



**REGULATION IN THE WASTE INDUSTRY IN IRELAND**  
**A Discussion Document**

**Presented by Greenstar**

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## OVERVIEW

- i. The scope of regulation in modern economies is extensive and covers a diverse set of instruments by which governments set requirements on citizens and businesses. Regulation embraces laws, statutory instruments, subordinate rules issued by different levels of government and rules set by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers.
- ii. Regulation reflects public policy. However, overall policy embraces wider issues than will be contained within the scope of responsibilities of a regulatory institution.
- iii. Irish government policy recognises that in certain cases, either more or less regulation, may be appropriate. The overall objective is better quality regulation.
- iv. The regulatory framework for waste management in Ireland has developed significantly over the last decade or so. This has been seen in policy initiatives by Government, in new domestic laws, and the application of EU laws in institutional development, and by greater involvement by citizens and enterprises in waste management.
- v. The issue is whether the type of regulatory system that has emerged serves consumers and businesses well, fulfils general environmental objectives and is efficient in economic terms while generating the required investment.
- vi. Local authorities have had a primary role in waste management. In 1998, in “*Changing Our Ways*”, a key role for the private sector was validated.
- vii. However, there are a number of regulatory anomalies, which the development of the waste management sector has highlighted.

- viii. These relate to confusion and inherent conflicts of interest on the different roles of local authorities, such as different responsibilities for household and other wastes, their operational and commercial activities as against their physical planning and enforcement roles, their regulatory functions and in their “*inside track*” on commercial opportunities arising from the nature of the waste management planning system.
- ix. There is insufficient regulatory certainty for the private sector in this context. Nevertheless, both local authorities and the private sector have worked intensely over the last decade to develop a modern and professional waste management industry.
- x. The regulation of the waste sector should be seen in the context of the six core principles of good regulation announced by government. These are “*necessity*”, “*effectiveness*”, “*proportionality*”, “*transparency*”, “*accountability*” and “*consistency*”.
- xi. The “*necessity*” for significant waste regulation is evident. Market mechanisms are also important in this context. The “*necessity*” for regulation does not of itself mean that an independent sectoral economic regulator is essential.
- xii. “*Effectiveness*” relates to the importance of achieving objectives, to the need for a results-orientated approach and to minimise unintended consequences. Historically, compliance and enforcement in Ireland have been poor. Even with the improvements in recent years, these issues will need to be further addressed in any modified regulatory system.
- xiii. “*Proportionality*” is concerned with striking a balance between the advantages of regulation and the constraints that it imposes. In the White Paper, the government states a general intention for the economy to regulate as lightly as possible given the circumstances and to consider alternatives such as taxes, subsidies, tradable permits, information campaigns or a mix of such instruments.

- xiv. There are a number of examples of these instruments in the waste industry. However, given the size of potential rewards in Ireland from large-scale illegal activity in wastes, questions arise on the strength of the enforcement structure and the severity of the penalties imposed.
- xv. “*Transparency*” is related to the clarity and openness of government and public administration, to the need for clear and straightforward regulations, and for consultation norms to facilitate more dialogue before regulation.
- xvi. Where Public Service Obligations (PSOs) or Universal Service Obligations (USOs) arise, there is need for clarity on their scope, rationale and cost.
- xvii. The view is expressed in the White Paper that “*transparency*” assures and satisfies investors that there is a “level playing field”. In the waste sector, as stated earlier, there are serious issues in this respect. The roles of local authorities and the “*rules of engagement*” for public/private partnerships need to be clarified, even though co-operation on practical matters can work well. Consultation arrangements between central government and the private waste management industry are direct and appropriate.
- xviii. On “*accountability*”, the focus has been to get the main elements of a regulatory system up and running, as Ireland was a late starter. The “*accountability*” dimension is evolving. The anomalies in the functions of local authorities are significant under this heading also.
- xix. In the White Paper, “*consistency*” in the regulatory process is considered important in providing predictability and legal certainty to individuals and groups. Sharing of resources between regulatory agencies is discussed. In this respect, the aim of government policy will be to minimise the creation of new regulatory authorities. The

functions of many independent regulators have been devolved from parent government departments.

- xx. The assumptions made in this document are that the regional waste management planning system will remain, that local authorities will continue in the “waste” market as significant players, and that the physical planning system will develop as announced by the Minister in 2005.
- xxi. Any modified regulatory system should take account of the principles for “*better regulation*” announced by government, the overall public policy framework, and the merits of rationalising existing regulatory arrangements in a more effective and transparent way as against establishing a new green-field regulator.
- xxii. The preliminary view offered in this paper is that the rationalisation of regulatory arrangements may be a more beneficial approach than planning new structures.
- xxiii. In any event, the anomaly of local authorities fulfilling both a significant regulatory and commercial role will need to be addressed.
- xxiv. A rationalisation would include elements such as the following:
  - removing all purely regulatory functions from local authorities on an incremental basis;
  - transferring such functions to the EPA or a sub-division of it;
  - such a transfer would include enforcement functions and licensing powers (such as for facilities and collection). This would enhance the perception of independence, transparency and consistency, and of a level playing field for both private and public sectors;

- attention to cross-subsidisation issues, for example on landfill operations and post closure obligations;
- a formal consultative role for the private sector and other community interests in the waste management planning system;
- enhanced involvement of the Competition Authority;
- consideration of a redress mechanism for consumers of services.

## SECTION ONE

### Regulation: Definition and Scope

1. In order to determine the merits or demerits of regulation, or various models of regulation, both generally and in particular economic sectors, it is useful at first to examine certain definitions and the scope of what is meant by regulation.
2. An OECD Report on Regulatory Reform (1997) stated:

*“There is no generally accepted definition of regulation applicable to the very different regulatory systems in OECD countries. In the OECD work, regulation refers to the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers”.*

3. In the OECD view, regulations fall into three categories:

Economic Regulations;

These intervene directly in market decisions such as pricing, competition, market entry or exit.

Social Regulations;

These protect public interests such as health, safety, the environment and social cohesion.



## Administrative Regulations;

These are paperwork and administrative formalities, or 'red tape' whereby governments collect information and intervene in individual economic decisions.

4. The Government White Paper "*Regulating Better*" (January 2004) is the main reference point of government policy on regulation. In its "*Glossary of Terms*" (page 4), it refers to various meanings of the terms "regulation", noting that in the White Paper the term "*regulation*" is generally used to mean primary legislation enacted by the Oireachtas or secondary legislation enacted by Ministers empowered under primary legislation. Depending on context, it can also mean "to regulate" in the economic and social sense of the word. For example, regulation of telecommunications would be taken in a general sense to include the sectoral regulator Comreg, the relevant government department and the body of regulation that covers telecommunications. A wider definition of regulation would include the Irish Constitution, and the Treaties, rules and regulations of the European Union. It is noted that such a definition might "*also extend to subsidiary rules and regulations, such as those made by Local and Regional authorities, and self-regulatory bodies with regulatory powers*".
5. In the "*Overview*" the government recognises that regulation is an integral part of the process of governing and will continue to be so. It is stated that the government is not against regulation. "*Rather it is in favour of Better Regulation*".
6. Reference to areas where legislation and subsidiary regulations have a critical role to play in economic and social life include the promotion of the efficient working of markets and sustainable development, and the protection of the environment. It is recognised that, in certain cases, less regulation may be appropriate, while in other

cases more regulation may be required to achieve particular outcomes. *“In all cases, however, there should be better quality regulation”*.

7. The OECD report *“Regulatory Reform in Ireland”* (2001) referred to international comparative indicators, which indicated that by the end of 1997, Ireland was among the least regulated countries in the OECD. The synthetic indicators combining measures of different kinds of regulation across the economy indicated that on a series of dimensions Ireland had a light handed regulatory environment. According to the OECD, *“these indicators confirm the main points of this review: the remaining regulatory problems in Ireland are primarily those associated with an inefficient state sector, weak competition policy and unfinished pro-market regulatory regimes, rather than the traditional agenda of state ownership, legal monopolies and explicit barriers to entry”*.
8. The scope and meaning of the word *“regulation”* has been explored above in terms of contemporary relevance. There appears to be a broad harmony between the OECD advisory comments and the approaches of the Irish government.
9. A general comment is worth making at this stage. One interpretation of *“regulation”* as defined in the widest sense would be that it reflects or should reflect chosen economic and social goals and strategies in the appropriate legislative and institutional context. In this sense, *“regulation”* is, or reflects, public policy.
10. However, that is not to say the choice of particular forms of institutional regulation such as a government department, a general regulator such as an independent competition authority, a local authority or a self-regulatory body, is a substitute for overall policy. The best institutional choice for various types of control and enforcement in a specific economic sector may, depending on the context, be of major or minor importance. Such a choice is, however, a component of policy. The overall framework of policy should not be delegated to any form of institution in the

expectation that debate on overall policy issues will be contained within the scope of such an institution.

11. It is recognised in the "*White Paper*" that legislation and subsidiary regulations have a critical role in relation to the promotion of efficient working of markets and the protection of the environment. The next section of this document refers to the general regulatory framework for the waste industry in Ireland, and raises certain regulatory issues. Later, the situation in the waste industry is discussed in the light of the six principles chosen by government for "*Better Regulation*".
  
12. In mid-July 2005, the Taoiseach announced the establishment of a new Business Regulation Group to tackle regulatory and administrative burdens faced by the Irish business community. It will be in the form of a Forum, independently chaired, with senior public and private sector members, and is expected to be operational by end-September. Two documents were also launched "*A Report on the Introduction of Regulatory Impact Analysis*", and "*Reaching Out; Guidelines on Consultation for Public Sector Bodies*".

## SECTION TWO

### CURRENT REGULATORY FRAMEWORK FOR THE WASTE INDUSTRY

13. The waste sector was the last significant area of environmental management to be subject to modern policy development and legislation. Historically, there had been legislation on public health functions of local authorities and a Litter Act in 1982. Local Authorities with landfills were responsible for permitting the disposal of waste by the private sector. There was no external regulation of their own collection and disposal activities.
14. More recent developments in legislation and regulation for waste management reflect broader economic and social priorities, the increasing imperative to implement and enforce EU legislation, and the development of public opinion. What is emerging also is an increasing awareness that environmental protection and the application in various ways of the “*polluter pays*” principle is not costless. What was a scantily regulated waste management industry, in terms of enforcement of laws and regulations whether in the public or private sector, has gradually become more professional and mainstream.
15. In Ireland, over the last decade or so, there has been an accelerating emphasis on policy development, the emergence of strategic planning at local and regional level, a large volume of new legislation and regulations and the greater involvement of citizens in waste management programmes. Governments have set an overall policy framework as expressed in the documents “*Waste Management, Changing Our Ways*” (1998) through to “*Preventing and Recycling Waste – Delivering Change* (2002) to “*Taking Stock and Moving Forward*” in 2004.

16. From the early 90s, new legislation had begun to flow, and was accompanied by a significant volume of regulations. The legislation was largely related to implementing EU directives. The main legislation included:

- **The Environmental Protection Agency Act (1992).** The EPA, for example, caters for a licensing system of integrated pollution control, criteria and procedures for landfill sites and a wide range of other areas. It is an 'independent body' with statutory functions. It is also responsible for the National Hazardous Waste Management Plan;
- **The Waste Management Act (1996).** This, inter alia, provided for a new waste management planning system by local authorities or groupings of local authorities. Local authorities were empowered to issue waste permits for collection. They were also the primary planning authority under separate planning legislation for private sector waste projects;
- **The Planning and Development Act (2000).** This was a major updating of planning law with an impact on waste management in certain areas.
- **The Waste Management Amendment Act (2001).** This gave powers over waste plans to County Managers rather than elected Councils where plans had not been made, and provided for a landfill levy, a plastic bag tax and the Environment Fund etc.
- **The Protection of the Environment Act (2003).** This gave all powers to review, vary or replace a waste management plan to County Managers. Charges on householders for waste services would also be decided by managers. Waste management plan objectives were given priority over those in a development plan. In addition, a planning application cannot be refused solely on the grounds that the site is not included in a waste management

plan, provided that the facility would facilitate the objectives of the plan. While the local authorities continued to have certain enforcement functions, the EPA now has greater powers to see that local authorities fulfil their statutory functions in relation to environmental protection. As well, the EPA is now obliged not to grant a waste licence unless the activity concerned is consistent with the objectives of a waste management plan. There were also new provisions relating to charging for disposal of waste in landfills, which would require an operator to be in a position to meet long-term costs, not just during the operating period, but long after closure. As well, penalties for offences were increased.

### **Some Key Issues in Waste Regulation**

17. The net issue is whether the type of regulatory system that has emerged is appropriate for citizens and consumers in terms of the need for provision of essential services, whether it serves economic efficiency and general environmental objectives, and whether it is commercially acceptable to business in terms of generating the investment required to meet such needs.
  
18. In this respect, “*Changing Our Ways*” signalled an important development for the role of the private sector and encouraged the public/private partnership approach. It noted that up to then, local authorities had “*sought to involve the private sector only in a limited way, mainly in the contract collection of household waste*”. This was “*an unnecessarily restricted approach*”. It was stated that there was “*considerable scope for increased participation by the private sector in all areas of waste management in Ireland, and authorities should encourage and facilitate business involvement in the provision of waste management services*”. Private participation could contribute much needed capital investment, specialist expertise in relation to emerging technologies and a better understanding of the dynamics of the market place.

19. A key role for the private sector was therefore validated in policy terms. Since 1998, both public and private sector waste management entities have responded to both market needs and regulatory pressure.

## **Competition Law**

20. Irish competition law is a combination of the Competition Acts (especially 2002) and Articles 81 and 82 of the EU Treaty. Section 4 of the Act is very similar to article 81 and prohibits anti-competitive acts among competitors and other participants in a business sector, e.g. cartels, price-fixing, illegal concerted practices, etc. Section 5 of the Act and article 82 prohibit “abuse of a dominant position”. There are various defences to sections 4 and 5 and the respective EU treaty articles and there are also some special legal provisions. One is article 86 (2) of the EU Treaty, which is referred to below. There is no corresponding section in the Irish Competition Act.
21. Article 86 (2) of the Treaty states: *“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community”*. Potential regulatory issues relevant to waste management in Ireland arise in this context due to the dominance of local authorities in certain waste services.

## **Local Authorities**

22. Looking at the waste management industry as a whole, a number of regulatory anomalies are evident, arising mainly from the core historical role of local authorities in dealing with waste. These include:

- a level of discrimination in favour of local authorities as commercial operators;
- an “inside track” for local or regionally grouped authorities arising from the nature of the waste management planning system and other arrangements;
- a lack of regulatory certainty for the private sector and absence of defined rules of engagement for public/private partnerships.

23. In fact, there can be confusion and inherent conflicts of interest regarding the different roles of local authorities in waste management.

24. For example, local authorities have a statutory responsibility to deal with household waste or to see that it is dealt with. No similar responsibility arises for commercial and industrial waste, where local authorities revert to a mere planning role.

25. Many local authorities are directly engaged in landfill provision as a commercial service. In fact, until the KTK development in Kildare, local authorities controlled all public landfill facilities. Many of them are engaged directly in waste collection and other services also. In this context, serious conflicts can arise between such commercial roles and other statutory responsibilities. A number of these are now outlined.

### ***Waste Management Planning***

26. The waste management planning system is one such potential area of conflict. Local authorities, either alone or in groupings, are statutorily designated to develop and operate the waste management planning system. In this context, can they be



reasonably expected to ignore or put to one side their own commercial priorities? In the first cycle of plans, developed mainly between 1997 – 2001, there was no or little private sector input or involvement. In the current cycle, there is provision for submission and engagement. The key difficulty however remains; local authorities are commercial operators of their own activities and strategic planners for the industry as a whole. County managers are under severe pressure to maximise revenue locally, while at the same time driving overall waste management plans.

### ***Planning Permission***

27. As regards physical planning, local authorities, under current arrangements, decide in the first instance on private sector planning applications. Such applications may relate to activities, which are directly competitive with their own revenue earning activities as commercial operators. By contrast, waste planning applications from local authorities go directly to An Bord Pleanála. A ministerial announcement on 1<sup>st</sup> June 2005 indicated that by means of future legislative change major transport, environmental, and energy projects proposed by the private sector that are of strategic importance will be referred directly to the Board by the County Manager and will not need local planning permission. It appears therefore that certification from the relevant County Manager will be required. This again would raise the issue of a conflict of interest between commercial and regulatory roles at local authority level. At present, local authorities have a time advantage and an advantage in reduced expenses by being enabled to go directly to An Bord Pleanála for their own commercial and other waste management activities.

### ***Facility and Collection Permits***

28. Another area where a special regime applies relates to the waste facility and waste collection permit system. Local authorities adjudicate on private sector permit applications. In practice, the handling of applications may be delayed, sensitive

commercial information may be requested, and onerous conditions may be proposed with the grant of a permit. The commercial operations of local authorities are effectively not subject to a similar public, administrative and legal process. Fees are also payable with the permit applications.

### ***Grants***

29. In 2002, a capital grant scheme in excess of €100m was announced for recycling and recovery infrastructure under the National Development Plan. Applications were invited from the private sector and costs incurred in developing applications. However, as matters turned out, the grant monies were allocated exclusively towards local authority infrastructure and enforcement initiatives.

### ***Enforcement***

30. Local authorities have an enforcement role in many aspects of waste management law and regulation, while also being involved in operations themselves. Under the 2003 legislation, the EPA has a number of enforcement powers, which can override local authorities. Perhaps, in the past, local authorities tended to ignore both their own and private sector transgressions. In terms of a level playing field, however, the management of both commercial and enforcement functions in the same public authority is unsatisfactory, especially in the context of both a growing business sector and increased emphasis on enforcement activity.

### ***Restrictions on Inter-Regional Transfers of Waste***

31. Historical arrangements regarding inter-regional waste transfers (for example, Dublin waste to Kill which is in the Kildare region) effectively pre-dated the new planning system and were allowed to continue. KTK was the only commercial private landfill there at the time. Under the first batch of waste management plans, which were directly relevant to new private sector investment, there were severe restrictions on

new inter-regional transfers of waste. The Minister's Directive of April 2005 addresses this issue. The expectation is that the contents of the Directive will be reflected in:

- the structure and content of the new cycle of regional waste management plans;
- the evaluation by local authorities and An Bord Pleanála of private sector waste project planning applications.

### ***“Fit and Proper Person” Standards***

32. A *“fit and proper”* person criterion is relevant to the granting of waste licences by the Environmental Protection Agency to private sector operators. Local authorities are not subject to this requirement. At the same time, a local authority is empowered under waste facility permit and waste collection permit regulations, if it appears to it that the permit holder is not, in its opinion, a fit and proper person to hold the permit, to revoke or suspend the permit. The local authority could act in this way for a number of reasons such as by reason of an offence committed by the person involved under waste management legislation, or the lack of the requisite knowledge or expertise to carry on the activity.
33. In summary, the Irish regulatory system for waste management in institutional terms embraces a number of key features:
  - an intensified departmental, ministerial and government focus on policy development in waste management and related environmental areas in recent years which is continuing;
  - a regional waste management planning system driven by local authorities or groupings of local authorities without formal co-ordination at national level;

- local authorities directly engaged in:
  - operations (landfill provision, and a range of other waste services either directly, or by sub-contracting to the private sector or by PPPs);
  - devolved regulatory functions (facility and collection permits etc);
  - physical planning adjudications (for the private sector);
  - enforcement of laws and regulations (now over-shadowed by the EPA).
- the Environmental Protection Agency (EPA) engaged in licensing, standards, inspection and increasingly in enforcement (the Office of Environmental Enforcement);
- An Bord Pleanála engaged in dealing with direct planning applications from local authorities and appeals from the private sector on applications decided in the first instance by local authorities.

34. Of course, the industry is subject, like other commercial sectors, to the law as administered by various institutions, such as the Competition Authority (which may become more relevant to waste in the future), and the Health and Safety Authority.

35. In this section, certain regulatory issues have been identified and difficulties arising for private sector participants in the waste management system outlined. Some of these will be further explored in the next section in the context of the government's six principles of "*Better Regulation*".

36. This document is not intended to convey that there have not been significant opportunities for investment by the private sector over the last decade, or indeed at present. Public policy has sought to address waste management priorities by focusing institutionally on actions by the local authorities, which were the traditional instruments available, while at the same time proffering a greater role for the private sector. In spite of regulatory anomalies, much has been achieved by the dynamic that has emerged in terms of sub-contracting activities, partnership arrangements and practical co-operation between the local authorities and private sector operators. This relationship is at times uneasy or marked by lack of compromise, but sometimes productive. In order to provide high quality services with economic efficiency, the regulatory regime for the future, while respecting the priorities of government policy, should ensure a predictable and fair “*playing pitch*” for all commercial participants.

## SECTION THREE

### THE SIX PRINCIPLES OF BETTER REGULATION AND THE WASTE INDUSTRY

#### *Background*

37. In the White Paper it is stated “*that the actions that will be taken arising from the application of the principles in the White Paper*” will tackle both the “stock” of existing regulation and the “flow” of new regulations. Some changes in regulatory architecture in recent times are referred to. For example, in the “Overview” to the White Paper, it is stated:

*“Like many OECD countries, the role of the Irish government has changed in some areas, from being service provider to being service regulator. Many regulatory decision-making functions have transferred to specific sectoral regulators, in a bid to open competition and promote innovation. These new independent regulators have been established in areas such as communications – both telecommunications and postal services – as well as energy, aviation and financial services. Further developments are expected in the transport sector. The new regulatory bodies do not necessarily have the same structure or powers”.*

38. The White Paper sets down six core principles of good regulation as follows:

- Necessity;
- Effectiveness;
- Proportionality;
- Transparency;
- Accountability;

- Consistency.

There are no specific references to the waste management industry in the White Paper. In this document, preliminary comments are offered on the waste sector in relation to the principles.

### **“Necessity”**

39. The “*necessity*” principle is about ensuring that regulatory policies and tools are deployed only when required and that the need for particular regulatory institutions is kept under regular review. In the economic context, it is considered important to assess whether or not the existing situation can be improved through market mechanisms, and to consider whether intervention will ensure the intended result or be outweighed by the unintended consequences. Evidence based policy making is a priority, and also adequate data to allow proper rigorous analysis. It is noted that regulations are the legal expressions of policy choices, but that policy outcomes can be influenced by the decision to use a regulation as the means of implementing the policy as well as the quality of the regulation itself.
40. It was noted that there were over 500 public agencies/bodies in Ireland, which have a regulatory function, either as a rule maker or rule enforcer. This includes more than 100 local authorities that regulate on a local basis.
41. In discussing governance and accountability, the White Paper refers to sectoral regulation as often having been set in the context of a three-part model of state activity; policymaking, service provision and regulation. In certain markets such as energy, public transport and communications, Ministers and their Departments have sometimes engaged in all three activities simultaneously by setting policy for the sector, owning the only service provider and regulating the market. In recent years, there has been a move towards the opening of such markets, to competition, and

thereby “*it becomes undesirable for a single part of the state (typically a Minister and a Department) to continue to regulate the behaviour of all market players, while owning the dominant such player*”. This has led in several instances to the establishment of “*an independent economic regulator who takes on responsibility for exercising the regulatory functions, within a policy context set by the Minister and the Government*”. Also, it is stated that in cases where the rationale for establishing an independent sectoral regulatory body is to facilitate a sector’s transition to the open market, the need for regulation ought to diminish in line with the development of competition in the sector.

### **Waste Management and the “Necessity” Principle**

42. There can be no serious argument, on environmental protection grounds, against a comprehensive regulatory system for waste management. EU obligations have created no option in any event. The real issues are the appropriate limits of the system and how it is structured and applied.
  
43. There are some features in common between the old “*monopoly*” providers in airlines, telephones, post, electricity, public transport, etc and the historical traditional role of local authorities in waste management. However, there are some important differences. Up to a few years ago, waste management was a fragmented activity and only partially market related, with a lot of formal regulations that were either largely ignored or unenforceable in the culture of the times. The application of EU obligations, and the imposition of waste charges, has brought large segments of the sector nearer or into the market system. Also, local authorities were not and are not a “national” monopoly, owned by anybody. They are statutory second-tier organs of government, which engage in some commercial activities in waste management and in other areas, which may turn out to have a near monopoly position in certain local markets. Along with the private sector, they have been creatively developing professional waste management services over the last decade.



44. A case can be made on the “*necessity*” principle for an independent regulator for waste management. The other principles will also have to be considered. It may be that regulatory policy can be approached by evaluating what can be done by rationalising the existing regulatory structure on a planned incremental basis. One objective would be to promote competition in the various waste markets and to create a visibly level playing pitch speedily rather than engaging with the longer process of structuring and planning a new green-field institution.

### ***Effectiveness***

45. This relates to the achieving of objectives and the need for a results-orientated approach to regulation or focusing on the outcomes of regulations rather than just on the process of making them. It is noted that an associated element of regulatory effectiveness is the need to minimise unintended consequences. *“That means avoiding the creation of unnecessary barriers which can frustrate and inhibit innovation and stifle economic activity by reducing entry and exit to particular sectors and markets”.*
46. The issue of downstream enforcement and compliance with regulations and the costs involved are raised. The objective appears to be to ensure the greatest level of compliance without excessive enforcement procedures. Regulatory Impact Analysis will have a role in developing compliance and enforcement indicators in order to assess formally the success of regulatory decisions.

### ***Waste Management and the “Effectiveness” Principle***

47. Up to some years ago, enforcement of waste regulations, by some of the entities charged with the task, was minimal. EU directives, discoveries of serious illegal dumping, domestic legal developments, public pressure and greater administrative

and political prioritisation have been changing the approach to enforcement. Penalties have been increased, and the EPA through the OEE has a stronger role. Greater accountability for the illegal use of land has been introduced and remediation responsibilities strengthened.

48. The importance of enforcement has increased. The expansion of the scope of activities of the waste management sector, more regulations and the development of professional management in the legitimate industry have accentuated the major financial incentive for entities with high waste management costs and other parties to accommodate and engage in business with illegal operators. The financial rewards and costs avoided for illegal activity can be very substantial. Plainly, compliance and enforcement are key areas to be addressed in any modified regulatory system. A market structure that creates economic efficiency with the same rules for all participants should be the aim.
49. The initial framing of the new regional waste management plans in the late nineties, which largely prohibited inter-regional movement of waste to new facilities ranks as a leading example of (apparently) unintended consequences. It was a misguided interpretation of the “proximity principle” and ran counter to the fostering of economies of scale, which was another policy objective. This issue is now being addressed by ministerial directive.

### ***Proportionality***

50. This relates to striking a balance between the advantages of regulation and the constraints that it imposes, and ensuring that the burdens imposed by regulations and penalties for non-compliance are proportionate to the risks, for example, whether penalties within the civil or criminal code are most appropriate.

51. The importance of addressing the costs and benefits of traditional “*command and control*” type regulations is noted, along with the importance of evaluating the possible use of another policy instrument “*other than regulation, such as a tax, subsidy, tradable permit, information campaign or other means. A combination of a number of these options might be the best mix to achieve a particular goal*”. Other areas are co-regulation, which usually involves sharing the regulatory role between the regulatory authority and the regulated parties through enforceable codes of practice. Another approach is to use performance based regulation, which specifies “ends” rather than means and allows firms and individuals to choose the process by which they will comply with the law.
52. In the “*White Paper*” the government states an intention to regulate as lightly as possible given the circumstances, and use more alternatives, and to ensure that both the burden of complying with regulations and the penalty for not complying are fair and proportionate.
53. The government also expressed an intention to use Regulatory Impact Analysis (RIA) as an evidence based decision tool. This embraces
- quantification of impacts;
  - structured consultation with stakeholders;
  - evaluation of alternatives to regulation and alternative types of regulation;
  - full consideration of downstream compliance and enforcement issues.

### ***Waste Management and the “Proportionality Principle***

54. The enforcement issue, which arose under the “effectiveness principle”, is also highly relevant to “proportionality”. In short, given the size of potential rewards from large-scale illegal activity, are the resources applied for enforcement large enough and the enforcement structure effective enough, and are the penalties sufficiently severe?

55. Alternatives to regulation already in train include advocacy campaigns by local authorities, the Repak scheme, school awareness programmes by private sector interests, the national “Race Against Waste” campaign and on the revenue front reduced subsidisation through higher domestic waste charges on households, the plastic bag tax and the landfill levy. The effects of each of such a mix of instruments taken individually, and in the context of the other extant regulations, are difficult to evaluate. The “landfill levy” is a significant cost for legitimate operators, and again accentuates the need for streamlined enforcement procedures to counter avoidance. It can safely be said that industry, commerce and the public at large are more aware of the costs and benefits of waste management than they were five years ago.

### ***Transparency***

56. This relates to clarity and openness in the operations of government and public administration, and underpins the need for regulations to be as clear and straightforward and accessible as possible in their drafting, promulgation, codification and dissemination.
57. According to the White Paper: *“transparency of regulations is also critically important to the performance of the economy, not least because it guards against special interests gaining undue influence in markets. It generates greater trust on the part of consumers. It assures and satisfies investors that there is a level playing field, and encourages new entrants to sectors”*.
58. The White Paper recommends the establishment of consultation norms for sectors and groups of regulatory agencies such as utility regulators, central government departments and local authorities. Generally, the approach will be to consult more widely before regulating. It argues for encouraging not-for-profit groups to engage with the consultation process.

59. However, it notes that there will *“always be the need for emergency regulations that would override normal consultation practices”*. The need to guard against the incidence and the perception of *“regulatory capture”* is noted.
60. Public Service Obligations (PSOs) are also discussed. Governments may decide that certain potential customers such as geographically isolated, low income, or low demand customers, should be provided with access to certain service levels at reasonable prices, even though it might not be commercially viable. It is stated that it is important that there is clarity around the scope, rationale and cost of PSOs and as a subset Universal Service Obligations (USOs). The government needs to be clear about the cost of providing PSOs, given that it is usually either the taxpayer (via the Exchequer) or consumer that bears the cost of PSOs” If the extra costs of delivery of PSOs *“are deemed to be relatively insignificant, then the USO provider must absorb them into its cost base. However if the USO can be shown as a significant and undue burden on the provider, then recompense may be available This is usually funded through a levy on other service providers in the market. Thus, the cost of PSOs generally falls ultimately on other customers in the market. In cases where the government contracts out such services it is important that alternative service providers are kept fully aware of the issues around PSOs, to ensure that barriers to sectoral entry are not created that would deter future competitors”*.

### ***Waste Management and the “Transparency Principle”***

61. The approach that *“transparency”* assures and satisfies investors that there is a level playing field is important. The absence of a level playing field in relation to potentially conflicting roles of local authorities has been analysed in Section 2 of this document. Whether this issue is cast in terms of *“transparency”* or in some other framework, regulatory reform is necessary. Suggestions are made in this regard in Section 4.

62. Consultation arrangements and encounters between the central government and the private waste management industry have worked well. There is also a strong level of co-operation on practical matters between the local authorities, and the private waste industry on both commercial and non-commercial issues in many regions. As stated in Section 2, there are, however, serious difficulties relating to the “*rules of engagement*” for public/private partnerships, particularly on some big investment decisions, and on the interaction of the local authorities with the private sector in relation to their statutory waste management planning role. Overall conflict of interest issues were also discussed in Section 2.
63. Public Service Obligations and how to deal with the associated costs and revenues is primarily a policy matter. The private waste management sector should only be expected to take commercial decisions on the basis of a level playing field, and to be recompensed for investment in relation to the risk involved. Any initiative on PSOs should include consultation with the industry.

### **“Accountability”**

64. The theme of regulatory accountability is discussed in the White Paper. It involves clarity and certainty about the roles of:
- *“those originating regulations;*
  - *those who must enforce or otherwise achieve compliance;*
  - *the regulated parties;*
  - *those charged with adjudicating on appeals;*
  - *and those reviewing and evaluating”.*
65. There is reference to the issue of “who regulates the regulators” which may not be always adequately addressed by the existing systems in place. The government state

an intention of ensuring a systematic approach to the overview of sectoral regulators by government departments and Oireachtas Committees. It is noted that in practice the accountability of regulators needs to be balanced against their independence.

66. Independent sectoral regulators are also accountable through the courts by being subject to judicial review of their decision processes. There is a discussion of regulatory appeal bodies, and of single regulatory appeals panels outside the court system in the case of utilities. Difficulties include the possibility that the only effect of a formalised appeals procedure may be to delay the decision further, and that the appeals procedures themselves may be used intentionally to delay a final decision by an incumbent or dominant producer.

### ***Waste Management and the “Accountability” Principle***

67. To date, in the waste sector it appears that the main focus has been seeking to get the regulatory system as it has now evolved up and running. In this area, Ireland was a late starter in moving towards implementing the principles which were later outlined in the White Paper of 2004. In waste management, the accountability dimension is evolving. Clearly, there are anomalies in the reality that the local authorities are responsible for the administration of waste facility and waste collection permit systems, have defined statutory functions in dealing with household waste, and a range of enforcement obligations while at the same time being involved in commercial or semi-commercial activities themselves. There is also the issue, in what sense, the local authorities are responsible to the Minister for the proper exercise of regulatory functions or responsible to Oireachtas Committees in any sense at all.

### ***“Consistency”***

68. The government’s stated intention is to ensure greater consistency across regulatory bodies. The White Paper states; “consistency in the regulatory process is important as

it gives a degree of predictability and legal certainty to individuals and groups within society and the economy”.

69. Two types of consistency are deemed to be particularly important. Firstly, there is the idea of structural consistency, whereby regulatory actors in similar situations would have broadly similar roles, responsibilities, powers and perhaps even structures.
70. The second important aspect is that of ensuring greater internal consistency between regulations and legislation within particular sectors. In this context also, where markets are reformed or deregulated “*other regulatory systems should not be used as an alternative form of regulation*”.
71. In the context of the limited size of the Irish economy and public service, the White Paper suggests that the integration of regulatory activity “*may be strengthened by a sharing of resources, especially in generic areas such as financial management, administration, human resource management (HRM), data systems, and legal services. To this end, government policy will be to minimise the creation of new regulatory authorities*”. Possibilities for rationalising or merging existing sectoral regulators will be assessed.
72. It is also noted that the principle of consistency applies to both new and existing regulations in a number of ways. In this context, it is important “*that where markets are liberalised, other regulatory measures for example, new physical planning, safety or other requirements, are not used as an alternative form of regulation to restrict market entry*”.

### **Waste Management and the “Consistency” Principle**

73. Again, this theme relates to the current structure of waste regulation in Ireland. There are a number of local authorities and regional groupings involved in regulation, as



discussed earlier. As regards regulatory structures in the future, the issue to be addressed embraces whether the priority should be the rationalisation of existing arrangements or the establishment of a new green-field institution. This is further developed in Section 4.

## SECTION FOUR

### *Conclusions*

74. In arriving at preliminary conclusions, certain aspects of policy are taken as given or as working assumptions. These include:
- the continuation of the regional waste management planning system without formal central co-ordination;
  - continued significant commercial activity in the waste sector by the local authorities across the waste hierarchy, either on their own account, in joint ventures or in public/private partnerships. In other words, there will be a mixed system of public sector, private/public, and private sector commercial activity;
  - the physical planning system to continue as updated by the Planning and Development Act 2000 subject to ministerial changes announced in mid 2005 relating to an enhanced role for An Bord Pleanála in critical infrastructure and other related reforms;
  - various proposals in the past to establish entities such as a National Waste Management Board will not be proceeded with.
75. Any modification to the Irish regulatory system for waste management would ideally take account of:
- the overall framework of public policy for waste management as set by government, the Oireachtas and our EU obligations;

- the principles for “better regulation” announced by government;
- the merits of rationalising existing regulatory arrangements in a more effective and transparent way among existing institutions as against establishing a new green-field regulatory institution;
- the growing impact of the Competition Authority on the promotion and policing of competition in different markets.

76. As referred to earlier, many of the independent statutory regulators in the Irish system were devolved from parent government departments, often in response to EU pressure for more competition. Important regulatory agencies include:

- Commission for Communications Regulation; at first operations and control of post and phones were in the old Department of Posts and Telegraphs. Then two semi-state bodies were set up, An Post and Telecom Eireann (1983), with policy and regulatory control in the Department, and in the late nineties the new regulatory system (now ComReg);
- Commission for Energy Regulation; in earlier times both policy and regulatory control was in the Department for gas and electricity;
- Commission for Aviation Regulation; devolved powers to regulate airport charges, to licence Irish air carriers, to implement slot allocation procedures etc. In effect, this includes the scrutiny of Aer Rianta, and now the new airport entities;

- Broadcasting Commission of Ireland; licenses independent services including TV services on digital, cable, MMDS and satellite codes and rules for advertising etc. RTE has a separate framework;
- Irish Financial Services Regulatory Authority; regulates all financial services functions in Ireland. It centralises functions earlier spread out between the Central Bank and other departments and agencies and is still linked to the Central Bank.

77. In structuring regulatory agencies, it is important to distinguish between the policy framework provided in the statute and their degree of freedom, if any, in practice to make policy as well as implement it.

78. The Competition Authority is an independent entity and is linked with EU competition enforcement. After initial tensions, there appears to be satisfactory working arrangements between the Authority and the sector-specific regulatory agencies.

### ***Rationalisation of Regulatory Arrangements***

79. A preliminary view offered on waste management is that, on balance, the rationalisation of regulatory arrangements may be a more beneficial approach than planning new structures and arrangements, preparing major legislation and then later installing a new regulatory institution.

80. In either event, the anomaly of local authorities fulfilling both a significant regulatory and commercial role will need to be addressed.

81. The regulatory framework has been improving incrementally by, for example, the directive on the proximity principle and remediation arrangements in 2005 and the announced intention on the future waste planning structure for major projects.

82. A rationalisation of existing arrangements would involve removing all purely regulatory functions from the local authorities, on the assumption that they would be continuing with a variety of other planning, commercial and operating functions in the waste management area.
83. It would appear logical that responsibility for such regulatory areas would be transferred to the Environmental Protection Agency (EPA), or to a dedicated sub-division of it. The Agency would, of course, need to be resourced sufficiently to undertake the enhanced regulatory functions. In England and Wales, the Environment Agency has a central role in waste management.
84. There is an important precedent for adding to EPA responsibilities in a contiguous area in the allocation to the Agency of a key role in arrangements relating to greenhouse gas emissions and allocations of allowances. Waste regulation is fundamentally about environmental protection, albeit with due reference to economic efficiency and best technological practice. Also, under current waste management legislation, the Minister is empowered to transfer certain functions from the local authorities to the EPA and vice versa.
85. This “*incremental*” approach therefore would embrace:
- transferring all enforcement functions in waste management to the EPA (or a dedicated sub-division of it, which could involve building on the Office of Environmental Enforcement). Therefore, there would be perceived independence, transparency and consistency, and a “*level playing field*” for both the public and private sectors. Adjustments to waste legislation would be necessary to accommodate this;

- transferring licensing facilities such as waste facility permits and waste collection permit administration and surveillance, to the EPA;
- attention to ensuring that both local authority and private sector pricing practices for landfill facilities take full account of long term costs including remediation without cross subsidisation;
- a formalised consultative role for the private commercial sector and other interests in the regional waste management planning process;
- the greater involvement of the Competition Authority in reviewing the waste management regulatory system and the rules of public/private sector engagement;
- consideration of an appropriate redress mechanism for consumers of services, either involving the industry as a whole or a mini “Ombudsman”.

86. Whatever the regulatory framework, “competition” issues are likely to arise in the future concerning market structure, the linkage between “markets”, distinctions between product and geographic markets and what constitutes the “relevant market” for competition or merger control purposes. Markets in modern waste management are complex involving prevention, collection, segregation, recovery, recycling, disposal and waste to energy markets, with a growing international trade.

87. Appropriate co-operation arrangements could be made between the EPA and the Competition Authority with regard to surveillance of the competitive functioning of the various “markets”. Significant information about accounting procedures and practices among both local authorities and the private sector for various products, markets and services may arise from such arrangements. It is clear that any sectoral regulatory solution should take account of the broader competition law framework.