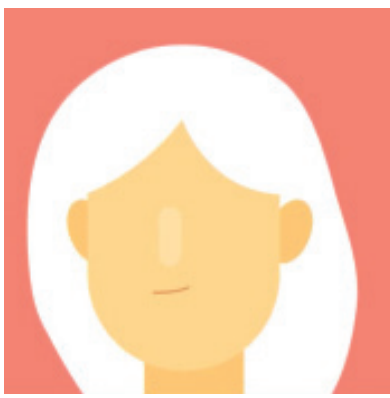
FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES
FONDATION EUROPÉENNE D'ÉTUDES PROGRESSISTES

Who owns Europe?

...and why it matters for progressives



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Preface

Ownership matters. Owners of businesses set their strategic direction, purpose and the terms of employment. Owners of land decide what should be done with it and who can access it. Owners of property decide how it is deployed and who can enjoy its benefits.

These decisions have a profound impact on the rest of European economy and society. Too often when we try to understand who owns the assets on which we all rely, the beneficial owners are obscured, and capital is controlled by owners whose interests are divergent from the citizenry at large.

Politicians rarely consider questions of ownership when making policy, but the frameworks that they establish for market economies have a profound effect on the levels of corporate plurality in business, and ultimately the outcomes for citizens.

Progressives must offer a thoughtful critique which ensures that the benefits of ownership are not concentrated in the hands of the few. Policy should facilitate a fair ownership opportunity for all.

This project seeks to examine ownership across the EU, it considers how Europe's businesses are owned and where the benefits of business flow. It looks closely at different types of ownership model, for example - the joint-stock company, the private business, the partnership model and the mutually-owned enterprise.

At the same time, it is concerned with ownership more widely. Who owns the land on which our produce is grown, the apartment blocks in which we live and the institutions in which we store our earnings?

We have examined whether some forms of ownership are more conducive to the public good and to what extent public goals can be discharged by a wider range of ownership types.

Ownership in the public interest can be achieved, but it requires a consistent approach across EU member states, with policy, legislative and regulatory frameworks that support and protect ownership that is designed for a common purpose, rather than simply focussed on maximising private profit.

This report makes a series of recommendations which seek to ensure strong economies which are purposeful and successful, but which also benefit the wider public good.

Executive Summary
Introduction

The answer to the question Who owns Europe? requires an understanding of ownership in its many forms, of what is actually 'owned' and of how things are owned. What is the impact of ownership and are owners now more powerful than governments? In addition, where do global priorities such as equality, fairness and progress sit within an ownership landscape driven by business whose priority is profit and shareholder primacy?

PART 1 Understanding ownership

The first section considers what we mean by ownership, why it is important, and how ownership has changed through time. It identifies different types of ownership and the features that are unique to each.

Whilst ownership by private individuals continues to be important, corporate ownership now dominates the ownership landscape and comes in a variety of forms: private, state, custodian, community, mutual. Individuals are free to do what they want with their possessions.

Corporations, or companies, are governed by law and their own constitutions. Where state/community/mutual ownership is driven by the need to provide something for the people, company ownership is solely for profit.

In public or state ownership, something is owned on the public's behalf. There are no private benefits. Philanthropy can be private or transferred to an association or foundation - a corporate body, similar to state-owned bodies and custodian-owned. And so to mutual ownership, which is neither public nor private, but set up to fill a gap for the good of the people who have come together with a shared need. Mutuals are fair and equitable, with power shared.

The pursuit of business results in power for suppliers, employers and providers. It's fair, therefore, to ask who is really in charge. And in charge of what, as a digitised world now includes ownership of brands, ideas and non-physical assets.

State ownership became less popular throughout the last three decades of the twentieth century due to a growing culture of individualism, self-reliance and independence. Corporate ownership has become much more prevalent in Europe.

Political ideology is still the most significant force, however, in determining sectors and services owned by the state, and the debate about private vs public doesn't try to understand the underlying concepts of different approaches to ownership. It's a debate that should be about efficiency and minimising wastage of energy, effort, time and money in pursuit of what is best for the people, the common good.

PART 2 Ownership in focus

The second section looks, through a series of essays, at a number of areas where issues of ownership are seriously considered in public policy discourse. It illustrates both the importance of ownership in a number of key policy areas, but also the lack of a consistent approach to these matters, including the dearth of official statistical measurements across the EU.

We begin by looking at land ownership - all of Europe's land is owned by corporations, states or individuals. The central argument is that land ownership is already too concentrated, and 'land grabbing' - where large corporate entities purchase the holdings of small landowners and farmers, taking it out of the control of the communities who depend on it - has exacerbated this.

A range of potential policy responses, many at European level, could help mitigate the situation, including a more progressive land ownership picture meaning greater distribution of ownership, wealth, opportunity and power; and supporting of agricultural co-operatives allowing smaller farm holdings and landowners to create strength in unity whilst preserving their independence. The current political context - in which rural areas have become breeding grounds for populist sentiment - would benefit from taking this issue seriously. A land ownership agenda would give Europe's social democrats and progressives the means to begin a conversation with rural voters and farmers who often see the concerns of social democratic parties as wildly divergent from their own.

Land rests in too few hands. In Scotland, 500 people own half of the privately-owned land - now a political issue and subject of legislation encouraging community purchase of land and protecting the rights of tenant farmers. Certainly, land ownership reform is needed, with social democratic values of spreading opportunity and wealth and breakdown of barriers to social and economic progress. It should form part of a wider agenda on ownership with business, finance, utilities, energy and natural resources.

Clear data, however, is needed in order to examine all patterns of ownership. Political support for public ownership broke down in the late 1970s, despite the fact that benefits other than profit can be prioritised - improvement of social welfare and better use of dividends for investment, pay or lower prices, for example. The argument is that social objectives are inconsistent with economic efficiency and lead to taxpayers' subsidising losses. Many economists, however, believe that competition drives efficiency and the fact that is in the public or private sector is irrelevant. In fact, governance and accountability are more important than ownership and progressives should reject the binary argument between public and private.

Community control ensures fair distribution of profits and social democrats and progressives would be wise to adopt policy rooted in mutual and co-operative ideas for utilities, water and energy. A useful community ownership model is Welsh Water (Glas Cymru).

Europe's energy is dominated by corporate providers - state and private. The EU is a keen driver of the broader 'energy liberalisation' agenda with monopolies phased out. RES-coops - groups of citizens that co-operate in the field of renewable energy - should be promoted. The stakes are too high to leave production of energy in a time of climate crisis to private corporations whose first loyalty is

to their shareholders. Capacity must be built, planning obstacles removed, and financial support offered.

So - the task of progressives is to build institutions that can engrain a culture and pattern of co-operative behaviour where energy is channelled towards productive and progressive social outcomes. Utilities provide a means of developing this agenda, and the 're-municipalisation' movement is progressing across Europe. After all, water and energy are best owned by the people.

Globalisation shows that corporations like Facebook, Apple, Uber and Google have greater power, wealth and influence than many individual nations. Foreign ownership is also high in a number of sectors at the heart of the economy - oil refining, pharmaceuticals, electronic and optical products, insurance, electrical equipment. Russia, China and UAE are prevalent and there is rising ownership amongst wealthy foreign individuals. Foreign investment benefiting the foreign state cannot go unchallenged.

The report also includes illustrations of average wealth in Europe and how government fiscal policy decisions affect how widely wealth is distributed. It concludes that the Australian policy of compulsory superannuation has been successful in increasing average wealth and recommends that the EU continue to develop such approaches.

PART 3 Understanding corporate ownership

The report examines corporate ownership in more detail. It seeks to develop arguments to aid an understanding of the importance of 'corporate purpose' in the way that businesses are established.

Different types of corporation exist across EU countries: companies, mutual societies, limited liability partnerships, associations, foundations and public bodies.

If we look at corporate ownership from the perspective of purpose, we can see that corporations fall into three broad purpose categories:

Business for private benefit: a company whose shares are privately-owned and either traded on a stock exchange or not publicly traded.

Business for the wider public benefit: including mutually-owned bodies, community-owned and social enterprises.

'Custodian ownership', where the owner acts on behalf of the public:

- Philanthropic ownership, established and owned by private individuals;
- State ownership, established and owned by the state on behalf of and for the benefit of the public.

All types of corporations are governed by their own bylaws and a corporation only has to consider the intentions and aspirations of the people behind it. The 'owners' are the shareholders (legal members).

Mutuals are businesses for public benefit and cover a broad range: co-operative enterprises, mutual insurers and co-operative financial institutions. A mutual needs a commitment between people to ensure they have access

to something they need, that is not currently available. Mutuals reward people differently - every member has one vote and profits are treated equitably and not as a reward for risking capital. On departure from the mutual, capital is repaid but the increased value of the mutual stays with the mutual for the benefit of the remaining members.

Community ownership is for the benefit of the community, but people have different relationships with it - they may give time, experience, finance… they may be a business user, benefactor, volunteer or employee. Community ownership varies as a model across Europe.

For custodian ownership a corporate body may be the custodian owner of funds, assets or service set aside for the benefit of people whose needs would not otherwise be met.

The purpose of philanthropy is public benefit.

State-owned businesses range from full state ownership to a minority shareholding. Their concern is public service, and the state acts as owner for the benefit of the public.

PART 4 Does corporate ownership work?

The report examines the impact of corporations on the ownership landscape - how well each type of corporate ownership works; how efficient they are at achieving their purpose. True success is measured in how well the business achieves its purpose.

Private purpose relies on creating shareholder value and is effective at delivering it. It dominates the commercial world today. It creates jobs, provides goods and services and generates tax revenue. It encourages constant innovation, improvement and progress and has driven many great advances.

But what about satisfaction, happiness, health, resilience or impact on the environment? Measurement of non-economic impacts are more important now. Corporations are now keen to report on external and social impacts - impact reporting. However, there is tension between delivering private benefits and protecting the wider public interest. State laws and regulation are required in order to hold such businesses to account. Unfortunately, investor-owned enterprise dominates many economies, putting it in a powerful position to ensure that corporate law reflects its needs.

Public benefit purpose corporations - with self-help a powerful motivator - are successful at times of need but not so much in times of prosperity, as they are vulnerable to predators. They provide a more mixed picture. In different times and places traditional mutuality has thrived, but less so in the last half century as the motivation for community and public benefit has given way to a more individualistic culture. There is renewed interest in mutuality today and this has remained strong in some sectors. Other forms of ownership for a social purpose are also now proliferating. State-owned enterprise has been significant in the past, but political support has dwindled, and long-term stability and planning are difficult to sustain within a democracy.

Philanthropic ownership continues to be important if marginal, but its dependence on given rather than earned income, and individual motivation in governance, tend

to suggest that its role is unlikely to increase significantly. It does not carry the same incentives to drive performance. A state-owned custodian is susceptible to political influence, not incentivised by economic measures, paid less and may incur inefficiencies from failure to recognise the purpose. Direct state ownership lacks the dynamism of other forms.

PART 5 Ownership by the people, for the people

This part of the report focuses on businesses that have been established for a clear purpose of providing public benefit, rather than for private investor gain or any other purpose. Building on the arguments put forward in 'The People's Business' (FEPS/Mutuo 2016), it describes some of the barriers faced by co-operatives and mutuals across EU member states, which inhibit their ability to grow and serve more people.

Co-operatives and mutuals have played an important part in the development of the European economy, where people have co-operated in business, both out of necessity and from a shared sense of purpose. By bringing together the natural inclination towards self-help, with the common sense to work together for the common good, mutually owned business has formed part of the bedrock of the European economy.

These co-operatives and mutuals have been in business for the long-term, focused on their core purpose of serving their members and the wider community. Member owned businesses exist in every part of Europe.

Mutual firms are successful. They are important. They are home grown. They deliver competition and choice and spread the benefits of business far beyond investor shareholders into the wider population.

Co-operatives and mutuals have succeeded without outside help but too often their contribution to European economy and society has been overlooked. As a result, the level of appreciation of co-operative and mutual business by government is surprisingly low, which has made doing business harder for these firms.

Demutualisation completely changed the face of the sector in some countries since the 1980s. It carved a hole through financial services mutuals by slicing off many of the largest firms as they converted to listed companies. In post-communist nations, public assets were privatised with little concern for the long-term interests of citizens. This inclination towards shareholder owned business as the 'norm' has had a damaging effect on the mutual sector and the way it is perceived.

The global financial crisis of 2008 exposed the risk to leading economies of having markets dominated by similarly structured businesses that were essentially focused on the same short to medium term economic outcomes. The lesson is that there is a real need to address the risk that a single dominant corporate form, dependent on market fluctuations, can pose to the health of our economy and society.

In government, this bias is seen in the binary debate which has divided people between public ownership and privatisation. The opportunity now is to choose a real alternative – mutual ownership which is independent of government but committed to a public purpose.

Europe needs the corporate diversity that

these businesses bring, helping to spread risk, and build resilience.

There is a new opportunity for economic policy to be re-cast in order to better manage markets, protect consumers and taxpayers as well as to promote sustainable wealth creation. It requires changes to corporate law and policies to ensure that mutually owned business can play a full and equal part in the European economy. Consistency is required on capital regimes, protection of assets and other legislation, for this to work.

The lack of external investment capital, skewing the purpose, for mutuals is viewed as a strength in the process of patiently building risk-averse mutual businesses that can focus on the job in hand rather than the short-term needs of investors. In some EU States, mutuals haven't changed their basic capital framework for 150 years. They are wary of introducing external capital into their business in case it could subvert the purpose and lead to demutualisation. But this also limits their ability to grow and compete in many markets that are now dominated by investor owned business. The challenge is to permit outside capital whilst safeguarding both the core purpose and mutual integrity of the business. Legislation in Australia allows this, mutual shares now exist in the UK, and should exist in every EU state.

Ensuring that co-operatives and mutuals are not the target for asset strippers is also essential to enabling them to play a fair part in a diverse economy. Their legacy assets should be protected. Indivisible reserves are funds put aside out of profits, not available for distribution to members, and are intended to provide capacity to absorb trading losses. They are an asset held in common by the co-operative - in the case of wind-up, they can be distributed or passed on to another co-operative. Rules differ across EU States - something that needs looking at - indivisible reserves need protecting. There is variation between how far individual member states acknowledge the existence of co-operatives as a business form, with co-operative laws and the requirement to set aside money from surplus into indivisible reserves, and to protect those reserves when the co-operative is wound up.

This part of the report recommends that:

States should recognise co-operatives or a range of corporate purposes; insist on the promotion of corporate diversity; require that co-operatives should be considered in specific sectors such as energy and care.

States should have their own national co-operative law which: protects co-operative identity relative to investor-owned companies; defines co-operatives by reference to features in-line with the corporate objective or purpose of a co-operative.

National co-operative laws should provide for the compulsory allocation of some part of surplus to indivisible reserves and should ensure that indivisible reserves remain indivisible even on dissolution or conversion.

States should keep their co-operative law under review, alongside company law, including the extent to which other laws (tax, regulation, competition) work to the detriment of co-operatives.

At the same time, the EU should:

Support and encourage member states to improve/optimise their own co-operative law, including through collective projects; support and enable co-operation within member states and within the EU; keep the EU's own laws and regulations under review.

PART 6 Why progressives should care about ownership

Understanding ownership and its effect on the economy and society is key to delivering positive policy outcomes for progressives, and measures promoting wider and more plural ownership should be adopted to achieve greater social justice.

European progressives are under pressure from the Left and the Right, with centre-right parties appealing to the cultural anxieties that the last 20 or 30 years of politics have created. The Left-Right axis is reorienting to a cosmopolitan-communitarian axis placing the Left on the other side from its traditional working-class support base. A new agenda is needed to bring the centre-Left back into the fold, centring on democracy, common ownership and participation. So how do social democratic parties appeal to the communitarian impulse without abandoning their traditional values?

In the private sector, this means greater stakeholder participation, encouragement of mutuals and co-ops as well as bolstering of employee share-ownership and reform of public services to give ownership to the communities served.

In the private sector, it means encouraging decision-making, power and democracy - with ownership distributed as widely as possible through a plurality of business forms. This policy agenda can speak to voters' concerns about security and cohesion and it can ensure that communitarian concerns such as prosperity and cohesion are placed front and centre of a suitable social democratic policy offer.

So who owns Europe? Who is in charge? There are tell-tale signs that, in time, corporate interests will own Europe. With the power of web-based giants and the 'Too Big to Fail' theory ensuring that to avert failure of a corporation, the public pays for shareholders' investments to be protected. The debate around the now abandoned TTIP is instructive. The proposed trade agreement with the US, where regulations to trade for big business would have reduced and led to a disempowerment of politics - we can also ask the question: Are governments losing control?

Investor-ownership is driven and owned by a need for profit and shareholder value, even if it results in impacts the world does not want. It would appear, therefore, to be the pursuit of private gain that 'owns' the modern corporate world. So in answer to Who owns Europe? Is it corporate interests? Perhaps, yes - unless steps are taken to prevent it. Such a take-over would not be by any particular person, organisation or group, but by an idea – the pursuit of private gain. On some parts of the political spectrum this may even be a reason for celebration. For those who believe in democracy and the rule of law this will be a cause of concern. Can anything be done?

This part of the report recommends that progressives should promote policies in their States that can:

- Encourage corporate diversity;
- Consider recognising mutual, co-operative and other forms of businesses for public benefit in their national constitution or other supreme law.
- Ensure that in all legislation, the role of and impact on different types of business forms are considered, rather than simply assuming one approach.
- Ensure that the remit of government business and enterprise departments includes all types of business, including all forms of

private and public enterprise.

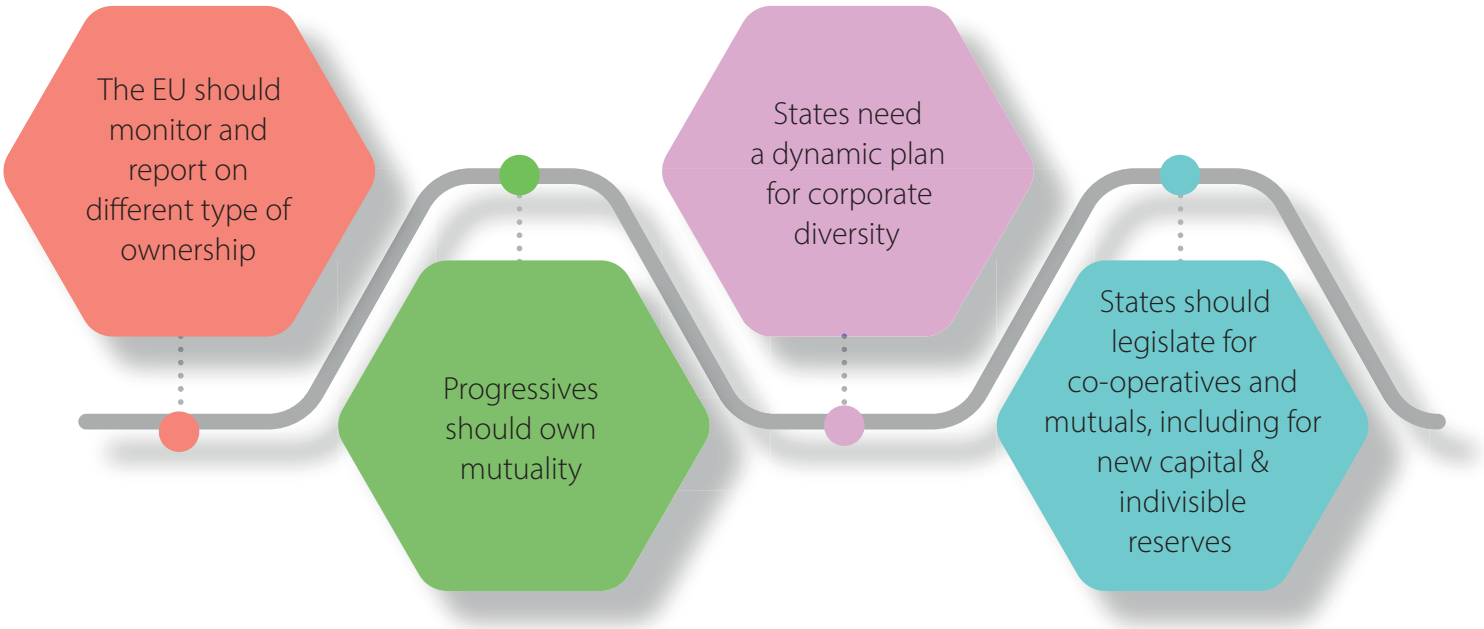
- Seek to ensure that laws optimise all forms of corporate trading for the benefit of all citizens, not just company laws. In particular, co-operative and other fields of organisa tional law merit equivalent attention.
- Appoint ministerial and official posts to represent and champion different types of business.
- Explore incentives for encouraging those setting up new businesses to choose a pub lic benefit business.

Those with most to lose are the youngest. The needs of future generations must take centre stage. The choice available is between public and private ownership when it should be a choice between public and private benefit. As states continue to withdraw from public service provision, mutual ownership is growing as an alternative mechanism.

There are many large and successful co-operatives and mutuals across the EU. Some are household names, yet still, despite enormous recent growth of interest in mutuals, co-operatives and social enterprises, social business remains marginal in the context of global trade.

States need to make rational and forward-thinking choices about ownership. Experimentation, trying out new ideas, research and shared learning are key. Schools, colleges and universities should take a different approach to teaching business. States should recognise corporate diversity.

The report concludes that we can only prevent Europe being taken over by an idea - that of the pursuit of private gain - if we move away from an economy dominated by business for private to one for public benefit. And that means that democracy needs to become a way of life beyond politics and government.



Part 1
Understanding Ownership

Why we need to talk about ownership

What is ownership?

Why it matters

The emergence of companies and corporate ownership

Ownership by nations

Philanthropic ownership

Mutual ownership

1.1 Why we need to talk about ownership

Who owns Europe? is a question about control and power. It hints at the possibility that although member states are democratically controlled, Europe may be in somebody else's pocket.

In a democracy where the rule of law prevails, the elected government is in control and holds power. Ownership, however, is a mechanism by which people or organisations have control over things, making them very powerful. Are non-state actors growing more important than governments?

Who is actually in charge today? It's a concern that the question even needs to be asked.

It is important to know the answer but finding out who owns everything will not in itself give us a complete answer to who holds the power. We need to understand more about ownership because there are different types, with different facets and different impacts.

Underlying all this is the need to address inequality, fairness and progress. All are global priorities, but what prospect is there of even trying to address these issues if we're not sure who is in charge?

Can anything be done?

The subject of ownership is commonly approached as if it is something over which states have no control. This is wrong. There is not just a binary choice between public and private ownership, between capitalism and communism, between authoritarianism and anarchy. Ownership is a much more sophisticated subject than it is usually made

- The world's richest 1% are on target to own as much as 2/3 of all wealth by 2030[1]. Ine quality is tolerated where there is a possibility of pulling ourselves out of it.[2] However, with the expectation that today's younger generation will be less well-off than their parents', the stark reality of current student debt, the demise of traditional employment and the threat of artificial intelligence, tolerance of an increasing number with insufficient funds to live on will be stretched to breaking point.

- Climate change poses a true planetary emergency. Solutions are possible but require urgent action across every part of our economy and society.

It is not just about the vast wealth of a small number of individuals. The economic power of large corporations now dwarfs that of nation states.[3] The ability to move capital around the globe in an instant enables both human and natural resources to be exploited by those with wealth, without apparent concern for the consequences of their activities. Young people make up half of the global population[4] but feel 'voiceless'.[5] A serious imbalance of wealth and power sows the seeds of instability and inter-generational inequality.

[1] https://www.theguardian.com/business/2018/apr/07/global-inequality-tipping-point-2030

[2] "Growth is a substitute for equality of income. So long as there is growth there is hope, and that makes large income differentials tolerable." Henry Wallisch, a former governor of the Federal Reserve and professor of economics at Yale

[3] https://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/

[4] Over half of the global population was under 30 in 2014 https://www.unfpa.org/data/world-population-dashboard . In 2018 aged 0 – 14 = 26%, aged 10 – 24 = 24% https://www.unfpa.org/data/world-population-dashboard

[5] "We are the voiceless future of humanity" letter to the Guardian, 1st March 2019 from "The global co-ordination group of the youth-led climate strike" https://www.theguardian.com/environment/2019/mar/01/youth-climate-change-strikers-open-letter-to-world-leaders

out to be. It needs to be better understood, and there needs to be discussion about how different approaches to ownership work. Choices can and need to be made.

So - we need to talk about ownership... not just so that we can understand who holds the strings and levers of power, but because how things are owned is key to freedom, security, social justice and tackling climate change. These matters are properly the subject of government and governments must recognise not only that types of ownership affect all these things, but that it is their job to understand how, and to make sure that the best choices are being made.

1.2 What is 'ownership'?

The traditional concept of ownership is a familiar one: people having possession and the continuing right to possession of things for their own personal use and benefit. Whether that is real property (house, land), physical assets (car, equipment, clothes, jewellery) or non-physical assets (health insurance, pension, shares in companies), these are all things which people can own and the law will defend that ownership.[6] The right to own property is a fundamental human right.[7] Ownership by individuals is basically without any form of restriction or terms and conditions.[8] Whilst all citizens must abide by the civil and criminal law of the jurisdiction in which they live, in free market countries there are no limits to what they can do with things they own. They can sell them, share them with others, rent them out, give them away, use them to destruction or wilfully destroy them. In law, private ownership permits the owner the full range of human behaviour from total selfishness to utter selflessness.

What has just been described is personal private ownership. It gives the individual complete and exclusive control over an asset, to use it for their own private benefit, or as they might choose from time to time.

Although the owner may choose to share the benefits of ownership with others, neither the state nor anybody else has the right to interfere with the owner's choice about how to use what they own.

Institutions and corporations also own things, including state bodies, public institutions and trading corporations. Essentially, ownership by a corporation is similar to ownership by an individual in that it is unrestricted save to the extent that criminal or civil law imposes restrictions. However, it is also subject to the powers contained in each corporation's legal constitution or by-laws limiting its ability to own things.

More importantly, institutions and corporations are usually set up by people for particular reasons, often (but not always) set out expressly in their by-laws. They are almost certain to be relevant to how the corporation uses its ownership of assets. 'Corporate ownership' is addressed in the next section but more should be said here first, by way of background.

[6] For example, criminal law upholds ownership rights against theft; property law upholds ownership of rights to land; intellectual property law upholds the ownership rights of those who create new ideas, concepts, art etc.

[7] Article 17 of the Universal Declaration of Human Rights http://www.un.org/en/universal-declaration-human-rights/

[8] There are obviously different types of property rights other than outright ownership - such as renting, leasing and hiring, and those are all governed by the specific terms under which those property rights are granted.

1.3 The emergence of companies and corporate ownership

In the past, wealth comprised land, physical property and cash, owned mainly by private individuals. In a pre-industrial age, there were far fewer corporate bodies owning things, though of course the church was an exception to this. In the middle ages, it ruled over and owned substantial property and assets in its own right alongside prevailing government. As church and state started competing for dominance, different paths were followed around Western Europe.[9] The Roman Catholic Church established its own state (the Vatican). England went in an entirely different direction by breaking from Rome and establishing its own church.

From the thirteenth century onwards, corporations created by states began to emerge. These included universities, colleges and schools[10] and in later centuries as seafaring nations began to assert control over overseas territories, they established corporations to manage their overseas assets. These corporations were created by monarchs and governments such as the Royal Charter Companies created by England for trading in its colonies, and similarly others by Scotland, the Dutch Republic, France, Portugal and Spain.[11]

However, from the mid-19th century onwards there was an explosion of new corporations. [12] This was because the industrial revolution, as well as leading to huge innovation based on advances in science, also led to the advent of the joint-stock company under newly emerging 'company law'.[13] "The [UK's Joint Stock Companies Act 1844] defined a joint stock company as any commercial partnership that either had 25 or more members or featured capital divided into freely transferable shares. Anyone could create a joint stock company upon filing, eliminating the need for the state to grant a charter or special legislation."[14] Prior to this, people who were trading in partnership did so in their individual names. The result was that they were all individually and personally liable for the debts of the business, and all of the individuals together had to bring proceedings to enforce the rights of the business.

The emergence of company law enabled anybody to register a company[15] without having to get permission from the state and every such company had its own separate legal personality, with limited liability for its shareholders. It enabled merchants, traders and those who wanted to participate in funding ('investing in') to set up a company and use it to achieve their objectives.

Over the rest of the 19th and 20th centuries these developments led to some very significant changes in the context of ownership, but three changes are of particular importance. First, although land and physical possessions remain important, much control and power are now based on owning brands, ideas and

[9] http://www.thefinertimes.com/Middle-Ages/church-in-the-middle-ages.html
[10] https://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/
[11] British and Dutch Chartered Companies, Tony Webster
https://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0099.xml
[12] By way of illustration, there are over 4 million companies on the Register of Companies in the UK
https://www.gov.uk/government/publications/incorporated-companies-in-the-uk-october-to-december-2018/incorporated-companies-in-the-uk-october-to-december-2018
[13] In the UK, the Joint Stock Companies Act 1844. In Germany, the Allgemeines Deutsches Handelsgesetzbuch 1861. In France Loi sur les Sociétés 1867.
[14] Evolution of British business forms: a historical perspective, Alexander Fallis, ICAEW 2017
https://www.icaew.com/-/media/corporate/files/technical/ethics/evolution-of-british-business-forms.ashx
[15] Subject to requirements to provide relevant information to the Registrar, payment of a fee, and a commitment to continue keeping necessary information up to date.

other non-physical assets and rights. Ownership of these assets is capable of generating great wealth.[16] The pursuit of riches now involves owning a different sort of asset.

Second, corporate ownership has become much more prevalent in number and scale and the corporate landscape in Europe and beyond is now dominated by companies. The largest corporations are now wealthier than some nation states, and immensely powerful. The power they exercise as major employers, suppliers and providers relates to and arises from their trading activities. The scope and scale of this power alone, and its dedication to private benefit, causes some to question the extent to which democratic governments are genuinely in charge today.[17] The third big change was the rapid emergence of state ownership as a consequence of an urban and industrial economy emerging out of the existing rural and agricultural one. The building of new homes, entire new towns and communities created many challenges for states ... and states were themselves soon drawn into owning, controlling and directing certain areas of enterprise and service-provision.

State-owned enterprises became a significant part of European and other economies[18] in a number of sectors including utilities (water, drainage, gas, electricity), housing, transport, financial security and care. There were different reasons for such involvement, including the need for sanitation, clean water and access to energy for people's homes and health and wellbeing (much affected by urban and industrial conditions);[19] the security of nation states, in being able to meet threats from neighbouring states and reduce dependency; and increased expectations of citizens of what a modern state should provide. The result, over time, was a very substantial state-owned economy.

1.4 Ownership by Nations

It made sense, too, for states to take ownership of or 'nationalise' an industry or sector for a variety of other reasons, for example, where dispersed ownership was not the most efficient approach to a national service (e.g. railways); where private companies supplying essential services could exploit monopoly situations or where the sheer scale of demand meant that creating a national service was a much quicker and more efficient way to secure objectives needed by citizens (healthcare).[20] In light of the industrial revolution, communism and socialism promoted widespread ownership by the state, the opposite becoming the traditional standpoint of the Right, with a preference for minimising state ownership and market interference. Much of the last hundred years has been spent contesting what and how much the state should own, and the ideological positions remain entrenched.

The state took over a market or industry not in order to profit, but for 'public benefit'. Furthermore, all these 'public services' needed people to operate them, which meant creat-

[16] For example Facebook, Microsoft and Apple have all generated enormous wealth for their founders

[17] For example see: https://www.theguardian.com/commentisfree/2014/dec/08/taming-corporate-power-key-politicalissue-alternative; and https://www.theguardian.com/us-news/2019/mar/11/elizabeth-warren-facebook-ads-break-upbig-tech

[18] See section on State-Owned Enterprises

[19] "In the aftermath of the Boer War, there was an avalanche of speculation … about the causes … of the supposed physical deterioration of the British male population. … between forty and sixty percent of recruits for the British Army were turned won as physically unfit for service." Winter, J. M. (1980). Military Fitness and Civilian Health in Britain during the First World War. Journal of Contemporary History, 15(2), 211–244.

[20] Millward, R. & Singleton, J., The Political Economy of Nationalisation in Britain, 1920-1950 (Cambridge: Cambridge University Press, 2001)

ing jobs as well. In particular, in the post-WW2 reconstruction period, the introduction of state or public ownership on a national scale brought a wide range of benefits to economies.

By the late 1970s, however, political support for state ownership of industry was breaking down and from the 1980s onwards large numbers of state-owned enterprises were privatised[21] – i.e. sold by the state to private investors, generating cash for the state and handing over management of very large enterprises to a system where the maximisation of profits was firmly embedded both in the ownership arrangements (see Part 2) and the culture.[22] Just as nationalisation was a concept championed by the Left and disliked by the Right, so privatisation was viewed the opposite way around. Throughout the last three decades of the 20th century, a growing culture of individualism, self-reliance and independence reinforced a more selfcentred approach to ownership, where private (as opposed to state) ownership had a wider appeal.[23] The collapse of communism in Europe and the introduction of market economies in those countries seemed to underline this.[24] State-ownership became something that no longer appealed to the centre-ground of politics and was more the province of the further Left. Meanwhile, hard-nosed private ownership formed the heart of neo-liberalism.[25]

It is still the case today that political ideology is the most significant force in determining what sectors or services should be owned by the state.[26] The debate should be about efficiency: how to optimise resources and minimise wastage of energy, effort, time and money in pursuit of the ultimate objective – namely what is best for citizens as a whole: the pursuit of the common good. The answer should be determined by that which is most supportive of the public interest.

The sterile debate between the pros and cons of private or public ownership continues but does not appear even to try to understand the underlying concept of different approaches to ownership, what they are designed to achieve and their intended purpose.

So - what is public or state ownership?

It is a form of ownership where the owner (whether the state, or a municipal or public body) 'owns' something on somebody else's behalf (the public).[27]

Essentially, a legal system needs to be able to identify an owner, and 'the public' is too vague and imprecise a concept for that. Somebody therefore needs to be the nominal owner on behalf of the public, as a custodian of its interests. Public ownership is a mechanism by which a public body owned and controlled by the state can play that custodian role. It enables money and assets to be set aside and held in a form of legal ownership which permanently dedicates those assets to the public purpose. It is the job of that public body to make sure that that public purpose is delivered.

[21] Margaret Thatcher, Prime Minister in the UK from 1979 to 1990
[22] 'Thatcher privatisation: history lessons' https://www.ft.com/content/f52951a6-a1f4-11e2-ad0c-00144feabdc0
[23] 'The Thatcher effect: what changed and what stayed the same' https://www.theguardian.com/politics/2013/apr/12/thatcher-britain
[24] 'Where Communist Economics Fell Short' https://www.nytimes.com/1989/12/17/weekinreview/where-communisteconomics-fell-short.html
[25] 'Neoliberalism: the idea that swallowed the world' https://www.theguardian.com/news/2017/aug/18/neoliberalism-theidea-that-changed-the-world
[26] ibid
[27] 'State-Owned Enterprises in the EU' https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf

In this type of ownership, the owner is not the user or the beneficiary. Not only is the user or beneficiary a different person from the owner, the owner (and its representatives) are not allowed to obtain any private benefits themselves. So, a public body can hold money and assets and employ and remunerate people to administer and maintain those assets, but it cannot provide its employees and officers with any private benefits through the special use and enjoyment of that money and those assets - they are for the public benefit.

State or public ownership is a mechanism by which money and assets are held and used for public benefit, but where the public themselves don't directly own and control them. Some other body holds those assets as custodian on behalf of the public, and for their benefit.

State ownership can take a range of different forms, from a minority shareholding in an investorowned corporation, to owning, controlling and being fully responsible for operating a public service. In the former, ownership by the state is nominal in the sense that it is likely to be passive, and likely to arise from the state's own aim to secure an investment return from funds at its disposal. Its purpose is commercial, and the public benefit is the economic benefit obtained.

Generally, state or public ownership refers to arrangements whereby the state has ownership and actual control over something for the benefit of the public, that is to say for a non-commercial or public purpose. These are commonly referred to as public services and in this context, the state has involvement in the management of the service or enterprise. So, whilst state-ownership is a form of custodian ownership where the state has significant involvement in management, its ramifications may go well beyond the custodian role and can be complex.

1.5 Philanthropy

As explained above, personal private ownership allows the owner to choose whatever they want to do with their assets. This includes sharing them with others, giving them away or making them available exclusively to others for philanthropic reasons. The individual can do this simply through retaining ownership and giving effect to their own wishes. Or they can transfer the assets to a corporate body (association or foundation).

In many jurisdictions, a philanthropic body of this nature is treated differently for fiscal purposes, particularly where its income comprises money given by private individuals who themselves have already been taxed. One of the conditions of preferential fiscal treatment is that the assets and any income derived from them are used exclusively for a philanthropic or public purpose.
Commonly, this will be limited to a particular group of people living with a particular disadvantage.

Essentially such philanthropic bodies are similar to state-owned bodies in that this is a form of custodian ownership where the owner is precluded from obtaining any private benefit, and where the organisation exists for a purely public purpose. The difference, of course, is that the state plays no part in such organisations. They are established by private

individuals and generally seek their funding from private individuals, businesses and other benefactors.

Ownership for philanthropic purposes is significant, though relatively small in the context of corporate ownership. It just needs to be noted for present purposes. It also needs to be compared with the last form of ownership to be considered, namely, mutual ownership.

1.6 Mutual ownership

There is a further form of ownership that does not fit conveniently within either public or private ownership - mutual ownership. Industrialisation brought many benefits, but it also introduced great hardship through long working hours, poor working conditions, insanitary housing and low wages. [28] Urban poverty and the resulting low life-expectancy made the early 19th century one of the worst times to live in the UK. Out of this suffering and poverty emerged an idea which was not new[29] but which took on a wholly new manifestation in a number of places and at different times around Europe.

In Rochdale in Northern England, the Rochdale Equitable Pioneers Society was established in 1844 as a shop to enable local people to buy uncontaminated food at a fair price and without being cheated. In 1852 the German co-operative pioneer Hermann Schulze-Delitzsch established the world's first credit union, essentially a member-owned and controlled provider of credit and other financial services to its members - traders, shop owners and artisans in urban areas. Wilhelm Raiffeisen built on this and established the first rural credit unions.[30] What is common to all of these is the concept of self-help: where people in communities lacking access to something get together in a common endeavour to achieve that access for themselves and those who need it. There is no reliance on or, indeed, any help from the state or wealthy benefactors.[31] It is an entirely community-based phenomenon, relying on trading between the members individually and the mutual organisations they set up. Crucially, there is no separate owner or investor seeking to make a profit out of the venture.

What is mutuality?

A mutual venture is one where people come together to achieve something for themselves and for each other. They have a shared need that none of them can meet on their own, but by pooling that shared need through a willingness to do something collaboratively or co-operatively, they provide a mechanism to meet the needs of all.

Mutuality consists of people making a commitment to each other through the mutual organisation they have set up. The venture is only sustainable if people commit to bringing their trade to the organisation, and if their needs change, then by changing what the

[28] "Half the streets [in Rochdale] had no sewers or drains… The worst houses had no toilets… In the worst area 45 people out of every 1,000 died each year. In 1848 (when the Rochdale Pioneers' shop was just beginning to establish itself), the life expectancy was 21 years …" Co-op: the people's business Johnston Birchall, 1994 Manchester University Press.

[29] "Co-operation, after being long declared innovatory and impracticable, has been discovered to be both old and various." G.J.Holyoake, History of Co-operation 1875. Also "The co-operative ideal is as old as human society. It is the idea of conflict and competition as a principle of economic progress that is new. The development of the ideal of cooperation in the nineteenth century can best be understood as an attempt to make explicit a principle which is inherent in the constitution of society but which had been forgotten in the turmoil and disintegration of rapid economic change." A M Carr-Saunders, P Sargant Florence and Robert Peers, Consumers' Co-operation in Great Britain, 1938 cited at https://www.rochdalepioneersmuseum.coop/wp-content/uploads/2013/02/Our-Story.pdf

[30] World Council of Credit Unions, Our History http://www.woccu.org/about/history

[31] The rural credit unions were supported by directors (local teachers, priests and other educated people) serving in a voluntary capacity.

organisation does to meet those changing needs. They are able to do this because, as members, they own and control the organisation.

In a consumer-driven society, this is counter-cultural. We expect to get the best option at the best price, which is fine where choices are available to us. Mutuals emerge where there is no such choice, where there is a 'market failure', where traditional forms of business do not meet people's needs. They have been failed, so their response is to create their own provision. That source of provision is one which they own and control.

It is a form of ownership which will only work and retain people's commitment if it is fair to everyone, and equitable. In other words, nobody should get any more out of the venture than anyone else.

This means that the form of ownership needs to be equitable as well.

In brief, this is achieved through members sharing equal power in the organisation (one member one vote), surpluses not being used to reward anybody, and nobody gaining more than anyone else through the funds they have contributed to the mutual. This is explored in greater detail in later chapters. Mutual ownership is a form of corporate ownership. Mutuals are trading corporations, just like companies. Just as company law was emerging in the mid-19th century in Europe, various forms of mutuality were also emerging. Mutuals also had limited liability and a separate legal personality.

Mutuality is a form of collective or shared ownership between members of a mutual commitment. Like a company, it is based on a separate legal entity but its owners' access what it provides, and they have set it up to meet their shared needs.

In the last two decades, a variation on traditional mutuality has emerged via trading organisations set up for explicitly social purposes. Sometimes referred to as 'social enterprises' - the language used across Europe varies - they range from trading organisations seeking to provide employment and other opportunities to groups of disadvantaged individuals, through to those carrying on a commercial trade whilst seeking to optimise their social impact rather than rewarding investors.[32]

There now exists a broad spectrum of different business types adopting features from both the traditional company form and mutuality. This makes the corporate landscape richer and more complex.

Whilst ownership by private individuals continues to be important, corporate ownership now dominates the ownership landscape. We have already seen that there are various forms of corporate ownership, with different facets. These will be explored further in Part 3.

[32] Social enterprises, social businesses, social co-operatives, community benefit societies, general interest co-operatives, community interest companies, are just some of them

Part 2
Ownership in Focus

Land ownership

Ownership by the state

Owning Europe's utilities

Foreign ownership

The ownership of wealth

2.1 Land Ownership

Introduction

The question of who owns Europe's land could hardly be more fundamental. The ground on which we walk, build our homes, businesses, hospitals, schools is all owned by someone or some entity, be it a large multi-national corporation, national or local government, individuals or some combination of the above. The matter of land ownership is inexorably tied up in broader questions of power and sovereignty, ownership and liberty. It has been fundamental to such seismic historic developments as Stalin's agricultural collectivisation programme, the Western expansion of the United States and Henry VIII's appropriation of the Catholic Church's monasteries.

The European Union comprises a diverse range of landscapes and includes some of the least as well as some of the most densely populated areas of the world. According to a European land survey the EU "comprises a total area of just under 4.5 million square kilometres (km^2) for the EU-28."[33]

There is significant variation in the way land is utilized within EU member states. For example, according to RICS Land Journal "around 70% of the UK land area is actively farmed. This is one of the highest proportions in Europe, with Norway at the bottom with a mere 3% and most of the larger nations at around 50%, largely due to a relatively low level of afforestation (10%) and limited mountainous terrain."[34] The utilised agricultural area (UAA) in the EU-28 is almost 175 million hectares (some 40.0 % of the total land area), giving an average size of 16.1 hectares per agricultural holding.[35] In 2013, there were 10.8 million agricultural holdings within the EU-28.[36] Eurostat states that France and Spain have "the largest share of the EU-28's agricultural land, with 15.9 % and 13.3 % shares respectively, while the United Kingdom and Germany had shares just under 10.0 %. By contrast, the largest number of agricultural holdings was in Romania (3.6 million), where one third (33.5 %) of all the holdings in the EU-28 were located. Poland had the second highest share of agricultural holdings (13.2 %), some way ahead of Italy (9.3 %) and Spain (8.9 %)."[37] In many respects, the history of the ownership of Europe's land is the history of the continent. But those histories - divergent, dramatic and troubled - have created a different picture in different pockets of the continent. Britain - and particularly Scotland - has a land ownership picture which is highly concentrated and a product of feudal inheritance. Meanwhile, post-communist Eastern and Central Europe are evolving from a system in which private ownership was discouraged (if not outlawed) to one in which large agricultural conglomerates are increasingly dominating the land ownership and agricultural picture.

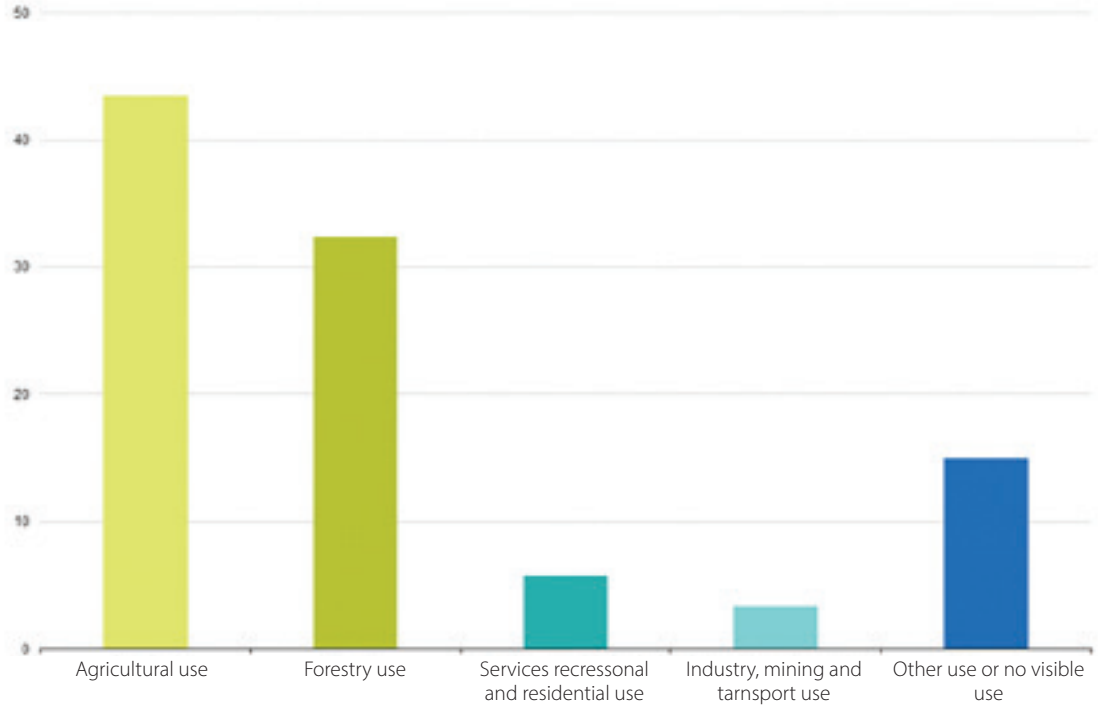
This section seeks to explore the question of land ownership in Europe, identify some contemporary policy issues (in particular 'land grabbing'), and propose some reforms that will reverse the trend towards concentrated ownership and create instead a progressive land ownership picture which could - if supplemented with a broader progressive

[33] https://ec.europa.eu/eurostat/statistics-explained/index.php/LUCAS_-_Land_use_and_land_cover_survey#The_LUCAS_survey
[34] RICS Land Journal, January 2016 https://www.isurv.com/info/390/features/8883/agricultural_land_ownership_in_europe
[35] https://ec.europa.eu/eurostat/statistics-explained/index.php/Farm_structure_statistics#Main_statistical_findings
[36] ibid
[37] ibid

agenda around spreading ownership - redistribute not only wealth and opportunity but, crucially, power… for the ownership of land and the question of power have always been entwined. A subsequent argument will be employed: that in our times of populism and instability, it is necessary to question power where it holds back progress. Social democratic parties in Europe must not be afraid to ask the questions that Tony Benn, the famous British socialist firebrand, asked: What power do you have? How did you get it? In whose interests do you exercise it? And how do we get rid of you?

The trend towards a concentration of land ownership is but the most alarming manifestation of the widening inequality inherent in Europe's socio-economic model. Small landowners lack the resources to stand up to large corporations and the result is that land now rests in too few hands.[38] The question of who owns Europe's land is a complicated one. Different countries have different kinds of legal structures, some of which encourage a greater degree of transparency than others. What we can see from Figure 1 is that agriculture and forestry represent a combined 70+% of Europe's land. By comparison, a relatively small proportion of the totality of European land is utilised for services, recreational and residential use (largely because these activities tend to be clustered around more densely-packed urban areas) as well as industry, mining and transport.

Figure 1: Land usage in Europe



Source: Eurostat (online data code: lan_lu)

[38] https://www.tni.org/files/publication-downloads/landgrabbingeurope_a5-2.pdf

The author and campaigner Guy Shrubsole, who runs the website Who Owns England,[39] finds a similar picture (see Figure 2, below) showing that corporate bodies are the largest landowners in England, with approximately 230,000 acres held by companies in offshore jurisdictions. Ultimately, all statistics point to a concentration of land in Europe in the hands of often large corporate entities, with the land used to extract profit rather than in line with some notion of community or public ownership.

Figure 2: Land ownership in England

Type of organisation	Area in acres
UK corporate bodies (excluding charities & trusts)	**12,878,549**
Limited companies	6,240,593
Other corporate bodies (central government, Church Commissioners, The Crown Estate, housing trusts, etc)	4,567,751
Local authorities	1,569,544
Industrial and provident societies	247,461
LLPs	136,034
Official Custodian for Charities	36,937
Other (unlimited companies, housing associations, co-operatives, societies)	80,228
Overseas companies (land acquired 2005-2014)	**279,523**
Of which, total owned by companies in offshore jurisdictions	c.230,000

Land grabbing

Over recent years the issue of 'land grabbing' has become more prominent, further intensifying a concentration of land ownership. Generally assumed to be a problem exclusively, or at least predominantly, occurring in the Global South, European countries have found that their land is not immune from being 'grabbed'. Land grabbing refers to the process by which the ownership of land is steadily concentrated and placed in the hands of a small number of dominant proprietors. Although it is a contested term, with no agreed definition, a series of research reports and briefings by the Transnational Institute, in collaboration with the European Parliament, have shed light on the extent of the problem in Europe. Their definition seems apt, with the term first and foremost [referring to] the capturing of the decision-making power of how land is to be used, by whom, for how long and for what purposes. [...] It is also about the substantive implications a land deal has for democratic land control and access to land for the most vulnerable and marginalised[40].

According to an article by German MEP, Maria Noichl "2.7 per cent of businesses own over 50 per cent of Europe's agricultural land." She goes on to explain that "Often, these are not simply large agricultural holdings. They can also be proprietors with no involvement in agriculture, under the umbrella of 'business-

[39] Who Owns England?: How We Lost Our Green and Pleasant Land and How to Take It Back by Guy Shrubsole, published by William Collins

[40] https://www.tni.org/files/publication-downloads/landgrabbingeurope_a5-2.pdf

es', buying many hectares of agricultural land in Europe, across national borders, at prices often unaffordable to farmers and behind the backs of the local population."[41] Land grabbing has a long heritage, with colonial powers often annexing or acquiring control and ownership of land, trading it or losing it militarily. Since decolonialisation, many former colonies have seen land acquired by large corporations based overseas. As such, the presence of corporations and owners from the Global North with significant land ownership holdings in the Global South has triggered charges of neo-colonialism. Indeed, according to an article by Borras et al 'there is a clear North–South dynamic that echoes the land grabs that underwrote both colonialism and imperialism'[42]. Recent global trends have accelerated the scale of acquisitions by overseas corporations. For example, in 2011 30,000 hectares were acquired for rice in Nigeria by the US company Dominion Farms. The scale and pace of these acquisitions are growing.

However, since the global financial crisis in 2007-08, these trends have ceased to be seen as a problem solely of the developing world, with the realisation that Europe - long seen as a model of good and equitable governance on the issue of land - has become subject to many of the same trends. A European Parliament report suggests a number of drivers that are fundamentally changing the land ownership picture in Europe. Firstly, large agro-holdings are being established in Europe from all over the world, completely disrupting the established profile of those with aninterest in land ownership in Europe.

Secondly, a new generation of investors who have not traditionally been involved in the agricultural sector, e.g. investment funds and private equity, are taking advantage of relatively cheap land in Eastern Europe with high value growth potential. Some of this farming land is acquired with a view to using it for non-agricultural purposes such as real estate and tourist sites. In France, for example, more than 60,000 hectares of mostly fertile farmland are lost every year due to changing land use and re-zoning plans[43]. Thirdly, an increase in large-scale land deals in Europe has givenrise to a snowball effect with actors involved in facilitating these kinds of transactions described by Borras et al as 'land grab entrepreneurs'.

As Paul Brannen, former MEP for North East England, has observed, Europe is still a continent whose model of farming is based on small family enterprises. 84% of farms rely on the use of family labour and farms of fewer than two hectares of land comprised nearly half (49%) of agricultural holdings in 2012[44].

Agricultural Holdings < 10 ha	1990	1995	2000	2003	2005	2007	2010	1990-2010 Variation
Austria		126,270	108,310	88,530	86,310	84,590	72,970	-42%
France				219,060	194,270	173,510	175,910	-20%
Germany	316,870	260,870	189,510	155,760	143,020	133,240	73,260	-77%
Italy	2,376,440	2,191,790	1,901,570	1,712,970	1,474,600	1,474,580	1,363,180	-43%
Spain	1,194,540	904,940	904,310	776,150	725,560	694,690	644,930	-46%
United Kingdom	62,050	60,010	68,520	94,500	96,650	58,020	39,370	-37%
Poland				1,789,770	2,110,420	2,015,840	1,158,370	-35%
Hungary			876,140	665,660	617,730	524,210	485,340	-45%
Romania				4,238,430	4,025,400	3,751,160	3,641,560	-14%
Bulgaria				643,290	507,550	466,690	336,080	-48%

Source: EUROSTAT (holdings and UAA: ef_ov_kvaa; ef_kvaareg).

[41] https://www.theparliamentmagazine.eu/articles/opinion/farm-land-europe-how-ensure-fair-ownership
[42] http://www.tandfonline.com/doi/full/10.1080/03066150.2011.559005
[43] https://www.tni.org/files/publication-downloads/landgrabbingeurope_a5-2.pdf
[44] http://www.huffingtonpost.co.uk/paul-brannen/eu-land-ownership_b_7767840.html

However, this picture is changing rapidly, thanks in part to land grabbing, partly responsible for the decline of small farms in Europe over the past 20 or so years. Since 1990, the number of small farms in Austria has declined by 43%. In Italy, the figure is 68%. In Germany, it is 79%. In Eastern Europe, the picture is coloured by EU accession rules which have slowed the process towards greater land concentration, but in Hungary it is 54% and Poland 40%. This is an alarming and disruptive trend, with serious environmental, social and economic implications for European citizens.

As well as posing obvious questions about ownership these large agroholdings risk leading to the steady erosion of European food cultures and traditions. Farming systems evolving over hundreds of years which were appropriate for local geography and wildlife are abandoned in favour of a homogenised industrial model. Clearly it is not desirable for Europe to have land ownership concentrated by a few corporations or outside investors. Land grabbing is only a part of the story in most Western European countries. In Eastern Europe it is of far greater concern. This passage from Constantin et al[45] is worth quoting in full:

> *Land grabbing occurs mostly in the Eastern and Central countries, particularly in Hungary and Romania, because they possess some of the best agricultural lands, with extremely fertile soil and water sources for irrigation in the Danube plain. This is mainly due to first Pillar of Common Agricultural Policy (CAP) permits concentration of subsidies, thus favoring a capital surplus in the old EU member states, enabling their farmers to purchase more land and also by the considerably lower level of the of support money made available through the CAP mechanisms, instruments and incentives, coupled with a lower quality of infrastructure, and with the specific features of the business environment, of the social, institutional, and legal background in the new EU-28 member states, that have kept the price of land at baseline, compared to the price of land in the old member states.*

This gives us a sense of the role of the European Common Agricultural Policy in hardening and accelerating these trends. As well as the potential for high yield activities, those who acquire farmland know that generous subsidies will accrue to them at ever-increasing levels based on their rate of acquisition. Whilst the CAP undoubtedly has its benefits and has been a key plank of European policy since the formation of the European Community, it is a system ripe for exploitation as recent events in Eastern Europe show. The most recent round of CAP reform removed the link between payments and production and instead paid in proportion to land holdings. This was a positive step, but it also distorted the distribution of direct payments, allowing the top 1% of agricultural businesses to benefit disproportionately from the CAP. In Italy, 0.8% of beneficiaries took home a huge 26.3% of the country's Direct Payments[46]. The current structure of the CAP is creating incentives for land acquisition and contributing to a narrowing field of owners.

The Transnational Institute has suggested some policy solutions which may help to redress the balance in terms of Europe's land ownership picture: the development of a European Land Observatory for monitoring large-scale land deals and land investments; the allowing of member

[45] http://www.sciencedirect.com/science/article/pii/S0264837716310183
[46] http://www.huffingtonpost.co.uk/paul-brannen/eu-land-ownership_b_7767840.html

states to better regulate their land markets by granting justifiable restrictions to the principle of the free movement of capital; the utilisation of provisions of the CAP in order to 'deconcentrate' land; the focus on human rights in the design of land governance; encouragement of the EU to become more engaged with land ownership issues[47].

The issue of land ownership reform has become particularly pertinent in Scotland where the country's government has gradually sought to overhaul a system which still resembles a feudal past. In 2018, the land ownership pattern in Scotland is still shaped by the events of the 19th Century[48]. As a result, only 500 people are said to own over half of the privately-owned land in Scotland[49]. Given the relationship between land ownership, power and inequality, the issue of this concentrated land ownership picture has become a symbolic barrier to the realisation of the progressive society to which many Scots aspire. Perhaps with this in mind, since 2011 the Scottish National Party (SNP) government has made land ownership a live political issue, setting up a series of reviews and commissions, and has legislated to begin influencing the land ownership picture in Scotland. The SNP Government has sought to encourage community purchase of land, create a public register and protect the rights of tenant farmers. However, the legislation was criticised by the Left for not being radical enough, with campaigners criticising, for example, the missed opportunity of preventing ownership by individuals based in tax havens, and, crucially, not limiting the amount of land that one entity or individual can own.

These are profoundly progressive insights which ought to be applied to the question of land ownership more broadly. To take them in turn - there is an inherent problem with those who reside or are based - even if just nominally - in an untaxed domicile, as it prevents the state from recouping income through taxation. Additionally, the distaste of land reform campaigners for the ongoing hegemony over the land of a distant class of elite aristocrats and plutocrats jars with any notion of land being for community, national or other forms of public benefit. The website Common Space has reported that the Buccleuch family, owners of over 240,000 acres of private land, use a Cayman Islands tax haven firm to control and sell land[50]. Although Hereditary Peers now make up a far smaller number of the total membership of the House of Lords following the House of Lords Act 1999, so the link between land ownership and political power is less explicit. Nonetheless, the relationship between land, money and power remains strong.

Campaigners consider land reform in Scotland to be unfinished business. Though the new Scottish Land Commission - created by the 2016 Land Reform Act - is 'responsible for scrutinising the effectiveness and impact of laws and policies relating to Scotland's land'[51], campaigners have criticised the policy for not going far enough, pointing specifically to its failures in tackling inequalities in land ownership, dealing with high rates of derelict land, preventing tax haven ownership structures and the lack of right-to-buy powers for tenant farmers.[52]

Ultimately, the insight that underpins the efforts of land reform campaigners in Scotland is that land should be utilised for the common good, and that concentrated land ownership patterns run contrary to this. Communities should have the right to purchase the land on which they live or from which they derive their livelihoods. The way land is held, owned and used should be updated for the modern world. These attitudes should underpin the attitudes of the centre-Left

[47] https://www.tni.org/files/publication-downloads/landgrabbingeurope_a5-2.pdf
[48] http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-28_Land_Reform_in_Scotland.pdf
[49] http://www.bbc.co.uk/news/uk-scotland-highlands-islands-41414706
[50] https://www.commonspace.scot/articles/3678/revealed-scotlands-largest-aristocratic-landowner-holds-landoffshore-tax-haven
[51] https://www.holyrood.com/articles/news/roseanna-cunningham-land-commission-will-mean-end-%E2%80%9Cstop-start-nature-land-reform%E2%80%9D
[52] https://www.commonspace.scot/articles/10695/new-era-land-reform-scottish-land-commission-born

to the issue of land ownership. Unfortunately, in Scotland, while the predominantly centre-left leaning SNP government has engaged with the issue, the energy and idealism that have given ballast to the campaign have been found elsewhere - in campaign groups and the smaller Scottish Green Party.

This is an agenda that the mainstream centre-Left should make their own, rather than ceding to a less inhibited activist Left, and it goes to the heart of what social democracy seeks to achieve - the spreading of opportunity and wealth, the sharing of prosperity and the breaking down of barriers to social and economic progress. Concentrated land ownership patterns are one such barrier, and land ownership reform - bringing the benefits of state action to empower and enfranchise local communities - should form part of a wider agenda on ownership which along with land encompasses business, finance, utilities, energy and natural resources. With ownership comes power. Giving power back means providing citizens and communities with at least the means to ownership.

Unfortunately, the direction of travel is towards a greater concentration of land ownership, thanks in part to the fallout from the financial crisis and the failed economic and social policies which gave rise to it. Amongst them was a dominant model of ownership that promoted short-term profiteering, greed and reckless behaviour. The upshot has been the creation of a state of political flux, with established parties of the centre-Left and Right suddenly finding their pre-eminence threatened. A feature of the new political landscape has been a growing divide between urban and built-up areas and the countryside, with wildly divergent views on the same phenomena taking root in each. An example of this is the 2016 Austrian Presidential Election in which urban areas by and large opted for the former Green Party member Alexander van der Bellen and rural areas opted for his far-right rival Norbert Hofer. A land ownership agenda and a stand against the increasing concentration of that ownership, with policies to back it up, could strengthen the position of social democratic and progressive parties in rural communities, helping to bridge a gap - caused in part by the alienating and destructive power of globalisation - that is worrying for democratic politics.

Another means by which progressive parties could reconnect with rural voters is through engagement with agricultural co-operatives. There are already some 22,000 agricultural co-operatives in the UK, generating €350bn turnover by collecting, processing and marketing produce from their six million members and by directly employing over 600,000 individuals[53]. However, progressive parties in Europe have been hesitant to link their values to these developments. Partly this is because while there is an identifiable link to progressive values inherent in member-owned businesses and organisations, the conservative and rural values of agricultural co-operatives have often been dictated by their sector rather than their business form. This is exemplified by the almost explicit link between the National Party of Australia - one half of the country's mainstream conservative coalition- and the agricultural co-operative sector. Yet this need not be the case. By fostering links with agricultural co-operatives and expressing support in rhetorical and policy terms, social democratic parties can foster links with rural voters who depend on farms for employment and local economic activity.

The European Co-operative and Mutual sector in agriculture is performing well. As of 2014, the total turnover of all co-operatives was in the range of some €347bn, while the total number of co-operatives has decreased

[53] https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-taskforce/contributions/concrete/copacogecaagrico-operatives_en_.pdf

to some 22,000. They are more likely to encourage more environmentally-friendly, local cultivation of produce and to engage supply chains that are local to the towns, regions and countries in which they operate. They allow small agricultural holdings to compete in those supply chains, due to the structure of agricultural co-operatives. Importantly, this provides economic benefits to rural communities who are seeing a level of population seepage to towns and cities that is exacerbating a rural/urban divide, with populist and reactionary political forces benefiting politically. Agricultural co-operatives, such as Arla of Denmark, are part of the solution. They allow small producers to group together with larger ones to achieve economies of scale without forfeiting their independence. Again, agricultural co-operatives and spreading the benefits of broader ownership allows competition with other producers in a manner that brings concrete benefits to those often cut out by other forms of ownership.

Conclusion

Land ownership is concentrated in too few hands. This section has sought to provide a brief introduction to the scale of the problem and to shed some light on one of the trends currently accentuating this already strained state of affairs. The central argument is that land ownership is already too concentrated, becoming more so through the process of land grabbing, which sees large corporate entities purchase the holdings of small landowners and farmers and place land out of the control of the communities who depend on it. There are a range of possible policy responses, many at European level, which could help to mitigate the situation. Additionally, the role of agricultural co-operatives which allow smaller farm holdings and landowners to create strength in unity whilst preserving their independence should be supported.

The current political context - in which rural areas have become breeding grounds for the kind of sentiment driving Europe's populist revolt - would benefit from taking this issue seriously. A land ownership agenda gives Europe's social democrats and progressives the means to begin a conversation with rural voters and farmers who often see the concerns of social democratic parties as wildly divergent from their own. Fundamentally, this is an issue of equality - with land ownership comes power, and social democrats must make it their business to redistribute that power.

Recommendations

The EU should collect clear, consistent data on patterns of land ownership across the Union. Whilst we have focused significantly on agricultural land ownership in this chapter, there are other types of owned land where it is tremendously difficult to make EU-wide comparisons. Data is key.

Ownership makes a difference to outcomes. If we want domestic food security, to protect livelihoods and traditional ways of life we need to make active choices about what types of land ownership are appropriate for the outcomes we desire.

In a globalised world, agricultural co-operatives allow the continuation of small-scale production within local traditions whilst maintaining the widely-renowned quality of European foods.

2.2 State ownership

Whether a public sector unit is classified for statistical purposes as part of general government or as part of corporations' sector depends on the nature of the unit – those involved in non-market activities are classified in general government and those involved in market activities are classified as public corporations. The term corporation must be understood here in a broad sense as it may include entities which do not have the legal status of a corporation.[54]

State-Owned Enterprises (SOEs) are those corporations where the state exercises control. The precise ownership arrangements and governance structures vary across countries and sectors and could involve national government, regional government or municipal government ownership.

At one extreme, the government may own only a minority share and the company enjoys relative managerial and organizational autonomy; at the other end of the spectrum, companies may be fully owned by the state and follow instructions from their line Minister. SOEs often combine commercial and non-commercial objectives.[55]

As with most other aspects of ownership, no official statistics are collected by the EU to measure the size and importance of the SOE sector.

In the absence of reliable statistics, estimates have been attempted that reflect particular aspects of state ownership in particular industries.

According to the OECD, SOEs account for a large part of assets and employment in developed economies globally; in Europe the scope of public ownership in various sectors of the economy is significant in a number of Member States. There is a concentration of SOEs in the transport (principally rail) and energy sectors in many countries and significant public ownership remains in other sectors found in the new member states from central and eastern Europe. (See fig 1 on next page).

Another way of assessing the importance of state ownership is to consider the level of Government participation in the capital of corporations. Using this measure the degree of state participation fluctuates considerably across Member States from less than 5% of GDP in the United Kingdom, Romania, Denmark and Germany to over 40% in Finland. However, in Finland social security funds hold large asset portfolios (over a half of the overall amount), which are likely to be predominantly holdings in private corporations, although the split is not available.[56]

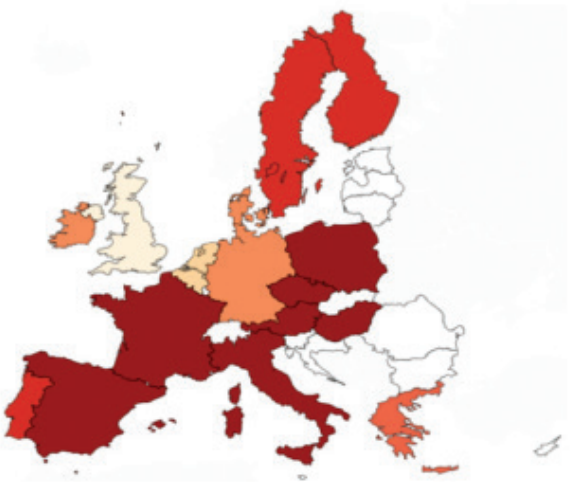
[54] State Owned Enterprises in the EU 2016 https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf

[55] ibid

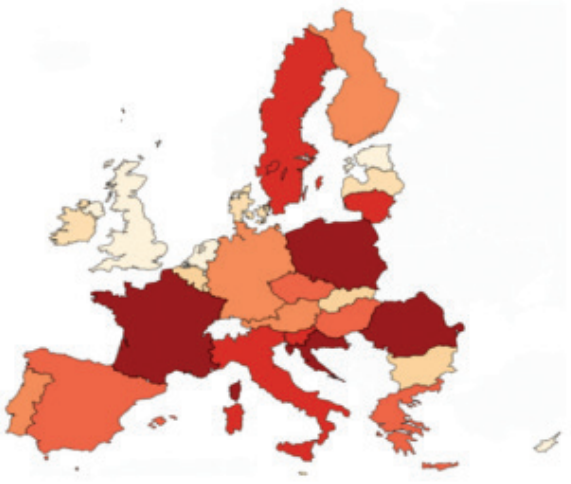
[56] ibid

Fig 1. OECD Scope of SOEs Index in EU Member States

(a) Scope of SOEs in 1998



(a) Scope of SOEs in 2013



Note: Lighter colours indicate fewer sectors in the economy in which SOEs are present. White colour indicates data is not available or non-EU.

Source: OECD. The underlying index is based on the following question "national, state or provincial government controls at least one firm in: (sectors)".

http://www.oecd.org/economy/growth/indicatorsofproductmarketregulationhomepage.htm#indicators

The lack of official statistics is surprising given the level of policy interest that is applied to public and private enterprise, privatisation, and the suspicion, particularly among those on the Left that the EU Commission is prejudiced in favour of private ownership.

Recent experience has shown that State-Owned Enterprises (SOEs) can be an important source of concerns in at least three areas: market functioning, public finances and financial stability. Given their economic role, it is important to develop a comprehensive EU wide overview on SOEs in order to consistently explore the multiple links between SOE performance, government budgets, financial stability and market functioning reforms.[57]

This debate is stuck in the frame of political and economic ideology. Political support for the public ownership of industry broke down in the late-1970s and from the 1980s onwards, large numbers of public corporations across the EU were privatised.[58]

The general concept that markets lead to beneficial outcomes is one of the main arguments for private ownership, as the incentive for firms to maximise profits leads to increased efficiency in producing goods and delivering services.

An argument in favour of public ownership is that, instead of pursuing profits, the public sector can prioritise other objectives that improve overall social welfare (and that can be harder to measure than financial indicators typically used to denote social wellbeing). In addition, advocates of public ownership cite private companies' profits used to pay shareholder dividends as money that could

[57] ibid

[58] Journal of European Public Policy 13:5 August 2006: 736– 756

be better used elsewhere, such as in investment in the industry, employee pay, or lower prices for consumers.

Government's participation in the capital of public or private corporations can also be beneficial for public finances.

For example, in Finland general government's revenue from distributed income of corporations amounted to 1.5% of GDP on average between 2005 and 2014; revenue of around 1% of GDP on average was also recorded in some other Member States with relatively high share of government's participation – Sweden, Estonia, Malta, Slovakia and the Netherlands.[59]

This whole debate was brought into question during the financial crisis when a series of failed financial institutions were placed in public ownership. More than €1.6 trillion was pumped into troubled banks by member states between October 2008 and December 2012, according to figures from the European Commission.[60]

When interpreting the link between government's participation in the capital of corporations and dividend revenue, one has to recall that the recent financial crisis has in some cases affected statistics, as governments stepped in to become owners of financial sector entities. This has affected government's participation in financial sector corporations for example in Ireland, Latvia, the Netherlands, Spain and in some other countries. [61]

Overall, the evidence has been that ownership is not the deciding factor in the performance of firms [62] but rather it is a matter of the governance of SOEs which is important for their performance and their impact on public budget.

An important distinction between the commercial and non-commercial objectives of SOEs is needed. Easily understandable targets are required with reporting of SOE performance against these. Such targets should reflect societal objectives.

The counter argument to this is that having social objectives can be inconsistent with economic efficiency and can thus lead to taxpayers subsidising loss-making SOEs. The debate on the merits of state versus private ownership are summed up in the following quote from Megginson and Netter:
"[T]he arguments for state ownership or control rest on some actual or perceived market failure, and countries have often responded to market failure with state ownership. Privatisation, in turn, is a response to the failings of state ownership."[63]

Competition and regulation

Article 345 of the Treaty on the functioning of the European Union states that the EU has no stance on whether Member States choose public or private ownership of industries or utilities: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." [64]

EU rules, however, are concerned with the extent to which Member States can support and operate companies in competitive marketplaces. State aid rules in conjunction with

[59] https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf
[60] https://europa.eu/european-union/topics/economic-monetary-affairs_en
[61] https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf
[62] Public versus Private Ownership: The Current State of the Debate, Shirley & Walsh
[63] From State to Market: A Survey of Empirical Studies on Privatization 2001
[64] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E345:EN:HTML

the EU's rules on competition[65] do mean that all enterprises have to behave competitively. This means that fully state-owned enterprises cannot receive subsides to prevent their failure or benefit from a tax regime which discourages other entrants into a market.

In natural monopolies, there is very little or no competitive pressure. This means there is potentially scope for privately-owned monopolies to exploit customers due to the absence of competition in the market.

"Some lessons learnt from past privatization experience suggest that transferring public monopolies into private hands may incentivise rentseeking."[66]

In cases like this the fear is that private firms may be inefficient, accruing 'excessive' profits and/or failing to invest. Government regulation is seen as a way to manage this risk.

Modifications of the regulatory framework have important implications for SOEs as the exposure to increased competition provides incentives for better management and efficiency gains. This is particularly important in the network industries where high entry costs have often resulted in incumbents adopting a dominant position.

Ultimately, many economists believe it is the degree of competition that drives efficiency and not whether an enterprise is in the public or private sector.[67] Allied to the quality of management, the effectiveness of governance and accountability regimes is more important than the ownership itself. Consequently, progressives should adopt this nuanced approach and reject the binary argument between public and private once and for all.

Recommendation

Progressives should reject the binary argument between public and private ownership.

2.3 Owning Europe's Utilities

Introduction

Europe's social democrats are rediscovering the state. Since the financial crisis, critiques of the neoliberal and financialised version of growth, which had previously been muted and tentative, have become louder and eventually dominant. Government is again being presented as the solution to society's problems, rather than the problem itself. Social democratic parties, in many cases adherents (to differing extents) of Third Way politics, now find themselves proposing muscular and interventionist policies such as taxes on robots[68] and the creation of a universal basic income (UBI). In the area of utilities, the assumption that the direction of travel should be towards greater private involvement has increasingly come into question, with social democrats rediscovering the virtues of state and municipal ownership.

They are proposing nationalisation, municipalisation - or in many cases 'remunicipalisation' - of services that have been shifted to a private sector model at a time when the assumption that 'the market knows best' had yet to be fully debunked by events. This

[65] https://europa.eu/youreurope/business/selling-in-eu/competition-between-businesses/competition-ruleseu/index_en.htm
[66] https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf
[67] Public versus Private Ownership: The Current State of the Debate, Shirley & Walsh
[68] https://www.theguardian.com/commentisfree/2017/sep/29/robots-labour-tax-jobs

agenda has arisen in response to the failure of these privatisations. Its effect in utilities on product price has proven to be extremely negative. In the 34 OECD countries, for example, the average price for energy charged by private companies is 23.1% higher than the price charged by public companies[69]. Additionally, according to a PIQUE report, privatisations have created weaker trade unions, lower wages, higher inequalities, tension between 'old' and 'new' employees and higher market concentration by large private players.[70]

The co-operative movement has long made the case that a binary approach which views the state and market as good and bad, depending on your perspective, is outdated and unhelpful. The critique which gave rise to the privatisation agenda of unworkable, sluggish and inefficient services is not entirely wrong. However, its enaction in policy terms has instead created a new set of problems that are proving to be equally damaging to society. While the discourse of the 'Third Way' is not, it is fair to say, in vogue in contemporary centre-left circles, member-owned organisations provide a means of squaring this circle and providing a genuine efficiency and supplementing it with member control, ensuring a fair distribution of profits and avoiding the risk of energy being used as a means of enriching groups of shareholders. The member-oriented approach has been utilised to great effect at different tiers of government in different countries, creating meaningful benefits.

This section will make the case for a co-operative and mutual solution for water and energy provision in the European Union. It proceeds with an exploration of recent trends in water ownership and uses the example of Welsh Water (Glas Cymru) to propose the adoption of a similar model by social democratic parties, drawing on its strengths and developing them further, creating membership, sharing profits and created wealth and ensuring genuine democratic control over a -or perhaps the - most crucial natural resource. It then moves on to energy, proposing renewable energy co-operatives as a viable vehicle for the development of a distinctively social democratic solution to the joint problems of high energy prices, the need to develop renewable energy sources and the other serious issues associated with privatisation. In short, it will argue that social democratic parties would be wise to adopt policy ideas rooted in mutual and co-operative ideas when it comes to utilities more broadly, but particularly in water and energy.

Owning Europe's water

On September 29th, 2013, The journal.ie[71]- one of Ireland's most popular online news outlets - ran a piece questioning why the Irish public didn't protest more. Given all that had occurred over the previous five to ten years - a crash following an unsustainable construction boom, over-exposure to the global financial crisis, years of crushing and punishing austerity and a corporate tax environment designed to attract those corporations who preferred to pay less than their fair share of tax - a climate of mass protest might have been expected.

The piece consulted two academics - a MEP and a social justice campaigner. Explanations ranged from the nature of the Irish Trade Union Movement to the native mindset of the Irish people. The contributors shared a degree of pessimism about whether this complacency could be relinquished in favour of a degree of proactive street protest commensurate with the scale of the injustice being wrought upon the Irish citizenry.

From November 4th of the following year,

[69] https://www.tni.org/files/publication-downloads/tni_privatising_industry_in_europe.pdf
[70] Ibid
[71] http://www.thejournal.ie/protests-ireland-why-1102930-Sep2013/

over a hundred street protests took place in response to Irish government plans to introduce charges for water usage for the first time. The protests, organised under the banner of Right2Water, were supported by the Irish trade unions as well as a number of campaign groups. Protesters at some events totalled nearly 90,000, all united in seeking to protect the right to water as recognised by the United Nations[72] and its status as a basic human need rather than a commodity to be traded. A second concern rested on fears that the imposition of charges for water were a first step towards privatisation, with public sensibilities offended that something as fundamental to life as water could be treated as a private good to be sold and bought as Irish Water's proprietors saw fit. That the organisation had spent nearly €50m on consultant charges speaks volumes about its priorities.

The Irish campaign was the most visible wing of a pan-European movement seeking to assert the right to access to clean and affordable water. A Citizens Initiative garnered over one million signatures, with European citizens the length and breadth of the continent responding to a lack of provision and the growing commodification of water. The fundamental principle asserted by the campaign is that water is a right and that it is the duty of states - and the European Union - to ensure that everyone has access to it. Whilst discontent may have followed around initiatives to liberalise and privatise water and sanitation services before the financial crisis, the new reality of a discontented and disenfranchised European citizenry who now balked at the central claims of the previously dominant neoliberal ideology meant that such projects had become a much tougher sell.

Water liberalisation has been a successful agenda of the neoliberal Thatcherite Right, following its realisation by the agenda's political foot soldiers in the 1980s and early 1990s. Britain's water companies are now largely owned by investment vehicles, banks and hedge funds. In parts of Eastern and Central Europe, privatisation was encouraged by international institutions following the fall of communism. The physical decline of water infrastructure came - perhaps uncoincidentally - at a time when the neoliberal privatising tide was at its height and as such policymakers and politicians were drawn to policy solutions which existed within that dominant policy paradigm. The movement of travel during these decades was towards greater private ownership and provision, with cost to the citizens increasing predictably.

In France, the latest figures indicate that about 70% of the French population receives its drinking water services from a private operator, with private operators also providing wastewater collection and treatment for about 50% of the public[73]. Against widespread public opposition, the two Greek public water providers were partly privatised by the government although the need for substantial public subsidy has remained. Events in Ireland and elsewhere show that European citizens can no longer be expected to accept the commodification of their water supply and sanitation services. And why should they? Water is the simplest necessity for human life, underpinning almost all else. Social democrats should ensure that the direction of travel in policy is toward widening provision of water and ensuring all have access to it. In countries which can afford to do so, water should be made freely available, or at least rolled up into progressive taxation that takes more from those with the ability to shoulder the burden. However, nationalised water services will always be vulnerable - particularly by right-wing austerian governments - to privatisation and the temptation to levy often high and unaffordable charges.

[72] http://www.right2water.ie/about

[73] http://www.globalwaterforum.org/2010/09/13/public-versus-private-management-of-water-services-a-french-casestudy/

The best protection against water privatisation and unfair fees is to pursue a different ownership model offering genuine community ownership to the individuals who rely on the supply, and one which is locally rooted in geography and communities beyond the reach of those who would seek to profit unduly from Europe's water. One model can be found in Wales, where the devolved government set up Glas Cymru (Welsh Water) following the failure of the Hyder combined utility project in 2000. In seeking not to repeat the failures of the recent past, the Welsh Assembly Government opted to try a different model. While not a mutual in the strict sense of the term (in that it is state - rather than member-owned) it nonetheless seeks to distribute the benefits of ownership more widely, delivering a dividend to service users due to bills that are substantially lower than when the supply of water was in private hands. Conversely, in London, Australian investment bank, Macquarie, acquired Thames Water in late 2006, accumulated enormous amounts of debt, paid next to nothing in tax and failed to carry out necessary repair and preparatory work. It was fined millions of pounds for repeated instances of sewage and pollution. The difference between private ownership and community ownership could hardly be more stark. Europe's social democrats must make the case for community ownership of water; it is an agenda that chimes with the environmental turn that centre-left thought has taken and that captures the activist spirit of the times. The contemporary campaign for remunicipalisation[74] suggests that there is renewed interest in these issues. However, social democratic parties should go further: water services should be free where possible, affordable everywhere and in genuine community ownership. Membership structures should be developed and created, with municipal and regional government taking the lead. Where there is a fully-privatised system, co-operative challengers should be introduced, with a view to the creation of a more sustainable, mutually-owned monopoly provider. A legal form should be utilised where available or developed when appropriate - preventing the body from being taken over and transferred into private hands, something to which a wholly publicly-owned water provider will always potentially be victim.

Owning Europe's energy

Europe's energy provision is dominated by corporate providers. Whilst energy, like water, represents something of a natural monopoly, there is a more established system in most European countries of consumers choosing a provider - a choice which usually disguises a uniformity of provision, if not price and customer service. The ownership of European energy is a patchwork quilt, with state providers competing with private providers to provide energy to differing extents across Europe, and with energy grids often in municipal hands. Since 2007, every household and industrial consumer of electric energy in the EU has been freely entitled to choose its supplier. The European Union has been a key driver of the broader 'energy liberalisation' agenda which has seen monopoly provision gradually phased out. Nonetheless, a truly competitive internal market for electricity has not yet been achieved. This is due to various factors, such as the market power of the former monopoly providers on the wholesale level and cross-border transmission constraints.[75] In 2013, Hamburg - Germany's second largest city - voted in a local referendum to return the city's power grid to public ownership[76]. One of the advocates of remunicipalisation involved in the successful campaign made the argument that a publicly-owned utility was more likely to make environmentally-focused decisions than a private company. While there

[74] http://www.remunicipalisation.org/front/page/about_us

[75] https://www.swp-berlin.org/fileadmin/contents/products/projekt_papiere/Electricity_paper_KS_IIformatiert.pdf

[76] https://www.ft.com/content/2f3b0b1e-4dee-11e3-8fa5-00144feabdc0

is undoubtedly a strong case that this is so, there is nothing inherent in a publicly-owned structure ensuring that this is the case, and indeed as the swell of right-wing populism in Europe and beyond shows, plenty of political parties exist which are positively hostile to the climate change agenda. Political control can shift, and with it control of municipally-run water or energy companies. One way of embedding it, and a potential solution, is the growth of renewable energy-sourced co-operatives, or REScoops. These are any groups of citizens that co-operate in the field of renewable energy, including the development of new energy production, the sale of renewable energy or the provision of energy-related sources. In Germany, over 1000 REScoops have emerged since 2004, making up a large number of the continental total. An enormous benefit of renewable energy co-operatives is that they involve the people that are affected by them.

Of course, the need to promote renewable energy could hardly be more pressing. 2016 was the hottest year on record, with average temperatures measuring 0.99 degrees Celsius higher than the mid-20th century mean. 2019 is tied for the second warmest year on record, behind only 2016.[77]

The European Union performs better than comparable units such as the United States and China, but there is a great deal further to go, with our continent responsible for some 9.62% of global carbon emissions as of 2015[78]. If it is not stymied, the impact of global sea rises, the displacement of people, resource conflict and the flooding of low-lying coastal areas will exacerbate and continue to destabilize Europe in diverse and unexpected ways.

In addition to their key role in creating a sustainable energy system in Europe, Renewable Energy Co-operatives create additional value to the communities they serve. "Community-owned renewable energy projects deliver twelve to 13 more times the community value for local areas than 100% privately owned schemes" according to Emma Bridge, Chief Executive of Community Energy England, a non-profit membership group for the sector in the UK. They also promote innovation. The author and academic Wolfgang Hoeschle describes the example of the Middellgrunden Wind Turbine Co-operative in Denmark, which was founded in 1997[79]:

> **[Middlegrunden] partnered with the Copenhagen municipal utility to build 20 wind turbines of 2MW capacity each, off the shore of Copenhagen. Københavns Energi, the municipal partner, has since then merged with several other companies to form the private energy company DONG Energy. The cooperative owns 10 of the turbines, while the other 10 are owned by DONG Energy. Over 8,500 people who mostly live in or around Copenhagen own the 40,500 shares of the co-op. The cooperative is organized as a partnership, and each partner has one vote, regardless of the number of shares. One wind turbine is a "children's wind turbine" — shareholders have had their children vote on their behalf and thereby participate in the decision-making process, learning how to organize a sustainable future as cooperation between people.**

Given the manifest benefits - to their local community, to employment, to the economy, their members and the environment - the question is why energy co-operatives have not become more dominant. Progressive parties must look at ways of encouraging and bolstering REScoops and must not be shy of making moves that disadvantage large private providers. Where possible, state-owned

[77] http://www.wired.co.uk/article/world-meteorological-organization-climate-report-2017

[78] http://edgar.jrc.ec.europa.eu/overview.php?v=CO2ts1990-2015

[79] https://blog.p2pfoundation.net/danish-energy-co-operative-lets-consumers-collectively-build-windturbines/2017/08/2678 http://edgar.jrc.ec.europa.eu/overview.php?v=CO2ts1990-2015

and backed companies should also adopt a mutual structure, transferring ownership to their customers and empowering them to make decisions about the strategic priorities, investments and other significant decisions of their companies. The state can help facilitate this. The stakes are too high to leave the production of energy in a time of climate crisis to private corporations whose first loyalty is to their shareholders.

Nonetheless, REScoops face numerous barriers across Europe.[80] In Germany, RESCoop members perceive risks in pursuing new renewable projects. Secondly, despite the broadly environmentallyfriendly nature of RESCoops there are perceived negative environmental impacts, and thirdly there is a lack of resources and competencies amongst RESCoop members to push their projects forwards. Governments of all levels in Europe must engage with these challenges. Capacity must be built, planning obstacles must be removed and financial support must be offered. Europe must overcome its aversion to 'picking winners' and support renewable energy co-operatives on the grounds that they are more likely to realise progressive values such as environmental protection and preservation, as well as sustain high quality employment and encourage participation and decision-making at community level. Europe's citizens do not have a choice in the matter. They require electricity and they require water. These are essential services underpinning not only the basic necessities of life, but also the productivity of the European economy. Even though the vast majority of the continent enjoys access to these things, often they are mismanaged resources, either in the hands of a distant state or private providers with business models that encourage their own financial success but not the affordable and environmentally-friendly provision that the times in which we live demand.

Later in this study, it is argued that the Left is being squeezed simultaneously by populists on both flanks, and with a centre-Right showing a greater degree of alacrity in the circumstances, the Left needs a new agenda. The issue of ownership provides an organising principle around which the serious, policy-oriented centre-Left can address the concerns that drive populism - benefiting remote and rural communities, holding up a shield against the destructive power of globalisation and creating institutions and organisations that bind individuals, communities and families into the economic system. The task of the Left is to build institutions that can engrain a culture and pattern of co-operative and collaborative behaviour, where energy is channelled towards productive and progressive social outcomes. But the progressive and social democratic movements must own this agenda because it brings their politics into being. Power can be found in governments and local authorities of various kinds, but it can also be found elsewhere - in business and in institutions. The mutual and co-operative approach provides a means of realising these values within the economy, spreading them throughout society and allowing them to take root in our communities.

Utilities provide a clear example. First, they perform better than privatised providers. Secondly, the state is a serious player in these sectors - even in areas in which private providers are dominant, the state's regulatory function is considerable. Social democratic governments should use this position to build in co-operation, to spread ownership and to encourage participation through membership-based organisations.

The remunicipalisation movement is making its presence felt across Europe, but perhaps what is needed is a supplementary mutualisation agenda - water and energy are best owned by the people, better than ownership by local, state or national government. The Left should promote this approach to genuinely return power to the people.

[80] https://www.sciencedirect.com/science/article/pii/S0301421517304056

Recommendation

Water and energy are best owned by the people, better than ownership by local, state or national government. Progressives should promote this approach to genuinely return power to the people.

Progressive governments should use their position to build in co-operation, to spread ownership and to encourage participation through membership-based organisations.

2.4 Foreign ownership

The increased globalisation of the past few decades[81] has rightly led to a greater interest in the nature of ownership, where it crosses national boundaries. How it affects the way that companies behave is one factor, but more important is the effect that their decisions have on individuals and nation states themselves.

It is topical to discuss the impact that digital giants such as Facebook, Apple, Uber and Google have on a range of public policy areas, and we do not need to repeat these concerns here. However, it must be recognised that these companies have greater power, wealth and influence than many individual nations. Beyond the ubiquity of such businesses, how is foreign ownership in business having an impact?[82] Does it matter? And when foreign investment is ultimately by an entity where the beneficial owner is a nation state itself,[83] what should be the public policy response across the EU?

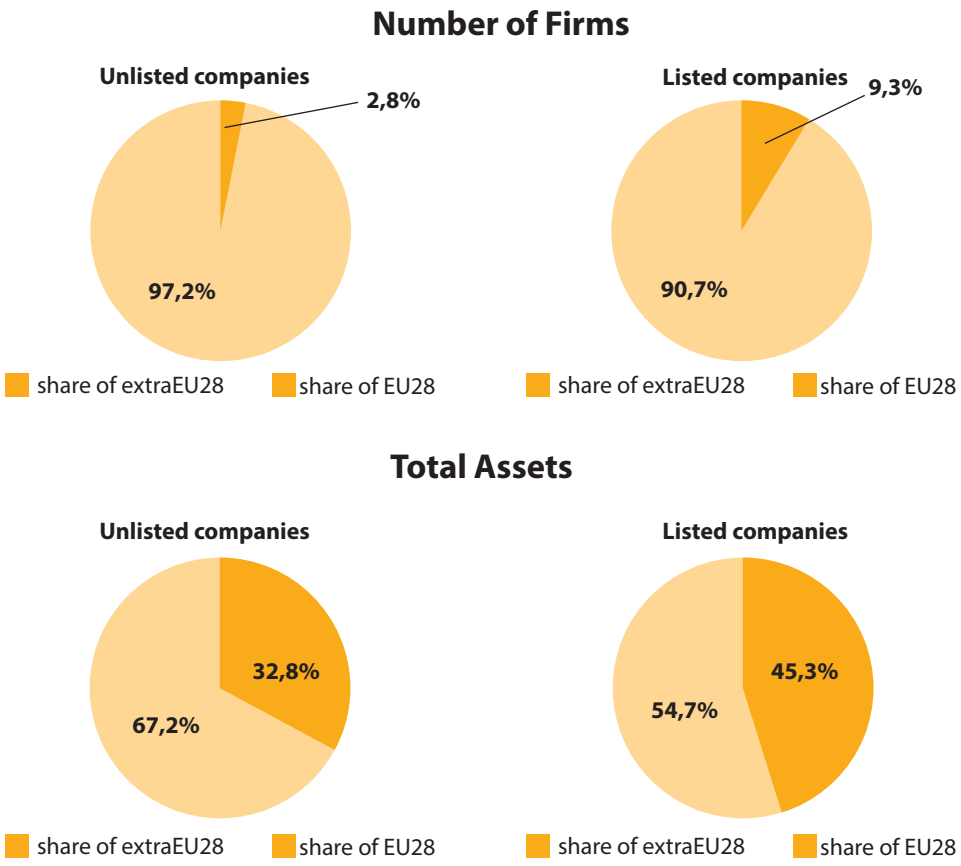
At this point, we need to distinguish between foreign ownership within the EU, which is the result of a deliberate policy to cross-fertilise between member states, and that from outside the EU. This is not a new issue. The Commission has considered this in recent years and produced, in 2019, its first report into Foreign Direct Investments (FDI) into the European Union.[84] As in other areas of ownership, there is a long-standing lack of available official FDI statistics "which do not allow to-date the systematic and reliable identification of the ultimate owner together with the detailed breakdown by sectors."[85]

For this report, a new database was constructed. It is based on firm-level data and enables a detailed account of the foreign ownership of EU firms. It is based on a sample, and although not an exhaustive database, it does permit the Commission to take a view on this issue. For progressives, this is an important resource that will feed into policy making.

"The analysis confirms the importance of foreign investment into the EU. While only 3 percent of European companies in the sample considered in 2016 were owned or controlled by non-EU investors, they represented more than 35 percent of total assets in the sample and around 16 million jobs. There has been a continuous rise in foreign ownership over that last ten years, which was mostly due to acquisitions of increasingly large, listed companies."[86]

[81] 'Pace of globalisation picks up, despite the rise of its opponents' https://www.independent.ie/business/world/danobrien-pace-of-globalisation-picks-up-despite-the-rise-of-its-opponents-37185483.html
[82] 'Foreign ownership and consequences for British business' https://esrc.ukri.org/files/news-events-andpublications/evidence-briefings/foreign-ownership-and-consequences-for-british-business/
[83] ibid
[84] 'Foreign Direct Investment in the EU' https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf
[85] ibid
[86] ibid

EU Firms controlled by non-EU companies 2016



Source: EC-JRC Foreign Ownership Database

The report analyses the countries of origin for this FDI. The US, Switzerland, Norway, Canada, Australia and Japan control more than 80% of all foreign-owned assets. Such investments are diversified across sectors.[87]

Interestingly the data also shows the emergence of new trends from a wider diversity of countries of origin. China is notable in terms of number of recent acquisitions, and the investments and acquisitions from developing or emerging countries are typically concentrated in a much more limited number of sectors. Some of these, such as aircraft manufacturing and specialised machinery investments from China, or pharmaceuticals from India. could be considered of strategic significance. Foreign ownership is remarkably high in a number of sectors at the heart of the economy, such as oil refining (67% of total assets of the sector), pharmaceuticals (56%), electronic and optical products (54%), insurance (45%) or electrical equipment (39%).[88]

The study also identifies the types of entities owning or controlling EU companies: "While state-owned companies represent only a small proportion of foreign acquisitions, their share in the number of acquisitions and their assets have grown rapidly over the latest years. Russia, China and the United Arab Emirates stand out in this respect with a total of 18 acquisitions in 2017, three times more than in 2007."[89]

This is surely significant for public policy. Where investment is being made by Chinese entities and where the ultimate beneficial owner is the Chinese state, for example, policy cannot be silent.

In the UK, the absurd situation has arisen

[87] ibid

[88] ibid

[89] 'Foreign Direct Investment in the EU' https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf

where state or any form of public ownership of the heavily domestic taxpayer-subsidised railways is denied as a matter of policy by the UK government, yet its franchise rules permit significant ownership stakes to be taken by the communist state of China.[90] It points towards a clear unintended consequence of the dogmatic view of capitalism held by many in the UK.

The rise in ownership by wealthy individuals is also noticeable (and not confined to English Premier League football clubs!) Individuals from Switzerland, Russia, United States, Norway and China account for an increasing number of business acquisitions.[91]

2.5 The ownership of wealth

Wealth is the total sum value of monetary assets and valuable material possessions owned by an individual, minus private debt, at a set point in time. Wealth in the European Union is distributed unevenly between the 28 member states.

Given that the ability to measure wealth varies from country to country, the definition of wealth or net worth reflects the variation in the specific purpose of surveys designed to collect information on wealth.[92] This means that it can be difficult to make easy comparisons between countries.

However, in comparison to other types of ownership covered in this report, a significant amount of quality data exists in various forms. Credit Suisse publishes an annual global wealth report[93] and there is academic research as well as work undertaken by the European Union through the European Commission.

According to Credit Suisse's Global Wealth Report 2018[94] the median wealth per adult for the European Union was $152,000 (USD). Sitting under this figure there is significant variation in the wealth per adult within countries. Wealth per adult varies from $412,127 in Luxembourg to $20,321 in Romania.

The European Commission has carried out extensive work in this area. Each year its 'Social Situation Monitor' carries out policy-relevant analysis and research on the current socio-economic situation in the EU on the basis of the most recent available data. It describes its work as follows:

"The Commission's work on the distribution of wealth builds on two international studies of wealth inequality. The Davies et al. (2008) study assembles estimates clustered around the year 2000. The Luxembourg Wealth Study (LWS) is a data archive of household surveys, the goal of which is to harmonise wealth and income data in order to provide a definition of wealth that is comparable across countries."[95]

The report states that "Sweden has the highest Gini coefficient in the LWS and the second-highest in the EU in the estimates of

[90] 'Chinese firm MTR to help operate UK's South West trains franchise' https://www.theguardian.com/uknews/2017/mar/27/chinese-firm-help-operate-uk-south-west-trains-franchise

[91] These represent only 5% of the total number of deals between 2007 and 2017.The number of acquisitions involving individuals or families increased from 31 to 197.

[92] https://ec.europa.eu/social/main.jsp?catId=1050&intPageId=1936&langId=en

[93] https://www.credit-suisse.com/media/assets/...us/.../global-wealth-report-2018-en.pdf

[94] ibid

[95] https://ec.europa.eu/social/main.jsp?catId=1050&intPageId=1939&langId=en

Davies et al. (2008). At the same time, it has one of the lowest levels of average wealth based on the mean and median results. On all available measures, Finland has one of the lowest levels of net worth inequality and the US one of the highest."[96]

According to the LWS "Sweden has the highest share of wealth held by the top 10% in Europe, followed by Germany and the UK, Finland and Italy."[97]

It is important to be cautious when comparing two estimates of the same statistics, because aspects of the data may limit their comparability. For example, "Low wealth levels can reflect measurement errors, but also the low rates of home ownership (in Germany) and high debt (in Sweden), as well as the dampening effect of public pensions on savings."[98]

The annually published Credit Suisse Global Wealth Report is also instructive: "During the 12 months to mid-2018, aggregate global wealth rose by USD 14 trillion to USD 317 trillion, which represents a growth rate of approximately 4.6%."[99]

According to the report, total wealth in Europe (BN USD) was $85,402. This accounted for $144,903 of total wealth per person.[100]

The report contains other data: "North America and Europe together account for 60% of total household wealth but contain only 17% of the world adult population. The total wealth of the two regions was similar at one time, with Europe's greater population compensating for higher average wealth in North America. However, North America pulled ahead after 2013, and now accounts for 34% of global wealth compared to 27% for Europe."[101]

Overall, Europe accounts for 30% of the adults in the global top 1% by wealth, with almost a fifth of the European contribution coming from Germany. This reflects the high total net worth of German households. The extent of inequality differs markedly between Member States, as noted earlier.

As noted there are issues in comparing data from different countries. For example, when we look at the case for Australia and Germany, Frick and Headey (2009)[102] show that without the inclusion of pension entitlement, average wealth in Australia is more than twice that in Germany, but once entitlement is taken into account it is much the same. This points to the fact that the Australian policy of compulsory superannuation has been extremely successful in increasing average wealth distribution in Australia.

Recommendation

The European Union should continue to undertake measurements of wealth distribution across member states.

EU states should consider adopting policies to spread wealth, similar to the Australian superannuation policy.

[96] ibid
[97] ibid
[98] ibid
[99] https://www.credit-suisse.com/media/assets/...us/.../global-wealth-report-2018-en.pdf
[100] ibid
[101] ibid
[102] https://ec.europa.eu/social/main.jsp?catId=1050&intPageId=1938&langId=en

Part 3
Understanding Corporate Ownership

Corporations and ownership

The corporate landscape – a purpose-based approach

Business for private benefit

Business for public benefit

Community ownership

Custodian-owned bodies

Understanding Corporate Ownership

Corporations are treated in law as if they are real people. That is to say, they are recognised by the law in that, although they do not physically exist, the law enables them to own property, to enter into contracts and other legal relationships and to come to the law courts in order to enforce their rights and protect their assets just like a human being. They don't exist in the real world, but the law enables us to pretend that they do.[103]

Some practical arrangements have to be fulfilled so that corporations become visible. These are: registration with a relevant body[104] including details of relevant human persons with authority to represent them; having a physical place, or registered office, where contact can be made; making available the legal constitution and latest financial records for the benefit of those outside the organisation, and various other formal requirements.

All this is necessary so that any person wanting to know about or deal with a corporation has access to sufficient information to form any necessary judgements. As humans we are constantly forming opinions or making judgements about people we interact with. We need certain information about a corporation in order to be able to make similar judgements.

Another obvious factor worth spelling out is that a corporation cannot do anything in the physical world unless there are human agents to do things on its behalf. It needs a workforce and, probably, managers and executives. It is important to know who these people are and how you become or cease to be one of them. The essence of this is written down in a constitution or by-laws - the authorised text setting out how the corporation is organised internally. This is generally called 'governance'. Without such by-laws and governance, outsiders would not know who had authority to speak or act on the corporation's behalf and people inside would not know what they were supposed to do.

Google, therefore, does not exist... but the law allows and enables us all to pretend that it does. It has a form of artificial existence. Google can only do things in the real world through human beings. Certain people have the power to spend its money and hire people. Some are its workers, others are executives. Google engages with the real world through people[105] who have the authority to do things on its behalf.

Corporate status, or artificial personality, is a strange concept. It is a legal fiction but has become so commonplace that we barely notice it. Without any difficulty we talk about corporations as if they were people. They are not. They need real people in order to do anything.

This artificiality is of great importance and something we need to recognise if we are going to understand corporate ownership. A corporation only has the mind, intentions and ambitions of the people behind it.

[103] There are some profound issues here in relation to types of corporate entity which are distinct from their owners (e.g. companies), as opposed to those which actually are the collective entity comprising individual owners (co-operatives).

[104] E.g. Bolagsverket in Sweden, Conservatórias do Registo Comercial in Portugal, Companies House in the UK

[105] Of course, today people engage with businesses online, but those online arrangements are set up by people, or at the very least are ultimately under the control of people. It is those people who carry responsibility for everything done in the corporation's name online.

3.1 Corporations and ownership

There are two aspects to corporate ownership. First, all corporations themselves have owners. They are usually referred to in law as members, though the nature of the members' rights and interests in different corporate bodies varies greatly. In companies and mutual societies, members play only a limited part as owners, but that part remains significant. In some cases, particularly the custodian forms of corporate ownership referred to previously, ownership of the corporation can be somewhat nominal. In this situation, but also in others where for some reason the legal owner has little or no interest in the asset owned, the result can be that nobody takes charge of looking after and maintaining the asset. It can result in an 'ownership deficit' where the asset may become vulnerable.

Second, corporate bodies themselves own things. Subject to their individual by-laws, they essentially have the legal right to do this, in much the same way that private individuals do.

However, the purpose for which corporations exist varies considerably between the different types of corporate entity, and therefore the ways in which they use their ownership of assets varies similarly.

There are many different types of corporation across European countries, including companies, mutual societies, limited liability partnerships, associations, foundations and public bodies. How can we attempt to categorise and then explain them in this context?

3.2 The corporate landscape – a purpose-based approach

Corporations are often divided into 'for-profit' and 'not-for-profit' (or 'non-profit' in the USA). This is both an unhelpful taxonomy and a misleading one.

- With all artificial persons, it is necessary that their income exceeds their expenditure – i.e. they make a surplus or a profit. If they do not do so, they will consume their assets and ultimately fail. Since all corporations must make a profit to survive, it makes no sense to divide them into 'for-profit' and 'not-for-prof it'.

- It might be deemed as demeaning to imply that the latter may be somehow other-worldly and not very commercial because they don't try to make a profit, and to be approving of the former for the opposite reason. Neither is appropriate.

- As well as defining them inaccurately by something which they are not, 'not-for-profit' also fails to give any clue as to what they are. It does not describe their actual purpose, which may be philanthropic, mutual or defined by some other social purpose. Generally, the term is understood to describe corporations trading for some social purpose or public benefit rather than for the private benefit of owners.

- Similarly, 'for-profit' is misleading. As well as incorrectly suggesting that this type of corporation aims to make a profit whereas the others don't, it also mis-states the real purpose of such bodies - to maximise profits for the benefit of shareholders (see further below).

It is suggested that this language should be abandoned altogether because of the po-

tential confusion it causes. This is a context in which it is important that people understand things clearly.

Confusion can be used to hide something which needs to be uncovered. We need clear and transparent language that characterises different types of corporate ownership accurately.

Usually if we want to know who owns something, our curiosity comes from a desire to understand why an owner has behaved in a particular way or how they might behave in the future. Where that owner is a human person, we get to know or find out about them and then make our own assessment of them. We want to understand what makes them tick or what personality traits govern the way they behave.

Where the owner is a corporation, we actually want to know the same sort of thing and for the same reason. However, this is not so easy in relation to an artificial person. We can look at the physical manifestations of the corporation and what it does in practice, but what we really want to know is what and who that corporate entity is really for ... why it was set up in the first place and who it was intended to benefit. What is its purpose?

It makes more sense to look at different types of corporation from the point of view of their corporate purpose. This report will do so on a generic basis rather than by looking at different types of specific legal corporate bodies, as there is much variation on this between different jurisdictions. In this way, the following broad categories can be identified:

• Corporations whose reason for existence or purpose is for private benefit. This comprises companies, including investor-owned or public companies,[106] whose shares are traded on a stock exchange, and private companies whose shares are privately-owned and not traded.

• Corporations whose reason for existence or purpose is a social one for the broader community or public benefit, rather than a private one. This includes mutually-owned bodies, community-owned bodies and social enterprises.

• Corporations acting as custodian-owners on behalf of others, including state-owned bodies and philanthropic bodies.[107]

Under this categorisation, the corporate purpose will be explored and explained so that the strengths and weaknesses of each purpose type can be appraised.

Before doing so, there is an important note of caution: the fact that a corporation cannot do anything in the real world without human persons, it is obvious that those human persons may or may not act as they were expected or intended to do. As a consequence:

- The people running a corporation of one type may do so as if it were not that type;
- The people running a corporation may take no notice of what should happen under its bylaws;
- The people running a corporation may try to do what they are supposed to do but simply do it badly, or experience bad luck because of matters beyond their control;
- The people running a corporation may be driven by personal ambition, dishonest or corrupt.

Corporation by-laws don't make businesses succeed or fail. People do. All the by-laws can

[106] 'Public' in this context refers to the fact that the company's shares are publicly traded on a stock exchange.

[107] These can be for public or private benefit, but these essays consider only those for public benefit. Private benefit custodianship arrangements include family trusts and other mechanisms to hold assets for private individuals.

do is create a framework, or scaffolding, within which a corporation is intended to operate. If the scaffolding is well-designed and fit-for-purpose, then it will more accurately reflect what the people who established and now own it aspire to do. However, that still does not guarantee success. The best a good legal constitution can do is make it more likely that a corporation will succeed and less likely it will fail. The rest is up to human beings.

3.3 Business for private benefit

Most incorporated businesses are a form of company. The larger proportion are smaller, privatelyowned companies with often a relatively small number of shareholders.[108] A smaller proportion of companies are public companies whose shares are traded on a stock exchange. A company is usually set up by one group of people to provide goods and services to another group. Whilst those who establish and subsequently own a company may participate in its trade as a customer, that's not the main intention. The intention is to set up, operate and grow a business which other people will buy from, and by doing things well the owners will earn a profit from the company's trade.

The basic purpose of a company (public or private) is to generate a profit through trading and to distribute that profit to shareholders as a dividend.[109] Investors buy shares in a company, taking into account the risks faced by the company and the sector it is trading in, its historical performance and the competence and experience of its management team. They are looking to secure the best possible 'return' for their investment. They also want the underlying value of the company to grow so that if and when they come to sell their shares, they will receive more than they paid for them.

The shares of public companies are listed on a stock exchange in order to facilitate the raising of capital by companies and the buying and selling of shares by and between investors. Investors are simply interested in getting the highest possible return on their investment, so it is of fundamental importance to them to know that such companies are dedicated to the purpose of maximising profits for shareholders and that the shareholders' interests take priority over everyone else including customers, employees, local residents and wider community. Where is this writtendown?

You might expect the answer to be in the companies' by-laws. But that is not the case. Nor is it generally explicit in company law. In practice, it is legally derived from the duties imposed on directors of companies to make decisions based on what is in the best interests of shareholders as a whole. This doctrine of 'shareholder primacy' means that although directors can and, in many cases must, take into account the interests of other parties such as employees, suppliers, customers, local residents and the natural environment, their duty is to give priority to the interests of shareholders – subject only to remaining within the civil and criminal law of the jurisdiction in which they are trading.[110]

[108] There are many instances where a single person sets up a company which they alone own and control. This is usually to limit personal liability, to comply with requirements in a regulated sector or for fiscal purposes. We are not so concerned with these cases, because in reality the existence and use of the corporate entity in such cases is of limited significance for present purposes.

[109] Some argue that some legal entities including companies are 'neutral' as regards purpose, e.g. see Fici A. The Essential Role of Co-operative Law The Dovenschmidt Quarterly DQ 2014/No.4, borrowing the term from Santini G. "Tramonto dello scopo lucrativo nelle società di capitali", Rivista di diritto civile I, 1973, p. 151 et seq. However, I would challenge this for the reasons explained below.

[110] So they must obey laws that impose positive requirements and protect the interests of workers, customers, suppliers, local residents and the natural environment, amongst others. This is considered further in Essay 3

Public companies whose shares are traded on an exchange are therefore legally required to do their best to maximise shareholder value, either through paying dividends to shareholders out of profits or by growing the underlying value of the business and thereby increasing the value of the shares held. The exchange (or market) is set up to enable investors to buy and sell shares in order to get the best possible returns. Often such investors are institutions managing funds on behalf of others, such as pension funds. Their success as investment or fund managers is based entirely on the financial results they achieve. Their job is to secure the maximum uplift in the value of funds invested – that is what the members of the fund expect.[111]

Turning to private companies, although the underlying premise is the same - that they are trading to maximise shareholder value - in practice the position may be rather different since their shares are not listed on an exchange. Their shares are usually held by a smaller number of shareholders, and since all of the shareholders collectively own the company, it is within their power to decide how to run the company and to influence the extent to which the business drives shareholder value at the expense of other priorities.
For smaller businesses it is important to maintain good relations with their workforce, suppliers and customer base. Their reputation in the local community is also important.
The shareholding owners may have personal views about the importance of offering apprenticeships to young people or paying workers more than some competitors, or a variety of other things that would increase costs and/or reduce income.[112] But where they all agree to do so, or those who aren't so supportive don't want to challenge the majority owners because they want to hold onto their shares, the company may well, and many do, behave less aggressively than a public company in terms of driving profitability. Other matters may and often do carry weight.

One of the challenges of turning a privately-owned company into a listed public company is the much tighter control over expenditure that becomes necessary where investors expect directors to do their utmost to maximise shareholder value. The loss of control by previous owners can feel like the destruction of the values and character of the old business. However, the company must be completely profits-focussed when it becomes investor-owned, because that is the promise to investors.

In summary:

The purpose of a company is to generate a return on investment for investors. Companies are for private benefit. Public companies are legally obliged to maximise shareholder value for the benefit of investors. Private companies have greater freedom and often take more account of their workforce, customers and local communities.

From here on, 'investor-ownership' will be used to describe all public companies and any private company which essentially strives to maximise shareholder value. It does not include those businesses where shareholders expressly set out to achieve some other purpose.

[111] "Our firm is built to protect and grow the value of our clients' assets. We often get approached by special interest groups who advocate for BlackRock to vote with them on a cause. In many cases, I or other senior managers might agree with that same cause – or we might strongly disagree – but our personal views on environmental or social issues don't matter here. Our decisions are driven solely by our fiduciary duty to our clients." Larry Fink, CEO of BlackRock, world's biggest investor, quoted by the Guardian https://www.theguardian.com/business/2019/may/21/blackrockinvestor-climate-crisis-blackrock-assets

[112] Smaller private companies often sponsor local community groups, sports clubs and charities; employ people with disadvantages; hold social events for employees and local residents and support political parties or other social causes.

3.4 Business for public benefit

Mutual ownership

Mutuals encompass a broad range of businesses, including co-operatives, building societies, credit unions, mutual insurers and financial institutions. As described previously, mutuals emerge in response to a particular need, where traditional businesses are failing to provide what people need for everyday living – a market failure. Mutuals originate from a collective, self-help response to lack of access to something basic, e.g. uncontaminated food at a fair price (consumer co-operatives), finance (co-operative banks and credit unions) or jobs (worker co-operatives).

Mutuality involves a commitment between people to working in an equitable way in order to ensure that they and others have access to something currently not available to them, or not available on acceptable terms. Like a company, it is focussed on setting up a business, but unlike a company people set up a mutual for themselves and their community. The whole point is that it will meet their personal needs, and they will trade with it. There is another basic difference. Ownership and governance of a company should reflect the differing levels of interest and investment of individual shareholders. A mutual is set up for the benefit of everyone so that they can all have access. Rather than seeking to reward people differently, the intention is that none should benefit more than others. This needs further explanation.

The amount invested in a company by each shareholder determines the number of shares they hold, and each share carries one vote. The number of shares also fixes their entitlement to a share of the profits or dividend. Lastly, the size of shareholding defines the share of the underlying value of the company which they would hope to realise on selling them. By increasing their shareholding, an investor can also increase their influence and power (votes).

In a mutual, each of these three factors is different. First, every member has one vote, however much capital they have contributed. Second, profits are treated equitably and not used as a reward for capital contributed. Third, on departure from the mutual, a member is entitled to repayment of the capital they contributed but not to any share of the increased value of the mutual. This increase in value remains the property of the mutual in order to support its continuing trade for the general benefit of current and future members.

Mutuality is a form of 'disinterested ownership'. In each of these three respects, mutuality is striving for an equitable approach. It therefore specifically does not aim to reward individuals for their level of participation in the business because that would defeat its very purpose. Compared with a shareholder in a company, a member of a mutual is worse off in each respect. So how can mutuality possibly work? And why would people sign up to it?
The answer is simple: because they need access to goods and services. The reason they set up a mutual in the first place is that the other type of business hasn't worked. A mutual is set up as an alternative. There is no ulterior motive to provide a mechanism to make money out of the business. The business is the purpose, nothing more.

The purpose of a mutual, therefore, is simply to provide the business. That is what the members want and need. It doesn't need to include a profit margin in its selling price because nobody is looking to extract a profit. As a result, it can charge less, and any surplus left over from the trade can be used as members feel appropriate. There are varying traditions in different sectors, but surpluses can be used to: build up reserves to make the business more resilient for future generations; provide things that members would like but don't otherwise have, e.g. access to books and education;

provide other things for the benefit of their local community. If anything is left over after all these things, then the remaining surplus could be paid back to members, in proportion to what they have bought from the mutual. The rationale is that if there is still a surplus, the mutual charged too much in the first place, so members need to be reimbursed.[113]

So - whilst the purpose of a company is to create private benefits for shareholders through paying dividends in proportion to their shareholding, the purpose of a mutual is to provide members fairly with access to a service for their benefit and for the benefit of others. For a company, the purpose is private profit. For a mutual, the trade is the purpose... for the benefit of everyone, without exploitation.[114]

This distinction exists even when a member's participation in a company or a mutual comes to an end, or where the corporate body is wound up. In a company, a selling shareholder expects to receive a payment equivalent to their share of the increased value of the company. In a mutual, on departure a member gets back the money they have put in or accumulated, but any growth in value remains in the business for the benefit of future generations. On the winding up of a company, any capital surplus is shared out in proportion to individual shareholding. In a mutual, nobody has the right to the capital surplus, and any capital surplus on winding up remains dedicated to mutual purposes.[115]

The purpose of a mutual is to provide access to essential goods and services that people need. It needs to be profitable to survive, but making profits is not the purpose. The purpose is to provide the business for public benefit.

3.5 Community ownership

Mutuality as a form of corporate ownership emerged in the 19th century at the same time that investor-ownership was developing through company law. Recent decades have seen the emergence of community-owned enterprises, where people within communities collaborate to ensure that their community has the benefit of a particular service. This might be care for older people or children, a source of renewable energy, connectivity for telecommunications, a local shop or a leisure facility such as a café, pub or library.

The essence of community-owned bodies is that the community (or a relatively small group within the community) wishes to provide or maintain some facility for the benefit of the community, and is in the position of being able and willing to contribute their time, or experience, or some finance to enable it to happen. The initiative may arise due to the closure of an existing commercial venture which local people value, but which is no longer viable (market failure), a pressing social need (e.g. childcare for working parents), the emergence of new technology (e.g. digital) or new priorities (e.g. renewable energy).

The motivation behind community-owned businesses is similar to that behind mutualism. That is to say, meeting a local need through collective self-help. However, today's economic and cultural contexts are different. There are often similar ownership arrangements as in a mutual, namely, one member one vote; all profits retained within the organisation or for the benefit of the community (commonly distributions are prohibited) and nobody gets a share of the value of the business.

[113] It is incorrect and misleading to say that the members of a mutual have a right to a share of the profits.

[114] It is important to note that in a number of European jurisdictions (e.g. Italy, Spain), mutual purpose is understood to mean 'conducting an enterprise in the interests of its members'. However, there is an essentially outward-facing aspect of mutuality too: see Alcock D. and Mills C. Co-operation for the Common Good, 2017 Anthony Collins. Solicitors https://www.anthonycollins.com/resources/downloads/co-operation-for-the-common-good/ Also see Fici A. 2014, section 6 The Social Function of Co-operatives and General Interest Co-operatives pp156 and ff.

[115] There is a wide variety of approaches here across different sectors and jurisdiction …

As in the case of mutuals, the business is set up so that the community has that facility available to them, not to make money for anybody.

The main difference between community ownership today and traditional mutuality is that in the former, different people have a relationship with the organisation for different reasons. Some need its services; some want to volunteer and perhaps benefit from social contact; some may need a job; some may want to provide financial help to support the maintenance of something for their local community. Mutual organisations tend to emerge as an initiative between people seeking to fulfil the same need – as customers, workers or producers. Often, they came from poorer working class communities where everybody was struggling to meet everyday needs. Community ownership, as it has emerged over recent decades, sees a broader range of social backgrounds, including some who are willing to give their time and money and are not expecting anything in return other than the continuity of the service for their community.

It is difficult to generalise, but whilst the purpose of community ownership is similar to mutuality, the motivation for people to be involved is more of a mixture of self-help by those who need access, community support from those who want their community to have the facility and philanthropy. In France and other states, it is this concept of a general interest co-operative. In Italy it is a social co-operative and in the UK it is a community benefit society. There is great variety in this field. Sometimes there is no expectation of paying interest on capital provided. Sometimes this is expected or even necessary (such as with renewable energy where it is needed in order to attract capital funding). Some ventures use volunteers as well as providing employment. The general focus, however, is benefitting the community, with a tendency for local ownership and local funding.

Like mutuals, community-owned businesses are set up to give a community access to something. They exist for a public purpose, but with a more varied motivation and do not rely exclusively on earned income.

3.6 Custodian-owned bodies

Philanthropic ownership

In the types of corporate ownership just described - companies, mutuals and community-owned businesses - the owners (members) of those corporate entities have a personal interest in the business. They are either investing shareholders, users, workers or producer members. They are, therefore, a dynamic form of corporate ownership.

With custodian ownership, the corporation still operates the business but doesn't have a comparable set of owners with a personal interest in the business. This is because they (and the corporation) are custodians. The business doesn't exist for them, it exists for the benefit of the public, and they are the custodians of the public interest.

In the case of philanthropic ownership, a corporate body may be the custodian owner of funds or assets or a service which have been set aside for the benefit of people whose needs would not otherwise be met. As in any other corporation, there is still a board or committee in charge of managing its affairs, but there is usually no equivalent body to the shareholders of a company or members of a mutual to 'hold the board to account'. It is also common for:

- the board or committee to be the members of the corporation – effectively the 'owners';
- the board to be responsible for appointing new board members;
- those benefitting from the organisation (users) not to play any part in the organisation.

Philanthropic ownership can be criticised for being paternalistic, but that is hardly surprising since it owes its origin to the generosity of (usually) more prosperous people who are keen not to lose control.

It is common for states to establish some form of regulation to oversee philanthropic bodies,[116] particularly where they have fiscal or other advantages which need to be kept under scrutiny.

The purpose of philanthropic corporations is public benefit. The legal body is required to uphold and maintain that purpose for the benefit of the public and may be regulated.

State-owned enterprise

State-owned enterprise covers a broad spectrum ranging from a minority shareholding in a commercial enterprise, to fully controlling and operating a public service. But in both cases, the state is acting as owner of something for the benefit of the public. In the former, the nature of the corporation in which the state holds an interest determines the nature of the ownership. But what about the latter? Is their purpose to provide a return on public capital invested by the state, employment for workers, a service for citizens or something else?

Some argue that state-owned enterprises should be directly compared in terms of economic performance with investor-owned enterprises, on the basis that if they are less economically efficient than the private sector, the taxpayer is being let down. However, comparing them with enterprises established for the purpose of maximising shareholder value is either an assertion that that is the purpose of the state-owned enterprise, or an unhelpful comparison.

The latter seems to be correct. Except where the state acquires assets as an investor (as above), it does not enter a particular sector to make money - that is not its job. It takes control in the belief that that is what is most beneficial to citizens (see Part 1). However, this purpose may neither be expressly specified nor even clearly understood (further discussed below).

State-ownership is a custodian role on behalf of the public. Where it is substantially involved in management, the division between ownership and control becomes blurred. However, it continues to be a form of custodian ownership on behalf of the public.

Some conclusions

By looking at corporate ownership from the perspective of purpose, a number of interesting conclusions can be drawn:

1. Corporations can be viewed as falling into one of two distinct categories:

- Where the business is established for the purpose of delivering private benefit;
- Where the business is the purpose, but for the wider public benefit.

These two categories might be labelled 'dynamic' forms of ownership as they contain their own internal drivers of performance through their owners.

2. There are also several forms of ownership where the owner acts in its role on behalf of the public:

- Philanthropic ownership, established and owned by private individuals;
- State ownership established and owned by the state.

These have already been referred to as 'custodian' forms of ownership where the owners hold something on behalf of others, and so the ownership structure itself does not contain the performance drivers.

Having arrived at a purpose-based approach for categorising corporations, the next section will consider how well they each work and how they impact on the question Who owns Europe?

[116] In the UK this is the Charity Commission

The two categories of corporate ownership

Dynamic Ownership

The business is for another purpose: for private benefit

Attracts participants through rewards in accordance with contributions

Inherently competitive

Includes public and private companies

The business IS the purpose: for public benefit

Attracts participants through pursuit of fairness and equity
Inherently collaborative

Includes mutuals, community-owned businesses and other enterprises striving to operate for a public purpose

Custodian ownership

Custodian ownership – private purpose[117]

Trustee ownership on behalf of private beneficiaries

Established by private individuals – normally unincorporated

Custodian ownership – public purpose

Philanthropic ownership

Established and maintained by private individuals

State ownership

Established and maintained by the state

[117] Custodian ownership for private purpose is not included in this review as it appears to have limited relevance to the present enquiry

Part 4
Does corporate ownership work?

Governance

Efficiency and success

Motivation and drivers of success

Private benefit corporations

Public benefit corporations

Custodian ownership by the state

Philanthropic ownership

Introduction

Part 1 concluded that in order to have a better understanding of where control and power lies in Europe today, it is necessary to understand corporate ownership. This was explored in part 3, which concluded that although there is a wide variety and spectrum of different corporate types and legal forms, corporate ownership can be divided into three broad categories based on purpose:

- where the purpose is for the private benefit of shareholders
- where the purpose is the business itself, to provide something for the public benefit
- where the owner is a custodian, on behalf of and for the benefit of the public.

Since, as observed previously, corporations dominate the ownership landscape, as well as categorising them based on who they are for, it is also necessary to enquire what impact they have. This involves considering how well each type of corporate ownership works: are they doing what they are supposed to do? How efficient and successful are they at achieving their purpose?

4.1 Governance

Each corporation is effectively an exercise in delegation: one group of people (members) sets up an entity, which another group (board or committee) will operate on their behalf.[118] Through the corporation, the members delegate to the board most of the corporation's power in order to do this. As long ago as 1776, in his Wealth of Nations[119] the Scottish philosopher Adam Smith pointed out that all corporate bodies involve the separation of ownership and control and argued that this separation will result in inefficiencies. This is the consequence, so the theory goes, of managers having control over something they do not own. This has become known as 'the agency problem'[120]

Clearly, this agency issue will be at the heart of our enquiry into different ownership types. How well each type of corporate ownership addresses the agency problem is of fundamental importance. In each case, the owners need to make sure that a corporation (through its agent managers) does what it is supposed to do. This includes monitoring managers and holding them to account by either congratulating them, correcting them or replacing them. Accountability is the mechanism by which owners mitigate the agency risk.

Accountability is at the heart of corporate governance. As discussed in the previous essay, an artificial person is dependent on real people to make it operate and the governance arrangements set out the rules about how it is supposed to operate. How well those rules work depends on how well designed they are ('fit for purpose') but also on the extent to which people are motivated to use those rules to make sure the corporation delivers its purpose.

[118] Sometimes, the latter group may include some of the former. But in larger corporations the former is a large group and the latter a relatively small one, commonly a dozen or so persons.
[119] The full title is An Inquiry into the Nature and Causes of the Wealth of Nations.
[120] 'The directors of such companies however being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance which the partners in private co-partnerships frequently watch over their own … Negligence and profusion, therefore, must always prevail, more or less; in the management of the affairs of such a company,' The Wealth of Nations

4.2 Efficiency and success

However, we need to be careful when talking about efficiency. It is fair to assume that all organisations aim to be efficient in terms of minimising wasted time and effort and optimising output in pursuing their purpose, but since their purposes vary, simply looking at efficiency is too narrow. Success is what is important – success in achieving the purpose. This enquiry is interested in all forms of ownership types, and success is not the same in all cases because of the different purposes. In each case, there needs to be an understanding of what success means.

Given the prevalence of private purpose enterprise in European economies (and indeed elsewhere), where the purpose is generating shareholder value, the 'success' of business tends to be seen and measured in terms of that purpose, namely financial outcomes: market-share, turnover, profitability, return on capital employed and ultimately, share price or value.[121] This information tells investors what they want to know - namely, how well the business (and therefore their investment) is doing and what their shares are now worth. It also has the great advantage of clarity, because it is expressed numerically. Through international consensus, the way of quantifying and reporting results through agreed accounting principles enables comparisons to be made between different businesses in different places.[122]

In practice, these financial measurements (or those that can be applied) are also often used in relation to public purpose and custodian-owned corporations. In principle, this is inappropriate.

Return on capital invested is a sensible measure of success for corporations whose purpose is to generate a return on capital invested, but where the purpose is something else – such as to provide the business for the public benefit – although it is still possible to calculate 'return on capital invested' as if it was a private purpose corporation, it is of limited value in assessing how the well corporation has performed in fulfilling its intended purpose.

Looking at financial outcomes is nevertheless important for all corporations because (as discussed previously) all corporations must make a profit to survive. Those in charge need to know the financial position, to use that information as an indication of progress and efficiency and to act accordingly. However, for private purpose corporations, such information also acts as a measure of success – of success from the point of view of investors. What the financial data does not reveal is how satisfied customers are; how happy, healthy and resilient the work-force is; whether their working conditions makes them a constant drain on health and care services; how the activities of the business are impacting on the environment and a host of other factors that do not impact on the accounts of the business (unless it breaks the law) but which are nevertheless significant positive or negative external impacts of the business.

Measurement of non-economic outcomes and impacts[123] has become much more

[121] In the UK, the BBC regularly includes in news broadcasts the latest summary of movement of share prices on the London Stock Exchange. This information is clearly relevant, but it would be inappropriate to regard this as reflecting the current state of success of UK business.

[122] International Financial Reporting Standards are maintained by the IFRS Foundation https://www.ifrs.org

[123] Social impact assessment, accounting, audit and reporting is still emerging. For example: "Our latest Impact Report looking back over the last financial year is a little bit different from previous reports. In the 2017/2018 Impact Report we wanted to look more at our own wider economic, social and environmental impact and how we, as an organisation, seek to address the issues we care about such as economic inequality and social justice." Social Enterprise UK https://www.socialenterprise.org.uk/Social-impact-report. and since 2018 non-financial reporting is now required for large undertakings; see https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN

important over the last few decades and particularly most recently as understanding of the impact of human activity in the Anthropocene age has grown.[124] Climate change is a major issue today.[125] However, where we have measured financial outcomes for centuries, measuring social and environmental outcomes is a relatively new, fast-growing and vitally important area of work.

Needless to say, corporations whose purpose is private are keen to focus on their results in terms of that private purpose, and not so much on external impacts.[126] Public purpose corporations, by contrast, are enthusiastic about reporting on such external and social impacts to demonstrate how well they are delivering their purpose. Impact reporting is becoming a much higher priority, but where much financial reporting for all types of business is based on legal requirements, most impact reporting currently remains voluntary.

This is a big subject, and not one which we set out to cover here. For present purposes, it is sufficient to note the following:

- 'Success' needs to be seen in how well a corporation achieves its intended purpose;
- The success of business has historically been viewed through its financial data report, and share price, but these only measures success from investors' perspectives;
- Whilst financial data is vitally important it does not (nor is it intended to) provide an assessment of the impact of the business on the world outside the business.

Different forms of ownership, therefore, need to be examined against their broader external impact as well as against their specified purpose if and where that is narrower.

4.3 Motivation and drivers of success

As already noted, separation of ownership and control of a corporation leads to the agency risk identified by Adam Smith. Owners delegate most of the corporation's powers to managers, but retain some powers, including the power to correct or replace managers; to change the constitution or by-laws; to withdraw as owners by selling shares (in a company) or withdrawing from membership (in a mutual), or to wind up the corporate entity.

These are meaningful powers giving owners the means of applying pressure and acting where appropriate. But how, and indeed whether the owners use their powers as owners will affect the extent to which they mitigate their agency risk and the corporation achieves its purpose. Clearly this depends on what incentive or motivation owners have to use their powers. This will vary between different types of corporate ownership, depending both on their purpose and on the extent to which individuals have a personal interest or motivation driving them.

Understanding these motivations is the starting point for understanding corporate ownership.

Corporations only strive to do more and

[124] The Anthropocene age is a proposed epoch dating from the commencement of significant human impact on the earth's geology and ecosystems, including, but not limited to, anthropogenic climate change.

[125] Sir David Attenborough emphasised the dangers to the World Economic Forum https://www.theguardian.com/tvand-radio/2019/jan/21/david-attenborough-tells-davos-the-garden-of-eden-is-no-more Young generation activists are now organising school strikes by children, against the failure of adults to take the climate crisis sufficiently seriously https://www.theguardian.com/environment/2019/mar/01/youth-climate-change-strikers-open-letter-to-world-leaders

[126] Economists aptly use the phrase negative externalities.

better things when the people who manage them cause them to do so. So what drives these managers? And what drives the owners to make sure that the managers do their job is important in understanding corporate ownership. The term 'driver' is used here to denote what motivates people to make an organisation succeed in its purpose.

We will now examine the following three areas in relation to each ownership type:

- a brief outline of how the governance of each type of corporation is designed to de liver the purpose;
- the motivation or driver that propels it forwards;
- the wider impact of both of these in practice, and how states respond to that impact.

4.4 Private benefit corporations

Outline of governance

Governance of private benefit corporations (companies) is essentially as follows:

- Shareholders contribute the capital that gives them pro rata entitlement to votes in a general meeting, annual dividends and the underlying value of the company.
- Shareholders have the power to appoint and remove directors, to whom otherwise most of the powers of the company are delegated.
- The purpose of a company is to generate shareholder value, and through the rights which shareholders have they are able to hold to account those appointed as directors.
- Only shareholders have rights in a company. Although a company needs customers, employees and suppliers, none of these have any rights under the by-laws of the company.
- Shareholder primacy[127] guarantees that the company will be run for their exclusive benefit and their rights as exclusive owners enable them to enforce this purpose.

There is a neat alignment between the interests of the shareholders, the purpose of the company and shareholders' powers to enforce that purpose. This reflects the origins of companies – merchants looking to trade together, combining their capital and endeavour in a shared venture

Motivation and drivers

The driving force in a company is the profit motive. Investors are in search of shareholder value and are motivated to use their powers by the desire to get the best return for their investment.

Shareholders might be the catalyst for driving success, but it is those managing the company that have the power to influence and control what it is doing. Their job is to manage the company in a way that delivers shareholder value. This mainly comprises optimising income and minimising costs to achieve the largest profit.

It is common in large investor-owned businesses for the remuneration of managers to be linked to the profitability of the business. Performance-related remuneration is therefore another powerful driver for the company to succeed. Tying managers into the financial results of the company directly aligns the interests of managers with the interests of shareholders. Other staff may also be incentivised by targets impacting on financial performance.

In other words, private purpose corporations have powerful internal drivers – directly incentivising key individuals – to make the company succeed in its purpose of maximis-

[127] The legal principle which requires the directors of a company always to act in the best interests of the shareholders as a whole

ing shareholder value. As well as these internal drivers within ownership and governance of companies, there are external factors driving performance (quality, efficiency and price) as well. Operating in a competitive market is one of these. Competing with other businesses requires managers to work continually to improve performance in terms of price and quality. Where there is little or no competition, this driver is absent and a monopoly arises.[128] Competition drives quality and improvement because if employees and managers do not rise to the challenge of delivering better goods and services to customers at better prices than their competitors, they will lose business.

In some sectors, regulation also has a part to play. Regulation acts as a driver because unless a business meets the standards required by the regulator, there may be penalties to pay, and ultimately the loss of the license or permission to operate in the sector.

Impact and responses

The profit motive is a powerful one. In the last two centuries, where substantial capital investment was required in order to take advantage of scientific and other advances, trading through a limited company has been the engine and the profit motive the fuel. It encourages investment, risk-taking and entrepreneurship and it offers great rewards to those who succeed and run businesses efficiently.

However, the drive to make profits can have an adverse effect. Profits will be higher if prices are higher, wages are lower, cheaper materials are used, lower cost but less well-equipped premises are used, and the business is driven more forcefully. Profitability can be increased if less care is taken about the product, the workers and their working conditions and about the impact of the trade on the surrounding neighbourhood and environment.

The establishment of a trading entity for their own benefit by one group of people, which another group of people is intended to buy things from, has the undeniable effect of creating two separate groups with different interests. The drive to make a profit will inevitably result in the owners benefitting as long as their business survives. Will this inevitably be at the cost of somebody else? Not necessarily. It would be possible to construct arrangements designed to ensure that the interests of workers, customers, local residents and the environment were balanced equally with the interests of shareholders providing the capital. That, however, is not what a company strives to do. Companies provide only one group with any constitutional powers – shareholders. Company law enshrines the principal that the company exists ultimately for the benefit of shareholders. This ensures that shareholders have the power and are expected to run the business in their own interests and only take into account other interests to the extent needed for the survival of the business.

In other words, unless a group of philanthropists privately owns a company, the pressure to make more money for shareholders is bound to involve passing costs on to others who have no voice in the decision-making. This isn't a criticism of investor-owned businesses ... it is simply an observation that since they exist for private benefit, it is not their job (or purpose) to look after the public interest - they just have to stay within the law. The pursuit of private benefit, by definition, results in competition between private and public interests. Shareholders are in charge in this competitive context and inevitably over the years this position has been abused.
As a result all states have had to introduce laws

[128] Where there is a monopoly, there is no incentive to keep prices down and there is a danger of inefficiency within the business which is simply passed on to customers through higher prices. There is also the risk of deliberate exploitation.

to protect the interests of workers (safe working conditions, length of hours, minimum age limits etc.); of customers (against danger from products and services, against incorrect statements and advertising, against price exploitation and monopoly); of neighbourhoods and the environment (by limiting noise, controlling use of dangerous materials, regulating emissions and effluents, protection of wildlife etc.) Regulation is part of this protective legal framework. In some sectors customers are particularly vulnerable (care services, financial services etc.) and need closer oversight to control the quality of those allowed to operate in the field and to protect those otherwise open to exploitation. Inevitably, legislative and regulatory protection sometimes lags behind imaginative and innovative businesses, which can exploit previously unknown or unrecognised loopholes until they are eventually outlawed. This includes the power of lobbying to slow down or prevent effective legislation being implemented. The story of tobacco is probably the most egregious example of this, where in the face of peer-reviewed scientific evidence of the harms of smoking, the tobacco industry, beginning in the 1950s, used sophisticated public relations approaches to undermine and distort the emerging science.[129]

Competition can also provide protection for customers and workers as long as there are genuine alternative products, services and jobs available. Through competition laws today states seek to ensure that competition exists and monopolies are prevented.

It is not just the state which seeks to protect the public interest. Commonly, representative bodies and other civil society organisations come into existence to stand up for the disadvantaged, or to provide them with relief and protection.[130]

The result of all of this is that although enterprise for private benefit provides goods, services and jobs and generates tax revenues, it has a tendency to be in opposition to government, society and the wider public interest. It is inherently competitive and that competitiveness needs to be held in check to protect the wider public interest.

Summary: private purpose corporations

Private purpose ownership is effective at delivering its intended purpose. It encourages constant innovation, improvement and progress, and has driven many of the great advances – railways, air transport, medical science, pharmaceuticals, digital technology and much else besides. As a result, this form of ownership dominates the commercial world today.

States are keen on private benefit enterprise because it creates jobs, provides goods and services to citizens and generates taxable revenues. However, the pursuit of private benefit is, by definition, not intended to be for the public benefit.[131] This puts it in competition with the wider public interest (and the state on its behalf), and such enterprise must therefore be held in check.

As a result, states seek to protect public interest through laws and regulation. Representative and other sector bodies also play an important role in counter-balancing the extensive power of private enterprise.

[129] Inventing Conflicts of Interest: A History of Tobacco Industry Tactics, Allan M Brandt PhD, American Journal of Public Health https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3490543/

[130] The trades union movement, the consumer movement, the environmental protection movement and, more recently, climate-change activism are all examples of this. They aim to uncover and stop exploitative practices.

[131] Reference trickle down economy theory

4.5 Public benefit corporations

Outline of governance

As described previously, whereas companies were set up by people to provide goods and services for others to buy, mutuals were set up by people to provide goods and services to themselves and others from their community who needed them.

The starting point is, therefore, very different. The owners are the customers (or workers, or producers, depending on the type of mutual). As a result, the starting point here is an alignment of interests rather than competing interests as in the case of a company, and this has a profound impact on what follows.
The basic principles are as follows:

- democratic ownership by users, workers or producers on an equitable basis (one member, one vote);[132]
- the provision of goods and services being the business's purpose or reason for existence;
- surpluses used to build up reserves, provide other benefits to members and their families or community. If distributed, these should be shared equitably on the basis of members' trade as a retrospective price ad justment, not as a reward on capital;
- any increase in the underlying value of the business to be retained within the business for future benefit and not available for distri bution to members;
- through their purpose and ownership ar rangements, mutuals trade for the wider community or public benefit and don't seek to provide private rewards for anyone. It is for members to protect that public purpose.

Motivation and drivers

Poverty and hunger provided the backdrop to the emergence of mutuality - people had no choicebut to find their own solution to getting access to the things they needed to live. There is no doubt that the motivation was self-interest and self-help, but it had to be collective and not individualistic, collaborative and not competitive, because it could not work otherwise. Collective endeavour was also a powerful driving force, particularly in the worker movement where "Cooperation turned toil into industry, which is labour animated."[133]

The motivation of mutuals, therefore, is still self-interest, but enlightened self-interest, recognising that by benefitting everyone equally, the gain for the whole community was access to goods, services or jobs without exploitation and surpluses would be available for other communityn or public purposes (reading room, education, care, pensions, etc.) The growth of mutualism from the mid-1800s onwards bears testimony to its effectiveness. A large mutual 'movement' emerged across Europe and beyond with a substantial share of particular sectors.[134] This strength and depth of mutuality slowed down and began to struggle in the second half of the last century as states themselves had taken over areas of provision from mutuals and funded them through taxation. The growth of investor-owned enterprise, particularly in the last two decades of the 20th century, soon dwarfed them. In a much more individualistic age and culture, collaboration and collective action became less significant to people. The

[132] At various times and places there have been and are mutuals based on more than one constituency, sometimes referred to as 'multi-stakeholder'.

[133] G J Holyoake, History of Co-operation 1875. He went on: "Industry means men working willingly, busily, knowing the reason why – no apathy, no idling, no bungling, no evasion of duty; because the profit of each is in proportion to his work, and is secured to him. … Co-operation means concert of the diffusion of wealth. It leaves nobody out who helps to produce it"

[134] The retail movement in the UK based on the 'Rochdale method'. Financial services in Germany following Raiffeisen and Schulze-Delitzsch, worker co-operatives in the Basque region of Spai.

focus was on opportunities for much greater and swifter personal gratification, transformed by the arrival of digital technology.

Consequently, the driver of mutuals became much weaker because people no longer needed to collaborate to get access to the essentials. Unlike companies that went from strength to strength, mutuality declined, with 'demutualisation' in many areas, as rather disinterested members were offered a windfall payment for giving up their mutual membership and the organisation turned into an investor-owned company.[135]

Mutuality struggled against the really powerful motivation and driver of profit motive – and the collapse of its own motivations and drivers. It struggled to attract executive talent and leadership as it could not offer the same remuneration and opportunities. The efficiency and effectiveness of businesses suffered, leading to significant decline in market-share, and the very purpose of mutuals was called into doubt as investor-ownership seemed to be the way of the future.

More recently, and especially following the financial crisis where mutuals were far less exposed than financial service providers whose shares were traded on stock exchanges and which became involved in trading in high-risk financial instruments, there has been renewed interest in mutuals.

Their lower risk appetite and different form of ownership are helpful in preserving greater corporate diversity, which helps to make economies more resilient.

A number of other factors have led to renewed interest in mutuality, including the atomisation of society and thirst for community, digital technology and the gig economy, the failure of investorownership to provide solutions in certain areas (e.g. care), climate change and the recognition of the need for corporate diversity. It is too early to say whether this interest is strong enough to provide motivation for establishing and driving mutuals.

External drivers of quality, efficiency and price exist for these types of organisation as for private benefit enterprise, namely, competition and regulation. At least in theory, public purpose enterprise should by its very nature seek to avoid the exploitation against which competition and regulation are intended to protect people. However, it would be unrealistic to say that their governance is sufficiently effective to achieve this, or that it is even possible to pursue given the highly competitive environments in which they carry on business.

One of the big challenges for this sort of business is that, to the extent that it strives to be collaborative, it is nevertheless governed by laws promoting and requiring competition. Those laws have been put in place to prevent private benefit enterprises from establishing a monopoly. Such laws are problematic for collaborative businesses where they stand in the way of their collaborating amongst themselves for the public benefit.[136]

Impact and responses All forms of enterprise seek to reduce cost and optimise income.

[135] "Ten of the largest UK building societies were demutualised, accounting for over 70% of the sector's assets. By 2008, all ten had either lost their independence and been taken over by other banks, or had failed and been taken into public ownership." From "Windfalls or Shortfalls? The true cost of Demutualisation", cited in the Ownership Commission http://www.mutuo.coop/wp-content/uploads/2012/03/Ownership-commission-2012.pdf

[136] M. Grillo, Competition Rules and the Cooperative Firm, Journal of Entrepreneurial and Organizational Diversity, Vol. 2, No. 1, pp. 36-53, 2013

However, where the purpose of the enterprise is the benefit of the community, there is not the same oppositional relationship which, of necessity, exists between investors and customers/workers/communities in private benefit trading. This does not mean that mutual and other social businesses are not prone to the same oppressive tendencies as investor-owned businesses - far from it, because they are competing with them. However, their different nature creates a different context. For example, 19th century mutuality had a significant effect on business and trade, on communities and society itself.[137] The introduction of weights and measures, striving for pure unadulterated goods, looking after workers, lending at fair rates, training people in speaking and working together on committees and engendering a broader sense of shared responsibilities and opportunities – all had a powerful impact.

These developments provide evidence of the pro-social impact of public benefit trading. Whilst the case must not be overstated, where the organisation exists for the public benefit and where it seeks to found itself on values and principles which inculcate pro-social behaviour, it at least makes it more likely that the organisation will reflect this. It is more likely to operate with the grain of the public good, rather than against it.

Their democratic arrangements are often cited as a source of weakness for mutuals, because of more lengthy decision-making processes. Other problems have been highlighted by a study looking at some big co-operative failures[138] where the top three factors were lack of board oversight, having the wrong people on boards and in executive roles, and (top of the list) a failure to believe in and understand the nature of a co-operative evidenced by starting to see being a cooperative as a problem not the solution.

Summary: Public benefit corporations

Self-help was and still is a powerful motivator in the early years of mutuality. Later generations, however, do not have the same experience of need, and therefore the drivers for them are weaker and often result in a large and disinterested membership. This leaves such organisations vulnerable to external predators. It seems that mutuality is more powerful and dynamic at times of need, but in times of comparative prosperity the tide can turn.

When this happens, as the interest of owners diminishes, there is less pressure on executives and managers to perform. The internal drive becomes weaker and performance suffers.

The consequence for mutuality today is that often only older generations tend to understand the culture of it and have any recollection of the benefits and reasons for collective self-help. Later generations have to relearn these benefits, but there is limited drive to do this while things appear to be going well. It is only when people recognise that things are going badly that they are spurred into action to find a different approach. The motivation can then be rekindled.

[137] This animation provides a brief illustration https://www.co-operativeheritage.coop/

[138] http://co-operativesfirst.com/isl/uploads/2017/08/When20Big20Co-ops20Fail20FInal2003.11.2015.pdf

4.6 Custodian ownership by the state

As discussed earlier, state-owned enterprise covers a broad spectrum ranging from a minority shareholding in a commercial enterprise to fully controlling and operating a public service.

Whatever its level of involvement in management, in its role as owner it is acting as custodian on behalf of the public. That involves making sure the organisation fulfils its purpose and drives its pursuit of improvement and success.

Where the state holds shares as an investor in investor-owned corporations, then investorownership as described above will govern the way the business operates. [139] The state is likely to play a passive or nominal role as owner.

Within public services where the state is actively involved in their management, there are many different structural approaches. It is not possible to summarise generic governance arrangements, and this makes it difficult to cover in the same way as the two preceding sections. It will therefore be approached via a series of general observations, but under the same headings.

Design of governance

In state-owned enterprises, the state is operating as a custodian owner on behalf of the public.

There can be a tacit assumption that the state should primarily influence strategic and detailed planning. As a result, the workforce and users of a service rarely have more than a nominal role in helping to shape services or holding to account those responsible for them. In practice, it is difficult for state-ownership to be other than paternalistic.

Where the state, through a minister or some other representative, is involved at management level, the two separate roles as owner and manager may become blurred. However, for the reasons previously considered, in any corporation the agency problem still needs to be properly managed in order to reduce risk. Regarding substantial services and enterprises (which probably includes most state-owned enterprises), it is important for the success of the service or enterprise that people with the relevant skills, training and track record hold positions of responsibility. An appropriate level of competence is essential. Where representatives of the state are involved in management, the interface between them (as representatives) and trained executives is important. However, where the ultimate power lies may be unclear. There may be a skills or knowledge imbalance on either side.

Scrutiny and holding to account can be difficult. In some cases, scrutiny by another part of government helps to provide some accountability. It is argued that elections also act as a mechanism for holding government to account for its management of state-owned services, but these are blunt instruments in a context where this is just one of numerous roles for government.

As discussed, the state does not own a service in order to make an investor's return. It does so because it is in the public interest for the state to be responsible for ownership and control. However, specific purposes of particular entities may themselves not always be clear.

The state's actual aim in relation to the service

[139] Finnish government investments

may not be clearly or correctly specified.[140] Without clarity of purpose, it may be difficult to know how to balance relevant interests in making important decisions.

Motivation and drivers

Where representatives of the state hold positions or directly exercise powers in services or enterprises, the nature of their role can be unclear. Individuals are inevitably affected by political priorities; decisions may be inconsistent with what experienced executives believe should happen.

The lack of independence of a state-owned body is an important factor in future planning particularly where it is constrained by an annual budgeting cycle outside their control and an electoral cycle bound to affect planning horizons.

Consequently, the question of motivation and drivers can be complex. Experienced executives may be highly motivated to drive performance for the public benefit, but political priorities cannot be ignored. An important motivation for many in the public sector is 'public service', but when they see political expediency taking precedence, this both demoralises and neutralises the driver and motivation

Impact and responses

Success is often much more difficult to define here. Whereas with an investor-owned business profitability and share price provide easy measures of success, there is rarely a comparable and meaningful equivalent for public ownership. Such bodies are generally not in charge of their income because they operate on a funding basis other than payment by customers for services provided. So the focus is usually on costs and expenditure, which form an important part of the body's management responsibility. However, here again, the body may have little or no control over demand for its services, or over factors causing increases and decreases in demand.

Attempting to assess the efficiency and success of a public service also becomes fraught with difficulty because of different views about its purpose, whether correct key strategic decisions have been made or whether particular outcomes are due to other factors, such as how users and workers behave. Because of the costs and the difficulty of running complex services, running stateowned enterprises is challenging. It lacks the clarity of purpose of investor-ownership, and the independence of mutual and other forms of public benefit trading.

Motivation and drivers are more problematic issues in custodian forms of ownership. Where the owner does not have a personal interest in the outcomes (as the owners of companies and mutuals do) then the motivation is dependent on the enthusiasm and commitment of individuals rather than any corporate and collective sense of purpose.

Summary for state-owned enterprise

Where it was possible to make some sort of assessment of how well the previous two categories of ownership work, it is not so easy in this case. Perhaps the thorniest problem with public ownership is its susceptibility to political influence. Those running investor-owned businesses have no such problem. They know that for their business to succeed they must win and retain customers, and that what their investors are looking for is economic success. In public ownership, where the aims and objectives are less clear, the most pressing issues politically may cause the owners to direct

[140] An illustration of this is in the UK, where the Minister of Justice is responsible for the "general superintendence of prisons … and … the maintenance of prisons and … prisoners" (Prisons Cat 1952). In 2017, new laws were planned recognising that what was needed was a duty to rehabilitate and prepare prisoners for release. These planned new laws have now been abandoned.

the public body to focus on issues which are not necessarily the top priority of its management, or to do things which may be commercially unwise.

Public ownership is never likely to provide as strong a driver for improvement and success as investor-ownership. The board and senior management of public sector corporations are generally not incentivised by economic measures, and these aren't usually applicable anyway (e.g. if the body doesn't earn its income). Additionally, public sector management is generally paid less than its private sector equivalent. A 'public service' commitment is important.

For the last three decades at least, direct state-ownership of a service has substantially declined and in many cases been replaced by the state becoming a commissioner rather than a provider of services. This allowed the state to use the strong performance-driver of the profit motive to make services more efficient. However, investor-ownership will only enter sectors where it can make a sufficient profit to justify the risks. In a number of areas, the private sector has started to withdraw because of insufficient profitability.

As mentioned previously, perceived inefficiencies may arise simply from failing to recognise the real purpose. So called inefficiencies may indeed be down to poorer performance in comparison with other businesses when measured in purely economic terms. But equally they may reflect the fact that they are being assessed using inappropriate measures (e.g. return on equity). Unless specific social and economic goals have been clearly set out in the state-owned context, arguments about efficiency can be somewhat unproductive. Long-term impacts of the privatisation of formally state-owned enterprises need to be taken into account. Where there has been significant political interference, this makes comparison even less helpful.

It seems likely that in a democracy where political control changes over time, state-ownership is likely to be problematic in the running and operation of a service (which tends to be an essential one). Long-term decisions are difficult and the constant diversion of management seeking to operate within changing political ideologies is bound to be inefficient. It is hard to avoid the conclusion that direct state ownership is increasingly difficult to justify on an ongoing basis for the future. As a form of custodian ownership, it lacks the dynamism of the other forms of ownership examined. There need to be alternative mechanisms for running essential services for the public benefit.

4.7 Philanthropic ownership

We know that philanthropic ownership is another form of custodian ownership, but in this case, the state is not the custodian owner. The custodian owner is a private corporation separate from the state. The most important point in relation to philanthropic ownership is that it is dependent on income which is given. This affects future planning and leads to insecurity.

As with state ownership, a custodian form of ownership lacks the incentives of investors in companies and members of mutuals to drive the performance of something relevant to themselves. That is not to say that the motivation and driver in philanthropic ownership is weak, rather that it is dependent on having the right individuals in place to drive the purpose of the organisation. Such individuals are not always available, and particularly upon succession between generations there is a risk of loss of drive.

Philanthropic ownership continues to be a significant feature in the corporate landscape, but it seems unlikely to increase substantially or to offer significant new solutions to contemporary problems.

An important difference with philanthropic ownership is that it is common for states to establish some form of regulation to oversee the sector, particularly where fiscal or other advantages need to be kept under scrutiny. External monitoring is important and helpful but is limited to the resources available to the regulator, the information available and the readiness to exercise regulatory powers of intervention. Regulation may provide some protection against malpractice but is less likely to prevent incompetence or simple inefficiency.

Some conclusions:

This section set out to consider whether corporate ownership works. Its blunt conclusions are that:

- Private purpose corporations are effective at delivering their intended purpose. However, there is tension between delivering private benefit and protecting the wider public interest. Such enterprise needs to be held in check by states through laws and regulation. Investorowned enterprise dominates many economies today, which puts it in a powerful position to influence such law changes;

- Public purpose corporations provide a more mixed picture. In different times and places traditional mutuality has thrived, but less so in the last half century as the motivation for community and public benefit has given way to a more individualistic culture. There is renewed interest in mutuality today and this has remained strong in some sectors. Other forms of ownership for a social purpose are also now proliferating.

Turning to the custodian forms of ownership which are less dynamic:

- State-owned enterprise has been very significant in the past, but political support has dwindled considerably and long-term stability and planning are difficult to sustain within a democracy;
- philanthropic ownership continues to be important if marginal, but its dependence on given rather than earned income, and individual motivation in governance, tend to suggest that its role is unlikely to increase significantly.

We now need to turn back to who owns Europe to see what conclusions can be drawn.

Part 5
Ownership by the people, for the people

Focus on co-operative and mutual ownership

Co-operative capital

Preserving reserves for their intended purpose

Indivisible reserves in co-operatives in EU member states

5.1 Focus on co-operative and mutual ownership

Co-operatives and mutuals have played an important part in the development of the European economy, where people have co-operated in business, both out of necessity and from a shared sense of purpose. By bringing together the natural inclination towards self-help, with the common sense to work together for the common good, mutually owned business has formed part of the bedrock of the European economy.

These co-operatives and mutuals have been in business for the long-term, focused on their core purpose of serving their members and the wider community. Member owned businesses exist in every part of Europe. [141]

Mutual firms are successful. They are important. They are home grown. They deliver competitionand choice and spread the benefits of business far beyond investor shareholders into the wider population.

Co-operatives and mutuals have succeeded without outside help but too often their contribution to has been overlooked. As a result, the level of appreciation of co-operative and mutual business by government is surprisingly low, which has made doing business harder for these firms.

Demutualisation completely changed the face of the sector in some countries since the 1980s, particularly in financial services where many of the largest firms converted to listed companies. In post-communist nations, public assets were privatised with little concern for the long-term interests of citizens. This inclination towards shareholder owned business as the 'norm' has had a damaging effect on the mutual sector and the way it is perceived.

The global financial crisis of 2008 exposed the risk to leading economies of having markets dominated by similarly structured businesses that were essentially focused on the same short to medium term economic outcomes. The lesson is that there is a real need to address the risk that a single dominant corporate form, dependent on market fluctuations, can pose to the health of our economy and society.

In government, this bias is seen in the binary debate which has divided people between public ownership and privatisation. The opportunity now is to choose a real alternative – mutual ownership which is independent of government but committed to a public purpose.

Europe needs the corporate diversity that these businesses bring, helping to spread risk, and build resilience. There is a new opportunity for economic policy to be re-cast in order to better manage markets, protect consumers and taxpayers as well as to promote sustainable wealth creation.

Co-operatives and mutuals operate across much of the European economy. From farming to finance, health to housing, education to manufacturing, they deliver trusted products and services in some of the most competitive domestic and international markets.

They are important to the prosperity of Europe. They help to create an economy and society that works in the interests of the widest number of people by sharing power in, and the rewards of, business.

Each type of mutual is defined by its own history, legal framework and market experience.

[141] The Peoples' Business report, FEPS/Mutuo 2016

Each has responded differently to changes in the size and impact of the sector but many share common challenges.

Their purpose is to serve their members, who are also their customers, suppliers, their employees or a mixture. They do not exist to serve external capital investors, which means that they can concentrate directly on the products or services that they exist to provide, instead of the economic reward for shareholders. It is a different way of doing business – with a different purpose.

Where there is a proper alignment between the products and services and the interests of the member-owners of the mutual, this way of doing business works well. With good management it is efficient, with no leakage of value from the business, and provides a systemic advantage over investor owned firms. Co-operatives and mutuals are owned by citizens, pay their taxes in EU states and contribute to Europe's prosperity.

Consumer owned retail co-operatives

A co-operative owned by its customers is able to achieve better prices or quality in the products that they purchase. Although food retail remains the area consumer co-operatives are best known for, this model functions in various other sectors too, notably in healthcare, travel, and legal services.

Consumer co-operatives:

- Provide best value to customer members
- Provide competition and choice in the wider market
- Support a range of community activities
- Share wealth with its customers through sharing profits through dividend

Worker owned co-operatives

Worker co-operatives are businesses where the members and beneficiaries work for the cooperative and have direct ownership and control.

Worker co-operatives:

- Help tackle inequality
- Build local wealth
- Create high quality jobs

Co-operative consortia

A co-operative consortium may be a collection of self-employed individuals or groups of companies. It provides services such as marketing, administration and management for its members in order to allow them to be more efficient and effective than if they worked alone.

Co-operative consortia:

- Facilitate independent business owners to benefit from economies of scale
- Support and encourage entrepreneurship
- Lower input costs: improve business productivity and efficiency
- Lower production costs: pass on better value to consumers
- Provide access to finance for small business
- Profit sharing spreads the benefits of business: wealth is distributed more widely.

Agriculture & Fisheries

Co-operatives are formed to enable independently owned businesses to achieve economies of scale.

Co-operatives of farms and fishing producers:

- Help to maintain the domestic ownership of strategic food assets, thus increasing food security
- Help to generate significant export earnings
- Facilitate independent farmers to compete by providing access to markets
- Facilitate economies of scale by enabling in

dividual businesses to jointly own and control their supply chain
- Enable smaller farmers and fishermen to stay in business and remain independent
- Maintain a traditional way of life whilst pro viding economic growth to strengthen the regions
- Employ locally
- Spread wealth back to farmers through pro duce rebates and profit sharing

Energy retailing and generation

Energy Co-operatives:

- Create collective purchasing power which can lower costs
- Put customers at the centre of the business
- Reinvest locally and benefit communities
- Focus on the long-term

Banking and financial services

Co-operative banks:

- Offer better value financial services products
- Provide price competition against profit maximising competitors
- Provide better customer service
- Are more ethical/demonstrably honest businesses
- Operate different business strategies, helping to mitigate against the overall risk of the sector to the economy
- Remunerate their executives reasonably
- Share a higher percentage of their profits with their community

Life and General Insurance

Mutual insurance companies are firms that are owned by their policyholders. The absence of a need to distribute money to shareholders enables them to offer better services to their customers, as they can afford to take a longer-term view in managing risk.

Mutual insurers:

- Increase customer trust and accountability
- Give consumers more choice and increase
- competition in insurance markets
- Contribute to corporate plurality and diversity
- Promote economic resilience and sustainability

Housing co-operatives

Housing co-operatives and mutuals are independent, non- profit businesses that provide decent homes. Housing Co-operatives are a collection of residential buildings that are owned and run by tenants on the principle of 'one person, one vote'.

Housing co-operatives:

- Are affordable housing providers
- Housing co-operatives are efficient
- Provide decent homes for key workers and first time buyers
- Is a model of housing that pools people's resources and builds strong communities
- Puts tenants in control of their homes

Why co-operatives and mutuals are good for the economy and society

Co-operatives and mutuals help to create an economy and society that works in the interests of the widest number of people by sharing power in, and the rewards of, business.

They have the potential to help create growth, prosperity and fairness through enterprises that spread wealth and prosperity. They:

- Help to build an economy with a diversity of business types
- Provide competition and choice for consumers in a wide range of markets
- Are businesses that plan for the long term rather than short term
- Are businesses that treat customers fairly and honestly
- Share the benefits of business and wealth throughout the country
- Provide quality local employment
- Provide services to communities that are valued and needed

Help to build an economy with a diversity of business types, that is not dominated by corporations that only act in their own interests, creating systemic risks to the economic system

All advanced economies benefit from a range of corporate forms. Co-operatives and mutuals have a different purpose to their competitors – they are focused on service and price rather than extracting the most profit. This safeguards European business from over-reliance on short term profit maximising firms by ensuring that no business sector is entirely prone to dramatic changes in the stock market.

Provide competition and choice for consumers in a range of markets

Co-operatives and Mutuals are good for the markets that they operate in. Their presence means that there is a permanent competitive pressure on profit maximising firms, keeping prices lower for consumers. In financial services in particular, mutuals promote competition to the big banks, through a range of diverse business options and products.

Businesses that plan for the long term rather than short term

Without the need to respond to short term stock market pressures, mutuals are able to adopt longer term business strategies. They are stable, reliable businesses that behave well in a mixed economy. Their success is clearly shown by the longevity of mutual businesses, many of which have traded continuously for over 150 years.

Businesses that treat customers fairly and honestly

Research consistently shows that the public trusts mutuals more than other types of business. This is because they have been established to serve their customers or members, rather than investing shareholders. This means that not only do they have an in-built advantage in not having to pay dividends to outside shareholders, but they can concentrate on running the business in a way that best meets the needs of their customers, whether that is through lower costs it better/more diverse service offerings.

Share the benefits of business and wealth throughout their countries

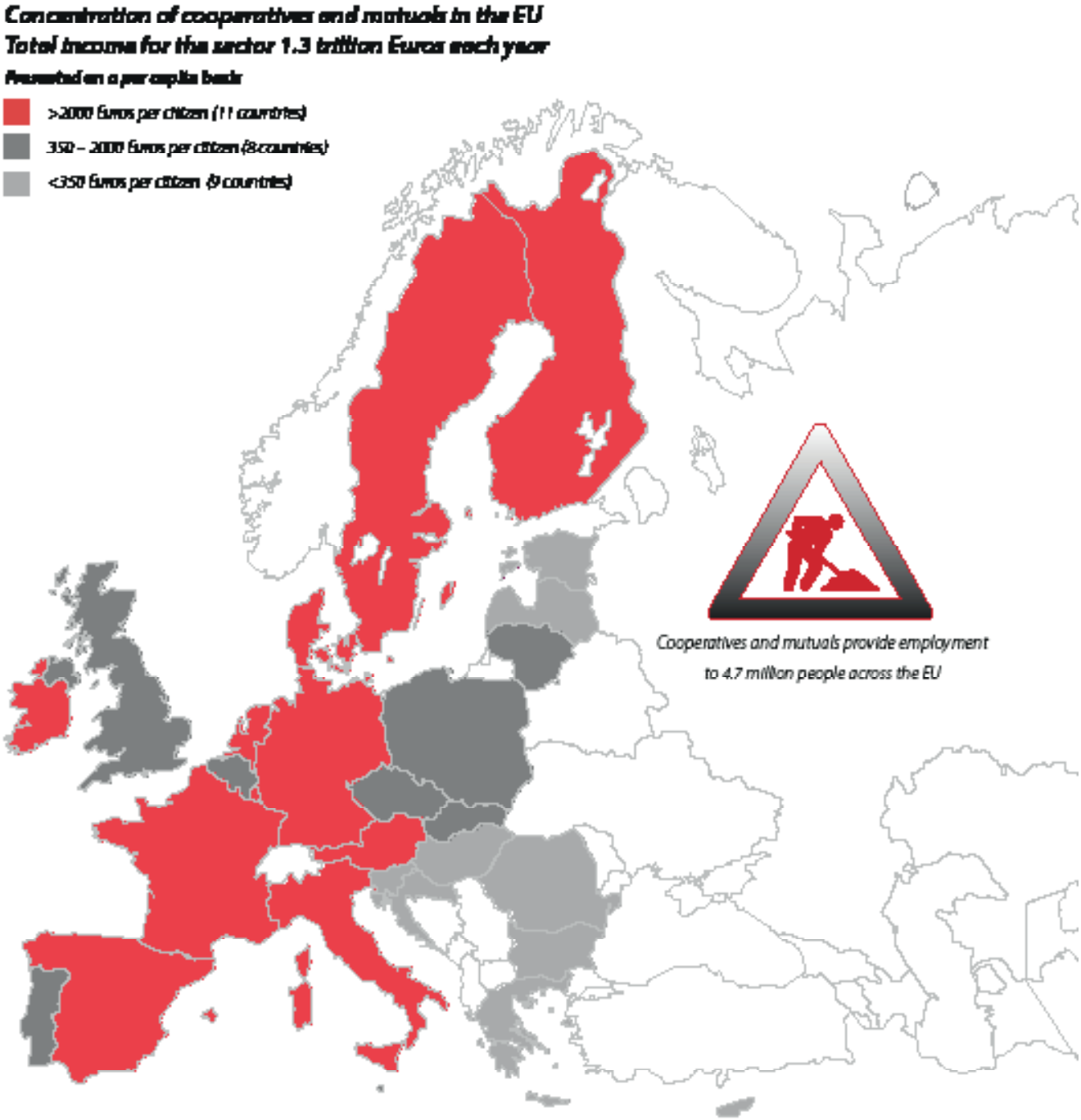
Co-operatives and mutuals are successful businesses that share their profits through lower prices to customers and dividends to members so that more people can benefit. They reward loyalty and hard work for their members' contribution in making their businesses a success. They provide employment opportunities across the country and are good for agriculture, bringing back fairness and equity to market supply chains.

Provide quality local employment opportunities

Member-owned businesses offer significant benefits for employees, consumers and small businesses across the nation. Increasingly, sole traders and micro enterprises are turning to collaborative strategies to maximise the efficiencies of their office functions to compete with larger entities. Freelance workers are turning to jointly-owned online businesses as a viable alternative to standard internet business platforms to safeguard working conditions.

Provide services to communities that are valued and needed

Co-operatives and mutuals are very well suited to providing public services where trust is paramount. The inclusive way that they are managed and operate ensures that they reflect the needs of the people they are serving as well as those who work for them.



Co-operatives and mutuals are significant in a range of business sectors:[142]

Sector	Annual Income € billion
Agriculture	338
Banking & Insurance	540
Consumer and retail	362
Housing	22
Industry & services	95
Renewable energy	1

[142] The Peoples' Business report FEPS/Mutuo 2016, www.peoplesbusiness.coop

The People's Business: A Mutual and Co-operative Approach to the Economy and Society [143]

The financial crisis saw Governments spend over EUR 1.5 trillion of taxpayers' money to rescue the failed investor owned banks. The subsequent period of austerity has delivered real hardship across Europe, with reduced economic growth, unemployment and damaged living standards for many, even as we have seen a greater concentration of wealth than before.

This experience shows how economies are vulnerable to major shocks when significant business sectors are dominated by listed firms, each similarly owned and following similar business objectives.

Recession and slow growth means that corporate tax revenues are down, whilst at the same time,greater globalisation has facilitated large corporations to go 'tax shopping' on a scale not seen before. From being seen as the engine of growth and progress, big business has been added to the lengthening list of institutions that the public no longer trusts to do the right thing.

Economic hardship has been exacerbated by an increase in housing inequality, personal debt and a lack of quality work, particularly for young people. Our economy and society remains challenged by huge structural issues such as an ageing population and its attendant ever higher healthcare costs.

We remain reliant on a volatile world market for oil and gas, where businesses and states combine to fix prices as we continue to struggle to replace fossil fuels with renewable alternatives.

The inability of our politicians to respond to this has led to the splintering of 50 years of consensus politics. The rise of populism of both the right and the left is evidence that voters are impatient with the 'managerial politics' on offer from the centre left and centre right.

Progressives need a fresh approach to rebuild popular trust by ensuring that business operates in the interests of people, rather than against them. We need to go beyond trying to regulate markets that are not working and consider how to promote the core purpose of enterprising economies.

We need to show that we understand how business works and how it can be a force for progress, dealing with many of the difficult challenges of our time. There is hope. There are already businesses that are of the people and for the people. We need to recognise and grow them.

Progressives can offer a vision of an economy that operates in the interests of people by stimulating business that has the service of customers and workers as its core purpose.

5.2 Focus on co-operative & mutual capital

In order to compete on a level playing field in a diverse economy that does not favour one type of business over others, co-operatives and mutuals need legislation and regulation that does not hinder their contribution. Most of all, they need a positive policy framework from political leaders that understands and values their particular contribution.

This means that a number of policy areas

[143] 'The Peoples' Business report FEPS/Mutuo 2016, www.peoplesbusiness.coop

need urgent attention across all member states. In particular, the way that co-operatives raise and manage capital requires a new level of

Corporate capital

Corporations (both companies and mutuals) access funds from two sources:

- Debt funding with a legal obligation to repay, creating debtor/creditor relationships;
- Loss-absorbing capital (shares) with a range of rights in the corporation itself, creating ownership relationships.

Shares in a company give shareholders, based on the number of shares held:

- A proportionate number of votes at general meetings;
- Entitlement to a proportionate share in profits;
- Entitlement to a proportionate share in the underlying value of the company.

Shares in a mutual differ in all three respects:

- Each member has one vote, irrespective of the amount of share capital contributed;
- Profits are treated equitably, not as a reward for investors;
- A member has no entitlement to a share in the underlying value ('disinterested owner ship').

As a result of these features, mutuals are said to have a different 'nature' from companies. This distinctive nature can be characterised as a more socially responsible form of ownership. The mutual member derives less private benefit than the company shareholder because that benefit is intended for the member community, including future members and future generations.

This distinctive nature resonates strongly with a sustainability and values-based agenda.

The mutual capital conundrum

By their very nature, mutuals are limited in how they can raise capital. Like all businesses, they can retain profits and can borrow against future earning, but they have no equity shareholders and so do not have access to this type of prime capital.

However, mutuals were not designed with capital investors in mind. They exist to serve their members who will be customers, employees or defined communities. Where members have contributed capital to their mutual enterprise, it is not to speculate for capital gain but to fuel the business.

Large mutuals are thus created patiently, and over a long time – requiring sustained periods of business success to grow. The lack of external capital is sometimes cited as a strength in the process of building patient, risk-averse mutual businesses, which can concentrate on the job in hand rather than the short-term needs of capital investors. However, it can also limit their flexibility in adapting to new market conditions and their ability both to secure maximum investment in the business and to grow through acquisition.

These restrictions are well known and mean that the debate around capital in mutuals is not new. To date, however, in some EU states at least, mutuals have not made significant alterations to their basic capital framework which was designed more than 150 years ago. The reason for this is that mutuals have been wary of introducing external capital into their business for fear that it could subvert the purpose of the firm and could lead ultimately to demutualisation in extreme cases.

The challenge, therefore, is to amend the capital regime in mutuals to permit the injection of external capital whilst safeguarding both the core purpose and mutual integrity of the business.

For example, co-operative businesses in Canada and the Netherlands have for many years been able to raise funds from their members as well as investing institutions, because this is facilitated by their legislation.

In the UK, new legislation has been passed to enable financial services mutuals - building societies and friendly societies - to issue 'mutual shares,' which fit within the ethos and purpose of these mutually-owned businesses. In Australia, the Federal Government has now passed such legislation for mutual businesses. We believe that similar provision should exist in every EU state.

Appendix 1 uses the United Kingdom as a case study in co-operative capital. It is a regime with real challenges and a need for new legislation. Although the legislative situation varies across EU states, the UK example is instructive of some of the typical barriers to capital raising that are found in individual states.

The law in EU states should now permit a wider range of capital-raising options for co-operatives.

5.3 Indivisible reserves in co-operatives in EU member states

Summary

Indivisible reserves are a powerful manifestation of co-operative distinctiveness and identity. They can help to provide financial stability, build solidarity and sustainability for future generations and can act as a disincentive to those seeking to take over its assets.

However, the manner and extent to which different EU member states deal with indivisible reserves within their national legal system varies greatly. Some have sophisticated co-operative laws making significant provision. Others do not even have a co-operative law.

Whilst co-operatives exist to serve individuals and meet their needs, having indivisible reserves underlines how co-operatives are a collaborative endeavour, through which individuals forego (greater) personal financial benefits and rights in order that such endeavour may prosper and achieve its purpose. This helps their co-operative to be more sustainable, creditworthy and financially secure. It supports wider co-operative development and education and it sustains the co-operative beyond the current members' own lifetime for the benefit of future generations.

Summary conclusions

- This study concludes that 23 of the 29 states consider indivisible reserves to be important, and sufficient to justify specific provision in their legislation. But only ten of them protect those reserves beyond the life of the co-operative, as is recommended by the PECOL project team of lawyers.[144]
- It also concludes that there is great variation between individual member states as to the extent to which they acknowledge the existence of co-operatives as a business form, have created co-operative laws and define co-operatives, as well as requiring co-operatives to set aside money from sur plus into indivisible reserves, and protecting those reserves when the co-operative is wound up.
- Five of the six member states whose national constitutions expressly refer to co-operatives do all of those things - namely, Greece (for some co-ops), Italy, Malta, Portugal and Spain.
- However, they are not the only states that do so. Belgium (for some co-ops), Croatia, Cyprus, France, Hungary and Romania all do. A number of states leave the fate of indivisible reserves to be determined by the co-operative's by-laws (Germany, Lithuania,

[144] PECOL is a legal project creating a set of modern co-operative legal principles to underpin national and EU laws (see further in section 4 below).

Luxembourg, Netherlands, Norway and Slovenia).

- At the other end of the spectrum, five member states (Austria, Czech Republic, Denmark, Ireland and UK) and Norway, do not have any requirement for setting aside indivisible reserves.

The ICA principles and reasons for indivisible reserves

International Co-operative Alliance (ICA) Principle 3 is as follows:

> *Members contribute equitably to, and democratically control, the capital of their cooperative. 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 of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefitting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.*

The concept of indivisible reserves was re-introduced into the ICA Principles in 1995 by the French delegation, to ensure that the concept of collective ownership did not disappear.[145] As Professor Ian MacPherson explained subsequently, in the previous version in 1966 reference to indivisible reserves had been dropped because of increasing complexity and variation of approach.[146] The unfortunate result had been that many co-operators had lost sight of the importance of commonly-owned capital as a symbol of co-operative distinctiveness, as a security for its financial growth and as a protector in times of adversity.

The ICA's recent guidance on the Co-operative Principles[147] takes the view that the 3rd Principle shows that the key economic concept enshrined in it is that in a co-operative, capital is the servant, not the master of the enterprise. The guidance goes on to argue that this principle is mainly a financial translation of the definition of the identity of a co-operative and of the financial implications of the 2nd Principle of Member Democratic Control.

A number of reasons can be put forward for providing in co-operative laws for the indivisibility of reserves, including the following:

- to create commonly-owned property as a symbol of co-operative distinctiveness;
- to counterbalance and supplement the vari able share capital;
- to increase financial security and provide protection in times of adversity;
- to increase the creditworthiness of the co-op and provide greater protection to creditors;
- to reduce the threat of speculative winding-up to liberate from co-operative control the assets built up by previous generations;
- to demonstrate concern for the future and sustainability, and to create solidarity across generations;
- as part of the financial implementation of co-operative identity.

What are indivisible reserves and what needs to be considered?

Indivisible reserves are funds set aside out of annual trading surplus or profits and are thereby not available for distribution to members either as a patronage dividend or via a

[145] See Table B and entries for France: until 1992 reserves were indivisible in French law, but in that year this was softened. Also collective interest co-ops introduced in 1992.
[146] See the quotation from his guidance on the 1995 Principles contained in Appendix 1 below
[147] See Appendix 1

distribution of profit.

Therefore, a member who leaves the co-op is entitled to the repayment of their share capital but is not entitled to a share of that surplus represented by the indivisible reserves. Some jurisdictions permit the creation of a divisible reserve from which a departing member may be entitled to claim a portion, but this is not common.

Indivisible reserves are generally intended to provide capacity to absorb trading losses. Recourse can be had to them before members' share capital is needed to perform that function. Individual jurisdictions also specify other categories of indivisible reserves, such as for education or cooperative development and promotion.

From members' point of view, since the creation of indivisible reserves establishes some form of common or shared ownership over some part of the co-op's assets, it results in some restriction on individual rights. The allocated funds become inaccessible (non-distributable) to the members as part of the contract between the members created by the co-op's statutes.[148] Instead, those funds become restricted to the use to which they have been allocated.[149] In some cases, it is compulsory to allocate a proportion of surplus to these funds.

From the co-op's point of view, the allocation of funds to reserves which are indivisible during the life-time of the co-op thereby creates an asset (the value of those reserves) to which nobody has an individual current right of ownership, but which is held in common by the co-op. It is the prospect of a winding up of the co-op whilst it is solvent and the reserves have significant value that makes co-ops and other mutuals attractive to predatory organisations looking to benefit from assets accumulated by previous generations, but to which no individual member has a right of ownership.

So, it needs to be considered how Member States address the question of what happens to these indivisible reserves if a co-op is wound up.

In some cases, there is no protection of such reserves and they simply become distributable to members, either as provided by laws or by the co-op's statutes. Traditionally, such distribution is in some way linked to the amount of members' trade with their co-op; in others, the distribution can be in accordance with shareholding. In these instances, indivisibility only applies during the lifetime of the co-op. In other cases, at the point of winding up, the members have a choice as to whether to distribute to themselves or to retain the indivisibility of the funds by transferring them to another co-op or cooperative institution. In yet other cases, members have no choice and the funds must be transferred to another co-operative or to an institution dedicated to a co-operative or community-based purpose. Where, at the point of winding up, members do not receive anything beyond repayment of their capital subscribed and payment of other entitlements arising during the lifetime of the co-op, this is generally described as a 'disinterested distribution'.

In some states, as well as allocating funds to an indivisible reserve, there is a legal requirement to set aside a proportion of profits which must then be paid to a secondary or tertiary co-op or a cooperative federation for certain purposes, such as co-operative development and promotion[150] or the furtherance of co-operative education, training, research and the general development of the co-op-

[148] The document setting out an individual co-op's internal regulations is known by a variety of different names, which in English can be translated as foundation document, rules, constitution, articles of association, statutes, by-laws or regulations. To avoid confusion, in this paper the document will be referred to as the co-op's statutes or by-laws.

[149] See for example Portugal: five categories comprising a general (legal) reserve, education fund, funds required by legislation, funds required by the co-op's own constitution and funds allocated by the general meeting.

[150] Table A, Italy – 3% of annual profits

erative movement.[151] In truth it is probably incorrect to characterise such allocations of surplus strictly as indivisible reserves in the sense that they no longer belong to the co-op, even though they serve a similar function. They continue to be funds allocated to a specific and restricted cause, over which the co-op may have some say as a member or participant in the organisation entrusted with the funds. Because these funds are no longer owned and controlled by the co-op, they cease to be available on winding up, whether solvent or insolvent, or on conversion to a company. They therefore remain completely protected and dedicated to a co-operative purpose.

In jurisdictions that make no provision in their co-operative laws for indivisible reserves, the same issue arises about what happens to the capital surplus on a solvent winding up, after the payment of all liabilities including repayment of share capital. This is the situation in the UK, for example, where the legislation makes no provision for indivisible reserves. However, individual co-ops can, and many do, provide in their statutes that members are not to be entitled to a share in those reserves on a winding up and that they must be transferred to another co-op or specified type of organisation. Statutes can be changed, however, so whilst this provides an impediment to demutualisation it cannot completely protect the assets and so they remain vulnerable.

The questions of indivisibility and asset protection need to be looked at both during the lifetime of the co-op and on a solvent winding up. In addition, co-ops need to be aware of the possibility of conversion into a limited company, as this provides another mechanism by which the co-operative sector can lose ownership of accumulated reserves. It is therefore necessary to consider whether the laws of member states make provision for what happens to indivisible reserves on a conversion, if that is permitted by their laws.

Moving on from the intrinsic or inherent benefits of co-operatives having indivisible reserves, it is appropriate to give some consideration to the question of whether, where national laws which seek to acknowledge and protect co-operative identity, there are other legal benefits or advantages arising from having indivisible reserves. For example, in some states favourable tax provisions encourage the setting aside of indivisible reserves.

From an EU perspective

There are four matters from an EU perspective that need to be briefly commented on:

i. Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE);

ii. A subsequent communication from the Commission to the Council and the European Parliament on the promotion of co-operative societies in Europe;

iii. The PECOL Project; and

iv. A decision of the European Court of Justice about preferential treatment for co-operatives.

Statute for a European Co-operative Society

This piece of EU legislation provided for the creation of a supranational legal form suitable for cross-border co-operative operations. A SCE is a legal corporate form with specific rules about the involvement of employees. It can be considered as the co-operative equivalent of the European Company (Council Regulation No 2157/2001) and was aimed at ensuring that co-operatives had a level playing field with for-profit companies. The EU was anxious not only to ensure equal relative treatment to companies, but also to contribute to their economic development.

It is relevant to note in passing what is stat-

[151] Table A, Malta – 5%

ed about co-operatives in the recitals to this legislation, namely as follows:

i. Co-operatives are primarily groups of persons or legal entities with particular operating principles that are different from those of other economic agents. These include the principles of democratic structure and control and the distribution of the net profit for the financial year on an equitable basis.

ii. These particular principles include notably the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion, where the 'one man, one vote' rule is laid down and the right to vote is vested in the individual, with the implication that members cannot exercise any rights over the assets of the co-operative.

iii. Then...

v. A European co-operative society (… 'SCE') should have as its principal object the satisfaction of its members' needs and/or the development of their economic and/or social activities, in compliance with the following principles:

1. …

5. …, net assets and reserves should be dis tributed on winding-up according to the principle of disinterested distribution, that is to say to another cooperative body pursuing similar aims or general interest purposes.

It is significant to note here that the EU itself expressly recognises the existence of co-operatives as a different form of business with "operating principles that are different from other economic agents|", and implicitly that those principles have a value which is worth addressing in legislation.

There are various features of the European Co-operative Society which it is also worth noting for the purpose of this study:

- Share capital is variable;
- A legal reserve fund must be built up until the point where it is equal to the registered capital;
- Not less than 15% of available surplus must be paid into the reserve;
- Members leaving the co-op have no claim on the reserve fund;
- The SCE provides for disinterested distribution on a winding up, i.e. distribution to another co-op or general interest purposes. However, this is not compulsory (a matter of regret)[152], in order to reflect the fact that national laws normally allow alternative arrangements.

There is no need to consider this legislation further for present purposes, save to comment that although this legislation has hardly been used, it has important symbolic and political value, raising the profile and underlining the importance of co-operatives and highlighting the importance of indivisible reserves and their protection. A comprehensive review of the SCE has been carried out and published in 2010.[153]

Communication on the promotion of co-operative societies

Subsequent to the Statute for a European Co-operative Society, the Commission issued a Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the promotion of co-operative societies in Europe Com (2004) 18). This noted that "All co-operatives act in the economic interests of their members, while some of them in addition devote activities to achiev-

[152] See the comments of Fici A. on page 146 of International Handbook of Co-operative Law, D. Cracogna, A.Fici and H.Henry (eds.) Springer, Heidelberg, 2013

[153] See Final Study Executive Summary and Part I: Synthesis and comparative report 5 October 2010 the Study on the implementation of the Regulation 1435/2003 on the Statute for European Co-operative Society (SCE) (accessible at http://base.socioeco.org/docs/sce_final_study_part_i.pdf)

ing social or environmental objectives in their members' and in a wider community interest." Having noted that the role of co-operatives had gained renewed interest following the adoption of the recent Statute, the Commission expressed the belief that "the potential of co-operatives has not been fully utilized and that their image should be improved at national and European levels.

Particular attention should also be paid to the new Member States and candidate countries, where despite extensive reforms the instrument of co-operatives is not fully exploited."
The Commission also noted "the important and positive role of co-operatives as vehicles for the implementation of many Community objectives in fields like employment policy, social integration, regional and rural development, agriculture, etc. The Commission believes that this trend should be maintained and that the presence of co-operatives in various Community programmes and policies should be further exploited and promoted."

The main points of the Communication were:
- The promotion of the greater use of co-operatives across Europe by improving the visibility, characteristics and understanding of the sector;
- The further improvement of co-operative legislation in Europe;
- The maintenance and improvement of co-operatives' place and contribution to community objectives.

Whilst it is not of direct legal impact, this Communication contains much that is relevant to this study's subject (such as encouraging Member States to provide for disinterested distribution on a winding up of a co-op). This Communication is also referred to by the ECJ in the judgement discussed below.

PECOL [Principles of European Co-operative Law] Project

The outcomes of the PECOL project were published in 2017. [154] A helpful summary of PECOL is contained in a recent review:

> "The basic idea of PECOL is, as the name states, to determine the general principles that identify, according to European co-operative traditions, the features of a cooperative. It is based on principles and rules that are found in different European jurisdictions and therefore constitutes some kind of common denominator, which ultimately defines what might be understood under the notion co-operative. From this, it clearly follows that PECOL is applicable to European co-operatives rooted in different European jurisdictions. It has to be specified that these principles are meta-principles.
>
> PECOL describes co-operative legal norms. In doing so, PECOL addresses how co-operatives are actually organised and function. The final goal of these principles is to create principles in parallel with European and national law. With this, the authors try to establish patterns that might help to better understand co-operative law.
>
> In this regard, three reasons for establishing PECOL are identified: first, PECOL shall establish a legal co-operative identity. In this context, it has been correctly criticised that the principles established by the ICA are too general. Then, PECOL should work as a pattern for other enterprises and therefore PECOL can be used as a model. Last and not least important, PECOL should be used as a tool to enter into academic debates." [155]

[154] Principles of European Co-operative Law (2017) Intersentia, Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H Münckner and Ian Snaith

[155] International Journal of Co-operative Law, Issue 1 2018 at page 191
https://iuscooperativum.org/wpcontent/uploads/2018/08/Issue-1-2018.pdf

The PECOL Project is therefore aspirational in nature and does not purport to create something normative or prescriptive. Its relevance in the present context is as a possible baseline against which to consider the specific laws of individual Member States. The relevant section[156] is as follows:

SECTION 3.4
RESERVES

(1) In co-operatives there are mandatory reserves and voluntary reserves.

(2) Mandatory reserves include the legal reserve and other reserves required by law or cooperative statutes, such as the reserve for co-operative education, training and information.

(3) The legal reserve and the reserve for co-operative education, training and information are indivisible, even in the event of co-operative dissolution.

(4) The legal reserve is established by:
(a) a percentage of the net annual co-operative surplus…

This extract provides a helpful summary of what national co-operative laws would ideally provide in this area.

ECJ decision

As mentioned in the introduction, six EU member states expressly refer to co-operatives in their national constitution. They recognise that co-ops contribute something which private for-profit businesses do not. The Italian constitution, for example, recognises that they operate for mutual benefit rather than private speculation. The Spanish and Portuguese constitutions expressly seek to support and promote the creation of co-ops.

It will be seen below that those states whose constitutions refer to co-operatives have the most favourable and pro-co-operative laws. The degree of protection of indivisible reserves/capital surpluses against threats from outside the sphere of co-operation is significantly greater than that provided by the other states, with some notable exceptions. This links closely to the question of what individual states do to support and promote co-ops when their national constitution requires them to do so. The most common approach is to provide tax reliefs based on indivisible reserves, which are not available to other types of business.

This was challenged in Italy under EU law on the grounds that it was contrary to State aid rules. The decision of the European Court of Justice on 8 September 2011 found that such tax reliefs were not necessarily contrary to State aid rules subject to a number of factors.[157] Essentially, the ECJ found that because co-operatives were at certain disadvantages when compared to other trading entities (lower profit margins than capital companies better able to adapt to market requirements), it was justifiable and proportionate to provide tax benefits to them, but not to those other trading entities.

The following characteristics of co-ops meant that they could not, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies:
• Registration as co-operative societies conforms to particular operating principles which clearly distinguish them from other economic operators.

[156] At page 83

[157] Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze (C-79/08) and Ministero delle Finanze v Michele Franchetto (C-80/08) Court of Justice of the European Union, 8 September 2011 (C-78/08 to C-80/08) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0078&from=EN

- The primacy of the individual, reflected in the specific rules on membership, resignation and expulsion.

- Net assets and reserves should be distributed on winding-up to another co-operative entity pursuing similar general interest purposes.

- Co-operative societies are not managed in the interests of outside investors.

- Control of co-operatives should be vested equally in members, as reflected in the 'one man, one vote' rule.

- Reserves and assets are therefore commonly held, non-distributable and must be dedicated to the common interests of members.

- As regards the operation of co-operative societies, in the light of the primacy of the individual, their activities should be conducted for the mutual benefit of the members, who are at the same time users, customers or suppliers, so that each member benefits from the co-operative's activities in accordance with his participation in the co-operative and his transactions with it.

This judgement took note of a number of things, including the European Co-operative Statute, the communication referred to above, and the positive comments about co-ops in the Italian constitution. But the presence of indivisible reserves, which are not distributable to members on a winding up, was also a significant factor.

Recommendations

States should seek to recognise co-operatives in their national constitutions, or where this is not possible, they should:
- recognise in ordinary legislation the existence of a range of different corporate purposes, including co-operatives;
- require the promotion of corporate diversity;
- require that co-operatives should be considered in certain specific sectors such as energy and care.

States should have their own national co-operative law which:
- protects co-operative identity relative to investor-owned companies;
- defines co-operatives by reference to features necessary to achieve the corporate objective or purpose of a co-operative.

National co-operative laws should provide for the compulsory allocation of some part of surplus to indivisible reserves, in accordance with PECOL, and should ensure that indivisible reserves remain indivisible even on dissolution or conversion.

States should keep their co-operative law under review, alongside company law, including the extent to which other laws (tax, regulation, competition) work to the detriment of co-operatives.

The EU should:
- support and encourage member states to improve/optimise their own co-operative law, including through projects such as PECOL;
- support and enable co-operation within member states and within the EU;
- keep the EU's own laws and regulations under review to ensure that other laws (tax, regulation, competition) do not operate to the detriment of co-operatives.

Part 6
Why ownership matters for progressives

The ownership agenda in European social democracy

Time for a progressive response?

Actions progressives should take on ownership

Summary of recommendations

6.1 The ownership agenda in European social democracy

Introduction

The European centre-Left is in disarray. Whilst the financial crisis in 2008 could have ushered in an era of social democratic hegemony, what has occurred instead is that centre-left parties have found themselves under pressure from the Left and the Right, with centre-right parties better able to speak to the cultural anxieties that the last 20 or 30 years of politics have created. The Left-Right axis is reorienting to a cosmopolitan-communitarian axis which puts the Left on the other side from its traditional working-class support base. A new agenda is needed to bring them back into the fold, centring on democracy, ownership and participation. In the private sector, this means the encouragement of member-owned businesses such as mutuals and co-operatives, as well as the bolstering of employee share ownership. In the public sector, it means greater stakeholder participation. What underpins these reforms is the question of ownership, which must be central to any progressive project seeking to redistribute power.

The challenge facing progressives

Progressives in Europe face a number of significant challenges. As the traditional structures that have underpinned progressivism, such as trade unions and the modes of work that underpinned them, have declined, so too have those progressive and social democratic parties which derived their strength from those institutions. The financial and Eurozone crises of the late 2000s and early 2010s compounded these problems, strengthening parties of the centre-Right who were better positioned to give voice to the anxieties of voters which more often manifested themselves - to the Left's frustration - in cultural rather than economic anxiety.[158]

One of Europe's strengths is its diversity, and the centre-Left has not failed everywhere. What is true in France is not necessarily true in Greece, or in Lithuania. What threatens democracy in Budapest may appear irrelevant to the citizens of Lisbon. What stifles progress in Rome may sound alien to the residents of Helsinki. The European centre-Left does not face a uniform set of challenges. However, this diversity of conditions disguises a unity of interests - and it is under the progressive banner that these shared values of fairness, plurality, democracy, tolerance and social progress can be reached.

These values are under threat. In Western Europe, the centre - and the shared assumptions that underpin its political dominance - is struggling to hold. It is often right-wing populists (who espouse nativism, anti-elitism, authoritarianism and law and order, with an emphasis on the threats posed by immigration[159]) who are in the ascendency. While no government is yet to fall to such a party, the progress made in recent years has been startling, as evidenced by the rise of Geert Wilders and his reactionary Freedom Party. The Sweden Democrats – right-wing fellow travellers of Wilders - now hold 62 seats in the Swedish Riksdag. And even in Germany - a country with a functioning social and economic model - The Alternative for Germany Party won a shocking 12.6% of the vote in the 2017 German Federal Election. And, of course, in France where Emmanuel Macron rose from nowhere to upend the political establishment and claim the Presidency of the Republic, he did so by defeating the far-right Marine Le Pen who oversaw the neo-fascist National

[158] https://www.newscientist.com/article/2095975-what-explains-brexit-trump-and-the-rise-of-the-far-right/

[159] www.policy-network.net/publications_download.aspx?ID=3684

Front's strongest ever showing in a Presidential election. In Britain, the government pursues the doomed endeavour of Brexit with its blood and soil rhetoric and scaremongering about refugees, hordes of Turks and foreigners 'taking jobs' from supposedly more deserving indigenous Brits. In Europe's three largest economies, reactionary forces are setting the terms of the debate.

In parts of Eastern Europe a different kind of menace rears its head, in which parties of government tilt towards a sinister authoritarianism of the Right[160]. The most obvious example is Hungary's Viktor Orban. Once a poster child of liberal anti-communism, Orban and his Fidesz party have ridden roughshod over the malleable and majoritarian institutions of Hungary's nascent democracy to build what has been termed by the Prime Minister himself an 'illiberal democracy'.
Something similar is afoot in Poland, where the Law and Justice Party entrenches its position as the party of power by filling positions on state bodies such as public broadcasters and the judiciary with reliable and pliable loyalists. And in Czechia and Slovakia, governments refuse flatly to participate in European Union directives around the settlement of refugees. Meanwhile, in the Baltic states, Russian efforts at destabilization of what is viewed by President Putin as the country's legitimate 'sphere of influence' continue to cast a shadow over what is in most other respects a successful consolidation of democracy.
In Southern Europe the picture is different. Hit hard by the Eurozone crisis, Greece and Spain have to different extents turned towards left-wing populist parties with roots in social movements.

These parties – Syriza and Podemos - rail hard against the unaccountable powers of finance and the iniquities of the fallout from the Eurozone crisis, and scorn the politics of mediation, compromise and incrementalism. In Catalonia, revolution is in the air, although in the case of Syriza, who were in government in Greece until 2019[161], power somewhat softened their approach.

While the left-wing populists' creed is far closer to progressivism - and indeed incorporates elements of it - its tone, character, and urgency sets it, or at least did set it, apart. These parties seek to overrun the centre, shattering its assumptions and breaking decades-long areas of consensus. Some of it is welcome, forcing the mainstream to question its own assumptions, strategies and long-held beliefs, but too often these parties put reflexive opposition ahead of constructive engagement and the hard slog of policy development.
An editorial in the German magazine Der Spiegel lamented the poor performance of Europe's "old, sclerotic social democracy" which labours under a rigid set of political assumptions that no longer hold. Shorn of the union movements and economic structures that have sustained them, they flounder. Politics, instead, is aligning on a communitarian vs cosmopolitan, rather than a Right vs Left, axis[162]. According to the leading proponent of this view, Wolfgang Merkel, this divide emerges from who has 'won' and 'lost' from globalisation:

The former want to open borders further for trade and immigration, they support European integration and universal human rights. The globalisation losers fear open borders, they see the nation state as a guarantor of security, prosperity and social protection. This separates the clientele of progressive politics based on the redistribution of wealth from the advocates of a multicultural, open society. The communitarians will tend towards right-wing policies when it comes to immigration and civil rights. Social democrats until today haven't been able to address this dilemma.

[160] https://euobserver.com/opinion/137580

[161] Syriza lost power to the centre-right liberal conservative New Democracy party in July 2019

[162] https://democracy.blog.wzb.eu/2015/04/24/towards-the-end-of-the-leftright-paradigm/

Unfortunately, Europe's social democrats often find themselves on the other side of this divide from their working-class traditional voters[163], with their preferences for supposedly cosmopolitan concerns such as enhancing women's rights, an interest in sexual politics and the free movement of people alienating much of their still numerically significant traditional 'base'. The result of all of this is that social democrats are out of government in all but six European countries. As well as social democratic hegemony, the financial crisis of 2008 was supposed to herald an era of progressive supremacy, but the opposite has happened as the ground has shifted beneath our feet.

It is time to try something new, and in doing so, to rebuild the mainstream in a progressive mould.

There is nothing to suggest this wave has crested, as a thoughtful report by the Tony Blair Institute for Global Change makes clear[164].

The report goes on to suggest that there is no reason to think - despite the success of Emmanuel Macron in France and the disaster-that-wasn't in the Netherlands (where the Islamophobic demagogue Geert Wilders' PVV party underperformed its polling) in holding back the populist tide - that Europe is through the worst of it. The German election saw an unprecedented wave of support for the AFD Party despite Germany's benign economic conditions and functioning social model. Likewise, Austria came within a hair's breadth of electing a right-wing populist as their Head of State in 2017. The fundamentals that underpin populist support are: an unease with globalisation, unemployment and cultural anxieties around immigration. The political mainstream needs a means of fighting back in a manner consistent with liberal democratic values that does not further inflame populist appeal.

Conservative parties are not generally capable of taking the difficult, disruptive and radical steps required to address these issues, wedded as they are to existing institutions. It falls to progressives and social democrats, therefore, to protect not only those European values of human dignity and human rights - freedom, democracy, equality and the rule of law - but also those progressive values of social justice, diversity, pluralism and tolerance. The core question for the centre-Left is this: how to respond to Europe's new political reality of communitarianism vs cosmopolitanism.

The answer will vary between polities, but, at its core, all answers will have in common an ability to speak to the emerging communitarian consensus whilst remaining true to social democratic convictions.

Deliberation, devolution and association
Of course, different problems require different solutions. One that has been suggested is of changing the way we 'do' democracy. This makes a degree of sense; populist parties rarely succeed by explicitly making their case against the notion of democracy. Orban's 'illiberal democracy' rejects liberalism, but it does not reject democracy. Populists on the Right, indeed, claim to be the guarantors of 'true democracy' and although this often disguises a sinister and exclusionary core, even those who seek to whittle away or compromise democracy realise there is little political mileage in proposing less of it rather than more.

Too many European citizens feel that the decisions reached by politicians don't reflect their beliefs or interests. In Southern Europe, trust in political leaders fell as low as 15% in 2013[165]. The preferences of individuals were not reflected in public policy as the Eurozone crisis strained the social compact underpinning the European social model. In Britain the Leave campaign won the referendum on EU

[163] https://www.ft.com/content/ac8f5060-7da7-11e7-9108-edda0bcbc928
[164] https://institute.global/insight/renewing-centre/european-populism-trends-threats-and-future-prospects

membership through cynically peddling the lie that to leave meant to regain 'control'. It is an unfortunate impulse amongst those who see their fellow citizens fall into the arms of demagogic politicians to suspect that democracy itself is the problem, with too many people simply incapable of exercising their democratic rights responsibly. In fact, more democracy - across Europe - can be part of the answer. Herein lies an opportunity for progressives, who have the advantage of being democrats of deep conviction.

One step may be to expand the scope of constitutional democracy, for example by opening up appointed positions, such as judgeships, to election. However, against a backdrop of falling electoral turnout and disengagement with politics, it is often an organised and motivated minority who gain ground in such elections. If a progressive party was to propose, for example, the direct election of members of a national Supreme Court, what odds that an organised far-right group would gain significant ground? Likewise, the dispiriting saga of Brexit shows the potential for dressing up an elitist project in the clothes of anti-elitism and exacerbating the problems described here. If democracy is to be part of the solution to the rise of pan-continental populism, it must be of a different, deliberative and discursive character. There is no single agreed-upon version of deliberative democracy, but its advocates generally agree that at its core are communicative processes of opinion and will-formation in which participants seek to convince each other by giving reasons for proposals and are willing to revise their own opinion in the light of reasons given by others[166]. Generally, the 'they' refers to lay citizens, either drawn by lot or chosen as a representative sample of either the public at large or of people affected by a particular agenda. A recent deliberative project in Japan, for example, looked at the future of state pensions and the government has adopted their recommendations.

Questions then arise as to how best to encourage deliberation and what institutional reforms progressives should advocate in order to deliver power and autonomy, engagement and involvement to Europe's citizens. Membership organisations, in which power resides in one member - one vote, and those voting and deciding on the day-to-day running of these organisations, are an appropriate vehicle to realise this ideal. The political theorist Stephen Elstub has argued persuasively that autonomy is the normative core of democracy, that deliberation is the most appropriate means of cultivating autonomy and that meaningful deliberation can be best achieved through involvement in voluntary associations in civil society. In short, the more appropriate place to 'do' deliberation is in civil society organisations governed by a democratic ethos[167]. In practice, these organisations are membership organisations, owned by the members.

Growing these organisations, however, requires social democrats to embrace a deepening of democracy at the sub-state level.

What is important about deliberation is that it levels the playing field, removing democracy from the control and influence of special interests and drawing together individuals who can discuss, educate one another and decide upon the most appropriate way forward. What does this have to do with populism? In short, research has shown that deliberation can act as its counterweight by demonstrating that the falsehoods underpinning much of populism's key claims are just that.

[165] http://news.gallup.com/poll/165647/trust-government-sinks-new-low-southern-europe.aspx

[166] http://www.e-ir.info/2014/03/21/civil-society-participation-and-deliberative-democracy-in-the-european-union/

[167] https://books.google.co.uk/books?id=OPCqBgAAQBAJ&pg=PA176&lpg=PA176&dq=Elstub+Deliberation+Association&source=bl&ots=ZqqB6Bpv7w&sig=xbDh57XsfV9sR5Z81GZeDzHYdJM&hl=en&sa=X&ved=0ahUKEwipgtOk_eXWAhXGOBoKHbAqCtsQ6AEIUTAH#v=onepage&q=Elstub%20Deliberation%20Association&f=false

Furthermore, in an information-rich society in which citizens do not drink from the same fonts of knowledge, the risk of siloing increases, with ideologically polarised sources of news and information creating different realities and shaping different attitudes. By contrast, the act of deliberation encourages facts to be asserted, lies to be confronted and individuals to interrogate their own views. Research by Policy Network[168] has shown that "deliberative events, involving a diverse group of people who are representative of the population, can lead to greater social cohesion as well as more efficient and legitimate policymaking". Furthermore, "Diverse groups are shown to make better decisions than expert groups, let alone homogeneous political groups". In short, bringing people together to talk and to decide, through institutions, can reap dividends in terms of building the trust, reciprocity and relationships. The power of association can rebuild the fractured bonds of our society, drawing together individuals who have been conditioned to distrust and dislike one another. Deliberation is not always an appropriate or feasible manner of governing organisations, but democracy - either hard or soft - should be an enduring goal.

This agenda can be best realised through membership organisations. Although the notion of cooperation, or collaboration, and co-operatives has become somewhat detached in recent years
(owing in part to the plurality of membership organisations that do not identify as co-operatives but nonetheless enjoy many of their strengths), historically the two were inseparable. The insight of the Rochdale Pioneers was that in order to realise the undisputed good of co-operation, there has to be an institutional mechanism to encourage and ensure it. This insight, though not new, should form the basis of a progressive agenda for co-operation and democracy; without the institutional means to produce these two societal goods, they will go unrealised.

With a simultaneous devolution of power from the central state, and within the market economy, it is incumbent upon progressive parties in Europe to put the growth of membership organisations at the centre of their policy agendae. To do so is not only a more effective means of realising their traditional and long-held values but answers the challenges of the present. The central insight, however, is this: a deepening of democracy to membership organisations of different types in both the public and the private sector provides a policy agenda which can make the progressive Left appeal to communitarian sensibilities without kowtowing to the reactionary rhetoric that unfortunately the centre-Right has embraced over recent years. Not all membership organisations, of course, are capable of delivering the deliberative ideal. In addition, not all businesses are appropriate sites for greater democracy. But much can be done nonetheless. Progressive parties must look at how they can build member, worker and stakeholder participation in the private sector, a realm which is too often overmighty but beyond the influence of the average worker or citizen. The creation of more democracy in the private sector can only be realised through the growth of democratically governed and operated businesses and organisations within the private sector.

Spreading ownership and democracy in the private sector

A key ingredient of European progressivism has been strong economic growth underpinning efforts at meaningful social reform. European economies continue to perform well, particularly the core nations of the European Union. Recent years have seen a trend towards liberalisation, with governments gradually relinquishing the coordinating and planning role that was adopted in the wake of the Second World War. While this has appar-

[168] http://www.policy-network.net/publications/4918/The-Populist-Signal

ently improved Europe's economic efficiency and the headline gains have been impressive, the declining power of organised labour and the shift towards service economies has created downwards pressure on wages. Meanwhile, the financial crisis showed the folly of leaving questions of national importance in the hands of a few large private institutions.

There are three strategies that progressive parties can pursue to promote economic democracy.

The first is to promote the growth of member-owned businesses such as co-operatives, mutuals and building societies. Reams of research has shown the benefits to members of participation in mutual businesses. They have lower failure rates, are grounded in communities and promote economic dependence and fairer wages. Members enjoy the ability to curb and control the excesses of management; their interests are more likely to be aligned with boards and managers; they are less likely to engage in socially damaging risk taking, thereby enhancing business durability and promoting economic stability and order[169]. This final point is crucial. The 2008 global financial crisis showed the dangers to society that untethered financial institutions can pose.

As the entire global system of finance teetered - thanks to the unscrupulous behaviour of bankers and the institutional failure of regulators to stop them - member-owned financial businesses prospered. They showed the value of institutions that are anchored in their members' interests, and which refused to play the game of overleveraging themselves in order to gain enormous shortterm profits.

The second strategy is to promote greater employee participation in the governance of investorowned firms, perhaps through employee share ownership schemes. These, too, encourage participation in the business and promote greater employee engagement and economic benefits such as business durability. They ground businesses in their local communities and evolve superior corporate governance. According to a European Commission report on employee share ownership[170], companies with greater employee ownership also contribute more in tax and are less likely to indulge in complicated and self-serving tax machinations. Rightly, social justice and antiglobalization campaigns have made much of the amount of revenue lost to public services by legal and illegal tax evasion. A greater degree of employee ownership would increase the tax take, allowing progressive parties to invest in the future through welfare states which remain the key tool in creating social justice.

The third is to, where necessary, level the playing field. In a number of European countries there is no dedicated co-operative law[171], meaning that co-operatives, mutuals and other member-owned businesses often labour under regulations designed with other kinds of corporate entity in mind.

Europe's social democrats can assist here simply by placing this issue onto the political agenda. To do so would remove obstacles to the growth of these businesses, aiding their development at a time when they are sorely needed.

The promotion of member and worker-owned businesses would have two immediate benefits.

Firstly, through devolving power considerably, it would strike against the notion that Euro-

[169] http://www.tandfonline.com/doi/full/10.1080/00346764.2011.632326?needAccess=true&instName=LSE+-+London+School+of+Economics+and+Political+Science

[170] http://ec.europa.eu/internal_market/company/docs/modern/141028-study-for-dg-markt_en.pdf

[171] https://coopseurope.coop/policy-topic/regulatory-framework-co-operatives

pean citizens are powerless to influence their communities. Secondly, it would contribute to a greater degree of corporate pluralism[172]. Homogeneity of ownership structures leads to narrowing in ideas and business models, resulting in a lesser degree of consumer choice and a replication of business practices, thus increasing the likelihood of virtual and actual monopolies. Progressive parties must make it their goal to make markets work better and a diversity of corporate forms is key to this.

While often it is the neoliberal Right who claim political ownership of markets, it is social democrats who ultimately possess a healthier attitude, recognising their potential for the creation and cultivation of wealth while also remaining cognisant of the structural limitations preventing them from distributing that wealth more equally.

Co-operatives and mutuals bind individuals together, build social solidarity and reciprocity and cultivate social capital. They can lift individuals out of poverty and are socially-focused rather than obsessed with the accumulation of capital and profit. And crucially for our purposes here, they can act as sites for deliberation, empowering those who partake and helping to alleviate the conditions which bring about right-wing populism. Spreading ownership more widely spreads power more widely. It improves economic performance and productivity by creating a more motivated workforce[173], creates shared priorities between management and workforce, vastly increases workers' voice and creates greater firm loyalty and financial rewards for workers. Europe's social democrats must promote the democratisation of their economies - not through crude nationalisation or majoritarian external control, but through the promotion of employee ownership schemes, the growth of member-owned co-operatives and mutuals and a broader promotion of the idea of stake-holding in the private sector. To do so will blunt the appeal of the populist Right and those mainstream conservatives who follow them in promoting an illusory cultural control which merely serves to stoke the flames of intolerance.

Democratising the state

The means by which progressives have sought to deliver social justice necessarily has differed from country to country, but a redistributive welfare state has tended to be central to these efforts.

However, recent years have seen a shift towards private provision within welfare states, with the government acting as a commissioner, rather than a provider, of services. Whilst intended to improve service quality and efficiency, often this shift has disempowered citizens and service users.

It has also created a false dichotomy between state and market, with the statists on the one hand and the privatisers on the other. As the UK Labour politician Hazel Blears argued in 2003: "Without creating a tangible connection between citizens and their public services, beyond narrow concepts of consultation and participation, the process of alienation and disengagement from mainstream politics and institutions will continue"[174]. This insight is not new, but it is more relevant than ever. Reform of our public services, with ownership and participation as central objectives, can help us tackle the alienation and lack of autonomy that is spreading across our continent.

An alternative and potential solution lies in mutualisation, a process by which ownership is transferred to a trust overseen by a stakeholder board who appoint the senior management, decide on service priorities and

[172] http://www.kellogg.ox.ac.uk/wp-content/uploads/2015/05/ownership_commission_2012.pdf
[173] http://www.nber.org/chapters/c8085.pdf
[174] https://www.fabians.org.uk/wp-content/uploads/2012/04/CommunitiesInControl.pdf

are generally accountable to those who rely on the service in question. The exact composition, structure and range of powers necessarily should differ based on the institution in question but the central insights should be the same. The public should have a say - and those with the largest stake in the service should be represented in its governance. Participation should be encouraged and the local community should feel that its preferences are reflected in the manifest priorities of the service. Co-operation with local institutions - local government, trade unions, businesses and other public services - should be encouraged. Staff and the most impacted-upon service users likewise should have their voices heard. These stakeholder insights of representativeness, participation, collaboration and democracy should be shot through progressive parties' agenda for public services. Crucially, these services are legally owned by the local community with a lock on their ownership preventing their transferral into the for-profit sector. This model has proven popular in Spain and in the United Kingdom and has been shown to create not only good service outcomes, but an increased degree of service-user engagement, involvement and participation. Community ownership of public services can bind communities together, create a climate of participation and demonstrate in a practical sense that the pervasive sense of powerlessness felt by many citizens during a time marked by the faceless duality of corporate excess and an unresponsive central state.

A further dynamic of this question concerns utility ownership. For example, much of Europe's water is privately owned and provided to consumers. The example of Glas Cymru, the partly mutualised water provider in Wales, shows a different and member-owned way forward. Likewise, the growth of energy co-operatives that provide low-cost, environmentally friendly energy for their members' benefit shows that the interests of co-operatives and mutuals and those of society so often go hand-in-hand.

The centrality of ownership

In both the private and the public sector, a diversity of ownership is required in order to underpin these reforms. Whilst it goes without saying that the growth of member-owned businesses in the private sector will lead to a more diverse array of ownership, this isn't necessarily the case with the welfare state. But it is equally important here, with communities not just given control over their services but guaranteed it through ownership. As such, progressives must place ownership at the heart of their policy offers on public services in order to ensure that good outcomes can co-exist with improved participation, deliberation and influence. Ownership must be distributed more widely in order to ensure that this participation, deliberation and involvement is meaningful, thereby bolstering the autonomy of communities and individuals. To do so requires a reimagining not only of the role of the government, but the role of the state more broadly.

Power must be given away proactively from the central - or regional, or city-wide - authorities to panels, boards, mutuals and co-operatives in the public sector. Structures that encourage and ensure genuine community-owned services must be built. Whilst the contention of this piece is that the current political climate makes the growth of associations in both the public sector and the private sector more important, and that to achieve this we need a diversity of ownership types and institutions which spread democracy and deliberative decision-making, this agenda is also entirely consistent with a more traditional progressive agenda. A policy agenda which supports a plurality of ownership models with democracy and deliberation at their core will support social democracy by spreading assets more fairly, with a wider distribution of productive assets put to social ends in our society.

However, the importance of ownership goes much deeper than this. With ownership goes

power.

And when power is hoarded in the hands of the few, the decisions that are taken are likely to be in the interests of those taking the decisions, and those like them. Genuine social democracy, and progressive politics more broadly, requires a diversity of ownership. This essay has sought to situate this eternal truth in the contemporary European political context, whilst providing more detail on what form appropriate reforms may take in terms of welfare state - or public service - reform, and in terms of growing corporate diversity.

Conclusion

The European centre-Left is in disarray. The centre is under attack from populists on the Right in Western Europe, populists on the Left in Southern Europe and authoritarian statists in parts of Eastern Europe. Voters no longer act in a manner consistent with a traditional 'Left-Right' understanding of politics. A new 'cosmopolitan/communitarian' division has taken its place.

Unfortunately, the centre left too often finds itself on the other side of this divide from its traditional supporters without possessing enough appeal to bring in new non-traditional supporters. The question is: how do social democratic parties appeal to the communitarian impulse without abandoning their traditional values?

The answer may lie in thinking seriously about how to encourage decision-making, power and democracy in the private sector, whilst distributing ownership as widely as possibly through a plurality of business forms. This can be achieved through encouraging the growth of member, worker and stakeholder ownership of companies, and by encouraging employee share ownership.

To do so encourages real benefits for the economy, for society and for workers. This agenda also requires the reform of public services in a way that gives ownership to the communities that these services exist to serve. This policy agenda can speak to voters' concerns about security and cohesion and it can ensure that communitarian concerns such as prosperity and cohesion are placed front and centre of a social democratic policy offer fit for these strange and confusing times.

6.2 Time for a progressive response?

So, who owns Europe? Who is in charge today? In March 2019, Elizabeth Warren, the US senator and Democratic candidate for President, argued that Facebook has too much power, evidenced by "their ability to shut down a debate over whether FB has too much power." This was after the social media network briefly blocked her campaign from running advertisements calling for the breaking up of Facebook. [175] It is questionable whether this truly amounted to an ability to shut down a debate, but it highlights a point at the heart of our question: the expanding reach of corporate power.[176]

[175] https://www.theguardian.com/us-news/2019/mar/11/elizabeth-warren-facebook-ads-break-up-big-tech

[176] According to Politico, the advertisements read: "Three companies have vast power over our economy and our democracy, Facebook, Amazon, and Google. We all use them. But in their rise to power, they've bulldozed competition, used our private information for profit and tilted the playing field in their favor."
https://www.politico.com/story/2019/03/11/facebook-removes-elizabeth-warren-ads-1216757

In March 2018, inventor of the world-wide web Tim Berners-Lee made a similar point: "This concentration of power creates a new set of gatekeepers, allowing a handful of platforms to control which ideas and opinions are seen and shared."[177]

Others might point to the banking crisis in 2007 when EU member states pumped more than €1.6 trillion into propping up failed financial institutions. Most of those (investor-owned) institutions are now back on their feet. Investors' capital was protected and bankers continue to receive large bonuses. The public paid.

Are governments losing control?[178]
The conclusions of previous sections stated that enterprise for public benefit seeks to go with the grain of public interest, whereas enterprise for private benefit does not because it's very purpose is to maximise shareholder value for private benefit.

The problem with the former is that it is not widely understood or even recognised. It is a hard and complex purpose to pursue in governance terms. In recent years the development of the law and governance of these types of organisation have not attracted the same level of legislative and scholarly time as companies.

The problem with the latter is that because its purpose is to pursue private and not public interest, in pursuing its purpose (which it does with undimmed commitment and determination) it is constantly wrestling with the state - seeking more pro-business laws; trying to reduce or stop increases in regulation;[179] reducing the protection of workers' rights;[180] encouraging customers to eat unhealthy food for prizes;[181] pushing back personal privacy laws[182] as well as funding think- tanks, lobbyists and politicians to explain away climate change as non-existent or somebody else's fault. Essentially, investor-owned enterprise competes with the interests of citizens and with the state. As a result, investigative journalism becomes even more important in maintaining an open society and the rule of law, as illustrated, for example, by the Paradise Papers revelations.[183]

When we ask who owns Europe, are we therefore asking if investor-ownership isn't just competing, but actually winning? Is national government being replaced by globalised corporate government? Tell-tale signs[184]

At present it would seem to be an overstatement to say that corporate interests own Europe, that investor-owned enterprise is in charge today. However, there are serious risks that without a significant change in direction, it will do, and there are clear signs of where the risks lie. What are these signs?

[177] https://webfoundation.org/2018/03/web-birthday-29/ Berners-Lee publishes an open letter every year on 12th March, the World Wide Web's birthday. This year's letter included the following: "At pivotal moments, generations before us have stepped up to work together for a better future. With the Universal Declaration of Human Rights, diverse groups of people have been able to agree on essential principles. With the Law of Sea and the Outer Space Treaty, we have preserved new frontiers for the common good. Now too, as the web reshapes our world, we have a responsibility to make sure it is recognised as a human right and built for the public good. This is why the Web Foundation is working with governments, companies and citizens to build a new Contract for the Web."

[178] In March 2019 Google was fined $1.7billion for imposing unfair advertising terms on companies. https://www.nytimes.com/2019/03/20/business/google-fine-advertising.html The fines given out to banks after the LIBOR interest rate fixing scandal amount to billions of dollars. Can big business now just shrug its shoulders when it breaks the law, because it is too big to be troubled by governments and regulators?

[179] https://www.theguardian.com/business/ng-interactive/2019/jan/23/free-market-thinktanks-tobacco-industry

[180] https://www.telegraph.co.uk/technology/2018/12/05/blow-gig-economy-deliveroo-riders-lose-landmark-legalappeal/

[181] https://www.theguardian.com/business/2019/mar/17/tom-watson-urges-mcdonalds-cancel-unhealthy-campaignpromotion

[182] https://www.theguardian.com/technology/2019/mar/02/facebook-global-lobbying-campaign-against-data-privacylaws-investment

[183] https://www.theguardian.com/news/2017/nov/05/paradise-papers-leak-reveals-secrets-of-world-elites-hiddenwealth

[184] I give examples related to the subject of these essays, but there are clearly political tell-tale signs as well, for example where in disillusionment about democracy citizens turn to autocratic figures from the business world, e.g. Trump.

The overwhelming power of web-based giants has already been mentioned, and the demand for their break-up.[185] As well as the above, an illustration of the challenge to government is the global lobbying carried out by Facebook against data privacy laws.[186] Such lobbying included European countries in relation to 'overly restrictive' GDPR legislation. This shows how globalisation makes this a potential threat for all governments. The threat is not just from corporations located in Europe, it also highlights how trading for private benefit puts an enterprise at odds with the interests of citizens generally, and governments have to stand up against it for the public interest.

Another illustration is the 'too big to fail' theory that argues that certain corporations, particularly financial institutions, are so large and so interconnected that their failure would be disastrous to the greater economic system, and that they therefore must be supported by government when they face potential failure. This results in 'moral hazard' where one party takes excessive risks knowing that another party will have to bear the cost of failure. Where failure is averted by governments, as in the case of the financial crisis in 2007/8, the public ends up paying. The abilityto fail is an essential ingredient of trading for private benefit. Where such failure is averted by government, this is a flashing red warning light about the risk of government losing control.

The Transatlantic Trade and Investment Partnership was another example – a now abandoned proposed trade agreement between the EU and the US to promote trade and multilateral economic growth. It had many critics - but criticisms included "reducing the regulatory barriers to trade for big business, things like food safety law, environmental legislation, banking regulations and the sovereign powers of individual nations";[187] and that the proposed court of arbitration and protection of foreign investment (ISDS) would mean a "complete dis-empowerment of politics".[188]

But if these are all tell-tale signs of where states risk being overtaken by corporate interests, who, exactly, is in danger of taking over that control?

The separation of ownership from ownership

We explored the separation of ownership and control enshrined in corporate ownership, and the inevitable inefficiency or cost it gives rise to. The reality today is that investor-ownership operates substantially through pension funds, insurance companies and other intermediaries who manage very large funds on behalf of others. The 'ultimate owner' – the worker making pension contributions, the individual paying an insurance premium to cover a risk, you and me – in reality plays no role as owner at all.

Beyond the separation of ownership and management, there is a further agency relationship in contemporary investor-ownership. In this agency relationship, the fund-manager acts as agent of the owners (you and me) both in investing on our behalf, and in engaging with managers of businesses to make sure that they are doing the right things to maximise shareholder value for our benefit. That's exactly what we want them to do on our behalf, because we want to get the best results from 'our investments'. It's why fund-managers are well-paid and rewarded for their results.[189]

So, when investor-owned businesses act in ways which are not in the public interest (minimising

[185] Elizabeth Warren on Twitter: "… I want a social media marketplace that isn't dominated by a single censor. #BreakUpBigTech."

[186] https://www.theguardian.com/technology/2019/mar/02/facebook-global-lobbying-campaign-against-data-privacylaws-investment

[187] Lee Williams What is TTIP? And six reasons why the answer should scare you. The Independent. 6 October 2015.

[188] Max Otte TTIP: "Völlige Entmachtung der Politik". 3sat. Published on 8 April 2016.

[189] This is vividly illustrated by a recent statement by Larry Finks, CEO of BlackRock, the world's largest investor: "Our firm is built to protect and grow the value of our clients' assets. We often get approached by special interest groups who advocate for BlackRock to vote with them on a cause. In many cases, I or other senior managers might agree with that same cause – or we might strongly disagree – but our personal views on environmental or social issues don't matter here. Our decisions are driven solely by our fiduciary duty to our clients." https://www.theguardian.com/business/2019/may/21/blackrock-investor-climate-crisis-blackrock-assets

tax payments, keeping wages low, cutting costs with safety, waste-disposal etc.) these are businesses we effectively own as individuals. This 'separation of ownership from ownership'[190] insulates individuals from moral responsibility for activities which are effectively carried out in their name, and usually without their knowledge. Where Adam Smith identified an economic inefficiency, in today's world we can also identify a social (or moral?) inefficiency.

How does this relate to who owns Europe?

We began by explaining that ownership provides control over an asset so that it can be used for private benefit, or as the owner might choose from time to time. But modern investor-ownership separates or hands over the owners' job of driving the pursuit of financial gain to highly qualified professionals.

It is as if the actual owner of this construct isn't a real or artificial person at all - it's the pursuit of private gain – an abstract idea – that is in charge. Investor-ownership is itself 'owned' by a dedication to pursuing profit and shareholder value, even if it results in impacts the world does not want. Individual citizens are, at one end of the chain (us) looking for investment gains, and executives of very large corporations are at the other end, doing lots of things at least some of which we would prefer them not to do. But their remuneration – the whole system – encourages, even requires them to do that, and most importantly, it provides them with moral cover where they end up doing unconscionable things. It would appear to be the pursuit of private gain that 'owns' the modern corporate world. It is the absolute commitment to this purpose that drives everyone's performance, drives it to compete and drives profitability. This is the context in which very high levels of executive remuneration become unobjectionable; scandalous corporate misbehaviour results in a fine which can quickly be forgotten about[191] and the impact that all manner of commercial activity has on the world and its climate can somehow be set to one side. That's just the way it is.[192]

Today's dominant economic model might be described as being subject to a massive ownership deficit, where the owners (citizens) are not only doing nothing as owners[193] to rein in the anti-social behaviours of corporations so diligently pursuing their intended purpose, but who actually expect them to pursue that purpose. That's how the system is designed to work.

So in answer to who owns Europe, we have concluded that it would be an overstatement today to claim that corporate interests do, but there is a real risk that they will do unless steps are taken to prevent it, and that such a take-over would not be by any particular person, organisation or group, but by an idea – the pursuit of private gain. On some parts of the political spectrum, that may cause little concern – even be a reason for celebration. But for those who believe in democracy and the rule of law, this will be a cause of serious concern.

Can and should anything be done?

[190] There is a post with this title (The Separation of Ownership from Ownership) by Matteo Tonello of the Conference Board on the Harvard Law School Forum on Corporate Governance and Financial Regulation https://corpgov.law.harvard.edu/2013/11/25/the-separation-of-ownership-from-ownership/

[191] The manipulation of interest rates by banks is another clear illustration, including Deutsche Bank Barclays RBS and HSBC. The Volkswagen emissions scandal is another

[192] This conclusion brings to mind Ayn Rand's dystopian novel Atlas Shrugged, in which laws and regulations of government (looters) increasingly burden private enterprise in order to exploit their productivity. This results in the key business leaders withdrawing from their companies and disappearing as a protest by productive individuals against the looters. "I am not primarily an advocate of capitalism, but of egoism; and I am not primarily an advocate of egoism, but of reason. If one recognizes the supremacy of reason and applies it consistently, all the rest follows." Ayn Rand, "Brief Summary," The Objectivist https://www.aynrand.org/ideas/overview

[193] This might be thought to be an exaggeration based on the growth of ethical investment. But this shuns investment in arms, tobacco etc., not in private benefit enterprise

6.3 Actions progressives should take on ownership

In September 2018 a Swedish teenager, Greta Thunberg, started to protest outside Parliament about the fact that nobody was doing anything about climate change.[194] More than 1.4 million children in 128 countries joined this protest with a school strike in March 2019.[195]

This is a generational issue. Those with most to lose are the youngest and, of course, future generations. It is easy for older people with most of their life behind them to see this sort of protest as idealistic. The harsh truth, however, is that that sort of response is likely to mask a more selfish underlying fear. With all the benefits of scientific and technological progress of recent decades, why should older generations not have the same expectations of their remaining years which are no worse than those of their immediate predecessors?

Because the needs of future generations must take centre stage.[196] Addressing the World Economic Forum in Davos in 2019, Sir David Attenborough told his audience about the passing of the world into the Anthropocene. "The enormity of the problem has only just dawned on quite a lot of people ... Unless we sort ourselves out in the next decade or so we are dooming our children and our grandchildren to an appalling future."[197] A survey conducted before the event found that environmental threats are now the biggest danger to the global economy and concern is mounting that co-operation between countries on the issue is breaking down.[198] After the event Attenborough spoke of the need for economic models to change: "Growth is going to come to an end, either suddenly or in a controlled way."

Earlier, we concluded that there are essentially two categories of corporate ownership – one for private benefit and one for public benefit. Changing economic models can happen in two possible ways.

The first is by addressing the private benefit model and seeking to change how it works and thereby seeking to change its impact. This was effectively the route suggested by another muchquoted speaker at Davos, the Dutch historian Rutger Bregman, who told his audience of the wealthiest and most powerful way to stop talking about philanthropy and start talking about taxes.

If everyone paid their fair share of taxes, philanthropy wouldn't be needed.[199]

Bregman is right to highlight the point, but asking them to pay their fair share of taxes is effectively asking them not to maximise shareholder value, which would be a breach of duty.[200]

The law doesn't require them to pay their fair share of taxes - simply what the tax laws require. Corporations seeking to minimise their tax bill stay within the law by establishing elaborate (but not unlawful) tax avoidance schemes. The only way to make companies pay more tax is by

[194] https://www.bbc.co.uk/news/av/world-europe-45439003/swedish-teen-greta-thunberg-skips-school-for-climateprotest

[195] https://www.theguardian.com/environment/2019/mar/19/school-climate-strikes-more-than-1-million-took-partsay-campaigners-greta-thunberg

[196] The Welsh Government brought this into focus by enacting the Wellbeing of Future Generations Act 2014, creating a number of duties for public bodies, and establishing a Commissioner to oversee implementation. See https://www.anthonycollins.com/newsroom/ebriefings/young-people-excluded/

[197] https://www.theguardian.com/tv-and-radio/2019/jan/21/david-attenborough-tells-davos-the-garden-of-eden-is-nomore

[198] ditto

[199] https://www.theguardian.com/business/video/2019/jan/30/this-is-not-rocket-science-rutger-bregman-tells-davosto-talk-about-tax-video

[200] UK legal reference Companies Act 2006 s.172(1) "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole …"

outlawing the tax avoidance schemes. But this would be met by strong resistance, and a probusiness government is unlikely even to attempt it. Trying to change investor-ownership to take account of public interest undermines its very purpose and so poses an existential problem. It is unlikely to succeed.

The reality is that whilst further restrictive law changes should be pursued, this is not going to provide a long-term solution to the bigger issue. It simply continues the adversarial relationship between governments/regulators and private benefit enterprise. Where business is as powerful as it is today, with the established political influence it has, governments will always be playing catchup with well-resourced enterprises which can always keep one step ahead. Whilst it is important to continue to pursue such initiatives, they will not solve the problem. That can only be addressed by challenging the very essence (the economic model) of private purpose enterprise – namely shareholder primacy. At this time, that does not seem to be a realistic option.

If the first approach involves trying to change enterprise for private benefit, the second approach involves encouraging the much more rapid growth of enterprises which strive to trade for public benefit, essentially seeking to grow the type of business which is already trying to meet the public needs anyway, and changing from a predominantly pro-private interest global economy to a predominantly pro-public one. The proposition is this: business does not have to be for private benefit – history and the existence of alternatives show that. The purpose of a business can simply and literally be to provide that business – without exploiting anybody or seeking to benefit anybody. But that proposition is not what many people think is the case.

If humanity needs a different type of enterprise to become the dominant approach, then governments need to take important steps to make it more likely to happen, and citizens need to be prepared to change their behaviours as well.

The rest of this section will explore this option and consider what individual member states can do to advance this.

Comparing private-purpose and public-purpose corporations

It is a simple fact that private purpose enterprise will look for opportunities to limit costs and optimise income. The only limitation is the need to stay within the law. Subject to that, trading through a private-purpose corporation with limited liability gives permission to enterprise to behave as well or badly as it wishes.

It needs to be said again that this is not an attempt to demonise private-purpose enterprise – indeed, any form of ownership can misbehave or adversely impact on other interests, and they frequently do. Many companies behave honourably, responsibly and bring great benefits to those they come into contact with. This enquiry, however, is aimed at analysing the mechanics of how different types of corporate ownership work and interact with the law.

At one time investor-ownership was assumed to be the way of the future; it appeared that nothing else was left to challenge it.[201] In recent decades, this has become subject to increasing challenge.[202] Whilst its success from the viewpoint of investors is hard to dispute, the way such success is measured does not reflect, and does not try to reflect, external costs arising from a company's trade save

[201] After the fall of the Berlin Wall, as evidence of the failure of Communism, it appeared to some to be the "end of history" – Francis Fukuyama: The End of History and the Last Man 1992.

[202] The Post-Crash Economics Society was established by students at Manchester University to draw attention to the way that economics was now being taught, elevating neoclassical economics to the sole object of study. They complained that this meant that economics students are taught the economic theory of one perspective as if it represented universally established truth or law. See http://www.post-crasheconomics.com/economics-educationand-unlearning/ in 2014 and the Foreword by Andrew Haldane Executive Director for Financial Stability at the Bank of England.

where it breaches laws and results in penalties or compensation claims.

What economists call 'negative externalities' must be taken into account. From the state's point of view, it needs to recognise the essential difference between the two types of business:
• Public benefit trading has a similar objective to government – public benefit. The two should therefore be working together to optimise their effect.
• Private benefit trading on the other hand seeks specifically to benefit private interests, and to the extent that it does so, this will tend to pass costs onto citizens and the state.
The biggest problem today with the potentially negative impact of trading for private benefit is that we simply do not know how big the problem is. Where businesses aren't required by law to report on or disclose particular negative externalities, it isn't in their interest to make them public or even to accept them when they become public. An illustration of this is the way in which tobacco companies denied negative health impacts for years until that simply became untenable, but then they continued lobbying to oppose or minimise health warnings to maximise sales.[203]

Responsibility for disposal of plastic waste is another example where regulation is changing dramatically. We don't know the extent of current risks, but when it is found that a whale died of starvation because it had 88 pounds of plastic in its stomach, the shock of this reminds us how little we currently know.[204]

There is a desperate need for businesses to be trying themselves to address these vital issues and to be taking the lead in identifying, highlighting and then solving issues as they become apparent.

The current system relies on investigative journalists, whistle-blowers, activists and much campaigning even to bring issues to the surface.[205] We need businesses that are themselves programmed to operate for the public good. That is what organisations that set out to trade for a public or community purpose are. In theory, at least, they are less likely to treat third parties unfairly or exploitatively. Because their corporate purpose goes with the grain of public interest, then their internal drivers should cause them to reflect on and avoid such behaviours and practices, and to change. It is perfectly fair to say that their governance, their reporting mechanisms, the democratic engagement and a number of other areas need to be significantly improved - but the same can be said of any corporate structure. It is particularly the case when this area of law has fallen behind because it was felt important to give more legislative time to private benefit trading.

This sounds and, to some extent, is idealistic. The reality is that all businesses are competing, and those with a public purpose cannot just behave nicely and avoid insolvency. But the point is nevertheless a very important one: organisations that trade for a private purpose will not deliver that private purpose unless they subsume third party interests to those of shareholders; and however ineffective they may be in doing so, organisations with a public purpose strive, at least, to treat people fairly.[206]

This doesn't mean that states want or like one type of corporate purpose and not another.

[203] Sees; Lessons from Health Hazards chapter 7 Tobacco industry manipulation of research. https://www.eea.europa.eu/publications/late-lessons-2/part-a-lessons-from-health-hazards

[204] https://www.nationalgeographic.com/environment/2019/03/whale-dies-88-pounds-plastic-philippines/

[205] It is instructive to look at how co-operative businesses took the lead in Victorian England in relation to selling uncontaminated food, ensuring accurate weights and measures, limiting the working day and caring for their workers, treating women equally, paying pensions and a number of other areas. This was an obvious thing to do – when customers owned the business. See for example this animation https://www.co-operativeheritage.coop/

[206] It also needs to be emphasised how serious and respected thinkers recognise today how the survival and success of our species is indebted to a human instinct for collaboration, rather than competitive instinct. In his Short History of Co-operation and Mutuality, Ed Mayo observes: "In a neat about-turn from his phrase 'the selfish gene', Richard Dawkins now points to models where 'nice guys finish first'. In the thirtieth anniversary edition of The Selfish Gene, he described how a less misleading title for the book could have been 'The Co-operative Gene'.

However, it does mean that the state has an interest in recognising the impact of choices it makes in relation to ownership types, and of treating different types of corporations differently – or rather, appropriately, in order to get the best out of each in the public interest. States need investor-ownership to maintain commercial activity across the range of sectors and it is legitimate to use the power of legislation and regulation to hold in check businesses trading for private benefit. However, it is also legitimate for states to use such legislation to encourage other types of corporation, because of the extent to which they support the state's own objectives in promoting the happiness and wellbeing of citizens.

A good example of the latter is where states use tax laws to encourage the development of co-operatives. Some states (e.g. Italy) allow co-operatives that set aside part of their profits into an 'indivisible reserve' which will never become available to members - to have the advantage of not paying corporation tax on funds set aside in this way. In its national constitution, Italy recognises the social value of co-operatives to the national economy, so encouraging co-operatives in this way is logical.[207]

So, the choice isn't between public and private ownership; it is between public and private benefit. Furthermore, enterprise for the public benefit does not have to be owned by the state.

As states are now withdrawing from public service provision, mutual ownership is one of the options being trialled in the UK as an alternative mechanism for public ownership. In Italy over 10,000 social co-operatives operate in the care sector; NOWEDA, which is among Germany's 150 largest enterprises, is a retail co-operative of pharmacies with 16 outlets in Germany and one in Luxembourg, and 8,600 pharmacies in membership; ACHMEA (Netherlands) provides health and other insurance to about half of all Dutch households and is active in seven other European countries.[208]

Finding a way forward

First, it is necessary to recognise that although there are more than two centuries of experimentation already and there has been enormous recent growth of interest in mutual, cooperative and social enterprise, as well as the rapid development of social impact measurement and related initiatives, 'social business'[209] takes many different forms but remains marginal in the context of global trade.

Second, it is important to point out that just because such businesses strive to trade for the public benefit, that doesn't mean that they necessarily do so, or that they are free of the faults identified above. Rabobank (a co-operative bank) was one of those fined in the interest rate fixing scandal.[210] The UK's Co-operative Bank lost many customers and was eventually sold to hedge funds after failing to secure sufficient capital to proceed with its planned expansion.

Also, as already pointed out, the by-laws don't make businesses of any type succeed or fail in achieving their purpose. Human beings do that. All the by-laws can do is create a framework, or scaffolding, within which a corporate body is intended to operate. Through human agency, it may not do so.

Third, the development of efficient corporate

[207] See the research by Ifigeneia Douvitsa National Constitutions and Co-operatives: an Overview, International Journal of Co-operative Law Issue 1 2018 at page 128.

[208] https://www.ica.coop/en/media/news/international-survey-looks-role-co-ops-and-mutuals-health-and-social-care

[209] For the remainder of this section, 'social business' is the phrase that will be used to define the broad range of enterprises including mutuals, co-operatives, social enterprises and all other ventures which seek to trade for public rather than private benefit.

[210] https://www.reuters.com/article/us-rabobank-libor/dutch-rabobank-fined-1-billion-over-libor-scandalidUS-BRE99S0L520131029

governance arrangements is something that evolves over long periods (decades at least). As a subject of academic and practitioner study, it is relatively new, only really becoming a focus of attention following the publication of the Cadbury Report (UK,1992),[211] the Principles of Corporate Governance (OECD, 1999, 2004 and 2015),[212] and the Sarbanes- Oxley Act of 2002 (US, 2002).[213] The development of the governance of large mutual organisations has not attracted as much attention, though there have been a number of important publications.[214] Also the comparative study of co-operative law, an important strand within mutualism, is relatively recent.[215]
It is reasonable to conclude that we don't currently have the answer in the form of a wellde-veloped, tried and tested ownership and governance model for public-purpose enterprise. Much important work has been and is being done, but without the urgency to accelerate this work, and importantly to fund and promote it, progress will be slow.

Understanding the urgency of this issue and the need for states to make rational and forwardthinking choices about ownership, is an important step. The need for experimentation, pilots of new ideas, research, and shared learning are fundamental. Perhaps most important of all is the need for schools, colleges and universities to understand the importance of teaching different approaches to business. This is a major challenge: footnote [29] above refers to the students at Manchester University establishing the Post-Crash Economics Society, because essentially, they were being taught economics as if the crash had not happened. It is not just economics that is taught as if one approach to business represents universally-established truth or law.

Summary recommendations for States It is important to highlight what the European Union and member states can do in furthering this agenda.
First, recognise the importance of corporate diversity. In a paper in 2009, Nobel prize-winning economist Joseph Stiglitz said:

> **"Success, broadly defined, requires a more balanced economy, a plural economic system with several pillars to it. There must be a traditional private sector of the economy, but the two other pillars have not received the attention which they deserve: the public sector, and the social co-operative economy, including mutual societies and not-for-profits. Let me just comment on the third, which I think has particularly not gotten the attention it deserves in most economic discourse. These are among the most successful parts of the American economy."[216]**

This point continues to be made in relation to financial services, especially by Professor Jonathan Michie (University of Oxford), arguing in 2017 that the "[c]urrent focus of regulators on capital and competition may be misplaced", and that "[d]iversity brings more certain economic benefits in terms of consumer outcomes and systemic stability."[217]

Second, states can review how their government approaches the whole subject of enterprise and business, and in particular:
- Adopt a positive policy in favour of corporate diversity that removes barriers to development and competition by unsuitable policy,

[211] https://www.icaew.com/technical/corporate-governance/codes-and-reports/cadbury-report

[212] http://www.oecd.org/corporate/principles-corporate-governance.htm

[213] https://www.govinfo.gov/content/pkg/PLAW-107publ204/html/PLAW-107publ204.htm

[214] The governance of large co-operative businesses, Birchall J. 2015 Co-operatives UK; see also Co-operative Governance Fit to Build Resilience in the Face of Complexity, International Co-operative Alliance, 2015, various authors.

[215] The most comprehensive from a European point of view being: Principles of European Co-operative Law (2017) Intersentia, Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H Münckner and Ian Snaith.

[216] J. Stiglitz, "Moving beyond Market Fundamentalism to a More Balanced Economy", 80 Annals of Public and Cooperative Economy 3, 2009, p. 356.

[217] https://www.bsa.org.uk/BSA/files/d2/d2da18d8-764e-42d6-991a-6294f26b5d0e.pdf and also Promoting Corporate Diversity in the Financial Services Sector, Policy Studies, Vol 32, Issue 4, 2011, pp. 309-23.

regulation or legislation;
- Consider whether mutual, co-operative and other forms of businesses for public benefit should be expressly recognised in their national constitution or other supreme law;[218]
- Ensure that in all legislation, the role of and impact on different types of business forms are considered, rather than simply assuming one approach;
- Ensure that the remit of government business and enterprise departments in cludes all types of business, and includes all forms of enterprise trading for both private and public benefit;
- Seek to ensure that their laws optimise all forms of corporate trading for the benefit of all citizens, not just company laws. In particular, co-operative and other fields of organisational law merit equivalent attention;
- Appoint ministerial and official posts as ap propriate to represent and champion different types of business;
- Where they see a public benefit in promoting and expanding the role of public benefit businesses, they explore what incentives can be put in place to encourage those setting up new businesses to choose that option.

States need to recognise the importance of the diversity of corporate ownership and need to play a role in this, through:
- recognition that appropriate corporate ownership is key to future safety, security, wellbeing and social justice;
- where appropriate, openly recognising this factor at the highest legal level, whether in a national constitution or other supreme law;
- understanding the need to oversee and direct corporate ownership in its different forms for the maintenance of democracy and the common good, rather than leaving it to chance;
- encouraging and incentivising enterprise for public benefit through fiscal, regulatory and other appropriate methods;
- organising the structure of government itself in recognition of these issues;
- maintaining corporate legislation to the same level, across the full range of corporate purposes, so that they all remain fit for pur pose.

Individual States should legislate to permit co-operatives to grow
- States should seek to recognise co-operatives in their constitutional document, or where this is not possible, they should:
    - recognise in ordinary legislation the existence of a range of different corporate purposes, including co-operatives;
    - require the promotion of corporate diversity;
    - require that co-operatives should be considered in certain specific sectors such as energy and care.

- States should have their own national
    - co-operative law which: protects
    - co-operative identity relative to
    - investor-owned companies;
    - defines co-operatives by reference to features necessary to achieve the corporate objective or purpose of a co-operative.

- National co-operative laws should provide for the compulsory allocation of some part of surplus to indivisible reserves, in accordance with PECOL, and should ensure that indivisible reserves remain indivisible even on dissolution or conversion.

- States should keep their co-operative law under review, alongside company law, including the extent to which other laws (tax,

[218] This is a far from cosmetic gesture. When a state aid challenge was made against the Italian Government in the European Court of Justice for more advantageous tax arrangements for co-operatives, one of the factors taken into account by the court in rejecting the challenge was the clear expression of approval of co-operatives in the Italian constitution. Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-8/08) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0078&from=EN

regulation, competition) work to the detriment of co-operatives.

Summary recommendations for the EU
We need to know more about ownership and the EU should methodically collect and publish data on certain aspects of ownership

Measuring land ownership:

• The EU should collect clear, consistent data on patterns of land ownership across the Union. Whilst we have focused significantly on agricultural land ownership in this chapter, there are other types of owned land where it is tremendously difficult to make EU-wide comparisons. Data is key.

• Ownership makes a difference to outcomes. If we want domestic food security, to protect livelihoods and traditional ways of life we need to make active choices about what types of land ownership are appropriate for the outcomes we desire

• In a globalised world, agricultural co-operatives allow the continuation of small-scale production within local traditions whilst maintaining the widely-renowned quality of European foods

Measuring wealth equality:

• As noted there are issues in comparing data from different countries. For example, when we look at the case for Australia and Germany, excluding pension entitlement, average wealth in Australia is more than twice that in Germany, but once entitlement is taken into account it is much the same. This points to the fact that the Australian policy of compulsory superannuation has been extremely successful in increasing wealth in Australia.

The EU should encourage the development of high-quality co-operative legislation

• support and encourage member states to improve/optimise their own co-operative law, including through projects such as PECOL;
• support and enable co-operation within member states and within the EU;
• keep the EU's own laws and regulations under review to ensure that other laws (tax, regulation, competition) do not operate to the detriment of co-operatives.

Conclusions

In answer to Who owns Europe?, whilst recognising the enormous power of investor-owned business today we have concluded that it would be an overstatement today to claim that corporate interests currently 'own Europe'. But there is a real risk that they will do unless steps are taken to prevent it.

Such a take-over would not be by any particular person, organisation or group ... but by an idea, an obsession – the pursuit of private gain. That can only be avoided if we move away from an economy dominated by businesses for private to one which is predominantly for public benefit. This report began by seeking to understand who owns Europe, implying some doubt about whether democratically elected government is still in charge. The existence of such doubt is itself of great concern, but much more so in the light of today's increasingly fragile state of affairs from a social, political, environmental and biological point of view.

It is of the utmost importance that in this situation, governments and politicians do everything they can to protect and strengthen democracy and the rule of law in all ways, especially in the context of corporate ownership and the role of different types of corporations in society.

Democracy needs to become a way of life in ways beyond politics and government. It particularly needs to become prevalent in the context of enterprise and corporate ownership. These are currently dominated by the pursuit of private gain, rather than the common good.

Appendix 1

Co-operatives: Sources of capital

A case study from the UK

Co-operatives: Sources of Capital

Introduction

1. This study, and the reason for it

a. This study considers how co-operatives in the UK are funded. The reason for doing this is to see whether any conclusions can be drawn about the effectiveness of the current statutory arrangements for share capital for societies registered under the Co-operative and Community Benefit Societies Act 2014 (the 2014 Act).

b. Co-operatives have significantly different statutory arrangements from companies in relation to share capital. Those arrangements evolved nearly two centuries ago, and are centred around the concept of withdrawable share capital. It has been suggested that these statutory arrangements should be reviewed.

c. This study looks at a sample of co-operatives across different sectors, with the simple aim of investigating whether they use statutory share capital or not, and how generally they are funded. It will then consider whether any conclusions can be drawn.

d. It is a desk-top study, based solely on considering published accounts and when appropriate, the constitution (rules or articles of association) or other information available from websites.

2. The approach and definitions

a. In this study, and subject to some important qualifications below, co-operatives will be divided into categories and considered as follows:

i. **Consumer co-operatives,** which are sub-divided into:

(a) Retail societies

(b) Community co-operatives, which are largely consumer based, and include such businesses as community shops and pubs, community energy and community farms

ii. **Producer co-ops** including agricultural co-ops

iii. **Worker co-ops** in a range of different fields

b. These are the important qualifications:

i. This study focusses on organisations which project or identify themselves and/or are substantially accepted within the co-operative sector as co-operatives, whatever legal form they take. For example:

(a) community businesses commonly regard themselves as co-operatives, even though in a narrow legal sense they are not because they are registered as community benefit societies;

(b) agricultural co-operatives are sometimes established as companies limited by shares, although they operate as co-operatives of farmers and project a co-operative image and (to some extent) culture

(c) worker co-operatives are commonly established as companies limited by guarantee (CLGs), but similarly operate as co-operatives of workers and project a co-operative image and culture.

ii. It seems inappropriate to include organisations which specifically do not project or regard themselves as coops. However for purposes of comparison, and because in some quarters they are counted or treated as coops in spite of how they regard themselves, the study includes:

(a) John Lewis, which is sometimes talked about as a "worker co-operative" but is actually a PLC whose shares are held on trust by a company limited by guarantee on behalf of employees and for their private benefit, and

(b) NISA (Since acquired by Co-op Group) which is also a PLC, whose shares are owned by various convenience store businesses for whom it effectively provides a federal service.

c. Funding

i. This study essentially considers whether co-operatives are funded by equity or debt. It looks at the amount of equity share capital, what proportion of members' funds is comprised of equity capital, and whether there are alternative sources of funding as well or instead.

ii. As observed above, this study includes both companies and societies, and it is important to note that there are radical differences between the statutory frame-work for these two different corporate forms, and the shares in each case.

(a) In relation to companies, the law has evolved a huge amount since the Joint Stock Companies Act of 1844. The Companies Act of 2006 runs to 1,200 sections, nearly 200 of which deal with shares. Companies are registered at Companies House.

(b) In relation to societies, the law has evolved comparatively little since 1854. The 2014 Act runs to a 120 sections, with 2 sub-sections dealing with shares. Societies are registered with the Financial Conduct Authority (FCA), though under its Mutuals Registration team and separate from the FCA's regulation of financial services.

(c) It is important to understand a fundamental difference between capital in a company and capital in a society.
(d) The starting point is that capital in a company cannot be repaid to shareholders expect in certain specific circumstances. The so-called "maintenance of capital rule" in company law is primarily to protect third party creditors, who know that although a company may incur trading losses during the year, subject to that the share capital is available to meet the liabilities of the company. Company capital is therefore "fixed".

(e) In practice today, there are extensive provisions enabling a company to purchase or redeem its own shares much more easily than in the past, but all of these require compliance with rules or statutory procedures to ensure that creditors are not prejudiced.

(f) These principles do not apply to societies. Because one of the principles of a co-operative society is open and voluntary membership, members need to be able to leave the society, and to take their capital with them when they do (subject to restrictions in the rules). Society capital is therefore withdrawable or repayable to members, at the very least when they leave the society, but commonly in other circumstances as well. Co-operative capital is therefore "variable".

iii. This difference is not unique to the UK: co-operative capital is similarly variable and withdrawable in other European states, in contrast to fixed capital in companies.

iv. This fundamental difference is important, and has a number of consequences.

(a) Creditors of a co-operative do not have the same protection as creditors of a company.

(b) It is normal for co-operative capital to remain at par value, so that a departing member can take with them the share capital to which they are entitled, but is not entitled to any notional share in the remaining value or equity in the society.

(c) Consequently, shares in a co-operative do not generally provide a share in the underlying value of the business as they

do in a company. (Nor, of course, do they provide one vote per share as companies do: members only have one vote however many shares they hold.)

(d) In a co-operative at the year-end, part of the surplus or profit may be allocated to members as a dividend on their trade with the society and added to their share account if not paid out. Prior to that, some of the surplus may be allocated to a reserve to build up a fund to meet liabilities if necessary. Other reserves may be created for co-operative education and development. These reserves are then not available to current members for distribution.

(e) It is a separate question what happens to these reserves if the co-operative is wound up whilst still solvent. In the past, constitutions or rule-books in the UK did not tend to provide for such an event, perhaps because it was assumed that the co-operative would continue in existence, or that it would transfer engagements to another society if it was to discontinue.[1] In the modern world with the presence of predatory organisations and the threat of demutualisation it has become normal to provide that such reserves will not be paid out to members, but passed on to another co-operative organisation.[2]

v. Direct comparisons between companies and societies in the context of funding is therefore not straightforward. When a company seeks funding, it makes an "offer" to potential investors, inviting them to invest to in order to share in the profits, based on the contents of a prospectus. This is not the case with a co-operative, which exists to provide something which its members need, and any surplus it makes (if distributed, which is not always the case as will be seen below) is shared with members in proportion to their trade with the society, not as a reward on capital. It is not therefore an investment proposition; it is an invitation to participate in a society's affairs as a member, and for the society to exist members need to provide capital. Such capital is entitled to compensation for its use, but any interest payable must not be a share of profits.

vi. This difference needs to be understood, because of the common tendency to look at everything to do with corporations and corporate finance through a company law lens. That will result in a distorted picture when looking at a co-operative.

d. Corporate forms

i. It is also appropriate to comment briefly on some other key differences between types of corporate entity.

(a) People tend to be most familiar with companies limited by shares, which are funded primarily through share capital provided by shareholders.

(b) Companies limited by guarantee are also relatively common. Such companies do not have share capital, and therefore have to be funded by loans or accumulated profits. It is common for worker co-operatives to use this form.

(c) Co-operative societies registered under the 2014 Act have shares, and in older societies it is common for such shares to be a primary source of funding. In some cases however as discussed below, share capital is nominal.

(d) Community benefit societies similarly often do not make substantive use of share capital, and members just hold a nominal £1 share. Housing associations, which are one of the largest groups of community benefit societies, tend to have nominal share capital, and are mainly funded by

[1] In many jurisdictions, such "indivisible reserves" receive statutory protection putting them beyond reach of any predator

[2] Re Watford Printers Ltd [2018] EWHC329 Ch

debt finance provided by banks, secured on their income stream from rents. As explored further below, community benefit societies are commonly used in community share offers, and in such cases the shareholding is not nominal.

e. Regulation

i. It has already been observed that societies are registered with the FCA, whereas companies are registered at Companies House. The FCA is also the regulator of financial services under the Financial Services and Markets Act. There are several important points to note in relation to the FCA.

ii. In its capacity as the Registrar for societies, it needs to be satisfied that a society or prospective society fulfils the criteria either for registration as a co-operative, or as a community benefit society. The FCA has published its guidelines on how it approaches this function,[3] and it should be noted that this guidance refers in a number of places to features of capital which are relevant to such consideration, such as restrictions on the payment of interest on share capital. It is important to take note of this guidance, because the FCA has the power to suspend or cancel registration if a society does not comply.

iii. In terms of financial regulation, when a corporate body raises capital publicly there are regulations in relation to prospectus requirements, financial promotions and dealing in and arranging investments. Subject to certain restrictions, exemptions are available to societies which are not available to companies, and this makes the society form an attractive approach in its own right. This will be commented on further below.

3. Organisations studied

a. There is a wide range of different types of co-operative: as well as the three categories described above, there are different legal structures and business structures, different sectors, geography and scale, and different stages of development. Such variety poses challenges which can only be partly addressed in a study of this nature which of necessity is based on a sample. This is as follows:

i. Consumer retail co-operatives (plus John Lewis) 11

ii. Consumer community co-operatives

(a) Renewable energy	3
(b) Community enterprises	4
	7
iii. Producer co-operatives	5
iv. Worker co-operatives	3

b. Each of these sector will now be considered in turn. A separate table is attached setting out the relevant information in relation to all of the societies considered.

Review of the different sectors

4. Consumer retail co-operatives. The ten largest UK retails societies are all considered in this study. They are all registered under the 2014 Act as societies (co-operatives). Food is their main business, and they 6 all have a substantial funerals business. Most have other, mainly consumer-facing businesses. A number of points emerge in exploring their sources of funding.

a. Equity finance

i. They all have some withdrawable share capital. Historically this is how the consumer retail movement, which is the backbone of the wider co-operative movement in the UK, was funded. It arose as a means of enabling people to keep their cash safe when they didn't have access to bank accounts, and many people left their dividends undrawn in their share accounts. This is what created the massive growth of UK co-operative capital in

[3] https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf

the last half or the 19th century. Today, societies maintain limited facilities for members to access capital, so its active use has declined in recent years.

ii. In 6 of the 10 cases share capital is low – namely 6% or less of total members' funds; of the rest, in one society it is 15%, but the other three are respectively 30% (Midcounties), 50% (Chelmsford Star) and 59% (Channel Islands). This reflects the fact that these three societies pro-actively seek to attract capital from members and make appropriate facilities available for this.

iii. One of the drawbacks with withdrawable share capital is the uncertainty it causes for the business. Midcounties has for some years provided a variation on the traditional form of withdrawable share capital, and provided arrangements for members to acquire shares (so-called "share bonds") with more limited withdrawability which is then reflected in higher interest rates.

iv. Other than share capital, members' funds of retail co-operatives essentially comprise accumulated and revaluation reserves, which are substantial in all cases (see separate table).

b. Debt finance

i. In terms of borrowings, apart from Co-operative Group which uses the bond market, other societies borrow from the banks. Two societies (Lincolnshire, which owns £200m of property, and Heart of England) have no borrowings at all.

ii. Included within liabilities most societies have pre-paid funeral plans, and the provision for this can amount to as much as 60% of total liabilities (Heart of England).

c. Comments on retail co-operatives

i. The retail societies are in the fortunate position where they have substantial accumulated reserves as well as substantial share capital. These reserves often date back many years. Many societies stopped paying dividends in the last few decades of the last century, but it became more wide-spread again comparatively recently (last 15 years or so). This has been helped by technology, and enables societies to compete with investor-owned retailers who provide loyalty schemes to their customers.

ii. However the large retail societies do not have the same facilities as their investor-owned competitors to raise funds on the capital markets to meet strategic needs. There are various factors contributing to this.

(a) Although "community share offers" have become popular in the context of community co-operatives where financial regulations are less onerous for societies (see next section), more stringent regulatory requirements would be likely to apply if the larger retail societies embarked on a "public offer".

(b) An offer to members alone may be less problematic, but such an offer would exclude institutional investors.

(c) The main mechanism for distribution of surplus by a retail co-operative is via a dividend to members based on their purchases. Under co-operative law (see further below), compensation for use of capital is allowed (i.e. payment of interest closer to borrowing rates), but it must not be used as a mechanism to distribute profits. It is normally based on an interest rate specified in the rules, or the rules provide for the board or general meeting to decide the interest rate.

(d) Section 1 (3) of the 2014 Act specifically provides that a society that carries on, or intends to carry on, business with the object of making profits mainly for the payment of interest does not qualify for

registration as a co-operative.

(e) ICA Principle 3 refers to "limited compensation, if any, on capital"; this is one of the factors taken into account by the registrar, the Financial Conduct Authority, in determining whether a society is complying with the requirements for registration as a co-operative.

As already pointed out previously and is also clear from the above, co-operative capital is significantly different from company capital, and does not provide a basis for "investment" in the traditional sense of that word.

iii. However these societies appear to have a range of other options for funding. Midcounties has raised capital directly from members through their "share bonds"; Co-operative Group uses the bond market; and a number of societies borrow from banks.

iv. Currently a minority of societies (3) seem to be pro-actively using withdrawable share capital as a significant source of funding. The approach adopted by Midcounties' referred to above has resulted in the development of standard documentation for societies to adopt an approach to withdrawable share capital where withdrawal is restricted or prohibited for a fixed term during which a higher rate of interest is payable.

v. The scale of Co-operative Group's business compared with other societies makes comparison with the other retail societies difficult, though it is more comparable in scale to John Lewis.

(a) John Lewis is itself different from other privately owned retailers in that its shares are not listed on the Stock Exchange. Its funding has several similarities to Group, including very substantial retained earnings/reserves, a low level of equity share capital, and significant funding from the bond market.

(b) Another area of similarity to the Group is that it has a form of democratic ownership. This arises from the fact that its shares are all held on trust on behalf of employees and for their benefit, as a result of a settlement and governance arrangements set up by its founder. Aside from the fact that food is a smaller proportion of its turnover, the fundamental difference is that John Lewis is a profit-maximising entity for its owners (employees rather than investors), not a co-operative. Consequently funding from the market is not in tension with its nature or purpose.

vi. There is a revised Code of Best Practice (2018) for retail consumer co-operatives using withdrawable share capital, which has been agreed with the Financial Conduct Authority.[4]

vii. It should also be noted that in relation to all of the societies considered, the capital value beyond the repayment of their share capital to members (the capital surplus) is not paid to members, but remains dedicated to a co-operative cause. This is a traditional sign of mutual ownership ("disinterested distribution"), and is to be distinguished from John Lewis which is not a mutual, and where the capital surplus would be paid to the employees.

d. Summary comments about consumer retail co-operatives

i. Three societies continue to proactively use traditional withdrawable share capital. ii. Withdrawable share capital does not provide certainty to the business, which makes it less attractive. Over recent decades, there has been a substantial decline in its use. One society devised a variation on this which limits withdrawability in order to reduce uncertainty. This is now available to others to use. iii.

[4] https://www.uk.coop/sites/default/files/uploads/attachments/withdrawable-share-capital-code-june-2018.pdf

Retail societies rely significantly upon accumulated reserves to fund their businesses.

iv. The fact that
(a) more societies are starting to borrow from banks, and

(b) others are interested in the restricted withdrawability approach to reduce uncertainty, suggest that the traditional use of WSC may not always provide what they need.

v. The restricted withdrawability option is available now under existing legislation.

(a) The advantage of this is that it goes some way to reducing the uncertainty of withdrawability;

(b) Its disadvantage is that the shares are still withdrawable: the schemes either temporarily suspend the ability to withdraw for a period of years, or shares continue to be withdrawable but on the basis that a higher rate of interest is earned if not withdrawn during the specified period, and forfeited if they are. vi. Care has to be taken that interest on share capital does not include a share of profits, as this would be likely to compromise entitlement to registration under the 2014 Act. As observed above, the FCA is responsible for such registration (the Mutuals Team or Mutual Societies Registration), and its guidance explains its approach to registration.[5]

vii. Care also has to be taken about the legal and regulatory requirements of the Financial Services and Markets Act 2005 (FSMA). Under FSMA important regulations apply in relation to "regulated activities", financial promotions and prospectus requirements. Various exemptions from these regulations are available in relation to non-transferable and withdrawable shares in societies. Staying within the requirements of the exemptions is important, and guidance is available through Co-operatives UK and its Code of Best Practice.[6] It is important to be careful when relying on exemptions – i.e. a relaxation of rules; the availability of such exemptions can be jeopardised if use is made of them inappropriately. viii. Where societies wish to raise very substantial sums from members, or explore the possibility of access to institutional funds, it would clearly be appropriate to consider complying with FSMA regulations, even if exemptions applied. Such regulations are designed to protect consumers, and it would seem inappropriate for societies which are comparable in scale to sizeable PLCs should provide less protection than PLCs to consumers. ix. Consumer societies seem to be able to access bank loans when they need to. x. In all of the societies considered (but not John Lewis), the capital surplus remains dedicated to a co-operative cause.

5. Consumer community co-operatives.
In this category, we reviewed seven organisations; three in renewable energy, and four in community enterprises including pubs, farm and post-office. Although they have all made use of community share offers, there is a stark difference between the capital funding required for the assets of these two different types of business, and it therefore makes sense to look at them separately.

a. Summary comments about consumer community co-operatives
i. Two of the three renewable energy businesses (Awel and Southill) were registered in 2015 as community benefit societies with an asset lock in their rules. Westmill Solar is a co-operative registered in 2011.[7] They have all raised substantial amounts of capital through community share offers, £2.6m, £1.1m and £4.6m respectively. They are relatively new businesses, and at this point have negative reserves.

ii. Most notably, they all have very substan-

[5] https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf
[6] https://www.uk.coop/sites/default/files/uploads/attachments/withdrawable-share-capital-code-june-2018.pdf
[7] For Westmill, only the accounts for 2016 seem to be available

tial borrowings, of £5.7m, £3.7m and £9.7m respectively, which are secured on the generation assets. The lenders include Co-operative Bank, Welsh Government and Triodos Bank. As well as needing to service this debt, those who have subscribed for shares anticipate a level of interest on their shares, although such payments remain at risk. Additionally, there may be an anticipation of repayment of share capital over a period of time (e.g. 20 years in the case of Awel).

iii. The number and scale of community share offers[8] suggests that this approach to using mutual societies[9] and withdrawable share capital is not only popular and attractive, but also successful. It seems that people are happy to subscribe and banks are willing to lend: it works. iv. Community share offers make use of significant exemptions from financial regulation based on using withdrawable share capital in co-operative and community benefit societies. There are three important matters to mention in relation to this approach. (a) Care has to be taken that interest on share capital does not include a share of profits, as explained above in relation to retail co-operatives.[10] Guidance on this is also provided by the Community Shares Unit, through its Handbook.[11] (b) Care also has to be taken about the legal and regulatory requirements of the Financial Services and Markets Act 2005 (FSMA), again as explained above. Staying within the requirements of the exemptions is important, and guidance on this for community share offers is also provided in the Handbook.[12] (c) Also as stated above, it is important to be careful when relying on exemptions – i.e. a relaxation of rules; the availability of such exemptions could be jeopardised if inappropriate use is made of them. The extent to which community shares are actually withdrawable is obviously limited; it is important therefore that clear and transparent information about this is provided to consumers; and that shares remain sufficiently withdrawable to satisfy the FCA. v. In two of the three cases considered, the capital surplus remains dedicated to a community benefit purpose; but in the third case, it is repayable to members according to their shareholding which is not the norm in a co-operative.

b. Summary comments in relation to community enterprises

i. Turning to the community enterprises, three of these (Bamford Community Society, Sutton Community Farm, and the Fox and Goose pub) are all community benefit societies with an asset lock. The fourth, the Old Crown, is a co-operative. All four have raised capital through community share offers (£263k,[13] £97k,[14] £130k and £232k respectively). Only one of the four (Bamford) appear to have any bank borrowing or substantial indebtedness (£103k in that case).

ii. Although the scale of fund-raising is lower than the renewable energy businesses mentioned above, this reflects the nature of the businesses and their needs. Only one of them has bank borrowings of £103k (Bamford), but with equity capital of £293k, its debt to equity ratio is still relatively low. iii. Similar conclusions can be drawn in relation to community consumer co-operatives as the renewable energy co-operatives, namely that using mutual societies and withdrawable share capital seems to be popular and attractive, and successful. The same caveats as above also apply in relation to the use of community share offers. iv. In all four cases, the capital surplus remains dedicated to a social purpose, and not available to members.

[8] Since 2009, almost a 120,000 people have invested over £100m to support 350 community businesses throughout the UK - http://communityshares.org.uk/find-out-more/what-are-community-shares
[9] In the period to February 2018, 499 projects are listed http://communityshares.org.uk/open-data-dashboard
[10] Westmill is the only co-operative, the other two are community benefit societies.
[11] See in particular section 6.2 http://communityshares.org.uk/resources/handbook/interest-share-capital
[12] See in particular section 7.3 http://communityshares.org.uk/resources/handbook/financial-services-and-markets-act-2000
[13] Information about a more recent share offer not available
[14] This information is from their website, though the accounts for this period are not available http://suttoncommunityfarm.org.uk/join-in/buy-a-share/

6. Producer co-operatives

a. Producer co-operatives are generally co-operatives of independent businesses, such as farm businesses, which need to work together for some purposes to optimise their trade. This may be in relation to the purchasing of supplies (seed etc.), or ownership of assets (agricultural machinery); or it may be in relation to sales where they can obtain a better price collectively (e.g. dairy farmers selling milk, livestock farmers selling through auction marts), or where businesses collaborate to secure increased value collectively before selling on (dairy farmers making other products such as cheese and butter).

b. This study has looked at five businesses; four of them are agricultural (First Milk, Openfield, OMSCO and ANM Group), and one – Nisa, which no longer exists independently as it was taken over by Co-operative Group – was a collective of independent retailers in the convenience store sector.

c. First Milk and ANM are both registered as societies (co-operatives); the other three are all companies limited by shares.

i. First Milk has recently reorganised its capital structure, and its 2018 accounts show share capital of £75.5m with a negative profit and loss reserve of £48.1m. In addition the group has secured borrowings of £45m. Members are required to build up capital to a target based on their target litreage of milk. There are five different classes of shares, with different rights in relation to ability to redeem or transfer, entitlement to interest, and solvent winding up.

ii. ANM has £6m of share capital which is transferable, but only repayable in certain circumstances. It has a bank overdraft of £2m but no other bank borrowings, and £8.7m of members loans.

iii. The capital and borrowings figures of the other three organisations are as follows:

(a) NISA - £1.47m share capital, £18.8m retained earnings, and £64m borrowings

(b) Openfield - £10m share capital, £6m retained earnings, and £27.5m borrowings
(c) OMSCO - £1,000 capital, £2m retained earnings, and no borrowings.

d. Summary comments about producer co-operatives

i. The fact that three of the five producer co-operatives chose to register as a company limited by shares is noteworthy. Additionally, the capital arrangements of First Milk are unusual for a co-operative society, and more resemble the sort of capital structure found in companies. Neither of the two societies refers to shares being "withdrawable", preferring to use the language of companies ("redeemable" and "repayable").

ii. In the case of both of the two societies, on a solvent winding up any capital surplus is to be distributed to members in proportion to their trade with the society. Whilst this is perhaps not surprising in the context, this is not the norm with co-operatives, where usually members receive back the capital they have subscribed, but any surplus remains committed to a co-operative purpose ("disinterested distribution"). All of the other societies considered in this study with one exception[15] adopt the disinterested distribution concept.

iii. It is also worth noting that until it was increased to £100,000 by an Order made in 2014,[16] the interest of any member of a society (other than another society) in withdrawable share capital was subject to a limit of

[15] Westmill Solar Co-operative. The rules of this society also provides that surpluses are distributed to members as interest on share capital. This approach was first promoted by Baywind and subsequently Energy4All.

£20,000. This limit had been in place since the early 1990s and was regarded as a significant constraint on co-operatives, particularly in the agricultural sector. Whether or not this affected the choice of corporate form by Omsco (registered in 1997), or Openfield (registered in 1998) is not known. First Milk was registered as a society in 2001, and ANM was founded in 1872, and converted into a society in 1930.

iv. The conclusions to be drawn in relation to producer co-operatives are not so strong and clear. The use of a company rather than a society, together with the somewhat corporate features of the share capital and capital surplus provisions in the two societies considered tends to distance them from other parts of the co-operative movement. v. Having said that, both societies appear to be able to make the capital provisions work for themselves.

7. Worker co-operatives

a. In this category we have considered three co-operatives trading in wholefood wholesale (Suma), food retail (Unicorn) and co-operative development (CMS), with 162, 68 and 3 members respectively. They are all registered as co-operatives.

b. The smallest of these has £1,503 in co-operative share capital (of total capital of £22,219) and the other two have 1 x £1 share per member. Suma has retained earnings of £3.9m, and borrowings of £347,000. Unicorn has retained earnings of £1.9m and borrowings of £32,000. CMS has retained earnings of £20,716 and no borrowings. In other words these co-operatives are funding their businesses through retained earnings and borrowings, not members' share capital.

c. In the UK, it is not uncommon for worker co-operatives to be established as companies limited by guarantee. This is a legal entity which does not have a share capital, so in all those cases as well, such co-operatives are not funded by members' capital. Generally worker co-operatives are small, with a handful of members; both Suma and Unicorn are large in comparison.

d. It is not possible in a desk-top review to establish whether the share capital provisions for societies in the UK acts as a restraint on worker co-operatives expanding, or limits the sectors in which they can become established.

8. General Conclusions

a. Overall, on the basis of the sample of case considered, the picture is mixed.

i. In relation to consumer community co-operatives (renewables and community enterprises), there is very substantial and significant use of withdrawable share capital. This may at least in part reflect the exemptions from financial services regulations available to societies and withdrawable shares.

ii. In relation to consumer retail societies, the active use of withdrawable share capital had declined in a number of societies, though there is renewed interest as the cost of borrowing is likely to increase. There is interest in an approach which reduces withdrawability in order to reduce uncertainty for societies.

iii. Producer co-operatives use companies limited by shares as well as co-operatives. In those registered as co-operatives, certain aspects of their approach to capital are rather more like a company.

iv. Worker co-operatives do not appear to use share capital to fund their business. v. In all cases where share capital is used, care needs to be taken in relation to levels of interest paid on capital. Where advantage is taken of the exemptions of societies from financial services regulations, similarly care must be taken.

[16] Industrial and Provident Societies (Increase in Shareholding Limit) Order 2014 SI 2014/210

Sources of capital: summary by sector: consumer/retail, consumer/community, producer and worker

Society, year-end of accounts used; co-op unless stated otherwise; source of information	Sector	Turnover	Equity Share capital of Companies (fixed)	Equity Share capital of Societies (variable)	Equity: retained earnings and other reserves	Total equity/ net assets	Total liabilities	Share capital as a % of total equity	Debt to equity ratio	Bank and other loans	Other significant debt or liabilities	Destination of capital surplus on solvent winding up	Members
Consumer Coops 1 – Retail coops													
Co-operative Group 06.01.18	Food, electrical, insurance, funerals, legal services	£9,470m		£73m	£3,015m	£3,088m	£6,081m	2%	1.97	£1,172m (mainly bonds)	Funeral plans £1,139m	Member(s) of CUK or CUK	Individual consumers, employees and retail societies
Midcounties 27.01.18	Food, Travel, Healthcare, Funeral, Childcare, Energy, Post Offices	£1,095m		£56m	£127m	£183m	£463m	30%	2.53	£69m	Funeral bonds: £61m Pension: £49m	Member(s) of CUK or CUK	Consumers and employees
Central England 27.01.18	food, petrol filling stations, funeral, property investment	£809m		£23m	£133m	£156m	£530m	15%	3.4	£28m	Funeral bonds: £134m Pension: £180m	Member(s) of CUK or CUK	Consumers and employees
Southern 27.01.18	Food, end of life services	£431m		£1m	£119m	£120m	£78m	0.4%	0.65	£11m	Funeral bonds: £37	Charity or CUK	Consumers and employees
Scotmid 27.01.18	Food, non-food, funerals, property	£374m		£6m	£94m	£100m	£111m	6%	1.12	£39m	Funeral bonds: £12m Pension: £19m	Member(s) of CUK or CUK or a charity	Consumers and employees
East of England 27.01.18	Food, funerals, travel, optician, pharmacy, Post Offices	£354m		£8m	£205m	£213m	£119m	4%	0.56	£3m	Funeral bonds: £42m Pension: £44m	Member(s) of CUK or CUK or a charity	Consumers and employees
Lincolnshire 02.09.17	food, bakery, filling stations, post offices, pharmacy, travel agency, funeral, crematorium, florist	£288m		£7m	£294m	£301m	£110m	2%	0.36	£0m	Funeral bonds: £35m Pension: £28m	Charity or CUK	Consumers and employees
Channel Islands 14.01.18	food, furnishings, leisure and automotive fuel retailing, travel, Post Offices, funerals, pharmacies, GP practices	£178m		£77m	£54m	£131m	£47m	59%	0.36	£9m	Members' loans: £15m Pension: £7m	Charity or CUK	Consumers and employees
Chelmsford Star 27.01.18	Food, non-food, travel, funerals property	£80m		£10m	£10m	£20m	£17m	50%	0.82	£6m	Pension: £2m	Member(s) of CUK or CUK	Consumers and employees
Heart of England	Food, funerals	£72m		£2m	£39m	£41m	£42m	5%	1.02	£0	Pension: £8m Funeral plans: £25m	Member(s) of CUK or CUK	Consumers and employees
John Lewis (PLC whose shares are owned on behalf of employees by a trust company) 27.01.18 [Copied here from below by way of comparing retailers]	Retailing	£11,598m	£0.6m	£0m	£2,2312m	£2,312m	£3,939	0.03%	1.7	£936.7m (mainly bonds)		The bulk returned to Trustees of JSL trust on behalf of partners	John Lewis Partnership Trust on behalf of employees
Co-operative Group 06.01.18	Food, electrical, insurance, funerals, legal services	£9,470m		£73m	£3,015m	£3,088m	£6,081m	2%	1.97	£1,172m (mainly bonds)	Funeral plans £1,139m	Member(s) of CUK or CUK	Individual consumers and retail societies

Society, year registered and type, year-end of accounts used; co-op unless stated otherwise; source of information	Sector	Turnover	Equity Share capital of Companies (fixed)	Equity Share capital of Societies (variable)	Equity: retained earnings and other reserves	Total equity/ net assets	Total liabilities	Share capital as a % of total equity	Debt to equity ratio	Bank and other loans	Other significant debt or liabilities	Destination of capital surplus on solvent winding up	Members
Consumer Coops 2 - community coops													
Awel (reg'd 2015 as a bencom with asset lock, but .coop and calls itself a co-op) 31.12.17	Own and operate wind farm	£0.767m		£2.573m Also intended to be re-paid after 20 years	(£0.538m)	£2.034m	£6.333m	126%	3.1	£5.697m		Not members, governed by asset lock	Local residents, clubs (rugby and football) etc.
Southill Community Energy (reg'd 2015 as a bencom with asset lock) 30.09.17	developing and operating a solar array	£417,394		£1.1m	(£0.186m)	£0.9m	£3.842m	120%	4.2	£3.659m		Not members, governed by asset lock	Local residents,
Westmill Solar Co-operative Limited (reg'd 2011 as a cooperative) 31.12.16	Generation and sale of electricity from renewable sources	£2,040,292		£4,648,440	(£252,902)	£4,395,538	£10,273,928	106%	2.3	£9,753,656		To members in proportion to their shareholding!	Local residents and businesses, supporters
Bamford Community Society (the Anglers Rest) (bencom with asset lock) sally.soady@gmail.com	Pub, post office, café and any business for the benefit of Parish of Bamford	£380,245		£292,750	(£39,929)	£252,821	£158,440	116%	0.6	£103,243		Not members, governed by asset lock	
Sutton Community Farm (Bencom with asset-lock) 31.03.17	community farm, organic produce	£325,001		£18,612 ??[1]	£58,185	£76,797	£87,224	24%??	4.7??	-		Not members, governed by asset lock	Customers and other local members (minimum £30 each)
The Fox and Goose (Hebden Bridge) (bencom with asset lock) info@foxandgoose.org	Pub	£227,878		£117,378	£98,308	£117,378	£19,204	16.2%	0.16	-		Not members - some other nonprofit body	Local community
The Old Crown (Hesket Newmarket) (co-operative) 31.08.17 jamross@globalnet.co.uk	Pub	£22,000		£232,500	£44,619	£277,119	£3,953 ??	84%	0.01	-		Not members; another assetlocked body	Local residents, business and workers

[1] They have raised a further £97,000 in 2017, but those accounts are not yet available http://suttoncommunityfarm.org.uk/join-in/buy-a-share/

Society, year registered and type, year-end of accounts used; co-op unless stated otherwise; source of information	Sector	Turnover	Equity Share capital of Companies (fixed)	Equity Share capital of Societies (variable)	Equity: retained earnings and other reserves	Total equity/ net assets	Total liabilities	Share capital as a % of total equity	Debt to equity ratio	Bank and other loans	Other significant debt or liabilities	Destination of capital surplus on solvent winding up	Members
Producer coops													
First Milk 31.03.18	Milk marketing, manufacture and sale of dairy products	£248m		£75.5m	(£48.1m)	£27.4m	£86m	275%	3.13	£45m		To farmer members pro rata volume of milk sold to the society in the last 12 months	Farmer members
ANM Group (co-operative society) 31.12.17	Operation of livestock auction marts throughout the North-East of Scotland, estate agency, catering, vehicle sales and leasing	£8.7m		£6m	£20.8m	£21.5	£18.07m	0.28%	0.84	£10.7m		To members pro rata their business with the society over final 7 years	
NISA (prior to acquisition by Co-op Group) (Company limited by shares) 02.04.17	Wholesale supplier to local retailers	£1,252m	£1.47m	(£252,902)	£18.77m	£18.83m	£174.24m	0.08%	9.25	£64m		Presumably distributable to shareholders pro rata holding	
Openfield Agriculture (company limited by shares) 30.06.17	Marketing arable crops as coop on behalf of farmer members	£655m	£10m	(£39,929)	£6m	£16m	£92.1m	62%	5.8	£27.5m		Presumably distributable to shareholders pro rata holding	
OMSCO 31.03.17 (company limited by shares) http://www.omsco.co.uk/	Selling organic milk as farmers' coop	£92m	£0.001m	£58,185	£2m	£2m	£11.6m	0.0001%	5.8			Presumably distributable to shareholders pro rata holding	Customers and other local members (minimum £30 each)

Society, year registered and type, year-end of accounts used; co-op unless stated otherwise; source of information	Sector	Turnover	Equity Share capital of Companies (fixed)	Equity Share capital of Societies (variable)	Equity: retained earnings and other reserves	Total equity/ net assets	Total liabilities	Share capital as a % of total equity	Debt to equity ratio	Bank and other loans	Other significant debt or liabilities	Destination of capital surplus on solvent winding up	Members
Worker coops													
Suma (Triangle Wholefoods Collective Limited) (registered society, operating as a co-operative) 24.09.17	Wholefood wholesale	£50.4m		£162	£3.9m	£3.9m	£8.6m	0.01%	2.2	£347k		Common ownership enterprise or charity (not members)	Worker members
Unicorn Grocery (registered as a society) 31.12.17	Food retail	£7.5m		£68	£1.9m	£1.9m	£0.4m	0.01%	0.2	£32k		Check rules	Worker members
Co-operative and Mutual Solutions (registered society) 31.12.16	Cooperative development	£136,000		£1,503 Repayable and transferable (limited)	£20,716	£22,219	£45,281	7%	2.18			Another coop or community business	Worker members

Appendix 2

Summary of EU member states' approach to indivisible reserves in co-operatives

A Study of Indivisible Reserves in Co-operatives in EU member states

Introduction

Indivisible reserves are a common feature of co-operatives. They can help to provide financial stability; build solidarity and sustainability for future generations; and can act as a disincentive to those seeking to take over its assets.

But the manner and extent to which different EU member states deal with indivisible reserves within their national legal system vary greatly. Some have sophisticated cooperative laws making significant provision.
Others do not even have a cooperative law.

The purpose of this study is:

- To carry out a high level review of the cooperative laws of the 28 EU Member States
- To identify relevant aspects of the cooperative laws relating to indivisible re serves
- To summarise the findings
- To draw some conclusions and make some recommendations which might be helpful for lawmakers.

The way it has been approached is as follows. The co-operative law of each of the 28 member states has been considered, and a series of questions has been answered in relation to each of them.

These questions are:

1. Does the national constitution of the member state refer to co-operatives?
2. Are there separate laws to govern co-ops?
3. Are coops defined?
4. What is the nature of capital?
5. Are "investor members" allowed?
6. Must a proportion of trading surplus be set aside to reserves, not to be distributed?
7. Are capital surplus/indivisible reserves protected on winding up?
8. Is conversion to a company permitted?
9. Are capital surplus/indivisible reserves protected on conversion?
10. What are the legal advantages in having indivisible reserves?

The answers to these questions have been put in summary form into tables. For this purpose states have been divided into two categories:

- those whose national constitution specifically refers to co-operatives in some way, namely Bulgaria, Greece, Italy, Malta, Portugal, and Spain (Group A): and

- those that do not, which comprises the rest (Group B). Norway is also included in Group B. Whilst it is not a member of the EU, its membership of the European Free Trade Association and inclusion in the European Economic Area means that it continues to be subject to the State aid rules. If the UK leaves the EU, it might end up in a similar position.

This categorisation is taken from the valuable work of Ifigeneia Douvitsa, to whom I am most grateful for permission to use her work.[1]

It is appropriate to acknowledge in addition the invaluable help provided by the following publications to which much reference has been made: the International Handbook of

[1]National Constitutions and Co-operatives: an overview, Ifigeneia Douvitsa, International Journal of Cooperative Law, Issue 1 2018 at page 128 https://iuscooperativum.org/wp-content/uploads/2018/08/Issue-1-2018.pdf

Cooperative Law, D. Cracogna, A.Fici and H.Henry (eds.) Springer, Heidelberg, 2013; and Principles of European Cooperative Law, G.Fajardo, A.Fici, H. Henry D.Hiez, D. Meira, Hans-H.Münckner and I.Snaith. Reference has also been made to the Final Study Executive Summary and Part I: Synthesis and comparative report; and Part II. National Reports, 5 October 2010, the Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE).

I am also grateful to Ifigeneia, to Deolinda Meira, Sonja Novkovic, David Hiez and Ian Snaith for their support in this study.

It is important to state that this study has been carried out mainly in August 2018, using the texts of 2013 and 2017 referred to above, supplemented by other sources including unofficial translations of national laws. In each of Tables A and B, in the first column, any other sources used are acknowledged. Also the latest year is specified to which the entries for that state are up to date. Where those laws have changed after that date, this has not been taken into account in this study, and therefore to that extent this study is qualified.

This paper proceeds as follows.
- Section 1: Executive summary
- Section 2: The ICA Principles and reasons for indivisible reserves
- Section 3: What are indivisible reserves and what needs to be considered?
- Section 4: From an EU perspective
- Section 5: Summary of EU member states' approach to indivisible reserves
- Section 6: Conclusions
- Section 7: Recommendations

At the end of this report are the following Appendices:
- Appendix 1 – Extract from ICA Guidance Notes on the Co-operative Principles
- Appendix 2 – Summary Table A
- Appendix 3 – Main Table A covering Member States with constitutional recognition of co-operatives
- Appendix 4 – Summary Table B
- Appendix 5 – Main Table B covering Member States without constitutional recognition of co-operatives (and Norway)

1. Executive Summary

Indivisible reserves are a powerful manifestation of cooperative distinctiveness and identity.

Whilst co-operatives exist to serve individuals and meet their needs, having indivisible reserves underlines how co-operatives are a collaborative endeavour, through which individuals forego (greater) personal financial benefits and rights in order that such endeavour may prosper and achieve its purpose.

This helps their cooperative to be more sustainable, creditworthy and financially secure; it supports wider cooperative development and education; and it sustains the cooperative beyond the current members' own life-time for the benefit of future generations.

Conclusions

- This study concludes that 23 of the 29 states consider indivisible reserves to be important, and sufficient to justify specific provision in their legislation. But only 10 of them protect those reserves beyond the life of the cooperative, as is recommended by the PECOL project team of lawyers.[2]

- It also concludes that there is great variation between individual member states as to the extent to which they acknowledge the existence of co-operatives as a business form,
  have created cooperative laws and define co-operatives, as well as requiring

[2] PECOL is a legal project to create a set of modern cooperative legal principles to underpin national and EU laws (see further in section 4 below)

co-operatives to set aside money from surplus into indivisible reserves, and protecting those reserves when the cooperative is wound up.

• Five of the six member states whose national constitutions expressly refer to co-operatives do all of those things, namely Greece (for some coops), Italy, Malta, Portugal and Spain.

• But they are not the only states which do. So do Belgium (for some coops), Croatia, Cyprus, France, Hungary and Romania. A number of states leave the fate of indivisible reserves to be determined by the cooperative's by-laws (Germany, Lithuania, Luxembourg, Netherlands, Norway and Slovenia).

• At the other end of the spectrum, five member states (Austria, Czech Republic, Denmark, Ireland and UK) and Norway, do not have any requirement for setting aside indivisible reserves.

Recommendations

• States should seek to recognise co-operatives in their constitutional document, or where this is not possible

- recognise in ordinary legislation the existence of a range of different corpo rate purposes including co-operatives
- require the promotion of corporate diversity
- require that co-operatives should be con sidered in certain specific sectors such as energy and care

• States should have their own national cooperative law which

- protects cooperative identity relative to investor-owned companies
- defines co-operatives by reference to the essential features which are necessary to achieve the corporate objective or purpose of a cooperative

• National cooperative laws should provide for the compulsory allocation of some part of surplus to indivisible reserves, in accordance with PECOL, and should ensure that indivisible reserves remain indivisible, even on dissolution or conversion

• States should continually keep their cooperative law under review alongside company law, including the extent to which other laws (tax, regulation, competition) work to the detriment of co-operatives

• The EU should
- support and encourage member states to improve/optimise their own cooperative law, including through projects such as PECOL
- support and enable cooperation within member states and within the EU
- continually keep the EU's own laws and regulations under review to ensure that other laws (tax, regulation, competition) do not operate to the detriment of co-operatives.

This is a desk-top study which looks at the national laws of member states. It is not the purpose of this study to explore whether there is any correlation between having a supportive legal system and having a more vibrant cooperative economy. This study is only up to date according to the availability of relevant texts for each member state, as stated.

This is also a study by a lawyer qualified in one jurisdiction having the temerity to comment on the laws of 28 others where he is not. To the extent that this study unfairly represents those laws, that is his fault alone and those qualified to do so are humbly requested to correct him in the interests of our own cooperative legal endeavours.

2. The ICA principles and reasons for indivisible reserves

a. ICA Principle 3 is as follows:

> *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 of the following purposes: developing their co-operative, possibly by* ***setting up reserves, part of which at least would be indivisible;*** *benefitting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.*

b. The concept of indivisible reserves was re-introduced into the ICA Principles in 1995 by the French delegation, to ensure that the concept of collective ownership did not disappear.[3] As Professor Ian MacPherson explained subsequently, in the previous version in 1966 reference to indivisible reserves had been dropped because of increasing complexity, and variation of approach.[4] The unfortunate result had been that many co-operators had lost sight of the importance of commonly owned capital, as a symbol of co-operative distinctiveness, as a security for its financial growth, and as a protector in times of adversity.

c. The ICA's recent Guidance on the Co-operative Principles[5] takes the view that the formulation of the 3rd Principle shows that the key economic concept enshrined in it is that in a cooperative, capital is the servant, not the master of the enterprise. The Guidance goes on to argue that this Principle is mainly a financial translation of the definition of the identity of a cooperative and of the financial implications of the 2nd Principle of Member Democratic Control.

d. A number of reasons can be put forward for providing in cooperative laws for the indivisibility of reserves, including the following:

i. to create commonly-owned property as a symbol of cooperative distinctiveness;
ii. to counterbalance and supplement the variable share capital;
iii. to increase financial security and provide protection in times of adversity;
iv. to increase the creditworthiness of the coop and provide greater protection to creditors;
v. to reduce the threat of speculative winding-up to liberate from cooperative control the assets built up by previous generations;
vi. to demonstrate concern for the future and sustainability, and to create solidarity across generations;
vii. as part of the financial implementation of cooperative identity.

3. What are indivisible reserves and what needs to be considered?

a. Indivisible reserves are funds which are set aside out of annual trading surplus or profits, and are thereby not available for distribution to members either as a patronage dividend or via a distribution of profit. Therefore a member who leaves the coop is entitled to the repayment of their share capital, but is not entitled to a share of that surplus represented by the indivisible reserves. Some jurisdictions

[3] See Table B and entries for France: until 1992 reserves were indivisible in French law, but in that year this was softened. Also collective interest coops introduced in 1992.

[4] See the quotation from his guidance on the 1995 Principles contained in Appendix 1 below

[5] See Appendix 1

permit the creation of a divisible reserve from which a departing member may be entitled to claim a portion, but this is not common.

b. Indivisible reserves are generally intended to provide capacity to absorb trading losses. Recourse can be had to them before members' share capital is needed to perform that function. Individual jurisdictions also specify other categories of indivisible reserves, such as for education, or cooperative development and promotion.

c. From the members' point of view, since the creation of indivisible reserves establishes some form of common or shared ownership over some part of the coop's assets, it results in some restriction on individual rights. The allocated funds become inaccessible (non-distributable) to the members, as part of the contract between the members created by the coop's statutes.[6] Instead, those funds become restricted to the use to which they have been allocated.[7] In some cases, it is compulsory to allocate a proportion of surplus to these funds.

d. From the coop's point of view, the allocation of funds to reserves which are indivisible during the life-time of the coop thereby creates an asset (the value of those reserves) to which nobody has an individual current right of ownership, but which is held in common by the coop. It is the prospect of a winding up of the coop, while it is solvent and the re serves have significant value, which makes coops and other mutuals attractive to predatory organisations looking to benefit from assets accumulated by previous generations, but to which no in dividual member has a right of owner ship. So it needs to be considered how member states address the question of what happens to these indivisible re serves if a coop is wound up.

e. In some cases, there is no protection of such reserves, and they simply become distributable to members, either as provided by laws or by the coop's statutes. Traditionally, such distribution is in some way linked to the amount of members' trade with their coop; in others, the distribution can be in accordance with shareholding. In these instances, in divisibility only applies during the life-time of the coop.

f. In other cases, at the point of winding up, the members have a choice as to whether to distribute to themselves, or to retain the indivisibility of the funds by transfer ring them to another coop or cooperative institution. In yet other cases, members have no choice and the funds must be transferred to another coop, or to an institution dedicated to a cooperative or community-based purpose. Where, at the point of winding up, members do not receive anything beyond repayment of their capital subscribed and payment of other entitlements arising during the life-time of the coop, this is generally described as a "disinterested distribution".

g. In some states, as well as allocating funds to an indivisible reserve, there is a legal requirement to set aside a proportion of profits which must then be paid to a secondary or tertiary coop or a cooperative federation for certain purposes, such as cooperative

[6] The document setting out an individual coop's internal regulations is called by a variety of different names, which in English can be translated as foundation document, rules, constitution, articles of association, statutes, by-laws or regulations. To avoid confusion, in this paper the document will be referred to as the coop's statutes or by-laws.

[7] See for example Portugal: five categories comprising a general (legal) reserve, education fund, funds required by legislation, funds required by the coop's own constitution, and funds allocated by the general meeting.

development and promotion,[8] or the furtherance of co-operative education, training, research and the general development of the co-operative movement.[9] In truth it is probably in correct to characterise such allocations of surplus strictly as indivisible reserves in the sense that they no longer belong to the coop, even though they serve a similar function. They continue to be funds allocated to a specific and restricted cause, over which the coop may have some say as a member or participant in the organisation entrusted with the funds. Because these funds are no longer owned and controlled by the coop, they cease to be available on winding up, whether solvent or insolvent, or on conversion to a company. They therefore remain completely protected, and dedicated to a cooperative purpose.

h. In jurisdictions which make no provision in their cooperative laws for indivisible reserves, the same issue nevertheless arises about what happens to the capital surplus on a solvent winding up, after the payment of all liabilities including repayment of share capital. This is the situation in the UK, for example, where the legislation makes no provision for indivisible reserves. However individual coops can, and many do, provide in their statutes that members are not to be entitled to a share in those reserves on a winding up and that they must be transferred to another coop or specified type of organisation; but statutes can be changed, so whilst this provides an im pediment to demutualisation, it cannot completely protect the assets and so they remain vulnerable.

i. So the questions of indivisibility and asset protection need to be looked at both during the lifetime of the coop, and on a solvent winding up. In addition, coops need to be aware of the possibility of conversion into a limited company, as this provides another mechanism by which the cooperative sector can lose ownership of accumulated reserves. It is therefore necessary to consider whether the laws of member states make provision for what happens to indivisible reserves on a conversion, if that is permitted by their laws.

j. Moving on from the intrinsic or inherent benefits of co-operatives having indivisible reserves, it is appropriate to give some consideration to the question of whether, where national laws which seek to acknowledge and protect cooperative identity, there are other legal benefits or advantages arising from having indivisible reserves. For example, in some states favourable tax provisions effectively encourage the setting aside of indivisible reserves.

4. From an EU perspective

a. There are four matters from an EU perspective that need to be briefly commented on:

i. Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)
ii. A subsequent communication from the Commission to the Council and the European Parliament on the promotion of cooperative societies in Europe;
iii. The PECOL Project; and
iv. A decision of the European Court of Justice about preferential treatment for co-operatives.

Statute for a European Cooperative Society

b. This piece of EU legislation provided for

[8] Table A, Italy – 3% of annual profits

[9] Table A, Malta – 5%

the creation of a supranational legal form suitable for crossborder cooperative operations. An SCE is a legal corporate form with specific rules about the involvement of employees. It can be considered as the cooperative equivalent of the European Company (Council Regulation No 157/2001) and was aimed at ensuring that co-operatives had a level playing field with for-profit companies. The EU was anxious not only to ensure equal relative treatment to companies, but also to contribute to their economic development.

c. It is relevant to note in passing what is stated about co-operatives in the recitals to this legislation, namely as follows:

i. Co-operatives are primarily groups of persons or legal entities with particular operating principles that are different from those of other economic agents. These include the principles of democratic structure and control and the distribution of the net profit for the financial year on an equitable basis.

ii. These particular principles include notably the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion, where the 'one man, one vote' rule is laid down and the right to vote is vested in the individual, with the implication that members cannot exercise any rights over the assets of the cooperative.

iii. …

v. A European cooperative society (… 'SCE') should have as its principal object the satisfaction of its members' needs and/or the development of their economic and/or social activities, in compliance with the following principles:
1. …
5. …, net assets and reserves should be distributed on winding-up according to the principle of disinterested distribution, that is to say to another cooperative body pursuing similar aims or general interest purposes.

d. It is significant to note here that the EU itself expressly recognises the existence of co-operatives as a different form of business, with "operating principles that are different from other economic agents", and implicitly that those principles have a value which is worth addressing in legislation.

There are various features of the European Cooperative Society which it is also worth noting for the purpose of this study.

i. Share capital is variable
ii. A legal reserve fund must be built up, until the point where it is equal to the registered capital
iii. Not less than 15% of available surplus must be paid into the reserve

iv. Members leaving the coop have no claim on the reserve fund

v. The SCE provides for disinterested distribution on a winding up, i.e. distribution to another coop or general interest purposes. However this is not compulsory (a matter of regret)[10], in order to reflect the fact that national laws normally allow alternative arrangements.

e. There is no need to consider this legislation further for present purposes, save to comment that although this legislation has hardly been used, it has important

[10] See the comments of Fici A. on page 146 of International Handbook of Cooperative Law, D. Cracogna, A.Fici and H.Henry (eds.) Springer, Heidelberg, 2013

symbolic and political value, raising the profile and underlining the importance of co-operatives, and highlighting the importance of indivisible reserves and their protection. A comprehensive review of the SCE has been carried out and published in 2010.[11]

Communication on the promotion of cooperative societies

f. Subsequent to the Statute for a European Cooperative Society, the Commission issued a Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, on the promotion of cooperative societies in Europe (Com(2004) 18). This noted that "All co-operatives act in the economic interests of their members, while some of them in addition devote activities to achieving social, or environmental objectives in their members' and in a wider community interest."

g. Having noted that the role of co-operatives had gained renewed interest following the adoption of the recent Statute, the Commission expressed the belief that "the potential of co-operatives has not been fully utilized and that their image should be improved at national and European levels. Particular attention should also be paid to the new Member States and candidate countries, where despite extensive reforms the instrument of co-operatives is not fully exploited."

h. The Commission also noted "the important and positive role of co-operatives as vehicles for the implementation of many Community objectives in fields like employment policy, social integration, regional and rural development, agriculture, etc.
The Commission believes that this trend should be maintained and that the presence of co-operatives in various Community pro grammes and policies
should be further exploited and promoted."

i. The main points of the Communication were:
   i. The promotion of the greater use of co-operatives across Europe by improving the visibility, characteristics and understanding of the sector
   ii. The further improvement of cooperative legislation in Europe
   iii. The maintenance and improvement of co-operatives' place and contribution to community objectives.

j. Whilst it is not of direct legal impact, this Communication contains much that is relevant to this study's subject (such as encouraging Member States to provide for disinterested distribution on a winding up of a coop). This Communication is also referred to by the ECJ in the judgement discussed below.

PECOL Project

k. The output of the PECOL project were published in 2017.[12] A helpful summary of PECOL is contained in a recent review: "The basic idea of PECOL is, as the name states, to determine the general principles that identify, according to European cooperative traditions, the features of a cooperative. It is based on principles and rules that are found in different European jurisdictions and therefore constitutes some kind of common denominator, which ultimately defines what might be understood under the notion cooperative. From this, it clearly follows that PECOL is applicable to European co-operatives rooted

[11] See "Final Study Executive Summary and Part I: Synthesis and comparative report 5 October 2010 the Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)" (accessible at http://base.socioeco.org/docs/sce_final_study_part_i.pdf)

[12] Principles of European Cooperative Law (2017) Intersentia, Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H Münckner and Ian Snaith

in different European jurisdictions. It has to be specified that these principles are meta-principles.

PECOL describes cooperative legal norms. In doing so, PECOL addresses how co-operatives are actually organised and function. The final goal of these principles is to create principles in parallel with European and national law. With this, the authors try to establish patterns that might help to better understand cooperative law.

In this regard, three reasons for establishing PECOL are identified: first, PECOL shall establish a legal cooperative identity. In this context, it has been correctly criticised that the principles established by the ICA are too general. Then, PECOL should work as a pattern for other enterprises and therefore PECOL can be used as a model. Last and not least important, PECOL should be used as a tool to enter into academic debates." Georg Miribung[13]

l. The PECOL Project is therefore aspirational in nature, and does not purport to create something normative or prescriptive. Its relevance in the present context is as a possible baseline against which to consider the specific laws of individual Member States. The relevant section[14] is as follows:

SECTION 3.4
RESERVES

(1) In co-operatives there are mandatory reserves and voluntary reserves.
(2) Mandatory reserves include the legal reserve and other reserves required by law or cooperative statutes, such as the reserve for cooperative education, training and information.
(3) The legal reserve and the reserve for cooperative education, training and information are indivisible, even in the event of cooperative dissolution.
(4) The legal reserve is established by:
(a) a percentage of the net annual cooperative surplus …

m. This extract provides a helpful summary of what national cooperative laws would ideally provide in this area.

ECJ decision

n. As mentioned in the introduction, six EU member states expressly refer to co-operatives in their national constitution. They recognise that coops contribute some thing which private for-profit businesses do not. The Italian constitution, for example, recognises that they operate for mutual benefit, rather than private speculation. The Spanish and Portuguese constitutions expressly seek to support and promote the creation of coops.

o. It will be seen below that those states whose constitutions refer to co-operatives have the most favourable and pro-cooperative laws. The degree of protection of indivisible reserves/capital surpluses against threats from outside the sphere of cooperation is significantly greater than that provided by the other states, with some notable exceptions. This links closely to the question of what individual states do to support and promote coops when their national constitution requires them to do so. The most common approach is to provide tax reliefs, based on indivisible reserves, which are not available to other types of business.

p. This was challenged in Italy under EU law on the grounds that it was contrary to State aid rules. The decision of the European Court of Justice on 8 September 2011 found that such tax reliefs were not necessarily

[13] International Journal of Cooperative Law, Issue 1 2018 at page 191 https://iuscooperativum.org/wpcontent/uploads/2018/08/Issue-1-2018.pdf
[14] At page 83

contrary to State aid rules subject to a number of factors.[15] Essentially, the ECJ found that because co-operatives were at certain disadvantages when compared to other trading entities (lower profit margins than capital companies which are better able to adapt to market requirements), it was justifiable and proportionate to provide tax benefits to them, but not to those other trading entities.

q. The following characteristic of coops meant that they could not, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies:

i. Registration as cooperative societies conforms to particular operating principles which clearly distinguish them from other economic operators.
ii. The primacy of the individual, which is reflected in the specific rules on member ship, resignation and expulsion.
iii. Net assets and reserves should be distributed on winding-up to another cooperative entity pursuing similar general interest purposes.
iv. Cooperative societies are not managed in the interests of outside investors.
v. Control of co-operatives should be vested
equally in members, as reflected in the 'one man, one vote' rule.
vi. Reserves and assets are therefore com monly held, non-distributable and must be dedicated to the common interests of members.
vii. As regards the operation of cooperative societies, in the light of the primacy of the individual, their activities should be conducted for the mutual benefit of the members, who are at the same time users, customers or suppliers, so that each member benefits from the cooperative's activities in accordance with his participation in the cooperative and his transactions with it.

r. This judgement took note of a number of things, including the European Cooperative Statute, the Communication referred to above, and the positive comments about coops in the Italian constitution. But the presence of indivisible reserves, which are not distributable to members on a winding up, was also a significant factor.

5. Summary of EU member states' approach to indivisible reserves

a. This section aims to set out a summary of the responses to the 10 questions referred to in the introduction above, as those responses have been collected in the main Tables A and B, and summarised in summary Tables A and B. Those responses are based on considering the texts and sources referred to in the first column of each of those main tables.

Question 1: Does the national constitution refer to co-operatives?	
Table A	All 6 states do
Table B	None of the 23 states do

b. This question sets the context in relation to individual Member States and their approach to co-operatives. As explained in the introduction, previous research[16] has already answered this question, and the results of that research are that all the national constitutions of the 6 states in Table A make reference to co-operatives (21%); and

[15] Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze (C-79/08) and Ministero delle Finanze v Michele Franchetto (C-80/08) Court of Justice of the European Union, 8 September 2011 (C-78/08 to C-80/08) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0078&from=EN
16 National Constitutions and Co-operatives: an overview, Ifigeneia Douvitsa, International Journal of Cooperative Law, Issue 1 2018 at page 128 https://iuscooperativum.org/wp-content/uploads/2018/08/Issue-1-2018.pdf page 128

the other 22 states (plus Norway) listed in Table B do not. Taking all European countries into consideration, the figures is 8 out of 43 countries (19%).[17]

c. I do not seek to comment further in relation to this feature, save to quote from Douvitsa's own conclusions in relations to two states she considered specifically:

The strong commitment to cooperative principles found in the Portuguese constitution and the protection of mutual purpose by the Italian constitution became central points of the cooperative law in each country, despite some noted deviations. The Italian and Portuguese supreme laws, to the extent that they offer constitutional protection of certain aspects of cooperative identity, can be considered as tools to realise ILO Recommendation 193/2002's call on legislators to safeguard the co-operatives' particular traits.

Question 2: Are there separate laws to govern coops?

Table A	Yes in all 6 states
Table B	Majority (22 of 23) of states do 1 (Denmark) doesn't

d. This question is asked as a baseline question to establish to what extent the legislature in Member States takes cognisance of co-operatives within their national economies and expressly seek to make provision for them through a cooperative law. Subject to a qualification explained below, I am using the term "cooperative law" as described by Fici[18] as follows: "Strictly speaking, cooperative law is the organizational law of cooperative entities – which, depending on the jurisdiction, are termed 'cooperative societies', 'cooperative associations', 'cooperative companies', 'cooperative corporations' or simply 'co-operatives' (which are alternatives that do not necessarily carry legal implications). It thus consists of rules on the definition, formation, organizational and financial structure, allocation of surplus, operations, relations among constituencies and among co-operatives, dissolution, merger, demerger and conversion, variedly distributed throughout a text (or, sometimes, more than one legal text)."[19] The study does not separate out whether the relevant laws are primary or secondary legislation, or civil codes; simply whether there is formal legislation specific to co-operatives and providing a framework for a cooperative law.

e. All of the states listed in Table A have separate laws for coops. Similarly, all but one of the states listed in Table B also have separate laws for coops, with the exception of Denmark where the coop sector has twice resisted attempts to legislate. Although the UK and Ireland are included as states with cooperative laws, their position is somewhat ambivalent.[20] Whilst their laws provide a mechanism by which co-operatives can be registered as legal entities separate from companies,
neither has legislation which fully meets the criteria described by Fici as follows.

f. Until 2014, the UK had laws known as the "Industrial and Provident Societies Acts", which date back to the historic legislation introduced in 1852, during the same period when company law was also taking shape, to provide an alternative legal basis for registration for the Rochdale Pioneers and the many other such cooperative societies established on similar lines. However this legislation did not expressly refer to "co-operatives" and did

[17] This makes Europe the "least cooperative" continent. By way of comparison, Africa has 14 out of 54 (26%), Asia has 20 out of 48 (41%), and the Americas have the most with 20 out of 35 (57%)

[18] Fici, A. (2014), The Essential Role of Cooperative Law, The Dovenschmidt Quarterly December 2014 no. 4

[19] Fici, A. op. cit.

[20] Netherlands is another state which could be argued either way as it now does not have a separate law for co-operatives as they are covered in the Netherlands Civil Code on Legal Persons. However this includes much that was in previous cooperative law, and so is considered to provide a legal framework for co-operatives.

not seek to capture a sense of cooperative identity. It was not until 1939 that the word "co-operative" appeared in legislation, but the term was still not defined. Although the legislation was consolidated in 2014 into a new law called "The Cooperative and Community Benefit Societies Act 2014", this did not change the underlying and substantive law,
which therefore still does not provide any legal definition of co-operatives or protect cooperative identity (see further in next section). Unlike the other states, the UK does not therefore have bespoke laws for co-operatives specifying cooperative characteristics. Instead the matter is left to the registrar's discretion as to what is registered as a "bona fide cooperative". Guidance makes it clear how the registrar will interpret this phrase by reference to the ICA Statement, but none of it is enshrined in law.[21] Co-operatives can register using various different forms including companies.

g. In Ireland, their laws are based on those of the former United Kingdom before the Irish Republic was established in 1922. This means that they have the old Industrial and Provident Societies legislation before it was substantially changed in 1939, and so there is no reference at all in their laws to the word "cooperative". But as with the UK, this legislation exists alongside but separate from company law, and so for the purposes of this study Ireland and the UK are treated as having a cooperative law, if a somewhat limited one.

Question 3: Are co-operatives defined?

Table A	Yes in all 6 states
Table B	Yes in majority of states (21 of 23) No in 2 states: Ireland and UK

h. This might seem to be something of a l awyer's question (it is), but it is important. Where there is no definition in legislation, it is likely to be less easy to make specific provision about co-operatives in other areas of national legislation where co-operatives might have a role to play, or justify different treatment. This is because there is uncertainty about precisely what is being referred to. It is also unhelpful to cooperative identity, and may result in no (or limited) protection of the word "cooperative", leaving it open for the word to be used loosely, whether appropriately or not.[22] See also further below in section 6.

i. Co-operatives are defined in the laws of all of the states in Table A, and most of those in Table B. In the latter, there are only two exceptions: Ireland and the UK. In the UK, as mentioned above legislation requires the registrar to be satisfy that a society is a "bona fide cooperative society", and leaves it to the registrar to set out the criteria to be fulfilled for this.[23] Because Irish law predates the introduction of the requirement to be a bona fide cooperative into UK law in 1939, it makes no mention of co-operatives.

Question 4: What is the nature of capital?

Table A	Variable in all 6 states
Table B	Variable in all 23 states

j. This question was included in the original list in order to check whether in all cases capital is variable, or whether in any of the States it was fixed. This could be relevant in addressing questions related to indivisible reserves; for example (as set out in section 2 above) indivisible reserves provide a counterbalance to variable share capital. It is all

[21] See the FCA Finalised Guidance at https://www.fca.org.uk/publications/finalised-guidance/fg15-12-guidancefca%E2%80%99s-registration-function-under-co-operative-and and its use of the ICA Statement in chapter 4 – and especially paragraph 4. The FCA can deny or end registration under CCBSA 2014

[22] In the UK for example, some protection is given in company law to the use of the word "co-operative" (see CA 2006 ss. 55 & 1194 and SI 2014/3140, reg. 3 and sched. 1 part 1); and other relevant words have some protection. But the word "cooperative" does not have specific legal status, or identify specific entities over against companies.

[23] See above. The introduction of this Guidance was of great assistance to co-operatives in the UK.

too easy to approach this subject from an assumption that fixed capital is the norm or the "natural" state, because of the predominance in commercial organisations of companies which have fixed capital. But both company law and cooperative law were emerging at a similar time, alongside key principles such as limited liability, and the two types of legal structure took two different pathways.[24] So when approaching this subject it is important to avoid making assumptions based on company law.

k. In the cooperative sector, open and voluntary membership is commonly considered to be fundamental, and the ability for a member to leave the cooperative and take their money with them needs to be provided. This may be at the root of the fact that in all states considered, capital is variable not fixed. The legal arrangements for co-operatives needed to fit around the evolving types of organisational arrangements being developed, and so it is no surprise therefore that the capital of co-operatives was/is variable. This tends to be one of the biggest differences (surprises) encountered by those coming to co-operatives for the first time from a company background.

l. In a number of jurisdictions, there is a requirement for minimum levels of capital, and in some there is reference to "registered capital", and provisions for increasing or reducing it. For example in Romania, the founding document of a coop must specify (amongst other things) the subscribed and the deposited share capital, with special mention of each member's contribution; and thereafter an Extraordinary General Meeting is needed to approve an increase or reduction. However capital is still expressly variable.

m. It seems that the situation of the UK where a member's share account was historically more like a deposit account, with freedom to deposit and withdraw funds subject to the rules, may be unusual. It is more common to find that there is a specified minimum amount which members must subscribe, with the option to subscribe other amounts. In other words, the ability to deposit and withdraw was more restricted. This question has not been researched further.

Question 5: Are "investor members" permitted?

n. This question was included for several reasons:

i. the possibility of investor members was included in the European Cooperative Statute;
ii. this raised the possibility that national laws would need to make provision for it;
iii. this might have some relevance on the question of indivisibility.

o. In some states (e.g. Germany, Netherlands) this is expressly permitted subject to restrictions over their voting rights to ensure control by cooperative members. In some states, profit maximising is specifically forbidden so no external equity is permitted (e.g. Denmark). In a few states, investor members are either forbidden or not possible for some specific reason (e.g. Poland). And in some cases it is not permitted for certain types of coop (e.g. social coops in Hungary).

p. However it is difficult to draw any significant conclusions, not least because in at least 10 of the States there appears to be no reference to the issue in legislation, making it difficult to conclude whether or not it might be legally possible. In any event, no

[24] See a summary of the emergence of UK cooperative law up to 1900 at the Co-operative Archive: Acting on Principle, (unattributed, but by Mills C.) https://www.archive.coop/hive/acting-on-principle

apparent connection with the question of indivisibility has been found.

Question 6: Must a proportion of surplus be set aside to reserves?	
Table A	Yes in all 6 states
Table B	Yes in majority (17 of 23)
	No in a minority (6): Austria, Czech Republic, Denmark, Ireland, Norway, UK

q. This is the central question in the context of this study. All 6 states in Table A have this requirement; and 17 in Table B have such a requirement; but 6 do not. So to summarise, in 23 states (including Norway), a coop is required to set aside a portion of its surplus to a reserve fund, which is thereby out of the reach of its members individually. Consequently, if members are to leave the coop, although they will normally be entitled to withdraw their subscribed capital, they will not have any right to a share in such indivisible reserves. Indivisible reserves are therefore held in common ownership during the life-time of the cooperative in all these states.

r. So out of the 23 states where reserves are indivisible during the lifetime of the coop (Question 6 above), only 9 states (or 10 if Greece is also counted) maintain those reserves as indivisible on winding up (Question 7).

s. There are six states in Table B where it is not prescribed in law, but the matter is left to the statutes of individual coops: Germany, Lithuania, Luxembourg, Netherlands, Norway and Slovenia. In these states, co-operatives may therefore provide for some form of disinterested distribution; but of course where the general meeting can amend the statutes, then unless there is some other legal protection preventing this, the members can change the statutes so that they can personally benefit from the winding up. This is also the case, for example, in the UK where retail consumer societies voluntarily adopt provisions for disinterested distribution, but which remain capable of being changed.[25]

t. It should be pointed out that behind this somewhat high level review, there are some very important additional issues which need

Question 7:	Are reserves indivisible on winding up?
Table A	Yes in 4 states (Italy, Malta, Portugal and Spain); and in some types of coop in Greece
	No in Bulgaria, and in some types of coop in Greece
Table B	Yes in 5 states (Croatia, Cyprus, France, Hungary, Romania)
	No in 12 states; a matter left to statutes in 6 states (Germany, Lithuania, Luxembourg, Netherlands, Norway and Slovenia);

[25] Their rules generally provide that on a solvent winding up, after reimbursement of share capital any surplus will not go to members, but should go to another cooperative or remain within the movement.

to be mentioned. For example:

i. In some states, there is a clear distinction between "surpluses" generated out of the trade with members and out of which a patronage refund can be paid and allocations to indivisible reserves cannot be made, and "profits" generated by trade with non-members which may be available to pay interest on capital, allocation to indivisible reserves and for other purposes, but not for a patronage dividend. However different language is used in different states, with the result that different approaches may apply to the source from which e.g. indivisible reserves and patronage dividends may be drawn.

ii. In some cases, there is an obligation to transfer funds to another organisation which is a separate legal entity from the coop itself e.g. Italy (3% to Mutual Funds), Malta (5% to Central Cooperative Fund). This is effectively the most powerful way of putting funds beyond the reach of predators and committing them to cooperative purposes; though of course subject to its interest in or membership of any such external body, the coop loses direct control over those funds and they no longer constitute indivisible reserves.

iii. In some states there is explicit provision in the laws requiring residual funds on winding up to be transferred elsewhere other than to members (e.g. Romania); or forbidding such funds from being divided amongst members (e.g. Malta). Again this is a strong form of protection.

Question 8: is conversion to a company permitted?

Question 9: Are indivisible reserves protected on conversion to a company?

u. These two questions go together, and arise because conversion to a company is one of the possible legal mechanisms for demutualising coops and taking over its assets. The first question needs to be asked, because conversion is not universally permitted. The second question only follows if conversion is permitted or not forbidden. Protection of reserves on conversion is only likely to be included where legislators have specifically made provision for conversion itself.

Question 8 and 9:	Is conversion to a company permitted? Are indivisible reserves protected on conversion?
Tables A and	In only 9 states are reserves protected on conversion; 6 of these permit conversion but protect reserves; 3 forbid conversion.
B	In the remaining 20 states, there is no protection of reserves, and conversion is either expressly permitted, or not specifically prohibited

[24] See a summary of the emergence of UK cooperative law up to 1900 at the Co-operative Archive: Acting on Principle, (unattributed, but by Mills C.) https://www.archive.coop/hive/acting-on-principle

v. Of the 29 states considered, in only 9 cases are indivisible reserves effectively protected in the event of conversion. In the cases of Greece, Italy, Spain, Croatia, France and Hungary, conversion is permitted, but in such event indivisible reserves are protected; in the case of Austria (where indivisible reserves are voluntary), Cyprus and Portugal, conversion is expressly prohibited, and so reserves are effectively protected by the prohibition.

w. In all the remaining 20 states conversion is either expressly permitted; or there are no provisions in relation to conversion, in which case the possibility of conversion cannot be ruled out. Since reserves are not protected in any of these States, the assets of the coops in these cases may be at risk.

Question 10: What are the legal advantages of indivisible reserves?

x. The purpose of this question was to establish whether, in addition to the intrinsic or inherent merits of indivisible reserves (including protection of assets), there are any other particular legal advantages of having indivisible reserves in particular States. Given the nature of this question and its potential breadth, the answers provided can only be treated as indicative; but they do give some idea of the picture.

y. In the cases of France, Hungary, Italy and Spain, funds set aside from surplus to indivisible reserves are partially or wholly exempt from tax. This is not the case in any of the other states which require funds to be set aside to indivisible reserves. In these four states but also in some others (Finland, Malta and Portugal), other tax advantages are available for coops. But in most cases, there are limited, minimal or no tax advantages for co-operatives either from having indivisible reserves (whether or not protected on insolvency) or generally.

6. Drawing some conclusions

5. The key points from above can be summarised as follows:

i. There is significant variation between states across most of the 10 questions above
ii. On the main question, a majority of states (23) require funds to be set aside to indivisible reserves
iii. Fewer (10) protect such reserves on solvent winding up
iv. Only 8 of these states protect such reserves in relation to conversion
v. Most states have their own cooperative law, and define co-operatives in legislation
vi. Share capital is variable in all the states considered

Some more supportive of indivisible reserves

a. From the analysis above, it can be concluded that a group of 10 states go further than others in requiring and protecting indivisible reserves, and generally supporting co-operatives. They all have separate co-operative laws, define coops in legislation, require a proportion of surplus to be set aside to reserves, and protect those reserves on winding up; the majority also protect reserves on conversion. They are supportive of co-operatives, and regard the protection of indivisible reserves as important.

b. This group includes 5 of the Table A states

[25] Their rules generally provide that on a solvent winding up, after reimbursement of share capital any surplus will not go to members, but should go to another cooperative or remain within the movement.

whose constitutions refer to co-operatives; Bulgaria is the only state from this group where there is no requirement for the allocation of surplus to reserves, and no protection of assets on winding up. But this group of more supportive states also includes 5 of the Table B states whose constitutions do not refer to co-operatives. So it can be argued that having constitutional recognition of co-operatives makes it more likely that states will have more supportive cooperative laws; but it does not follow that without such recognition, a state will not have supportive cooperative laws.

Some less supportive of indivisible reserves

e. There is another group of 5 states which are essentially at the other end of the spectrum, in providing no protection at all to cooperative reserves and generally being less supportive of co-operatives. All of these states are from Table B. Of these 5 states, one does not have cooperative laws at all, and 2 do not define "cooperative" in their legislation or fulfil all the requirements for a cooperative law as described by Fici above. None of these 5 require part of the surplus to be allocated to reserves or provide any protection to surplus assets on a winding up or conversion to a company. In these states, there is no long-term protection of cooperative assets.

Member state	1. Does national constitution refer to coops?	2. Are there separate laws to govern coops?	3. Are coops defined?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on winding up?	9. Are indivisible reserves protected on conversion to a company?
Greece	Yes	Yes	Yes	Yes	Yes for some coops	Yes for some coops
Italy	Yes	Yes	Yes	Yes	Yes	Yes
Malta	Yes	Yes	Yes	Yes	Yes	No provision
Portugal	Yes	Yes	Yes	Yes	Yes	Yes (conversion forbidden)
Spain	Yes	Yes	Yes	Yes	Yes	Yes
Croatia	No	Yes	Yes	Yes	Yes	Yes
Cyprus	No	Yes	Yes	Yes	Yes	Yes (conversion not permitted)
France	No	Yes	Yes	Yes	Yes	Yes
Hungary	No	Yes	Yes	Yes	Yes	Yes
Romania	No	Yes	Yes	Yes	Yes	No provision

j. Whilst this group of states certainly includes some that are known to have strong cooperative sectors (Italy, Portugal, Spain), this study does not attempt to determine whether there is a correlation between having more supportive cooperative laws in relation to indivisible reserves and the strength of the national cooperative economy. Many other factors clearly play a part in this.

Member state	1. Does the constitution refer to coops?	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	9. Are indivisible reserves protected on conversion to a company?
Czech Republic	No	Yes	Yes	No	No	No provisions
Denmark	No	No	Yes	No	No	No
Ireland	No	Yes	No	No	No	No provisions
Norway	No	Yes	Yes	No	Up to the statutes	[Unclear]
UK	No	Yes	No	No	No	No

f. As with the more supportive group of states referred to above, this study makes no attempt to determine whether there is any correlation between having comparatively less supportive cooperative laws in relation to indivisible reserves and the comparative strength of the national cooperative economy.

So what?

g. The basic finding that there is such a wide variation between the 29 states in relation to indivisible reserves, and the supportiveness of their laws towards co-operatives, is not exactly dramatic. But does it matter? Is it important to have supportive cooperative laws – are they essential to the development of co-operatives?

a. This question was considered in depth by Fici in his article already referred to.[26] He concludes that "the essential function of cooperative (organizational) law is to recognize and preserve the distinct identity of co-operatives relative to joint-stock (for-profit) companies. This function of cooperative (organizational) law is 'essential' inasmuch as workable substitutes for it could not be found elsewhere in the law and is 'specific' in comparison to the general, essential function(s) of company law."

a. He goes on to conclude that "a definite, distinct legal identity of co-operatives is increasingly being seen by the cooperative representatives as a precondition for the cooperative defence and growth, also in light of the fact that a particular legal identity may justify a specific policy regime of co-operatives, especially under tax law. Once that the distinguishing traits of co-operatives are recognized by law, it becomes easier for cooperative advocates to invoke policy measures in favour of co-operatives and for the state to justify these policies in light of the principle of equal treatment."

a. So the preservation and promotion of cooperative identity are essential requirements for developing co-operatives, and legislation is the foundation upon which such identity is built in individual states. For the reasons explored in this study, indivisible reserves play a sufficiently significant role in defining that identity and in distinguishing co-operatives from other forms of ownership that the concept was re-introduced by the ICA in 1995, that it is included in the cooperative law of the majority of states considered, and it is both a feature of the SCE and the PECOL project. Where national laws do not adequately

[26] Fici, A. (2014), The Essential Role of Cooperative Law, The Dovenschmidt Quarterly December 2014 no. 4

protect cooperative reserves, they are left open to attacks by predators, endangering both substantial existing ventures which help to preserve corporate diversity, and losing the accumulated capital from previous generations which should remain dedicated to cooperative endeavours.

h. Based on these arguments, the wide variation in how the 29 states treat indivisible reserves is obviously a source of concern amongst cooperators. It should be of concern to the EU, given its broad support of co-operatives as evidenced by: the European Cooperative Statute which was aimed at ensuring that co-operatives had a level playing field with for-profit companies; the subsequent 2004 Communication on the promotion of co-operatives; the funding of research by EURICSE on the implementation of the European Cooperative Statute commenced in 2009; and its funding of the subsequent PECOL project.

i. It should also clearly be of concern to those individual states which recognise the need and wish to strengthen and grow their co-operative economy for a variety of reasons including:
- To reduce the dominance by and dependence on investor-ownership, with a view to building more resilient economies through greater corporate diversity
- To change the drivers in law-making to be more focussed on future generations and protection of the environment, rather than on wealth-creation for today
- To enable cooperative initiatives to have the opportunity to address major challenges which governments and markets struggle to address efficiently, including human services, and the ownership of utilities, data, and property
- Specifically to support collaborative endeavours between citizens to meet their own needs, rather than relying on markets and governments.

j. So what actions should therefore follow?

7. Recommendations

Constitutional recognition

a. Reference to co-operatives in national constitutions (supreme or foundational laws) is desirable, but clearly a long-term matter, and opportunities to support co-operatives in this way are likely to arise infrequently. However, other approaches are possible. The fundamental issue is to address the default setting commonly adopted by governments (not always intentionally) when legislating in relation to any trading activity, namely that they are dealing exclusively or mainly with investorownership. Whilst investor-ownership is the dominant and most familiar basis for business, governments should be open to the possibility of other corporate purposes than profit maximisation, and other forms and models of business, including co-operatives and other forms of democratic or locally accountable business.

b. Alternatives to recognition in national constitutions might include:

i. Recognising in ordinary legislation the existence of a range of different corporate purposes, including in particular co-operatives and the values and principles on which they are based

ii. Requiring the promotion of corporate diversity by government departments responsible for business. This could include establishing/revising standard procedures when assessing the impact of all new legislation to make sure that all corporate purposes and forms are considered and appropriately treated.[27]

iii. Requiring in legislation in particu-

[27] This is one of the recommendations in Co-operatives Unleashed, New Economics Foundation 2018, Lawrence M., Pendleton A. and Mahmoud S. which can be found at https://neweconomics.org/uploads/files/co-ops-unleashed.pdf

lar sectors such as energy, or care, that co-operatives should be specifically considered[28]

A Cooperative Law

c. As argued powerfully by Fici referred to above, having a cooperative law which protects cooperative identity relative to investor-owned companies is essential, and a precondition to "defence and growth". This point is affirmed in relation to the UK in Co-operatives Unleashed29 where it is stated: "Our research finds that co-operatives and the wider cause of democratising and more evenly spreading the benefits of enterprise are held back due to an absence of legislation and policy, institutional support, advice, incentive and promotion. With an economy that does nothing to help co-ops thrive and everything to create a hostile environment for models of co-operation, it is unsurprising that the UK has one of the smallest sectors of any country."

d. Where states wish to encourage the development of co-operatives, changing national laws to recognise and accommodate cooperative enterprise establishes an important foundation for other legislation to provide appropriate support and encouragement to establish or explore cooperative approaches. Cooperative law has an important role to play, both in helping to define and protect cooperative identity, and providing the basis for the appropriate treatment of co-operatives elsewhere in legislation including in relation to tax and competition law. This can also be an incentive for citizens, through self-help, to cooperate to meet their changing needs, and to rely less upon the state or markets to provide essential services.

e. If it is to be effective in supporting and promoting a healthy cooperative economy, cooperative law needs to be regularly reviewed and updated at state level, by every individual state to ensure that it meets changing needs. This has been normal in relation to company law for many years. For example in the UK, company law is generally reviewed comprehensively every 25 years or so (1925, 1948, 1985, 2006), involving a careful consideration of what changes are needed to enable companies to be as efficient and effective as possible. No such review has ever taken place in the UK for cooperative law. It needs to, in all states.

Defining co-operatives

f. Without providing a definition of co-operatives in national law, there is no legal certainty, and no clear basis for appropriate policy making. Organisational laws (company law, cooperative law) need to set out the essential features which are necessary to achieve the corporate objective or purpose. By setting out these essential features for the corporate purpose, the organisational laws thereby create and define the identity. It is not sufficient to have internationally recognised principles (such as the ICA statement) unless the core features are anchored in national organisational laws. Without that, an organisational form will lack an identity. "In other words, when a legal entity, or category of legal entities, has a defining feature that relates to the objective pursued – whether negative (the profit non-distribution constraint that qualifies nonprofit entities) or positive (the mutual purpose that qualifies co-operatives) – the organizational law of that entity, or category of entities, plays the essential role of defining their particular identity in light of the objective pursued."[30]

Indivisible reserves, variable capital

[28] A good example of this is in Wales, where The Social Service and Well-being (Wales) Act 2014 expressly requires the promotion of co-operatives and certain other types of organisation (section 16).

[29] See previous footnote

[30] Fici, A. (2014), The Essential Role of Cooperative Law, The Dovenschmidt Quarterly December 2014 no. 4

g. Indivisible reserves play a significant part in defining cooperative identity. Reference was made above to the removal of indivisible reserves from the ICA principles, and their subsequent reintroduction because, in the words of Ian MacPherson, "many co-operators have lost sight of the importance of commonly owned capital, as a symbol of co-operative distinctiveness, as a security for its financial growth, and as a protector in times of adversity."

h. But arguably indivisible reserves provide a more fundamental role than that. In the laws of all of the states considered, cooperative share capital is variable. This is in direct contrast to company law, in which capital is basically fixed, though increasingly mechanisms are being introduced to enable capital to be more variable. But such measures have to take account of the need to protect creditors, for whom fixed capital otherwise provides basic protection. In co-operatives with variable capital, indivisible reserves provide some protection to creditors. So requiring co-operatives to set aside funds to indivisible reserves not only reinforces the concept of commonly owned capital among the members, it also helps to build their business credibility and creditworthiness when compared with companies.

i. The recommendation is to implement the PECOL provisions in relation to setting aside indivisible reserves.

Protecting reserves

j. As well as specifically requiring indivisible reserves to be set aside, the subsequent protection of those reserves is also highly significant. The appreciation of the importance of corporate diversity has increased greatly as a result of the economic crisis ten years ago. Protecting organisations and assets which have been built up by people over generations in support of a particular purpose is not only important in order to give effect to those peoples' legitimate intentions. Protecting such organisations and assets should be a matter of public policy for wider public benefit. In particular, protection against changing the corporate purpose is essential. Where organisations have served their useful purpose and are to be wound up, allowing their surplus assets to continue to be committed to the particular purpose is simply completing the purpose of supporting such organisations in the first place. Likewise, where founders wish to allow the possibility for future generations to "cash in" on the organisation, they should have the freedom to do so.

k. These issues are too important to be left to chance. States should legislate clearly so that everybody knows what the position is in dealing with individual organisations. Just because companies have a well-known and understood failure and winding up regime, it should not be assumed that other types of corporation should follow suit. Those establishing organisations should ensure that they address the question of the destination of any surplus assets beyond the life of the organisation itself. Protection needs to be provided both on the winding up of co-operatives, but also on any other process of change of purpose permitted by national legislation, such as conversion into or take-over/purchase by an investor-owned company.

l. The recommendation, as above, is to implement the PECOL provisions.

Recommendations for EU

m. It has been pointed out that the EU is itself supportive of co-operatives as another form of business, as evidenced by its own legislation, the European Cooperative Statute, and the Communication referred to above. It is committed to the promotion of the greater use of co-operatives across Europe by improving the visibility, characteristics and understanding of the sector; the further improvement of cooperative legislation in

Europe; and the maintenance and improvement of co-operatives' place and contribution to community objectives.

n. Since the establishment and maintenance of cooperative law is primarily a matter for individual states, the EU therefore has an important role to play in supporting and encouraging member states to optimise their own cooperative law. The PECOL project is an important example of valuable work which can be undertaken to advance the European cooperative agenda, and it provides an important and helpful tool for individual states. This should be built upon further.

o. But there is another important role for the EU to fulfil. Cooperation is a world-wide movement; cooperation between co-operatives is one of the underlying principles, and both supporting and enabling cooperation within member states and within the EU as a whole are important. This means continually keeping under review, at transnational level as well as at individual state level, the extent to which other laws (tax, regulation, competition) work in favour of investor-owned enterprise and/or to the detriment of co-operatives. The EU's own laws and regulations must be kept under continual scrutiny to ensure that this does not happen.

Final comments

Both in Europe and beyond, faith in democracy is at a low ebb. There are many contributing factors to this, not least the worrying level of politically unaccountable corporate power, which challenges the very sovereignty and even the relevance of smaller states. We should not be surprised if the sight of banks and other large businesses regularly getting away with scandalous behaviour, contributes to broader disillusionment with established institutions, fuelling more extreme electoral reactions.

Co-operatives are important, and different. Substantial entities trading for broader social purpose and differently accountable, smaller local enterprises empowering local people and meeting local needs, and the greater prominence of democratic control in the operation of businesses could all help to change the narrative, and reclaim the rightful place of individuals rather than money and class which still control modern society. The dominance of investor-owned business is one of today's major challenges.

Cooperative law may be particularly important in this context, in raising awareness about the role of business, improving its robustness and credibility, and providing incentives which encourage the start-up and development of businesses designed to meet the needs of people, rather than capital.

But it is important also for the future of the EU and its member states in addressing urgent challenges which governments struggle to meet, and where private ownership does not provide a solution or threatens to undermine democracy, including:

- the health and well-being of its citizens
- climate change
- information and communications
- the changing nature of work/employment.

Cooperative law is important, and for it to succeed, so are indivisible reserves.

Appendix 1

Extract from ICA Guidance Notes on the Co-operative Principles

https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf

The 1995 general assembly of the Alliance that approved the elimination of the strict limits on remuneration of co-operative members' capital contributions also, by amendment, introduced the notion of collective

ownership of capital. This amendment was tabled by the French delegation, which was keen to ensure that the concept of collective ownership, so important to workers' co-operatives, did not disappear. The idea of the collective ownership of capital by co-operatives, like a number of the Co-operative Principles, can be traced back to the ***"Regulations for co-operative societies unanimously adopted at the 3rd Co-operative Congress held in London in 1832 and chaired by Robert Owen".*** Their regulations included the following:

> ***"In order to ensure without any possibility of failure the successful consummation of these desirable objectives, it is the unanimous decision of the delegates here assembled that the capital accumulated by such associations should be rendered indivisible, and any trading societies formed for the accumulation of profits, with a view to them merely making a dividend thereof at some future period, cannot be recognised by this Congress as identified with the co-operative world, nor admitted into this great social family which is now rapidly advancing to a state of independent and equalised community."***

Professor Ian MacPherson, Dean of the Centre for Co-operative and Community Studies at the University of British Columbia at Victoria, Vancouver Island, Canada, served on the Alliance's committees and wrote the Alliance's guidance to the 1995 reformulation of the Principles. Ian, a delightful and dedicated co-operator, sadly now deceased, explained at the time:

> ***"Similarly, the Third Principle, which deals with members' economic participation, is strongly situated within the member perspective. It is different from the two previous principles on the financial operations of the co-operative in several respects. It is called "Member Economic Participation". It emphasises the vital importance of members controlling the capital of their organisation, and indicates that they should receive limited compensation on the capital they subscribe as a condition of membership. The principle allows for a market return on capital otherwise invested by members. As for capital emanating from other sources, one would have to consider the implications of attracting such capital in light of the Autonomy Principle: the key concern must always be to preserve the capacity of the members to decide the fate of their organisation.***
>
> ***There was much debate over the inclusion of a reference to indivisible reserves. The 1966 formulation did not refer to this normal aspect of co-operative economic structure perhaps because the matter had become increasingly complex and practices were beginning to vary. The unfortunate result had been that many co-operators have lost sight of the importance of commonly owned capital, as a symbol of co-operative distinctiveness, as a security for its financial growth, and as a protector in times of adversity.***
>
> ***The problem of including a reference to indivisible reserves has been finding the best wording for a limited space. After much discussion at two meetings, the board decided … that the most appropriate wording, suggested at the European Region meeting, was to make two additions. The first was a sentence: "At least part of that capital is usually the common property***

of the co-operative". The second was to indicate that members, in allocating part or all of the co-operatives' surpluses, should consider setting up reserves, "part of which at least would be indivisible."[31]

This background to the debate on the formulation of this 3rd Principle shows that the key economic concept enshrined in it is that in a co-operative capital is the servant, not the master of the enterprise. The whole structure of co-operative enterprise is designed around the concept of capital being in service of people and labour, not labour and people being in servitude to capital. The key question addressed in this 3rd Principle is: "How do we make this work?" Like everything to do with money, this 3rd Principle is the most sensitive and challenging part of the Co-operative Principles, though not necessarily the most important. Indeed, this 3rd Principle is mainly a financial translation of the definition of the identity of a co-operative and of the financial implications of the 2nd Principle of Member Democratic Control.

Given the huge scale and diversity of co-operative enterprise, this 3rd Economic Principle is, necessarily, one that has many caveats to its practical application; caveats shown by "at least" and "usually" in the wording of the Principle. These practical caveats have steadily been incorporated into this 3rd Principle in order to cover the significant range of different practices of co-operatives.

[31] Ian MacPherson; "Co-operative Principles", ICA Review, Vol. 88 No. 4, 1995. in www.uwcc.wisc.edu/icic/orgs/ica/pubs/review/ICA-Review-Vol--88-No--4--19951/

Summary Table A of Member States with constitutional recognition of co-operatives

	Member state	1. Does the constitution refer to coops?[1]	2. Are there separate laws to govern coops?	3. Are coops defined?	4. What is the nature of capital?	5. Are "investor members" allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
1	Bulgaria	Yes	Yes	Yes	Variable	No provision	Yes	No	No provision	No provisions	Some tax relief
2	Greece	Yes	Yes	Yes	Variable	No provision	Yes	Yes for some coops	No general provision, yes for some	Yes for some coops	Limited tax relief
3	Italy	Yes	Yes	Yes	Variable	Yes	Yes	Yes	Yes	Yes	Tax reliefs
4	Malta	Yes	Yes	Yes	Variable	No provision	Yes	Yes	No provision	No provision	Tax reliefs
5	Portugal	Yes	Yes	Yes	Variable	Yes	Yes	Yes	No, forbidden	Yes (conversion forbidden)	Tax reliefs
6	Spain	Yes	Yes	Yes	Variable	Yes	Yes	Yes	Yes	Yes	Tax reliefs

1 See Main Table A (Appendix 3) for explanation of sources, and further information about individual questions

Indivisible reserves: main table of Member States with constitutional recognition of co-operatives (Table A)

	Member state, legislation text/scholar on which this table is based[1], and latest date	1. Does the constitution refer to coops?[2]	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are "investor members" allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are capital surplus/indivisible reserves protected on a winding up?	8. Is conversion to a company permitted?	9. Are capital surplus/indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?[3] [4]
1	Bulgaria Cooperative Societies Act 1999, amended up to SG 43 of 29.04.2008	Yes. The 1991 constitution following the revolution provides in article 19(4) "The law shall establish conditions conducive to the setting up of co-operatives and other forms of association of citizens and legal entities in the pursuit of economic and social prosperity." In 2003, a new article 1a was inserted into the cooperative legislation (see next column) under the heading "Support and encouragement from the State" as follows: "The state can support and promote the cooperative societies in their activities under conditions and in conformity with rules set in the relevant special laws."	Yes. Appears to be legislation dated 1999 covering the establishing of co-operatives under Bulgarian law, and also of the establishment of an ECS	Yes. "A cooperative is an association of natural persons with variable capital and variable number of members who shall engage in activities based on mutual assistance and cooperation to satisfy their economic, social and cultural interests."	Variable.	Appears to be no reference to investor members, so unclear whether permitted or not.	Yes. There is provision for a compulsory reserve fund of not less than 20% of the subscribed capital, and a compulsory investment fund of not less than 10%. After that, it is for the general meeting to decide the distribution of dividends to members and for other purposes in connection with the activities of the coop. The general meeting decides the level of interest to be paid on members' loans, but there is no mention of payment of interest on share capital.	No. On a solvent winding up, unless the statutes provide otherwise, the residual assets are distributed to the members in proportion to their prescribed shares.	No, it is not provided for in legislation.	No provision	None. However there are some other advantages for coops. In the coop legislation there is specific provision that co-operatives and cooperative unions are exempt from payment of taxes related to their formation, transformation, termination and winding up. Co-operatives and cooperative entities established by them, members of cooperative unions are ceded 60% of corporate tax provided the ceded tax is only used for investment purposes. Furthermore, the ceded tax is split into two parts - 50% are used directly by the cooperative, and the remaining 50% are contributed by the cooperative to a special fund at the respective national cooperative union. This fund can be used by co-operatives to receive funds to implement investment projects and to acquire fixed tangible assets under conditions set out by the respective union.

[1] Unless stated otherwise, the source on which this is based is the International Handbook of Cooperative Law (2013) EURICSE, Cracogna D., Fici A., and Henrÿ H and, in relation to Finland, France, Germany, Italy, Portugal, Spain and UK, also on Principles of European Cooperative Law (2017) Intersentia, Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H Münckner and Ian Snaith

[2] Information in this column is taken from: National Constitutions and Co-operatives: an overview, Ifigeneia Douvitsa, accepted to be published in the first issue of the International Journal of Cooperative Law, 2018

[3] Other than protection of assets

[4] Where information about taxation is not available from sources referred to in footnote 1 above, reference has been made to Final Study Part II National Reports 5 October 2010 of the Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)

	Member state, legislation text/scholar on which this table is based[1], and latest date	1. Does the constitution refer to coops?[2]	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are "investor members" allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are capital surplus/indivisible reserves protected on a winding up?	8. Is conversion to a company permitted?	9. Are capital surplus/ indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?[3,4]
2	Greece. Ifigeneia Douvitsa, by email. 2018.	Yes. In ar. 12.4 the Greek Constitution stipulates that: "Agricultural and urban co-operatives of all types shall be selfgoverned according to the provisions of the law and of their statutes; they shall be under the protection and supervision of the State which is obliged to provide for their development. And in ar. 12.5 that: "Establishment by law of compulsory co-operatives serving purposes of common benefit or ublic interest or common exploitation of farming areas or other wealth producing sources shall be permitted, on condition however that the equal treatment of all participants shall be assured".	Yes. There is no general coop law applied to all coops, but, instead, there are numerous special laws that regulate specific categories of co-operatives. Specifically: L.4384/2016 applies to agricultural co-operatives; L.4423/2016 to forest coops; L.2716/99 (ar. 12) to limited liability social coops; L.4430/16 on social and solidarity economy that prescribe for the establishment of social cooperative enterprises and worker co-operatives; L.1667/1986 on civil/urban coops; and finally the recent L.4513/2018 on energy communities (energy coops).	Yes. The definition varies between the laws. In the agricultural, forest and civil coops the definition closely follows the ICA definition. Other coops are subject to mandatory provisions that specify exhaustively their purpose in the legal text.	Variable, except for energy communities, where in order to get an electricity supply license there is a 60.000 euros requirement of minimum capital (ar. 11.8 L. 4513/18)	No provision	Yes. Agricultural coops: profits cannot be distributed to members; transferred to legal reserve; part of profits may be allocated to development of community. Civil coops and limited liability social coops: a) 10% to legal reserve and other reserves decided by general assembly b) to members. Unless by-laws state differently 50% allocated based on shares, 50% based on transactions. c) rest allocated for other purposes decided by general assembly. Similar provisions apply to forest coops. For social coop enterprises and worker coops profits cannot be distributed to members, unless employees. 5% to legal reserve; up to 35% to employees; rest re-invested to create jobs and development of coop's activities. Energy communities (EC): a) Not-for-profit EC 10%=> legal reserve; the rest: not distributed to members; distributed to other reserves (per general assembly decision); part / all profits allocated for local collective energy activities b) For–profit EC 10%=> legal reserve. The rest: distributed to members as long as at least 15 members (10 members in island regions); and 51% of members are physical persons	In some coops yes. Agricultural coops: remaining assets allocated to: another agricultural coop, or for social purposes according to the bylaws provisions; cannot be allocated to the members. Forest worker coops: remaining assets allocated to members Civil/urban coops: remaining assets allocated to members according to their coop	Coop law does not generally include provisions which prevent, prohibit or discourage conversion. Such conversion may take place for social coop enterprises and worker co-operatives that have been removed from the Register by the public authority.	Where it is permitted, prior to conversion, members receive the value of their coop shares and the remaining funds are transferred to the Social Solidarity Fund.	None, though there are other limited tax benefits. For example, the contributions of members to the coop are tax exempted.

	Member state, legislation text/scholar on which this table is based[1], and latest date	1. Does the constitution refer to coops?[2]	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are "investor members" allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are capital surplus/indivisible reserves protected on a winding up?	8. Is conversion to a company permitted?	9. Are capital surplus/indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?[3] [4]
3	Italy. Antonio Fici. 2017	Yes. "The Republic recognises the social function of cooperation for mutual benefit free of private speculation. The law shall assist and promote its development by the most suitable means and shall ensure, by means of appropriate controls, its nature and purposes. The law shall protect and promote craft trades." (1948 Constitution) There is also a statement in the Ministerial Report on the Italian Civil Code stating that coops are to be distinguished from other companies because they pursue "a prevalently mutual purpose consisting in providing goods, services or work opportunities directly to the members… under conditions more favourable than those that they would find on the market".	Yes. Coops are treated as a distinctive type of company, with their own regulation and legal treatment. Italian coop law gives coops a definite legal status and distinct identity helping to distinguish them from investor owned companies. The purpose and structure of the entity is fundamentally important in determining the legal type.	Yes, as "societies with variable capital and mutual purposes, registered in the register of coops …" There are: prevalently mutual coops (PMCs) which act prevalently with their members as consumers or users of the goods or services provided by the coop (consumer coop) as providers of the goods or services employed by the coop in its activity (production coops), or as workers (worker coops); and other coops (OCs) which have no such mutual	Variable (does not protect creditors) Does not determine voting rights	Yes, the law expressly allows a coop's statutes to permit investor members to be admitted. Investor members may never have more than 1/3rd of the votes in a general meeting.	Yes. Coops must allocate to a reserve fund at least 30% of profits, whatever the amount of this fund, and 3% to mutual funds to promote and finance new cooperative enterprises. Thereafter there is a distinction between distribution of profits which is limited, and patronage refund out of coop transactions, which must be pro rata transactions and is not limited. Further restrictions on distributions on financial instruments in PMCs and SCs linked to interest on postal bonds; other restrictions on distributions on financial instruments. For OCs, the statutes must state the maximum percentage of dividends distributable to members. Patronage dividends by SCs is incompatible with their nature as non-mutual.	Yes. PMCs and SCs prohibited from distributing reserves to members. ALL capital surplus to go to mutual funds after repayment of capital and payment of unpaid dividends. Indivisible reserves can only cover losses after all other reserves and resources utilised. In OCs, only indivisible reserves are devolved to mutual funds.	Yes. Only OCs may be converted. PMCs may not be, until they lose their qualification as PMC, e.g. a consumer coop having less than 50% of total sales to members; a worker coop where less than 50% of total labour costs are worker members.	On conversion the indivisible reserves (effectively) are devolved to the mutual funds, making demutualisation unattractive, and keeping assets accumulated as a coop within the movement. Dissenting, abstaining or absent members may withdraw.	Profits allocated to indivisible reserves (must be indivisible on dissolution too) not subject to corporation tax. This exemption applies to 100% of profits of a "social coop" but only 35% for consumer coops. The 3% allocated to mutual funds and all patronage refunds free of tax for PMCs and OCs. Other tax reliefs available to OCs. Social coops exempt from VAT

	Member state, legislation text/scholar on which this table is based[1], and latest date	1. Does the constitution refer to coops?[2]	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are "investor members" allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are capital surplus/indivisible reserves protected on a winding up?	8. Is conversion to a company permitted?	9. Are capital surplus/indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?[3 4]
4	Malta. Cooperative Societies Act 2001, updated to Act X of 2013.	Yes. Article 20 of the constitution provides: The State recognises the social function of co-operatives and shall encourage their development	Yes. 2001 Cooperative Societies Act as amended in 2007 and 2008.	Yes. 21. (1) A society is an autonomous association of persons united voluntarily to meet their economic, social and cultural needs and aspirations, including employment, through a jointly-owned and democratically-controlled enterprise, in accordance with co-operative principles, and which, subject to the provisions of this Act, may be registered by the Board as a cooperative society under this Act. The ICA principles are also incorporated into the Act and must be dhered to in interpretation and implementation, but are not directly enforceable.	Variable.	There is apparently no mention of them in the legislation	Yes, there must be a reserve fund which is kept liquid in order to cover losses. 20% of each year's surplus must be transferred to the reserve until it is equal to paid up share capital and 20% of borrowings. Every year a coop must transfer 5% of its surplus to the Central Cooperative Fund in furtherance of co-operative education, training, research and for the general development of the co-operative movement in Malta. After payments to these funds, net surpluses may be distributed as the statutes provide, including by way of a patronage fund to member in proportion to their trade with the society, or otherwise.	Yes. On a solvent winding up, a dividend or patronage refund at a rate not exceeding that set out in regulations or the coop's statutes, may be paid to members for any period in relation to which no such dividend or patronage payment has been paid. After that, any residual assets may not be paid to members, but must be transferred to the Cooperative Societies Liquidation Account maintained by the National Board.	No provision	No provision	None. However coops are exempt from exempt from income tax, along with universities, philanthropic organisations etc.

	Member state, legislation text/scholar on which this table is based[1], and latest date	1. Does the constitution refer to coops?[2]	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are "investor members" allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are capital surplus/indivisible reserves protected on a winding up?	8. Is conversion to a company permitted?	9. Are capital surplus/ indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?[3,4]
5	Portugal. Rui Namorado, and Deolinda Meira. 2018.	Yes. The 1976 constitution (art. 82) established and guaranteed the existence of a cooperative sector on equal footing with the public and private sectors on the basis of ownership of the means of production. ICA principles given legal/constitutional force. Through constitutional reviews in 1989 and 1997, cooperative sector became a fundamental sub-sector of the "social economy" alongside the self-management and community subsectors (1989) and the solidarity subsector (1997). Art. 85 further states that "the state stimulates and supports the creation and activity of co-operatives; and "the law shall define the fiscal and financial benefits enjoyed by co-operatives, and the most favourable conditions for obtaining credit and technical assistance". In addition the constitution expressly recognises agricultural, consumer, educational, and housing coops with regard to agricultural policy, consumer protection, educational and housing policy. Portugal has a cooperative constitution.	Yes, and more than this. At the next level, there is a Cooperative Code – PCC (Law no. 119/2015, which was published on 31.08.2015 and came into force on 30.09.2015) and the legal texts governing each of the twelve types of cooperative. According to Article 4 of the PCC, there are twelve types of co-operative in Portugal today: consumer, trade, agricultural, credit, housing and building, worker, crafts, fishery, cultural, services, education, and social solidarity. In the PCC, it is provided that where there are legal gaps, there may be recourse to the Commercial Company Code, to the extent that the precepts applicable to limited liability companies do not disrespect coop principles (article 9)	Yes. The 1974 revolution placed coops outside commercial companies so that they were no longer considered as a kind of company. Companies divide profits among members, coops are by law expressly nonprofit [meaning?]. So coops are not a type of company, and really need a fourth legal type, as well as companies, foundations and associations. In the PCC art.2.1 a coop is defined as "an autonomous association of persons, united voluntarily, of variable composition and capital, which through cooperation and mutual assistance on the part of its members and in accordance with cooperative principles, aims not at profit but at satisfying the economic, social, or cultural needs and aspirations of said members". Art. 3 goes on to define cooperative identity as the ICA conceives it. Compliance with these principles is mandatory	Variable. The minimum share capital principle is explicitly established in the Portuguese legal system. Accordingly, under Article 81.2 of the PCC, the statutes must establish the coop's minimum share capital, which may not be less than 1,500 euros, although the complementary legislation regulating each branch may impose a different minimum.	Yes, Article 20 of the PCC allows statutes to permit this. However investor members must not participate in the coop's transactions, and can only contribute financially. Plural voting is permitted for investor members, provided that no investor member may have more than a figure equivalent to 10% of the total votes held by cooperators; and investor members may not have more than the equivalent of 30% of the total voting rights of co-operators.	Yes. The PCC envisages the existence of five types of reserve: a legal reserve, a reserve for education and training within the cooperative, a reserve provided for in the subsidiary legislation applicable to each type of cooperative, the reserves required by the cooperative's statutes, and the reserves established by resolutions of the General Meeting. The first two types of reserve are mandatory, the third will be mandatory or not according to guidelines from which it derives, and the last two are voluntary, because they depend on the collective will of the members as embodied in the statutes or a resolution of the General Meeting. A percentage of the cooperative's surplus (that "may not be less than 5%") for a financial year in transactions with members will be allocated to the legal reserve (Article 96.2.b) of the PCC) and the reserve for education and training (at least 1% - Article 97.2.b). Voluntary reserves can only be established with any annual net surplus remaining after interest on shares, if applicable, has been paid, after allocations for the various reserves have been made, after losses of previous years have been off-set, and, when the legal reserves have been used to compensate for these losses, after the legal reserve has been reset at the level prior to its use (Article 100.2 of the PCC).	Yes. Article 114.1 of the PCC states that when a coop is wound up, any legal reserves that have not been allocated to cover losses in the financial year and cannot be used for any other purpose "may be transferred with the same purpose to a new cooperative entity to be formed following the merger or division of the cooperative in liquidation." Paragraph 3 of the same article of the PCC states, however, that "where no new cooperative succeeds the cooperative in liquidation, the balance of the mandatory reserve will be allocated to another cooperative, preferably from the same city, to be determined by the federation or confederation that represents the main activity of the cooperative." Paragraph 4 goes even further when it states that "as to reserves established under the provisions of Article 98 of this Code, in the event of liquidation and where the statutes do not provide otherwise, the provisions of paragraphs 2 and 3 of this Article will apply", which means that any free reserves may also be covered by the principle of disinterested distribution.	No. Article 111 of the PCC states that "the conversion of a cooperative into any form of commercial company is null and void, as are all acts that seek to thwart or circumvent said legal prohibition." This prohibited form of conversion is heterogeneous, since the converted legal entity was not originally a commercial company. Furthermore, the prohibited conversion includes both a formal cooperative conversion and a conversion by extinguishment, in which the original legal person is dissolved and replaced by another that succeeds it. The legislator also forbids covert conversions, which are understood here as being any acts that allow co-operatives to access the regime of commercial companies.	Conversion prohibited, so protection not needed	None. But coops have enjoyed significant tax benefits in the past. There were significant changes in 2011 which removed any of these benefits, which have now been reduced to a list of exemptions. However these are still significant. Exemption from corporation tax benefits coops in the farming, cultural, consumption, housing and solidarity ectors. Profits generated from third-party transactions are not exempt. For other sectors, there is only an exemption from corporation tax if 75% of the dependent workers are members and 75% of the members are permanent workers. There are also significant exemptions from council tax in certain circumstances.

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6	Spain. Isabel Gemma Fajardo García. 2017.	Yes. The 1978 constitution orders public authorities to promote co-ops through appropriate legislation. It also gives the 17 autonomous regions legislative powers over co-ops, because they are neither civil societies nor commercial companies. 16 of these autonomous regions have passed cooperative laws.	Yes, since 1931. A special law that applies to all coops (Law 27/1999), except credit coops, insurance and transport. The national law of 1999 is infrequently applied, because there are 16 regional cooperative laws all with a similar structure	Yes, similar to ICA statement on co-op identity, and principles mentioned in all co-op laws and implicit. It is a clearly mutual purpose intended to provide services (or jobs etc.) to members. This is in contrast to commercial companies whose purpose is for profit. But different from other mutuals, with non-distributable assets, devoting part of surplus to public benefit.	Variable.	Yes, "contributor members" are allowed who are generally investor members. Such members do not take part in the coop activity, and their combined votes cannot exceed 30%.	Surplus must be divided into co-op surplus (trade with members), extraco-op surplus (with nonmembers), and other surplus. 20% of co-op surplus goes to obligatory reserve; 5% to education and promotion; remainder can be distributed as patronage refund. Out of other surpluses, 50% must be assigned to obligatory reserve, remained may go to voluntary reserves (distributable) or education and promotion fund. Interest on capital limited to 6%	Yes. Both obligatory reserve and education and promotion fund are non-distributable. If a co-op converts or is liquidated, the obligatory reserve and education and promotion fund must be assigned as designated in the constitution. If that is a co-op, those funds are added to its obligatory reserve and cannot be disposed of for 15 years.	Yes, a co-op can convert into a civil or commercial society. Requires a resolution of the general assembly with a 2/3rds majority of votes cast in favour, requiring a quorum of over half of the possible votes, or 10% or 100 votes on the second calling of the meeting.	Yes. If a co-op converts or is liquidated, the obligatory reserve and education and promotion fund must be assigned as designated in the constitution. If that is a co-op, those funds are added to its obligatory reserve and cannot be disposed of for 15 years.	Provided that a coop has observed the co-op rules on distributions, reserves, interest and transactions with non-members, it is a "protected coop" and has a series of tax benefits in company tax, capital transfer and documented legal acts tax, economic activities tax or property tax. In certain sectors such as farm where members have little financial strength and are closer to mutual principles, co-ops which meet the relevant conditions can be "especially protected co-ops" with e.g. 50% tax relief of total tax due.

Appendix 3
About us

Dr Sean Kippin
University of Sterling

Dr. Sean Kippin is a Lecturer in Politics at the University of Stirling. He has a PhD from the University of the West of Scotland, and has previously studied at the London School of Economics and Northumbria University.

He has worked at the London School of Economics, the Smith Institute, and for two Members of Parliament.

His research focuses on political parties, social democracy, and political institutions.

Cliff Mills
Principal Associate, Mutuo

Cliff is a practitioner in the law and governance of cooperative, mutual and membership-based organisations. He has written the constitutions of a number of the UK's leading co-operative retail societies including the Co-operative Group, established the constitution and governance of a substantial number of NHS Foundation Trusts and played a significant part in the development of mutual society legislation in the UK.

He has worked extensively with Mutuo over the last decade in the development and application of mutual and co-operative models of ownership for public services. These have included healthcare, social housing, leisure services, education and children's services. He has also worked in the voluntary and charitable sector.

The aim has been to create robust models for organisations which are trading for a public or community purpose, with an ownership and governance structure based on user, staff and local community membership.

Recent and current projects include the mutualisation of Post Office Limited, Co-operative Councils, library services and community health services. As well as being Principal Associate with Mutuo, Cliff is a consultant with Anthony Collins Solicitors.

Cliff is involved in the modernisation of UK co-operative law, and the comparative study of co-operative law across different jurisdictions. He is a member of an international community of co-operative lawyers (Ius Cooperativum), is listed on its World Map of Cooperative Lawyers and has published in its International Journal of Co-operative Law.

Peter Hunt
Managing Partner, Mutuo

Peter founded Mutuo in 2001 as the first cross mutual sector body to promote co-operative and mutual business to opinion formers and decision makers.

For ten years prior, he was General Secretary of the Cooperative Party (UK). He is co-founder of Supporters Direct, the football supporters' initiative, which went on to establish over 100 supporters' trusts at professional football clubs.

He led the Parliamentary teams which piloted five private members bills through the UK Parliament, working with all parties to update co-operative and mutual law.

He advised the UK Coalition Government on its plans to mutualise Post Office Ltd and in 2012 published the report of the Ownership Commission, a two-year study into corporate diversity.

In 2015, he published an independent review into public policy affecting mutuals and completed work on the Mutuals Deferred Shares Act, which permits mutual insurers to issue co-operative share capital. Peter has worked with the Foundation for European Progressive Studies (FEPS) since 2015, co-authoring the 'Peoples' Business' research document.

In 2018/19 he led the successful industry alliance to develop the Australian Treasury Laws Amendment (Mutual Reforms) Act 2019.

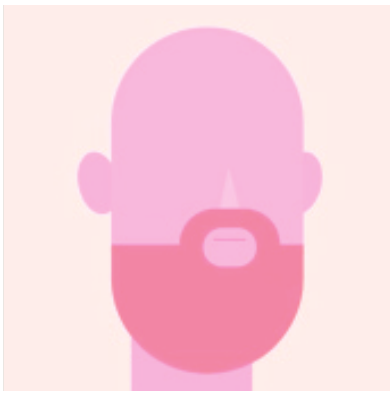
Mark Willetts
Partner, Mutuo

Mark joined Mutuo in 2010 as a public affairs and corporate communications specialist. He is currently Secretary to the All-Party Parliamentary Group for Mutuals, liaising with Government, MPs and Peers on projects to help develop mutual businesses.

Between 2010 and 2012, he served as Assistant Secretary to the Ownership Commission – a two year study into corporate diversity. He has presented at a number of global events for co-operatives and mutuals including the International Cooperative Alliance (ICA) Global Assembly in Kuala Lumpur, the International Co-operative and Mutual Insurance Federation (ICMIF) Communications Leaders Forum in Singapore and the International Cooperative Summit in Quebec.

He has worked with the Foundation for European Progressive Studies (FEPS) since 2015, coauthoring the Peoples' Business research document. He recently worked on a Policy Guide for Consumer Co-operatives Worldwide, which he presented in Moscow and a project to facilitate new capital to be raised by Australian mutuals.

He has previously co-authored guides for the ICA, ICMIF and the Australian Business Council for Co-operatives and Mutuals (BCCM). Prior to joining Mutuo, Mark worked as a Researcher for a Member of the UK Parliament. He is a graduate of the University of Warwick.



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