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**38. The Politics of Regulation in Ireland**

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**Introduction**

There has been a global trend towards greater dependence on regulation in contemporary governance in the period since the 1980s, notably within the member states of the OECD, but also more widely. Researchers in political science and the wider interdisciplinary field of regulatory governance tend to think of regulation as occurring through regimes in which the key tasks of setting rules or norms, feeding back or monitoring for compliance, and enforcing or correcting behaviours are frequently assigned to a range of organisations which may include legislative bodies, government departments, specialised agencies, local authorities, courts and private organisations ([Eisner, 2000](#_ENREF_21); [Hood et al., 2001](#_ENREF_31)).

A key part of the evidence for the trend toward regulatory governance is the establishment of regulatory agencies across key aspects of economic and social activity throughout the OECD member states and beyond ([Levi-Faur, 2005](#_ENREF_41)). Regulatory modes of governance are not limited to the establishment and operation of regulatory agencies overseeing business, but can be identified in a wider range of contexts ([Scott, 2012](#_ENREF_70)). Indeed, so pervasive are regulatory modes of governing across public and private sectors that an early conception of ‘the regulatory state’ ([Adshead et al., 2008: 17](#_ENREF_2)) has progressively been displaced by the idea that we live in an era of ‘regulatory capitalism’ ([Levi-Faur, 2005](#_ENREF_41); [Braithwaite, 2008](#_ENREF_6); [Scott, 2014](#_ENREF_72)). A key point of contestation in the literature is whether the shift to regulatory governance modes brings with it wholesale commitment to competition and the value of market norms ([Majone, 1994](#_ENREF_53); [Kirby and Murphy., 2008](#_ENREF_38)) or whether, as more recent analyses suggest, the values associated with the state role in developing and delivering social welfare can and are also being advanced through regulatory instruments ([Mabbett, 2011](#_ENREF_47); [Levi-Faur, 2014](#_ENREF_43)).

Ireland offers an interesting case study because, as discussed below, the longstanding practice of delegating the delivery of key welfare functions to NGOs, and in particular religious organisations, established the early Irish state as regulator (though admittedly of a largely absentee sort) at least as much as direct service provider. Arguably a new focus on regulatory instruments in the past thirty years has enhanced the capacity of the state to understand and to steer both state and non-state delivery of welfare services through regulatory modes alongside the regulation of business.

As a mode of governance, regulation involves a degree of separation between policy and operational responsibilities and a high dependence on rules to define expectations and performance. Regulatory governance beyond oversight of businesses includes the regulatory oversight of public sector activity, and the shift towards rule-based governance within public sector relationships which are increasingly governed by rules, both where public services continue to be delivered by public agencies and also where such services are contracted out or otherwise delivered by private actors ([Loughlin and Scott, 1997](#_ENREF_46)). Additionally, private standard setting and regulation is increasingly regarded as a core aspect of regulatory governance ([Haufler, 2001](#_ENREF_28)). Furthermore regulatory norms are increasingly being shaped by international agreements, the *sui generis* governance activities of the EU, and also by transnational private governance regimes ([Majone, 1996](#_ENREF_54); [Braithwaite and Drahos, 2000](#_ENREF_7); [Büthe and Mattli, 2011](#_ENREF_11)).

This chapter examines how these trends have played out in Ireland and examines how we might understand the general trends and also those explanations particular to Ireland. The chapter first addresses the trend towards the establishment of regulatory agencies in Ireland and next considers the more diffuse forms of regulatory governance arising from both international obligations and the deployment of private rules. It concludes with an assessment of how trends in regulation have shaped the oversight of the public sector, both over regulatory activities in particular, and in respect of politics and public services more generally, establishing modes of accountability for public sector activity that are substantially non-parliamentary.

Within the chapter I suggest that regulation has become an accepted doctrine of contemporary governance, with emphasis on the independence of regulators from ministers and departments in implementing their regimes, and a key role in establishing alternative knowledge and authority to central government, with particular importance in the oversight of government itself. To the extent that this claim is accepted, doctrines of regulation can be seen as part of wider set of mechanisms that address weaknesses of representative democracy, both through establishing capacity for implementing rules at arms-length from concerns of elected politicians, and also through the capacity for developing and participating in supplementary norms of democratic governance relating to participation in and oversight of government ([Scott, 2014](#_ENREF_71)). The potential, not yet fully actualised, is for regulators in Ireland to constitute a fourth branch of government, linking to civil society organisations at national and international level in establishing greater participation and transparency in governance at all levels.

**Non-Majoritarianism and the Rise of Agencies**

A central aspect of ‘the rise of the regulatory state’ in Europe and more widely has been the growth in regulatory agencies, more or less independent from central government ministers and departments ([Majone, 1994](#_ENREF_53); [Jordana et al., forthcoming](#_ENREF_36)). Ireland been amongst the most enthusiastic states in embracing the regulatory agency model ([Scott, 2012](#_ENREF_70)). The remarkable growth in numbers of regulatory agencies in Ireland is part of a wider international trend driven by changing ideas about governing, copying from the experience of others and, in some cases, deriving from obligations arising from membership of the EU ([Gilardi, 2005](#_ENREF_23)). However it is important to observe regulatory agencies were not new to Ireland in the 1980s and 1990s. A number of regulatory bodies were established prior to independence in 1922 and retained and a significant number were established in the early years of the state.

Institutional Inheritance and Regulatory Agency Development

On independence in 1922 Ireland took over the machinery of government left to it by the British. With central government this was translated with minimal changes through the Ministers and Secretaries Act 1924. Ireland also inherited a number of regulatory bodies. The focus of the inherited bodies was on health and education. There were also regulatory bodies over professionals in health, education and law, some of which were privately established, and there were regulatory bodies which comprised part of the more general state infrastructure (Table 38.1). Post-1922 agencies introduced new concerns in fields such as moral regulation (including censorship of books and films) and economic development, in addition to the office of Comptroller and Auditor General to oversee probity in the public finances ([Hardiman and Scott, 2010](#_ENREF_27)).

[Table 38.1 about here]

Thus there is evidence of a regulatory state *avant la lettre* with forty or so regulatory agencies active in the 1930s ([Hardiman and Scott, 2010](#_ENREF_27); [Hardiman et al., 2018](#_ENREF_26)). But other aspects of the new state also had a regulatory governance flavour. The delegation of health and education functions to non-state bodies is reflected both in the maintenance of existing regulatory bodies and the development of new regulators in the health area. The high degree of deference to the Roman Catholic Church, and reluctance to put sufficient regulatory machinery into these arrangements, rendered them very weak, and indeed some functions (for example in respect of schools) remained part of central government departmental functions rather than being assigned to independent agencies ([MacCarthaigh, 2012: 41](#_ENREF_49)).

The Irish Constitution adopted in 1937 sets down some principles outlining a mixed economy approach to state-industry relations generally and regulation in particular. This gave considerable priority to private enterprise and property rights, but reserved rights for the state to intervene both on efficiency and social justice grounds, and paved the way for wider regulatory activity in respect of both economic and social matters ([Connery and Hodnett, 2009: 2-3](#_ENREF_15)). Major developments in regulatory agencies in Ireland in the post-WWII period mirrored that of other OECD states: regulators were established ‘after the rights revolution’ ([Sunstein, 1990](#_ENREF_73)) in areas such as employment rights and occupational health and safety, consumer protection, and equality and human rights (see Table 38.2).

[Table 38.2 about here]

Notwithstanding the strong presence of regulatory bodies in the state apparatus up to 1990, there was a pronounced policy boom for regulatory agencies in Ireland between 1990 and 2010 ([MacCarthaigh and Boyle, 2012](#_ENREF_52); [Hardiman, MacCarthaigh et al., 2018](#_ENREF_26)). The trend to establish new regulatory capacity over a mixed economy of state and non-state public service provision in the 1990s and 2000s is a uniquely Irish version of a wider story in which regulatory instruments have delivered enhancements to aspects of welfare provision, rather than being at odds with the welfare state ([Mabbett, 2011](#_ENREF_47); [Levi-Faur, 2014](#_ENREF_43)). Economic regulators were established under the pressure also felt elsewhere to re-regulate as a consequence of privatization and liberalization in network industries ([Majone, 1994](#_ENREF_53)). But the regulatory agency also became one of the core modes for addressing policy problems, ‘a solution in search of a problem’ ([Scott, 2012](#_ENREF_70)), whereby the creation of new specialised agencies were intended to operate more efficiently and effectively than divisions of government departments.

Ireland has been relatively slow to privatise key state enterprises ([Palcic and Reeves, 2011](#_ENREF_65)). Amongst the early cases was the sale of Telecom Eireann in 1999, which stemmed from a controversial government commitment to diversify share ownership. Significant structural changes to the delivery and financing of water services, a centralization rather than a privatization, later attracted a great deal of public opposition, with social media deployed to amplify negativity and protest about the introduction of user charges ([Quinn et al., 2016](#_ENREF_67)). Protests caused government to undertake a significant reversal of key pricing policies for water ([MacCarthaigh, 2015](#_ENREF_51)), and generated demands (as yet not met) for an amendment of the Constitution to entrench public ownership of water services.

Among the areas in which regulatory powers grew was the expanding remit of the constitutional and quasi-constitutional office holders of the Comptroller and Auditor General (1923) and Ombudsman (1983); a range of new free-standing regulatory functions also developed over time (Table 38.3).

[Table 38.3 about here]

Nonetheless, many regulatory functions persist within government departments which in other jurisdictions tend to be held within independent agencies. Schools inspection, for example, is carried out by a division of the Department of Education rather than being assigned to a specialised agency.

Furthermore, some regulatory techniques do not require the setting up of independent agencies ([Ogus, 1998](#_ENREF_64)). Government has been able to deploy tax-based legislative instruments to steer behaviours, chiefly by increasing costs in relation to such matters as tobacco and fuel consumption. Ireland was a key innovator in this area with the successful implementation of a levy on plastic bags in 2002 ([Convery et al., 2007](#_ENREF_16)). There is growing interest in other mechanisms for steering behaviour in ways that do not remove choices and need not require new agencies, but which may encourage better choices through shaping the choice architecture ([John et al., 2011](#_ENREF_35)). The OECD has been a particular champion of national policies and practices which draw more on behavioural insights in developing and implementing regulatory regimes ([OECD, 2018](#_ENREF_63))

At all periods there has been a significant role for private regulatory bodies established to carry out functions which, if they were not privately undertaken, would likely be taken on by the state. Early forms of private regulators across Europe were the guilds controlling access to and standards within key labour and product markets ([Braudel, 1982](#_ENREF_8)). In Ireland, professional bodies in law and medicine predate independence and exercise significant self-regulatory powers. However, statutory provisions increasingly delimit the scope of professional self-regulation, for example in the case of the Legal Services Regulatory Authority, established in 2016, and growing powers over licensing medical practitioners through the statutory General Medical Council. The industry-led Advertising Standards Authority of Ireland (1981) was established to set standards which would maintain confidence in the advertising profession (following a model set down in the UK earlier and widely copied across Europe). When government threatened to tackle growing evidence of press intrusion on privacy in Ireland, arising from the entry of British newspapers in the Irish market in the 2000s the industry established a private Press Council and Press Ombudsman to set standards and to act on complaints respectively ([O'Dowd, 2009](#_ENREF_59)).

Tensions over self-serving self-regulatory power can generate a significant politics around the balance between private and public regulation. The exercise of private regulatory powers over the legal profession by the Bar Council of Ireland and the Law Society of Ireland has been the subject of extensive official criticism over a number of years, notably with a Competition Authority report in 2006, which identified widespread anti-competitive practices ([Competition Authority, 2006](#_ENREF_14)). Notwithstanding measures within the professions to address some of the matters identified, the financial crisis of 2008- provided an opportunity for government to enlist external support for tackling the legal profession. The IMF/ECB/European Commission troika which approved and applied the emergency support to Ireland in 2010 approved proposals to restructure key aspects of the Irish economy including the establishment of a new regulatory agency over the legal profession, broadly in line with the Competition Authority recommendations. The proposals were highly contentious with the professions, and a bill, published in October 2011, took a number of years to undergo its parliamentary processes, finally passing in late 2016. This period of delay permitted the legal profession to direct ‘unrelenting campaign’ at both government and parliamentarians to dilute some of the more stringent aspects of the proposed legislation ([Murphy, 2019](#_ENREF_58)).The establishment of the Legal Services Regulatory Authority to oversee some aspects of professional self-regulation and to take over others is a significant pull-back from self-regulation in Ireland and a challenge to an important aspect of club government.

Independence, Expertise, Politics and Interests

A core rationale for the establishment of regulatory agencies, at arms-length from ministers and departments, is to insulate decision making about rule making, monitoring and enforcement from politicians and political considerations ([Thatcher, 2002](#_ENREF_75)) establishing ‘credible commitment’, especially in investment-heavy network sectors ([Levy and Spiller, 1996](#_ENREF_44); [Gilardi, 2002](#_ENREF_22)) . A culture of informal and even clientelist accessibility of politicians along with bureaucratic conflict-avoidance makes delegation to agencies of effective regulatory powers somewhat challenging and, accordingly, has tended to reduce the degree of independence granted ([MacCartaigh, 2014: 79](#_ENREF_48)). Indeed, an international study of 799 regulatory agencies across 115 countries and 17 policy domains found that whilst there has been a proliferation of agencies with regulatory responsibilities, up to half of such agencies do not have the traits associated with significant regulatory independence ([Jordana, Fernandez-i-Marin et al., forthcoming](#_ENREF_36)). EU requirements entail more extensive delegation of powers than governments might otherwise have proposed. Membership of EU networks has also served to empower and add legitimacy to the mandate of domestic regulators ([Westrup, 2012: 74-77](#_ENREF_77)).

There has been little attempt in Ireland to match governance arrangements to fit with the functions of agencies ([MacCarthaigh and Boyle, 2012: 45](#_ENREF_52)). There is a strong preference for ministers retaining powers to appoint and in many cases remove senior regulatory officials ([MacCarthaigh and Boyle, 2012: 45](#_ENREF_52)), though with some recent additions of procedures for independent application, screening and recommendations to ministers through the Public Appointments Service ([MacCarthaigh, 2015](#_ENREF_51)). Following challenging experience in the early years of the Office of The Director of Telecommunication (ODTR,1996) subsequent legislation has clarified duties to adhere to policy frameworks set by ministers and to require annual reports to the Oireachtas ([Collins, 2007: 127-8](#_ENREF_13)). The establishment of the ODTR was a turning point for economic regulation in Ireland, but also provided valuable lessons in institutional design, both in respect of accountability, but also the need for more robust enforcement powers, lessons which were acted on both with reforms in telecommunications regulation, and also in the establishment of subsequent economic regulators ([Westrup, 2012:72-3](#_ENREF_77)).

When taken together we can see that a regulator, such as the Comptroller and Auditor General (C&AG), which has strong formal independence, for example because of protection from removal of office, may be rather limited in formal powers, because it can neither make nor formally enforce rules over the public sector bodies which it regulates. In contrast, the Central Bank of Ireland (CBI) has less robust protections for its non-executive Board members, but has formal powers both over making and enforcing regulatory rules and is relatively free from ministerial powers of direction. The C&AG and the CBI are amongst the most robustly independent regulatory bodies in Ireland. It is common to find amongst social and economic regulators powers for ministers to remove board members, to give directions, and control over funding, such that independence may be somewhat limited. The Commission for Communications Regulation (COMREG) has somewhat more independence in financing and staffing in order to establish credibility for autonomy from government in a substantially privatised market ([MacCartaigh, 2014: 92-94](#_ENREF_48)). Importantly, such agencies typically have a single focus and expertise, but there is a risk that the agency will develop its own policies, deviating from government priorities – what has been referred to as ‘bureaucratic drift’ ([Horn, 1995](#_ENREF_33)).

The development of regulatory agencies can be explained to some degree by political and policy needs within the state ([MacCarthaigh, 2012: 43-44](#_ENREF_49)).. Often governments respond to crises in establishing new regulatory machinery. The various scandals involving food safety in Europe in the 1990s caused the Irish government to develop a response which could reassure not only Irish consumers, but also consumers in key export markets of the safety of Irish food, and Ireland was one of the first countries to develop an independent regulator, the Food Safety Authority of Ireland, established in 1998 ([Taylor and Millar, 2004](#_ENREF_74); [Roederer-Rynning and Daugbjerg, 2010](#_ENREF_68)). Horizontal explanations for changes in regulatory arrangements are concerned with identifying policy learning, where states mimic each other ([Gilardi, 2005](#_ENREF_23)). For example the corporatisation, privatisation and re-regulation of telecommunications services in Ireland followed a path set by the UK over the previous decade and half with the objectives of seeking more efficient delivery of services, increased investment in high quality services and digitalisation and reduced costs to consumers, but with mixed success and significant failures in respect of delivery of national broadband capacity ([Palcic and Reeves, 2011](#_ENREF_65)). ([Westrup, 2012](#_ENREF_77)). While the telecommunications story in Ireland has a horizontal dimension, there is also a top down aspect, since regulatory regimes over a number of economic sectors are subject to EU regulatory regimes which require member states to establish independent regulation. The independence requirement is particularly significant where the state retains a stake on dominant incumbent providers as is true for electricity, gas, water, postal and public transport services in Ireland ([Prosser, 2001](#_ENREF_66)).([Connery and Hodnett, 2009:13-14](#_ENREF_15)).

One further factor affecting the pattern of regulatory agencies in Ireland is the pressures during a period of recession and financial crisis for government to be seen to reducing costs of bureaucracy through culling of regulatory agencies. The government had already committed in 2004 not to establish new regulatory agencies unless strictly required ([Department of the Taoiseach, 2004](#_ENREF_19)). The period from 2008 has seen a small reduction in numbers of state agencies overall ([MacCarthaigh, 2014](#_ENREF_50)), with numbers of regulatory agencies reduced through mergers creating new multifunction regulators including the Competition and Consumer Protection Commission (2014), the Irish Human Rights and Equality Commission (2014) and the National Transport Authority (2009). The trend should not be overstated, however, since few, if any, regulatory functions were terminated and pressures to establish new regulatory bodies (for example to tackle structural problems with the economy identified during the financial crisis) yielded new agencies such as the Legal Services Regulatory Authority (2016).

**Patchwork, Multi-level and Diffused Regulatory Governance**

The delegation of tasks to regulatory agencies can be a challenge for narratives of democratic governance since regulatory agencies are typically designed to be at least one remove from elected government, for reasons noted above. Within the Irish parliamentary system of government, there is a high value given to legal rules being made by the elected legislature. This is in contrast to other systems of government, such as that of the United States, where powers to make regulatory rules are routinely delegated to federal independent agencies ([Schultz and Doern, 1998](#_ENREF_69)). The pattern is Ireland is consistent with claims that the state exhibits a high degree of centralism in the legal system, with law making assigned to parliament and authoritative legal decision making assigned very largely to the courts ([Daley, 2020](#_ENREF_18)) and with limited capacity for regulators to adapt legal interpretation to the functional concerns of their particular regulatory regimes.

Whilst legislative rule-making is the norm in Ireland there is a range of important exceptions to this. Notably, pressures to demonstrate sufficient powers over financial markets have led to the Central Bank having assigned to it more powers to make rules than is typical of regulators in Ireland ([Hurley, 2018](#_ENREF_34)). A similar trend is observable at the level of the EU where, contrary to the norm that European agencies do not have rule-making powers assigned to them, each of the three powerful regulators of financial markets at EU level have significant rule making powers ([Adamski, 2014](#_ENREF_1)).

More generally, membership of the EU has profoundly affected the normative environment of regulation in Ireland, with many norms implemented through Irish legislation originating in EU measures which require adoption at member state level and some directly effective rules, which do not require implementing measures, including the Treaty competition rules and implementing regulations, notably 2003/1 and other regulations, such as the General Data Protection Regulation, which came into force in May 2018. EU membership, together with the proliferation of transnational private rules within some regulatory regimes has engendered a degree of pluralism both in rule making and implementation, challenging the tradition of legal centralism cf ([Daley, 2020](#_ENREF_18)).

Regulatory bodies are frequently assigned significant powers to engage in monitoring including powers of inspection, access to premises, audit and so on. This aspect of implementation of regulation is very much within doctrines that permit government departments and agencies to act to implement the rules set by the legislature. With respect to enforcement , most regulators do not deploy formal regulatory sanctions in all or even most cases. Rather the ‘street level bureaucracy’ ([Lipsky, 1980](#_ENREF_45)) involves a hierarchy or pyramid of sanctions ([Ayres and Braithwaite, 1992](#_ENREF_4)). In the Irish case the cultural preference of avoiding conflict and informally addressing regulatory infractions may lead to under-enforcement rather than simply rational deployment of limited resources. For most regulators if they can secure compliance with the rules through education and advice at the base of the pyramid this will meet their requirements. The idea of the enforcement pyramid is that regulators can escalate sanctions to address repeated, egregious or intentional non-compliance. The theory suggests that fundamentally compliant regulatees are likely to comply at the base of the pyramid, but that ‘amoral calculators’ ([Kagan and Scholz, 1984](#_ENREF_37)) are only likely to comply at the base if there is a credible capacity to escalate up a pyramid of sanctions. For this reason it is very important for regimes to be designed with a good set of gradated sanctions which are credible, constituting ‘responsive regulation’. ([Ayres and Braithwaite, 1992](#_ENREF_4)), and, with attention to a wider range of external considerations, ‘really responsive regulation’ ([Baldwin and Black, 2008](#_ENREF_5)).

In the case of the Central Bank the sanctions within the enforcement pyramid includes enforcement orders (which, if breached may be enforced through court action) and restitution orders to provide compensation for those adversely affected by breaches. As regards the next layer, the Central Bank was empowered to deploy administrative sanctions, without reference to a court, by legislation passed in 2003, but did not use these powers significantly until after the financial crisis ([Murphy, 2014](#_ENREF_57)). Arguably the Central Bank lacked credibility in its capacity to escalate sanctions until they started using the administrative sanctions power. Even then, the use of the power has been hedged around with quite strong procedural requirements within the Central Bank processes which make them more court-like and consequently both slower and less predictable (and therefore less credible as an escalation strategy). Beyond administrative sanctions is the possibility of prosecution and of licence revocation. With prosecution, the direct involvement both of the prosecuting authorities (the DPP in the case of more serious offences prosecuted on indictment) and of judges, makes outcome less predictable (in addition to more costly and time consuming). Whilst the power to revoke licences can be exercised autonomously by the Bank (subject to judicial review), its very severe consequences, not just for the regulated organisation, but also for the economy and for the customers, make it very difficult to use except in the case of most egregious and persistent wrong-doing.

[Figure 38.1 HERE]

The Constitutional provision to the effect that criminal penalties shall not be applied without due process in a court (Connery, 2009: 14-15; chapter 9) has constituted a significant obstacle to the construction of appropriate enforcement pyramids in Ireland. The exceptional assignment of powers to apply extensive financial sanctions to the Financial Regulator (now the Central Bank of Ireland) in 2003 applied a doctrine that since the firms involved are licensees their application for and grant of a licence constitutes consent to the statutory sanctions regime ([McDowell, 2010](#_ENREF_55)). Provision in an EU legal instruments such as a directive or regulation requiring members state to apply administrative sanctions overrides constitutional provision, because of the principle of supremacy of EU law ([Connery and Hodnett, 2009: 15, 429](#_ENREF_15)). This is exemplified by the General Data Protection Regulation (Regulation EU 2016/679) which set down powers for national data protection authorities, including the Irish Data Protection Commissioner, to apply administrative sanctions up to 4 per cent of annual global turnover. The Law Reform Commission has taken on board the need for effective enforcement pyramids and recommended that all financial and economics regulators should have access to a standard toolkit of regulatory sanctions, including the ability to apply administrative financial sanctions ([Law Reform Commission, 2018: chapter 2](#_ENREF_40) ).

Enforcement patterns for financial services regulation in Ireland demonstrate the importance both of the design of enforcement powers and of the ways in which such powers are implemented. The issue took on particular political salience due to the experience of both market and regulatory failures during the recent financial crisis. A central debate has been whether the regulatory failure lying behind the collapse of the banks related to weaknesses in structures and powers or, rather, in the way powers were implemented. For some a principles-based approach to regulation was a key problem in Irish financial regulation and internationally ([O'Sullivan and Kinsella, 2013](#_ENREF_60)). However there is strong evidence that the weaknesses lay more in processes of supervision than in the structure of the regulatory norms ([Clarke, 2017: 111](#_ENREF_12)). A core problem lay in the failure to use enforcement powers which were available to regulators. Thus if it is correct to criticise ‘light touch regulation’ ([Allen, 2017: 59-60](#_ENREF_3)) then it was lightness in implementation and not in allocation of powers.

Two further aspects of regulatory enforcement are significant for the politics of regulation in Ireland. First, to the extent that enforcement involves a bilateral relationship between regulators and regulated organisations the process is relational in character, with the consequences that processes and outcomes may be shaped by wider dimensions of relationships going beyond the orientation of regulators to promoting compliance and regulated organisations to doing business. A consensual approach to government-industry relationships generally likely reduced the appetite for and acceptability of more conflictual regulatory relationships, especially as it tended to lock in the interests of powerful industry and social actors ([Daintith](#_ENREF_17); [Hardiman, 2006](#_ENREF_25); [MacCartaigh, 2014: 80-82](#_ENREF_48); [McGrath, 2015](#_ENREF_56); [Allen, 2017](#_ENREF_3)) . With respect to regulation it has been observed both in Australia (regulation of business) and the UK (regulation of government) that the relational distance between regulators and regulatees is a factor in shaping the stringency of regulatory enforcement ([Grabosky and Braithwaite, 1986](#_ENREF_24); [Hood et al., 1999](#_ENREF_32)). Empirical research has shown that where relational distance is low because of such factors as shared educational experience, contact through clubs and societies, and even high frequency of inspection, there are the positive effects of building trust between regulator and regulatee, but also potentially negative effects that decisions about application of sanctions will be shaped by the relationship rather than the functional requirements of the regulatory regime. In the case of financial regulation in Ireland, the Honohan Report found that tight social relationships between senior figures in banking and the Central Bank caused some infractions, detected at more junior level within the Bank, to be treated with insufficient stringency when issues were escalated to higher levels ([Honohan, 2010](#_ENREF_29)). Thus there was a form of regulatory capture of regulators by industry interests ([Westrup, 2012: 76-77](#_ENREF_77)).

A second aspect of regulatory enforcement is that in many cases it cannot be correctly characterised as bilateral in character, as it frequently draws in other actors. Thus many regulatory regimes are dependent on complaints from consumers, competitors or employees. As regards employees, who are likely to have the best knowledge of wrongdoing, protected disclosures legislation was introduced in 2014 to permit potential whistleblowers to channel their complaints first internally and then externally with protection from punitive sanctions (although still with high risk to career and reputation) (Protected Disclosures Act 2014). Other key actors in enforcement include officials of other agencies (such as the gardai, local authorities, revenue), and so-called gatekeepers who have capacity to know about wrong doing and can be incentivised to deploy that knowledge to inform agencies or to enforce directly ([Kraakman, 1986](#_ENREF_39)). Key examples of gatekeeping include the role of banks and professional services firms in enforcing controls over access to services such as banking and also in reporting suspicious transactions (notably in respect of risks of moneylaundering).

Both public and private regulators in Ireland increasingly form part of European and/or international networks which variously underpin cooperation around operational matters such as enforcement and also provide steering around wider norms for key regulatory structures and practices. At one extreme some networks of national regulatory authorities established formally or informally by the European Commission are taking on such institutionalised structures as to be described as ‘agencified’, with their own organisational and decision making structures ([Levi-Faur, 2011](#_ENREF_42)). The EU telecoms regulator BEREC provides an example. At the other end of the continuum are the looser networks which provide mutual support, for example the European Advertising Standards Alliance, which operates through making Best Practice Recommendations to its members over structures and norms, and also provides a basis for operational cooperation ([Verbruggen, 2013](#_ENREF_76)). Irish regulators are key actors within these various networks, engaging in cooperation and deriving learning on operational matters, and drawing more broadly on norms within networks for a kind of legitimacy which bolsters legitimacy vis-à-vis national government ([Brown and Scott, 2010](#_ENREF_9)).

**Politics of Regulatory Oversight and Reform – Remedying a Misfiring State?**

It is clear within the EU and further afield within the OECD that a set of norms for contemporary governance have developed in which regulatory agencies are increasingly recognised as an aspect of good governance in order to ensure balanced and expert oversight of business in particular sectors and across the economy as a whole in respect of such matters as occupational health and safety, competition and consumer protection and environmental protection. Constituting part of the apparatus of democratic governance, regulatory agencies can be seen as one of a number of mechanisms which correct for some of the weaknesses of parliamentary and other forms of electoral democracy, within which executive government has tended to become more powerful at the expense of elected representatives. Within such a doctrine, a key role of regulatory agencies over business is to promote the idea that the state should use its power by reference to principles and policies, which, though they may be set by legislature and government, are implemented at one remove from government. To the extent that the legitimating arguments for regulation are based on independence and technical expertise, there is scope to evaluate and enhance regulatory governance, with a particular focus on effectiveness and efficiency. This is today a core aspect of the oversight of government within the rubric of better regulation addressed below.

There is a further dimension to the role of regulation in democratic governance. Regulators over business can become an alternative source of expertise to government departments and may therefore constitute a form of non-parliamentary accountability over government ([Scott, 2014](#_ENREF_71)). Equally, across OECD member states, a battery of independent regulators have been established to oversee government itself across a range of administrative, financial and other values ([Hood et al., 2004](#_ENREF_30)). The emergence of regulation of the public sector should now be regarded as establishing a core set of doctrines for regulating government as an aspect of democratic governance. In Ireland the best established of these regulators of government is the Comptroller and Auditor General (1923) established to ensure that the expenditure of public funds was consistent with the purposes for which they were voted by Parliament. Regulation inside government has grown significantly in the last four decades, with the establishment of the Ombudsman in 1983, the extension of the C&AG jurisdiction to encompass value for money in addition to probity, and the addition of a range of other regulators of the public sector. On one view, these bodies contribute to democracy by holding public sector bodies to their democratically assigned mandates in at least two dimensions. The first of these dimensions concerns the matters which are assigned to public bodies in legislation. But arguably more significant is the range of values that permeate the operation of the contemporary state, with both social aspects (for example fairness, equality and sustainability) and economic aspects (efficiency and effectiveness). When addressing these wider societal norms, it is clear that regulators inside government are not simply holding public bodies to the values, they are also involved in developing the values through their actions, for example in auditing public expenditure or addressing complaints or launching own-initiative investigations into the quality of administration of public agencies and holding government to account over compliance with human rights norms. If we see regulation inside government not only as implementing but also developing the values of democratic governance, we can then locate these public agencies within a wider group of mechanisms for addressing weaknesses of parliamentary democracy.

The apparatus for overseeing government and public bodies has only gradually come to be seen as an aspect of regulation. Public sector audit pre-dates independence under the Exchequer and Audit Departments Act 1866 (UK) and was reconfigured with the establishment of the constitutional office of Comptroller and Auditor General in the Free State Constitution in 1922 (Art.62) and under the Comptroller and Auditor General Act 1923. Wider regulation of the public sector was consolidated in the 1980s and 1990s with two significant changes, the first being the establishment of the Office of the Ombudsman (1983) to oversee the conduct of administration by government and the second being the extension of the remit of the C&AG through legislation in 1993 which empowered the C&AG to undertake special reports into the economy, effectiveness and efficiency of the administration. Both these changes were part of wider set of changes internationally for increased scrutiny over the administrative actions of government.

Government is now additionally overseen by independent agencies in respect of transparency (Office of the Information Commissioner 1997), ethics (Office for Standards in Public Office 2005) and equality and human rights (Irish Human Rights and Equality Commission (established through merger in 2014) and also by agencies which oversee both public and private actors in respect of such matters as environmental protection and sustainability (Environmental Protection Agency, 1993 ) and Data Privacy (Data Protection Commissioner, 1989). There are additionally a number of more specialised oversight bodies addressing particular public sector activities such as policing (Garda Inspectorate, 2005 Garda Ombudsman, 2007) and public services involving both state and non-state providers such as health (Health Information and Quality Authority, 2007) and education (Quality and Qualifications Assurance Authority of Ireland, 2012).

A key political issue, and which has been subject to contestation, is the scope of regulation of public sector activities, determining which bodies are within and outside any particular regime. The issue has practical effects as it decides against whom an ombudsman complaint or a freedom of information request can be made. but more generally the extent to which the norms overseen are likely to be brought into the day to day workings of particular administrative units. The Ombudsman, in particular, has sought extensions to its jurisdiction over many years, and secured legislation in 2013 extending its remit to 180 additional organisations, including publicly funded universities, for the first time

A key challenge for regulators of public sector bodies is, that in contrast to regulators of business, they typically have few formal powers to require compliance with the norms they oversee. Thinking back to the enforcement pyramid, there is typically a capacity to educate and advise, but little else which is formal. In this context, the act of reporting and publishing reports becomes part of the pyramid as does the referral of matters to ministers or parliamentary bodies ([Hood, Scott et al., 1999](#_ENREF_32)). How effective are the measures and agencies concerned with overseeing public sector activities? There is frequent criticism of the Office for Standards in Public Office that it lacks both the resources and the rules necessary to systemically tackle unethical conduct in public affairs. The Comptroller and Auditor General also faces resource constraints. The Ombudsman has developed a proactive role in encouraging better complaints mechanisms in public bodies, and thus extended the reach beyond the effects it would have if it simply responded to grievances. The development of such a meta-regulatory approach provides one solution to the limited resources and authority of regulators of the public sector.

Following international trends Ireland initiated a Better Regulation programme in 1999, constituting a regime of regulation over the regulatory activity of the state itself. Such oversight is, inevitably, politically contentious as it has potential to challenge political imperatives of ministers with technical critique relating to the necessity and shape of new legislative rules. A 2004 White Paper set out six key principles and the mechanisms of regulatory impact analysis ([Department of the Taoiseach, 2004](#_ENREF_19); [OECD, 2010](#_ENREF_61))}. The principles focused on such matters as transparency, and, echoing the concerns of EU Better Regulation, the doctrine of proportionality. The principles were buttressed by a commitment that government departments should carry out a regulatory impact analysis (RIA), a form of cost-benefit analysis on all new regulatory proposals. Such evaluations were supposed to be carried out before finalising the decision on whether or how to act. Once a policy problem was identified, the possible responses were to include doing nothing (on the basis that intervention might be worse than the problem), to foster self or co-regulation, or to develop rule-based or other regulatory mechanisms for overseeing the activities concerned. In practice, as in many other better regulation regimes, the RIA process has tended to be delayed until after a firm decision around new legislation has been made, reducing the possibility for implementing alternative and possibly less costly, less intrusive or more effective mechanisms ([Brown and Scott, 2011](#_ENREF_10)). In Ireland there is a particular challenge in considering all policy options at an early stage as ministers may see a political imperative to the introduction of new rules and institutions so as to be seen to be addressing policy problems and securing the political capital from introducing stringent new regimes. Such considerations may have lain behind a decision to remove oversight of better regulation from the Office of the Taoiseach in 2011. The OECD reported in 2010 that Ireland had made considerable advances in implementing better regulation policies, but that the commitments were fragile and needed ongoing governmental commitment ([OECD, 2010](#_ENREF_61)). More recently both the OECD and the Law Reform Commission have identified needs to consolidate and clarify regulatory powers, to see regulatory practices as more systematic and requiring of greater strategic capacity to plan and to implement and to establish a central oversight office for the development of regulatory practice ([OECD, 2018](#_ENREF_62)) ([Law Reform Commission, 2018](#_ENREF_40)).

There is also a range of international bodies that scrutinise public sector activities generally (including the European Commission over fiscal and competition matters and also legislative compliance) and over more specific issues such as prisons (European Committee for Prevention of Torture) and human rights (UN Committee on Human Rights). The contrast between methods of international institutions is instructive. Whereas the ECPT carries out its own visits and inspections of prison facilities prior to report reporting, the UN Committee on Human Rights carries out its monitoring largely through collecting evidence in writing and orally both from official bodies (notably the IHREC) and from civil society organisations including Amnesty International, Frontline Defenders, the National Women’s Council of Ireland, etc. ([Egan, 2011](#_ENREF_20)).

**Conclusions**

Ireland exhibits key characteristics of the regulatory state, especially with the proliferation of regulatory agencies since 1990. Regulation in Ireland involves significant and distinctive issues of politics around such questions as who is appointed to regulate and with what powers, who is within the scope of regulation, how are enforcement powers deployed, and how effective are mechanisms of accountability both over particular regulators but also over the regimes within which regulation is established and modified.

The history of regulation in Ireland has exhibited particular national characteristics, with significant weaknesses both in regulatory capacity and effectiveness and also with respect to accountability. Arguably the global financial crisis, and the ensuing financial and political crises which hit Ireland in the period from 2008 have shifted regulation towards a less exceptional model, with better established independent capacity over such matters as financial regulation, and, following a longer trend, growing independent provision for overseeing government itself. Within Ireland there is a growing recognition that effective regulation of business and of government is becoming a core doctrine both for effectiveness and legitimacy of contemporary governance.

The increasing importance of regulatory modes of governance, not only to government-industry relations, but also within government and within industry relationships, are suggestive of a shift from the regulatory state to regulatory capitalism ([Levi-Faur, 2005](#_ENREF_41); [Braithwaite, 2008](#_ENREF_6)). The extent to which regulatory modes govern a wider range of relationships than government-industry relations and the implications of this not only for public governance, but also for the industry, constitutes an important issue for further research on the politics of regulation in Ireland.

**Table 38.1: Regulatory Bodies in Ireland Inherited by New State in 1922**

|  |  |  |  |
| --- | --- | --- | --- |
| **Health** | **Education** | **Professional Regulation** | **General State Infrastructure** |
| **Inspector of Mental Hospitals** (1845);**National Health Insurance Commission** (1911) | **Commissioners of Education in Ireland** (1813);**Intermediate Education Board for Ireland** (1878) | **Law Society of Ireland** (1830)\*;**Pharmaceutical Society of Ireland** (1875)\*;**Bar Council** (1897)\*;**Registration Council for Secondary Teachers** (1914)**Central Midwives Board** (1918)**General Nursing Council** (1919); | **Railways and Canal Commission** (1854);**Office of the Registrar of Friendly Societies** (1896);**Land Registry (1892).****Companies** **Registration Office** (1908); |

\*Non-State Bodies

Source: ([Hardiman, MacCarthaigh et al., 2018](#_ENREF_26))

**Table 38.2: Post-War Bodies Addressing Employment, Consumer and Equality Rights**

|  |  |  |
| --- | --- | --- |
| Occupational Health and Safety/Employment | Consumer Protection | Equality and Rights |
| **National Authority for Occupational Health and Safety** (1989, subsequently Health and Safety Authority)**Employment Equality Agency** (1977, subsequently Equality Authority and then part of Irish Human Rights and Equality Commission) | **Director of Consumer Affairs** (1978, subsequently National Consumer Agency, and then part of Competition and Consumer Protection Commission)**Advertising Standards Authority of Ireland** (1981)\***Data Protection Commissioner** (1989)**Competition Authority** (1991) | **Office of the Ombudsman (1983)****Data Protection Commissioner** (1989)**Equality Authority** (1999)**Irish Human Rights Commission** (2001)(subsequently **Irish Human Rights and Equality Commission** 2014) |

\*Non-State Body

Source: ([Hardiman, MacCarthaigh et al., 2018](#_ENREF_26))

**Table 38.3: Regulatory Agencies Established in Ireland Since 1990**

Source: ([Hardiman, MacCarthaigh et al., 2018](#_ENREF_26))

|  |  |  |  |
| --- | --- | --- | --- |
| Economic Regulation | Social Regulation | Health and Education | Oversight of Government |
| **Pensions Board** (1990, replaced by Pensions Authority)**Director of Telecommunications Regulation** (1997, subsequently **Communications Regulation Commission**); **National Standards Authority for Ireland** (1997)**Irish Takeover Panel** (1997)**Commission for Aviation Regulation** (2001); **Irish Financial Services Regulatory Authority** (2003, financial services regulation subsequently merged back into Central Bank of Ireland);**Commission for Electricity Regulation** (2002);**Commission for Taxi Regulation** (2002, subsequently part of National Transport Authority);**Licensing Authority for Sea Fishing Boats** (2003);**Pensions Ombudsman** (2003)**Irish Auditing and Accounting Supervisory Authority** (2005);**Financial Services Ombudsman** (2005)**National Property Services Regulatory Authority** (2006); **Railway Safety Commission** (2006) | **Environmental Protection Agency** (1993);**Food Safety Authority of Ireland** (1998); **Broadcasting Commission of Ireland** (2001, subsequently Broadcasting Authority of Ireland);**Private Security Authority** (2004);**Road Safety Authority** (2006)**Press Council of Ireland and Press Ombudsman** (2007)\***Office for Internet Safety** (2008) | **Irish Medicines Board** (1996)**Health Insurance Authority** (2001)**Irish Universities Quality Board**\*(2002, replaced by **Quality and Qualifications Assurance Authority of Ireland,** 2012)**State Examinations Commission** (2003)**Teaching Council** (2006)**Health and Social Care Professions Council** (CORU, 2007)**Health Information and Quality Authority** (2007) | **Information Commissioner** (1997); **Standards in Public Office Commission** (2001);**Ombudsman for Children** (2003)**Commission for Public** **Service Appointments** (2004)**Ombudsman for the Defence Forces** (2005)**Garda Síochána Inspectorate** (2005)**Inspector of Prisons** (2007)**Garda Siochána Ombudsman Commission** (2007) |

*\*Non-State Body*

Enforcement Order

Revocation

Education/Advice

Warnings

Settlement & Publication

Admin Sanctions

Prosecution

Restitution Order

**Figure 38.1 Simplified Model of Central Bank Enforcement Pyramid, Adapted from (**[**Ayres and Braithwaite, 1992**](#_ENREF_4)**).**

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