

Regulatory Reform in Ireland

**Government Capacity to Assure High Quality
Regulation**



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Government Capacity to Assure High Quality Regulation* analyses the institutional set-up and use of policy instruments in Ireland. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Ireland* published in 2001. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, on specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was principally prepared by Cesar Córdova-Novion, Regulatory Management and Reform, with the participation of Edward Donelan, and Scott H. Jacobs in the Public Management Service. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Ireland. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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Executive Summary

Background Report on Government Capacity to Assure High Quality Regulation

Can the national administration ensure that social and economic regulations are based on core principles of good regulation? Regulatory reform requires clear policies and the administrative machinery to carry them out, backed up by concrete political support. Good regulatory practices must be built into the administration itself if the public sector is to use regulation to carry out public policies efficiently and effectively. Such practices include administrative capacities to judge when and how to regulate in a highly complex world, transparency, flexibility, policy co-ordination, understanding of markets, and responsiveness to changing conditions.

Closely connected to the outstanding economic performance and transformation of the economic, social and cultural environment of the country in the last fifteen years, is the significant improvement of the Irish regulatory environment and framework. Accountability and transparency have been strongly enhanced, not only through traditional participatory and consensus-building mechanisms characterised by the social partnership approach, but also through new mechanisms such as enforcement and compliance with the *Freedom of Information Act*. The remarkable Strategic Management Initiative is fostering a new culture in government practices, including rule making. New market-oriented institutions have been set up or strengthened, such as the sectoral regulators and the competition authority.

But the Irish regulatory system continues to have some weaknesses. Ireland lags behind many OECD countries in terms of its capacities to ensure high quality regulation. Economic assessment of proposed legislation is missing. Alternatives to regulations, such as economic instruments, have replaced few traditional 'command and control' approaches. Critically, implementation mechanisms and enforcement powers of the 1999 *Reducing Red Tape* policy may need to be enhanced if anti-competitive styles of regulations in non-traded sectors and interventionist tendencies are to be reversed. Like other small and participative countries, Ireland should acknowledge that globalisation and openness require a certain degree of formalism in the national regulatory management system to support market confidence and avoid undue preferences for insiders or 'big players'. A particular challenge concerns the search for a new balance between public consultation, flexibility and rapidity in rulemaking. The modernisation of other state institutions needs further attention. The Judiciary, the new market-based institutions, including the competition authority, the Parliament and its committees, even the new regional powers still need institutional adaptation in terms of their efficiency, accountability and overall co-ordination. Lastly, the Irish policy-making culture continues to be highly risk adverse, with a tendency to follow rather than lead.

While initiatives are underway across a wide range of areas, attention to implementation, evaluation, and refinement is essential to ensure that potential benefits are realised. Moreover, important gaps remain unaddressed. Policy options that should be considered by the Irish government are the following:

- *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*

The modernisation of the regulatory management system has lacked resources, training and resolve. Accountability mechanisms of the new policy have been based on vague internal procedures and have been 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. Measurable and public performance standards for regulatory reform should create feedbacks and incentives to transform culture and practice across the government. A high-level regulatory committee should be created for these tasks with adequate powers to influence decisions at the cabinet level.

- *Strengthen the accountability of sectoral regulators by building capacities for 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.*

While Ireland has been one of the first countries to start to tackle the complex issues raised by the impact of sectoral regulators in terms of governance and accountability in the regulatory process, the government should strengthen effective review capacities of the Parliament and its committees to complete the new framework. As the new system stabilises, a second issue concerns the process of co-ordination and the need for a legal basis for the sectoral regulators and the Competition Authority to defer to each other without risk and without compromising the application of competition and high quality regulation policies.

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

Use of regulatory impact assessment in Ireland is at an early stage and, unsurprisingly, requires strengthening if the potential benefits of this policy tool in improving regulatory quality are to be achieved. As a key step, the Central Unit in the Department of the Prime Minister should be reinforced with enough resources and analytical expertise to provide an independent opinion on regulatory matters. RIA should also be improved in four dimensions. First, a single assessment, based on a universal benefit-cost principle, should be adopted, merging the various existing assessments currently required. Second, application of the full RIA discipline should be extended to lower level rules as well as primary legislation. Third, the expanded RIA should incorporate detailed consideration for alternatives to be analysed and compared with the regulatory proposal. Fourth, the transition cost of implementing RIA would be reduced, and its quality increased, if it were routinely integrated with public consultation processes.

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

As relationships evolve and new participants, including non-nationals, become affected by Irish regulatory affairs, minimum rules will improve public consultation and regulatory procedures enhancing effectiveness, speed and timeliness of regulatory responses. 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 mentioned previously). 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, which establishes in particular the rights of 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).

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

Adding specific regulatory quality criteria, based on the 1995 OECD regulatory quality checklist, to the review programme of existing laws and regulations would enhance its impact. 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 previously mentioned.

1. REGULATORY REFORM IN A NATIONAL CONTEXT

1.1. *The administrative and legal environment in Ireland*

Good public governance in Ireland faces important challenges in adapting its practices, culture, and relations to a high-growth and pro-market environment in which consumer interests are dominant. Over most of the life of the Irish state, government policies have been aimed at redistribution, protection of producers, and managing slow growth and high unemployment. Important reforms, such as abandoning protectionist policies, have been made. Undoubtedly the public sector and its institutions have changed in the past decade and half. However, further reform are still needed to sustain and consolidate the market-led growth of the past decade, which has evolved so rapidly that it has strained the capacities and flexibility of existing government institutions to repair market failures, protect consumers, and target social welfare policies at new needs. That is, reform of Ireland's governance structure is lagging behind dynamic market and social changes, and hence could be a bottleneck to sustained growth.

This challenge is not an unpleasant challenge to face, since it is a result of rapidly rising prosperity. Ireland experienced remarkable economic performance in the last decade, with an average annual growth of 8.5% in 1997-1999. A 'virtuous circle' has emerged, as increases in take-home pay and improved cost competitiveness led to substantial job creation and a turnaround in public finances. These trends freed up resources for spending on health, education and social welfare that will support continued growth.¹ Irish performance is even more striking when set in a European context of slow growth (see Chapter 1).

Several factors contributed to this success: a successful policy on inward investment and increased openness of the economy; a favourable tax regime for corporations; massive investment on education and human capital; favourable demographic factors; the return of skilled emigrants; significant social consensus; and Ireland's robust rule of law.² The fact that Ireland is an English-speaking country might have made it more attractive for foreign firms as an entry point into Europe. Accession in 1973 to the EU and the consistent adoption of pro-EU policies proved helpful to the creation of a favourable climate for growth and development. In addition to the significant boost provided by the EU Structural and Cohesion Funds,³ a substantial number of policies were brought up to European standards, including, health and safety at work, environment and consumer policies in keeping with the rest of the members states of the EU. Membership also transformed the regulatory environment and framework as, for example, some product markets and network industries were subjected to Single Market disciplines.

In addition to these factors, which some other countries have shared, the awakening of the 'Celtic Tiger' has been supported by a public administration that has taken steps to adapt policies to the changing market environment. Following radical decisions in the late 50s and 60s to abandon inward and protectionist policies that had been in place since independence and intensified in the 30's, successive governments have transformed Ireland into one of the OECD's most open economies.⁴ Accompanying decisions, such as investing in education and basing industrial policy on attractive tax rates, have borne impressive fruit after a few decades. Capacity to learn from mistakes and use crises to overcome barriers also played parts.⁵

The Irish approach to modernisation of the public sector during the past decade was based on pragmatic steps. Some other countries, such as the UK and New Zealand, pursued a rather contentious, ideological, and legalistic approach to reform (which may have been necessary in their particular circumstances), but successive Irish governments based their efforts on building consensus through processes of national partnership. A process begun in 1987 has developed through a succession of complex national concordats on pay into a permanent conference on wider economic and social policies (see Box 7 in Section 3.1 below). In this respect, the Irish reform style is closer to the experience of the Netherlands and Denmark. The development of policies in Ireland is characterised by prudence, pragmatism, and an incremental approach to change rather than the adoption of 'big projects'.

**Box 1. Good practices for improving the capacities of national administrations
to assure high quality regulation**

The OECD Report on Regulatory Reform, which was welcomed by ministers in May 1997, includes a co-ordinated set of strategies for improving regulatory quality, many of which were based on the 1995 Recommendation of the OECD Council on Improving the Quality of Government Regulation. These form the basis of the analysis undertaken in this report, and are reproduced below.

A. BUILDING A REGULATORY MANAGEMENT SYSTEM

1. Adopt regulatory reform policy at the highest political levels.
2. Establish explicit standards for regulatory quality and principles of regulatory decision-making.
3. Build regulatory management capacities.

B. IMPROVING THE QUALITY OF NEW REGULATIONS

1. Assess regulatory impacts.
2. Consult systematically with affected interests.
3. Use alternatives to regulation.
4. Improve regulatory co-ordination.

C. UPGRADING THE QUALITY OF EXISTING REGULATIONS

(In addition to the strategies listed above)

1. Review and update existing regulations.
2. Reduce red tape and government formalities.

In this step-by-step transformation, the roles of the State, markets and society have shifted. State-market intervention in Ireland, formerly characterised by direct involvement in the economy through ownership of public monopolies and direct intervention, has changed to acceptance of free market forces and the development of pro-competitive policy regimes that support market forces notably in aviation, electricity and telecommunication. Driven largely by the European single market programme, the last decade has seen restructuring, privatising and deregulating, and construction of new market institutions such as independent regulators. Today, governments on all sides of the political spectrum acknowledge the benefits of competitive and open markets.

Yet skills gaps and institutional and cultural rigidities persist in the public administration that could create bottlenecks to future growth. An emerging challenge facing the Irish government is a shortage of skills and personnel resulting from rapid economic growth. The number of applicants for entry-level positions in the civil service is declining as more opportunities open up in the private sector. Some key institutions are experiencing difficulties in recruiting and retaining staff.⁶ The labour shortages are compounded by skills mismatches. At local level and national level shortages have hit the staffing of the planning authorities and the planning appeals boards. The labour shortages are compounded by skills mismatches. Although this is changing, the traditional Irish civil servant is more a generalist who lacks specific training in economic and analytical expertise needed in key regulatory positions.

Second, interventionist practices that reduce market efficiency linger in the Irish public sector, and this habit of market intervention presents a challenge for further reforms.⁷ Although these habits are changing, there is still suspicion of market mechanisms and a cautious attitude toward market-based approaches, perhaps reflecting the view of the general electorate. Many Irish still believe that government can and should solve all problems. For example, although the recent voluminous Social Partnership pact, *the Programme for Prosperity and Fairness*, makes general reference to implement the regulatory reform agenda and fostering competition policy, little specific mentions are made to fostering market functioning, consumer choice, and price mechanisms as solutions to bottlenecks and shortages, instead focussing on state actions and market interventions. Indeed, though this policy document focuses on the need to increase competitiveness of Irish enterprises, the role of competition as a central means to achieve this goal is nearly absent. Competition principles are not widely used in public debates and policy statements. Producer interests tend to take precedence over consumer interests in many policies (see Chapter 1 and background report to Chapter 3), and governance institutions are still vulnerable to “capture” by producer interests who, in the aftermath of more intensive competition policy enforcement, will intensify their efforts to use regulatory regimes for private advantage. The 'command and control' reflex, looking first to a regulatory solution rather than other types of policy instruments (or no intervention), is still present among parliamentarians and rule-makers. For instance, licences and price controls are still common reactions when problems arise, accompanied by strong resistance to elimination of protectionist and corporatist regulations.⁸

Policy-making in Ireland still confronts rent-seeking attitudes, typically in the form of strong and close relationships between elected representatives and particular groups of interests. Functioning as a broker at the local level, and directly connected to the electoral constituency, the Irish politician becomes a specialist on governmental information and contacts, to, for example, help citizens obtain a house or a scholarship,⁹ or to resist changes that would reduce regulatory rents. This type of lobbying, often assimilated to brokerage', or even 'Clientelism' was shown recently to be a powerful ingredient in the opposition to reforms to the agriculture policy, the introduction of some “polluter pays” instruments, and the liberalisation of taxis and public houses. Land-use planning by local governments, in particular in Dublin, seems to have been particularly vulnerable.¹⁰ Recent measures, such as the enactment of the *Freedom of Information Act*, a new *Electoral Act* and codes of conduct, the incisive role of the Ombudsman and of an aggressive media, have raised awareness and brought a climate of change. These important transparency and accountability steps would be strengthened by further reducing the influence of informal mechanisms and processes that provide opportunities for interests to monopolise information, and thus favour 'insiders', and by strengthening government-wide “watchdog” functions such as competition advocacy by the competition authority (3).

A third challenge for progress on regulatory reform is upgrading the effectiveness of what is now a regulatory management system aimed at legal quality rather than regulatory efficiency and performance. Where there are controls, they tend to be based on tradition or informal practices rather than on written standards and consistent rules. Considerable discretion is left to ministers when making new rules. There are almost no written standards and rules for quality regulation, apart from the legal requirement that regulations be authorised by a parent statute. Challenges to regulations must be done by judicial review, a costly and time consuming process.¹¹ Judicial review cannot be regarded as an effective quality control mechanism in view of the 500 to 600 regulations made each year. An additional problem is that there is no body independent from the regulating ministries (see Section 2.1) to oversee the preparation of secondary regulations. As a result, there is a natural tendency for the regulatory framework to fragment and inflate. For example, the legal and regulatory system for the communications sector is spread among many individual pieces of secondary legislation. Irish regulation is vulnerable to the vicious cycle seen also in the United States: more regulations attempt to remedy more problems, and when performance falls short, even more regulations are triggered.

Box 2. The legal and regulatory framework in Ireland

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.¹²

There are essentially two classes of legislation: primary legislation consisting of acts enacted by the Parliament (*Oireachtas*), and secondary legislation (regulations, rules, orders and bye-laws made by ministers and other bodies under a power conferred by an Act.¹³ Ireland enacts between 50-60 Acts and some 500-600 regulations in any one year.¹⁴

In addition, departments and offices produce a significant number of administrative circulars (such as schemes, standards, licenses and formalities) which although not recognised by the courts as binding law, for many practical reasons impose similar administrative burdens.

The larger picture is one of adjustment of governance institutions in line with market and social changes. Like many OECD countries, Ireland faces important challenges in adjusting its governance arrangements to the new realities of globalisation, demands of civil society, and new technologies. In particular, the effectiveness of existing institutions is tied to the relationships between the three executive, legislative, and judiciary branches of the state ('horizontal coherence') and the relationships between central and local levels of government ('vertical coherence').¹⁵

Compared to the pace of change in the executive branch, the Parliament has been slow to assume its new accountability responsibilities. Since 1997 a reform strengthened Parliamentary committees fairly extensive powers and prerogatives to oversee bodies under the aegis of government departments.¹⁶ However, adequate resources have not accompanied these new competencies to provide effective overseeing mechanisms.¹⁷ Members of Parliament receive a flood of official reports, but the sheer number of these reports and the lack of staff to help assess them reduce accountability and parliamentary capacity to focus on important issues.¹⁸ The lack of resources and research capacities means that members of the Parliament are dependent for information on the government and interest groups. The more powerful of the latter are well served by independent, expert advice and research support and may exercise undue influence through these information resources. Localism and the 'brokerage' system referred to above in Irish parliamentary culture tends to further hinder the Parliament from concentrating on 'big picture' issues. Changing institutions, the transferral of competencies to European levels, new domestic consultation processes and the setting up of independent regulators further complicate Parliamentary overview, and contribute to a loss of effective influence by the Parliament over national policy.

The judiciary must also confront new challenges to adapt to the new Irish context. Through judicial reviews or court appeals, judges increasingly make key regulatory decisions. This has raised concern about judicial trespass into the field of the legislature.¹⁹ Not dissimilar to debates in other countries, this complex issue has raised questions about the accountability of judges, and their selection, appointment and training.

Questions remain open on the need to improve vertical coherence. Ireland has been confronted by the difficult choices in balancing a demand for devolution (advocated by EU regional policy), and on the other hand, the dangers of fragmentation and diseconomies in a small country of 3.7 million inhabitants (of which 1 million live in Dublin).²⁰

1.2. *Recent regulatory reform initiatives to improve public administration capacities*

A recently approved regulatory reform programme *Reducing Red Tape* is an important addition to an array of initiatives and policies, stretching back more than a decade, that are intended to increase, efficiency, transparency and accountability of the Irish public administration. The main vehicle for these improvements was the launching in 1994 of the *Strategic Management Initiative* (SMI). Its main objectives were:

*Reforming [the] institutions at national and local level to provide services, accountability, transparency and freedom of information. In so doing [the government is] committed to extending the opportunities for democratic participation by citizens in all aspects of life.*²¹

SMI is the third attempt to reform the Irish administration. Earlier attempts to reform the public service were of value in diagnosing the problems of the public service and raising awareness about new management approaches and tools.²² The first attempt to reform the public service followed the publication of the *Report of the Public Services Organisation Review Group 1966-1969*, (commonly referred to as the *Devlin Report*). The Devlin Report presented a series of recommendations to permit the administration to cope with new demands generated by the creation of a European welfare state providing more services to a wider array of citizens. It concentrated on key functional elements, the most important of which was a separation of policy making from implementation and service delivery functions. For several reasons, notably, a lack of involvement from the administration and partisanship in the political spheres, the reform initiative failed. Its legacy was a series of piecemeal results.

In 1985, the government launched a second reform programme through publication of a White Paper: *Serving the Country Better*. That reform aimed to introduce new public management concepts and policy tools. It advocated greater decentralisation, improved budgetary management and greater mobility across departments of top level administrators. While the programme permitted the introduction of some important changes, by the time of the economic crisis of 1987, the political level and highest level of administration had withdrawn their support, and basic structural changes were not implemented.

Though the successive reforms built robust foundations for change and a wealth of experience, the continuing need for deeper and wider reform of the public sector led in 1994 to the SMI. Today, the SMI is regarded as the first successful reform of the Irish Public Service since the foundation of the independent state. One of the reasons for the success of the SMI is that it has had strong support, not only from senior civil servants, but also from three successive governments.²³ Another reason is that many of its central policies were underpinned by legislation in the *Public Service Management Act, 1997*, the *Freedom of Information Act, 1997* and the *Committee of the Houses of the Oireachtas [Parliament] (Compellability, Privileges and Immunities of Witness) Act, 1997*. In many ways, the laws provided formal structure and content to informal and heterogeneous procedures and practices.

The SMI has been converted into a series of policy documents and guidelines that build on the principles laid down at the outset.²⁴ Currently, eight initiatives form the core of SMI. Four are aimed at improving customer service and delivery of policies:

- Quality services for customers.
- Simplification of administrative procedures and regulatory reform.
- Open and transparent service delivery.

- Effective management of cross-cutting issues.

Four initiatives are aimed at internal improvements of the administration:

- Devolving authority and accountability;
- New approaches to human resource management;
- More effective financial management, and
- Improved use of information technology to meet business and organisational needs.

The programme is based mainly on a 'bottom-up' approach, where 'shared ownership' by public administrators is favoured over an exclusively 'top down' approach, and where goals and priorities are to be achieved with the help of positive and negative feedback. This participative approach intends to focus on behaviours and empowerment of the civil servants. Basically, the government implements SMI through self-assessment, that is, a requirement that each department and office identify in an iterative way, its own strengths and weaknesses and put into place a process of strategic management. This process is ongoing. In particular the preparation of Strategy Statements is undertaken every three years, or after the election of a new government, through the preparation of a statement of strategy by each department and office and by the setting out of a business plan by which the strategy will be delivered. Individual departments' strategies are consistent with the current policies of the government of the day and international and EU obligations. Departments are also requested to implement sectoral programmes that follow the eight core initiatives noted above.

To oversee the SMI process the government appointed nine top-level civil servants from different departments to serve on the steering group known as the Co-ordinating Group of Secretaries. This group is itself supported by specialised working groups of senior officials and experts, from both the public and private sectors, focusing on particular actions or issues. A specific working group focuses on legal reforms, where the Attorney General Office has been working since the beginning. In 1997, a new group, the Implementation Group of Secretaries was given responsibility for implementing and monitoring SMI and reporting progress across departments to the Congress. Two small executive units support the programme: a unit in the Department of the Prime Minister's Office has responsibility for central co-ordination of the programme, and another within the Department of Finance provides financial support to the programme. In each department and office, a specific implementation group has been created. In 1999, a Change Management Fund of IR£ 5 million per annum was established to support departments and offices (up to 50% of the project costs) in their efforts to implement the programmes.

Assessment. From some perspectives, the SMI seems to have been a successful programme but no external and comprehensive evaluation has yet been undertaken to evaluate it.²⁵ The SMI helped to reverse low morale in the public service resulting from the perception that public management policies were centred on the overall goal of continuously cutting the number of public servants. A recent evaluation of the departments' strategic statements prepared during the first (1995-1996) and second (1998-1999) iteration of the SMI showed progress. Focusing in three key elements, the evaluation found significant and clear improvements in strategic capacities, a reduction of "aspirational expressions", better focus on customers and a significant effort to set up a performance measurements framework in most departments and offices. The study, however, stressed that there was room for improvement, in particular many departments have failed to link their analysis to internal change and restructuring.²⁶ Another clear impact of the SMI has been changes in the culture of public service and in the manner by which it deals with the public. Concrete improvements are felt by citizens dealing with the Department of Social Community and Family Affairs and the Revenue Commissioners, and transparency and accountability have improved. A

new culture is patent in the fact that some departments have undertaken strategic examination of particular policies in the light of developments within the relevant environment; examples of this include the policy papers on critical aspects of accountability (of sectoral regulators, see Section 3.4)²⁷ and transparency and ethics (see the design and implementation of the *Freedom of Information Act*). SMI has also helped to improve the degree of formality in administrative procedures across the government.²⁸

Critics have pointed out, however, that the SMI has been slow to show concrete results and that outcomes only became tangible in 1999, five years after its launch. Lack of uniform compliance by departments and offices has raised questions about the drawbacks of a 'bottom up' approach based on self-assessment and peer pressure to achieve its objectives rather than on incentives and a standardised approach. The lack of precise indicators and targets and the lack of an explicit auditing mechanism by an independent overview body have hampered the development of objective measures of performance in the programme. The ability and will of the Implementation Group of Secretaries, whose members are judge and part of the programme, to challenge, check and stir advancements of the programme across the whole government are as yet unproven. The effectiveness of the new collaboration mechanisms to deal with cross-cutting issues, such as children policy, asylum seekers and regional development are still to show results. Anticipation of needs and adaptation to change, monitoring and evaluation of policy and effective reward for performance are yet to be engrained in the operation of services.²⁹ Equally, the SMI has not yet proven its impact on the improvement of local government capacities (see Section 2.3). While the 'bottom up' approach to reform has benefits, it could be supplemented by other more direct and speedier approaches to change based on clearer disciplines, rights and obligations.

E-government. As with most OECD countries, Ireland has invested in new information and communication technologies to improve transparency and delivery of government services. An infrastructure exists which interconnects all agencies in central government. It is intended to replace this infrastructure in 2001 with a countrywide virtual private network, which will cover all of the government sector. This network will be used to support the delivery of E-government, and for the Intranet and Extranet needs of government.

Deregulation, privatisation and liberalisation. Derived in large measure from EU directives, Ireland has exceeded EU directives in aspects of its privatisation and market liberalisation programme. Aviation and telecommunications have been fully liberalised. Markets for gas, electricity and postal services are in the process of liberalisation and proposed arrangements for public transport have been issued for public consultation. However, the Irish economy is still characterised by state monopolies in some sectors, where Ireland has been slower than other OECD countries to sell. The Irish government still retains monopoly control of Irish Rail and bus companies serving Dublin and the provinces. The state also owns a commercial bank and controls big utilities including electricity, gas, water and peat. Based on a practical, non-ideological and case by case approach, policies on privatisation have been developed in close consultation with trade unions and effected, in some cases, through 'strategic alliances' where their support is linked to immediate benefits, often in the form of direct participation in the privatised company. In terms of competition law and policies, Ireland has been slowly converging to EU standards, though implementation has not been sufficiently integrated into the general policy framework for regulation (see background report to Chapter 3).

Box 3. **Chronology of regulatory reforms and important laws in Ireland**

- 1924: *Ministers and Secretaries Act* creates the Civil service and basic accountability mechanisms.
- 1969: Publication of *Report of Public Services Organisation Review Group* (Devlin).
- 1980: *Ombudsman Act*. The Ombudsman's remit was extended in 1985 to Local Authorities, Health Boards, Telecom Eireann and An Post.
- 1984: Government White Paper *Serving the Country Better*.
- 1986: New Judicial Review Procedures introduced.
- 1991: *Competition Act*. The Act establishes a competition authority. The Act was later amended and strengthened in 1996 by the introduction of criminal offences and penalties (see background report to Chapter 3).
- 1993: *Comptroller and Auditor General's Act*.
- 1994: Strategic Management Initiative Launched.
- 1995: *Ethics in Public Service Act*: new enforcement accountability mechanisms. Also provides for a register of interests and other procedures against corrupt practices.
- 1996: Publication of the Report *Delivering Better Government*.
- 1996: *Telecommunication (Miscellaneous Provisions) Act*. The Act makes provision for the establishment of the Office of the Director of Telecommunications Regulation, (an independent regulator); transfers functions and pricing authority from the minister to the Director; provides for the imposition of a levy on providers of telecommunications services to finance the regulator.
- 1997: *Freedom of Information Act*. The Act enables members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies; to have personal information relating to them in the possession of public bodies corrected; to have the right of access to records held by public bodies; to be entitled to an independent review of decisions of public bodies. The Act also establishes an the office of information commissioner.
- 1997: *Public Service Management Act*. The Act provides for a new management structure to enhance the management, effectiveness and transparency of operations of departments of state and certain other offices of the public service. It also increases the accountability of civil servants while preserving the discretion of the government in relation to their responsibility to Parliament.
- 1997: *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witness Act.)* The Act together with the Public Service Management Act provides the framework for accountability of civil servants to committees of the Parliament's
- 1999: *Electricity Regulation Act*. The Act establishes the Commission for Electricity Regulation (independent regulator), transfers certain regulatory functions from the Minister to the Commission, and provides for the imposition of an industry levy to finance the regulator.
- 1999: Reducing Red Tape—An Action Programme for Regulatory Reform in Ireland.
- 2000: Publication of *Governance and Accountability in the Regulatory Process: Policy Proposals*.

2. DRIVERS OF REGULATORY REFORM: NATIONAL POLICIES AND INSTITUTIONS

2.1. Regulatory reform policies and core principles

The 1997 *OECD Report on Regulatory Reform* recommends that countries “adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.”³⁰ The 1995 *OECD Council Recommendation on Improving the Quality of Government Regulation* contains a set of best practice principles against which reform policies can be measured.³¹ The recent policy on *Reducing Red Tape: An Action Programme of Regulatory Reform in Ireland* adopted by the government in July 1999 is based on these principles.³² The following Sections consider whether the goals and strategies set out in this programme meet Ireland's regulatory needs and priorities, and whether the mechanisms proposed are likely to allow them to be put into practice.

The current policy has its root in previous initiatives and programmes, in addition to the long established quality standards that laws and regulations have a legal basis and are clear, consistent, comprehensible and accessible to all users. A strong judicial review mechanism has also promoted reforms and quality regulation (see Box 4). In terms of explicit policies, substantive reforms can be traced to the 1980s, when attempts to reduce the burden of regulations were launched through the work of ad hoc groups such as the Industrial Costs Monitoring Group in the Department of Industry and Commerce, and the Task Force Report on Small Business and Services, set by the Department of Enterprise, Trade and Employment. More recently, the SMI has been a vehicle to promote quality across all government activities, including laws and regulations. For this task, each department was asked to undertake on a regular basis a systematic review of all its operations and ask whether each policy was necessary or whether it could best be achieved by alternative means. This process has resulted in many regulatory reforms.

Box 4. Judicial Review in Ireland

Judicial review in Ireland has been more vigorous than in other countries, and has been a deterrent against ‘bad quality’ laws and regulations, and thus form part of the central regulatory management armoury. Similar to the practice in other countries such as the United States, a judge may declare legislation to be unconstitutional,³³ and the High and Supreme Courts 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. The courts also ensure that secondary legislation and other acts of public bodies are consistent or go beyond the authorising primary legislation. In this regard, the courts will be concerned with how, for example, a decision was taken by a regulator, rather than with the merits of the decision itself.

Courts review the constitutionality of legislation through two methods: the first is set out in Article 26 of the Constitution which provides that the President may, after consultation with the Council of State, refer any bill to the Supreme Court for a decision on the question as to whether any such bill or any provision of the bill is repugnant to the Constitution or any provision of it. The second method is set out in Article 34.3.2 of the Constitution which enables the High or Supreme Court on appeal to question the validity of any law having regard to the provisions of the Constitution.

First, judicial review can be costly and time consuming. In addition, a single judge sitting in a particular court handling certain types of cases can become a *de facto* regulator with little accountability constraints. Judges performing this task may lack technical expertise or experience in solving such problems. In addition, since review by the courts increases uncertainties and delay in regulatory policies, it may undermine the responsiveness and transparency of the regulatory system. The costs in terms of money, time and risk may deter small regulatory cases of concern to individuals or less well off groups in society.

Regulatory reform became an explicit policy objective in the mid-1990s. In May 1996, the Government published a policy document on public service modernisation (*Delivering Better Government*) which devoted a specific Section to regulatory reform and set out a programme of action for administrative simplification. The policy outlined four principles of reform:

- To improve the quality, rather than reduce the quantity, of regulations;
- To eliminate unnecessary and/or inefficient regulations (including legislation);
- To simplify necessary regulation and related procedures as much as possible, and
- To lower the cost of regulatory compliance, and to make regulations more accessible.

The policy was not implemented at the time. However, a Regulatory Reform Working Group was set up to propose a detailed programme of action. Three years later, based on the recommendations of the Working Group, the government adopted in July 1999 the report, *Reducing Red Tape—An Action Programme of Regulatory Reform in Ireland*.³⁴ The social partners in the recent partnership programmes—*Partnership 2000* and the *Programme for Prosperity and Fairness*—later endorsed the policy, as well as this OECD review of regulatory practices in Ireland.³⁵

The heart of *Reducing Red Tape* is to establish a programme of action to reform the regulatory management system. The programme institutionalises new regulatory procedures and requires a series of actions. It sets out the policy of deepening public consultation with a department's "customers and other interested parties" through existing mechanisms or the establishment of new user groups. It requires that each department and office assess all new laws and regulations based on a "Quality Regulation Checklist" (see Section 3.3) and assigns responsibility for implementing the programme at a senior management level. It called for the listing "by Autumn 1999" of relevant legislation (both primary and secondary) to identify the scope for consolidation, revision /or repeal. Lastly, it recommended the establishment of a small Central Regulatory Reform Resource Unit in the Department of the Prime Minister to drive the agenda and monitor progress, and an ad hoc High Level Group to monitor, to the extent possible, implementation of the remaining recommendations of the Small Business Forum.

The programme is slowly materialising, following the SMI's decentralised approach and based on 'bottom up' implementation mechanisms. In November 1999, the *Cabinet Handbook*, which guides departments on the principal administrative procedures to follow when making laws, was amended.³⁶ In addition to other proofing and impacts assessment (such as on women, poverty or rural communities), departments and offices must verify, prior to presentation to government, that their proposed legislation meets the Checklist criteria (see Section 3.3). The Checklist should be completed together with the other six impact assessments.³⁷ This self-assessment must then be reported in the Memorandum for the Government, which Ministers present for Cabinet approval. The Assistant Secretary General of the Department of the Prime Minister in charge of SMI was made responsible for the implementation of a policy on regulatory reform. Senior Officials of equal rank are responsible for this area within each department. They are responsible for implementation of the regulatory reform programme in their respective Departments and report through the Department of the Prime Minister to the Implementation Group, which in turn has responsibility to report to the Government on overall progress. In the Summer 2000, two officials were appointed in the Department of the Prime Minister as the first staff of the new central resource unit to co-ordinate the regulatory reform agenda. Their remit includes developing a work programme for the unit and identifying human resource requirements which are to be provided initially through consultancies, secondments and contracts funded by the change management fund. They both also have other duties to perform. The Ad Hoc High Level Group of senior officials set up to examine the remaining recommendations of the Small Business and Services Forum has begun to examine the implementation of the recommendations on administrative simplification accepted by the government.

In conjunction with the new regulatory quality policy the government has made progress in reviewing existing laws and regulations.³⁸ A Statute Law Revision Unit was established in the Office of the Attorney General in February 1999. The Unit will have five full time and one part time officials when it is fully functioning. The objective of the Unit is to draft statute law reform and consolidation bills and undertake related work, including supervising the preparation of indexes to the statutes and statutory instruments (See Section 4). The Unit has worked closely with the Department of the Prime Minister to ensure that each department and office has reviewed its legislative stock and identified laws in need of consolidation, revision or repeal. The Unit has also obtained government approval for publishing administrative consolidations of Acts. Approval will be sought for the introduction of changes in the procedures of Parliament so that revision bills may be enacted on a fast track procedure.

The content of the *Reducing Red Tape* policy and its programme of action are comprehensive and are in line with regulatory quality standards in place across the OECD area. They adequately cover the preparation of new regulations and the revision of existing regulations. The policy also fosters transparency and accountability by stressing the need for consultation and reforming the rule-making process. The Checklist articulates a clear test concerning the impact of legislation on market entry, restriction on competition and increase in administrative burdens. In that sense, the policy has a market-oriented and pro-competition stance. It could easily be basis for the development of regulatory impact assessment.

However, the implementation strategy and institutional drivers for reform are weak. From the perspective of the departments of state and of the ministers concerned, regulatory reform is one of many SMI projects, with unclear priorities. But reliance on the SMI approach, based on self-assessment and peer pressure, may provide too few incentives (positive and negative) to effectively transform regulatory traditions and practices. From the perspective of the departments of state and of the ministers concerned, regulatory reform is one of many SMI projects, with unclear priorities. The distinction between the Checklist and the ever extending list of issues to be assessed or proofed is not clear. And this might be an important reason to explain why during the first year of operation the Checklist has often been ignored or been perceived as a formality in the internal red tape of governmental procedures rather than a genuine regulatory decision making tool.

The establishment of a small Central Regulatory Reform Resource Unit at the Department of the Prime Minister to drive the agenda of regulatory reform and monitor progress represents best practice in this field. However, the small size of the Unit raises questions about the political commitment to the process and about its effectiveness. The Unit does not have a statutory mandate to assess the quality of the answers to the Checklist nor a statutory duty to report on the outcome of its work. In fact, the Unit would appear to have less powers than those recommended by the 1996 Working Group. The Working Group recommended that the central resource unit would produce an annual report and provide an independent assessment of new proposals, in particular of compliance costs. It remains to be seen whether or not the central resource unit will be in a position to deliver these responses in its current configuration. Moreover, the delay in the articulation of the policy and programme, the small size of the Central Regulatory Reform Resource Unit, and a perceived lack of support in terms of staffing the Unit may reduce its credibility during the crucial transition phase of establishing a regulatory management system.³⁹

Furthermore, while many OECD recommendations have been adopted, others have not. Some important gaps may be identified. In practice, this means that departments preparing secondary regulations will not provide written answers to the Checklist *Although the Reducing Red Tape* explicitly indicates that the Checklist applies to the preparation of new laws and subordinate regulations, its enforcement mechanism is the Memorandum for Government, and the Memorandum needs to be completed only for the preparation of laws and exceptionally for secondary regulations. This contradiction implies that departments preparing subordinate regulations have not a clear obligation to use the Checklist. Secondly, the OECD has recommended as an essential principle that regulations should “produce benefits that justify

costs” and “consider the distribution of effects across society.” This principle is referred to in various countries as the “proportionality” principle or, in a more rigorous and quantitative form, as the benefit-cost test. Such a test is the preferred method for considering regulatory impacts because it aims to produce public policy that meets the criterion of being “socially optimal” (*i.e.*, maximising welfare).⁴⁰ This key principle is insufficiently developed in the policy of the government of Ireland and in the Checklist. Third, sufficient consideration does not seem to be given to the determination of the distributive effects of proposed regulations across society. Moreover, no explicit links seem to exist between the implementation of the policy and related policies such as structural adjustment policies, competition policy or trade openness (though the second test in the Checklist refers to market entry and restrictions on competition.) Finally, there are no standards and parameters for the operation of the Unit. No training has been provided in the specialist work of regulatory reform, in particular training on public consultation and RIA (for a further discussion of the Checklist see Section 3.3).

Modernising regulatory bodies and regulatory institutions. In parallel to the policies focussed on improving existing and new regulations, the Department of Public Enterprise recently developed a set of policy proposals to improve the performance, transparency and accountability of the recently created sectoral regulators (see Section 3.4).

Competition advocacy. Competition advocacy by the Authority, which in many countries has been a primary driver for reforms of regulation, has been meagre in Ireland, principally due to resources constraints, although this issue has been the subject of a recent examination and additional staff are in the process of being recruited (see background report to Chapter 3).

2.2. Mechanisms to promote regulatory reform within the public administration

Mechanisms for managing and tracking reform inside the administration are needed to keep reform on schedule and to avoid a recurrence of over-regulation. It is often difficult for ministries to reform themselves, given countervailing pressures, and maintaining consistency and systematic approaches across the entire administration is necessary if reform is to be broad-based. This requires the allocation of specific responsibilities and powers to agencies at the centre of government.

Ireland has a strong decentralised rulemaking process, where the proponent Ministry assumes most of the regulatory decisions before the Cabinet approves a bill (see Box 5 on the Irish rulemaking process). Procedures tend to be quite permissive and be seen as guides rather than rules to be complied with. At the centre the *Department of the Prime Minister* co-ordinates the discussion through the management of the fundamental regulatory documents: the Memorandum for the Government. The Cabinet Secretariat discharges the role of co-ordinating co-operation between departments and acts as mediator in the case of disputes. As noted, a small *Central Regulatory Reform Resource Unit* implements and oversees regulatory reform policy.

A second important participant in the legislative drafting process is the *Office of the Attorney General*. The Office provides an independent legal review of legislative proposals, both primary (bills) and secondary regulations.⁴¹ Its main objective is to ensure that constitutional principles and relevant international obligations are respected (*e.g.* fair procedures, proportionality and equality of treatment of citizens). It also verifies the legal quality of legislation. A special unit, called the *Office of Parliamentary Counsel to the Government* at the Attorney General Office drafts all Bills (proposed primary legislation) initiated by government and most secondary legislation.⁴²

The *Department of Finance* also provides advice to Government on all proposals submitted by other Department regarding primary legislation. It verifies in particular, the “Explanatory and Financial Memoranda” that accompany the bills on presentation to the Parliament prepared by sponsoring

Departments.⁴³ However, the Department does not examine subordinated regulations that do not have to be co-signed by the Minister of Finance. There are no published guidelines as to the criteria used in these reviews but they seem to be confined to minimising expenditure.

A few other bodies have participated as advocates for reform. The *Government Legislation Committee* (a committee composed of the Government Chief Whip, the Attorney General, the Office of the Government Parliamentary Counsel and the programme managers of each political party in Government) meets weekly to monitor the implementation of the government's published legislation programme. The committee also manages the flow of legislation into the Parliament. It has, however, no role in reviewing the quality of the bills. A well respected Ombudsman, who also is the Commissioner of the *Freedom of Information Act*, and the Comptroller and Audit General play a valuable surveillance role in strengthening accountability of the administration.

Box 5. The regulatory decision making process in Ireland

The Irish regulatory reform management process is shared between the Department of the Prime Minister (*Taoiseach* in Irish) and each department promoting regulations in consultation with the Attorney General Office. There are essentially three stages in respect of the making of new primary legislation. The first stage is a decision in principle to proceed with the development of a new law. After approval of the policy, the next step is to draft legislation on the basis of an approved general scheme. The third is the approval of text and publication. At each stage, the Memorandum for the Government (the document that forms the basis for the discussion and decisions) is circulated for comments to all concerned departments and the Office of the Attorney General. In the case of primary legislation, the decision to draft and publish legislation rests with Government. The Government acts on the basis of a proposal put forward by a Minister and based on a document known as a Memorandum for Government. The Memorandum is prepared following an iterative process in which the officials concerned identify the problem to be solved, research and consider policy options and hold consultations inside and outside the administration to be sure that the proposal for Government is soundly based.

Under the government procedure rules, set out in the *Cabinet Handbook*, all departments are consulted 'sufficiently in advance ... to allow proper consultation and consideration (para. 1.3) at each stage of the legislative drafting process.⁴⁴ Public consultation is often done in parallel to the interministerial discussions.⁴⁵

After government approval of the draft heads, the department concerned sends a complete file to the Office of the Government Parliamentary Counsel (OGPC), part of the Office of the Attorney General. OGPC is responsible for the drafting of all government bills. The main element of the file is the draft heads of bill accompanied by explanatory memoranda. In the formal drafting process by the OGPC, there is 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. Essentially, the drafter analyses legislative proposals from the point of view of constitutionality and effectiveness. He or she then prepares a series of drafts in consultation with officials in the department or office promoting the legislation and lawyers from the advisory side of the Office of the Attorney General.

After the text is ready, 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 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.

The preparation of secondary regulation (regulations, orders, rules and bye-laws) 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 OPGC. 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 which in many cases has 21 days to invalidate them.

After approval by the Cabinet, a bill is submitted to each House of the Parliament (in Irish, *Oireachtas*) for a five-stage process that leads to its eventual enactment. Notice of making of regulations is published in the *Iris Oifigiúil* (Official Journal) and in many cases notice is also published in national newspapers circulating throughout the country.

Forfas, as the policy advisory board of the Department of Enterprise, Trade and Employment for enterprise, trade, science, technology and innovation, has been a key promoter of reforms.⁴⁶ In particular, *Forfas* serves as the secretariat of the influential *National Competitiveness Council* established in 1997 whose members include both employers and trade union representatives. Senior government officials attend as observers. The Council's focus on improving competitiveness has provided a useful counterbalance to other lobby groups, as it focuses on reducing input costs to business. In successive reports it has promoted increased competition in energy, telecommunications, transport and many other areas of the Irish economy. In particular, it has highlighted areas where costs for Irish business (and generally also for private consumers) are out of line with those in other competitor countries. Its annual reports bring together a wide range of useful measures of competitiveness, helping focus attention on the areas most in need of reform. Equally, the Institute of Public Administration (IPA) has contributed to the debate on the modernisation of the public administration and the dissemination of new public management techniques including regulatory management tools.⁴⁷

2.3. Co-ordination between levels of government

Ireland is considered as one of the most centralised countries in Europe. There are 114 elected local authorities, which have a more limited range of powers than their counterparts in other EU countries.⁴⁸ The present-day system of local government differs little structurally from the one established by the *Local Government (Ireland) Act, 1898 by the Westminster Parliament*. Under the general supervision of the Department of the Environment and Local Government, local governments mainly provide public services, such as social housing, water, waste removal and treatment, roads, fire services and recreational facilities for local communities. In recent years, a certain amount of discretion has been decentralised in the areas of personnel, building construction, and traffic management. At the same time, new responsibilities have been added to local governments, in areas such as environment, planning, urban renewal, housing and general development, while others have been reduced, such as health functions that were moved to regional health boards and primary environmental protection transferred to a specialised agency.⁴⁹ Local governments have limited powers in the fields of education, health, and public transport (except taxis). Their involvement in social programmes is growing. In terms of regulatory powers, local authorities' competencies concentrate on licensing and permitting (*e.g.* land use) and control of nuisance and litter. Few explicit quality principles to be observed when preparing new local rules existed until recently.

A significant number of semi-autonomous single purpose public regional bodies operate in the health, tourism promotion and fisheries areas in addition to the local authorities.⁵⁰ While these bodies operate separately from local government, elected members are represented on the boards of some of these bodies. In addition, more than 100 other local development bodies operate at local level supported by EU programmes and are concerned with rural development, micro enterprise and community development/social exclusion.

In the last decade, a series of functional, rather than structural, reforms have been launched. In particular, the government has made important efforts to improve the managerial capacities of local governments' administration and co-ordination between local governments and between local governments and local development bodies. Based on the SMI, the programme 1996 *Better Local Government* created strategic policy committees for all counties.⁵¹ In 2000, county/city development boards were set up to improve co-ordination between local government, local development and state agencies and reduce policy and service delivery fragmentation at the local level. In 2000, the *Planning Act* was overhauled to improve transparency and accountability of local authority in respect of decisions concerning the preparation of the draft development plan. For example, the Act ensures pre-draft discussions with relevant interest groups and requires all submissions on the draft plan to be in writing. The *Local Government Bill, 2000* will also make further changes in respect of local authority procedures to ensure wide consultation on local decisions, for example through the Strategic Policy Committees, and transparency in the system, for example by ensuring that almost all meetings of the local elected members must be in public.

Since the early 90s, the government has also been building second-tier bodies to improve co-ordination and maximise the effectiveness of EU funds at the regional level (as well as to ensure their reinstatement). In 1991, the country was divided into eight regional authorities and in 1998, the country was further divided into two regions. Two new regional assemblies were created for the latter. Although the newest structure was designed to avoid conflicts and overlaps with existing regional authorities, a certain amount of scepticism greeted the new bodies as they were considered additional talking shops.⁵²

The new arrangements may help local governments modernise management capacities, streamline administrative procedures and reduce duplication from the proliferation of semi-autonomous and local agencies (some of them funded by EU) and local governments with partial objectives.⁵³ Two particular concerns have been detected. Inefficient spatial and housing planning is becoming an important obstacle to growth, impeding greater employment mobility and emigration as well as exacerbating inflation and transport problems. The problem is rooted on the many layers in the planning approval process with subsequent recourse to courts.⁵⁴ Secondly, the fact that many local governments are producer, supplier and regulator impede the delivery of high quality public services. The sheer number of local governments has created fragmented industries incapable of reaping scale economies, for instance in the maintenance of social housing, road repair, engineering and architectural design, or disposal and water supply.

Ireland joined the European Union in 1973 as part of the first enlargement of the Union. The effects of its membership have been huge and essentially beneficial. The economic and political opening and subsequent growth and diversification of trade and investment have been a powerful driver of Ireland's economic success (see background report to Chapter 4). However, EU membership has added an additional layer of government and policymaking.

The obligations of each EU Member State are to ensure that national law guarantees that directives have been given full effect. A key element has thus been the development of the machinery needed to implement the *acquis communautaire* (see Box 6). This process necessitates the drafting of measures in precise and clear language.⁵⁵ The choice of form and methods is left to Member States to decide. In Ireland, this has meant implementation by using one of two choices: primary legislation or secondary regulation.⁵⁶ The bulk of Directives have been implemented by means of regulations made under the *European Communities Act, 1972*. This route has not been without controversy.⁵⁷ Some directives have been implemented by primary legislation. The choice of primary or secondary legislation is usually determined by reference to whether the policy proposals are entirely within or go beyond the terms of the directive. The tendency is to copy out directives into Irish law, that is, to replicate as far as possible the wording of the directive in Irish legislation. This contrasts with the approach in other Member States, notably the United Kingdom, where the directives are rewritten to fit in more closely with English law.

Box 6. The European *acquis communautaire*

The *Acquis communautaire* comprises the entire body of legislation of the European Communities that has accumulated, and been revised, over the last 40 years. It includes:

The founding Treaty of Rome as revised by the Maastricht and Amsterdam Treaties.

The Regulations and Directives passed by the Council of Ministers, most of which concern the single market.

The judgements of the European Court of Justice.

The *Acquis* has expanded considerably in recent years, and now includes the Common Foreign and Security Policy (CFSP) and justice and home affairs (JHA), as well as the objectives and realisation of political, economic and monetary union.

In addition to transposing the body of EU legislation into their own national law, countries must ensure that it is properly implemented and enforced. The record of Ireland in transposing directives has been fair. By November 1999, Ireland needed to transpose 4.4%. In terms of the Single Market Scoreboard table, it occupied the 11th position, with delays in particular in the Transport and Veterinary sectors. Where there is action by the Commission for failure to implement directives the reason is often due to lack of staff resources to work on implementation projects rather than any ideological objections.

The Department of Foreign Affairs in conjunction with other relevant Departments has responsibility for monitoring the development of EU policy across the government and ensuring that there is sufficient coherence in Ireland's stance in Brussels. In addition, the Department of the Prime Minister through the Cabinet Committee on European Affairs provides overall direction to Government policy. Day to day co-ordination is done through working groups of senior officials. As other Member States have experience on this matter, public consultation on draft directives and EU regulation is mostly left at the discretion of concerned departments. Important interests, such as business associations tend to intervene directly in Brussels through specialised lobbies.

Relationship with Northern Ireland. Institutional relations and co-ordination between the national government and regional governments were rare. The Good Friday Agreement of 1998 changed this situation. Since the Agreement, the discharge of a range of public functions is undertaken in close co-operation with the devolved government in Northern Ireland, while certain functions are now carried out on an all-island or cross-border basis. These co-operation arrangements are set out in and governed by *the British-Irish Agreement Act, 1999*.

A North/South Ministerial Council (NSMC) has been established bringing Ministers, North and South, together to develop consultation, co-operation and action within the island of Ireland-including through implementation on an all-island and cross-border basis. The Council meets in different ways:

In plenary or summit format twice a year, with both sides represented by the Heads of Government;

In specific sectoral format—so far eleven⁵⁸—with each side represented by the appropriate Ministers; these meetings take place quarterly; and

In an institutional format to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement. This format, in which Ireland is to be represented by the Minister for Foreign Affairs, has yet to meet.

All Council decisions are by agreement between the two sides. The Ministerial Council has a range of modes of operation, from exchange of information and consultation, through using best endeavours to reach agreement on the adoption of common policies, to taking decisions by agreement on policies and actions at an all island and cross-border level to be implemented either (a) separately in each jurisdiction, North and South or (b) by implementation bodies operating on a cross-border or all-island level. Six such bodies have been established with defined executive functions in the areas of Inland Waterways throughout the island, Food Safety Promotion throughout the island, Special EU Programmes, Language (Irish and Ulster Scots), Trade and Business Development and Lough Foyle and Carlingford Lough (inland fisheries and aquaculture in these river basins). Six areas have been identified for co-operation in the first mode described above: Agriculture, Education, Transport, Environment, Tourism and Health.

In line with the Good Friday Agreement, a British-Irish Council (BIC) has also been established, comprising representatives of the British and Irish Governments, of the devolved governments in Northern Ireland, Scotland and Wales, together with representatives of the Isle of Man and the Channel Islands. The BIC is also to meet in different formats, mirroring the situation with the NSMC. The BIC will exchange information, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest. It is open to the BIC to agree common policies or common actions. Individual members may opt not to participate in such common policies and common actions. There are no implementation bodies with executive functions reporting to the BIC. A number of priority subjects have been identified for co-operation under the BIC—the fight against drugs, social inclusion, transport links and the knowledge economy.

3. ADMINISTRATIVE CAPACITIES FOR MAKING NEW REGULATION OF HIGH QUALITY

3.1. *Administrative transparency and predictability*

Transparency of the regulatory system is essential to establishing a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influence by special interests. Transparency also reinforces legitimacy and fairness of regulatory processes. Transparency is not easy to implement in practice. It involves a wide range of practices, including standardised processes for making and changing regulations; consultation with interested parties; plain language in drafting; publication, codification, and other ways of making rules easy to find and understand; controls on administrative discretion; and implementation and appeals processes that are predictable and consistent.

Openness and consultation are integral elements of public life and government procedures in Ireland. The *Freedom of Information Act, 1997*, has expanded these values. Transparency is further reinforced by the fact that the Irish administration is small and interrelated. However, there is little consistency in the consultative processes; and because consultation tends to be ad hoc and informal, it might be vulnerable to 'insiders' or powerful interest groups, relative to smaller or new actors such as consumer groups.

Transparency of rule-making procedures. Ireland does not have a law setting out procedures for the legislative drafting process. However, since 1998 [the Department of the Prime Minister has been publishing and up-dating a *Cabinet Handbook* that details the required procedures to present proposals for legislation for approval by the government. Previously the rules, or rather guidelines, were set out in confidential internal circulars. The Handbook also sets out the requirements to be followed when Ministerial or Departmental Orders (*i.e.* regulations, rules, schemes and bye-laws) need to be submitted to the government.

Transparency as dialogue with affected groups: use of public consultation. The Irish public service attaches great importance to public consultation. Consensus building, anchored in extensive dialogue with the social partners is considered a central element of the economic and social successes of the country (see Box 7). Since the advent of the *Public Service Management Act 1997* and the *Freedom of Information Act 1997*, the flow of information between departments and the public has been considerably enhanced. In the past few years, the practice of prior consultation at an early stage in the development of regulations has become for many departments a well-anchored custom.

In terms of formal requirements for the government to produce Bills and subordinate regulations, the *Cabinet Handbook* provides that proponent departments may consult with outside persons/bodies “if necessary”, although they should refrain from disclosing the actual legal text prior to approval by the Cabinet and presentation to the Parliament in the case of bills.⁵⁹ Furthermore, the 1999 *Reducing Red Tape* policy, incorporated in the *Cabinet Handbook*, requires as an element of the Quality Regulation Checklist that departments “outline the extent to which interested groups or representative bodies have been consulted”.⁶² In practice, the consultation process is ad hoc and unsystematic. Consultation procedures vary in accordance with the circumstances. There are no formal written procedures to prescribe as a matter of course who should be consulted before the making of legislation. Departments regard it to be part of their responsibility to identify key players in the areas for which they have responsibility and to keep in touch with them and their concerns. In some cases, the public is consulted widely and views are sought by means of advertisements in the national newspapers. In other cases where the proposals are industry or sector specific, the proposals are discussed with known industry or sector representatives. The process of consultation might involve the publication of a Green Paper, setting out the options for regulation and inviting formal submissions from the general public. This would be followed by a White Paper setting out the government’s policy intentions. Some policy changes are preceded by discussion documents, and when published these documents would set out with some particularity the nature of the issues considered and how problems were solved.⁶⁰

Box 7. Social Partnership in Ireland

Since 1987, the Social Partnership process in Ireland has been the catalyst for stable change in both economic and social spheres. The first social partnership, the *Programme for National Recovery (PNR)* was prompted by a number of crises—principally a fiscal crisis in which the debt/GNP ratio was around 125%. In return for moderate wage growth, competitiveness was restored and some control over public finance achieved. The view was taken that the trade unions would gain in the long term from these corrections and, additionally, the government accepted that the value of social welfare payments would be maintained and that the income tax regime would be reformed to the benefit of trade union members.

Four other social partnership agreements followed. An important aspect of social partnership in Ireland has been the consciousness that the process must have an inherent dynamic to respond the changing needs and new challenges. For example, under the second programme (1990-1993), the *Programme for Economic and Social Progress (PESP)*. Partnership companies were established, on a pilot basis, in 12 disadvantaged areas in order to achieve a more co-ordinated approach to social inclusion. Under *Partnership 2000*, community and voluntary interests were included for the first time in the negotiations and social inclusion issues were given much greater emphasis than before. Under the most recent Agreement *Programme for Prosperity and Fairness*, a change of format was introduced, in addition to an extended participation from the unions, farmers and the community and voluntary sector.⁶¹ Each Section begins with a small number of overall objectives followed by a number of specific actions working towards these objectives. This was to take account of criticisms that earlier agreements focussed too much on detail and not enough on the bigger picture.

Departments also rely on an array of advisory and liaison bodies. For instance, the Revenue Commissioners have a standing committee (called the Tax Administration Liaison Committee) comprising members of the accounting and legal profession which consider issues relating to tax regulation and administration. Most of the times, these bodies have been set up within the Social Partnership system to introduce checks and balances into decision-making, to increase the legitimacy of legislation, to identify and discuss policies, and to improve the level of voluntary compliance, including a smooth and rapid implementation of new legislation, once agreed. The official aim for the consultation is also to ensure that affected parties are well-informed of new regulation in advance and are able to minimise adjustment costs through forward planning.

Occasionally, after the Cabinet has approved the text, draft legislation is published in advance of its initiation in Parliament, with a general invitation to comment. The objective of this is to nurture national debate in Parliament. This has happened for example with consolidated tax legislation and with some significant changes to VAT legislation.

Assessment of public consultation. The nearly universal support for the social partner mechanism signals a general satisfaction with existing consultation and participation practices.

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.⁶² 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.⁶³ 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 do not participate to 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.⁶⁴ Here again precautionary steps, as full disclosure of interests, can be the best way to maintain a healthy consultation process.

Transparency in implementation of regulation: Communication. Transparency and regulatory compliance require that the government and Parliament effectively communicate the existence and content of laws and regulations to the public, and that enforcement policies are clear and equitable. As part of its modernisation programme, Ireland has been deepening and improving the accessibility of the regulatory framework, reversing a situation in which access to the law was a preserve of specialists. As is the case in most jurisdictions, notice of new legislation (primary and secondary) is given in the *Iris Oifigiúil* (Official Journal). In many cases, notice is also published in national newspapers circulating throughout the country. There are bound volumes of the Acts for each year. These are published chronologically, not according to subject, which makes it hard to identify precise obligations. *Statutory Instruments* are bound separately. Currently, the Office of the Attorney General, the Parliament, the Department of Finance and the Government Publications Office are formulating a policy to ensure that appropriate indexes (including Chronological Tables to the Statutes)⁶⁵ be made available in hard copy and electronically on a regular and updated basis. Making available the statute book on the Web and preparing updated CD-ROMs of all statute law for sale will accompany this programme. To complement such initiatives the government presented a *Statute Law (Restatement) Bill* in June 2000 to enable the Attorney General Office to produce administrative consolidations of laws (see Section 4).

While there is no central database for circulars, licences, permits and other administrative procedures, individual Customer Service Action Plans (CSAPs) published every two years by each department and office describe the services, including the required formalities, and set out standards of service delivery to which they are committed over the period of the Plan.

Irish departments have been keen to organise public information campaigns about new legislation that affects the public widely. For instance, when major new legislation or policies are introduced information seminars are held nation-wide. This was the case when the policy document *Social Housing—The Way Ahead* was published in 1995. Similarly, when the 1998 *Traveller Accommodation Act* was enacted the responsible department held a series of nation-wide seminars with local authorities to explain the impact of the legislation. Information leaflets in plain language are updated and published on a regular basis to take account of changes to the terms and conditions of the various schemes. The Department of the Environment and Local Government has also been publishing explanatory guides to its regulations. There are a series of 11 leaflets on the planning system which are available free of charge. One of them in the series is “A Guide to the Building Regulations”. Technical Guidance Documents covering all parts of the building code and explaining how compliance with the buildings regulations can be achieved have been issued in 1997 by the department, following a two year review process, which included public consultation.

Use of Plain language. As a matter of policy, the *Cabinet Handbook* encourages regulators to avoid jargon and technical language when possible.⁶⁶ Recently the Law Reform Commission published a Consultation Paper on the subject of Statutory Drafting and Interpretation.⁶⁷ Although the Commission did not find major faults in the process of drafting legislation that would give rise to interpretation difficulties, it recommended the adoption of standard drafting practices, which would ensure consistency in the statute book and better understanding of the legal texts. The Paper also recommended that as far as possible all legislation be drafted in clear language. The Office of the Attorney General broadly welcomed the Paper and started work on a style guide for the drafting of legislation and the use of plain language to be published in the Autumn 2000.

Compliance, application and enforcement of regulations. The adoption and communication of a law or regulation is only part of the regulatory framework. The framework can achieve its intended objective only if each law is adequately implemented, applied, enforced and complied with. A mechanism to redress regulatory abuse must also be in place, not only as a fair and democratic safeguard of a rule-based society, but as a feedback mechanism to improve regulations. Ireland in all these issues shows results, commitment and intention for further progress.

A fundamental feature of regulatory justice is the existence of clear, fair and efficient administrative procedures. A clear trend among OECD countries towards the establishment and achievement of these goals has been the development or updating of administrative procedure acts. Ireland does not have such an instrument, though. Its administrative 'law' is still scattered widely across diverse legislative acts and rulings of courts. Enforcement and dealing with complaints practices vary significantly across departments and offices, and there are no over-arching generic procedures for ensuring fairness or transparency of the administrative process. For instance, in the case of enforcing labour law, a variety of approaches have been adopted in individual labour law over the years reflecting both differences in the laws to be enforced and the development of the institutional framework over time. Earlier legislation relied for enforcement on criminal sanctions with power given to the Minister to appoint inspectors to investigate complaints and initiate prosecutions. A more proactive approach was taken in the administration of the enforcement regime in employment covered by newer acts. In addition, most employment legislation of the modern era relies for enforcement primarily on civil remedies by means of special procedures created to provide speedy and inexpensive redress.

Since the late-1970s, Irish administrative law has become more coherent.⁶⁸ In the past five years, further progresses have been achieved through the enactment of new acts, such as the *Freedom of Information Act*, 1997. The possibility to enshrine in a single Act basic administrative justice principles and administrative procedures, as is the case in many other common law jurisdictions, may improve consistency, coherence and transparency in the interpretation and application of the rules.⁶⁹ An initiative of this kind could also be an opportunity to review, codify and reduce, if needed, any excessive discretionary powers delegated to regulators or local governments in preparing or designing regulations.⁷⁰

A second essential element in the effectiveness of the legal and regulatory framework is the existence of a timely and effective appeal system. The method for challenging administrative decisions is an application to a court of competent jurisdiction. This 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 (see background report to Chapter 5).

A recent reform, the *Courts Service Act*, 1998, may bring improvements to the administration of justice.⁷¹ 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 £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 fulfil the mandate, the outputs to be achieved, with corresponding key performance indicators, on different services provided by the courts.

Regulatory compliance and enforcement. Assessments of compliance are seldom part of the rulemaking process. Compliance nevertheless is perhaps one of the most important performance indicators of a good quality regulation.⁷² Ireland, as most OECD countries, has rarely systematically studied or evaluated the issue. Even if recent evidence shows increasing efficiency in enforcing regulations, strong informal relationships and persistence of effective lobbies at local level, may indicate the need for further efforts on this issue.

Some interesting initiatives to improve compliance may be identified in current practices. Following increasing evidence of corporate misconduct, the government accepted the thrust of most of the recommendations presented by the Working Group on Company Law Compliance and Enforcement.⁷³ One of the Group's principal recommendations is the establishment of a new statutory office to be known as the Office of the Director of Corporate Enforcement. The Office will have specific powers and responsibilities for the investigation of instances of suspected reckless or fraudulent trading and of suspected offences under the Companies Acts (false accounting, offences relating to insolvency, etc.). In relation to tax evasion, and based on the findings of the Comptroller and Auditor General 1997 annual report, the government has also recently given the Revenue Commissioners more powers to combat tax evasion, including the power to examine bank accounts without court approval and to pursue tax evaders. Related to other policy areas, an interesting pilot scheme launched in 1999 enables businesses to comply with a voluntary code of conduct for workplace safety to qualify for preferential insurance rates.⁷⁴

3.2. Choice of policy instruments: regulation and alternatives

Much reform of the regulatory process in other OECD countries is based on the use of wider range of policy instruments that work more efficiently and effectively than traditional regulatory controls. The range of policy tools and their use is expanding as experimentation occurs, learning is diffused, and understanding of the markets increases. At the same time, rule-makers and regulators often face risks in

using relatively untried tools, bureaucracies are highly conservative, and there are typically strong disincentives for public servants to be innovative. Reform authorities must take a clear leading and supportive role, if alternatives to traditional regulations are to make serious headway into the policy system. Ireland in this respect has been slow in promoting the use of policy instruments that have been proved to work more efficiently. In general, regulators still tend to rely on 'command and control' mechanisms. This may reflect the conservatism of the Irish administration. Progress nevertheless is seen in some areas, and this trend may be accelerated if the Regulatory Quality Checklist embedded in new regulatory policy is adequately implemented and enforced.

Some progress in using alternatives to regulations can be found in particular areas. The most used instruments seem to be the voluntary codes of conduct organised by industry groups. Voluntary codes for instance have been used for instance to implement the guidelines contemplated by the *Broadcasting Act* of 1990, or for the pensions guidelines issued under the *Pensions Act*, of 1990, and of artists' tax exemption guidelines issued under the *Finance Act*, 1994. Voluntary codes have also been issued under the *Safety Health and Welfare at Work Act*, 1989. However, the use of voluntary codes have been criticised as having the character of legislation without any of the safeguards of legislation,⁷⁵ and have raised questions about potential collusive effects and corporatist attitudes

Ireland has also promoted self-regulation schemes, for example in the field of advertising. A complaint may be made to the Advertising Standards Authority about an advertisement. This self-regulatory body, may hear the complaint and if it considers that its Code of Conduct has been breached it may issue a ruling calling on the advertiser to withdraw the advertisement. In the majority of cases the offending advertisement is withdrawn. On the other hand, Irish regulatory authorities seldom use economic instruments. A recent report by the OECD states that "Ireland has made only limited use of economic instruments in environmental management so far. While some funding is provided for incentive payments and remuneration of environmental services, particularly in the context of agricultural policy, charges are of marginal importance. To some extent, present practice and recent decisions are inconsistent with the intention to make polluters pay and to confront consumers of scarce resources with their actual costs".⁷⁶ Recent episodes in establishing user charges on domestic waste in Dublin show how powerful vocal local opposition may hinder important regulatory innovations.

Ireland has also delegated regulatory powers to non-governmental bodies or other self-regulatory bodies, where powers are usually to be exercised within a broad policy framework laid down in a parent act. For example, some of the enforcement provisions of the tax collection system are delegated to a network of Revenue sheriffs and external solicitors. The Law Society has also been empowered as a self-regulatory body to overview and to regulate solicitors. Joint Labour Committees (JLCs) can as well be considered as non-governmental bodies with limited regulatory capacities in the area of industrial relations and statutory minimum and conditions of employment for the workers involved. The supervision of company auditors has also been delegated by law to a number of recognised accountancy bodies that monitor, investigate and (where appropriate) discipline its members practising as auditors. The supervision by recognised accountancy bodies of their auditing members has recently formed part of a detailed review. The Report of the Review Group on Auditing (July 2000) has suggested that the monitoring arrangements in place up to recently have not been effective in deterring a number of significant instances of corporate malpractice over a prolonged period. The Group has recommended that an independent and more rigorous system of regulation and accountability should be established and maintained in the public interest, in order to ensure that the structures, procedures and professional standards in the recognised accountancy bodies are operating to high standards.⁷⁷

3.3. Understanding regulatory effects: the use of Regulatory Impact Analysis (RIA)

The 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* emphasised the role of RIA in systematically ensuring that the most efficient and effective policy options were chosen. The 1997 *OECD Report on Regulatory Reform* recommended that governments “integrate regulatory impact analysis into the development, review, and reform of regulations.” A list of RIA best practices is discussed in detail in *Regulatory Impact Analysis: Best Practices in OECD Countries*.⁷⁸

The use of RIA is currently in its infancy in Ireland. The government adopted RIA only in July 1999, which was later than most OECD countries. The process of approving this policy was in itself slow. The policy was established three years after being proposed by the Working Group on Regulatory Reform. The implementation of the programme of action has also been laborious, as many months were required before the *Cabinet Handbook* stipulated the completion of the Quality Regulation Checklist and the Central Regulatory Resource Unit was assigned its first administrator. This contrasts with the elaborate procedures for financial and budgetary control mechanisms, which include accountability assessments applied by the Ministry of Finance and external overview by the Comptroller and Auditor General and the Parliament.⁷⁹

Box 8. Quality Regulation Checklist in Annex VI of the *Cabinet Handbook*

1. Is the proposed legislation and/or regulation absolutely necessary *i.e.* is the problem correctly defined and can the objective be achieved by other means (*i.e.* improved information, voluntary schemes, codes of practice, self regulation, procedural instructions)?
2. Will the legislation affect market entry, result in any restrictions on competition or increase the administrative burden?
3. Is the legislation compatible with developments in the Information Society, particularly as regards electronic Government and electronic commerce?
4. Outline the consideration which has been given to exemptions or simplified procedures for particular economic or social sectors which may be disproportionately burdened by the proposal, including the small business sector.
5. Outline the consideration which has been given to application of the following principles:
 - Sunsetting *i.e.* establishing a date by which the measure will expire unless renewed
 - Review date *i.e.* a predetermined date on which the efficacy and impact of the proposed new measure will be reviewed.
 - The “Replacement” principle *i.e.* where the body of regulations/legislation in a particular area will not be added to without a corresponding reduction through repeal of an existing measure
6. Outline the extent to which interested or affected parties have been consulted, including interest groups or representative bodies where such exist. A summary of the views of such parties should be provided.

According to the *Cabinet Handbook*, when presenting a Memorandum for the Government all departments and offices must “indicate clearly, as appropriate, the impact of the proposal” based on a standard Quality Regulation Checklist (see Box 8). They must also self-assess, through a “proofing” if during the preparation of the proposal consideration was given to for 1) relations, co-operation or common action between North and South of Ireland, and between Ireland and Britain; 2) employment; 3) women, 4)

persons in poverty or risk of falling into poverty, 5) industry costs and cost to small business; 6) rural communities and 7) costs to the Budget and staffing implications (in consultation with the Department of Finance).⁸⁰ This Section will concentrate mainly on the Quality Regulation Checklist rather than on the other impact issues. Moreover, as the information available about the actual implementation of the Checklist in Ireland shows that for the moment most of the departments have considered that their legal proposals passed the tests and that the Department of the Prime Minister accepted their assurance, it will focus on the formal instruments described in the *Reducing Red Tape* programme against OECD best practice recommendation rather than its practice.

Assessment

Maximise political commitment to RIA. Use of RIA to support reform should be endorsed at the highest levels of government. The Irish system obtains an average mark on this criterion. On the one hand, the Memorandum for the Government, which implements the Checklist, is presented and discussed at Cabinet level and thus must be endorsed by ministers. However, the *Cabinet Handbook* gives discretion to the proponent ministers whether or not to include the Checklist (“as appropriate”). More problematic, most of the secondary regulations (*i.e.* Orders) are not reviewed by the Cabinet and thus will be automatically exempted from the Checklist altogether.

Allocate responsibilities for RIA programme elements carefully. To ensure “ownership” by regulators, while at the same time establishing quality control and consistency, responsibilities for RIA should be shared between regulators and a central quality control unit. Here too, the Irish system receives a mixed result. On the positive side, the programme is embedded in the SMI approach, where a key component is to produce an endogenous cultural change from regulators, strengthening accountability and transparency. The policy also provides for the establishment of a small central unit in the Department of the Prime Minister to drive and monitor progress. Although the central unit (currently two persons) could have access to the Memoranda for Government by being located in the Department of the Prime Minister, it is not clear that it has the capacities to review and assess hundreds of Checklists a year covering a variety of issues and areas, some of which are very technical (*e.g.* new regulation on food safety). Furthermore, due to its hierarchical ranking and the high level of autonomy of each ministry, the unit or even the Department of the Prime Minister may find it difficult and politically expensive to challenge ministers' answers to the Checklist. Experience of other countries like the Netherlands and Denmark show that the 'check and balance' function that a RIA should play can be substantially enhanced when institutional 'heaviness' and/or a tacit and strong alliance between powerful institutions (traditionally the Department of Finance) raises the cost for proponent departments of confronting the overseeing unit.

Train the regulators. Regulators must have the skills to do high quality economic assessments, including an understanding of the role of impact assessment in assuring regulatory quality, and an understanding of methodological requirements and data collection strategies. Currently no formal training programmes or guidelines are in place in Ireland to help implement the Checklist. Given the fact that impact assessment is at an early stage, training should be a high priority, both to develop specific skills and to contribute to longer term cultural changes among regulators. Training and guidance are also essential to ensure methodological consistency between assessments. The Dutch experience of having a specific help desk at the disposal of regulators might also be applicable to Irish circumstances.

Use a consistent but flexible analytical method. Irish requirements do not include specific methodological standards or guidance to help proponent departments answer the Checklist's items 2 and 4 concerning impacts on market entry and administrative burdens, as the distribution impacts on SMEs. This area should be a high priority one, as economic valuation has been detected as being a weak point of the Irish administration. Fostering analytical methods for completing the Checklist could also be seen as an

important step to comply with Section 4(1)g of the *Public Service Management Act, 1997* which specifies that all ministries need to “examine and develop the means to improve service delivery at the lowest costs”.

At any rate, the absence of a requirement to use quantitative methodologies means that consistency in assessments cannot be assured. Attention to developing detailed methodological requirements for impact assessments, and supporting them with relevant training, guidance and expert assistance, is key if impact assessment is to achieve its potential in improving the quality of Irish regulation. As a clear goal of the policy, the RIA system should aim in the longer-term to establish benefit-cost analysis as the primary method for assessing regulations. This could benefit from the growing experience on evaluation techniques concerning many EU programmes, where Brussels requires a cost/benefit analysis.

Develop and implement data collection strategies. As RIA seems in the Checklist to have been confined to qualitative analysis, data collection strategies have not been developed. Since data issues are among the most consistently problematic aspects in conducting quantitative RIA, the development of strategies and guidance for departments and offices is essential if a successful programme of quantitative RIA is to be developed. However, the programme of action anticipates the establishment of 'user groups', whose role is not defined. According to the 1996 Working Group's recommendations accompanying the policy, their main function should be to provide advice on “the quality and quantity of regulation”.⁸¹ In that sense, it would be advisable if such user groups could be assimilated to the existing Danish Business Test Panels, where a cross-section of businesses is asked directly about expected administrative burdens of proposed legislation.⁸²

Target RIA efforts. RIA resources should be targeted to those regulations where impacts are most significant, and where the prospects are best for altering outcomes. In all cases, the amount of time and effort spent on regulatory analysis should be commensurate with the improvement in the regulation that the analysis is expected to provide.⁸³ In reality, the Irish RIA is almost totally focussed on primary legislation, as the *Cabinet Handbook* does not require the preparation of a Memorandum for the Government (and thus a Checklist) for most secondary regulations. While in theory subordinate regulations cannot go beyond their parent Act, in practice many requirements set in secondary legislation have major impacts. A major improvement will thus be to broaden the scope of RIA to all type of instruments, but in parallel to design a targeting system to focus only on those with potentially high impact. For instance, the Korean RIA defines as “significant” regulations those that have an annual impact exceeding 10 billion won (US\$ 0.9 million), an impact on more than 1 million people (approximate 2% of the Korean population), a clear restriction on market competition, or a clear departure from international standards. In general terms, the assessment is made by the proponent department, which needs to justify its request for an exemption from the requirement of cost-benefit analysis, but the central unit, through a 'silence is consent' rule, can contest the self-estimate and require a complete RIA.

Integrate RIA with the policy making process, beginning as early as possible. Integrating RIA with the policymaking process is meant to ensure that the disciplines of weighing costs and benefits, identifying and considering alternatives and choosing policy in accordance with its ability to meet objectives are a routine part of policy development. In some countries where RIA has not been integrated into policymaking, impact assessment has become merely an *ex post* justification of decisions or meaningless internal paperwork. Integration is a long-term process, which often implies significant cultural changes within regulatory ministries. Here again Ireland gets a mixed mark given that the Checklist must accompany the Memorandum for the Government before the Office of the Attorney General drafts the legal text. But the difference between complying with the Checklist and the various assessments or proofs that departments need to report in the Memorandum, such as employment, impact on women, affect on persons in poverty, industry costs and cost to small businesses are unclear. Too many goals and

assessments create confusion and overlap. In addition, the tests are so imprecise and difficult to assess that it has little analytical credibility, and the criteria for regulatory efficiency are not clear. If the Checklist is intended to be a true RIA, steps should be taken to either consolidate some of the impacts currently “proofed” or clearly differentiate the type of compliance required for the Checklist and for the other general considerations. For instance, the justification of the foreseen impacts on “industry costs and the cost to small business” or the impact on “employment” could be easily integrated into the Checklist.

Involve the public extensively. Public involvement in RIA has several significant benefits. The public, and especially those affected by regulations, can provide the valuable data necessary to complete RIA. Consultation can also provide important checks on the feasibility of proposals, on the range of alternatives considered, and on the degree of acceptance of the proposed regulation by affected parties. The Programme of Action emphasises in three out of its seven main actions the need for consulting with “customers”. However, the *Cabinet Handbook* does not impose a requirement to hold consultations with third parties in respect of the Checklist. The *Freedom of Information Act* states that Memoranda for the Government may be withheld from access for five years.⁸⁴ Ireland should consider making it a statutory requirement to publish RIAs at the earliest possible stage. For this, a first step could be to dissociate the Checklist from the Memorandum which is kept confidential for the sake of the Cabinet effectiveness and cohesion. The publication of the Checklist could also be a powerful way for Ireland to formalise public consultation and at the same time improve rapidly the quality of RIAs—and foster accountability across regulators. Indeed, a ‘name and shame’ mechanism is often the strongest incentive and/or sanction for public servants.

In conclusion, Ireland has not yet incorporated into its policy making process a well-functioning RIA process, but a start has been made. The checklist constitutes an important step in this process. Nevertheless, the checklist and the institutions for implementing it have significant weaknesses. Additional steps are needed to make the analysis more rigorous, with a broader scope, developing appropriate methods and adequate incentives for different stakeholders. Critics have claimed that Irish adoption of RIA was only to “keep pace with developments” in other countries, without being convinced that a RIA is a crucial element for efficient, transparent and accountable regulatory decisions. Development of RIA in the coming months may prove them wrong.

3.4. Institutional design

As have most OECD countries, Ireland is building market-based institutions to separate ownership, policy development and day-to-day regulatory overview in key economic sectors. This is in line with EU requirements.⁸⁵

In June 1997, regulatory functions for telecommunications were transferred to the Director of Telecommunications Regulation (DTR). Two years later, the Commission for Electricity Regulation (CER) was formally established. Legislation for the setting up of an airports regulatory body was enacted in February 2001; a regulator-designate was appointed in late 1999 in anticipation of the legislation. In September 2000, the regulation of postal services was assigned to the telecommunications regulator. Regulatory arrangements for gas and for surface transport are under consideration at present.⁸⁶ In February 2001, the government announced the establishment of a new sectoral regulator for financial services: the Irish Financial Services Regulatory Authority (IFSRA). The new authority will have its own board and an independent chair, who will report to the Minister for Finance and to the Prime Minister.⁸⁷

These regulatory authorities operate within the policy parameters of the regulatory framework laid down by the minister responsible for policy in the sector. Part of the minister's policy role is to undertake an ongoing evaluation of the appropriate extent and range of utilities regulation, having regard to

developments within the sectors and within the economic environment generally. As the Department of Public Enterprise's Strategy Statement (1998) states, the regulatory objective is "to provide for an effective regulatory framework for each sector in such a way as to strike a balance between independence and accountability".

Although recent, the practice in Ireland indicates that with respect to independence, the design is working properly. For instance, in terms of financial independence, the independent regulators are funded by the industry on the basis of fees for licences and levies. This has allowed the regulators to have adequate staff, premises, equipment, services and other resources necessary for their operation.

Oddly, the independence of sectoral regulators in utilities in the public sector contrasts with the position of the Competition Authority. Although the Authority is independent in decision-making, in other respects it is strongly dependent on the Department of Enterprise, Trade and Employment, to which it is attached for administration, personnel, and budget.⁸⁸ This has important consequences on the institutional architecture (*e.g.* salary levels at the Authority are lower than in the sectoral regulators, and thus create recruitment difficulties and reduce credibility.) The relationship between the Competition Authorities and the sectoral regulators was unclear in the early days of independent sectoral regulation. However, in the context of development of the regulatory framework, the issue of the management of overlapping jurisdiction is now being addressed. Some proposals in this regard were made both by the Minister for Public Enterprise in her *Governance and Accountability* document of March 2000 and by the Competition and Mergers Review Group in its Report of May 2000. The various regulatory agencies are already engaged in administrative arrangements to deal with such matters, and some legislative measures are also proposed by the Minister for Public Enterprise and the Minister for Enterprise, Trade and Employment. (see background report to Chapter 3).

Important issues concerning **accountability** have received attention in recent times, and the regulatory framework has undergone some development in this regard. For example, the 1996 legislation establishing the independent telecommunications regulator made no provision in relation to accountability to Parliament. However, the 1999 legislation for the electricity regulator demonstrates how this lacunae in the regulatory framework, once discovered, was filled. That legislation makes specific provision requiring the Commission for Electricity Regulation to account to parliamentary committees for the performance of its functions. Although there is no statutory obligation, the Director of Telecommunications Regulation has, in fact, appeared before parliamentary committees on several occasions. Forthcoming legislation for regulation of the communications sector will include provision for a statutory obligation in this regard.⁸⁹

As other countries have found, replacing direct political accountability based on ministerial responsibility with managerial/technical accountability between regulators and ministries as well as parliament can create new potential problems. There is both the risk that such parliamentary overview will either be too loose, allowing the regulator too much or inappropriate discretion, forcing the regulator into specific market decisions not linked to the regulatory mission. It is important that the accountability requirements are balanced with the necessary operational independence of the regulators.⁹⁰ The fact that independent sector-specific regulation in relation to certain public utilities is a new advent in Ireland—the first such sectoral regulator was only established in 1997—means that it is yet too early to assess the effectiveness of parliamentary overview.

In March 2000, the discussion was expanded with the publication by the Minister for Public Enterprise of a policy paper entitled *Governance and Accountability in the Regulatory Process: Policy Proposals*. This paper sets out the Minister's policy proposals on the governance and accountability aspects of the regulatory framework for the sectors within her portfolio. The policy proposals drew on the views expressed in the submissions received in response to the Minister's call in September 1999 for public comments on these arrangements; they were also informed by the experience gained to-date in the

independent regulation of the utilities in Ireland, and by international experience. The proposals are reflected in the various legislative documents that the Minister has been bringing forward recently for the regulation of the individual sectors.

In general terms, the Governance and Accountability document develops the regulatory framework so as to resolve perceptions about 'democratic deficit' which could have had an impact on the credibility and legitimacy of the new regulatory institutions.⁹¹ Some of the issues analysed by the document concern the 'top-level' structure and composition of regulatory authorities, the relative merits of regulatory boards over a single regulator, the methods of selection, appointment and removal of regulators, and the relationship between appointment and independence and accountability. The document also discusses the transparency, fairness, efficiency and effectiveness of decision-making mechanisms of regulators, and the relationship with important stakeholders and the question of enforcement powers. In conclusion, the document proposes:

- The introduction of legislation to clarify the right to judicial review of the decisions of regulatory bodies, and proposes that, unless otherwise decided by the Courts, the decision of a regulator should stand while under review.⁹²
- The updating of the relevant legislation in the area of fines and penalties in order that punitive measures reflect both the nature and the consequences of a breach of the regulatory rules.
- The adoption of a model of regulatory commissions comprising three persons, as in the case of the Commission for Electricity Regulation.
- The strengthening of consultation mechanisms between the Competition Authority and the sectoral regulators.⁹³
- That the setting of public service/social requirements remain a function of the Minister (subject to public notification, in the interests of openness and transparency), but that, in addition, regulators and other interested parties be invited to make suggestions to the Minister in relation to such comments.

The discussion and analysis in the Governance and Accountability Report is of a cross-sectoral, generic nature, but it is proposed that the implementation of the policy proposals be done by means of sector-specific measures in each of the various sectors to which the document relates. This will allow the exact manner of the implementation to vary from sector to sector, in order to take account of each sector's individual circumstances.⁹⁴ In areas for which legislative arrangements are already in place (*e.g.* telecommunications, electricity) the existing legislation is being reviewed so that future legislation can include provisions which bring it into line with the policy set out in the Governance and Accountability document. In the areas for which legislation post-dates the publication of Governance and Accountability (*e.g.* aviation), such legislative measures are being drawn up in accordance with the principles set out in that policy document. Moreover, given the changing nature of technologies and evolution in markets, the policy requires that a review should take place on a regular and systematic basis, possibly every three to four years, though some aspects of telecommunications may require more frequent review.

The Governance and Accountability Report can be considered one of the more interesting exercises about these issues undertaken in OECD countries. Still, it leaves important questions unclear. First of all, a central proposal concerns the clarification about the accountability role played by Parliament. But Parliament's committees do not have yet the capacities to materially respond to such a responsibility, in part due to lack of financial and human resources. A second concern relates to the quality of the regulations produced by the regulators. Although not systematic, the Office of the Government Parliamentary Counsel

and the newly established Central Regulatory Reform Unit provide a quality check on proposals concerning secondary regulations prepared by all departments (see Section 2.2). With independent regulatory authorities having the power to make regulations in specified areas, central *ex ante* overview on the quality and impact regulations could be eroded.

A third important concern that is unresolved (and perhaps accentuated) by the Governance and Accountability Report refers to the core objectives for such bodies. The report justifies regulatory intervention “to facilitate market entry, ensure fair market conditions and customer protection and ensure that all users have access to a basic level of services at reasonable prices. In this way, economic regulation can comprehend social and regional objectives” (p.6). Although these objectives are commendable, the Report does not consider their potential contradictory effects and does not set priorities or mechanisms to help regulators resolve discrepancies when they implement strategies to attain each one of these goals.

Lastly, some issues that go beyond accountability issues and refer to effectiveness of the regulators are still to be settled. In 1996, the government announced its intention to establish a multi-sector regulator for the energy and communications sectors.⁹⁵ The thinking behind this was that for a small country connected to a larger EU regulatory framework, synergies between the different fields of expertise could be found to maximise the output of the scarce number of expert regulators. Since then, a shortage of appropriate expertise has appeared, yet the current political position has shifted away from the multi-sector regulator approach to setting up independent regulators for each of the regulated sectors. In addition to a less than optimal use of scarce human resources and possibilities of duplication between bodies, the proliferation of sectoral regulators may increase institutional rigidity and fragmentation, and augment the risk of capture by powerful interests.

Governance and Accountability in the Regulatory Process concluded that, for the present, regulation at the sectoral level was probably the most appropriate for the utilities in Ireland, given that it would allow for an approach focused on the particular circumstances of the various markets while comprehending the competition/complementarity between industries operating (or potentially operating) in the same market. However, *Governance and Accountability* noted that, as markets develop the justification for detailed sectoral regulatory intervention might diminish over time and the question of a supra-sectoral regulatory authority could be re-examined, at a future date.⁹⁶

4. DYNAMIC CHANGE: KEEPING REGULATIONS UP-TO-DATE

The *OECD Report on Regulatory Reform* recommends that governments “review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively”. Ireland until recently did not have a systematic policy to review its existing laws and regulations. Review and reform of its stock of regulations and administrative formalities were done by each department and office, and consisted mainly of harmonising with EU directives and conforming to the SMI programme.

But 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 Employment 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 has helped advance regulatory reform. Some of the most influential have been the *Competition and Mergers Review Group*, which examined competition policy and enforcement processes (see background report to Chapter 3), and a series of *Company Law Review Groups*. The First of the Company Law Review Group was established in 1994 to examine seven aspects of Irish company law. The Group represented interests such as the accounting professions, the Law Society and Bar Council, the Irish Association of Investment Managers, the Irish Bankers Federation, the Irish Stock Exchange, the business community and the trade unions. Also represented were two government departments, the Revenue Commissioners and the Minister for Finance. The creation of a forum representing all interests in company law was a departure from the usual means of reforming legislation. Another Review Group was established in 1998 to recommend reforms in company law compliance and enforcement, and reported in November 1998. Following from a parliamentary inquiry into the non-payment of Deposit Interest Retention Tax, a Review Group on Auditing was established to examine the regulation of and rules governing auditors and accountants, and reported in July 2000. The recommendations of both these groups are being implemented. Yet another Company Law Review Group was set up in 2000 to review aspects of company law not covered by the original Group. Interestingly, the Group has been set up on an ongoing basis to review company law and support “the enactment every two years of a Company Law Review Bill which will update, streamline and otherwise bring the Companies Code in Ireland into line with international best practice on corporate governance, having regard to the principles of compliance and simplification.”

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.⁹⁷ 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.

Sunsetting and automatic reviewing mechanisms. 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. Information on the effectiveness and efficiency of sunseting, and on the challenges of managing it in practice is quite limited. Sunseting laws and regulations may create unforeseen problems and wrong incentives, especially if too brief a period is established. Indeed a badly designed sunseting mechanism may lower compliance and predictability of the regulatory framework. However, a recent OECD/PUMA study reviewed the use of sunseting in several Australian States and concluded that its use has removed much redundant regulation from the statute books and played a significant role in encouraging the updating and rewriting of much that has remained. The report noted, though, that a review cycle of five years might be too short, leading to a waste of review resources and reducing the predictability of the legal system.⁹⁸ Ireland may refer to this experience when establishing the criteria and guidelines to implement the new requirement.

As noted above, at the sectoral level, the Minister for Public Enterprise proposed in the Governance and Accountability Report a periodic formal evaluation of regulatory developments, including an assessment of the continued justification for intervention in the context of the achievement of national economic, social and regional objectives.

Reducing administrative burdens. An important focus of the current Irish policy is the control of administrative burdens. As such, it incorporates past thrust and 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.⁹⁹ 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.¹⁰⁰ 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 in Ireland in this field 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 aegis of 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.¹⁰¹ 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.¹⁰²

5. CONCLUSIONS AND RECOMMENDATIONS FOR ACTION

5.1. *General assessment of current strengths and weaknesses*

Ireland has transformed its economy in the last 15 years. From a low-skilled and low-wage population with high levels of emigration, and a protected and highly regulated economy, Ireland today is enjoying market-driven prosperity and low unemployment. Governance changes have also been significant, but have lagged behind economic changes, and could pose a bottleneck to sustained high levels of growth. Good economic performance explains part of the transformation of the economic, social and cultural environment. But external and perhaps one-off factors were also at play. In sustaining its development, Ireland will need continued regulatory reform to improve the market environment and resolve emerging success-related challenges such as skills and housing shortages.

The Irish regulatory environment and framework has been significantly improved. Major legal reforms have produced fundamental changes in important sectors such as financial services, telecommunications, electricity, transport, and in the roles of local governments. Within the broad framework of public service reforms and market developments, new regulatory regimes have evolved. New market-oriented institutions have been set up or strengthened, such as the sectoral regulators and the competition authority.

Accountability and transparency have been strongly enhanced, not only through traditional participatory and consensus-building mechanisms characterised by the social partnership approach, but also through new mechanisms such as enforcement and compliance with the *Freedom of Information Act*. Improvements have been gradual and incremental, and in some case piecemeal, but recently the rate of changes in the modernisation of the public sector has accelerated. The high-level support by the administration and by successive governments of the remarkable SMI is fostering a new culture in government culture, including rule making. The Irish judicial review process is in many ways exemplary, and has helped to identify poor laws and regulations.¹⁰³

This progress in government capacities has been accomplished without an external crisis, but instead through pressures from the European Union and an internal, non-partisan initiative sustained through several governments. Ireland provides a lesson in the strategies of regulatory reform. Prolonged, consistent policies that are broadly supportive across policy areas can create a stable micro-economic environment that enables new institutions to produce positive outcomes. For instance, the sustained policies to foster market openness and attract FDI, as well as EU integration, have trickled down to most policy areas.

However, new challenges in the short and medium term need to be addressed. In the next few years, a range of success-related difficulties, such as shortages and bottlenecks, in a context of fiscal constraints and anti-inflation controls, may require that Ireland regulate 'better and smarter' than in the past or than its trading partners. Rapid growth may be masking significant regulatory weaknesses. In a high-growth environment, discerning regulatory failures and acting against high regulatory costs are more difficult. A cyclical down-turn may reveal costly burdens due to low quality and rigidity of laws and regulations. As durable anti-market regulatory regimes in pubs, taxis or land zoning show, interventionist policies and influence by interest groups are still powerful.

Second, Ireland lags behind many OECD countries in terms of its capacities to ensure high quality regulation. Economic assessment of proposed legislation is missing. Alternatives to regulations, such as economic instruments, have replaced few traditional 'command and control' approaches. Critically, implementation mechanisms and enforcement powers of the *Reducing Red Tape* policy may need to be enhanced if anti-competitive styles of regulations in non-traded sectors and interventionist tendencies are to be reversed. In particular, self-assessment and peer review seem to be too weak to create incentives for newer and more effective regulatory approaches. Like other small and participative countries, Ireland should acknowledge that globalisation and openness require a certain degree of formalism in the national regulatory management system to support market confidence and avoid undue preferences for insiders or 'big players'. A particular challenge concerns the search for a new balance between public consultation, flexibility and rapidity in rulemaking.

Third, Ireland's reforms have mainly concentrated on the modernisation of the public administration. These developments have gone further than those concerning other governance actors. While progresses are visible, the Judiciary, the new market-based institutions, including the competition authority, the Parliament and its committees, even the new regional powers still need institutional adaptations in term of their efficiency, accountability and overall co-ordination.

Lastly, the Irish policy-making culture continues to be highly risk adverse, with a tendency to follow rather than lead. The adoption of a formal regulatory reform policy only in 1999, years after most OECD countries, is striking evidence. In global environments, small countries will need to increasingly exploit their nimbleness in adapting to changing markets and technologies. Ireland should seek ways to become an innovator in the next generation of governance reforms.

5.2. Policy options for consideration

The policy options below suggest concrete actions that should be considered to address the challenges identified above. The strategies recommended are in accord with basic good practices in other countries. Some of the recommendations can be carried out quickly, while others would take some years to complete.

- *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.¹⁰⁴ Participants on the committee could include the Department of the Prime Minister and the Ministry of Finance, and the General Attorney 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 modelled on the Netherlands' Ministerial Committee in charge of the influential MDW ('Functioning of Markets, Deregulation and Legislative Quality') programme.¹⁰⁵

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. One possible model to be explored is the U.S. *Government Performance and Results Act* of 1993, which established a government-wide system, including for regulators, to set goals for programme performance, measurement, and publication of results.¹⁰⁶

- *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' beside the Executive, Legislative and Judiciary.¹⁰⁷ 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,¹⁰⁸ 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.

As background report to Chapter 3 argues, 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.¹⁰⁹ Having someone from the Authority sit on appeal panels for sectoral regulator decision is an excellent idea for integrating policy perspectives.

- *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 in the Irish process. 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 some key assessment, 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. Moreover, these tools should not only be well-designed but well-used, that is, incorporated into day to day administrative practices. Based on OECD best practices, five key steps are needed to improve effectiveness. As a first, step, Ireland should 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.

A second challenge is the development of effective ways to apply the *Reducing Red Tape* programme to subordinate 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.

Third, 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.

Fourth, expand RIA to 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.

Fifth, the effectiveness of the Irish regulatory management system would be enhanced by integration of 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.

- *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 mentioned previously). 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).

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

The enactment *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 previously mentioned. The review process undertaken in Australia as part of its National Competition Policy is illustrative. Under that policy, all legislation was reviewed and anti-competitive restrictions were required to be removed unless it could be demonstrated that those restrictions were in the public interest and that there was no other way to achieve public policy objectives.¹¹⁰

5.3. *Managing regulatory reform*

The next policy steps to be taken need to focus on issues of sustainability and the development of a robust regulatory policy. An important driver for an effort to modernise regulatory management is that Ireland recognises that not only regulatory capacities in other countries have been changing faster, but that the recent economic success permits a more innovative approach to regulatory affairs. Ireland is falling behind in the “race” for “regulatory quality”. Success permits it to be more assertive and forthcoming. But success will require it to think differently; not just differently from what it did before, but differently from its closest “peers”. Ireland should benchmark itself to a higher standard than its neighbours should.

These efforts will require a new political commitment. Although its contribution has been essential, regulatory reform is not a political 'hot topic', and some reforms lack the external imperative that is often needed to overcome internal resistance. Hence, the government will need all the convincing and communication skills necessary to push beyond a sceptical administration and public.

NOTES

1. Total employment has risen from just one million in 1988 to 1 737 900 in 1999, and unemployment has dropped from 15% in 1994 to 4.1% in 2000. Debt/GDP ratio had been reduced from 120% in the mid-1980s to about 39% in 2000. The Irish living standards are converging with the EU average, with GNP per capita at 97% in 1999 compared with less than 70% in 1987. In terms of GDP per head (PPP basis), Ireland ranked 8th in 1999, above Netherlands, Germany or Sweden. OECD, 2000 and Irish Government.
2. OECD (1999a). See also Fitz Gerald, J. (1999), *Les Études du CERI*, No. 56, November.
3. During the 90s, EU yearly transfers represented more than 4% of GDP.
4. The first decades of independence from UK saw the erection of very high tariff barriers against the outside world. Fitz Gerald, J (1999), pp. 6 and 24.
5. The macro-economic stability of the 90s was a result of the painful adjustments of the 80s to solve the late 70s 'dash for growth' policy, that involved a huge fiscal injection which turned out to be unsustainable and almost wrecked the economy Fitz Gerald, J. (1999), p. 14.
6. For example, although this is being addressed, the Competition Authority had until recently difficulties recruiting high level professionals.
7. Interventionism can be traced to Article 45 of the Constitution which stipulates that “the State shall favour and, where necessary supplement private initiative in industry and commerce” and “the State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation” Millar, Michelle, Onik Karapchian and Tony Verheijen (1998), p. 283.
8. Such as in the case of the recent implementing price control in pubs to fight inflation or the permanence of the old Groceries Order which prevents full competition in the retailing market, see background report to Chapter 3.
9. The ‘brokerage’ system is not only related to the electoral system based on proportional representation in multi-seat constituencies but to the political environment where ideology plays a minor part compared to direct contact and knowledge of the constituency's needs. Collins, Neil and Patrick Butler (1999), p. 41. O’Halpin, E and E. Connolly (1999), p. 135.
10. Laffan, Brigid (1999), p. 94; and Collins, Neil (1999), p. 73. About the taxi and pub market see Chapter 1 and Chapter 3 of the review.
11. See Kelly, M. (1999), p. 69 on this point.
12. Hogan, Gerard (1994), in Chapter 2.
13. In addition to the Acts of the Houses of the *Oireachtas* (Parliament), Ireland's statute book is composed of Acts of the Parliament of *Saorstát Éireann*, Acts of the Parliament of the United Kingdom of Great Britain and Ireland passed in the period 1801 to 1937, Acts of the Parliament of Great Britain passed in the period 1707 to 1800, Acts of the Parliament of England passed in the period 1226 to 1707, Acts passed by any Parliament sitting in Ireland before the Union with Great Britain in 1801.
14. See the volumes of the Statutes and Statutory instruments published since 1990. It is significant to note also that some orders may be kept on the Statute Book even if its primary act has been repealed (*e.g.*, Groceries Order).

15. An additional issue concerns the inter-temporal coherence of dealing with policies with impact on different generations.
16. Powers to compel appearance by public servants at Parliamentary committees predated 1997 in particular in relations to reviews of public accounts.
17. The reform permitted Parliament's committees to require senior public servants to appear to give evidence to them Committees of the Houses of the *Oireachtas* (Compellability, Privileges and Immunities of Witnesses) Act of 1997.
18. O'Halpin, E and E. Connolly (1999), p. 133. N. Collins, for instance has underlined the "declining parliamentary supervision", Collins, Neil (1999), p. 78.
19. Morgan, D.G, (1999), p. 8 and 12.
20. A case clearly shown by the Department of Education in its findings of the high costs of creating decentralised local boards.
21. Government of Ireland (1996), p. 6.
22. Millar, Michelle Onik Karapchian and Tony Verheijen (1998), pp.285-291 and Kelly, M. (1999), pp. 82-85
23. An important contribution to the development of SMI was a joint thesis produced by a group of senior civil servants who were undertaking a special Masters programme in Strategic Management in the Public Sector from 1992 –1994 in Trinity College Dublin with the support of the Civil Service Training Centre in the Department of Finance. Based on the courses and work visit to New Zealand and Australia, the 'Masters Group' submitted a joint thesis stressing the need to develop strategic capacities for policy development in the public service. The thesis, published in 1995 an academic journal, contained the basis of what became the policy document Delivering Better Government. (Kelly, M. 1999, p. 86.)
24. For instance, Delivering Better Government—Strategic Management Initiative (1996); Better Local Government - A Programme for Change (1996), Reducing Ted Tape—An Action Programme for Regulatory Reform (1999), etc.
25. The Department of the Prime Minister issued at the end of 2000 a Request for Tenders for a major external assessment of SMI.
26. For instance, see Keogan Justin and David McKeivitt (1999), pp. 3-25.
27. Department of Public Enterprise (2000).
28. Kelly, M. (1999), p. 90.
29. Based on a NESC Strategy Report reported in Boyle, R. *et al.* (1999), "Review of Developments in the Public Sector in 1999", Administration 48(4), p.10.
30. OECD (1997a), p. 37.
31. OECD (1995).
32. Reducing Red Tape: An Action Programme of Regulatory Reform in Ireland, Government Publications, Dublin, July 1999.
33. Moran, David (1999), p. 8.

34. The report of the Working Party was published together with the policy document Reducing Red Tape.
35. Government Publications, Dublin, July 1999.
36. <http://www.irlgov.ie/taoiseach/publication/cabinethandbook/contents.htm>
37. All Memorandum for the Government must indicate clearly, as appropriate, the impact of the proposal for:
- (i) Relations, co-operation or common action, North/South in Ireland, or East/West, as between Ireland and Britain
 - (ii) Employment.
 - (iii) Women.
 - (iv) Persons in poverty or at risk of falling into poverty, in the case of significant policy proposals.
 - (v) Industry costs (except in the case of measures relating to the Budget) and the cost to small business.
 - (vi) Exchequer costs and staffing implications, and
 - (vii) Quality regulation by reference to the notes in Appendix V1 The Quality Regulation Checklist.
- Department of the Taoiseach, 2000, Cabinet Handbook, paragraph 3.1.
38. The policy was first launched based on the recommendations of the Report of the Review Group on the Law Offices of the State.
39. The attitude towards the programme of the Department of Finance seems to have been mixed. According to interviews, funds and resources to support the development of the Central Unit and the Statute Law Revision Unit have been reluctantly allocated and there are substantial delays in the recruitment and putting in place of trained personnel. Interviews during the OECD Mission to Ireland, June 2000.
40. OECD (1997*b*), p. 221.
41. The mandate derives from the constitutional role of the Attorney General as legal adviser to the Government. There is therefore an implicit obligation that laws that are drafted are legally sound and consistent with the constitution. This seems so inherent to the system that it is not written down. See: Donelan. E. (1992), p. 1, and also Donelan. E. (), p. 1.
42. Up to September 2000 this was called the Office of the Parliamentary Draftsman.
43. Department of the Prime Minister, Cabinet Handbook, Rule 4.5.
44. Collective authority responsibilities, set up in the Constitution, Article 28.4.2 requires that Ministers should inform their colleagues in Government of proposals, they, or Ministers of State at their Departments intend to announce and if necessary, seek their agreement (Cabinet Handbook, para. 1.1)
45. Two further important sources for law are Green and White Papers. Green or White Papers set out Government plans in advance and permit a high level of public consultation to take place before the enactment of legislation. Green Papers were invented by the Labour Government in England in 1967. They essentially set out the Government proposals without committing themselves. White Papers tend to be definite statements of Government policy. These documents were used with great effect for the formulation

of recent education policy and the Education Act, 1998, was developed following a process that includes both Green and White Papers.

46. See Statement on Regulatory Reform, July 2000 <http://www.forfas.ie>
47. Boyle, R. (1998).
48. Local authorities are categorised in five legal classes 29 County councils, 5 county borough corporations (cities), 5 borough corporations, 49 urban districts, 26 town commissioners.
49. Council of Europe (1998) and OECD (2000*a*).
50. A quasi-autonomous non-governmental organisation or non-departmental public body has been defined as a body which has a role in the processes of national government, but is not a governmental department or part of one, and which accordingly operates to a greater or lesser extent at arm's length for the Ministers' Cabinet Office, Officer of Public Service, 1997.
51. By 1999, the Chambers of Commerce of Ireland (CCI) published a *CCI Local Government Policy. From Local Administration to Real Local Government* where they indicated that the "... local government must be strengthened... and [make] it more accountable to the community it serves and offer value for money in the services it provides." The 3rd recommendation (out of 12) was "The principles of the SMI should be applied to local government - guaranteeing customer focus, accountability and the search for efficiency".
52. Boyle, R. *et al.* (1998), p. 10-11. Knox, Colin, Richard Haslam (1999), p. 30.
53. Until now, local agencies and bodies have rarely been merged or eliminated.
54. Examples of co-ordination difficulties go from the propensity of local authorities to create industrial and commercial zones instead of housing zones (for tax reasons) to the difficulties in securing permission to lay telecom cables or plan the Eastern By Pass highway around Dublin.
55. See case 29/84 (Commission -v- Germany) and see case 365/93
56. Initially, it was believed that directives could be given effect to by administrative circulars as well as by primary and secondary legislation and some Directives were implemented by means of administrative circulars. However, the Court of Justice has rejected this policy as an appropriate means of implementation CF Case 116/86 Commission -v- Italy [1988] ECR 1223, Case 236/85 Commission -v- Netherlands [1987] ECR 4637 Case 381/92 Commission -v- Ireland [1994] ECR I-215
57. Some doubt was cast as to the validity of the European Communities Act by the challenge to regulations made under the European Communities Act in the case of *Meagher -v- the Minister for Agriculture and Food*. [1994] ILRMI. In that case, the applicant challenged the validity of two statutory instruments made by the Minister pursuant to Section 3(2) of the European Communities Act 1972. That Section provides that: "Regulations under this Section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including repealing, amending or applying, with or without modification, other law, exclusive of this Act)." The two statutory instruments in question had purported to amend Section 10 (4) of the Petty Sessions (Ireland) Act, 1851. The High Court held that the regulations were *ultra vires* the European Communities Act on the basis that they purported to amend the primary legislation by means of secondary legislation. This decision was reversed in the Supreme Court.
58. Agriculture, Education, Transport, Environment, Tourism, Health/Food Safety, Inland Waterways, Language (Irish and Ulster Scots), Special EU Programmes, Trade and Business Development, Lough Foyle and Carlingford Loughs (aquaculture and fisheries).

59. Department of the Prime Minister, *Cabinet Handbook*, Rule 4.8.
60. For example, the Ombudsman's Act, 1980, implemented the recommendations of the Report All-Party Informal Committee on Administrative Justice 1977. The Safety, Health and Welfare at Work Act, 1987, followed the recommendation of the Barrington report into that area.
61. The parties to the negotiations for the *Programme for Prosperity and Fairness* included:
- Trade Union Pillar:* Irish Congress of Trade Unions (ICTU)
- Employer and Business Pillar:* Irish Business and Employers Confederation (IBEC); Construction Industry Federation (CIF); Small Firms Association (SFA); Irish Exporters Association (IEA); Irish Tourist Industry Confederation (ITIC); Chamber of Commerce of Ireland (CCI)
- Farming Organisation Pillar:* Irish Farmers Association (IFA); Irish Creamery Milk Suppliers Association (ICMSA); Irish Co-operative Organisation Society Ltd. (ICOS); Macra na Feirme
- Community and Voluntary Pillar:* Irish National Organisation of the Unemployed (INO); Congress Centres for the Unemployed; The Community Platform; Conference of Religious of Ireland (CORI); National Women's Council of Ireland (NWC); National Youth Council of Ireland (NYCI); Society of Saint Vincent de Paul; Protestant Aid.
62. Consumer groups reported frustration that Ministers have refused to meet with them about particular concerns such as on pharmacy licenses and other health care regulations (see Chapter 3).
63. Irish Small and Medium-sized Enterprises - ISME, (2000). Document presented to the OECD delegation, June.
64. Overt exercise of sectoral influence concentrated in few powerful interest groups, including the Catholic Church, trade unions, farmers and domestic industry and professional interests have been replaced by "a myriad of organisation, groups and movements demanding a say in public policy at local, national and European level". O'Halpin, E and E. Connolly (1999), p. 126.
65. These are publications that enable users of statutes and statutory instruments identify whether a particular law has been amended, repealed or otherwise affected since publication.
66. Department of the Prime Minister, *Cabinet Handbook*, Rule 6 and Appendix II.
67. The Law Reform Commission (1999), *Statutory Drafting and Interpretation—Plain Language and the Law*. Consultation Paper
68. Before that time, Irish administrative law was described as "a collection of shreds and patches, with no coherent statement of principle or in-built dynamism", Hogan, G. (1995).
69. Recent proposals for an Irish Administrative Procedure Act can be found on the policy document, *A Government Renewal* (Section 71) or the Law Reform Commission, 1999, *Statutory Drafting and Interpretation—Plain Language and the Law*, Consultation Paper, p. 122.
70. In part because redress for a single case of excessive discretion of administrative sometimes is too costly and unpredictable through courts, in general Irish citizens acting in their own interest do not seek redress in the courts for mal-administration (Verheijen and Millar (1998), *op. cit.* p. 113). However, in 1993, a case was won against an environmental regulation more restrictive than the framing EU directive. More recently, the Ombudsman reported about a secondary regulation going beyond the primary law in a case of Pension and Welfare. Ombudsman (1997).

71. There have been some substantive proposals to solve the problem. For instance, the Devlin Report of 1969 recommended a systematic scheme for reviews and appeals for the decision of public authorities under a 'Commissioner for Administrative Justice' acting like an Ombudsman (Verheijen and Millar (1998), *op. cit.* p. 113)
72. See OECD (2000*b*).
73. The working party was established in 1998.
74. The initiative has been backed by the unions, (Congress), the business association (IBEC), the Department of Enterprises, Trade and Employment, the Health and Safety Authority and the Irish Insurance Federation.
75. Administrative Law in Ireland, Hogan and Morgan Dublin, 1988.
76. OECD (2000*a*).
77. Chapter 6 of *The Report of the Review Group on Auditing*.
78. OECD (1997*a*), Paris.
79. Verheijen and Millar (1998), *op. cit.* p. 107.
80. Department of the Prime Minister, 2000, *Cabinet Handbook*, Rule 3.1*j*.
81. See point 4.1 of the recommendations of the Working Party report in *Reducing Red Tape*, 1999.
82. OECD (2000*c*).
83. Morrall, John and Ivy Broder (1997), p. 245.
84. Section 19 of the *Freedom of Information Act* and Department of the Prime Minister (2000), *Cabinet Handbook*, Rule 1.7
85. For instance in the case of telecommunications, independence of the regulator from the shareholder is an EU requirement set out in Directive 90/388/EEC and subsequently amplified by the Court of Justice and the Licensing Directive 97/13/EC.
86. The functions of the telecommunications, electricity and aviation regulators are set out respectively in the *Telecommunications (Miscellaneous Provisions) Act*, 1996 the *Electricity Regulation Act*, 1999 and the *Aviation Regulation Act* 2001. The assignment of postal functions was effected by the European Communities (Postal Services) Regulations 2000. The outline legislative proposals to amend current arrangements in the communications sector are available at www.irlgov.ie/tec/communications/commconsultation.pdf. The proposals in relation to the regulation of surface transport are at www.irlgov.ie/tec/transport/2117 DPE.pdf.
87. For more details see <http://www.irlgov.ie/finance/News/sra/srap1.htm>.
88. A similar situation pertains to the Office of the Director of Consumer Affairs.
89. The proposals for the new legislation, as issued for public consultation, are available on the website of the Department of Public Enterprise at <http://www.irlgov.ie/tec/communications/commconsultation.pdf>.
90. For discussion of governance and accountability see Tuohy, Brendan (2000).

91. For a fuller discussion of 'democratic deficit' in the regulatory process, see Ferris, Tom (2000).
92. At present, decisions of both the Director of Telecommunications Regulation and the Commission for Electricity Regulation are subject to judicial review, but only in the latter case is there express statutory provision in this regard.
93. A point further discussed in the May 2000 Report of the Competition and Mergers Review Group requested by the Minister for Enterprise, Trade and Employment.
94. In this regard, the implementation mechanism could be viewed as akin to that for EU Directives, where the policy direction and end result is decided at a central level, but the means of reaching that result are left to the discretion of the Member States in light of their individual circumstances.
95. Parliamentary Debates, Dail Eireann, vol. 466, cols 2244-9, 13 June 1996.
96. *Governance and Accountability*, Chapter 3, pp. 9 and 10.
97. By virtue of a change to the law proposed by this Bill the text of a restatement will be *prima facie* evidence of the relevant law and as such will be capable of being presented in court. This expedited approach would allow Acts to be restated at regular intervals.
98. OECD (1999*b*). See especially pp. 38-40.
99. Government of Ireland, communication to the OECD, May 2000.
100. OECD (2000*b*).
101. See High Level Group on Administrative Simplification. Report of the Meeting held 8 February, 2000, *Answers to a Small Business Federation Recommendation*. A particular complain raised by SMEs is that departments and agencies tend to duplicate information requirement despite the Central Statistical Office (CSO) powers to be previously consulted (states in Section 31 of Statistical Act, 1993).
102. ISME -The Enterprise Association (2000), *op. cit.*
103. For instance, the High Court decision in October 2000, which repealed quantitative limits on taxi licenses.
104. This body could build on the Council of Regulation and Competition proposed by Forfas
105. See OECD (1999*c*).
106. See US Government, General Accounting Office (1997).
107. Some of the questions raised may also be applicable to the accountability of other 'recent' institution such as an independent central bank, competition authority, ombudsman office or electoral institutions.
108. For instance, the 1997 report of the Comptroller and Auditor General, the 1995 Delivering Better Government Report.
109. Making the agencies meet together quarterly to make sure they really do this seems like an oddly precise requirement, but its inclusion in the CMRG recommendation recognises, unfortunately, the history of suspicious relations among these agencies.

110. For further information see, Hilmer, F, Raynor, M., and Taperell, G. (1993), The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, Australia. Or <http://www.ncc.gov.au/nationalcompet/Legislation%20Review/Legislation%20Review.htm>.

BIBLIOGRAPHY

- Boyle, R. *et al.* (1999), “Review of Developments in the Public Sector in 1999”, *Administration* 48(4).
- Collins, Neil (1999), “Corruption in Ireland: a Review of Recent Cases” in Collins, Neil ed.
- Collins, Neil and Patrick Butler (1999), “Public Services in Ireland: Social Marketing Management” in Collins, Neil ed.
- Council of Europe (1998), Report on *Structure and Operation of Local and Regional Democracy in Ireland*, Strasbourg.
- Department of Public Enterprise (2000), *Governance and Accountability in the Regulatory Process: Policy Proposals*, March.
- Donelan, Edward (1992), “The Role of the Parliamentary Draftsman in the Preparation of Legislation in Ireland”, *Dublin University Law Journal*.
- Donelan, Edward (1992), “The Role of the Parliamentary Draftsman in the Implementation of European Union Directives” in *Ireland: Statute Law Review*, Volume 18.
- Ferris, Tom (2000), “Regulation of Public Utilities”, *Irish Banking Review*, Winter.
- Fitz Gerald, J. (1999), *The Irish Economic Boom*.
- Government of Ireland (1996), *Delivering Better Government. The Strategic Management Initiative. Second Report to Government of the Co-ordinating Group of Secretaries*, May.
- Hogan, Gerard (1994), “An introduction to Irish Public Law”, in *European Public Law*.
- Irish Small and Medium-sized Enterprises—ISME, (2000), *Sustaining FDI let Economic Development. An ISME Response*, June.
- Keogan Justin and David McKeivitt (1999), “Another Set of Strategy Statements: What is the Evidence on Implementation?” in *Administration* 47(1).
- Knox, Colin and Richard Haslam (1999), “Local and Regional Reforms” in Collins, Neil ed.
- Laffan, Brigid (1999), “The European Union and Ireland”, in Collins, Neil ed.
- Millar, Michelle, Onik Karapchian and Tony Verheijen (1998), in Tony Verheijen and David Coombes (eds), *Innovations in Public Management. Perspective from East and West Europe*, Edward Elgar, Cheltenham, UK and Northampton, MA, USA.
- Morrall, John and Ivy Broder (1997), “Collecting and Using Data for Regulatory Decision-making” in OECD (1997b), *Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris,

- Moran, David (1999), “The future of the Irish Constitution” in Collins, Neil, *Political Issues in Ireland Today*, Manchester University Press, Manchester and New York.
- OECD (2000a), *Environmental Performance Review of Ireland*, Paris.
- OECD (2000b), *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, Paris.
- OECD (2000c), “Background Report on Government Capacity to Assure High Quality Regulation” in *OECD Reviews of Regulatory Reform, Regulatory Reform in Denmark*, Paris.
- OECD (1999a), *Economic Surveys: Ireland*, Paris.
- OECD (1999b), Report by the Public Management Service of the OECD on *Regulatory Impact Assessment in New South Wales*, Published by the Regulation Review Committee, Parliament of New South Wales, Report No. 18/51, January 1999.
- OECD (1999c), “Background Report on Government Capacities to Produce High Quality Regulations” in *OECD Reviews on Regulatory Reform: Regulatory Reform in the Netherlands*, Paris.
- OECD (1997a), *The OECD Report on Regulatory Reform: Synthesis*, Paris.
- OECD (1997b), *Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris.
- OECD (1995), *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*, OCDE/GD(95)95, Paris.
- O’Halpin, E and E. Connolly (1999), “Parliaments and Pressure Groups: The Irish Experience of Change”, in *Parliaments and Pressure Groups in Western Europe*, Ed. Nolton P., London.
- Ombudsman (1997), *Report on the Non-Payment of Arrears of Social Welfare Contributory Pension*, March.
- Tuohy, Brendan (2000), “Evolving towards and Excellence Regulatory Framework through Review, Reassessment and Reform”, paper delivered to the Conference on ‘Managing for Performance for Excellence’, University College Cork, September.
- US Government, General Accounting Office (1997), “Managing for Results: Regulatory Agencies Identified Significant Barriers to Focusing on Results”, Washington, D.C.