



**Better Regulation in Europe**  
**IRELAND**



## *Foreword*

The OECD Review of Better Regulation in Ireland is one of a series of country reports launched by the OECD in partnership with the European Commission. The objective is to assess regulatory management capacities in the 15 original member states of the European Union (EU), including trends in their development, and to identify gaps in relation to good practice as defined by the OECD and the EU in their guidelines and policies for Better Regulation.

Ireland is part of the third group of countries to be reviewed – the other two are Austria and Luxembourg. The first group of Denmark, the Netherlands, Portugal and the United Kingdom were released in May 2009, the second group of Belgium, Finland, France, Germany, Spain and Sweden in mid-2010 and the remaining countries will follow in the second half of 2010.

The project is also an opportunity to discuss the follow-up to the OECD's multidisciplinary reviews, for those countries which were part of this process, (Austria, Belgium, Luxembourg and Portugal were not covered by these previous reviews) and to find out what has happened in respect of the recommendations made at the time. The multidisciplinary review of Ireland was published in 2001 [OECD (2001), *OECD Regulatory Reform: Regulatory Reform in Ireland*, OECD, Paris].

The completed reviews will form the basis for a synthesis report, which will also take into account the experiences of other OECD countries. This will be an opportunity to put the results of the reviews in a broader international perspective, and to flesh out prospects for the next ten years of regulatory reform.



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*Abbreviations and Acronyms*

<b>ASAI</b>	Advertising Standards Authority
<b>AHTU</b>	Anti-Human Trafficking Unit
<b>BRF</b>	Business Regulation Forum
<b>BRU</b>	Better Regulation Unit
<b>CAR</b>	Commission for Aviation Regulation
<b>CCD</b>	Common commencement dates
<b>CER</b>	Commission for Energy Regulation
<b>CIO</b>	Chief Information Officer
<b>CSTDC</b>	Civil Service Training and Development Centre
<b>DBG</b>	Delivering Better Government
<b>DETI</b>	Department of Enterprise, Trade and Innovation
<b>ECRG</b>	e-Consultation Research Group
<b>eISB</b>	Electronic Irish Statute Book
<b>EPA</b>	Environmental Protection Agency
<b>eSIS</b>	Electronic Statutory Instrument System
<b>ESRI</b>	Economic and Social Research Institute
<b>FOI</b>	Freedom of Information
<b>GLC</b>	Government Legislation Committee
<b>HLG</b>	High-level Group
<b>HRM</b>	Human Resources Management
<b>IBF</b>	Irish Bankers Federation

<b>ICB</b>	Irish Credit Bureau
<b>ICCEUA</b>	Inter-departmental Co-ordinating Committee on European Affairs
<b>ICT</b>	Information Communications Technology
<b>IDG</b>	Inter-departmental group of representatives
<b>NCA</b>	National Consumer Agency
<b>ODPC</b>	Office of the Data Protection Commissioner
<b>OPC</b>	Office of the Parliamentary Counsel to the government
<b>REAP</b>	Risk Evaluation, Analysis and Profiling System
<b>RIA</b>	Regulatory Impact Analysis
<b>ROS</b>	Revenue Online Service
<b>SCM</b>	Standard cost model
<b>SIs</b>	Statutory Instruments
<b>SME</b>	Small- to Medium-Sized Enterprises
<b>SMI</b>	Strategic Management Initiative
<b>SOG</b>	Senior Officials Group on European Affairs
<b>TD</b>	Teachta Dála (Member of Parliament)
<b>TPS</b>	Transforming Public Services

## Country Profile – Ireland



Source: CIA Factbook: [www.cia.gov/library/publications/the-world-factbook/geos/ei.html](http://www.cia.gov/library/publications/the-world-factbook/geos/ei.html).



## Country Profile – Ireland

<b>The land</b>		
Total Area (1 000 km <sup>2</sup> ):	70	
Agricultural (1 000 km <sup>2</sup> ):	43	
Major regions/cities (thousand inhabitants, 2008):	Dublin	1 661
	Cork	119
	Galway	72
<b>The people</b>		
Population (thousands, 2008):	4 459	
Number of inhabitants per km <sup>2</sup> :	64	
Net increase (2006/07):	2.5	
Total labour force (thousands, 2007):	2 102	
Unemployment rate (% of civilian labour force, 2009):	11.9	
<b>The economy</b>		
Gross domestic product in USD billion:	197.3	
Per capita (PPP in USD):	44 200	
Exports of goods and services (% of GNI):	98.2	
Imports of goods and services (% of GNI):	86.1	
Monetary unit:	Euro	
<b>The government</b>		
System of executive power:	Parliamentary	
Type of legislature:	Bicameral	
Date of last general election:	May 2007	
Date of next general election:	2012	
State structure:	Unitary	
Date of entry into the EU:	1973	
Composition of the main chamber (Number of seats):	Fianna Fail	75
	Fine Gael	52
	Labour	20
	Other	19
	<b>Total</b>	<b>166</b>

*Note:* 2008 unless otherwise stated.

*Sources:* OECD Economic Survey of Ireland 2009, OECD in Figures 2009, OECD Unemployment Outlook 2009, and OECD Government at a Glance 2009.

## Executive Summary

### Economic context and drivers of Better Regulation

The OECD's 2010 Economic Survey of Ireland recorded that growth in GDP per capita had been among the highest in the OECD until the economic downturn. In the wake of the financial crisis, the economy plunged into a severe recession in 2008. The sharp slowdown in activity contrasts with the rapid expansion from 2002 to 2007. The downturn has revealed a weak underlying fiscal position. The authorities have already taken important steps to restore stability, but more will need to be done and the adjustment will be prolonged. Major economic and policy adjustments are now taking place to address the situation. Better Regulation has an important part to play in this process. Regulatory as well as policy failures were a fundamental factor underlying the downturn. This implies that beyond the sector specific actions that are needed in complex sectors such as banking, the application of general regulatory policy principles such as *ex ante* impact analysis of regulations, public consultation and robust institutional frameworks need to be vigorously promoted.

Better Regulation is supportive of fiscal consolidation, as it can help to make the public sector and public services more efficient, including through the use of e-Government to reduce paperwork inside the administration, reviewing policy on enforcement including a risk based approach, and reducing the number of agencies. Better Regulation helps to strengthen the institutional fabric of the public service, for example, by identifying ways in which the framework within which government agencies operate can be improved. Better Regulation can also help to support buy-in and implementation of reform. For example, effective approaches to public consultation and communication are a key part of the Better Regulation toolkit.

A positive perspective of what Better Regulation can bring to the economy and society is already evident in Ireland. The Smart Economy Strategy (Building Ireland's Smart Economy - a Framework for Economic Recovery, published in December 2008) includes "Smart Regulation" among its five key action areas. The 2009 report of the National Competitiveness Council underlines the need to restore competitiveness which includes the need to reduce the costs of doing business.

### The public governance framework for Better Regulation

The underlying framework for Ireland's public governance is quite stable compared to the developments seen in some other European countries which are experiencing significant decentralisation, for example, or a major rationalisation of their subnational structures.

Public governance modernisation has been a major feature of the Irish policy landscape over the last twenty years, has come a long way, but as in many other OECD countries remains a "work in progress", as Ireland itself acknowledges. There is a need to continue strengthening institutional capacities (skills, culture change) within the public administration in support of a modern economy and society. The report of the Irish government, Transforming Public Services (TPS - published in November 2008) is a further step on this way, together with the appointment of a Minister of State with responsibility for public service transformation.

## Developments in Better Regulation and main findings of this review

### *Strategy and policies for Better Regulation*

**Ireland has made considerable progress since the 2001 OECD report.** In relation to nearly all of the issues raised in that report, there has been movement, often significant. A milestone was the 2004 White Paper “Regulating Better” which set out six key-principles of Better Regulation and an agenda of 50 actions grouped around five headings. This remains the blueprint for further work. A progress report by the Department of the *Taoiseach* in 2007 demonstrates a breadth and persistence of efforts across a broad front which compares well with many other EU countries over the same period. The issues which have been, and continue to be, tackled include: regulatory impact assessment; simplification and accessibility of the law; administrative simplification; public consultation; a framework for the effective functioning of regulatory agencies; and a stronger framework for the management of EU regulations. There are also initiatives to address enforcement and compliance. This agenda remains a work in progress, and is subject to regular reviews.

**A set of principles is now in place to guide developments, on which Ireland is developing its policy for Better Regulation, driven from the centre of government.** The principles – necessity, transparency, consistency, accountability, effectiveness, and proportionality – cannot be faulted. They represent a clear statement of intent, which is still lacking in some other EU countries.

**An important achievement has been to raise general awareness of Better Regulation, both within and outside the administration, but active support remains fragile.** General awareness is high as a result of the initiatives of the Better Regulation Unit within the Department of Taoiseach, the High-level Group on Business Regulation (which gathers external stakeholders and the administration), and the large number of reports issued on Better Regulation policies. It is not complete, however. The detailed picture across departments and beyond reveals that it is patchy and that “buy in” (the next step beyond awareness) is far from complete. Some parts of the administration do not yet fully support the objective and downplay the importance of Better Regulation. However interviews, more positively, also suggested that the business community is anxious for more effective regulatory management and has a good grasp of its importance as well as the detail of what is needed.

**The challenge at this stage is to mainstream Better Regulation more fully into the fabric of policy and rule making, and to encourage political support, post crisis.** Better Regulation remains a poor relation of other priorities such as public service modernisation and fiscal consolidation. However regulatory policy has considerable links with the effective achievement of those policies. This needs to be drawn out and communicated. There is also a need for political sponsorship. In the meantime, a relative failure to reflect on the connections limits capacities to deliver (it is difficult to engage departments, and to secure necessary resources). Raising support beyond the inner-circle of Better Regulation champions is essential. This will require a (re) articulation of the link between Better Regulation and a stronger economy and society, to prevent senior officials and politicians from staying in the perspective that “the real issues lie elsewhere”.

**The gap between principles and practices often remains wide. Ireland is confronted with the classic difficulty (common to most countries) of converting principles and strategy into reality.** Thus *ex ante* impact assessment is now supported by well designed tools and processes, but actual results fall short of expectations. The longstanding issue of simplifying the complex stock of legislation is universally understood, but despite progress over the last decade, much remains to be done, and the work is (relatively) under-resourced which slows progress. The administrative burden reduction programme was, at least until quite recently, moving forward quite slowly.

**The Better Regulation agenda may require some rebalancing and a linked effort to structure it around priorities over time.** The Better Regulation agenda in Ireland has a broad scope by EU standards. Whilst Ireland has broadened its perspective from a relatively narrow focus on red tape, relatively little attention is given to the broader needs of citizens, society and public service improvement, and to issues of sustainability. Local authorities are largely out of the loop at this stage, although there are some valuable initiatives. At the same time, limited resources imply the need for prioritisation of activities over time.

**The communication strategy has succeeded in the first phase of awareness raising, but needs to be updated and refreshed.** The key initial challenge was the need to increase awareness of Better Regulation among internal and external stakeholders. This can be considered a “mission accomplished”, aided by the prominence of the Department of the *Taoiseach*. A second stage has opened up, partly because the tools and processes are now largely in place, requiring a different kind of communication, but also to fit the post-financial crisis environment and a desire on the part of interested stakeholders for more attention to be paid to the promotion of a fairer society and reduce the “democratic deficit”, alongside the traditional emphasis on economic aspects. There are significant pockets of enthusiasm for Better Regulation both within and outside the administration, whose views on what needs to be communicated could usefully be tapped. Communication at this stage needs to be more pro-active, going beyond reports and websites. It also needs to highlight the progress made. As one stakeholder put it, “the government has not spelt out what it has achieved”. For example, the BRU website focuses on the different reports and documentation on Better Regulation initiatives. This does not do enough justice to significant achievements (for example, the progress on legislative simplification). The BRU website itself needs to be publicised.

**Taking stock of what has been done is well embedded in the administrative culture, follow through is not so strong.** Ireland compares favourably with a number of EU countries in its willingness to evaluate the development of Better Regulation processes. The number of high-quality reports produced over the last few years is impressive by OECD standards. Reports actively seek to identify areas for improvement and to make focused recommendations of practical value. The real challenge in the Irish context is to act on the results of these evaluations. Reports tend to accumulate and to some extent reflect a forward movement that is more about appearance than reality. Performance could be strengthened by using more measurable targets, which is not yet fully embedded in the administrative culture. “Public exposure supports higher standards” as one stakeholder put it.

**E-Government is being used to good effect in some areas, and the broad strategy has been given a renewed impetus.** E-Government is a key supporting element of Better Regulation. The OECD peer review team were not able to review this aspect in any detail. It is clear, however, that ICT is being used to good effect to support some key Better Regulation processes such as administrative simplification, the development of a web based Statute Book, and new Internet based forms of public consultation. The link between e-

Government and Better Regulation is a significant driver for Better Regulation initiatives in many EU member states and the link could be developed further in Ireland. Since the OECD mission, the Government established a new e-Government strategy and announced the intention to appoint a Chief Information Office (CIO). The renewed impetus with the publication of the e-Government strategy provides the opportunity to make a clear strategic and institutional link to the Better Regulation agenda.

### ***Institutional capacities for Better Regulation***

**Institutional structures to support Better Regulation have progressed steadily since the 2001 OECD report, spearheaded by an active central unit.** The first structures of the late 1990s, which were primarily focused on red tape reduction, have been broadened and replaced with a range of bodies and networks covering Better Regulation processes ranging from the implementation of regulatory impact analysis to statute law simplification. The Better Regulation Unit in the Department of the Taoiseach (Prime Minister's Department) has, in particular, established itself as a small but highly active and enthusiastic advocate of Better Regulation across government and beyond (commendably so, given its small size). It has overall responsibility for supervising the roll out of Better Regulation, and direct responsibility for the key process of regulatory impact assessment. Not all EU countries are yet equipped with such a unit. This is an important achievement, which needs to be sustained.

**There are limits to what the Better Regulation Unit has been able to do, in order to bridge the gap between principles and practice.** The Better Regulation Unit has, in essence, succeeded in putting Better Regulation on the government policy radar screen, not least through clear explanations of what it means, how it works, and why it is important for Ireland. But – Ireland is not alone in this situation – there remains an appreciable gap between principles and practice. The OECD's 2001 report had already noted that "implementation strategy and institutional drivers for reform are weak". These have significantly improved, but need further strengthening. Beyond the often uncertain political support, this can be linked to three factors, which are explored further below: a relative lack of buy-in from other key players at the centre of government; the need for the Better Regulation Unit itself to be strengthened within the Department of the Taoiseach; and the need for significant further culture change among line ministries.

**Beyond the Better Regulation Unit, other key players are, or need to be, providing active support for the development of Better Regulation.** The constitutionally established Office of the Attorney General advises the government on matters of law and legal opinions, and also drafts most of the important regulations, as well as spearheading key aspects of statute law simplification. Its perspective on developments must be seen as valuable and necessary. Two government departments also have responsibilities that are important for the Better Regulation agenda. The Department of Trade, Enterprise and Innovation has been engaged for some time in the business related aspects of the agenda, and was charged by the government in 2007 with responsibility for the business administrative burden reduction programme. In March 2008, DETI was given responsibility for leading and co-ordinating the measurement and reduction of administrative burdens across government, leading to the achievement of the 25% target by 2012. The Department of Finance leads more broadly on key aspects of public governance which are relevant to Better Regulation. Without the perspective and full support of these players, the further development of Better Regulation will be a struggle. Reflecting a common dilemma across Europe over the best organisational structure, it is difficult for Prime Ministers' Offices to take sole responsibility for Better Regulation, as they must balance the whole range of issues meriting the Prime Minister's attention, and they are not directly "connected" to the

citizens and businesses for which they ultimately work, in the way that line departments are. The Better Regulation Unit needs, therefore, the full and unconditional support of other key players, in order to exert effective leverage across government. The “baton” of Better Regulation advocacy must be shared, if it cannot be handed over, building on the recent achievement of sharing part of the agenda with the DETI.

**Yet the engagement of these key players seems muted.** The OECD peer review team had the sense that the other key actors were not always fully engaged. The Finance ministry is the most important department alongside the Department of the *Taoiseach* for Better Regulation. It is responsible for financial and performance management across government, shares responsibility with the Department of the *Taoiseach* for public sector modernisation, and oversees e-Government policy. However its understanding of the value of the horizontal Better Regulation work promoted by the Department of the *Taoiseach* as support for policies to strengthen the economy post crisis appears fragile.

**There is a need to reinforce the Better Regulation Unit itself, not least in terms of securing supportive connections with the other parts of the Department of the Taoiseach.** The Better Regulation Unit also needs the active engagement and support of other parts of the Department of the *Taoiseach*. It is attached to the Public Service Modernisation Division, which only reflects a part of the relevant Better Regulation functions inside the Department. The Department includes other relevant units including the division for European and International Affairs (link to EU management), the economic and social policy division (link to competitiveness), and not least, the cabinet secretariat. It is not clear to what extent this work is fully joined up, where it needs to be. Given the horizontal nature of the Better Regulation agenda, have other divisions in the Department of the *Taoiseach* mainstreamed its agenda sufficiently? Does its work perhaps lack a strong enough visibility within its own Department? The 2008 OECD public service review of Ireland underlined the importance of the Department of the *Taoiseach* (as a whole) as a strong central driver of reform.

**The Better Regulation Unit also lacks powers, and may be short on the necessary resources to do an effective job.** The BRU currently can do little more than encourage, monitor and advocate. It has few if any real powers (sticks or carrots) to ensure that departments, for example, produce timely and adequate Regulatory Impact Assessments. It may not be appropriate to increase its powers, as this does not necessarily fit with the Irish conception of how a Prime Minister’s Office should function. However, this should be considered. Resources and their effective deployment may also be an issue. The BRU expanded following the publication of the 2004 White Paper “Regulating Better”, but staff were reduced in 2007. Given the size of the country, and compared with some other EU countries, resources overall (taking account of staff directly deployed on Better Regulation functions elsewhere, such as in the DETI), are reasonable. But as some stakeholders suggested, they may need to be deployed more effectively. Some other countries such as the United Kingdom and the Netherlands have developed their institutional approach on the basis of secondments from relevant parts of the institutional structure, which encourages buy-in, so that the BRU is not working in relative isolation. This approach also reflects the findings of the 2008 OECD public service review, which drew attention to the need for more mobile postings across the public service, as well as the Irish government’s own statement on Economic Regulators, which advocated internal cross-postings. The Belgian federal government is another example to reflect on, as it has developed its Better Regulation unit into a semi detached “agency” within its federal Chancellery, which allows it some independence from political cycles, as well as the potential to acquire and to use resources more flexibly.

**There is, as in most other EU countries, the need for further significant culture change across the “whole-of-government” in support of Better Regulation.** Overall, and with some important exceptions, ownership of the Better Regulation agenda in-line ministries looks fragile. Ireland’s departments are traditionally autonomous, a feature shared with most other jurisdictions, and the context is therefore challenging. It is difficult to hold departments accountable and to put them under pressure to perform. Significant efforts have been deployed over the last few years to develop networks and co-ordinating groups for different aspects of Better Regulation, internally and shared with external stakeholders. The 2008 OECD public service review of Ireland drew attention to the importance of networking. This is a key way of advancing. It should be pursued in tandem with “stronger” mechanisms to secure performance. As already advocated in the OECD public service review, there should be a stronger use of performance measures and budget frameworks to drive effectiveness, with departments held to account on the basis of measurable targets.

**There is a general lack of baselines, measurements, targets to support qualitative analysis and allow for effective *ex post* evaluation.** The 2001 OECD report had already noted that Ireland could raise accountability for results through measurable and public performance standards. The Irish government is aware of this need. Both the report “Smart Economy” and the report “Transforming Public Services” emphasise the need for quantification and performance measurement. The argument which the OECD peer review team sometimes heard that the relatively small size of the country needs to be taken into account is not clear. The team also heard many comments to the effect that there are no measurable performance targets, and that a tougher approach (more sticks, not only carrots) and increased accountability, was needed. This is one major reason why the Finance Department needs to be part of the central leverage, and the performance and delivery focus – as advanced through the Annual Output Statements – needs to be brought to the forefront within the resource allocation process. Without this, it will be an uphill struggle to secure buy-in. At the same time, the carrots need to stay in place (for example, the BRU has set up some impressive training for Regulatory Impact Assessment, which draws in an increasing number of line ministries).

**One aspect that needs particular attention is the need to improve capacities for a more rigorous and quantitative approach to the Better Regulation work of line ministries.** The OECD peer review team heard a number of comments to the effect that the use of data and quantitative approaches needed to be strengthened (“Metrics needed as well as incentives”. “Be data driven”. “Is there enough of the right capacities in ministries?” “Dearth of expertise”. “Legitimising the use of quantitative approaches has some way to go”). Enhancing the quality of processes which are in place will require a more rigorous approach to measurement, targets, and the use of quantitative methods in processes such as RIA.

**Rationalisation of government agencies is a priority; at the same time they offer some important examples of Better Regulation best practice.** The government is conscious of the need to identify further means of rationalising a complex network of government agencies, following the rapid growth in their numbers in the 1990s. Judging from stakeholders’ comments to the OECD peer review team about the confusion generated by the existence of numerous agencies whose functions are not always clearly understood, this is important. The government also notes that the principles in its 2009 Statement on Economic Regulation may be considered to apply to all regulatory agencies. A broader review of government agencies, focusing not so much on savings but aiming to strengthen their governance framework to maximise efficiency and effectiveness, as well as to clarify the functions which are most appropriately delegated, would be a helpful further step. This

could build on the 2009 Economic Regulation Statement and the 2007 mapping exercise. At the same time, it seems that Better Regulation practices are well advanced with some regulators, which could help to guide others in their adoption of good practice which has been tested on the ground.

**The role of the parliament appears to be changing, with a growing engagement and interest in Better Regulation issues.** This appears to be a significant development relative to the OECD's 2001 report. Three parliamentary committees, two with specific mandates relating to regulatory management (the Joint Oireachtas Committee on Economic Regulatory Affairs, and the Joint Oireachtas Committee on EU scrutiny), and a third which takes an interest in initiatives related to the business environment (the Joint Oireachtas Committee on Enterprise, Trade and Employment), are now increasingly active. A particular area of progress relates to EU issues where significant efforts have been made by the government to better inform parliament on negotiation and transposition. This interest needs to be actively encouraged, as in some other EU countries, since parliament shares with the executive the development of legislation. Parliament's overall ability to be engaged remains fragile.

**The importance of the judiciary in the Irish context should not be neglected.** In the Irish system, the judiciary has traditionally played a significant role in the judicial review of regulation, even by the standards of common law countries. Judicial review of regulations can be vigorous. The system of judicial review in Ireland is described in detail in Annex C.

**Finally, some other key players should not be neglected.** These include the Office of the Comptroller and Auditor General, which was receptive to the OECD peer review team on increased involvement in Better Regulation (which could be done by asking them to help with regular evaluations of the RIA process, for example). The Ombudsman is also relevant for its surveillance role and the feedback which it can provide on the effects of regulation. The Law Reform Commission, an independent body which was set up to examine specific areas of the law as directed by the government and to make practical proposals for its reform, carries out necessary underlying work (including statute law restatement) to ensure that the Irish Statute book is effectively reformed, and needs adequate resources to carry on this work. Finally, the local authorities play a key role in direct contact with business and citizens over the provision of public services.

### ***Transparency through consultation and communication***

**Ireland has a strong tradition of public consultation, based on informality and social partnership.** Consultation in the development of regulations is well embedded in the administrative culture. It has traditionally relied heavily on informal interaction between departments and external stakeholders, as well as social partnership since the late 1980s. Social partnership has played an important role in developing a consensus on major public policy issues. By contrast, formal requirements relevant to all potential external stakeholders have been handled with a light touch. For example, the Cabinet Handbook briefly raises the issue of public consultation without going into detail.

**A recognition of the need for evolution with the 2004 White Paper, combined with a growing use of ICT, has generated significant developments which have opened up the traditional processes.** There have been noteworthy changes since the 2001 OECD report. With transparency identified as one of the six core principles of Better Regulation in the 2004 White Paper, steps have been taken to promote a more formal and structured approach to public consultation. The approach nonetheless leaves an important margin for departments to define specific arrangements. The aim is to allow room for the relevant dose of informality, linked to Ireland's small size, as well as allowing for innovation, which has



been grasped with enthusiasm by some departments and for some consultations, through their use of ICT.

**The BRU's consultation guidelines set clear best practice standards, which need to be enforced.** The BRU's 2005 guidelines on public consultation are clear and comprehensive. They were designed to be a practical tool to help departments, and as such, fully meet this objective. Any Department which reads the guidelines (especially the checklist and the flowchart) should be in no doubt over how to apply best practice. The guidelines are not prescriptive. There are no sanctions for non-compliance. Departments are left to define the appropriate level of consultation, which can go from a full formal public consultation to informal consultation. They are "advised" or "encouraged" to publish submissions and provide feedback. Specific approaches therefore, and as might be expected, vary. The use of ICT appears to be spreading and to be handled with sophistication in some cases (just using ICT without proper follow through does not guarantee a quality consultation), which means that some consultations engage a wide range of stakeholders.

**Echoing the situation in some other EU countries, Ireland is in a period of transition, and the full engagement of relevant stakeholders is not always achieved.** The testimony of a wide range of stakeholders to the OECD peer review team suggests strongly that there are issues, as well as a demand for more effective consultation from the wider community. While everybody consults (usual practice), the capacity of departments to reach out to a broader public (where relevant) and develop new forms of consultation varies a lot. Public consultation within the RIA process also does not seem, as yet, to play a strong formal role in practice for gathering evidence. The consultation guidelines are not universally known. Issues raised by stakeholders included the problem of being heard if one was not an insider; the need to reach out to all sizes of company, not just the larger ones; the need for stronger efforts to reach out to citizens and the broader public; and the need to step up efforts to make the consumer voice heard. There seems to be a growing demand for the government to be more inclusive and to hear citizens.

**Informality continues to play an important role, the argument sometimes being advanced that the size of the country dictates that this should be so.** This argument needs to be treated with caution, as size is not necessarily a barrier to a more formal approach, and it should not limit efforts at the consistent deployment of best practice, especially in the Irish context where the political system (multi-seat constituencies with a tradition of direct links between citizens and their local politicians for the discussion and resolution of issues) may in fact require the promotion of a more centralised and structured approach. Some stakeholders suggested that the lack of formal safeguards can lead to undue influence from some groups or lack of consultation in cases of political pressure. Informality can easily turn into a self referential insiders' debate.

**For social partnership or dialogue to remain an important process it must continue to evolve.** Social partnership has been helpful in bringing consensus on key issues since the late 1980s when it was developed. It has also evolved, encompassing new parts of the society (community groups). However, while it has integrated community and environmental groups, it has not always adapted easily excludes many, and may not adapt easily to new technological and societal developments. The 2001 OECD report had already drawn attention to the fact that over time, and given the open nature of the Irish economy, new participants (for example, non-nationals) are affected by Irish regulatory affairs. In tandem with any ongoing social partnership process, it is important that divergent and external voices are heard. The consensual approach can also lead to the avoidance or exclusion of some issues from the agenda.

**Ireland faces considerable challenges, which it is addressing, in the accessibility of its regulatory stock, which harms transparency.** There is no single consolidated Irish statute book. The historical development of the Irish legislative landscape and methods for enacting legislation have combined to generate a complex regulatory stock. The government has stressed the importance of ensuring accessibility of legislation and taken a number of initiatives since the 2001 OECD report to make the law more accessible. Efforts to make regulations publicly available sit alongside efforts at simplification of the regulatory stock. A major initiative in the former category is the electronic Irish statute book, a free of charge database, as well as the Legislation Directory. These initiatives may not be “politically interesting” but are highly valuable and necessary for future progress on transparency. As matters stand, despite the efforts of recent years, the state of the statute book combined with uneven performances in public consultation significantly reduce regulatory transparency, which has to be assessed as rather poor in comparison with many other European countries, and which has knock on effects for government accountability.

### ***The development of new regulations***

**Irish regulatory production needs to be monitored, not least in support of the efforts to simplify the regulatory stock.** A significant number of new primary and secondary regulations come on to the statute book every year. In the Irish context this matters especially, as much of this represents amendments to existing statutes, necessitating a major and ongoing cleaning up of the regulatory stock over time so that it remains legible.

**Secondary regulations are not subject to the same processes as primary regulations.** Primary laws are the subject of forward planning published on the Department of the *Taoiseach* website by the Office of the Chief Whip for upcoming parliamentary sessions. This is well in line with international best practice. However, it contrasts with the lack of arrangements for secondary regulations. Planning of secondary regulations rests with the sponsoring department, and is not made publicly available. Checking for the legal quality of secondary regulations is also much less in evidence than for primary legislation (which is implicitly subject to legal quality principles by dint of the fact that it is drafted by the staff in the Office of the Parliamentary Counsel to the government in the Attorney General’s Office).

**Ireland was a relative latecomer to Regulatory Impact Analysis but has been catching up.** Deployment of a policy to embed *ex ante* RIA in policy and rule-making has been gathering speed over the last few years. Following a pilot phase and an evaluation, in 2005 the government established RIA as a requirement for all government departments and offices. This was a landmark step forward. Some aspects of the policy reflect the best international practice, including the requirement for an integrated RIA covering all the major issues, and its application to EU directives (at least in principle). The principles and practical guidance and training disseminated by the BRU are among the best.

**The BRU is an active advocate and promoter of RIA, and its activities have been met with some success.** The BRU has been active and creative in the promotion of RIA following the 2005 decision to make it a requirement. The guidance and training is comprehensive, well focused and well developed. A network of Departmental officials orchestrated by the BRU is gradually extending understanding and culture change. RIAs are examined for their quality by the BRU on their way to the cabinet. Most of the necessary support tools for an effective RIA are in place. There is, as a result, progress on the ground, with a significant and documented rise in the number of RIAs carried out.

**But acceptance of RIA as an integral part of policy and rule-making has some way to go, and the gap between the principles of RIA and the practice generally remains wide.** The process continues to operate within a weak institutional framework which does not sufficiently “scare” departments into co-operating for the production of quality RIAs. Thus the OECD peer review team were told that RIAs were often “self-serving”, and that RIAs can get lost in “turf battles” between departments. The team were also told that in practice, some draft proposals did proceed without a RIA attached, depending on political will and support. However several stakeholders (including from outside the administration) were supportive and said it was an important process, even while acknowledging that it tended to remain an “add on”. The 2001 OECD report had already proposed that disciplines on regulatory quality should be strengthened. Despite progress since then, more is needed to discipline departments into carrying out RIAs of good quality, systematically. How should this be done, in the Irish context? The compulsory nature of the process remains something of a formality unless there are real sanctions, and perhaps a statutory requirement to carry out RIAs. The recent conclusion of some other EU countries where previous “requirements” were largely flouted is that statutory backing for the process may be needed, combined with a watchdog function that enables poor RIAs to be turned back, and that publication of RIAs (and opinions on their quality) is also an important lever. These aspects are considered further below.

**Currently, there is no statutory backing for the RIA process.** The requirement rests on a cabinet decision, integrated into the Cabinet Handbook, so that in principle, all departments have “signed up” to the RIA process. Ireland lacks an administrative procedures law, which exists in some (not all EU countries) to give statutory backing to the processes for development of legislation (and other issues such as appeals).

**The process lacks sanctions and a strong challenger that would force departments to pay attention.** The BRU does not have a statutory gatekeeper role with regard to RIAs (it does not have formal authority to turn poor RIAs back), nor does it have a formal mandate to assess the quality of RIAs or to report on the outcomes of its monitoring work on RIA. There is no strong challenge function. Many stakeholders said that the training was good but the process lacked quality control. “Too many carrots and not enough sticks”, said one, and another “BRU is not a gate, as it should be”. The OECD peer review team also heard that a stronger approach is needed at the beginning of the process. The scrutiny by the BRU of RIAs attached to heads of bill, before they are circulated for approval by government is an important part of their work, and they have used this channel to promote higher quality RIAs. But could this input start sooner?

**Systematic public consultation and publication, which would also help departments to co-operate by exposing RIAs to public scrutiny, is often inadequate or not done.** The formal integration of public consultation as part of the RIA process is a positive development, as is the requirement in principle that RIAs be published (a least for primary legislation and when the bill is published etc). However, neither of these practices appear yet to be fully embedded. There is concern that there are still low rates of publication. The OECD peer review team heard that there is considerable resistance to publication. It also heard that publication would be a significant lever to promote change. Name and shame is not (as yet) a strong tradition within the administration and this is likely to be an effective way of applying pressure.

**The analytical framework and quantitative support for RIAs remain relatively weak.** The BRU now focuses on its action on improving the quality of RIAs, where a lot is still needed. A key weakness is quantification by departments. The OECD peer review team heard that there is a need to “legitimise quantitative approaches”. Beyond the economic and

business related impacts, methodologies remain relatively undeveloped. Whilst it is important to strike an appropriate quality/quantitative balance, the latter needs a further boost, including further capacity building among departments. It was suggested that there is a need for a more effective allocation of appropriate resources (economic, legal) within departments to areas conducting a lot of RIAs. Departments appear to make little use of the service of the economic expert, which is not a good sign. These points suggest that capacities may exist but are not fully used. Is there an underlying issue of the perceived relevance of RIAs for some departments? The current process, whilst broad, tends to emphasise in practice the economic dimension, and sustainability, for example, is not so clearly covered.

**Significant statutory instruments (secondary regulations) may be slipping through the net.** The requirement to prepare a RIA applies to “significant” secondary regulation, but there is no clear definition of what “significant” means. This is left in the hands of departments. The OECD peer review team were told that many significant secondary regulations were in fact slipping through the net. There is a similar issue for RIAs on EU regulations, which are required in principle but also often not done (see also Chapter 7). Secondary regulations are important as these are often the vehicle for amendment of existing laws, adding to the complexity of the regulatory stock and lack of readability of the law.

**Regular evaluations of the overall process are important for sustaining pressure and for securing any necessary improvements.** Evaluation is valuable for moving the process forward and refining mechanisms for maximum effectiveness, as evidenced by the 2005 report and subsequent review. The next evaluation might be structured around an impact analysis on the RIA process itself, in other words, consider the costs and the benefits of the system in order to pinpoint what needs to change.

**Effective communication is critical in order to make clear the importance of RIA for meeting high-level public policy goals.** The BRU has articulated the strategic value of RIA as a means of improving the quality of governance, improving economic efficiency and the effectiveness of the public service, and to improve competitiveness. How can RIA be further promoted as a tool for enhancing effective policy debate, both internally and externally? Supportive external stakeholders could be encouraged to contribute to the communication of why RIA is important. Internally, the OECD peer review team were not clear whether buy in had been achieved within the Department of the *Taoiseach* itself, for example by the Cabinet Secretariat. There appears to be a need to strengthen communication, both internally and externally.

**The integration of *ex post* evaluation in the RIA process reflects best international practice.** *Ex post* review is now also a mandatory element of the regulatory impact assessment process, reflecting best international practice. As one stakeholder put it, “if we can’t stop draft legislation, we can look at it afterwards”. Although it is of course preferable to catch issues before they become law, several EU countries are aware of the fact that in a context where effective RIAs may pose a challenge, *ex post* review is another opportunity to take stock. However, the most important reason for having a process that uses both *ex ante* and *ex post* evaluation is that this should generate a virtuous circle, in which the *ex post* evaluation can help to strengthen understanding how draft regulations can be more robustly constructed, for example in terms of securing compliance, and avoiding “unintended consequences”, as well as discouraging the production of poor RIAs in the first place, if evaluations are publicised.

**More broadly, there is a need to envision the development of the RIA process in the wider context of regulatory governance aimed at joining up stock and flow initiatives.** RIAs are only part of the processes that need to be deployed for effective regulatory governance. They can be seen as part of a support chain for broader efforts to secure an effective and efficient legal framework. As well being a tool to evaluate each draft regulation individually, they should also serve to provide an overall view of the way in which regulation is evolving, with reference for example to different sectors of the economy or different types of company. For example, a review of RIAs may show that one sector has been particularly affected by (too much) regulatory activity. Joining up the RIA process with the initiatives for simplification may also suggest issues for debate and further action in terms of managing regulatory output, improving the quality of the law, and evaluating the effects of regulatory output on specific actors and sectors of the economy.

**As in many other countries, further emphasis seems to be needed on considering alternatives to regulation at an early stage of the process.** The OECD peer review team was not able to consider this aspect in any depth. Ireland has various strong examples of the use of alternatives. However, as one stakeholder put it, “the government may be stuck with a policy decision, but can still work on how it is implemented”. This is an area where sustained pressure is needed over time to encourage the consideration of alternatives. The evidence from other EU countries is that it is not enough to include this consideration in the guidance on development of regulations, and leave it at that.

### *The management and rationalisation of existing regulations*

**Ireland has a longstanding issue of needing to simplify a complex stock of legislation.** Ireland is not the only country to face challenges in this regard. In the Irish case, however, the problems are somewhat specific. They stem from the historical development of the Irish Statute book (which includes pre independence legislation), as well as from the process for making regulations, under which acts and statutory instruments are usually amended by the enactment of new regulation which makes piecemeal changes. This means that simple, effective and transparent access to regulations does not exist in Ireland. There is a consensus (both within and outside the administration) over the fact that it is difficult to understand what regulations apply, and what is in the law (lawyers systematically need to be consulted, and even they have trouble). The National Competitiveness Council notes that legal fees are one of the important non pay costs for businesses.

**Impressive efforts have been set up to address the challenge, and there has been progress since the 2001 OECD report.** The Irish government fully acknowledges the importance of tackling the challenges, which are underlined in successive reports on Better Regulation. There is a three-pronged approach at work: statute law revision (abrogation); statute law restatement (an administrative form of consolidation); and consolidation. Different parts of the institutional structure are engaged, including the Attorney General’s Office and the Law Reform Commission. Since the 2001 OECD report, significant progress has been made, particularly in the area of statute law revision. The Statute Law Revision Act 2007 and the Statute Law Revision Act 2009 together repealed over 4 500 spent or obsolete pre-1922 Acts.

**But progress is slow, creating palpable frustration and incomprehension among many stakeholders.** The OECD peer review team found a broad consensus (both within and outside the administration) over the need to move much faster. The regulatory framework remains difficult to understand. Many consolidation projects are moving slowly. Resources allocated do not seem to match the requirements for the work and do not reflect

the importance given to the issue in the Better Regulation agenda. It is therefore not clear to what extent a real priority is being attached to this work and what political commitment it commands.

**Links are needed between simplification of the regulatory stock and the RIA process.** As new regulations are produced, amendments continue to pile up, transforming restatement into an endless race against time. This issue needs to be tackled *ex ante* as well as *ex post*. Part of the RIA process should be to examine the nature of the proposals for new regulations in order to spot those which would lead to unnecessary further complication of the regulatory stock.

**Communication of the benefits to be gained from the simplification work is not evident, but essential for stimulating interest and support.** It is not clear how many (inside as well as outside the administration) are aware of the simplification work, its objectives and its importance. The 2008 report of the Law Reform Commission has a compelling section on the benefits of restatement for example, explaining its importance for increased transparency, the potential to enhance compliance, and accountability by government, as well the wider benefits for the economy (confidence for investors) and the cost for all users. The OECD peer review team considered that communication of this should be enhanced.

**As in many other fields of Better Regulation, Ireland has strengthened its approach to administrative burden reduction since the 2001 OECD report.** The programmes that have been put into place are clear. There are two strands to the policy: a programme to reduce administrative burdens on business by 25% by the end of 2012, announced in March 2008; and the work of a High-level Group on Business Regulation on five priority areas, based on the work of the Business Regulatory Forum and international experience, and identified through these processes to be the most burdensome. Although there is no up to date figure, progress has already been made, with an estimated EUR 20 million savings (figure reported in 2008) and some significant ongoing projects such as: an XBRL project (extensible Business Reporting Language) including Revenue, CSO and CRO; ROS Signatures and eFiling with the CRO and revenue, and risk-based enforcement with participation of agencies across government.

**The momentum, which seemed to have slowed, has been picking up speed.** The DETI notes that the work programme is business driven. In other words it depends on the ideas, suggestions and issues put to it by business. Reporting is done periodically, not according to a fixed cycle. The problem of initial momentum may have its roots in the fact that the work is not perceived to be the most important issue for business competitiveness, and may have been “drowned out” by other measures to redress the economy in the wake of the financial crisis.

**The initiatives are acquiring a stronger framework with regard to measurement and follow up, but specific targets and resources remain issues.** With respect to the quantitative target, the DETI has defined the areas for reduction, has established a baseline measurement for itself, and is now encouraging other departments to follow suit. To encourage buy in and in line with best practice elsewhere in the EU, the target should be divided between ministries (which would put pressure on them to perform). It should also be a net target, as many rightly see RIA as key to reducing overall regulatory burdens. Adopting a quantitative approach requires strong incentives if not sanctions, as the Irish administrative culture is not particularly tuned in to measurements and data. Ireland could use the examples of relevant other countries and through discussion in the SPOC network to strengthen its approach on the ground. The project has also stumbled on a relative lack of

resources (or a reluctance to allocate resources) within line ministries for taking forward the identification and measurement of burdens.

**The institutional structure which appeared to make a slow start is now gathering pace.** At the time of the OECD mission in late 2009, the framework structures for the programmes did not seem to command adequate attention. The HLG did not appear to be functioning effectively. The OECD team understands that this is now improving.

**The initiatives do not seem to be backed up by a strong communication strategy.** Public consultation and communication fall short of international best practice. Beyond the High-level Group standing dialogue with stakeholders, the initiative is with departments and attention will be needed to ensure that they follow up on the workshops anticipated after the measurements have been completed.

**Overall, the policy may benefit from a review to draw out what really matters in the Irish context post crisis.** There seems to be compelling evidence from some reports, echoed by comments to the OECD peer review team, that more should be done to support very small firms, in order to strengthen the domestic economy. Some of these actions may relate to administrative burdens. Some interviewees also pointed out the reluctance to address the “real” issues behind simplification, implying that the programme should go beyond administrative burdens. The 2007 ESRI survey commissioned by the BRU provided a very useful snapshot at the time of the issues judged important by business. Three years on, another survey would help to crystallise what the focus should be.

**A specific programme for citizens may be a step too far at this stage, especially given resources and the need to prioritise, but Ireland might usefully review the experiences of other countries such as the Netherlands and Portugal, with a view to putting this into its forward Better Regulation programme.** There is also no clearly defined programme at this stage for burdens inside the administration. However the wide range of relevant initiatives which are already underway or planned under the banner of Transforming Public Services, could be identified to see whether there are any gaps.

### ***Compliance, enforcement, appeals***

**Policies for compliance monitoring vary.** Some departments and agencies have developed specific policies to track compliance. As this is an important indicator of the effectiveness of regulations the practice should be encouraged.

**Approaches to enforcement also vary across sectors, with a significant number of enforcement entities developing initiatives to enhance efficiency.** This area appears to be one where Ireland is ahead of many other EU countries, at least as regards individual cases of good practice, as it not clear just how widespread the developments are. The Smart Economy Strategy, however, identifies the need for a more consolidated approach, and that enforcement should where possible be based on risk. There are promising initiatives spearheaded by the DETI and some agencies to share views and develop a national approach.

**Compliance and enforcement are closely linked to the development of effective RIAs.** An effective RIA process seeks to identify and anticipate likely issues of compliance and enforcement. There is considerable knowledge stored within agencies which should be used to help strengthen this aspect of RIA assessments.

**Administrative appeals practices vary across departments and agencies, raising some concerns about fairness and transparency.** Although the Irish appeals system does appear to raise any major issues, the OECD peer review team heard that the piecemeal

development of appeals mechanisms has led to inconsistencies and a relative lack of transparency. An improved approach to regulatory appeals was the subject of a recent consultation by the BRU, the conclusion of which was not to establish a single appeals body.

**The Ombudsman is a useful channel for views on how the regulatory process is “lived” by ordinary citizens.** As in other countries with an Ombudsman, this institution is well placed to develop a systemic view of regulatory management which should be tapped for ideas on where there is a need of improvement.

### *The interface between member states and the European Union*

**The establishment of clear and formalised structures for the management of EU regulations has helped to strengthen Irish performance.** Co-ordination and monitoring have been improved. A range of processes and structures have been put into place including EU specific co-ordinating committees within the executive which meet on a regular basis, as well as parliamentary committees, guidelines to departments on best practice in transposition, and the introduction of an electronic database “EU Returns”, to co-ordinate and monitor information. The EU Returns system is particularly striking relative to other EU countries, allowing departments to run reports on transposition and infringement proceedings, and the centre to monitor the overall picture. The structures that are now in place have forced departments to adopt more standard procedures (requiring them, for example, to prepare reports to the parliament), and have enhanced Parliamentary scrutiny of EU developments. The Department of the Taoiseach plays a growing role in co-ordination, alongside the Department of Foreign Affairs. Ireland has reduced its transposition deficit (now under the 1% target set by the Commission).

**Resource constraints require a stronger and clearer approach to prioritisation. Departments can only deploy a limited number of staff on EU issues.** This fosters flexibility and an ease of communication as the network of officials on EU affairs is small. However, it can create difficulties to respond adequately to developments and thus makes prioritisation a necessity. There is a need to prioritise not only on the immediate agenda but also in terms of Ireland’s strategic priorities- what are the most important issues for Ireland?

**The application of RIA to EU regulations is far from systematic.** The RIA guidelines are quite clear as to the use of RIA on draft and adopted directives (*i.e.* both in the negotiation and transposition phases). Irish requirements are ahead of some other EU countries in this regard. However the guidelines are often not observed. One way of applying pressure on departments to comply is to ensure that RIAs are attached to the drafts sent to the parliament (in the case of draft directives the information may be less developed than for adopted directives).

**Communication on EU matters needs attention.** The need to identify and prioritise the most important issues for Ireland also puts a premium on communication of the overall strategy. The OECD peer review team heard a number of comments to the effect that the government should communicate more effectively on EU issues (which needs to be put in the perspective of the rejection of two referenda on the EU, and the recent adoption of the Lisbon Treaty). If departments and other key players are to maximise their performance on EU issues, it is important that the government communicates the importance and positive aspects of engagement in EU processes, including transposition of directives.



### *The interface between subnational and national levels of government*

**A relatively simple structure and relatively restricted functions compared with many other EU countries are assets in the Better Regulation context.** The structure is simple and does not need to be pruned, as in some other European countries. Responsibilities devolved to the local levels of government are relatively circumscribed, albeit not inconsequential. Local authorities in Ireland are responsible for the delivery of public services under central supervision, and they have significant responsibilities in the delivery of permits and in planning. Most of their regulatory work rests on regulations that have been defined at the centre of government.

**Co-ordination with central government needs attention.** The OECD peer review team found evidence that each Department goes its own way in relationships with the local level. There were complaints that “central departments are not joined up” and co-ordination between the centre and the local levels does not always seem to be optimal. This raises a number of issues. For example, environmental burdens which can mainly be traced back to the EU are a major issue at this level and may not be effectively picked up. Local authority representatives also raised the issue of unfunded mandates, and the fact that regulatory burdens on them of regulations adopted at the national or EU level are not properly discussed beforehand. The local level seems in need of more effective consultation with the centre, with special regard to financial and resource implications. The 2008 OECD report on the Irish public service underlined the need for a more co-ordinated approach at the national level to minimise regulatory burdens on local authorities.

**By contrast, horizontal co-ordination between local authorities appears to be stronger.** The local authorities remarked that horizontal links between them were stronger. The OECD peer review team heard that a wide range of groups are active.

**National policies such as the administrative burden reduction programme do not include the local level.** There may, however, be interest. The local authorities said that they had “not been invited to join the AB programme”.

### Key recommendations

<i>Strategy and policies for Better Regulation</i>	
1.1	Review the way in which the Better Regulation is presented within the administration, drawing out more clearly the potential links with the agenda for post crisis recovery (not just business competitiveness, but also structural and sectoral reforms, including the financial sector, the transformation of the public service, and stronger citizen engagement in policy and rule making.
1.2	Review the scope and balance of the current Better Regulation initiatives. Prioritise the work over time, perhaps through an anticipated programme of activities to take the agenda forward over a five year time horizon.

1.3	Review and update the communications strategy, if necessary with specialist help. Ensure that, post financial crisis, the messages on what Better Regulation can deliver are focused and clear. Make sure that for specific initiatives where there has been significant but perhaps unnoticed progress such as simplification, full and public credit is given to achievements. Consider an annual report for the Better Regulation Unit of the Department of the Taoiseach, as a vehicle for this and for publicising priorities and the forward programme, to be published on a regular basis and shared with the Parliament.
1.4	Devise a follow through strategy to evaluations. Set targets for further improvements, publicise these and publicise achievements against targets.
1.5	Continue to give e-Government greater visibility, a firm strategy and strong champions, as well as closer links with the Better Regulation strategy. Strengthen the working links between the Department of Finance, the BRU and the DETI.

### ***Institutional capacities for Better Regulation***

2.1	Consider whether to increase the powers of the Better Regulation Unit. Actively integrate the Better Regulation agenda across all areas of the Department of the Taoiseach. Consider whether to evolve towards a larger shared unit, based on secondments from other key players as well as selected line ministries, and perhaps on the basis of a special status within the Department of the Taoiseach. At the very least, ensure that the Better Regulation Unit does not shrink further, and (as far as possible) that the public service cuts needed for fiscal consolidation do not affect capacities to deliver on Better Regulation.
2.2	Consider identifying a Better Regulation “champion” in each Department. Consider secondments from departments to the Better Regulation Unit. Sustain the networks that have been set up. Link Better Regulation performance to budgets and performance assessments.

2.3	Pursue the efforts in rationalisation of government agencies, and at the same time, clarify the extent to which the principles set out in the 2009 Statement on Economic Regulators will be applied to enhance governance for optimum efficiency and effectiveness. Consider, with the relevant agencies, how to encourage the diffusion of their best practices to other agencies (and to government departments).
2.4	Consider how to further encourage parliament into taking an interest in Better Regulation. This could be done by sending it relevant reports on progress as well as evaluations, which would also have the merit of increasing accountability for Better Regulation performance by government departments and agencies.
2.5	Consider using the legal decisions of the judiciary to learn about regulatory issues that may need attention.

***Transparency through public consultation and communication***

3.1	Share best practices for public consultation across departments (and agencies). Consider how to give the consultation guidelines some teeth so that they are observed and so that consultation is applied to the same consistent high standards. Ensure as a first step that the guidelines are fully known across departments and relevant agencies. Benchmark Irish consultation arrangements with those of other small countries in the EU to see what could be of value in the Irish context. Consider how the social dialogue can best evolve to take account of societal developments.
3.2	Sustain the efforts at improving the accessibility of regulations and if necessary, increase funding. Communicate more clearly and broadly the value of these initiatives, as part of an enhanced general communications strategy for Better Regulation (see recommendation 7.4).

<i>The development of new regulations</i>	
4.1	Take steps to monitor regulatory production systematically (both primary and secondary regulations), identifying amendments to existing regulations as well as entirely new regulations.
4.2	Consider whether to set up a system for the forward planning of upcoming secondary regulations, and to publicise this. Consider whether there is a need to bolster the process for assuring the legal quality of secondary regulations.
4.3	Check Irish arrangements against those of relevant EU countries to see what might be done to strengthen the RIA requirements so as to strengthen their quality. For example, consider how the BRU could be formally equipped with the power to turn back inadequate RIAs so that draft proposals cannot be tabled before cabinet unless there is a RIA attached of adequate quality, and how publication might be made a statutory requirement. Enhance accountability for results by regular publication of (and publicity for) RIA statistics-how many done as a proportion of proposals, how many assessed to be reasonable quality, by department.
4.4	Consider how to further boost methodological support and buy in from departments for a quantitative approach. Among the approaches that could be envisaged are the further development of online user friendly tools for departments, linked to the training which is already provided, the establishment of “peer review” groups in departments for mutual support, linked to departments’ economists or economic units, and encouragement to departments to systematise the use of their economic staff for support and review of the work done by non specialist officials.
4.5	Consider how to ensure that significant secondary regulations are picked up by the RIA process, linking this to the issue of amendments that undermine the clarity of the law. A panel of relevant officials working on simplification, together with the BRU could be organised to review RIAs on primary legislation in order to identify expected significant secondary regulations.

4.6	Ensure that the RIA process continues to be evaluated by an objective external entity or entities at regular intervals, taking account of resources for this. Consider who is best placed for this task.
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***The management and rationalisation of existing regulations***

5.1	Reaffirm publicly that this work is a priority. Review resources for it, and increase as necessary, with a firm commitment to sustaining these for a reasonable time period such as five years.
5.2	Encourage a dialogue between those engaged in the simplification work and those engaged in the processes for making regulations. Start, for example, with an ad hoc meeting, orchestrated by the BRU, of the officials involved in these initiatives as a starting point (RIA network, Attorney General's Office, and Law Reform Commission).
5.3	Establish a communications strategy in support of the simplification work.
5.4	Take further measures to strengthen the practical approach, including delegated net targets. Establish a stronger link with the RIA process.
5.5	Monitor the performance of key institutional structures for delivery of the burden reduction programme (High-level Group and Inter-departmental Group). Consider whether it would be useful to rotate the chair of the HLG across key departments. Consider broadening the HLG mandate, for example by giving it an advisory role on important related processes such as RIA. Alternatively or in parallel, and taking account of resource constraints, consider whether a fully external (and independent) watchdog should be established, on the lines of those set up recently in some other EU countries such as the UK, Germany, Sweden. Task it initially to help shape a new strategy for the programme.
5.6	Clarify and monitor the requirements on departments with regard to consultation with stakeholders, and ensure that they have access to best practice examples (using

	<p>international experiences) of how to go about it. Develop a communications strategy which clarifies the strategic objectives of the programme and why it is important to Ireland, as part of a broader communication strategy on Better Regulation proposed in recommendation 1.4. Consider committing to an annual report (following the example of several other EU countries) so that stakeholders can be regularly and clearly informed of how the programme is developing and results. This could be part of the broader reporting proposed in Better Regulation (recommendation 1.4) or standalone.</p>
5.7	<p>Commission a new survey of business views, and especially, of what matters to very small firms in terms of burdens. In the light of this, consider whether there is a need to adapt the strategy for administrative simplification.</p>

### ***Compliance, enforcement, appeals***

6.1	<p>Consider whether it would be useful to collect and centralise data based on what is already done by departments and agencies in relation to compliance and enforcement, so as to establish a strategic picture of trends and potential issues.</p>
6.2	<p>Promote and disseminate good enforcement practices to broaden their use. Develop a more systematic approach to the development of enforcement, building on existing initiatives.</p>
6.3.	<p>Ensure that the RIA process fully underlines the importance of anticipating compliance and enforcement issues (not only costs, but possible practical difficulties).</p>
6.4.	<p>Consider whether to revisit the issue of appeals and how the system can be made more streamlined and transparent.</p>

<b><i>The interface between member states and the European Union</i></b>	
7.1	Prioritise key areas of EU activity for Ireland so that time and resources can be directed toward these areas
7.2	Ensure that RIAs related to draft directives and transposition of adopted directives are sent to Parliament.
7.3	Consider how to establish a clearer communications strategy for EU matters, both in strategic terms and at the level of practical detail (for example transposition and infringement rates). Part of this might be picked in the annual BRU report recommended in Chapter 1.

<b><i>The interface between subnational and national levels of government</i></b>	
8.1	Review co-ordination and consultation mechanisms between the central and local levels, with a view to reinforcing these. Consider an annual forum.
8.2	Invite local authority participation in the administrative burden reduction programme for business, perhaps as part of the strategy renewal proposed in chapter five.

## *Introduction: Conduct of the review*

### **Peer review and country contributions**

The current review of Ireland reflects contributions from the Irish government and discussions at meetings held in Dublin on 24 September and 2-6 November 2009 by an OECD peer review team with Irish officials and external stakeholders. Major initiatives and developments since this mission are referenced in the report, but have not been evaluated.

The OECD peer review team combined the OECD secretariat and two peer reviewers from other European countries:

- Caroline Varley, Project Leader for the EU 15 reviews, Regulatory Policy Division of the Public Governance Directorate, OECD.
- Sophie Bismut, Policy Analyst, EU 15 project, Regulatory Policy Division of the Public Governance Directorate, OECD.
- Rita Antunes, member of the board of the Portuguese Agency for Public Service Modernisation, Portugal.
- Ulrike Prauser, Executive Officer (*Regierungsrätin*) at the Federal Ministry of the Interior, Germany.

The team interviewed representatives from the following organisations:

- Better Regulation Unit, Department of the Taoiseach.
- Central Statistics Office.
- City and County Managers Association.
- The Commission for Energy Regulation (CER).
- CMOD, The Department of Finance.
- Competition Authority.
- The Commission for Communications Regulation (ComReg).
- The Civil Service Training and Development Centre (CSDTC).
- Data Protection Agency.



- Department of Communications, Energy and Natural Resources.
- Department of Enterprise, Trade and Innovation.
- Department of Environment, Heritage and Local Government.
- Department of Finance.
- Department of Health and Children.
- Department of the Taoiseach (Prime Minister's Office).
- Department of Transport.
- Environmental Protection Agency.
- Financial Regulator.
- Food Safety Authority.
- Forfás (National Policy Advisory Body for Enterprise and Science).
- Goodbody Economic Consultants.
- Health and Safety Authority.
- Health Information and Quality Authority (HIQA).
- Irish Business Employers Confederation (IBEC).
- Irish Bankers Federation (IBF).
- Irish Congress of Trades Unions (ICTU).
- Institute of Public Administration (IPA).
- Irish Small and Medium sized Enterprises Association (ISME).
- Law Reform Commission.
- National Consumer Agency.
- National Employment Rights Authority.
- Office of the Attorney General.
- Office of Comptroller and Auditor General.
- Office of the Ombudsman.

- Revenue Commissioners.
- Small Firms Association (SFA).
- University College Dublin (UCD).
- University College Cork (UCC).

## Structure of the report

The report is structured into eight chapters. The project baseline is set out at the start of each chapter. This is followed by an assessment and recommendations, and background material.

- **Strategy and policies for Better Regulation.** This chapter first considers the drivers of Better Regulation policies and seeks to provide a “helicopter view” of Better Regulation strategy and policies. It then considers overall communication to stakeholders on strategy and policies, as a means of encouraging their ongoing support. It reviews the mechanisms in place for the evaluation of strategy and policies aimed at testing their effectiveness. Finally, it (briefly) considers the role of e-Government in support of Better Regulation.
- **Institutional capacities for Better Regulation.** This chapter seeks to map and understand the different and often interlocking roles of the entities involved in regulatory management and the promotion and implementation of Better Regulation policies, against the background of the country’s public governance framework. It also examines training and capacity building within government.
- **Transparency through consultation and communication.** This chapter examines how the country secures transparency in the regulatory environment, both through public consultation in the process of rule-making and public communication on regulatory requirements.
- **The development of new regulations.** This chapter considers the processes, which may be interwoven, for the development of new regulations: procedures for the development of new regulations (forward planning, administrative procedures, legal quality); the *ex ante* impact assessment of new regulations; and the consideration of alternatives to regulation.
- **The management and rationalisation of existing regulations.** This chapter looks at regulatory policies focused on the management of the “stock” of regulations. These policies include initiatives to simplify the existing stock of regulations, and initiatives to reduce burdens which administrative requirements impose on businesses, citizens and the administration itself.
- **Compliance, enforcement, appeals.** This chapter considers the processes for ensuring compliance and enforcement of regulations, as well administrative and judicial review procedures available to citizens and businesses for raising issues related to the rules that bind them.

- **The interface between the national level and the EU.** This chapter considers the processes that are in place to manage the negotiation of EU regulations, and their transposition into national regulations. It also briefly considers the interface of national Better Regulation policies with Better Regulation policies implemented at EU level.
- **The interface between subnational and national levels of government.** This chapter considers the rule-making and rule-enforcement activities of local/sub federal levels of government, and their interplay with the national/federal level. It reviews the allocation of regulatory responsibilities at the different levels of government, the capacities of the local/sub federal levels to produce quality regulation, and co-ordination mechanisms between the different levels.

## Methodology

The starting point for the reviews is a “project baseline” which draws on the initiatives for Better Regulation promoted by both the OECD and the European Commission over the last few years:

- The OECD’s 2005 Guiding Principles for Regulatory Quality and Performance set out core principles of effective regulatory management which have been tested and debated in the OECD membership.
- The OECD’s multidisciplinary reviews over the last few years of regulatory reform in 11 of the 15 countries to be reviewed in this project included a comprehensive analysis of regulatory management in those countries, and recommendations.
- The OECD/SIGMA regulatory management reviews in the 12 “new” EU member states carried out between 2005 and 2007.
- The 2005 renewed Lisbon Strategy adopted by the European Council which emphasises actions for growth and jobs, enhanced productivity and competitiveness, including measures to improve the regulatory environment for businesses. The Lisbon Agenda includes national reform programmes to be carried out by member states.
- The European Commission’s 2006 Better Regulation Strategy, and associated guidelines, which puts special emphasis on businesses and especially small to medium-sized enterprises, drawing attention to the need for a reduction in administrative burdens.
- The European Commission’s follow up Action Programme for reducing administrative burdens, endorsed by the European Council in March 2007.
- The European Commission’s development of its own strategy and tools for Better Regulation, notably the establishment of an impact assessment process applied to the development of its own regulations.

- The OECD’s recent studies of specific aspects of regulatory management, notably on cutting red tape and e-Government, including country reviews on these issues.

The report, which was drafted by the OECD Secretariat, was the subject of comments and contributions from the peer reviewers as well as from colleagues within the OECD Secretariat. It was fact checked by Ireland.

The report is also based on material provided by Ireland in response to a questionnaire, including relevant documents, as well as relevant recent reports and reviews carried out by the OECD and other international organisations on linked issues such as e-Government and public governance.

Within the OECD Secretariat, the EU 15 project is led by Caroline Varley, supported by Sophie Bismut. Elsa Cruz de Cisneros and Shayne MacLachlan provided administrative and communications support, respectively, for the development and publication of the report.

### **Regulation: What the term means for this project**

The term “regulation” in this project is generally used to cover any instrument by which governments set requirements on citizens and enterprises. It therefore includes all laws (primary and secondary), formal and informal orders, subordinate rules, administrative formalities and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers. The term is not to be confused with EU regulations. These are one of three types of EC binding legal instrument under the Treaties (the other two being directives and decisions).



## Chapter 1

### Strategy and policies for Better Regulation

Regulatory policy may be defined broadly as an explicit, dynamic, and consistent “whole of government” policy to pursue high quality regulation. A key part of the OECD’s 2005 Guiding Principles for Regulatory Quality and Performance is that countries adopt broad programmes of regulatory reform that establish principles of “good regulation”, as well as a framework for implementation. Experience across the OECD suggests that an effective regulatory policy should be adopted at the highest political levels, contain explicit and measurable regulatory quality standards, and provide for continued regulatory management capacity.

Effective communication to stakeholders is of growing importance to secure ongoing support for regulatory quality work. A key issue relates to stakeholders’ perceptions of regulatory achievements (business, for example, may continue to complain about regulatory issues that are better managed than previously).

Governments are accountable for the often significant resources as well as political capital invested in regulatory management systems. There is a growing interest in the systematic evaluation of regulatory management performance – “measuring the gap” between regulatory policies as set out in principle and their efficiency and effectiveness in practice. How do specific institutions, tools and processes perform? What contributes to their effective design? The systematic application of *ex post* evaluation and measurement techniques can provide part of the answer and help to strengthen the framework.

E-Government is an important support tool for Better Regulation. It permeates virtually all aspects of regulatory policy from consultation and communication to stakeholders, to the effective development of strategies addressing administrative burdens, and not least as a means of disseminating Better Regulation policies, best practices, and guidance across government, including local levels. Whilst a full evaluation of this aspect is beyond the scope of this exercise and would be inappropriate, the report makes a few comments that may prove helpful for a more in-depth analysis.

#### Assessment and recommendations

##### *Development of Better Regulation strategy and policies*

**Ireland has made considerable progress since the 2001 OECD report.** In relation to nearly all of the issues raised in that report, there has been movement, often significant. A milestone was the 2004 White Paper “Regulating Better” which set out six key-principles

of Better Regulation and an agenda of 50 actions grouped around five headings. This remains the blueprint for further work. A progress report by the Department of the *Taoiseach* in 2007 demonstrates a breadth and persistence of efforts across a broad front which compares well with many other EU countries over the same period. The issues which have been, and continue to be, tackled include: regulatory impact assessment; simplification and accessibility of the law; administrative simplification; public consultation; a framework for the effective functioning of regulatory agencies; and a stronger framework for the management of EU regulations. There are also initiatives to address enforcement and compliance. This agenda remains a work in progress, and is subject to regular reviews.

**A set of principles is now in place to guide developments, on which Ireland is developing its policy for Better Regulation, driven from the centre of government.** The principles – necessity, transparency, consistency, accountability, effectiveness, and proportionality – cannot be faulted. They represent a clear statement of intent, which is still lacking in some other EU countries.

**An important achievement has been to raise general awareness of Better Regulation, both within and outside the administration, but active support remains fragile.** General awareness is high as a result of the initiatives of the Better Regulation Unit within the Department of *Taoiseach*, the High-level Group on Business Regulation (which gathers external stakeholders and the administration), and the large number of reports issued on Better Regulation policies. It is not complete, however. The detailed picture across departments and beyond reveals that it is patchy and that “buy in” (the next step beyond awareness) is far from complete. Some parts of the administration do not yet fully support the objective and downplay the importance of Better Regulation. However interviews, more positively, also suggested that the business community is anxious for more effective regulatory management and has a good grasp of its importance as well as the detail of what is needed.

**The challenge at this stage is to mainstream Better Regulation more fully into the fabric of policy and rule making, and to encourage political support, post crisis.** Better Regulation remains a poor relation of other priorities such as public service modernisation and fiscal consolidation. However regulatory policy has considerable links with the effective achievement of those policies. This needs to be drawn out and communicated. There is also a need for political sponsorship. In the meantime, a relative failure to reflect on the connections limits capacities to deliver (it is difficult to engage departments, and to secure necessary resources). Raising support beyond the inner-circle of Better Regulation champions is essential. This will require a (re) articulation of the link between Better Regulation and a stronger economy and society, to prevent senior officials and politicians from staying in the perspective that “the real issues lie elsewhere”.

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**Recommendation 1.1. Review the way in which the Better Regulation is presented within the administration, drawing out more clearly the potential links with the agenda for post crisis recovery (not just business competitiveness, but also structural and sectoral reforms, including the financial sector, the transformation of the public service, and stronger citizen engagement in policy and rule making.**

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**The gap between principles and practices often remains wide.** Ireland is confronted with the classic difficulty (common to most countries) of converting principles and strategy into reality. Thus *ex ante* impact assessment is now supported by well designed tools and processes, but actual results fall short of expectations. The longstanding issue of simplifying the complex stock of legislation is universally understood, but despite progress over the last decade, much remains to be done, and the work is (relatively) under-resourced which slows progress. The administrative burden reduction programme was, at least until quite recently, moving forward quite slowly.

**The Better Regulation agenda may require some rebalancing and a linked effort to structure it around priorities over time.** The Better Regulation agenda in Ireland has a broad scope by EU standards. Whilst Ireland has broadened its perspective from a relatively narrow focus on red tape, relatively little attention is given to the broader needs of citizens, society and public service improvement, and to issues of sustainability. Local authorities are largely out of the loop at this stage, although there are some valuable initiatives. At the same time, limited resources imply the need for prioritisation of activities over time.

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**Recommendation 1.2. Review the scope and balance of the current Better Regulation initiatives. Prioritise the work over time, perhaps through an anticipated programme of activities to take the agenda forward over a five year time horizon.**

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### ***Communication on Better Regulation strategy and policies***

**The communication strategy has succeeded in the first phase of awareness raising, but needs to be updated and refreshed.** The BRU notes that the key initial challenge was the need to increase awareness of Better Regulation among internal and external stakeholders. This can be considered a “mission accomplished”, aided by the prominence of the Department of the *Taoiseach*. A second stage has opened up, partly because the tools and processes are now largely in place, requiring a different kind of communication, but also to fit the post-financial crisis environment and a desire on the part of interested stakeholders for more attention to be paid to the promotion of a fairer society and reduce the “democratic deficit”, alongside the traditional emphasis on economic aspects. There are significant pockets of enthusiasm for Better Regulation both within and outside the administration, whose views on what needs to be communicated could usefully be tapped. Communication at this stage needs to be more pro-active, going beyond reports and websites. It also needs to highlight the progress made. As one stakeholder put it, “the government has not spelt out what it has achieved”. For example, the BRU website focuses on the different reports and documentation on Better Regulation initiatives. This does not do enough justice to significant achievements (for example, the progress on legislative simplification). The BRU website itself needs to be publicised.



**Recommendation 1.3. Review and update the communications strategy, if necessary with specialist help. Ensure that post financial crisis, the messages on what Better Regulation can deliver are focused and clear. Make sure that for specific initiatives where there has been significant but perhaps unnoticed progress such as simplification, full and public credit is given to achievements. Consider an annual report for the Better Regulation Unit of the Department of the Taoiseach, as a vehicle for this and for publicising priorities and the forward programme, to be published on a regular basis and shared with the Parliament.**

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### *Ex post evaluation of Better Regulation strategy and policies*

**Taking stock of what has been done is well embedded in the administrative culture, follow through is not so strong.** Ireland compares favourably with a number of EU countries in its willingness to evaluate the development of Better Regulation processes. The number of high-quality reports produced over the last few years is impressive by OECD standards. Reports actively seek to identify areas for improvement and to make focused recommendations of practical value. The real challenge in the Irish context is to act on the results of these evaluations. Reports tend to accumulate and to some extent reflect a forward movement that is more about appearance than reality. Performance could be strengthened by using more measurable targets, which is not yet fully embedded in the administrative culture. “Public exposure supports higher standards” as one stakeholder put it.

**Recommendation 1.4. Devise a follow-through strategy to evaluations. Set targets for further improvements, publicise these and publicise achievements against targets.**

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### *E-Government in support of Better Regulation*

**E-Government is being used to good effect in some areas, and the broad strategy has been given a renewed impetus.** E-Government is a key supporting element of Better Regulation. The OECD peer review team were not able to review this aspect in any detail. It is clear, however, that ICT is being used to good effect to support some key Better Regulation processes such as administrative simplification, the development of a web based Statute Book, and new Internet based forms of public consultation. The link between e-Government and Better Regulation is a significant driver for Better Regulation initiatives in many EU member states and the link could be developed further in Ireland. Since the OECD mission, the Government established a new e-Government strategy and announced the intention to appoint a Chief Information Office (CIO). The renewed impetus with the publication of the e-Government strategy provides the opportunity to make a clear strategic and institutional link to the Better Regulation agenda.

**Recommendation 1.5. Continue to give e-Government greater visibility, a firm strategy and strong champions, as well as closer links with the Better Regulation strategy. Strengthen the working links between the Department of Finance, the BRU and the DETI.**

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## Background

### *Economic context and drivers of Better Regulation*

The OECD's 2010 Economic Survey of Ireland recorded that growth in GDP per capita had been among the highest in the OECD until the current downturn. In the wake of the financial crisis, the economy plunged into a severe recession in 2008. The sharp slowdown in activity contrasts with the rapid expansion from 2002 to 2007. The downturn has revealed a weak underlying fiscal position. The authorities have already taken important steps to restore stability, but more will need to be done and the adjustment will be prolonged. Major economic and policy adjustments are now taking place to address the situation. Better Regulation has an important part to play in this process.

### *Unwinding macro-economic imbalances and restoring financial stability*

This requires, among other measures, restoring international competitiveness, and reforms of financial regulation and supervision. Strengthening and sustaining competitiveness, and promoting greater competition within the domestic economy (these are mutually reinforcing policies) is a persistent theme of OECD reports on Ireland.<sup>1</sup> A stronger domestic economy is not only important in its own right but will help to support Foreign Direct Investment. Competition in some key sectors such as telecommunications and transport has some way to go. SME growth needs to be encouraged. These policies depend, at least in part, on effective regulatory frameworks. A particularly direct benefit of Better Regulation is to support SME growth by addressing business competitiveness issues for SMEs, through the removal of unnecessary regulatory burdens, the prevention of new ones, and easier access to clear legislation.

The financial and banking crisis has revealed a number of weaknesses in the regulatory and supervisory framework (both in Ireland and internationally). The main supervisory issues were weak enforcement of the rules, and the enormous risks taken by heavy reliance on market funding and the scale of exposure to housing and other real estate lending. A major shift in the model of supervision is now underway, and the governance of the financial regulator is being enhanced. The OECD's Economic Survey recommends that additional resources should be allocated to banking supervision, the ability of the supervisor to monitor major institutions should be enhanced, and analysis of developments in the banking and financial markets should be improved.

Regulatory as well as policy failures were a fundamental factor underlying the current downturn. This implies that beyond the sector specific actions that are needed in complex sectors such as banking, the application of general regulatory policy principles such as *ex ante* impact analysis of regulations, public consultation and robust institutional frameworks need to be vigorously promoted. Effective *ex ante* impact assessment, for example helps to pinpoint the costs as well as the benefits of regulatory proposals, including the possibly unintended consequences of proposals.

### *Securing fiscal sustainability and reducing public expenditure*

The OECD's Economic Survey notes that the structural shift in the budget deficit can be traced in major part to a strong and continuing rise in public spending. A Special Group on Public Service Numbers and Expenditure Programmes, was set up to identify the scope for spending cuts. Its July 2009 report identified a wide range of measures, both specific spending cuts and more general improvements in public sector processes and efficiency. The report places a strong emphasis on raising public service efficiency and improving

expenditure management, in line with the recommendations of the 2008 OECD review *Towards an Integrated Public Service*. In response to that review, the government created a high level Task Force to prepare a comprehensive framework for renewal of the public service. The report of the Task Force and a government statement on “Transforming Public Services”, published in November 2008, led to a number of processes and actions aimed at transforming of the public service.

Better Regulation is supportive of fiscal consolidation, as it can help to make the public sector and public services more efficient, including through the use of e-Government to reduce paperwork inside the administration, reviewing policy on enforcement including a risk based approach, and reducing the number of agencies. Better Regulation also helps to strengthen the institutional fabric of the public service, for example, by identifying ways in which the framework within which government agencies operate can be improved.

#### *Achieving long run sustainable growth, through competition and competitiveness*

The OECD notes that policies are already favourable to competition in many respects, but market forces are weak in the network industries and parts of the service sector, which affects Irish competitiveness. In some sectors, such as the network industries, regulatory reform is an essential part of the reform process. A faster pace of reform in the most regulated economies implies that Ireland is now close to the OECD average, despite some further liberalisation of Irish markets. It is relatively easy to establish a new business, administrative burdens are fairly light and it is easy for foreign firms to enter the Irish market. However, the burden of different licences and permits is relatively heavy, the government remains heavily involved with providing infrastructure, and barriers to entry in the network industries remain higher than the OECD norm. Competition in some other sectors, for example, professional services, is generally low, due to a number of restrictions to entry and price competition.

#### *The Irish perspective on Better Regulation*

A positive perspective of what Better Regulation can bring to the economy and society is already evident in Ireland. The Smart Economy Strategy (Building Ireland’s Smart Economy - a Framework for Economic Recovery, published in December 2008) includes “Smart Regulation” among its five key action areas. The 2009 report of the National Competitiveness Council sets out the competitiveness challenges facing Ireland, which include ensuring that the regulatory environment is business friendly and that business costs do not increase (Box 1.1).

#### **Box 1.1. The National Competitiveness Council and Ireland’s competitiveness<sup>2</sup>**

The National Competitiveness Council was established by Government in 1997, reporting to the Taoiseach on the competitiveness issues facing the Irish economy. It publishes an annual report in two parts: benchmarking Ireland’s performance, and setting out the main challenges to Ireland’s competitiveness.

The 2009 report notes that Ireland’s competitiveness improved over the previous year. However improvements largely reflected the sharpness of the recession rather than competitive advantages arising from structural change.

Among the challenges highlighted were:

- The need to reduce the costs of doing business.
- Limited competition in locally traded sectors of the economy, which seriously affects the costs of doing business, and the consequent need to remove barriers to competition in these sectors.

However, Better Regulation can do more and go deeper in support of economic and societal goals than is currently evident from the government's strategic policy documents. Some OECD economies are enhancing efforts at Better Regulation based on an understanding of its importance not only for business competitiveness, but also for effective structural reforms, a more efficient government, and happier citizens. The Better Regulation Unit is part of the Public Modernisation Division in the Department of the Taoiseach, a location which partly reflects the difficulty of persuading other parts of the government of the broader importance of Better Regulation and hence a certain reluctance to play an active role alongside the Department of the Taoiseach as champions of this policy. Beyond an inner-circle, interviews suggested that there is some scepticism among senior civil servants and politicians over the link not only between Better Regulation, competitiveness and a stronger SME sector, as well as broader reforms. Several officials highlighted the vulnerability of the policy, suggesting that "the real issues lie elsewhere". There is an institutional and policy need to "join up" specific regulatory reforms with the horizontal regulatory work of the Department of the Taoiseach.

Better Regulation can also help to support buy-in and implementation of reform. Effective approaches to public consultation and communication is a key part of the Better Regulation toolkit. The horizontal work on these issues spearheaded by the Department of the Taoiseach needs to be more adapted for those sectors that particularly require robust regulatory frameworks. This is not just a question of how individual laws and regulations are processed, but of the overall coherence of the regulatory framework in systemically important but potentially vulnerable sectors, and its support for the underlying policy objectives for these sectors.

Ireland pays considerable attention to international benchmarking in order to move forward, as evidenced by its participation in the EU 15 project of the recent international comparative review of economic regulators, and its willingness to be reviewed by the OECD on its public service to see how this compared with practice elsewhere.<sup>3</sup> The EU agenda for Better Regulation has played a role in the establishment of a programme for the reduction of administrative burdens. The EU, however is not the only benchmark for a country that sends over half its exports to non-EU countries.

### ***Developments in Ireland's Better Regulation agenda***

The Better Regulation agenda initially emerged in close association with reforms of the public service. With the launch of the Strategic Management Initiative (SMI) and the publication of the government policy document *Delivering Better Government* (DBG), regulatory quality became an explicit policy objective of the Irish government in the mid-1990s. The 1994 SMI drew from the 1965 Devlin Report and the 1985 White Paper, which had previously attempted to reform the public service and introduce new public management concepts and policy tools.<sup>4</sup> The SMI emphasised the delivery of a quality service to the public. A cornerstone of the reform, as further specified in the DBG issued in 1996, was the principle of a simplified and fair regulatory environment. This led to an action programme *Reducing Red Tape* in 1999, which outlined three key actions: simplification of administrative procedures; consultation with stakeholders; and coherence and accessibility of legislation.

The next major milestone was the publication of the White Paper *Regulating Better* in 2004 following a broad consultation process, which was promulgated directly by the Taoiseach (as have other Better Regulation reports) and outlined a comprehensive action

plan for Better Regulation in Ireland. The White Paper followed the 2001 OECD report, which acknowledged that considerable progress had already been made in the regulatory field, but highlighted that a wide range of regulatory reforms were still required if the country was to overcome current and emerging economic and competitiveness challenges. The report called for stronger disciplines on regulatory quality in departments and offices, and in particular recommended the development and implementation of regulatory impact analysis in the Irish law making process. The White Paper set out key principles for Better Regulation and outlined an action plan of 50 key actions under five main headings (Boxes 1.2 and 1.3). This remains the blueprint of the government agenda for Better Regulation.

#### Box 1.2. The 2004 action programme for Better Regulation

The 2004 White Paper *Regulating Better* defines key principles for Better Regulation and spells out a programme consisting of 50 actions. For each action, the programme specifies the principle it is referring to, the office or department in charge of the action and a deadline.

The White Paper in its introduction is clear about the need for Better Regulation: “We need a White Paper on Regulation, mainly because of the impact which regulation has on national competitiveness. We also need it because regulation affects the quality of everyday life. This includes the quality of our food and water, the safety of our workplaces, as well as the range of products and services available to us and the price we pay for them. The White Paper explains that the principles will improve competitiveness. Competitiveness is a relative concept and Ireland must constantly seek to improve its position *vis-à-vis* other economies. Inappropriate regulation can adversely affect the competitiveness of the economy. For example, public services must not become snarled up in red tape. Businesses must not be made to carry the dead weight of unnecessary or unduly restrictive regulation. We must not stifle competition or innovation through regulation that promotes or protects inefficiencies in the economy.

The 50 actions are structured under five main headings:

- **Actions relating to legislative process and statute law revision** (pre-1922 legislation, statutory instruments, process of legislative drafting, information on new legislation, amendment of existing legislation, improved access to legislation, use of statute law revision tools, scrutiny of EU legislation, interaction with customers).
- Actions on RIA and evidence-based policy-making.
- **Actions on institutional change and review** (e.g. regulatory review of sectors of the economy, building on existing capacity, establishment of a Better Regulation group).
- **Actions on sectoral regulators/sectoral issues** (including accountability, strengthening structures, improving approach to appeals of decisions by sectoral regulators).
- **Actions on regulatory procedures and processes** (consultation, alternatives to regulation, administrative procedures, penalties, public service obligations, case management).

Source: Department of Taoiseach (2004), White Paper Regulating Better.

The Department of the Taoiseach published a progress report in 2007 (Box 1.3), which shows a breadth and persistence of effort across a number of fronts, relative to the more restricted developments in some other EU countries over this period.

### Box 1.3. Progress report on the 2004 action plan

The report considers progress under five headings:

- **Legislative process and statute law revision.** The Better Regulation Group steered a programme to revise and modernise the Irish Statute book. The work is ongoing.
- **RIA and evidence based policy making.** A pilot RIA was introduced, which has now been developed into a fully fledged process, including guidelines and training.
- **Institutional change and review.** Consumer interests have been promoted. There has been substantial interaction with EU level Better Regulation processes, and with the OECD for peer review and benchmarking Ireland's performance. Sectoral reviews have consolidated and modernised financial services legislation. A "regulatory mapping" exercise was done (list of all public and private sector bodies that have a regulatory function underpinned by statute).
- **Sectoral regulators and issues.** Contacts between sectoral regulators have been strengthened. A public consultation was launched on regulatory appeals and penalties.
- **Regulatory procedures and processes.** Consultation guidelines have been established and e-consultation promoted.

The first substantive efforts towards Better Regulation (going beyond the red tape initiatives of the 1990s) started a decade ago, with a systematic building up of processes to give effect to the principles set out in the 2004 White Paper. An important line of recent action has concerned the operation of economic regulatory agencies.

**Table 1.1. Milestones in the development of Better Regulation policies in Ireland**

2001	<ul style="list-style-type: none"> <li>• OECD review of regulatory reform in Ireland is published.</li> <li>• Public consultation document <i>Towards Better Regulation</i>.</li> </ul>
2004	<ul style="list-style-type: none"> <li>• Government White Paper, <i>Regulating Better</i>, sets six principles for Better Regulation and how to take these forward.</li> <li>• Pilot of Regulatory Impact Analysis (RIA) commenced.</li> </ul>
2005	<ul style="list-style-type: none"> <li>• Government Decision to implement RIA across all Government Departments.</li> <li>• Launch of Guidelines on RIA produced by the Department of the <i>Taoiseach</i> Better Regulation Unit.</li> <li>• Launch of Guidelines on public consultation produced by the Department of the <i>Taoiseach</i> Better Regulation Unit.</li> </ul>
2006	<ul style="list-style-type: none"> <li>• The Department of the <i>Taoiseach</i> commissions the Economic and Social Research Institute (ESRI) to conduct a comprehensive study of business attitudes to, and experience of, regulation (published in 2007).</li> <li>• Consultation paper on regulatory appeals.</li> </ul>
2007	<ul style="list-style-type: none"> <li>• Report of the Business Regulation Forum which recommends setting a 25% reduction target in administrative costs and identifies key areas of regulation for administrative burden reduction.</li> <li>• Commencement of the Review of the Operation of RIA.</li> </ul>

2008	<ul style="list-style-type: none"> <li>• High-level Group on Business Regulation publishes its first report.</li> <li>• OECD review of Irish public service is published.</li> <li>• Government commits to reduce administrative burdens on business by 25% by 2012.</li> </ul>
2009	<ul style="list-style-type: none"> <li>• Government Statement on Economic Regulation sets principles and practical arrangements to strengthen economic regulators, potentially applicable to all regulators (government agencies).</li> <li>• Revised RIA Guidelines published.</li> </ul>
2010	<ul style="list-style-type: none"> <li>• Online tool went live for “Introduction to RIA”.</li> <li>• Taoiseach chairs the first Annual Regulatory Forum.</li> </ul>

### *Guiding principles for the current Better Regulation agenda*

The 2004 White Paper, *Regulating Better*, sets out six principles of Better Regulation. These principles are: necessity, transparency, consistency, accountability, effectiveness, and proportionality (Box 1.4). They serve as a basis for the programme of actions for Better Regulation outlined in the White Paper, as each of the actions is linked to one or several of these principles. This is a clear statement compared with many other EU countries, which do not yet have a set of principles to guide their Better Regulation work.

#### **Box 1.4. Irish principles of Better Regulation**

- **Necessity.** Is the regulation necessary? Can we reduce red tape in this area? Are the rules and structures that govern this area still valid?
- **Transparency.** How have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?
- **Consistency.** Will the regulation give rise to anomalies and inconsistencies given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?
- **Accountability.** Is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?
- **Effectiveness.** Is the regulation properly targeted? Is it going to be properly complied with and enforced?
- **Proportionality.** Are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter weight of achieving the same goal?

### *Main Better Regulation policies*

Key initiatives have included:

- **Promotion of Regulatory Impact Analysis (RIA).** Introduction of RIA was one of the key commitments taken by the government in the 2004 White Paper *Regulating Better*. This was done across all government departments and bodies in 2005, following a pilot phase. The Department of the *Taoiseach* issued guidelines in 2005 and developed further efforts to provide practical assistance and to

increase awareness and understanding of RIA across departments. In 2008, it commissioned a review of the operation of RIA and consequently revised the guidelines to tackle the implementation issues identified in the review. The RIA policy has thus moved from focusing on introducing the system across departments (and providing support in this process) to ensuring effective implementation (for more see Chapter 4).

- **Law simplification and accessibility.** This encompasses Statute Law Revision, Restatement and Consolidation. Making legislation more coherent and more easily accessible has been a key dimension of Better Regulation. While the challenge of dealing with a complex stock of legislation is not unique to Ireland, historical and governance specificities in Ireland have made it particularly acute. In 2004, the Irish government committed to implementing a programme of Statute Law Revision to repeal obsolete regulations pre-dating independence (1922). Three general laws have been enacted since then, the latest in 2009, which have made major strides in repealing pre-independence legislation. In addition, other acts, dealing with specific areas, have repealed some of the remainder. The restatement programme is another initiative to simplify legislation by incorporating all amendments made to selected acts into a single text. Major projects have been undertaken to consolidate legislation in key areas (for more see Chapter 5). Action on law accessibility has focused on improving the online Irish Statute Book (the central registry for primary and secondary regulations) to make legislation more quickly and accurately available. In 2007, the electronic Statutory Instrument System was introduced to allow for more efficient updating of the Irish Statute Book.
- **Reduction of administrative burdens.** Initiatives in this area are relatively recent compared to other EU countries. This reflects the consideration that administrative burdens are not a major issue for Ireland (for example, drawing on the good ranking of Ireland in international benchmarking of competitiveness). Some actions have been taken however, partly in the framework of the European Commission's initiative, and partly as a response to a growing perception that reduction of administrative burdens could support the competitiveness of Irish SMEs. In 2008, the Irish government committed to reduce administrative burdens by 25% by 2012. In addition the High-level Group on Business Regulation (which includes representatives from departments, trade unions and business representatives) has been mandated to examine opportunities for administrative burden reduction in the areas of taxation, environmental law, health and safety, statistics and company and employment law.
- **Sectoral regulators.** As part of its programme for government published in June 2007, the Irish government committed to reviewing the economic regulatory environment and subsequently commissioned an independent review. This led to the publication of a government statement in October 2009, in the wake of the economic crisis, setting out a range of actions designed to improve the economic regulatory environment, and the efficiency and effectiveness of Irish economic regulators. Specific issues included: accountability of regulators; structures and mandates of regulators; cost; and engagement with stakeholders.



### ***Communication on the Better Regulation agenda***

Publication of reports and accompanying press coverage has been a major channel for communicating on the Better Regulation agenda. The 2004 White Paper Regulating Better, signed at the highest level of government by the Taoiseach, was followed by a number of other reports, including on RIA and economic regulation. Communication is also taken forward through the various groups and units set up to take the Better Regulation agenda forward, some of which include external stakeholders, for example the High-level Group on Business Regulation. The website of the Better Regulation Unit in the Department of the Taoiseach has been set up as a channel for information and visibility on the Better Regulation agenda. departments are also expected to set out their work on Better Regulation projects in their Statements of Strategy and Annual Reports.

### ***Ex post evaluation of Better Regulation strategy and policies***

Evaluation as processes unfold is understood to be an important part of building up capacities for Better Regulation. For example, the RIA policy was subject to a review, done by an external provider, which led to a revision of the RIA guidelines.

### ***E-Government in support of Better Regulation***

#### ***General context***

As in most other countries, e-Government is increasingly used to improve and streamline the interaction of business and citizens with the public service (online information, transactions etc). The Department of Finance has overall responsibility for developing and co-ordinating the implementation of e-Government policy in Ireland.

E-Government was not an area which the OECD peer review team could address in any depth. However, the formal link between e-Government and Better Regulation, which is a significant driver for Better Regulation initiatives in many EU states, is not apparent in Ireland. There is no very clear liaison in this regard between the CMOD within the Department of Finance, the BRU and the DETI. The utilisation of e-Government varies significantly between departments. As noted by the 2008 OECD public management review, in a constrained fiscal environment, e-Government should be treated as an opportunity to raise efficiency and to improve public services, not a threat. Several reports (such as the TPS report) identify the potential of e-Government to achieve cost savings and public service improvement. Various interviewees underlined the high importance of ICT to facilitate data sharing among Departments as well as a more risk based approach from regulators.

A new e-Government Strategy for 2010 has been approved by the Cabinet Committee on Transforming Public Services. This Strategy highlights new approaches to overcome some of the difficulties with putting certain services online and should thereby help to achieve an improvement in the use of electronic means for delivering public services. The Department of Finance is engaging bilaterally with organisations to help them with their analysis and development work. The government notes that according to the latest EU Commission e-Government Benchmarks, Ireland's ranking for online sophistication has now improved from 17th position in 2007 to joint 7th position.

Institutionally, the government has also taken action. It has made a commitment in the renewed Programme for Government to appoint a Chief Information Officer (CIO). This CIO will provide leadership for the development of information and communications technology and other relevant technologies within and outside Government. The CIO will report directly to the Taoiseach and will lead a streamlined Government structure for delivering the ICT function both within the Government and in the community. The CIO will advise the Government on how to take a proactive, leading role in championing ICT innovation and development externally and will assist Public Service Modernisation by driving changes to government business processes and implementing improvements in how Government communicates with its citizens through ICT. The CIO will take a cross-departmental and agency leadership role in driving the e-Government programme.

Notwithstanding the renewed impetus to e-Government strategy and institutional arrangements generally, there is no clear strategic or institutional link to the Better Regulation agenda.

#### Box 1.5. 2008 Public management review OECD report: e-Government

While Ireland has had many successes in developing internal e-Government systems, co-operation across different public service bodies is not widespread. **Fragmentation of responsibility for different elements of e-Government has meant that the full potential of ICT is not being realised by public sector organisations for citizens.** The integration of functions regarding the technical and financial framework will assist in progressing e-Government, especially given the accelerating pace of broadband penetration.

The initial focus of putting services on line has moved on to improving business processes and back office systems. Some large complex ICT projects have failed in the past, but there are many examples from organisations such as the Irish Revenue Commissioners, the Department of Agriculture, Fisheries and Food, the Department of the Environment, Heritage and Local Government, which have met success.

**Part of the challenge has been the strong fiscal environment that has lessened pressure to use e-Government** as a means to improve service efficiency through business process re-engineering. **A tightening fiscal environment should be seen as an opportunity to create pressure for renewed innovation.** There should be improved integration with the modernisation and change programme, for example, to make online services more user-friendly. Ireland has started to fall behind in international benchmarks such as for the 20 online services monitored by the European Commission. Large bodies have been observed to advance quicker than smaller bodies. Fragmentation due to agencification, as well as lack of shared ICT service agencies, except in the local government sector.

Government bodies that lag in the implementation of e-Government should be pushed to develop in a number of ways: clearer objectives and related measurable targets, accountability for delivery; more guidance and technical tools; sharing of good practices; and nomination of centres of excellence.

**Leadership, co-ordinated vision and shared funding and accountability will be required.** There is a need to improve co-operation between public service bodies. **The centre needs to provide unified e-Government leadership** including the setting of “whole-of-government” objectives. The public service should prioritise the development of the standards and architectures that underpin integrated and shared services.

### *E-Government and Better Regulation*

E-Government supports the Better Regulation agenda in several ways, including:

- **Administrative simplification.** The High-level Group progress report to the government in July 2008 details a number of ICT based simplification projects, including the online application system for the Redundancy Payments Scheme and the development of an online Tax Clearance Certificate system. Some of the other

- examples of e-Government use cited below are part of the drive to reduce administrative burdens.
- **Web based statute book.** The electronic Irish Statute Book (eISB) on the web includes the full-text of *Acts of the Oireachtas* (1922-present), Statutory Instruments (1922-present) and the Legislation Directory (Chronological Index to the Statutes) for the period 1922-present in a searchable format. The site does not require users to register and is free of charge, and is available at [www.irishstatutebook.ie](http://www.irishstatutebook.ie).
  - **Revenue Online Service.** According to the Revenue Commissioners, the Revenue Online Service (ROS) is widely regarded as one of the best tax online filing and payment systems in the world. Subject to the availability of budgetary resources, Revenue will continue to invest further in the use of ICT to deliver more electronic service options. In recent years, Revenue has also used ICT to focus increasingly on those who pose the greatest compliance risk. Revenue's Risk Evaluation, Analysis and Profiling System (REAP), a computer-based, rules-driven risk scoring system, is central to this approach to dealing with risk. REAP is the principal tool for audit case selection, identifying high-risk sectors or segments in the taxpayer base, and identifying likely instances of undeclared income, gains and other taxable transactions.
  - **Communications regulation.** The Commission for Communications Regulation, *ComReg*, has a number of websites and services to facilitate business and citizens. These include: [www.licensing.ComReg.ie](http://www.licensing.ComReg.ie) – online application and renewal of licences website; [www.ComReg.ie](http://www.ComReg.ie), - provides the user with detailed information on developments within the sector, relevant publications and details on consultations; [www.askComReg.ie](http://www.askComReg.ie), – consumer focused website which provides users with up to date information about the telecoms and postal industries; [www.callcosts.ie](http://www.callcosts.ie) – *Callcosts.ie* is designed to provide users with a method of comparing tariffs for: Mobile and fixed line phones and broadband; [www.comstat.ie](http://www.comstat.ie) – portal for presentation of statistical data and analytical research on the electronic communications market and to facilitate personalised downloads of statistics; [www.testandtrial.ie](http://www.testandtrial.ie) – portal for promoting the advantages for testing and trialling schemes.
  - **E-planning.** Planning authorities have been active using their websites to provide a range of information to the public (in most authorities it is now possible to view details of current applications over the Internet, and applications may be submitted at any hour of the day or night). A Task Force on e-planning reported in 2008, and an e-planning implementation group has been set up. Priorities include the removal of any barriers in planning regulations to the receipt of electronic planning applications; the preparation of technical standards; and further development of the electronic referrals pilot project.
  - **Public consultation.** Use of the Internet and online mechanisms for public consultation on new policies and regulations is increasingly deployed (see chapter 3), opening issues up to a wide audience. Tools include web based consultation documents, issue based website forums and web based surveys.

## Notes

1. OECD Economic Survey 2009; OECD Going for Growth 2009.
2. Competitiveness is defined as the ability of firms to compete in markets. National competitiveness refers to the ability of enterprises to compete in international markets.
3. Ireland – Towards an Integrated Public Service, OECD 2008. Economist Intelligence Report for the Irish Government, “Review of the Economic Regulatory Environment”, March 2009.
4. The *Report of the Public Services Organisation Review Group 1966-69*, commonly referred to as the *Devlin Report*, prompted the first attempt to reform the public administration. The report presented a series of recommendations to permit the administration to meet the needs of a changing economy and society. It concentrated on key functional elements the most important of which was the separation of policy making from implementation and service delivery functions. The 1985 White Paper *Serving the Country Better* was another attempt to develop a more customer-responsive public service. Most of the Devlin Report and the 1985 White Paper, while broadly welcomed, was largely unimplemented.



## *Chapter 2*

### **Institutional capacities for Better Regulation**

Regulatory management needs to find its place in a country's institutional architecture, and have support from all the relevant institutions. The institutional framework within which Better Regulation must exert influence extends well beyond the executive centre of government, although this is the main starting point. The legislature and the judiciary, regulatory agencies and the subnational levels of government, as well as international structures (notably, for this project, the EU), also play critical roles in the development, implementation and enforcement of policies and regulations.

The parliament may initiate new primary legislation, and proposals from the executive rarely if ever become law without integrating the changes generated by parliamentary scrutiny. The judiciary may have the role of constitutional guardian, and is generally responsible for ensuring that the executive acts within its proper authority, as well as playing an important role in the interpretation and enforcement of regulations. Regulatory agencies and subnational levels of government may exercise a range of regulatory responsibilities. They may be responsible (variously) for the development of secondary regulations, issue guidance on regulations, have discretionary powers to interpret regulations, enforce regulations, as well as influencing the development of the overall policy and regulatory framework. What role should each actor have, taking into account accountability, feasibility, and balance across government? What is the best way to secure effective institutional oversight of Better Regulation policies?

The OECD's previous country reviews highlight the fact that the institutional context for implanting effective regulatory management is complex and often highly fragmented. Approaches need to be customised, as countries' institutional settings and legal systems can be very specific, ranging from systems adapted to small societies with closely knit governments that rely on trust and informality, to large federal systems that must find ways of dealing with high levels of autonomy and diversity.

Continuous training and capacity building within government, supported by adequate financial resources, contributes to the effective application of Better Regulation. Beyond the technical need for training in certain processes such as impact assessment or plain drafting, training communicates the message to administrators that this is an important issue, recognised as such by the administrative and political hierarchy. It can be seen as a measure of the political commitment to Better Regulation. It also fosters a sense of ownership for reform initiatives, and enhances co-ordination and regulatory coherence.

## Assessment and recommendations

**Institutional structures to support Better Regulation have progressed steadily since the 2001 OECD report, spearheaded by an active central unit.** The first structures of the late 1990s, which were primarily focused on red tape reduction, have been broadened and replaced with a range of bodies and networks covering Better Regulation processes ranging from the implementation of regulatory impact analysis to statute law simplification. The Better Regulation Unit in the Department of the *Taoiseach* (Prime Minister's Department) has, in particular, established itself as a small but highly active and enthusiastic advocate of Better Regulation across government and beyond (commendably so, given its small size). It has overall responsibility for supervising the roll out of Better Regulation, and direct responsibility for the key process of regulatory impact assessment. Not all EU countries are yet equipped with such a unit. This is an important achievement, which needs to be sustained.

**There are limits to what the Better Regulation Unit has been able to do, in order to bridge the gap between principles and practice.** The Better Regulation Unit has, in essence, succeeded in putting Better Regulation on the government policy radar screen, not least through clear explanations of what it means, how it works, and why it is important for Ireland. But – Ireland is not alone in this situation – there remains an appreciable gap between principles and practice. The OECD's 2001 report had already noted that "implementation strategy and institutional drivers for reform are weak". These have significantly improved, but need further strengthening. Beyond the often uncertain political support, this can be linked to three factors, which are explored further below: a relative lack of buy-in from other key players at the centre of government; the need for the Better Regulation Unit itself to be strengthened within the Department of the *Taoiseach*; and the need for significant further culture change among line ministries.

**Beyond the Better Regulation Unit, other key players are, or need to be, providing active support for the development of Better Regulation.** The constitutionally established Office of the Attorney General advises the government on matters of law and legal opinions, and also drafts most of the important regulations, as well as spearheading key aspects of statute law simplification. Its perspective on developments must be seen as valuable and necessary. Two government departments also have responsibilities that are important for the Better Regulation agenda. The Department of Trade, Enterprise and Innovation has been engaged for some time in the business related aspects of the agenda, and was charged by the government in 2007 with responsibility for the business administrative burden reduction programme. In March 2008, DETI was given responsibility for leading and co-ordinating the measurement and reduction of administrative burdens across government, leading to the achievement of the 25% target by 2012. The Department of Finance leads more broadly on key aspects of public governance which are relevant to Better Regulation. Without the perspective and full support of these players, the further development of Better Regulation will be a struggle. Reflecting a common dilemma across Europe over the best organisational structure, it is difficult for Prime Ministers' Offices to take sole responsibility for Better Regulation, as they must balance the whole range of issues meriting the Prime Minister's attention, and they are not directly "connected" to the citizens and businesses for which they ultimately work, in the way that line departments are. The Better Regulation Unit needs, therefore, the full and unconditional support of other key players, in order to exert effective leverage across government. The "baton" of Better Regulation advocacy must be shared, if it cannot be handed over, building on the recent achievement of sharing part of the agenda with the DETI.

**Yet the engagement of these key players seems muted.** The OECD peer review team had the sense that the other key actors were not always fully engaged. The Finance ministry is the most important department alongside the Department of the *Taoiseach* for Better Regulation. It is responsible for financial and performance management across government, shares responsibility with the Department of the *Taoiseach* for public sector modernisation, and oversees e-Government policy, together with the Department of Communications, Energy and Natural Resources. However its understanding of the value of the horizontal Better Regulation work promoted by the Department of the *Taoiseach* as support for policies to strengthen the economy post crisis appears fragile.

**There is a need to reinforce the Better Regulation Unit itself, not least in terms of securing supportive connections with the other parts of the Department of the Taoiseach.** The Better Regulation Unit also needs the active engagement and support of other parts of the Department of the *Taoiseach*. It is attached to the Public Service Modernisation Division, which only reflects a part of the relevant Better Regulation functions inside the Department. The Department includes other relevant units including the division for European and International Affairs (link to EU management), the economic and social policy division (link to competitiveness), and not least, the cabinet secretariat. It is not clear to what extent this work is fully joined up, where it needs to be. Given the horizontal nature of the Better Regulation agenda, have other divisions in the Department of the *Taoiseach* mainstreamed its agenda sufficiently? Does its work perhaps lack a strong enough visibility within its own Department? The 2008 OECD public service review of Ireland underlined the importance of the Department of the *Taoiseach* (as a whole) as a strong central driver of reform.

**The Better Regulation Unit also lacks powers, and may be short on the necessary resources to do an effective job.** The BRU currently can do little more than encourage, monitor and advocate. It has few if any real powers (sticks or carrots) to ensure that departments, for example, produce timely and adequate Regulatory Impact Assessments. It may not be appropriate to increase its powers, as this does not necessarily fit with the Irish conception of how a Prime Minister's Office should function. However, this should be considered. Resources and their effective deployment may also be an issue. The BRU expanded following the publication of the 2004 White Paper "Regulating Better", but staff have been reduced recently. Given the size of the country, and compared with some other EU countries, resources overall (taking account of staff directly deployed on Better Regulation functions elsewhere, such as in the DETI), are reasonable. But as some stakeholders suggested, they may need to be deployed more effectively. Some other countries such as the United Kingdom and the Netherlands have developed their institutional approach on the basis of secondments from relevant parts of the institutional structure, which encourages buy-in, so that the BRU is not working in relative isolation. This approach also reflects the findings of the 2008 OECD public service review, which drew attention to the need for more mobile postings across the public service, as well as the Irish government's own statement on Economic Regulators, which advocated internal cross-postings. The Belgian federal government is another example to reflect on, as it has developed its Better Regulation unit into a semi detached "agency" within its federal Chancellery, which allows it some independence from political cycles, as well as the potential to acquire and to use resources more flexibly.



**Recommendation 2.1. Consider whether to increase the powers of the Better Regulation Unit. Actively integrate the Better Regulation agenda across all areas of the Department of the Taoiseach. Consider whether to evolve towards a larger shared unit, based on secondments from other key players as well as selected line ministries, and perhaps on the basis of a special status within the Department of the Taoiseach. At the very least, ensure that the Better Regulation Unit does not shrink further, and (as far as possible) that the public service cuts needed for fiscal consolidation do not affect capacities to deliver on Better Regulation.**

There is, as in most other EU countries, the need for further significant culture change across the “whole-of-government” in support of Better Regulation. Overall, and with some important exceptions, ownership of the Better Regulation agenda in-line ministries looks fragile. Ireland’s departments are traditionally autonomous, a feature shared with most other jurisdictions, and the context is therefore challenging. It is difficult to hold departments accountable and to put them under pressure to perform. Significant efforts have been deployed over the last few years to develop networks and co-ordinating groups for different aspects of Better Regulation, internally and shared with external stakeholders. The 2008 OECD public service review of Ireland drew attention to the importance of networking. This is a key way of advancing. It should be pursued in tandem with “stronger” mechanisms to secure performance. As already advocated in the OECD public service review, there should be a stronger use of performance measures and budget frameworks to drive effectiveness, with departments held to account on the basis of measurable targets.

There is a general lack of baselines, measurements, targets to support qualitative analysis and allow for effective *ex post* evaluation. The 2001 OECD report had already noted that Ireland could raise accountability for results through measurable and public performance standards. The Irish government is aware of this need. Both the report “Smart Economy” and the report “Transforming Public Services” emphasise the need for quantification and performance measurement. The argument which the OECD peer review team sometimes heard that the relatively small size of the country needs to be taken into account is not clear. The team also heard many comments to the effect that there are no measurable performance targets, and that a tougher approach (more sticks, not only carrots) and increased accountability, was needed. This is one major reason why the Finance Department needs to be part of the central leverage, and the performance and delivery focus – as advanced through the Annual Output Statements – needs to be brought to the forefront within the resource allocation process. Without this, it will be an uphill struggle to secure buy-in. At the same time, the carrots need to stay in place (for example, the BRU has set up some impressive training for Regulatory Impact Assessment, which draws in an increasing number of line ministries).

One aspect that needs particular attention is the need to improve capacities for a more rigorous and quantitative approach to the Better Regulation work of line ministries. The OECD peer review team heard a number of comments to the effect that the use of data and quantitative approaches needed to be strengthened (“Metrics needed as well as incentives”. “Be data driven”. “Is there enough of the right capacities in ministries?” “Dearth of expertise”. “Legitimising the use of quantitative approaches has some way to go”). Enhancing the quality of processes which are in place will require a more rigorous approach to measurement, targets, and the use of quantitative methods in processes such as RIA.

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**Recommendation 2.2. Consider identifying a Better Regulation “champion” in each Department. Consider secondments from departments to the Better Regulation Unit. Sustain the networks that have been set up. Link Better Regulation performance to budgets and performance assessments.**

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**Rationalisation of government agencies is a priority; at the same time they offer some important examples of Better Regulation best practice.** The government is conscious of the need to identify further means of rationalising a complex network of government agencies, following the rapid growth in their numbers in the 1990s. Judging from stakeholders’ comments to the OECD peer review team about the confusion generated by the existence of numerous agencies whose functions are not always clearly understood, this is important. The government also notes that the principles in its 2009 Statement on Economic Regulation may be considered to apply to all regulatory agencies. A broader review of government agencies, focusing not so much on savings but aiming to strengthen their governance framework to maximise efficiency and effectiveness, as well as to clarify the functions which are most appropriately delegated, would be a helpful further step. This could build on the 2009 Economic Regulation Statement and the 2007 mapping exercise. At the same time, it seems that Better Regulation practices are well advanced with some regulators, which could help to guide others in their adoption of good practice which has been tested on the ground.

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**Recommendation 2.3. Pursue the efforts in rationalisation of government agencies, and at the same time, clarify the extent to which the principles set out in the 2009 Statement on Economic Regulators will be applied to enhance governance for optimum efficiency and effectiveness. Consider, with the relevant agencies, how to encourage the diffusion of their best practices to other agencies (and to government departments).**

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**The role of the parliament appears to be changing, with a growing engagement and interest in Better Regulation issues.** This appears to be a significant development relative to the OECD’s 2001 report. Three parliamentary committees, two with specific mandates relating to regulatory management (the Joint *Oireachtas* Committee on Economic Regulatory Affairs, and the Joint *Oireachtas* Committee on EU scrutiny), and a third which takes an interest in initiatives related to the business environment (the Joint *Oireachtas* Committee on Enterprise, Trade and Employment), are now increasingly active. A particular area of progress relates to EU issues where significant efforts have been made by the government to better inform parliament on negotiation and transposition. This interest needs to be actively encouraged, as in some other EU countries, since parliament shares with the executive the development of legislation. Parliament’s overall ability to be engaged remains fragile.

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**Recommendation 2.4. Consider how to further encourage parliament into taking an interest in Better Regulation. This could be done by sending it relevant reports on progress as well as evaluations, which would also have the merit of increasing accountability for Better Regulation performance by government departments and agencies.**

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**The importance of the judiciary in the Irish context should not be neglected.** In the Irish system, the judiciary has traditionally played a significant role in the judicial review of regulation, even by the standards of common law countries. Judicial review of regulations can be vigorous. The system of judicial review in Ireland is described in Annex C.

**Recommendation 2.5. Consider using the legal decisions of the judiciary to learn about regulatory issues that may need attention.**

**Finally, some other key players should not be neglected.** These include the Office of the Comptroller and Auditor General, which was receptive to the OECD peer review team on increased involvement in Better Regulation (which could be done by asking them to help with regular evaluations of the RIA process, for example). The Ombudsman is also relevant for its surveillance role and the feedback which it can provide on the effects of regulation. The Law Reform Commission, an independent body which was set up to examine specific areas of the law as directed by the government and to make practical proposals for its reform, carries out necessary underlying work (including statute law restatement) to ensure that the Irish Statute book is effectively reformed, and needs adequate resources to carry on this work. Finally, the local authorities play a key role in direct contact with business and citizens over the provision of public services.

**Box 2.1. Recommendation from the 2001 OECD report**

**Strengthen implementation of the regulatory reform policy by creating stronger disciplines and performance assessment of regulatory quality within the departments and agencies, and by enforcing the disciplines through a high-Level committee.**

*Reducing Red Tape* originated in the SMI as one of the elements to modernise the Irish public administration. The new policy and action plan inherited the management and implementation mechanisms as well as the accountability structure of SMI. In particular, the enforcement and compliance approaches of *Reducing Red Tape* are based on self-assessment and peer pressure. **Contrary to the implementation approach used for other flagship policies, such as the *Freedom of Information Act*, the modernisation of the regulatory management system has lacked resources, training and resolve, and has yielded few concrete benefits for citizens and business.** Accountability mechanisms of the new policy have been based on vague internal procedures, supervised by an over busy SMI Co-ordinating Group of Secretaries. Such mechanisms are too weak and remote: to change long-established habits and culture; to protect the regulatory system from influence and pressures from powerful special interests; to offset perverse incentives within the ministries and agencies; and to co-ordinate the difficult agenda of regulatory reform.

**A high-level regulatory committee should be created** for these tasks with adequate powers to influence decisions at the cabinet level. Its role should be to advocate and promote implementation of the regulatory reform policy, to initiate key regulatory reform decisions, and to co-ordinate regulatory reform across government. **Participants on the committee could include the Department of the Prime Minister and the Ministry of Finance, the General Attorney's Office, and the Competition Authority. Regulatory departments and offices and sectoral regulators should be invited on an *ad hoc* basis.** The committee may be supplemented by an advisory body where social partners (including consumer groups) and key institutions, like *Forfas*, could discuss regulatory affairs. The committee's work should be co-ordinated with other horizontal policies, such as SMI or budgeting. **It should also prepare an annual report to the parliament.** This political body could be modeled on the Netherlands' Ministerial Committee in charge of the influential MDW ("Functioning of Markets, Deregulation and Legislative Quality") programme.

In parallel with a strong central promoter, Ireland could raise accountability for results within the departments and agencies through **measurable and public performance standards for regulatory reform**. Indeed, control mechanisms are not balanced by effective incentives for the departments to change themselves, particularly given contrary pressures from their constituencies and the political level. At present, the objectives of the regulatory reform programme are formulated at a high-level of generality, and transparent measures of performance for each department have not been adopted. That is, objectives are strategic rather than results-oriented. Hence, accountability for results is over-centralised, whereas the skills and resources for reform are decentralised. The fact that **incentives for the departments to produce good regulation are still not very strong** may be one explanation why the regulatory habits of the administration have not changed very much.

**Strengthen the accountability of sectoral regulators by building capacities for appropriate overview by the Parliamentary committees, and clarify the respective roles of sectoral regulators and the Competition Authority to ensure a co-ordinated, uniform competition policy approach in the regulated sectors.**

Market-oriented bodies and institutions have developed along with liberalisation, privatisation and regulatory reform. However, the powers, nature, and accountability mechanisms of the sectoral regulators are challenging the general public governance and institutional balance. **In some respects, these bodies have become a “fourth branch of the State” alongside the Executive, Legislative and Judiciary.** Ireland has been one of the first countries to start addressing the complex issues of accountability raised by this situation. In March 2000, the Minister of Public Enterprises published policy proposals on *Governance and Accountability in the Regulatory Process* which among other things advocated a clearer role for parliament in overseeing sectoral regulators. However, the parliament and its committees lack capacities to do so. In light of this and past reports, Ireland should **consider a strategy to improve parliament accountability procedures**, including appropriate resources. Attention should be paid to managing the information to permit the committees to focus on strategic policy decisions. A step in that direction could be the development of a succinct impact assessment of policy decisions along the line of a RIA.

Many of the Competition and Mergers Review Group recommendations should be followed, to provide for a structured process of co-ordination and a legal basis for the sectoral regulators and the Competition Authority to defer to each other without risk and without diluting or compromising the application of competition policy. The Authority and sectoral regulators should advise each other about matters that may come under the others’ jurisdiction, and consult when they find they are both pursuing the same matter. To do this meaningfully, they must have the right to exchange information with each other. Having someone from the Authority sit on appeal panels for sectoral regulator decision is an excellent idea for integrating policy perspectives.

## Background

### *Ireland’s public governance context and developments*

The underlying framework for Ireland’s public governance is quite stable compared to the developments seen in some other European countries which are experiencing significant decentralisation, for example, or a major rationalisation of their subnational structures. The Constitution of Ireland (1937) is the fundamental law of the state. The Constitution can only be amended by the people following a referendum.

### *Public governance modernisation*

Public governance modernisation has been a major feature of the Irish policy landscape over the last twenty years (waves of reforms have been launched since the early 1990s), has come a long way, but as in many other OECD countries remains a “work in progress”, as Ireland itself acknowledges. Many of the findings of the OECD’s Public Management Review (Box 2.2) are highly relevant to Better Regulation, including the need to develop more shared and networked approaches to working within government; the stronger use of performance measures and budget frameworks to drive public service effectiveness; a renewed emphasis on the role of e-Government; more mobile postings across the public service; and the importance of the Department of the *Taoiseach* as a strong central driver of reform.

Some of the findings of the 2001 report also still resonate today, for example, the need to continue strengthening institutional capacities (skills, culture change) within the public administration in support of a modern economy and society, and the challenging effects of the multi-seat constituency electoral system on public transparency and consultation, as well as in relation to the handling of appeals on administrative decisions. The report noted that the reform of Ireland’s public governance structure lacks market and social changes,

and was proving a bottleneck to sustained growth; and that skills gaps and institutional and cultural rigidities persisted in the public administration.

### Box 2.2. Public governance modernisation: the OECD 2008 Public Management Review

#### 2008 report

The report was commissioned by the Irish government so that its public service could be benchmarked internationally in support of the ongoing modernisation and reform effort. Ireland appreciates the importance of its public service for the national well being and quality of life. The Irish public service has played a central role in Ireland's growth and development.

The focus of public service reform efforts so far has generally tended to be inward looking, at the improvement of internal structures and processes. In a changing society, greater focus needs to be placed on citizens and their expectations, and on targeting delivery of services from their perspective. **In short, the public service needs to become more outward focused.**

**The public service remains segmented overall, leading to sub-optimal coherence in policy development, implementation and service delivery. It needs to evolve toward a more integrated system.** This requires amending existing accountability structures and ways of working, to allow for integrated system wide action where this is required. This will require targeted action in a number of areas:

- **Improved dialogue is needed to address fragmentation and disconnects between departments, their offices and agencies,** and other public service actors. The current disconnects need to be addressed.... particularly between departments and agencies... improved dialogue to reach shared agreement on performance targets.
- **The use of networks to bring together relevant players from across the public service needs to be expanded...** to allow greater connectivity between different sectors. Networks need to be developed that exploit agility, informality and openness. The Social Partnership model represents another possible way for exploring the networked approach. In order to respond to the increasing interconnectedness of policy challenges. Despite various new co-ordinating structures, there is evidence that departments are reluctant to devote resources to cross cutting activities such as integrated e-Government service delivery or improved policy co-ordination at the local level. The challenge of overcoming a stovepipe system is common to all OECD countries, as is the need to develop accountability structures to take account of shared responsibility for commonly agreed outcomes.
- **Increased interconnectedness and co-operation** are also necessary in order to allow the public service to achieve economies of scale through shared services and the development of centres of excellence that can serve as repositories for good practice and expertise. Otherwise, the fragmentation of the public service risks driving up costs and decreasing efficiency and effectiveness.
- **Performance measures** need to look at outcomes rather than inputs and processes, and increased flexibility is needed to allow managers to achieve those outcomes. This links to HRM strategy and the need to continue moving towards performance related pay.
- **Budget frameworks are needed to facilitate prioritisation and reallocation of spending.** Full benefits of some recent reforms such as the production of departments' Annual Output Statements linking annual targets to annual expenditure allocations, have yet to be fully realised, but this is a sound trajectory.
- **A renewed emphasis is needed on the role of ICT and e-Government to strengthen information sharing and integrated service delivery.** For citizens and business, the key measure of public service performance is how quickly and easily they can access a service and the quality of that service once received. E-Government, and the development of a more integrated ICT interface, provides a major opportunity to deliver faster, more readily accessible

services and secure internal data sharing to simplify contact with the public service.

- **Greater mobility is needed to help develop and broaden the skills and competency base of generalist staff.** At present, few opportunities exist even for generalist staff to move within and across the public service. Limited mobility creates challenges in sharing skills and competencies across the system and in re-allocating resources to those areas most in need. Also, the public service has to compete with opportunities elsewhere in the economy. The capacity to implement policy effectively and to anticipate future policy needs will depend on ability to recruit and retain the best of the workforce, and to develop and allocate them to maximum effect.
- **In support of all of these, a stronger role is needed to lead and support the renewed change,** both through the creation of a Senior Public Service, and the development of a more strategic role for the centre. Over the last decade, the Taoiseach, as head of government, has championed the reform agenda, and this has been a crucial driver for change within the public service. Given the changes outlined, Ireland will continue to require strong central leadership if new ways of working are to be successfully implemented. The transformational effort will require achieving efficiencies and steering the renewed reform agenda.. and will need to be appropriately resourced.

### *Transforming Public Services Programme*

The report of the Irish government, Transforming Public Services (TPS – published in November 2008) and accompanying government statement, endorsed the core messages of the OECD review. The TPS Programme represents the blueprint for a new type of unified public service, focused on common goals, with greater co-operation and reduced boundaries between sectors, organisations and professions, with a greater integration of services around user needs and greater efficiency in internal data sharing and administration through shared service models.

The appointment of a Minister of State with responsibility for public service transformation was announced by the Taoiseach on 23 March 2010. The aim of this appointment was to give a strengthened emphasis to the direction and leadership of change in the public service. The measures announced in the Government Statement (including a new Public Service Board; new senior appointments in relation to e-Government, shared services and procurement; senior public service) also support change. Implementation of the Programme is overseen by the Cabinet Committee on Transforming Public Services, chaired by the *Taoiseach*.

### *The financial crisis, fiscal consolidation and public expenditure cuts*

In the wake of the 2008 financial crisis, the accent is, not surprisingly, on public expenditure cuts which include reducing the size of the public service. The report of the Special Group on Public Service Numbers and Expenditure (McCarthy report), published in June 2009, made significant recommendations for cuts, but it also supported the need to raise public sector efficiency. Earlier in 2010, the Government reinforced the role of the Public Sector Modernisation Division, by the appointment of a Minister of State at the Departments of the Taoiseach and Finance with special responsibility for Public Service Transformation.

The 2008 OECD Public management review recorded, although public expenditures have risen sharply over the last few years, this is from a low-base and at a slower-rate than overall economic growth.<sup>1</sup> The number of public service employees increased significantly by 30% between 1995 and 2007, but also from a low-base relative to other OECD countries. Rationalisation is important, but as the 2008 OECD public service report also

underlines, Ireland needs an effective body of public officials to carry through public policy, and as the OECD peer review team heard, many are concerned that in the rush to make cuts, these will be carried out in the wrong places, and the public service reform agenda on which Ireland depends for strengthening its economy and society will be neglected. There is particular concern, as regards Better Regulation, that cuts may slow up the policy and rule making process and lead to neglect of the application of quality principles such as RIA. In short, rationalisation and cuts need to be carried out in a framework that also addresses the effective implementation of a strong regulatory policy for the longer term.

### *The growth of government agencies*

The majority of government agencies have been created since the beginning of the 1990s as a way to build capacities and increase flexibility in the public sector during a time of rapid growth in public spending. The Irish government has not developed a clear governance framework for agencies, so that structures and methods can vary across agencies (OECD, 2008).<sup>2</sup>

The growth in the number of government agencies was a repeated issue in meetings with a wide range of stakeholders, who generally perceive this proliferation as a negative development on which action should be taken.<sup>3</sup> As one stakeholder put it “it is difficult to know who’s doing what”.

The government is aware of the need for rationalisation. Tackling this is now on the agenda as part of the drive to improve public services and to reduce public expenditures. The 2004 White Paper on *Better Regulation* included a commitment that “where new sectoral regulators are proposed, they will be established only if the requirement for a regulator can be clearly demonstrated and if responsibility for the sector in question cannot be assigned to an existing regulator”. In line with the rationalisation of agencies set out in Budget 2009, the government continues to review possible mergers between agencies.

The rationalisation measures set out in *Budget 2009* took account of the government principles on agency rationalisation including citizen focus; sustaining a clear distinct between policy making (the task of government departments) and the work of agencies; taking a clear view of whether specialist agencies are needed; the need to streamline and share service where this can be done; and agency life cycle. The OECD 2008 Public Management Review made a number of recommendations to improve the framework within which government agencies operate (Box 2.3). The recently published Government Statement on Economic Regulation provides a framework for the future development of economic regulation in Ireland, which picked up some of the proposals of the OECD report. This was a valuable exercise and should perhaps be the trigger for a further and broader review of government agencies (focusing on the need to strengthen their governance framework to maximise efficiency and effectiveness, as well as to clarify the functions which are most appropriate for delegation to agencies). The government does, however, consider that the principles of the economic regulation review are applicable to all regulatory agencies.

### Box 2.3. Government agencies

#### The 2008 OECD Public Management Review

**The report notes that the potential value added of agencies should be looked for less in their policy autonomy and more in a focus on performance, for which they will need additional managerial flexibilities.**

While adding needed capacity to the public service, the way in which agencies have been set up in recent years has decreased the overall accountability of the public service, while increasing fragmentation and complexity. The establishment of an overall governance framework for agencies will require that the government rethink the organisational form of service delivery as a whole, deciding what functions in principle should remain in central departments, what functions should be devolved to local authorities, and what functions should be carried out at arm's length from the civil service. Governance structures should be matched with agency objectives. The government should establish clear guidelines and criteria for establishing new agencies and for operating existing ones. The new agency rationale should prohibit the creation of agencies solely for increasing resources and personnel allocated to a specific policy priority. Departments need to build up capacity for their oversight and performance management roles.

#### *The political context: a multi seat constituency system*

The Irish electoral system is based on proportional representation in multi-seat constituencies and a political environment where ideology has traditionally taken second place to direct contact and knowledge of the constituency's needs. The 2001 OECD report noted that policy making is affected by the strong and close relationships between elected representatives and particular groups of interests. Functioning as a broker at the local level, the Irish politician becomes a specialist in government information and contacts. The OECD peer review team heard that this remained an issue. The system encourages competition between *Teachta Dálas* (including within one party) to spend time responding to specific requests of their constituents. This can make it difficult to have a broad approach to policy and legislative/regulatory issues. It also blurs the approach to dealing objectively with public consultation and appeals on administrative decisions (local *Teachta Dálas* being a preferred conduit).

#### *Social partnership*

The social partnership model, developed in Ireland in the 1980s (Box 2.4), has been an important vehicle for formal consultation on high-level national policies. All eight social partnership agreements concluded to date were negotiated between the government, main employer groups, farming representatives and the trade unions ("social partners"). Since the mid 1990s, representatives of the community and voluntary sectors have also taken part in the process. Originally focused on pay, the agreements have expanded to cover a wider-range of increasingly complex issues. In the Better Regulation context, the social partnership process has proved important, and has covered the review of the operation of RIA, data collection on the public and private sector bodies with regulatory functions, and a survey of business attitudes to regulation.

In response to the economic crisis, the government reached an agreement with social partners on a "Framework for Stabilisation, Social Solidarity and Economic Renewal" in January 2009. In June 2009, the government proposed a new agreement on "Further Measures to Support National Recovery through Social Partnership". While it did not subsequently prove possible to conclude a further national agreement in 2009, the government remains committed to social dialogue. Furthermore, a Public Services Agreement was concluded with the public service unions in June 2010. It provides a



comprehensive agenda for Public Service Transformation and a framework for public service pay determination over the period to 2014.

#### Box 2.4. Social partnership in Ireland

The original impetus for the series of social partnership agreements came from the poor state of the economy and the public finances in the mid to late 1980s. In 1987, the newly elected government set about correcting the public finances through relatively stringent cuts in public expenditure. The Programme for National Recovery (PNR), the first of the current type of agreements, was a key part of the process. A key objective of the Programme was to achieve consensus on wage bargaining and deliver a cost/wage structure that would enhance the competitiveness of the economy. This model was based on agreement between the social partners – government, employers and trade unions – to limit wage increases in return for other concessions.

Seven other social partnership agreements followed. The negotiations widened to include agricultural organisations, community and environmental groups. While the pay deal remained a key element, the final agreements broadened to include social and community issues.

#### *Institutional framework for Ireland's policy, lawmaking and law execution process*

Ireland is a parliamentary democracy.<sup>4</sup> The Irish Constitution was approved by referendum in 1937. It renamed the Irish Free State as Ireland (*Eire* in Gaelic) and ended the country's status as a dominion within the British Commonwealth. Ireland officially became a republic in 1948.

#### Box 2.5. Institutional framework for the Irish policy, law making and law execution process

##### The executive

The Irish government is made up of the head of the government or *Taoiseach* (Prime Minister), who has his/her own department, and a cabinet of at least 6 but no more than 14 ministers with a government department each. The current cabinet has 14 ministers. Members of the government are appointed by the President, and must be members of one of the Houses of Parliament.

The Constitution sets the principle of collective responsibility. Government approval is required for significant new or revised policies and strategies, and no bill can be drafted without prior formal approval of the cabinet.

The *Uachtarán* (President), who is head of state, is directly elected for a seven-year term. The civil service is non-political (officials do not change according to the political make up).

##### The legislature

The constitution vests legislative power in a bicameral parliament (*Oireachtas*). This consists of the lower house (*Dáil Éireann* or House of Representatives), and the upper house (*Seanad Éireann* or Senate) which acts as a reflection chamber. The President signs and promulgates the laws adopted by the parliament.

Members of the *Dail* are elected at least once every five years by a system of proportional representation in multi-seat constituencies. Under this system the representative is closely linked to his/her constituency and usually functions as a broker at the local level, specialised on government information and contacts, for example to help citizens solve individual problems.

##### The judiciary

Ireland is a common law country with a written constitution. While much of Irish public law is similar to that of other common law jurisdictions, the existence of a written constitution and judicial review of legislation has meant that the Irish legal system has developed its own distinctive characteristics. Judicial review is more vigorous than in most other countries. Similar to the US, a judge may declare legislation to be unconstitutional, and the High and Supreme Courts in the cases that come before them

ensure that government and parliament, in the enactment of primary legislation, respect principles of natural and constitutional justice. These principles include principles of proportionality, the right to be heard, and the right to have decisions taken without bias. Courts also ensure that secondary legislation and other acts of public bodies are consistent with the authorizing primary legislation. In this regard, the courts will be concerned with how a decision was taken by a regulator, rather than with the merits of the decision itself.

The court system was set up by the Courts (Establishment and Constitution) Act 1961 pursuant to Article 34 of the 1937 Constitution. The constitution outlines the structure of the court system as comprising a court of final appeal, the Supreme Court, and courts of first instance which include a High Court, with full jurisdiction in all criminal and civil matters, and courts of limited jurisdiction, the Circuit Court and the District Court, organised on a regional basis. The High Court and the Supreme Court have authority, by means of judicial review, to determine the compatibility of laws and activities of public bodies with the constitution and the law.

Although not a part of the judiciary, the Office of the Attorney General plays a significant role advising the government on matters of law and the constitution.

*See also Annex C.*

### **Regulatory agencies**

Ireland has over 200 regulatory bodies. Their numbers have more than doubled since the 1990s. In some cases agencies were established to develop new public service capacity and meet needs in relation to service delivery during the major economic expansion of the 1990s. In other cases they have been set up to separate the functions of policy making and service delivery. The 2007 report, *Regulatory Bodies in Ireland*, listed 213 regulatory bodies, of which 205 were public sector regulators.<sup>5</sup> This list included 114 local authorities and town council and 9 Fisheries Commissioners and Fisheries Boards. Since then five other regulatory bodies have been established: the Legal Ombudsman, the National Employment Rights Authority (NERA), the National Consumer Agency (to be merged with the Competition Authority), the Health Information and Quality Authority, and the Health and Social Care Professional Council.

All government agencies are established under the remit of a government department and are required to submit regular reports on their activities to their minister. Negotiations with the Department of Finance regarding funding, resource allocation and staffing take place via the parent department. Agencies tend to be staffed initially with secondments from departments, followed by recruitment of own staff.

### **Local levels of government**

The Twentieth Amendment of the Constitution of Ireland (1999) provided for constitutional recognition of local government for the first time in Ireland. The Local Government Act 2001 is the basic legislation governing the structures, operation and functions of local government in Ireland. Ireland is considered to be one of the most centralised countries in Europe. There are 114 elected local authorities, which have a more limited range of powers than many of their counterparts in other EU countries. The 29 county councils and 5 city councils are the primary units of local government. Local elections take place every 5 years. Under the general supervision of the Department of the Environment, Heritage and Local Government, local governments mainly provide public services (see Chapter 8).

### **Civil service**

The civil service comprises the permanent staff of the 15 government departments and certain specified "core" agencies or offices. These civil service agencies include: the Office of the Revenue Commissioners; the Central Statistical Office; the Office of the Comptroller and Auditor General; the Courts Service of Ireland; the Director of Public Prosecution; the Office of the Attorney General; the Office of Public Works; the Office of the Houses of the *Oireachtas*; the Office of the Information Commissioner; the Office of the President of Ireland; and the Office of the Ombudsman. All civil servants are expected to maintain impartiality.

The wider public service generally consists of specialised staff such as teachers, doctors, police, armed forces, or those staff within agencies (e.g. the Food Safety Authority, the Health and Safety Authority, *Forfás*) who, while not formally part of a department, provide services on behalf of the government.

In 2009, the civil service employed 37 357 people out of a total workforce of 2.2 million. The wider

public service employees 309 751 people (a large part of which in the health sector)\*.

Note: \* Source: Central Statistics Office, website, Database Direct.

### *Developments in Better Regulation institutions*

From relatively modest beginnings focused mainly on reducing red tape, the last few years have seen a number of developments to provide institutional support for Better Regulation policies. These include the establishment of the Better Regulation Unit in the Department of the *Taoiseach* and of High-level Groups dedicated to Better Regulation (including department officials, in some cases regulatory agencies, business representatives, trade unions).

**Table 2.1. Milestones in the development of Better Regulation institutions in Ireland**

Late 1990s	<ul style="list-style-type: none"> <li>• Working Group on Regulatory Reform.</li> <li>• <i>Ad hoc</i> High-level Group on Administrative Simplification for the “Reducing Red Tape” policy.</li> <li>• Task Force on Small Businesses and Services.</li> </ul>
1999	<ul style="list-style-type: none"> <li>• Statute Law Revision Unit established in the Office of the Attorney General.</li> </ul>
2000	<ul style="list-style-type: none"> <li>• Better Regulation Unit established in the Department of the Taoiseach.</li> </ul>
2001	<ul style="list-style-type: none"> <li>• Working group established in the wake of the 2001 OECD report to develop a RIA model.</li> </ul>
2004	<ul style="list-style-type: none"> <li>• Establishment of Better Regulation Group (with a broad range of Departmental as well as agency representatives, chaired by the Department of the <i>Taoiseach</i>)<sup>6</sup> following publication of the 2004 White Paper “Regulating Better”, to oversee implementation of the Action Programme proposed in the White Paper.</li> </ul>
2005	<ul style="list-style-type: none"> <li>• Establishment of the Small Business Forum.</li> <li>• Establishment of the Business Regulation Forum (BRF).</li> </ul>
2007	<ul style="list-style-type: none"> <li>• Senior officials group on Economic Regulation set up to guide work on a Programme to review the economic regulatory environment.<sup>7</sup></li> <li>• Establishment of the RIA network.</li> <li>• Establishment of the Business Regulation Unit in the Department of Enterprise, Trade and Innovation (DETI), to oversee the programme on administrative burden reduction, and of an inter-departmental officials group on administrative burdens.</li> <li>• Establishment of the High-level Group on Business Regulation, chaired by the secretary general of the DETI. It replaces the BRF.</li> </ul>

## ***Key institutional players for Better Regulation policy***

### *The executive centre of government*

#### The Department of the *Taoiseach* (Prime Minister’s Office)

The Better Regulation Unit, which is part of the Public Service Modernisation Division, has overall responsibility for promoting and supporting Better Regulation initiatives across government (Box 2.6).

#### **Box 2.6. The Better Regulation Unit in the Department of the *Taoiseach***

The Better Regulation Unit (BRU) has its origins in earlier units to drive forward the regulatory reform agenda in the late 1990s (an earlier version was the Central Regulatory Reform Resource Unit).

It plays an especially key role in Regulatory Impact Assessment (RIA). It operates a RIA helpdesk and delivers RIA Training in partnership with the Civil Service Training and Development Centre (CSTDC). It chairs the RIA Network which includes representatives from all departments and has worked closely with the Central Evaluation and Expenditure Division of the Department of Finance in revising the methodological elements of the RIA Guidelines. The BRU does not have a statutory gatekeeper role with regard to RIA (it has no formal authority to turn poor RIAs back), nor does it have a formal mandate to assess the quality of RIAs or to report on the outcomes of its monitoring work on RIA.

The BRU also supports the Office of the Attorney General in relation to the Statute Law Revision project and the Law Reform Commission in relation to the Restatement project (see Chapter 5).

The BRU supports other activities related to Better Regulation. For example, it facilitated the independent review of the economic regulatory environment and co-ordinated work on the 2009 government Statement on Economic Regulation (see Chapter 1). The unit is responsible for organising meetings of the Annual Regulatory Forum which the government has committed to in their Statement on Economic Regulation. The first Forum was held in February 2010.

The BRU represents Ireland at Better Regulation meetings of the EU and the OECD.

The BRU does not directly oversee the work on administrative burden reduction. This work is the responsibility of the Business Regulation Unit in the Department of Trade, Enterprise and Innovation, created in 2007.

The Department of the *Taoiseach* comprises a number of other divisions and units which play a more or less important role in regulatory management. These include a division of European and international affairs; and an Economic and Social policy division (link to competitiveness). The Department of the *Taoiseach* has been increasingly involved in EU matters, partly as it provides support to the *Taoiseach* as a member of the European Council. It is involved in all key EU policies and decisions, and can be brought into negotiations in case of specific difficulties or conflict between departments. It is involved in improving the accessibility of regulations alongside the Attorney General’s Office (drawing together an informal group, the e-Legislation Group to discuss improvements to the online Statute Book).

The Department also includes the Cabinet Secretariat, among whose tasks is to ensure compliance with procedures for putting proposals to the Cabinet, based on the Cabinet Handbook (which includes a quality regulation checklist and the requirement to carry out a RIA).<sup>8</sup> The Government Chief Whip is a Minister of State (minister attached to the Department of Taoiseach). S/he attends government meetings and is also assigned the functions relating to the Central Statistics Office. The role of the whip is principally that of disciplinarian for all government parties, *i.e.* to ensure that all parliamentarians, including ministers, attend to *Dail* business and follow the government line on all issues.

## The Office of the Attorney General

The constitutional Office of the Attorney General was established in 1937, concurrently with the Constitution. The office is a key player in regulatory management. The principal role of the Attorney General is to advise the government in matters of law and legal opinions. While not a member of government, the Attorney General attends cabinet meetings in that capacity. The Attorney General's Office also drafts most of the important regulations. The office includes a number of specialist units and carries out the following functions:

- **Provision of legal advice to the government.** The Advisory Counsel to the Attorney General carries out a broad range of advisory work for the government. The range of advisory work undertaken by the office is very broad, including constitutional and administrative law, commercial law, public international law and criminal law - in fact, any legal issue on which the government or a department may require legal advice. Advice frequently has to be provided, and is provided, under extreme pressure of time. Requests for advice may be received from the government as a whole, from Ministers, or from civil servants in government departments or offices.
- **Drafting of legislation.** The Office of the Parliamentary Counsel to the government (OPC), part of the Attorney General's Office, drafts all primary bills and most secondary regulations with the Advisory Council having an important but essentially auxiliary role in the drafting process (providing counsel on legal quality).
- **Reform of statute law.** The Statute Law Revision Unit within the Attorney General's Office is charged with improving the body of statute law, working with the Law Reform Commission (see Chapter 5). The online Irish Statute Book (eISB- see Chapter 3) is managed by this Unit.
- **Legislative programming.** The Attorney General also takes part in legislative programming as a member of the Legislation Committee which is chaired by the Government Chief Whip (see Chapter 4).
- **Management of litigation.** The Chief State Solicitor's Office within the Office of the Attorney General deals with all civil litigation involving the state.

## The Department of Trade, Enterprise and Innovation

The Department of Trade, Enterprise and Innovation (DETI) has been engaged, to a greater or lesser degree, in business aspects of Better Regulation since the late 1990s, when *Forfás*, a policy advisory agency to the Department, played a significant role in the promotion of early regulatory reforms.

The Business Regulation Unit set up within this Department in 2007, part of the Commerce, Consumers and Competition Division, is responsible for overseeing the business administrative burden reduction programme and its target to reduce burdens by 25% by 2012 (including burdens generated by its own department), in partnership with the Inter-departmental officials Group on Administrative Burdens. The Department provides the secretariat to the High-level Group on Business Regulation which meets 4-6 times per year, to consider concrete business suggestions for red-tape reduction a successor to the Business Regulation Forum). The Unit also co-ordinates Ireland's interaction with

European groups for administrative burden policy.<sup>9</sup> The Department also leads on the development of risk based enforcement.

Other key players for Better Regulation in the executive:

- **The Department of Finance plays an important role in different aspects of Better Regulation.** The Department has the lead role in implementing reforms in the area of financial management, performance management and HRM, and alongside the Department of the Taoiseach, leads on public service modernisation. It has overall responsibility for training of the civil service. It has overall responsibility for developing and co-ordinating the implementation of e-Government policy (together with the Department of Communications, Energy and Natural Resources). The Department also plays a prominent role in EU affairs as it is involved in any proposals with financial implications and directly manages EMU, structural funds and taxation issues. It is also involved in following through the Freedom of Information Acts, managing a dedicated website to this effect (Chapter 3).
- **The Department of Foreign Affairs** shares overall co-ordinating responsibilities on EU issues with the Department of the Taoiseach. It is responsible for day-to-day co-ordinating on EU matters and ensuring the coherence of Ireland’s stance in European institutions.
- **The Department for the Environment, Heritage and Local Government** has general supervisory responsibility for local authorities and their provision of public services.

#### *Co-ordination across central government on Better Regulation*

The 2001 OECD report noted that Ireland has a strong tradition of autonomous ministries, and linked to this, a decentralised rule making process in which the proponent ministry assumes most of the regulatory decisions before the cabinet approves a bill. This remains the case, a situation that Ireland shares with several other European countries (such as Germany for example). The tone is also somewhat informal, which reflects in part the small size of the country. Procedures are quite permissive and are seen as guides rather than rules to be complied with. The OECD peer review team heard the departments were “independent minded” and that “relationships are friendly, but they do not like being told what to do and to conform to a standard pattern”.

Within this context, the policy and rule-making process does not generally rely on any structured networks of ministerial or official committees for decision-making. That said, there are four cabinet committees with special relevance to regulatory management: the Cabinet Committee on EU Affairs which provides strategic overview and direction on major EU developments; the Cabinet Committee on Economic Renewal; and the Cabinet Committee on Transforming the Public Service.

The informality of this framework has raised a challenge for Better Regulation and its processes, which rely heavily on a shared approach and understanding if they are to be effective, for example as regards impact assessment. Important steps have been taken to encourage a shared-approach in matters of Better Regulation, with the Better Regulation Group and Business Regulation Forum, and more recently, with the establishment by the *Taoiseach* BRU of a RIA network across departments, and of an equivalent group by the DETI for taking forward the administrative burden reduction programme. Additionally, DETI has convened a group of inspection and enforcement agencies (the Risk-based Enforcement group) to share best practice and establish a critical path of steps towards

better risk-based enforcement. In this case, the group will not only periodically make recommendations to the High-level Group on how to improve the practice of risk-based enforcement across government, but aims to establish concrete collaborations between relevant participants to improve their effectiveness and efficiency. The informality of the group and its discussions is expected to reinforce its ability to find practical solutions that might be difficult within a more formal structure. The e-Legislation group is another example of efforts at progressing key Better Regulation issues.

### *Regulatory agencies and Better Regulation*

Government agencies are traditionally responsible for setting their own Better Regulation policies, which means that the nature and degree of Better Regulation activities varies across agencies. The OECD peer review team was told, however, that parent departments do disseminate Better Regulation papers such as the White Paper “Regulating Better”, consultation guidelines and RIA guidelines. Although this is not strictly required by the government decision on RIA, it is standard practice for independent regulators to carry out impact assessments, and that a large number of agency staff have received RIA training. The programme to reduce administrative burdens involves some regulatory bodies.<sup>10</sup> Many agencies are actively involved in EU groups and networks. This applies especially (as in other EU countries) in those cases where the EU is active in developing policies and new regulatory frameworks, as in the network sectors. For example, the Commission for Energy Regulation (CER) is an active participant in the EU Energy Regulators’ Group for Electricity and Gas (ERGEG).

The OECD peer review team was not able to go into any detail on this issue, but it seems that Better Regulation policies such as impact assessment and consultation are well advanced with some regulators, more so in some cases than with the parent department. This can also be seen in some other European countries. Good performances may be partly driven by the advantage of starting a new institution from scratch, a well identified set of stakeholders, and specific issues for attention that require stakeholder engagement and expertise such as network access. The team also noted a good level of co-operation between some agencies (for example, CRO, Revenue) on certain issues such as enforcement.

With the 2009 government Statement on Economic Regulation, the policy management of at least some government agencies (economic regulators) looks set to be significantly strengthened (Box 2.7), with scope for further development of effective Better Regulation as part of this. The Statement sets out a framework for the management of regulators, which will have to prepare Statements of Strategy and Integrated Annual Reports based on performance indicators agreed with the parent departments. The government has signalled that the principles may apply to a much wider range of regulators than the six directly covered in the review process. In a 2007 paper (Bodies in Ireland with regulatory powers), the government has already set out a very clear and comprehensive definition and analysis of the “regulators” that exist in Ireland, a useful baseline document that could be updated and used to further investigate relevant issues such as consolidation, relations with the parent Department and Better Regulation practices.

### Box 2.7. 2009 Government Statement on Economic Regulation

The Statement was drawn up in October 2009 to give effect to the key findings of a report commissioned by the government on the role and operation of six regulators (the Commission for Aviation Regulation - CAR; the Commission for Communications Regulation - *ComReg*; the Commission for Energy Regulation – CER; the Commission for Taxi Regulation (Taxi Regulator); the Health and Safety Authority – HSA; and the Irish Financial Services Regulatory Authority (the Financial Regulator). The report was based on an international comparative review of regulators around a selection of OECD countries. It focused on policy objectives and performance.

The Statement covers issues of:

- **Governance and accountability.** Where not already required, regulators will now be asked to produce statements of strategy on a five yearly basis, taking account of mandates and policy directions. Integrated **annual reports and annual output statements** will allow for reporting on progress on objectives. The onus will be on departments to develop performance indicators as a basis for annual reporting. Annual reports will also encompass Public interest statements, and **regulatory frameworks will be “stress tested”**.
- **Appropriateness of structures and mandates.** There will be five yearly reviews of the roles and mandates of regulators. Regulators will conclude or update Memoranda of Understanding with the Competition Authority.
- **Costs and driving efficiencies.** Ministers will formally approve any planned expenditure or levies following consultation with both business and consumers. There will be shared administrative and legal services as well as the exchange of personnel and joint procurement. The scope for additional efficiencies through the co-location of regulators will be examined.
- **Engagement with stakeholders.** A stronger focus will be put on effective engagement between regulators and the public. The Statement says that “regulators must be seen not just as effective regulators of the market (producers) but also as champions of consumer interest”. The National Consumer Agency (which is to be merged with the Competition Authority) will continue to have a broad role in terms of advancing consumer issues generally, regulators will be asked to place an increased emphasis on the protection of consumer interests in line with their mandates. Also, relevant ministers will establish industry panels or advisory councils for selected regulators, and there will be statutory requirement to consult with the National Consumer Agency or consumer panels in relation to expenditure.

An Annual Regulatory Forum will be organised, for the communication of “Whole of government” priorities relating to the economy, competitiveness and competition. It will be chaired by the *Taoiseach*. The Forum will complement but not replace traditional bilateral communication between ministers and regulators, and will help departments in devising performance indicators. The Forum held its plenary meeting in February 2010.

The Statement says that “the government has decided that principles set out.... will apply, where relevant, to all regulators. They are directed, however, primarily at key economic regulators”.

Although the review was not primarily concerned with structure, in presenting the Statement, the *Taoiseach* underlined that, “in line with government policy on rationalising agencies, the options for merging various regulatory bodies are being examined across departments in the light of changing markets and technologies and the need to ensure that our regulatory structures are both effective and efficient”.

### *The legislature and Better Regulation*

Until recently, parliament has not been an evident presence in the Irish Better Regulation landscape. The 2001 OECD report recorded that parliament was slow to assume its accountability responsibilities. Parliamentary committees were strengthened in the late 1990s, but staff and research capacities were in short supply with parliamentarians having



to rely as a consequence on information from government reports and interest groups. The multi-seat constituency system of representation also meant a diversion of effort by parliamentarians to address constituents' individual needs rather than focusing on broader issues of public policy.

This may be changing, with the establishment of two joint-committees with specific mandates relating to regulatory management. The Joint *Oireachtas* Committee on Economic Regulatory Affairs was established in December 2007 with a mandate to scrutinise the operations of economic regulators, while the Joint *Oireachtas* Committee on EU scrutiny, established in 1995, has a specific role in scrutinising all proposed EU legislation (Chapter 7). The government also notes that parliament asks regular questions on the number of RIAs prepared and published by departments, which has helped to raise the profile of RIA, and that the administrative burden reduction programme has also been the subject of parliamentary attention. Parliamentary researchers now regularly use RIAs as the basis for briefing on bills (and some have attended the two day RIA training course). Parliament also has an important role in relation to bills brought forward to simplify or consolidate existing legislation, which go to the relevant committees. There is also the Joint *Oireachtas* Committee on Enterprise, Trade and Innovation which scrutinises initiatives related to the business regulatory environment. The research capacity available to parliament has increased considerably (including a library established in 2006, the recruitment of librarians, researchers and the development of services).

### *The judiciary and Better Regulation*

In Ireland, the judiciary has traditionally played a significant role in the judicial review of regulation, even by the standards of common law countries. It combines all the elements which can be attributed to the judicial function: constitutional guardian; ensuring that the executive acts within its proper authority; and interpretation and enforcement of regulations. Judicial review of regulations is more vigorous and common than in most other countries, with the courts not only reviewing but sometimes reshaping or even overturning regulations. Altogether this has meant that the judiciary was implicitly seen to be a core part of regulatory management. In the past this broad engagement has risked “crowding out” other and broader Better Regulation processes. The 2001 OECD report was critical of this situation, noting that judicial review as the main challenge to regulation was costly and time consuming, and that it could not be regarded as an effective quality control mechanism, but rather the reverse, as it reinforced a natural tendency for the regulatory framework to “fragment and inflate”. The OECD peer review team understood that the role of the judiciary remained an issue. However, it is also clear that Better Regulation processes which are quite independent of the judiciary, such as RIA, have gained significant ground. The judiciary nonetheless remains an important actor in the Irish Better Regulation landscape. The OECD peer review team heard that the courts are increasingly reviewing secondary regulations, which means that primary laws must become more detailed (“The courts are becoming *de facto* legislators”).

### *Local levels of government and Better Regulation*

Local authorities have relatively minor regulatory powers of their own but are responsible for implementing regulations adopted centrally which raises some important issues of co-ordination with central departments over the potential impact of these regulations (Chapter 8).

### *Other important players*

The Law Reform Commission (see Chapter 5) is an independent statutory body. Its programme of work is approved by government, which directs it to examine particular areas. Its main aim is to keep the law under review and to make practical proposals for its reform, established in 1975 under an Act which defines law reform to include the development of law, its codification (including its simplification and modernisation) and the revision and consolidation of statute law. The Law Reform Commission has three main areas of activities: conducting programmes of law reform; preparing statute law restatement; and updating the Legislation Directory. Given the historical complexities of the Irish legislative stock, and the way in which Irish law is developed, this body plays an important role in Irish Better Regulation.

The Ombudsman (who is also the Commissioner of the Freedom of Information Act), the Comptroller, and Auditor General play a surveillance role to strengthen accountability of the administration. In principle therefore, if not in practice, they have an important potential perspective to offer on the development of the Better Regulation agenda.

### ***Resources and training***

#### *Resources*

The resources directly allocated to Better Regulation have decreased in the last two years, reflecting the general contraction of the civil service.

- **Better Regulation in the Department of the Taoiseach.** The Better Regulation Unit initially expanded following the publication of the White Paper, *Regulating Better*, in 2004. As of early 2010 it comprised one half-time principal officer, two full-time policy officials and one clerical officer, who report directly to the head of the Public Service Modernisation Division.
- **Statute Law Revision Project in the Office of the Attorney General.** During the passage of the Statute Law Revision Bill of 2009 through parliament, the research team consisted of a project manager, deputy project manager and a number of other research assistants. Subsequent to the bill's enactment, the project is on hold pending the availability of resources.
- **Business Regulation Unit in the Department of Enterprise, Trade and Innovation.** This comprises one and one third senior policy officials and one and a half junior officials. The size of this unit has not changed significantly since it was set up in 2007.

To these resources, however, should be added the officials involved in the networks and groups set up for impact assessment and for the administrative burden reduction programme. All departments are represented on the RIA network and the inter-departmental group on administrative burdens. These involve up to 100 officials across government, part time (staff are often assigned other duties such as the co-ordination of other public service modernisation initiatives). Some departments and government agencies also deploy more significant resources on Better Regulation than others, reflecting responsibilities which tie them in more closely to the Better Regulation agenda. The DETI, for example, deploys some 19 staff on projects including the consolidation of legislation, but this is at the “top end” of the scale.

Access to appropriate resources, and their effective deployment, has been a challenge. The BRU notes that considerable investment has been made in recent years in the training and recruitment of officials with regulatory or related expertise such as economics. But it is not clear that such staff are always assigned appropriately within departments. The 2009 Statement on Economic Regulation proposes some opening up, with lateral transfers of staff between departments and the regulatory agencies.

### *Training*

The Civil Service Training and Development Centre (CSTDC) in the Department of Finance is responsible for running relevant training courses for government officials.<sup>11</sup> A number of training options are available to officials involved in developing policy and legislation (Box 2.8). These options increasingly integrate Better Regulation elements such as impact assessment.

#### **Box 2.8. Key policy and legal training courses for officials**

##### **Legislative Process Course**

The CSTDC run a two-day course on the legislative process which is available to all government officials. The aim of the course is to help officials develop an understanding of the working of the legislative process and how best to achieve policy objectives through legislation. This course includes modules on Regulatory Impact Analysis, drafting legislation, overview of secondary legislation and progress through parliament.

Since 2006, 543 officials have attended this course.

##### **Statutory Instrument Course**

The CSTDC run a two-day course on statutory instruments which is available to all government officials. The aim of the course is to help officials develop an understanding of the legal basis governing secondary legislation and statutory instruments. This course includes modules on constitutional and legal framework, drafting Statutory Instruments and RIA.

This course was introduced in 2007, and since then, 214 officials have participated in the course.

##### **Public Financial Management**

The CSTDC run a two-day course on Public Financial Management which is available to all government officials. The aim of the course is to give a sound understanding of the legal basis on which government finances work, the budgetary cycle and accountability for outputs and outcomes.

##### **Policy Analysis Course**

The CSTDC also run a four-day course to provide an overview of Policy Analysis in a Civil Service context. This course includes an introductory module on RIA as well as other modules such as analytical techniques and risk management.

Since 2006, 159 officials have attended this course.

##### **Standard cost model training**

DETI provided an SCM training course to all departments during 2008 and 2009. The training has been attended by approximately 40 officials. The Business Regulation Unit also supplied an Irish version of the SCM Manual to all departments, and has circulated a variety of project guides and templates to the members of the inter-departmental group, setting out a clear and structured approach to prioritisation and measurement.

## RIA training

The Department of the *Taoiseach*, in conjunction with the CSTDC, runs a dedicated two-day training course on Regulatory Impact Analysis (RIA). This training is available to all officials including staff of regulatory agencies and parliamentary research staff. The course details the step-by-step process for conducting a RIA. The course also gives an introduction to different analytical techniques, builds awareness of RIA and addresses issues particularly relevant to business including compliance costs and specifically administrative burdens. Significance and proportionality and the role of RIA during EU negotiations and transposition are also discussed. The course includes a number of case studies and workshops which allows participants to interact with presenters. Courses are held based on demand. 294 officials have attended since 2006. In addition to the training materials, participants are also supplied with revised RIA Guidelines, a RIA template, and consultation guidelines. Participants are also made aware of other supports available to them including the Better Regulation website ([www.betterregulation.ie](http://www.betterregulation.ie)), RIA Network, RIA Bulletin, RIA Helpdesk and assistance of an economic consultant which is commissioned by the Department of the *Taoiseach*.<sup>12</sup> The Business Regulation Unit in DETI provides support and advice on *ex ante* administrative burden measurement as required.

The Better Regulation Unit in the Department of the *Taoiseach* is also available to conduct tailored presentations on RIA to suit the specific needs of requesting departments or offices. Requests sometimes come through a Departmental representative on the RIA Network.

## Notes

1. Annual growth in public expenditure between 1995 and 2005 was 5.1%, significantly lower than real GDP growth of 7.5%.
2. OECD (2008), Public Management Review.
3. Comments received included “Agencies multiply the sources of regulation”; “Agencies cause confusion”; “There are too many agencies”; “Rationalise the agencies please”; “Institutional reform is needed, shake out please”; “Regulators are (too) well resourced”. “It is difficult to know who is doing what”.
4. It traces its existence back to the Anglo-Irish War of Independence of 1919-21 and the subsequent Anglo-Irish Treaty of 1921. The treaty partitioned Ireland into two entities: the Irish Free State in the south (covering 80% of the island’s land area) and Northern Ireland which remained part of the United Kingdom.
5. Department of Taoiseach (2007):  
[www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Bodies%20in%20Ireland%20with%20Regulatory%20Powers.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Bodies%20in%20Ireland%20with%20Regulatory%20Powers.pdf).

6. Members include : Department of the Taoiseach ; Department of Transport; Department of Finance; Department of Enterprise, Trade and Innovation ; IFRA (Irish Financial Services Regulatory Authority); Competition Authority; Department of Communications, Energy and Natural Resources; Commission for Aviation Regulation; Department of Environment, Heritage and Local Government; Commission for Communications Regulation; Department of Agriculture, Fisheries and Food; Department of Justice, Equality and Law Reform; Office of the Attorney General. The Department of the *Taoiseach* provides the secretariat.
7. Members include : Department of the *Taoiseach*; Department of Finance; Department of Transport; Department of Enterprise, Trade and Employment; Department of Communications, Energy and Natural Resources; Office of the Attorney General. The secretariat is provided by the Department of the Taoiseach.
8. The Government Chief Whip is a Minister of State (minister attached to the Department of Taoiseach). He/she attends government meetings, and is also assigned the functions relating to the Central Statistics Office. The role of the Whip is primarily that of disciplinarian for all government parties *i.e.* to ensure that all parliamentarians, including ministers, attend for Dáil business and follow the government line on all issues. The functions and responsibilities of the Chief Whip include: attendance at government meetings; preparation of weekly brief for Taoiseach on legislation in preparation; scheduling and monitoring of Dáil business; operation of the pairing system; Dáil reform; Leinster House accommodation for political parties; and chairing the Legislation Committee.  
*Source:* [www.citizensinformation.ie/categories/government-in-ireland/national-government/the-irish-government/the\\_government\\_chief\\_whip](http://www.citizensinformation.ie/categories/government-in-ireland/national-government/the-irish-government/the_government_chief_whip)
9. It is the Irish contact for the EU Commission Single Point of Contact for the European Administrative Burden Reduction Action Programme; member of the Standard Cost Model Network; and member of European High Level Group of Regulatory Experts, alongside the *Taoiseach* BRU.
10. The RBE Group includes Revenue and the Companies Registration Office, the National Employment Rights Authority, the Health and Safety Authority, the Office of the Director of Corporate Enforcement, the Environmental Protection Agency, the National Consumer Agency, the Department of Agriculture, the Food Safety Authority of Ireland, and the Private Security Authority. The group also calls on the Central Statistics Office, the Centre for Management and Organisation Development (CMOD) and the Data Protection Commissioner for technical advice. DETI is currently arranging to expand the activities of the group beyond data sharing to co-operative inspections, and will shortly invite five further participants to join the discussion to search for practical solutions to multiple inspections of the retail sector.
11. A full list of these courses is available at: [www.cstdc.gov.ie](http://www.cstdc.gov.ie).
12. Renewal of this contract is currently under consideration.

## Chapter 3

### Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates (CCDs) can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text, for example appeals are considered in Chapter 6).<sup>1</sup>

#### Assessment and recommendations

##### *Public consultation on regulations*

**Ireland has a strong tradition of public consultation, based on informality and social partnership.** Consultation in the development of regulations is well embedded in the administrative culture. It has traditionally relied heavily on informal interaction between departments and external stakeholders, as well as social partnership since the late 1980s. Social partnership has played an important role in developing a consensus on major public policy issues. By contrast, formal requirements relevant to all potential external stakeholders have been handled with a light touch. For example, the Cabinet Handbook briefly raises the issue of public consultation without going into detail.

**A recognition of the need for evolution with the 2004 White Paper, combined with a growing use of ICT, has generated significant developments which have opened up the traditional processes.** There have been noteworthy changes since the 2001 OECD report. With transparency identified as one of the six core principles of Better Regulation in the 2004 White Paper, steps have been taken to promote a more formal and structured approach to public consultation. The approach nonetheless leaves an important margin for departments to define specific arrangements. The aim is to allow room for the relevant dose of informality, linked to Ireland's small size, as well as allowing for innovation, which has been grasped with enthusiasm by some departments and for some consultations, through their use of ICT.

**The BRU's consultation guidelines set clear best practice standards, which need to be enforced.** The BRU's 2005 guidelines on public consultation are clear and comprehensive. They were designed to be a practical tool to help departments, and as such, fully meet this objective. Any Department which reads the guidelines (especially the checklist and the flowchart) should be in no doubt over how to apply best practice. The guidelines are not prescriptive. There are no sanctions for non-compliance. Departments are left to define the appropriate level of consultation, which can go from a full formal public consultation to informal consultation. They are "advised" or "encouraged" to publish submissions and provide feedback. Specific approaches therefore, and as might be expected, vary. The use of ICT appears to be spreading and to be handled with sophistication in some cases (just using ICT without proper follow through does not guarantee a quality consultation), which means that some consultations engage a wide range of stakeholders.

**Echoing the situation in some other EU countries, Ireland is in a period of transition, and the full engagement of relevant stakeholders is not always achieved.** The testimony of a wide range of stakeholders to the OECD peer review team suggests strongly that there are issues, as well as a demand for more effective consultation from the wider community. While everybody consults (usual practice), the capacity of departments to reach out to a broader public (where relevant) and develop new forms of consultation varies a lot. Public consultation within the RIA process also does not seem, as yet, to play a strong formal role in practice for gathering evidence. The consultation guidelines are not universally known. Issues raised by stakeholders included the problem of being heard if one was not an insider; the need to reach out to all sizes of company, not just the larger ones; the need for stronger efforts to reach out to citizens and the broader public; and the need to step up efforts to make the consumer voice heard. There seems to be a growing demand for the government to be more inclusive and to hear citizens.

**Informality continues to play an important role, the argument sometimes being advanced that the size of the country dictates that this should be so.** This argument needs to be treated with caution, as size is not necessarily a barrier to a more formal approach, and it should not limit efforts at the consistent deployment of best practice, especially in the Irish context where the political system (multi-seat constituencies with a tradition of direct links between citizens and their local politicians for the discussion and resolution of issues) may in fact require the promotion of a more centralised and structured approach. Some stakeholders suggested that the lack of formal safeguards can lead to undue influence from some groups or lack of consultation in cases of political pressure. Informality can easily turn into a self referential insiders' debate.

**For social partnership or dialogue to remain an important process and must continue to evolve.** Social partnership has been helpful in bringing consensus on key issues since the late 1980s when it was developed. It has also evolved, encompassing new parts of the society (community groups). However, while it has integrated community and environmental groups, it has not always adapted easily excludes many, and may not adapt easily to new technological and societal developments. The 2001 OECD report had already drawn attention to the fact that over time, and given the open nature of the Irish economy, new participants (for example, non-nationals) are affected by Irish regulatory affairs. In tandem with any ongoing social partnership process, it is important that divergent and external voices are heard. The consensual approach can also lead to the avoidance or exclusion of some issues from the agenda.

**Recommendation 3.1. Share best practices for public consultation across departments (and agencies). Consider how to give the consultation guidelines some teeth so that they are observed and so that consultation is applied to the same consistent high standards. Ensure as a first step that the guidelines are fully known across departments and relevant agencies. Benchmark Irish consultation arrangements with those of other small countries in the EU to see what could be of value in the Irish context. Consider how the social dialogue can best evolve to take account of societal developments.**

### *Public communication on regulations*

Ireland faces considerable challenges, which it is addressing, in the accessibility of its regulatory stock, which harms transparency. There is no single consolidated Irish statute book. The historical development of the Irish legislative landscape and methods for enacting legislation have combined to generate a complex regulatory stock. The government has stressed the importance of ensuring accessibility of legislation and taken a number of initiatives since the 2001 OECD report to make the law more accessible. Efforts to make regulations publicly available sit alongside efforts at simplification of the regulatory stock. A major initiative in the former category is the electronic Irish statute book, a free of charge database, as well as the Legislation Directory. These initiatives may not be “politically interesting” but are highly valuable and necessary for future progress on transparency. As matters stand, despite the efforts of recent years, the state of the statute book combined with uneven performances in public consultation significantly reduce regulatory transparency, which has to be assessed as rather poor in comparison with many other European countries, and which has knock on effects for government accountability.

**Recommendation 3.2. Sustain the efforts at improving the accessibility of regulations and if necessary, increase funding. Communicate more clearly and broadly the value of these initiatives, as part of an enhanced general communications strategy for Better Regulation (see recommendation 7.4.)**

#### **Box 3.1. Transparency: 2001 OECD report and 2008 public service report**

##### **2001 report**

##### **Increase transparency by formalising administrative procedures, including those concerning public consultation and rule making.**

It is accepted that the small size of the country, the political culture of openness, the number of elected representatives relative to the size of the population and the *Freedom of Information Act* contribute to a climate of openness that facilitates an effective consultation process. **However, as relationships evolve, new participants, including non-nationals, become affected by Irish regulatory affairs.** Likewise, lack of minimum rules may complicate public consultation and regulatory procedures reducing effectiveness, speed and timeliness of regulatory responses. The recognition of such new circumstances is reflected in the increasing formalisation of basic administration duties (e.g., the *Cabinet Handbook*, the *Public Service Management Act*). However, accessibility may still be needed. As a precautionary step, **consideration should be given to establish as a safeguard a “notice and comment” mandatory requirement for all regulatory proposals** (perhaps managed by the RIA central unit). As a complementary measure, Ireland may wish to **establish the minimum criteria and disciplines for the public consultation** required by the *Reduce Red Tape* action plan. Furthermore, these efforts may be integrated into an encompassing initiative to prepare an Administrative Procedure Act. This would consolidate the recent effort to publish the basic rule-making procedures in the *Cabinet Handbook*, and on the other hand would provide in a single text clear rights to citizens and businesses to know and challenge the rules to be followed when making regulations (RIA, consultation, publication, etc.) and when adjudicating regulatory matters (make a decision on a formality). The nearly universal



support for the social partner mechanism signals a general satisfaction with existing consultation and participation practices.

### Background comments

Although the processes are transparent, the efficiency and expediency of the consultation process could be enhanced by **improved information and though the creation of safeguard mechanisms to avoid potential abuse**. It can then be counter-argued that in a small open economy, with a strong media and a strong tradition of local politicians' accessibility, formalised procedures would be costly and counter-productive. But important interests, notably consumer groups, report that they have not been able to participate and defend their interests. Equally, consultation processes on zoning or reforming local public transportation have raised criticism that the consultation system can be unduly influenced by influential groups. In this sense, **clear guidelines and training, establishing “notice and comments” requirements prior to acceptance at the cabinet and general improvement in the quality of the documents subject to consultation may be required, without unnecessarily formalising the processes**.

Rethinking the institutional setting might also be desirable to sustain public support on reforms and adapt Irish institutions to new circumstances. As the Netherlands discovered in the early 90s, too many advisory bodies focusing on details do not increase the quality of the public consultation and slow down government responsiveness to a changing environment. The existence of more than 90 different groups established under the last Social Partnership Agreement, for instance, makes it difficult for a newcomer to the process to understand where the decisions will be made, before considering the substance of the decision.

Lastly, **existing institutions and procedures for consensus building, either formalised or *ad hoc*, may not be adequate to deal with a rapidly changing society**. Some interlocutors such as the unions or “big business” representatives may play too large a role. Changing priorities and strategies involve assessing the representativeness of traditional participants. For instance, a new pro-competition stance should require a re-balancing of powers between the views of producers and those of consumers – an interest group which does not participate in the partnership process. Economic and social developments also mean that new interest groups can become increasingly vocal, and require further transparency and accountability safeguards. Interest groups, sometimes supported internationally or in the case of local issues nationally, may exert a significant influence and control over the policy-making and the lawmaking processes. Here again precautionary steps, as full disclosure of interests, can be the best way to maintain a healthy consultation process.

### 2008 public service report

An open public service is a necessary element of user satisfaction and a source of input for improving services and policies. Ireland has shown a willingness and leadership to have an open public service. This is reflected in its recent consultation guidelines and the frequency of consultation both through administrative channels and through the mechanisms of Social Partnership. The culture of openness needs, however, to be further encouraged.

While much public information is already available under the Freedom of Information Act, the public service should consolidate information in order to make it more transparent and easily accessible. For example, in addition to ensuring that the results of RIA are made available through the relevant department's website, they should also be available from one centralised location. The requirement that annual reports from 2006 onwards should include information on RIA published in the preceding year (as outlined in the partnership agreement “Towards 2016” will also help to improve transparency and openness. Renewed effort should also be made to streamline information about public service contacts, regulations and service standards in order to promote clear public service delivery standards and to make them more accessible to citizens.

Greater openness can slow implementation, but this can be eased by providing a framework for consultation in order to match the purpose of the consultation with the type of consultation needed. The public service should explore greater cross departmental and cross agency communication on proposed public consultation processes, so that greater co-ordination of consultation efforts can take place. The creation of a consultation portal - a central database where the public can see what processes are underway in thematic areas and allows them to submit comments on line, could improve response rates. Who is consulted and how their input is used is also important. There should be feedback to consultees.

The commitment to greater openness should extend beyond the public service management and unions, to the broader civil society. Social Partners are well placed to enhance common cause with citizens to

bring their voices in. This can be achieved by continuing other forms of consultation and participation as a complement to Social Partnership - both directly by the public service and by using Social Partnership consultation mechanisms.

Source: OECD.

## Background

### *Public consultation on regulations*

#### *History and general context*

Ireland's approach to public consultation has traditionally relied heavily on informal interaction between departments and external stakeholders, with a presumption that draft regulations should not be disseminated externally until formal approval by the government and parliament. Formal requirements were limited to the *Cabinet Handbook*, which provides that during the stage of drafting a regulation, "consultations may take place with outside organisations if necessary" and adds that departments "should refrain from disclosing the actual legal text prior to approval by the cabinet and presentation to the parliament in the case of bills".<sup>2,3</sup> In practice, departments have often relied on an array of advisory and liaison bodies to support them.

A key factor in the overall approach has been social partnership, which was developed in the 1980s (Chapter 2, Box 2.4). Social partnership has been an important vehicle for formal consultation on high-level national policies, embedding a corporatist and consensus building approach to public consultation. It has helped to promote a common understanding of the problems facing the country and to secure industrial peace.<sup>4</sup> The system (which originally brought together employers, unions and the farming community) has also shown a capacity to evolve through an extension to community and environmental groups and has become a forum for the entire social and economic agenda. The financial crisis challenged social partnership's capacity to react quickly and effectively to urgent needs. While the government reached an agreement with social partners on a "Framework for Stabilisation, Social Solidarity and Economic Renewal" in January 2009, it did not subsequently prove possible to conclude a broader national social partnership agreement in 2009. However the Public Service Agreement 2010-14 was concluded with public service unions in 2010.

#### *Developments*

The overall approach started to change a few years ago, when transparency was identified as one of the six principles of Better Regulation in the 2004 White Paper "Regulating Better". The government recognised the need for greater consistency and openness in its approach to public consultation and committed to developing procedures and guidelines to this effect. The Department of the *Taoiseach* was responsible for taking this forward, and issued public consultation guidelines (*Reaching Out: Guidelines on Consultation for Public Sector Bodies*) in 2005, at the same time as it embedded public consultation as a formal part of the Regulatory Impact Assessment process, which was also being renewed. Meanwhile, many departments and other public bodies started to experiment with new approaches, not least via the Internet (see below).

## Public consultation guidelines

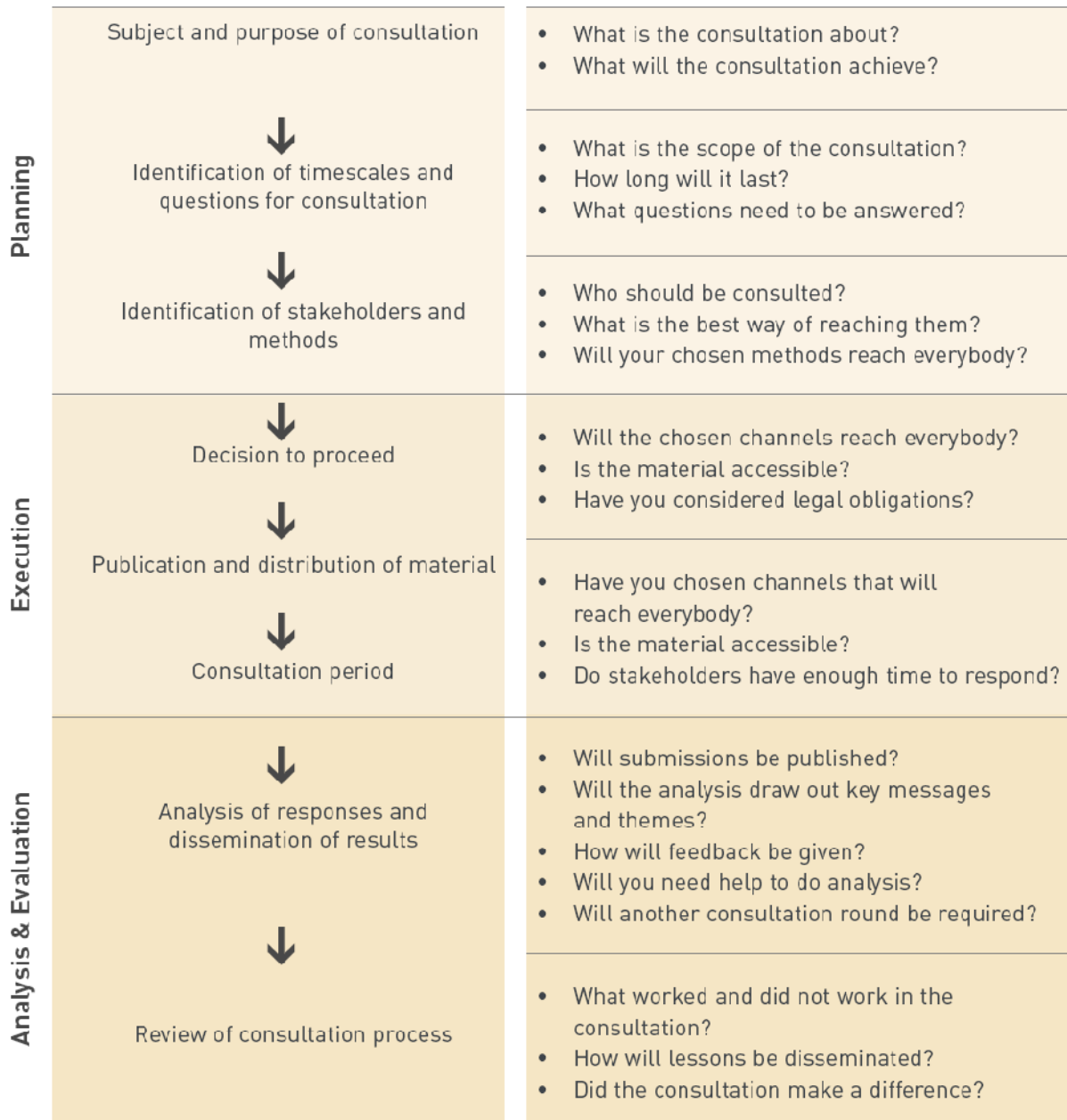
The 2005 guidelines on consultation have been designed not as a prescription, but more as a practical tool, as it was considered that very formal procedures are not appropriate to the size and administrative tradition of the country. The 60-page document sets out the components of an effective consultation process when preparing new regulations, outlines the different methods (written consultation, advisory committees, face-to-face interviews, focus groups, etc.) and provides a practical checklist (Box 3.2) as well as a flow chart (Figure 3.1). It promotes a number of quality standards regarding documentation, scope, publicity, time to respond, and feedback to those who provide comments. It recommends that officials acknowledge and publish all submissions received, subject to considerations of confidentiality and/or defamation, and give feedback to those who have taken part in consultation.

### Box 3.2. Checklist for consultation

- Are you clear on the purpose and objectives of your consultation?
- Are you clear on the questions you want to ask in your consultation?
- Have you identified all of the stakeholder groups and individuals that should be consulted?
- Have you chosen the most appropriate and inclusive methods of consultation, including those that meet the needs of “non-traditional” stakeholders?
- Have you allowed for sufficient resources for the consultation?
- Have you considered all of your legal obligations?
- Have you publicised your consultation in online and offline media?
- Have you allowed sufficient time to give stakeholders an opportunity to consider the issues fully?
- Have you planned how you will analyse the submissions received during your consultation?
- Have you planned to evaluate your consultation process and to ensure any lessons learned are taken into account for the future?

Source: Department of *Taoiseach*, *Reaching Out: Guidelines on Consultation for Public Sector Bodies*.

**Figure 3.1. Consultation flow chart**



Source: Department of *Taoiseach* (2005), *Reaching Out – Guidelines on Consultation for Public Sector Bodies*.

Departments and public bodies<sup>5</sup> are left to define how they consult external stakeholders. In practice, consultation procedures vary across departments as well as circumstances. Departments define the approach to be taken and identify key players to be consulted on a case-by-case basis. Some proposals go through a full formal public consultation whereas others, normally less significant proposals, go through a more informal consultation, which mainly means that less publicity is given to the request for comments. In the case of major policy issues departments occasionally publish a green paper, setting out the options for regulation and inviting formal submissions from the

general public. While details of the consultation process vary, stakeholders are usually asked to provide views on alternative options or any impacts or costs which have not already been identified.

### *Public consultation and impact assessment*

Public consultation is integrated in the regulatory impact analysis (RIA) process which is required to be conducted on all primary legislation, EU directives, significant secondary legislation and significant EU regulations (Chapter 4). The RIA guidelines specify that officials should engage consultation with key stakeholders as early as possible in the RIA process so that it can feed into the analysis of costs, benefits and impacts. They also encourage them, where possible, to use a draft RIA as the basis for consultation. A summary of views conveyed through the consultation process should be set out as part of the RIA, as well as a brief response to key issues expressed.

### *New forms of public consultation and use of the web*

There is awareness of the need to reach out to a wider range of stakeholders, as seen for example with the 2007 report of the government-appointed independent Taskforce on Active Citizenship.<sup>6</sup>

Some departments have developed a pro-active approach to public consultation to encourage participation by the wider public. A recent example is the broad consultation scheme put in place by the Department of Health and Children for a major policy (Box 3.3). Relevant organisations across the country were identified and invited to take part in workshops, using experts as facilitators. The experience was considered to be a great success, with quality contributions. But it also highlighted that significant effort and resources are needed to engage pro actively in this way. The Department nonetheless considered that it had been very worthwhile and hoped that others might be encouraged to follow suit.

#### **Box 3.3. Department of Health and Children consultation on the Health Information Bill**

The process unfolded in the following way:

1. Decision taken at a high political level for a wide ranging consultation.
2. Search carried out to identify the widest range possible of organisations with a potential interest (150 found).
3. Consultation via writing to the identified organisations in the first place, plus media campaign to engage the wider public, and use of the Departmental website.
4. Consultation documentation careful not to “pre-impose” views.
5. Conference organised with as many as possible who had expressed an interest.
6. One day workshop.
7. The Department commented that the experience had overall been enriching and very positive. The public was much better informed than expected. However, inviting a broad range of participants required effort and resource for digestion of the views expressed.

*Source:* Interview of the OECD peer review team with the Department of Health.

Use of the Internet, as elsewhere in the OECD, has been enthusiastically embraced for some consultations, opening these up to a wide audience. Departments are encouraged to

consider a range of ICT tools – web based consultation documents, online submissions, electronic mailboxes, email distribution, issue based website forums, online focus groups, web-based surveys. However, whilst there is ample evidence of the use of ICT, this does not necessarily mean that the consultation is effectively carried out (for example, website postings may not be effective if they are not pro-actively followed through).

#### Box 3.4. Public consultation: examples of new approaches, including ICT

##### Statute Law Revision

The Statute Law Revision Bill 2009 has been accompanied by a process of consultation<sup>7</sup> which commenced in September 2007. This involved the placing of public advertisements in newspapers and a notice on the Attorney General's website in September 2007 inviting submissions. In addition, letters were issued to certain organisations and interested parties. In November 2008 all departments, local authorities and other relevant parties were sent a schedule of Acts that were relevant to them. A specific email address was set up and made available to the public to facilitate electronic communication.

##### Statute Law Restatement and Legislation Directory

The Consultation Paper on Statute Law Restatement was published in July 2007 in print and was put on the Law Reform Commission's website, inviting submissions. The Report on the same topic was also published on the website as well as in print. Many of the submissions were received by email.

The Consultation Paper on The Legislation Directory: Towards a Best Practice Model was also published in July 2008<sup>8</sup> simultaneously on line and in print, and invited submissions by e-mail as well by other means.

##### Broadcasting Bill

An eConsultation project was conducted on the Broadcasting Bill 2006, the first ever e-Consultation process carried out in relation to legislation in Ireland. The project consisted of a website which was set up solely for the purpose of public consultation on the draft Heads of the proposed Bill and was conducted by the Joint *Oireachtas* Committee on Communications, Marine and Natural Resources. The Universities e-Consultation Research Group (ECRG) evaluated this pilot project and published its independent report in May 2007. The ECRG found that the process, in relation to the draft Heads of the proposed Broadcasting Bill, had improved the transparency of the workings of parliament, was efficient and had facilitated public participation. More information on this project is available at [eConsultation.ie](http://eConsultation.ie).

##### Green Paper on Pensions

Publication of the Green Paper on Pensions was followed by an extensive period of consultation which was supported by a dedicated website ([www.pensionsgreenpaper.ie](http://www.pensionsgreenpaper.ie)) through which members of public/organisations could make submissions. In addition, all the submissions made (including those not made through the website) were made available on the website at: [www.pensionsgreenpaper.ie/consultation.html](http://www.pensionsgreenpaper.ie/consultation.html).

##### Transport Sector

All proposals involve a public consultation process, which includes publication on the Department of Transport website. In some instances which involve proposals for significant regulatory change, the Department establishes a dedicated website for consultation which enables interested parties to submit their comments/observations through it. The comments, unless requested otherwise, are published on the website. A recent example is the proposal for a new vessel registration regime.

ICT is mainly used to provide information on the Department website, e.g. information on legislation and practice is supplied and Marine Notices are posted on a dedicated page of the Department's website. Contact addresses are supplied online and electronic communication is normal and frequent.

##### Justice Sector

The Anti-Human Trafficking Unit (AHTU) has a total of 7 working groups and communication within these groups is made through email. The AHTU set up a webpage in October 2008 giving information on the blue blindfold campaign and a Facebook account (social networking site) was opened in February

2009 inviting members of the public to become friends on line. The national Action Plan to prevent and combat Trafficking in Human Beings can be accessed at [www.blueblindfold.gov.ie](http://www.blueblindfold.gov.ie) as well as through the Department's website ([www.justice.ie](http://www.justice.ie)).

#### **Revenue Commissioners**

The Revenue Commissioners consults with stakeholders regarding administrative changes and regarding legislative changes where possible. An example of the latter is the recent consultation exercise regarding the simplification of the administration and collection of Capital Acquisitions Tax.<sup>9</sup>

#### **Department of Agriculture, Fisheries and Food**

ICT is used extensively for internal consultation and the circulation of Community documentation, draft regulations and SIs. Draft legislation and accompanying regulatory impact assessments are made available on the Department's website for a period of consultation. Responses are generally accepted in writing and by email. All secondary legislation relevant to the Department is contained in a link on the Department's website. There is also a link to the Irish Statute Book.

*Source:* Irish government responses to OECD questionnaire.

### **Strengthening the consumer voice**

A major specific concern has been that the consumer voice is not heard enough. The 2001 OECD review noted a poorly developed consumer culture and an entrenched policy bias in favour of producer interests. In response to a critical 2005 report by the Consumer Strategy Group, the government established the National Consumer Agency (NCA), which was charged with consumer advocacy in addition to consumer law enforcement (Box 3.5). While the establishment of the NCA has helped to build up a consumer culture, several interviewees pointed out that the consumer voice is still weak relative to producer interests, departments still paying insufficient attention to the consumer perspective. The NCA pointed out that there are powerful economic arguments for paying closer attention to the consumer voice. The OECD peer review team could not form a view on whether the proposed merger of the NCA with the Competition Authority (done it seems more from an efficiency savings than a policy point of view) would help or hinder the consumer cause. This will need to be monitored.

Some regulators (such as the energy regulator and the telecom regulator) have set up specific consumer panels or committees but are confronted with the limited capacities of the consumer organisations. The energy regulator (CER) has introduced a consultation calendar, following a review of its consultation processes, to outline major initiatives in the year as well as help overcome consultation fatigue.

#### **Box 3.5. The National Consumer Agency**

The National Consumer Agency (NCA) is a statutory body (a form of government agency) established by the Irish government in May 2007.

The NCA's mandate is to enforce consumer legislation, and to advocate for and defend consumer interests at the highest levels of national and local decision-making. Its overall mission is to embed a robust consumer culture in Ireland and to represent the voice of the consumer. Its advocacy role includes research, consumer information, education and awareness programmes.

The Agency was established in response to the publication of a critical 2005 report by the Consumer Strategy Group entitled: *Make Consumers Count*.<sup>10</sup> This identified important deficiencies in the protection and promotion of consumer rights in Ireland. It found that consumer voices were very weak, and needed to be strengthened.

Its parent ministry is the DETI, which is overall responsible for consumer policy. 95% of staff are

from the parent Department. The NCA considers the relationship to be a good one, in which its independence is respected. There are quarterly meetings with the DETI as well as informal contact (both at official and political levels). The NCA produces an annual report which goes to the DETI minister, as well as to parliament, and is published on the web. The OECD peer review team were told that the main issue is a chronic understaffing. The NCA has a staff of 44 full-time equivalents.

The NCA will shortly be merged with the Competition Authority.

### *Evaluation of progress*

The picture is mixed and not always easy to read, as is the case in a number of other European countries which, like Ireland, are in a transition from traditional approaches to the new more open forms of consultation and the use of new technologies.

The OECD peer review team found evidence that the practice of prior consultation in the development of regulations is well-anchored in the Irish administration. There is frequent interaction, both formal and informal, between stakeholders and the government, usually at an early stage of policy development. It appears that departments make a growing use of the Internet, and hence a wide audience, to gather information (*e.g.* consultation documents posted on their websites, email distribution, website forums). The recommendations of the BRU seem to have been taken to heart, at least in some departments and for some consultations.

There are, however, issues, which suggest that there is a demand for more effective consultation from the wider community as well as from some insiders, and that putting more pressure on departments to be consistent in applying the (very clear and comprehensive) consultation guidelines would help. SMEs, consumers and citizens appear to be often out of the loop. There seems to be a continuing reluctance to include unknown or uncommon stakeholders:

- **The problem of insiders.** A number of stakeholders (including some who might be considered insiders) noted that the system overall still appeared to work best for insiders. Comments received included: “legislation is developed by insiders for insiders”; “the social partners are inside the tent, others are outside”; “social partnership has outlived its usefulness”; “stakeholder groups don’t always represent the interests of the public”; and “there is a habit of secrecy”. There are concerns that the social partnership had developed an inward-focused approach, excluding some stakeholders from the discussion.
- **Reaching out to all sizes of company.** Large companies are, it seems, more readily heard than others. This is partly due to the important role played by social partnership. Comments received included: “there is a lack of consultation with business”; “big firms have the ear of the minister”; and “micro firms can’t get their voice heard - they are excluded from the partnership”. Consultation seems to favour the “usual suspects” in the business community. However there are issues in all countries concerning the part played by small companies due to their resource constraints.
- **Reaching out to citizens and the broader public.** There appears to be a thirst for more effective consultation in the wider community: “the government is reluctant to engage with the public”; “ordinary citizens are kept out of the system”; “citizens should be consulted more”; “the government does not respect the legitimate right to participate”; “the government is not listening”; “more dialogue with the government please”; “consultation is done for the sake of it”. Establishing more inclusive policy making is a challenge for Ireland as for other



OECD countries (OECD, 2009).<sup>11</sup> In the Irish case there is also “competition” with the political tradition of easy accessibility to local politicians to resolve issues on an individual basis or to make broader views known. But is the tide beginning to turn?

- **Hearing consumers.** There appears still to be some way to go in rebalancing the producer/consumer perspective, despite the efforts made with the establishment of the NCA. “The consumer voice is lost”.

There were several calls for more formalised consultation which works better because it broadens out the range of consultees, and because it secures a more consistent quality of consultation across departments and projects (for example with respect to feedback). The consultation code is far from being universally known, and interviews showed discrepancy in its implementation. Several interviewees noted that the lack of formal safeguards can lead to undue influence by some groups or lack of consultation in cases of political pressure. The political commitment to take on board information resulting from consultation could be limited.<sup>12</sup>

### ***Public communication on regulations***

#### *Access to government information*

The Freedom of Information (FOI) Act 1997 entitles individuals to request any record held by a public body (and produced after April 1998). It was amended by the Freedom of Information (Amendment) Act 2003. The FOI acts require public bodies to publish information relating to their structure, functions, duties, descriptions of records, and the internal rules, procedures, practices, guidelines and interpretations. Public bodies must respond within four weeks and justify why information is withheld. The FOI acts also require that agencies provide a written explanation to individuals of decisions that affect their interests. The Department of Finance maintains a dedicated website which provides information, guidelines and other relevant information. Most departments and offices also have FOI arrangements in place, including a designated FOI officer and a published information system to assist those who might wish to make a request for the release of information. The FOI acts have contributed to a culture of openness and enhanced the accountability of the administration. The Office of the Information Commissioner (whose independence and powers are set in the FOI Act) oversees and enforces the act. Her decisions are binding and can be appealed only on a point of law.

There are, however, a number of restrictions on access to information. In particular, requests may be declined if they fail either “public interest” or “harm” criteria. A key restriction stems from the fact that a number of public bodies are not covered by the act. While the list of covered bodies has expanded over the years, the FOI act still does not apply to the *Garda Síochána* (national police service), vocational education committees, the Central Bank, the Financial Services Authority, the National Treasury Management Agency, the National Pensions Reserve Fund Commission, and the State Claims Agency. In her annual reports, the Commissioner has regularly criticised the exclusion of a number of bodies, in particular the police, from the act’s provisions. In the 2008 report (OIC, 2008),<sup>13</sup> she outlined the need to re-assess the role of the Freedom of Information Act in holding financial institutions, to account on the background of the financial downturn and the subsequent increased demand for transparency and accountability. Another restriction has come from the introduction of up-front fees by the FOI Act 2003 for requests and appeals (although not for requests relating to personal information). While user charges may limit frivolous requests and reduce burdens on the public service, they have also

created a disincentive as seen in the drop in requests in the years following their introduction (the trend was reversed in 2008).<sup>14</sup>

### *Accessibility of regulations (through publication)*

The government has stressed the importance of ensuring accessibility of legislation, and has taken a number of initiatives over the past decade to make the law more accessible. This has combined efforts to improve the way regulations are made publicly available (in particular through the publication of the electronic Irish Statute Book – see below) and efforts to simplify the existing stock of regulations through repeal of obsolete regulations, consolidation and codification. In the Irish context, this simplification is especially important, as the historical development of the Irish legislative landscape and the methods of enacting legislation create specific challenges (see Chapter 5).

### The electronic Irish Statute Book

The central instrument for accessing Irish regulations is the electronic Irish Statute Book (eISB).<sup>15</sup> This is a free of charge online database, managed by the Office of the Attorney General, which registers all primary and secondary regulations. It is now updated promptly, on a regular basis. It includes all acts of the *Oireachtas* from 1922 to present, statutory instruments (from 1922 to present), and the Legislation Directory (a searchable database of amendments to primary regulations).

A bill becomes law (an act of the *Oireachtas*) on the day it is signed by the President who is also required to promulgate every law. This is done by publication of a notice in the *Iris Oifigiúil* (the official journal, published twice a week and available on line<sup>16</sup>). The Act is then published. Responsibility for the publication of primary regulation rests with the Houses of the Oireachtas Commission. The text of the acts is made available on the *Oireachtas*' website<sup>17</sup> and on the eISB. Acts are published in their enacted form only.

The publication of statutory instruments (secondary regulations) is governed by the Statutory Instruments Act 1947, according to which they are announced in the *Iris Oifigiúil*. The electronic Statutory Instrument System (eSIS), introduced in 2007, was developed to allow for faster and more accurate production of Statutory Instruments (SIs) in both final printed format and in electronic format that is suitable for placing SIs on the online Irish Statute Book. The key element of the revised system is that SIs are converted into the required print and web ready formats before the SI is signed into law. In this way, the SI is ready for publication, both in hard copy and electronically, within 4 working days of signature. Overall this enables the statute book to be updated more quickly and efficiently. In early 2008, the Department of the *Taoiseach* produced guidelines on the use of eSIS to provide support to the officials preparing statutory instruments.<sup>18</sup> In 2007 the government also agreed that departments should put a “pdf” version of statutory instruments signed by their minister on their websites as soon as possible after signature. This is currently done by a number of departments, although not all of them.

In addition to a registry of primary and secondary regulations, the eISB contains the Legislation Directory, which improves access to primary regulations by documenting modifications made to primary legislation by subsequent legislation. The Legislation Directory is a major source of information for the public, particularly legal professionals and officials, on the current state of the law.<sup>19</sup> It enables users of the Irish Statute Book to identify whether a particular provision has been amended or otherwise affected since its enactment. It is thus a very useful tool for navigation in the complex Irish regulatory framework, where amendments typically pile up. It is developed and managed by the Law Reform Commission (LRC). The Legislation Directory covers only amendments made to

primary regulations. According to the LRC, the same work could be done for secondary regulations but would require additional resources (currently the LRC's staff includes one manager and two researchers).

The Law Reform Commission (LRC) uses the Legislation Directory to prepare statute law restatement (a form of consolidation of primary regulations).

### e-Legislation Group

The Department of the *Taoiseach* has drawn together an informal group, the e-Legislation Group, to examine how the Irish Statute Book could be improved in the short- to medium-term. The group includes representatives from the Department, the Office of the Attorney General, the Office of the Chief Parliamentary Counsel, the Houses of the *Oireachtas*, the Civil Service Training and Development Centre and the Law Reform Commission.

The LRC also published a consultation paper on the Legislation Directory in 2008 to provide a focus for public discussion on how the Directory could best serve its users in terms of content provision and accessibility. It contained 36 recommendations, spanning from technical recommendations to broader ones (such as the recommendation that Ireland should adopt a more comprehensive *eLegislationmodel*). The key challenge, from what the OECD peer review team understood, is to gain sufficient support and consequently resources to make further progress, both for the development of the eISB and for consolidation initiatives (see Chapter 5).

## Notes

1. Procedures for rule-making (Chapter 4); codification (Chapter 5); appeals (Chapter 6).
2. Department of the Prime Minister, *Cabinet Handbook*, Rule 4.16.
3. Text from the handbook: "During this stage (drafting of the text) consultations may take place with outside organisations if necessary (on the basis of the general scheme or outline of the approach being considered) but the text should not be disclosed to third parties prior to approval by Government and presentation to the Houses of the *Oireachtas*".
4. OECD Economic survey 2003, page 33.
5. The guidelines define public bodies as "the range of organisations, including government departments and offices, state-sponsored bodies, independent sectoral regulators, bodies in the health and education sectors, and local authorities, who may have a role in framing, developing or implementing policies, including through regulation".
6. The Taskforce on Active Citizenship was established to advise the government on the steps that can be taken "to ensure that the wealth of civic spirit and active

participation already present in Ireland continues to grow and develop”. The Taskforce conducted a nationwide consultation process and produced a set of recommendations in its final report in March, 2007. The report, which addressed a larger scope than regulatory making, outlined the need to promote awareness and understanding amongst public bodies about how to engage more effectively with citizens and community and voluntary organisations, including through consultation. The government accepted the recommendations and appointed a Steering Group to oversee the implementation of the Taskforce’s recommendations in October, 2008. There has been so far no other follow on.

7. Information on this consultation is available at: [www.attorneygeneral.ie/slru/slrp.html](http://www.attorneygeneral.ie/slru/slrp.html).
8. The following links provide more information on the consultation papers and reports, [www.lawreform.ie/publications/consultpapers.htm](http://www.lawreform.ie/publications/consultpapers.htm) and [www.lawreform.ie/publications/reports.htm](http://www.lawreform.ie/publications/reports.htm).
9. More information is available at: [www.revenue.ie/en/practitioner/ebrief/2009/no-352009.html](http://www.revenue.ie/en/practitioner/ebrief/2009/no-352009.html).
10. [www.consumerconnect.ie](http://www.consumerconnect.ie).
11. OECD Studies on Public Engagement – Focus on Citizens: Public Engagement for Better Policy and Services.
12. For example, the OECD peer review team heard that transposition of the EU data protection directive generated a large number of comments which could not be used as the political decision on how to proceed had already been taken.
13. Office of Information Commissioner (2008), Annual Report. [www.oic.gov.ie/en/Publications/AnnualReports/AnnualReport2008/File,9998,en.pdf](http://www.oic.gov.ie/en/Publications/AnnualReports/AnnualReport2008/File,9998,en.pdf).
14. From the Office of Information Annual report 2008.
15. [www.irishstatutebook.ie](http://www.irishstatutebook.ie).
16. [www.irisoifigiuil.ie](http://www.irisoifigiuil.ie).
17. [www.oireachtas.ie](http://www.oireachtas.ie).
18. The guidelines are available on the Better Regulation website, at [www.betterregulation.ie/eng/Publications/SI-System-Guidelines\\_jan\\_08.pdf](http://www.betterregulation.ie/eng/Publications/SI-System-Guidelines_jan_08.pdf).
19. The Legislation Directory was known as the Chronological Tables of the Statutes until 2006, at which date the responsibility was transferred from the Office of the Attorney General to the Law Reform Commission. The change in name marked the new allocation of responsibility but was mainly done to give more visibility to potential users.



## Chapter 4

### The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

*Ex ante* impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the “no regulation” option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true – impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule-making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional “command and control” regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use “soft” approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

## Assessment and recommendations

### *Trends in the production of new regulations*

**Irish regulatory production needs to be monitored, not least in support of the efforts to simplify the regulatory stock.** A significant number of new primary and secondary regulations come on to the statute book every year. In the Irish context this matters especially, as much of this represents amendments to existing statutes, necessitating a major and ongoing cleaning up of the regulatory stock over time so that it remains legible.

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**Recommendation 4.1. Take steps to monitor regulatory production systematically (both primary and secondary regulations), identifying amendments to existing regulations as well as entirely new regulations.**

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### *Processes for making new regulations*

**Secondary regulations are not subject to the same processes as primary regulations.** Primary laws are the subject of forward planning published on the Department of the *Taoiseach* website by the Office of the Chief Whip for upcoming parliamentary sessions. This is well in line with international best practice. However, it contrasts with the lack of arrangements for secondary regulations. Planning of secondary regulations rests with the sponsoring department, and is not made publicly available. Checking for the legal quality of secondary regulations is also much less in evidence than for primary legislation (which is implicitly subject to legal quality principles by dint of the fact that it is drafted by the staff in the Office of the Parliamentary Counsel to the government in the Attorney General's Office).

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**Recommendation 4.2. Consider whether to set up a system for the forward planning of upcoming secondary regulations, and to publicise this. Consider whether there is a need to bolster the process for assuring the legal quality of secondary regulations.**

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### *Ex ante impact assessment of new regulations*

**Ireland was a relative latecomer to Regulatory Impact Analysis but has been catching up.** Deployment of a policy to embed *ex ante* RIA in policy and rule-making has been gathering speed over the last few years. Following a pilot phase and an evaluation, in 2005 the government established RIA as a requirement for all government departments and offices. This was a landmark step forward. Some aspects of the policy reflect the best international practice, including the requirement for an integrated RIA covering all the major issues, and its application to EU directives (at least in principle). The principles and practical guidance and training disseminated by the BRU are among the best.

**The BRU is an active advocate and promoter of RIA, and its activities have been met with some success.** The BRU has been active and creative in the promotion of RIA following the 2005 decision to make it a requirement. The guidance and training is comprehensive, well focused and well developed. A network of Departmental officials orchestrated by the BRU is gradually extending understanding and culture change. RIAs are examined for their quality by the BRU on their way to the cabinet. Most of the necessary support tools for an effective RIA are in place. There is, as a result, progress on the ground, with a significant and documented rise in the number of RIAs carried out.

**But acceptance of RIA as an integral part of policy and rule-making has some way to go, and the gap between the principles of RIA and the practice generally remains wide.** The process continues to operate within a weak institutional framework which does not sufficiently “scare” departments into co-operating for the production of quality RIAs. Thus the OECD peer review team were told that RIAs were often “self-serving”, and that RIAs can get lost in “turf battles” between departments. The team were also told that in practice, some draft proposals did proceed without a RIA attached, depending on political will and support. However several stakeholders (including from outside the administration) were supportive and said it was an important process, even while acknowledging that it tended to remain an “add on”. The 2001 OECD report had already proposed that disciplines on regulatory quality should be strengthened. Despite progress since then, more is needed to discipline departments into carrying out RIAs of good quality, systematically. How should this be done, in the Irish context? The compulsory nature of the process remains something of a formality unless there are real sanctions, and perhaps a statutory requirement to carry out RIAs. The recent conclusion of some other EU countries where previous “requirements” were largely flouted is that statutory backing for the process may be needed, combined with a watchdog function that enables poor RIAs to be turned back, and that publication of RIAs (and opinions on their quality) is also an important lever. These aspects are considered further below.

**Currently, there is no statutory backing for the RIA process.** The requirement rests on a cabinet decision, integrated into the Cabinet Handbook, so that in principle, all departments have “signed up” to the RIA process. Ireland lacks an administrative procedures law, which exists in some (not all EU countries) to give statutory backing to the processes for development of legislation (and other issues such as appeals).

**The process lacks sanctions and a strong challenger that would force departments to pay attention.** The BRU does not have a statutory gatekeeper role with regard to RIAs (it does not have formal authority to turn poor RIAs back), nor does it have a formal mandate to assess the quality of RIAs or to report on the outcomes of its monitoring work on RIA. There is no strong challenge function. Many stakeholders said that the training was good but the process lacked quality control. “Too many carrots and not enough sticks”, said one, and another “BRU is not a gate, as it should be”. The OECD peer review team also heard that a stronger approach is needed at the beginning of the process. The scrutiny by the BRU of RIAs attached to heads of bill, before they are circulated for approval by government is an important part of their work, and they have used this channel to promote higher quality IAs. But could this input start sooner?

**Systematic public consultation and publication, which would also help departments to co-operate by exposing RIAs to public scrutiny, is often inadequate or not done.** The formal integration of public consultation as part of the RIA process is a positive development, as is the requirement in principle that RIAs be published (a least for primary legislation and when the bill is published etc). However, neither of these practices appear yet to be fully embedded. There is concern that there are still low rates of publication. The OECD peer review team heard that there is considerable resistance to publication. It also heard that publication would be a significant lever to promote change. Name and shame is not (as yet) a strong tradition within the administration and this is likely to be an effective way of applying pressure.



**Recommendation 4.3. Check Irish arrangements against those of relevant EU countries to see what might be done to strengthen the RIA requirements so as to strengthen their quality. For example, consider how the BRU could be formally equipped with the power to turn back inadequate RIAs so that draft proposals cannot be tabled before cabinet unless there is a RIA attached of adequate quality, and how publication might be made a statutory requirement. Enhance accountability for results by regular publication of (and publicity for) RIA statistics-how many done as a proportion of proposals, how many assessed to be reasonable quality, by department.**

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**The analytical framework and quantitative support for RIAs remain relatively weak.** The BRU now focuses on its action on improving the quality of IAs, where a lot is still needed. A key weakness is quantification by departments. The OECD peer review team heard that there is a need to “legitimise quantitative approaches”. Beyond the economic and business related impacts, methodologies remain relatively undeveloped. Whilst it is important to strike an appropriate quality/quantitative balance, the latter needs a further boost, including further capacity building among departments. It was suggested that there is a need for a more effective allocation of appropriate resources (economic, legal) within departments to areas conducting a lot of RIAs. Departments appear to make little use of the service of the economic expert, which is not a good sign. These points suggest that capacities may exist but are not fully used. Is there an underlying issue of the perceived relevance of RIAs for some departments? The current process, whilst broad, tends to emphasise in practice the economic dimension, and sustainability, for example, is not so clearly covered.

**Recommendation 4.4. Consider how to further boost methodological support and buy in from departments for a quantitative approach. Among the approaches that could be envisaged are the further development of online user friendly tools for departments, linked to the training which is already provided, the establishment of “peer review” groups in departments for mutual support, linked to departments’ economists or economic units, and encouragement to departments to systematise the use of their economic staff for support and review of the work done by non specialist officials.**

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**Significant statutory instruments (secondary regulations) may be slipping through the net.** The requirement to prepare a RIA applies to “significant” secondary regulation, but there is no clear definition of what “significant” means. This is left in the hands of departments. The OECD peer review team were told that many significant secondary regulations were in fact slipping through the net. There is a similar issue for RIAs on EU regulations, which are required in principle but also often not done (see also Chapter 7). Secondary regulations are important as these are often the vehicle for amendment of existing laws, adding to the complexity of the regulatory stock and lack of readability of the law.

**Recommendation 4.5. Consider how to ensure that significant secondary regulations are picked up by the RIA process, linking this to the issue of amendments that undermine the clarity of the law. A panel of relevant officials working on simplification, together with the BRU could be organised to review RIAs on primary legislation in order to identify expected significant secondary regulations.**

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**Regular evaluations of the overall process are important for sustaining pressure and for securing any necessary improvements.** Evaluation is valuable for moving the process forward and refining mechanisms for maximum effectiveness, as evidenced by the 2005 report and subsequent review. The next evaluation might be structured around an impact analysis on the RIA process itself, in other words, consider the costs and the benefits of the system in order to pinpoint what needs to change.

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**Recommendation 4.6. Ensure that the RIA process continues to be evaluated by an objective external entity or entities at regular intervals, taking account of resources for this. Consider who is best placed for this task.**

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**Effective communication is critical in order to make clear the importance of RIA for meeting high-level public policy goals.** The BRU has articulated the strategic value of RIA as a means of improving the quality of governance, improving economic efficiency and the effectiveness of the public service, and to improve competitiveness. How can RIA be further promoted as a tool for enhancing effective policy debate, both internally and externally? Supportive external stakeholders could be encouraged to contribute to the communication of why RIA is important. Internally, the OECD peer review team were not clear whether buy in had been achieved within the Department of the *Taoiseach* itself, for example by the Cabinet Secretariat. There appears to be a need to strengthen communication, both internally and externally.

**The integration of *ex post* evaluation in the RIA process reflects best international practice.** *Ex post* review is now also a mandatory element of the impact assessment process, reflecting best international practice. As one stakeholder put it, “if we can’t stop draft legislation, we can look at it afterwards”. Although it is of course preferable to catch issues before they become law, several EU countries are aware of the fact that in a context where effective RIAs may pose a challenge, *ex post* review is another opportunity to take stock. However, the most important reason for having a process that uses both *ex ante* and *ex post* evaluation is that this should generate a virtuous circle, in which the *ex post* evaluation can help to strengthen understanding how draft regulations can be more robustly constructed, for example in terms of securing compliance, and avoiding “unintended consequences”, as well as discouraging the production of poor RIAs in the first place, if evaluations are publicised.

**More broadly, there is a need to envision the development of the RIA process in the wider context of regulatory governance aimed at joining up stock and flow initiatives.** RIAs are only part of the processes that need to be deployed for effective regulatory governance. They can be seen as part of a support chain for broader efforts to secure an effective and efficient legal framework. As well being a tool to evaluate each draft regulation individually, they should also serve to provide an overall view of the way in which regulation is evolving, with reference for example to different sectors of the economy or different types of company. For example, a review of RIAs may show that one sector has been particularly affected by (too much) regulatory activity. Joining up the RIA process with the initiatives for simplification may also suggest issues for debate and further action in terms of managing regulatory output, improving the quality of the law, and evaluating the effects of regulatory output on specific actors and sectors of the economy.

#### Box 4.1. Recommendation from the 2001 OECD report

**Strengthen disciplines on regulatory quality in the departments and offices by reinforcing the central review unit and refining and integrating tools for regulatory impact analysis, based on a benefit-cost principle, increasing the use of alternatives to regulation, integrating these tools into public consultation processes and training public servants in how to use them.**

The Regulatory Quality Checklist that accompanies memoranda for a proposed law is a crucial step forward in the modernisation of the Irish regulatory management system. However, important weaknesses and gaps exist. Particularly important is the need, on one hand, to clearly differentiate between the mandatory Checklist and the “proofing” of impacts as, *inter alia*, employment, women, persons in poverty, and on the other hand, the need to consolidate in an extended RIA key-assessments such as the impacts on industry and small business costs. As the central principle, a universal benefit-cost test should be adopted, with step by step strategies to gradually improve the quantification of regulatory impacts for the most important regulations, while making qualitative assessments more consistent and reliable. These tools should not only be well-designed but well-used, that is, incorporated into day to day administrative practices.

Five steps are needed to improve effectiveness:

- **Reinforce the Central Unit in the Department of the Prime Minister.** Concrete steps could be to provide it with: (i) statutory authority to make recommendations on the quality of checklist responses to the high-level regulatory committee as recommended; (ii) adequate capacities to collect information and co-ordinate the reform programme throughout the public administration; and (iii) enough resources and analytical expertise to provide an independent opinion on regulatory matters.
- **Develop effective ways to apply the *Reducing Red Tape* programme to sub-ordinate regulations.** Parliamentary and judicial review are the only quality check on this kind of regulation (not including the non-mandatory legal review undertaken by the Attorney General Office). However, these mechanisms are in many ways either theoretical, too rigid or politically, too late in the process, or too expensive to assure that lower level rules comply with criteria of high quality. Hence, an important improvement would be to apply and enforce the *Reducing Red Tape* disciplines on subordinate regulations (*i.e.* the preparation and external review of the checklist, mandatory public consultation, centralised publication, etc.). A delicate but vital element to be considered concerns the need to develop a mechanism that should permit third-party review of the quality of sectoral regulators' rules without impinging on the independence of these bodies. A first step could be to require them to implement a ‘notice and comment’ procedure for an expanded RIA for their draft regulations.
- **Increase methodological rigour in the answers to the Checklist by providing training, written guidance, and minimum analytical standards,** including for the benefit-cost tests, to departments and agencies. The practical and conceptual difficulties of a formal benefit-cost analysis suggest that a step-by-step approach is needed in Ireland, in which the RIA programme is gradually improved, integrating both qualitative and quantitative elements of the analysis, so that over time it better supports application of the benefit-cost principle.
- **Incorporate detailed consideration for alternatives to be analysed and compared with the regulatory proposal.** Because Ireland has been slow in incorporating regulatory and non-regulatory alternatives that can increase policy effectiveness at lower cost, regulators must be motivated through results-oriented management. This requires strong encouragement from the centre of government, supported by training, guidelines and expert assistance where necessary. Where rigid laws and legal culture inhibit use of more effective alternatives, broader legal reforms to allow more innovation and experimentation may be necessary.
- **Integrate RIA with public consultation processes.** Publication of RIA through a procedure that required regulators to respond to comments from affected parties would enable consultation to function more effectively as a means of cost-effective information gathering, and thereby improve the information needed for good RIA. Public exposure of RIAs would also be a mighty incentive for departments to raise rapidly the quality of their answers to the checklist.

Access to RIA would also improve the quality of consultation by permitting the public to react to more concrete information. Such integration should, however, be carefully designed so that additional delays to the policy process are not introduced.

### *Alternatives to regulations*

As in many other countries, further emphasis seems to be needed on considering alternatives to regulation at an early stage of the process. The OECD peer review team was not able to consider this aspect in any depth. Ireland has various strong examples of the use of alternatives. However, as one stakeholder put it, “the government may be stuck with a policy decision, but can still work on how it is implemented”. This is an area where sustained pressure is needed over time to encourage the consideration of alternatives. The evidence from other EU countries is that it is not enough to include this consideration in the guidance on development of regulations, and leave it at that.

## Background

### *General context*

#### *The structure of regulations in Ireland*

As in other countries, there is a hierarchy of regulations, starting with the Constitution.

#### Box 4.2. The structure of regulations in Ireland

##### **Primary regulation**

Primary regulation consists of acts enacted by the *Oireachtas* (parliament). There are three types of acts of the *Oireachtas*:

- Acts to provide for the amendment of the Constitution, following approval by the people of the proposed amendment in a referendum.
- Public general acts, which create law for the public at large.
- Private acts, which create law for particular individuals or groups of individuals, such as companies or local authorities.

##### **Secondary regulation**

Secondary regulation, in the form of statutory instruments, is governed by the Statutory Instruments Act 1947. The main types of statutory instrument are: orders, regulations, rules, and bye-laws. They are made by ministers and other bodies under a power conferred by an act. Specified government ministers and other agencies and bodies are authorised to make statutory instruments. For limited purposes, specified by the legislation, a limited number of bodies, such as the Law Society and the sectoral regulators, may prepare and issue regulations.

Statutory Instruments have a wide variety of functions. They are not enacted by the *Oireachtas* but allow persons or bodies to whom legislative power has been delegated by statute to legislate in relation to detailed day-to-day matters arising from the operation of the relevant primary legislation. Statutory instruments are used, for example, to implement European Council Directives, designate the days on which particular District Courts sit and delegate the powers of Ministers.

Secondary legislation can be annulled by a motion passed in *Dáil* or *Seanad Éireann* within one year (which in practice is very rarely used).

##### **Other forms of “regulation”**

In addition, and as can be found in most other European countries, departments and offices produce a significant number of administrative circulars (such as schemes, standards, licences and formalities) which are not recognised by the courts as binding law even though they may generate administrative burdens and be perceived as regulations.

### *Trends in the production of new regulations*

Ireland enacts in the region of 40-50 acts and some 500-600 regulations in any one year. In addition, a significant number of circulars and other non binding instruments are produced by departments. In the Irish context, there are some cases where the constant production of regulations matters especially, because much of this represents amendments piling up on the original statute, necessitating a major and ongoing cleaning up of the regulatory stock to ensure that it remains legible (Chapter 5).

### *Procedures for making new regulations*

#### *The law making process*

There are two main steps in the preparation of draft primary regulations. In the first step the initiating Department officials prepare a draft memorandum and outline of the bill (“the heads of bill”) along with a draft Regulatory Impact Assessment. Once approval is given by government, bills are drafted by a team of specialist lawyers of the Office of the Parliamentary Counsel to the government, which provides drafting services for the preparation of primary legislation. Upon request of departments, and consistent with resources, the OPC will also draft secondary regulations (which may include statutory instruments transposing EU legislation into domestic legislation). Some departments have dedicated legislation units which will draft statutory instruments. Equally, departments may, on occasion retain external expertise to assist with drafting. It should be noted that the nature of statutory instruments varies significantly, some being relatively straightforward, others more difficult.

The Constitution sets the principle of collective Government responsibility. Article 28.4 provides that: “the government shall be collectively responsible for the departments of state administered by the members of the government”. This requires that ministers should inform their colleagues of proposals they intend to announce. Government approval is required for significant new or revised policies and strategies, and no bill can be drafted without prior formal approval of the cabinet.

#### Box 4.3. The law-making process in Ireland

##### **Primary legislation**

There are essentially three stages in the law making process, detailed in the Cabinet Handbook:

- **Decision in principle to proceed with the development of a new bill.** The ministry prepares the draft “heads of bill” and draft RIA which, together with a draft memorandum to government, must be circulated to all departments and the Office of the Attorney General for comments at least two weeks prior to their formal submission to government.
- **Draft legislation on the basis of the approved general scheme.** Once the heads are approved by the government, the proponent department sends a complete file to the Office of the Parliamentary Counsel to the Government (OPC), part of the Office of the Attorney General, for the bill to be drafted. The OPC has a continuous dialogue with the policy division of the department to ensure that the final legal text reflects the intention of the proposed legislation. The evolution of a draft from idea to law is very much an iterative process. The draft,

together with an updated RIA and memorandum, is circulated again to all departments for comments at least two weeks prior to their formal submission to government.

- **Approval of text and publication.** The proponent department draws up the final memorandum setting out the proposal for legislation and the background with a clear statement of the problem to be solved and appends this to the draft bill. Since November 1999, the memorandum must also state whether or not the department has completed the regulatory quality checklist, which appears as Appendix VI of to the Cabinet Handbook. Lastly the draft bill and memorandum and appendices are presented and approved at cabinet level.

After approval by the cabinet, a bill is submitted to each house of parliament (*Oireachtas*) for a five-stage process that leads to its eventual enactment. The second and third stages are considered the most important as they offer the fullest opportunities to parliament members to discuss and amend the contents of the bill. The government may present amendments at this stage (and uses this possibility).

Once a bill has been passed by both houses, the *Taoiseach* presents a vellum copy of the bill, prepared in the Office of the Houses of the *Oireachtas*, to the President for signature and promulgation as a law. The signed text is then enrolled for record in the Office of the Registrar of the Supreme Court.

Notice of adopted regulations is published in the Irish *Oifigiúil* (Official Journal) and in many cases notice is also published on the website of the proponent department, and in national newspapers.

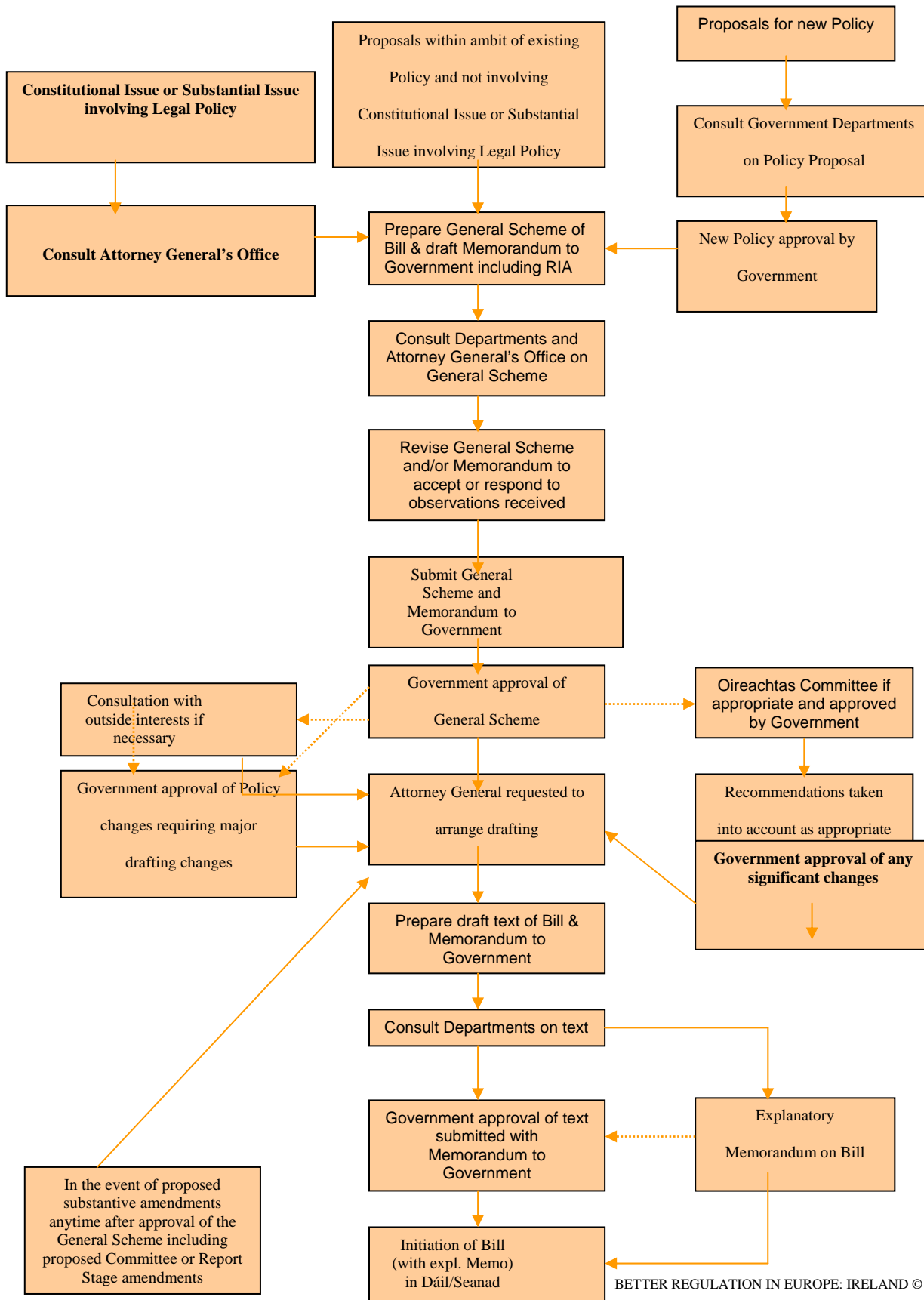
Parliament may initiate its own legislation (Private Members' Bills). Although a number are proposed, very few are adopted, with none adopted over the last few years.

### Secondary regulations

The preparation of secondary regulations follows the same principles laid down in the Cabinet Handbook. The process is one of custom and follows no set-rules, though. A minister has full responsibility to prepare secondary regulation according to the parent act. A majority of departments tend to involve the OPC. For limited purposes, specified by the legislation, a limited number of bodies, such as the Law Society and the sectoral regulators, may also prepare and issue regulations. When published they are usually laid before the parliament.

Most primary legislation which enables the making of regulations will provide for the relevant regulation to be laid before the Houses of the *Oireachtas*. It will usually provide that either House of the *Oireachtas* may pass a resolution annulling the regulation within 21 days, although without prejudice to the validity of anything done pursuant to regulation prior to the resolution being passed.

Figure 4.1. Preparation of Legislation



### *Forward planning*

The Office of the Chief Whip<sup>1</sup> prepares the government legislative programme for primary legislation for the upcoming parliamentary session. It publishes the programme on the website of the Department of *Taoiseach* before each parliamentary session, along with a press release. The Government Legislation Committee (GLC), chaired by the Government Chief Whip, oversees the implementation of the programme in close co-operation with the Office of the Parliamentary Counsel to the Government (OPC). It makes recommendations to the government in relation to the level of priority that should be accorded to the drafting of each bill, anticipates blockages that might occur in the process, and recommends actions to avoid any delays in the drafting process. The members of the GLC include the Chief Whip, the Attorney General, the Chief Parliamentary Counsel, the programme managers of the main parties in government, the leader of the upper house of the parliament and representatives of the Department of the *Taoiseach* and the OPC.

Individual departments are responsible for the co-ordination of secondary legislation and arrangements vary across departments. Planning of secondary regulation usually rests with the policy section responsible for drafting the regulation. Some departments (for example the Department of Agriculture, Fisheries and Food) have a central co-ordination unit or legal division that oversees the process within the department. Information regarding planning of secondary regulation is not made publicly available.

The Government Legislation Committee meets regularly to monitor progress towards publication of the bills on the “A” list (*i.e.* those promised for publication during the current parliamentary session) of the government’s published legislation programme. It has no role in reviewing the quality of the bills, nor on setting priorities.

### *Administrative procedures*

There is no administrative procedures act, as exists in some other European countries to give a legal framework to regulatory proceedings. The Cabinet Handbook<sup>2</sup> lays down procedures for making new regulations. This includes provision for a Regulatory Impact Analysis (RIA) to be initiated at the beginning of the process, as a draft RIA must be attached to heads of bills. The handbook also contains the Quality Regulation Checklist. The latest edition of the handbook was prepared by the Department of the *Taoiseach* and approved by the government in late 2006. All ministers and departments have to comply with the handbook. The Cabinet Secretariat in the Department of the *Taoiseach* has responsibility for ensuring compliance with the handbook and with cabinet procedures. An e Cabinet template has been introduced to make the process of preparing proposals for cabinet more efficient.

### *Legal quality*

The legal quality of bills is mainly ensured by the fact that these are drafted by a team of specialist lawyers at the Office of the Parliamentary Counsel to the government, which provides drafting services for the preparation of all primary regulations. Upon request of departments the OPC will also draft secondary regulations (in particular statutory instruments transposing EU legislation into domestic legislation). The Cabinet Handbook encourages drafters to avoid jargon and technical language when possible (Rule 6, Appendix 2). The OPC has its own drafting manual. Guidelines were published in 2008 to support drafting of secondary regulations.<sup>3</sup> The Law Reform Commission report 'Statutory Drafting: Plain Language and the Law'<sup>4</sup> published in December 2000 made a number of



recommendations with regard to statutory interpretation and plain language, some of which were adopted in the Interpretation Act 2005.<sup>5</sup>

### ***Ex ante impact assessment of new regulations***

#### ***Policy on regulatory impact assessment***

Ireland was a relative latecomer to regulatory impact assessment. A working group developed a draft RIA model for Ireland in the wake of the 2001 OECD report, and the 2004 White Paper “Regulating Better” committed to the piloting of this model and its subsequent introduction across departments and offices. This was given full effect in 2005, when the Irish government introduced a requirement, through formal guidelines which were integrated into the Cabinet Handbook and procedures for the development of regulations, to make an *ex ante* Regulatory Impact Analysis (RIA) for new regulations. The objective was also to integrate the various dimensions and potentially affected groups into a single analytical framework.

The guidelines were revised in June 2009 following a review of the RIA process, which made a number of recommendations (Box 4.4).<sup>6</sup> This included the removal of the formal division between screening and full RIAs as screening RIAs were often shaped by a desire to prove that the threshold for a full RIA was not met, rather than a proper evaluation of impacts. Other issues included the need for stronger guidance and training, and the importance of public consultation and publication.

#### **Box 4.4. Review of the Operation of Regulatory Impact Analysis: Recommendations**

The report noted that good progress had been made in establishing the use of RIAs in all Government Departments. However lack of visibility, issues with consultation, and issues of timing were found to be issues. Quality of RIAs was variable.

The report made a range of recommendations to strengthen the RIA process, including:

- Strengthen the high level support for RIA.
- Embed RIA thinking earlier in the policy development process, with oversight by senior management.
- Remove distinction between full and screening RIAs, but identify proportionate level of analysis.
- Strengthen guidelines and provide further support and advice.
- Consider additional training on EU legislation.
- Require annual reports to show what legislative proposals have been accompanied by a RIA, and where they have been published.
- Strengthen planning for RIA within Departments and maximise use of trained resources.
- Conduct quality assessments of a sample of RIAs.

Strategically, RIA is seen by the Department of the *Taoiseach* sponsors as a means of improving the quality of governance, increasing economic efficiency and the effectiveness of the public service, and to improve competitiveness. The economic dimension is especially stressed. The aim is to assess the likely effects of a proposed regulation including

all related costs, benefits and impacts in a structured and transparent way. The 2005 reform also took the important step of establishing an integrated RIA which includes all impacts. The integrated RIA in particular looks at the effects on national competitiveness, socially excluded and vulnerable groups, the environment, whether there is a significant policy change in an economic market, including consumer and competition impacts, rights of citizens, compliance burdens and North-South and East-West Relations. The RIA is based on the proportionality principle (adjusting the level of analysis to the significance of the measure on a case-by-case basis). It is considered to be a process, not a single snapshot, meaning that it should be undertaken at a very early stage and continuously modified.

### RIA scope

Since June 2005, RIA has been a requirement for all government departments and offices. It applies to<sup>7</sup>:

- Proposals for primary legislation involving changes to the regulatory framework.
- Significant statutory instruments.
- Proposals for EU Directives and significant EU Regulations when they are published by the European Commission.
- Policy review groups bringing forward proposals for legislation.

The coverage of EU directives is in line with best European practice, at least in principle, assuming it is followed through (see Chapter 7). Whilst the requirement to prepare a RIA applies to “significant” secondary regulation, there is no clear definition of what “significant” means. This is left to departments to decide, with the BRU acting as an “adviser” in that respect. The OECD peer review team were told that many significant statutory instruments (SIs) tend to “slip through the net”.

RIA does not formally cover regulatory agencies or local authorities, which however are encouraged to conduct RIA where appropriate. As might be expected, since RIA is not compulsory for government agencies (and may not be appropriate in all cases, especially as agencies’ regulatory powers are limited), the agency approach is not systematic. However, there appears to be considerable interest and some agencies have well developed RIA policies of their own. An example is the Commission for Communications Regulation, which published its own RIA guidelines in 2007, based on the government guidelines. It would appear that some agencies may have some good practice as well as useful information (such as on compliance and enforcement) to share with departments.

The RIA policy covers the executive, and as in other countries, the issue arises of how to encourage the legislature to take an interest, both as regards the Private Members’ Bills which it may initiate, and the drafts sent to it by the executive, which are likely to be amended, with consequences for the original RIA.

### *Institutional framework*

As in most other OECD countries, the departments which initiate draft legislation are responsible for preparing the RIA, which they are required to do at an early stage in the development of a law (preparation of heads of bills). They are also responsible for promulgating RIA in the regulatory bodies that come within their aegis. There has been some investment in economic expertise in recent years, particularly through the Masters in Policy Analysis (Economics) which was developed for the Civil Service in partnership with

the Irish Institute for Public Administration and increased recruitment of individuals with economic expertise.

The BRU in the Department of the *Taoiseach* plays a central and critical role in the development of the RIA process and encouraging departments through the following:

- **Advice and information.** It provides advice directly to officials conducting RIAs. This is known as the “RIA Helpdesk”. The BRU has also engaged an economic consultant to advise and assist departments and offices in carrying out RIAs. The BRU’s Better Regulation website, *www.betterregulation.ie*, is updated regularly and is also used to provide advice on RIA (as well as other Better Regulation processes and developments).
- **Guidelines and RIA template.** Guidelines for RIA were originally produced in 2005 by the BRU when the requirement to conduct RIAs was formally introduced. The Guidelines were revised following the independent report on the review of the operation of RIA in 2008. They were approved by the government, and then disseminated to heads of department and through the RIA network. The revised RIA Guidelines as well as a template for conducting RIA are published on the Better Regulation website.
- **Training.** In conjunction with the Civil Service Training and Development Centre (CSTDC), it runs a two day RIA training course, modules on certain other related training courses, as well as tailored information sessions for departments (see Chapter 2).
- **RIA network.** This had its first meeting in January 2007. Each department, together with the Office of the Attorney General and the Office of the Revenue Commissioners, has a representative in the RIA network orchestrated by the BRU, and set up to promote best practice across departments and offices. The network meets several times a year.
- **Quality control.** While the Cabinet Secretariat oversees compliance with the general procedures for preparing regulations (set out in the Cabinet Handbook), the BRU separately examines the RIAs. The BRU does not have the formal power to block a draft if a RIA is low quality. However, it is in contact with departments either to remind them of the obligation of making a RIA and/or to provide advice and recommendations if the RIA is considered “insufficient”.
- **Online tool for “Introduction to RIA”.** The Civil Service Training and Development Centre in conjunction with the Department of the Taoiseach have developed an online information tool to include an “Introduction to RIA” which went live in January 2010.

The compulsory nature of the process (or not) and the issue of quality control are central to any RIA process. The cabinet procedures and RIA guidelines (approved collectively by formal government decision) establish that a draft proposal cannot in theory proceed without a RIA attached (of the appropriate quality). However, there is no statutory requirement, and no Administrative Procedures Act to which such a requirement might be attached. The OECD peer review team were told that in practice, some draft proposals did proceed without a RIA attached, depending on political will and support for the proposal. The BRU control of the situation is far from complete. Part of the way forward might be to

see whether the link between the BRU and the Cabinet Secretariat – responsible for cabinet procedures, and compliance with the Cabinet Handbook, could be used to ensure that proposals with a poor RIA are not ratified until the RIA is improved.

### *Methodology and process*

The revised guidelines (Box 4.5) state that the RIA process should be started as early as possible in the regulatory proposal development process and used as the basis for consultation, where possible. Specifically, a RIA must be attached to the draft memorandum and outline of the bill (“the heads of bill”) on its way to cabinet for approval prior to the stage of drafting the bill itself. It is stressed that the RIA is a living document subject to continuous change and there can be numerous drafts before the final version of the RIA is complete.

#### **Box 4.5. Revised RIA guidelines: key points**

The revised guidelines and associated training materials cover the following key points:

- Stronger emphasis on compliance costs, including administrative costs.
- Specific guidance on calculating public service implementation costs.
- Details on how RIAs should be integrated into the EU policy making process.
- Extended discussion of methodologies (especially multi criteria analysis).
- Clarification of proportionality, and exceptions to RIA.
- More practical examples.
- Requirement to publish.
- Summary sheet.

Ireland does not subscribe to the UK approach which is considered to be biased towards costs. “Benefits should outweigh the costs of regulation”. Rather, it prefers a framework of “here are the benefits; here are the costs” as support for decision-making. An effective RIA should also “flush out the unintended consequences of proposed regulation”.

To ensure that RIA is proportionate and does not become overly burdensome, a proportionate level of analysis should be conducted for RIA on case-by-case basis, having regard to the significance of the measure.

The following eight steps are conducted in the RIA process:

1. Summary of RIA.
2. Statement of policy problem and objective.
3. Identification and description of options.
4. Analysis of costs, benefits and other impacts for each option.
5. Consultation.

6. Enforcement and compliance.
7. Review.
8. Publication.

Detailed guidance on the relevant analytical techniques (multi-criteria analysis and cost-benefit analysis) is also provided. The economic adviser hired by the BRU helps with the development of methodology.

*Ex post* review is now also a mandatory element of the impact analysis process. Sunset clauses may be used. A recent example is an interim scheme of a health insurance levy and age-related tax credits, which includes a sunset clause which will come into effect after three years. This interim scheme is in place pending the introduction of a new scheme of risk equalisation.

#### Link with administrative burden reduction and support for SMEs

The guidelines include a specific appendix on the measurement of administrative burdens in the *ex ante* context. The methodology outlined reflects that used to measure administrative burdens arising from existing legislation which was developed by the Department of Enterprise, Trade and Innovation. The majority of Irish companies would be considered SMEs (approximately 98% or 800 000 firms). As part of the assessment of compliance costs, officials are advised to assess the potential administrative and compliance burdens for all businesses and the importance of understanding the impact of compliance on small business is stressed. Nevertheless, the OECD peer review team heard that SMEs were still being “damaged” by excessive and further burdens.

#### *Public consultation and communication*

Effective public consultation and communication are also a central part of an effective RIA process. Since the 2005 reform, public consultation is expected to be an integral part of RIA. The RIA guidelines recommend that officials engage consultation as early possible in the policy development process along with their work on the RIA. RIAs must contain information on the consultation conducted by departments in the preparation of regulations. The quality of this reporting is mixed.

The revised guidelines state that all RIAs relating to primary legislation should be published on departmental websites as soon as the bill is published. They should be accessible and easy to find. If a departmental website has a legislation page, the RIA should be published on that page. If there is no legislation page, it is expected that a dedicated RIA page will be created. This requirement being relatively new, a number of departments are currently adapting their websites. Departments are also expected to report on the RIAs which they have conducted in their annual reports, in order that levels of compliance with RIA requirements can be monitored.

#### *Evaluation of progress*

As in many other EU countries, the design and implementation of RIA has been a long and often difficult road, which is starting to show results. The 2008 evaluation, the Review of the Operation of RIA, indicates that between the introduction of RIA in June 2005 and the end of February 2008, 74 RIAs were produced across departments and offices and of these, 31 RIAs had been published (42%). The Better Regulation Unit estimates that, since the review, another 69 RIAs have been produced with 29 of these being published (42%).

Whilst RIAs are now being (more or less) routinely conducted for primary legislation, fewer are being conducted for secondary regulations.

A key concern at this stage are to improve the rate of publication, and to address the problems of a relative lack of RIAs for secondary regulations and EU legislation. The OECD peer review team heard a number of comments to the effect that RIAs were often not yet taken very seriously, and could be “self-serving” to reflect political wishes (a situation that is not unique to Ireland). The lack of real challenge is perceived to be a major issue, RIAs are not always produced and not all RIAs are published.

### ***Alternatives to regulation***

The RIA guidelines require officials to consider alternative forms of regulation as well as alternatives to regulation for a given policy issue, including the “no action” option. No particular approach is emphasised although practical examples are given. As with all elements of the RIA process, officials are asked to consider alternatives as early as possible and certainly before the decision to regulate is made. The RIA training course also emphasises this. The use of alternatives to regulation is most developed in the environment area and the regulation of professions. The OECD peer review team were told that the government should be “encouraged to think beyond the rules” and that “the government may be stuck with a policy decision, but can still work on how it is implemented”.

### ***Risk-based approaches***

Although there is no specific requirement to consider risk based approaches (other than risk in relation to enforcement) in the development of regulations, some departments and agencies have taken initiatives in this direction. For example, risk assessment, risk management and risk communications tools are used in the development of regulations for agricultural sector, and the Department of Agriculture, Fisheries and Food has a corps of veterinary practitioners who are available to provide technical advice.

## Notes

1. The Government Chief Whip is a Minister of State (minister attached to the Department of *Taoiseach*). He attends government meetings, and is also assigned the functions relating to the Central Statistics Office. The role of the Whip is primarily that of disciplinarian for all government parties *i.e.* to ensure that all parliamentarians, including ministers, attend for *Dáil* business and follow the government line on all issues.
2. See: [www.taoiseach.gov.ie/eng/Publications/Publications\\_Archive/Publications\\_2007/Cabinet\\_Handbook.html](http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2007/Cabinet_Handbook.html) (accessed January 6, 2010).
3. “Statutory Instruments: Drafting checklist and guidelines”, 2nd edition, 2008, prepared by Jack Hazlett of the Office of the Parliamentary Counsel for use by Departments of State. The overall aim is to draft in accordance with the terms of the primary legislation governing it. The policy merit of the instrument is another matter considered separately.

4. Report available at: [www.lawreform.ie/publications/data/lrc110/lrc\\_110.html](http://www.lawreform.ie/publications/data/lrc110/lrc_110.html).
5. Interpretation Act 2005 is available at: [www.irishstatutebook.ie/2005/en/act/pub/0023/index.html](http://www.irishstatutebook.ie/2005/en/act/pub/0023/index.html).
6. Revised RIA guidelines - How to conduct a Regulatory Impact Analysis (Department of the Taoiseach, June 2009).
7. With some limited and specific exceptions: the Finance Bill, some emergency, criminal and security legislation, and some tax legislation and regulations.

## Chapter 5

### The management and rationalisation of existing regulations

This chapter covers two areas of regulatory policy. The first is simplification of regulations. The large stock of regulations and administrative formalities accumulated over time needs regular review and updating to remove obsolete or inefficient material. Approaches vary from consolidation, codification, recasting, repeal, *ad hoc* reviews of the regulations covering specific sectors, and sun setting mechanisms for the automatic review or cancellation of regulations past a certain date.

The second area concerns the reduction of administrative burdens and has gained considerable momentum over the last few years. Government formalities are important tools to support public policies, and can help businesses by setting a level playing field for commercial activity. But they may also represent an administrative burden as well as an irritation factor for business and citizens, and one which tends to grow over time. Difficult areas include employment regulations, environmental standards, tax regulations, and planning regulations. Permits and licences can also be a major potential burden on businesses, especially SMEs. A lack of clear information about the sources of and extent of administrative burdens is the first issue for most countries. Burden measurement has been improved with the application by a growing number of countries of variants on the standard cost model (SCM) analysis to information obligations imposed by laws, which also helps to sustain political momentum for regulatory reform by quantifying the burden.<sup>1</sup>

A number of governments have started to consider the issue of administrative burdens inside government, with the aim of improving the quality and efficiency of internal regulation in order to reduce costs and free up resources for improved public service delivery. Regulation inside government refers to the regulations imposed by the state on its own administrators and public service providers (for example government agencies or local government service providers). Fiscal restraints may preclude the allocation of increased resources to the bureaucracy, and a better approach is to improve the efficiency and effectiveness of the regulations imposed on administrators and public service providers.

The effective deployment of e-Government is of increasing importance as a tool for reducing the costs and burdens of regulation on businesses and citizens, as well as inside government.



## Assessment and recommendations

### *Simplification of regulations*

**Ireland has a longstanding issue of needing to simplify a complex stock of legislation.** Ireland is not the only country to face challenges in this regard. In the Irish case, however, the problems are somewhat specific. They stem from the historical development of the Irish Statute book (which includes pre independence legislation), as well as from the process for making regulations, under which acts and statutory instruments are usually amended by the enactment of new regulation which makes piecemeal changes. This means that simple, effective and transparent access to regulations does not exist in Ireland. There is a consensus (both within and outside the administration) over the fact that it is difficult to understand what regulations apply, and what is in the law (lawyers systematically need to be consulted, and even they have trouble). The National Competitiveness Council notes that legal fees are one of the important non pay costs for businesses.

**Impressive efforts have been set up to address the challenge, and there has been progress since the 2001 OECD report.** The Irish government fully acknowledges the importance of tackling the challenges, which are underlined in successive reports on Better Regulation. There is a three-pronged approach at work: statute law revision (abrogation); statute law restatement (an administrative form of consolidation); and consolidation. Different parts of the institutional structure are engaged, including the Attorney General's Office and the Law Reform Commission. Since the 2001 OECD report, significant progress has been made, particularly in the area of statute law revision. The Statute Law Revision Act 2005, Statute Law Revision Act 2007, and the Statute Law Revision Act 2009 together repealed over 4 500 spent or obsolete pre-1922 Acts.

**But progress is slow, creating palpable frustration and incomprehension among many stakeholders.** The OECD peer review team found a broad consensus (both within and outside the administration) over the need to move much faster. The regulatory framework remains difficult to understand. Many consolidation projects are moving slowly. Resources allocated do not seem to match the requirements for the work and do not reflect the importance given to the issue in the Better Regulation agenda. It is therefore not clear to what extent a real priority is being attached to this work and what political commitment it commands.

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**Recommendation 5.1. Reaffirm publicly that this work is a priority. Review resources for it, and increase as necessary, with a firm commitment to sustaining these for a reasonable time period such as five years.**

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**Links are needed between simplification of the regulatory stock and the RIA process.** As new regulations are produced, amendments continue to pile up, transforming restatement into an endless race against time. This issue needs to be tackled *ex ante* as well as *ex post*. Part of the RIA process should be to examine the nature of the proposals for new regulations in order to spot those which would lead to unnecessary further complication of the regulatory stock.

**Recommendation 5.2. Encourage a dialogue between those engaged in the simplification work and those engaged in the processes for making regulations. Start, for example, with an ad hoc meeting, orchestrated by the BRU, of the officials involved in these initiatives as a starting point (RIA network, Attorney General's Office, and Law Reform Commission).**

Communication of the benefits to be gained from the simplification work is not evident, but essential for stimulating interest and support. It is not clear how many (inside as well as outside the administration) are aware of the simplification work, its objectives and its importance. The 2008 report of the Law Reform Commission has a compelling section on the benefits of restatement for example, explaining its importance for increased transparency, the potential to enhance compliance, and accountability by government, as well the wider benefits for the economy (confidence for investors) and the cost for all users. The OECD peer review team considered that communication of this should be enhanced.

**Recommendation 5.3. Establish a communications strategy in support of the simplification work.**

#### Box 5.1. Simplification of regulation: comments from the 2001 OECD report

**Enhance the current programme of restating existing laws and regulations with a target review programme based on pro-competition and regulatory high-quality criteria.**

The enactment of the Statute Law (Restatement) Bill and its full application is an important step to enhance the Irish regulatory framework. Adding specific regulatory quality criteria to the review process would enhance this mechanism. For such reviews, the 1995 OECD regulatory quality checklist could be used as a reference to verify the continued necessity and appropriateness of the existing stock of regulations. To support the review, the parliament or government could directly or via an independent commission review the main areas of legislation and produce a rolling programme of reform spanning various years. As a prerequisite for such an endeavour, the government should provide enough human and technical resources to the unit in charge of the review. Such a unit could be merged with the enhanced RIA unit.

#### Background

Until the last two years Ireland did not have a comprehensive and explicit policy to deal with the stock of laws and regulations. Following the recommendations of the Report of the Review Group on the Law Offices of the State, a small unit was established in 1999 at the Office of the Attorney General. Based on that policy, in July 1999, the *Reducing Red Tape* Programme of Action required "that each department/office... list, by autumn 1999, the relevant legislation (both primary and secondary) and identify the scope which exists for its consolidation, revision and/or repeal". For example, the Department of Enterprise, Trade and Innovation set up in 1999 a Company Law Review and Consolidation working group with the double objective of modernising the statutes, procedures and supervision of companies and also consolidating all rules and regulations into a basic company law. As a first step, departments and offices have been required by the Department of the Prime Minister and the Statute Law Revision Unit to list by the spring of 2000 relevant legislation identifying the scope for consolidation, revision or repeal. The second stage, to be completed in the autumn of 2000, will consist in prioritising consolidation work. The initiative however, remains limited to clarity and transparency of the legal system. The review strategy did not encompass principles of good regulation (*i.e.* proportionality, impact assessment, choice of policy instruments), nor it is linked to broader structural review programmes based on the implementation of competition principles.

Ireland has also relied on High-level advisory groups in key reform areas such as the *Competition and Mergers Review Group*, which examined competition policy and enforcement processes, and a series of *Company Law Review Groups*. A recent initiative, the *Statute Law (Restatement) Bill*, currently being discussed in parliament, will strengthen the review policy. It proposes that the Attorney General prepare and make available (in hard copy and electronic form) Acts that restate the statute law in any

given area in a more intelligible form without any change being made to that law except in its presentation. To speed the process, instead of proceeding through the parliament, it is proposed that restatements be certified by the Attorney-General. This policy will also be of particular benefit where a series of Acts has been consolidated and the consolidation has been superseded by an amending Act. Parliament has yet to develop a specific role in relation to this novel procedure.

The new Regulatory Reform programme requires through the Regulatory Quality Checklist that rule-makers verify if new laws and regulation can incorporate **automatic review mechanisms, such as sunseting**, a precise review date or mandatory substitution (adding a rule only when a corresponding reduction or repeal accompany it). Until now, application criteria or guidance has not supported these mechanisms. Systematic use of sunseting and mandatory periodic reviews places Ireland among a very small group of OECD Member countries.

Source : OECD (2001), OECD regulatory reform review of Ireland.

### *Administrative burden reduction for businesses*

**As in many other fields of Better Regulation, Ireland has strengthened its approach since the 2001 OECD report.** The programmes that have been put into place are clear. There are two strands to the policy: a programme to reduce administrative burdens on business by 25% by the end of 2012, announced in March 2008; and the work of a High-level Group on five priority areas, based on the work of the Business Regulatory Forum and international experience, and identified through these processes the issues which were covered to be the most burdensome. Although there is no up to date figure, progress has already been made, with an estimated EUR 20 million savings (figure reported in 2008) and some significant ongoing projects such as: an XBRL project (extensible Business Reporting Language) including Revenue, CSO and CRO; ROS Signatures and eFiling with the CRO and revenue, and risk-based enforcement with participation of agencies across government.

**The momentum, which seemed to have slowed, has been picking up speed.** The DETI notes that the work programme is business driven. In other words it depends on the ideas, suggestions and issues put to it by business. Reporting is done periodically, not according to a fixed cycle. The problem of initial momentum may have its roots in the fact that the work is not perceived to be the most important issue for business competitiveness, and may have been “drowned out” by other measures to redress the economy in the wake of the financial crisis.

**The initiatives are acquiring a stronger framework with regard to measurement and follow up, but specific targets and resources remain issues.** With respect to the quantitative target, the DETI has defined the areas for reduction, has established a baseline measurement for itself, and is now encouraging other departments to follow suit. To encourage buy in and in line with best practice elsewhere in the EU, the target should be divided between ministries (which would put pressure on them to perform). It should also be a net target, as many rightly see RIA as key to reducing overall regulatory burdens. Adopting a quantitative approach requires strong incentives if not sanctions, as the Irish administrative culture is not particularly tuned in to measurements and data. Ireland could use the examples of relevant other countries and through discussion in the SPOC network to strengthen its approach on the ground. The project has also stumbled on a relative lack of resources (or a reluctance to allocate resources) within line ministries for taking forward the identification and measurement of burdens.

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**Recommendation 5.4. Take further measures to strengthen the practical approach, including delegated net targets. Establish a stronger link with the RIA process.**

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**The institutional structure which appeared to make a slow start is now gathering pace.** At the time of the OECD mission in late 2009, the framework structures for the programmes did not seem to command adequate attention. The HLG did not appear to be functioning effectively. The OECD team understand that this is now improving.

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**Recommendation 5.5. Monitor the performance of key institutional structures for delivery of the burden reduction programme (High-level Group and Inter-departmental Group). Consider whether it would be useful to rotate the chair of the HLG across key departments. Consider broadening the HLG mandate, for example by giving it an advisory role on important related processes such as RIA. Alternatively or in parallel, and taking account of resource constraints, consider whether a fully external (and independent) watchdog should be established, on the lines of those set up recently in some other EU countries such as the UK, Germany, Sweden. Task it initially to help shape a new strategy for the programme.**

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**The initiatives do not seem to be backed up by a strong communication strategy.** Public consultation and communication fall short of international best practice. Beyond the High-level Group standing dialogue with stakeholders, the initiative is with departments and attention will be needed to ensure that they follow up on the workshops anticipated after the measurements have been completed.

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**Recommendation 5.6. Clarify and monitor the requirements on departments with regard to consultation with stakeholders, and ensure that they have access to best practice examples (using international experiences) of how to go about it. Develop a communications strategy which clarifies the strategic objectives of the programme and why it is important to Ireland, as part of a broader communication strategy on Better Regulation proposed in recommendation 1.4. Consider committing to an annual report (following the example of several other EU countries) so that stakeholders can be regularly and clearly informed of how the programme is developing and results. This could be part of the broader reporting proposed in Better Regulation (recommendation 1.4), or standalone.**

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**Overall, the policy may benefit from a review to draw out what really matters in the Irish context post crisis.** There seems to be compelling evidence from some reports, echoed by comments to the OECD peer review team, that more should be done to support very small firms, in order to strengthen the domestic economy. Some of these actions may relate to administrative burdens. Some interviewees also pointed out the reluctance to address the “real” issues behind simplification, implying that the programme should go beyond administrative burdens. The 2007 ESRI survey commissioned by the BRU provided a very useful snapshot at the time of the issues judged important by business. Three years on, another survey would help to crystallise what the focus should be.

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**Recommendation 5.7. Commission a new survey of business views, and especially, of what matters to very small firms in terms of burdens. In the light of this, consider whether there is a need to adapt the strategy for administrative simplification.**

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### Box 5.2. Administrative burden reduction: comments from the 2001 report

**An important focus of the current Irish policy is the control of administrative burdens.** As such, it incorporates past initiatives, such as the mid-1990s recommendations of the Task Force on Small Business and Services. **Some evidence exists of significant results:** business licences and permits have been reduced and gradually improved in some areas. For instance, the recent efforts by the Revenue Commissioners have significantly streamlined and simplified the information requirements provided by firms. The registration of companies has also been simplified, permitting the registration of a company in one week. Ireland has also been praised by the implementation of a sophisticated and efficient environmental licensing system requiring integrated permits for medium to large industries covering air, water, noise and waste/soil. The setting up of a one-stop-shop by the Industrial Development Authority and simplified administrative procedures to help foreign investors have also been recognised as a significant factor in attracting foreign investment.

**Nonetheless, initiatives tend to be piecemeal and lack an overall and systematic approach.** Anti-competitive and entry-controlling licensing schemes still govern activities such as utilities, public transport, banking, lotteries, places of public amusement, professions, housing, and policy areas such as environment and health. The extent and number of licences and permits is not known with certainty. Although the *Ad hoc* High-level Group on Administrative Simplification to be set up under the *Reducing Red Tape* Policy should address the issue, a particular concern is still the **lack of consistency across the administrations when establishing formalities and the duplication and lack of co-ordination of information required by departments and agencies.** One reason for this relates to the large discretion that departments, agencies, sectoral regulators, and local governments have in the design of their formalities without any central overview. **This has disproportionately higher impact on SMEs.**

Source: OECD (2001), OECD regulatory reform review of Ireland.

### *Administrative burden reduction for citizens and for the administration*

**A specific programme for citizens may be a step too far at this stage, especially given resources and the need to prioritise, but Ireland might usefully review the experiences of other countries such as the Netherlands and Portugal, with a view to putting this into its forward Better Regulation programme.** There is also no clearly defined programme at this stage for burdens inside the administration. However the wide range of relevant initiatives which are already underway or planned under the banner of Transforming Public Services, could be identified to see whether there are any gaps.

## Background

### *Simplification of regulations*

#### *General context*

The historical development of the Irish legislative landscape and the methods of enacting legislation create specific challenges:

- **Historical development of the Irish Statute Book.** When the Irish state was established in 1922, all pre-1922 acts were carried over and continued to apply until replaced by legislation enacted by the *Oireachtas*.<sup>2</sup> As a consequence the Irish Statute Book was to encompass a varied selection of sources which reflected the political history of the country.<sup>3</sup> Though the amount of pre-1922 legislation still in force has been much diminished and is continually being further reduced, some remains which can only be found in publications which are out of print and difficult to locate, and is often written in archaic language.

- **The process for making regulations.** Whilst most legislation is reasonably accessible, some research may be required to trace amendments, although mostly this can be done by reference to the publicly available legislation directory. The Statute Book is also publicly available on line. Acts and statutory instruments are usually amended by the enactment of new regulation which makes piecemeal changes. The result is a patchwork of regulation that can be challenging to assemble, read and understand. Further, amendment may be included in an act that deals with issues other than those with which the amended text is primarily concerned and whose title gives no indication of its relevance to the amended legislation in question.<sup>4</sup> This is known as the “buried amendment phenomenon”.<sup>5</sup>

The government has stressed the importance of tackling these challenges and simplifying the existing stock of legislation to ensure its coherence and transparency. In 1999, a key recommendation of the report *Reducing Red Tape – An Action Programme of Regulatory Reform in Ireland* was to make legislation more coherent and more easily accessible. The 2001 OECD report advocated the establishment of a more coherent statute law reform and revision in Ireland. The 2004 White Paper on Better Regulation stated: “Legislation in linked or connected areas will be consistent, and kept up to date and accessible through processes of simplification, consolidation and restatement”. More generally, the Law Reform Commission (Box 5.3) was established in 1975 to keep the law under review and to make practical proposals for its reform. The government programmes and social partnership agreements have included commitments to review regulation.

Regulatory simplification has been carried out through:

- **Statute Law Revision (abrogation).** This requires legislation to be given effect, so needs parliamentary time and approval.
- **Statute Law Restatement.** This is an administrative form of consolidation. It can lay the groundwork for consolidation or reform of a given area of legislation.
- **Consolidation.** This requires legislation to be given effect, and may follow on from statute law restatement.

These projects have been closely linked to the initiatives to make legislation available on line (see Chapter 3). Since the 2001 OECD review, progress has been achieved in particular through the enactment of the Statute Law (Restatement) Act 2002, and of the Statute Law Revision Acts 2005, 2007 and 2009. The work is spread across a number of bodies, notably the Attorney General’s Office and the Law Reform Commission, with a coordinating role by the Department of the *Taoiseach*. Consolidation Bills are drafted by the OPC on the instructions of individual departments. The Irish government has also relied on High-level advisory groups in key reform areas, such as company law review.

#### Box 5.3. The Law Reform Commission

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*. The 1975 Act defines law reform to include the development of law, its codification (including its simplification and modernisation) and the revision and consolidation of statute law.

The Law Reform Commission has three main areas of activities: conducting programmes of law reform, preparing statute law restatement, and updating the Legislation Directory.

Membership and staffing comprises a President, one full time Commissioner and 3 part time Commissioners, supported by 11 research staff and, a further seven administrative support staff. Two staff are allocated to Statute Law Restatement and two to the Legislation Directory.

#### **Programmes of law reform**

The Commission's law reform research work arises from two main sources: first, under a programme of law reform prepared by the Commission and agreed by the government, and laid before the Houses of the *Oireachtas* under the 1975 act; and second, in accordance with a request from the Attorney General under the 1975 act.

The Commission is conducting a third programme of law reform. The first two programmes took place between 1977 and 1999, and between 2000 and 2007. Each of them led to the publication of over 60 documents (consultation papers and reports). The Third Programme of Law Reform 2008-14 was prepared after a period of consultation in 2007. The Commission has recently published an Interim Report on Personal Debt (17 May 2010), a Consultation Paper on Jury Service (29 March 2010) and a Consultation Paper on Hearsay. A report on Alternative Dispute Resolution will be published in 2010 which will include a Draft Mediation and Consultation Bill. Other consultation paper or reports due for publication in Autumn 2010 include papers on Inchoate offences, legal aspects of carers, adverse possession, family relationships, personal debt management and search and bench warrants.

#### **Restatement**

The responsibility for conducting statute law restatement (administrative consolidation of acts) was transferred from the Attorney General Office to the Law Reform Commission in 2007. In 2008, the Commission published its Report on Statute Law Restatement, which contains the details of the commission's first programme of restatement for 2008-09. Work on the first programme is well advanced and material is being forwarded to the Office of the Attorney General. A second programme is scheduled to start in 2010 and development of the programme is in preparation.

#### **Legislation Directory**

Along with statute law restatement, the Law Reform Commission took over functional responsibility for updating the Legislation Directory (a searchable guide to amendments) in 2007. Updates to the Legislation Directory from 2006 to April 2010 were published in July 2010. The directory will be updated on a monthly basis from September 2010. The Commission is addressing a long-standing omission from the directory by adding information to the directory in respect of amendments to pre-1922 legislation effected by the pre-1922 legislation. The commission has also started preliminary work on the creation of a directory for secondary legislation.

#### *Statute law revision*

The process of statute law revision is concerned with repealing legislation on the statute book, which is obsolete, spent or which have no continuing relevance. The main objective is to provide certainty to citizens and businesses as to what legislation from the period prior to the foundation of the Irish state in 1922 continue to apply. Another objective of the project is that the revision should ultimately lead to the codification of the Irish statute book. The Office of the Attorney General and the Department of the *Taoiseach* have engaged in a wide-ranging analysis of all legislation of the various Irish and United Kingdom parliaments which exercised authority over Ireland prior to Irish independence, as well as legislation passed since 1922. The project was taken forward within the Office of the Attorney General, initially by the Statute Law Revision Unit and subsequently by the Statute Law Revision Project Consultant and a number of legal researchers. The project is currently on hold pending the availability of resources.

The first phase of the project involved a review of public general acts (*i.e.* statutes with general application as opposed to private acts which have more limited application) enacted prior to Irish independence on 6th December 1922. This process led to the publication and enactment of the Statute Law Revision Act 2005 and the Statute Law Revision Act 2007. The 2005 act was the first step towards a major overhaul of pre-1922 legislation, and led to

the repeal of over 100 acts. The 2007 act had a much wider scope. Instead of listing what was to be repealed, the law listed what was to be retained from pre-1922 legislation. The act provided a “White List” of 1 364 statutes which were to remain in force after the enactment of the bill. The effect was that the act repealed over 3 200 statutes, making it the largest statute law revision measure ever to apply to Ireland. The number of remaining pre-1922 statutes has been further significantly reduced by the passage of various sector-specific acts since the 2007 Act (for example, the Land and Conveyancing Law Act 2009) that have repealed pre-1922 statutes.

The second phase of the project covered a number of local and personal acts and private acts. Private acts are those which are concerned with the affairs of a single individual or body while local and personal acts are concerned with matters affecting a very limited section of the community such as a single local authority or company. The Statute Law Revision Bill 2009, published in June 2009 and enacted as the Statute Law Revision Act 2009, deals with all private acts enacted up to and including 1750 and all local and personal acts up to and including 1850. It sets out two lists of such acts – those to be retained in force and those to be repealed. As for the first phase of the project, the Office of the Attorney General conducted public consultation on the draft bill.

### *Statute law restatement*

Statute Law Restatement, as defined in the Statute Law (Restatement) Act 2002, is an administrative consolidation of an act, which incorporates all subsequent amendments and makes the consolidated text available in printed electronic form in a single text. Restatements may also simplify language and terminology. Restatement includes primary regulation (statutes or acts) and secondary regulation made by way of a statutory instrument (for definitions, see Chapter 4). This consolidation is certified by the Attorney General as an up-to-date statement of the act in question. The certified new versions, known as restatements, are placed before the Houses of the *Oireachtas* and made available electronically on the Attorney General’s website. They do not alter the substance of the law or have force of law and, therefore, do not require *Oireachtas* approval. Restatements can, however, be cited in court as *prima facie* evidence of the legislation set out in them.

In May 2006, the government charged the Law Reform Commission with undertaking a programme of statute law restatement. Prior to this decision, responsibility for the preparation of statute law restatements rested with the Statute Law Revision Unit in the Office of the Attorney General. The transfer of responsibilities was requested by the Attorney General, to reflect its priorities on the extensive legislative agenda. The Office of the Attorney General still has an active part in the process however, as the Attorney General continues to certify the texts of restatement prepared by the Law Reform Commission. This involves ongoing liaison between the Law Reform Commission and the Office of the Attorney General. The LRC has developed a methodology for carrying out restatement, building upon the guidance material that had been issued by the Statute Law Revision Unit.

In 2008, the LRC published its Report on Statute Law Restatement, which detailed its first programme of restatement for 2008-09. The programme covers 45 acts covering a range of departmental areas, including 6 suites of related legislation.<sup>6</sup> It was adopted following a public consultation paper which outlined 60 candidate acts. The work is expected to be finished by the end of 2009. Restatements are being prepared and/or finalised on a number of pieces of legislation on an ongoing basis. The LRC plans to issue a second programme in consultation with government and external stakeholders, to start in 2010. A first stage was carried out in 2003 and 2004 when the Office of the Attorney



General produced four restatements. In practice, carrying out a restatement faces a number of challenges, as it includes the following steps: locating a copy of the principal act to be restated and affecting legislation; identifying the provisions which affect it; verifying the existing Legislation Directory for the act; inserting the amendments in the restatement; and establishing the commencement status of the affecting provisions. The restatement process is thus closely linked with the efforts to keep the Legislation Directory up to date. The LRC notes that international technological standards are used for this work.

### *Consolidation projects*

A major tool for reforming law is consolidation, a process whereby the *Oireachtas* passes one, overall act into which all previous regulations relating to a topic are collected. The new act stands out as a comprehensive text which repeals and replaces all former acts on the subject. In some cases, consolidation has a broader scope, and includes adoption of new provisions which update and modernise legislation. As it goes through the *Oireachtas*, the draft bill can be subject to amendments. Consolidation projects are carried out by individual departments, which instruct the OPS to draft a consolidation bill. These projects are also done in co-operation with the Law Reform Commission. Work to date has focused on key economic areas such as company law, customs law and health and safety (see Box 5.4). Many of the projects are related to areas that the 2007 ESRI Business Regulation Survey identified as particularly burdensome.

#### Box 5.4. Consolidation: flagship projects

**Land law.** The Land and Conveyancing Law Reform Act 2009 is the product of a joint project between the Department of Justice, Equality and Law Reform and the Law Reform Commission. It repeals over 150 pre-1922 statutes (thereby complementing the Statute Law Revision Act 2007) and replaces them with revised provisions. Irish land law and conveyancing law was a patchwork quilt of old statutory provisions and judge-made rules dating back to the 13th century. This had resulted in a complex code, much of which was difficult to apply in modern conditions.

**Company law.** A review group was set up in 2001, which prepared a bill to consolidate and modernise company law (scheduled to be published in 2012). The proposed bill consolidates the existing 15 companies acts, dating from 163 to 2006, as well as other regulations and common law provisions relating to the incorporation of companies, into a single act comprising over 1 300 sections. The bill also modernises company law to reflect modern business practice. It re-organises provisions law, to take account of the different company types and sets out clearly the corporate governance duties of directors, auditors, etc., brings together the provisions relating to compliance and enforcement, and defines the functions of the different authorities in charge of ensuring compliance (Companies Registration Office, Office the Director of Corporate Enforcement, and the Irish Auditing and Accounting Supervisory Authority).

**Tax and Customs legislation.** The Revenue Commissioners has been engaged in a programme for number of years to consolidate and modernise the body of older legislation governing the various taxes and duties. Much of this legislation pre-dates the foundation of the Irish State in 1922 and some dates back over 130 years to the Customs Consolidation Act 1876, with layers of non-textual amendments over the year and many archaic and overlapping regulations. In June 2010, the government approved the drafting of a Customs Bill for the consolidation of legislation on excises. The consolidation programme incorporates a review mechanism together with an assessment of whether certain regulations are obsolete. It has included Taxes Consolidation Act 1997, Stamp Duties Consolidation Act 1999, Capital Acquisitions Tax Consolidation Act 2003 (gift tax and inheritance tax), VAT Regulations 2006, Excises consolidated over a number of Finance Acts from 1999 to 2005 and an integrated collection and recovery regime which streamlines and simplifies provisions in various acts.

**Liquor licensing.** The government legislative programme provides for the publication of the Sale of Alcohol Bill. The main objective of the proposed bill is to streamline and modernise liquor licensing law by repealing the licensing acts 1833 to 2008 and replacing them with updated provisions. Consolidation will also involve the repeal of licensing provisions that are currently spread across about 100 statutes

(about two-thirds of which are pre-1922).

Other examples of ongoing consolidation projects include: gaming and lotteries legislation, nurses and midwives regulation, sea-fisheries and aquaculture, national monuments, pharmacy. The Department of Social Protection has a policy of consolidating the social welfare acts roughly every ten years with the most recent consolidation in 2005.

### *Codification*

As Ireland is a common law jurisdiction, codification means combining case law with existing legislation to form a legal code. To date, codification has been undertaken in the area of criminal law, which is housed in a multiplicity of statutes and court judgments. The project to establish a single crimes act dates back to the government programme for 2002-07. A major initial step was the establishment of the Criminal Law Codification Advisory Commission in February 2007, a statutory body responsible for overseeing the project. In 2008 the commission issued its first programme of work for 2008-09. The commission has used large areas of research work by the Law Reform Commission under its programmes of law reform.

### *Annulling statutory instruments*

Most primary legislation which enables the making of regulations will provide for the relevant regulation to be laid before the Houses of the Oireachtas. It will usually provide that either House of the Oireachtas may pass a resolution annulling the regulation within 21 days, although without prejudice to the validity of anything done pursuant to regulation prior to the resolution being passed.

Motions annulling regulations are rarely used and on very few occasions has time been given over by the government to debate a Motion to Annul. There was some provision made to debate Motions to Annul various “Emergency Powers Orders” in the late 30’s/early 40’s during the outbreak of World War II but the majority of such motions to annul were defeated on division and a small number were withdrawn.

In theory, opposition parties can table a Motion to Annul and utilise their private members’ time to debate it but in practice this has rarely happened [twice - in 1937 and 1941]:

- Either house of the *Oireachtas* may, by resolution passed within 21 sitting days after the day on which an order was laid before it in accordance with section 13, annul the order.
- The annulment of such an order takes effect immediately on the passing of the resolution concerned, but does not affect anything that was done under the order before the passing of that resolution.

Either house may annul an order. This section is a standard legislative provision relating to the annulment of orders by either house of the *Oireachtas*.

### *Challenges*

The OECD review found a broad consensus (both within and outside the administration) over the need to move much faster on law reform, consolidation and restatement, and significant frustration over the pace of progress. The regulatory framework remains difficult to understand, including for professional lawyers, and is unanimously considered a key issue.<sup>7</sup> Simplification is important for businesses, for example on

employers' obligations, but as matters stand, recourse to a lawyer is needed and some cannot afford this. Several interlocutors outlined the progress achieved, particularly in setting a work methodology for simplification, but also underlined the slow pace of progress and projects being abandoned. A first key difficulty stems from the pace of regulatory production. As new regulations are produced, amendments continue to pile up, transforming restatement into an endless race against time. Some consolidation projects have also been delayed because consolidation requires revising legislation.

Some interviewees also said that the allocation of resources does not match the scope of the work that needs to be done, limiting the capacity to sustain momentum, and also losing the opportunity to do much with little. The OECD peer review team were told that relatively few resources were needed to ensure an effective follow through, but still, more than currently allocated, and with a commitment to sustaining the effort over a reasonable time horizon (five years for example) so that effort is not dissipated. Resources are however limited, and appear to have diminished over time. The failure to resource the work effectively is undermining morale. While in 2005 the Office of the Attorney General had six researchers on a contractual basis working on these projects, the LRC at the end of 2009 has one project manager and two researchers (with one person tracking the issues in the Office of the Attorney General). Departments also seem to have limited resources for consolidation projects.

Yet the LRC's 2008 progress report is clear about the benefits:

- Increased transparency of legislation, potential to enhance compliance, and accountability by government.
- Benefits to the economy through a clear, unambiguous and appropriate regulatory framework, supporting investor confidence.
- Reducing costs for all users. The current patchwork is costly and there are savings to be achieved from convenient restatements of widely used legislation.

### ***Administrative burden reduction for businesses***

#### *Policy on administrative burden reduction for businesses*

Since the mid-2000s the Irish government has developed a programme of actions to reduce administrative burdens on business, as part of the government's agenda to improve the regulatory environment. As noted in the 2001 OECD report, the government already took initiatives to simplify licensing, permits and information requirements provided by firms in the 1990s, but these actions tended to be piecemeal, and lacked an overall and systematic approach. Many consider that Ireland has a strong regulatory framework, often referring to international indicators such as the Global Competitiveness Report of the World Economic Forum and the OECD's Product Market Regulation indicators. Red tape only ranked fourth in a wide ranging business survey (Box 5.5), so it is important, but not apparently the most important issue for companies. However there are concerns – which the crisis has reinforced – that Ireland's major internationally trading sectors depend on a strong regulatory environment, and that more should be done to support SMEs, including through administrative simplification. At the same time, there has been recent High-level acknowledgment of the need to address business burdens. The "Smart Economy" strategy, published in December 2008, includes "smart regulation" among its five key action areas, and emphasises the need for quantification and performance measurement. Among the Better Regulation actions identified which are integral to economic recovery, is the need to

“accelerate the administrative burden reduction programme to reduce the volume and frequency of data required from the public”.

#### Box 5.5. The ESRI business survey

The report details the results of a study of business attitudes to regulation in Ireland conducted by the Economic and Social Research Council (ESRI). Key findings were that:

- Most firms consider that the overall amount of regulation is about right
- Taxation regulation was most frequently mentioned as a heavy burden
- Both the compliance burden and administrative burden of regulation are an issue but the compliance burden is somewhat more of a burden
- Firms who used online forms found them effective. Smaller businesses were less likely to use online forms
- Just over half of firms had been inspected or audited in the previous three years
- Firms are generally positive about the regulator that they deal with most often. However, flexibility and consistency of enforcement could be improved as well as consultation on new regulations

The report notes that these findings suggest a number of areas which the government could prioritise to improve the regulatory environment for business including a continued focus on reducing compliance costs; simplification in the area of income tax and VAT; ways to address the fact that regulation is more of a burden on smaller than larger firms; the need for systematic (including direct) consultation with business as part of the RIA process for new regulatory proposals; and the need for flexibility as well as consistency of enforcement, based on more transparent guidelines.

There have been three major milestones in the formulation of a wide-scope policy for burden reduction:

- The establishment of the Business Regulation Forum (BRF) at the end of 2005, which included government and business representatives, laid the ground for a more comprehensive approach. Its report, released in April 2007, recommended that the government establish a formal programme, setting a reduction target of 25%, which would result in annual savings of EUR 500 million (0.3% of GNI) according to its estimate. The BRF also identified five priority areas of regulation where the burden reduction policy should concentrate on (taxation, environment, health and safety, statistics, and employment and company law).
- As a response to the BRF report, the government set up the High-level Group on Business Regulation in 2007. The primary role of the High-level Group, which works as forum for dialogue between government departments, the business community and trade unions, is to identify opportunities for administrative simplification in the five priority areas identified by the BRF. The Department of Enterprise, Trade and Innovation acts as a co-ordinator and leader, but simplification projects are conducted by individual departmental bodies (many of which are within the DETI).
- In March 2008, the Irish government took a further step forward when it set a 25% reduction target by 2012. The programme is co-ordinated by the DETI, and covers all departments. Baseline measurements have now been made. Setting a

quantitative target was (as in many other EU states) mainly a response to the European Council's invitation to set a target and the Lisbon Agenda. The programme is being taken forward on the basis of prioritisation as this is considered the most efficient approach, based on international experience that suggest most burdens arise from a small percentage of information obligations.

### *Institutional framework, guidance and support*

The Minister for Enterprise, Trade and Innovation is leading the government programme to reduce administrative burdens on business. A specific unit, the Business Regulation Unit, was set up within the DETI to carry out work in this area. It is responsible for developing the methodology for the 25% target reduction programme, and for reporting to government on progress. Co-ordination with other departments is done through an inter-departmental group of representatives (IDG) from each department and agency which manages the cross-departmental 25% reduction process.

The HLG was set up in July 2007 to progress specific business issues and ideas for red tape reduction. It acts as a fast-track "action group", pinpointing and seeking solutions to key business irritants. The IDG was set up later (in 2008) following the decision to have a 25% target. The IDG co-ordinate the departments involved in the 25% measurement and reduction process. The High-level Group's terms of reference are set by the group itself. The items to be tackled by the group are proposed by the business members and progress is co-monitored by the group. Since September 2008, the role of the group has been expanding to include the validation of the prioritisation and measurement work carried out by the IDG. The business members of the HLG play a significant and expanding role in the measurement process, acting as a conduit between departments and agencies and the relevant business sectors. The HLG meets around 4-5 times a year.

The Business Regulation Unit serves as secretariat to the HLG and is the main interlocutor on burden reduction within DETI. Consequently it plays an important role in ensuring coherence between the 25% target programme and the work of the HLG. The DETI also oversees the IDG, on which all departments were initially represented. Six departments, however, are considered to have little or no regulation affecting business. Today seven departments and two agencies (Revenue and CSO) participate.<sup>8</sup>

The Business Regulation Unit has started to work on a methodology in co-operation with other departments, and taken action to inform other departments on the programme. The Business Regulation Unit provided SCM training during both 2008 and 2009, to all relevant departments. The Irish SCM Handbook was circulated in 2009. Detailed project plans, templates, timetables, charts, etc. have been circulated to all inter-departmental group members. Meetings of the IDG have been monthly for most of 2010. Additionally, the Business Regulation Unit has visited each participating department at least once since January 2010. Resources have however been very limited as the Business Regulation Unit includes one and a third (full-time equivalent) senior staff and one and a half junior staff.

The two groups will interact increasingly as measurement and reduction progresses:

1. HLG members already participate in stakeholder groups, checking and validating the prioritisation of Information Obligations (IOs), and the measurement results, as they are produced.
2. HLG members are invited to simplification workshops; and are invited to invite or nominate their own relevant business members to assist in identifying simplification ideas.

3. Draft simplification plans will be presented to the HLG for inputs and comments.

As a result of these interactions, the HLG will become, in practice, if not officially, an important part of the reporting structure for progress against the 25% target.

### *Methodology and process*

There are two strands to the burden reduction policy: the 25% reduction target for 2012, and the work of the High-level Group on the five priority areas. Overall, recent measurement work suggests that the total administrative burdens on business in Ireland is of the order of EUR 2 billion.

The DETI has recently completed the measurement of administrative burdens in their regulations, which are estimated to account for about half of all burdens (with the help of consultants). This was based on thirty-one Information Obligations, and the results were validated by the High Level Group on Business Regulation. Business workshops were subsequently set up to look for the best ideas for simplifying the measured burdens. Workshops dealing with Company Law and Employment Law were held on 11th May and 1st June 2010, with a Health & Safety workshop to follow shortly. Simplification plans are to be drafted by the relevant legislative areas following the workshops, and are to be presented to the High Level Group in autumn 2010.

The DETI is also currently leading and co-ordinating a cross-Government measurement project involving seven further Departments and Revenue (the tax authority), these being the Departments with regulations that impact significantly on business. Informal agreement has been reached that a centralised measurement project will be carried out, to begin shortly, and culminating in mid 2011. Approximately 150-200 prioritised Information Obligations (IOs) are to be measured, again representing 90% of the burdens across these areas. The prioritised lists of IOs are currently being checked and validated by the business members of the HLG. It is envisaged that simplification workshops will also be carried out following this project.

For now, there are no specific requirements on individual departments (as there are no sub-targets detailing out the overall 25% target), apart from a general requirement that departments ensure that sufficient proposals are identified to meet the target. Ireland also notes that it does not intend to duplicate the work of the European Commission, but to focus on regulations where Ireland itself has scope to make simplifications. However the intention is to combine the results of both the national and the Commission programmes to reach an overall figure for burden reduction, if possible.

The initial approach of the High-level Group on Business Regulation was to examine specific issues under the five priority areas identified by the Business Regulation Forum as the most onerous, burdensome or irritating. It revisited the submissions received by the Business Regulation Forum. In addition it organised workshops with businesses. In its 2008 report the Group identified a number of short-term and longer-term actions. The High-level Group undertook some measurements, some of which fall under the national programme for the reduction of administrative burdens. It used a SCM-based methodology and surveyed a small number of representative businesses to collect information regarding the time taken when responding to an information obligation. These measurements have primarily been aimed at assessing the impact of burden reduction measures (and not at estimating the amount of burdens on business). In 2008 it had identified more than EUR 20 million of red tape reductions, and its 2009 programme contains almost 70 actions, of which nearly half have been processed.

### *Public consultation and communication*

The DETI has made extensive use of public consultation and involvement of external stakeholders in the process of developing the policy for burden reduction. Both the Business Regulation Forum and the High-level Group include government department representatives and business representatives. The High-level Group membership has been extended to trade unions.<sup>9</sup> Besides the initial impetus for public consultation when the work started, and the fact that the High-level Group represents a “standing dialogue” with stakeholders, stakeholder groups are involved in validating measurements as they are produced. It is left to departments to follow through, as part of the requirement on them to come up with contributions to the overall burden reduction.

The High-level Group released its first progress report in July 2008 and its second report in July 2010, both of which are available on line. The HLG has not committed to report annually, but does so periodically when outputs and delivered actions dictate. The DETI has also released the measurement report on Company Law, Employment Law and Health and Safety Law, which is available on line.

### *Achievements so far*

Ireland notes that even in the absence of completed baseline measurements, proposals are “proceeding”, and a number of departments have launched projects. The 2008 report of the High-level Group presented eight simplification projects undertaken over the past years. The group estimated that the measures have resulted in an annual administrative saving of nearly EUR 20 million.

**Table 5.1. Administrative savings resulting from simplification projects**

Simplification project	Lead department/agency	Annual administrative savings (million EUR)
Redundancy payments	Department of Enterprise, Trade and Innovation	1.200
Audit exemption threshold	Department of Enterprise, Trade and Innovation	3.735
Tax clearance certificates	Revenue Commissioners	0.300
Companies Registration Office annual return	Companies Registration Office	10.000
VAT registration	Department of Finance	5.400

Source: DETI (2008) High-level Group report, July 2008.

**Table 5.2. Administrative costs<sup>10</sup>**

	Annual administrative costs (EUR million)
Department of Environment, Heritage and Local Governments	8.000
Road Safety Authority	0.247
Department of Enterprise, Trade and Innovation	0.650
Total	29.532

Source: DETI (2008) High-level Group report, July 2008.

The High-level Group report presented other larger projects, which span over a longer period. These projects are still underway. They include:

- Simplification of processes to return data to the Revenue Commissioners, the Company Registration Office and the Central Statistical Office (to avoid any overlap in returns of similar data to different offices in different formats).
- Establishment of single window for importing and exporting, through which a business can fulfil all or many of the requirements related to import and export regulations (*e.g.* customs clearance, food safety approval).
- Establishment of a unique business identifier and an associated register system to provide all agencies with a uniform means of identifying business entities. The government agreed to the establishment of a cross-departmental group in December 2006, to examine the feasibility. The project has not led to concrete steps yet. In its 2008 report, the High-level Group called for quicker action, a message which was also conveyed during the OECD mission.
- Request on each department to draw up a data strategy. The National Statistical Boards published guidelines to assist departments with the process of preparing the strategy.

The Companies Registration Office (CRO) provides a positive example of what has been achieved in terms of simplification in a particular area. The CRO is a party to a number of projects recommended by the High Level Group on Business Regulation such as:

- The introduction of a facility to file accounts electronically, which will enable the sharing of this data with other public bodies, thereby reducing their need to gather this data and the amount of re-casting of information by businesses. More than 80% of the forms being filed in the CRO can be filed electronically. 56% of annual returns are filed electronically and approximately 70% of the 3 next most prevalent forms.
- The addition of the Revenue Online Services digital signature capability to CRO online forms, thereby simplifying procedures by use of a common signature for Revenue and CRO filings.
- The sharing of data with other public bodies, which has reduced the administrative burden of companies by reducing the amount of data they are required to submit, in particular, to the Central Statistics Office.

The High-level Group 2009 report set out the top 15 achievements so far (Box 5.6).



### Box 5.6. The 2009 High-level Group report

1. Revenue has introduced less frequent VAT3 returns for small traders; additionally, approximately 65% of traders are currently accounting for VAT on the cash basis, rather than the invoice basis, thus improving their cash-flow position.

2. Revenue launched a new version of their website, in December 2008, to make accessing information and services as easy and intuitive as possible, gathering them in logical clusters under primary headings.

3. Revenue's Online Service (ROS) offers business and individuals a quick, secure and cost effective method to manage their tax affairs online. Following a detailed and wide-ranging consultation process with tax practitioners, industry representative bodies, software providers and customers, Revenue introduced Phase 1 of mandatory e-filing and e-paying for large companies and Government Departments with effect from 1 January 2009. Phase 2 of mandatory e-filing commenced in January 2010 and will apply to other large companies, other public bodies and Local Authorities.

4. The Central Statistics Office — Following agreement on a Common Business Identifier, the CSO and Revenue are collaborating to match their databases, allowing the CSO to receive relevant business registration data from Revenue. As a result of obtaining this data, the CSO has been able to discontinue its annual Business Register Inquiry to businesses. (The sample size for this survey was 51,400 businesses in 2007.)

5. From reference year 2010, the CSO also plans to incorporate Corporation Tax and Income Tax returns in the processing of surveys conducted under the Structural Business Statistics Regulation; it is envisaged that this will lead to a reduction of 80%-90% in the number of businesses, with less than 10 persons employed that are sampled.

6. The CSO has also reduced the sample size of its Quarterly Earnings Survey, thereby reducing the overall burden on business.

7. In June 2009, the CSO published its second comprehensive response burden report (in respect of 2008). It found that 67% of enterprises in Ireland did not receive any CSO questionnaires in 2008. The CSO is continuing to make efforts to reduce burdens where possible.

8. The Department of Enterprise, Trade and Innovation — Responding to a request from the High Level Group, a facility to allow the direct payment of redundancy rebates to Revenue has been put in place to ease the burden on those businesses with outstanding tax obligations who are awaiting receipt of a redundancy payment.

9. Substantial progress was also made during 2009 in streamlining the application process for employment permits. The design of a new back-office IT system has been completed and work has commenced on the build phase.

10. The Health & Safety Authority has produced a number of Guides to help, in particular, small business, to comply with Health and Safety Legislation.

11. In addition to these initiatives, it is often the case that simple guidance and straightforward information notes can help businesses to understand their legal responsibilities more readily, and thus make it easier for them to comply with regulations. For example, the CRO recently produced an information note to guide companies wishing to change their Annual Return Date so that it will coincide with their Revenue filing date. This simple initiative will allow an increasing number of companies to reduce the duplicated effort that may previously have resulted from filing similar information on two different dates.

12. The Department of the Environment, Heritage and Local Government has introduced simplified procedures in relation to waste collection permits. The ten separate permits necessary to operate nationally were reduced to one, the cost of these permits was reduced from €12,000 to €5,000, and the duration of the permit was increased to 5 years from 2 years.

13. Also, the variety of charging structures in relation to trans-frontier shipments of waste was simplified to one, and a single Competent Authority replaced the 34 that had existed previously. A similar reduction from 34 authorities to one is expected in early 2011 in the area of internal movements of hazardous waste.

14. Two key initiatives aimed at improving the communication between business and local authorities are the establishment of a Business Support Unit (or similar arrangement) in each county to act as a point of contact for businesses to ensure co-ordinated response (e.g. planning, water and roads), and the intended set up of Business Users Fora to improve consultation / responsiveness by local authorities to local businesses including in respect of regulatory requirements.

15. The Department of Transport introduced new regulations during 2009 to streamline the permit system for wide and long vehicles on major interurban routes. A single permit is now required to transport such loads along designated national routes between major cities and ports. The Department, in conjunction with the Road Safety Authority, is expanding the number of designated routes, where feasible.

At the time of the OECD peer review team's visit in November 2009, the programme for the reduction of administrative burdens appeared to have lost momentum. Meetings of the High-level Group had become less frequent, and the group has not released a progress report since July 2008. Several interviewees commented on a loss of momentum and the lack of a clear vision. The programme had been given no public visibility (as reflected by the lack of any mention at that time on the website of the DETI or on the website of the Better Regulation Unit). Since the mission it appears that the situation has improved (for example with clear progress on measurements). Several interviewees suggested that support both at administrative and political levels was insufficient to sustain momentum. Effective *ex ante* impact assessment was considered by some to be the bigger priority. Many consider that red tape is not a key issue in Ireland. However another view that emerged quite strongly from interviews was that action was important, but needed to be more targeted at SMEs, especially micro firms, to strengthen the domestic economy, and reduce reliance on large FDI related firms. The environment for SMEs remained difficult, and they had problems making their voice heard (not for example forming part of the social partnership). Some others suggested that the focus on information obligations was too narrow (although whatever was put in place should not be too resource intensive to implement).

#### *Other simplification measures for businesses*

One-stop shops have been developed at the local level in partnership with the central government. The EU Services Directive is being implemented on an ongoing basis, to make the National Point of Single contact as useful and transparent as possible for service providers and service recipients. Overall, there does not appear to be a clear strategy on the ground, with local authorities, for example, setting up their own systems but only with reference to their own services. Clarity of purpose and momentum appear to be lacking. On licensing, a number of initiatives have been taken by individual administrations. Overall, although this was not an area which the OECD peer review team was able to examine very far, the approach seems fragmented and without any overall guiding principles to ensure that there is coherent and effective coverage.

#### *Administrative burden reduction for citizens*

The Programme "Transformation of Public Services" and e-Government initiatives are generally relevant, as they seek to put the focus on users (see Chapter 2). The programmes led by the DETI and the High-level Group focus on businesses. Citizens are being addressed through specific initiatives (in particular in the tax area), but burdens on citizens are not integrated in the approach. However, ICT is used to support the simplification of all aspects of business or citizen interaction with public authorities. This includes the provision of a large number of online information and transaction services, downloadable forms, multi-channel access to services and electronic backend system integration and data sharing (in particular in the area of taxation).

### *Administrative burden reduction for the administration*

The Irish government has not launched any specific initiatives on the reduction of administrative burdens inside government. The report of the task force on the public service, *Transforming Public Services* (TPS), however, outlines the need to streamline processes and internal reporting requirements so as to reduce the administrative burdens for organisations and to facilitate greater efficiency in processes and in the delivery of services. The report states that the compliance burdens arising from any new systems or the generation of new data and performance reporting must be minimised. TPS also refers to the value of ICT in reducing administrative burdens. One example of this is the Department of the *Taoiseach*'s eCabinet system, which has removed the requirement for duplication of paperwork. Also arising from TPS, a number of working groups have been established to recommend increased and improved sharing of services in the Public Service. Issues being addressed through these groups include human resources, payroll, financial management, pensions administration, means information and a single point of contact for the public service. In addition, the revised guidelines on RIA (2009) include information on the calculation of Public Service Implementation costs.

### Notes

1. Programmes to reduce administrative burdens may include the review and simplification of whole regulatory frameworks or laws, so there can be some overlap with policies aimed at simplification *via* consolidation etc. There may also be some overlap with the previous chapter on the development of new regulations, as administrative burden reduction programmes are often conducted on a net basis, that is, taking account of the impact of new regulations in meeting target reductions.
2. Article 73 of the 1922 Constitution provided as follows: “Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (*Saorstát Eireann*) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the *Oireachtas*”.
3. The stock of legislation in force in Ireland at the time of independence in 1922 included pre-Union Irish statutes passed by various parliaments sitting in Ireland between 1169 (Anglo-Norman invasion) and the Act of Union 1800; (ii) pre-Union statutes enacted by the English Parliaments between the Norman invasion of 1066 and the Union of England and Scotland in 1707 which were applied to Ireland by virtue of Poyning’s Law 1495; (iii) statutes of the Kingdom of Great Britain passed by the Parliament of Great-Britain at Westminster after the Union of England and Scotland in 1707 but before the Union of Great-Britain and Ireland in 1800 and which were applied to Ireland; and (iv) statutes of the United Kingdom of Great Britain and Ireland passed after the Act of Union 1800 but before the establishment of the Irish Free State in 1922 and which were applied to Ireland.
4. It should be noted that while primary legislation may amend other primary legislation, secondary legislation cannot amend primary legislation (save in rare circumstances,

mostly related to EU law, or else with amending schedules to Acts to enable their application to other bodies).

5. Law Reform Commission (2008), Report – Statute Law Restatement.
6. Among the acts in the programme are the *Criminal Procedure Act 1967*, the *Data Protection Acts 1988 and 2003* and the *Freedom of Information Act 1997*. The 6 suites of related legislation are: Civil Liability and Statute of Limitations legislation (13 Acts), Employment Leave legislation (7 Acts), Equality legislation (3 Acts), Ethics in Public Office legislation (3 Acts), Firearms legislation (8 Acts) and Proceeds of Crime legislation (3 Acts).
7. The OECD peer review team heard from one stakeholder that it is «a nightmare for anyone to find out what the position is».
8. Agriculture; fisheries and food; communications; energy and natural resources; environment; heritage and local government; finance; health and children; social protection; transport; and revenue.
9. Membership comprises representatives of: Department of Enterprise, Trade and Innovation ; Irish Congress of Trade Unions ; Small Firms Association ; Irish Business and Employers' Confederation ; Kinsale Capital ; Irish Banking Federation ; Irish Small and Medium Enterprises ; Revenue Commissioners ; Department of the Taoiseach ; Department of Law, University College Dublin ; Central Statistics Office ; Department of Finance ; Department of the Environment, Heritage and Local Government.
10. Work already done to simplify, but resulting savings have not been measured.



## Chapter 6

### Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,<sup>1</sup> and the adoption of rules to promote responsiveness, such as “silence is consent”.<sup>2</sup> Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example, scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

#### Assessment and recommendations

**Policies for compliance monitoring vary.** Some departments and agencies have developed specific policies to track compliance. As this is an important indicator of the effectiveness of regulations the practice should be encouraged.

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**Recommendation 6.1. Consider whether it would be useful to collect and centralise data based on what is already done by departments and agencies in relation to compliance and enforcement, so as to establish a strategic picture of trends and potential issues.**

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**Approaches to enforcement also vary across sectors, with a significant number of enforcement entities developing initiatives to enhance efficiency.** This area appears to be one where Ireland is ahead of many other EU countries, at least as regards individual cases of good practice, as it not clear just how widespread the developments are. The Smart Economy Strategy, however, identifies the need for a more consolidated approach, and that enforcement should where possible be based on risk. There are promising initiatives spearheaded by the DETI and some agencies to share views and develop a national approach.

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**Recommendation 6.2. Promote and disseminate good enforcement practices to broaden their use. Develop a more systematic approach to the development of enforcement, building on existing initiatives.**

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**Compliance and enforcement are closely linked to the development of effective RIAs.** An effective RIA process seeks to identify and anticipate likely issues of compliance and enforcement. There is considerable knowledge stored within agencies which should be used to help strengthen this aspect of RIA assessments.

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**Recommendation 6.3. Ensure that the RIA process fully underlines the importance of anticipating compliance and enforcement issues (not only costs, but possible practical difficulties)**

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**Administrative appeals practices vary across departments and agencies, raising some concerns about fairness and transparency.** Although the Irish appeals system does appear to raise any major issues, the OECD peer review team heard that the piecemeal development of appeals mechanisms has led to inconsistencies and a relative lack of transparency. An improved approach to regulatory appeals was the subject of a recent consultation by the BRU, the conclusion of which was not to establish a single appeals body.

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**Recommendation 6.4. Consider whether to revisit the issue of appeals and how the system can be made more streamlined and transparent.**

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**The Ombudsman is a useful channel for views on how the regulatory process is “lived” by ordinary citizens.** As in other countries with an Ombudsman, this institution is well placed to develop a systemic view of regulatory management which should be tapped for ideas on where there is a need of improvement.

#### **Box 6.1. 2001 OECD report: Administrative appeals**

The judicial review process is undoubtedly transparent and fair but is regarded by businesspersons as slow, complex and expensive. In addition, remedies are often unclear and rarely justify the costs of legal proceedings. Ireland has also been slow to develop private arbitration or other alternative dispute resolution mechanisms. A recent reform, the *Courts Service Act, 1998*, may bring improvements to the administration of justice. The Act provides for the establishment of an independent agency named the *Courts Service* that will have management and financial autonomy for the day-to-day operation of the Courts. Of particular importance, the agency will invest almost GBP 12 million in information technology systems. In its three-year Strategic Plan, the Courts Service is planning a review of Court Rules to ensure that persons seeking a legal remedy are provided with an efficient and user-friendly court service with minimum delay. The Plan sets also the strategies which must be undertaken to fulfill the mandate, the outputs to be achieved, with corresponding key performance indicators, on different services provided by the courts.

## Background

### *Compliance and enforcement*

#### *Compliance monitoring*

Policies to encourage and monitor compliance vary across departments and agencies, with some of them developing specific initiatives to improve compliance. In the company law area, for example, the government established a specific public body in 2001, the Office of the Director of Corporate Enforcement (ODCE), to encourage compliance and ensure enforcement with company-related legislation as set out in the Company Law Enforcement Act 2001. The ODCE has a compliance unit which focuses on informing and educating company directors and other parties about their duties and powers under the company legislation (through publication of information and guidance in hard copy and electronic form, and an “outreach” programme of presentations to directors, seminars and conferences. Some departments and agencies also publish information about compliance rates (*e.g.* the Revenue Commissioners and the Environmental Protection Agency in their reports).

#### *Enforcement policy*

In keeping with the centralised nature of the Irish state, state agencies are mainly responsible for enforcement, although some government departments have direct responsibility, and local authorities play a role in some areas.<sup>3</sup> Approaches to enforcement vary across sectors. The Smart Economy strategy identifies the need for a “consolidated inspections programme to reduce the number of inspection visits to business” and that “enforcement should be based around risk so as to minimise the burden on citizens and business”, as one of the actions integral to economic recovery. Annex x, which reviews the way in which enforcement is approached across a range of bodies, suggests that initiatives to improve the process and make it more efficient are numerous, sometimes encouraged by the laws regulating specific sectors.<sup>4</sup> The OECD peer review team heard that there are efforts to promote voluntary compliance through advocacy, and there is co-operation across agencies. An issue however is the multiplicity of agencies involved in enforcement, and it appears that there are data sharing constraints which make it difficult to organise joint inspections. The OECD peer review team heard from the local authorities that there are too many inspectors.

While the Department of Enterprise, Trade and Innovation is not directly responsible for developing a national approach to enforcement, the Business Regulation Unit has initiated a two-pronged project to investigate enforcement and inspection practices currently in use and to explore possible progress in the area. A cross-Agency group on Risk-Based Enforcement, convened by DETI, is currently working towards a critical path of steps to facilitate data sharing to underpin: the identification of relevant populations of business to be inspected; improving analysis of risk; and the consequent reduction of administrative burdens on compliant firms. The DETI reports significant enthusiasm for practical progress in this area among the participants, and a report on progress will be presented to the HLG before the end of 2010. The group takes a two-pronged approach, looking both for immediate concrete steps that can be taken to increase practical co-operation, as well as using this experience to inform policy recommendations on enforcement to the wider system, via the HLG. It is likely that the group will continue to meet to discuss and work on further issues, such as consolidated inspections and risk analysis, for example, during 2011.



Risk based enforcement also appears to be making headway in some areas and as a principle to be considered when regulations are developed. The revised RIA Guidelines ask officials to consider the issue of compliance burdens and to consider whether a risk-based approach to enforcement might be used to reduce such burdens. The BRU notes that resource cuts may help to accelerate a move to new approaches including risk-based and multi-task inspections, whilst observing that these raise challenge such as the need for retraining of inspectors.

### *Appeals*

Systems and procedures for appeals vary across sectors having regard, *inter alia*, to the requirements of EU law, and the decisions which are covered.<sup>5</sup> Judicial review is a central part of the Irish system of administrative appeals. There are also internal processes. The statutes creating many of the regulatory bodies provide for specific separate appeals mechanisms which operate alongside judicial review. Ireland is also one of the few European countries that has an independent third party planning appeals system, operated by *An Bord Pleanála* (the Planning Appeals Board). Judicial review is however always available, even where a specific appeals mechanism is provided for. However, the judicial review remedy itself may be modified by statute.<sup>6</sup> Judicial review's adequacy as a sole appeals mechanism arises by virtue of the incorporation into Irish Law of the European Convention on Human Rights. Ministers and their departments are subject to judicial review. Certain other bodies, both public and private, may also be subject to review.

The 2001 OECD report noted that appeals practices varied significantly across departments, and that there were no generic procedures for ensuring fairness and transparency of the system in all its manifestations. One of the commitments in the 2004 White Paper *Regulating Better* was to develop an improved approach to regulatory appeals. A sub-group of the Better Regulation Group was established to examine the issue in the context of the Review of Economic Regulators. The Group sought views through a public consultation paper which focussed on the six economic regulators.<sup>7</sup> In the subsequent 2009 Government Statement on Economic Regulation, the government indicated that it does not intend to establish an appeals panel to cover key economic areas. This decision was reached having regard to factors such as the efficiency of the Commercial Court and the low volume of appeals taken. Nonetheless, echoing the findings of the 2001 OECD report, most respondents highlighted the fact that appeals mechanisms in Ireland have developed in a piece-meal fashion and that there are inconsistencies between and across sectors in terms both of what types of decisions can be appealed and the nature of the appeals processes in place. It was noted that there are regulatory areas where there is no scope for appeal apart from judicial review and it was suggested that there should be merits based appeals in all sectors of strategic importance to the economy. On the other hand, the OECD peer review team heard from the sectoral regulators that the grounds for appeals should be narrowed.

### *Judicial review*

Judicial review<sup>8</sup> exists as a legal remedy where a body determining rights or liabilities has acted contrary to, or in excess of, its legal authority. The remedy is concerned with the legality of decisions. This will include the process by which the decision was made and in particular the issue of whether the decision-maker observed procedural fairness and whether the decision was arbitrary or irrational. It can also include an analysis of whether there was an appropriate legal basis for the decision. The judicial review remedy lies within the inherent jurisdiction of the High Court. The first stage in using judicial review to challenge administrative decisions is an application to a court of competent jurisdiction. The High Court may review actions of public bodies when discharging public law

functions. The High Court reviews the fairness and reasonableness of the process by which a decision was made, in the light of principles established by the Courts. The High Court may strike down decisions in certain circumstances. The High Court may also require the decision-maker to reconsider all or part of its original decision.

The broad grounds on which a decision can be challenged can be summarised as follows:

- Legality and jurisdiction. Is the decision within legal powers and if so, is it used for a proper purpose?
- Procedural fairness.
- The reasonableness of a decision
- Compatibility with Human Rights law.
- Proportionality.
- Legitimate expectations.
- The obligation to give reasons.

All decisions amenable to judicial review are subject to the necessity for conformity with European Community law and the Constitution.

#### *Remedies available to the court*

The remedies available to the court in judicial review, both interim and final, are discretionary. They include the following:

- An order quashing or setting aside a decision or declaring a decision or subordinate legislation unlawful.
- An order prohibiting a body from carrying out a particular act.
- An order compelling a public body to perform a duty.
- A declaration of the existence of an obligation or that an action or decision is unlawful.
- An injunction either limited or indefinite (in certain circumstances the injunction may have a positive aspect).
- Damages.

In taking into account whether or not to give a remedy a court will consider the following matters:

- Any delay in bringing the case.
- Whether the applicant has suffered hardship.
- Any impact the remedy may have on third parties.
- The merits of the case.
- Whether the decision would be in the interests of good administration.

Damages can be awarded in situations where parties have suffered financial loss but they may also be awarded where there has been some maladministration by the public authority involved.

### *The Ombudsman*

The Irish Ombudsman reports to parliament. The legislation setting up an Irish ombudsman dates back to 1980 and the first ombudsman took up office in 1984. The Office of the Ombudsman investigates complaints about the administrative actions of government departments, the Health Service Executive, local authorities and An Post. By the end of 2008, approximately 72 000 valid complaints had been handled by the office. In addition, at present the office deals with up to 10 000 queries from the public every year.<sup>9</sup> The OECD peer review team were told that s/he is in “competition” with parliamentarians, in the Irish context of multi seat constituencies in which citizens may use their local *Teachta Dála* (member of parliament) as a conduit for issues and complaints. However the Ombudsman is increasingly consulted, and also has a systemic appreciation of developments.

## Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. For example, alongside the Environmental Protection Agency in respect of waste. In the first instance, it is a matter for each individual local authority to deal with any instances of illegal disposal of waste in their area and to take the appropriate enforcement action. Local authorities have significant powers available to them under the Waste Management Act 1996, as amended, to enable them to tackle illegal waste activity.
4. For example, the Food Safety Agency and the Environmental Protection Agency now systematically use risk based approaches to enforcement, especially inspections, as it helps to prioritise the use of resources. The Revenue Commission uses a risk based computer programme.
5. The Consultation Paper on Regulatory Appeals sets out how the system works. Some specific processes cited in this paper have since changed however (for example the Electronic Communications Appeals Panel has been abolished).
6. This exists in certain areas such as planning law and immigration law. The legislation governing both the CAR and the CER limit to two months the timeframe in which an application for leave to apply for judicial review may be made.
7. Commission for Communications Regulation; Commission for Aviation Regulation; Commission for Energy Regulation; Financial Regulator; Competition Authority; and Commission for Taxi Regulation.
8. See also Annex C.
9. For further information see: [www.ombudsman.gov.ie/en/](http://www.ombudsman.gov.ie/en/).

## Chapter 7

### The interface between member states and the European Union

An increasing proportion of national regulations originate at EU level. Whilst EU regulations<sup>1</sup> have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EU legislation are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market and avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EU law. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

#### Assessment and recommendations

**The establishment of clear and formalised structures for the management of EU regulations has helped to strengthen Irish performance.** Co-ordination and monitoring have been improved. A range of processes and structures have been put into place including EU specific co-ordinating committees within the executive which meet on a regular basis, as well as parliamentary committees, guidelines to departments on best practice in transposition, and the introduction of an electronic database “EU Returns”, to co-ordinate and monitor information. The EU Returns system is particularly striking relative to other EU countries, allowing departments to run reports on transposition and infringement proceedings, and the centre to monitor the overall picture. The structures that are now in place have forced departments to adopt more standard procedures (requiring them, for example, to prepare reports to the parliament), and have enhanced Parliamentary scrutiny of EU developments. The Department of the *Taoiseach* plays a growing role in co-ordination, alongside the Department of Foreign Affairs. Ireland has reduced its transposition deficit (now under the 1% target set by the Commission).

**Resource constraints require a stronger and clearer approach to prioritisation.** Departments can only deploy a limited number of staff on EU issues. This fosters flexibility and an ease of communication as the network of officials on EU affairs is small. However, it can create difficulties to respond adequately to developments and thus makes prioritisation a necessity. There is a need to prioritise not only on the immediate agenda but

also in terms of Ireland's strategic priorities- what are the most important issues for Ireland?

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**Recommendation 7.1. Prioritise key areas of EU activity for Ireland so that time and resources can be directed toward these areas.**

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**The application of RIA to EU regulations is far from systematic.** The RIA guidelines are quite clear as to the use of RIA on draft and adopted directives (*i.e.* both in the negotiation and transposition phases). Irish requirements are ahead of some other EU countries in this regard. However the guidelines are often not observed. One way of applying pressure on departments to comply is to ensure that RIAs are attached to the drafts sent to the parliament (in the case of draft directives the information may be less developed than for adopted directives).

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**Recommendation 7.2. Ensure that RIAs related to draft directives and transposition of adopted directives are sent to Parliament.**

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**Communication on EU matters needs attention.** The need to identify and prioritise the most important issues for Ireland also puts a premium on communication of the overall strategy. The OECD peer review team heard a number of comments to the effect that the government should communicate more effectively on EU issues (which needs to be put in the perspective of the rejection of two referenda on the EU, and the recent adoption of the Lisbon Treaty). If departments and other key players are to maximise their performance on EU issues, it is important that the government communicates the importance and positive aspects of engagement in EU processes, including transposition of directives, which may be considered as boring.

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**Recommendation 7.3. Consider how to establish a clearer communications strategy for EU matters, both in strategic terms and at the level of practical detail (for example transposition and infringement rates). Part of this might be picked in the annual BRU report recommended in Chapter 1.**

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## Background

### *General context*

Managing the flow of new EU regulations poses specific challenges for Ireland, which combines a relatively small central administrative system with the small size of the country itself. Departments face resource constraints which gives a prominent role to the permanent representation in Brussels as a place for knowledge and expertise on EU issues. While making communication lines shorter, fostering flexibility and a priority-based approach in negotiations, the resource constraint of departments can limit the capacity of the Irish administration to bring expertise on specific issues and to deal with more complex, cross-cutting issues.

### *Institutional structures*

As in other EU countries, line-ministries take responsibility for EU matters that fall within their remit, but at the same time, a strong central co-ordination and steering function has developed. While changes in the structures put in place on accession had been mainly incremental until the end of the 1990s, the rejection of the Nice Treaty in the referendum of May 2001 triggered significant formalisation in the system for managing EU business. The government formalised inter-departmental co-ordination structures, and the adoption of the

European Union (Scrutiny) Act 2002 enhanced parliamentary scrutiny (Laffan, 2008).<sup>2</sup> The rejection of the Lisbon Treaty by the voters in June 2008 (eventually adopted in October 2009) prompted another period of review and evaluation at official and political level of how EU issues are managed and communicated at the national level.

The Department of Foreign Affairs shares overall co-ordinating responsibilities on EU issues with the Department of the *Taoiseach*. The Department of Foreign Affairs is responsible for day-to-day co-ordinating on EU matters and ensuring the coherence of Ireland's stance in European institutions. The EU Division of the Department of Foreign Affairs and the Permanent Representation in Brussels interact with EU institutions and Irish government departments both individually and collectively. This includes collecting all formal information from the Commission via the Permanent Representation and dissemination to the relevant bodies in the government and the *Oireachtas*. The Department of the *Taoiseach* has been increasingly involved in EU matters, partly as it provides support to the *Taoiseach* as a member of the European Council. It has a more strategic focus, is involved in all key EU policies and decisions, and can be brought into negotiations in case of specific difficulties or conflict between departments. The involvement of individual departments in EU affairs largely depends on their areas of responsibility. The Department of Finance however plays a prominent role as it is involved in any proposals with financial implications and directly manages EMU, structural funds and taxation issues.

A number of structures are in place to ensure horizontal co-ordination. As for domestic issues, the cabinet is the centre of decision-making. It is complemented by specific EU-related co-ordinating structures (Box 7.1).

#### Box 7.1. Co-ordinating structures within the executive

- At a political level, the **Cabinet Sub-Committee on EU Affairs** provides strategic overview and direction on major EU developments. It is chaired by the *Taoiseach* and meets regularly. It is attended by key ministers involved in EU matters, ministerial advisers and senior civil servants.
- The **Inter-departmental Co-ordinating Committee on European Affairs (ICCEUA)**, chaired by the Minister of State for European Affairs, is attended by senior officials from all departments (at assistant secretary level) and a representative of the Office of the Attorney General. It focuses on transposition of directives and monitoring of infringement cases against Ireland. It also has an overview of the *Oireachtas* scrutiny procedures.
- The **Senior Officials Group on European Affairs (SOG)** is chaired by the Assistant Secretary General with responsibility for European affairs in the Department of the *Taoiseach*. It plays a complementary role to the ICCEUA in ensuring oversight and co-ordination on EU policy matters. It concentrates primarily on preparation of cross-cutting EU policy issues. It serves as a clearing house and early warning system as well as debriefing officials on the *Taoiseach's* and Minister's key European engagements. It has a significant role in preparing the Cabinet Committee meeting on EU affairs. The group, which meets fortnightly, comprises assistant secretaries from departments with substantial European business and the Permanent Representatives.
- **Other inter-departmental committees are created on an *ad hoc* basis** to deal with specific cross-cutting issues that arise. They are usually attended by senior officials from the relevant departments. A recent example is the Inter-Departmental Committee on Climate Change (non EU specific).

### *The role of the parliament*

The European Union (Scrutiny) Act 2002 set the legislative basis for an enhanced involvement of the parliament in the discussion of EU legislative proposals. The implementation of a more formal scrutiny system was one of the decisions taken after the Nice Treaty referendum was narrowly rejected in May 2001 (and subsequently adopted in October 2002). Under the European Union Act 2002, the government is legally obliged to lay copies of all EU legislative proposals before both houses of the *Oireachtas* together with a statement from the minister outlining the content, purpose and likely implications for Ireland of the proposed measure. The note also indicates the likely means of future transposition (primary or secondary regulation). Under the act, ministers are also obliged to make a report to the Houses of the *Oireachtas* at least twice yearly in relation to EU measures and other EU developments within their area of remit. The objective is to inform the parliament as early as possible in the EU legislative process and give it more capacity to influence the government's negotiation position at the working group level.

The parliament has set up two dedicated joint committees on EU issues, which work in parallel. Generally the Joint Committee on European Affairs deals with issues of policy as well as the transposition and implementation of EU law, while the more recently established Joint Committee on European Scrutiny deals with draft EU legislation before it is adopted at the Council and the European Parliament (Box 7.2).

#### Box 7.2. Parliamentary Committees for EU affairs

Established in 1995, the **Joint Committee on European Affairs**<sup>3</sup> examines EU policies, for example through consideration of green and white papers, and monitors the government's position within the Council of the EU. At the beginning of each year the committee draws up a work programme which sets out the main topics the committee will address during the coming year. It holds a monthly meeting with the Minister of Foreign Affairs or the Minister of State for European Affairs prior to each meeting of the General Affairs and External Relations Council in Brussels.

Established in 2007, the **Joint Committee on European Scrutiny** scrutinises all draft EU proposals sent by departments as required under the 2002 Act. It replaced a sub-committee which the Joint Committee on European Affairs had established to scrutinise EU proposals. It carries out detailed scrutiny of EU legislative measures and reports on the implications of the measures, setting out its conclusions and any recommendations, which are laid before the Houses of the *Oireachtas*. The Joint Committee has its own staff of two policy advisers (it discovered that it was important to have dedicated staff to work on this), and meets at least every two weeks. The committee met 24 times during 2009 to examine the wide range of EU legislative proposals which were published. In all, the committee considered 440 documents of which 391 were new legislative proposals. In 2009, the Joint Committee decided that 24 proposals may be of significant importance to Ireland and required further scrutiny:

- 14 of the proposals were examined in detail by the joint committee itself;
- 5 proposals were sent to the relevant sectoral committee for details scrutiny as provided for in their orders of reference; and
- 5 proposals were sent to the relevant sectoral committee for its observations to assist the European Scrutiny Committee in considering the implications of the proposal.

Source: [www://oireachtas.ie/committeess30thdail/j-euscrutiny/work\\_programme/AR20089-20100513.doc](http://oireachtas.ie/committeess30thdail/j-euscrutiny/work_programme/AR20089-20100513.doc)

The 2002 Act reinforced the reporting requirements to the parliament. All government ministers have to provide a report to the Joint Committee on European Scrutiny every six

months on measures, proposed measures and other developments in relation to the EU in their remit. The government must provide a report to the parliament on developments in the European Union, which is usually considered by the Joint Committee on European Affairs. In addition, the *Taoiseach* reports to the *Dáil* following every European Council. The *Oireachtas* thus now has systematic information on EU matters, although Ireland does not go so far as a few other EU countries, where parliament gives a mandate to the government for negotiation.

The European Union Act 2009 provides for some new powers for the *Oireachtas* under the terms of the Lisbon Treaty, particularly in respect of national parliaments' new role to ensure that the principle of subsidiarity is respected. More broadly the rejection of the Lisbon Treaty by the voters in June 2008 led the Joint Committee on European Affairs to set up a sub-committee charged with assessing Ireland's management of EU issues. One of the key recommendations of its report of November 2008 was to enhance the role of the *Oireachtas* and address weaknesses in the way the *Oireachtas* can hold the government to account for its role in EU law making. This includes earlier involvement in the EU law making process, increased transparency regarding the use of statutory instruments for transposing EU directives, and better use of RIA.<sup>4</sup>

A subsequent review on the role of the *Oireachtas* in European Affairs was carried out by a joint sub-Committee of the JCEA and JCES, which reported in July 2010. While many of the recommendations are about the organisation of business within the *Oireachtas* including amalgamation of the two Committees into one Joint Committee, other recommendations covered a number of other issues including – The introduction of a scrutiny reserve system; Ministers to appear before Committees before Councils; European Council Statements to take place before the EC; On the issue of transposition, Committees to have a role in decision on primary or secondary legislation route; On the issue of infringements/transposition, interaction between ICCEUA and European Committees; JCEA should undertake comparative analysis of transposition of selected number of EU Directives (re goldplating). The report's recommendations will be considered by Government and it is expected will be debated in the *Oireachtas* in Autumn 2010.<sup>5</sup>

## *Negotiating EU regulations*

### *Institutional framework and processes*

Overall responsibility for negotiation of a proposed EU regulation is normally assumed by the department whose officials service the Council working group at which the proposal is presented. The process is not systematic as each department is left to define its standard procedures for preparing negotiations, reporting on them and sharing information with other departments. The need for departments to provide the *Oireachtas* with notes on EU proposals and to prepare RIAs (see below) has however forced each department to put in place procedures. The preparatory work for negotiations is conducted by home-based officials in close conjunction with Brussels-based officials. The Permanent Representation in Brussels, whose staff includes attaches from each government department, plays a key role in detailed co-ordination on the spot with all departments involved, as negotiations proceed. Given resource constraints, the capacity to act at an early stage of the process depends in practice on the resources and priority assigned to the issue.

If a proposal affects some issues which are outside the remit of the department servicing the relevant working group, that department has a responsibility to seek views of other relevant departments. Where there is disagreement on lead responsibility, the



Department of Foreign Affairs provides guidance and acts an informal mediator between the departments concerned. A government decision of 10 December 2002 established the procedures for resolution of disputes about which department is responsible for an EU measure in the context of the European Union (Scrutiny) Act 2002, which can lead the Secretary-General to the government (in the Department of the *Taoiseach*) in consultation with the *Taoiseach* to make a binding determination.<sup>6</sup> In practice, this procedure has rarely proved necessary.<sup>7</sup>

#### *Ex ante impact assessment (negotiation stage)*

Departments are in principle required to conduct RIAs on all proposed EU Directives and on significant EU regulations. The revised RIA guidelines indicate that “the RIA process should be commenced as early as possible and certainly no later than four weeks from when the Commission publishes the proposed legislation and its own impact assessment. (...) The RIA should contain a sufficient level of analysis of key issues to properly inform Ireland’s negotiating position, thereby minimising any potentially negative implications for Ireland”.<sup>8</sup> The guidelines encourage officials to update the RIA periodically to take account of significant changes introduced at various stage of the proposal’s development. Guidelines provide detailed explanations as well as practical examples. However the guidelines are rarely observed in practice. The RIA review conducted in 2008 showed that departments carried out few RIAs in relation to draft EU legislation. The OECD interviews did not show tangible sign of progress in that respect, and revealed doubts among officials as to the relevance of the exercise.

### ***Transposing EU regulations***

#### *Institutional framework and processes*

The department in charge of negotiation is also responsible for the transposition of the directive. Where the content of a proposed directive cuts across the remit of a number of government departments, those departments involved agree upon a lead department. In cases where proposals remain unallocated the Department of Foreign Affairs facilitates the allocation of the directive to a department through dialogue with the key stakeholders. In case of a dispute over responsibility the same procedure as the one regarding negotiation can be applied. Likewise it is rarely needed. The Department of Foreign Affairs is also the central point for managing infringement procedures supported by the monitoring role of the ICCEUA chaired by the Minister of State for European Affairs.

EU directives can be transposed into Irish law either through primary domestic legislation, or through ministerial regulations (statutory instruments). The usual route is statutory instruments. There is no detailed statistical analysis on the relative use of acts or statutory instruments to transpose EU directives. The tendency is to copy out directives into Irish law, that is, to replicate as far as possible the wording of the directive into Irish legislation, a practice which can be found in some but not all other EU countries (some such as the United Kingdom seeking to rewrite directives so that they fit more closely with English law).

The Department of the *Taoiseach* published “Guidelines on best practice on Transposition of EU Directives”<sup>9</sup> in March 2006. The guidelines are based on EU Commission recommendations; fully integrate the principles of Better Regulation and the Regulatory Impact Analysis model (but are not integrated into the RIA guidelines); take into account the increasing influence of the courts and the evolving case law on the transposition process; take into account the *Oireachtas* Scrutiny Process and provide early

warning to government of EU legislation likely to be difficult and/or costly to transpose; and set out in simple steps how best to transpose a Directive.

As for domestic laws, bills transposing EU regulations are drafted by a team of specialist lawyers at the Office of the Parliamentary Counsel to the government, which provides drafting services for the preparation of primary legislation. Although Departments when requesting drafting by the Office of the Parliamentary Counsel are obliged to provide a table of correspondence/equivalence whereby each Article of the new Directive is listed against proposed or existing domestic legislative measure, it may often be the case that, for whatever reason (usually resource related), such a table is not forwarded to the Office of the Parliamentary Counsel.

### *Legal provisions and the role of the parliament*

The Joint Committee on European Affairs has responsibility on behalf of the Oireachtas for overseeing transposition and implementation of EU regulations. Sectoral committees can look at relevant directives and the Joint Oireachtas Committee on European Scrutiny can also refer particular directives to the relevant committee. Efforts have in the past tended to focus more on fostering parliament's involvement at the early stage of EU law development, to give parliament an opportunity to influence the process and hold ministers accountable. The Sub-Committee on Ireland's Future in the European Union has, however, outlined the need for enhanced accountability in transposition and oversight of statutory instruments.<sup>10</sup> It has recommended that heads of the instruments be circulated to *Oireachtas* members to mirror the current practice of distributing all texts of draft primary legislation. The subsequent report of the Joint Sub-committee on the role of the Oireachtas in European Affairs made similar recommendations.<sup>11</sup>

### *Ex ante impact assessment (transposition stage)*

The RIA Guidelines indicate that officials responsible for the transposition of EU Directives should prepare a separate RIA on the available transposition options (both legislative and non-legislative). They should also distinguish prescriptive or mandatory elements and elements that are optional or have been added as a result of specific national concerns, as a means to detect any goldplating. The RIA is to draw on the RIA done at the stage of EU proposal development. The guidelines also indicate that the RIA should be published as early as possible, and not later than publication of the statutory instrument or bill. Implementation is challenging, as for RIA in general (Chapter 4) and according to the Irish government, is aggravated by the difficulty of interacting with the EU-level RIA. RIAs on transposition texts to transpose EU directives are more commonly seen than on draft EU texts for negotiation.

### *Monitoring transposition*

The Inter-Departmental Co-ordinating Committee on EU Affairs (ICCEUA) has a central monitoring and oversight role regarding the timely transposition of EU legislation into Irish law. The committee has a particular focus on Ireland's performance in transposing EU Directives in time, which is a standing agenda item of its meetings. The committee also reviews infringement proceedings brought against Ireland at each meeting. Other items include issues arising at key working groups in the EU and information exchange between government departments on EU issues.

A major recent change has been the introduction of *EUReturns* in September 2007, an electronic database, to co-ordinate and monitor information. The system tracks information

on the transposition of all EU directives (both internal market and non-internal market directives) and records information on any infringement proceedings. Adopted directives are added to the system, upon request of departments responsible for the directive or after checking the European Commission's databases. Departments fill in the fields on directives for which they have responsibility. The EU Affairs Division in the Department of the *Taoiseach* manages the *EUReturns* system.

The *EUReturns* system produces a number of reports which provide snapshots of Ireland's performance in real-time. Each department can run reports on directives and infringements under their remit while the Department of the *Taoiseach*, the Department of Foreign Affairs and the Office of the Attorney General can run reports for the whole of government. The system is now running as routine, with the departments filling in the information on a regular basis. The reports, which form the basis of the discussion on transposition and infringement proceedings at the monthly ICCEUA meetings, have proved a useful tool for central government to monitor Ireland's performance. The EU Affairs Division now focuses its efforts on encouraging departments to make their own more pro active use of the system.

There is no central policy requiring departments to prepare correlation tables as part of the transposition of EU Directives into Irish law. A number of departments produce correlation tables for their own internal use; however, no department publishes correlation tables. The European Commission is developing a pilot project on correlation tables, in which Ireland has signalled it would be willing to participate.

As regards goldplating (going beyond what is strictly necessary to transpose a directive), which is an issue in a number of EU countries, the OECD peer review team did not pick up any strong issues. Parliament relayed some concerns from its hearings about "the regular use of secondary legislation to give effect to far reaching proposals" and the "perception that Ireland implements or enforces its EU obligations more rigorously than some other member states".

### Box 7.3. Ireland's performance in the transposition of EU directives

The European Commission's Internal Market Scoreboard\* gives a snapshot of Member States' progress on the transposition into national law of EU Directives. The July 2009 scoreboard shows that Ireland achieved its best ever score with a transposition deficit ratio of 0.8%. This score means that Ireland has achieved the European Commission target of a 1% transposition deficit ratio consistently for the last three Internal Market Scoreboards and ahead of the 2009 deadline set out by the European Commission.

The scorecard indicates that Ireland has 31 cases of non-fully transposed directives (18 not correctly transposed, 13 not fully transposed) against 13 outstanding directives, which roughly puts it in the middle of the league) and 16 Member States have the same or more cases of non-conformity than outstanding directives. Ireland has 63 pending infringement cases, a vast majority of which due to incorrectly transposed or not properly applied directives. It is one of three member states, within the EU-15, that have seen an increase in the number of infringement procedures against them as compared to May 2006.

Source: European Communities (2009), Internal Market Scorecard, July 2009. Available at: [http://ec.europa.eu/internal\\_market/score/docs/score19\\_en.pdf](http://ec.europa.eu/internal_market/score/docs/score19_en.pdf) (accessed February 17, 2009).

**Table 7.1. Ireland’s performance in the transposition of EU Directives**

	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02	Nov-02
Transposition deficit as % in terms of Internal Market Directives	5.4	5.4	5.8	3.9	4.4	4.0	3.6	3.3	2.4	2.4	2.6
	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08	July-09	Nov-09
	3.5	1.2	1.6	1.8	2.0	1.2	1.7	1.2	1.0	0.8	1.0

Source: European Commission.

### *Interface with Better Regulation policies at EU level*

Ireland makes considerable efforts within the limits of its capacities as a small country, to attend relevant meetings at EU level, including participation in the EU HLG, SPOC group and SCM network. Under its 2004 Presidency, Ireland was very active in helping to shape and drive the EU Better Regulation agenda, then at its beginnings. It followed this up by chairing a group which led to the development of a training course for the EU level impact assessments.

The revision of the EU elements of the RIA guidelines highlighted some difficulties met by Irish officials with impact assessments produced by the European Commission. A key issue is the fact that the impact assessments (IAs) produced in advance of the publication of draft legislation are not subsequently updated. This means that the information set out in the impact assessment can bear little relationship to evolving proposals to which national officials are expected to apply RIA. In addition, resource constraints make it difficult for Ireland as a small member state to participate in all expert groups and influence the content of the impact assessment and to supply alternative data. Irish officials emphasised the importance of quality RIAs at EU level.

## Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. Brigid Laffan and Jane O’Mahony (2008), *Ireland and the European Union*, Palgrave Macmillan.
3. Established in 1995, the Joint Committee on European Affairs took over the responsibilities of the *Oireachtas* Joint Committee on Secondary Legislation that had been set up in 1973 when Ireland joined the EEC. The role of the Joint Committee on Secondary Legislation was to oversee the secondary legislation used to bring EU law into effect in Ireland. The role of the Joint Committee on European Affairs was extended to monitor both EU policies and legislation emerging from the European Union.

4. Houses of the Oireachtas. Sub-Committee on Ireland's Future in the European Union. "Ireland's future in the European Union: Challenges, Issues and Options", November 2008. <http://www.euaffairs.ie/publications/Final-version-Sub-Comm-Report-full.pdf>, accessed February 16, 2010.
5. Source: [www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/document1.htm](http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/document1.htm).
6. The decision provides that the Department of Foreign Affairs, assisted where necessary by the European Affairs Division, Department of the Taoiseach, will make an initial ruling on which department is responsible. If a Department feels that the ruling is incorrect, the Secretary General of that Department can indicate in writing to the Secretary General to the Government the reasons why the Department identified should not have responsibility for the measure, and the reasons why another department should. The Secretary General to the Government, in consultation with the Taoiseach, makes a finding which will be binding on departments.
7. The Irish government says that it is only aware of one case since 2007 that required formal adjudication. In this case, when departments could not agree on lead responsibility, the Department of Foreign Affairs had to meet with them, receive written submissions and make a ruling. Where there have been disagreements between departments, the Department of Foreign Affairs mediates and this has always brought a mutual solution, other than in the one case referred to above. It should be emphasised that the number of such cases are really low, probably 1-2% and are generally settled amicably.
8. Department of the *Taoiseach*. "Revised RIA Guidelines – How to Conduct a Regulatory Impact Analysis", June 2009.
9. The guidelines are available at: [www.taoiseach.gov.ie/eng/Publications/Publications\\_Archive/Publications\\_2006/Final\\_Version\\_Guidelines.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006/Final_Version_Guidelines.pdf).
10. Page 74 of the report.
11. Source: [www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/document1.htm](http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/document1.htm).

## Chapter 8

### The interface between subnational and national levels of government

Multilevel regulatory governance – that is to say, taking into account the rule-making and rule-enforcement activities of all the different levels of government, not just the national level – is another core element of effective regulatory management. The OECD’s 2005 Guiding Principles for Regulatory Quality and Performance “encourage Better Regulation at all levels of government, improved co-ordination, and the avoidance of overlapping responsibilities among regulatory authorities and levels of government”. It is relevant to all countries that are seeking to improve their regulatory management, whether they are federations, unitary states or somewhere in between.

In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. Licensing can be a key activity at this level. These issues have a direct impact on the welfare of businesses and citizens. Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, they may be taking on a growing responsibility for the implementation of EC regulations. All of this requires a pro active consideration of:

- The allocation/sharing of regulatory responsibilities at the different levels of government (which can be primary rule-making responsibilities; secondary rule-making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or subnational regulations; or responsibilities for service delivery).
- The capacities of these different levels to produce quality regulation.
- The co-ordination mechanisms between the different levels, and across the same levels.

#### Assessment and recommendations

**A relatively simple structure and relatively restricted functions compared with many other EU countries are assets in the Better Regulation context.** The structure is simple and does not need to be pruned, as in some other European countries. Responsibilities devolved to the local levels of government are relatively circumscribed, albeit not inconsequential. Local authorities in Ireland are responsible for the delivery of public services under central supervision, and they have significant responsibilities in the delivery of permits and in planning. Most of their regulatory work rests on regulations that have been defined at the centre of government.

**Co-ordination with central government needs attention.** The OECD peer review team found evidence that each department goes its own way in relationships with the local level. There were complaints that “central departments are not joined up” and co-ordination between the centre and the local levels does not always seem to be optimal. This raises a number of issues. For example, environmental burdens which can mainly be traced back to the EU are a major issue at this level and may not be effectively picked up. Local authorities representatives also raised the issue of unfunded mandates, and the fact that regulatory burdens on them of regulations adopted at the national or EU level are not properly discussed beforehand. The local level seems in need of more effective consultation with the centre, with special regard to financial and resource implications. The 2008 OECD report on the Irish public service underlined the need for a more co-ordinated approach at the national level to minimise regulatory burdens on local authorities.

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**Recommendation 8.1. Review co-ordination and consultation mechanisms between the central and local levels, with a view to reinforcing these. Consider an annual forum.**

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**By contrast, horizontal co-ordination between local authorities appears to be stronger.** The local authorities remarked that horizontal links between them were stronger. The OECD peer review team heard that a wide range of groups are active.

**National policies such as the administrative burden reduction programme do not include the local level.** There may, however, be interest. The local authorities said that they had “not been invited to join the AB programme”.

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**Recommendation 8.2. Invite local authority participation in the administrative burden reduction programme for business, perhaps as part of the strategy renewal proposed in chapter five.**

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## Background

### *Structure, responsibilities and funding of local authorities*

The Twentieth Amendment of the Constitution of Ireland (1999) provided for constitutional recognition of local government for the first time in Ireland. The basic structures, procedures, financing arrangements, etc., of local authorities are set out in the Local Government Acts. The main act is the Local Government Act 2001. Provisions regarding specific activities, e.g. water, planning, environmental activities are contained in specific acts dealing with those areas. Provisions in relation to the role for the Minister for the Environment, Heritage and Local Government are contained, as appropriate, throughout these acts.

### *Structure of local governments*

The primary units of local government in Ireland are counties and cities; the state is divided into 34 areas – 29 county council areas and 5 city councils (Cork, Dublin, Galway, Limerick and Waterford). Each city operates as an independent and autonomous local authority and is entirely separate from its home county. Each of the 29 counties and 5 cities has its own local authority elected by the local population, and known as the county council or the city council as appropriate.

Within most county council areas (but not all), and forming part of them, are other local authorities areas known as towns. Each of the 80 towns elects its own local authority

known as a town council or, in five cases, a borough council. The residents of the towns are represented by councillors elected both at town level and at county level (in separate elections), some of whom are members of both authorities. While town councils perform a range of functions independently, there is, in practice, substantial co-operation between them and their respective county councils.

Local elections take place every 5 years. Every resident over 18 years of age is entitled to be registered as a local authority's elector. Citizenship is not a requirement for voting at a local election. Councillors, *i.e.* the elected members, form the elected tier of a local authority. They are elected under a system of proportional representation. The elected council is the policy making forum of the local authority; the day-to-day management is carried out by the executive, *i.e.* the cadre of full-time officials led by the county or city manager. The number of councillors elected to each local authority ranges from 9 to 52.

Elected councils exercise reserved functions defined by law. They include decisions on policy and financial matters. The elected members also have an oversight role and responsibility for the general direction of the affairs of the local authority. The executive advises and assists the councillors, and discharges the day-to-day business of the local authority within the policy parameters defined by the elected council. While the division of roles between councillors and the executive is clearly defined in statute, in practice the policy and executive roles overlap.

At the regional level, there are eight regional authorities and two regional assemblies, whose members are not elected by a separate regional election but nominated by the county and city councils within their area. Regional authorities, which came into place in 1994, promote the co-ordination of public service provision. The two regional assemblies were established in 1999, mostly as an instrument for the management of EU structural funds at the time when Ireland's economic status in the European Union quickly changed. They have had limited impact on Irish governance.

Other local or regionally-based bodies operate separately from the local government system although, in some cases, having a degree of linkage with it (*e.g.* part of their membership appointed by the local authorities). Such bodies generally have specific executive or service functions within a particular sector (*e.g.* fisheries boards, health boards).

### *Responsibilities and powers of local authorities*

The functions of local authorities in Ireland are more restricted than usually found in other European countries. They mainly provide public services under the general supervision of the Department of the Environment, Heritage and Local Government. Their annual budget is formulated under eight main programme groups (housing, road transport and safety, water supply and sewerage, local economic development, environmental protection, recreation amenities, agriculture, health and welfare), within which they exercise a limited role within these areas (see Table 8.1). Local authorities can issue by-laws to regulate some local matters (example), but their regulatory role largely focuses on the implementation of regulations that have been defined at the central level (which in many cases originate from the EU level). Their regulatory competences focus on issuing some permits (*e.g.* land use) and licences and control of nuisance and litter.



**Table 8.1. Activities of local authorities in Ireland**

Programme group	Summary of activities/services
Housing and building	Provision of social housing, assessment of housing needs, housing strategies, homelessness, housing loans and grants, Traveller accommodation, voluntary housing, private rented sector and housing standards
Roads and transportation	Road construction and maintenance, traffic management, public lighting, collection of motor taxes, driver licences, taxi licensing
Water and sewerage	Water supply, waste water treatment, group water schemes, public conveniences
Planning and development	Adoption of development plan, decisions on planning applications, urban or village renewal plans and works, heritage protection, industrial and tourism infrastructure and support
Environmental protection	Waste collection and disposal, waste management planning, litter prevention, the fire service, civil defence, air/water pollution controls, burial grounds, building safety
Recreation and amenity	Public libraries, parks and open spaces, swimming pools, recreation centres, the arts, culture, museums, galleries and other amenities
Agriculture, education, health and welfare	Making nominations to vocational education committees and harbour boards, processing of higher education grants, veterinary services
Miscellaneous services	Maintaining the register of electors for elections, financial management, rate collection, provision of animal pounds

Source: Department of Environment, Heritage and Local Government.

A number of services, which in other EU countries are delivered by local authorities, are in Ireland provided by local units of central government, which are much larger in scale than most Irish county or city councils. Over the past 20 years, in an effort to streamline service delivery, some strategic functions have been taken from local authorities. For example, the Environmental Protection Agency and the National Roads Authority were set up in the 1990s to bring a strategic focus and consistent national approach to major environmental functions and national road developments. Some health functions were also moved to regional health boards.

Over the last two decades, the government has engaged a series of reforms to improve the managerial capacities of local authorities administration and their capacity to deliver high quality public services. In 1996, the Department of the Environment, Heritage and Local Government initiated *Better Local Government*, a blueprint for reform of the local authorities structure. This programme was grounded in the 1994 *Strategic Management Initiative*, which set a broad agenda for change in the Irish public service and emphasised the delivery of a quality service to the public. In 2004, the Local Government Management Services Board published its first report, which detailed the performance of local authorities in the delivery of public services through a set of indicators. The reports, which have been produced on an annual basis, have increased the accountability required from local authorities. In 2000, the Planning Act and the 2001 Local Government Act made changes to local authority procedures to ensure more transparency (e.g. through submission of draft plans, requirement to have council meetings in public). More recent initiatives to enhance local democracy have focused on revising the structures for local governance. The Minister for the Environment, Heritage and Local Government launched a green paper on local government in April 2008, which outlined a number of options for governance changes in

the structure of local governments. It also stressed the need for continuous change, flexibility and imagination in service delivery, and increased sharing services between local authorities.

### *Funding of local governments*

Irish governments have limited revenue-raising capacities and largely depend on central government for capital funding and, to a lesser degree, current funding. Subnational expenditures in Ireland grew at a very quick pace over the last decade as a result of the demands of a fast growing economy, a rising population and a large-scale infrastructure investment plan. This increase was not matched by an increase in local resources, resulting in further dependency on central government. Almost all of the capital spending is funded by state grants, covering the cost of major construction works on roads, water and sanitary service facilities, and much of the housing construction programme. Current expenditure is financed through a combination of state grants, local rates on commercial and industrial property, and through fees, charges, rents and services provided by the local authorities. Local authorities have little room for manoeuvre with respect to taxes as there are no local taxes levied on citizens in Ireland, and the revenue from local rates on commercial and industrial properties has been relatively static. There are extensive reporting relationships between central government and local authorities, on service delivery and the spending of government grants (OECD, 2008).<sup>1</sup>

#### **Box 8.1. Sources of local authority income**

Sources of Income for Current Expenditure 2010:

- Charges for Goods and Services (30%).
- Rates (29%).
- Government Grants and Subsidies (24%).
- Local Government Fund – General Purpose Grant (17%).

*Source:* Department of Environment, Heritage and Local Government, [www.environ.ie/en/LocalGovernment/LocalGovernmentAdministration/LocalGovernmentFinance](http://www.environ.ie/en/LocalGovernment/LocalGovernmentAdministration/LocalGovernmentFinance) (accessed February 17, 2010).

Efforts to promote quality regulatory management at the local level have focused on the development of consultation between central and local government, and between local authorities themselves. The Department of the Environment, Heritage and Local Government is the key interlocutor of local authorities, which interacts with them either through the Office of Local Authority Management (OLAM) or individually. OLAM is also a main channel of consultation and co-operation across local authorities, along with the regional authorities. In recent years many legislative and other changes have incorporated a requirement or advice in relation to consultation. In addition, consultation and co-operation takes place on an on-going basis between central government and subnational government on specific issues.

## *Co-ordination mechanisms*

### *Co-ordination between central and local authorities*

Vertical co-ordination rests on two pillars. The first is the Department of Environment, Heritage and Local Government and the second is the Office for Local Authority Management (OLAM - see Box 8.2). OLAM is a division of the Local Government Management Services Board (LGMSB). The LGMSB was established by the Department of Environment in 1996, to provide for local authorities services with respect to staff negotiations, human resources and other management services. OLAM was established in 2004, at the initiative of the County and City Managers' Association (CCMA), which is the representative body for senior managers in Irish local authorities with the support of the Department of the Environment, Heritage and Local Government.

#### **Box 8.2. The Office for Local Authority Management (OLAM)**

The key focus of the work of OLAM is to ensure that the view of the local authority system, articulated through the CCMA and its committee structure, are conveyed to relevant departments and Agencies. This is done on both a planned and responsive basis throughout the year, and combines the input of local authority practitioners with the research capacity of OLAM.

It is done in a number of different ways:

- Through submissions and position papers.
- In direct engagement with senior public servants and Ministers.
- By identifying opportunities for wider communications.
- Through press releases on relevant issues.
- By the production and distribution of factual material on local authorities.
- Through the annual Service Indicators in Local Authorities Report.

Source: LGMSB website.

One of the key roles of the Minister for the Environment, Heritage and Local Government is to set down national policy for the local government sector, and to provide the necessary legislative and regulatory framework within which the sector operates. The relationship between the Minister and local authorities, which is also governed by legislation, ranges from a total prohibition on involvement by the minister in local authority matters (*e.g.* planning permissions), optional involvement (*e.g.* issuing directions on development plans, holding public inquiries etc), required involvement (*e.g.* determining local electoral boundaries, the ultimate decision on removing a manager from office, etc) and statutory consultation across a wide range of areas. Informal (structured and non-structured) co-operation between local authorities and government departments is a feature of the day-to-day interaction between local and central government. Local authorities now interact with wide range of government departments as departments have been reorganised and as local authorities have become involved in a wider range of activities in areas such as sports, arts and culture and community development.

The Department of the Environment, Heritage and Local Government is represented both on the High level Group on Business Regulation and on the Inter-Departmental Group, co-ordinating the 25% measurement and reduction process. Information Obligations administered by Local Authorities have been and are considered by both Groups.

Additionally, the Minister for Enterprise, Trade and Innovation has recently invited representatives of the County and City Managers' Association (CCMA) to discuss, inter alia, the issue of administrative burdens arising for business as a result of their activities. Following this meeting, the Business Regulation Unit in DETI has agreed with the Chair of the CCMA that the Local Authorities will (a) be represented on DETI's Risk-Based Enforcement Group, to discuss data sharing among inspection agencies, and (b) will identify a number of national issues (licences, permits, etc.) that may be simplified to reduce burdens on business. Thus, the interaction between the Administrative Burden Reduction Agenda and the Local Authorities is being actively considered at three or more fora.

In December 2009, the Minister for the Environment, Heritage and Local Government, announced the establishment of a Local Government Efficiency Review Group to review the cost base, expenditure of and numbers employed in local authorities.

### Box 8.3. Report of the Efficiency Review Group

The Terms of Reference for the Group were:

To review the cost base, expenditure of and numbers employed in local authorities with a view to reporting on:

- specific recommendations to reduce costs;
- the effectiveness of particular programmes;
- optimal efficiency in the way programmes are delivered; and,
- any other proposals to enhance value for money in the delivery of services at local level.

The chair of the Group presented its report to the Minister on 9 July 2010. The report makes 106 recommendations and has identified efficiency and other savings of €511m for the local government sector to be pursued in the short, medium and longer terms. These savings are comprised of €346m in efficiencies and €165m in improved cost recovery and revenue raising.

The Group's recommendations cover proposals such as: joint administrative areas for some sets of counties; reductions in senior management and other staffing levels; greater efficiency in procurement; more use of shared services, such as joint inspectorates and regional design offices; better financial management including annual reporting to the Oireachtas; and wider use of service indicators to help improve performance.

There was a comprehensive consultation process involving the key stakeholders, including Government Departments/Agencies, local authorities, business and local authority representative groups and the general public.

The realisation of the savings and other efficiencies identified in the Report involve implementation over time. In this context, a small Local Government Efficiency Review Implementation Group with an independent chairperson to oversee implementation of relevant recommendations within the timescales identified will be established shortly.

Source: [www.environ.ie/en/LocalGovernment/LocalGovernmentEfficiencyReviewGroup/PublicationsDocuments/FileDownload,23533,en.pdf](http://www.environ.ie/en/LocalGovernment/LocalGovernmentEfficiencyReviewGroup/PublicationsDocuments/FileDownload,23533,en.pdf).

The OECD peer review team heard some concerns that there is little central co-ordination, and that each department manages its own relationship with the local level independently, which generates issues of duplication and excessive bureaucracy. The Department of Environment itself noted that a traditional criticism was that they had in the past adopted an over strict supervisory approach. Efforts had therefore been made by the department to reduce reporting requirements, on which there had been progress, but against a growing demand from the public and *Teachta Dálas* for more information and reporting of local authority performance.

OLAM notes that a key concern for local authorities is the extent of the regulatory or administrative burden falling on local authorities from various sources (national government/government agencies/EU level). While there is some consultation with local authorities, particularly at a regional level, in regard to the regulatory development process, local authorities outline the need for a greater level of consultation particularly having regard to resource or financial implications, for example as regards environmental regulations.<sup>2</sup> Regulations need to give local authorities sufficient flexibility to set policies at local level and so that timeframes for transpose directives are realistic. At the same time, they highlight their own resource constraint to assess regulatory processes. OLAM reports that local authorities have been seeking to assess some of the key risks and implications of new regulations that they need to apply, including the issue of unfunded mandates.

These issues were reflected in a range of comments to the OECD peer review team from local authority representatives. These included the comment that “we should be better at doing *ex post* review (and was the RIA correct in anticipation of impacts)”; “Many burdens perceived by business and local authorities directly arise from EU directives. This is particularly difficult in the environmental area.” “Regulations are growing out of transposition of EU directives”. “It is not a question of more/less regulation, but of good regulation”.

The 2008 OECD report on the Irish public service underlines the need for a more co-ordinated approach at a national level in order to minimise the regulatory burden on local authorities.

### *Co-ordination between local authorities*

Although no specific local written policy exists in this area and informality is the key note, since 2002, the County and City Managers Association (CCMA) has established formal committee structures to enable a co-ordinated approach to regulatory issues. Local authorities use the CCMA networking structures to collaborate, to disseminate best practice, and to streamline procedures where possible in order to minimise the regulatory burden. The Committees also work with their respective counterpart functional Divisions in the Department of the Environment, Heritage and Local Government (*e.g.* Housing and Planning). In respect of waste management, local authorities co-ordinate regulation across waste regions. Strategic or management issues of common concern are dealt with at CCMA level and OLAM provides a corporate response on behalf of the system on a range of issues. At a regional level, regional authorities enable co-ordinated responses on strategic issues with nominated “lead authorities” led by county managers. Directors of service also co-ordinate specific work programmes at this level. A number of services are delivered or managed regionally (for example, fire services). A range of co-ordination mechanisms exist either at regional or national level on other policy areas, including water services. The OECD peer review team heard confirmation that a wide range of groups are active to bring local authorities together.

### ***Better Regulation policies deployed at local level***

Reflecting the fact that they have relatively few regulatory powers, the main activity focuses on the issue of managing regulations “from above”. Local authorities themselves reported that they have become increasingly better at doing consultation (citing for example the Housing Forum which carries out extensive surveys). Individually and collectively, however, local authorities are actively trying to reduce the burden of administration where it is in their remit to do so. They are also actively seeking the reduction of administrative burdens in their dealings with government departments and state organisations.

Initiatives by local authorities to support business include:

- Each county/city council has established a Business Support Unit (or similar arrangement) to act as a point of contact for businesses to ensure co-ordinated response (*e.g.* planning, water and roads).
- The Minister for the Environment has agreed (and signalled to the Oireachtas Committee on Economic Regulatory Affairs) to set up a Business Users Fora to improve consultation / responsiveness by local authorities to local businesses including in respect of regulatory requirements.

The Minister for Enterprise, Trade and Innovation met with members of the County and City Managers’ Association in June 2010 to discuss, *inter alia*, AB reduction. Following this meeting, officials in DETI have discussed how priority national ABs arising from Local Authority administration may be tackled in co-operation with the HLG. Additionally, the cross-Government prioritisation of IOs includes any priority IOs that have national scope and may give rise to substantial burdens for business, including those that govern Local Authorities. Once these IOs have been measured, by mid 2011, it is envisaged that simplification workshops will then, of necessity, involve the Local Authorities directly in the search for simplification ideas.

## Notes

1. OECD (2008), OECD Public Management Reviews – Ireland, Towards an Integrated Public Service, page 68.
2. The case of environmental enforcement is cited, where prescriptive standards and targets are set (for example criminal liability is an issue for local authority staff in respect of some environmental regulation but not always accompanied by dedicated resources).



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## *Annex A*

### The constitution and the courts

Article 34 of *Bunreacht na hÉireann* (the Irish Constitution) provides that "Justice shall be administered in courts established by law by judges appointed in the manner provided in this Constitution and... shall be administered in public".

Article 37.1 provides that "...limited functions and powers of a judicial nature, in matters other than criminal matters, [may be exercised] by any person or body of persons duly authorised by law... notwithstanding that such person or such body of persons is not a judge or a court..."

Article 34.3.2 provides that "...the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provision of this Constitution..". Lower courts with limited jurisdiction defined by statute do not have jurisdiction to adjudicate on the constitutionality of laws. Nonetheless, all courts, including the lower courts are obliged to enforce the Constitution.

Article 26 of the Constitution provides for *ex ante* adjudication on the constitutionality of bills referred to the Supreme Court by the President. This is a rare occurrence and there have been fifteen references since the coming into force of the Constitution in 1937.

The Treaties governing the European Communities and Acts adopted by the institutions are part of the domestic law of the State (European Communities Act 1972). Regulations are made by Ministers to give effect to this and they have statutory effect. EC Regulations apply directly and automatically without the need for domestic legislation. The courts are therefore obliged to implement European law and, in accordance with European law, all courts or tribunals may refer a question to the European Court of Justice under the Treaty to give a preliminary ruling on the validity and interpretation of an Act of a European institution.

The European Convention on Human Rights Act 2003 provides that "Interpreting and applying any statutory provision or rule of law, a court shall, insofar as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions." The High and Supreme Courts "...may... on application to it... by a party or of its own motion, and where no other legal remedy is adequate and available, make a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions." Such a declaration, however, does not "...affect the validity, continued operation or enforcement of the statutory provisions or rule of law in respect of which it is made individuals bring cases to the ECHR."

The Constitution provides at Article 34.2 for a Supreme Court which is a Court of Final Appeal. Courts of First Instance includes the High Court and also courts of local and limited jurisdiction with the right of appeal as determined by law. Appeal in these circumstances can be a full appeal *de novo* on all matters of law or fact. In some contexts the *Oireachtas* provides for a statutory right of appeal from a decision from an administrative body. The right of appeal is usually confined to an appeal on a point of law, although this need not necessarily be the case.

In addition, the High Court (and the Supreme Court on appeal) possesses an inherent jurisdiction to supervise the activities of inferior courts, tribunals and other public authorities. This power may be exercised in circumstances where the inferior body has exceeded its jurisdiction. The High Court is not concerned with the merits, but rather with the legality of the decision under review. This is known as judicial review.

## *Annex B*

### The RIA process

#### Step 1 - Summary of RIA

A summary sheet must be prepared for all RIAs in line with the following template. The sheet is designed to capture key information about the regulatory proposal being brought forward and the options considered. (More detail on this step can be found in Appendix A of the revised RIA Guidelines).

#### Step 2 - Statement of policy problem and objective

This part of the RIA consists of a brief description of the policy context and an explicit statement of the objectives that are being pursued. (More detail on this step can be found in Section 2, Page 16, of the revised RIA Guidelines).

#### Step 3 - Identification and description of options

This section of the RIA involves identifying and describing the various policy options for achieving the objectives. One of these options should be the “do nothing” or ‘no policy change’ option even where doing nothing is not a viable option in practice, as it can serve as a useful benchmark against which other options can be compared. Officials are also advised to consider alternatives to regulation and alternative models of regulation as potential options. (More detail on this step can be found in Section 3, Page 18, of the revised RIA Guidelines).

#### Step 4 - Analysis of costs, benefits and other impacts for each option

Once the options have been outlined, the costs, benefits and impacts of all options should be identified and analysed. The impacts should be monetised or quantified where possible. Significant proposals should be accompanied by a robust and structured multi-criteria analysis and where appropriate, a formal cost-benefit analysis should be used. All impacts should be considered, at a minimum, the impacts of the proposal on national competitiveness, socially excluded and vulnerable groups, environment, whether there is a significant policy change in an economic market, including consumer and competition impacts, rights of citizens, compliance burdens including administrative burdens and, North-South and East-West Relations, should always be considered. The consideration of compliance burdens should include consideration of the impact of compliance on small business in particular including administrative burdens. (More detail on this step can be found in Section 4, Page 21, of the revised RIA Guidelines).

## Step 5 - Consultation

Consultation is an integral part of the RIA process. Consultation with key stakeholders should take place as early as possible in the RIA process so that it can feed into the analysis of costs, benefits and impacts and where possible, a draft RIA should be used as the basis for consultation. A summary of views conveyed through the consultation process should be set out as part of the RIA. In some cases, it may not be practical to deal with every concern, but the RIA should also contain a brief response to key issues expressed. Where the final regulatory proposals do not take on board points/issues raised during the consultation process, this should be explained where possible. (More detail on this step can be found in Section 5, Page 32, and Appendix G of the revised RIA Guidelines).

## Step 6 - Enforcement and Compliance

This section of the RIA should describe the enforcement arrangements for the proposed options including issues such as what agency/body is to be charged with enforcement and how the Better Regulation principles of consistency and accountability are to be achieved under the enforcement regime. This section is closely related to the consideration of public service implementation costs and officials are expected to consider the compliance burdens on small business in particular. This step should also take into consideration what targets need to be achieved to meet the objectives of the proposal and how best to achieve these targets.

Detailed guidance on issues of compliance and enforcement is provided in the revised RIA Guidelines. A RIA must assess how a proposed regulation would be enforced, what level of compliance is required and any costs related to any particular stakeholder involved. In the context of compliance costs officials are advised that compliance costs are not just merely the direct charges or fees imposed by a proposal but that they are also any costs which arise from the necessity of having to comply with the regulations in question *e.g.* facilitating inspection. (See page 23 of the revised RIA guidelines for more detail on what is covered) Material on administrative costs and how to calculate them are also included in the revised guidelines (see Appendix E of the revised RIA Guidelines). (More detail on this step can be found in Section 6, Page 32, of the revised RIA Guidelines).

## Step 7 – Review

This step in the RIA is to identify mechanisms for periodically reviewing the regulations to evaluate the extent to which they are achieving the objectives/intended benefits. Performance indicators need to be specified and mechanisms for measuring these should also be identified including the data which will be used to conduct the measurement. (More detail on this step can be found in Section 7, Page 34, of the revised RIA Guidelines).

## Step 8 - Publication

All RIAs relating to primary legislation should be published on Departmental websites as soon as the bill is published (more detail on this step can be found in Section 8, Page 34, of the revised RIA Guidelines).

## *Annex C*

### Judicial review

Judicial Review is a mechanism by which an affected party can ask the High Court to rule on the legality of the actions of public bodies when exercising public law functions. This remedy assists in ensuring that the actions of public authorities have a proper legal basis. Persons adversely affected by the action of a public body may apply to the court for an appropriate remedy.

A feature in the Constitution which contributes to judicial review is the existence of unenumerated rights arising under Article 40.3 which covers the concept of constitutional justice.

Ministers and their departments are subject to judicial review. Certain other bodies, both public and private, may also be subject to review. Private sector bodies may be reviewed when they exercise a public function arising from a statutory power, but review may also arise in other situations. Certain functions of government departments and public bodies may appear to have a private law aspect and therefore should theoretically not be amenable to judicial review. This occurs, for example, in relation to contracts and other functions arising because of the corporate nature of the body when it is not exercising a specific public administrative function. It may be difficult to draw these distinctions in practice.

#### Basic principles

All decisions amenable to judicial review are subject to the necessity for conformity with European Community law and the Constitution. In addition to this basic requirement, the broad grounds on which a decision may be challenged can be summarised as follows:

- Legality and jurisdiction. Is the decision within legal powers and if so is it used for a proper purpose?
- Procedural fairness.
- The reasonableness of a decision.
- Compatibility with Human Rights law.
- Proportionality.
- Legitimate expectations.
- The obligation to give reasons.

## Legality

The first issue to consider in making a decision is whether the relevant power exists. The source of the power may derive from: (a) primary legislation, (b) subordinate legislation, (c) common law, (d) a European Community instrument, (e) the inherent executive power of the State.

All the powers exercised must, however, fall within the limits that apply under European law and under the Constitution. Otherwise the instrument itself may be unconstitutional or in conflict with Community law. Primary legislation passed since the 1937 Constitution is presumed to be constitutional but it is still subject to review by the courts in particular circumstances. If any doubts arise, legal advice should be sought.

If the decision-making power exists, the next issue to determine is whether the exercise of that power is within or outside permitted limits. A Minister, as a corporate entity under the Ministers and Secretaries Act, has a variety of powers but may not be able to use these outside the scope of the functions specifically granted by statute.

If a particular statute gives a power, but does not set out the principles and policies which must inform that decision-making power, a problem arises and it may not be possible to use that power in a lawful manner. Even where the principles and policies are set out, if a Minister purports to use that power beyond the scope of those policies and principles, such exercise will also be *ultra vires* and illegal. The power must be exercised within the scope laid down in the relevant statute.

A decision-maker should ensure that in exercising discretion irrelevant factors have not been taken into account and that the issues to be considered have been given proper weight. The statutory power may indicate what matters must be taken into account or these may be implicit. If it appears to a court that an irrelevant matter was taken into account in the decision-making process, this may invalidate the decision. If it appears that relevant matters were excluded this will also be a potentially fatal flaw.

If a particular power is exercised by someone who does not meet the qualifications laid down in the instrument which granted that power, the action may be illegal. Certain important decisions may not be delegated where it is clear that the decision-maker specified in the statute must exercise the discretion personally. If a statute gives a specific power to a Minister to delegate to a body or person, that requirement must be met and the matter cannot be delegated to parties not specified.

On occasions the legislation makes specific requirements directing the decision-maker in the exercise of the power. In some circumstances this may require the giving of a decision within a reasonable time or within a specific time limit. Any delay or failure to meet the time limit may be judicially reviewable and the decision-maker could be compelled by the court to give an answer. Lengthy delays, where there is a clear obligation to give a decision, will be reviewed by the courts especially where the rights of individuals have been adversely affected.

Certain basic principles would also be implied even though not specifically stated in the power. So, for example, it is not possible for the power to be used retrospectively unless expressly stated in statute. There is also a presumption that a power will not restrict a person's access to the courts.

## Procedural fairness

Procedural fairness when taking a decision is central to ensuring that a decision is not susceptible to judicial review. The concept is often referred to as 'natural justice' or 'constitutional justice'. The European Convention of Human Rights (ECHR) also deals with procedural fairness, particularly Article 6. Legislation itself may contain requirements such as the duty to consult or to hold an inquiry. Failure to abide by these requirements will render a decision susceptible to judicial review. The procedural requirements may be mandatory or directory in nature and it is only the mandatory requirements that will affect the validity of the decision. Determining whether a requirement is mandatory or directory is difficult and will depend on interpretation. In each case the intention of the legislator is important in determining whether the effect of non-compliance will impact on the validity of the decision.

Factors to be taken into account include the following:

- The importance of the relevant procedural requirement.
- The relation of that requirement to the general objects set out in the legislation.
- The relevant circumstances of the case.

Fair procedure consists of two elements:

- Eliminating bias and ensuring impartiality and independence.
- Ensuring the right to a fair hearing.

The first principle of fair procedure has traditionally been summed up as ensuring that no person should be a judge in his/her own cause. It is important to demonstrate that justice is not only done but is seen to be done. Any suggestion of bias can have serious consequences. Article 6 ECHR also requires that a tribunal, or decision-making body, which is determining civil rights or obligations, must be impartial and independent. There must be no suggestion of pressure or influence on the tribunal. The question is whether there is the appearance of a real danger of bias. If the decision-maker involved could have a conflict of interest, this raises the question of unfairness. A close connection between the decision-maker and one of the parties appearing before him/her can also result in the suggestion of bias and in those circumstances it would be safer to disqualify oneself from the decision-making process. Parties may waive any objection to the decision-maker if the connection or interest is clear but it is important in those circumstances that no pressure has been exerted. It is preferable to avoid situations where such risks arise and to maintain a situation where the decision-maker remains beyond reproach on these grounds.

The second principle of fair procedure arises from the right to represent one's own interests. For example, in cases of dismissal there must be adequacy of notice to the individual concerned, who should be told of the reasons for the dismissal and given sufficient time and opportunity to make representations. The same considerations apply where a licence may be revoked. An affected party must have notice of the matter and of the issues arising as well as an opportunity to respond.

In terms of a formal hearing, a party must be accorded sufficient opportunity to make his/her case. The following are some matters the courts have considered to be required for this purpose:



- A copy of the evidence.
- The right to cross-examine accusers.
- The right to refute any accusations by giving evidence.
- The right to address the tribunal in one's own defence.

### The reasonableness of a decision

The issue of reasonableness is central to a discussion of judicial review. When considering an application for judicial review a court should not substitute its own decision for that of the decision-maker. The judicial review process is not an appeal involving a rehearing. Instead a court is reviewing the legality of the decision. A decision will generally be overturned if it is unreasonable in the sense that no reasonable person considering the question could have arrived at the decision made. The level of evidence required to justify a decision may vary according to the context however.

However, the principle remains that the court will not substitute its own decision for that of the decision-maker and the sanction is limited to quashing the decision itself. A court will often focus on the decision-making process, rather than on the final decision, to see if it was flawed. If a body takes an irrelevant consideration into account this will make the decision vulnerable on the grounds of unreasonableness as it offends the essential procedural process.

The court will be concerned with whether the decision-making body has addressed itself to all the relevant factors. A mere mistake will not necessarily be a ground for quashing a decision. It is the overall effect of any oversight or irregularity that is crucial.

In Ireland, in judicial review proceedings, in order to assess whether a decision is legally correct, the courts have regard to the provisions of the Constitution and human rights law.

### Human rights law

The European Convention on Human Rights Act 2003 gave further effect to the ECHR in Irish law. The Act requires that any power should be exercised by a decision-maker or tribunal in a manner that meets the requirements of the Convention. ECHR principles will feature in judicial review applications. It will also be possible for affected persons to seek a separate declaration from the High Court that a statutory provision or rule of law is contrary to the Convention where no other legal remedy is adequate and available.

### Proportionality

The concept of proportionality is well established in European law. It requires that a particular measure or penalty should be proportionate to the object or offence against which it is directed. Mandatory penalties could breach constitutional property rights and the right to earn a living if not properly framed and if not subject to proper controls.

The principle of proportionality in Irish law is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to be reasonable. In applying the principle of proportionality, the court may have regard to the degree of discretion conferred on the decision-maker. A margin of appreciation should be allowed to the

decision-maker in choosing an effective means of fulfilling any legitimate policy objectives.

### Legitimate expectation

Legitimate expectation is another concept found in European and Irish law. For example, there are circumstances in which it would be unfair to permit an administrator to decide in a manner contrary to an earlier promise or representation, provided that promise is compatible with any relevant statutory provision. In relation to legitimate expectation, it is important to remember that discretion cannot be fettered and that a public authority must have the scope to act in the public interest.

A promise or expectation can be subject to review but such review may require allowing the affected party to make representations and have his/her views taken into account before a final decision is made. There may be an express or implied promise to a person or class of persons and this must be taken into account. This may be distinguished from situation where an error has been made. Provided that error is corrected promptly and the person to whom it is addressed has not acted to his/her detriment, the mistake may be rectified.

### The obligation to give reasons

Under section 18 of the Freedom of Information Act 1997 a number of public bodies are obliged to provide reasons for decisions that affect a person. In some instances, unless reasons for a decision are given, it may not be possible, in defending judicial review proceedings, to establish if natural justice and fairness have been provided. If the reasons for a decision are not clear it may be difficult to establish whether a party has received a fair hearing. The body exercising a quasi-judicial function may be obliged to provide reasons in order to demonstrate that it is properly administering its functions.

Where an individual's civil rights or general interests are affected there may be a requirement to provide a reasoned decision. Failure to do so may also be contrary to the ECHR. If there are statutory provisions requiring the giving of reasons these must be adhered to. In other cases careful consideration should be given to whether it is advisable to provide an explanation. A record of the decision and the basis for it may be a protection. It will demonstrate that due process was accorded to the individual, that a decision was not irrational and that relevant matters had been taken into account.