficiently compelling for two reasons:

- 1) The establishment of a dedicated legal form is not necessary to address the barriers identified, and
- 2) There is a significant divergence of opinion as to what form a dedicated legal form would take.

However, the research recommends a series of actions to address the issues identified. These should first be pursued, and the need for a dedicated legal form could be reconsidered based on the resolution of these issues and the development of the sector.

1. There is a need to support social enterprises to maximise the use of current legal forms to meet their needs. Clarity around the use of existing legal forms to provide for the features identified in the research should be provided.

¹³ It should not be assumed that social enterprises would adopt a dedicated legal form. For example, in Scotland, less than one in five social enterprises have adopted the CIC form there.

- This could take the form of model rules for all company forms.
 - Guidance and model rules should include supporting the use of subsidiary and holding company models for multiple-activity social enterprises.
 - Organisations such as the Irish Co-Operative Organisation Society (ICOS) should develop specific programmes to highlight the advantages of the co-operative model as a legal form which could be used by social enterprises, and to support social enterprises in use of the co-op model.
2. Expectations of funders and funding eligibility: perceptions around funding eligibility arose as significant issues. The actual requirements and eligibility for funds needs to be clarified. There is a perception that charitable status is required to avail of certain public funding programmes, and that it would be a barrier to others.
 - There is a need for ongoing awareness-raising (and training) activities in relation to eligibility for funding and social enterprise with public bodies (including enterprise funding bodies, but also wider funders and public bodies including the Health Service Executive [HSE], Department of Employment Affairs and Social Protection, local authorities, and others).
 3. There is a need for a sector-wide discussion on issues of identity and principles and criteria of social enterprise, to work towards a shared understanding around social enterprise, to accommodate the perspectives raised around the ‘identity’ of the sector.
 4. There is a need for some form of ‘standard’ or certification for social enterprises, particularly for those social enterprises where charitable status is not appropriate. There are a range of models and practices in use, some of which are identified in this research. However, an adequate system of measuring quality needs to incorporate a set of principles underpinning social enterprise activity.
 5. Consideration should take place as to how specific incentives and exemptions (including tax exemptions) could be utilised to apply to social enterprises (regardless of legal form).¹⁴
 6. Issues that relate to incentivising and supporting social enterprise activity should be explored. Models of support for early-stage social enterprises (e.g., an incubator-type model of support) or supports around merging or amalgamating social enterprises to support scaling of the sector should be developed as concepts and explored for how they might be piloted.
 7. For social enterprises that are scaling, and require private equity investment, models and uses of existing legal forms (for example, establishment of Designated Activity Companies with share capital) should be explored and documented. Consideration should be given to applying legal resources to social enterprises which are actively pursuing these forms of finance.
 8. The needs of social enterprises that arise from their legal form (and their effective use of current legal forms) should continue to be monitored and explored.

¹⁴ For example, there are tax exemptions that apply to certain approved activities, such as sporting bodies.

1. INTRODUCTION AND CONTEXT

This research has been undertaken as part of the Department of Rural and Community Development's National Social Enterprise Policy for Ireland. It was commissioned by Rethink Ireland and funded by the Department of Rural and Community Development.

In this section, an overview of the policy context, particularly as it relates to legal form, and the European context is outlined.

1.1 IRISH POLICY CONTEXT AND THE ISSUE OF LEGAL FORM

In Ireland, a number of government and policy documents have included commitments for supporting social enterprises. The *Programme for Government* (2011) committed to promoting 'the development of a vibrant and effective social enterprise sector.'¹⁵ It also made the commitment to 'instruct agencies to view social enterprises as important stakeholders in rejuvenating local economies' (Programme for Government, 2011, p. 13).

The Forfás report, *Social Enterprise in Ireland: Sectoral Opportunities and Policy Issues*, was published in 2013 arising from a commitment by the Government (in the *Action Plan for Jobs 2012*) to commission a report on the potential of social enterprise to create jobs. The Forfás report recommended the development of an 'enabling framework' for social enterprises and included 22 recommendations to government under the themes of policy development, capacity building for social enterprises, access to procurement opportunities, funding and finance, leadership and community support, and governance.

In 2017, the Government assigned policy responsibility for social enterprise to the newly established Department of Rural and Community Development. The strategic objectives of the Department include the advancement of the economic and social development of both rural and urban communities, and enabling communities disadvantaged by location or social issues to reach their full potential. As part of *Realising Our Potential: The Action Plan for Rural Development*, published in 2017, the Government made a commitment to develop a national policy on social enterprise.

To progress this objective, a research partnership was established between the Department of Rural and Community Development and the Social Finance Foundation (SFF) to produce a research report to bring clarity to what constitutes the social enterprise sector in Ireland and to provide background information on the sector to develop the policy.¹⁶ This report, *Social Enterprise in Ireland: Research Report to support the development of a National Social Enterprise Policy*, included a consultation process which indicated that just over half of the respondents (51%) were in favour of the introduction of a new legal form that is specific to social enterprises (12% were against, and 37% were unsure). Those in favour of a new legal form offered the following reasons for supporting this view:

- Greater recognition of this new form of business model
- Clarity of definition or differentiation of social enterprise
- Ease and appropriateness of formation
- Potential to open new forms of financing
- More appropriate, responsive, and streamlined regulation
- Additional flexibilities or protections for voluntary directors

As part of the same research, analysis of social enterprise in other jurisdictions was undertaken by Dr. Aisling Moroney and Dr. Mary O'Shaughnessy from University College Cork. This observed that 'a key factor in the development of the sector seems to lie in legislating for organisational forms which recognise the distinct identity and needs of social

¹⁵ Programme for Government, 2011, p. 13

¹⁶ Social Finance Foundation and Department of Rural and Community Development (2018): *Social Enterprise in Ireland: Research Report to support the development of a National Social Enterprise Policy*

enterprises. The emergence of legal frameworks is a common trend across countries with strong and/or growing Social Enterprise sectors' (p. 39). It also identified the lack of a specific legal form for social enterprises as a weakness of the sector in Ireland.

Arising from the research, a recommendation was made to undertake further research in relation to difficulties experienced by social enterprises operating within the current legal structures, and an assessment of the need for a distinct legal form for social enterprises.

Subsequently, the Department of Rural and Community Development published its *National Social Enterprise Policy for Ireland* in 2019. The social enterprise policy includes 26 actions under the following three objectives:

- Building awareness of social enterprise
- Growing and strengthening social enterprise
- Achieving better policy alignment

The national policy defines social enterprise as:

A Social Enterprise is an enterprise whose objective is to achieve a social, societal, or environmental impact, rather than maximising profit for its owners or shareholders.

It pursues its objectives by trading on an ongoing basis through the provision of goods and/or services, and by reinvesting surpluses into achieving social objectives.

It is governed in a fully accountable and transparent manner and is independent of the public sector. If dissolved, it should transfer its assets to another organisation with a similar mission.

The national policy states that 'the definition of social enterprise is evolving nationally and internationally and is likely to continue to do so as social enterprises themselves adapt to new societal challenges. The definition will also evolve as national and local governments and wider society understand more fully the nature of social enterprise and the contribution they make to social and economic development. (p.8)

Regarding legal structures, the policy states that

Internationally, there is no uniformity in legal structures for social enterprises. For example, the UK has put in place a bespoke legal form for social enterprises called Community Interest Companies, whereas in Italy social enterprises can be legally recognised as such, irrespective of their legal form.

In Ireland, many social enterprises adopt one of the existing legal structures provided for through the Companies Act. The Company Limited by Guarantee (CLG) is the most common form currently used by social enterprises.

The consultations undertaken during the preparation of this Policy called for greater clarity on the current legal structure options for social enterprises and social entrepreneurs, along with a call to examine options for bespoke legal structures in the longer term for social enterprises. The consultation also acknowledged the complexity around introducing new legal forms.

The national policy makes a commitment that 'Government, in collaboration with relevant stakeholders, will conduct further research and analysis on the operation of social enterprises within existing legal structures and assess the potential value of a distinct legal form for social enterprises' Action no. 19).¹⁷

This research report was commissioned under the auspices of this action.

¹⁷ Policy measure 19.

1.2 EUROPEAN CONTEXT

1.2.1 EUROPEAN LEGAL POSITION ON SOCIAL ENTERPRISE

In a mapping exercise undertaken by the European Social Enterprise Law Association (2015),¹⁸ the authors identified dedicated legal forms in countries such as the UK, France, and Italy which are exclusively designed for social enterprises, through the tailoring and adaptation of existing legal forms. In all, 16 legal forms or legal statuses that recognise and regulate social enterprise activity were identified in their research.

The authors make a clear distinction between legal form and legal status:

- Legal form relates to the fundamental legal structure of an organisation. For example, in Ireland, (and not specific to social enterprise), CLG is a legal form, as is Company Limited by Share.
- Legal status (which attaches to a number of legal forms) enables particular treatment of legal forms, where they meet certain characteristics. For example, in Ireland (again not specific to social enterprise), charitable status is a legal *status* (and not a legal form).

The authors note that the predominant legal provisions derive either from co-operative law (most notably in Italy, in the form of the constituted 'social co-operative') or from company law (most notably, in the UK with the Community Interest Company (CIC), which includes the options of without and with share capital). The model of CIC is regularly referred to as a possible model for application in Ireland, given that Ireland's legal system is similar to that of the UK, and that the company form (notably that of CLG is commonly used by social enterprises).

1.2.2 THE RATIONALE FOR A DEDICATED LEGAL FORM

In terms of the function of legal form as it relates to social enterprise, Fici (2015) asserts that 'the primary, essential and irreplaceable role of social enterprise law is (and should be) to establish a precise identity of social enterprises and to preserve their essential features ... having a specific identity ... conveys objectives and modes of action – that meets the interests of social enterprises' founders and members, and is consequently, a precondition for the existence and development of this type of business organisation (p. 10).¹⁹

Fici asserts that legal form allows the social enterprise to 'signal ... the terms that the firm offers to other contracting parties, and to make credible commitment not to change those forms'.

According to Fici, there are a number of reasons why legal form for social enterprise is important:

- It can help justify policies (of support) under EU competition and State aid law. The specific (tax) treatment of Italian co-operatives was held by the European Court of Justice in 2011 to be lawful because of a specific EU statute that distinguished co-operatives from other legal forms. Hence, having an EU-wide statute enabled supportive policies towards co-operatives.²⁰
- To prevent the creation and operation of 'false' social enterprises which could cause damage to the sector's image.
- To establish clearer boundaries between social enterprise and other concepts such as corporate social responsibility (CSR), and to avoid confusion between sectors which could jeopardise the independence of the non-profit sector from the for-profit sector.

¹⁸ ESELA (2015) *Social Enterprise in Europe: Developing Legal Systems Which Support Social Enterprise Growth*. Prepared by Bates Wells and Braithwaite London on behalf of ESELA.

¹⁹ Fici, A (2015) 'Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective', *Euricse Working Papers*, 82, 15.

²⁰ Note: Attempts to introduce a European-wide status which was originally considered as part of the Social Business Initiative has not been progressed, due to the diversity of legal and policy environments across Europe.

1.2.3 DEFINING SOCIAL ENTERPRISE

Related to the above issues of boundaries, the existing definitions of social enterprise are wide and country-specific. According to Borzaga et al. (2020), social enterprise includes a wide range of organisations and there are various perspectives on social enterprise. The issue of defining social enterprise is complex.²¹ O’Byrne et al. (2015) characterises the different perspectives on social enterprise thus:

There are two bodies of thought governing social enterprises and their relationship to the third sector and the social economy. The first places the social enterprise within the third sector at boundaries between co-operatives and non-profits and characterises them as subgroups of the social economy (Defourny, 2001). Conversely, US thinking places social enterprises nearer to the private and public sectors rather than at the core of the third sector (Leadbeater 1997; Westall, 2001). However, EMES²² offers a further perspective which gives still greater insight into the third sector. For EMES, the central criterion for situating organisations within this sector is, “... the fact that the organisation is governed in a way that ensures that the potential surplus is used and reinvested alongside social criteria. ...such organisations would then not have to be non-profit, but they would have to be not-for-profit” (Evers, 2012).²³

The European Commission’s 2020 study on social enterprise (a map of social enterprises and their eco-systems in Europe)²⁴ noted that, of the 28 countries studied, 20 have a national definition of social enterprise; but, in six of these countries, the definition does not require social enterprises to have ‘inclusive governance’ models. Similarly, in several of the remaining nine countries that do not have a national definition, inclusive governance is not seen as a defining characteristic of social enterprise. It also noted that in some countries (Finland, Lithuania, Poland, Slovakia, and Sweden), the notion of social enterprise as articulated in national laws and/or policy documents, narrowly focuses on work integration social enterprises (WISEs). This restricted definition excludes enterprises pursuing societal missions such as provision of social and educational services, environment, wellbeing for all, or solidarity with developing countries.

In terms of legal form, the same study noted that, although growing in number, legally or institutionally recognised forms of social enterprise (where these exist) do not capture the ‘de-facto’ universe of social enterprise. De-facto European social enterprises are often ‘hidden’ among existing legal forms, most notably amongst:

- Associations and foundations with commercial activities
- Co-operatives serving general or collective interests
- Mainstream enterprises pursuing an explicit and primary social aim

In Ireland, social enterprises (as other third sector organisations) adopt a range of legal forms, including those of a company (in all its various forms), an association, and a trust. As with social enterprises in general, co-operatives can adopt a range of legal forms (as an Industrial and Provident Society [IPS] or as a CLG). Co-operatives commit to seven co-operative principles which are established by the International Co-operative Alliance.²⁵ Similarly, charities can avail of a range of legal forms (charitable status not being a legal form). Regarding this, the Law Reform Commission noted in 2005 that ‘this creates obvious difficulties in any attempt to codify any set of rules to apply across all the different

²¹ European Commission (2020) *Social enterprises and their ecosystems in Europe. Comparative synthesis report*. Authors: Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales, and Chiara Carini. Luxembourg: Publications Office of the European Union. Available at <https://europa.eu/!Qq64ny>

²² The EMES criteria are outlined in Appendix 1. EMES is a European social research network.

²³ O’Byrne, D., Lean, J., Moizier, J., Walsh, P., Dell’Aquila, E., and Friedrich, R. (2015) *Social Enterprise in the European Union: A Review of Policy. Social & Public Policy Review*. 9.

²⁴ European Commission (2020) *Social enterprises and their ecosystems in Europe. Comparative synthesis report*. Authors: Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales, and Chiara Carini. Luxembourg: Publications Office of the European Union. Available at <https://europa.eu/!Qq64ny>

²⁵ The definition, values and principles of cooperation are outlined in Appendix 2. <https://www.ica.coop/en/cooperatives/cooperative-identity>

legal structures' (p.17)²⁶. Having considered the issues involved, the Commission recommended the introduction of a new form of legal structure for charities, to be called the Charitable Incorporated Organisation.

1.3 RESEARCH PROJECT

This research has been undertaken as part of the *National Social Enterprise Policy for Ireland*. It is commissioned by Rethink Ireland and funded by the Department of Rural and Community Development.

Its objectives are to consider:

- What are the barriers experienced by social enterprises in Ireland as they relate to legal form?
- Whether a dedicated legal form would benefit the sector and, if so, what form should it take?
- Whether a dedicated legal form would be necessary for the sector.

1.3.1 METHODS

The methods employed comprised:

- Desk research (including policy documents, research reviews on social enterprise at national and EU-level)
- Survey of social enterprises throughout Ireland
- Semi-structured interviews with 33 individuals from 27 organisations²⁷ and two focus groups with 10 individuals

²⁶ Law Reform Commission (2006) *Report: Charitable Trusts and Legal Structures for Charities*. Dublin: LRC 80-2006

²⁷ Comprising policymakers, social enterprises, network and advocacy organisations, academics, local development organisations, social finance/social impact investors, regulators, and funders.

2 SURVEY OF SOCIAL ENTERPRISES

A survey of social enterprises operating throughout Ireland was undertaken as part of this research. This survey sought to identify the current situation of social enterprises (for example, in terms of their trading situation and turnover, age, activities, structure, legal form) and views around challenges and legal form. The survey therefore sought to generate information on these social enterprises that went beyond legal form.

2.1 DEVELOPING A DATABASE OF SOCIAL ENTERPRISES

In order to develop a database of social enterprises, notice of the survey was disseminated and publicised through national networks, social enterprises, Community Service Programme (CSP) recipients, local development companies, social finance providers and funding bodies, and other stakeholders.

Social enterprises were asked to register their interest in participating in the survey by providing their contact details which were included on the database, from which database survey recipients were selected.

2.1.1 SELECTION OF RECIPIENTS

The criteria for inclusion were that social enterprises would be registered in Ireland, have a legal form (or be part of a wider organisation with a legal form) and that they should be trading. In addition, the survey sought to ensure that all four sub-groups of social enterprise activity as outlined in the *National Social Enterprise Policy for Ireland* should be represented. These are WISEs²⁸, 'deficient demand' social enterprises,²⁹ enterprise development social enterprises,³⁰ environmental social enterprises,³¹ and social enterprises contracted with the public sector to deliver public services in disadvantaged areas and communities.

As there is overlap across these categories and each one can encompass a broad range of activities, coverage of groups operating in a range of the following activities was sought.

²⁸ WISEs support disadvantaged people to prepare for, and participate in, the labour market.

²⁹ 'Deficient demand' social enterprises seek to meet a demand for goods and services within a community where there is insufficient demand for the operation of a regular market due to inherent economic and social disadvantage or low density of population.

³⁰ Enterprise development social enterprises support the creation of other enterprises (e.g., through the provision of office space and facilities).

³¹ Environmental social enterprises focus on environmental sustainability.

Table 2.1 Sectors of activity targeted in the survey
Childcare (including pre-school and after-school services)
Eldercare (including home care, meals, and day-care services)
Sports and leisure activities
Services for people with disabilities (e.g., targeted education, training, and other services)
Education and training services
Tourism/heritage services and promotion
Community centres
Enterprise development and support (including enterprise centres)
Re-use and recycling initiatives
Environmental/area enhancement
Community transport
Arts, culture, and community media production
Food and catering services (including community cafés)
Community retail (including markets)
IT and technology/digital hubs
Buildings maintenance and repairs services
Green economy/renewable energy initiatives
Health and wellbeing enterprises

Purposive sampling was utilised. The rationale for using this form of sampling is that this approach allows the researchers' judgement to be used to select organisations that are best suited to answer the research question and meet the above criteria.³² In addition, this approach is suited when combined with qualitative research.³³

2.1.2 ADMINISTRATION OF THE SURVEY AND RESPONSE RATE

The survey's subject areas included legal and organisation structure; turnover, challenges, sustainability, and questions relating to legal form.

The online survey was sent to 347 recipients via email. The survey was publicised through social media and was promoted at social enterprise events. A reminder email was sent (prior to, and following, the deadline). A final reminder was sent prior to an extended closing date of the survey. A total of 179 responses were received.

³² Saunders, M., Lewis, P., and Thornhill, A. (2007) *Research Methods for Business Students*, Harlow; Prentice Hall.

³³ Ibid.

2.2 LOCATION OF SOCIAL ENTERPRISES

The table below outlines the county of origin of social enterprises that could be identified from the survey (157 social enterprises).

Table 2.2 Location of respondents (n=157)

Carlow	1	Longford	4
Cavan	8	Louth	7
Clare	3	Mayo	5
Cork	10	Meath	3
Donegal	4	Monaghan	2
Dublin	41	Offaly	5
Galway	19	Roscommon	3
Kerry	3	Sligo	2
Kildare	3	Tipperary	7
Kilkenny	1	Waterford	7
Laois	1	Westmeath	1
Leitrim	5	Wexford	1
Limerick	9	Wicklow	2

2.3 FEATURES OF THE LOCAL ENTERPRISES

The survey included a question about the features of the survey respondents' social enterprises, to establish their adherence with the features as set out in the national definition of social enterprise. It also asked respondents whether they regarded their organisation to be a social enterprise (to which the positive response rate was 93.8%).

While most of the survey respondents indicated that their social enterprise activity adheres to these features, it is of note that just under two-thirds selected the feature that 'if dissolved, the social enterprise would transfer its assets to another similar organisation' (often described as an 'asset lock') as applying to their organisation.



Table 2.3 Features of the social enterprises (n=177)

Response options	%	N
The social enterprise has an objective to achieve a social, societal, or environmental impact	93.8%	166
The social enterprise's social, societal, or environmental objectives take primacy over maximising profit for its owners or shareholders	71.8%	127
The social enterprise reinvests surpluses/profits into achieving social objectives	84.2%	149
If dissolved, the social enterprise would transfer its assets to another similar organisation	64.4%	114

Table 2.4 Do you consider your organisation to be a social enterprise? (n=178)

Response options	%	N
Yes	92.7%	165
No	1.1%	2
Not sure	6.2%	11

2.4 AGE AND LEGAL STRUCTURE

2.4.1 AGE OF SOCIAL ENTERPRISES

A significant majority of the social enterprises had been trading for over six years (71.2%).

Table 2.5 When did your social enterprise start trading? (n=177)

Response options	%	N
Pre-start up - not yet trading	5.7%	10
Trading for less than 2 years	7.9%	14
Trading for 2-6 years	15.3%	27
Trading for more than 6 years	71.2%	126

2.4.2 LEGAL STRUCTURE

The majority (71.8%) of respondents were incorporated as a CLG (without share capital). The second most prevalent structure was a co-operative (10 respondents). Eight respondents had no legal structure. The legal structures of respondents are outlined in Table 2.6.

Table 2.6 What is the legal structure of your social enterprise? (n=177)

Response options	%	N
Company Limited by Guarantee (without share capital)	71.8%	127
Co-operative (Industrial and Provident Society)	5.7%	10
Company Limited by Share	3.4%	6
Designated Activity Company Limited by Share	0.6%	1
Designated Activity Company Limited by Guarantee	2.8%	5
No Legal Structure (Unincorporated Association)	4.5%	8
Sole Trader	2.3%	4
Hybrid/Other (please specify)	9.0%	16

The response ‘hybrid or other’ was selected by 16 respondents and included structures such as a CLG, and subsidiaries of a parent organisation (whereby the subsidiary was a company limited by share), and a co-operative registered as a CLG. Some respondents included as their hybrid structure one of a CLG and a registered charity (even though, strictly speaking, these are not hybrid structures).

2.4.3 ORGANISATIONAL STRUCTURE

Many social enterprises are formed by existing organisations and the survey was interested in determining whether – in these instances – separate legal structures were formed for the social enterprise activity, or whether social enterprise activity remained part of the legal structure of the ‘parent’ organisation.

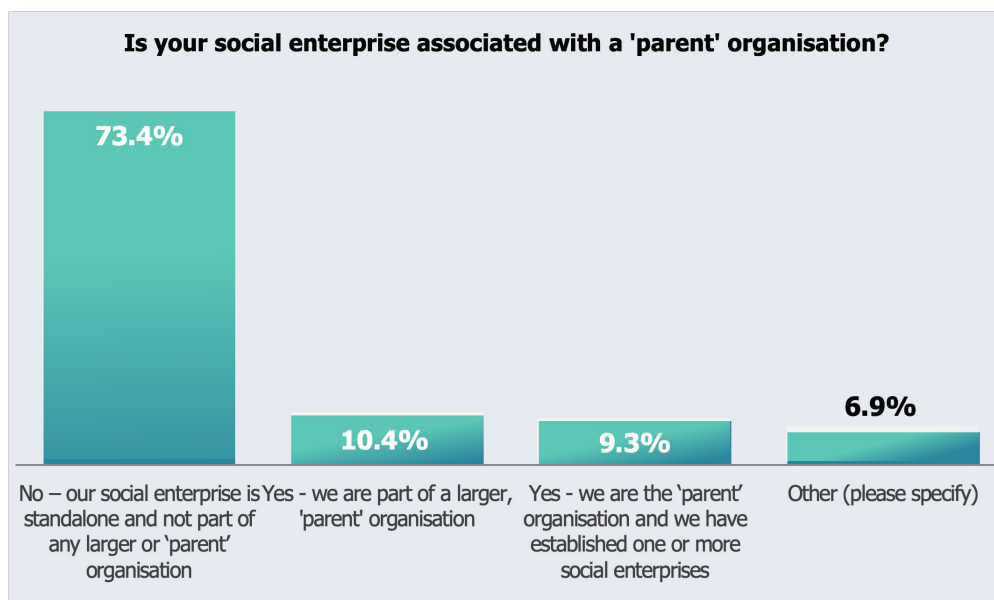
In some cases, social enterprise activity can be established as separate legal entities (and sometimes as wholly owned subsidiaries) for a number of reasons, including separating trading activities and risk from the ‘parent’ or founding organisation.

Almost three quarters (73.4%) of respondents were standalone local organisations. Just under one-fifth (19.7%) were associated with a parent organisation: either being a parent organisation that established social enterprises (9.2%) or were a social enterprise that was formed by a parent organisation (10.4%).

The remaining 6.9% selected ‘other’. These responses included organisations that were also part of a parent organisation, or otherwise affiliated to other organisations (including operating under license with a global organisation, governed by a trust, and operating for the benefit of structures located in other jurisdictions).

Table 2.7 Is your social enterprise part of a ‘parent’ organisation?

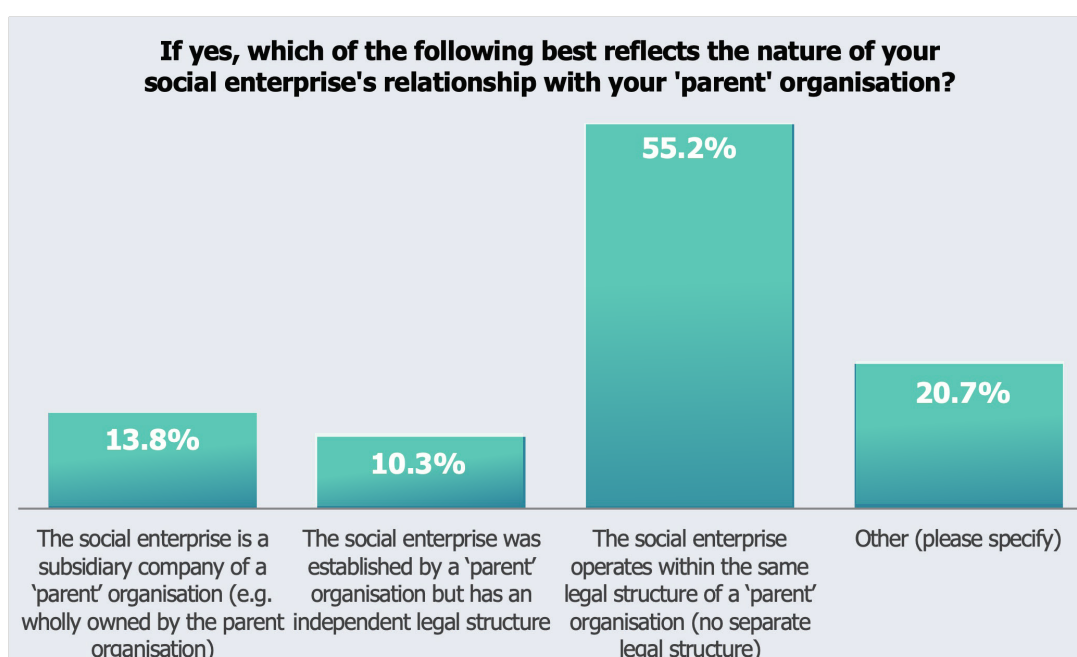
Response options	%	N
No – our social enterprise is standalone and not part of any larger or ‘parent’ organisation	73.4%	127
Yes - we are part of a larger, ‘parent’ organisation	10.4%	18
Yes - we are the ‘parent’ organisation and we have established one or more social enterprises	9.3%	16
Other	6.9%	12



Twenty-nine respondents gave more details on their organisational structure, where the social enterprise was part of a larger or parent structure. The organisations that had formed separate legal structures to the 'parent' organisation (whether or not this parent was itself a social enterprise) were in the minority as indicated below.

Table 2.8 If your social enterprise is associated with a 'parent' organisation, what is the nature of this relationship?

Response options	%	N
The social enterprise is a subsidiary company of a 'parent' organisation (e.g., wholly owned by the parent organisation)	13.8%	4
The social enterprise was established by a 'parent' organisation but has an independent legal structure	10.3%	3
The social enterprise operates within the same legal structure of a 'parent' organisation (no separate legal structure)	55.2%	16
Other (please specify)	20.7%	6

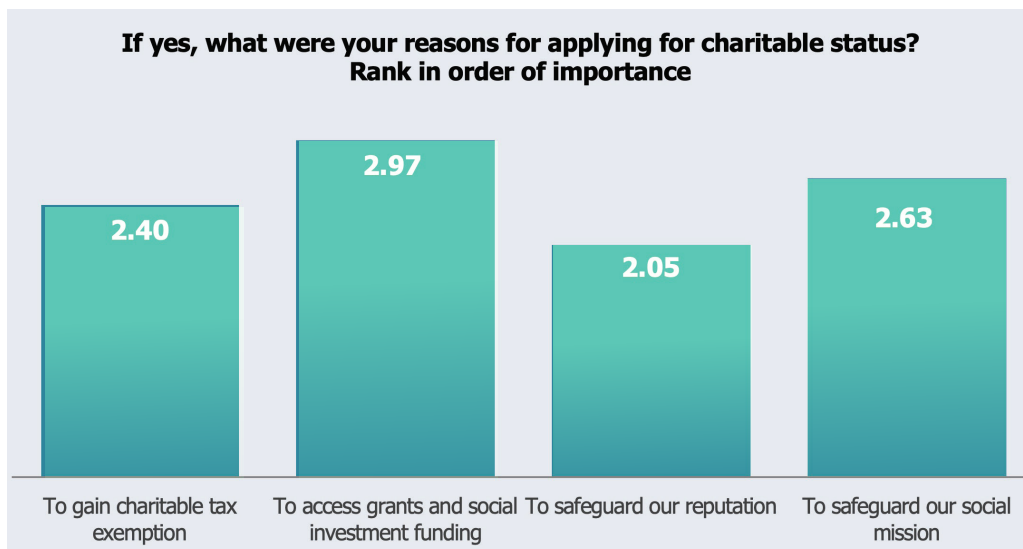


2.4.4 CHARITABLE STATUS

Most respondents had applied for charitable status (60.3%). In reality, however, that figure should be higher because some of those that selected ‘other’ were registered charities.

Response options	%	N
Yes	60.3%	108
No	27.4%	49
Other (please specify)	12.3%	22

Respondents were asked to select from a list – in order of importance – their reasons for applying for charitable status. The principal reasons were to access grants and social investment funding, and to safeguard the social mission.³⁴



Reasons for *not applying* for charitable status included being a wholly-owned subsidiary of a CLG,³⁵ being a sports body, irrelevance of charitable status to the respondent (‘never would – we are not a charity’), burden of compliance and restrictions, no benefit, commercial nature of trading activity, perceptions of incompatibility with co-operatives, and ineligibility. Some of the responses are outlined below:

Charitable Status involves appointing a Board and losing autonomy.

Advised not to, as there was nothing to be gained for us.

We are a co-op, not a charity.

[We] do not have the resources to enable compliance with additional regulation.

There also appeared to be a perception among some that charitable status is not compatible with social enterprise activities, or trading activities:³⁶

We are not interested in operating as a charity and would rather generate sufficient income by trading goods and services.

³⁴ Respondents were asked to rank reasons in order of importance from 1 (the most important reason) to 4 (the least important). The scoring and marking of responses work as follows: a #1 choice has a weight of 4. The #2 choice has a weight of 3. The #3 choice has a weight of 1, and #4 choice a score of 1. The score for each response is based on the average ranking score that it was given by survey respondents.

³⁵ Hence being incorporated as a company limited by share.

³⁶ Generating a trading income does not imply ineligibility for gaining charitable status, and many successful social enterprises are also registered charities.

SIZE OF SOCIAL ENTERPRISE AND CHARITABLE STATUS

Social enterprises (with a high turnover) appeared to be slightly more likely to have applied for charitable status, compared with smaller ones. For example, those in the €150,000–€600,000 annual turnover category accounted for 45% of those that applied for charitable status, while accounting for 33.12% of all survey respondents.

2.5 ACTIVITIES

In total, 157 respondents gave details on their activities. There was an average of three activities identified for each respondent, indicating the range of activities and services that social enterprises provide.

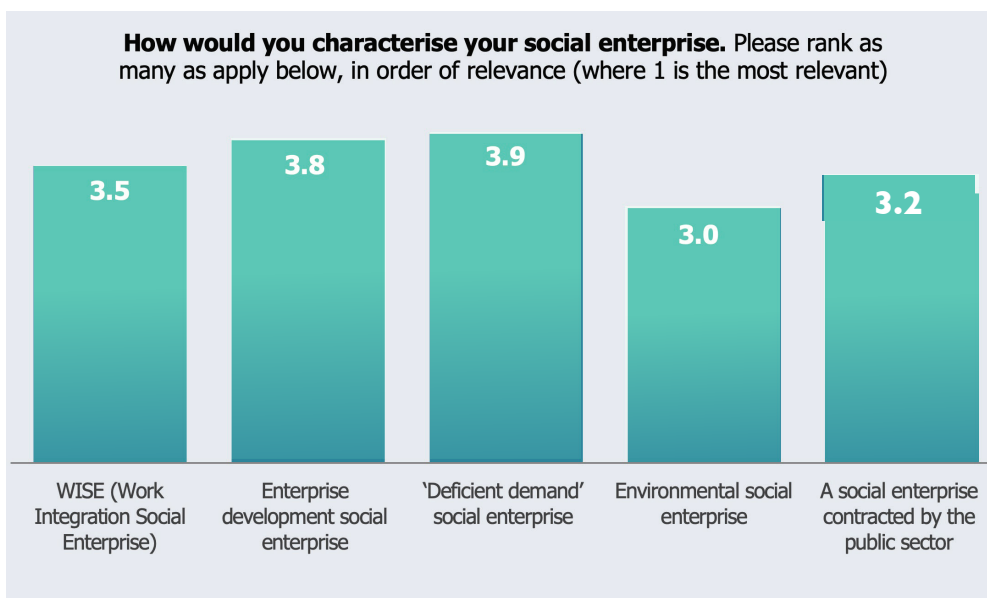
Options	% of responses	No.
Childcare (including pre-school and after-school services)	7.6%	12
Eldercare (including home care, meals, and day care services)	10.8%	17
Sports and leisure activities	14.0%	22
Services for people with disabilities (e.g., targeted education, training, and other services)	17.2%	27
Education and training services	39.5%	62
Tourism/heritage services and promotion	21.7%	34
Community centres	25.5%	40
Enterprise development and support (including enterprise centres)	24.2%	38
Re-use and recycling	8.9%	14
Environmental/area enhancement (e.g., grass cutting, litter picking)	12.7%	20
Community transport	2.6%	4
Arts, culture, and community media production	15.3%	24
Food and catering services (including community cafés)	12.7%	20
Retail (including markets)	12.1%	19
IT and technology/digital hubs	13.4%	21
Buildings maintenance and repairs services	3.2%	5
Green economy/renewable energy	10.2%	16
Health and wellbeing	27.4%	43
Other (micro-finance, advocacy services, community/urban regeneration, community radio, manufacturing/work experience, data analytics, translation, counselling, drop-in centre, hostel, promotion of Irish language, outdoor recreation, production of street and garden furniture, housing, costume hire)	26.1%	41

2.5.1 HOW WOULD YOU CHARACTERISE YOUR SOCIAL ENTERPRISE?

The national policy notes that the spectrum of social enterprise activity in Ireland is broad, and social enterprises take a variety of different forms, including, amongst others:

- WISEs, which support disadvantaged people to prepare for, and participate in, the labour market
- Enterprise development social enterprises which support the creation of other enterprises (e.g., through the provision of office space and facilities)
- 'Deficient demand' social enterprises which seek to meet a demand for goods and services within a community where there is insufficient demand for the operation of a regular market due to inherent economic and social disadvantage or low density of population
- Environmental social enterprises which focus on environmental sustainability
- Social enterprises contracted with the public sector to deliver public services in disadvantaged areas and communities

The survey sought to establish how respondents characterise their social enterprise in terms of these forms. The deficient demand social enterprise followed by enterprise development social enterprise ranked highest overall.



2.6 FINANCES

2.6.1 TURNOVER FOR 2019

The survey included a question asking respondents to estimate their total turnover (including all sources of income) in 2019.

The most frequently arising response was 'less than €50,000' (with more than one-quarter of respondents selecting this option). This includes all form of income, including grants and traded income.

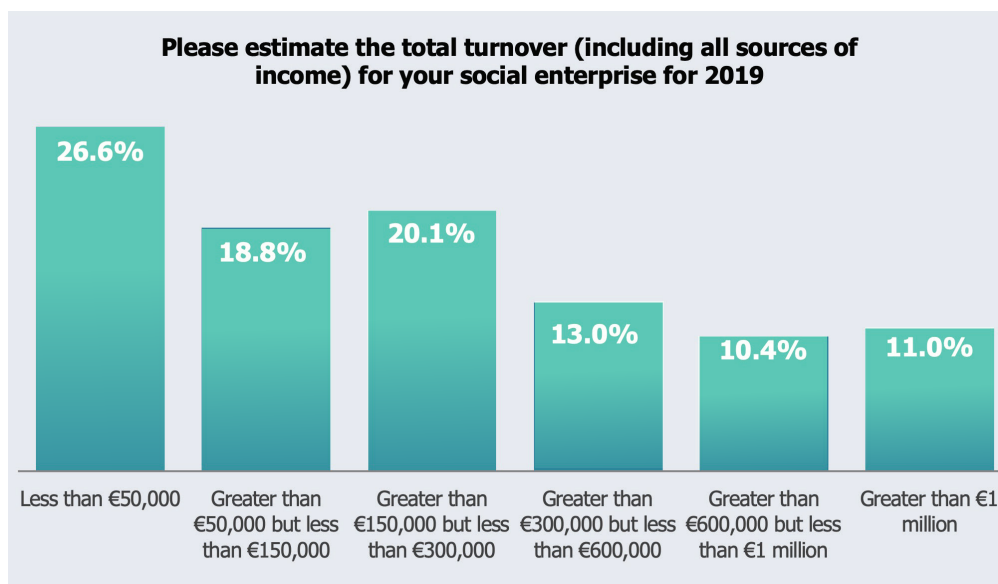


Table 2.11 Total income for 2019 (including traded income and grants)

Options	% of responses	No.
Less than €50,000	26.62%	41
Greater than €50,000 but less than €150,000	18.83%	29
Greater than €150,000 but less than €300,000	20.13%	31
Greater than €300,000 but less than €600,000	12.99%	20
Greater than €600,000 but less than €1 million	10.39%	16
Greater than €1 million	11.04%	17

2.7 FUTURE NEEDS AND CURRENT CHALLENGES

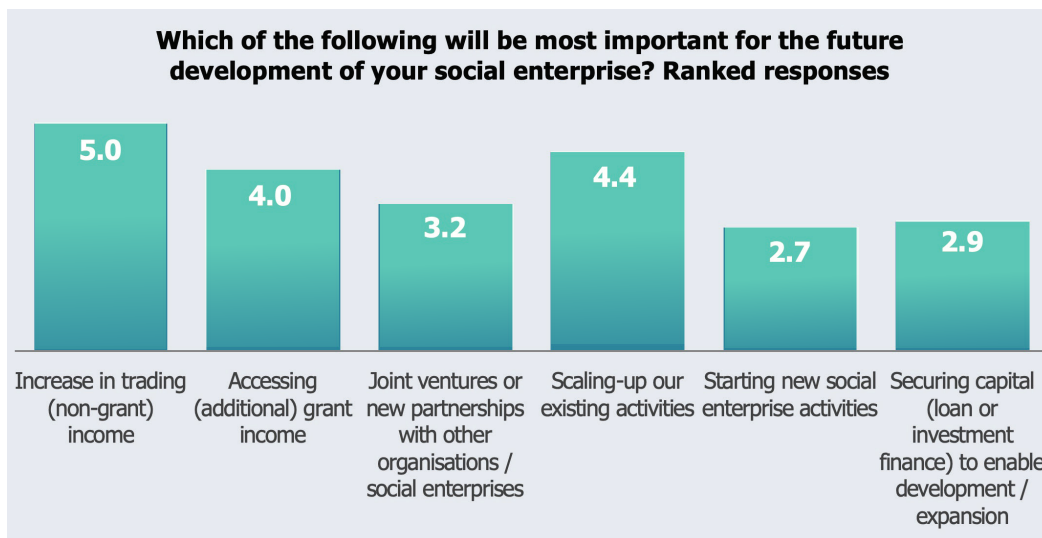
2.7.1 MOST IMPORTANT ISSUES FOR SUSTAINABILITY AND FUTURE PLANS

Respondents were asked to rank the most important issues affecting the sustainability of their social enterprises. Increasing income (trading and grant) were the top two issues, followed by scaling-up/expanding activities and joint ventures or new partnerships. Securing loan finance was ranked lowest.³⁷

Table 2.12 Factors affecting sustainability ranked in order of importance (n=157)

Training need	Score
Increase in trading (non-grant) income	5.01
Accessing (additional) grant income	4
Joint ventures or new partnerships with other organisations/social enterprises	3.24
Scaling-up our existing activities	4.39
Starting new social enterprise activities	2.73
Securing capital (loan or investment finance) to enable development/expansion	2.86

³⁷ Respondents could rank responses in order of significance from 1 (the most significant) to 6 (the least significant). The scoring and marking of responses are as before where those with a higher ranking have a weighted score. An overall average that is calculated (as shown) for each response is based on the average ranking score that it was given by survey respondents.



2.7.2 CHALLENGES

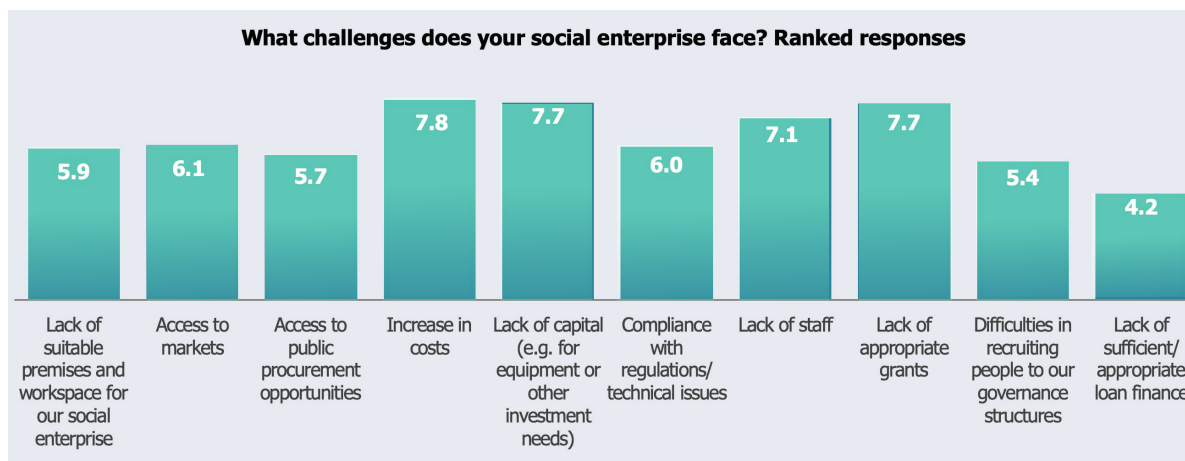
Respondents were asked to rank challenges that may apply to them in order of importance (from a list of potential challenges). They are listed in the table below in order of importance, according to the ranked scores.³⁸

Increase in costs, lack of capital, lack of grants, and lack of staff were the most significant challenges, all scoring over seven. These were followed by access to markets and compliance with regulations/technical issues (both scoring over six).

Table 2.13 Relative importance of challenges facing social enterprises (n=154)

Challenge	Score
Lack of suitable premises and workspace for our social enterprise	5.93
Access to markets	6.05
Access to public procurement opportunities	5.65
Increase in costs	7.81
Lack of capital (e.g., for equipment or other investment needs)	7.7
Compliance with regulations/technical issues	6
Lack of staff	7.09
Lack of appropriate grants	7.66
Difficulties in recruiting people to our governance structures	5.41
Lack of sufficient/appropriate loan finance	4.15

³⁸ Respondents could rank challenges in order of significance from 1 (the most significant challenge) to 10 (the least significant challenge). The scoring and marking of challenges work as follows: a #1 choice (i.e., most significant challenge) has a weight of 10. The #2 choice has a weight of 9. The #3 choice has a weight of 8, and so on until choice #10 (the least significant challenge) which has a weighting of 1. The score for each response is based on the average ranking score that it was given by survey respondents.



2.8 SUITABILITY OF LEGAL FORM

2.8.1 DOES YOUR CURRENT LEGAL FORM MEET YOUR NEEDS?

The majority of those who answered the question believed that the legal form of their social enterprise met their current or future requirements (59%). However, close to one-quarter believed that it did not.

Table 2.14 Do you believe that the legal form of your social enterprise meets your current or future requirements? (n=157)

Response	%	N
Yes	59.2%	93
No	24.8%	39
No opinion	15.9%	25

Those with charitable status were more likely to report that their legal form met their current or future requirements (an analysis of responses indicates that 66% of those with charitable status believed that it did, compared to 59% of all survey respondents as outlined in Table 2.14 above).³⁹

2.8.2 IF IT DOES NOT MEET YOUR REQUIREMENTS, WHAT FEATURES OF YOUR LEGAL FORM ARE CONSTRAINING YOUR SOCIAL ENTERPRISE?

The themes emerging and some comments from respondents are highlighted below. Some of these are not related to legal form, per se, but related to constraints associated with having charitable status.

VOLUNTARY GOVERNANCE STRUCTURE

Constraints relating to participation on governance structures arises in relation to restrictions on managers becoming members of boards, and for directors to be paid:⁴⁰

Not having a vote at board level, despite being the founder and the person with the vision.

We should be able to pay our directors - this is a business.

³⁹ Notwithstanding the fact that charitable status is not a legal form.

⁴⁰ These are issues that relate not specifically to legal form (e.g., such as CLG) but to the requirements of charitable status (which prohibits payments to directors, other than in very exceptional circumstances). They also relate to the practice and norms in the community and voluntary sector.

FUNDING CONSTRAINTS (INCLUDING THOSE ARISING FROM CHARITABLE STATUS)

For most of the respondents who identified funding constraints, those constraints were related to funders' eligibility criteria. For example, different requirements of funders meant that charitable status enabled access to some funds, but precluded access to others:

Having a registered charity status prevents us from accessing Local Enterprise Office grants.

The expectation from funders, particularly public funding, to have charitable status to access grants.

Difficulty in accessing funds as we are not a charity. It is difficult to explain our business as being "social enterprise".

We were required to seek charitable status to operate labour market programmes on behalf of the State.

For others, funding constraints arose in relation to the non-shareholding aspect of the legal form:

We are unable to access private capital, Enterprise Ireland, or Local Enterprise Office support.

We need a legal form that allows for private investment, that safeguards the social purpose and has special status from the State ... in terms of low/exemption from tax on profits, once those profits are re-invested.

LACK OF RECOGNITION

Some respondents made the point that, in the absence of charitable status, there is no recognition for their not-for-profit status. Others made the general point that there is a lack of understanding and recognition for social enterprise activity:

Lack of clarity and legal basis for social enterprises leads to confusion.

Difficult to prove not-for-profit nature of our social enterprise without Charitable Status.

We are a not-for-profit co-operative. Too corporate for the charity sector, too community-minded for the business supports such as LEOs, we are a square peg forced to fit ourselves into multiple round holes!

There should be a defined 'Social Enterprise' category of business that others can more readily recognise what type of organisation it is and where there is then potential for the government to target better supports to this category.

COMPLIANCE ISSUES

Compliance issues relating to Companies Acts, charitable status, and the Governance Code⁴¹ were noted:

The Governance Code is causing a major problem in recruiting new board members and should be simplified for smaller enterprises.

The multitude of governing authorities, CRO,⁴² and Charities Regulator - a structure comparable to a SCIO⁴³ in Scotland or CIO⁴⁴ in England would be beneficial.

Increasing legal responsibilities and liabilities on voluntary groups is reducing the numbers of volunteers prepared to participate on boards of social enterprise companies.

We simply don't have the capacity to deal with the paperwork of being a charity.

Ownership issues

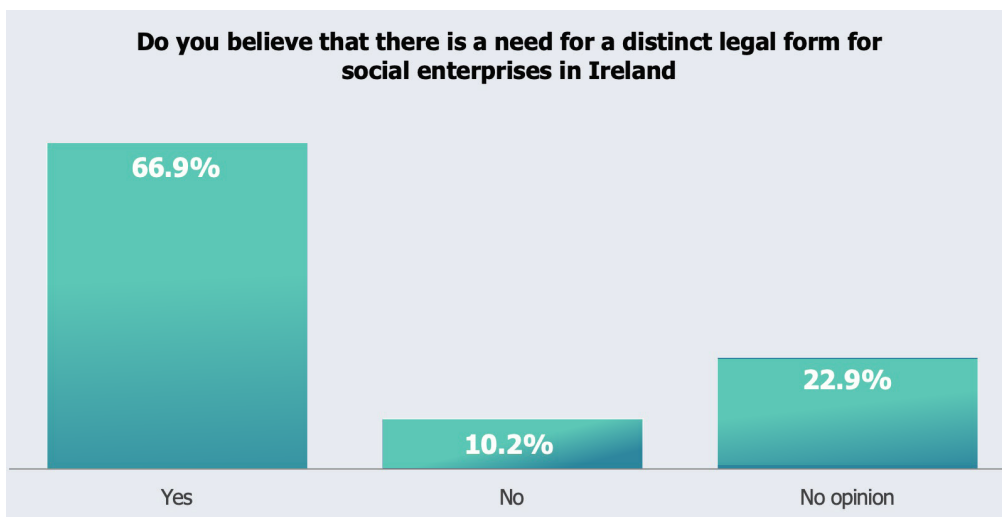
The inability to distribute profits to staff was noted:

We'd like to incentivise staff with a small share of profit – e.g., 20% total shared between all staff equally...

2.8.3 IS THERE A NEED FOR A DISTINCT LEGAL FORM FOR THE SOCIAL ENTERPRISE SECTOR?

While the majority of respondents believed that their current legal form met their current and future needs, two-thirds of respondents believed that a distinct legal form was required for the social enterprise sector.

Table 2.15 Is there a need for a distinct legal form for the sector? (n=157)		
Yes	66.9%	105
No	10.2%	16
No opinion	22.9%	36



⁴¹ The Charities Governance Code was launched in 2018, and sets the minimum standards, which everyone on the board of a registered charity, should ensure their charity meets in order to effectively manage and control their organisations.

⁴² Companies Registration Office

⁴³ Scottish Charitable Incorporated Organisation

⁴⁴ Charitable Incorporated Organisation

2.8.4 WHAT CONSTRAINTS WOULD A DISTINCT LEGAL FORM ADDRESS?

Regarding the constraints that a distinct legal form might address, responses have been grouped according to a number of themes identified:

- Definition and clarification of the sector and regulation (including the degree of trading activity, distribution of surplus and dividends, private shareholding, etc.)
- Facilitate governance structures that enable management to form part of the decision-making structure (e.g., board membership)
- Offering an alternative to charitable status, while safeguarding the social mission (e.g., through an ‘asset lock’), thereby validating the social mission and enabling access to State grants (where there is a view that charitable status is often required)
- Enable access to equity finance and investor capital and payment of dividends (by facilitating private shareholding)
- Recognition of the sector
- Ability to pay staff (e.g., profit share or bonus) from the surplus of the social enterprise
- Compliance issues – currently too onerous and a new legal form could mitigate these
- Provision for payment to directors (for charities, directors cannot receive remuneration)⁴⁵
- Tax benefits through a designated status – while not needing to apply for charitable status

Some of the comments are highlighted below and grouped according to relevant themes.

Demonstration of social credentials and developing trust

The main thing is to enable non-charity social enterprises to be distinct, governed and regulated in a way that is easy to prove to donors, partners and public.

Good governance to ensure public trust.

Recognition for social enterprises.

Recognition as being involved in enterprising activity.

Lack of recognition of what a social enterprise is by other organisations/public, e.g., they may not know or understand that there is no ownership of organisation.

Allow social enterprises to focus on their social mission. State agencies, i.e., Enterprise Ireland, should recognise any new legal form.

Clarity on the features of a social enterprise

Clarification of what exactly is and isn't a social enterprise ... Clarity on the % of traded income to claim to be a social enterprise ... clarification of distribution or profits to be a social enterprise (i.e., if profits are distributed to shareholders as in the case of co-ops or credit

⁴⁵ For organisations with charitable status, no director can be an employee or receive any remuneration other than in very specific circumstances (as set out in Section 89 of the Charities Act 2009)

unions, are these "social enterprises" meeting the current policy definition?

I think it would help regulate the sector and make it clearer to determine what businesses are actually social enterprises. At the moment, I believe that there is confusion within and outside the organisations of what really constitutes being a social enterprise.

Recognise that communities have a direct stake in social enterprises and reflect this in the rules for governance.

A clear distinction, ability to establish themselves as a different entity to a business that occasionally does nice things and tries to label themselves as a social enterprise.

Payment of directors and managers/ employees as directors

As a founder of a social enterprise, can you really be a "Social Entrepreneur" of a social enterprise when you are not allowed to sit on your own board and have a vote at the board table?

Allow directors to be paid.

The founders of a community interest company (CIC) can retain control over the business while being appointed and paid fairly for their work as directors of the company. It will be easier to attract additional high calibre individuals to join the board of a CIC through the offer of a measure of control alongside a salary set at a market rate. A CIC limited by shares can also pay dividends up to a 'dividend cap', which might help attract board members with desirable expertise ... The social aims permissible and ways they can be pursued are wider for a CIC than a charity.

Access to funding

Social enterprises fall between two stools and are mitigated against ... two examples here: firstly, we were prohibited from applying for the first Covid Restart Grant because we had Charitable Status ... secondly, we are not allowed to apply to the LEO for Website Funding because we are a social enterprise.

Provide access to Enterprise Ireland, LEO, and private capital funding.

Investment in social enterprise by joint ventures.

Easier to explain the concept to potential investors/donors.

Shareholding

The inability for employees to have a shared interest in the business beyond a simple contract of employment.

Small % profit share with team, access to equity type investments.

Compliance and reporting issues

Reduce administrative burden.

One regulator [which would] reduce associated administrative and governance related work.

An alternative to registering as a charity

Reduce the need to apply for charitable status to access funding, better clarity for stakeholders on the organisation’s mission and activities.

These commercial activities and products and services could be perhaps taxed differently for purpose-driven organisations with their governance in order.

Allow for a good standard of particular regulation but not to charity regulation standard as social enterprises typically trade to get income and can be tiny/small organisations.

2.8.5 IF THERE IS A NEED FOR A DISTINCT LEGAL FORM, WHAT FEATURES SHOULD IT HAVE?

This question generated a total of 89 responses (of the 105 responses who believed that a distinct legal form was required). However, not all 89 responded to all parts of the question.

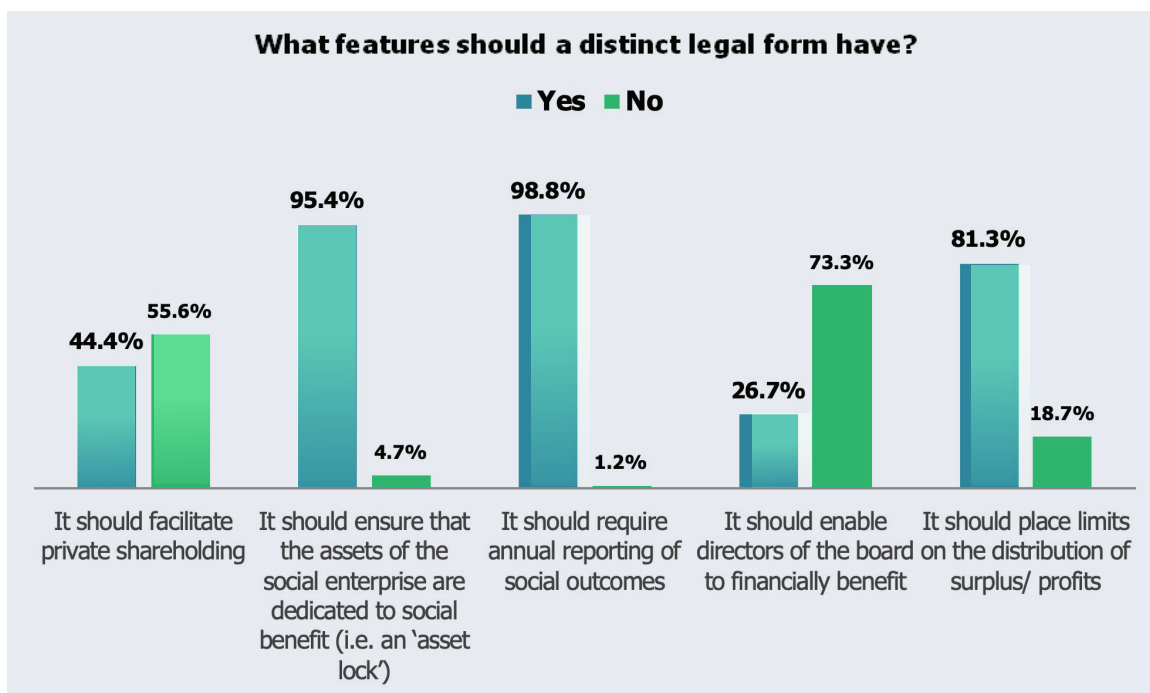
Table 2.16 What features should a distinct legal form have (n=89)					
Feature	Yes		No		Total
It should facilitate private shareholding	44.4%	32	55.6%	40	72
It should ensure that the assets of the social enterprise are dedicated to social benefit (i.e., an ‘asset lock’)	95.4%	82	4.7%	4	86
It should require annual reporting of social outcomes	98.8%	85	1.2%	1	86
It should enable directors of the board to financially benefit	26.7%	20	73.3%	55	75
It should place limits on the distribution of surplus/profits	81.3%	61	18.7%	14	75
Other					13

There was a strong consensus among respondents in relation to the features of annual reporting of social outcomes, an ‘asset lock’, and placing limits on the distribution of surplus/profits.

However, a majority believed that private shareholding should not be facilitated and almost three-quarters believed that directors should not benefit financially.

The issue of directors benefitting financially warrants further consideration. In the consultations and the survey feedback, the ability to provide directors with remuneration and – more particularly – the ability for managers (who are financial beneficiaries) to become directors and sit on boards was raised. And yet, here, almost three-quarters of those in favour of a dedicated legal form, did not agree with directors benefitting.

An analysis of the survey responses was undertaken to explore this further and, it would appear that in the case of one respondent, this answer was not associated with managers becoming directors. However, rather than this question being interpreted differently by respondents, it would appear that this answer reflects the different views of those who took part in the survey. That is, a divergence in views between an exclusively volunteer board on the one hand, and facilitation of paid directors (including managers) on the other. This divergence arose throughout the research process and is further discussed in a later section.



2.8.6 OTHER COMMENTS REGARDING FEATURES

I believe that, to qualify as a social enterprise, ALL profits should be reinvested into the mission and back into the organisation.

It should not expose the board member so severely for no compliance etc.

We want a business form that recognises Social Businesses, that is a strengthened updated cooperative legal form, with a clear non-profit option. Like the BenCom⁴⁶ in the UK. And also acknowledge wider community benefit.

I don't think any founders or directors should have more than a 25% share of any social enterprise.

A commitment to environmental standards.

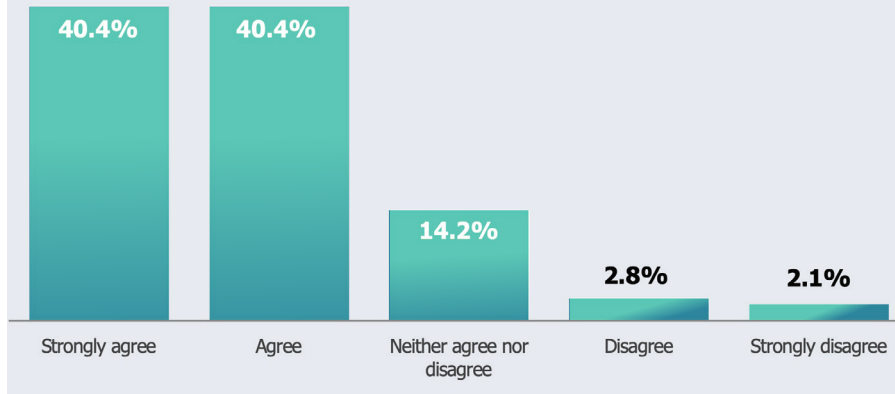
Persons getting involved on boards of directors for well-intentioned work, should not have to worry about personal liability whilst carrying out previously agreed board's work.

2.9 ATTITUDINAL STATEMENTS

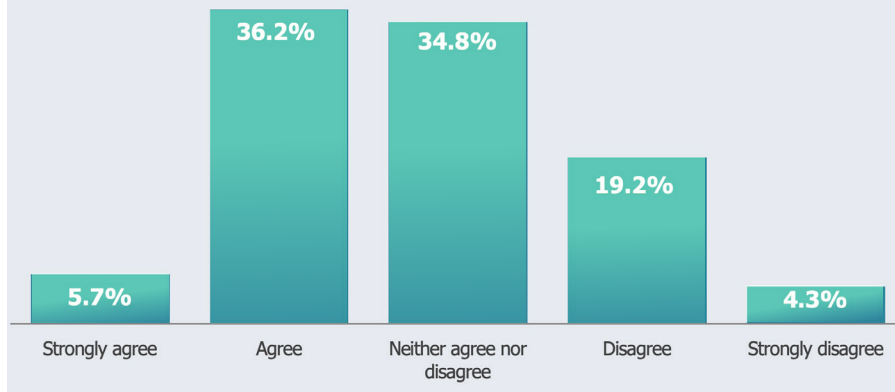
As a way of generating a response to what can be complex and nuanced issues, a series of statements were introduced and respondents were asked to respond to these, in a way that best matched their view (along the agree-disagree continuum). The responses are presented below.

⁴⁶ A Community Benefit Society (BenCom) is similar to a co-operative society except that it conducts business for the benefit of the community, rather than the members of the society. A BenCom must be run primarily for the benefit of people who are not members of the society and must also be in the interests of the general community.

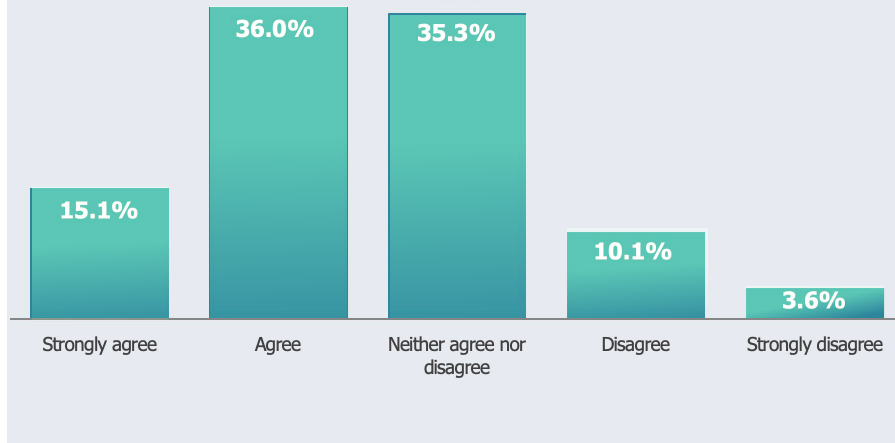
A distinct legal form for social enterprises would provide clarity and boundaries on what constitutes social enterprise activity

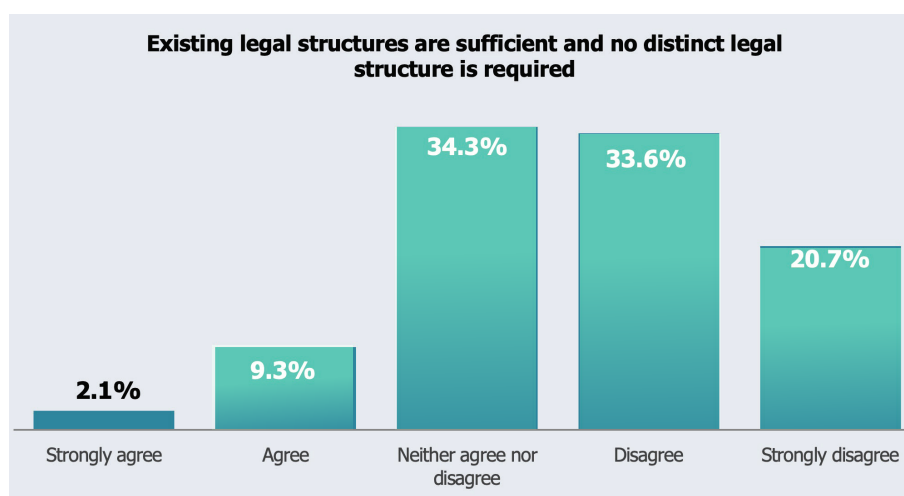
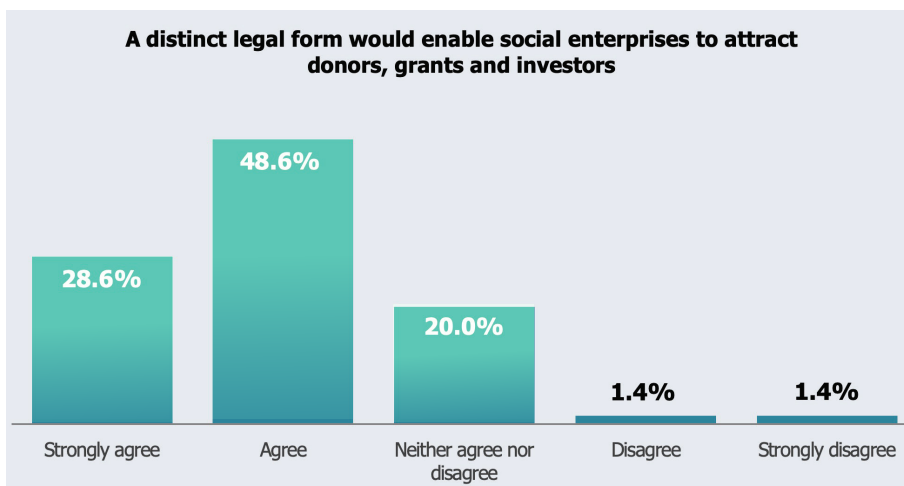
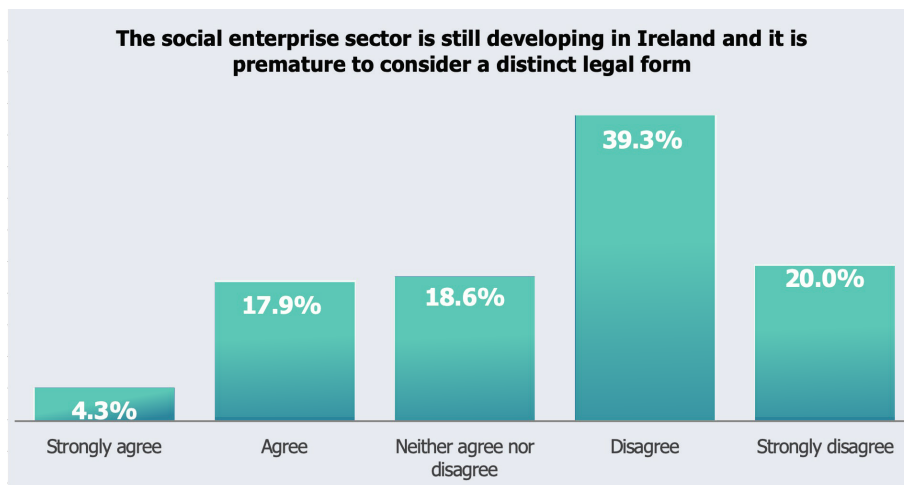


Current legal forms can be used to accommodate the governance and ownership needs of social enterprises



A distinct legal form could provide for private shareholding in social enterprises while safeguarding the social / environmental mission





2.10 CONCLUDING COMMENTS

Some of the concluding comments in the survey illustrate the breadth of views on the issues concerning dedicated legal form.

There's a lot of confusion about what exactly is a social enterprise, who is a social entrepreneur (who may or may not run a social enterprise), a company with a social mission (which may or not be a social enterprise) and the social sector, social economy.

What are the potential unintended difficulties that could be created by constraining social enterprises into one distinct legal form?

There needs to be a unified approach applied to all social enterprises with regards to requirements of governance, policy positions and obligations within legislation. These issues are choking volunteerism.

Tax relief should be extended to social enterprise ... legal form should be for the benefit of the community and all profits should be reinvested within the community.

Companies Act 2014 has put enormous responsibility on directors/trustees of voluntary development companies ... I am a passionate community and voluntary advocate, but I would not become a director of our social enterprise, it's way too onerous. This will inhibit the growth of the social enterprise sector when trying to attract new blood to boards.

The co-operative is recognised across Europe as the gold standard legal form for a social enterprise which provides the framework for an enterprise with a social/environmental mission to remain governed by its primary stakeholders with the flexibility to provide for external investment while safeguarding its mission. It also provides for the re-investment of some or all of its surplus in its social objectives, and an asset lock.

While there could be merit in offering shareholding opportunities within the social enterprise legal structure - the fear is, is that those community-owned low hanging resources will be quickly picked off by the big boys and wealthy investors and it will produce a two-tiered social economy sector.

I am not sure whether or not SE [social enterprise] needs its own legal structure, however I do believe that the new Charities Governance Code is too directive, especially for small SE[s]. This level of compliance is going to push small SE[s] with charitable status out of the market and prevent people volunteering on boards.

I think the sector needs to be very careful in relation to private profit from SE. This could undermine the nature of SE.

There may not be a one size fits all solution and it may be a matter of having more than one legal structure. We very much disagree with the idea of providing an avenue for venture capital into the social enterprise sector ... It would also be good to map out the impact of social enterprise not just in terms of jobs but also innovative things like preserving language, culture or skills that might otherwise be lost.

The entrepreneurial aspect of social enterprise has to be acknowledged. It is not reasonable to expect social entrepreneurs to set up successful initiatives and not be able to derive even subsistence from them.

I think a distinct legal structure would be a good idea. A condition of our contract with one funder was that we apply for Charitable Status. We spent a lot of time on this application only to be told after 2 years that tourism organisations cannot have Charitable Status. The only concern about not having Charitable Status is that we may not be able to apply for some grants.

The voluntary sector is often the most responsive way to address local social and economic issues ... It is important that such structures are preserved as local autonomous bodies.

3 FINDINGS OF THE CONSULTATION PROCESS

A consultation process comprising semi-structured interviews and focus groups was undertaken to gain the insight and experience of a small number of stakeholders on the issues of legal form. These included social enterprises; academics in Ireland, Spain, and the UK; support organisations including social finance, social investment, and local development bodies; social enterprise networks and other interest and representative organisations. Thirty-three individuals from 27 organisations were interviewed, and 10 individuals participated in two focus groups.

The discussions were wide-ranging and concerned issues affecting the sector as a whole. The findings are presented below in terms of the themes and constraints that arose, and in terms of whether – and how – a dedicated legal form might address them.

3.1 ISSUE OF IDENTITY

3.1.1 A DEDICATED LEGAL FORM WOULD PROVIDE CLARITY ON SOCIAL ENTERPRISE ACTIVITY

The survey found that providing clarity is an important consideration for establishing a dedicated legal form. Those consulted believed there to be confusion among a wide range of stakeholders as to the nature and purpose of a social enterprise and, for some, a legal form could address this issue. As indicated in the survey findings, there was divergence on what the identity of social enterprise is. A significant part of the discussion in consultations reflected these issues of identify and definition and how a legal form could provide clarity and definition (the boundaries issue).

The definition of social enterprise as stated in the National Social Enterprise Policy for Ireland 2019-2022 is:

- A Social Enterprise is an enterprise whose objective is to achieve a social, societal or environmental impact, rather than maximising profit for its owners or shareholders.
- It pursues its objectives by trading on an ongoing basis through the provision of goods and/or services, and by reinvesting surpluses into achieving social objectives.
- It is governed in a fully accountable and transparent manner and is independent of the public sector. If dissolved, it should transfer its assets to another organisation with a similar mission.

The European Commission's definition has incorporated the three key dimensions of a social enterprise:

- An entrepreneurial dimension, i.e., engagement in continuous economic activity, which distinguishes social enterprises from traditional non-profit organisations/social economy entities.⁴⁷
- A social dimension, i.e., a primary and explicit social purpose, which distinguishes social enterprises from mainstream (for-profit) enterprises.
- A governance dimension, i.e., the existence of mechanisms to 'lock in' the social goals of the organisation. The governance dimension, thus, distinguishes social enterprises even more sharply from mainstream enterprises and traditional non-profit organisations/social economy entities.

Subsequently, a set of core criteria were developed reflecting the minimum conditions that an organisation must meet in order to be categorised as a social enterprise under the EU definition. The following core criteria were established:

- The organisation must engage in economic activity: it must engage in a continuous activity of production and/or exchange of goods and/or services.
- It must pursue an explicit and primary social aim: a social aim is one that benefits society.
- It must have limits on distribution of profits and/or assets: the purpose of such limits is to prioritise the social aim over profit making.

⁴⁷ For example, social economy organisations that may pursue a social aim and generate some form of self-financing, but not necessarily engage in regular trading activity.

- It must be independent i.e., organisational autonomy from the State and other traditional for-profit organisations.
- It must have inclusive governance i.e., characterised by participatory and/or democratic decision-making processes.

As with the survey findings, the wider consultations indicated that these dimensions and core criteria are open to different interpretations and perceptions. For some, there were concerns that social enterprise is becoming a ‘catch-all’ to include organisations with a limited or occasional trading aspect, and that this was impacting on the identity and perception of the sector:

Unless we can be clear about the enterprise aspect - trading and commercial activity as compatible with a social objective - we will never get full acknowledgement of the sector.

However, not all social enterprises are commercial in their emphasis. Some require some ongoing subsidy, so this poses some questions, for example:

How do you define the level of trading required – how much [what proportion of income] should it be?

In terms of identity and definitions, some features of social enterprise that a distinct legal form might provide for are subject to a divergence in opinion (across the survey and the consultations). These include provisions around private ownership. This points to a need to establish a stronger identity for social enterprise:

There are organisations characterising themselves as social enterprises which are more similar to Corporate Social Responsibility initiatives. They are doing fantastic things, and they are achieving a strong social impact, but they are not social enterprises.

For some, there was also a view that the discussions on social enterprise in Ireland did not sufficiently focus on its participatory or democratic decision-making characteristics. The point was made that this characteristic is part of the European Commission’s definition of social enterprise.

We have not embraced the participatory element of social enterprise. It needs to be more than just providing services, it has to engage the community which it serves in its structures.

This was a point of principle for some; for others, it had a practical benefit, as community engagement and buy-in was associated with viability and sustainability. One organisation that supports social enterprises emphasised this relationship:

If it has strong community buy-in, it will succeed, because the community will make sure that it succeeds.

For others, the participatory element of social enterprise is often adopted by the sector but is not – and should not – necessarily be a defining principle:

Social impact can be achieved without involving beneficiaries or communities in decision-making structures – you can generate a feedback loop through impact measurement.

The issue of definition and clarity on social enterprise also raises the question about the status of co-operatives. Co-operative social enterprises argue that there is a dedicated legal form for social enterprises, in the form of IPS legislation (which is currently being revised by the Department of Enterprise, Trade and Employment). Moreover, across Europe, legal forms have traditionally emerged from either the co-operative tradition (e.g., social co-

operatives in Italy⁴⁸) or the company form (for example, CIC in the UK). Some contend that co-operatives are already part of the sector, while others maintain that those co-operatives with private shareholding and their member-beneficiary structure potentially exclude them from the sector. Notwithstanding the fact that the co-operative structure can accommodate non-shareholding structures, the point was made that the perceived complexity of co-operatives limited the use of the form.

Co-operatives are participatory democracy in action, but it takes a lot of time and money to manage this and commit to it ... The format is seen as too obscure, too complex.

Other points raised in relation to issues of identity for the sector are summarised below:

- The broad definition of social enterprise in Ireland as articulated in the National Policy was welcomed and that placing boundaries on the sector is one that the sector itself should have a key role in undertaking as the momentum around social enterprise develops.
- There is a need for discussion and agreement on broad principles or criteria that underpin social enterprise. Reference was made to how the seven principles of co-operation form a blueprint for co-operatives and can apply to any legal form.⁴⁹ Work has been completed by EMES, and previously for Pobal (when Area Development Management) on social enterprise criteria.⁵⁰ Guidance principles from other sectors and jurisdictions were noted as good examples of framing activities, without being too prescriptive.⁵¹
- There was a view that the above needs to happen first prior to progressing a dedicated legal form, and that “form should follow function”.
- However, the view was also expressed that the issue of deciding “who’s in and who’s out” is a difficult one, and also that “social enterprise will probably always be a contested topic”. It is also important to note that for some, defining the sector and establishing its identity was not a priority issue.

3.2 RECOGNITION (AND CHARITABLE STATUS)

The issue of recognition was one that arose in the survey and in consultations. The importance of having some validation of social enterprise was important in generating trust with stakeholders. In Ireland, this is closely associated with gaining charitable status and the majority of surveyed organisations had applied for charitable status. In this section, the issues arising from charitable status are presented, as this was a key theme that arose in the research.

The majority of surveyed organisations had applied to register as a charity (60%). The rationale for applying for charitable status among social enterprises consulted included:

- Perceptions that charitable status was a requirement of certain funders
- To safeguard their social mission (primarily through the ‘asset lock’)⁵²
- As a means of validating and certifying their social enterprise activities and, therefore,
- To generate trust with stakeholders

⁴⁸ Italian Law 381, introduced in 1991, recognised social co-operatives on the basis that the primary beneficiary is the community, or groups of disadvantaged people. For the first time, the law provided that these groups no longer had to be members of the co-operative, and so the concept of wider community benefit (or ‘beneficial ownership’) was provided for in law, whereby social co-operatives were required to fulfil their activities “for the general benefit of the community and for the social integration of citizens”. The law also provides tax benefits to social co-operatives.

⁴⁹ For example, some co-operatives are formed as CLG. The seven principles of co-operation are: 1. Voluntary and Open Membership, 2. Democratic Member Control, 3. Member Economic Participation, 4. Autonomy and Independence, 5. Education, Training, and Information, 6. Co-operation among co-operatives, 7. Concern for Community.

⁵⁰ These criteria focused on dimensions including structure, ownership, democracy, social impact, sustainability, and accountability. A series of indicators for each were developed, against which social enterprises could be assessed.

⁵¹ For example, The All Ireland Standards for Community Work, and the voluntary social enterprise code in Scotland.

⁵² For example, where on dissolution, all assets are distributed to an organisation with similar charitable aims.

Tax exemption was also noted as an important benefit in terms of recognition (secured via charitable tax exemption from the Revenue Commissioners).⁵³

For many social enterprises, charitable status was (and will continue to be) critical. For others, the conditions attached to charitable status were too restrictive. The point was made that there is no alternative to charitable status, as a form of safeguarding a social enterprise's social mission. For example, while an 'asset lock' can be applied in any company form in Ireland, it can be reversed (through a change in the constitution). A company with charitable status cannot reverse the 'asset lock'.

The issues arising for social enterprises which sought an alternative to charitable status are outlined below.

3.2.1 FUNDING CONSTRAINTS

First, social enterprises consulted reported a perception that some State funders expect them to gain charitable status (and to comply with the Charities Governance Code). However, social enterprises also stated that charitable status had disqualified them from other support (e.g., enterprise supports). Some social enterprises believed that this reflected a belief among some State agencies that there was an incompatibility between charitable status and enterprise activities. However, this disqualification was also related to legal form (where the form of enterprise support was on the basis of equity investment, thus requiring a shareholder structure) which is discussed below.

3.2.2 MANAGERS AND GOVERNANCE STRUCTURES

Second, having charitable status prevented the social enterprise manager/CEO (or any paid staff member or financial beneficiary) from participating in decision-making structures.⁵⁴ For many observers, this was a major issue for founders of social enterprises, as they were required to choose between generating a livelihood from their social enterprise idea on the one hand, and maintaining a strategic or decision-making role at governance level on the other.

If a founder develops a social enterprise to the point of recruitment, they have to step down from their role if they want to continue working within a paid position in the social enterprise. This is a major disincentive.

This can also lead to a degree of frustration if a board does not share the vision of the manager, or is more risk averse:

The person who has the characteristics of a manager of an enterprise will be looking to change things in a fast-moving way and should be embracing of risk and change.

However, this view was not universal: founders also made the point that a well-constituted governance structure can act as a strong support for managers and can focus on the social considerations while enabling the enterprise dimension to progress.

For others, the social objectives of a social enterprise or a charity present an additional dimension for directors over and above the viability of the trading or enterprise aspect:

Being a trustee has greater risk – because the viability of the business is one aspect but safeguarding the social objective is the other.

For some, it is this social and enterprise aspect which distinguishes social enterprises from private enterprise activity and provides the rationale for the executive and management function and governance structure to be kept separate. The point was also made that it is important to have a strong board of directors, independent on the management

⁵³ However, in the UK, the CIC form does not provide tax benefit.

⁵⁴ Under Charities Act 2009, no director of a registered charity can be paid by salary or fees or receive any remuneration or other benefit in money from the company with the exception of very specific circumstances (e.g., expenses, repayment of loans).

function, and that this would be unlikely if a manager was also a director.

It is not good practice to have a manager-dominated board. This is often the case at present and it is likely that this would be even more of a risk if the manager was also a member of the board, especially if that manager is a founder – it is harder to hold a manager to account in these circumstances.

Third, having charitable status also prevents directors benefiting financially from the company, and there was a view that paying directors would enhance the governance of a social enterprise by enabling access to specific expertise. However, as the survey results showed, the majority of social enterprises (that believed that a distinct legal form was needed) were not in agreement that directors should be permitted to benefit financially within a social enterprise legal form.

Some of these points highlighted above are not directly related to legal form, as charitable status is not a legal form. If a social enterprise does not apply for charitable status, the CLG form (which most social enterprises would adopt) does not prohibit directors from benefiting financially from the enterprise (and therefore would enable managers to participate on governance structures).

However, charitable status was a prominent issue because of its 'certification' and validation of the social credentials of a community or voluntary organisation. For social enterprises and others consulted, the importance of building trust and gaining validation and recognition was crucial. For some, a dedicated legal form is a means of achieving this recognition and, for others, it is about agreeing standards or other forms of validation (and certification). It also points to the importance of social enterprises (including those registered as charities) being included in the range of supports that are available to mainstream and owner-investor enterprises.

3.2.3 CERTIFICATION, VALIDATION, AND DEVELOPING TRUST

As outlined above, the need for certification, regulation, or validation enables recognition of social enterprise activity, and was a key driver for those who applied for charitable status. For some, legal form itself is a certification process, as the rules provided for in the legal form places boundaries on activities.

Depending on legal form, there can be different approaches to certification or regulation. For example, in the UK, companies adopting the CIC legal form report to the CIC regulator. Other forms of regulation could include a self-regulatory function, such as those provided in the co-operative sector (for example, there are formal regulatory provisions with the Industrial Common Ownership Society, which provides model rules for IPS Law for co-operatives, and which requires each co-operative to gain approval from ICOS prior to changing their Constitution, even though the Registrar of Friendly Societies provides the legal oversight).

Other forms of voluntary regulation and certification, including the Social Enterprise Mark⁵⁵ and BCorp⁵⁶ certification, as well as standards and codes of practice (including the Voluntary Code of Practice for Social Enterprise in Scotland⁵⁷) were discussed as existing models of certification. In Spain, discussions are taking place around how best to address the limits of legal form and recognition of social enterprise (where a number of legal forms are used by social enterprises), and the focus of these discussions is on the relative merits of certification and advocacy for new legal forms. Regardless of what form certification or oversight takes, regulation of social enterprise as a concept was

⁵⁵ The Social Enterprise Mark is an international accreditation, which provides an independent, external assessment that a business is operating as a social enterprise. It is overseen by Social Enterprise Mark CIC, registered in the UK. The mark was launched in Ireland in late 2020 in collaboration with Social Impact Ireland.

⁵⁶ B Corporation certification of "social and environmental performance" is a private certification of companies. B Corp certification is conferred by B Lab, a global non-profit organisation. Among the requirements to be granted and to maintain certification, companies must receive a minimum score from an assessment of "social and environmental performance", integrate B Corp commitments to stakeholders into company governing documents, and pay an annual fee based on annual sales.

⁵⁷ Available at <http://www.se-code.net/>

emphasised in this research study.

There must be some form of regulation of social enterprise. Otherwise, the reputation and standing of social enterprise could become tarnished – as anyone could declare themselves to be a social enterprise.

However, an important aspect of building trust is transparency, and it was observed that many social enterprises (as well as other third sector organisations) published abridged accounts, sometimes contrary to requirements as bodies in receipt of public funds. This was viewed as running contrary to the spirit of disclosure and full transparency and could undermine the sector in terms of public perception.⁵⁸

3.3 SOCIAL ENTERPRISE LIFE-CYCLE ISSUES

3.3.1 EARLY STAGE AND SMALL-SCALE SOCIAL ENTERPRISES

Barriers arising from legal form as they relate to social enterprise stages of development were identified in the consultations. In terms of early stage or start-up social enterprises, a number of those consulted said that the current expectation for a legal form once a social enterprise started trading could act as a disincentive to forming a social enterprise (given the bureaucracy and liabilities involved in adopting a legal form). A number of people raised the point about having an incubation-type of support for early stage social enterprises:

Ideally an arrangement where those wishing to start a social enterprise could be supported through some sort of association structure, for the initial period.

The point was made that some social enterprises start as sole traders, and start delivering services, and then – in time – form a social enterprise, and that this process should be supported.

... we need another format ... bring them into a collective until they have a set turnover which could trigger a separate legal structure.

Social enterprise founders just start doing it – legal form is not on their minds and they should have that space to develop their initiative.

These issues are primarily related to issues of support and development of the sector, rather than legal form.

However, compliance and reporting obligations for small-scale social enterprises (that do arise from existing legal forms) was noted. The liability on voluntary directors at present is a major barrier to engaging them in governance structures, according to a number of people consulted, and this led to a view that the recruitment of professional directors should be facilitated. Fears around litigation for voluntary directors was also noted.⁵⁹ It was also asserted that any dedicated legal form should endeavour to put in place reporting and compliance obligations that are graduated, depending on the size and turnover of the organisation.

There should be a tiered structure – so that small social enterprises have a different reporting and compliance regime.

The issue of compliance and regulation arose with respect to charitable status and some social enterprises surveyed had not applied for charitable status because of the administration and reporting requirements that it

⁵⁸ According to Benefacts, the filing of abridged accounts has increased exponentially, from 27% in 2015 to 38% in 2016 and 48% in 2017. 40% of charities and 56% of non-charities filed abridged accounts. (Benefacts [2019] 'Less doesn't always equal more in non-profit disclosure'). <https://www.benefacts.ie/2019/01/18/less-doesnt-equal-more-in-nonprofit-disclosure/>

⁵⁹ This may also point to a need for social enterprises as well as voluntary and community organisations to provide directors and officers with liability insurance for members of their boards.

entailed. Nonetheless, there was a strong view that there would remain a need to capture and monitor social impacts, whether in the form of a dedicated legal form or other form of oversight and certification. This would inevitably result in the need for monitoring and data gathering, which can be onerous.

Again, not all of the responses to this issue related to a dedicated legal form. There was a view that there should be more mergers among social enterprises to achieve economies of scale, as well as to manage governance and compliance issues. This was also related to geography, with widespread duplication of social enterprise activity within a small area:

We need consortia, mergers and collaborations and shared services. There is no encouragement for this to take place – funders do not allow cost recovery models within organisations that have a range of assets and programmes.⁶⁰ This leads to segmentation and separation of structures.

The view was also expressed that the limited liability offered to directors and members of a company (for example, in the case of a CLG, where a nominal liability of approximately €1 is guaranteed upon winding up of the company) necessitates important reporting and transparency requirements, and that these responsibilities are central to this limited liability. The point was made that a dedicated legal form, based on company law, is unlikely to change this reporting requirement (although in the case of CIC in the UK, there are less onerous reporting responsibilities compared with other company forms).

3.3.2 SCALING SOCIAL ENTERPRISES - ACCESS TO EQUITY FINANCE

One of the key arguments for the establishment of a dedicated legal form for social enterprises is the need to secure equity finance to support the development of social enterprises, and to attract wider sources of capital. Access to capital remains an important factor for the sustainability of social enterprises as outlined in the survey findings.

While equity finance is also important for start-ups (which may not have an asset base or track record in trading to access loan finance), it is most associated with social enterprises as they scale up, which may require funding from venture capitalists or equity finance from third-party financiers (for example, through Enterprise Ireland and others). This is an issue which arose both in the survey and in the consultations. Access to this type of finance requires a legal form with private shareholding, in order to issue share capital to investors.

The point was made that a co-operative form can facilitate access to capital through issuing equity (shares) to members, while maintaining their democratic structure. For example, the community co-operative was a legal form suited to large-scale infrastructure initiatives, and the first community-owned renewable energy initiative on the island of Ireland acquired capital through the community co-operative structure by generating share capital through community members.⁶¹ However, the limited knowledge and awareness of co-operatives was cited as a barrier to its development as a form.

In the UK, the CIC legal form includes an option to incorporate as a company limited by shares. In 2019, 3,438 of CICs registered were incorporated using this shareholding form (18% of all CICs).⁶² In the absence of a dedicated legal form such as a CIC, social enterprises that are incorporated as a CLG in Ireland typically would form a dedicated legal entity such as a Designated Activity Company (DAC) with private shareholding (as a subsidiary). This structure would then be used as a Special Purpose Vehicle (SPV) in order to attract equity investment with the shareholding held by the social

⁶⁰ For example, an organisation that is a property owner is not allowed to charge rent from a funded programme within its own organisational structure. This incentivises the establishment of separate legal forms, rather than merging of activities.

⁶¹ Drumlin Wind Energy Community Co-operative. While the energy co-operative is located in Northern Ireland, and is therefore outside of this jurisdiction, the legal form of co-operative in Ireland and the principles of co-operation would enable capital to be generated in the same way as with co-operatives in Northern Ireland.

⁶² Regulator of Community Interest Companies (2020): *Annual Report 2019-2020*.

enterprise (as a holding company) which could then issue shares to investors.

One of the principal differences between this DAC form of legal incorporation and the CIC dedicated form is the absence of an ‘asset lock’ in the DAC form, although it could be inserted into the Constitution of a DAC. However, in the CIC form, the ‘asset lock’ cannot be reversed. For some consulted, the presence of an ‘asset lock’ could be important, as some equity investors would seek the sale of a profitable entity in order to have an exit mechanism.

The issue of an exit mechanism for equity investors – they will want to sell their equity and make a return and sometimes they may put pressure on the company to sell – an asset lock relieves this pressure.

Some of those who responded to the survey and took part in consultations utilised a number of legal forms, including subsidiaries of companies that were registered as CLG (whereby some also had charitable status). The subsidiary was usually incorporated using the DAC (with shareholding) legal form. However, the point was made that the complexity of legal forms can generate costs and complex legal provisions that are not well known by social enterprises and requires extensive legal advice to enact.

For some organisations, social enterprise forms only one part of their activities. Many have not established separate legal forms for the social enterprise (as reflected in the survey) and social enterprise activity takes place within the ‘parent’ organisation’s legal form. This can present issues of risk. In the case of one (scaling) social enterprise, they did not establish a holding company with the social enterprise incorporated as a wholly owned subsidiary as originally planned, because a funder did not want to change the contractual relationship from the ‘parent’ to a subsidiary. These issues are more to do with funders’ perspectives, than legal form.

However, the attitude of some State agencies towards multiple company structures was problematic for some:

Some agencies are very suspicious of multiple legal forms.

In the case of a number of social enterprises, extensive engagement with the State in order to explain the purpose and rationale of subsidiary activities was required:

We are constantly explaining ourselves to State agencies.

There were two perspectives on this issue: one was that these are issues of policy and awareness of social enterprise, rather than legal form. However, the contrary view was that a dedicated legal form might alleviate these issues, as it would provide a fit-for-purpose form that could be promoted as a legitimate model among State and other funders. It could also facilitate greater engagement with equity investors (which was a growing source of finance for some). The argument here is about providing a framework for the future development of the sector, to facilitate its advancement and scaling.

3.4 THE RELATIONSHIP TO MEASURING SOCIAL IMPACTS

As legal form was closely associated with recognition, there was also a view that legal form should not be seen as a proxy for (or validation of) social impact.

The primacy of social impact and ensuring that some form of measurement and certification for same was noted. The point was made that legal form is an enabler of activity but that social impact is key:

You can do what you like with legal form. You can have limited distribution of profits, but this does not guarantee social impact ... you can pay some staff massive salaries, while others are on minimum wage.

The primacy of social impact was stated in terms of its relationship to enterprise activity:

Enterprise activity is the main activity, but it is still only a tool. Social enterprises are

fundamentally trading and enterprise activity, but they are driven by a broader social objective. And this social objective needs to be minded.

For some, certification was key to validating and accounting for social impact. For example, in Spain, the clarity and effectiveness of reporting and signalling that models such as the Building Energy Rating (BER) provide are discussed in terms of their applicability to reporting on a graduated social impact. This model allows organisations to advance along the rating scale as they develop and progress. Others sought to incorporate the Sustainable Development Goals (SDGs)⁶³ in consideration of the social impacts that social enterprise should seek to achieve. In particular, SDGs relating to gender equality, reducing inequalities, decent work, sustainable cities and communities, 'Industry, innovation, and infrastructure', and responsible consumption were felt to be particularly relevant.

There was some concern that the implications and burden of certification programmes could hinder social enterprises that do not have the resources to undertake widespread reporting.

However, with emerging policy objectives such as social procurement, the need to demonstrate social outcomes is important: with the exception of reserved contracts (which are dedicated for social enterprises), legal form of itself could not confer preferential status (this could be construed as in breach of competition law and harmful to the single market). Instead, the capacity to deliver added social value would need to be demonstrated and demonstrating this is a key issue for social enterprises.

3.5 A DEDICATED LEGAL FORM

While there was a strong desire for a dedicated legal form arising predominantly in the survey, the issue of its timing and viability was raised in the consultations.

3.5.1 RELATED LEGISLATIVE DEVELOPMENTS

First, the scale of the task in reviewing legislation is significant: for example, the revision of Companies Act 2014, the largest piece of legislation ever to come before the Oireachtas and took several years to complete.

Second, following an in-depth review of the existing legislative framework of co-operatives (the Industrial and Provident Societies Acts 1893-2018), which included conducting a public consultation on the operation and implementation of the current statutory code, the Department of Enterprise, Trade and Employment is preparing a General Scheme of a Bill for new legislation. The legislation will revise and modernise IPS law, and the General Scheme is expected to be published in early 2021. The consultation process for the legislation has ended but the General Scheme will be presented for scrutiny by an Oireachtas committee. It is unlikely that any legislation for a dedicated form for social enterprises would be progressed while this legislation is being prepared.

A dedicated legal form would also have to achieve a high threshold of need in order to warrant specific legislation.

The research findings indicated that there was no consensus that a dedicated legal form is needed. Among those who do agree that a dedicated legal form is required, there is no consensus as to what form it should take, or what features it one should allow. There was also a view that a dedicated legal form should focus on needs that are emerging and future needs (and in particular those needs relating to access to third-party finance). These needs may not be evidenced by social enterprises currently.

Sometimes you need to be able to see around corners and consider the issues that have not yet arisen.

For others, in the consultation process, the sector is not yet advanced to a stage that its needs (and subsequently features required in a legal form) are known.

⁶³ The Sustainable Development Goals or Global Goals are a collection of 17 interlinked global goals designed to be a 'blueprint to achieve a better and more sustainable future for all'. The SDGs were set in 2015 by the United Nations General Assembly and are intended to be achieved by 2030.

3.5.2 RISKS OF A DEDICATED LEGAL FORM

The view was expressed that any legal form should facilitate social enterprise but should not lead it.

Form should follow function – we need to be clear about the function.

There was also a concern that establishing a dedicated legal form might lead to expectations that social enterprises should adopt the form, even though other legal forms would still be available to social enterprises:

Once a dedicated legal form exists, it is important that social enterprises are not expected to use it, or that if you don't, you will be asked 'why'.

The risk here is that other legal forms adopted by social enterprises may be excluded from targeted supports, particularly if a dedicated legal form is the conduit or mechanism for recognition and support for the sector.

However, the counter argument is that, in Scotland, this has not appeared to be the case, where the take-up of the CIC form accounts for just 14% of the sector.⁶⁴

Finally, the issue that a legal form is a relatively permanent form that will last many years and needs to be carefully planned was noted. While the take up of the CIC model in England and Wales has been high, legal form in other jurisdictions tended to be restrictive and place boundaries on the type of activities that social enterprises could undertake (for example in Italy and Spain, where dedicated legal forms were established for very specific types of social enterprises, such as work integration social enterprises).

The issue of a new legal form is a not a live one for the majority of social enterprises – I think it is overstated. There are far more important issues facing the sector.

3.5.3 WOULD A LEGAL FORM FACILITATE OR STIMULATE SOCIAL ENTERPRISE ACTIVITY?

The limitations of existing legal forms in incentivising social entrepreneurship were noted, and the need for clarity and simplifying governance systems was noted:

There are many young people interested in this form of entrepreneurship, but they are not governance experts, and navigating a complex legal system is difficult.

An issue that arose in relation to payment of staff benefits from the surplus of social enterprise was raised by a small number of those consulted. The point was made that the use of staff incentives, such as limited shareholding in social enterprises, could be enhanced if there was some provision for private shareholding. The most commonly utilised legal forms (CLG) do not provide for any shareholding including employee share ownership (unless dedicated subsidiaries are established). However, as reflected in the survey results, there was a concern reflected in the consultations that social enterprise should not be blurred with private ownership.

You have to be careful. Social enterprise is different – it's not the private sector, and it's not for everyone. It shouldn't really be about private ownership or about a shareholding.

For some, incentivising staff through bonus schemes was often viewed with suspicion, even if these schemes contributed to the improvement of working conditions for staff and to the sustainability of the social enterprise. This pointed to attitudinal issues rather than legal form ones.

We experienced an attitude of 'you can't do that' when we first tried to introduce staff bonuses, based on performance. But there was no reason why we couldn't do it, and we have done it.

⁶⁴ As indicated in the 2019 Social Enterprise Census.

The view was expressed that a distinct legal form should focus on meeting the future needs of the social enterprise sector, and to support the development of the sector. The point was made that it would create a clearer path and easier access to those that wish to access commercial finance and other financial products (investment finance).

Sometimes you need to look around corners – and see what the potential is.

3.6 IS A DEDICATED LEGAL FORM REQUIRED TO ADVANCE THE SECTOR?

Concerns raised in the research included those related to funders’ attitudes and understanding of social enterprise, access to finance, the need for recognition and greater awareness of the sector, clarity around identity issues, administrative burdens, and the limitations of charitable status on enterprise development.

From the perspective of the majority of those surveyed, a dedicated legal form would resolve many of these issues and would benefit the sector. However, among those surveyed, and across the wider consultation process, there was no consensus about what features a dedicated legal form could provide for. There was also a view that existing legal forms might be able to address these barriers. For others, it was not yet possible to demonstrate the necessity of a dedicated legal form at this point in the sector’s development.

The various characteristics relating to social enterprise that were discussed in this research are outlined below in Table 3.1 with reference to current legal forms. Note: with regard to cooperatives, they are most commonly incorporated under IPS law, but the option of incorporating under CLG is also available to a cooperative. Charitable status is differentiated from the other forms as it is not a legal form. The provisions of charitable status may also apply to the other legal forms (for example, where a CLG has also charitable status).

Feature	CLG ⁶⁵	CLS ⁶⁶	DAC ⁶⁷	IPS ⁶⁸	CHY status ⁶⁹
Can facilitate private shareholding	No	Yes	Yes	Yes	No
Can ensure that the assets are dedicated to social benefit (i.e., an ‘asset lock’)	Yes – could be included in constitution but could be reversed (members/shareholders could vote to change).				Yes – cannot be reversed
Requires reporting of social activities	No	No	No	No	Yes
	Unless clauses provided for same and a methodology was developed				Mandatory
Can enable directors of the board or governance structures to benefit financially (thus enabling staff to participate on structures)	Yes	Yes	Yes	Yes	No
Limited distribution of surplus/profits to shareholders/members	Can be provided in constitution / rules for but reversible (members / shareholders could vote to change)=.				No profit distribution
Can facilitate manager or employee membership of governance structures	Yes	Yes		Yes	No
Democratic decision-making (one person, one vote)	Yes	No ⁷⁰	No ⁷¹	Yes	Yes
Accountability to wider stakeholders (participatory elements)	Needs to be specified	Shareholder only		Yes (co-operative principles)	Needs to be specified
Can access equity finance (and issue shareholding)	No – need for subsidiary	Yes	Yes	Yes, with limitations	No
In-built regulation of social impacts and certification	No	No	No	Yes ⁷²	Yes ⁷³

⁶⁵ Company Limited by Guarantee without share capital.

⁶⁶ Company Limited by Share

⁶⁷ Designated Activity Company. There are two forms of DAC. One is a DAC with shareholding, and the other is DAC limited by guarantee with share capital. The form described above is DAC limited by share.

See page 49 for notations 68, 69, 70, 71, 72, 73

4 CONCLUSIONS AND RECOMMENDATIONS

This research focused on the three questions addressed in this section.

4.1 WHAT ARE THE BARRIERS EXPERIENCED BY SOCIAL ENTERPRISES IN IRELAND AS THEY RELATE TO LEGAL FORM?

The key barriers identified in the research process included:

- Lack of recognition (principally – although not exclusively – among state agencies) for social enterprise activity and difficulties in securing State funding owing to a limited awareness or acceptance of social enterprise as a legitimate activity for funding.
- A perception that charitable status is a requirement to gain support from some funders, which presents difficulties in cases where it is not an appropriate model for some social enterprises (e.g., with regard to managers' participation on boards, remuneration of directors).
- Compliance issues that arise from legal form which act as disincentives for voluntary directors, or for promoters of social enterprises (e.g., early stage or small-scale social enterprises).
- Difficulties in securing equity finance arising from the CLG legal form as this form does not enable private shareholding.

4.2 WOULD A DEDICATED LEGAL FORM BENEFIT THE SECTOR AND, IF SO, WHAT FORM SHOULD IT TAKE?

For many, the benefits that a dedicated legal form should provide would include:

- Recognition of social enterprise as a legitimate form of enterprise distinct from both the private and broader not-for-profit sector.
- An alternative to charitable status, but which establishes the sector's credentials among funders, establishes trust with stakeholders, and safeguards the social mission of social enterprises (e.g., through an 'asset lock').
- Support for the development of the sector through limiting compliance requirements for voluntary directors (particularly social enterprises with a small turnover), while facilitating the scaling of social enterprises through enabling options for private shareholding (and access to equity finance).
- These would also attract individuals to promote, develop, work in, and volunteer in social enterprises.

Some survey respondents advocated for a dedicated legal form to derive from an adaptation of the co-operative (as in the case of some EU countries), but the predominant view referenced the CIC in the UK, which is derived from company law. The broad consensus arising in the survey was that there should be limits on the distribution of profits, and an 'asset lock'.

If access to equity is a key requirement for the development of the sector, and if a dedicated legal form was to be established on this basis, this would require some provision of private shareholding. This, and the ability of board

⁶⁸ Industrial and Provident Society (IPS legislation currently under review). This is the main legislation that co-operatives are registered under, but some co-operatives can incorporate under company law (Company Limited by Guarantee) as there is no such thing as a co-op in Irish law. Co-operatives will also be underpinned by the International Co-operative Alliance's (ICA) principles of co-operation.

⁶⁹ Charity Status – this is not a legal form.

⁷⁰ Based on amount of shareholding.

⁷¹ Based on amount of shareholding.

⁷² International Cooperative Alliance and ICOS

⁷³ Charities Regulator

members to benefit financially were points of divergence in the research.

There was also a view that a dedicated legal form might not benefit the sector as it would involve placing boundaries on a sector which is evolving, and where there are different views on the concept of social enterprise and the principles underpinning it. In this respect, the relatively broad national definition of social enterprise (as articulated in the national policy) was positively viewed.

There was a concern that a dedicated legal form would become the de-facto legal form for social enterprises, even if its characteristics were at odds with the predominant structure and governance of social enterprises currently constituted. If a dedicated legal form was the means by which recognition and support for the sector is to be advanced, it is logical that social enterprises not adopting this form would be disadvantaged in terms of this recognition.⁷⁴ This perspective maintains that any potential dedicated legal form should follow from a wider agreement and analysis of principles of social enterprise activity.

4.3 WOULD A DEDICATED LEGAL FORM BE NECESSARY FOR THE SECTOR?

Many of the barriers identified in the consultation were less to do with legal form, and more to do with recognition, policy, governance issues, and awareness of social enterprise. For example, most social enterprises had applied for charitable status (to access funding as well as to safeguard their social mission), even if charitable status constrained them in other ways. There was a view that gaining charitable status was a requirement of some funders but precluded social enterprises from accessing funding from others. This indicates a need for a wider understanding among some funders, and a need to change some funders' eligibility criteria. It also points to the need for alternative means of validating or recognising social enterprise activity. While a dedicated legal form may be one means of doing this, the research indicates that it is not the sole means of doing this and could also potentially be a constraint to social enterprises (for example, if it sought to define or restrict the sector).

While safeguarding the social mission (and assets) and establishing trust and recognition among stakeholders is important, a dedicated legal form may not be necessary or the only way to achieve these. The consultations also indicated a broad consensus of the need for social enterprise to be regulated, certified, or validated in some way in order to safeguard the reputation of the sector and to build trust and reputation among the public as well as funders, policymakers, and other stakeholders.

The argument for a dedicated legal form makes the point that it would provide a fit-for-purpose form that could be promoted as a legitimate model and would provide a framework for the future development of the sector, to facilitate its advancement and scaling. This is a strong argument, but there remains a lack of consensus about what this legal form should facilitate, and this was reflected in the differing opinions about what features a dedicated legal structure, if one was pursued, should comprise.

For some of the barriers identified, they could be alleviated by greater use of existing legal forms, and it is noted that the predominant form of legal form (CLG) does not preclude the payment of directors, including managers. The establishment of wholly owned subsidiaries could be used to acquire equity finance, even though it was the view (and experience) of some people consulted that these can be viewed negatively (or suspiciously) by some State agencies. The forming of such structures can be expensive, and legally complex, and may require specific supports. Likewise, the awareness among funding bodies or State agencies of these structures and their purposes may need to be enhanced.

Even if a dedicated legal form for social enterprises is to be pursued, the above issues would still need to be addressed (outside of a dedicated legal form). The recommendations in the research point to the need for greater engagement and support on these issues, rather than pursuing a dedicated legal form, at least in the short term.

A wider issue was that while other forms of company legislation are under review (IPS Law), the feasibility of

⁷⁴ In Scotland, less than one in five social enterprises have adopted the CIC form there.

establishing a dedicated legal form at this point in time was questioned. This also related to the extensive legislative requirements for a dedicated legal form, and the time taken to put in place (although this latter point also raises the need for future proofing, if the process of change is a long-term one).

While a dedicated legal form might benefit the social enterprise sector, the successful pursuit of one would require a compelling argument, and a high threshold of necessity. The research found that the argument for a dedicated legal form at this point in time is not sufficiently compelling for two reasons: 1) the establishment of a dedicated legal form is not necessary to address the barriers identified, and 2) there is a significant divergence of opinion as to what form a dedicated legal form would take.

4.4 RECOMMENDATIONS

Borzaga et al. (2020) identify four key elements of a social enterprise eco-system as follows:



Issues that are articulated in relation to legal form relate also to these four elements and, in particular, to access to resources, and visibility and recognition (as well as awareness) of social enterprise.

The research recommends a series of actions to address the barriers identified. These should first be pursued, and the need for a dedicated legal form could be reconsidered based on the resolution of these issues and the development of the sector.

1. There is a need to support social enterprises to maximise the use of current legal forms to meet their needs. Clarity around the use of existing legal forms to provide for the features identified in the research (including those identified in Table 3.1 above) should be provided.
 - This could take the form of model rules for all company forms.
 - Guidance and model rules should include supporting the use of subsidiary and holding company models for multiple-activity social enterprises.
 - Organisations such as ICOS should develop specific programmes to highlight the advantages of the co-operative model as a legal form which could be used by social enterprises, and to support social enterprises in use of the co-operative model.
2. Expectations of funders and funding eligibility: perceptions around funding eligibility arose as significant issues. The actual requirements and eligibility for funds needs to be clarified. These issues are the

perception that charitable status is required in order to avail of certain public funding programmes, and that it would be a barrier to others.

- The need for ongoing awareness-raising (and training) activities in relation to eligibility for funding and social enterprise with public bodies (including enterprise funding bodies, but also wider funders and public bodies including HSE, Department of Employment Affairs and Social Protection, local authorities, and others).
3. There is a need for a sector-wide discussion on issues of identity, features and criteria of social enterprise. While diversity of the sector is important and needs to be facilitated, there is also a need to work towards a shared understanding around principles or key criteria defining social enterprise, to accommodate the perspectives raised around ‘identity’ of the sector. Lack of clarity around identity is likely to undermine wider initiatives to secure broader public and public body understanding of social enterprise and will lead to a fragmented social enterprise sector.
 4. There is a need for some form of ‘standard’ or certification for social enterprise, particularly for those social enterprises for whom charitable status is not appropriate. There are a range of models and practices in use, some of which are identified in this research. There are a wide range of standards and models of certification and regulation – some of which are from outside of the sector but could be adapted for social enterprises. The increased use of ‘quality standards’ to certify good practice across many sectors needs to be applied to the social enterprise sector. However, an adequate system of measuring quality needs to incorporate a set of principles underpinning social enterprise activity.
 5. Consideration should take place as to how specific incentives and exemptions (including tax exemptions) could be utilised to apply to social enterprises (regardless of legal form).⁷⁵
 6. Issues that relate to incentivising and supporting social enterprise activity should be explored. Models of support for early stage social enterprises (e.g., an incubator type model of support) or supports around merging or amalgamating social enterprises to support scaling of the sector should be developed as concepts and explored for how they might be piloted. There are models of incubator-style support programmes from other sectors (including the academic sector) that should be considered for their applicability (and perhaps piloted) for early stage social enterprise activity.
 7. For social enterprises that are scaling, and require private equity investment, models and uses of existing legal forms (for example, establishment of Designated Activity Companies with shareholding) should be explored and documented. Consideration should be given to applying legal resources to social enterprises which are actively pursuing these forms of finance.
 8. The needs of social enterprises that arise from their legal form (and their effective use of current legal forms) should continue to be monitored and explored. The planned census of social enterprise in 2021 may provide a good opportunity to capture data in relation to this issue.

⁷⁵ For example, there are tax exemptions that apply to certain approved activities, such as sporting bodies.

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CONSULTATIONS

INTERVIEWS

Individuals from the following organisations participated in semi-structured interviews:

Airfield Estate
Ballyhoura Development Company
Benefacts
Clann Credo
Community Finance Ireland
Community Reuse Network of Ireland (CRNI)
Co-operatives/Legal Unit, Department of Enterprise, Trade and Employment
Department of Rural and Community Development
FoodCloud
Galway Traveller Movement, t/a Bounce Back Recycling
GIY (Grow It Yourself)
Grow Remote
Huddersfield Business School
ICOS (Industrial Co-operative Organisation Society)
Irish Social Enterprise Network
National Association of Community Enterprise Centres
Partas / Social Enterprise Republic of Ireland (SER)
Pobal
Rethink Ireland
Revenue Commissioners
School of Law and Government, Dublin City University
SENScot (Social Enterprise Network Scotland)
SERNI (Social Enterprise Research Network of Ireland)
Social Finance Foundation
Social Impact Ireland
South Dublin County Partnership
Concepción Galdón PhD. Professor of Entrepreneurship and Innovation (Director of IE Center for Social Innovation & Sustainability, Madrid)
The Charities Regulator

FOCUS GROUPS

Focus group hosted by South Dublin County Partnership: attended by individuals from Afanite; O’Gorman, Brannigan, Purtill & Co; South Dublin County Partnership and John Curran.

Focus group hosted by Social Enterprise Research Network of Ireland (SERNI): attended by individuals from Trinity Centre for Social Innovation; Sutherland School of Law, University College Dublin; Queens University Belfast; National University of Ireland Galway; Technological University, Dublin.

APPENDIX 1 EMES ECONOMIC AND SOCIAL CRITERIA UNDERPINNING SOCIAL ENTERPRISE

The European research network, EMES, has formulated a definition of social enterprise. This definition is based on four economic and five social criteria. The economic criteria are:

- Continuous activity in the form of production and/or sale of goods and services. Unlike traditional not-for-profit organisations, social enterprises do not normally undertake advocacy work; instead, they produce goods and services.
- A high level of autonomy: social enterprises are created voluntarily by groups of citizens and are governed by them. Public authorities or private companies have no direct or indirect control over them, even though grant funding may be provided by these organisations.
- A significant economic risk: the financial viability of social enterprises depends on the efforts of their members, who have the responsibility of ensuring financial resources are either secured or generated from trading activity, unlike the majority of public institutions.
- A minimum number of paid workers are required, although, like traditional non-profit organisations, social enterprises may combine financial and non-financial resources, voluntary and paid work.

The social criteria are:

- An explicit aim of community benefit: one of the principal aims of social enterprises is to serve the community or a specific group of people.
- Citizen initiative: social enterprises are the result of collective interaction involving people belonging to a community or to a group that shares a certain need or aim.
- Decision-making not based on capital ownership: this generally means the principle of 'one member, one vote', or at least a voting power not based on capital shares. Although capital owners in social enterprises can play an important role, there are other stakeholders that influence decision-making.
- Participatory character, involving those affected by the activity: the users of social enterprises' services are represented and participate in their structures. In many cases, one of the objectives is to strengthen democracy at local level through economic activity.
- Limited distribution of profit: social enterprises include organisations that totally prohibit profit distribution as well as organisations such as co-operatives, which may distribute their profit only to a limited degree, thus avoiding profit-maximising behaviour.

APPENDIX 2 INTERNATIONAL COOPERATIVE ALLIANCE (ICA) STATEMENT OF COOPERATIVE IDENTITY

Definition A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.

Values Co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others.

Principles The co-operative principles are guidelines by which co-operatives put their values into practice.

1st Principle: Voluntary and Open Membership. Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

2nd Principle: Democratic Member Control. Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also organised in a democratic manner.

3rd Principle: Member Economic Participation. Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. 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 co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.

4th Principle: Autonomy and Independence. Co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

5th Principle: Education, Training and Information. Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives. They inform the general public - particularly young people and opinion leaders - about the nature and benefits of co-operation.

6th Principle: Co-operation among Co-operatives. Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, regional, national and international structures.

7th Principle: Concern for Community. Co-operatives work for the sustainable development of their communities through policies approved by their members.

