

Forfás Response to the OECD Report on Regulatory Reform Requirements in Ireland

Overview

The OECD regulatory reform review of Ireland was published on 24 April 2001. This document gives a Forfás response to it, highlighting issues raised in the report that Forfás believes are particularly important for improving enterprise competitiveness in Ireland. The document includes a brief summary of previous Forfás recommendations in this field, and sets out principles that should be followed in Ireland's case. It also identifies particularly important areas for follow-up by Government to the report.

The OECD Report

Forfas has for a number of years been addressing issues of regulation and competition. *Shaping Our Future: A Strategy for Enterprise in Ireland in the 21st Century* (1996) first addressed the need for competition policy development and the importance of regulation in the consumer interest. Forfas made a detailed submission to the Minister for Public Enterprise in 1999 in response to her request for submissions on governance and accountability in the regulatory process. In this submission an ordered set of steps was outlined to ensure a coherent institutional framework. In *Enterprise 2010: A New Strategy for the Promotion of Enterprise in Ireland in the 21st Century* (2000), Forfas set out a statement of the role of regulatory reform and competition policy as central ingredients of enterprise policy. (See Annexes 1, 2, and 3).

The proposal for the OECD to undertake a regulatory review of Ireland was originally made by Forfás, and this proposal was endorsed in the NESC Review in preparation for the new partnership agreement, and a commitment was given by Government to this that is reflected in the Programme for Prosperity and Fairness itself. Forfás has actively participated in the furtherance of the study, both in providing material to the OECD and in engagement in the Steering Group chaired by the Department of the Taoiseach.

The report gives a comprehensive account of the regulatory process in Ireland, setting out the legislative and institutional framework within which the enterprise sector operates and economic activity takes place.

The report also makes welcome recognition of the progress that has been made in Ireland in this field. In the field of competition law, and aviation and telecommunications regulation, considerable steps forward have been taken with the objective of encouraging competition and the results to the consumer have been recognised in the form of lower prices and higher quality. Telecommunications and air travel charges have fallen as a consequence of the commitment of successive government to improvements in the regulatory process, and the report rightly recognises the positive benefits that have accrued from this.

In general the report notes Ireland's recent economic progress, comments favourably on regulatory reform so far undertaken, and points to the need for continued efforts, especially in the field of action to increase competition in the protected sectors and for improved regulation in the self-regulated sectors. Specific changes needed in Government capacities are noted, especially in the areas of assessment of changes in regulation and the need to ensure that consultation takes place in a systematic and transparent way. The following paragraphs highlight issues raised in the report that are particularly important in Forfas' view for improving competition and competitiveness.

Key Issues

Government capacities

Regulatory reform does not only refer to the improvement of competition. It also covers the way in which the government process itself operates, and how this affects the operations of economic actors. Decision making, and necessary action to implement those decisions, will be influenced in their impact on businesses by the speed and quality of the decision and the timeliness and comprehensiveness of the

actions undertaken in support. For this reason government capacities form an important area of assessment within the OECD analysis. Forfas supports this approach, since Ireland's progress in this field is likely to impact powerfully on the success of business operations. The OECD report rightly recognises the important progress that has been made in recent years in the Government sector, and points in particular to the role of the Strategic Management Initiative in transforming the goals and operations of the public service.

Regulatory Impact Analysis

A further significant step forward in terms of Government capacities has been the introduction of a quality checklist for legislation, and the OECD recognises the value of this instrument in contributing towards improved quality in decision-making. However Forfás shares the OECD view that this instrument now needs to be further developed in the direction of full regulatory impact analysis (RIA) following best practice internationally. More systematic and detailed analysis of the impact of legislation and changes in regulations would allow for a clearer view of its costs and benefits to the economy as a whole. If this were allied to improvements in the consultative process, which precedes most changes in the regulatory regime, there would be significant benefits in the form of regulatory reform that was appropriate to consumer needs and reflected the concerns of the consumer in as effective a way as possible.

Regulatory impact analysis is an area where more work needs to be done in Ireland, for the following reasons. Firstly, A good system of economic analyse of the impact of proposed changes in regulations would help policy makers to understand the full consequence of changes in legislation before they were introduced. It would also guard against the danger of capture of the regulatory process by special interests or vociferous groups, because it would show what the consequences were for all groups, not just those pushing for or resisting change. Finally, it would provide the necessary documentation in support of the democratic process, showing not only what decisions were taken but also why they were taken. It should be noted that this is not a wholly new idea. For instance the Finance Acts when being prepared are informed by

analysis of the effects of particular measures on particular groups. Similarly with changes in social welfare entitlements. But what is needed is a more systematic and comprehensive analysis, following a standard and transparent methodology, showing the costs and benefits to all groups of the changes proposed.

Competition

Competition policy is highlighted as a chapter in the OECD country review and there is recognition that the legal framework in Ireland is a strong one, with significant powers, including criminal penalties attached to wrongdoing. At the same time the report notes the difficulties under which the Competition Authority has suffered in terms of shortages of staff resources. Although these have eased somewhat in recent months, it remains true that the staffing of the Authority is very small compared to that of the other institutional support given to the enterprise sector, or to the Office of the Director of Consumer Affairs. Yet competition is a critical instrument for improving efficiency in the economy as a whole. It is in the protected sectors that the greatest efficiency gains and thus lower prices and improved quality for consumers can be achieved. Domestically trading sectors, in particular, such as business and professional services, wholesaling and retailing need more competition as well as in certain cases specific regulation. Competition policy can thus contribute significantly to the control of inflation. The first step is in this an increase in the resources of the Competition Authority. Forfás also supports an increased advocacy role for the Competition Authority, allowing it to champion the competition agenda at every level. For instance, the view of the Competition Authority should be sought in proposed legislation, especially given the fact that the importance of the issue is already recognised in the Quality Regulation Checklist.

Principles for Regulatory Reform

The OECD has had for a number of years a programme on regulatory reform. In this programme a number of principles have been developed that are recommended to

Governments to help them in undertaking programmes of regulatory reform. These include:

- Adoption of broad programmes of reform with clear objectives and implementation framework
- Systematic review of regulations to ensure continued effectiveness
- Regulatory processes should be transparent, non discriminatory and efficient
- A parallel review of competition policy, with a view to strengthening it, should be undertaken
- Regulations should be reformed to stimulate competition, with elimination where possible
- Eliminate unnecessary barriers to trade and investment
- Identify linkages with other policy objectives and develop policies for these that also support regulatory reform

Forfás endorses these principles and supports their application in an Irish policy context. In so doing, it is important that these be translated into practical guidelines that can find ready application in policy making and that can also meet with understanding and support among consumers. The following are felt to be particularly important points in this regard:

- Competition is important and should be extended to all sectors of the economy: by so doing we can lower costs and improve quality
- Regulation should be directed towards consumer (including business consumer) interests
- Regulation is necessary but should be as light as possible consistent with health and safety and other national concerns
- Ireland is less regulated than most of Europe and it is important to ensure that implementing a programme of regulatory reform it does not lead to greater bureaucratic burdens on enterprise
- Regulation can be by way of law: there does not necessarily have to be a regulator or board of regulators
- Any new regulations imposed should have a cut-off date incorporated into them at which the need for the regulations will be reviewed and that their continuation would require a positive decision based on a policy necessity

- The pace of change in the world economy means that the regulatory process has to be responsive and flexible, in order to reflect changes in competitiveness and the need to continually adapt economic structures to new challenges
- Government capacities in terms of policy implementation have to be improved continuously, through a process of regular review, re-orientation and restructuring as appropriate, and continued improvements in transparency and openness

Arising from the OECD Report Forfás Recommends the Following

There is a need for an over-arching statement on regulatory reform. This should be in the form of a White Paper, making a firm public commitment to competitive markets and to improvements in the way that Government regulates these markets. The OECD review has provided the basic material for this, together with the principles set out by the OECD and also by Forfás in previous documents. Forfás has set out some of the issues to be addressed under this heading in its submission to the Minister for Public Enterprise with regard to governance and accountability in the regulatory process. In his initial response to the OECD report, the Taoiseach has already indicated that he will propose the preparation of a major policy statement on regulatory reform.

Judicial review: there should be examination of simpler ways to ensure that objections can be made to regulation and regulatory and administrative decisions. The OECD report has pointed to an excessive reliance on the judicial review process and the Forfas submission to the Minister for Public Enterprise had emphasised the need in accountability arrangements to avoid excessive reliance on time consuming and costly legal procedures.

Consumers should be placed at the top of the policy agenda. A fundamental shift towards the primacy of consumer rights in the operations of the market is required, and measures need to be taken to ensure this. Forfás strongly believes that this is the best way to ensure that the needs of the enterprise sector are taken in to account, since

all businesses are also consumers. Measures to improve the consultation process, allied with regulatory impact analysis, will be better able to demonstrate the effects of regulatory change on consumers and ensure that their interests are paramount.

Protected sectors: a strong programme of reform is needed. This includes improved regulation of the self-regulating sectors, and removal of quantitative restrictions on entry to all sectors. There should be more policy focus on the non-traded sectors as a source of quality improvements and cost reduction. Public transport, business services and many local services can be important elements of business costs and are thus important inputs into the productive process. Their efficiency can affect that of the economy as a whole. In his initial response to the OECD Report, the Taoiseach had indicated that he will be proposing action in the fields of professional services, liquor licensing and pharmacies.

Quality checklist for new regulation: a full regulatory impact analysis should be introduced that includes social cost-benefit analysis of the proposed regulation. Again the Taoiseach had, in his initial response to the OECD Report, indicated his support for this proposal.

Legal system review: the legal system plays a key role in determining the process of regulatory reform and the costs and competitiveness of the economy as a whole. The greater use of conciliation, mediation and arbitration procedures should be considered. While fully competitive markets for legal services can reduce costs, there may be scope for additional savings in the reconsideration of legal processes themselves

Formalised consultation: Departments already consult widely, but the process should be formalised, to ensure specific consultation with an agreed list of consultative bodies. Departments should also reach out to consumer and or community groups and ensure they are consulted. The results of such consultation should be publicised.

E-Government: Additional emphasis needs to be given to the use of e-Government in improving the quality of regulation, and this should be included as a specific objective of the e-Broker project.

Co-ordination: there are an increasing number of regulators dealing with individual sectors. A security industry regulator, adding to the existing aviation, telecommunications, and electricity and gas regulators will join the recently announced financial services regulator. This in turn raises issues of co-ordination, as well as those of resources. For a small country, there may be economies of scale and scope in making sure that these bodies work closely together, pooling experience and expertise to the extent possible, and being ready to make common cause in terms of promotion of competition, proposing changes in legislation, etc.

Forfás intends to work closely to follow up with Government Departments on all the above issues in order to further the interest of the enterprise sector.

**Annex 1. *Shaping Our Future: A Strategy for Enterprise in Ireland in the 21st Century*
(1996) (Extract)**

The Actions Required: Public Finances and Administration

Organisation and Regulation

The activities of vertically integrated State monopolies should be separated;

Independent regulators for State monopolies should control profitability and promote competition;

State regulatory and licensing activities that impact on competition should be reviewed with the objective of eliminating licensing and regulation that impede competition.

Objectives

National competition policy should have more clearly defined objectives and, in particular, should not rely exclusively for its inspiration on EU competition policy. The overall objective of competition policy is to benefit consumers through encouraging efficiency in the production and distribution process by ensuring that:

Irish business does not engage in collusive and anti-competitive practices;

Irish firms are not penalised by uncompetitive Irish supply sectors, whether manufacturing or service, public or private;

Irish consumers are not penalised through the existence of anti-competitive practices in production, distribution and other service sectors.

Competition policy ought to be broadly based and should focus on eliminating anti-competitive practices wherever they exist. In particular, public enterprise and the State sector generally ought to be subject to competition policy, as is envisaged by EU rules.

Annex 2: Forfás Submission to the Minister for Public Enterprise on Governance and Accountability in Regulation (December 1999) (Summary)

In the context of Forfás work on regulatory reform as a key instrument of competitiveness policy, Forfas made a submission to the Minister of Public Enterprise in connection with the preparation of a discussion paper on Governance and Accountability Arrangement for regulators.

The paper noted that the differences between functions and objectives of the Competition Authority and the sector specific regulators were clearly identifiable. The Competition Authority objective is to ensure efficient functioning of markets while the objectives of the regulator are typically more specific. Conflicts between the two types of agencies are most likely to arise in areas in which they both have a substantial interest. The causes underlying conflict between them may include conflicting objectives, the use of different standards to evaluate a set of events and differences among the constituencies of the two types of agencies. Membership of international organisations also place new requirements and restrictions on the behaviour of regulatory and competition authorities.

The submission set out a series of steps to be taken in order to provide a consistent policy framework and institutional setting for competition and regulation in Ireland:

- Determine the objectives of the Competition Authority:
- Establish criteria for regulation:
- Review different sectors to determine whether regulation is required:
- Determine (possibly sector-specific) regulatory objectives:
- Provide assistance in as direct a manner as possible:
- Apportion competition tasks between regulators and the Competition Authority:
- Determine the extent of agency discretion:
- Determine selection procedures for regulators and Competition Authority officials:
- Determine procedures for stakeholder participation:
- Determine appeals procedures:
- Implement chosen policy.

With regard to issues of accountability and co-ordination, the submission made the following proposals

- a separate Dáil Committee on Sectoral Regulation responsible for the production of an annual report on the activities of the sectoral regulators and of the Competition Authority, and in discharging this function would be empowered to summon and examine regulators on their performance in relation to clearly defined functions.
- The second institution required to resolve the co-ordination problem would be the formation of a Council on Regulatory Issues, which would be a structured consultative mechanism. It would comprise representatives of the Competition Authority, sector specific regulators, the Director of Consumer Affairs, relevant Government Departments and other appropriate bodies, including those engaged in social regulation and perhaps independent experts nominated by the Government.
- The appropriate Minister should be legally empowered to introduce, in consultation with the Minister for Enterprise, Trade and Employment, procedures for resolving issues of concurrent jurisdiction between industry regulators and the Competition Authority. These procedures should be developed in consultation with the Council on Regulatory Issues.
- Regulators must be obliged to consult formally with the Competition Authority in the vetting and agreeing of draft sector specific regulations with implications for competition within the sector.

Annex 3: Enterprise 2010 and input to NESC study (2000) (Extract)

The growth in the number of sectoral regulators represents desirable progress in providing a clear and pro-competitive framework in which enterprises may operate. But it also raises a number of policy issues that need to be addressed.

- The resource requirements of establishing regulators for so many sectors are considerable
- there is the question as to whether or not there should be a common framework for their operations;
- their relationship with the Competition Authority needs to be clarified;
- the selection of sectors for which regulators are established needs to be done on a systematic basis: at present, it is focused mainly on sectors in which the State has up to now had a direct or monopoly involvement, especially in utilities. Yet there are other sectors that also play an important role in the economy and powerfully affect the competitiveness of the enterprise sector which may also need specific regulatory reform;

In general, in relation to sector-specific regulators, the following points should be noted:

- the best way of judging the appropriateness of regulation in a sector is to examine its impact on consumers – both households and other enterprises. Sector-specific regulators should only be established where there is clear evidence of market failure;
- where a sector-specific regulator is established, it is important to define clearly whether their role is exclusively concerned with technical regulation, or whether it is wider, encompassing, for example, the promotion of competition or the enforcement of competition law;
- the role of the sector-specific regulator should be regularly reviewed, and expanded, reduced or eliminated as appropriate for the market conditions at the time.

It remains the fact that a review is needed that addresses the wider issues of regulation, beyond the legal framework, setting out principles to be followed in the application of regulation to different sectors of the economy. There has as yet been no comprehensive analysis of the way in which the regulatory system affects the operations of the economy. Moreover, there is also a need to look at the impact of all new legislation in the light of regulatory reform, and to assess the degree to which competition is encouraged and costs to the final consumer are minimised by any proposed changes.

With regard to the development of a general policy framework for regulatory reform, much work has been done internationally that can be drawn upon. The OECD has drawn up a series of recommendations on regulatory reform, based on experience in a number of countries. These include the following:

broad programmes of reform should be adopted, with clear objectives and an implementation framework;

regulations should be systematically reviewed to ensure continued effectiveness;

regulatory processes should be transparent, non-discriminatory and efficient;

a parallel review of competition policy should be undertaken, with a view to strengthening it;

regulations should be reformed to stimulate competition, and eliminated where possible;

unnecessary barriers to trade and investment should be eliminated; and

linkages with other policy objectives should be identified, and policies developed for these that also support regulatory reform.

Ireland needs to adopt these principles and translate them into practical actions.

Other principles to guide such action include:

regulation should be directed towards consumer interests;

focus should be on quality of goods and services rather than quantity;

bureaucracy should be minimised;

the costs and benefits of any proposed regulation should be quantified;

sectoral regulators' roles should be focused and sector-specific, and operate in tandem with general competition law.

Recommendations

In view of the above the following actions are necessary to develop appropriate public policies for effective regulation in Ireland:

- there should be a policy statement on regulatory reform, followed by a detailed programme for change and an implementation plan that specifies how the changes will be carried out; EU harmonisation efforts should be closely monitored;
- Ireland should participate in the OECD country review programme on regulatory reform; a detailed inventory and impact assessment of current regulation should be undertaken;
- detailed regulatory reform should be examined in the areas of business services and public transport;
- the relationship between the regulators and the Competition Authority should be clearly defined and existing arrangements should be changed as necessary;
- a Regulatory Impact Analysis should accompany all proposed legislation;
- Regulatory innovations in competitor countries should be monitored systematically and effectively.