

Implementing EU Directives – an opportunity to lead

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Key Point

The Irish policy system has been properly obsessed by the need to make progress in reducing the extent and impact of the bank related debt. Now that we have made some progress on this front, it is timely to focus on another dysfunctional aspect of Irish and European governance. By delays amounting to decades in the implementation of some directives, the member states of the European Union (EU) undermine the Union's credibility, effectiveness and its competitiveness. Once they have finally been found guilty by the European Court and been fined, member states rush to comply. As a result, 'Europe' gets blamed by the citizenry for being forced to take actions the justification of which has been poorly explained, where a credible evidence base for action is often not available or not accessible, and the many benefits of action get lost in a maelstrom of recrimination and disputation. What is needed is to learn from the many cases of successful implementation in Ireland and elsewhere, including those member states - Nordic countries, Netherlands and the UK – that perform best. Each member state should design and implement a credible plan once a directive has been approved, and then monitor implementation as part of the European semester process. Ireland should implement these procedures itself so as to become one of the leaders in best practice. The European Affairs Committee of the Oireachtas (Parliament) should be given an explicit mandate to monitor and report on performance. Ireland should use its influence in Europe to put this issue on the EU agenda.

Introduction

There are many areas where the performance of the EU can be improved. Improving the governance of the banking system and addressing public debt have dominated recent efforts in Ireland and across the Union. Now that the promissory note aspect of our banking crisis has been addressed, there is an opportunity to focus on another area where the performance of the EU and Ireland is inadequate.

Ireland holds the Presidency of the European Union from January through June 2013. We have a well deserved reputation for being business-like and administratively effective in advancing those agendas which are at a point where they can be progressed. We rarely add our own strategic perspective. There is one area where there is significant policy failure, which does not involve banking and finance, and where we could make an important contribution at EU level. This is in the implementation of directives. It is too late in the EU

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policy cycle to effect any change during our Presidency, but we should work at getting the issue on the European agenda.

The general pattern is as follows: after a number of years of deliberation, a legislative proposal from the European Commission is approved by the member states (Council) and the European Parliament; Ireland has a voice in both fora. It is then transposed into domestic legislation in each of the member states. Typical legislation lays out what is to be achieved, by which dates, but leaves considerable discretion to the member states as to how it is to be achieved. A relatively long period for implementation – typically two years but sometimes 10 years or more – is allowed. In the event of non compliance – and after several warnings – the Commission takes a case to the European Court. Where the court finds against the member states, it imposes fines, typically a combination of lump sum and daily charges, the latter continuing until compliance is achieved.

Two recent Irish examples, announced by the Court of Justice of the European Union 19 December 2012²:

Septic Tanks

This ruling relates to Ireland's failure to properly regulate the installation and use of septic tanks (individual waste water treatment systems). Discharges from septic tanks, of which there are close to 500,000 in Ireland, have contributed to micro-biological pollution of groundwater and nutrient pollution of surface waters. Human health is put at risk because pathogens can enter drinking water sources via septic tanks that are poorly designed, located or maintained.

Fine: A penalty payment of €12,000 for each day of delay in adopting measures necessary to comply with the 2009 judgment, from the date on which judgment is delivered in the present case to the date of full compliance with the 2009 judgment. Also a lump sum payment of €2,000,000.

This directive³ was first approved 38 years ago (in 1975) when James Tully was the relevant Irish Minister (for Local Government).

Impact Assessment

The Court found that the thresholds for undertaking an environmental impact assessment for certain types of projects, including the restructuring of rural landholdings and water management projects for irrigation or land drainage, were too high.

Fine: a lump sum of €1,500,000.

² Details can be accessed via: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-12/cp120171en.pdf> 

³ Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

This directive⁴ was first approved in 1985 (28 years ago) when Liam Kavanagh was the relevant Minister.

Why do we do this, does it matter, and what should we do about it?

Why do we delay?

There are a number of reasons:

Time Disconnect

There is a large time lag between when agreement is reached on the policy at EU level, and Court proceedings. The politicians and the governments in which they serve that are involved in the initial decision have moved on long before engagements with the European Court take place, and the associated costs are incurred. So the current political incumbent – Phil Hogan in the Irish case – is stuck dealing with a mess not of his making. The same applies to the public servants involved, although the file will be there, and it their job to process it.⁵

Planning Deficit

Secondly, effective implementation requires hard thinking and effective planning, and the Irish system is not well designed to deliver this. There are exceptions, but ours is a ‘put out the fires’ model, and seems to be only fully energised by crisis. This is especially true when effectiveness requires substantive involvement by a number of departments and/or agencies. Who is going to do what, when? What minimum knowledge will be needed to understand where we are starting from (the baseline), and to judge policy effectiveness over time? How and by whom will this be delivered? What skills in science, engineering, design, risk assessment, economics, law and project management etc. are needed and how can they best be mobilised? What are the financial implications, and how will costs be covered? Can we identify a financial model that is self sustaining, or will subsidy be required? Are there property or other rights involved that need to be understood? How can the economic social and environmental benefits of policy implementation be maximised? How and by whom will the interest and engagement of the Oireachtas, the key stakeholders and the general public be achieved? This level of planning requires someone with the mandate and the skills to be given sufficient time to sort through the issues, engage with key players, and put an implementation framework together. And then senior management need to agree an implementation plan.

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Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5).

⁵ One of the problems is that there are very few lawyers in the public service, and none with specialist skill in EU law. We hope to address this issue with a separate commentary.

Wrong Incentives

No Minister or civil servant suffers any career or other sanction for failing to act early on in the manners suggested, and similarly there are no career gains – from the electorate in the case of politicians, or in terms of promotion for civil servants – if they do act effectively early on. The incentive asymmetry is especially sharp where one department has the legal responsibility for compliance, but effort by other departments and agencies is needed to deliver effectively. The latter have little or no incentive to devote scarce staff time and budgetary effort to the task.

We're not the worst

There is little peer pressure from other member states to improve our performance. Table 1 gives indicative evidence for EU15 over the 2005-2007 period. The ever virtuous Nordics are the best, Italy is the worst, and we are in the middle at number eight.

Table 1. Infringement Cases Opened against Member States, 2005-2007, ranked from least to most.

Country	Number	Rank
Denmark	14	1
Sweden	25	2
Finland	33	3
Netherlands	59	4
UK	65	5
Portugal	84	6
Austria	85	7
Ireland	91	8
Spain	100	9
Luxembourg	112	10
Belgium	118	11
Germany	120	12
Greece	150	13
France	195	14
Italy	211	15

Source: Nicolaidis, Phedon and Anne-Marie Suren, 2007. 'The Rule of Law in the EU: What the Numbers Say', *EIPASCOPE 2007/2*, available at:

<http://publications.eipa.eu/en/eipascope/search/>

Does it matter?

There are important costs incurred by delay. One is credibility of the EU mission. At EU level, it is striking that 5 of the 6 worst in terms of compliance (Italy, France, Germany, Belgium, Luxembourg) are also founding members of the EU. It weakens the credibility of the whole when so many key members are delinquent. And it is paradoxical that three of the top 5

performers (Denmark, Sweden, U.K.) are not members of the Euro. There is a gap between rhetoric and reality. David Cameron, Prime Minister of the UK, has initiated a discussion about the character of the EU, and has committed to hold an in-out referendum within the first half of the next parliament (if the Conservatives form the next government)⁶. Many issues will arise in the course of the debates on the future of Europe over the next years, but one is likely to be the lethargy of the core countries - relative to the UK and the Nordic performance - in implementing EU legislation. It is likely to be tagged as another example of European sclerosis and complacency or worse. The delays also damage the image of the EU with its citizens. It gets blamed for 'forcing' us to do what our governments have consciously agreed should be done and what any self-respecting country should do anyway. The blame arises because the issues involved and the benefits accruing are not explained and discussed over a reasonable period. Furthermore, the evidence supporting the action is either not available, or is only available to experts, the choices for implementation are not articulated and support from the public is not generally secured for the preferred means of implementation. To take two recent examples of non-compliance, where many would support effective implementation if fully informed in time: the conservation of the last remnants of intact boglands as being of value for ourselves and posterity⁷; secondly, understanding if and to what extent septic tanks were deficient in protecting surface and ground water. But the engagement with the citizens seems to happen when action is immediately required, in an atmosphere where the costs are seen to loom large, the benefits are ignored, and there is low confidence in official pronouncements and promises. We need to find a path to do what needs to be done because we the citizens agree that it makes sense, rather than be dragged by the courts to do what 'Europe' wants.

It also damages EU competitiveness. Most directives yield substantial net benefits, and these are foregone as long as non compliance prevails. And these wider considerations apply also locally. There is the diversion of scarce political and management capital, and the payment of legal fees involved in dealing with court cases. Instead of advancing our strategic economic, social and environmental agendas, we are sucked into case making, documentation and actions to meet our obligations. Finally, the fines are not trivial. A year's delay in meeting our septic tank inspection obligations will cost €4.38 million.

What should we do about it?

Four elements are needed. We need to learn from best practise within and between countries. Not all Irish experience is poor. One example among many: The Energy Performance in Buildings Directive came into force at EU level in 2003. By 2006 the Irish legislation was transposed, and in 2007 began the process of rating buildings on a phased

⁶ The full text of his speech is available at: <http://www.guardian.co.uk/politics/2013/jan/23/david-cameron-eu-speech-referendum>

⁷ See: Commentary 'Bogs – when they're gone, their gone' June 2012 available at: <http://www.publicpolicy.ie/bogs-when-theyre-gone-theyre-gone/#comments> for why such conservation makes sense.

basis⁸. We need to learn from our own good experiences as to why they succeeded.⁹ We also need to learn from the Nordics, Dutch and the UK about why and how they succeed.

Secondly, we need to include leading successful implementation of directives as an important criterion for promotion in the public service, especially where this requires agreement across departments and agencies.

Thirdly, we need a commitment by every member state to prepare a realistic implementation plan whenever a directive is approved at EU level. Finally, we need reporting on the progress of the implementation plan. In Ireland, the European Affairs Committee of the Oireachtas (Parliament) should be given an explicit mandate to monitor and report on performance. At EU level, performance monitoring should be undertaken as a routine part of the European Semester; this is an EU level policy coordination tool which is part of a broader EU aim to strengthen economic governance. As it stands, this surveillance framework governs the:

- Implementation of fiscal policies under the Stability and Growth Pact to strengthen economic governance and ensure budgetary discipline.
- Implementation of structural reforms in the context of Integrated Guidelines outlined in National Reform Programmes to ensure progress towards the agreed goals of the EU Strategy for Growth and Jobs ("Europe 2020").¹⁰

If we could make progress on the implementation of directives, the coherence and credibility of the European mission would be improved, as would our own self- image and performance. We would all gain. And there is a framework to build on. In regard to environmental policy, there is a framework already in place which provides evidence and analyses. These include the European Environmental Law Network¹¹, and Milieu which comprises a team of lawyers, economists and policy analysts who address legal challenges.¹² We should build on these.

⁸ See: Implementation of the EPBD in Ireland, available at: http://www.epbd-ca.org/Medias/Downloads/CA_Book_Implementing_the_EPBD_Featuring_Country_Reports_2010.pdf

pp.III175-III186

⁹ Declaration of interest. I was chairman of the Sustainable Energy Authority of Ireland at the time; it was designated as the 'issuing authority' for implementing the directive.

¹⁰ Details at: <http://www.consilium.europa.eu/special-reports/european-semester>

¹¹ http://www.asser.nl/default.aspx?site_id=7

¹² <http://www.milieu.be/index.php?page=home>