



Title	Regulation and Governance Reforms for Ireland and the European Union
Authors(s)	Scott, Colin
Publication date	2001
Publication information	Scott, Colin. "Regulation and Governance Reforms for Ireland and the European Union" 1 (2001).
Publisher	University College Dublin. School of Law
Item record/more information	http://hdl.handle.net/10197/6772

Downloaded 2024-05-19 20:13:37

The UCD community has made this article openly available. Please share how this access benefits you. Your story matters! (@ucd_oa)



© Some rights reserved. For more information

Regulation and Governance Reforms for Ireland and the European Union

Colin Scott*

Introduction

Governance has become one of the most fashionable words to link to reform both of private and public sector institutions. With corporate governance both government and professional bodies such as the Irish Association of Investment Managers have sought to raise the standards of conduct of the directors of major companies.¹ Major reforms both of the public service generally and of regulatory bodies in particular are designed to enhance governance arrangements for the public sector.² Responding to concerns about the legitimacy of European Union institutions the European Commission has published a White Paper on European Governance which proposes major reform of EU governance.³

Governance

The term governance is not simply a synonym for government. International organisations have tended to use the term in a relatively narrow sense to refer to the allocation and exercise of state power and relations between citizen and state.⁴ A similar definition has been espoused in recent Irish commentaries. Tutty refers to “the collection of rules, standards and norms that inform the behaviour of civil and public servants and politicians in conducting the business of state with and on behalf of the public” and this is

*Law Department, London School of Economics and Research School of Social Sciences, Australian National University.

¹ Irish Association of Investment Managers. *Corporate Governance, Share Option and Other Incentive Scheme Guidelines* (1999); National and international initiatives in the area of corporate governance are itemised by the World Bank at <http://www.worldbank.org/html/fpd/privatesector/cg/codes.htm> (visited 28 September 2001).

² Department of Public Enterprise *Governance and Accountability in the Regulatory Process, Policy Proposals* (2000); *Outline Legislative Proposals in Relation to Regulation of the Telecommunications Sector, Consultation Paper* (2000); *General Scheme of Communications (Regulation) Bill* (2001); R. Boyle *Governance and Accountability in the Irish Civil Service* (Dublin, Committee for Public Management Research Discussion Paper No. 6, no date), 29.

³ European Commission *European Governance: A White Paper* COM (2001) 428 Final.

⁴ OECD *Governance in Transition* (Paris, OECD, 1995); World Bank *Governance: The World Bank's Experience* (Washington DC, World Bank); European Commission *op cit* n2.

cited with approval in a recent official report.⁵ However the term has been more widely drawn in the scholarly literature to recognise that capacities for governing are widely dispersed between public and private sector and between different levels, local, regional, national and supranational, and that contemporary governance is characterised by relationships of interdependence between those holding public and private power.⁶ Close examination of the European Commission White Paper and contemporary developments in Ireland suggest that the narrower conception of state governance finds more favour in public policy circles.

The White Paper on European Governance

The White Paper on European Governance is a direct response to the fall of the Santer Commission in 1999 and more general concerns that EU institutions are poorly governed and understood by the citizens of Europe. The ‘No’ vote in Ireland in the referendum on ratification of the Treaty of Nice in June 2001 has demonstrated the urgency of bringing EU institutions closer to the citizens.⁷ The reform proposals in the White Paper are said to be concerned chiefly with enhancing legitimacy and focus on enhancing the so-called ‘Community method’ under which the Commission makes legislative and policy proposals, the Council of Ministers and European Parliament adopt legislative and budgetary acts and the European Court of Justice upholds the rule of law and the terms of the EC Treaty. Five ‘principles of good governance’ will be applied to the Community method: openness, participation, accountability, effectiveness and coherence.⁸ These principles translate into a number of policy proposals, none of which would attract criticism by themselves. However, when taken together these proposals appear incoherent because of the tension between two conflicting objectives: deepening of the ‘Community

⁵ M.Tutty, ‘The governance and accountability implications of new organisational structures’, in R. Boyle and T. McNamara (eds.), *Governance and Accountability: Power and Responsibility in the Public Service*, (Dublin, Institute of Public Administration, 1998); R. Boyle *op cit* n2, 29.

⁶ R.A.W.Rhodes, ‘The new governance: governing without government’, (1996) 44 *Political Studies* 652; *Understanding Governance* (Buckingham, Open University Press, 1997).

⁷ D. Staunton ‘Referendum Sends Shock Through Brussels’ *Irish Times* 9 June 2001. European Commission *op cit* n3, 3.

⁸ European Commission *op cit* n3, 10.

method’ and the enhancement of democratic participation in European policy making. Close analysis of the reforms envisaged in the White Paper suggests that, notwithstanding a rhetorical commitment to the renewal of democratic values, the underlying Commission agenda is the tightening of Commission control over the policy process. This reveals a major weakness in Commission dominance of the White Paper process – a failure to address the role of other institutions and broader capacities for governance amongst other actors.

Civil Society and the EU

A central set of proposals is to enhance the involvement of EU citizens and representative groups (labelled as ‘civil society’ in the White Paper) in policy making. This will involve better and more active communication at each stage of the policy process, and the development of a ‘reinforced culture of consultation and dialogue’.⁹ In essence this aspect of the proposals plays to those critics of the ‘Community method’ who equate the EU policy process to that of national governments and argue for levels of transparency and consultation equivalent to best practice in the member states. But this begs the question whether the EU polity really is comparable to that of national governments. Some argue that the strength of the Community method lies precisely in its relative isolation from the citizens and interest groups of the EU.¹⁰ On this view the legitimacy of European governance is premised upon its capacity for delivering the core Treaty objectives, such as the single market and a single currency, rather than on the nature of the policy process itself. In other words EU legitimacy is based upon outputs rather than inputs and this is perceived to be the problem for those who criticise the ‘democratic deficit’.

Law Making Styles and Instruments

⁹ *Ibid* 16.

¹⁰ P. Dunleavy ‘Explaining the Centralization of the European Union: A Public Choice Analysis’ P. Moser, G. Schneider and G. Kirchgässner (eds) *Decision Rules in the European Union: A Rational Choice Perspective* (London, Macmillan, 2000).

The tension between what we might call the democratic and technocratic view of legitimacy is made clearer in the raft of proposals concerned with ‘better policies, regulation and delivery’. Here the Commission is critical of the extent of detail in EU legislation, suggesting that the Council and Parliament should leave more of the detailed activity to the European Commission acting on the advice of experts.¹¹ The Commission has been engaged in processes of simplification of legislation for the internal market (the SLIM programme) for a number of years.¹² Linked to the proposal for further legislative simplification is a plan to better scrutinise the appropriateness of instruments, and to place greater emphasis on the principles of proportionality and subsidiarity, which were the subject of a protocol to the Amsterdam Treaty of 1997¹³. The Commission favours the use of a wider range of ‘soft law’ instruments such as recommendations and guidelines to supplement and amplify legislative rules. The proposals give the appearance that greater responsibility for making of such soft law might be passed to non-state institutions – a reference to self-regulation is a particular indicator. However the proposals might equally be seen as the basis for the enhancement of Commission power through greater use of soft law instruments which it can issue without adoption by the other legislative institutions. Equally the proposal to develop co-regulatory instruments (which involve shared responsibility between private and public bodies for some aspects of a regulatory regime such as rule making or enforcement) disguises the extent to which the Commission will be able to have enhanced control over regulatory regimes.

The European Council placed particular emphasis on the ‘open method of coordination’ (OMC) as an alternative to harmonising EU legislation at the Lisbon summit.¹⁴ The term OMC actually refers to a variety of different types of process under which cooperation between member state governments in sharing information about national rules, standards and policy indicators might be used to try to steer EU policy in a particular direction and in a way which gives member states some autonomy to set policy to suit national

¹¹ European Commission *op cit* n3, 18.

¹² I. Maher “Legislative Review in the EC Commission” in J. Shaw & G. More (eds), *New Legal Dynamics of European Union* (Oxford, Oxford University Press, 1996).

¹³ Protocol on the application of the principles of subsidiarity and proportionality.

¹⁴ D.Hodson and I. Maher ‘The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-Ordination’ (2001) 39 *Journal of Common Market Studies* 719

conditions. It is already apparent that the extent of openness and of coordination varies by domain. Thus in respect of monetary policy the exercise by the Irish government of its freedom to set fiscal policy to suit national conditions led to a stern rebuke,¹⁵ suggesting that the EU intends for more coordination than openness in that domain. In other domains such as information technology policy (e-Europe¹⁶) the emphasis lies more in openness and less in coordination. But in each case the White Paper is clear the Commission 'should be closely involved and play a co-ordinating role'.¹⁷

Regulatory Agencies

The major new institutional development suggested by the White Paper is the development of EU regulatory agencies with 'power to take individual decisions in application of regulatory measures.'¹⁸ There already exist 12 European agencies (including the European Union Office for Veterinary and Phytosanitary Inspections, which is located in Ireland under a policy of dispersing the location of the agencies around the EU), but they mostly have information gathering and publication powers rather than regulatory enforcement powers. The intention is that these agencies should be involved in the technical application of rules, but, in common with most agencies in the member states, will not be empowered to make rules. Furthermore the Commission suggests that the new agencies should not be granted powers in 'areas where they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments.'¹⁹ Having regard to the experience of new regulatory agencies in the member states, and including Ireland, it seems difficult to identify areas of decision making which might be transferred to agencies which meet these conditions. No doubt the cautious wording has been included in order to have the principle of European regulatory agencies agreed in anticipation that agencies may in due course be empowered beyond the narrow limits set down in the White Paper. The creation of such agencies is

¹⁵ *ibid* 736-7

¹⁶ European Commission *e-Europe Action Plan* (2000) - http://europa.eu.int/information_society/eeurope/action_plan/actionplantext/index_en.htm (visited 28th September 2001)

¹⁷ European Commission *op cit* n3, 22.

¹⁸ *Ibid*, 23.

¹⁹ *Ibid*, 24.

consistent with a technocratic vision of EU policy within which decision making on application of rules is isolated from the political processes of the Commission and the legislative institutions (and in contrast with the Commission's powers of enforcement in competition policy which it intends to retain). By the same token the growth of European agencies will not appeal to those who seek more participatory and transparent decision making processes, and will sit ill with the political cultures of most of the member states which have, at least until very recently, largely avoided the extensive delegation of power to independent agencies.

Governance in Ireland

Ireland has, as part of a far-reaching process of public management reform, already shifted towards an independent agency model in a number of sectors and domains of activity. This is true not only in the high profile utility sectors such as telecommunications and post, regulated by the Office of the Director of Telecommunications Regulation,²⁰ but also for the core civil service which faces oversight by a number of new or reinvigorated external agencies including the Office of the Ombudsman,²¹ the Data Protection Commissioner,²² and the new value for money jurisdiction of the Comptroller and Auditor General.²³ Similar reforms to these have been adopted in many OECD countries. In the UK the effect has been to reduce the emphasis on and importance of traditional accountability to Parliament and the courts, supplementing these mechanisms with forms of horizontal accountability to specialised agencies and, in some cases accountability to various forms of market (for example capital and retail markets in the case of privatised utilities).²⁴ The diffusion and externalisation of accountability mechanisms has been seen also at the EU level, for example with the creation of the European Ombudsman²⁵ and the relocation of the Commission's fraud control unit (given a new acronym OLAF) outside the Commission

²⁰ Telecommunications (Miscellaneous Provisions) Act 1996, ss2-4.

²¹ Ombudsman Act 1984. The Ombudsman also acts as Information Commissioner under the terms of the Freedom of Information Act 1997.

²² Data Protection Act 1989.

²³ Comptroller and Auditor General (Amendment) Act 1993.

²⁴ C. Scott 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38.

²⁵ EC Treaty Art 195.

management structure.²⁶ In a new wave of reform Ireland is now seeing new institutional forms and procedures being imposed on regulators with a view to enhancing their legitimacy and accountability.²⁷

Conclusions

Where the EU reform proposals are lacking is in providing any real commitment to transfer powers away from public institutions towards such bodies as interest groups and trade associations. There have been limited attempts in EC legislation to empower consumer groups to enforce legislation,²⁸ and to empower trade unions and management associations to make new rules,²⁹ but the White Paper far from developing this potential appears to be seeking to consolidate the centralised powers of the Commission. If judged against technocratic standards of legitimacy (that is to say achievement of outcomes) this may succeed in forging a new consensus around EU governance. However, the reform proposals seem more likely to be judged against the standards of national governments under which the monopolisation of power with officials and politicians is no longer seen as appropriate or effective. There is a possibility that the reform agenda may come to be dominated by the European Council and not the Commission, in which case the sensibilities of the Member States may be more to the fore.

²⁶ EC Decision 1999/352; Regulation EC No 1073/1999.

²⁷ Department of Public Enterprise *op cit* n2.

²⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 095 , 21/04/1993 P. 0029 – 0034 (implemented by The European Communities (Unfair Terms in Consumer Contracts) Regulations, SI no 27/1995); Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests OJ L 166 , 11/06/1998 P. 0051 – 0055.

²⁹ Arts 137-139 EC.