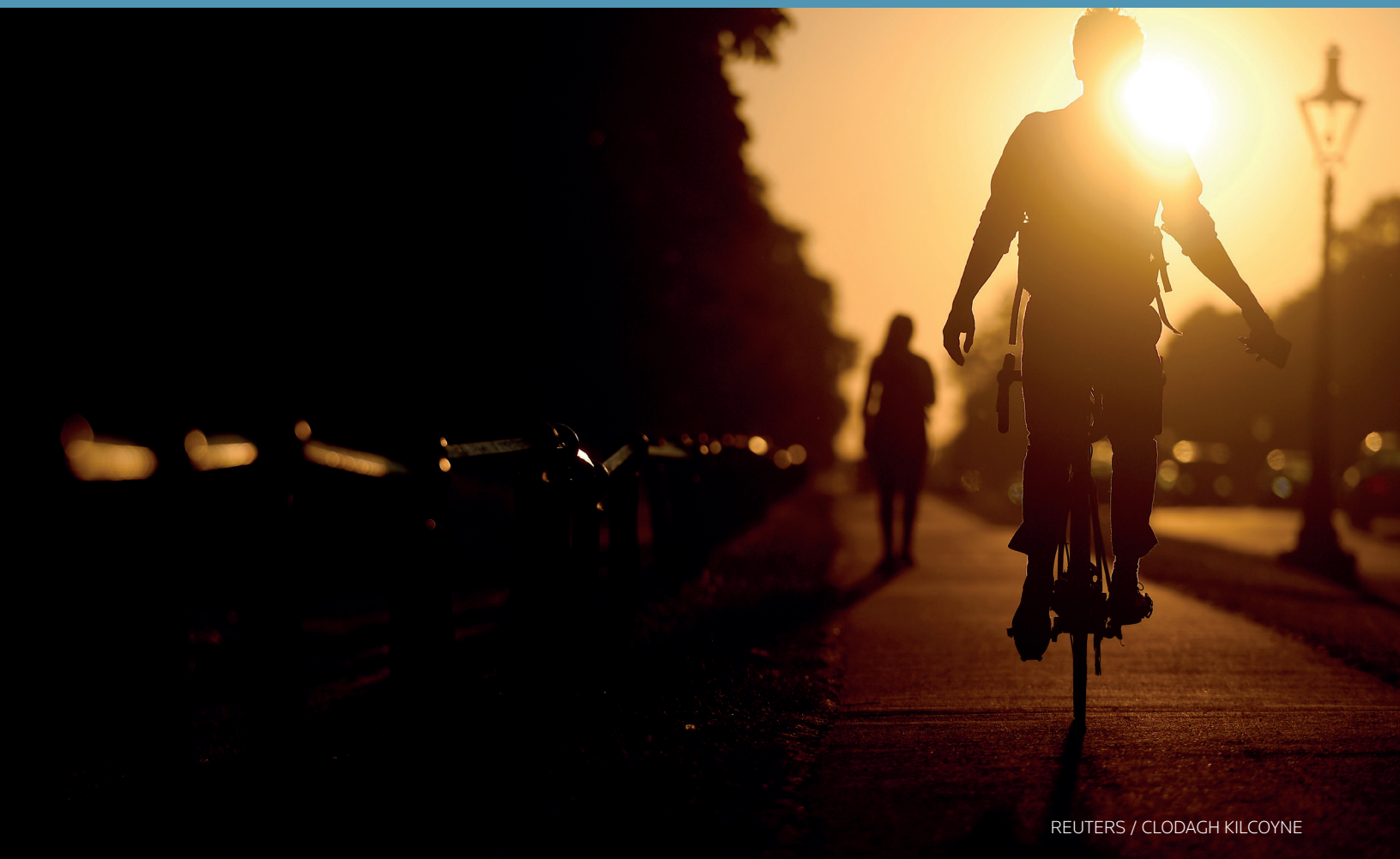


SOCIAL ENTERPRISES IN IRELAND

LEGAL STRUCTURES GUIDE
NOVEMBER 2020



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Our Charity and Not-for-Profit team has served the charity, social enterprise, NGO and broader voluntary sector for decades, giving us an in-depth awareness of the functioning and activities of such organisations which focus firmly on delivering their mission and purpose. Our solicitors have unparalleled knowledge and experience of the sector and a deep appreciation of the mission and vision of our clients. We provide well-known international bodies and smaller, community-based organisations alike with bespoke, specialist legal services. The team appreciates the pressures faced by charities and social enterprises in carrying out their activities within today's commercial world, while keeping up-to-date with regulatory regimes and legislative changes. We regularly assist our clients with the many complex and strategic issues faced by the third sector to assist with their aims of making positive social, societal or environmental impacts.



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FOREWORD

The Thomson Reuters Foundation launched TrustLaw in July 2010, a global pro bono service that amplifies the impact of NGOs and social enterprises by connecting them with the best lawyers around the world. Our mission: spread the practice of pro bono worldwide to drive social change.

It has always been a priority for us to support innovative organisations that have the potential to address many of the world's environmental, humanitarian and social problems. As the social enterprise and social investment sector becomes increasingly sophisticated around the globe, we believe these efforts are especially key to having a large-scale impact on society, but their effectiveness may be impeded by lack of legal resources.

TrustLaw has been working with key players in the social enterprise sector globally for over ten years, partnering with leading law firms to develop a set of legal structuring guides for social enterprises in a variety of regions which have become vital tools for many social ventures. How a social enterprise is legally structured can greatly influence the types of finance available to it and how the organisation can operate and grow.

In July 2019, the Irish Government introduced a National Social Enterprise Policy 2019-2022. The policy included a definition of social enterprises but acknowledged that further research was needed to assess the potential value of a distinct legal form for social enterprises. Through our work with social enterprises in Ireland, we saw the need for this overview Guide setting out the variety of legal structures available. Whether you are just beginning to formulate your entrepreneurial idea or are already working in an established social enterprise, this Guide will give you a clear overview of the various legal structures available to you and includes a decision tree to help guide your way.

We are immensely grateful to Mason Hayes & Curran LLP for their dedication and the extensive resources they have provided to make this Guide possible. A special thank you also goes to Rethink Ireland, Social Entrepreneurs Ireland, the Irish Social Enterprise Network, as well as their members, and the team at the Department of Rural and Community Development, for all of their contributions to the preparation of this Guide.



Carolina Henriquez-Schmitz
Director, TrustLaw
Thomson Reuters Foundation



OVERVIEW

The purpose of this Guide is to assist social enterprises to choose a suitable legal structure within which to carry out their activities. No particular legal structure is the “best”, as each has accompanying advantages and disadvantages, although certain structures will be more suitable to different types of enterprise. This Guide considers the legal structures available and those which are most commonly chosen when establishing a social enterprise in Ireland.

Unlike in other jurisdictions, there is no tailored legal form for social enterprises under Irish law. The legal structures set out within this Guide are the structures that are typically chosen by social enterprises. Some of those structures are more common than others. For the purposes of completeness, we have included all potential legal structures in this Guide, even those which are less common. Choosing one of these structures does not in itself make an entity a social enterprise. Rather, a number of elements relating to the organisation’s purpose, how it uses its profits and how it is governed will determine whether that organisation is a social enterprise.

Although there are many definitions of the term “social enterprise”, the National Social Enterprise Policy for Ireland 2019 – 2022 defines a social enterprise as:

“an enterprise whose objective is to achieve a social, societal or environmental impact, rather than maximizing 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.”

The terms “non-profit” and “not-for-profit” are often used when describing social enterprises, although those terms are also used for a wide variety of other organisations, including registered charities. There is no legal definition in Ireland of the terms “non-profit” and “not-for-profit”. In the context of a social enterprise, it is most accurate to say that a social enterprise is typically a profit-seeking organisation, but seeks and uses that profit in order to advance its social, societal or environmental purpose, rather than ultimately to enable its members and investors to profit from the business, as is the case with purely commercial concerns. Social enterprise organisations typically also include some form of “asset lock” within their structure, which prevent or limit the distribution of the property and income of the business to the members, owners or managers of the organisation.

The legal structure which is most appropriate for any particular social enterprise will depend on a variety of factors. We set out below a summary of the factors that are likely to be most important when choosing a suitable legal structure, as well as some high level advantages and disadvantages of each structure. We also include case studies of five social enterprises which have adopted different types of legal structure.

An important consideration when deciding which legal structure is the most appropriate is: what is the anticipated source of funding for the social enterprise and will proposed stakeholders (including funders, customers, members, settlors, partners and beneficiaries) have specifications in relation to the legal structure of the business?

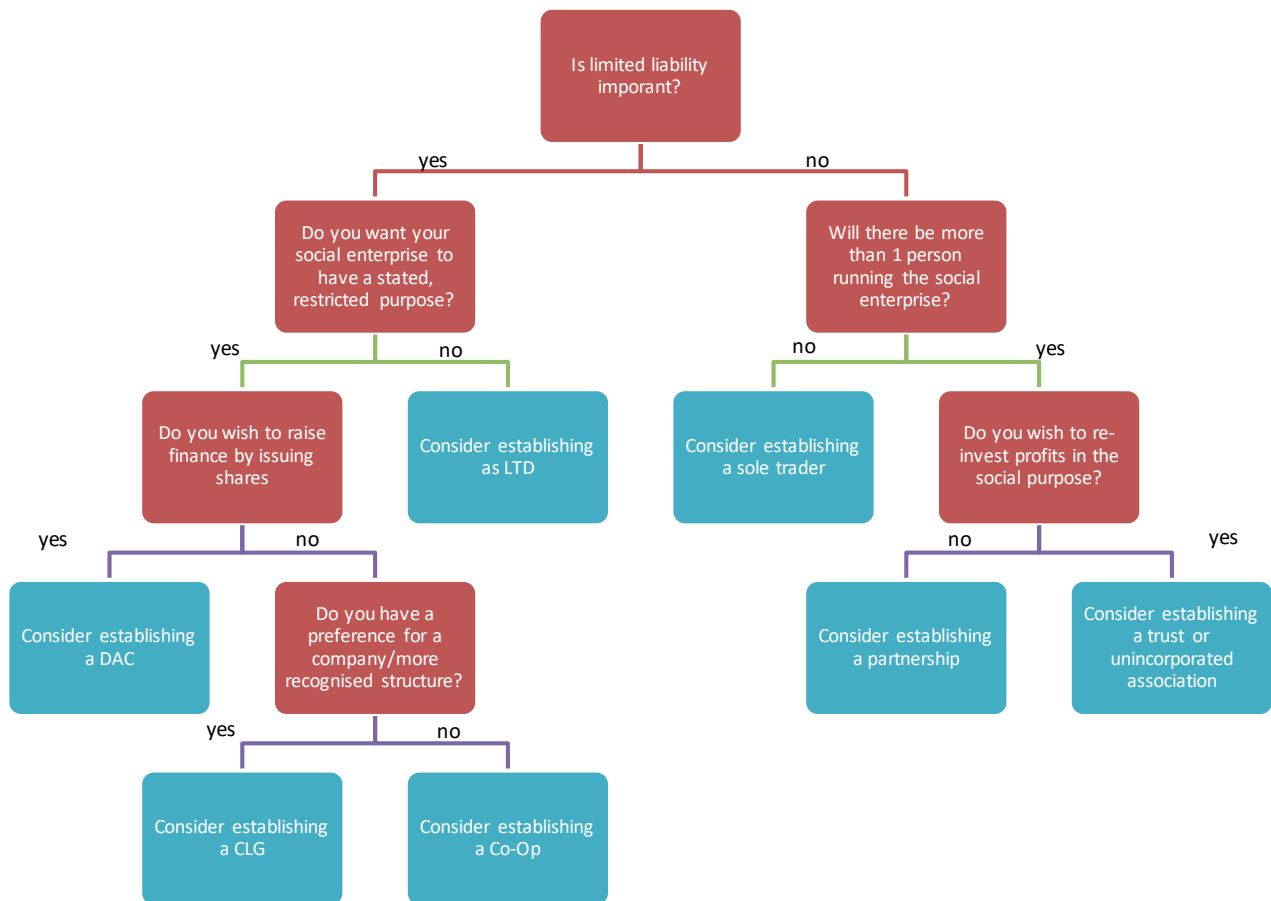
It is very common that funders will require certain matters to be embedded in the governing document of the social enterprise, including a stated social, societal or environmental purpose or a prohibition on the distribution of property by the enterprise which is outside of its stated purpose. In addition, certain funders may want to receive equity, meaning an ownership stake (for instance, shares), in the enterprise. The proposed or potential funders of the enterprise should be identified as early as possible and their requirements should be carefully considered when choosing a suitable legal structure.

Another consideration for any social enterprise is whether its activities bring it within the realm of charity regulation. If an organisation falls within the definition of a “charitable organisation” under the Charities Act 2009, it must register as a charity prior to operating or carrying out activities in Ireland. Although this factor is not specifically mentioned within each legal structure summarised below, it is important that an assessment is carried out at an early stage as to whether a social enterprise must register as a charity and adhere to charity regulation. Registered charities are permitted to apply to the Revenue Commissioners for a charitable tax exemption. Certain funders may require an organisation to be registered as a charity in order to be eligible to apply for funding, so this should be considered.

A social enterprise may decide to change its legal structure as it develops. This can be done, although it may be a costly exercise, so it is best to give considerable thought to legal structure at the outset of an organisation’s existence.

A final factor that a social enterprise may wish to consider, regardless of the legal structure chosen, is whether it should become a Certified B Corporation (generally referred to as a “**BCorp**”). BCorps are businesses which are certified by an organisation called BLab as balancing purpose and profit. In order to become a BCorp, an organisation must meet certain eligibility criteria and amend its governing document to embed the consideration of various stakeholders. BCorp status is becoming an increasingly popular method of demonstrating commitment to factors that are broader than simply making a profit.

WHICH TYPE OF LEGAL STRUCTURE IS RIGHT FOR MY ORGANISATION?



LEGAL STRUCTURES





1. COMPANY LIMITED BY GUARANTEE

AT A GLANCE

1.1 OVERVIEW

A company limited by guarantee (“**CLG**”) is the most common corporate legal form for organisations that do not exist for private profit, and therefore for social enterprises, in Ireland. A CLG does not have a share capital like most limited companies. Rather, its members each guarantee to contribute a fixed amount of money to the assets of the CLG if the CLG is wound up, which is to be used towards the payment of the debts and liabilities of the CLG. Typically, this would be a nominal sum, such as €1.

The constitution of a CLG is in two parts, one of which, the “memorandum of association”, contains an objects clause which outlines the permitted activity of the CLG. The objects clause of a social enterprise that has been incorporated as a CLG will generally include a reference to the enterprise’s main social aim or aims.

The constitution of a CLG that is a social enterprise should also contain an “asset lock” provision which prohibits any property of the CLG from being used for a purpose other than its main object and which prohibits, for instance, the payment of any dividends to its members. On the solvent liquidation of a CLG, it is common for the CLG’s constitution to provide for the surplus assets (after the payment of the CLG’s liabilities) to be paid to an organisation with similar objects to the CLG.

Notwithstanding this, provided a CLG does not have charitable status or some other restriction set out in its constitution which prohibits it from doing so, it can enter into contracts with its members to provide bonuses which are related to the CLG’s performance.

ADVANTAGES

- ✓ Limited liability for members and directors
- ✓ Activities are limited to the stated objects clause
- ✓ An asset lock can be incorporated into the structure thereby guaranteeing that the assets of the CLG are used for the promotion of its objects and not distributed to its members
- ✓ Companies have a high degree of transparency as they publicly file their accounts and constitution
- ✓ Companies are well recognised by funders and the public.

DISADVANTAGES

- ✗ On-going and annual compliance obligations
- ✗ Cannot raise funds by issuing shares as a CLG does not have a share capital
- ✗ Profits cannot be distributed to members (which is a disadvantage for members, but may be an advantage for funders)
- ✗ Companies are constrained by the requirements of company law, including reporting and filing requirements, obligations to prepare and (unless exemptions apply) have audited annual financial statements and rules relating to how meetings are convened and held and how decisions are taken

1.2 Governance

A CLG must have at least one member but there is no maximum number of members. As CLGs do not have share capitals, the members do not own shares and are not called shareholders.

Control of a CLG rests with the members, who can pass special resolutions to change the CLG's constitution and who hold the fundamental power to remove directors. Members have the right to receive a copy of the annual financial statements of the CLG, including the directors' and auditors' reports to those statements.

A CLG must have at least two directors (who must be natural persons who are at least 18 years of age) and a company secretary, who may be one of the directors. The directors of a CLG are tasked under company law with the day-to-day management and governance of the CLG and owe fiduciary duties to the CLG which are listed in the Companies Act 2014. The directors can delegate their powers of management to, for instance, a CEO.

Employees of the CLG can act as members and be appointed as directors (unless the CLG is a charity, in which case employees cannot be directors of the CLG).

1.3 Regulation

CLGs are governed by the Companies Act 2014 and have annual and on-going compliance obligations under that legislation. The directors must ensure that the CLG complies with these obligations, although in practice, the responsibility for doing so is often delegated to the company secretary. Among the requirements of the Companies Act 2014, CLGs must prepare and file an annual return and financial statements in the Companies Registration Office ("CRO"). The contents of these financial statements, and the requirement to have them audited, depend on the turnover, asset value and number of employees of the CLG. Forms must be filed with the CRO upon the occurrence of certain events, including the appointment of a new director or the resignation of an existing director.

CLGs are also required to maintain various registers, including a register of members, directors and secretary, register of directors' interests, a minute book and a beneficial ownership register (details of the last must be filed on a publicly accessible register).

1.4 Establishment Costs and Documents

In order to establish a CLG, a constitution which accurately sets out the object of the CLG and provisions relating to the appointment and retirement of members and directors, among other things, will need to be agreed and filed at the CRO.

To incorporate the CLG, a Form A1 (signed by the proposed members, directors and company secretary) must be filed in the CRO with the constitution. There is a filing fee of €50 (paper) or €100 (online) for a Form A1. Once acceptable to the CRO, the company will be incorporated. The CLG should then procure a company seal to execute deeds and similar documents.

A CLG will have the words “company limited by guarantee” or its Irish equivalent as a suffix to its name, although charitable CLGs can apply to dispense with this requirement.

1.5 Tax Treatment

A CLG should register for Irish corporation tax. The current rate of corporation tax is 12.5% on trading profits and 25% on non-trading profits. The CLG will also be required to register and account for payroll taxes if it will have employees. The CLG may be obliged to register for VAT or in some cases may elect to register if it has a basis for doing so.

1.6 Liabilities

A CLG has a separate legal personality to its members. The liability of members of a CLG is limited to the amount of the guarantee which, as outlined above, is typically a nominal figure such as €1, unless the members have given personal guarantees in respect of the debts of the CLG to specific entities, such as a bank.

A CLG also has a distinct legal personality from its directors. The possibility of personal liability for directors is generally limited to cases where they have not acted honestly, responsibly or reasonably or where they have expressly agreed, by taking some action, to accept personal liability. It is standard practice for CLGs to maintain directors and officers insurance.

1.7 Finance and Fundraising

As CLGs do not have shares, they cannot raise capital through equity investment. In the constitution of the CLG, membership may be conditional on paying subscriptions which are, in essence, a membership fee. A CLG can also seek donations or loans from its members or from the public.

A CLG may raise capital by way of loan finance or by the issue of debentures, notes or similar instruments. A CLG can also seek grants or donations from financiers or others.



2. PRIVATE COMPANY LIMITED BY SHARES

AT A GLANCE

2.1 OVERVIEW

Private companies limited by shares (“LTDs”) are the most common form of commercial company in Ireland. An LTD is typically established to carry on a trade with a view to making a profit and to distribute that profit to its shareholders. The shareholders in an LTD would also expect to see a return of the LTD’s assets, after the payment of its liabilities, on a solvent liquidation. An LTD established solely for commercial aims would not be a social enterprise.

An LTD has full unlimited capacity to undertake business, as its constitution, which has only one part, has no objects clause. It is, therefore, unlikely to be the most appropriate vehicle for a social enterprise, given that the constitution does not restrict the LTD to pursuing a stated social, societal or environmental purpose. However, we have included it in this Guide, while noting that position, as it is possible to establish an LTD to carry on a social enterprise.

ADVANTAGES

- ✓ Limited liability for members and directors
 - ✓ Flexibility to raise funds via equity and loan finance
 - ✓ Companies have a high degree of transparency
 - ✓ Companies are well recognised by funders and the public
-

DISADVANTAGES

- ✘ No stated objects clause so no focus on a socially beneficial object
- ✘ On-going and annual compliance obligations
- ✘ Companies are constrained by the requirements of company law including reporting and filing requirements, obligations to prepare and (unless exemptions apply) have audited annual financial statements and rules relating to how meetings are convened and held and how decisions are taken

2.2 Governance

It is the shareholders of the company who hold ultimate control. An LTD must have at least one shareholder holding at least one share, but not more than 149 shareholders. Shareholders can pass resolutions to change the LTD's constitution and they hold the ultimate right to remove directors. Shareholders are also entitled to receive the annual financial statements, including directors' and auditors' reports to those statements.

An LTD can issue shares of different classes with different rights attaching to the shares in those classes. The rights attaching to different classes of shares are almost always set out in the LTD's constitution, although certain rights can be agreed by the shareholders and recorded in a separate shareholders' agreement. Subject to the availability of distributable profits in the necessary amounts, there are no limits on an LTD paying dividends to its shareholders unless its constitution, or the rights attaching to any class of share, include any such limits

The directors are responsible for the management and administration of the LTD and are appointed and removed in accordance with the LTD's constitution. In the absence of such provisions in the constitution, additional directors may be appointed by the directors themselves and by the members in general meetings. Directors must comply with their

fiduciary duties under the Companies Act 2014. These duties include a duty to act in good faith in what the directors considers to be the best interests of the company and to avoid conflicts of interest. The directors can delegate their powers of management to, for instance, a CEO.

An LTD must have at least one director (who must be a natural person at least 18 years of age) and a company secretary (who must either be a natural person at least 18 years of age or a body corporate). The company secretary may also be a director except where there is only one director. A company of any type must have a director who is ordinarily resident in an EEA country or must lodge a bond with the CRO to mitigate against unpaid fines.

Employees of the LTD can own shares in the LTD (and therefore be members of it) or be appointed as directors (unless the LTD is a charity, in which case employees cannot be directors of the LTD. However, LTDs are not likely to be a suitable legal form for a charity).

2.3 Regulation

LTDs are governed by the Companies Act 2014 and are required to adhere to the same annual and on-going compliance obligations as set out above in relation to CLGs, including the maintenance of registers and minute books and the completion of annual and on-going filings to the CRO, which become publicly available. Shares in LTDs are transferable (although usually subject to directors' approval) and share transfers must be documented and recorded in the LTD's register of transfers.

LTDs are also required to maintain a beneficial ownership register which must be maintained and kept up to date and which is filed on a publicly accessible central register.

2.4 Establishment Costs and Documents

To incorporate an LTD, a Form A1 (signed by the proposed shareholders, directors and company secretary) must be filed in the CRO with the constitution. There is a filing fee of €50 (paper) or €100 (online) for a Form A1. Once acceptable to the CRO, the LTD will be incorporated. The LTD should then procure a company seal to execute deeds and similar documents.

2.5 Tax Treatment

An LTD should register for Irish corporation tax. The current rate of corporation tax is 12.5% on trading profits and 25% on non-trading profits. The LTD will also be required to register

and account for payroll taxes if it will have employees. The LTD may be obliged to register for VAT or in some cases may elect to register if it has a basis for doing so.

2.6 Liabilities

As an LTD is a separate legal entity to its shareholders, the shareholders have limited liability in respect of the debts of the LTD. In general, the liability of the shareholders of an LTD is limited to the amount unpaid on their shares. However, this principle will not apply where the shareholders have given personal guarantees in respect of the company's debts.

An LTD also has a distinct legal personality from its directors. The possibility of personal liability for directors is generally limited to cases where they have not acted honestly, responsibly or reasonably or where they have expressly agreed, by taking some action, to accept personal liability. It is standard practice for LTDs to maintain directors and officers insurance.

2.7 Finance and Fundraising

An LTD can allot or issue shares to its shareholders to raise capital. An investor who makes an equity investment into the LTD by purchasing shares will become a shareholder of the LTD. An LTD can also seek donations and loans from its shareholders.

An LTD can raise finance by offering equity in its capital in return for external investment, loans or other forms of debt. Generally, an LTD is not permitted to offer shares or debentures to the general public.

3. DESIGNATED ACTIVITY COMPANY

AT A GLANCE

3.1 OVERVIEW

There are two forms of designated activity company (“DAC”) in Ireland. The first is a private company limited by shares with the capacity to only do those acts or things set out in the memorandum of association in its two part constitution. The second type, a private company limited by guarantee having a share capital, is rare and is not considered in this Guide. It is thought that there may be fewer than 100 DACs limited by guarantee and having a share capital registered in Ireland

A DAC’s constitution, like that of a CLG, contains an objects clause which outlines the permitted corporate activity of the DAC. A social enterprise can stipulate its purpose within the objects clause which will bind the DAC to that purpose. To the extent that a DAC exists for a social, societal or environmental purpose, as set out in its constitution, the obligation of the directors is to advance the stated purpose. The constitution can include provisions which cap the amount of dividends that can be paid to shareholders or provide for a full asset lock (see above at section 1.1)

ADVANTAGES

- ✓ Limited liability for members and directors
 - ✓ Stated objects clause facilitates inclusion of, and focus on, social, societal or environmental purpose
 - ✓ Flexibility to raise funds via equity and loan finance
 - ✓ Companies have a high degree of transparency
 - ✓ Companies are well recognised by funders and the public
-

DISADVANTAGES

- ✘ On-going and annual compliance obligations
- ✘ Companies are constrained by the requirements of company law including reporting and filing requirements, obligations to prepare and (unless exemptions apply) have audited annual financial statements obligations and rules relating to how meetings are convened and held and how decisions are taken

3.2 Governance

A DAC must have at least one member, who will own shares and who may also therefore be called a shareholder and a maximum of 149 shareholders. The shareholders have the same company law rights as the members of an LTD and have many rights in common with members of a CLG. The constitution of a social enterprise structured as a DAC may include restrictions or prohibitions on the payment of dividends or provide that dividends may only be payable in specified circumstances or up to certain amounts.

The directors are responsible for the management and administration of a DAC and are appointed and removed in accordance with its constitution. In the absence of such provisions in the constitution, interim directors may be appointed by the directors themselves and by the members in general meetings. Directors must comply with their legal duties under the Companies Act 2014. These duties include a duty to act in good faith in what the directors considers to be the best interests of the company and to avoid conflicts of interest. The directors can delegate their powers of management to, for instance, a CEO.

A DAC must have at least two directors (who must be natural persons who are at least 18 years of age) and a company secretary, who may be one of the directors.

Employees of the DAC can own shares in its capital (and therefore be members of it) or be appointed as directors (unless the DAC is a charity, in which case employees cannot be directors of the DAC).

3.3 Regulation

DACs are governed by the Companies Act 2014 and are required to adhere to the same annual and on-going compliance obligations as set out above in relation to CLGs and LTDs, including the maintenance of registers and minute books and the completion of annual and on-going filings to the CRO, which become publicly available. Unlike CLGs, DACs must complete share transfer documentation every time that its members change.

DACs are also required to maintain a beneficial ownership register which must be maintained and kept up to date and filed on a publicly accessible central register.

3.4 Establishment Costs and Documents

In order to establish a DAC, a constitution should be drafted, which accurately sets out the objects of the DAC and provisions relating to the appointment and retirement of members and directors. Depending on the level of detail that it is proposed to include in the constitution, the constitution can be a one page document. However, it is more common for it to be a much longer document.

To incorporate the DAC, a Form A1 (signed by the proposed members, directors and company secretary) must be filed in the CRO with the constitution. There is a filing fee of €50 (paper) or €100 (online) for a Form A1. Once acceptable to the CRO, the DAC will be incorporated.

3.5 Tax Treatment

A DAC should register for Irish corporation tax. The current rate of corporation tax is 12.5% on trading profits and 25% on non-trading profits. The DAC will also be required to register and account for payroll taxes if it will have employees. The DAC may be obliged to register for VAT or in some cases may elect to register if it has a basis for doing so.

3.6 Liabilities

As a DAC is a separate legal entity to its shareholders, the shareholders have limited liability in respect of the debts of the DAC. In general, the liability of the shareholders of a DAC is limited to the amount unpaid on their shares. However, this principle will not apply where the shareholders have given personal guarantees in respect of the company's debts.

A DAC also has a distinct legal personality from its directors. The possibility of personal liability for directors is generally limited to cases where they have not acted honestly, responsibly or reasonably or where they have expressly agreed by taking some action to accept personal liability. It is standard practice for a DAC to maintain directors and officers insurance.

3.7 Finance and Fundraising

A DAC can allot or issue shares to its members to raise capital. An investor who makes an equity investment into the DAC by purchasing shares will become a member of the company. A DAC can also seek donations and loans from its members and from others.

A DAC can raise finance by offering equity in the company in return for external investment, loans or other forms of debt. A DAC may offer certain types of debenture to the public, but not the shares in its capital.



4. CO-OPERATIVE

AT A GLANCE

4.1 OVERVIEW

A co-operative (also known as an industrial and provident society) is a body corporate established by a group of people who unite to meet economic, social and cultural needs and aspirations through a jointly and democratically-controlled enterprise. Co-operatives tend to do business primarily with their own members with the object of providing a product or service at a minimal cost. They are fairly popular legal structures for a wide array of enterprises, including community energy activities.

Co-operatives are generally registered under the Industrial and Provident Societies Act 1893 (as amended) (the “**1893 Act**”), although some organisations with co-operative features incorporate as companies. A co-operative may operate in any business, industry or trade authorised by its rules. Under the 1893 Act, these rules must contain the object of the co-operative – which can have a social benefit.

ADVANTAGES

- ✓ Limited liability for members
 - ✓ Democratic structure
 - ✓ Activities are limited to the stated objects
 - ✓ An asset lock can be incorporated into the structure thereby guaranteeing that the assets are used for the promotion of its objects
-

DISADVANTAGES

- ✘ May not be as easily recognisable to some funders and members of the public as other structures, in particular companies
- ✘ Must adhere to regulations for co-operatives
- ✘ Some ongoing filing and governance obligations
- ✘ There is no audit exemption for smaller co-operatives

4.2 Governance

A co-operative must have at least seven members, who may be natural persons, companies and/or other societies. The rules of the co-operative (known as the “Rules” or the “Rulebook”) must include details on the terms of admission of the members and the method of making, altering or rescinding Rules. The Rules must also include details of the manner in which meetings are to be held and the scale and rights of voting. Unlike companies, whose members can agree to vary rights to vote across different classes of share or membership type, all members have one vote only each.

A co-operative is governed by a Committee of Management. Their powers and duties must be set out in the Rules governing the co-operative.

4.3 Regulation

Co-operatives are registered under the 1893 Act and are registered on the Register of Friendly Societies, which is administered by the CRO. The Rules of the co-operative must be approved by the Registrar of Friendly Societies.

Co-operatives are required to submit an annual return and financial statements to the CRO. The annual financial statements of every co-operative must be audited. Certain changes to the administration or status of the co-operative (including a change of registered address or changes to the Rules) require filings to be made. Co-operatives are also subject to the same regulations relating to beneficial ownership filings as companies.

4.4 Establishment Costs and Documents

To register as a co-operative, a Form A1 and two copies of the draft Rules of the co-operative must be submitted to the Registrar of Friendly Societies. The fees for this submission depend on whether the “Model Rules”, approved by the Registrar in relation to the Rules prepared by certain representative groups for co-operatives, are used, and range from €50 to €200.

4.5 Tax Treatment

As co-operatives are bodies corporate, they are subject to corporation tax. The current rate of corporation tax is 12.5% on trading profits and 25% on non-trading profits. A co-operative should also consider whether a VAT registration is required.

4.6 Liabilities

A co-operative has a separate legal personality from its members. Under the 1893 Act, the liability of its members is limited. Accordingly, a member will, generally speaking, only be liable for the amount unpaid on their membership fees in the event of the winding up of the co-operative, unless they have taken specific actions, such as expressly agreeing to guarantee the debts of the society.

4.7 Finance and Fundraising

Members contribute equitably to, and democratically control, the capital of their co-operative. There are limits placed on the amount that a member may have by way of interest in the shares of a co-operative. Under current legislation the default position is that no individual member can hold an interest of more than €150,000 or 1% of the total asset value of the co-operative, whichever is the greater, in any co-operative society, unless the rules of the co-operative society provides otherwise. A co-operative can also seek donations or loans from its members.

The legislation governing co-operatives places certain restrictions on the raising of share capital above certain amounts without the prior approval of the Registrar of Friendly Societies. Co-operatives can also raise finance through loan finance, grants and donations.



5. SOLE TRADER

AT A GLANCE

5.1 OVERVIEW

A sole trader is a single individual who sets up a business. There are no registration requirements or formalities to set up a sole trader business save for the requirement to register the business name where that name is different from that of the sole trader. Therefore, this is the default structure for a person who starts a business on his or her own account without incorporating. A sole trader does not have a separate legal personality from the business which he or she carries on, meaning that all liability relating to the business will rest with the individual behind it.

ADVANTAGES

- ✓ Easy to establish
- ✓ Less governance and regulation than most of the other structures

DISADVANTAGES

- ✗ Personal liability
- ✗ More difficult to raise funds
- ✗ Low degree of transparency as no public filing of accounts
- ✗ Difficult to demonstrate that the business is bound to a social, societal or environmental purpose as there is no public governing document

5.2 Governance

Sole traders are free to structure their business as they see fit.

5.3 Regulation

Sole traders are not subject to on-going or annual administrative and compliance obligations related to this legal structure. This is one of the main distinctions between a sole trader and a company. However, other regulations will apply to sole traders in the same way as they apply to business generally, including health and safety legislation, data protection legislation, requirements relating to retention of financial and other records etc. As noted above, sole traders who are not trading under their own name are obliged to register a business name with the CRO.

5.4 Establishment Costs and Documents

Generally, and except as noted above regarding business names, sole traders are not required to register their business or submit documentation to any regulatory bodies in order to “establish”.

5.5 Tax Treatment

An individual’s charge to income tax in Ireland is determined by their residency, ordinary residency and domicile status. The taxation of a sole trader is based on the annual accounts of the business for the applicable tax year. There are a range of deductions which a sole trader may claim which may reduce his or her overall tax bill, including day-to-day business expenses and capital allowances on the business’ capital expenditure. Sole traders are also entitled to personal tax credits.

In addition to income tax, sole traders are also liable for the universal social charge and pay related social insurance, which is charged on their income, and to capital gains tax on any capital gains.

5.6 Liabilities

One of the main disadvantages of being a sole trader is that sole traders do not have limited liability in relation to the debts and liabilities incurred in the carrying on of their business. As the business is not a separate legal entity to the sole trader, a sole trader is personally liable for all of the debts of the business.

5.7 Finance and Fundraising

Sole traders do not have the ability to raise capital in the same way as most companies, from the sale or issue of shares. Typically, a sole trader will use their own finances to establish their business. Sole traders may also be able to secure finance by way of loan secured over the assets of the business or over their personal assets or, in some circumstances, may receive unsecured loans.

6. UNINCORPORATED ASSOCIATION

AT A GLANCE

6.1 OVERVIEW

An unincorporated association is a collection of individuals who come together with a common purpose. It does not have a separate legal personality of its own and any property which it holds is legally held by its constituent members. The members of an unincorporated association do not benefit from limited liability and are liable for the debts of the organisation.

The governing document of an unincorporated association will generally set out its permitted activities and powers. For a social enterprise, this would normally include reference to the social enterprise's main aims.

ADVANTAGES

- ✓ Easy to establish
- ✓ Has an objects clause so can include a stated social, societal or environmental purpose
- ✓ Less governance and regulation than most of the other structures

DISADVANTAGES

- ✗ Personal liability for its members and officers
- ✗ More difficult to raise funds
- ✗ Very little transparency as no public filing of accounts

6.2 Governance

In general, an unincorporated association is free to structure its business as it sees fit. There is no specific law requiring that its governance is structured in any particular manner, although common law rules about the calling and holding of meetings will apply. The members may agree rules which will apply to the organisation and such rules may include the appointment of officers of the organisation and how processes and procedures operate. The members and officers will be bound by the objects of the association and will be under an obligation not to do anything which is outside the scope of the objects.

A person can be an employee of an unincorporated association and a member or officer of the unincorporated association (unless the unincorporated association is a charity, in which case an employee cannot be an officer of the charity).

6.3 Regulation

Unincorporated associations are not subject to the same administrative and compliance requirements as companies. They are under no obligation to file an annual return or accounts or to have their accounts audited.

6.4 Establishment Costs and Documents

There is no formal establishment procedure for an unincorporated association. Once a governing document has been prepared, and signed by the constituent members, the unincorporated association can be established.

6.5 Tax Treatment

As an unincorporated association has no separate legal personality, its members are subject to tax. Further detail on the tax liabilities of individuals is set out above in the "Sole Trader" section.

6.6 Liabilities

As an unincorporated association is not a separate legal personality from its members the members do not enjoy the benefit of limited liability. They can be held jointly and severally liable for matters which give rise to liability.

6.7 Finance and Fundraising

As an unincorporated association does not have shares, it cannot raise funds by way of equity investment. It may raise finance by way of loan, finance, grants and donations. The rules of the unincorporated association may require members to pay subscription fees. An unincorporated association can seek donations and loans from its members and from other people.



7. PARTNERSHIP

AT A GLANCE

7.1 OVERVIEW

A partnership arises automatically where two or more people carry on a business in common with a view of making profit and do not incorporate the business as a company or other body corporate. There are no registration requirements or formalities required to establish a partnership save in relation to the registration of business names discussed below. A partnership is not a separate legal entity from its partners (although in certain circumstances the law treats it as such) and the partners in a general partnership do not enjoy the protection of limited liability.

It is possible under Irish law to incorporate limited partnerships, where one or more partners, known as limited partners, have only limited liability for the debts and obligations of the partnership. Those limited partners cannot involve themselves in the management of the business of the partnership without risking their limited liability status. Limited partnerships are required to be registered at the CRO. Please note that limited partnerships are not considered any further in this Guide and the following sections relate to general partnerships only.

ADVANTAGES

- ✓ Easy to establish
 - ✓ Less governance and regulation than some of the other structures
-

DISADVANTAGES

- ✘ Personal liability for the partners
- ✘ Difficult to raise funds without a funder running the risk of being classed as a partner
- ✘ Low degree of transparency as no public filing of accounts
- ✘ Difficult to demonstrate that the business is bound to a social, societal or environmental purpose as there is no public governing document although most partnerships are governed by a (private) partnership agreement

7.2 Governance

Partnerships are primarily governed by the Partnership Act 1890. This Act sets out the basic default rules which apply to every partnership. Many of these provisions can be modified and excluded by the partners by agreement between themselves.

It is advisable that prospective partners negotiate and agree a partnership agreement prior to their entering into partnership with one another, as many of the default provisions under the Partnership Act 1890 are inappropriate for many businesses, including the right of every partner to dissolve the partnership by giving notice, the automatic dissolution of the partnership on the death of a partner and the lack of a provision in the 1890 Act for a partner to retire.

7.3 Regulation

Like sole traders, partnerships are not subject to on-going or annual administrative and compliance obligations related to this legal structure. However, other regulations will apply to social enterprises established by way of partnership in the same way as they apply to businesses generally, including health and safety legislation, data protection legislation, requirements relating to retention of records etc.

If a partnership trades under a business name that is something other than the surnames of all individual partners (and the corporate names of any partners that are companies) the partnership must register a business name at the CRO.

7.4 Establishment Costs and Documents

Save in relation to business names as noted above, partnerships are not required to register their businesses or submit documentation to any regulatory body in order to establish. As outlined above, it is advisable that a written partnership agreement is entered into.

7.5 Tax Treatment

Partnerships are not taxed as a separate entity to the people who constitute the partnership. The partners are taxed directly on the profits of the partnership in proportion to their share in the partnership. For an overview of the tax treatment of individuals, please see section 5.5 above.

7.6 Liabilities

Partners in a general partnership do not enjoy limited liability and may be found personally liable for the debts of the partnership should it be unable to meet its obligations. There is also a risk that the personal creditors of a partner may be able to recoup some of a partner's share of a partnership.

7.7 Finance and Fundraising

Typically, partners use their own finances to establish a social enterprise. Partners may also be able to secure finance by way of a loan secured over the assets of the business or over their personal assets or, in some circumstances, partners may receive unsecured loans.



8. TRUST

AT A GLANCE

8.1 OVERVIEW

A trust is an arrangement whereby property is held by a person or people (the trustees) on behalf of others (the beneficiaries) for a particular purpose. A trust does not have a separate legal personality to its trustees and property it holds is legally held by the trustees. It is suitable for social enterprises as the trustees may not profit from the trust and owe strict duties to the beneficiaries. However, these duties are onerous and, owing to the lack of a separate legal personality of a trust from its trustees, the trustees may incur personal liability for the debts of the trust.

ADVANTAGES

- ✓ Relatively easy to establish
- ✓ Has an objects clause so can include a stated social, societal or environmental purpose
- ✓ Less governance and regulation than other structures

DISADVANTAGES

- ✗ Personal liability for trustees
- ✗ More difficult to raise funds
- ✗ Deeds are required upon changes to the trustees
- ✗ Very little transparency as no public filing of accounts
- ✗ May be difficult to demonstrate that the business is bound to a social, societal or environmental purpose as there is no public governing document, although there is a private declaration of trust or similar

8.2 Governance

Trusts are governed by the trust deed which establishes the trust and by legislation which governs trusts. The law imposes fiduciary duties on trustees including the duty to safeguard the trust property, the duty to keep accounts and provide certain information to the beneficiaries.

8.3 Regulation

Trusts are governed by a range of legislation, including the Trustee Act 1893 and the Land and Conveyancing Law Reform Act 2009.

Trusts are required to maintain a beneficial ownership register which must be maintained and kept up to date.

8.4 Establishment Costs and Documents

To establish a trust, a trust deed should be prepared which sets out the identity of the trustees, the property which is subject to the trust and the purpose of the trust.

8.5 Tax Treatment

As a trust does not have separate legal personality, the trustees of the trust will be liable to income tax at a flat rate of 20% and CGT at 33% on capital gains. There are certain taxes which are specific to trusts, so tax advice is strongly recommended in relation to the establishment of a trust structure.

8.6 Liabilities

As a trust does not have a separate legal personality from its trustees, the trustees do not enjoy the benefit of limited liability. Trustees can be held jointly and severally liable for matters which give rise to liability.

8.7 Finance and Fundraising

As a trust does not have shares, it cannot raise funds by way of equity investment. It may raise finance by way of loan, finance, grants and donations.



9. HYBRID STRUCTURES

It is also possible for a social enterprise to constitute part of a “hybrid structure”. Generally, these types of structures are put in place where an organisation has both for-profit and not-for-profit elements and it has been decided to separate those elements into separate legal structures. Often this type of a structure develops over time. In other instances, organisations are set up in this way from the outset.

The most common types of hybrid structures are:

1. A parent for-profit entity with a not-for-profit subsidiary; or
2. A parent not-for-profit entity with a trading subsidiary.

In deciding what types of entity the parent and the subsidiary should be, many of the considerations set out above in relation to legal structure will be of relevance. Typically, these hybrid structures are set up by the establishment of two companies, as this facilitates a clearer and more typical “parent” and “subsidiary” structure.

CASE STUDIES



CASE STUDY 1:



DUBLIN FOOD CO-OPERATIVE SOCIETY LIMITED

Dublin Food Co-operative Society Limited (“DFC”) was first founded in 1983 as an unincorporated association before registering in 1991 as a co-operative society. The main object of DFC is to provide wholesome, sustainable and affordable food to its members and the wider community. In addition to this, DFC has a host of objectives in its governing document which include a range of different social purposes relating to sustainability and co-operation. At present, there are around 2,500 members of DFC.

In order to choose the appropriate legal structure, DFC reviewed its foundational purpose: it was founded to address the needs of its members and to fulfil a social purpose. The co-operative ethos was considered ideal for this. The founders of DFC were strong believers in self-help, self-responsibility and ensuring that all those who benefited from the activities of DFC should have a role in its governance.

DFC believes that, although the Industrial and Provident Societies Act is somewhat archaic and in need of modernisation (which is currently ongoing), it protects the co-operative model of “one member, one vote” while allowing the co-op to raise capital from its members.

DFC is run by a committee of management (with 9 members). It also has 2 sub-committees with 5 persons in each. Executive management of DFC has been delegated to a General Manager and a Secretary. There are also 11 members of staff of DFC. DFC is governed by a constitution (known as its “Rulebook”) which is a short document of about 14 pages.

Although DFC has availed of a number of support grants, it is fundamentally a trading co-operative. The vast proportion of DFC’s revenue comes from trading, with approximately 75% of this trading being with members of the co-operative and 25% from non-members. The remainder of DFC’s income is a mixture of membership subscription fees, grants and income from a community development programme.

A major advantage of this structure, in DFC's opinion, is that the compliance obligations are lower than that of a company and the relevant legislation is not currently very prescriptive, allowing for quite a bit of flexibility in terms of structure and governing documentation. In addition, the legislation also allows a lot of matters to be dealt with in secondary rules (rather than the Rulebook, which allows greater flexibility). Other advantages that are important to DFC are the protection of the concept of "one member, one vote" and certain tax advantages (which are dependent on the nature of the co-op and its activities). DFC does not find the compliance obligations for co-operatives onerous.

DFC points to a disadvantage within the co-operative legislation which is the absence of an audit exemption. DFC explains that this is difficult for start-up or smaller co-operatives which will not be expecting significant income in the first three years. Until an audit exemption is introduced, this remains onerous for new societies. DFC is happy to undertake an audit, as it feels that it provides an assurance of DFC's internal financial recording.

DFC intends to remain structured in this way for the future and is eagerly awaiting the proposed new legislation relating to co-operatives. DFC believe that co-operatives represent the gold standard legal form for a social enterprise matching social purpose, social dividend and stakeholder control within one structure.

CASE STUDY 2:



SWAP-ABLE LIMITED t/a MOBILITY MOJO

Swap-Able Limited was established in 2014 as a private company limited by shares (“LTD”). In 2016, the company registered the business name “Mobility Mojo”, which is the name by which it is commonly known.

Mobility Mojo is an independent global rating system for hotel accessibility, which aims to give people with accessibility needs the confidence to go where they want to go. The company provides hotels with the tools to accurately audit the level of accessibility in their premises and then display this information on their websites, so that guests can decide whether a hotel suits their needs.

When choosing a legal structure, the founders were focused on their desire to scale internationally and to obtain the investment to do so. They did not want to solely rely on donations and fundraising due to the nature of the company’s services as “B2B2C”, meaning “business-to-business-to-consumer”.

The company is governed by its 23-page constitution has 3 directors (one of whom is also the company secretary). The company also has a shareholders’ agreement governing the rights of members.

The company has received private investment and grants through Social Entrepreneurs Ireland and Enterprise Ireland. The company also obtains income by charging hotels a minimum fee for its services. Any profit generated by the company is kept within the business so that the company can achieve its goal of making the world accessible to all.

The directors do not find the regulatory and compliance obligations overly burdensome, as they are the same obligations that are imposed on all LTDs.

CASE STUDY 3:



SENSATIONAL KIDS CLG t/a SENSATIONAL KIDS

Sensational Kids CLG was established in 2007 as a company limited by guarantee (“CLG”). It also registered the business name “Sensational Kids” in 2007. The company is a registered charity with the Charities Regulator and has received a charitable tax exemption (CHY number) from the Revenue Commissioners.

The main object of Sensational Kids is to promote the health and welfare of children with special needs and children in need of additional supports by providing clinical assessments, occupational therapy, sensory integration therapy, speech and language therapy, psychological services and evidence-based therapies, all of which impact on child development and wellbeing, to assist children to develop to their full potential. The company operates four child development centres throughout Ireland, with centres located in Kildare, Mayo, Monaghan and West Cork.

The founders considered a number of factors when choosing the most suitable legal structure, including their objective of being a mission-driven organisation, where all profits are put back into the mission and social impact is as important as financial sustainability. In addition, structuring Sensational Kids as a CLG, which is a registered charity, has facilitated the company in accessing philanthropic funding and sector support, which is required for financial sustainability. The majority of the company’s funding (51%) comes from clinical income contributions with the remaining contributions comprising income from training workshops (3%), fundraising (12%) and retail income (34%).

The charity has a voluntary board of 7 directors and a voluntary company secretary. There is also a senior management team of four people (including a CEO) comprising 2 full-time and 2 part-time employees. Additionally, the company employs a team of over 20 employees, 6 sub-contractors and 3 Community Employment / Tús scheme workers.

The constitution of Sensational Kids is approximately 20 pages and contains the clauses required by the Charities Regulator and the Revenue Commissioners to be included in the constitutions of charities (including an asset lock clause).

In relation to regulatory and compliance obligations, Sensational Kids must comply with the obligations of both the CRO and the Charities Regulator. The directors and employees find this very time-consuming but ultimately, they can see why it is necessary.

Sensational Kids also acknowledge that it can be difficult to be a “social entrepreneur” within a charitable CLG structure, as charities are not permitted to have paid directors. Therefore, the person who leads and brings the company’s vision to reality cannot be paid by the organisation and have a vote at the board table at the same time. However, as a registered charity, the company feels that it doesn’t have a choice about its legal structure at present.

The company would like to see more legal structure options for social enterprises in Ireland (such as options that exist in other countries) which would allow social entrepreneurs to set up social enterprises, rather than choosing between a typical “for profit” model and a charity model.

CASE STUDY 4:



FINTAN MULLIGAN t/a 121DIGITAL

Fintan Mulligan (trading as 121digital) first commenced activities in February 2010 and registered “121digital” as a business name in the CRO in 2013. At present, there are two people involved in running the social enterprise; Fintan Mulligan and his son, Marc Mulligan.

The main object of 121digital is to ease the isolation of seniors who struggle with IT, as 121digital believes that digital skills are today’s ‘literacy’. 121digital aims to harness the IT skills of young adult volunteers and their goodwill, across schools and universities, to be shared with seniors in communities across Ireland and overseas. 121digital has been introduced to communities in Latvia, France, Poland and Austria under EU Erasmus funding in 2017.

As 121digital does not have a formal legal structure, such as that of a company or a co-operative, it does not have any formal governing documentation. For Fintan, the advantages of choosing this legal structure were the minimal cost of the structure and the absence of the administrative overhead of regulatory reporting obligations. The main disadvantages of this structure, in Fintan’s opinion, are the absence of protection from liability should a legal claim ever arise and the failure (during the first ten years of operations) to qualify for any kind of social enterprise grant funding.

121digital is funded from time to time by the Irish Government. Specifically, the Department of Communications, Climate Action & Environment, which has a grant scheme to encourage people to learn basic digital skills nationwide. 121digital recently received a social enterprise grant for the replacement of capital equipment.

CASE STUDY 5:



JUMPAGRADE

JumpAgrade is established as two entities: JumpAgrade Limited (LTD), which was established in 2015, and jumpAgrade Foundation CLG (CLG) which was established in 2020. The organisation as a whole works towards the same vision: to help all students to fulfil their potential. The main objective of the enterprise is to reduce inequity within the education system. JumpAgrade does this by providing personalised teaching support to students from less fortunate or under-represented groups. JumpAgrade plans to help more students in the areas of motivation and confidence by using researched-based methods delivered by in-person.

The three main factors that jumpAgrade considered when choosing its legal structure were ease of getting started, alignment to the founders' purpose and transparency for jumpAgrade's partners.

The founders of jumpAgrade established the social enterprise in this way due to the lack of a specific legal structure for social enterprises in Ireland. As the enterprise has grown, so too has its legal structure, which adapts to the changes that the founders have seen. Both entities (the LTD and the CLG) allow jumpAgrade to achieve its aims in different ways.

Both companies have a constitution. The constitution of the LTD is much shorter than that of the CLG. Currently, there are over 10 staff and 25 teachers involved in running and governing the enterprise. JumpAgrade receives trading income, which is the main driver of the social enterprise, where partners work with jumpAgrade to support young people progress in education. JumpAgrade also has the support of organisations like Rethink Ireland and Social Entrepreneurs Ireland.

The founders find the regulatory and compliance obligations of both companies a challenge. The founders mention that the extent of the obligations requires a favour from someone in the early days (which automatically disadvantages those who are not lucky enough to have that network to call upon) or a lot of time and effort working on legal documentation which is rarely the expertise of founders. The time spent on this is time which is taken away from growing the impact of an enterprise.

In considering potential legal structures for the future, jumpAgrade's focus over the next year is to create a more transparent governance and reporting structure between the two entities. Down the line, jumpAgrade may explore a different legal structure that which might be more tailored for social enterprises. The founders are open to exploring becoming a benefit corporation, B Corp or something similar.

GLOSSARY

charity	an organisation which meets the definition of a “charitable organisation” within the Charities Act 2009;
CLG	company limited by guarantee, governed by Part 18 of the Companies Act 2014;
constitution	the governing document of an organisation;
CRA	the Charities Regulatory Authority, which regulates charitable organisations in Ireland;
CRO	the Companies Registration Office;
DAC	designated activity company, governed by Part 16 of the Companies Act 2014;
directors	the people in charge of managing the day-to-day operations of a company;
limited liability	the ability to be sued only for the amount of money that a person has contributed, or guaranteed to contribute, to an entity, and not a person’s other assets;
LTD	private company limited by shares, governed by Parts 1 to 14 of the Companies Act 2014;
members	the stakeholders of a company, who “own” and exercise reserve power of control of the company. If the company has shares, the members are the shareholders;
VAT	Value Added Tax;
1893 Act	the Industrial and Provident Societies Act 1893 (as amended).



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