

W(h)ither Better Regulation?

Regulation is a key instrument of contemporary governance. Ireland saw a proliferation of regulatory agencies in the last few decades. More generally regulatory ways of governing using rules to achieve government objectives have displaced forms of governance which depend on governmental discretion or on expenditure. Successive governments have been aware of the need to provide a strategic overview of regulatory capacity and oversight techniques and have worked closely with the OECD to introduce programmes of regulatory reform. The 2004 White Paper *Regulating Better* was a landmark statement of governmental objectives to ensure the quality of regulation in Ireland through the establishment of key regulatory principles and processes of consultation and of regulatory impact assessment. The implementation of the White Paper commitments was challenging. An OECD Review in 2010 found that the Better Regulation Unit, located within the Department of the Taoiseach, had been effective in raising awareness of the principles and requirements of better regulation. A programme to review the costs and benefits of new regulation, under the rubric of Regulatory Impact Analysis (RIA), had been implemented across government as an aspect of policy evaluation and evidence-based policy making. However, the OECD noted also that the commitment to implementing principles of better regulation across government was fragile. In particular the OECD noted weaknesses in consultation processes and in properly evaluating the potential for alternatives to classical public regulation prior to deciding to implement new rules. A tick-box approach to RIA is a pervasive risk which requires constant vigilance. The existence of an effective and strong central coordinating unit also provides a degree of counter-balance to the tendency of politics to trump the quest for effective policy making. These conclusions offered a rather clear agenda for building on success to further develop the capacity for high quality, transparent and cost-effective regulation in Ireland.

The current context of regulatory governance is dominated by Ireland's participation in the EU/IMF aid programme, agreed in November 2010. The aid package commits the Government to addressing weaknesses in the regulation of financial markets and seeking to enhance the competitiveness of the economy through beefing up the powers of the Competition Authority and targeted measures to restructure aspects of the markets for legal, medical and pharmacy services. Whilst these regulatory measures have considerable prominence in the programme, the practice of implementation has been dominated by

other concerns with raising revenue and reducing expenditure. The government admitted in its 2012 action plan for jobs that, as far as practices of better regulation are concerned, there is 'a lacuna' in government. This lacuna has arisen from structural changes under which the Department of Finance was split into two Departments with the creation of the Department of Public Expenditure and Reform (DPER), and the public service reform functions were transferred from the Department of the Taoiseach to DPER. The staff of the Better Regulation Unit, which had been located within the public sector reform function, were dispersed, arguably missing the opportunity to further embed the enhancement of regulatory effectiveness more strongly within the broader public sector reform. The Department of Jobs, Enterprise and Innovation continues to fulfil responsibilities for review of red tape, and is advised in this through an active programme of the High Level Group on Business Regulation. It is now suggested that the functions relating to RIA may be undertaken by a new established Government Economic & Evaluation Service, to be located within DPER. But it is far from clear that these activities together could constitute the kind of strategic oversight of regulatory governance to which the current and previous governments have committed themselves. Nor is it obvious who will be representing Ireland in the various supranational organisations (notably the OECD and the EU) at which developments in better regulation are benchmarked, reviewed and progressed.

The existence of a central coordinating unit to act as a champion for transparent and cost effective regulation is a core aspect of OECD doctrines on better regulation, emphasised in the March 2012 Recommendation. What difference might it make in Ireland if such central coordinating capacity were to be lost? There are a number of aspects of government policy which presume capacity for oversight and review of regulation at a level above that of particular policy sectors.

The Programme for Government includes a commitment to requiring government departments to publish RIAs 'before government decisions are taken'. There are a number of bills before the Oireachtas with significant regulatory aspects and potential costs for businesses for which no RIA has been published. These omissions in the cases of the Legal Services Regulation Bill and the Water Services (Amendment) Bill might be justified by reference to urgency arising from the EU-IMF aid package or other commitments. However we may at least hypothesize that some of the political difficulties government has faced with the legislation might have been addressed had there been compliance with the requirements for regulatory impact analysis concerning consultation, consideration of alternatives, and evaluation of costs and benefits.

The Legal Services Regulation Bill, for example, raises key issues of regulatory technique that might have been better addressed in the context of an RIA under which alternatives to public regulation were fully considered. The Government was committed to establishing a public regulatory agency because of a commitment in the EU-IMF aid package to acting on the 2006 Report of the Competition Authority. As originally drafted the Bill presented some

ambiguity as to the relationship between public and private regulation. Specifically it is unclear whether the main emphasis of regulation of the professions in future is to be by reference to the making and enforcement of professional codes by the self-regulatory organisations of the legal professions, subject to the approval of the proposed Legal Services Regulatory Authority, or will the Legal Services Regulatory Authority draw up and enforce its own codes. Much of the public debate about the Bill has proceeded on the assumption it is the latter. It is surprising to see the former possibility, a scheme of meta-regulation, substantially ignored as meta-regulation provides a mechanism to harness the benefits of self-regulation (expertise, reduced public costs, industry confidence and so on) whilst providing public reassurance that self-regulation will operate and be seen to operate in the public interest through detailed oversight and accountability.

Distinct from the issues of what may be the most appropriate techniques for regulation, the advancement and implementation of principles relating to consultation provides a mechanism both to learn more about the nature of a regulated domain and the preferences of those affected by a proposed regime, whilst also securing greater commitment from consultees who are liable to feel they have had opportunities to shape the outcomes. Similar potential for promoting learning within and across regulatory regimes arises from the effective stewardship of networks within regulatory regimes (of which the Environmental Enforcement Network has been highlighted as a key example) and across regulatory regimes. The economic regulators do continue to meet periodically to discuss current issues and to learn from each other, but without high level coordination the broader Regulatory Forum established in 2009 under the chairmanship of the Taoiseach, is unlikely to deliver on its potential. More generally regulatory networks have become key mechanisms for cooperation both on policy learning and operational matters at a supranational level across most policy domains. A central challenge both of consultation and of networks is to avoid some of the risks associated with relatively tight and closed networks (for example capture of regulators by regulatees) whilst securing the benefits of learning and cooperation. In this respect it may be that the High Level Group on Better Regulation, comprising representation from government and key industry bodies, is too narrowly drawn. Better understanding of and implementation of principles relating to consultation and networks would also yield benefits in terms of promoting accountability within regulatory regimes.

A range of further issues would properly fall within the remit of a central coordinating and oversight body for regulation. Amongst these issues is the question how to secure benefits from rationalization (through mergers and absorption of functions into departments) whilst avoiding risks that an undue focus on costs results in a loss of expertise or appropriate independence. The government commitment to building capacity through research and training on regulation also requires championing by a dedicated unit, particularly in times of scarce resources. Within the Programme for Government there is a commitment to 'streamlining regulatory enforcement'. Again this is the sort of activity which may best be

pursued through the kind of high level review and implementation strategy which occurred in the UK through and following the Hampton and Macrory Reviews, but which require a high degree of capacity for learning and implementation across policy domains.

The costs of sustaining and developing capacity for coordinating, developing and implementing better regulation across government are not high, but the benefits in terms of ensuring effective and legitimate regulation, are potentially substantial. Whither better regulation?

Further Reading

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