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Regulating Everything: From Mega- to Meta-Regulation¹

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Such is the extent of contemporary regulatory governance that it is possible to characterise the ambition of governments as ‘regulating everything’. This article contrasts the highly visible growth in numbers and scope of regulatory agencies in Ireland, with the more hidden but highly significant diffusion of regulatory capacity which is evident within regulatory regimes. I argue that the concept of the ‘regulatory regime’ is helpful for resisting the tendency to overstate the power and significance of regulatory agencies and to draw in other kinds of actors and other forms of control into our view of governance. I argue that the fragmentation in terms of organisations and forms of control within regulatory regimes creates a problem involving regulatory agencies *not* of too much power and too little accountability, but rather the converse – too little power and too much

¹ This article originated in my inaugural lecture as Professor of EU Regulation & Governance at University College Dublin, delivered on 26th February 2008. This restructured and updated article draws on a number of research projects, including: *Mapping the Irish State*, led by Niamh Hardiman, and funded by the Irish Research Council for Humanities and Social Sciences (IRCHSS); *Reflexive Governance in the Public Interest* supported by the 6th European Framework Programme in Research and Development coordinated by Jacques Lenoble of the Centre for Philosophy of Law - Centre de Philosophie du Droit (CPDR) of the Catholic University of Louvain (Louvain-La-Neuve); *Regulatory Capacity & Networked Governance* supported by the IRCHSS and the Institute of Public Administration; and *Growing Regulatory Capacity* supported by the IRCHSS. I am grateful to the various colleagues associated with these projects and in particular to Ciara Brown for outstanding research assistance.

The title ‘Regulating Everything’ was suggested to me by the work of two of my former LSE colleagues. Mike Power’s *The Risk Management of Everything* (Power, 2004) describes and evaluates the effect of displacing a variety of professional disciplines by risk management, first in private, and then in public sector organizations. Hugh Collins’ *Regulating Contracts* (OUP, 1999) offers a highly original analysis of the law of contract through the lens of regulation which finds contracts to be simultaneously instruments of, and subjects of, regulation.

accountability. The reconceptualization of regulation which I offer in this article is centrally concerned with questioning an exclusive focus on 'mega-regulation' – command and control by regulatory agencies - and offering a way of thinking about regulatory regimes which recognises and works with the diverse capacities for control within them and offering a more 'meta-regulatory' image of how the steering capacity of governments might be deployed.

Regulation; Governance; Ireland; Regimes; Meta-Regulation

1. Introduction

We live in a regulatory age such that we might speak of 'regulating everything'. In one sense the idea of 'regulating everything' might refer to the increased propensity of government to use the classical regulatory institutions and instruments of rules and independent agencies to address public policy problems, and it is correct that the policy boom in regulation has seen remarkable growth in numbers of regulatory agencies, not just in Ireland, but throughout much of the industrialized world. This growth phenomenon has raised questions about the legitimacy of delegation to unelected agencies, with risks that they may wield too much power with too little accountability. There has been a policy fad towards seeing regulation of this kind as a solution, sometimes almost as if it is in search of policy problems to address such that we are 'regulating everything'.

However, a focus on this classic meaning of regulation neglects a wider and different sense of 'regulating everything' which acknowledges the significance not only of governments and rules as regulators, but also the roles of market and community actors, and competitive and social forces in steering behaviour. A second sense of my title is that some capacity for regulating is found in everything, not just in government and law.

In this article I explore the relationship between these dual meanings connoted by the title, contrasting the highly visible growth in numbers and scope of regulatory agencies in Ireland, with the more hidden but highly significant diffusion of regulatory capacity which is evident within regulatory regimes. I argue that the concept of the 'regulatory regime' is helpful for resisting the tendency to overstate the power and significance of regulatory agencies and to draw in other kinds of actors and other forms of control into our view of governance.

Regulatory regimes are focused on particular domains and issues. Thus there is a regime regulating safety of food, another for smoking in public places, and a third for the quality of teaching and research within universities. There are also cross-sectoral regimes addressing such issues as competition, consumer protection and occupational health and safety. Though each of these regimes has at least one form of regulatory agency associated with it in Ireland there are in each case other organisations with significant regulatory capacity – and not simply the obvious ministries. Furthermore, to a greater or lesser degree, behaviour of those regulated in those regimes is shaped only partly by legal rules, but also by other forms of control, notably, but not exhaustively: internal arrangements in food providers for managing safety in the case of food, social pressures in the case of smoking, and both peer pressures and user feedback from students in the case of university teaching.

I argue that the fragmentation in terms of organisations and forms of control within regulatory regimes creates a problem involving regulatory agencies *not* of too much power and too little accountability, but rather the converse – too little power and too much accountability. Agencies rarely have uninhibited power to engage in what is sometimes called 'command and control'. Our expectations of what regulatory agencies can achieve are likely to be excessive. And whilst their accountability to parliament may be weak (though there are mechanisms to enhance this), and as I have argued elsewhere, the interdependence with others within regulatory regimes has the potential to create a different, extended form of

accountability (C. Scott, 2000). And, my solution to this is *not* to give agencies more power and less accountability. Rather I argue for seeking a better understanding of the limits and potential of different organisations and different modes of control within particular regimes. Such an ambition is as much about promoting learning as it is about control within regulatory regimes (C. Scott, 2010a).

In this article I first examine the evidence for the proliferation of regulatory agencies. Secondly I am going to discuss the nature of regulation and regulatory regimes. Then I will examine the variety of organisations and individuals involved within regulatory regimes. This is closely linked to variety in the forms of control. I will conclude with an assessment of the implications of my reconceptualization of regulation for the ways in which regulatory policy is developed and overseen. I will argue that policy processes of regulatory design and reform should be adapted to accommodate and exploit the potential of many organisations and variety in control.

The questions addressed in this article have taken on a greater urgency because of a perception that regulatory failure was a major cause both of the global financial crisis (GFC) and also of the financial and fiscal woes which have afflicted Irish government since 2008. For some the financial crisis and evidence of regulatory failures is to be resolved by better coordinated and more stringent agency-based regulation. I suggest that such an approach risks repeating hubristic assumptions of the past – that state agencies can substantially control the behaviour of market actors towards meeting public ends. We must remember that many of the market actors involved failed spectacularly even to secure the private ends they sought, suggesting that the problem for both firms and state agencies was a lack of understanding rather than a lack of control.

The reconceptualization of regulation which I offer in this article is centrally concerned with questioning an exclusive focus on ‘mega-regulation’ – command

and control by regulatory agencies - and offering a way of thinking about regulatory regimes which recognises and works with the diverse capacities for control within them. If we really want to be 'regulating everything' then this alternative way of thinking, sometimes referred to as 'meta-regulation', may offer a more fruitful way forward, accommodating the institutions and methods of command and control where possible and appropriate, but offering further mixtures of institutional forms and capacity for steering in context where claims to command and control appear less plausible.

2. The Growth of Regulatory Agencies

The growth of regulatory agencies has, of course, been an important trend in the governance of most OECD member states over the past thirty years – a distinctive indicator of the rise of the regulatory state (Majone, 1994), and of the establishment and global diffusion of 'regulatory capitalism' (Levi-Faur, 2005).

How many regulatory agencies are there in Ireland? This depends of course on what you count as regulatory agencies. An official report in 2007 suggested that there were 215 public bodies exercising regulatory functions (Better Regulation Unit, 2007). This figure included local authorities and certain other bodies which did not have regulation as their *primary* function. The Irish State Administration Database (www.isad.ie) enables the identification of numbers of national bodies for which regulation is the primary function and includes both state agencies and a small number of private bodies, such as the Advertising Standards Authority of Ireland and the professional bodies regulating lawyers. The database shows that a core group of regulatory agencies were established prior to or during the early years of the state and that this number increased gradually, from 22 in the 1920s to 47 in the 1980s (Figure 1). Indeed, the first agency established by the new Irish Free State, after the Comptroller & Auditor General, was the Irish Film Censor's Office. The pace of growth increased markedly after this. Even allowing for the abolition or replacement of certain regulatory agencies, the number of

active agencies increased by 16 in 1990s and a further 17 in the noughties. In 2001 alone nine new agencies were created and by 2012 there were 83 active agencies for which regulation was the primary function. Though reductions may be achieved through are plans to merge certain key agencies such as the Competition Authority and the National Consumer Agency, this must be balanced by proposals for new agencies, such as the Legal Services Regulation Authority proposed to oversee the legal profession.

Figure 1 Here

The pattern of growth is linked to a number of distinct trends. Privatization and /or liberalization of state owned enterprises has frequently been accompanied by the creation of regulatory agencies, to maintain elements of public control, and to provide reassurance of independence from government in creating a level-playing field for new entrants (Gorecki, 2011; C. Scott, 1993; Thatcher, 2002). In Ireland the imperative for the establishment of regulatory agencies to accompany liberalizing measures substantially derived from membership of the EU. For example, the Office of the Director of Telecommunications Regulation, (established in 1997, and succeeded by the Commission for Communications Regulation in 2002), took on powers transferred from the Minister for Communications, in order to comply with EU legislation. The EU regime required that regulation of telecommunications operators should be exercised independently from sponsoring government departments so as to establish a level playing field for new entrants, particularly important where, as in Ireland, the government retained a financial stake in the dominant incumbent operator (Westrup, 2012: 69-70). Such measures provide also credible commitment by government to maintaining reasonable consistency in regulatory policies, at one remove from elected politicians (Thatcher & Sweet, 2002). Similar stories may be told about the energy sector (Gorecki, 2011).

The Irish government has also deployed the regulatory agency form in domains where EU measures did not require it. In some instances Ireland has been a leader, responding to policy problems faced by others, such as environmental degradation and concerns over food safety, with the establishment of agencies such as the Environmental Protection Agency (1993) (Lynott, 2008) and the Food Safety Authority of Ireland (1998) (G. Taylor & Millar, 2004). The take up of similar institutional forms, albeit with variations, in other EU members states and at the level of the EU is sometimes said to exemplify a tendency towards policy learning or mimeticism (Gilardi, 2005). The establishment of the Financial Regulator in 2003, a response to perceptions of weaknesses in state oversight of financial markets (O'Sullivan & Kinsella, 2012 (forthcoming)), may be seen as copying a wider trend towards more powerful independent financial regulation in other jurisdictions such as the UK (which established its Financial Services Authority in 1986). Similarly the establishment of the Office of the Director of Consumer Affairs (1978, subsequently subsumed into the National Consumer Agency, 2007) and the Competition Authority in 1991 followed European and global trends towards establishing independent regulators for oversight of consumer and competition issues respectively.

Regulation is attractive not just because others require it or others do it. When governments are short of cash or unwilling to spend it, the creation of regulatory agencies provides a low cost symbolic commitment to action (Loughlin & Scott, 1997). Rules, after all, are cheap when compared to welfare programmes (though there has been increasing recognition within programmes of regulatory reform that though rules may be cheap for government, they may be costly for those who have to comply with them). For this reason, and other things being equal, we might expect further growth in regulation in the period of fiscal crisis affecting many countries following the global financial crisis of 2008. Equally, as governments become preoccupied with seeking to balance the books we might expect less emphasis on policies of better regulation and regulatory reform which seek to reduce costs for business, but not necessarily for government.

Whilst the problem of the growth of regulatory agencies is often presented as involving delegation of over-extensive powers without proper control and accountability (Hennessy, 2007; Westrup, 2012) , my own view is that the phenomenon presents a more fundamental and opposite problem. In brief the creation of regulatory agencies creates expectations which, in many cases, they cannot possibly be expected to fulfil. If the banks are not sound, if the food is not safe, if the environment is degraded, we have frequently found that regulatory agencies lack the capacity to detect the problem or to correct it. The paradox of regulatory agencies is that they frequently possess too much power outside the normal structures of ministerial responsibility to be legitimate, but too little power to secure the outcomes sought. The allocation of regulatory power to agencies is accompanied by the fragmentation of regulatory power in most regimes (J. Black, 2007). I explain this claim that the emergence of agencies involves a fragmentation rather than a concentration of regulatory power in the next section.

3. Regulatory Regimes: Fragmented Participants and Variety in Control

3.1 Fragmentation

Governments do not and cannot regulate everything. 'Regulating everything' occurs not through discrete agencies applying rules, but rather within regimes. A regulatory regime is the aggregation of the activities of those whose actions shape behaviour within a particular set sector or policy domain (Eisner, 2000). We may not be able to define with precision all the organisations and individuals within a regime. What is important for a regulatory regime is to seek an understanding of how regulation – control or steering – occurs.

A regulatory regime can be said to comprise three elements common to systems of control generally (whether biological, social or economic):

- (i) norms, standards or rules,
- (ii) mechanisms for monitoring or feedback,
- (iii) ways of correcting behaviour which deviates from the norms.

(Hood, Rothstein, & Baldwin, 2001)

This way of thinking about regulation originates in the field of biology, where scientists are accustomed to thinking about control systems organised around some norm with mechanisms to detect deviations and to correct them. The scientific field of cybernetics – the science of control systems – also has applications in the social sciences and regulation is a core example (Beer, 1966). Whereas in biology the functions of norm-setting, feedback and correction are often found in a single organization, such as the human body, in the world of social and economic regulation these functions are commonly fragmented.

Fragmentation within regulatory regimes is pervasive even with the classical agency model comprising legal rules, monitoring powers and application of formal sanctions (C. Scott, 2001). Rule making is frequently reserved to legislatures or government ministers under delegated legislation, monitoring assigned to ministries or agencies, and formal sanctions available only on application to a court. The United States is exceptional in routinely assigning each of the three powers - to make rules, to monitor and formally enforce - to independent agencies. The phrase 'governments in miniature' was coined precisely to capture the idea of the North American independent regulatory agency exercising legislative, executive and judicial functions (Schultz & Doern, 1998; Willis, 1958). In the UK there have been significant moves in recent years to give competition and financial services regulators greater power of direct regulatory enforcement (Baldwin, 2004; J. Black, 2007). The best example in Ireland of such direct empowerment to enforce is in the powers to apply administrative sanctions given to the Central Bank (formerly the Central Bank and Irish Financial Services Regulatory Authority) in 2004 (s33 AQ, Central Bank

Act 1943 (as amended)).² These powers were little used initially. A greater intrusiveness in financial regulation appears directly linked to concerns about regulatory weaknesses revealed by the financial crisis (Honahan, 2010; O'Sullivan & Kinsella, 2012 (forthcoming)).

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It is significant that where agencies do have powers to apply or seek formal sanctions, research in a wide range of jurisdictions suggests that such powers are used sparingly. Agencies, in the words of Grabosky and Braithwaite, authors of the leading Australian enforcement study, are 'of manners gentle' (Grabosky & Braithwaite, 1986). The resistance to using legal enforcement powers is largely a matter of pragmatism, combining a sense of the limited resources and the potential for eking these out by seeking to educate and advise all but the most blatant offenders. Where, as is common in Ireland, infractions constitute criminal offences there is likely to be something of a tension between the orientation of agencies towards instrumental outcomes, and the orientation of judges towards the integrity of the legal system. These tensions are well understood by regulatory agencies which tend to reserve prosecution for a class of cases that are likely to be approved of by criminal courts (C. Scott, 2010b). Enforcement steps falling short of prosecution have the advantage, from an agency perspective, that as compared with litigation they enable the agency to maintain an element of control over outcomes. In some cases others, such as adversely affected competitors or consumers, have rights to enforce regulatory rules without reference to the agency, and such private enforcement capacity may dilute the capacity of agencies to control the sanctioning process. Patterns found in many enforcement agencies are summarised in the famous enforcement pyramid - a key component of the highly influential model of 'responsive regulation' (Ayres & Braithwaite, 1992) (figure 2). Within a pyramidal approach

² Comreg has more limited direct power to issue notices relating to prosecution of summary offences. If undertakings remedy the matter giving rise to the offence and pay €1500 within 21 days no prosecution will take place. (s.44 Communications Regulation Act 2002, as amended). Similarly a number of regulatory agencies, such as the National Consumer Agency, have powers to issue fixed penalties: Consumer Protection Act 2007, s. 85 (€300).

the main enforcement emphasis is at the base of the pyramid, with a credible capacity to escalate sanctions if education and advice do not result in compliance.

Figure 2 Here

Recent legislative measures have addressed concerns that enforcement pyramids are sometimes broken in the middle, with few options between informal advice and warnings at the base, and 'nuclear' sanctions of incapacitation and licence withdrawal. Responding to these concerns the legislature has created an architecture of sanctions which permits agencies the possibility of gentle escalation through a range of sanctions. A key example is provided by the National Consumer Agency, which, under the Consumer Protection Act 2007, has powers to prosecute summary offences in the courts, but also has lower level possibilities, including the issuing of prohibition orders and compliance notices and the seeking and taking of written undertakings not to continue engaging in prohibited acts. When coupled with the implicit power to educate, advise and warn, the agency has considerable flexibility in deploying sanctions. There is additionally the possibility of consumers seeking damages against companies engaging in prohibited acts without reference to the agency. Similarly the Broadcasting Act 2009 added the possibility of the broadcasting regulator, the Broadcasting Authority of Ireland, imposing financial penalties on broadcasters as an intermediary step between license suspension or revocation and informal warnings.

Variety in enforcement practice is explained not only by reference to the functional imperative of maximizing compliance. Donald Black famously hypothesised that the stringency with which legal rules were enforced might be linked to the 'relational distance' between enforcer and enforcer (D. Black, 1976). The basic idea is that where these two parties have similar educational and professional backgrounds, perhaps high frequency of contact and shared

sense of purpose then enforcement is likely to be less stringent than where that 'relational distance' is greater. In other words membership of communities may sometimes trump hierarchy. Grabosky and Braithwaite found evidence to support the hypothesis in business regulation in Australia (Grabosky & Braithwaite, 1986) and further support was found in empirical research on regulation of public sector bureaucracies in the UK (Hood, Scott, James, Jones, & Travers, 1999). The relational distance hypothesis provides some support for the intuition that white collar criminals are treated in fundamentally different ways from those detected committing more ordinary crimes, and is suggestive of a solution within which relational distance is increased, for example by recruiting regulators from different walks of life than those they are regulating. The appointment of judges to inspect prisons is an example of relatively high relational distance underpinning a regime where, although enforcement powers are fairly minimal, stringency in naming and shaming those responsible for poor prison standards (both in the UK and Ireland) has been quite impressive. In his inquiry into the Irish Banking Crisis, Patrick Honohan noted a preference within the Financial Regulator for seeking voluntary compliance with rules, rather than strict formal enforcement (Honohan, 2010: 43). We may hypothesise that the lack of stringency which he observed was linked in part to the extent of shared experience and understanding between regulators and regulated, an example of the way that informal networks regulate social and economic behaviour (Collins, 2010: 28). This concern has been addressed through the deliberate appointment of 'outsiders' to key posts concerned with financial regulation within the Central Bank.

Discussion of regulatory arrangements for prisons, above, highlights recent ideas that public sector bodies are as much subjected to regulation as firms. Research on 'regulation inside government' in the UK found exponential growth in the armies of auditors, grievance handlers, inspectors and others charged with overseeing public sector activity in the UK (Hood, et al., 1999). It is apparent that there are similar trends in Ireland, with introduction or expansion in recent years

of public regimes for regulating the public sector in respect of such matters as appointments, maladministration, value for money, transparency in domains such as provision of healthcare, education and prisons. There is, of course, also the economic regulation of commercial state enterprises such as An Post, currently subject to an EU-driven policy of liberalization.

Fragmentation in regulatory capacity is wider than simply mirroring the separation of powers between legislature, executive and judiciary. Legislative powers are today frequently exercised by supranational bodies, including but not limited to the key case of the EU legislature. Whilst there is a temptation to think of supranational or international regulatory regimes in a manner analogous to classical domestic models, in fact such regimes are even more prone to fragmentation. In a majority of regimes with a substantial supranational element, that involvement does not extend beyond the setting of norms (C. Scott, 2012). Even within the most developed of supranational regulatory regimes, those associated with the European Union, the EU element frequently involves only the setting of standards which are then subject to mechanisms of oversight, monitoring and enforcement through national institutions. In such regimes, of course, the European Commission is itself a meta-regulator since it has a key role in ensuring national governments fulfil their obligations to transpose and implement directives. The Commission has been inventive in bolstering its formal capacity to apply sanctions to member states for non-compliance with over governance techniques, for example using competition in the form of a scoreboard showing implementation compliance for single market measures (Mendrinou, 1996).

The more direct regulatory role of the Commission is exceptional, perhaps most strongly represented in the competition policy area (Majone, 1996). Even here recent modernization reforms introduce a greater element of national competition authorities in enforcing EU competition rules. Whilst there are hierarchical mechanisms for coercing members to comply with their Community obligations,

in this and other domains where the Commission is dependent on national authorities for implementation, there has been an increasing emphasis on the more community-based methods of steering associated with the development of networks of national and EU authorities. Such networks have been very prominent in competition, telecommunications and energy fields (Eberlein & Grande, 2005). They are part a wider shift identifiable in EU governance from hierarchical to more community-based governance, exemplified by the development of the Open Method of Coordination (Maher, 2002), noted in the next section.

The partial nature of EU regulatory regimes is demonstrated by the rather limited functions of the much-discussed European agencies. The European Commission currently has 25 Community agencies on its list, and this does not include the new European financial supervisory bodies established in 2011 in the wake of the Global Financial Crisis.

(http://europa.eu/agencies/community_agencies/index_en.htm - last visited 11 March 2012). What is striking about these agencies is how little regulatory power they possess. Thus the European Food Safety Authority is primarily an advisory body, charged with advising the Commission on the exercise of powers to make and implement legislation. Even the European Environment Agency is chiefly concerned with collecting information and giving advice. Two agencies, the Community Plant Variety Office and the Office for Harmonisation in the Internal Market do have legal powers to hand out intellectual property rights. In a geographical sense these agencies do represent decentralization – and there may be some in Irish government envious of the track record of the European Commission on this. However, in governance terms the fact that so little power is given to the agencies means that they are instruments of consolidation for the central power of the European Commission (C. Scott, 2005a).

An intriguing development is the introduction of more complete supranational regulatory regimes based on non-state rather than intergovernmental activity. Such transnational private regulation is both increasingly important but also

challenging for conventional views of legitimate governance (C. Scott, Cafaggi, & Senden, 2011). Private legislation in the field of technical standards has long been recognized as important and dates back at least as far as the creation of private national standards organizations in the UK, Germany, France and the US in the first quarter of the twentieth century. It is perhaps indicative of the limited industrialization in twentieth century Ireland, and the concomitant stronger role for the state in development that the National Standards Authority of Ireland, established 1996, is a statutory corporation rather than a private body and it develops standards for matters as diverse as security for cash-in-transit to the safety of sporting goalposts. Supranational standards institutions have also been in existence for many decades, of both general character, such as ISO, and more specific, such as the IEEE, which sets many electrical standards (Hallström, 2004). These international bodies are mirrored by non-governmental standard setting institutions in the EU, such as the general standards organization, CEN, the electrical standards body CENELEC, and the European Telecommunications Standards Institute (ETSI). Key examples of the more complete regimes, which involve not only the setting of norms, but also the generation of mechanisms for monitoring and enforcement are found in fields such as environmental conservation in logging (the Forest Stewardship Council) and Fair Trade (P. L. Taylor, 2005).

Distinctly from private standard-setting, the relationships between business and government in many sectors are such that the meaning of regulatory regimes is negotiated between them in many instances, rather than determined by the adjudication of any tribunal or court. Such relationships point to the contingency of legal rules on bargaining. It has long been recognized in welfare economics that there are frequently information asymmetries between regulators and those they are charged with regulating. Ethnographic research on the operation of the UK telecommunications regime in the mid-1990s observed that dominant incumbent operator British Telecom shaped both the norms and operation of the regulatory regime through its overwhelming organisational and informational

resources (Hall, Scott, & Hood, 2000). Going beyond asymmetries of information it is not so unusual for public regulators to be dependent on firms they notionally regulate for their view of what is appropriate and feasible, such that the formal legal power is held by the regulator, but the operation and outcomes within the regime are determined, often implicitly, by leading firms. This is the problem of 'epistemic dependence' (Hardwig, 1985). There are some domains where uncertainty is pervasive, and decision making modes based on assumptions that full information is possible are unsuitable.

Many businesses have powers to regulate the conduct of others, often through contracts, for example specifying the necessary quality of products to be supplied. Contracts have become a central instrument through which producers and retailers seek to enforce ethical norms relating to employment rights and environmental protection in fields as diverse as the production of footballs and logging of wood. Oversight of such contractual arrangements may be bilateral, but increasingly involved third party certification (Blair, Williams, & Lin, 2007). Insurance companies have substantial regulatory capacity over businesses, individuals and governments in seeking to curb their risky behaviour (Ericson, Doyle, & Barry, 2003). The use of window locks and burglar alarms has grown largely in response to incentives and requirements set by insurance companies.

More broadly there is a wide range of businesses which have the capacity but not necessarily the incentive, to regulate or inhibit certain forms of conduct, and they may be enrolled as gatekeepers (Kraakman, 1986). A key case relates to internet gambling. Governments and regulatory agencies in the US have struggled to enforce legislation that makes it an offence to offer internet gambling services from anywhere in the world to persons located, for example, in New York State. The then New York State Attorney General Eliot Spitzer observed that some form of financial intermediation was required for internet gambling transactions and most intermediaries, in contrast with the service providers, were established in New York State or at least within the territory of the US. He also

observed that internet gaming transactions were coded both as internet and gambling, and that the financial intermediaries had the capacity to block them. Citibank and Paypal were amongst the first to accede to requests to block all such transactions in the face of threats of creative enforcement actions by the State (C. Scott, 2005b). Airlines, of course, have long been the gatekeeper and enforcer in respect of immigration laws. Airlines, as private organisations, can do things which might constitute breaches of treaty obligations were they done by governments or their agencies (Gilboy, 1997).

What are the implications of the fragmented character of much regulatory governance? Within the European Union a recognition of the limits to 'command and control' has resulted in the development of alternative mechanisms of steering, alongside the traditional mechanisms. These alternative mechanisms include both the harnessing of markets and mechanisms of competition and also appeal to community-based mechanisms including corporate social responsibility, self-regulation and the organisation of networks. I turn to this variety of modes of control or steering in the next section of the article.

3.2 Variety in Control

Regulatory regimes involve lots of different kinds of organisations and individuals this variety in actors calls for variety in modes of control also. Just as the ancient Greeks distinguished the governance of the forum, the marketplace and hearth so contemporary theories of social ordering suggest that the traditional hierarchical form of governance is one of three essential types – the other two being variants on competition and community (Goodin, 2003). I am going to discuss examples of all three modalities of control, and the possibility of a fourth, based in design. Key elements and examples of these modalities are shown in table 1.

TABLE 1 HERE

As discussed above, empirical evidence from regulatory regimes suggests that regulators frequently show little direct dependence on formal legal powers of enforcement. This is not to say that law and the capacity for coercion is unimportant, but rather that it frequently provides a framework within which other factors shape day to day conduct. Intriguingly this observation of the relative unimportance of law to determining outcomes appears to apply as much to contractual relationships as it does to regulatory environments (Macaulay, 1963). Where hierarchy is absent or in the background only, steering of behaviour is liable to be shaped by the competitive pressures of markets and/or the social pressures of communities.

Within communities norms are set informally, members of the community are involved in monitoring and have available informal sanctions such as showing disapproval and ostracizing those who deviate from the norms. Such practices are not limited to what we ordinarily think of as community settings, such as villages, but also occur in workplaces and amongst firms and other market actors (Bernstein, 1992). Within the Whitehall village of senior civil servants in the UK it has long been observed that regulation has occurred through informal monitoring and such community sanctions (Heclo & Wildavsky, 1974), although this has been disrupted more recently by bringing outsiders in. We may hypothesise that within the Dublin village of senior civil servants and politicians control is exercised at least as much through such implicit mechanisms as through hierarchical regulation. Non-state actors also participate in such social networks with potential for both negative and positive consequences. The risk of such networks is that they are deployed for the pursuit of private interests, excluding some from participation, and leading to outcomes determined by reference to the interests of participants in the social network rather than the public interest. The potential of such networks is that they may harness capacity for learning and understanding and secure stronger buy-in to public interest objectives, and this

potential appears particularly strong for regulatory agencies organising and and/or participating in networks.

One of the most important forms of such community based control is in the more institutionalised form of self-regulation. In the case of the legal profession in Ireland, the setting and enforcement of professional norms for barristers is undertaken through the Bar Council without statutory basis, whereas the regulation of solicitors, though also self-regulatory, is undertaken substantially under statutory powers delegated to the Law Society of Ireland (Solicitors Acts 1954-2008). At the time of writing these self-regulatory arrangements are threatened by a Legal Services Regulation Bill which will establish a new public agency to assume many of these functions, arguably completing a move from informal community regulation to explicit and institutionalised public regulation.

Though guilds as private regulators of their members date back to the middle ages, trade association models are more recent (Braudel, 1982). The Advertising industry in Ireland is substantially regulated through the self-regulatory codes and enforcement processes of the Advertising Standards Authority of Ireland and a similar model was introduced 2008 for the press, with the establishment of the Press Council of Ireland and the Press Ombudsman. This new self-regulatory regime is, of course, overlaid on the long established community-based regulation based on the Code of Conduct of the National Union of Journalists. Critically, the Press Council regime was established 'in the shadow of hierarchy' – the Minister of Justice was threatening legislation if the regime was not judged effective. In the UK it was announced in early 2012 that the equivalent institution of the Press Complaints Commission was to be abolished, a victim of the fallout from the mobile phone hacking scandal which has engulfed the British press and which is subject to investigation by an inquiry chaired by Lord Justice Leveson. The Irish model of a Press Ombudsman has been favourably discussed in considerations as to what might replace the UK Press Complaints Commission.

Community-based modes of governance are increasingly recognised for public organisations too. At the level of the EU the European Commission has sought to overcome its limits to direct member states government and agencies through increased dependence on networks to share knowledge and to benchmark activities (J. Scott & Trubek, 2002). This arguably enhances capacity not only for the EU but also for national regulatory authorities which may increasingly come to be recognised as 'networked agencies' where much of their capacity derives not from formal powers but rather from participation in international, European and domestic networks (Levi-Faur, 2011). Many national regulators participate in such networks as a means to learn more about how they may use their resources, but also to legitimate what they do, sometimes in the face of opposition at national level (Brown & Scott, 2010). Similarly domestic regulatory bodies participate in national networks, to share learning, for example across economic regulators, and also create their own sectoral networks, for example in the area of environmental protection, to draw in broader capacities both for policy making and enforcement (National Economic and Social Council, 2010).

Market mechanisms have increasingly been deployed in pursuit of policy objectives within regulatory regimes. The application of corrective taxes is a central form of market based regulation (Ogus, 1998). A key example in Ireland involves the levying of a tax on the supply of plastic bags by retailers to their customers. This regime simply uses a pricing mechanism to reduce consumption of plastic bags and has been surprisingly successful, arguably because the financial costs of using plastic bags has been reinforced by a measure of social disapproval (Convery, McDonnell, & Ferreira, 2007). In some instances new markets have been created so as to exploit the market mechanism so as to steer behaviour. A key example in Europe is provided by the European Emissions Trading Scheme which operates through pricing pollution, and permitting firms to trade their permits so encouraging, however imperfectly, those who can to reduce pollution and profit from their reduced emissions (Baldwin, 2008).

Leaving aside markets, as traditionally conceived, competition also exerts a steering influence over states, public sector bodies, employees, etc, as they jockey for position in respect of performance and reputation. The biennial Public Service Excellence Awards in Ireland is an example of using competition for recognition to promote better public services. The regulation of performance in Universities, for so long dependent on community based structures of peer review, approval and disapproval, have increasingly been subjected to new pressures to compete, in particular, for research and other resources, but also for reputational standing. International competition is reflected in the generation of league tables of which those produced by the Shanghai Jiao Tong University and the Times Higher Education Supplement are only the most prominent. There is, of course, widespread criticism of these trends and their effects, and a search for more subtle bases of comparison (Marginson & Wende, 2007).

What of the situations where hierarchy, competition and community, separately or together, are deemed inadequate to achieve objectives? A fourth possibility is the use of design as an instrument for inhibiting undesirable behaviour. Bentham saw its potential in his design for the panopticon prison – with its central tower from which a small number of warders could see and therefore control large numbers of prisoners in the irradiating wings (Foucault, 1977). The layout of the Paris boulevards was designed in such a way as to inhibit the mob from gathering (J. C. Scott, 1998). The idea of control through design has considerable prominence in Lawrence Lessig's much cited book *Code and Other Laws of Cyberspace* (Lessig, 1999) and its successor, written by many hands using a wiki *Code: Version 2.0* (Lessig, 2006). Lessig famously asserts that (software) 'code is law' because of the effect code has in controlling behaviour, often without the controllee knowing they are being controlled. Reservations emerge in Roger Brownsword's critique of the lack of choice associated with design-based control, and a related absence of accountability for such mechanisms. (Brownsword, 2005).

The exploration of hybrid modalities at play reveals that not all regulatory regimes have hierarchical elements. Internet shoppers are familiar with the risk that payments will be made and no goods or unsatisfactory goods will be delivered. One solution is to stick to trusted high profile sellers, placing dependence on their legal conscientiousness and concerns to protect brand reputation. Ebay offers a different solution. My guess is that buyers are not able to depend on either of these factors in most e-bay transactions. Rather they use the system for rating sellers for each of their transactions. There is both a community and competition element to the system. The system is dependent on community members taking the time to review sellers (and not taking a free ride) out of a sense of responsibility. The competition element means it is not impossible to sell with no track record or with poor ratings, but rather the pool of buyers is smaller, since such sellers will be avoided by the risk averse buyers, and even the risk lovers will only be willing to pay less, all other things being equal, than they would with a seller with a stronger track record (Reiley, Bryan, Prasad, & Reeves, 2007).

4. What Can We Learn for Design and Reform of Regulation?

I have offered a reconceptualization of regulation – ‘regulating everything’ - as something that happens within regimes, involving many organisations and individuals, and a variety of forms of control, sometimes operating alone, but more commonly in hybrid patterns. What use is this insight? Perhaps the most important policy implication is to suggest that wherever governments are considering a policy problem – be it unsafe food, passive smoking or poor quality university research – what they are considering is an existing regime which cannot be swept away and simply replaced by a regulatory agency. A more fruitful approach would be to seek to understand where the capacities lie within the existing regimes, and perhaps to strengthen those which appear to pull in the right direction and seek to inhibit those that pull the wrong way. Such a process of adaptive tweaking is referred to as collibration (Dunsire, 1993; Kirkbride & Letza, 2004). In this way the regulatory reform agenda has the potential to

address issues of regulatory fragmentation in a manner that recognizes both the limits of governmental capacity and the potential of reconceptualizing regulation in other ways, for example that invoke non-state actors and alternative mechanisms to hierarchy.

Regulatory reform has become a major activity for governments, encouraged by both the OECD and the European Union. Many governments have been caught between a choice of trying to make classical regulation better – more targeted, more consistent, more transparent through regulatory impact analysis – and a more radical programme which gives fuller consideration to the alternatives to agencies and rules. The UK Better Regulation Task Force was explicit in guidance it issued in 2000 that facing a public policy problem decision makers should first consider doing nothing, and then consider self-regulation of some kind and, only if less costly alternatives were not viable, plan a more hierarchical form of intervention (Better Regulation Task Force, 2000).

The Irish government's 'Better Regulation' programme scores pretty well both in its sensitivity to alternatives to regulation and its institutionalisation of alternative rules and processes within its Regulatory Impact Analysis strategy. Indeed it has received praise for its 'multi-instrument, multi-stakeholder' approach (Radaelli, 2007). However the orientation to rules and agencies is difficult to change. The relatively narrow definition of regulation in the 2004 White Paper - primary and secondary legislation and the agencies for implementing them ((Department of the Taoiseach, 2004: 6) - is, I think, a hindrance to thinking more creatively. The 2004 White Paper stated that '[t]he Government will create new sectoral regulators only if the case for a new regulatory can be clearly demonstrated in light of existing structures.' (2). Since publication of the White Paper twenty three new regulatory agencies have been established, at least ten of them being wholly new, whilst others were the product of replacements or mergers of existing bodies.

The proliferation of regulatory agencies, whilst designed to address certain policy problems, has caused other problems, and notably an anxiety that government has too little capacity for coordination. A 2009 statement sought to impose greater transparency on agencies, and to enhance the capacity of government for oversight and coordination (Department of An Taoiseach, 2009). The direction of the proposed changes has been criticised as challenging the important and justified independence from ministers of regulatory agencies, particularly in the network industries (Gorecki, 2011).

Ensuring that units involved in sponsoring regulatory development implement regulatory impact assessment well presents its own challenges (Brown & Scott, 2009; Radaelli, 2004). The programme of better regulation in Ireland, though favourably evaluated both by the OECD (OECD, 2010) as well as external observers, has been threatened by the new emphasis within regulatory policy adopted by the coalition government elected in February 2011, and charged with implementing the terms of the IMF/EU Aid package agreed in November 2010. Insofar as the aid package addresses regulation it emphasises the need for structural reforms and new regulatory arrangements to address anti-competitive practices in legal, medical and pharmacy services and, relatedly, the need to give greater enforcement powers to the Competition Authority. The tight timescales associated with delivery on these commitments has led the government not to conduct the regulatory impact assessments normally required prior to introducing key new legislation. In the case of the Legal Services Regulation Bill the absence of a timely regulatory impact assessment has resulted in limited consideration of the potential for the proposed Legal Services Regulatory Authority exercising meta-regulatory oversight of professional self-regulation as an alternative to mega-regulation. Furthermore the precise location of the responsibility for regulatory coordination has not been identified following the establishment of the Department of Public Expenditure and Reform and the disbanding of the Better Regulation Unit formerly located in the Department of An Taoiseach (Department of Jobs, Enterprise and Innovation 2012: 37).

In any case regulatory reform programmes have nowhere led to a substantial reduction in governmental activity in regulation, nor, more importantly, a qualitative change in the character of regulatory governance. This is because the problem they tackle is limited to a sense that regulation imposes burdens rather than tackling more fundamental issues of the limits to the governance capacity of government. A recent review identified the significance of a number of examples of regulatory organisations which are oriented both to learning about the limits of their capacity and to engaging the capacity of others (National Economic and Social Council, 2010). The analysis offered here is supportive of this call for a more reflexive approach to better regulation (Brown & Scott, 2011). I suggest that a valuable way to conceive of this, as an overarching conception, is found in the idea of meta-regulation.

The core idea of meta-regulation is that all social and economic spheres in which governments or others might have an interest in controlling already have within them mechanisms of steering – whether through hierarchy, competition, community, design or some combination thereof. Meta-regulation is sometimes referred to as the regulation of self-regulation (Parker, 2002). The first challenge is to observe and identify, to some approximation, the variety of mechanisms of regulation at play. The second challenge is to work out ways to key into those mechanisms to steer them, to the extent they are not already securing desired outcomes.

In conceiving of meta-regulation as a solution to policy problems my analysis extends beyond that of Christine Parker and others who see hierarchy as the main basis for steering the self-regulatory capacity of others (Gilad, 2010; Parker, 2002). Consistent with my more general position on modalities of control, the reasons for applying self-regulatory capacity in particular directions within businesses, government and NGOs, might be because of the hierarchical impositions placed on them by others, such as governments and legislatures. But

just as hierarchy can be strong in steering in behaviour, so with community and competition (C. Scott, 2008). In some sectors it appears that producers and retailers seek to appeal to the market behaviour of consumers who will buy products which have been produced organically, or without the use of child labour, or where producers are guaranteed a fair price. This 'preference for processes' (Kysar, 2004) requires not only rules, but also a regime of inspection and certification of compliance. Accordingly it involves hierarchy, but is driven by the market.

This extended conception of meta-regulation argues for a more modest conception of hierarchy and is suggestive of regulatory regimes which may emerge and have effects, but in which no-one is in charge. I acknowledge that this could be the most challenging aspect of my discussion for governments, and perhaps for others. We need to understand better why it is difficult for governments to engage in or observe meta-regulation. When crises strike it often politically more attractive to offer a mega-regulatory response – this is what happened with the BSE crisis, Enron and the Global Financial Crisis. It is interesting to note that in response to a crisis in the medical profession and widespread concern about self-regulation of the legal profession, the UK government responded in each case with the establishment of meta-regulatory bodies to oversee self-regulation – The Council for the Regulation of Health Care Professionals established by the National Health Service Reform and Health Care Professions Act 2002 and the Legal Services Board established under the Legal Services Act 2007 (Baldwin, Cave, & Malleson, 2004; Whelan, 2008). Such meta-regulation has the advantage of harnessing the capacity and knowledge of the regulated professionals, and also reducing cost to government, while at the same time providing the reassurance of government oversight and steering of the regimes involved.

5. Conclusions

I have argued that if 'regulating everything' is to be understood as a trend towards more agencies and rules governing wider areas of social and economic life, then it may fairly be criticised, not for generating an excess of unaccountable regulatory power, but rather because it overstates the possibility of governing through regulatory agencies and law. Whilst acknowledging the importance of regulatory agencies and the enforcement of legal rules to contemporary governance, I have sought to demonstrate that meta-regulation – the regulation of self-regulation - provides a alternative conceptualization of how governments, but also communities and processes of competition, might steer social and economic activities. I have argued also that developing the capacity for better reflection and learning within and outside government would promote the development of a viable way to conceive of 'regulating everything' in which agencies and rules are sometimes to the fore, but within which smarter alternatives may be considered and adopted where mega-regulation is less likely to succeed.

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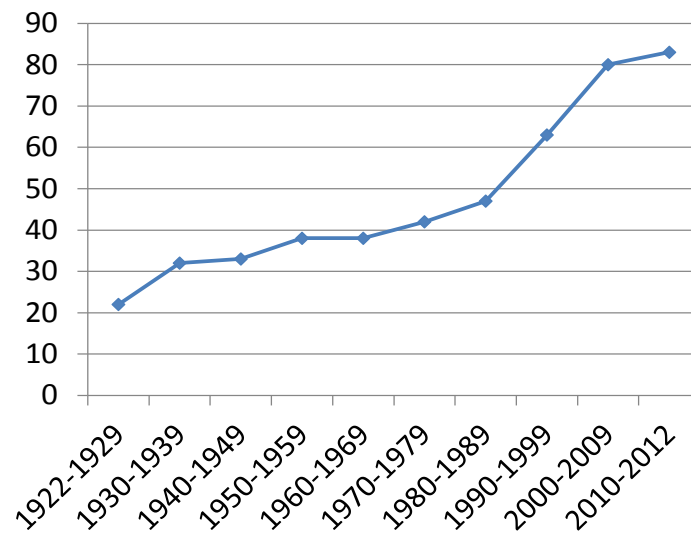


Figure 1 Regulatory Agencies Active in Ireland 1922-2012
Source: Hardiman et al. 2012



Figure 2 Example of an Enforcement Pyramid

Adapted from Ayres and Braithwaite 1992

Table 1

	Norms	Feedback	Behavioural Modification	Example	Variant
Hierarchical	Legal Rules	Monitoring Powers/Duties	Legal Sanctions	Classical Agency Model	Contractual Rule-Making and Enforcement
Competition	Price/Quality Ratio	Outcomes of Competition	Striving to Perform Better	Markets	Promotions Systems
Community	Social Norms	Social Observation	Social Sanctions – eg Ostracization	Villages, Clubs	Professional Ordering
Design	Fixed within Architecture	Lack of Response	Physical inhibition	Parking Bollards	Software Code

Table Modalities of Control Source – Adapted from (Lessig, 2006); (Hood, 1998); (Murray & Scott, 2002)]

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