



2000
Statement on
Regulatory
Reform

Forfás



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July 2000



Council Members

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What is regulatory reform? It is a restructuring of the laws and institutions that govern economic activity so that they have, as a priority, a consumer orientation balanced by the need to promote investment in traded goods and services. Regulatory reform is not the same as deregulation: in some cases consumer interests can be better served by introducing new regulations, and in other cases by getting rid of existing regulations. The basic idea, however, of regulatory reform is that it should improve competition with a view to lower costs and increased choice. Regulatory reform can also reduce the administrative burden on enterprise. Regulatory reform is a particularly important field of policy action to improve competitiveness, because many of the traditional economic policy instruments are no longer available to Government. Other countries, including many that are our competitors, are moving ahead in the field of regulatory reform.

Although a number of steps have been taken in Ireland, there remains a lack of an overall policy framework. The institutional arrangements for efficient and effective regulation and competition continue to evolve. Some progress has been made in some areas but it is essential that the operating environment for business be enhanced by regulatory reform. Some key sectors where regulatory reform is needed have strong linkages to the whole enterprise sector, such as transport and business services.

This statement gives the Council's initial recommendations on steps that are urgently needed in the field of regulatory reform. Given the complexity of the subject and the rapid pace of change internationally, the Council intends to revisit the subject at regular intervals, particularly within the scope of its annual publications. The Council hopes that the present publication will focus increased attention on the subject of regulatory reform, and an appreciation of its significance for all sectors of the economy. However the main purpose of the statement is to point to the need for rapid action in the areas highlighted in the recommendations.

Regulatory reform in Ireland is a priority for enterprise policy, and is essential for competitiveness. There are a number of reasons for this:

- Many of the traditional instruments used by Government to encourage enterprise are no longer available, because of EU rules, EMU membership and other international agreements.
- Other countries have been placing considerable emphasis on regulatory reform, including many of our close competitors, because they see it as a way to improve competition, to increase the efficiency of markets and promote the interests of consumers, and, thereby, increase the international competitiveness of their enterprises.
- Changes in the regulatory system in Ireland have been fragmented and in many cases undertaken in response to market liberalisation as a result of EU directives or associated with particular privatisation issues.
- In Ireland a comprehensive review of existing regulation and its effects has still to be completed, and a comprehensive policy framework for regulatory reform, setting out the broad principles to be followed, has not yet been drawn up.
- Regulatory reform amounts to a redistribution of the costs and benefits of the existing system. These costs and benefits can be substantial. However, the costs of the reform itself are usually low, and the positive return on the “investment” can be very high if the reform measures put in place are clear, transparent and consistent with the objectives of national social and economic policy.

The OECD has drawn up a series of recommendations on regulatory reform, based on experience in a number of countries. These include:

- Adoption of broad programmes of reform with clear objectives and a clear implementation framework.
- Systematic review of regulations to ensure continued effectiveness.
- Regulatory processes should be transparent, non-discriminatory and efficient.
- Review and strengthen competition policy.
- Regulations reformed to stimulate competition, with elimination of regulation where possible.
- Eliminate unnecessary barriers to trade and investment.
- Identify linkages with other policy objectives (such as health, safety and consumer protection) and develop policies to achieve those objectives that are as efficient and complementary to the objective of regulatory reform as possible.

The Council believes that these principles are an appropriate starting point for regulatory reform for Ireland also. The principles should be examined in detail and elaborated in the light of Ireland's economic and social structure and long-term development goals. The Council also recommends consideration of the following principles:

- Regulation should be directed towards consumer interests.
- The quality of goods and services should be as much a concern of regulatory policy as any concern in relation to quantity: regulation should not only ensure that there is competition in the supply and demand for goods and services but that the resulting supply is of the standard required to meet consumer needs.
- The administrative burden of regulation should be consistent with its importance: in other words unnecessary red tape should be avoided.
- The costs and benefits of any proposed new regulation should be quantified and those of existing regulation reviewed at regular intervals.
- Where existing regulation is in place or where a new area of regulation is contemplated systematic arrangements to establish the views of those regulated and of the consumers of the regulated goods and services should be put in place.
- Regular (e.g. triennial) reviews of the regulatory arrangements in place should be undertaken and published by the Minister responsible.

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Existing Regulatory Framework in Ireland

The legal framework for regulation of economic activities in Ireland includes Common Law, the Constitution, EU law, and other international commitments such as WTO agreements. Primary legislation that affects all enterprises includes the Companies Acts, Mergers, Takeovers and Monopolies Control Act, Competition Acts, consumer legislation, and employee rights legislation. There is also a considerable body of delegated legislation (ministerial orders, etc.). Statutory bodies such as the Competition Authority, Office of the Director of Telecommunications Regulation (ODTR) and the Commission of Electricity Regulation among others, including Government Departments, also play a major role.

What has been done?

5.1 Competition Authority

The Competition Authority has the overall role of ensuring the application of general competition law across the economy. The basic framework for the Authority's activities is provided by the Competition Acts 1991 and 1996. In addition, much progress has been made in recent years in deregulating and introducing competition in the utilities sectors, largely in response to EU requirements.

5.2 Competition and Mergers Review Group (CMRG)

The Competition and Mergers Review Group was set up to review and make recommendations on mergers legislation and on appropriate structures. The Council welcomes its final report, which was published in March 2000. In this report, the CMRG put forward a number of recommendations covering both the role of the Competition Authority and the relationship between the Competition Authority and regulators.

5.3 Sector Specific Regulators

- In May 1998, the government decided to renounce its EU derogation and to liberalise voice telephony a year earlier than had previously been agreed with the EU and there has been full liberalisation since December 1998. An independent regulator (ODTR) was set up entrusted with the sector-specific technical issues such as access pricing, output pricing, licensing and the determination of universal service obligations. A further bill is proposed to clarify objectives of the regulation and takes on board the recent recommendations in the Discussion Paper of the Minister for Public Enterprise on governance and accountability. The Council looks forward to the early publication of this bill.
- The first steps to liberalise the postal service took place earlier this year and the recent proposals by the European Commission in this regard are welcome. These proposals require significant liberalisation of letter mail services, with outgoing international mail and express mail services to be liberalised by January 2003. The Council welcomes these proposals and urges the Government to give them significant consideration to ensure that enterprises receive the most competitive and efficient services possible while maintaining the social and regional objectives outlined in the NDP.
- The EU Directive 96/92 called for 28 per cent of the electricity market to be opened by February 2000. This has been exceeded, and at present 30 per cent has been liberalised. The recent announcement of full liberalisation by 2005 is therefore welcomed. The process of liberalisation is overseen by the Commission for Electricity Regulation.
- Under the Gas (Amendment) Bill, 2000 the Commission for Electricity Regulation will be charged with allocating scarce capacity in the natural gas network to power producers in order to ensure that there is sufficient electricity generating capacity to meet forecast demand.

- A new institution to regulate the financial sector is shortly to be recommended by the Government Advisory Committee set up last October.
- The legislation establishing an Aviation Regulator is expected to be law by the middle of the summer this year.
- The recent proposals of the Minister for Public Enterprise to the Cabinet Subcommittee on Infrastructural Development and Public Private Partnerships in relation to regulation of the bus market in the greater Dublin area are welcomed. However, it is essential that the bus market for Dublin be not viewed in isolation from other modes of transport in Dublin. Furthermore, the proposals once agreed must be implemented immediately.
- Following the report of the committee appointed by her to enquire into the regulation of the accountancy profession, proposals are now being prepared by the Tánaiste and Minister for Enterprise, Trade and Employment for significant changes in this regard, including for the establishment of an independent external oversight body.

5.4 Department of An Taoiseach: Action Programme for Regulatory Reform

The Taoiseach launched an Action Programme for Regulatory Reform in July 1999. This focuses principally on cutting “red tape”. The Programme includes stocktaking of existing legislation, a checklist for new legislation, and a central unit to drive the regulatory reform agenda. The early establishment of this unit is needed in order to assist in driving the regulatory reform agenda forward in Ireland.

5.5 Governance and Accountability Arrangements

The Minister of Public Enterprise has recently published a Discussion Paper on Governance and Accountability in the Regulatory Process. This paper addresses the relations between institutions and the general public and the responsibility of the regulators to look after the customer’s interest. It also addresses issues of overlap, enforcement, impartiality and transparency in the regulatory process, and the issue of whether a single regulator for a sector is preferable to a board of regulators for that sector. The scope of the paper covers those sectors for which the Minister has responsibility. In drawing up the Discussion Paper, the Minister had invited submissions from interested parties. The NCC therefore made a submission on the issues raised, and the submission is reflected in the present statement. The Council looks forward to the early implementation of this report.

5.6. OECD Country Review

At the request of the Government, the OECD is now undertaking a country review of regulatory reform in Ireland. This is an analysis of the regulatory regime in the Irish economy in the light of international experience of this field. It follows the lines of work already carried out by the OECD in a number of other member countries, and is due to be completed by mid 2001. The Council welcomes the OECD decision to examine the business services sector, which the Council has already been considering along with the transport sector (see annex 1). The Council looks forward to the completion of the OECD review of the regulatory situation in Ireland and considers this a valuable exercise in terms of benchmarking against international best practice and identifying areas that require reform.

The Council's recommendations are as follows:

6.1 General recommendations

1. A statement on national policy for regulatory reform should be drawn up: this should set out principles of competition and regulation, and establish the national objectives to be achieved through regulatory reform. It should set out specific steps that will be taken by Government, to give effect to the policy set down, with indications of timing and responsibility.
2. A systematic programme of regulatory reform should be initiated in the economy to eliminate regulations unnecessarily restricting competition (i.e. not outweighed by larger social gains for society).
3. Regulation should have regard to wider social objectives (e.g. universal service obligations, ensuring that access to the service in question is available to all parts of the country where appropriate).
4. Where social objectives are to be taken into account, market-based incentives should be considered rather than command and control rules.
5. The burden of red tape on small business should continue to be minimised consistent with national social and economic objectives.
6. Competition and regulatory legislation should be reviewed regularly and quickly to reflect the changing profile and needs of regulated entities and their customers, and changes in the business, technological and social environment.

6.2 Steps towards improved institutions

7. Establish and apply criteria for establishing a regulator in a sector: for intervention there should be clear market failure and it should be established that government intervention leads to a better outcome than the market can provide.
8. Determine (possibly sector-specific) regulatory objectives: e.g. the overriding criterion used should be the consumer interest, since this covers both households and the enterprise sector.
9. If subsidies to groups are needed, this should be provided in as direct a manner as possible: e.g. universal service subsidies where possible should go directly to high-cost (rural population) or low-income (long-term unemployed) consumers for the purpose of purchasing essential services. For instance, in rural areas, subsidies through forms of local taxation could go directly to the rural population: companies wishing to serve them would then compete for their custom.

10. Improve information diffusion on regulatory issues through the development of stronger links between regulatory bodies in Ireland and people working in the regulatory field at EU and OECD levels and in other countries. Regulatory bodies need a certain number of highly qualified staff whether the industry they are regulating is large or small. This poses difficulties in ensuring that each regulatory body is adequately staffed and that costs are contained. Therefore, co-operation would help in sharing and building on experience in regulation of different sectors, especially fast-moving ones, across countries.
11. New procedures for stakeholder participation are needed: soliciting the views of all interested parties, while time-consuming and expensive, is essential, to ensure transparency and support for the regulatory process and to ensure also that it reflects the changing needs of both consumers and the regulated entities. This should be done in a planned and systematic way e.g. through the establishment of 'user groups' and representatives of the regulated entities.
12. Clear, transparent and efficient appeal procedures are needed that bring certainty of decision and timing to the regulatory process. As already noted, external factors make it more and more urgent that decisions be taken quickly and definitively in regulatory matters. For the regulatory authorities, the possibility of building in an arbitration process in the event of disagreement should be considered, thus avoiding to some extent the lengthy and costly process of appeal through the courts.

6.3 Governance and accountability

With different bodies involved in regulation and competition policy, overlaps and conflicts can arise in the process. It is of course, a *sine qua non* that the independence of regulators be guaranteed, to copper fasten the effectiveness of the significant responsibilities that they exercise. At the same time, because of the range and depth of these responsibilities it is essential in the interests of a highly democratic society, such as that enjoyed in Ireland, that there be full accountability for the regulatory process.

13. The right of appeal to the courts against decisions of regulators is fundamental, but this right should not be used to frustrate the regulatory process and to preserve, even if not permanently, the benefits of uncompetitive behaviour.
14. Consideration should, therefore, be given to building binding decision into the regulatory process, so that appeals to the legal system would be limited to questions of whether the correct procedure was fully utilised.
15. The legal system itself should be adapted to facilitate the speedy resolution of the regulatory question that are referred to it and to further discourage frivolous and obstructive or vexatious applications.
16. In this regard the Council welcomes the proposal in the Minister for Public Enterprises recent Discussion Paper, entitled *Governance and Accountability in the Regulatory Process: Policy Proposals*, suggesting that appeals concerning the merits of regulators' decisions should take place only to a very limited degree. These appeals should be heard by a panel, established by the Minister, under statute comprising, typically, three independent persons who have the required expertise.

17. The industry regulators and the Competition Authority should be required to consult formally in relation to regulatory decisions with important implications for sectoral competition or vice versa. This could be facilitated through the establishment of an ad-hoc consultative Council on Regulation, bringing together the Competition Authority, the regulators, and the Director of Consumer Affairs. An Inter-Departmental Group would also be required to co-ordinate Government action in this field.
18. The relevant Minister should be empowered to approve, in consultation with the Minister for Enterprise, Trade and Employment, procedural rules agreed between the regulatory and competition authorities relating to overlapping activities.
19. The Competition Authority should have exclusive responsibility for competition enforcement, and sectoral regulators should have the promotion of competition explicitly in their objectives.
20. The effectiveness of competition legislation should be reviewed in line with the recommendations of the Final Report of the Competition and Mergers Review Group (March 2000).
21. There should be penalties for non- (or delayed) compliance with regulatory determinations that are commensurate with the commercial benefits accruing from the adoption of this course of action. In this regard the Council welcomes the recommendations set out in the recent Discussion Paper of the Minister of Public Enterprise on *Governance and Accountability in the Regulatory Process: Policy Proposals*.
22. Irish regulations should be reviewed in light of EU legislation and where possible Irish regulation should reflect EU competition policy to ensure consistency for enterprises.
23. Similarly a systematic and effective monitoring of regulatory innovations in competitor countries should be developed.
24. A statement of regulatory impact should be attached to all draft legislation and ministerial orders for consideration by Government and the Oireachtas.

7 Conclusion

Measures designed to reform regulatory structures and competition policy rarely receive unanimous support. As with any change in economic policy, reform of regulatory and competition policy will lead to losses for some members of society even when the end result is improved economic performance and productivity. When regulatory or competition policy reform results in increased competition for incumbent firms, the employees and shareholders of incumbent firms are likely to suffer economic losses. For all these reasons, universal support should not be a requirement for implementing changes in regulatory and competition policy. Solutions cannot be found that will please everyone, but the task of regulatory reform is one that will bring undoubted benefits to the economy as a whole, while not adversely affecting the broader requirements of social and environmental regulation.

Annex 1 Sectoral Focus

Regulation affects the performance, efficiency and competitiveness of a sector. The impact on consumers is the means by which the appropriateness of regulation in a sector may be best assessed. However, for most sectors the consumers are not just households but other enterprises. Analysing the sectoral impact of regulation should take account of the sector's linkages with other sectors. Analysis of linkage data¹ for Ireland carried out by Forfás suggests that particular focus should be placed on the analysis of regulation on the sectors of business services and on inland transport. Business services include the service of financial intermediaries, lawyers, accountants, and management and computer consultants. Inland transport includes both passenger services and freight. The NCC has considered aspects of the existing regulatory regime in these sectors and how changes might improve competitiveness. This annex contains recommendations in this regard.

A1 Transport

A number of activities under the general heading of transport have an important role in determining the competitiveness of the economy. They include road and rail transport, both local and long haul and both for passengers and for freight. Seaports and airports, since they contribute to the costs and quality of the inland and international transport services, are also important in this regard.

A.1.1. As a general principle, if it is not practicable to have competition within a sector, there should be competition for the right to operate within the sector. For instance, it may not be possible to have two seaports for a city, or to allow numerous bus companies to compete within a city. Nevertheless, there should then be competition for the right to operate the service in question.

Internal Surface Passenger Transport

A.1.2. Regulatory reforms to introduce competitive service supply within the field of urban transport should be introduced: the Council has already recommended this in its recently issued "Proposals on Transport Infrastructure, the Planning Process, and Public Transport". The Government should determine the kinds of and levels of services it wants to have in place and then the means by which this is to be achieved, whether through direct competition between operators or through competition for franchises.

A.1.3. Some competition in inter-urban (long distance) bus services already exists; it should be placed on a proper legal footing and extended. Unrestricted competition should be introduced subject to suitable quality of service safeguards. Universal Service Obligations should be provided on the basis of competitive franchise with subsidies provided in a direct as manner as possible.

Air & Sea Ports

A.1.4. Consideration should be given to the question of regulating sea ports, perhaps through extending the remit of the aviation regulator to include seaports: this is because there are, to some degree, similar problems in encouraging competition in both areas.

¹ Analysis of CSO input-output data identified business services and inland transport as the two most important in terms of forward and backward linkages.

A.1.5. At present the national road and rail infrastructure is not of a standard to allow Dublin, Cork and Shannon airports to compete with one another for passengers with origins/destinations in different parts of the country. If, for instance, there were fast road and rail connections between airports and the main population centres, as can be found in other countries, then it would be possible for the airports to compete. This could then be ensured by encouraging multiple operators of airport services, or, if it can be shown that there would be losses of scale and scope as a result of this, then it is recommended that there should be a franchise competition to provide unified airport services. Measures should also be taken to encourage more competition between Dublin and the Belfast airports.

Road Freight Services

A.1.6. An assessment should be made of the effectiveness of existing enforcement practices for compliance with regulatory requirements especially in relation to tachograph and load factors. Within the framework established by the Road Haulage Review, targets for enforcement need to be established and the necessary resources for the Gardai to achieve these need to be deployed.

Information Requirements

A.1.7. The CSO and Eurostat should collect more transport costs data so as to allow analysis of trends in competitiveness and costs in the sector

A.2 Business services

This sector includes the services of financial and insurance auxiliaries; real estate; services of lawyers, accountants, tax advisers, management consultants; publicity services; computer and data processing services, and also services of renting of movable goods without accompanying personnel. All these activities have an important role to play in the competitiveness of the enterprise sector as a whole. Business services account for about 13 per cent of all purchases of goods and services by the other sectors of the economy.

The fact that some of these sectors are not traded internationally does not make them irrelevant to Ireland's competitiveness. In a sense the reverse may be true. If a certain service is not traded internationally, foreign competition is not playing a role in keeping down the costs of these business services on the Irish market. However, in most business services there is adequate competition and a good quality of service. But in order to ensure that the sectors function optimally and that international competitiveness is sustained, the details of regulation in these sectors need to be kept under review. Regulation can determine entry, e.g. what qualifications are needed. It can also affect price competition, the types of services offered and the degree to which they are used.

Two important activities, law and accountancy, are essentially self-regulated. The governing body of the profession in question controls standards, qualifications and conduct. However the State gives statutory recognition to the qualifications. For instance, companies are obliged to have audits carried out, and the auditor has to be a member of one of the recognised accountancy bodies.

A.2.1. The existing self-regulating systems (law, accountancy) should be supplemented by some form of external overseeing, initially designed to collect information on how these sectors work in practice. At present, not enough is known about the way the systems work in practical terms to determine whether changes in regulation could bring improvements. Standard economic data that is used in determining whether the market is functioning well is not available for these sectors.

A.2.2. There should be a move away from control of education and entry to a sector by the sector's self-regulatory body. The state licenses practitioners and so it should have a direct input into decisions on the quality of entrants who are accepted into training programmes. In general, anything that has the effect of quantitative restriction is not compatible with competitive supply of services, and should be eliminated.

Legal services.

The supply of legal services appears to be adequate to ensure competition, and this suggests that the costs of legal services should be competitive. However the Council feels that the present method of determining legal fees should be examined in order to ensure that market forces operate adequately and that legal costs to enterprises are minimised. A further difficulty is that there are capacity constraints in the Courts system itself, so that cases take longer than they should and thus cost more.

A.2.3. Consideration should be given to effecting changes in the manner in which barristers' fees are arrived at by means of either changes in taxing or changes in the responsibility for fees or both. Solicitors might be given an incentive to secure low cost supply of barristers' services. In the absence of a unified legal profession this will require either a change in the taxing system or some form of obligation on the part of solicitors to assume responsibility for paying barristers' fees while the client pays the solicitor a single fee to cover all costs.

A.2.4. The cost-effectiveness of the Courts system needs to be improved, and consideration should be given to introducing two daily High Court sessions of three hours to replace the single daily session of four hours, with additional judges appointed as required. In general there is a perception that proceedings are too lengthy, and there is a very low level of predictability of access or of time in Court. These together affect the competitiveness of the economy as a whole.

A.2.5. In the High Court, which is the most important Court for business purposes, court procedures and such items as proofs result in unnecessary time being taken up in presentation of evidence. Recent rule changes governing the management of cases in Britain provide an example of how improvements could be made in this respect. These are designed to reduce the time a case takes in Court and to increase the ability of a judge and the parties to a case to estimate the time requirements, which both reduces unpredictability and improves the ability of the Court system to manage its resources efficiently.

Surveying

At present each potential party to a property transaction is obliged to obtain a separate surveyors report. Given the legal complexities in terms of liability and the commercial realities in terms of confidentiality, it is not clear that a change in the law would achieve a reduction in costs, but the possibility is worth examining in more detail. Accordingly the Council recommends that:

A.2.6. Replication of surveying costs should be examined in detail to see if improvements could be introduced by way of regulatory reform.

List of Publications

Annual Competitiveness Report 1998	March 1998
The Competitiveness Challenge Summary Statement 1998	March 1998
Statement on Telecommunications: A Key Factor in Electronic Commerce and Competitiveness	November 1998
Statement on Skills	December 1998
Annual Competitiveness Report, 1999	May 1999
Report on Costs	June 1999
Statement on Social Partnership	September 1999
Proposals on Transport Infrastructure, the Planning Process and Public Transport	March 2000
The Competitiveness Challenge, 2000	May 2000
Annual Competitiveness Report, 2000	May 2000
Statement on Telecommunications, e-Business and the Information Society	July 2000
Statement on Regulatory Reform	July 2000

