



Project no. CIT1-CT-2004-506392

# NEWGOV

## New Modes of Governance

Integrated Project  
Priority 7 – Citizens and Governance in the Knowledge-based Society

**Working Paper: Comparative Perspectives on OMC in Information Society  
in Ireland and France**  
reference number: 2/D45

Due date of deliverable: December 2006  
Actual submission date: 5 February 2007

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:  
**University College Dublin. Authors: Colin Shaw, Brigid Laffan**

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
<b>PU</b>	Public	X
<b>PP</b>	Restricted to other programme participants (including the Commission Services)	
<b>RE</b>	Restricted to a group specified by the consortium (including the Commission Services)	
<b>CO</b>	Confidential, only for members of the consortium (including the Commission Services)	

## Summary

In EU parlance, ‘Information Society’ designates policy areas covered by both Community and exclusively national competence. Consequently, the field is characterised by strong regulatory and weak voluntary governance. Taking the national experience of telecommunications legislation and regulation (as the ‘backbone of Information Society policy), an area of strong Community regulatory competence, and the eEurope agenda, an area dominated by weak voluntary action and the open method of coordination (OMC), this working paper will compare case studies from France and Ireland. After an overview of Community-level action in both areas of hard regulation and soft coordination, we will show how the implications of regulation have knock-on effects on coordination attempts and that far from achieving complementary goals with asymmetrical means, hard coordination can sometimes undermine attempts at overall coordination.

## Contents

<b>FOREWORD</b> .....	<b>4</b>
SITUATING INFORMATION SOCIETY POLICY WITHIN THE FRAMEWORK OF NEWGOV .....	4
<b>I. THE BROADER PICTURE: INSTITUTIONS AND LEGISLATIVE/POLITICAL ACTIVITY AT EU LEVEL</b> .....	<b>7</b>
I.1 TREATY PROVISIONS .....	7
I.2 LEGISLATIVE OUTPUT .....	7
I.3 ACTORS IN EU POLICYMAKING .....	8
<i>European Council: Presidency conclusions</i> .....	8
<i>The European Commission: DG Infso and documentary analysis</i> .....	9
<i>Council of Ministers press releases</i> .....	11
<b>II. THE OBJECTIVES OF INFORMATION SOCIETY POLICY</b> .....	<b>12</b>
II.1 MAKING AND CORRECTING MARKETS .....	13
<b>III. ORIGINS AND SCOPE OF COMMUNITY ACTION IN THE AREA OF INFORMATION SOCIETY</b> .....	<b>14</b>
III.1 TREATY-BASED INITIATIVES: BOOTSTRAPPING COMMUNITY COMPETENCE IN THE AREA OF TELECOMMUNICATIONS .....	14
III.2 LEGISLATING THE SECTOR: THE BANGEMANN REPORT AND THE ‘98 PACKAGE .....	14
III.3 REGULATING THE SECTOR: EUROPEAN AND NATIONAL REGULATORY AUTHORITIES .....	15
III.4 PROMOTING THE SECTOR: eEUROPE .....	18
<b>IV. TELECOMMUNICATIONS AND eEUROPE: NATIONAL EXPERIENCES</b> .....	<b>19</b>
IV.1 COMMON PRESSURE FOR CHANGE .....	19
IV.2 IRELAND: REGULATORY ENVIRONMENT .....	21
<i>The ‘nuclear option’: privatising telecommunications in Ireland</i> .....	21
<i>Governance structure: a privatised incumbent is not necessarily a free-market player</i> .....	21
IV.3 FRANCE: REGULATORY ENVIRONMENT: LIBERALISE, THEN PRIVATISE. ....	23
<i>The ‘softly-softly’ approach: privatising telecommunications in France</i> .....	23
<b>V. CONCLUSIONS</b> .....	<b>24</b>
V.1 NEW GOVERNANCE STRATEGIES.....	25
<b>VI. BIBLIOGRAPHY</b> .....	<b>27</b>

## Table of Figures and Graphs

FIGURE 1	LEGAL INSTRUMENTS AND FORMS OF IMPLEMENTATION.....	5
FIGURE 2	SPECIFIC SECTORIAL INSTRUMENTS IN INFORMATION SOCIETY.....	6
GRAPH 1	LEGISLATIVE OUTPUT IN INFORMATION SOCIETY, 1971-2006.....	8
GRAPH 2	FREQUENCY OF SPECIFIC TERMS IN PRESIDENCY CONCLUSIONS 1992-2006.....	9
FIGURE 3	COMMISSIONERS HOLDING ‘INFORMATION SOCIETY’-RELATED PORTFOLIOS FROM DELORS TO BARROSO .....	10
GRAPH 3	COMMISSION PUBLICATIONS IN THE FIELD OF INFORMATION SOCIETY 1994-2006.....	11
GRAPH 4	FREQUENCY OF SPECIFIC TERMS IN COUNCIL OF MINISTER PRESS RELEASES 1995-2006 .....	12
FIGURE 4	EU AND NATIONAL AUTHORITIES .....	16
FIGURE 5	CROSS-COUNTRY COMPARISONS .....	17
FIGURE 6	OECD CROSS-COUNTRY BROADBAND COMPARISON JUNE 2006 .....	19
FIGURE 7	EVOLUTION OF OWNERSHIP AND MARKET SHARE OF IRISH AND FRENCH INCUMBENTS.....	20
FIGURE 8	NRAS, PRIVATISATION AND LIBERALISATION IN IRELAND AND FRANCE.....	20
GRAPH 5	INVEST IN E-COMMUNICATION IN FRANCE AND IRELAND 2001-2004 .....	24

## Foreword

### Situating Information Society policy within the framework of NEWGOV

New modes of governance, their emergence, execution, evaluation and evolution, have been, in an earlier phase of the cluster's activities, analysed 'in vitro', i.e. from a normative or theoretical point of view. Currently, our perspective switches to an 'in situ' approach i.e. from within a specific policy field. This study takes the hybrid policy field of 'Information Society' as a laboratory for observing new modes of governance in action. The policy field is 'hybrid' in the sense that it cannot be associated with a single policy objective, nor a discrete set of actors, even less a unique mode of governance. As such it serves as an interesting case study for exploring the definitions and hypotheses suggested by the Consortium's scientific guidelines. In order to situate better the arguments set out in this working paper, it is useful to first confront this current perspective with the more general of the guidelines hypotheses and situate it within the conceptual framework of the Consortium.

### Definitions, propositions and plan

Firstly, is Information Society policy a 'new mode of governance' within the understanding of NEWGOV? Boerzel, Guttenbrunner and Seper (deliverable 12/D1) provide us with a conceptual filter to test whether a policy area can be said to be a new mode:

new modes of governance refer to the making and implementation of collectively binding decisions (based or not based on legislation) that (1) are not hierarchically-imposed, i.e. each actor involved has a formal or de facto veto in policy-making and voluntarily agrees with the decision made, and (2) systematically involve private actors, for profit (e.g.) firms and not for profit (e.g. non-governmental organisations) in policy formulation and/or implementation' (Boerzel et al. 12/D1).

Our policy field straddles this definition for the following reason: information society policy covers both (a) telecommunications policy that is (1a) hierarchically-imposed i.e. actors have no right of veto in policy-making, but (2a) does involve private actors, i.e. telecom operators, in policy implementation (and to some extent, its formulation) and (b) an eEurope programme that is (1b) not hierarchically-imposed, and (2b) does not systematically involve private actors. That is to say, Information Society policy is both based *and* not based on legislation according to which area of the policy one concentrates on. Information Society *legislation* is characterised by framework directives that establish broad objectives and decentralised (but centrally supervised) implementation. Information Society *promotion* is characterised by Community programmes and voluntary compliance. For example, under Regulation EC/2887/2000, incumbent telephone operators are required to share access to existing communications infrastructure or 'local loops'<sup>1</sup> with new market entrants. As a regulation, it does not have to be transposed into national law and is directly applicable. This is a model of the traditional Community method: the regulation has direct effect, takes precedence over national law, and is judiciable before the European and national courts. Furthermore, its implementation is supervised by the European Commission in concert with national authorities. As a counterpoint to this, the i2010 programme for the promotion of an Information Society is a

---

<sup>1</sup> Local loop unbundling (LLU) involves access from the local telephone exchange (generally operated by the incumbent) to the home or business of the customer. It is one of the most contentious issues in telecoms regulation as it deals with competition aspects.

voluntary programme based on encouraging, supporting and preparing initiatives. These represent two very different steering modes, both unarguably within the policy field.

Following Trieb et al., figure 1 illustrates the link between types of policy instrument and forms of implementation and also the relationship between legal instruments and forms of implementation.

**Figure 1 Legal Instruments and Forms of Implementation**

Legal Instruments and Forms of Implementation.		Legal Instruments	
		Binding	Non-binding
Implementation	Rigid	I. Coercion: <b>Regulation on local loops</b>	III. Targeting
	Flexible	II. Framework Directive: <b>Telecommunications</b>	IV. Voluntarism: <b>eEurope/i2010</b>

Source: Treib et al. (2004)

Using this framework, Information Society policy straddles the binding and non-binding dichotomy, both telecommunications legislation and eEurope programmes display aspects of flexible implementation: the implementation of the greater part of telecommunications policy is delegated to national regulatory bodies who apply the principles of EU law to the domestic situations. These are independent authorities although their decisions are subject to both Commission recommendations and guidelines and national courts of appeal. Figure 2 below illustrates the variety of instruments used in the field of Information Society policy.

**Figure 2 Specific sectorial instruments in Information Society**

<b>Specific sectorial instruments</b>	<b>Telecoms</b>	<b>eEurope/i2010</b>
<b>BINDING MEASURES</b>		
<b>Regulations</b>	Regulations: Local Loop Unbundling	N\A
<b>Rulings, obligations</b>	Rulings: Appeals courts, European Court of Justice	N\A
<b>Framework directives</b>	Directives: 2003 Framework Directive (6)	N\A
<b>Decisions</b>	Decisions: EU-Committees and National regulators	Assessing action plans Establishing advisory bodies
<b>NON-BINDING MEASURES</b>	<b>Telecoms</b>	<b>eEurope/i2010</b>
<b>Guidelines</b>	Commission guidelines on market analysis	Communications from Commission
<b>Recommendations</b>	Commission recommendations on assessment of market structure	Community action plans
<b>Statements/plans</b>	ERG policy documents	National action plans

A second question arises from the above: given the hybrid nature of the policy field, what NEWGOV propositions can be usefully explored? The definitional complications are, we argue, opportunities to set the two modes (binding and non-binding) against some of the following questions posed by NEWGOV. Information Society, taken as a whole, presents a policy field with, (a) strong cross-border characteristics, (b) involves governmental and non-governmental actors, (c) requires extensive domestic reform, and (d) encompasses old and new modes. Thus, we should be able to examine such NEWGOV questions as:

Q.1. Are these new modes of governance better able to tackle the challenges a diverse and interdependent world?

Q.2. Do they improve governability or do they detract from it?

Q.3. Are they gradually subject to processes of institutionalisation and embedding in existing political/administrative frameworks, or are they especially subject to capture by ‘traditional’ forces and institutional erosion?

These questions will be the object of our concluding section. Following the guidelines established by the Cluster (Diedrichs and Wessels, 2006), we will begin with an institutional map of the policy field at EU level. The following section presents the two national case studies: Information Society in Ireland and France. The final section will confront the findings with the framework of the Consortium and ask what we have learned from Information Society policy regarding new modes of governance?

## **I. The Broader Picture: Institutions and Legislative/Political Activity at EU Level**

Analysing new modes of governance in specific policy areas using the classical legislative approach where the quantity of directives and regulations in the field can be a proxy for Community action can only go so far. Drawing on work of Wessels and Diedrichs (D01/36) we present here certain features of what they call the ‘legal and living’ constitution. Soft law instruments such as the open method of coordination and national action plans are ‘beneath the radar’ so to speak, as they do not occur in Celex databases nor are published in the Community’s Journal Officiel. Elements of content analysis applied to a wider selection of EU documents (press releases, presidency conclusions, Commission communications, etc.) can yield a picture of who is involved in policy making and when a policy area is subject to intense political activity. By analysing the occurrence and frequency of key terms in institutional documents as well as in Celex, we can map the legislative and political lifecycle of aspects of Information Society policy.

### **I.1 Treaty provisions**

The Treaty provisions invoked in Information Society legislation are generally those relating to rules on competition i.e. Article 86.<sup>2</sup> Subparagraph 86(3) gives the European Commission the right of initiative in the policy cycle with Qualified Majority Voting in the Council (Transport, telecommunications and energy) and co-decision with the European Parliament. However, both competition and trade policy provisions have been used by the Commission in liberalising the sector.

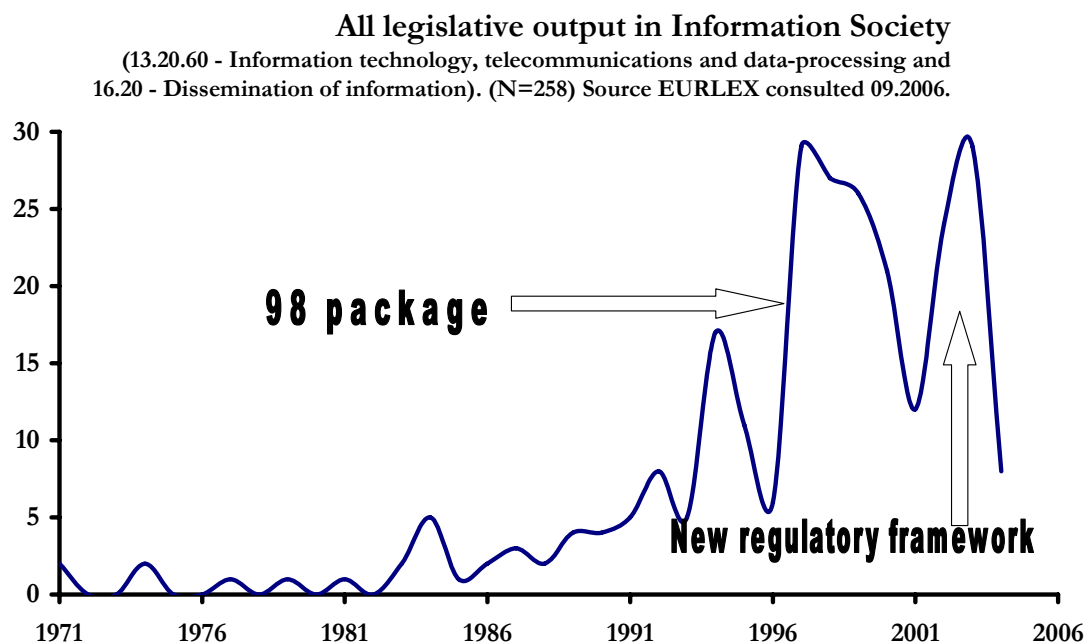
### **I.2 Legislative output**

A detailed analysis of all legislative output (regulations, directives and decisions) using the Eurlex database provides a rough portrait of the emergence of Community activity in the area. EU-level involvement was residual throughout the 1970s but showed some increase in the late 1980s. The peaks observed in legislative activity correspond with the three crucial stages in the policy’s development: the Bangemann report and its fallout in 1994, the 98 package and, most recently, new regulatory framework of 2002. Also of note is the drop off of activity since 2003. As the framework effectively delegates regulatory authority to the National Regulatory Authorities (NRAs), Community legislation is not to be expected.

---

<sup>2</sup> Article 86 reads:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

**Graph 1 Legislative output in Information Society, 1971-2006**

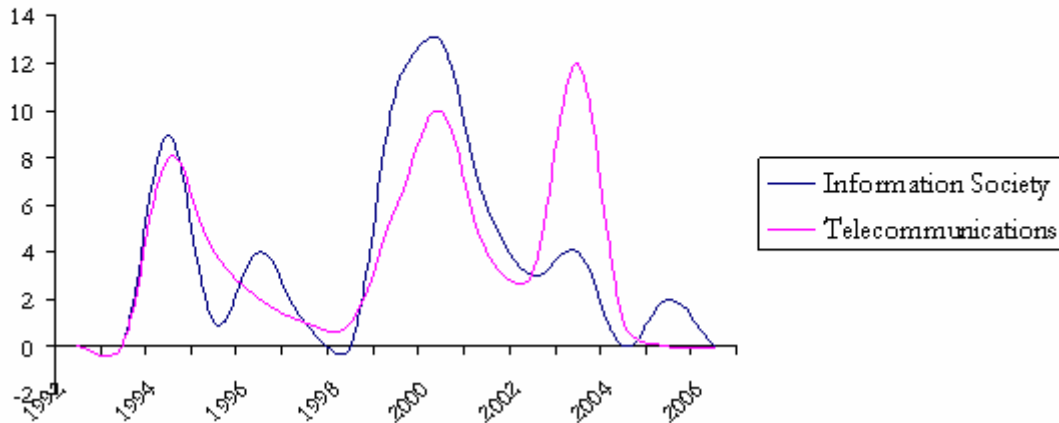
### I.3 Actors in EU policymaking

#### European Council: Presidency conclusions

The 'ultimate' policy initiator, the European Council, does not legislate of course, but its declarations establish general objectives that eventually get translated into legislation by Community institutions. It is useful therefore to examine the appearance of certain terms in Presidency conclusions and compare them with other indicators of Community involvement. Taking the occurrence of the terms 'Information Society' and 'Telecommunications' as proxies for the European Council's interest in the field the following can be observed: the first reference to the 'Information Society' appeared in 1994 (Corfu Summit) after which the term has frequently, if irregularly (see Graph 2 below), re-occurs. References to Telecommunications follow a remarkably similar path with most occurring in 2000 and 2003. Interestingly, references to Information Society peaked in the run up to the Lisbon summit of March 2000 (the co-called 'dot.com summit') and have dropped considerably since. Indeed, the term has only occurred twice since 2004. The peak observed over 1999-2000 corresponds to the launch of the eEurope initiative in the wake of the 98 package at the Lisbon Summit.

## Graph 2 Frequency of specific terms in Presidency conclusions 1992-2006

Frequency of terms in Presidency Conclusions 1992-2006  
(N=106) Source: Consilium site 10.2006



### The European Commission: DG Info and documentary analysis

The existence of a single Information Society portfolio within the Commission emerged only slowly as the figure 5 below testifies. The definition of a specific policy area within the Commission's own organisation only became clear from the Delors I onwards. The portfolio was shared between Commissioners from 1985 until 1989. With the Prodi Commission, Information Society subsumed Telecommunications but the portfolio was still only one of many under the Commissioner's responsibility. The current Commissioner, Viane Reding, is the first to hold a single 'information society' portfolio covering the areas of electronic communications and media.

**Figure 3 Commissioners holding ‘Information Society’-related portfolios from Delors to Barroso**

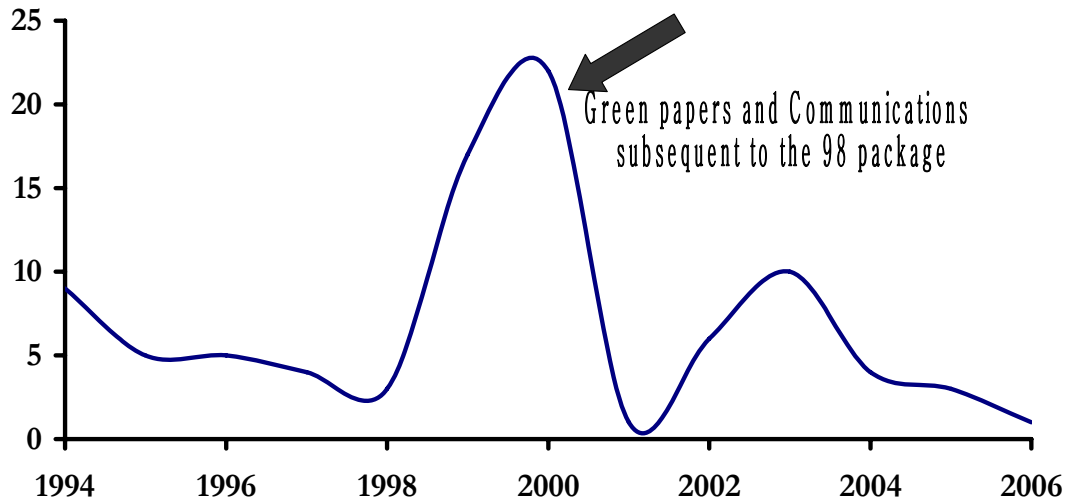
<b>Commissioners holding ‘Information Society’-related portfolios from Delors to Barroso</b>	
<b>DELORS Commission 85-89</b>	
<b>Karl-Heinz NARJES</b> Industrial Affairs Information Technology, Research, Science	<b>Lord Francis Arthur COCKFIELD</b> Internal Market Information Technology’ Research, Science
<b>DELORS Commission 89-93</b>	
<b>Filippo Maria PANDOLFI</b>	Science, Research and Development Telecommunica- tions, Information Technology and Innovation
<b>DELORS Commission 93-95</b>	
<b>Martin BANGEMANN</b>	Industrial Affairs Information Technologies and Tele- communications
<b>SANTER Commission 95-99</b>	
<b>Martin BANGEMANN</b>	Industrial Affairs Information and Telecommunications Technologies
<b>PRODI Commission 99-04</b>	
<b>Erkki LIIKANEN (resigned 11 July 2004)</b>	Enterprise, Innovation, Competition, Information Soci- ety
<b>Olli REHN (12 July 2004)</b>	
<b>BARROSO Commission 04-09</b>	
<b>Viane REDING</b>	Information Society and Media

DG Information Society (Infso) has a staff of 1,022 and a budget of €1,065m (2004). The Prodi reform of the European Commission in 1999 created a unique DG Infso where formerly DGXIII Telecommunications, Information Market and Exploitation of Research was responsible for similar policies areas pre-1999. Under Prodi, Commissioner Erikki Liikanen (Finland) had the twin portfolios of Enterprise and Information Society. Viviane Reding (Luxembourg), former Education and Culture Commissioner replaced Liikanen in 2004 with the sole portfolio of the ‘Information Society’.

The DG’s documentary output is another indicator of Community activity, the graph below plots the predictable trend in green and white papers covering the area. As in the Presidency conclusions, the peak corresponding to the aftermath of the 98 package is observed, as is a surge in documents in 2003 when the new framework was been implemented.

### Graph 3 Commission publications in the field of Information Society 1994-2006

Number of Commission COM publications in the field of Information Society. Source: EURLEX consulted 09/2006. N=44



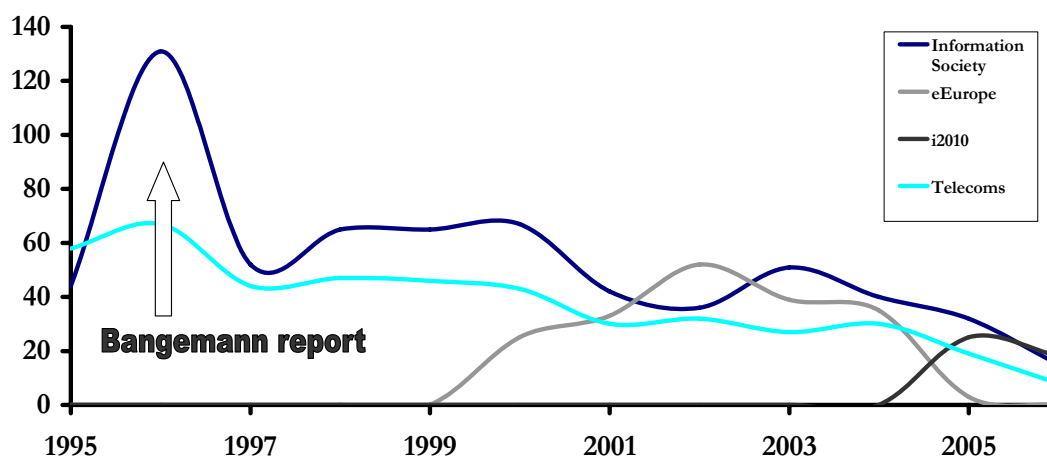
#### Council of Ministers press releases

A similar picture is seen if the Council of Ministers' press releases are analysed for the occurrences of the terms 'Information Society', eEurope, i2010 and Telecommunications. Since June 2002, the three policies of Transport, Telecommunications and Energy have been placed under the sole responsibility of a single Council configuration which meets approximately every two months. The origin of the 'Bangemann peak' is clearly identifiable. 'eEurope', as a term, was 'born' in 1999 and 'died' in 2005, to be replaced by i2010 in 2004. A general declining trend for the terms 'information society' and 'telecommunications' can be observed although the significance of this is debateable. The press releases of the Council of Ministers can be interpreted as a rough guide to the day-to-day occupation of the Council. Presumably, when an issue is successfully legislated for, it disappears from the agenda until the policy cycle dictates that it reappear. However, telecommunications are a perennial concern of the Council and one would expect the occurrence of the term to be stable or even increase over time.

**Graph 4 Frequency of specific terms in Council of Minister press releases 1995-2006**

**Occurrence of terms 'Information Society', 'eEurope' and 'i2010' in Council of Minister press releases 1995-2006.** Source

Consilium website (consulted 09/06). N=640



### Summary

Information Society policy is a relative newcomer to EU policy making. By bootstrapping Community competence in the field of telecommunications, ECJ case law uncoupled the sector from the state-owner enterprise exemption which led to all subsequent initiatives. The Bangemann report marked the explosion of Community activities that led to the 1998 and 2002 regulatory packages. The current lull in political activity as observed by the content analysis presented above is perhaps an interlude before the next wave of Community action. The Commission is currently working on proposals for new Directives modifying the regulatory framework for electronic communications and services. The revised framework is expected to be implemented in Member States around 2009 - 2010.

## II. The Objectives of Information Society Policy

For the purposes of this paper, the 'information society', a term that can be interpreted widely, has been taken to cover both telecommunications policy (legislation and regulation) and the eEurope programme (promotion). As mentioned above, the former can be characterised as a 'traditional' policy field with distinct Community competence, objectives, actors and legislative instruments. eEurope is a more nebulous entity that covers more 'aspirational' goals of coordination and convergence with weak Community competence and soft modes of governance. If the two areas are compared as to their respective objectives, telecommunications policy can be seen to regulate the 'hardware' of the information society, i.e. the channels through which content is delivered. eEurope (and its successor, i2010) operates at the level of the 'software' of the information society, i.e. the substance of what technology delivers. Without being ideal types, the two areas display asymmetrical modes of governance with complementary goals.

It is hard to overstate the impact of EU legislation in the field of telecommunications. Few policy areas display such a predominant European influence that has seen the dismantling of firmly established public monopolies and the establishment of liberalised communication markets in a matter of years. The two decades that separate the publishing of the first Commission green paper<sup>3</sup> on liberalising telecommunications and the current state of play have been marked by a remarkable convergence in governance structure in all member states. In 1986, government-owned and regulated Post and Telephone offices held legal monopolies. Twenty years later, whereas other public utilities are still governed by state-operated bodies (e.g. water, energy, transport, or education) all member states have wholly or mostly liberalised or privatised telecommunications sectors with market regulation ensured by independent agencies overseen by the Commission.

The knock-on effect of the liberalisation of this sector on national economies and societies is immense: without a dynamic telecommunications sector (the hardware), the content of an information society (the software) is simply not available (Botterman et al., 2003). The effect of liberalisation has also been varied: whereas all member states have converged towards a single regulatory model, the availability and affordability of telecommunications (especially broadband) differs greatly. Thus, e-government initiatives providing services to citizens through the internet are useless to those who cannot avail of a decent internet connection. The provision of an efficient and affordable communications infrastructure has been made the backbone of what the Lisbon agenda has termed the ‘knowledge economy’ and Community measures promoting the first are entirely bound up with the latter.<sup>4</sup>

Thus, the effect of EU telecommunications policy on the national performance in the key area of broadband penetration (how the regulation of the Information Society affects its promotion) will be the object of our case studies in section four.

## II.1 Making and correcting markets

The primary objective of information society (IS) policy pursued by the Community is the convergence of performance of member states as regards the provision and use of Information and Communications Technology (European Commission, 1995). The so-called ‘digital-divide’ encountered across member countries means that some extensively use ICT (e.g. Finland, Sweden) while others ‘lag behind’ (e.g. Greece)<sup>5</sup>. This regional disparity is seen as a hindrance to the functioning of the internal market, and provides the underlying rationale for Community action (Efana, 2003). Thus IS policy attempts both to (a) to regulate the infrastructure in order to guarantee efficient supply of services across the EU and (b) promote investment and rollout of ICT in areas such as broadband, the use of mobile phones, e-commerce etc. by establishing targets and benchmarks. Consequently, a combination of Treaty-based internal market and competition legislation has provided the instruments of IS regulation whereas voluntary, open method processes have been employed to promote the sector. Combining both market-making (through national deregulation of national telecommunications monopolies) and market-correcting (through the promotion or even direct funding of ICT projects<sup>6</sup>) measures, IS policy combines so-called ‘hard’ and ‘soft’ instruments.

---

<sup>3</sup> Towards a Dynamic European Economy, Green Paper on the development of the common market for telecommunications services and equipment. COM(87) 290, June 1987

<sup>4</sup> See Presidency Conclusions – Brussels, 14/15 December 2006 (16879/06)

<sup>5</sup> See EUROPEAN COMMISSION (2005b) Information Society Benchmarking Report.

<sup>6</sup> Approximately 7% of the Structural and Cohesion funds are used for ICT projects. Source: Inforegio MEMO/05/209

The twin market-making/market-correcting concepts (Radaelli, 2004) are useful in understanding the differing modes of governance observed in the field: frameworks directives and regulations have been employed ‘negatively’ to remove national restrictions to competition and free up EU markets for telecommunications infrastructure, intellectual property, broadcast media and e-commerce, whereas soft or voluntary coordination measures are designed to promote wider use of ICT. The liberalisation-by-legislation/promotion-by-coordination couplet characterises EU governance in the field thereby providing an apposite opportunity to analysis the interaction of the two modes. And, as we shall see below in the case studies, the regulation and promotion activities do not always complement each other.

### **III. Origins and Scope of Community Action in the area of Information society**

#### **III.1 Treaty-based initiatives: bootstrapping Community competence in the area of Telecommunications**

Since the Information Society cannot be isolated from telecommunications policy, it is practical to situate the origin of Community action in the field with the earliest attempts to open up the then monopoly-dominated area of post and telephony. In 1985, the European Court of Justice (ECJ) *Italy v. Commission* ruling<sup>7</sup> first introduced competition legislation into the telecommunications sector. This ruling was a departure from the then current understanding that state-owned service providers were exempt from Community competition law. However, the Court held that competition law applied to the sector despite the presence of statutory monopolies and state-ownership. Italy had argued that state action (involving price controls on private suppliers) was exempted from the Treaty articles 81 (ex 85), 82 (ex 86), and 86 (ex 90) as state-owned firms served a ‘uniquely public service’. Article 86 states that, [u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, *in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.*<sup>8</sup> The Court agreed with the Commission and held that competition law applied to the sector and that national laws favouring the ‘incumbent’ or monopoly supplier ran counter to the Treaty provisions. State-monopolies could remain in the hands of the state but could not behave in an anti-competitive manner by excluding private supplier access to markets.

In effect, this ruling interpreted telecommunications services as a business service (not a public service) no different from any other. This, perhaps more than any single legislative act, sounded the death knell for the century-old public service postal and telecoms monopolies in the Union.

#### **III.2 Legislating the sector: the Bangemann report and the ‘98 package**

A programme of specific EU legislation was launched with the Commission’s White Paper on growth, competitiveness, and employment.<sup>9</sup> This document identified the telecommunications sector as the key element in creating the information society. The main recommendation of

---

<sup>7</sup> Italy v. Commission (1985) ECR 873

<sup>8</sup> Art 90 (now 86) TEC (emphasis add)

<sup>9</sup> White Paper on growth, competitiveness, and employment: The challenges and ways forward into the 21st century (COM(93) 700 final)

the paper was the rapid creation of a ‘common information area’ based on common standards, a single regulatory environment, a trans-European telecommunication service and open competition. The European Council’s presidency conclusions of December 1993 echoed the white papers aims and requested a report on ‘Infrastructures in the sphere of Information’ that would cover such aspects of the sphere as networks and services (databanks, electronic mail, interactive video, etc.). The so-called Bangemann report on ‘Europe and the global information society’ was submitted in May 1994. Its ambitious and far-reaching recommendations established many policy objectives that largely define the Union’s agenda today.

The report recommended a ‘negative integration’ approach with the dismantling of national monopolies for telecommunication. It argued that the deregulation of the sector would open up competitive forces and recommended that ‘[t]he creation of the information society should be entrusted to the private sector and to the market forces’ (Bangemann, 1994). The report emphasized the importance of community action to ensure that European firms maintain their global competitiveness. It highlighted the need to accelerate the process of liberalisation, pointing out that US deregulation, which began a decade earlier with the break-up of AT&T in 1982, had strengthened foreign competition.

Commission proposals for legislation on the foot of the report became the so-called ‘98 regulatory package’. The liberalisation directives were accompanied by a series of harmonising directives adopted under Articles 95 (ex-100a, internal market) and 47(ex-57) and 55 (ex-66, freedom to provide services). The purpose of the legislation was to undo the monopolies in each member state (although privatisation was not obligatory) and remove any distortion of competition inevitably left over by the existence of a dominant formerly state-owned undertaking. A ‘soft-touch’ approach was favoured: the legislation set policy objectives but allowed member states the possibility of achieving these end via different means. Given the variety of national settings, the Commission opted for an *ex-ante* legislative approach: once the framework directives set out the general goals, national markets would be regulated only when circumstances required i.e. were market distortions remained. Legally distinct and functionally independent National Regulatory Authorities (NRAs) were given powers to enforce the *ex ante* rules and impose fines based on Commission guidelines and recommendations.

### III.3 Regulating the sector: European and National Regulatory Authorities

The governance of telecommunications policy is shared between several EU-level bodies that aim to ensure the consistency of implementation across member states and individual national bodies that translate the guidelines into enforceable decisions. These decisions affect the behaviour of players in the market and are therefore subject to appeals from unhappy players (whether from the established or new entrants).

The European Commission supplies the NRAs with the methodology and definitions needed to analyse the eighteen markets covered by the framework directive.<sup>10</sup> Decisions are issued only where markets are not effectively competitive, that is where one player has significant market power (SMP). Typically, the former state-owned operator has significant market power by virtue of it owning the physical network over which voice or data is communicated. This is particularly prevalent in the area of wired connections to individual homes or businesses. These ‘leased lines’ are the entry points for telephony and internet services which, if withheld by the incumbent provider, can block the entry of competitors to markets.

---

<sup>10</sup> These range from ‘Access to the public telephone network at a fixed location for residential customers’ to ‘Broadcasting transmission services, to deliver broadcast content to end users’. See OJ L 114/49

Once the Commission has issued guidelines on how to analyse markets and establish the presence of anti-competitive behaviour, the NRAs carry out the analyses and notify the Commission on its findings.<sup>11</sup> The Commission assesses the findings under the ‘Article 7’ procedure after which it can approve or comment or, in certain cases, veto the measures. Only four notifications of over five hundred (as of 2006) have been vetoed, two from Finland, one each from Germany and Austria.

**Figure 4 EU and national Authorities**

<b>EU-LEVEL AUTHORITIES</b>	<b>Membership</b>	<b>Role</b>
The Communications Committee	Member States representatives chaired by Commission representative	Advisory and regulatory committee
European Regulators Group	Heads of the national regulatory authorities	Ensure the consistent application of the regulatory framework
Radio Spectrum Policy Group	High level governmental expert from Member States and high level Commission representative	Coordination of the use of radio spectrum
Radio Spectrum Committee	Member States representatives chaired by Commission representative	Harmonisation of frequency allocation and develop radio spectrum policy
<b>NATIONAL AUTHORITIES</b>		
	IRELAND	FRANCE
Regulatory Authority	COMREG	ARCEP
Competition Authority	The Competition Authority	Conseil de la Concurrence
Telecoms Appeals Panel	ECAP	N/A
Court of Appeal	High Court	Conseil d'Etat, Cours d'Appel

Although the EU directives and regulations thoroughly restructured the area of telecommunication, overriding national rules and practices, causing monopolies to be liberalised or privatised, and the adoption of common standards, the major players in the sector today remain the former monopolies (incumbents). So although *implementation* of Community measures is complete, *compliance* with open market principles remains an allusive goal.

In 2006, the NRAs general annual report on the state of play in the market notified the Commission that incumbent provider still account, on average, for 93% of fixed line local calls and 50% of broadband access.<sup>12</sup> One of the reasons for the persistence of incumbents’ market

<sup>11</sup> Commission's Recommendation on relevant markets and the Guidelines on market analysis and assessment of significant market power (SMP).

<sup>12</sup> EUROPEAN COMMISSION (2006a) Commission Staff Working Document Annex to European Electronic Communications Regulation and Markets 2005 (11th report). SEC(2006)193.

power in some member states is the relative ineffectiveness of NRA decisions. Under the framework directive, telecommunication providers have the right to appeal any decision issued by the NRA. According to the national legal system, the appeal court may be a local administrative court, a high court or, as in the case of Ireland, a specially established authority. Firstly, given the importance of the stakes many, if not most, of the NRA decisions are subject to appeal. Secondly, in the event that an operator is in breach of a decision, not all NRAs have the power to impose fines or sanctions. For example, the Irish NRA, Comreg, cannot impose fines of more than €3000 whereas the French NRA, ARCEP, can impose a fine of up to 5% of a firm's annual turnover, i.e. a sum that could easily reach into the hundreds of millions of euro. Unsurprisingly, the Irish NRA has seen 75% of its decisions appealed or overturned whereas ARCEP's batting average is only 20% (see table below).

**Figure 5 Cross-country comparisons**

INDICES	IRELAND	FRANCE	SOURCE
Broadband penetration per capita	9.2%	17.7%	OECD June 2006
Incumbent share of ISP market	76%	69%	'ECTA Broadband scorecard end of March 2006'
Percentage of ULL lines	3.9%	37%	'ECTA Broadband scorecard end of March 2006'
Cost of initial connection (€)	107	46	DG Regional Policy 2005
Broadband score	14th	1st	ECTA Regulatory scorecard 2006
Implementation of New Regulatory Framework	2 <sup>nd</sup>	10 <sup>th</sup>	ECTA 2006
Effectiveness of Appeals procedure	10 <sup>th</sup>	1st	ECTA 2006
Percentage of NRA's rulings annulled or overturned by competent national courts since 2002	75%	20%	ECTA 2006
Institutional framework	9 <sup>th</sup>	3rd	ECTA 2006
Effectiveness of implementation	14 <sup>th</sup>	3 <sup>rd</sup>	ECTA 2006

The annual European Competitive Telecommunications Association's<sup>13</sup> (ECTA) regulatory scorecard places Ireland's NRA fourteenth out of seventeen for effectiveness of the framework implementation. France came first.

Indeed the spread of performance across member states both in terms of actual telecommunication output and regulatory effectiveness is great. This has prompted the EU Commissioner,

<sup>13</sup> The European Competitive Telecommunications Association is a privately funded body that promotes the regulatory and commercial interests of new entrant telecoms operators

Viane Reding, to call for the establishment of a single European regulator. ‘The independent European telecom authority that would work together with national regulators in a system similar to the European System of Central Banks. In such a system, national regulators would continue to act as direct contact points with operators and could directly analyse the market as they do today, but would have to operate as a system, and in line with the guidelines and decisions of their supranational level’ (Speech/06/697).<sup>14</sup>

### III.4 Promoting the sector: eEurope

As mention above, information society policy encompasses broader socio-economic objectives beyond the existence of a dynamic telecommunications sector. The Bangemann report emphasised the links between infrastructure and social goals (‘a more caring European society, new opportunities to express cultural traditions’) but did not prescribe regulations in the latter area. The report called for a ‘market-driven revolution’ with the minimum of regulation in the area of content supply. This has not prevented the Commission promoting content development through an open method of coordination launched in 2000: eEurope. This initiative was not accompanied by any hard legislation, leaving member states the option of voluntarily participating in the benchmarking and target-setting. However, like other OMC initiative, it relied on naming and shaming techniques to encourage state involvement. Whether or not member states were involved with the process, all members were included in performance tables and scoreboards on such measures as broadband penetration, public services on-line, and e-privacy etc.

All member states did indeed establish eEurope action plans with national measures flagged to promote the convergence of their performance with best practice. Whether or not these national action plans were effective is another matter as, c.f. the example of implementation above, compliance with eEurope goals has been very unequal across member states. Several benchmarking exercises have been carried out, revealing disappointing trends. In 2005, the Information Society Benchmarking Report<sup>15</sup> concluded that although there were some success stories (broadband uptake in some countries, availability of online public services), ‘disparities between Member States had not reduced between the start of eEurope and 2004’ (CEC 2005). Although member states had progressed towards an ‘information society’, the gaps in performance remained proportionately the same.

These coordination efforts were themselves ‘benchmarked’ independently in March 2005. The report considered the impact of OMC on IS policy, while the second analysed the impact of IS policy on the Lisbon Strategy. The conclusions of the first report were not enthusiastic:

The OMC mechanism in eEurope (benchmarking, exchange of good practice) has had little effect, except where it is in tune with national ways of doing things and pre-existing practices. While OMC has helped frame or reinforce policy objectives and orientations, it has not helped to define actual policy, nor has it helped to determine actions to be taken (ibid p.33)

### Summary

EU legislation and ensuing regulation determine member states ability to promote the Information Society. In a following section we will attempt to see whether the goals of eEurope

<sup>14</sup><http://www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/697&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>15</sup> EUROPEAN COMMISSION (2005c) Information Society Benchmarking Report 2005.

were helped or hindered by the regulatory package. First, it will be useful to map the emergence and evolution of information society policy at EU level. As in all policy fields: institutions matter.

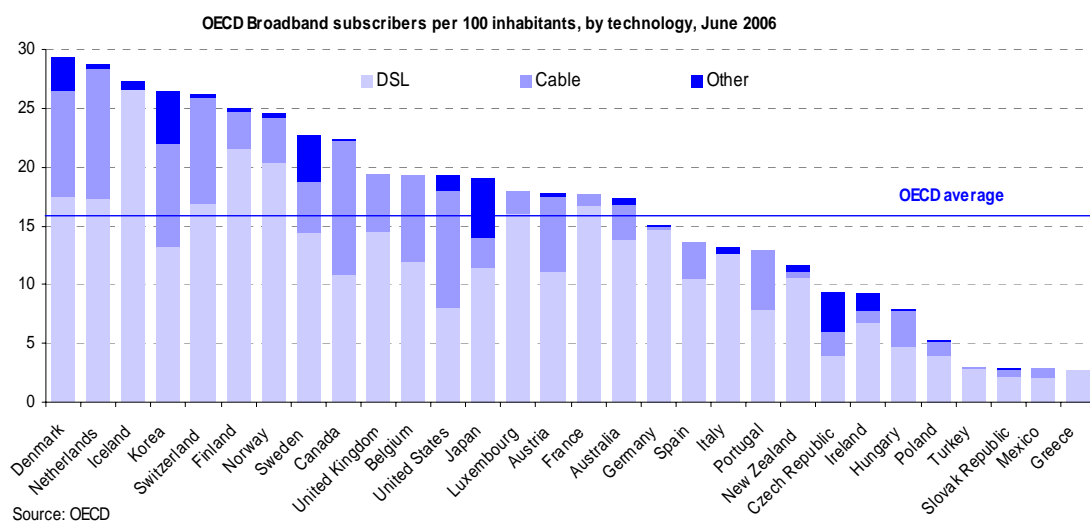
#### IV. Telecommunications and eEUROPE: National Experiences

The following section will appraise the twin areas of telecommunications and eEurope in both Ireland and France. This two-policy/two-country approach will allow a comparison of outcomes between governance modes in two very different regimes. Ireland is a small open economy whose approach to governance (here ownership of public utilities) differs greatly from that of the comparator, France. Whereas Ireland took an extremely liberal approach to the telecommunications reform, France conformed to its traditional étatist approach (Thatcher, 2004a). As we shall see, these similar pressures for reform gave rise to a variety of adaptations.

##### IV.1 Common pressure for change

The telecommunications sector in developed countries has shown a remarkable level of convergence both in technology and regulatory environment (Thatcher, 2004b). Indeed, concomitant with EU legislation, both Ireland and France dispose of almost identical governance structures: legislation is made at EU-level with national regulatory authorities (NRA) ensuring implementation under Commission leadership. However, this symmetry in governance structure belies the performance of each member state in the Information Society. As the figures in table 4 indicate, in both broadband and regulatory scoreboards, Ireland and France come, respectively, almost worst and best practice.

**Figure 6 OECD cross-country broadband comparison June 2006**



The reason for such a performance gap is, it is argued, can be attributed to the manner in which the liberalisation process was implemented by the member states (Wallsten, 2006, Edwards and Waverman, 2006). The principal focus of the European Commission was the liberalisation of the telecommunication sector, leaving the choice of privatisation to individual member states. France and Ireland had differing philosophies as regards the dismantling of state ownership of public utilities. The prevailing position of the French governments in the

90s was the so-called ‘ni-ni’, or neither-nor, approach: neither privatisation nor nationalisation. This meant that France Telecom remained under government influence whilst its ownership and the markets it operated in were opened up to private investors.

By contrast, in Ireland, the nineties was a time of widespread disillusionment with state ownership:

The state companies became identified with high costs and overmanning. The companies achieved 'regulatory capture' over the government departments charged with their supervision. They received regular subsidies from the Exchequer and sought regular supplies of free capital. The protection which the state companies enjoyed created economic rent which was absorbed by a combination of overmanning and remuneration in excess of the levels in sectors which did not have protection from competition (Barret, 2003).

Telecommunications deregulation in Ireland was faster and more intensive than in most other member-states. Indeed, the state quickly sold 100% of its share, foregoing any residual control offered by the golden share option adopted in other member states. French governments took a more sceptical approach to regulatory reform in telecommunication markets and tended to lag behind in the implementation of EC Directives and, according to a OECD report, had ‘been overprotective of the incumbent carrier in which the government is still a major shareholder’ (OECD, 2003). However, although Ireland’s implementation of the package was more in keeping with the liberal nature of the directives, France’s performance in the information society is significantly better if the usual benchmarks (broadband penetration, e-government, prices to consumers) are applied.

**Figure 7 Evolution of ownership and market share of Irish and French incumbents**

Evolution of ownership and market share of Irish and French incumbents.							
		1990		1998		2006	
		FT	Eircom	FT	Eircom	FT	Eircom
Government ownership		100%	100%	62%	49.9%	34.9%	0%
Share of broadband market operated by incumbent						69%	76%

Source Corporate annual reports, ECTA scorecard 2006

**Figure 8 NRAs, privatisation and liberalisation in Ireland and France**

	France	Ireland
National Regulatory Authority established	1997	1997
Full market liberalisation	1999	1998
State ownership falls below 50%	2004	1999

## **IV.2 IRELAND: Regulatory environment**

### **The ‘nuclear option’: privatising telecommunications in Ireland**

The state-owned operator, Bord Telecom Éireann (now, eircom group plc), was held in state-monopoly until 1999. The state had gradually divested itself of ownership and control from 1995 onward but full liberalisation was initially resisted by the Irish government which, in 1996, sought, and successfully obtained, an eighteen-month derogation from implementing the EU regulatory reforms. Arguing that massive on-going capital investment by the state-owned operator was necessary for the strategic development of the telecommunication's infrastructure. The debts incurred by Telecom Eireann were such that the government of the day estimated that it would not attract sufficient interest from private investors. It set an initial date for open market access from 1 January 2000.

In the event, the government decided to forego the grace period and bring the privatisation forward. The floatation of the state monopoly on the Irish, London and New York stock exchange took place in May 1999 and the object to great public interest. Some 480,000 Irish small and first time investors (almost 25% of the adult population), encouraged by a government advertising campaign, bought into the company to the tune of €5000 (approx) per person. The company was valued at €10 billion, with the state initially holding 50.1% of the stock.

The stock almost immediately lost 60% of its value, leading many small investors to sell out to larger corporate actors at a deflated price. The government also sold the remainder of its stock, also at a substantially reduced price. The ensuing scandal not only rocked the then incumbent Fianna Fail government, it sapped popular confidence in what had been a pillar of Ireland public service.

In November 2001, the company delisted from the stock market having being purchase by a private consortium (Valentia) for 3 billion euros. It was broken up into fixed, mobile and internet services with the more profitable sectors being sold off, reaping enormous dividends for the seller. This lead to accusations of asset-stripping and capital underinvestment as the management pursued a ‘milk the cash-cow’ stratagem (Palcic and Reeves, 2004). It was returned to the stock exchange three years later. In all, the company has been bought and sold four times in seven years leading a major Irish newspaper to sum up the situation thus,

As a result, the company is but a pale shadow of what was once the flagship of the sector. In the space of seven years the Republic has gone from having a good telecommunications network operated by a well-capitalised company with a clear focus to having a network desperately in need of investment run by a company lacking any discernible long-term goal other than selling itself to the highest bidder (The Irish Times, 24.02.2006).

### **Governance structure: a privatised incumbent is not necessarily a free-market player**

The independent telecommunication regulator (set up under the terms of the EU 98 regulatory package) was established in 1996. Its primary role was to ensure that market rules were obeyed and that the incumbent (the former monopoly holder Eircom) did not abuse its dominant position by crowding out potential market entrants. “The purpose of the Office of the Director of Telecommunications Regulation (ODTR) is to regulate with integrity, impartiality and expertise to facilitate rapid development of a competitive leading edge telecommunication sector, that provides the best in price, choice and quality to the end user, attracts business investment and supports ongoing social and economic growth (ODTR, 1998)”. From the

outset, the incumbent Eircom proved itself very skilful in obstructing the liberalising measures of the legislation by successfully appealing the ODTR's rulings. Although the regulator won most appeals, the significant delays in issuing ruling was seen as an impediment to competition (The Irish Times, 18.2.2005).

In 2002, in accordance the implementation of the new regulatory framework, the ODTR became the Commission for Communications Regulation (ComReg) that cover all of the former's sectors and included postal services. Again, the incumbent Eircom was quick to appeal ComReg's rulings and initiate proceedings against decisions. These 'delaying tactics' were exacerbated by the establishment on a formal appeals panel (ECAP) that was intended to increase the speed with which ComReg decisions are complied with. Eircom effectively used this forum to block any decision ComReg made against them by issuing an appeal against it. Recently, Eircom appealed to the court of last resort (the High Court) to guarantee its right of appeal. The High Court Judge upheld Eircom's right. An independent report (Citigroup) concluded that

Trench warfare characterises the ComReg/eircom relationship as the regulator attempts to engineer a boost to nascent competition. However, ComReg's inability to enforce structural change – as a result of the appeals process and right to Judicial Review – has enabled eircom to reinforce its market position. The list of ongoing regulatory reviews, consultation and appeals is long and far ranging. However, as the recent Judicial Review aptly demonstrated, eircom is well equipped to repel its boarders (Citigroup, 2005).

As a consequence, Ireland lags well behind other EU countries in the price of telecommunications and broadband penetration. As illustrated by graph 5, underinvestment by the incumbent was a factor in Ireland's poor eEurope performance (The Irish Times, 30.05.2003). When faced with NRA decisions is sometimes threatened to suspend investment arguing that it would be made bankrupt by the imposed tariff reductions. In 2005, the subsequent loss to Ireland's telecommunication infrastructure was the trigger for state intervention. The Irish government sought and obtained Commission permission (DG Communication, 2006) to relax state aid rules and invest €200 million in broadband infrastructure. Citing the Communication "i2010 – A European Information Society for growth and employment (European Commission, 2005a)", it argued that state aid was both necessary and justified. In partnership with the local authorities, the Irish Government is currently building state-owned fibre-optic networks ("Metropolitan Area Networks") in over 120 towns where such infrastructure is not supplied by the market (European Commission, 2006d).

The irony of the situation is stark: Ireland's privatised incumbent displays monopolistic behaviour and avoids state and European control (a) because it is wholly independent (the Irish state is not a shareholder and therefore cannot exercise control over the incumbent's behaviour) and (b) it thwarts the NRA's control by exploiting the appeals procedure made available by the European legislation. The state is forced into a position of filling the gap left by the incumbent and supply state-aid to infrastructural development arguing that it must do so to fulfil its i2010 objectives (the Irish MAN initiative).

The Commission recently remarked,

[o]bstacles remain to the further development of competition in the fixed and broadband markets, particularly the limitation of the NRA's power to enforce decisions. These issues may have contributed to the lack of a functioning local loop unbundling (LLU) product that would help to further im-

prove Ireland's poor broadband performance, which has shown progress towards the end of 2005' (European Commission, 2006b).

#### **IV.3 FRANCE: Regulatory environment: Liberalise, then privatise.**

As mentioned, France was not an enthusiastic regarding the liberalisation of its state-owned utility. Unlike the UK, who liberalised its telecommunications market and established an independent national regulatory authority (OFTEL) in 1984, France waited until after the EU initiative (the 98 package) to initiate market liberalisation. The domestic enabling legislation was passed in 1996 and L'Autorité de Régulation des Télécommunications (ART) was established in 1997. This NRA was reformed in 2005, becoming l'ARCEP : l'Autorité de Régulation des Communications Electroniques et des Postes. Until recently (January 2004) the French government's stake in France Telecom was, by law, above 50%. However, slow but steady privatisation

This late privatisation has not hindered France's performance in the Information Society. According to a recent OECD report 'French users can take advantage of one of the most dynamic and competitive broadband markets in Europe, which has high penetration rates and attractive prices. Considerable progress has been made in France since the last Report concerning transposition, finally completed, and market analyses, although an effort is required to conclude the latter as soon as possible (OECD 2003).

#### **The 'softly-softly' approach: privatising telecommunications in France**

Until 1988, telecommunications were managed under the auspices of a government department, the Direction générale des telecommunications. In 1990, the re-baptised France Télécom was granted a separate legal and financial status and the state officially seceded from day-to-day control. Six years later France Télécom becomes a limited company, albeit one with a sole shareholder: the French state. October 1997 saw the first opening of 25% the company's capital to a public share offer (or 211 million shares). The move met strong internal trade union opposition as traditionally, employees were civil servants (Knapp and Wright, 2006). The prospect of privatisation led to fears of a loss in status by the labour force. Despite this unrest, the offer met with widespread enthusiasm and the stock was vastly oversubscribed and price gained immediately (Le Monde, 18.03.1998).

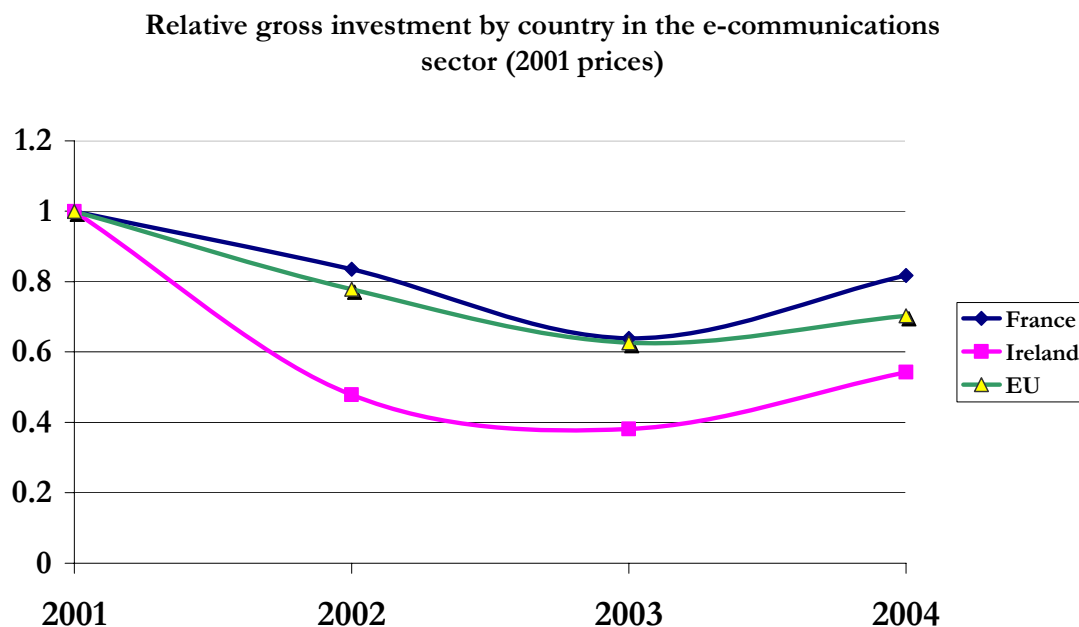
Such was the success of the initial offer that the state decided to sell off another 13% the following year. The profits from the sales, (then FF80 billion or the equivalent of €12 billion today) were used to invest heavily in the digitisation of the voice and internet networks and the burgeoning mobile market. France Télécom engaged in massive international investments, becoming the fourth largest operator in the world in 2000. Once the bubble had burst on the dot.com episode, France Télécom found itself overstretched and saddled with huge debts of €45 billion that the company sought to reschedule with its financial backers but also the state, which still owned 56% of the shares. In late 2000, €15 billion was granted to the operator by the treasury in the form a recapitalisation.<sup>16</sup> It was made clear at the time that these monies were forthcoming in preparation of a complete privatisation of the company before 2005 (l'Expansion 05/12/2002).<sup>17</sup>

<sup>16</sup> DG COMMUNICATION (2004) Commission rules that France Télécom received illicit aid and orders that it be paid back to the state. *RAPID press release*, IP/04/981.

<sup>17</sup> France Télécom : Objectif privatisation, dernière restructuration avant privatisation. *L'Expansion* 05/12/2002

As a result, investment suffered. By 2003, gross investment had fallen to less than 70% of its 2001 level (London Economics, 2006). This trend was observed in most member states, as represented in the graph below, although investment regained after 2003.

**Graph 5 Invest in e-communication in France and Ireland 2001-2004**



### Summary

As was evident from section 3, the role of the regulator and the strategic choices of national governments weigh heavily on the performance of member states in the field of Information Society. Ireland's liberal approach led to the transfer of a monopoly from state to private control. Both forms of monopoly have their limits, states 'oversupply' public goods, firms under-supply them. The question whether or not telecommunications infrastructure is considered a public good has been answered by recent government-funded initiatives to roll-out broadband. The NRA's difficulties to introduce competition in to the market are largely explained by the early privatisation of the major player in market that was not fully liberalised. France's approach has its drawbacks too. The maintenance of France Télécom's special status and the attribution of state-aid may have allowed it to shore up its dominant position: in the meantime it invested hugely in infrastructure providing France with a world-class broadband offer. Also, the powers of the regulator has grown to the extent that it can impose its decisions on

## V. Conclusions

Regulatory convergence, i.e. the establishment of a single model of governance does not guarantee similar policy outcomes. In both Ireland and France, an identical template for change was imposed: the scheduled liberalisation of telecommunications markets, the end of any special status for the historical monopoly, and the combined regulatory supervision of national and EU-level independent authorities. This convergence in governance across member states has not heralded a convergence in performance. France's broadband rollout is

world-class whereas Ireland's puts it in the worst performing counties in the developed world, prompting the state to finance a parallel government-backed network.

The reasons for the disparity in performance are to be found in the market structure (Ireland has a higher rural-to-urban inhabitant ratio than France) and market size but also in the regulatory environment encountered in each member state:

1. The Framework Directive 2002/21/EC did not require member states to set up a system of fines, sanctions or remedies. This has meant that certain NRAs have little leverage to influence the incumbent's behaviour, leaving the player with so-called significant market power to retain or even extend its dominance.
2. Certain member states chose to privatise the formerly state-owned operator before or during the liberalisation phase. This has meant that the historically entrenched operator effectively owns the infrastructure that is must then share with new entrants. In the event, full privatised incumbents have exploited this monopoly with little or no comeback available to governments.
3. The unresponsiveness of monopolistic (but privatised) players in the telecommunications market to member states' entreatment to invest and develop access to broadband access has led to state-funded regional schemes that attempt to correct the type of market failure that provided the justification of state-ownership a decade ago.

In our case studies, the implications of how EU level regulation is played out on the ground greatly influence the performance of individual member states in the Information Society: Ireland is doing badly, France is doing well. Consequently, attempts to use soft methods as a means to coordinate the Information Society simply draw attention to regulatory failures. While infrastructure development is stalled by lack of investment, member states cannot learn-by-doing: they cannot 'do' anything without a cheap and efficient broadband network.

However, one aspect of open method of coordination-style methods, naming and shaming, can be said to have had some influence on member states' attitudes to the Information Society. The ranking of countries as measured by internet usage and broadband penetration is a powerful means of highlight the respective weakness and strengths of individual countries. Several protest websites have appeared in France, but more frequently in Ireland, that criticises the behaviour both regulator<sup>18</sup> and incumbent<sup>19</sup>, using OECD and Commission data to make their case for improvements in tariffs or services. The ready availability of comparative statistics at least permits stakeholders to put pressure on actors (whether or not it prompts action).

### **V.1 New governance strategies**

The Commission recently review the state of play in the telecommunications sector and made the following comments concerning remedies the appeals:

1. Many comments made by the Commission on draft measures of NRAs have related to the appropriateness of the remedies proposed. The Commission has voiced concerns in particular regarding remedies that solved only part of the competition problem identified, remedies that appeared to be inadequate and remedies that might have produced effective results too late. To secure the benefits of the internal market, it is proposed to extend Commission veto powers to cover proposed remedies (European Commission, 2006c).

<sup>18</sup> See, for example [www.comwreck.com](http://www.comwreck.com) or [www.irelandoffline.com](http://www.irelandoffline.com)

<sup>19</sup> See [www.eircomsucks.com](http://www.eircomsucks.com) and [www.eircomtribunal.com](http://www.eircomtribunal.com)

2. A major difficulty with implementation of the framework is the judicial practice of routinely suspending regulatory decisions, despite the provisions of Article 4 of the Framework Directive. Courts vary widely in their treatment of interim relief. The proposal is to tackle the problem of routine suspension of regulatory decisions by some national courts during the appeal period by laying down EU level criteria for granting suspension of regulatory decisions (ibid p9).

Hence, Commissioner Reding's proposal to replace the present game of "ping pong" between national regulators and the Commission by an independent European telecom authority would work together with national regulators in 'a system similar to the European System of Central Banks'. This Central Regulatory Authority (CRA) could impose obligations, settle appeals disputes and set fines in a style of governance far removed from the 'soft touch' approach formerly associated with the field.

The legal effect of decisions issued by a central regulator in individual member states remains a key question if such a route is chosen by the Commission (for example, would such decisions overturn national procedures of judicial review or national norms of accountability?) but does represent an interesting evolution in terms of governance.

This recourse to old-style top-down hierarchical governance overturns a NEWGOV assumption namely that new modes of governance are effective when policymakers are met with 'policy failure'. This refers to a situation in which policy makers realize that a policy is not working, 'either because it fails to produce the expected outcome, or because certain domestic factors prevent its effective implementation (Scientific Objectives version 3, p 10)'. Here, it can be argued, policy failure brought on by the ineffectiveness of a new mode (the framework directive) has led to the re-emergence (at least in principle) of familiar command-and-control instruments. So the emergence hypothesis "Central intervention failed to reach its set policy objectives, and led to the development of the new modes of governance, e.g. delegation' (ibid p. 17) will not hold in the case of Information Society policy if the current proposal sees powers delegated to NRAs uploaded to a CRA.

Nor does the proposition that 'if a new mode of governance stands out as a successful practice of one organization, other organizations tend to emulate this practice' (ibid p.18) inform us of the evolution of governance in the field of Information Society policy. Although the European Regulators Group's role is to pool experience and circulate best practice, national systems of administrative and judicial jurisprudence are not readily amenable to convergence. The practice of imposing heavy fines on recalcitrant operators in France may be an effective instrument for ensuring competition, in Ireland the NRA does not have the authority to fine and competent courts only rule on matters of procedure, not substance and consequently cannot levy fines on a party. Changing the Irish system would require constitution reform of a degree unlikely to become part of a government agenda.<sup>20</sup>

These considerations do give credence to a strong NEWGOV hypothesis that 'if redistributive, prisoners' dilemma and institutionally deeply entrenched problems are at stake, new modes of governance are less likely to be effective' (ibid p. 21). The 'newer' elements of Information Society policy, its flexibility, its high level of delegation, its reflexivity, are as many hostages to the fortunes of the policy itself. The risk of these modes of governance being put aside in favour of a top-down approach is always present. So although experimental governance reigns, it is always in the shadow of tried-and-tested traditional modes.

---

<sup>20</sup> Constitutional changes require a referendum in Ireland.

## VI. Bibliography

- BANGERMANN, E. A. (1994) Europe and the Global Informantion Society.
- BARRET, S. D. (2003) Privatisation in Ireland. *Joint Conference on Privatisation Experiences in the EU*. Lago di Coma, CES/ifo/University of Warwick.
- BOTTERMAN, M., RAND CORPORATION., RAND EUROPE., UNIVERSITÉ LIBRE DE BRUXELLES. & EUROPEAN COMMISSION. INFORMATION SOCIETY DG. (2003) *Enabling the information society by stimulating the creation of a broadband environment in Europe: analyses of evolution scenarios for future networking technologies and networks in Europe*, Santa Monica, CA, RAND.
- CITIGROUP (2005) Trust in the luck of the Irish. *Global Markets*.
- DG COMMUNICATION (2004) Commission rules that France Télécom received illicit aid and orders that it be paid back to the state. *RAPID press release*, IP/04/981.
- DG COMMUNICATION (2006) State aid: Commission endorses public funding to bridge broadband communications gap in Ireland. IP/06/284.
- DIEDRICHS, U. & WESSELS, W. (2006) 01/D38 Revised Scientific Guidelines / Checklist for Working Papers on the Evolution and Impact of Governing Modes. *NEWGOV*.
- EDWARDS, G. & WAVERMAN, L. (2006) The Effects of Public Ownership and Regulatory Independence on Regulatory Outcomes. *Journal of Regulatory Economics*.
- EFANA, L. B. (2003) *Institutionalisation in science, policy choice and development knowledge uses: new perspectives for studying the digital-divide and poor regions*, Åbo, [Dept. of Political Science, Åbo Akademi University].
- EUROPEAN COMMISSION (1995) *Introduction to the Information Society: the European way*, [European Commission, 1995].
- EUROPEAN COMMISSION (2005a) i2010 – A European Information Society for growth and employment. COM(2005) 229 final.
- EUROPEAN COMMISSION (2005b) Information Society Benchmarking Report.
- EUROPEAN COMMISSION (2005c) Information Society Benchmarking Report 2005.
- EUROPEAN COMMISSION (2006a) Commission Staff Working Document Annex to European Electronic Ecommunications Regulation and Markets 2005 (11th report). SEC(2006)193.
- EUROPEAN COMMISSION (2006b) Implementation of the electronic communications framework in the 25 Member States.
- EUROPEAN COMMISSION (2006c) Review of the EU Regulatory Framework for electronic communications networks and services. COM(2006) 334 final.
- EUROPEAN COMMISSION (2006d) State aid n° N 284/2005 – Ireland Regional Broadband Programme. C(2006)436 final.
- KNAPP, A. & WRIGHT, V. (2006) *The government and politics of France*, London, New York Routledge.
- LE MONDE (18.03.1998) Valeur du jour: France Télécom continue de flamber. *Le Monde*. Paris.
- LONDON ECONOMICS (2006) An assessment of the regulatory framework for electronic communications: growth and investment in the EU e-Communications sector. Brussels, DG Information Society and Media.
- ODTR (1998) Mission Statement. Dublin.

OECD (2003) OECD REVIEWS OF REGULATORY REFORM  
REGULATORY REFORM IN FRANCE.

PALCIC, D. & REEVES, E. (2004) An Economic Analysis of Privatisation in Ireland, 1991-2003. *Statistical and Social Inquiry Society of Ireland*.

RADAELLI, C. (2004) Europeanisation: Solution or problem? *European Integration online Papers (EIoP)*, Vol 8.

THATCHER, M. (2004a) 'Varieties of capitalism in an internationalized world: domestic institutional change in European telecommunications. *Comparative political studies*, 37, 1-30.

THATCHER, M. (2004b) 'Winners and losers in Europeanization: reforming the national regulation of telecommunications. *West European politics*, 27, 284-309.

THE IRISH TIMES (18.2.2005) Eircom, ComReg dispute set for High Court.

THE IRISH TIMES (24.02.2006) Crossed lines. *The Irish Times*. Dublin.

THE IRISH TIMES (30.05.2003) Eircom warns it may delay Eur 1bn investment.

TREIB, O., BÄHR, H. AND G. FALKNER (2004) 'Modes of Governance, Old and New: A Note Towards Conceptual Clarification'. *paper presented to the NEWGOV work-shop on 'Emergence, Evolution and Evaluation'*.

WALLSTEN, S. (2006) Broadband and Unbundling Regulations in OECD Countries. *AEI-Brookings Joint Center For Regulatory Studies*.