

Regulatory Capacity and Networked Governance

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1. Introduction¹

Regulation is amongst the central instruments through which governments within the OECD member states seek to deliver on their policy priorities. The significance of regulation for contemporary government challenges us to understand better both who has and who exercises regulatory capacity and how, and with what effects. A lack of consensus on exactly how regulation should be conceptualised makes such an inquiry problematic (Black 2002). A classic and much cited definition of regulation refers 'to sustained and focused control exercised by a public agency over activities that are valued by a community' (Selznick 1985: 363). This classic definition chimes with popular understanding of regulation as the set of activities performed by regulatory agencies. Within such an understanding regulatory capacity comprises the authority to make and enforce rules for others to follow and, broadening the definition of regulation, might also involve the other things agencies are able to do because of their powers and position.

Broader conceptions of regulation involve an expansion of modes of governing (to include market based instruments and even mechanisms of social control) and a wider cast of regulatory actors, including government departments and a variety of non-state actors, including trade

¹ This paper draws on a literature survey and small interview programme undertaken as part of a research project on Regulatory Capacity and Networked Governance in Ireland co-funded by the Irish Research Council for Humanities and Social Sciences and the Institute of Public Programme. We are grateful to project team members Niamh Hardiman, Muirir McCarthaigh and Imelda Maher for advice in framing the research and the paper. Interviews have been undertaken with senior staff, who by convention we do not identify, from the following organisations: The Department of Communications, Energy and Natural Resources (1), the Department of the Taoiseach (2), The Competition Authority (3), the National Consumer Agency (4), The Office of the Ombudsman (5), the Equality Authority (6), COMREG (7), the Broadcasting Authority of Ireland (8), the Financial Services Ombudsman (9), the Advertising Standards Authority of Ireland (10), the Internet Service Providers Association of Ireland (11), the Institute of Advertising Practitioners of Ireland (12), the Independent Broadcasters of Ireland (13), the Press Council and Press Ombudsman (14), Digital Rights Ireland (15), the National Union of Journalists (16), two independent consultants (17, 18) the UK Office of Communications (19), the European Commission (20) the Alliance of Independent Press Councils of Europe (21), the European Advertising Standards Alliance (22). Interviews were conducted during April and May 2010, mostly face to face by both authors. Interviews 1, 6, 11, 15, 17, 20 and 22 were conducted face to face by Scott alone. Interviews 5, 19 and 21 were conducted by Brown alone, the first face to face and the latter two by telephone. We are grateful to all those who agreed to be interviewed from the project.

associations, firms and NGOs (Scott 2009). Such a broadening encourages us to think beyond regulation as a bilateral process imposed on one organisation by another, and to recognise the diffusion of regulatory capacity within particular regimes. Viewed in this way regulatory regimes are places of multiple and overlapping engagements (Hancher and Moran 1989). Key resources extend beyond the possession of authority to include possession of, and capacity to deploy, information as well as the possession of financial and organisational resources (Hood 1984; Hood and Margetts 2007).

We argue in this paper that a central response of actors within regulatory spaces to the recognition of such interdependencies is to participate in and actively use networks as a means of accessing the capacity of others within a policy domain. Informal and, increasingly, formalised networks are significant and nearly ubiquitous for organisations within major regulatory regimes in Ireland at both national level, in supporting the gathering and deployment of knowledge by government and others, but also at supranational level in underpinning processes of policy learning and exchange of operational information, and bolstering capacity of national actors. Regulatory capacity, then, is the sum of the resources available to actors within regulatory regimes for getting things done, including expertise, and these resources are typically spread, not only amongst state bodies, such as government departments, regulatory agencies and courts, but also between state and non-state actors.

2. Resources and Capacities in Regulatory Governance

Regulation is conventionally conceived of as the mode of government which, distinctively, deploys authority in making, monitoring and enforcing rules through arms-length oversight of targeted actors engaging in certain forms of social and economic behaviour. Working with that definition it is nevertheless clear that frequently observed characteristics

tend to limit capacity within regulatory regimes. Economic analysis of regulation, for example, has long observed that regulatory agencies are constrained in their ability to regulate by asymmetries of information between themselves and those they oversee (Scott 2001:334; Vickers and Yarrow 1988: chapter 2). If an agency has no access to the cost models of a particular industry it may be difficult to set appropriately stringent price control measures. More sociological analyses of regulation point to the participation of enforcement officials in social networks with those they regulate as a factor shaping the stringency of enforcement. Officials with a low relational distance from those they oversee (in terms of shared education, employment, frequency of contact and so on) are liable to enforce less stringently (Grabosky and Braithwaite 1986; Hood et al. 1999: chapter 3). More generally enforcement strategies are frequently developed in a context of limited organisational and financial resources and priorities developed (Cranston 1979).

It is potentially a source of frustration that regulation might so frequently be undermined by limited information, deficient organisational and financial resources and by the networking relationships of key officials and regulated units. An alternative approach is to incorporate each of these elements into a positive conception of how regulatory regimes function. The literature on policy networks offers a fruitful way to do this because of an underlying conceptualization that relationships within such networks are shaped by 'resource interdependencies' and are generally of a non-hierarchical character (Compston 2009: 7). To the extent that dependencies are shaped by the possession and exchange of information then such a characterisation may be valuable. However, within the settings of regulatory regimes, where we are more thinking about implementation rather than making of policy, we may think of relationships in which some or all of the actors possess not only information, but also resources linked to the exercise of authority.

There is a range of different analyses of the resources relevant to governing within different policy settings (Compston 2009: 22-23). In their analysis of the tools of government Hood and Margetts have a particular focus on the possession by government of resources. Their focus is on executive rather than legislative functions and so they are not so interested in the mechanisms, democratic or otherwise, through which governing norms are determined. The analysis is valuable for thinking about the implementation dimension of regulation. They suggest that there are four basic types of tools (or resources) involved in the two key executive functions of modern government, collecting information and changing behaviour. These resources are captured in the acronym NATO: Nodality, Authority, Treasure and Organisation ((Hood and Margetts 2007: 4). Nodality refers to the position of government at the centre of a variety of networks and the capacity to collect information and shape behaviour which accrues from this. Authority is concerned with the acquisition and use of legal powers – often conceived of as the distinctive element of regulatory governance. Treasure is the capacity to collect and deploy financial resources. Organisation is concerned with the direct capacity of government to get things done, for example through ownership of plant and employment of staff to operate public enterprises.

The NATO approach is valuable in thinking about how governments, agencies and others get things done in regulatory settings (Scott 2001). If a government wants to see a high quality tram service operating between two points in a city, it deploys authority to provide for the acquisition of relevant land and changes to the roads regime. To get the service designed and built it may use its own organisational capacity (public enterprise) or it may use treasure to contract for the building and operation of the service with or without a subsidy, once in operation. Nodality is important in understanding not only what is to be done to establish the new tram service, but also who is capable of executing the key tasks, within or outside government, and how to mobilise support for

the project. Once the service is operating, organisational or authority resources may be deployed to ensure that it operates within acceptable service levels in respect of such matters as safety, user charges, punctuality, cleanliness and so on. Nodality may be used to promote take-up of the service as an alternative to cars, and nodality is frequently combined with authority (random inspections) to encourage passengers to pay their fares.

Nevertheless a focus on government alone is incomplete. As Hood and Margetts note, the capacities described in the NATO approach are not the monopoly of government agencies and are typically diffused amongst a variety of actors within the regulatory space (Hood and Margetts 2007: 126-7). It is rather obviously the case that treasure and organisational capacity are possessed in large quantity by non-state actors including firms and non-governmental organisations (Compston 2009: 24-25).

As noted above, authority is the tool of government which might traditionally be presumed to be the monopoly of government, in the sense that the right to legislate is typically reserved to elected legislatures, with strong controls over the possibility of delegating secondary legislative powers to ministers and agencies and over the issue of licences to deploy scarce resources, such as the spectrum required for providing broadcast and mobile phone services. Equally the right to coerce through the threat of sanctions is typically regarded as reserved to the state. However, it has long been recognised that non-state actors can express authoritative power over others through contracts (Hale 1923), both individuated and bilateral, as with supply chain contracts, and collectively, for example through membership of trade associations. Indeed there is a seeming paradox that government may itself be regulated by non-state actors through such instruments (Scott 2002). The capacity to legislate and enforce privately extends beyond contracts because of a degree of delegation by governments to non-state actors such as professional bodies. Additionally many standards set by national and supranational

standardisation bodies, both in respect of products and processes, are given authoritative effects through their incorporation in legal instruments, notably legislation and contracts.

The extent to which nodality is shared between government and non-state actors depends on how one defines nodality. If it is a resource which derives its efficacy specifically from the status and role of government then it may not be so widely shared. In favour of such a view many utterances of government are intended to have effects on behaviour, but do not take the form of binding legal instruments (Snyder 1993). On one view the effectiveness of such soft law instruments is dependent on the status of government and includes not only government agencies' national positioning, but also their potential for participation in supranational networks of governmental and regulatory actors.

On the other hand, there are similar networks and non-binding instruments which appear to have wide effects which do not issue from government. The Combined Code on Corporate Governance, issued by the Financial Reporting Council, a UK self-regulatory body, has wide impact within and beyond the UK. Furthermore, whilst the capacity for issuing effective non-binding instruments of general effect may be greater for government than others, networking is clearly not restricted to government. It is a reasonable working hypothesis that governmental and non-state actors target each other both for the collecting of information, for mutual learning about appropriate practices, and the steering of behaviour in relationships of interdependence (Hancher and Moran 1989).

Fragmentation of regulatory capacity amongst and beyond state actors is liable to create something of a problem for governments. It is a paradox associated with the rise of the regulatory state and the growth of regulatory capitalism that it has laid bare the limited capacity of governments to exert direct control over social and economic life. It has

been argued that increasing specialization and diffusion of governance capacity is a more general trend of contemporary public management which has subsequently led to responses in many states which seek to reassert some capacity for greater coordination (Bouckaert, Peters and Verhoest 2010: 237).

In Ireland the desire to reassert coordination is represented by the somewhat frustrated remarks of a senior Department official to the effect that whereas the trend towards the creation of regulatory agencies should see agencies developing greater operational autonomy, in a context where policy is controlled by government, the preservation of old norms governing pay and rations for the public service generally has seen government retaining substantial elements of operational control (for example over staffing numbers and pay) whilst ceding excessive policy autonomy to regulatory agencies (iv 2). The situation is further complicated by a skills shortage within central government departments (compounded by recruitment embargos and inability to compete with private sector on pay), which is accompanied by a growth in expertise within independent regulatory agencies and by a lack of skills transfer and shared learning within the civil service. As one senior official pointed out, there has been a failure to create a family of regulatory professionals within central government and to tap into the experience in departments which have had a lot of dealings with regulatory issues. While the recent Government Statement on Economic Regulation (Department of An Taoiseach 2009) attempts to foster greater networking among regulators, and between regulators and government, it does not do the same for networks within government

Intriguingly the reassertion of coordination by governments has frequently involved the deployment of network and market forms of management rather than an exclusive focus on more hierarchical forms of control. Particularly important in the national context has been the use of networks of civil servants to achieve coordination, alongside competition-

based and hierarchical mechanisms (Bouckaert, Peters and Verhoest 2010: 271). We may add that professional and other non-state networks have also taken on increasing significance in enhancing the capacity for coordination over such matters as standards both at both national and supranational levels.

The development of network-based modes of governing within regulatory regimes involves the recognition that the resources which make regulation possible are widely dispersed amongst state and non-state actors. Relationships are frequently characterised by interdependence of key actors within regulatory regimes (Hancher and Moran 1989). A better understanding of the nature of the interdependence may be sought by elaborating the concept of nodality and linking it to ideas of network governance.

Theoretical and empirical research on network governance tends to emphasise the diffuse range of actors engaging in co-ordination and self-governance activities, with a consequent de-centring of the position of the state (Pierre 2000: 2). Within such an analysis the state is one of a number of actors using its resources to advance its position. This shifting emphasis has emerged in part because of the recognition of excessive expectations being placed on what government can do by way of steering economic and social behaviour through traditional governmental processes, such as formal enforcement. An emphasis on the fragmentation of regulatory capacity and network governance has the potential both to take a more limited conception of what can be done by government but also to encourage the exploitation of the resources possessed by each of the actors within any particular regulatory regime.

If governance has strong nodal properties, then there are typically many nodes involved in shaping objectives and delivering capacity. The theory of nodal governance attributes greater significance to nodes than is true either of Hood's approach or of theories which emphasise the role of

networks. Within the theory of nodal governance, governance can be defined as 'the management of a course of events' (Burris, Drahos and Shearing 2005: 30) and nodes are institutions comprising ways of thinking about the matters which are governed, methods of governing, resources and structures of mobilisation (Burris, Drahos and Shearing 2005: 37-38). Thus nodal governance offers a way to express not only fragmentation of resources, but also the thinking and techniques of governance. A central challenge of network governance generally, and of the more extended nodal governance concept in particular, is the *coordination* of this diffuse but interdependent capacity, based on social rather than hierarchical or market ordering (Parker 2007: 116).

There has been significant emphasis within the policy literature on networks (for example concerning the open method of coordination within the EU) on the potential for mutual learning through processes of benchmarking and surveillance (Sabel and Zeitlin 2008). Learning is linked to behavioural modification, to the extent that participants seek to align their behaviour around practices identified as desirable ('best practice') amongst the network participants. Such analysis assumes a form of equivalence in the standing of network participants. Regulatory networks may take other forms and involve other kinds of outcomes. Regulators may convene networks of stakeholders to address issues where they lack authority or information, and where other participants can supply these missing resources. In these circumstances the network bolsters capacity. A national regulator, for example, may invoke the authority of a supranational network in its interpretation or enforcement of rules, so as to exert greater authority over firms or ministries.

Networks may promote behavioural changes in other ways. A key example is provided by the European Commission's sponsorship of networks of regulators in such fields as communications and energy, as a means to steer national regulatory authorities towards their preferred mode of implementing EU rules (Coen and Thatcher 2008; Eberlein and

Grande 2005). These European networks address the limited formal capacity of the European Commission to regulate directly and its dependence on the formal powers held by national regulators to deliver on EU regulatory policies (Eberlein and Grande 2005: 95).

In national settings network arrangements provide a mechanism for regulatory and self-regulatory bodies to steer the behaviour of regulated firms over whom there may be limited capacity for formal enforcement of applicable codes. Such networks operate as a means to build consensus around, and thus commitment to a regulatory body's interpretation of a regime. In practice learning, bolstering and steering are likely to be overlapping rather than distinct outcomes of networked governance arrangements. Network arrangements are likely to be particularly attractive where the capacity to coordinate through hierarchical means is weak.

Networks may, of course, also undermine regulatory regimes where participants learn about or agree on objectives or practices which are inimical to the purposes of a regime as understood by those seeking compliance with them. Networks of firms geared towards fixing prices provide one example as do the informal social networks between regulators and regulatees which may cut across optimal enforcement strategies.

Fragmentation of resources and characteristics of interdependence mean that coordination is likely to involve both a degree of trust (Parker 2007: 119) and a degree of negotiation (Vabo and Røiseland 2009: 4), not simply over the objectives of a regime, but, perhaps more significantly over its operation and implementation. Whilst there is a substantial literature concerning the negotiations which occur over public policy, the negotiation of implementation is less well understood (Reichman 1992). An important strand of socio-legal research links the negotiation of meaning within regulatory regimes to the indeterminacy of legal rules in

regulatory settings. Thus, even the implementation of quite hierarchical regimes, such as taxation, are shaped by the fragmentation of capacity amongst participants and the reflection of that interdependence in processes of negotiation over meaning (Picciotto 2007). In the particular case of taxation the emergence of a cohort of highly trained taxation professionals concerned with reducing tax exposure for wealthy individual and corporate clients clearly makes the imposition of publicly set tax rules problematic.

3. Authority and the Capacity for Command

Within this and the following sections of the paper we offer a more structured analysis of the diffusion of resources linked to the NATO analysis, and some initial thoughts on its application to regulatory regimes in Ireland.

The capacity of government to coerce (Authority) is frequently linked to legislative rules – for example requiring the provision of information or access to premises to gather information- and the capacity to apply sanctions to behaviour, whether financial penalties, imprisonment or taxes, in breach of rules or, in the case of taxes, when the behaviour complies with certain conditions (Hood and Margetts 2007: 51-77).

3.1 Enforcing and Reviewing Regulatory Decisions

Powers to exercise formal authority, and notably agency powers to enforce regulatory rules, frequently require formal processes of litigation before the courts. The requirement for litigation to enforce criminal or administrative rules on regulatees creates costs, delay and frequently a degree of uncertainty both for regulator and regulatee (Scott 2010). Nevertheless, the involvement of a court can bolster the authority and capacity of a regulator. It is telling that the Irish Competition Authority cites with approval dicta of Mr Justice McKechnie concerning the definition

of, and damage caused by, cartelization, as part of their campaign to persuade firms and a wider public that cartelization is a 'hard-core' breach of competition law and deserving of severe criminal penalties when detected and prosecuted (The Competition Authority 2010: 6). In other instances, however, Competition Authority officials have noted it has been difficult to persuade even a supportive judge of their arguments with consequent adverse effects for their enforcement capacity (iv3).

Where there are powers to make binding decisions affecting regulatees without a requirement to litigate, the exercise of formal authority within a regime may provide the occasion for challenging that exercise through appeals or litigation. Indeed the establishment of statutory appeals processes has frequently been linked to delegation of direct enforcement powers to agencies as a check on enforcement discretion (Scott 2010). The exercise of authority, where it is challenged, may work against an agency. In the early history of agency regulation of the Irish telecommunications sector, the Office of the Director of Telecommunications Regulation (ODTR) successfully defended a significant number of challenges to its decisions by way of judicial review, but found that the litigation sufficiently delayed matters to the extent that the companies challenging them were thought to have substantially secured their objectives in hindering competition through delay (Westrup 2007: 11). (The attractiveness of litigation as a delaying tactic was subsequently restricted by legislation which provided for regulatory decisions to stand pending the outcome of litigation.)

Where authority is held through contracts, as with the power of trade associations and self-regulatory bodies over their members and purchasers of products over their suppliers, typically the regulator will be able to make determinative decisions without reference to a court. In some of the more developed self-regulatory regimes there is provision for appeal or review. Decisions of the Press Ombudsman, for example, may be appealed to the Press Council, and decisions of the Advertising

Standards Authority of Ireland may be subjected to a review by a Review Panel drawn from the Complaints Committee itself. In the instance of bilateral contractual decisions (for example purchaser over supplier) there may be provision in contracts for arbitration to resolve disputes over the interpretation of a contract. Judicial review of self-regulatory decisions is less developed in Ireland than in some other common law jurisdictions, notably the UK, and there remains some doubt as to whether the fairly extensive principles under which self-regulatory decisions may be judicially reviewed in England (*R (Datafin plc) v Panel for Takeovers and Mergers* [1987] QB 815) would be applied by an Irish court. Specifically the decisions of bodies which derive their authority purely from the consent of their members have been held not to be amenable to judicial review (*Rajah v. The Royal College of Surgeons in Ireland* [1994] 1 I.R. 384, Keane J).

3.2 Information Gathering

Within both public and private regimes the capacity for formal enforcement frequently underpins less formal and more nodal mechanisms both for gathering information and for seeking compliance. In our interviews with a range of regulatory bodies and associations we asked each interviewee how their organisation gathered information about issues requiring action and about the mechanisms they deployed to change behaviour.

There is evidence of a good deal of variety in approaches to information gathering, some organisations exercising regulatory power being more or less wholly dependent on complaints, with others placing greater emphasis on more proactive surveillance of inspection. The Broadcasting Authority of Ireland combines both approaches in its oversight of broadcast content from compliance with content rules. So, in addition to responding to complaints the BAI engages in random monitoring of tapes of broadcast output. The BAI reports a risk-based element to monitoring.

'If you have misbehaved in the past, you are more likely to be monitored and have your tapes called in more frequently.' (i/v 8). Similarly the Advertising Standards Authority of Ireland both receives and responds to complaints and engages in monitoring of advertising output.

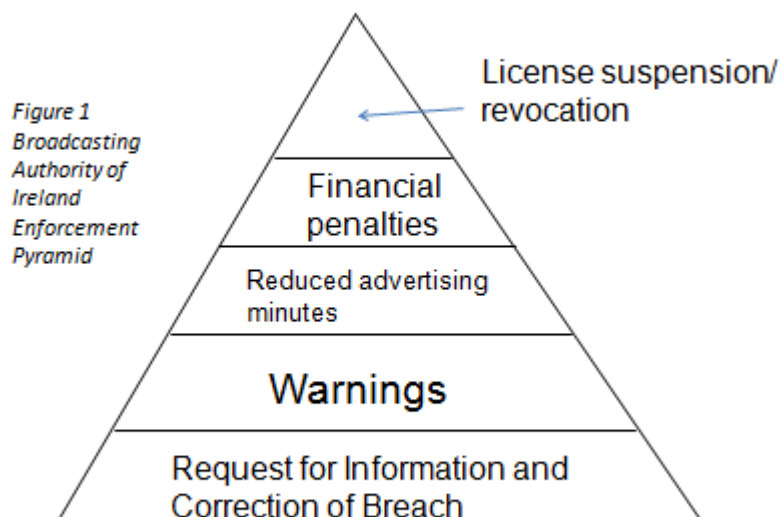
3.3 Enforcement Strategies

It is possible to array enforcement practices on a continuum with ranges between the seeking of consensus and negotiation of compliance ('a compliance approach') at one end to strict and punitive enforcement of regulatory rules ('a deterrence approach') at the other (Reiss 1984). It has been suggested that enforcement practices in Ireland have tended towards the former, compliance approach, and more stringent enforcement strategies are remarked on as being unusual.

Tendencies towards compliance-based enforcement are sometimes criticised for being weak and ineffective, or as providing evidence that a regulator has been captured by regulatees (Pearce and Tombs 1990). More stringent approaches are criticised for being unresponsive to the nature of offence and offender (Kagan and Scholz 1984). Explanations of degrees of stringency are diverse. Many regulators express an entirely instrumental set of explanations for the ways in which they enforce the regime for which they are responsible. Such explanations are commonly tied to the limited resources available and expressed in terms of the kind of pyramidal approach to enforcement set down in the classic Ayres and Braithwaite text (Ayres and Braithwaite 1992). Within their responsive regulation model education and advice is deployed where infractions are discovered and escalation to more coercive techniques reserved to instances where, variously, the behaviour is persistent and or deliberate, where the motivations of the regulatee are questioned, or the consequences of the breach are so serious that formal sanctions are the only appropriate way to signal regulatory disapproval. Preferences for less stringent enforcement are sometimes explained by reference to national

style (for example the United States favouring adversarial legalism, whereas in Japan softer and more nodal forms of coordination are preferred (Kagan 2003)).

Whilst the variety and gradation of sanctions varies significantly between organisations exercising regulatory powers, most report some form of gradation of sanctions reminiscent of the enforcement pyramid. The enforcement pyramid described to us by the Broadcasting Authority of Ireland is at figure 1. 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. The Broadcasting Act 2009, for example, added the possibility of the BAI imposing financial penalties on broadcasters. The Consumer Protection Act 2007 introduce a variety staged enforcement measures ranging between compliance notices, naming and shaming and fixed penalty fines to criminal prosecution, larger fines and imprisonment and includes also the possibility of consumers seeking civil damages against a company.



The application of pyramidal approaches to enforcement is not restricted to public agencies. The Advertising Standards Authority of Ireland similarly advises advertisers where its members of its secretariat think that there is a *prima facie* breach of its code, and many issues are resolved at this stage with an acceptance by the advertiser of the breach and withdrawal of the advertisement. But the approach is not always pyramidal. In respect of exaggerated environmental claims the Secretariat has taken a view that they wish to have a formal decision of their Complaints Committee on matters of principle relating to such claims(iv 10). Persistent or serious breaches may result in the application of an additional sanction that all future advertisements are required, for a period, to receive pre-clearance by the ASAI. It is significant that beyond requiring pre-clearance the high level sanctions, following on from the upholding of a complaint, are largely entirely dependent on other organisations. In the first instance media organisations are requested to refuse to carry advertising held in breach of the code:

‘This capacity to go to the media is a very important competence or resource for us. They are the gatekeepers. It is a very important role – they have no vested interest but they have capacity to act on our behalf. This is a very significant tool.’ (iv10)

A second route for addressing serious and/or persistent breaches (‘tackling cowboys’ (iv10)) is to link up the ASAI findings to the possibility of statutory penalties through referring the matter to the National Consumer Agency. Both the ASAI and the NCA recognise the need for some coordination of their respective capacities and are preparing a Memorandum of Understanding as to how the more extensive powers to address misleading and false advertising, introduced in the Consumer Protection Act 2007 should be applied.

The recognition by the ASAI that they have limited enforcement capacity, but can invoke the capacity of others, both industry gatekeepers and

government, is significant. The potential for such cross-sanctioning has more limited recognition amongst officials in government agencies, even though it offers a way to address directly the limited capacity that sometimes exists either *de iure* or *de facto*. Perhaps the most developed example which operates across a range of agencies is the use of the media. The media can be important not only in respect of advocacy issues (discussed below) but also enforcement. For organisations with limited enforcement powers, such as the Ombudsman, the media offers a mechanism for applying pressure to government departments and agencies to comply with its decisions. For those which choose to use low level sanctions, such as the National Consumer Agency, it is possible to amplify their effects through publicity. Thus naming and shaming can be independent of formal enforcement or linked to it.

Within the responsive regulation model the gradation of sanctions applied by a regulator is linked to a deliberate strategy geared to securing compliance. Research in a number of jurisdictions suggests that stringency of enforcement may also be shaped by relational and cultural factors. The relational distance hypothesis suggests that where enforcer and enforces have low relational distance – shared history of education, professional experience or high frequency contact (for example through routine inspections or onsite presence) – enforcement is likely to be less stringent (Black 1976). Support for the hypothesis has been found both in regimes of regulation over businesses (Grabosky and Braithwaite 1986) and public agencies (Hood et al. 1999). Whilst we do not have systematic data in Ireland it has been suggested that a cultural preference for a relative lack of stringency in enforcement may be partially explained by reference to low relational distance between regulators and regulatees who may have common education and social experience. Distinctly the development of social partnership and consensual approaches to government may have influenced approaches to regulatory enforcement. When the Competition Authority was assigned powers of criminal

prosecution to tackle cartels it took the organisation a number of years to build up the experience and confidence to prosecute and to seek not only fines but also imprisonment for members of 'hardcore' cartels. There is recognition that the Competition Authority has, at least in respect of cartels, made a decisive break with the preference for less stringent enforcement. During the period of this change the organisation was headed by someone who was an outsider to the shared educational experience and social networks of Dublin government and business and the organisation had recruited some other senior staff from overseas.

More recently, in response to perceptions that laxity in enforcement was a contributing factor in the banking crisis of 2008-, government has deliberately sought outsiders for senior roles in banking and financial regulation. The Governor of the Central Bank was appointed from the ranks of academia in 2009, and the Financial Regulator, appointed in 2010, was recruited from overseas. Indications by the latter appointee that enforcement would, in future, be stringent, have been widely welcomed. Whilst this message has been interpreted by some to suggest that enforcement will be always and everywhere punitive, it appears more likely that the public statements relating to toughness in enforcement are geared more to persuade regulatees that there exists an enforcement pyramid in which more stringent sanctions are available and will be applied, in order to promote compliance at the base of the pyramid.

4. Nodality and Regulatory Networks

In respect of information resources, the positioning of government at the nodal point in a complex network of relationships creates an important resource for collecting information and steering behaviour which appears to be quite well understood by the actors within regulatory regimes, but relatively neglected in the literature. Nodality is defined by Hood and Margetts as 'the property of being in the middle of a social network' (Hood

and Margetts 2007: 21). This is a point from which government can both gather information and be listened to by those whose behaviour it wishes to steer (Hood and Margetts 2007: 21-49). Access to and use of the media is a key aspect of the steering capacity of governments and others over social and economic behaviour. The techniques involved include public information campaigns, off-the-record briefings to media, guidance, and naming and shaming, (Yeung 2005: 370-376).

There has been a growing interest in the literature in law, political science and public management in the displacement or supplementing of hierarchical and legal forms of governance, with those based in networks (Bouckaert, Peters and Verhoest 2010: 68; Rhodes 1997). The interest in the shift towards networked governance is particularly prominent at European (Scott and Trubek 2002) and international (Slaughter 2004) levels and has had a particular focus on formalized networks. In the research for this project we have asked interviewees about both formal and informal networking and suggest that both are aspects of nodality. But whereas Hood characterises nodality as a positioning for government which enables government to do things, we see nodality as a property of social relations within regimes which has potential to lend capacity to each of the actors within a regime. Nodality cuts in more than one direction.

The use of nodal capacity for information gathering ranges between the passive receipt of information about problems, the encouragement of complaints (for example by a regulator relating to wrong doing by regulatees or encouragement of reporting/whistle-blowing) through to the active gathering of information of the kind undertaken by national statistical services and proactive regulators engaging in surveillance of market conduct, inspection of premises and facilities and surveys. Finding itself short of the necessary information to judge what regulatory interventions were appropriate, the ODTR commenced, of its own initiative and without express statutory authority, a quarterly survey of

the Irish communications market addressing such matters as revenue, costs and nature and extent of services provided by the market actors. The Director was explicit in stating that following on from *de jure* liberalisation of the market the publication 'will help stimulate the development of a vibrant telecommunications industry in Ireland' (Office of the Director of Telecommunications Regulation 2000: 3).

The deployment of nodality for steering behaviour ranges between official information campaigns, targeted at society at large (for example to discourage drink-driving), to 'bespoke messages' (Hood and Margetts 2007: 31) alerting recipients to some action they are requested to undertake, such as renewing a driving licence or paying tax. Non-governmental actors also use such messages targeted at particular groups or at society at large to promote their objective also.

Recognition of the importance of nodality is evident in the structure of a number of regulatory regimes in Ireland. Notably the Competition Authority has a statutory responsibility to promote competition in the Irish economy and has an Advocacy Division, headed by an Authority member, which actively pursues this task. The CA has tended to use its advocacy function to target particular sectors which prove resistant to normal competitive pressures, such as the legal and pharmacy professions and the health sector more generally. Where the CA is able to engage the interest of the media then journalists have proved to be key allies in disseminating the Authority's messages about the need to tackle anti-competitive conduct and situations in particular sectors (iv 3). We found evidence of other state and non-state regulatory bodies also engaging extensively with stakeholders and the community more generally to put over their messages about their regulatory objectives in order to steer behavioural changes, notably the National Consumer Agency, the Broadcasting Authority of Ireland and the Press Council.

The most striking indicator of nodality being deployed as it affects regulation in Ireland is the existence of a wide variety of dense networks within virtually every sector and area of regulatory responsibility at both national and supranational level. At national level the Government has given recognition to and sought to intensify networking arrangements between ministers and regulators, between regulatory agencies *inter se*, and between regulators and those they regulate (Department of An Taoiseach 2009). A High Level Regulators Group, bringing together the heads of the economic regulatory agencies has been functioning for a number of years. Participants in the network report a certain amount of sharing of experience and cross-sectoral learning, though most express some disappointment at its limited impact. The 2009 Statement on Economic Regulation supplements the High Level Regulators Group with an annual Regulatory Forum, chaired by the Taoiseach (Prime Minister) as a mechanism for steering nine of the public economic regulators and for reasserting a strong role in coordinating regulatory policy. The first meeting of the Forum was held in February 2010. The establishment of the Forum appears to have been inspired by widely acknowledged regulatory failings of the Irish Financial Services Regulatory Authority (IFSRA – the Financial Regulator). The two central themes emerging from the press release on the first forum were a need for economic regulation to be robust and responsive.

A key instrument of bilateral linkage between regulators has been the negotiation and adoption of memoranda of understanding (MOUs) with respect to the scope of, and the nature of any cooperative working practices between regimes. Such MOUs have particular importance where there is significant overlap, as with the Competition Authority and the various sectoral regulations in energy, communications, energy etc. It is now proposed to extend the making of MOUs to provide coordination between the public and statutory activities of the National Consumer Agency (NCA) and the non-statutory and private Advertising Standards

Authority of Ireland in respect of the implementation of the EU Unfair Commercial Practices Directive, as implemented in the Consumer Protection Act 2007 (i/v 4).

Bilateral network relationships are also evident in the contacts between regulatory organisations in Ireland and their counterparts in other jurisdictions. In the media and communications sector the proximity and overlap have made relations with UK regulators particularly important. In respect of advertising, the press, broadcasting and telecommunications there is frequent contact both on matters of policy and operational issues. The UK Press Complaints Council was active in assisting with the establishment of the Press Council and Press Ombudsman, assisting with training members and with advising on setting up systems for handling contacts from the public (21) (Gore and Horgan (forthcoming)). This history is indicative of the creation of a community ethos across jurisdictions which may be just as important to the shaping of a regime as national priorities and sensibilities. Cross-border issues require a degree of operational cooperation across each of these sectors. None of those involved appear to mind reaching different views, for example on the compliance of a newspaper with the applicable national code for a story published both in Belfast and Dublin, but none would want to reach their decisions in ignorance of the approach taken by the other. Such bilateral relations are institutionalised in the case of the network of ombudsman schemes known as the British and Irish Ombudsman Association.

For many of the informants contacted for our research European networks have taken on an increasing and in many instances central importance in enhancing regulatory capacity. All interviewees for this project, government departments, agencies, self-regulatory organisations (SROs), industry associations, reported that they had significant participation in European networks. The more mature networks tend to engage with both policy and operational matters.

Amongst the longest standing of the regulatory networks are those established by, or with the encouragement of, the European Commission to assist in securing reasonably harmonised implementation of European legislation in the network industries. The informal grouping of the Independent Regulators Group in telecommunications, established in 1997 as a forum for sharing experiences and perspectives amongst national regulatory authorities implementing the single market regime in telecommunications, has progressively taken on a harder and more directly regulatory quality (iv19). This process culminated with the establishment of the Body of European Regulators for Electronic Communications (BEREC) by an EU Regulation in 2009 (Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC)). For the European Commission this hardening is perceived as essential (iv20). In particular BEREC will be required to reach published decisions on operational aspects of application of EU regulatory rules through majority decision, whereas its predecessor permitted individual NRAs to veto decisions or to require decisions and reasoning to be kept confidential. Whilst the new structure falls short of the single European regulator model favoured by the Commission, it is a significant move away from the open form of network within which learning from others is the primary mode of steering. One national regulator told us his view that BEREC will become highly significant taking on much of the Commission's current role and engaging in extensive steering of national regulators.

In other instances European networks of regulators are less developed. Equinet, the European Network of Equality Bodies, established in 2007, comprises a somewhat heterogeneous group of organisations, including ombudsman organisations, human rights organisations and equality authorities such as the Irish Equality Authority (iv6). This heterogeneity

has apparently inhibited the development of common understandings of purpose necessary to developing stronger network capacity.

The emergence of effective regulatory networks is not limited to statutory public agencies. The European Advertising Standards Alliance, which comprises national self-regulatory organisations for advertising, together with industry association representatives, has been a very significant force for the (loose) harmonisation of regimes, through the promulgation of a series of Best Practice Regulations and the provision of encouragement advice to national SROs to initiate and develop their regimes (iv 10, iv 22). The promulgation of Best Practice Regulations is a soft form of harmonisation, and has assisted national SROs in development of regimes. But it carries risks for SROs also, since deviation from the BPRs makes them vulnerable to criticism (iv22). EASA has also been a key point of interface with the European Commission in bolstering the legitimacy of self-regulation and, in particular, ensuring that SROs are referred to as key mechanisms for regulating advertising in policy initiatives and legislative documents such as the Unfair Commercial Practices Directive (European Commission 2006). In operational matters EASA provides a degree of coordination in responding both to cross-border marketing campaigns, such as those of Benetton, and to cross-border campaigns of complaint, such as that launched by Friends of the Earth in respect of emissions claims (iv22).

A number of interviewees indicated that the operational value of networks in which they participate lies to some extent in the communications which they can initiate between meetings. It was also noted that budget constraints and limited resources can mean that fewer international meetings are attended than might be desired. However, there is a great deal of online communications. In addition to exchanges of operational information, the networks facilitate adoption of common approaches and practices (for example in complaints-handling) and allow for shared learning on matters of policy. It may be that such networks allow for the

creation and adoption of common best practice models in dealing with similar problems.

Amongst public agencies – such as the NCA - systems for rapid exchange of information about defective products and unsafe food are strongly institutionalised using information technology (iv 4), but a number of other networks such as those in advertising and in the press (AIPCE) and the European Competition Network are also valued for the possibility of putting out questions to the group through email or messaging systems and securing relatively speedy and (frequently) numerous responses (ivs 10, 14, 21, 22). Whilst policy engagements in such public and private networks are sometimes made public, it is an essential element of such confidential online systems that support the networks that discussions remain confidential, though they may then lead to public action, as with Europe-wide product recalls.

Overall the European networks have a range of effects, ranging between shaping of EU policy, facilitating learning about approaches to common issues, sharing operational information and bolstering the capacity and independence of organisations within their national systems. International networks appear generally to have of been less significance, engaging in the softer forms of learning, but less with policy coordination and operational matters. The International Competition Network provides an example of such soft learning processes (iv3). By contrast the International Chamber of Commerce has been a central force in the development of advertising self-regulation through the promulgation of its Consolidated Code of Advertising and Marketing Communications Practice (European Advertising Standards Alliance 2010).

We can see networked modes of governance also being deployed in relation to enforcement activity, particularly where capacity is relatively weak or at least limited on the part of the regulator. Examples include specific use of the media as gatekeepers by ASAI and the more general

strategic use of the media to raise awareness of issues, or to gauge the existence of problems by the Office of the Ombudsman and the use of the media in naming and shaming enforcement by NCA, the Ombudsman, BAI and the Press Council

5. Treasure: the Collection and Application of Financial Resources

The capacity of government to collect money, through taxes and charges, and to steer behaviour through the expenditure of money, for example through transfer payments (such as welfare benefits and subsidies) and contracts (eg procurement contracts) is referred to as Treasure (Hood and Margetts 2007: 78-101). Concerning the gathering of financial resources, a key variable affecting regulatory regimes concerns the degree of autonomy those responsible for regulating have for raising the funds for their own activities. Associations and other non-state organisation have the greatest formal autonomy for setting and collecting funds, in the form of membership fees and/or levies in the case of associations, and simply additional charges to customers in the case of firms. Such formal autonomy may, of course be constrained by what is acceptable to members and customers. Self-regulatory organisations and trade associations operating in the Irish media sector have, in general, found that they have been able to resource themselves sufficiently from membership fees, but have found finances coming under pressure during the recessionary period since 2008 as levy income diminished in line with reductions in revenues from sales of advertising and newspapers (ivs 10, 11, 12 14).

In some instances public agencies are empowered to collect funds through levies applied to those they regulate, just as self-regulatory bodies can collect membership fees from those they oversee. On the one hand such revenue-raising capacity might appear to make the regulators dependent on those they oversee, but on the other it gives greater autonomy from others. The converse case is that of a public regulator

dependent on the provision of funds in annual expenditure budgets, which are subject to overall pressures on government to reduce expenditure and more generally to follow standard public service norms on pay and rations.

Legislation governing various of the sectoral regulators in Ireland empowers regulatory agencies to levy industry actors in order to fund their activities. The establishment in 1996 of the Office of the Director of Telecommunications Regulation has been described as a turning point in developing a distinctive model of regulatory governance because of three linked aspects of the regime: the separation from the government department responsible for the sector; requirements of greater transparency and inclusiveness in decision making; and empowering ODTR to raise its own funding from the telecommunications industry through the imposition of a levy which 'gave it an important degree of financial independence that allowed it, over time, to build up its resources and expertise.' (Westrup 2007: 12).

The financial independence has been important to ODTR and its successor, ComReg, in a number of ways. First, it has had greater autonomy over recruitment of staff, and pay and conditions, than is true of the civil service. It has used this autonomy to recruit expert staff from outside the civil service and from overseas. Bringing in of consultants on short and long term bases has also bolstered expertise and permitted a degree of avoidance of Department of Finance set caps on staffing numbers (ivs 17, 18). Second, the organisation has been able to retain the services of leading commercial law firms and other professional organisations (iv17). The organisation's success in defending itself against legal challenges to its decisions has been attributed in part to its ability to match the legal fire-power of the firms it is charged with regulating. The relative success of ComReg in establishing itself as an agency respected for its expertise and professionalism is widely attributed to its relative autonomy on financing and, linked to that, its capacity to secure and

develop the expertise it requires. A number of informants suggest that the appointment of ComReg chair John Doherty to be the first chair of the new EU telecommunications regulators group, the Body of Regulators for European Communications (BEREC), constitutes a recognition of ComReg's success (iv 7, 19, 20).

The relative autonomy provided by the industry levy model is, of course, no guarantee of success in developing the appropriate expertise, nor is the power to levy entirely unconstrained. A report by the Governor of the Central Bank, Professor Patrick Honahan, into the causes of the Irish Banking Crisis noted that banking supervision teams within the Irish Financial Services Regulatory Authority (IFSRA), also empowered by legislation to raise industry levies to fund its activities, lacked the appropriate range of expertise, that 'this skills gap will have reinforced the tendency to diffidence in engaging with regulated entities' and that the regulated entities with whom the regulators dealt had access to 'a wide range of specialist experts' (Honahan 2010: 63). This weakness was attributed to an inability to compete for experts with provision of appropriate salaries. Notwithstanding the existence of the power to raise levies, IFSRA remained dependent for half its funding on the exchequer, and the power to levy was subject to ministerial approval. Following from the banking crisis of 2008 the newly appointed head of IFSRA indicated a new determination to recruit larger numbers of expert staff to IFSRA, doubling the staffing of the office over a period of two years (Carswell 2010).

The granting of legal autonomy to impose levies on industry does not mean that the exercise of the power is unconstrained. The Broadcasting Authority of Ireland (BAI), established in 2009, was empowered to levy industry actors to pay for its activities by a statutory instrument to be laid before the Oireachtas. The order comes into force unless annulled by the Oireachtas within 21 days (Broadcasting Act 2009, s.33). Such negative resolution orders are generally routine, but the initial order laid by BAI in

2009 called forth howls of protest from the broadcasting industry as it proposed a significant increase in the BAI budget (27 per cent) over that of its predecessor, and at a time when industry revenues from advertising were being adversely affected by recession (House of the Oireachtas 2010). The BAI was forced to pull back from the increase in funding and scale down its proposed activities. Overall, it was suggested to us that the power to annul budgets is an important oversight/accountability tool.

It is sometimes said of levy-based funding models that they replace a dependence on government with a dependence on industry and that this might adversely affect the independence of regulation. The BAI story demonstrates the power of an industry to constrain the resources available to a regulator. Senior officials within government, however, put a positive gloss on the story, suggesting that the imposition of an industry levy had engaged industry organisations with the regulator and regulation in a way that they had not been engaged before, and that this would assist in raising the quality of regulation for the sector as scrutiny of both regulatory budgeting and of the regulator's activity was enhanced (ivs 1, 13).

Expenditure-related policy activity is frequently conducted through making, monitoring and enforcing contracts. 'Government by contract' was long ago identified as an important and problematic mode for the exercise of public power (Daintith 1979) and it has become more important as the retreat from the direct provision of the welfare state (using treasure and organisational resources) has been displaced, to some extent, by the use of regulation and contracts for the delivery of public services (Vincent-Jones 2006). We have not found so many examples of expenditure to support regulation directly. We were told that the Broadcasting Authority of Ireland provides funds to broadcasters to train staff in the requirements of the various codes which the BAI oversees as well as to improve the overall quality of broadcasting, which is one of its statutory responsibilities(iv 8).

6. 'If you Want a Thing Done Well, Do it Yourself': Organisational Capacity in Regulation

Organisation refers to the capacity of government to deploy its staff, property and systems of administration towards tasks such as collecting information or providing services (Hood and Margetts 2007: 102-105). Whilst the organisational capacity of most governments is a distinctly modern phenomenon, the stock of this capacity has changed significantly in recent times. Thus Hood and Margetts note that in the UK CCTV has become a central instrument of detection or surveillance (Hood and Margetts 2007: 104). Turning to the effectors based on organisation, they note a variety of forms of 'individual treatment' comprising marking of items, storing (both property and persons), moving or distributing, and processing (eg vaccinations) (Hood and Margetts 2007: 106). Treatment may also be applied to groups (eg provision of education) and to the world at large (for example the provision and maintenance of roads).

A central feature of contemporary trend in governance has been the shift in emphasis away from organisation to treasure as provision of such services as cleaning, prisons and roads are transferred from public sector organisations, towards private companies subject to contractual arrangements with government. This is sometimes referred to as the shift from 'rowing to steering', that is from direct provision to less direct forms of control. Distinct from the use of contracts as instruments of steering, the Irish government has engaged in policies of privatization which have seen the state's organizational capacity displaced by the establishment of new regulatory bodies to oversee private providers. This trend has been less complete than in some other jurisdictions and the Irish government retains ownership of key service providers, such as the major gas and electricity supply companies. Fiscal pressures arising from recession may lead to further programmes of privatization in future. The Irish Government initiated a review of state assets and liabilities in 2010 with a view to engaging in further asset sales .

7. Conclusions

Recent trends in regulatory governance in Ireland are suggestive of organisations and government seeking simultaneously to complement regulation through authority with greater use of nodality and network modes of governance. It is a reasonable hypothesis that social networks have long been important to the process of government and government-industry relations in Ireland, in common with highly centralized government systems such as that of the UK (Heclo and Wildavsky 1974) and Japan (Schaede 2000). There is a well-established (but now threatened) institutionalised form of such relationships in the practices of social partnership between government, business, trade unions and other key stakeholders (Hardiman 2006).

There is now evidence of greater deployment of network modes at the level of particular regulatory regimes and in respect of regulatory governance more generally. This is seen at national level with government itself seeking to assert greater coordination over economic regulation though engaging in networks with regulatory bodies.

Regulatory organisations place increasing dependence on participation in European, and to a lesser extent, other international networks, not only in the well documented attempts to engage in mutual learning about policy, but also in respect of operational matters where the exchange of both information and strategies does, in several cases, offer a significant bolstering of capacity. It may also in some cases also bolster their legitimacy as regulators can point to their counterparts elsewhere taking the same line on issues.

Though a shift towards such softer and more networked modes of governance is evident, there is at the same time a significant challenge to aspects of regulatory governance for which credibility is threatened by excessive steering through network modes. There has been a sense that enforcement practices have been overly influenced by a keenness to

maintain the equilibrium of well-established social networks. Government has sought to disrupt such effects of social networks through the appointment of outsiders, in social terms, to key regulatory positions and the adoption of language and practices which indicate that a more stringent approach to regulatory enforcement may be appropriate. This policy has also been underpinned by commitments to provide financial resources to secure appropriate expertise so as to reduce the dependence on regulatees for knowledge about the particular sector.

Self-regulation, and related hybrid forms such as co-regulation, are potentially attractive to governments as means to balance requirements for regulation with policy commitments not to over-burden businesses. However, to the extent that self-regulation is associated, accurately or not, with such networked governance practices its legitimacy may be threatened by a sense that ineffectiveness or laxity is attributable to excessive identification of the self-regulatory organisations with industry interests. This form of critique has been evident both in Ireland and elsewhere in respect of financial services regulation, and in particular in respect of practices of principles-based regulation which require firms or associations to play a significant role in interpreting and elaborating on principles to make them effective in practice (Black 2008; McManus 2009).

In the case of self-regulatory organisations participation in European and international networks have, paradoxically, provided part of the means to bolstering credibility and legitimacy of self-regulation as an alternative or a complement to public regulation. In this respect the European Advertising Standards Alliance has been of particular importance to the Advertising Standards Authority of Ireland in establishing through its work in promoting the extension of self-regulation across Europe, the standardisation of norms and practices, such that they are recognised not only by national governments but also by the European Commission and legislative institutions as significant and credible components of the

regimes for advertising regulation. It is remarkable that the EASA has, at the same time, deepened its engagement with the advertising industry and secured a degree of consensus around the idea that responsible advertising, with credible monitoring and enforcement of appropriate norms, serves both public and industry interests. A less well developed but similar story might be told about the more recently established Press Council and Press Ombudsman in Ireland in the sense that its credibility and authority is derived, in part, from its learning from and participation in international networks. AIPCE has a specific remit to promote self-regulation as a model/concept. By contrast the National Consumer Agency has, to date, done rather little with its statutory powers to recognise (and therefore stimulate the development of) self-regulatory regimes.

The complementary qualities of deploying authority and nodality are analytically distinct from distinctions between public and private roles in regulatory governance. Both public and private organisations can in principle deploy either or both modes of governing. There is some evidence that private regulatory organisations have been more creative in drawing on both public and private capacity for bolstering their regimes, for example in respect of enforcement, than is true of public bodies. This may simply be an instance of necessity being the mother of invention. But it is suggestive of greater scope for public bodies seeking to understand better the diffusion of capacity and regulatory resources within the regimes in which they operate and using such understanding to enhance their effectiveness by enrolling the capacity of other actors, public or private, in support of their objectives. The gatekeeping role of powerful private actors such as media organisations, banks, insurance companies and investment managers provide key examples. But there is also scope for developing better understanding for the potential of other public bodies, for example to engage in cross-sanctioning where breaches of norms within a regime where sanctions are less effective, are met by the

threat of sanctions within a more effective regime. Taking hypothetical examples, weaknesses in the capacity for enforcing competition law norms, might be met by invoking sanctions from other regimes such as those for licensing of consumer credit, licensed premises, public transport or the authorisation of professionals to practice. The potential for developing such cross-sanctioning practices is likely to be enhanced by stronger networking across regulatory regimes so that regulators may better understand both the problems faced by, and capacity of, other regulatory organisations.

Recognition of the limits of regulatory governance in Ireland, then, has been met by a search for and enrolment of the capacity of others, involving, simultaneously greater use both of authority and network modes of governance. European networks have been, to varying degrees critical to the development of national capacity, and government has responded to perceptions of regulatory weaknesses with a deepening of both enforcement and nodal capacity.

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