

Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,¹ and the adoption of rules to promote responsiveness, such as “silence is consent”.² Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example, scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment and recommendations

Policies for compliance monitoring vary. Some departments and agencies have developed specific policies to track compliance. As this is an important indicator of the effectiveness of regulations the practice should be encouraged.

Recommendation 6.1. Consider whether it would be useful to collect and centralise data based on what is already done by departments and agencies in relation to compliance and enforcement, so as to establish a strategic picture of trends and potential issues.

Approaches to enforcement also vary across sectors, with a significant number of enforcement entities developing initiatives to enhance efficiency. This area appears to be one where Ireland is ahead of many other EU countries, at least as regards individual cases of good practice, as it not clear just how widespread the developments are. The Smart Economy Strategy, however, identifies the need for a more consolidated approach, and that enforcement should where possible be based on risk. There are promising initiatives spearheaded by the DETI and some agencies to share views and develop a national approach.

Recommendation 6.2. Promote and disseminate good enforcement practices to broaden their use. Develop a more systematic approach to the development of enforcement, building on existing initiatives.

Compliance and enforcement are closely linked to the development of effective RIAs. An effective RIA process seeks to identify and anticipate likely issues of compliance and enforcement. There is considerable knowledge stored within agencies which should be used to help strengthen this aspect of RIA assessments.

Recommendation 6.3. Ensure that the RIA process fully underlines the importance of anticipating compliance and enforcement issues (not only costs, but possible practical difficulties).

Administrative appeals practices vary across departments and agencies, raising some concerns about fairness and transparency. Although the Irish appeals system does appear to raise any major issues, the OECD peer review team heard that the piecemeal development of appeals mechanisms has led to inconsistencies and a relative lack of transparency. An improved approach to regulatory appeals was the subject of a recent consultation by the BRU, the conclusion of which was not to establish a single appeals body.

Recommendation 6.4. Consider whether to revisit the issue of appeals and how the system can be made more streamlined and transparent.

The Ombudsman is a useful channel for views on how the regulatory process is “lived” by ordinary citizens. As in other countries with an Ombudsman, this institution is well placed to develop a systemic view of regulatory management which should be tapped for ideas on where there is a need of improvement.

Box 6.1. 2001 OECD Report: Administrative appeals

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

Background

Compliance and enforcement

Compliance monitoring

Policies to encourage and monitor compliance vary across departments and agencies, with some of them developing specific initiatives to improve compliance. In the company law area, for example, the government established a specific public body in 2001, the Office of the Director of Corporate Enforcement (ODCE), to encourage compliance and ensure enforcement with company-related legislation as set out in the Company Law Enforcement Act 2001. The ODCE has a compliance unit which focuses on informing and educating company directors and other parties about their duties and powers under the company legislation (through publication of information and guidance in hard copy and electronic form, and an “outreach” programme of presentations to directors, seminars and conferences. Some departments and agencies also publish information about compliance rates (*e.g.* the Revenue Commissioners and the Environmental Protection Agency in their reports).

Enforcement policy

In keeping with the centralised nature of the Irish state, state agencies are mainly responsible for enforcement, although some government departments have direct responsibility, and local authorities play a role in some areas.³ Approaches to enforcement vary across sectors. The Smart Economy strategy identifies the need for a “consolidated inspections programme to reduce the number of inspection visits to business” and that “enforcement should be based around risk so as to minimise the burden on citizens and business”, as one of the actions integral to economic recovery. Annex C, which reviews the way in which enforcement is approached across a range of bodies, suggests that initiatives to improve the process and make it more efficient are numerous, sometimes encouraged by the laws regulating specific sectors.⁴ The OECD peer review team heard that there are efforts to promote voluntary compliance through advocacy, and there is co-operation across agencies. An issue however is the multiplicity of agencies involved in enforcement, and it appears that there are data sharing constraints which make it difficult to organise joint inspections. The OECD peer review team heard from the local authorities that there are too many inspectors.

While the Department of Enterprise, Trade and Innovation is not directly responsible for developing a national approach to enforcement, the Business Regulation Unit has initiated a two-pronged project to investigate enforcement and inspection practices currently in use and to explore possible progress in the area. A cross-Agency group on Risk-Based Enforcement, convened by DETI, is currently working towards a critical path of steps to facilitate data sharing to underpin: the identification of relevant populations of business to be inspected; improving analysis of risk; and the consequent reduction of administrative burdens on compliant firms. The DETI reports significant enthusiasm for practical progress in this area among the participants, and a report on progress will be presented to the HLG before the end of 2010. The group takes a two-pronged approach, looking both for immediate concrete steps that can be taken to increase practical co-operation, as well as using this experience to inform policy recommendations on enforcement to the wider system, via the HLG. It is likely that the group will continue to meet to discuss and work on further issues, such as consolidated inspections and risk analysis, for example, during 2011.

Risk-based enforcement also appears to be making headway in some areas and as a principle to be considered when regulations are developed. The revised RIA Guidelines ask officials to consider the issue of compliance burdens and to consider whether a risk-based approach to enforcement might be used to reduce such burdens. The BRU notes that resource cuts may help to accelerate a move to new approaches including risk-based and multi-task inspections, whilst observing that these raise challenge such as the need for retraining of inspectors.

Appeals

Systems and procedures for appeals vary across sectors having regard, *inter alia*, to the requirements of EU law, and the decisions which are covered.⁵ Judicial review is a central part of the Irish system of administrative appeals. There are also internal processes. The statutes creating many of the regulatory bodies provide for specific separate appeals mechanisms which operate alongside judicial review. Ireland is also one of the few European countries that has an independent third party planning appeals system, operated by *An Bord Pleanála* (the Planning Appeals Board). Judicial review is however always available, even where a specific appeals mechanism is provided for. However, the judicial review remedy itself may be modified by statute.⁶ Judicial review's adequacy as a sole appeals mechanism arises by virtue of the incorporation into Irish Law of the European Convention on Human Rights. Ministers and their departments are subject to judicial review. Certain other bodies, both public and private, may also be subject to review.

The 2001 OECD report noted that appeals practices varied significantly across departments, and that there were no generic procedures for ensuring fairness and transparency of the system in all its manifestations. One of the commitments in the 2004 White Paper *Regulating Better* was to develop an improved approach to regulatory appeals. A sub-group of the Better Regulation Group was established to examine the issue in the context of the Review of Economic Regulators. The Group sought views through a public consultation paper which focussed on the six economic regulators.⁷ In the subsequent 2009 Government Statement on Economic Regulation, the government indicated that it does not intend to establish an appeals panel to cover key economic areas. This decision was reached having regard to factors such as the efficiency of the Commercial Court and the low volume of appeals taken. Nonetheless, echoing the findings of the 2001 OECD report, most respondents highlighted the fact that appeals mechanisms in Ireland have developed in a piece-meal fashion and that there are inconsistencies between and across sectors in terms both of what types of decisions can be appealed and the nature of the appeals processes in place. It was noted that there are regulatory areas where there is no scope for appeal apart from judicial review and it was suggested that there should be merits based appeals in all sectors of strategic importance to the economy. On the other hand, the OECD peer review team heard from the sectoral regulators that the grounds for appeals should be narrowed.

Judicial review

Judicial review⁸ exists as a legal remedy where a body determining rights or liabilities has acted contrary to, or in excess of, its legal authority. The remedy is concerned with the legality of decisions. This will include the process by which the decision was made and in particular the issue of whether the decision-maker observed procedural fairness and whether the decision was arbitrary or irrational. It can also include an analysis of whether there was an appropriate legal basis for the decision. The judicial review remedy lies within the inherent jurisdiction of the High Court. The first stage in using judicial review to challenge administrative decisions is an application to a court of competent jurisdiction. The High Court may review actions of public bodies when discharging public law

functions. The High Court reviews the fairness and reasonableness of the process by which a decision was made, in the light of principles established by the Courts. The High Court may strike down decisions in certain circumstances. The High Court may also require the decision-maker to reconsider all or part of its original decision.

The broad grounds on which a decision can be challenged can be summarised as follows:

- Legality and jurisdiction. Is the decision within legal powers and if so, is it used for a proper purpose?
- Procedural fairness.
- The reasonableness of a decision
- Compatibility with Human Rights law.
- Proportionality.
- Legitimate expectations.
- The obligation to give reasons.

All decisions amenable to judicial review are subject to the necessity for conformity with European Community law and the Constitution.

Remedies available to the court

The remedies available to the court in judicial review, both interim and final, are discretionary. They include the following:

- An order quashing or setting aside a decision or declaring a decision or subordinate legislation unlawful.
- An order prohibiting a body from carrying out a particular act.
- An order compelling a public body to perform a duty.
- A declaration of the existence of an obligation or that an action or decision is unlawful.
- An injunction either limited or indefinite (in certain circumstances the injunction may have a positive aspect).
- Damages.

In taking into account whether or not to give a remedy a court will consider the following matters:

- Any delay in bringing the case.
- Whether the applicant has suffered hardship.
- Any impact the remedy may have on third parties.
- The merits of the case.
- Whether the decision would be in the interests of good administration.

Damages can be awarded in situations where parties have suffered financial loss but they may also be awarded where there has been some maladministration by the public authority involved.

The Ombudsman

The Irish Ombudsman reports to parliament. The legislation setting up an Irish ombudsman dates back to 1980 and the first ombudsman took up office in 1984. The Office of the Ombudsman investigates complaints about the administrative actions of government departments, the Health Service Executive, local authorities and An Post. By the end of 2008, approximately 72 000 valid complaints had been handled by the office. In addition, at present the office deals with up to 10 000 queries from the public every year.⁹ The OECD peer review team were told that s/he is in “competition” with parliamentarians, in the Irish context of multi seat constituencies in which citizens may use their local *Teachta Dála* (member of parliament) as a conduit for issues and complaints. However the Ombudsman is increasingly consulted, and also has a systemic appreciation of developments.

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. For example, alongside the Environmental Protection Agency in respect of waste. In the first instance, it is a matter for each individual local authority to deal with any instances of illegal disposal of waste in their area and to take the appropriate enforcement action. Local authorities have significant powers available to them under the Waste Management Act 1996, as amended, to enable them to tackle illegal waste activity.
4. For example, the Food Safety Agency and the Environmental Protection Agency now systematically use risk-based approaches to enforcement, especially inspections, as it helps to prioritise the use of resources. The Revenue Commission uses a risk-based computer programme.
5. The Consultation Paper on Regulatory Appeals sets out how the system works. Some specific processes cited in this paper have since changed however (for example the Electronic Communications Appeals Panel has been abolished).
6. This exists in certain areas such as planning law and immigration law. The legislation governing both the CAR and the CER limit to two months the timeframe in which an application for leave to apply for judicial review may be made.
7. Commission for Communications Regulation; Commission for Aviation Regulation; Commission for Energy Regulation; Financial Regulator; Competition Authority; and Commission for Taxi Regulation.
8. See also Annex C.
9. For further information see: www.ombudsman.gov.ie/en/.