Journal of European Public Policy 9:6 December 2002: 954–972

Regulation after delegation: independent regulatory agencies in Europe

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ABSTRACT Three aspects of the life of independent regulatory agencies (IRAs) after delegation are examined: their independence from elected officials, their relationship with regulatees; their decision-making processes. The article suggests that IRAs enjoy considerable insulation from elected politicians in terms of party politicization and tenure. The evidence for relations between IRAs and business regulatees is more mixed: the two have been relatively separate in terms of the professional origins and destinations of senior IRA staff and, in some countries, there has been considerable legal conflict between them. However, in an important and visible field such as merger control, IRAs have undertaken little activity. The greatest changes introduced by IRAs have been in decision-making processes, which they have opened up, in contrast to closed processes before delegation.

KEY WORDS Independent regulatory agencies; capture; delegation; political control; legitimacy; regulation.

Independent regulatory agencies (IRAs) have spread in Western Europe. The most common are agencies regulating competition – general competition authorities, utility regulators and financial regulators. The regulatory state model posits that IRAs are an essential element in the rise of the 'regulatory state' that is claimed to be replacing the 'positive state' in Western Europe (Majone 1997). IRAs are created to increase credible commitments because they can enjoy 'autonomy' and 'independence' from elected politicians (Majone 1997: 152–5). It also suggests that whereas in the 'positive state', government and its generalist bureaucracies were often the prisoners of a corporatist culture and the interests of producers, IRAs can focus on specific regulatory objectives such as enforcing competition law or protecting the economic or health interests of consumers (Majone 1997: 157). It claims that IRAs can obtain procedural legitimacy through more transparent and pluralistic policy-making and greater accountability than offered by state ownership and regulation by government (cf. Majone 1999).

Thus far, cross-national comparative analysis has focused on the formal institutional design of IRAs, and in particular on 'delegation' – the powers

Journal of European Public Policy
ISSN 1350–1763 print/ISSN 1466-4429 online © 2002 Taylor & Francis Ltd
http://www.tandf.co.uk/journals
DOI: 10.1080/1350176022000046445

delegated by elected officials to IRAs and the controls over IRAs (Thatcher 2002; Giraudi and Righettini 2001; Gilardi, this issue; Majone 1996; Coen and Thatcher 2000; Levy and Spiller 1996; Doern and Wilks 1996; Perez 1996; Cassese and Franchini 1996; Horn 1995). Nevertheless, although formal institutional arrangements are important, they do not determine the behaviour of IRAs and their relationships with other actors because powers and controls can be used in many diverse ways and institutional frameworks are incomplete, allowing discretion to decision-makers. The issue here is how the new institutional framework after delegation of powers to IRAs operates in practice and its effects on 'regulatory politics'.

Three aspects of IRAs after delegation that arise from claims about the 'regulatory state' in Europe are examined. First, the article looks at the independence of IRAs from elected politicians. Second, it looks at relationships between IRAs and regulatees, testing arguments that IRAs have escaped from the clutches of corporate interests. Third, it analyses the decision-making processes of IRAs, thereby considering whether delegation to IRAs has resulted in more transparent, pluralist and accountable policy-making. Each of the three aspects is analysed in the light of a wider literature that is particularly apposite (principal–agent analyses of control, 'capture theory' and procedural legitimacy).

The empirical analysis covers national IRAs in four major countries – Britain, France, Germany and Italy (the European Community (EC) presents its own specific issues – cf. Pollack 1997; Tallberg 2002). The discussion is focused on regulators of market competition (both general competition authorities and sectoral regulators). Although IRAs are seen as an essential element of the growth of the 'regulatory state' in Europe, their behaviour and consequences in Europe remain under-analysed, especially across countries. Moreover, there are limited data available, especially in comparative form over several years. Thus the present article must be exploratory. It offers a broad overview, using quantitative indicators in order to put forward general arguments for further testing and detailed scrutiny.

The article begins by setting out the spread of IRAs regulating competition in the domains selected for investigation here. Thereafter, analytical frameworks for studying the three selected aspects of the behaviour and operation of IRAs are discussed. The article then considers the three aspects of how IRAs operate in practice, before drawing wider conclusions.

THE SPREAD OF IRAs IN WESTERN EUROPE

Until the late twentieth century, IRAs were rare in Europe.[1] However, they have increasingly emerged in Western European countries. Although general competition authorities were established in Britain and Germany after the Second World War (Wilks with Bartle 2002), most IRAs were created in the 1980s and 1990s, especially for the utilities (Thatcher 2002; Gilardi, this volume). IRAs have been given important powers – for instance, to approve or

block mergers, to prevent unfair competitive practices, to issue and enforce licences.

Empirical analyses of IRAs immediately face the problem that definitions of IRAs vary across countries, depending largely on legal doctrines. To allow cross-national comparison, an IRA is defined using its formal institutional status rather than nationally specific labels. An IRA is a body with its own powers and responsibilities given under public law, which is organizationally separated from ministries and is neither directly elected nor managed by elected officials.[2] Table 1 offers an overview of market IRAs in selected domains which will be examined in this article, together with the date of their creation.

ANALYSING THE BEHAVIOUR AND CONSEQUENCES OF IRAs IN EUROPE

There is no one dominant overarching model of the consequences of establishing IRAs nor of 'regulatory politics' in general (Gerber and Teske 2000). Therefore, the present article draws on several literatures which offer starting points for analysis of the three aspects of IRAs covered here (independence from elected politicians, relations with regulatees and decision-making processes) and which help in choosing indicators.

Principal–agent models, derived in large measure from the US, address the issue of the independence of regulatory agencies from elected politicians. They underline the danger of 'agency losses' as agents do not follow the preferences of their principals (Thatcher and Stone Sweet 2002; cf. Pollack 2002). To reduce 'agency losses' they look to formal institutional design, and in particular controls such as the appointment and dismissal of regulators and the determination of budgets (cf. Kiewet and McCubbins 1991; McCubbins and Schwartz 1984).

However, as Moe points out, the ability of the principal to influence agency performance depends on both control mechanisms and its use of those mechanisms. The latter cannot be taken for granted (Moe 1985: 1101). Principals must have the desire and energy to use the controls; many different applications of controls are possible (for instance, appointment powers can be used to select political cronies or independent-minded individuals) (Moe 1985; cf. Moe 1982). Hence this article examines the use of controls such as appointment, dismissal and budget-setting in practice, taking key indicators such as the party political affiliations of appointees, resignations, length of tenure of regulators and resources given by elected politicians to IRAs.

In studying relations between regulators and regulatees, the American interest group literature offers a vigorous debate as to whether agencies can protect the public good from sectional interests or are captives of those interests. Theories from the 'Chicago school' claim that producers are likely to capture regulators because they tend to enjoy high benefits from regulation but are few in number, and hence can organize easily; in contrast, consumers often

Table 1 Independent regulatory agencies for market competition in Britain, France, Germany and Italy in selected domains

Domain	*Britain*	*France*	*Germany*	*Italy*
General competition	Competition Commission 1998 (1948) and OFT (Office of Fair Trading) 1973	Conseil de la Concurrence 1986 (1977)	Bundeskartellamt (Federal Cartel Office) 1957	AGCM (Autorità Garante della Concurrenza del e Mercato) 1990
Telecom-munications	OFTEL (Office of Telecommunications) 1984	ART (Autorité de Régulation des Télécommunications) 1996	RegTP (Regulierungsbehörde für Telekommunikation und Post) 1996	AGCOM (Autorità per le Garanzie nelle Comunicazioni) 1996
Energy	OFGEM (Office of Gas and Electricity Markets) 2000 (1986 for OFGAS and 1989 for OFFER)	Commission de Régulation de l'Electricité 2000		AEEG (Autorità per l'Energia Elettrica e il Gas) 1995
Water	OFWAT (Office of Water Services) 1989			
Railways	Office of Rail Regulator (1993) and Strategic Rail Authority 1999 (1993)			
Postal services	Postal Services Commission 1999		RegTP (see telecommunications)	
Media	ITC (Independent Television Commission) 1990 (1954)	Conseil Supérieur de l'Audiovisuel 1989 (1982)	No national body – Landesmedienanstalt for each *Land*	AGCOM (see telecommunications)
Stock exchange/ shares	FSA (Financial Services Authority) 1997 (1986)	COB (Commission des Opérations de Bourse) 1996 (1967)	Bafin (Bundesantalt für Finanzdiensleistungen) 2002 (1995)	Consob (La Commissione nazionale per le società e la borsa) 1974

Notes:
1. Dates refer to legislation creating the IRA; the date in brackets is the date on which an IRA was first created in the domain.
2. Empty boxes – no sectoral IRA: for a discussion of the German model, see Coen *et al*. 2002; Böllhoff 2002; Eberlein 2000; Lodge 2000.
3. There are often several financial regulators – the most important regulator for stock exchanges is taken; for Germany, analysis relates to the Bundesaufsichtsamt für den Wertpapierhandel, which was absorbed into Bafin in 2002.

face low losses individually and are dispersed and numerous, making collective action difficult (Stigler 1971; Peltzman 1976; Becker 1983; cf. Bernstein 1955). Wilson offers a sophisticated view whereby the relationship between interest groups and public officials depends on the distribution of costs and benefits of regulation, the staffing of an agency and the regulatory environment (Wilson 1980).

Although it is almost impossible to define 'the public interest', the 'capture' literature does suggest that the professional characteristics of regulators are likely to be important, as a 'revolving door' with regulatees will aid capture. In addition, it suggests that lack of conflict between regulators and regulatees should be regarded with suspicion. Finally, a small number of regulatees with high benefits from regulation represent a group that is particularly well placed to attempt to capture regulators, since it will have low organizational costs and high potential benefits. The article therefore looks at the professional origins and destinations of IRA members, conflict between regulatees and IRAs, and use of a visible and important regulatory power, namely control over mergers by general competition authorities.

The decision-making processes of IRAs have been analysed in relation to legitimacy. As non-majoritarian institutions, IRAs make policy but cannot rely on the legitimacy of direct election. 'Procedural legitimacy' offers a source of 'input legitimacy' for IRAs. Their decisions may be accepted because of the processes they use – notably whether they make decisions transparently, stay within their legislative mandate, are accountable, use due process or have expertise (cf. Baldwin and McCrudden 1987: ch. 3; Pontorollo and Oglietti 2000; Majone 1996: ch. 13; Baldwin and Cave 1999: ch. 22; Majone 1999). The article therefore examines decision-making by IRAs, notably their openness, expertise, consistence and 'answerability'.

IRAs and elected politicians

Delegation involves elected officials giving IRAs legal powers. IRAs are organizationally separated from elected politicians and their members are appointed and difficult to remove before the end of their terms of office. Nevertheless, they remain subject to controls by elected politicians. The formal institutional framework defines the procedures to be followed for the use of those controls, but usually lays down very few rules for substantive decisions; for example, criteria for selecting IRA members or setting resources given to IRAs. Hence elected officials enjoy great discretion and a key issue is how they apply their controls over IRAs.

Nomination of IRA members is claimed to be the most visible and effective formal control (Majone 1996: 38; Wood and Waterman 1991). Dismissal of regulators before the end of their term offers another control. Length of tenure affects the expertise and experience of regulators. Setting the resources of IRAs offers elected politicians a further tool of control. Finally, elected politicians retain some powers to overturn the decisions of IRAs. These factors can be

expected to strongly influence the nature of the relationship between the two groups, notably whether IRAs are held on a 'short rein' or enjoy the maximum independence possible within the formal institutional framework.

Five indicators of the use of controls by elected politicians over IRAs in practice are therefore presented:

- party politicization of appointments: the greater the politicization of regulators, the lower the likely independence of regulators and the greater the control by elected politicians;
- departures (dismissals and resignations) of IRA members before the end of their term (since it is difficult to distinguish 'forced' resignations from voluntary ones, they are treated together in the figures): the lower the level of early departures, the more likely IRA independence;
- the tenure of IRA members: the longer their tenure, the greater their likely independence from elected politicians;
- the financial and staffing resources of IRAs;
- the use of powers to overturn the decisions of IRAs by elected politicians.

All five are indicators rather than definitive proof of the independence of IRAs from elected officials. Nevertheless, they point to the conditions that help or hinder IRA independence. Figures concern senior IRA members who head IRAs.

Table 2 takes two measures of the party politicization of appointments to IRAs: holding national government office or standing for legislative or local elections; publicly known party affiliation. Party politicization does not exclude expertise – some individuals may be linked both to parties and be experts in a domain (for instance, several members of the RegTP in Germany or Professor Giuliano Amato as head of the Italian competition authority 1994–7) but, at the very least, appointing individuals with clear party links reduces the public distance between IRAs and partisan politics.

The results show that in Britain, France and Germany elected politicians have not used their appointment powers to choose party activists; even the broader category of publicly known party affiliations covers a minority of IRA members and generally arises in communications regulators. Britain is an extreme case: no regulator has been recently politically active or linked to a party (this does not mean that they lack political views but does show that individuals with public ties to parties have not been appointed).[3] Italy is an exception in that almost all members of AGCOM, the communications regulator, have clear party political affiliations and a high proportion have stood for or held public office (della Cananea 2002).

More detailed analysis suggests that choices of regulators have largely followed existing national patterns of filling policy-making positions outside central government. In Britain, many regulators have been drawn from 'the great and the good' (i.e. distinguished individuals without public affiliations to

Table 2 Party activism and public affiliations of IRA members, 1990–2001

	Britain	*France*	*Germany*	*Italy*
% holding or standing for public office (local, national or European) before or after term on IRA	3% (1 of 33)	9% (4 of 46)	15% (2 of 13)	32% (13 of 41)
% publicly affiliated with party	0 (0 of 33)	46% (21 of 46)	36% (5 of 13)	73% (30 of 41)

Notes:

1. *Coverage*: **Britain**: members of all sectoral IRAs; only heads of OFT, Competition Commission and predecessor Monopolies and Mergers Commission, Savings and Investment Board (SIB)/ FSA and ITC; excludes temporary interim regulators. **France**: all members of sectoral IRAs; President of Conseil de la Concurrence and COB. **Germany**: Presidents and Vice-Presidents of Bundeskartellamt, Bundesaufsichtsamt für den Wertpapierhandel and RegTP; one Vice-President of Bundeskartellamt excluded owing to lack of information. **Italy**: all members of AGCOM, AEEG and AGCM; all members of CONSOB except two (information lacking).
2. Information derives from biographies, newspaper reports, *Who's Who* and IRAs.

political parties). Thus, for instance, the first head of the Office of Telecommunications (OFTEL), Sir Bryan Carsberg, was an accountant and former academic, and his successor Don Cruickshank was a former businessman and head of regional health services. In France, regulators have often been drawn from the élite 'grands corps', with some university professors. In Italy, regulators have been a mixture of party loyalists and university professors (for example, Enzo Chelli at AGCOM) or individuals who were both. In Germany, many regulators are civil servants, especially lawyers.

No IRA member has been formally dismissed in the sample. Even resignations have been relatively rare, and have often been for personal or professional reasons, such as taking other attractive posts, rather than pressure from elected politicians. Table 3 shows both total numbers of IRA members who resigned and those who left from the IRAs that existed throughout the period 1990–2001 (the latter to correct for biases owing to different lifespans of IRAs).

The average length of tenure of regulators is high – well above that of ministers or even governments. Table 4 looks at the tenure of senior members of general competition authorities to allow cross-national comparability, since such authorities have existed throughout the 1990s in all four countries. It takes those senior members who finished their term or whose appointment was renewed.

Although IRAs perform important tasks and often face large, well-resourced powerful firms, they are small in terms of numbers and spending. See Table 5.

Table 3 Resignations of IRA members before end of term, 1990–2001

	Britain	*France*	*Germany*	*Italy*
% resigning before end of term (or retirement if permanent post)	15% (5 of 33)	13% (6 of 46)	17% (2 of 12)	15% (6 of 41)
% resigning from IRAs existing 1990–2000	29% (5 of 17)	18% (5 of 28)	0 (0 of 5)	14% (4 of 28)

Notes:
1. *Coverage*: as Table 2.

This is likely to curtail their activities and may lead to dependence on governments; nevertheless, these possibilities need to be investigated since one of the characteristics of regulators is that their activities, especially rule-making, may not require many staff.

Ministers sometimes have formal powers to overturn the decisions of IRAs. Although there are few publicly available data, the figures are very striking. Thus, for instance, in Germany, under the 1973 amendment of the competition law, the Federal Economics Minister can overturn a refusal to allow a merger by the Bundeskartellamt (cf. Baake and Perschau 1996). However, only six decisions were overturned between 1973 and 2000, with the last dating back to 1989.[4] In Britain, the Secretary of State for Industry has the power to accept or reject the Office of Fair Trading's (OFT's) 'recommendations' as to whether a merger should be referred to the Competition Commission (formerly the Monopolies and Mergers Commission, MMC); he/she also has the power to reject the Competition Commission's advice (Wilks 1999:

Table 4 Average tenure of senior members of general competition authorities, 1990–2001

	Britain	*France*	*Germany*	*Italy*
Average tenure	6.4 years (5)	7.5 years (17)	7.7 years (3)	5.3 years (7)

Notes:
1. Average tenure: only those members who left during the period 1990–2000, except if appointment renewed; where term of office began before 1990, time is included; excludes those deceased in office.
2. For France, all members of the Conseil de la Concurrence are included; if only the President is included, average tenure would be 5.5 years. For Italy, all members of AGCM are included; for Britain, the Director General of Fair Trading and Chairman of Competition Commission/MMC (Monopolies and Mergers Commission). For Germany, only Presidents of the Bundeskartellamt are included.

Table 5 Resources of IRAs, 2000

	Britain	*France*	*Germany*	*Italy*
General competition authorities – spending	68.6m euros (OFT and Competition Commission/ MMC)	1.9m euros	17m euros	28.6m euros
General competition authorities – staff numbers	547	110	262	137
Telecommunications regulators – spending[1]	22.4m euros	14.1m euros	63.8m euros	26.8m euros
Telecommunicatons regulators – staff numbers[1]	190	145	4200	178

Note:

1. **Germany**: RegTP covers both postal and telecommunications services; **Italy**: AGCOM covers telecommunications and broadcasting.

194–242). Use of the two powers is extremely rare: the OFT's recommendations were rejected in only fourteen cases between 1990 and 1997, and only four cases have been found for rejection of the MMC's reports (source: MMC annual reports).

The findings suggest that, having created IRAs, governments do not use their most visible formal powers to control them, with the exception of limiting IRAs' resources (and the partial exception of politicization in Italy). This does not necessarily mean that IRAs are independent from elected politicians. However, it does suggest that, if elected officials control IRAs, they do so through other means such as creating resource dependencies and/or informal relationships (cf. Coen *et al.* 2002; Böllhoff 2002).[5]

IRAs and regulatees

Before the creation of IRAs, relations between governments and large firms were close and constant (cf. Hayward 1986; Schmidt 1996; Machin and Wright 1985; Cawson *et al.* 1990; Dyson and Wilks 1983; Grant 1989; Muller 1989). Powerful, long-established and entrenched 'national champion' producers (both state-owned and private firms) enjoyed great political influence (cf. Hayward 1995). Relationships were built on mutual favours – governments protected firms from competition and in return obtained benefits such as maintenance of employment or money for political parties. There were strong links between the heads of state-owned firms and elected politicians: the former were appointed by the latter, often on party political grounds, and sometimes individuals moved from party politics or government to senior management of firms (or vice versa).

IRAs' members do not face elections and usually have tight legal constraints on accepting money from regulatees. However, there are few rules concerning their occupations before and after IRA membership. Moreover, IRAs enjoy considerable discretion over the use of their powers. Their objectives are very broadly defined under legislation – for example, sectoral regulators are often given aims of ensuring fair competition and universal service. Even over specific matters such as issuing licences, scrutinizing mergers and imposing fines, they have much scope for choice. 'Capture' theories would expect businesses to use all available means to obtain control of IRAs and that IRAs would favour producer firms (since the latter usually consist of highly concentrated interests).

To examine the relationship between IRAs and firms, and especially the possibility of 'capture', three quantitative indicators are examined. The first is the extent of the 'revolving door': regulators moving from regulatees to IRAs and then back to regulated industries. This offers an indication of the 'relational distance' between IRAs and regulatees. For 'capture theories', the revolving door is also important in providing regulators with material incentives to favour regulatees, as well as shared cultural assumptions and mindsets (although these claims are strongly contested by recent work; see Makkai and Braithwaite 1992). The second is the number of mergers blocked or made subject to conditions. Since firms initiate mergers and those mergers that are subject to control generally involve large firms, the data are particularly useful in assessing regulation of powerful firms. The third indicator, the number of legal challenges to the decisions of IRAs, offers a sense of whether sharp conflict exists between regulatees and IRAs: legal action represents a public and hostile challenge to an IRA and hence suggests that the IRA has not been captured.

Table 6 offers a simple analysis of the revolving door in Europe by looking at the percentages of IRA members who are drawn from the private sector and then the proportion who depart for the private sector.

The data suggest that in continental Europe the revolving door exists but remains limited. Only a minority of regulators are recruited from the private sector as a whole. When regulators leave IRAs, a significant number join the private sector, mostly as consultants. Nevertheless, such activities may lie outside the domain of the IRA in which the regulator worked and may be partial, since regulators are frequently over retirement age.

Britain represents an important exception. A high proportion of regulators have come from large private-sector firms, especially for the OFT and the MMC/Competition Commission (cf. Wilks 1999: 77–112). Thus, for example, Sir Sydney Lipworth (MMC Chairman 1988–93) had been deputy chairman of Allied Dunbar, director of BAT and legal director of Abbey Life, whilst Graham Odgers had been chief executive of McAlpine after senior posts in other private firms. Similarly, on departure, many regulators have become consultants and/or held senior managerial posts (for instance, Sir Andrew

Table 6 Business origins and destinations of IRA members, 1990–2001

	Britain	*France*	*Germany*	*Italy*
% IRA members from private sector (previous occupation)	71% (22 of 31)	26% (5 of 19) (see note 3)	8.3% (1 of 12)	18% (7 of 40)
% IRA members going to private sector after departure	93% (13 of 14)	17% (1 of 6)	60% (3 of 5)	38% (6 of 16)

Notes:

1. *Coverage*: as Table 2.
2. Principal occupation taken. Business includes: firms; self-employment, e.g. as barrister or consultant; associations representing companies.
3. **France**: if ordinary members of the Conseil de la Concurrence are included in addition to the President, the proportion from business is 28 per cent (13 of 47), an unsurprising result since one of the three 'colleges' is composed of nominees from the private sector.

Large, head of the SIB 1992–97 became deputy chairman of Barclays Bank).

Merger decisions offer another useful indicator of relations between general competition authorities and regulatees. Table 7 sets out the number of decisions taken, together with outcomes. (Although figures may not be directly comparable across countries, the absolute numbers and percentages within countries offer very compelling evidence.)

The figures suggest that when referral to competition authorities is voluntary, it is rare: thus in Britain referral to the MMC/Competition Commission requires a decision by the Secretary of State for Industry, and in France the Minister chooses whether to seek the advice of the Conseil de la Concurrence. Moreover, very few mergers are rejected or even subjected to conditions. Moreover, when competition authorities undertake detailed investigations of cases chosen because they are likely to pose problems (in the UK referral to the MMC; in Germany since 1999 'second stage' investigations), a high proportion of mergers are allowed. The result is that very few mergers are blocked by general competition authorities.

Why should general competition authorities block so few mergers? One explanation is that competition regulation and IRAs exert such an enormous dissuasive influence that firms do not even dare to attempt mergers that might be rejected. However, such timidity on the part of large companies appears unlikely. Another explanation is that lack of resources (see above) leads competition authorities to be highly selective. A third possibility is that general competition authorities find informal solutions to merger problems and/or favour mergers. Qualitative studies provide some evidence for the existence of close and friendly relations between IRAs and regulatees. For certain IRAs, strong informal links exist with regulatees. Thus, for instance, in Britain,

Table 7 Merger decisions by general competition authorities, 1990–2000

	Britain	*France*	*Germany*	*Italy*
Mergers considered by general competition authority	1990–2000, 115 references to MMC/ Competition Commission	78	Total cases notified 15,594	4,171
% of merger cases considered	4.6% of 'qualifying cases' considered by OFT (115 of 2,490)	1.2% (6,453 '*operations recensées*', i.e. mergers noted by Economics and Finance Ministry)	100%	100%
mergers rejected as % of total cases notified/ qualifying cases	1.6% (39 of 2,490)	N/A since minister decides	0.2% (37 of 15,594)	0.1% (5 of 4,171)
Mergers accepted with conditions/ modifications as % of total cases notified/ qualifying cases	0.7% (17 of 2,490)	N/A since minister decides	N/A – only possible since 1999	0.6% (24 of 4,171
% of mergers investigated in detail rejected or subject to condition	52% (56 of 108)	N/A	16% (21 of 132 for 1999–2001)	N/A

consultations between companies contemplating mergers and the OFT are encouraged, and the OFT issues 'confidential guidance' to firms; in any case, 'mergers are regarded with favour' (Wilks 1999: 205, 223–8).

A final indicator concerns the number of legal challenges to IRAs. These are the 'nuclear weapons' of regulatees as they involve open conflict and the possibility of expensive, lengthy court cases that lead to publicly known winners and losers. They stand in stark contrast to informal private agreements and compromises between regulatees and IRAs that would be expected if large supplier firms had captured IRAs. The data are very varied. On the one hand, legal challenges are rare in Britain (twenty-seven cases against all the regulators in the sample 1990–2000 – source: LEXIS search; see also Prosser 1997: 53–4). They remain relatively scarce in France (e.g. only twenty-two '*recours*' against the ART 1998–2002). In contrast, the RegTP has seen approximately

80 per cent of its decisions challenged in court resulting in approximately 2,000 cases since 1998 (source: RegTP). There have been approximately 275 legal challenges against competition law decisions of the Italian competition authority over the period 1990–2001 (both interim orders and judgments).

Therefore, overall, the data on relationships between IRAs and regulatees are mixed. On the Continent the revolving door between regulators and regulatees has been limited and there have been a significant number of legal challenges (Britain appears to be an exception with a strong revolving door but few legal challenges). Yet few mergers have been blocked by general competition bodies. Detailed case studies of the relationship between firms and sectoral IRAs equally suggest that IRAs have maintained a relational distance but have not sought to attack the structural advantages of incumbents. Thus, for instance, sectoral IRAs and general competition authorities have not sought to break up public telecommunications operators such as British Telecom, France Télécom and Deutsche Telekom or major energy and water incumbents; rather, they have preferred 'behavioural regulation', notably controlling interconnection and prices, and even here, they have adopted a gradualist approach to tightening controls on incumbents (cf. Coen *et al.* 2002; Thatcher 1999; Maloney and Richardson 1995; Prosser 1997). Regulators may be separated from regulatees in terms of professional origins and destinations and their relations be marked by relatively high hostility, but they rarely call into question changes in the ownership of firms or seek rapid removal of inherited market power.

IRAs and decision-making processes

Until the creation of IRAs, regulation in domains such as the utilities was largely the preserve of a small and closed policy community, dominated by civil servants and powerful incumbent interests, especially suppliers (Foster 1992; Foreman-Peck and Millward 1994; Cawson *et al.* 1990; Thatcher 1999). Governments took decisions, often in private after negotiations with suppliers. Decision-making processes lacked guiding principles and consistency. Legislatures enjoyed little information and exercised little real scrutiny over regulation.

The formal institutional framework frequently offers IRAs little detail on matters such as consultation or publication of information. As non-majoritarian institutions, specialized in regulation (sometimes of particular sectors), IRAs might be expected to be highly technocratic (cf. Radaelli 1999). In practice, however, they have altered decision-making procedures away from previously largely closed and private processes. The evidence suggests that they have increased openness in the practice of decision-making and remain subject to political and administrative public scrutiny.

The number of actors involved in debates and consultation has risen (although this is due to liberalization as well as new IRAs). They include new

Table 8 Number of website visits to telecommunications IRAs, 2000–2002

OFTEL	*ART*	*RegTP*	*AGCOM*
approx. 500,000 visits	284,732 different visitors in 2000; average of 10 web pages read per visitor in August 2000	in month of March 2002 81,197 website visits and 39,220 different website visitors	approx. 204,000 visits

entrants, consumer groups, the European Commission and users. IRAs have created new procedures, such as producing consultation papers and draft decisions and inviting comments. They have published a much greater volume of information than governments did, even on sensitive commercial matters such as costs, profits and market shares. They have also made available the models on which their decisions are based, including economic and pricing models. Such developments have occurred not only in Britain (Prosser 1997), but also in traditionally more closed countries such as Italy where IRAs have adopted procedures based on principles of openness and contestability (della Cananea 2002). The information produced by IRAs has been widely disseminated. Although few quantitative data are available, one indication is provided by the number of 'hits' on websites (here, for telecommunications IRAs). The figures suggest a high level of interest, particularly given that IRAs are specialized bodies.

IRAs have built up much more expertise than government departments composed of generalist civil servants (although they may still lack the resources of large regulatees). Sectoral IRAs have been greatly helped by competition which has reduced the previous monopoly of information of incumbents by providing comparators and rival firms with an interest in scrutinizing information. Whereas public telecommunications operators or energy suppliers provided little information about costs in justifying price structures, today they must provide increasingly detailed evidence and justify their costs to IRAs for matters such as interconnection or abuse a dominant position. Thus, for instance, OFTEL, the UK telecommunications regulator, has demanded detailed information from BT (for example, on costs, profit margins and quality) and hence developed more expertise than its predecessor, the Department of Trade and Industry (Thatcher 1999). IRAs have also made use of economic data and evidence, often bringing in outside experts. Their budgets have increased and, perhaps more importantly, numbers of specific experts such as lawyers and economists have often risen (for an analysis of Britain and Germany, see Bauer 2002).

Consistency and coherence are difficult to assess, but are important for both legal and business certainty. IRAs have given reasons for their decisions, even

when not legally required to do so (e.g. in Britain). They have developed public doctrines, conceptual frameworks and principles for their actions. Hence, for example, OFTEL has set out its approach of ensuring the widest possible 'fair and effective competition' (cf. Carsberg 1989). At the very least, these have allowed debate and have set standards to judge the decisions of IRAs. Some measure of consistency (at least in terms of using appropriate administrative procedures and remaining within their powers and objectives) is provided by challenges using administrative law: successful challenges to IRAs have been rare. For example, only 27 per cent of challenges to the Italian competition authority have succeeded, whilst none has done so against the Monopolies and Mergers Commission in Britain between 1990 and 2001 or against the Autorité de Régulation des Télécommunications (ART) in France between 1998 and 2002.

Although unelected, IRAs have also become subject to a higher degree of accountability or perhaps rather 'answerability' than governments previously. Their decisions over matters such as tariffs, takeovers or quality of service have been controversial and subject to debate. The fuller information they have provided has aided discussions. Press coverage of IRAs has often been extensive, especially in the utilities, and some regulators have become major public figures, held responsible for the actions of their offices (for example, in Britain, Don Cruickshank at OFTEL or Clare Spottiswood at OFGAS). Legislatures (especially their committees) have used their powers to demand information and call regulators to account for their decisions. However, even the full legislature continues to show interest; for instance, between November 1998 and April 2002 154 questions about telecommunications were asked in the German legislature, a number that compares favourably with the period before the RegTP was established (53 questions, February 1987–December 1990; 251, December 1990–November 1994; and 243, November 1994–November 1998). IRAs are subject to scrutiny by internal administrative bodies such as the Cour des Comptes and the National Audit Office (NAO). In Britain, the NAO has produced twelve reports on the regulation of utilities between 1992 and April 2002.

CONCLUSION

The 1980s and 1990s saw the establishment of a new framework for regulation in European countries in which powers were delegated to IRAs. However, the operation of that framework cannot be simply read off its formal institutional features since it gives much discretion to elected politicians and IRAs over the use of their powers. The article has therefore investigated three important aspects of regulation after delegation to IRAs that arise from claims that the 'regulatory state' has replaced the 'positive state': the independence of IRAs from elected officials; the relationship of IRAs and regulatees; the processes of decision-making by IRAs. The data presented are limited and hence claims

must be tentative. Nevertheless, certain conclusions can be put forward for further testing and investigation.

Elected officials have not used their formal controls of nomination to pack IRAs with party politicians and politicization has been limited in Britain, France and Germany (Italy is an exception with a much higher level of politicization). Formal dismissal of IRA members is virtually unknown; informal pressures to depart early, even if exerted, do not appear to have succeeded. Instead, few IRA members resign – typically they serve out their terms and have longer average tenure than ministers. Elected politicians have made little use of powers to overturn IRA decisions. Once created, IRAs have limited financial and staff resources, but the effects on dependence *vis-à-vis* elected politicians need to be studied. Thus delegation to IRAs has led to the creation of a body of regulators distinct from elected politicians and enjoying tenure that favours independence from direct control by the latter.

IRAs are also separated from business regulatees. In France, Germany and Italy, the revolving door is an exception. Sharp conflicts have taken place between IRAs and regulatees, with the latter resorting to legal action against the former, in some cases, frequently. (Britain offers a different picture, with a strong revolving door between IRAs and the private sector and very little legal action against IRAs by regulatees.) Yet IRAs have not broken decisively with regulatory traditions of favouring suppliers. Even in a highly visible area such as merger control, IRAs have undertaken little activity. The findings are mixed but give partial support to studies arguing that regulators often act in the interests of regulatees. They invite further analysis and broader discussion. Is strongly pro-competitive regulation almost impossible in industrialized democracies because of the 'systemic power' of business (cf. Lindblom 1977)? Do firms absorb the 'rules of the game', thereby anticipating IRA regulation? Does IRA inactivity reflect lack of resources, including support by governments and formal powers, for an attack on the interests of large suppliers? Or do the findings reflect the relative youth of IRAs in Europe, so that at some future time major agency action for liberalization can be expected, matching the 'deregulation' movement seen in the United States in the 1970s and 1980s (cf. Peltzman 1976; Wilson 1980; Derthik and Quirk 1985)?

The greatest break with the past has come in the processes of regulatory decision-making. IRAs have broken open previously private regulatory governments. They have introduced public consultation procedures, allowing a wider range of actors to at least express their views. They have published significant information. They have given rationales for their decisions and have been 'answerable' via scrutiny by the press, legislatures and administrative bodies. At the very least, IRAs have aided public debate and knowledge about regulation, and contributed to making decision-taking and conflicts more open.

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ACKNOWLEDGEMENTS

The author expresses his thanks for comments on earlier drafts to the reviewer, Adrienne Héritier and Claudio Radaelli. He thanks Angelika Betzold, Maria Kampp, Ben Morris, Francesco Salerno, Alexandre Serot and Hidia Taoufiqi for research assistance. He also acknowledges support from ESRC grant no. L216 25 2007 within the ESRC Future Governance programme and the Centre for the Analysis of Risk and Regulation.

NOTES

1 Britain had Commissions and agencies, but parliament and government often kept effective control; cf. Baldwin and McCrudden 1987: ch. 2.
2 Although this produces very similar results to Gilardi, this volume, the definition offers a sharper cut-off between IRAs and other agencies by excluding those bodies that lie within ministries and/or are largely consultative.
3 Sir Gordon Borrie, Director General of Fair Trading 1976–92, stood unsuccessfully for Parliament in the 1950s but by the 1970s was not publicly linked to a political party.
4 The 1989 Daimler Benz–MBB decision, although much discussed, represents the exception rather than the rule.
5 Qualitative studies of individual regulators have offered some indications, although the results can be contradictory; thus, for instance, OFTEL and the OFT in Britain involve regular contacts with government ministers and officials (see, for instance, Thatcher 1999; Hall *et al.* 2000; Wilks 1999). But the first two differ in their assessment of OFTEL's independence from government; moreover, regular contacts do not mean that IRAs are controlled by elected politicians – dependence may be mutual.

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