SUBMISSION FROM THE CHARTERED INSTITUTE OF LOGISTICS AND TRANSPORT IN IRELAND TO THE PUBLIC CONSULTATION IN RESPECT OF GOVERNMENT POLICY ON ECONOMIC REGULATION

Introduction

The Chartered Institute of Logistics and Transport in Ireland ("the Institute") is the independent professional body for people engaged in logistics and all modes of transport. The Institute is part of an international body with 30,000 members worldwide. As a professional body, the Institute does not lobby on behalf of any sectoral interest but seeks to take an independent, objective and considered view on matters of public policy.

The Institute welcomes the opportunity to respond to the public consultation in respect of Government policy on economic regulation. Our submission begins by raising some general issues and goes on to respond selectively to a number of topics raised in the consultation paper.

Preliminary Remarks on the Need for a Review

Government policy on economic regulation has been under more or less continual review for the last decade, beginning with the White Paper on Better Regulation in 2004 and continuing with the OECD and Economist Intelligence Unit studies which culminated in the Government Policy Statement on Economic Regulation in 2009. Some four years later, we are embarking on yet another review of policy in this area. The consultation paper explains that the review derives from Programme for Government commitments and from planned changes in the architecture of economic regulation. Notwithstanding this, the need for yet another review so soon after the 2009 Policy Statement is not immediately apparent having regard to the following considerations:

- Much of our sectoral economic regulation is mandated by EU law and many of the parameters of that regulation are set out in the relevant European legislation. This seriously constrains the policy choices available to the Irish Government.
- It is not immediately apparent what failures of economic regulation the review is trying to address. The obvious exception is the failure of financial regulation, but this is rightly beyond the scope of the current review.
- Are serious policy issues being raised by Departments, sectoral regulators, consumer interests and regulated industries which warrant a further review? There will always be tensions between regulators and the regulated and

there will be frustrations in Government about regulatory decisions, particularly when they impact on prices. However these tensions and frustrations are a natural feature of any decision making process and are not necessarily symptoms of a more fundamental problem.

- To what extent has the 2009 Policy Statement reshaped sectoral economic regulation in the intervening period? It is not at all clear that there has been any significant change resulting directly from the publication of the 2009 document.

These are important preliminary questions which should be seriously addressed before embarking on a more detailed review. If the review proceeds, these questions should form the starting point and be addressed in a substantive way in any resulting analysis.

If it is decided to proceed with a detailed review which results in an updated policy statement, it should be followed by a sustained period of policy certainty. Too frequent reviews lead to policy uncertainty which in turn may lead to inaction at sectoral level. Is there any point in making a change now since policy may be changed again in a couple of years?

The focus for the future should be on ensuring the implementation of established policy on economic regulation and on regular and effective reviews of regulation in individual sectors. Those sectoral reviews should be the primary trigger for future general policy reviews. If significant cross-cutting issues arise from the sectoral reviews, it may be prudent to consider them on a whole of Government basis. Such a bottom up approach is preferable to the current top down one.

Having made these preliminary comments, the submission will now address a selection of the questions posed in the consultation paper.

Principles underpinning Economic Regulation

The Institute supports the principles articulated in the 2004 White Paper on Better Regulation, namely necessity, effectiveness, proportionality, transparency, accountability and consistency. We would draw particular attention to the principles of **necessity** and **proportionality.** Whenever new proposals for economic regulation are being considered the key questions posed under these headings in Appendix 2 of your consultation paper should always be thoroughly considered, particularly:

- Is regulation necessary?
- Are we satisfied that the advantages of regulation outweigh the disadvantages?
- Is there a smarter way of achieving the same goal?

It should never be assumed that Government intervention is always a good thing. There should be a careful analysis of the potential negative consequences of Government intervention and a real effort should be made to identify and analyse potential unintended consequences of such intervention. This latter issue is frequently the most difficult to assess but is often of critical importance. These questions should also be asked every time there is a review of economic regulation in a particular sector. It should not be assumed from the outset that continuing regulation is a given, unless of course it is mandated by EU legislation. Even where such regulation is unavoidable, we should always re-evaluate the approach taken and assess whether it remains appropriate and proportionate.

Articulating and balancing broader policy priorities

The Institute supports the Forfas analysis that the core function of sectoral regulators should be to ensure that end users have access to quality services at lowest price, both now and in the future. We agree with their analysis that concentrating solely on the lowest price in the short term could lead to higher prices in the longer term. We endorse their view that reducing prices as low as possible today might seem superficially attractive, particularly in the current difficult economic conditions, but could ultimately lead to higher prices for consumers over the longer term. Political decisions to keep prices artificially low in the past led to longer term problems, particularly underinvestment in infrastructure.

It is for Government to determine policy and the job of the regulator is to implement it. Where the objectives are not already determined with precision by EU legislation, there is a constant temptation for Government to decide on a range of regulatory policy objectives, without resolving any inherent conflicts or indicating priorities. This may be a way of satisfying the demands of differing interests and avoiding political difficulties, but it wrongly cedes much of the policy making role of Government to the regulator. Where the analysis suggests a number of policy objectives for a regulatory regime, it is critical that there is an effective challenge process which asks if each of these objectives is appropriate and necessary and which identifies a clear hierarchy of objectives and where appropriate a primary or overarching objective. In this way, both the regulator and the regulated will have clarity about the Government's policy objectives and this in turn should lead to greater predictability in regulatory outcomes. The resulting hierarchy of objectives should then be clearly set out in the relevant legislation.

It is the view of the Institute that the legislative provisions enabling Ministers to issue general policy directions to regulators should be repealed. The use of these directions has not been effective in achieving policy objectives and it can be argued that the process impinges unnecessarily on the independence of the regulator and lacks sufficient transparency. A much better approach is to achieve clarity on the objectives of regulation from the outset, set them out precisely in statute and regularly review the regulatory policy and mandate. If Government and the

Oireachtas are not sufficiently clear as to their policy objectives and policy priorities, they have no right to complain about the decisions taken by regulators.

The Government Regulatory Forum, comprising the relevant Ministers and sectoral regulators, could certainly have a useful role in analysing the objectives of regulation and in considering the hierarchy of objectives. However this Forum would benefit from some external participants, both domestic and international, who should be chosen for their expertise but more importantly for their ability to challenge the conventional wisdom.

Reviewing Mandates

The Institute supports the Forfas recommendation that sectoral regulatory mandates should be reviewed every five to seven years. This would achieve an appropriate balance between providing regulatory certainty for the regulated sector and ensuring that the mandate continues to be relevant and fit for purpose. The review should be thorough and, as we have already proposed, ask fundamental questions relating to necessity and proportionality. Where not explicitly excluded by EU obligations, the regulatory legislation should include a sunset clause. This would be the best way of ensuring that the review of the mandate takes place and of providing for an appropriate input by the Oireachtas and by extension the wider public. To allow for co-ordination with the transposition of any relevant future EU legislation into Irish law, the regulatory legislation could provide for a review of the regulatory regime within five to seven years after it comes into force. In the event that no review had taken place within seven years, the existing legislation would lapse.

The review of the mandate should be undertaken by the relevant Department. Consistent with our earlier comments, it should involve external participants, both domestic and international, chosen for their expertise and their ability to challenge the conventional wisdom. There should be consultation with the consumers of the regulated service, the industry players and the regulator. The review should be published and there should be an opportunity for the relevant Oireachtas Committee to consider the document and hold public hearings.

There is likely to be some overlap between the mandates of sectoral regulators and the mandate of the Competition Authority. It is therefore important that there are clear protocols agreed between the Competition Authority and each sectoral regulator setting out their respective spheres of influence and how any areas of overlapping responsibility are dealt with and also making provision for the sharing of information, analyses and intelligence. Reviews of sectoral regulation should consider the adequacy of the existing arrangements for co-operation with the Competition Authority and whether any changes are necessary to the relevant agreed protocol.

Driving Efficiencies and Reducing Costs

The primary driver for the rationalisation of sectoral regulators seems to be a desire to contain costs. While this is understandable in current circumstances and is desirable, it also presents risks. It may lead to sub-optimal regulatory arrangements and may result in a more diffuse mandate for regulatory bodies. These should be a thorough assessment prior to any rationalisation or amalgamation to determine if real cost savings will be achieved and to consider whether the resulting revised arrangements will be wholly effective. The impact of the proposals on the productivity of the regulator should also be considered as reorganisations can take up a lot of management time and energy and impact on staff morale.

The Institute is not convinced that there is scope for further significant rationalisation of sectoral economic regulators. One of the advantages of the approach taken to regulation to date is that it brings a focus to the particular task which a Department, with a wide range of functions and often conflicting responsibilities, could not. There is a risk that continuing to assign additional and sometimes disparate responsibilities to existing regulators could diminish their effectiveness.

One example which illustrates this concern is the National Transport Authority. It started life as the Dublin Transport Authority, designed to bring a necessary focus to tackling Dublin's transport problems. It then took on national responsibility for the licensing of access to the bus market and the administration of public service contracts for public transport. It now also has national responsibility for the economic regulation of taxis and for rural transport and it is proposed to give it national responsibility for the regulation and licensing of private clamping services. This mandate creep at both a functional and geographical level presents a number of potential difficulties. It is increasingly difficult to decide what the priority for the NTA is. Its mandate is becoming increasingly diffuse and multi-dimensional, replicating one of the problems it was meant to solve. There is a real concern that it does not have sufficient resources and adequate expertise to carry out its existing mandate and that this will be exacerbated as it is assigned additional functions in a piecemeal way.

A similar concern could be raised about the extension of the responsibilities of the Commission for Energy Regulation to cover the regulation of water services. The proposed restructuring of the Irish Aviation Authority and the Commission for Aviation Regulation also needs to be handled with care, so as to ensure that the effective delivery of their mandates is not compromised, particularly during the transition period.

The Institute would certainly support the adoption of a shared service model for the back office activities of the regulators and in respect of any other functions which might be discharged in this way. The examples mentioned in the consultation paper, such as consumer information and protection and enforcement, are worthy of serious

consideration. We would also support the adoption of stretch targets for the reduction of administrative costs as a way of incentivising the regulators to minimise costs and improve efficiency.

Effectiveness

The Institute agrees with the Forfas recommendation that any review of the mandate of regulators should consider the adequacy of the resources and expertise available to deliver on that mandate. In the light of the concerns we expressed earlier, we are also strongly of the view that there should be an explicit assessment of the adequacy of the resources and expertise available to the regulator every time it is proposed to extend its range of functions. Additional functions should only be assigned where adequate resources to discharge them are assured, otherwise we risk adversely affecting the carrying out of both new and existing responsibilities.

While we support the continued use of sectoral levies to finance the costs of regulators, we have reservations about the use of these levies to finance Departmental costs relating to the provision of specific regulatory expertise. In principle, we consider that such costs should be funded from general taxation. However if a way could be found to ensure that levy funding was ringfenced to strengthen the expertise of Departments in relation to policy sectoral economic regulation and corporate governance of regulators, we would be prepared to lend provisional support. It would have to be clearly demonstrated that the levy funding genuinely augmented the Departmental expertise and did not, over time, simply become another way of financing general Departmental budgets.

The Institute, while generally supportive of independent economic and safety regulation, is concerned at the impact of such developments on the policy capacity of Departments. The more regulatory and other functions that are assigned to independent bodies, the greater the risk that the policy making capacity of their parent Departments will be depleted and their expertise hollowed out. As we stressed earlier in our submission, regulatory policy is the responsibility of Ministers and their Departments and implementation of that policy is the proper role of regulators. Departments need to have the resources and expertise to determine regulatory policy, identify and prioritise regulatory objectives and put in place effective governance procedures to ensure delivery by the regulators. If the Departments do not have the necessary resources and skills they simply cede the policy ground to the regulators and it is not appropriate that regulators should be deciding policy by default. It is also essential that Departments should have the necessary skills effectively to represent Ireland in EU legislative negotiations and in other international fora. It is not appropriate that this role be delegated to regulators, though their expertise should be availed of where, and only where, the leadership role is clearly vested in the Department.

We would favour lateral mobility between regulators themselves and with their parent Departments as a way of improving understanding and enhancing skills. However it needs to be done in such a way as not to compromise the independence of regulators or the policy primacy of Departments. Secondment of regulatory staff to Departments can be used as a way of strengthening their capacity for policy analysis and development but this should not be the only or even the principal source of such expertise.

Performance and Accountability

The Institute supports the Forfas analysis that there needs to be a greater focus on the assessment and measurement of outcomes. While the measurement of outputs is an important component of any performance management system, the core question that needs to be asked is how the regulatory regime improves the lot of consumers, both now and more importantly in the longer term. Adequate and effective outcome measurement metrics are not necessarily easy to develop, but they focus the attention of both the regulators and their parent Departments on the core reasons for putting a regulatory regime in place – the public good. If it is not possible adequately to demonstrate that the regulatory regime is making a difference, it should lead to a questioning of the value of retaining it at all or in its current form.

Appeals Mechanisms

The first question which should be addressed is whether there is a need to provide for appeals on merits, except where this is mandated by EU law or other international obligations. An appeal on merits involves a review of the detail of the decision made by the regulator and in some cases the substitution of a new or modified decision by the appellate body.

The areas covered by economic regulation are very specialised and complex. We have put in place dedicated sectoral regulators and they have built up considerable expertise and experience which an appeals body cannot hope to replicate. Yet we allow the appeals body to substitute its conclusions on a given set of facts and analysis for that of the regulator in circumstances where there may be no single right or wrong answer. There is also a danger that, in circumstances where most decisions are appealed, the appeals body becomes the de facto decision maker. It also prolongs the regulatory decision making process and can be used, along with a subsequent judicial review, by regulated bodies to protect their market position and delay the implementation of undesired outcomes. Are decisions taken by regulators so frequently and obviously wrong as to require an additional layer in the decision making process? Is the only way of ensuring public confidence in regulatory decisions the provision of a mechanism which permits a full review of the merits of those decisions? The Strategic Infrastructure Act provides an interesting precedent where Government decided that a single comprehensive decision making process by

an expert body was sufficient to give planning approval to major infrastructure projects. Why is a similar approach not justifiable in the case of economic regulatory decisions?

Another question which might be considered is whether an appeals body should be empowered to overturn a decision of a regulator? A novel approach was adopted in the case of the Commission for Aviation Regulation which allows an appeals panel to refer issues back to the regulator and to pose questions but not to overturn the decision originally made. The merit of this is that it permits a review and questioning of a decision and allows for the correction of errors in the original decision making process but leaves the final call to the regulator which has the expertise and experience. However the regulator also has to explain the reasons for the decision it eventually reaches having fully considered the issues raised by the appeals panel.

There is also merit in an approach which leaves the decision of a regulator in place unless or until it is modified or overturned on appeal. This reduces the temptation for a regulated body to appeal just to postpone the evil day. Where the regulated entity is a dominant player in a market, such a delay can by itself protect and possibly reinforce its dominance.

Without prejudice to the above observations, we now go on to respond to some of the specific questions posed in the consultation paper.

There is currently a wide variety of appeals mechanisms, ranging from independent appeals panels (CER and CAR), appeals to the High Court (Comreg) and internal appeals officers followed by appeal to the Circuit Court (NTA bus licensing). There is certainly a strong case for reviewing the existing appeals processes to establish if a greater degree of consistency of approach could be introduced. The first question to be asked is whether a single type of process could be identified as representing best practice. Departures from that model should then only be allowed where it can be demonstrated that an alternative approach is more effective for a particular regulatory regime.

The Forfas study suggests that the Commercial Court is the best avenue for appeals on merits, partly because it is speedy and because the number of appeals is not large enough to justify an independent tribunal. Courts are not the best places to deal with the technical complexities of regulatory decisions and there is a concern that the assignment of additional regulatory appeals functions to the Commercial Court could dilute the focus which it has brought to dealing with commercial legal disputes. At a minimum, ad hoc appeals panels should be replaced and the case for introducing a single independent regulatory appeals tribunal should be reassessed. If there is to be provision for appeals on merit, it is important that the chosen appeals body be appropriately resourced. If that appeals body is the Commercial Court, it should be given explicit powers to avail of appropriate experts and assessors to advise it on the technical complexities of regulatory appeals and it should be

adequately resourced to quickly make decisions on regulatory appeals without impacting on its primary purpose of speedily adjudicating on commercial legal disputes.

There is a reference in the consultation paper to the possible relevance of the single appeals process in the Strategic Infrastructure Act and the possible application of the threshold model used in that Act. The relevance of this is not entirely clear since the appeal permitted to the High Courts is only on process and not in relation to the merits of the Bord Pleanala decision on a strategic infrastructure project. It may however be useful to consider whether there should be a threshold below which regulatory decisions should not be appealed on merit to the Commercial Court. The difficulty would be in determining a threshold since it is not easily possible to decide on, say, a simple measurable financial threshold which could be applied. Other criteria might have to be considered which allowed for the referral of only major regulatory decisions to the Commercial Court, with other decisions, for example, being dealt with by way of internal review and appeal to a lower Court or no external appeal.

We endorse the criteria identified by Forfas when considering appropriate appeals processes – avoiding unnecessary bureaucracy and ensuring robust procedures, strong case management and defined timelines to ensure efficient decision making.

Compliance and Enforcement

The Institute supports the identification of a full range of enforcement mechanisms and the adoption of a more standardised approach to enforcement. We recognise that the full range of enforcement mechanisms may not be relevant in all circumstances, but a standard menu should be used for selection purposes. We strongly support the use of administrative mechanisms wherever possible, including the giving of binding undertakings by regulated bodies, the use of reputational incentives such as performance or quality league tables and the use of risk-based enforcement. The availability of civil fines, even if enforced through the Courts, should be extended. The levels of fines for breaches of the criminal law should be regularly reviewed to ensure that they adequately reflect the gravity of the offence and the commercial and financial advantage gained from the purported illegal practice.

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