

Réponses au questionnaire sur la régulation économique
Responses to the questionnaire on economic regulation

Irlande
Cour suprême

Ireland
Supreme Court

QUESTIONNAIRE ON ECONOMIC SECTORAL REGULATION IN EUROPEAN UNION COUNTRIES

I. Scope and purpose of economic sectoral regulation

1. Economic sectoral regulation mainly focuses on sectors submitted to European Union' secondary legislation (transport, energy, postal activities, electronic communication, audiovisual media). Are other sectors subject to such regulation in your country?

It should be emphasised that economic sectoral regulation in Ireland extends beyond the obligations imposed by Union legislation in two different respects. First, there are aspects of the regulation which applies in those areas which are the subject of European legislation which go beyond the measures required to comply with Union obligations. Second, there are areas which are subject to regulation in respect of which there is no Union legislation.

In that context it should be noted that the financial sector is subject to a certain degree of economic sectoral regulation originating from the European Union. However, in light of Ireland's recent banking difficulties, this area has seen wide-ranging domestic regulation above and beyond that imposed through European secondary legislation.

The Central Bank Reform Act 2010 was first step in the introduction of a new fully-integrated single structure within the Central Bank. It provided a statutory basis for a comprehensive domestic regulatory framework for financial services. It set out new powers for the Central Bank to ensure the fitness and probity of nominees to key positions within financial service providers. The Central Bank (Supervision and Enforcement) Act 2013 strengthened the ability of the Central Bank to impose and supervise compliance with regulatory requirements. It provides the Central Bank with greater access to information and analysis which it is hoped will underpin the credible enforcement of Irish financial services legislation in line with international best practice.

Sectors where economic regulation has been carried out outside the scope of EU secondary legislation include the aviation industry (overseen by Commission for Aviation Regulation) and the taxi industry (overseen formerly by the Commission for Taxi Regulation and now by the National Transport Agency). Perhaps reflecting their importance in the Irish economy, there is also significant regulation of the horse and greyhound racing industries and the bookmaking industry. There are proposals at the moment to see greater regulation in the legal profession.

2. Is the whole set of European Union' secondary legislation for economic sectoral regulation transposed into national law and/or practically implemented?

There are some notable areas where Ireland has failed to fully transpose EU sectoral regulation. For instance, the European Commission is referring Ireland to the Court of Justice for failing to fully transpose the EU internal energy market rules. To date, Ireland has only partially transposed the Electricity Directive (2009/72/EC). The aim of the Directive is to ensure that electricity is generated, transported and sold in competitive markets which create a level-playing field for all market players. The Electricity Directive should have been transposed by the 3rd March 2011. Other examples could be given.

3. Is economic sectoral regulation only aimed at introducing competition in sectors where there is State monopoly? If not, what are its other purposes (implementing an internal market, defining universal service obligations, consumer protection, etc.)?

Economic sectoral regulators normally have a much broader remit than simply introducing competition in sectors where there may be/have been a state monopoly. An example in an Irish context is the Commission for Energy Regulation (“CER”) which is Ireland’s independent energy regulator. This agency has been in operation since 1999, and its responsibilities continue to grow. It divides its role into three primary areas – economic, consumer protection and public safety. Its own website provides the following explanation:

“CER’s Economic & Customer Protection Roles in Energy

The CER’s primary economic responsibilities in energy are to regulate the Irish electricity and natural gas sectors. This covers electricity generation, electricity and gas networks, and electricity and gas supply activities.

The overall aim of the CER’s economic role is to protect the interests of energy customers, maintain security of supply, and to promote competition in the generation and supply of electricity and supply of natural gas.

The CER has an important related function in customer protection by resolving complaints that customers have with energy companies.

CER’s Energy Safety Role

Turning to its energy safety responsibilities, the CER’s role has expanded significantly in recent years, with the core focus being to protect lives and property across a range of areas in the energy sector. This includes safety regulation of electrical contractors, gas and LPG installers and gas pipelines. In addition the CER is the safety regulator of upstream petroleum safety extraction and exploration activities including off-shore gas and oil.”

Recent government initiatives in regulatory spheres have focused on creating an environment in which Ireland can be internationally competitive and an attractive place to do business. The basis for regulation may well differ from case to case. Some degree of

consumer protection is almost always present. Some level of enforcement of minimum standards likewise is a common feature. Many such schemes require the holding of a form of permit or licence by which minimum obligations are imposed (independent of overarching legislative obligations). Such licensing systems typically also permit for some form of enforcement of those obligations.

4. Is economic sectoral regulation an *ex ante* control, aimed at defining obligations for companies in the regulated sectors *a priori*, or an *ex post* control, aimed at upholding competition provisions in case of infringement ?

Generally, such regulation involves *ex ante* and *ex post* controls. Although, consumer protection and public health are foremost in the minds of regulators and those establishing such bodies, it is often the case that *ex post* controls receive much greater attention from regulators, particularly in the competition sphere.

5. Has the implementation of an economic sectoral regulation prompted the emergence of competition in the relevant sectors? Did new entrants manage to fit in regulated markets? If not, why?

The implementation of regulation has generally prompted much greater competition in regulated sectors. New entrants to markets are normally encouraged in order to promote competition and reduce natural monopolies which have emerged over time due to state ownership. However, in many of these industries, the cost of entry has been a barrier to entry. However, solutions to this problem have on occasion been found, as shown by the operation of mobile network virtual operators (MNVOs).

To take an example, the mobile telecommunications industry has seen the emergence of many new operators over its lifespan. The industry operates through a tendering process by the government which sells bandwidth to providers of telecommunications services. This has allowed the industry to evolve from its original form as an element of the state-run monopoly in the broader telecommunications industry. Mobile communication services are now provided by a number of operators. These operators have changed over time, mainly due to mergers, takeovers, and new entering the market.

There are presently four mobile telecommunications providers: 3 Ireland, O2 Ireland, Meteor (Eircom), and Vodafone Ireland. There are also six MNVOs: 48 (runs off the O2 Network), eMobile (runs off the Meteor network), Tesco Mobile (runs off the O2 Network), Lycamobile (runs off the O2 Network), Blueface (runs off the 3 Ireland network) and Postfone (runs off the Vodafone network).

6. Has the implementation of an economic sectoral regulation directly or indirectly lead to the total or partial privatisation of publicly owned companies?

Yes, partial, gradual and full privatisation of many publicly owned companies has come with economic sectoral regulation. Full privatisation has come in the fixed line telecommunications sector. Government policy in some areas has resulted in a division of state monopolies into two elements, an infrastructural element and a service provider element. The infrastructural element has remained government controlled, whereas the service provision element has been opened up to the private sector. This has occurred in both the electricity and gas industries.

7. Which economic sectors would you like to address more specifically in terms of regulation?

From an Irish separation of powers perspective it is not considered appropriate for the courts to have a view on the question of which sectors should be regulated and, indeed, how such regulation should be conducted, subject only to the conformity of any regulatory regime with the Constitution.

II. Organisation of economic sectoral regulation

8. Is economic sectoral regulation implemented by one or several independent authorities? If so, on what grounds was this choice made and how is this independence guaranteed?

Economic sectoral regulation is implemented by several independent authorities, depending on the industry. In the past, there was a trend towards individual regulators for each area, however, this has reversed in recent times with related areas being brought under the remit of a single umbrella regulator. This recent trend is primarily being driven by wider government initiatives seeking greater cost-efficiencies in government funded regulatory agencies. For instance, the Commission for Energy Regulation has recently been granted authority to regulate the water industry in Ireland. In addition, the Competition Authority, although not a sectoral economic regulator, has a broader mandate to ensure that competition works well across all sectors of the economy.

To understand the independence of regulators, it is best to start with an understanding of the framework of how such bodies operate. Within the overall regulatory framework, the role of government departments is to set policy goals, decide on regulatory structures and provide general guidance on the required policy outcomes, while the role of regulatory authorities is to independently decide how to implement the decisions to effectively achieve these outcomes.

Although independent, these regulators can be accountable to various parliamentary committees, at which representatives of the regulators attend at regular intervals. This is more a public oversight function as these parliamentary committees have no authority to order the regulator to act in any particular manner or to sanction the regulator for perceived poor or inadequate performance. For example, ComReg is accountable to a number of parliamentary committees and its Commissioners attend Joint Oireachtas Committee

(Communications and Agriculture) meetings to discuss the full range of issues under their remit.

9. Are these authorities independent of the regulated economic sectors? If so, how is this independence guaranteed?

These authorities are normally fully independent of their regulated economic sectors. Representatives of the regulated sectors no longer have representatives at the executive level of such authorities, which had sometimes occurred in the past.

Such bodies and their employees are all governed by ethics in public office legislation and commissioners/directors and staff in these agencies are additionally governed by codes of conduct. For instance, ComReg, the communications regulator, has separate codes of business conduct for its commissioners and for its staff. It should, however, be noted that regulators are normally appointed by government or sovereign agencies, although the appointment process is frequently specified in legislation. However, once appointed, regulators are, as a matter of law, independent in their role and, almost always, not subject to external direction as to how their functions are to be carried out.

10. Do these authorities have a regulatory power? If so, is it a general regulatory power for the sectors concerned or a narrower regulatory power limited to certain specific aspects of regulation?

The regulatory power of these authorities is normally set out in legislation, whether that be establishing legislation or subsequent legislation granting the authority new or additional powers. The authorities must act within the remit of such legislation, otherwise they risk having their actions invalidated by the courts in administrative proceedings. As noted above, government Departments, rather than regulatory agencies, normally set policy goals, decide on regulatory structures and provide general guidance on the required policy outcomes. The regulatory authorities then work within the confines of these mandates. To that extent, it can be said that these authorities have a narrow regulatory power. That power is almost always limited to certain specific aspects of regulation. However, in some sectors, the powers of regulators have been significantly widened through enabling legislation to ensure that they can adequately act, both proactively and reactively, e.g. the additional powers granted to the Central Bank in the area of financial regulation.

11. Do these authorities take part in drafting the relevant legislation for regulated sectors, through notice procedures for instance?

The drafting of legislation is primarily reserved for the relevant Government department. In some instances, it may be that the regulatory agencies can provide feedback and commentary on legislative drafts prepared by the government department prior to finalisation. The level of involvement can vary depending on the area of regulation and the

extent to which there has been close cooperation in the past between the relevant government department and regulatory authority. However, the final decision rests with the relevant department/parliament, depending on whether primary or secondary legislation is in issue. Regulators do not, therefore, have any formal role in the drafting of legislation. Some legislative schemes do, however, confer on a regulator the power to make secondary legislation within the parameters specified in the legislation itself. In accordance with general Irish administrative law principles in that regard such secondary legislative power can only be conferred when the "principles and policies" to be applied are to be found in the primary legislation itself.

However, there are many alternative outlets through which regulatory authorities can make their views known as to what legislation/powers are needed or desired. Representatives of the regulatory authorities can make their wishes known through attendance at parliamentary committees, through opinions expressed in publications such as annual reports, and through speeches made at gatherings which are then reported in the media.

12. Do these authorities have a sanctioning power toward companies of the regulated sectors? If so, what kind of sanctions can they adopt and under which procedure? Do these procedures guarantee compliance with provisions of article 6§1 of the CPHRFF?

The sanctioning power of a regulatory authority depends on the powers which have been granted to it under legislation. In some instances, a regulatory authority can impose large civil fines and disqualify persons proven to have been involved in some form of wrongdoing. In other instances, the necessary legislative authority may not have been granted. Irish administrative and constitutional law requires that in any such process, fair procedures and due process must be respected. Therefore, any person/company which is subject to some form of disciplinary process must be given a satisfactory account of the breach or wrongdoing alleged and given a full opportunity to question the evidence or materials on which such breach of wrongdoing is said to be based including being given the opportunity of putting forward its own case. Any resulting decision must be made in a quasi-judicial manner. If these protections are not adhered to, an aggrieved person may seek to quash the decision/sanction through judicial review proceedings in the courts. It can be said that these protections are broadly in compliance with Article 6§1.

Concerns have been expressed by the authorities themselves and other independent observers that the powers afforded regulators in Ireland are comparatively weak when compared with other jurisdictions, particularly other EU Member States. This is particularly so in relation to enforcement powers such as the imposition of fines and other sanctions. For instance the Competition Authority has commented that regulators in Ireland have "*little power to act quickly and cheaply to force compliance with their directions*" and that this means that "*structural reform in regulated sectors in Ireland will likely lag behind that experienced in other EU Member States.*"

In some cases a regulatory authority is, because of the absence of any power conferred on it by legislation, required to apply to the courts for enforcement. As noted earlier, it is also the case that licences issued by regulatory authorities frequently contain provisions which allow for the withdrawal or suspension of the relevant licence in case of breach. The procedures which would be required to be followed before any such sanction could be imposed are the same as those earlier noted in respect of the imposition by a regulatory authority of a civil penalty.

13. Is every economic sector regulated by a specific authority, or are there some authorities exercising their powers in several sectors?

There has been a trend in recent years towards rationalisation in the number of regulatory agencies, resulting the merging of certain regulators into a single body sharing certain front office and to a greater extent, back office functionality.

For example, Ireland is presently in the process of establishing a nation-wide system of charging for water usage. As part of this process, the government have decided to assign an independent economic regulatory function for water services to the Commission for Energy Regulation, rather than establish a stand-alone body in this area.

14. How are economic sectoral regulatory authorities' competences articulated with those, when appropriate, of a transverse authority in charge of assessing compliance to competition law?

The Competition Authority has co-operation agreements with various other regulatory authorities such as the Commission for Energy Regulation, the Commission for Aviation Regulation and the Commission for Communications Regulation. These agreements are intended to facilitate co-operation, avoid duplication and ensure consistency in actions. These aims are achieved primarily through the exchange of information and consultation prior to action and during an action by an authority.

III. Judicial review of economic sectoral regulatory authorities' decisions

15. Are all economic sectoral regulatory authorities' decisions subject to judicial review? If not, which decisions are not subject to such checks and why?

At the level of principle the decisions of all sectoral regulatory authorities are subject to judicial review.

16. Which system of jurisdiction is competent to verify these decisions? When relevant, is the same system of jurisdiction competent to control the decisions of the authority in charge of assessing compliance to competition law?

It is important in this context to note that Ireland does not operate a separate system of administrative law courts. Thus, the general courts have jurisdiction to deal with civil, criminal, constitutional and administrative law matters. So far as judicial review is concerned the general jurisdiction is vested in the High Court. It should be noted that the relevant legislation in certain cases allows that, in addition to the general oversight role played by the High Court exercising its judicial review function, there can be an appeal to the courts on a point of law from certain types of decisions made by regulators. In many cases the appeal on a point of law is specified to be to the High Court. It is, however, open to the legislator to provide for an appeal to be brought to one of the lower courts exercising local and limited jurisdiction. This power has sometimes been exercised in respect of the Circuit Court which is given the role of conducting appeals in a limited number of cases.

The same judicial review jurisdiction which exists in respect of a sectoral regulatory body also applies in respect of decisions of the Competition Authority.

17. Which kind of legal recourse is open against these decisions? What are the relevant legal proceedings in this matter?

In the absence of a specific legislative provision allowing for an appeal on a point of law, the recourse which is available in judicial review proceedings against regulatory authorities are the same as the recourse available to any party whose legal rights or obligations is affected by any form of legally binding public law decision. Within the ambit of judicial review proceedings a party may seek an order of certiorari (*i.e.* an order quashing the relevant decision), an order of prohibition (*i.e.* an order prohibiting the regulatory authority from taking certain steps) or an order of mandamus (*i.e.* an order requiring that a decision or other action be taken). In addition declarations as to legal rights and obligations can be sought. In a limited number of cases a claim for damages can also be included.

18. Which control does the judge exercise on these decisions? Does he monitor the formal requirements, legal proceedings and/or reasons for these decisions? For which kind of decisions does he have limited control? In contrast, for which kind of decisions does he exercise thorough control?

The judicial review jurisdiction of the Irish courts corresponds with the jurisdiction typically exercised in that regard in common law countries. The primary focus is on whether the relevant decision is lawful both on a procedural or a substantive basis. A decision may be found to be unlawful on a procedural basis because of factors such as a failure to adequately inform a party affected of the issues which might lead to an adverse decision, a

failure to permit a party affected to adequately test the strength of the case in favour of an adverse decision or a failure to permit a party to adequately present its own case. The way in which such principles are applied in practice depends, of course, on the nature of the decision under question.

So far as substantive legality is concerned, the court must be satisfied that the decision made is within the competence of the regulatory body and that any legislative requirements which exist as preconditions to the exercise of the power concerned have been met. Insofar as the regulatory body may exercise a judgment on questions of fact (including questions of expertise) the court must be satisfied that there were adequate materials properly before the regulatory body which would allow the relevant decision to be made. The court applies a test of irrationality in considering whether an assessment by the regulatory body of facts (including expert facts) is correct. This latter test has been the subject of significant debate and judicial consideration in recent times. A proportionality principle has been introduced. In addition, where the assessment of the regulatory authority is carried out in accordance with EU mandated requirements, it has been accepted that a more invasive inquiry (perhaps based on a test of manifest error) is mandated. It can fairly be said that the topic of the standard of review of the factual aspects of the decision of regulatory authorities (along with all other bodies exercising legal powers) is a subject of significant debate at present.

19. While exercising his power of judicial review, how does the judge keep himself informed (appointment of experts, specialised and contradictory investigation, resort to universities, international sources consultation, etc.)?

In accordance with the general principles for the conduct of litigation in common law jurisdictions, it is a matter for the parties to place before the court any expert evidence which is considered necessary to the court's deliberation. In many cases that expertise will, in fact, have been available to the regulatory body itself either in the form of its own expertise or in the form of expert reports tendered to it by economic actors in the course of its deliberations. Fair procedures, as interpreted in Ireland, would require the regulatory authority to make available to any party potentially affected, an account of any expert knowledge which it possessed itself and which it considered material to the exercise of its function. Thus, it is likely that the regulatory authority and any aggrieved party would already have engaged in some level of debate on any relevant areas of expertise prior to the making of a relevant decision. In many cases it would not be considered appropriate, as a matter of Irish administrative law, in judicial review proceedings to consider materials not before the decision-maker at the time when the relevant decision was taken. To the extent that any such additional information is legally relevant to the court's consideration, then it would be a matter for the parties (the party aggrieved and the regulatory body) to place such testimony before the court. Normally, this will be achieved by the filing of sworn affidavit evidence in writing, although the possibility for oral evidence also exists.

20. Which role does the administrative Supreme Court take toward these decisions? What are the major decisions of supreme administrative justice in economic sectoral regulation matters?

The Supreme Court has, with certain statutory exceptions, the role of an appeal court from all decisions of the High Court. Save for those cases where there is a statutory exception as already noted, an appeal lies as of right by either party. Thus, the role of the Supreme Court is to consider such appeals as are brought by the parties from judicial review proceedings in the High Court. The appellate role of the Supreme Court may also extend to appeals from decisions of the High Court in proceedings which are themselves appeals on a point of law from a decision of a regulatory body. The Supreme Court does not exercise any wider role.

It should be noted that, as a result of an amendment to the Constitution brought about in October 2013, a new Court of Appeal will shortly come into existence (it is anticipated that this will occur in October of this year) which will lie between the High Court and the Supreme Court. Thereafter, the right of appeal from the High Court will lie to the Court of Appeal. In those circumstances the role of the Supreme Court will be to hear appeals from the Court of Appeal save in limited circumstances where a so-called "leap frog appeal" will be possible in urgent and important cases directly from the High Court. In order for an appeal to be brought to the Supreme Court under the new regime it will be necessary for the Supreme Court to be satisfied that an important point of law is involved. The decision on whether to permit an appeal to the Supreme Court will, in those circumstances, be a matter for the Supreme Court itself.

In *Hand v Dublin Corporation* [1991] 1 I.R. 409, the applicants sought to challenge the provision in the Casual Trading Act 1980, which resulted in their ineligibility for a licence following conviction for two or more offences under the Act. The applicants argued that this amounted to an unjustified inference with their constitutional right to earn a livelihood. However, this argument was dismissed by the Supreme Court, which held that an appropriate balance had been struck, taking into account all those affected by the legislation, e.g. members of the public, law abiding casual traders, other businesses in the locality.

The question of whether a Minister/regulatory authority is entitled to adopt a particular policy in the granting of licences to carry out an economic activity was addressed in *O'Neill v Minister for Agriculture* [1997] 1 I.L.R.M. 435. In that case, the Supreme Court, held that the adoption of a policy in order to avoid capricious or arbitrary decisions is permissible but a policy which operates to almost exclusively fetter the power to grant such licences. If the discretion of the awarding authority is so fettered, then the policy will be declared ultra vires.

In *Orange Telecommunications Ltd. v Director of Telecommunications Regulation* [2000] 4 I.R. 159, a challenge was made to the decision of the Director of Telecommunications Regulation to refuse to grant the third mobile telephone licence to the applicant. The

Supreme Court held that an appeal to the courts under the relevant Act was not intended to be a complete re-examination of the merits of decision, and that a court will exercise a degree of deference to specific knowledge and experience of the administrative decision-maker.