



LEGAL STRUCTURES FOR COMMUNITY ENERGY PROJECTS



the coalfields
regeneration trust
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meysydd glo

Our Mission:

“To create opportunities for social and economic growth, deliver a positive lasting impact and ensure former mining communities are not disadvantaged by the legacy of the past.”

Established in 1999 the Coalfields Regeneration Trust (CRT) is a national charity and social enterprise that is solely dedicated to the social and economic regeneration of former mining communities across the UK. Since inception CRT has prioritised the protection and development of vital community assets and services and the creation of community owned businesses in some of the most deprived areas of the UK, working in long term partnerships to develop resilient communities and local economies for the future.

Community owned renewable energy projects have the potential to deliver a range of environmental and local socio-economic benefits which can help empower people to access affordable clean energy and generate surplus income to reinvest back into their communities helping to regenerate these former coalfield areas.

Wales has an ambitious target to generate 70% of its electricity consumption from renewable sources by 2030 of which 1GW will be locally owned and from 2020 all new renewable energy schemes will be expected to include an element of local ownership.

Whilst challenges remain for the sector through the reduction of tax incentive schemes, government subsidies and Brexit there remains a steady demand for communities to look at alternative models to generate income. With public land owners such as Welsh Government, Local Authorities and Natural Resources Wales increasingly amenable to transfer of land for community benefit greater opportunities exist for collaborative working to help achieve a shared vision.

Community owned renewable energy schemes can take a number of legal forms which are as diverse as the communities in which they operate. While this flexibility is a great strength of the community energy sector, choosing the correct structure can be complicated.

Due to the complex nature of legal structures and trading CRT commissioned Wrigleys Solicitors who are leading advisors to the charity and social economy sectors since the mid 1980's to provide a comparison of the different forms of legal structures and highlight some of their unique features and their comparative advantages and disadvantages when used for community energy projects. Wrigleys Solicitors are nationally regarded as advisors on legal structures for community renewable energy projects and social finance.

Legal Structures

There are a number of legal structures which are utilised in the community sector and some have more relevance in the context of energy projects. In this report, some of the most common forms of legal structure are considered and compared:

- Private limited companies (also known as "**Companies Act companies**");
- Community Interest Companies ("**CICs**") (which can be limited by shares or by guarantee);
- Community Benefit Societies ("**CBSes**");
- Co-operative Societies; and
- Charitable Incorporated Organisations ("**CIOs**")

These shall be referred to as the "**Structures**" throughout this report.

Common Features

Each of the different Structures considered in this section share some common characteristics.

Directors and Members

A distinction between the organisation's "members" and its "directors" is common to each of the Structures listed above. Although each Structure has its own specific rules and procedures, the difference can broadly be summarised as follows:

Directors are responsible for the ordinary day-to-day business of the organisation, for example approving legal agreements and reviewing the annual accounts of the organisation. Decisions are generally taken by majority, though this can be varied under the organisation's governing documents; where organisations have charitable status directors are also known as trustees. There must be a minimum of one director for a company. The Constitution of a CIO, a Co-operative and a CBS must specify the minimum number of directors/trustees. In all cases it is usually at least two persons.

Members can be thought of as being akin to the "owners" of an organisation. Members are generally responsible for overarching "big picture" decisions to be taken by the organisation – for example, decisions to appoint new directors or to change the constitution of the organisation. In Companies Act companies limited by shares and CICs limited by shares, the members are shareholders, each owning a percentage of the company's issued shares, and generally decisions are taken by the agreement of the holders of certain percentages of the shares in issue and therefore the largest investors in the organisation can typically exercise the most control in a CIO, a CIC company limited by guarantee and a Companies Act company limited by guarantee ("CLG") on the other hand, each member is entitled to a vote on the principle of "one member one vote". Co-operatives and CBSes are somewhat between the two in that their members may own shares in the organisation but decisions are taken on the "one member one vote" instead of one share one vote principle. In Co-operatives and CBSes there is a minimum requirement of three members. In other Structures it can be one person.

Directors' Duties

Whichever Structure is adopted, directors will owe legal duties to the organisation that they are appointed by. The legal basis on which the duties are owed differs from Structure to Structure, however the content of those duties is well established. In particular, directors owe duties to the organisation:

- to act within the director's constitutional and legal powers;
- to promote the success of the organisation;
- to exercise independent judgement;
- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interests and declare interests in proposed transactions; and
- not to accept benefits from third parties.

Directors can be liable to the organisation itself or, in certain circumstances, to criminal prosecution where these duties are not adhered to.

It is important to note that the trustees of charitable organisations (including the directors of a CIO) have further duties under the laws governing charities further information can be found

<https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>

Limited liability

Each of the Structures listed have the benefit of what is known as "legal personality". An organisation with legal personality can contract in its own name, owns assets in its own name and is responsible for its own liabilities. Legal personality means that, generally, any liability incurred by the organisation remains the responsibility of the organisation itself, and not the individuals involved in running the organisations. This protection is known as "limited liability".

Limited liability gives the directors, employees and members of an organisation protection in the event that the organisation goes into liquidation and from other claims made against it, provided they act in accordance with their legal obligations and within the powers of its governing documents of the organisation (its Rules for a CBS or co-operative, or its Memorandum and Articles of Association for CICs and Companies Act companies).

The protection afforded by limited liability is not without boundaries. For example, personal liability can be imposed on directors or employees by specific laws, such as those protecting the environment or the health and safety of employees, or where a director acts outside the powers they have been permitted under the organisation's governing documents.

Charitable Status

With the exception of the CIO, the award of charitable status is separate from the legal structure under which an organisation is incorporated, and as such there is no single Structure which an organisation which seeks charitable status must follow in order to achieve this. There are, however, certain Structures which are not able to apply for charitable status. If an organisation wishes to become a registered charity, it will be important to choose a Structure which is compatible with this aim.

A CIO is a structure set up and established for exclusively charitable purposes and registered by the Charity Commission. They are an exception to the general rule that charitable status exists and is assessed separately to incorporation. The requirements of charity law and Charity Commission guidance will therefore be relevant to CIOs from the date of incorporation.

The ability of each Structure to be awarded charitable status is considered in the following sections.

Private Limited Companies under the Companies Act 2006

The Companies Act 2006 ("Act") is the most recent legislation governing the incorporation of limited liability companies under which all new companies are incorporated. Companies formed under the Act can fall into a number of different categories. In particular:

- private companies / public companies – private companies have no capital start-up requirements and have fewer legal reporting requirements to fulfil, but public companies are entitled to seek investment from the public.; and
- companies limited by shares ("CLS") and companies limited by guarantee ("CLG") – private companies may be limited either by shares or by guarantee. CLGs do not have share capital and, unlike a CLS, their members are not entitled to participate in the profits of the company. A private company limited by shares is not permitted under the Companies Act to ask for investment from the public. A company limited by guarantee may ask the public to invest by way of debt in the company often known as bonds, debentures or loan stock. These three legal terms are largely interchangeable.

Most commercial organisations seeking a share of their profits for their members are established as a CLS, under which the company can pay dividends to its shareholders from profits it makes. In contrast, community groups, charities and social enterprises are often established as CLGs under the Companies Act. Both are governed by their Articles of Association and the Companies Acts. There are Model Articles for the different types of companies permitted under the Companies Acts set by statute but often bespoke Articles are drafted except where it is a CIC where there are Articles which must be incorporated by law.

Given their prominence in the social enterprise, community and charity sectors, the guidance below is directed primarily towards CLGs. Where the position differs significantly between that of a CLG and a CLS, this is highlighted.

Governance

A CLG benefits from flexible governance arrangements as well as being a well-recognised and generally commonly understood form of legal Structure (albeit not as prevalent as the CLS). This can assist in securing funding from traditional debt funders who may find it easier to lend into an organisation that they understand.

CLGs have a great deal of constitutional flexibility and allow for a wide range of approaches to governance representing all levels of complexity. The articles of association of a CLG set out the rules under which the directors and members shall conduct business of the CLG. The articles of association of a CLG can be amended by a resolution passed by a resolution passed by not less than 75% of the members and filed at companies house.

The appointment, retirement and removal of directors is governed by the articles of association of the CLG. Directors take the day-to-day decisions in a CLG and are generally responsible for the day-to-day running of the organisation. It is usual for the articles of association of the CLG to permit the directors to delegate their authority to third parties or to establish sub-committees of the board. The chair of the board may, in certain circumstances, be given a casting vote.

A CLG can apply for charitable status and become a charitable company limited by guarantee. The organisation will have separate charity and company registration numbers and will be required to report to both the Charity Commission and Companies House.

Reporting requirements

The directors of a CLG must prepare and file company accounts along with a directors' report for each of their financial years, which will be made publically available on companies house. The level of detail and audit requirements for these accounts varies dependent upon the size of the company.

A CLG must also submit an annual return confirming any changes to the CLG's officers or registered office, or a confirmation statement for the relevant year if these details remain correct. There is a fee for the filing of this statement (currently £13 for online filing and £40 for paper filing).

Taxation

The primary mechanism for taxation of Structures is corporation tax, which is payable annually on the Structures' taxable profits arising from trading income and chargeable gains. The exception is when the Structure is a charity which has certain exemptions for corporation tax except where the charity is involved in non-charitable trading. In other words trading which is not for the promotion of the objects of the charity. Non-charitable trading by a charity is usually carried on by a trading subsidiary company.

The generation and sale of electricity (including renewable energy) is not itself charitable. There are, however, charitable purposes which can be compatible with renewable energy developments where these elements are present in the organisation's activities (such as the advancement of environmental protection or improvement, or potentially education) where charitable status could be of benefit. In such cases, the generation and sale of electricity is often undertaken by a trading subsidiary which will pay its post-tax profits up to the charity to apply for its purposes.

A number of complex rules, holdovers, exemptions are available for corporate expenditure with allowances for capital expenditure, and specialist tax advice should be sought if more information is required on corporation tax.

All Structures may be liable to charge and recover Value Added Tax on their trading activities over the current minimum of £85,000 trading activity each year. Specialist VAT advice should always be obtained when required.

Community Interest Companies (CICs)

CICs are companies registered under the Act which choose to register as CICs in order to ensure that the proceeds of the company must be applied for the benefit of the community for which they have been registered. CICs were first established in the UK under the Community Interest Company Regulations 2005.

In order to be registered as a CIC, an organisation must apply to the regulator of community interest companies ("CIC Regulator") together with a community interest statement detailing the community which the CIC will benefit and how it intends to do so. CICs may be public or private, and (if private) may be limited by shares or guarantee.

A CIC can either be incorporated from scratch (in which case the usual company incorporation forms are submitted to the CIC Regulator along with the statement of community interest) or can be converted from an existing CLS or CLG or CBS by submitting the necessary forms to the CIC Regulator.

Asset lock

The principal restriction which CIC status places on a company is the so-called "asset lock". This is a means of ensuring that the assets of the CIC are applied for the benefit of the community (as outlined in the community benefit statement) and are not applied for the benefit of the shareholders of a company.

CICs must, as a condition of registration, include an asset lock within their articles of association. The asset lock restricts what can be done with the assets of the CIC and in particular:

- requires that the assets of the CIC are applied for the benefit of the community;
- (where the CIC has share capital) sets a limit on the CIC's ability to make payment of its profits to its shareholders; and
- requires that any transfer of assets out of the CIC may only be made:
 - for the benefit of the community;
 - for full market value; or
 - to another asset-locked body specified in the articles of the CIC.

The asset lock cannot be changed or removed following incorporation, and all assets, once owned by the CIC, will be subject to it. This means that it is very important to take care that assets are only vested in the CIC where they are to be applied for the benefit of the community, and that the CIC does not transfer assets out from the CIC unless it is done in accordance with the provisions of the asset lock. Assets can however be permitted to be sold by a CIC and then it is the proceeds of those assets which remain subject to the asset lock.

Unlike CBSes CICs limited by shares have some flexibility to incorporate a less strict asset lock that permits the payment of a limited percentage of any profits of the CIC out to its shareholders. This may be an attractive option where for-profit equity investment from a partner is being considered as a means of financing the organisation. Partners can also invest by way of debt which is less strictly regulated.

Governance

CIC governance is substantially similar to the governance of other Companies Act companies, with additional duties arising from the nature of CICs as vehicles for community benefit. As such, the governance principles outlined in respect of limited companies will also apply to CICs.

In addition to their general company law duties, the CIC directors and members are responsible for ensuring that the CIC is run in such a way that it will continue to satisfy the community interest test and must have regard to the community the CIC has been established to benefit.

Charitable Status

CICs cannot be charities. In order for a CIC to become a charity it must convert to a CIO or, where the CIC is a CLG, to a charitable CLG. The Regulator has published guidance on the process of converting to a CIO, for further information <https://www.gov.uk/guidance/convert-a-community-interest-company-to-a-cio>

Reporting Requirements

As well as the requirements applicable to CLGs, CICs must produce an annual CIC report to the CIC Regulator, detailing as a minimum:

- what the CIC has done to benefit the community;
- how the CIC has consulted its stakeholders on its activities;
- details of any dividends declared and performance related interest paid (where applicable); and
- information on any transfers of assets to other asset locked bodies or at less than market value.

An additional fee (currently £15) is payable in respect of the submission of the annual CIC report.

The submission of the CIC report is not typically onerous.

Taxation

Like Companies Act companies, CICs are subject to the payment of corporation tax. Although CICs remain eligible for corporation tax reliefs and exemptions, there are no CIC-specific tax exemptions available.

Community Benefit Societies

Since 1 August 2014 it has been possible to register two different types of society (formerly known as Industrial and Provident Societies) a Co-operative Society and a Community Benefit Society ("CBS").

The main difference between co-operatives and CBSes are that cooperative societies are required to conduct its business for the mutual benefit of its members, while a CBS must operate for the benefit of persons other than its own members and act in the interests of the community. Co-operatives are considered below.

Governance

A CBS is governed by its rules, which form a contract between the registered society and its members akin to the articles of association of a companies act company. The rules of a CBS set out its objects, its powers, and amongst the key clauses are those providing for the rights and duties of the members, the admission and withdrawal of members, appointment and removal of directors and for decision-making.

The Financial Conduct Authority ("FCA"), in addition to its role in regulating financial organisations, retains a role similar to the registrar of companies in respect of the registration of societies. The FCA must approve any changes to a CBSes rules, which will not be effective unless and until such approval is obtained. This contrasts with the position for Companies Act companies, for whom changes to the articles of association are effective from the passing of the relevant members' resolution. The FCA also considers whether the status of the society can still be justified at the time rule amendments are made.

Registration

Due to the role of the FCA, the registration process for a registered society is distinct from that applicable to Companies Act companies and CICs, although the information required is similar to that of a CIC. A completed application form and copies of the rules to be used by the CBS are sent to the FCA electronically.

A CBS must have its rules approved by the FCA prior to registration, and generally to facilitate quick and cost-effective incorporation a CBS will submit rules based on a pre-approved set of "Model Rules", which are standard CBS rules maintained by a third party sponsoring body that have received prior approval from the FCA as suitable CBS rules.

The FCA charges a variable fee based on the number of amendments to a set of model rules. The fee ranges between £40 (for adoption of Model Rules without amendment) to £950 (for bespoke rules). The sponsoring body will generally also charge a fee for the use of their set of Model Rules.

Asset lock

A key difference between registration of a CBS and registration of a CIC is that a CBS has the option, but not the requirement, of incorporating an asset lock into its rules.

- A CBS may decide to incorporate with or without an asset lock for a variety of reasons. For example: certain pots of grant funding may be made available only to organisations incorporating an asset lock;

- it may benefit the CBS to find local support and volunteers where there is a constitutional guarantee through the asset lock that the assets of the CBS shall only be used for the benefit of the community; or
- an asset lock would prevent the CBS from converting to a charity, or companies act company in the future, other than converting to a CIC incorporating the same asset lock, and the organisation considers that this may restrict its intended activities.

Given the irrevocable nature of the asset lock, a CBS may wish to refrain from limiting itself to an asset lock until it has a specific reason to do so.

If a CBS incorporates with (or decides at a later date to include) an asset lock in its rules, the asset lock will function in the same way as that of a CIC which incorporates a full asset lock. Like a CIC, there is flexibility to incorporate an asset lock into a CBS which allows for limited distributions of profit in the form of interest on share capital (so not strictly profit). The legislation has specific wording which the CBS must incorporate into its rules if it is registered with an asset lock. This wording not only restricts the use of the assets of the CBS but also prevents the asset lock itself from being amended in future.

Charitable status

It is possible for a CBS to have charitable status (along with the tax benefits this status confers) by seeking that status from HM Revenue and Customs, although currently a CBS is not required to register as a charity. Proposals contained in the Charities Act 2006 but not yet in effect would require certain charitable CBSes with income in excess of £100,000 to register with the Charity Commission, and it should be noted if intending to register a charitable CBS that this registration requirement will apply at some point in the future. A CBS with an asset lock cannot convert to charitable status, a new organisation would need to be formed and assets passed to it.

Share capital

A CBS has share capital in the same way as a private company limited by shares. However, share capital is not as flexible as that issued in a CLS, and in particular shares do not generally entitle the shareholder to full dividends in the profits of the CBS. As such, shareholding in a CBS should generally be seen as being a social investment in the CBSes purposes, rather than a financial investment for the benefit of the investor. To this end, the CBS benefits from a preferential regime for raising money from the public through community share offers.

Share capital in a CBS is generally separated into two classes – "transferrable" share capital which as the name suggests may be transferred between shareholders (with board consent) and "withdrawable" share capital, which can (where the CBS has funds to do so) be redeemed for its nominal value, allowing the investor to have their investment returned. Given that a CBS cannot distribute its assets to its members on a winding up, it is unlikely that investors in transferable shares would expect to see a significant increase in the capital value of their transferable shares (and the FCA has stated in guidance that it would see the opportunity to make such capital gains as being inconsistent with registration as a CBS). It is also important to note that the relaxation of the rules for community share offers will only apply to withdrawable share capital in the CBS and not transferable share capital.

Notwithstanding the existence of share capital in a CBS, membership decisions are taken under the principle of "one member one vote". As such, unlike in a CLS, a greater shareholding does not grant the member a greater share of the voting rights in the CBS.

Interest (similar to and sometimes inaccurately referred to as dividends) can be paid on shares provided that such interest payments are not higher than is necessary to obtain and retain enough investment to run the business. This means, for example, that interest can be paid on shares which are issued as part of a community share issue if the rate is set at a level which is necessary to ensure that the minimum capital necessary to be raised can be raised (particularly from investors seeking financial rather than social returns).

There is a statutory limit (currently £100,000) on the amount an individual may invest in withdrawable (redeemable) share capital of a CBS. There is no limit on the amount a person may hold in transferable share capital of a registered society. Legal advice should be taken before issuing transferable share capital because the FCA takes the view that there are limits on how that transferable capital can be repaid.

Reporting requirements

CBSes are, for historical reasons, overseen by the FCA and not companies house, which means that the filing and reporting requirements are very different for CBSes

An advantage of the CBS over limited companies is a somewhat reduced administrative and statutory burden, although internal records must still be maintained as a matter of good governance.

The CBS must produce an annual return and accounts, which must be sent to the FCA. The FCA will publish the annual return, but not the accounts of the CBS, though the accounts must be made available to any member or other interested person requesting them.

A consequence of the reduced reporting requirements are that CBSes are comparatively less transparent than Companies Act companies, and less information is generally available on the online mutual register maintained by the FCA. Recent changes to the register have made this information free to access online.

The FCA does review the annual returns closely to check whether societies still qualify as CBSes (or Co-operatives).

Taxation

As a "body corporate", CBSes are subject to corporation tax in the same way as for Companies Act companies and CICs. It should be noted that although a CBS which is charitable cannot register with the Charity Commission it can apply to HMRC to be recognised as charitable, in which case it will be eligible to receive the advantageous tax treatment of a charity notwithstanding it is not registered as a charity. For the reason stated above an asset-locked CBS cannot be charitable.

Co-operatives

Co-operative societies are another form of registered society regulated by the FCA. They differ from CBSes as co-operatives are operated for the benefit of their members, rather than being operated for the benefit of the community other than its members.

Co-operatives operate on the principle of "one member one vote" and were, in previous years, a popular choice for community energy schemes since generated profits which could be applied for the benefit of the members of the co-operative.

The FCA has, however, in recent years made it extremely difficult to permit the registration of new energy co-operatives due to its interpretation of what a co-operative is as an organisation which must trade with its members. The FCA's current interpretation is that this requirement is not generally satisfied by the specifics of community energy projects where energy runs through the grid and the Co-operative is not selling the energy directly to its members.

As such, unless and until the FCA's interpretation changes, it has become very difficult to structure a new community energy project as a co-operative society.

Taxation

There are potential tax benefits to registering as a co-operative, as HMRC considers trading between members ("mutual trading") as capable of falling outside the scope of corporation tax, provided that any surpluses go back only to the members who contributed to the trade and subject to additional requirements relating to the treatment of surpluses and control of funds, amongst others.

Charitable Incorporated Organisations (CIOs)

CIOs were introduced in January 2013 and are a distinct legal structure intended as an alternative legal structure for use by charitable organisations.

The CIO has been increasing in popularity gradually since its introduction within the charitable sector, however it is currently uncommon for the CIO to be used as a vehicle for discrete renewable energy projects due to the non-charitable nature of the primary economic activity of energy projects (being generation and sale of electricity).

Governance

Governance of a CIO is similar in most respects to that of a charitable CLG. A CIO must have both members and trustees (who act as directors of the CIO as well as being trustees for the purposes of charity law).

The most important distinction between the CIO and other non-charitable structures is the impact and effect of charitable status on the governance requirements of a CIO. This means that decisions taken by the trustees must support the CIO's charitable objects and be for the public benefit. These additional considerations underpin all decisions of the CIO and are more wide-ranging than non-charitable Structures (even those of asset-locked CICs and CBSes who must act for the benefit of their community but need not consider the wider public benefit). As such, CIOs should be seen as having a more exacting governance regime.

Registration

Unlike the other structures considered in this Report, CIOs are exclusively for the use of charitable organisations. Registration of a CIO is conducted through the Charity Commission, and the process substantially follows that for the registration of a charity, with the principal exception that unless and until registration is complete, the entity itself does not exist and cannot act with legal personality.

As such, the registration formalities for a CIO are comparatively complex and will typically take significantly longer than the other Structures to register (particularly Companies Act companies)

Reporting requirements

As a consequence of a CIO's registration with the Charity Commission and not companies house, CIOs are not required to file accounts and reports with companies house as is the case for Companies Act companies and CICs.

CIOs must submit an annual report to the Charity Commission which is made publically available on the register, including a trustees report together with the annual accounts. Other filings (including notably the constitution of the CIO) are not publically available to view.

Taxation

CIOs fall within the definition of a "body corporate" and are therefore subject to corporation tax in the same way as Companies Act companies, CICs and CBSes. A CIO is a charitable organisation and can therefore benefit from exemptions to corporation tax in relation to profits which are applied solely for the purposes of the charity.

There are a number of exceptions, requirements and tests to determine whether or not charitable expenditure falls within the available exemptions and it will be important for specialist charity tax advice to be taken to ensure that such reliefs can be maximised in the context of a CIO engaged within the energy sector.

The relevance of "community" for community energy schemes

The question "what makes an energy scheme community owned?" has no single legal answer and is a regular challenge for regulators (and, by extension, organisations hoping to meet the categorisation). It may also be relevant for local government and charitable funding.

When structuring an energy scheme, there are two stages at which the definition of "community" can be important:

- when registering a legal structure; and
 - when registering with Ofgem.
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The Ofgem interpretation of "community"

Community energy installations have, historically, benefitted from increased validity periods and tariff guarantees under the Feed-in Tariff ("FiT") scheme administered by Ofgem from 2012 until April 2019. These benefits were significantly curtailed following the 2015 general election and the FiT is now closed to new applications. As such, the definitions below are likely to be of limited relevance to new community energy projects unless alternative support mechanisms are introduced for community projects.

A community energy installation is defined as a FiT-eligible energy installation "wired to provide electricity to a building which is not a dwelling and in relation to which the FiT generator is a community organisation".

Legislation defines "community organisation" for the purposes of the Feed-in Tariff ("FiT") as "any of the following which has 50 or fewer employees: a charity; a subsidiary, wholly owned by a charity; a community benefit or co-operative society; or a community interest company".

Registering a legal structure

The concept of community benefit is central to two of the common forms of legal entity utilised in community energy schemes considered above. In particular CICs and CBSes.

The "community" requirement of each of these Structures is considered in the following section.

Community Interest Companies

As previously noted a CIC's registration depends upon the submission of a community interest statement which both identifies what "community" the CIC will benefit and how that community will be benefitted from the proposed activities of the CIC.

The CIC Regulator has published detailed guidance on what "community" means in the context of a CIC. In particular, chapter 2.3 of the CIC Regulator's guidance specifies:

A community for CIC purposes can embrace either the population as a whole or a definable sector or group of people either in the UK or elsewhere. The CIC legislation states that any group of individuals may constitute a community if they share a common characteristic which distinguishes them from other members of the community and a reasonable person might consider that they constitute a section of the community. [However][...] it is expected that the community will usually be wider than just the members of the CIC.

Once the relevant community is identified, the CIC must satisfy the community interest test in respect of that community. The test is whether a reasonable person might consider that its activities (or proposed activities) are carried on for the benefit of the community.

The CIC Regulator must be satisfied that a suitable community is identified and that the community interest test is satisfied in respect of that community in order for registration of the CIC to proceed. CICs must also submit annual community interest statements detailing the ways in which their community has benefitted in the previous year to ensure they continue to satisfy the community interest test.

The CIC Regulator's website (including its published guidance) is available at <https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies>.

Community Benefit Societies

Like CICs, CBSes must identify at registration the community that they will be established to benefit. Unlike CICs, this is not the subject of a separate form but forms an intrinsic part of the rules of the CBS and the forms to be submitted on registration.

The FCA has published guidance on its registration function in relation to mutual societies (including CBSes). The requirements are substantially similar to those requirements applicable to CICs (although they are set out and worded differently) and in particular, the guidance:

- identifies that the "community" that the CBS is set up to benefit may be the community at large or a specific locality;
- clarifies that the industry, business or trade carried on by the CBS must be conducted for the sole purpose of benefiting the community (in other words, the CBS cannot have secondary or ancillary purposes which do not benefit the community); and
- specifies that, whilst a CBS can be wholly charitable or benevolent, it does not have to be so long as its business is conducted for the benefit of the community.

Similarly to the process for CICs, the FCA must be satisfied that the community requirements of the CBS are satisfied before it will register the society.

The FCA's mutual societies portal is available at <https://www.fca.org.uk/firms/mutual-societies>. In particular, the FCA's guidance on registration of mutual societies can be found at <https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf>.

Which Structure is most appropriate?

Of the Structures considered within this report, there are good reasons that an organisation might choose any of those forms. The specifics of a given project or community might make a particular form more or less attractive, and some of the more common considerations when making this determination are considered below. It should be noted that the considerations below are not an exhaustive list, and often multiple considerations will apply and will need to be weighed up and compared when determining an appropriate Structure.

Where more than one Structure would seem to be appropriate for a particular project, it is beneficial to seek further external advice in respect of the proposed Structure, as there can often be legal or financial (particularly taxation) reasons that one Structure might be preferable.

It is also worthwhile bearing in mind that, where any relevant conditions are met, it may be possible to convert from one type of legal Structure to another. This is considered further below.

Governance structure

If a specific governance structure has been agreed with the members, it is important to note that it is very difficult (due to the requirement for FCA approval of rule changes) to move a CBS away from the principle of "one member one vote". Where, for example, a particular founding member wants to retain enhanced voting rights which go beyond a casting vote in the board of directors, it may be more appropriate to look at companies act companies (including CICs), which generally have more freedom when it comes to setting governance arrangements. It may however be possible to provide a specific member with some veto provisions to protect the mission in a CBS,

Community shares

A key consideration for all community energy projects is where the funds to develop the project will come from.

There is a general prohibition on the issuing of shares in companies (including CICs) to the public. Private Companies Act companies cannot generally do so at all, and public companies are subject to complex (and consequently expensive) formalities and legal duties when doing so.

CBSes can benefit from an exemption to these rules enabling them to offer withdrawable, non-transferable shares in the CBS to the public (commonly known as "community share issues" or "community share offers"). A CBS is, therefore, a popular structure where investment from the wider community is envisaged. Despite the reduced formalities associated with community share issues, they remain complex processes and specialist advice will be required to ensure this approach is available.

Community share issues can provide substantial cost and time advantages and allow the CBS a means of raising substantial capital from investors which is unavailable to other legal structures. The pool of investors can also include investors which seek social as opposed to exclusively financial benefits from the investment. These advantages would need to be considered alongside the parallel disadvantage that withdrawable shares in a CBS may be less attractive to private investors due to the non-transferrable nature of the share capital.

Investments in CBS shares may also attract tax incentives although the current availability of tax incentives for community energy projects should be considered.

Debt finance

Debt finance (also called bank finance) is a more traditional route of finance than community share offers and can be a good way of securing capital, provided the funder is satisfied that it will receive repayment for its investment and that its money is secured. As such, the more familiar a bank is with a particular legal structure the more accurately it can predict its risk and, therefore, the more likely it is to agree to lend money to the organisation.

Commercial lenders are typically most comfortable when dealing with structures which involve a CLS, since most for-profit commercial ventures tend to be undertaken through this vehicle. A CLG follows broadly similar principles to those of a CLS, though the lack of share capital can require some exploration within the bank.

The asset locks of CICs can be problematic for a bank if it is unfamiliar with the concept, though the CIC Regulator does state in its guidance that granting the bank security is not prohibited by the asset lock where it is offered on usual market terms.

CBS's, co-operatives, Companies Act Companies limited by guarantee and CIC's limited by guarantee may all make debt offers to the public and this can be another way of raising finance instead of or in addition to share capital. Financial promotion rules will need to be followed, and legal advice will be necessary.

Equity finance

Where an investor seeks to invest sums in an organisation with a view to making a financial return based on the profits of the organisation and an increase in value of the organisation it should be noted that a CLS, CLG, CIC, CIO and CBS are each very different in what an equity investor may receive:

- a CLS would permit the equity investor to full dividends in any profits of the organisation and their shareholding would increase and decrease in value in line with the value of the CLS while a CLG generally cannot pay profits out to its members in the same way;
- the asset lock of a CIC will severely restrict dividends and asset distribution to private investors; and
- a CBS (whether or not incorporating an asset lock) is similarly prohibited from making payments out to its members, and may only pay interest (which should be limited) on the shareholdings of members.
- CLGs, CICs limited by guarantee and CIOs are owned through membership and not through shareholdings, so equity investment through shares is not possible in these structures. Other more involved forms of equity investment (such as bond or loan note issues) may be available, but there are restrictions on offering investments of this kind to the public, and CIOs and CICs limited by guarantee will be restricted in the interest they can offer to members by charity law and the organisation's asset lock, respectively.

Crowdfunding

Each of the Structures is eligible to participate in certain forms of crowdfunding, though the issue of securities to the public (itself a form of crowdfunding) is subject to the restrictions identified above. Seeking donations from the public (as well as rewards-based crowdfunding platforms) are not subject to the same restrictions and are in theory available to all structures, though the organisation would need to adhere to the terms of service of the relevant platform, as well as the organisation's overarching governance and regulatory requirements.

Taxation

As well as legal structuring issues to consider, taxation is another area in which specialist advice should be sought to ensure that the taxation implications of a given structure are known ahead of time.

A number of tax reliefs available for social enterprises are not, as a matter of policy, available to organisations set up for the purposes of carrying on energy generation activities. In particular, the Enterprise Investment Scheme (EIS) and Community Investment Tax Relief (CITR) are expressly no longer available for energy generation.

The government announced plans to expand Social Investment Tax Relief (SITR) to community energy organisations which were engaged in the export of energy, however these plans were shelved indefinitely and presently remain unavailable.

Charitable status can confer a number of taxation advantages onto an organisation, which are beyond the scope of this report.

At the time of writing this report the Scottish Government are offering up to 100% business rate relief for community energy projects and the Welsh Government are offering 100% business rate relief for community hydro projects (2019-2020)

Conversion

Registration of an organisation as a particular Structure will not necessarily prevent the organisation from subsequently converting itself to another form of organisation.

The process of re-registration should not be undertaken lightly, since it can be complex and expensive to undertake (particularly where the organisation holds assets and contracts with third parties, or a trading history, each of which can add complexity to the legal and taxation consequences of converting an organisation) however it does provide some flexibility where an organisation decides it wishes to re-register either for organisational reasons, or where there are tangible benefits (e.g. a previously unavailable tax benefit) to re-registration.

Set out below are those conversions which can be undertaken in respect of the specific entities considered within this report. The formalities of undertaking a conversion vary from form-to-form and are beyond the scope of this report. However, there are special provisions under the Co-operative and Community Benefit Societies Act 2014 which make it easier for a company to convert into a CBS without affecting the assets of the company as the corporate status is not treated as changed. In particular, it should be noted that certain conversions will need the consent of a regulator (e.g the Charity Commission or the FCA) and, in the case of a conversion to a charity, can be particularly complex and may not be available in all cases.

Considerations When Selecting A Legal Structure For Your Community Energy Scheme

	CLS	CLG	CIC Limited by shares	CIC Limited by guarantee	CBS With asset lock	CBS Without an asset lock	CO-OP	CIO
Who Will Be Responsible For Decision Making?								
Board Of Directors	✓	✓	✓	✓	✓	✓	✓	✓ Foundation
Wider Members - One Member One Vote		✓		✓	✓	✓	✓	✓ Association
Shareholders - One Share One Vote	✓		✓					
Enhanced Voting Rights (note this is more difficult in some Structures than others)	✓	✓	✓	✓	✓	✓	✓	✓
Who Will Be The Main Beneficiaries?								
Shareholders/ Members	✓		✓				✓	
Defined Community			✓	✓	✓	✓		✓
Organisation		✓						
How Can Your Project Be Financed?								
Loan Funding	✓	✓	✓	✓	✓	✓	✓	✓
Grant Funding	Unlikely	Usually only if bespoke articles	Unlikely	✓	✓	Unlikely	✓	✓
Community Share/ Bond Offer		✓		✓	✓	✓	✓	
Equity Finance (Financial Returns Will Differ According To The Chosen Structure)	✓		✓					
Crowd Sourced Funding	✓	✓	✓	✓	✓	✓	✓	✓

Converting a Legal Structure

	Can Convert To:							
	CLS	CLG	CIC Limited by shares	CIC Limited by guarantee	CBS With asset lock	CBS Without an asset lock	CO-OP	CIO
Company Limited Shares (CLS)								
Company Limited By Guarantee (CLG)								
Community Interest Company (CIC) - Limited By Shares	 If charitable							 With charity commission consent
Community Interest Company (CIC) - Limited By Guarantee		 If charitable						 With charity commission consent
Community Benefit Society (CBS) - With An Asset Lock								
Community Benefit Society (CBS) - Without An Asset Lock						 Through amalgamation		
Co-Operative								
Charitable Incorporated Organisation (CIO)								

Useful Contacts

Community Energy Wales

Community Energy Wales is a not for profit membership organisation that has been set up to provide assistance and a voice to community groups working on energy projects in Wales.



For up to date information about the support available for groups looking into community energy schemes or to join the network of community energy groups in Wales then please get in touch with Community Energy Wales. 02920 190260 or email info@communityenergywales.org.uk | www.communityenergywales.org.uk

Legal Advice

We would recommend seeking independent legal advice particularly if entering into any contractual agreements.

WRIGLEYS
— SOLICITORS —

Wrigleys' solicitors can advise on all the elements of a renewables project and the Wrigleys team has experience across wind, solar, hydro and other renewable technologies and acting for developers, funders, commercial tenants, and developments of all sizes. For more information, please contact the Wrigleys renewable energy team: Peter Parker (Partner, Charities and Social Economy) 0113 204 5792 or email peter.parker@wrigleys.co.uk | Website: www.wrigleys.co.uk

Community Voluntary Councils

Governance support is available from your local community voluntary council. For contact details for your local CVC please visit: <https://thirdsectorsupport.wales/contact/>

Financial Conduct Authority: <https://www.fca.org.uk/firms/registered-societies-introduction>

Charity Commission: <https://www.gov.uk/guidance/charity-commission-guidance>

Companies House: <https://www.gov.uk/topic/company-registration-filing/starting-company>

Planning Aid Wales

Planning Aid Wales is an independent, charitable organisation helping individuals and communities across Wales to participate more effectively in the planning system. Core-funded services include delivering planning training to a range of audiences, developing easy read planning guidance and a free planning advice Helpline.



Planning Aid **Wales**
Cymorth Cynllunio **Cymru**

For information and advice on the full list of services on offer, please visit <http://www.planningaidwales.org.uk/>
email info@planningaidwales.org.uk
or phone 02920 625004



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www.coalfields-regen.org.uk

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