NEWGOV
New Modes of Governance

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

Analysis – Independent Regulators in Europe
reference number: 06/D4

Due date of deliverable: December 2005
Actual submission date: 7 May 2006

Start date of project: 1 September 2004
Duration: 48 months

Organisation name of lead contractor for this deliverable:
London School of Economics and Political Science; Mark Thatcher

<table>
<thead>
<tr>
<th>Dissemination Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PU</td>
<td>Public</td>
</tr>
<tr>
<td>PP</td>
<td>Restricted to other programme participants (including the Commission Services)</td>
</tr>
<tr>
<td>RE</td>
<td>Restricted to a group specified by the consortium (including the Commission Services)</td>
</tr>
<tr>
<td>CO</td>
<td>Confidential, only for members of the consortium (including the Commission Services)</td>
</tr>
</tbody>
</table>
Summary

The working paper presents data on the behaviour of regulatory agencies after delegation; it maps and analyses their relationships with elected politicians by looking at how the latter use their formal controls over IRAs, both in general and in two sectors, telecommunications and securities/financial services. Thus it examines nominations, departures, tenure of IRA members and resources. It finds that elected politician have not, in general, used their formal powers to appoint party politician or known party supporters. Equally, they have not dismissed IRA members or rarely forced them out of office before the end of their terms. Instead, most IRA members serve relatively long periods, well beyond those of the average minister. Although IRAs have limited budgets and staff, these appear to have grown over time and to be substantial, especially have new broader IRAs have been created. Finally, elected politicians have not abolished IRAs frequently. When changes have been made, they have expanded the scope of IRAs.

Contents

I. INTRODUCTION ..............................................................................................................................................3

II. ANALYSING RELATIONSHIPS BETWEEN IRAS AND ELECTED POLITICIANS AFTER DELEGATION ..............................................................5

III. IRAS AND ELECTED POLITICIANS IN EUROPE ..........................................................................................6

   III.1 POLITICISATION OF IRA MEMBERS ..................................................................................................6
   III.2 THE BACKGROUNDS OF IRA MEMBERS .......................................................................................7
   III.3 EARLY DEPARTURES OF IRA MEMBERS ..........................................................................................8
   III.4 LENGTH OF TENURE .............................................................................................................................8
   III.5 RESOURCES .............................................................................................................................................9
   III.6 REORGANISATION OF IRAS ....................................................................................................................10

IV. CONCLUSION ..............................................................................................................................................10

V. REFERENCES ................................................................................................................................................11

Table of Figures and Graphs

TABLE 1: IRAS IN BRITAIN, FRANCE, GERMANY AND ITALY IN KEY DOMAINS.........................................................4
TABLE 2: PARTY ACTIVISM AND PUBLIC AFFILIATIONS OF IRA MEMBERS 1990-2001............................................6
TABLE 3: PARTY ACTIVISM AND PUBLIC AFFILIATIONS OF MEMBERS OF IRAS COVERING SECURITIES TRADING AND COMMUNICATIONS 1990-2001 .................................................................7
TABLE 4: PERCENTAGE OF IRA MEMBERS WHOSE MAIN BACKGROUND IS PUBLIC SECTOR 1990-2001.....................7
TABLE 5: RESIGNATIONS OF IRA MEMBERS BEFORE END OF TERM 1990-2001.........................................................8
TABLE 6: RESIGNATIONS OF MEMBERS OF IRAS COVERING SECURITIES TRADING AND COMMUNICATIONS END OF TERM 1990-2001 ..................................................................................................................8
TABLE 7: AVERAGE TENURE OF SENIOR MEMBERS OF SECURITIES IRAS 1990-2002 ..............................................9
TABLE 8: EXPENDITURE AND STAFFING OF FINANCIAL REGULATORS 2004 .................................................................9
TABLE 9: EXPENDITURE AND STAFFING OF COMMUNICATIONS REGULATORS 2004 ..................................................9
I. Introduction

Traditionally European nations had few independent regulatory agencies (IRAs). Instead, governments and/or business associations held regulatory powers such as licensing or enforcement of law. In contrast, the United States had a long history of IRAs; key federal IRAs included as the SEC (Securities and Exchange Commission) for shares, the FCC (Federal Communications Commission) for communications and the CAB (Civil Aviation Board) (abolished 1985); in addition there are many state-level commissions.

However the period after the 1980s saw the establishment of many agencies in Europe. Defining an IRA is tricky, since each country has different legal doctrines, institutional appellations and administrative structures. Thus there are AAIs (Autorités administratives indépendentes) in France, and ‘independent administrative authorities’ in Italy. In Germany, there are several types of agency- public and private law agencies, federal and Land agencies, most within or subordinate to ministries, with even ‘independent agencies’ such as the Federal Cartel Office and the telecommunications regulator, the RegTP, being (legally) subject to supervision and instructions from ministries. Surprisingly, Britain does not have a legal doctrine of independent agencies, and many are classified as non-government ministerial departments, while others (e.g. the Financial Services Authority) are even private companies (cf. Prosser 1997).

Here, requirements for categorisation as an IRA refer to the formal institutional position. Three conditions are the minimum: the agency has its own powers and responsibilities given under public law; it is organisationally separated from ministries; it is neither directly elected nor managed by elected officials (Thatcher 2002). However, other aspects can be studied, such as the length of tenure of members or sources of finance or the degree of legislative oversight (Gilardi 2002). Hence the degree of formal independence is a variable, which can be greater or smaller depending on which powers are delegated and what controls are placed over the IRA. Table 1 presents IRAs in key domains in four major European countries that meet the three minimal conditions.

---

3 Döhler 2002; Wilks/Bartle 2002; Coen and Héritier 2005; Böllhoff 2005a,b
## Table 1: IRAs in Britain, France, Germany and Italy in key domains

<table>
<thead>
<tr>
<th>Domain</th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water</td>
<td>Ofwat (Office of Water Services) 1989</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Railways</td>
<td>Office of Rail Regulator and Strategic Rail Authority 1999 (1993)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postal services</td>
<td>Postal Services Commission 1999</td>
<td>Autorité de régulation de communications électroniques et des postes (2005)</td>
<td>Bundesnetzagentur 2005 (Regulierungsbehörde für Telekommunikation und Post (RegTP) 1996)</td>
<td></td>
</tr>
<tr>
<td>Environment</td>
<td>Environment Agency 1996</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food safety</td>
<td>Food Standards Agency 1999</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes: 1 Dates refer to the creation of the IRA; dates in brackets refer to the date on which an IRA was first created in the domain.
2 Germany: Media Each Land has a Landesmedienanstalt, which is a legal entity under public law, has a degree of financial and regulatory independence but within the supervision of the Land which ensures that it exercises its powers within the framework of legal and regulatory provisions.
At least three major issues can be studied in looking at IRAs. First, why elected politicians choose to delegate – i.e. why IRAs are created and their institutional form. Second, the behaviour of IRAs after delegation. Third, questions of legitimacy and accountability of IRAs, which are unelected but make policy decisions. This paper concentrates on the second, looking particularly at relations between IRAs and their ‘principals’, namely elected politicians.

II. Analysing relationships between IRAs and elected politicians after delegation

Delegation does not end the role of politics and elected politicians, for the latter maintain several ongoing controls over IRAs. Moreover, since IRAs deal with sensitive questions such as price controls, licensing, information provision and enforcement of licences, we would expect elected politicians to continue to take a close interest in IRAs.

There is no overall theory or model of the relationship between elected politician and IRAs after delegation. This is unsurprising given that IRAs have many different functions and relationships within an overall ‘regulatory space’ (Hancher and Moran 1989; Scott 2001). However, the principal-agent literature has been most concerned with the ‘problem’ of ‘agency losses’ – i.e. agencies acting contrary to the preferences of elected politicians. It arises from a large US-based literature on whether there is a ‘runaway bureaucracy’ (cf. Huber and Shipan 2002, Ch. 2). Such losses can arise from ‘shirking’ i.e. the agent following its own preferences which diverge from those of its principal(s) and ‘slippage’, namely institutional incentives that cause the agent to behave contrary to the wishes of its principal(s) (McCubbins 1985). However, elected politicians can establish mechanisms to attempt to reduce their losses, notably administrative procedures such as screening and selection mechanisms that apply before the agent acts, and ongoing devices (e.g. monitoring and reporting requirements and oversight mechanisms) that apply after delegation (cf. Kiewet and McCubbins 1991, McCubbins and Schwartz 1984). Finally, the counterpart to problems of ‘agency losses’ suffered by elected politicians has been the danger of ‘agency capture’ by powerful regulates underlined by the US interest group literature (Stigler 1971, Peltzman 1976, Becker 1983; cf. Bernstein 1955). Much of the explanation for creating IRAs in the 1930s and 1940s was normative, namely that they operated ‘in the public interest’. However, this was then challenged in terms of ‘capture’ being possible or likely, either over time, as agencies and their staff lost their public interest ambitions and a revolving door developed between an agency and the industry it regulated (cf. Bernstein 1955).

This is a useful starting point for analysing the relationship between IRAs and elected politicians, but two points must be borne in mind in so doing. First, the role of formal controls depends both on the existence of such controls and on the ability and desire of elected politicians to use them, (Moe 1985, cf. Moe 1982). Moreover, formal controls are often broadly defined - for instance, that the government sets an IRA’s budget or nominates ‘qualified persons’. Hence the use of controls must be investigated rather than assumed from their formal existence. Second, inferring autonomy from the use of controls is dangerous. In particular, it faces the problem of ‘observational equivalence’, in which the same data can be used to support agency autonomy or lack of autonomy (Weingast and Moran 1983). In particular, agencies may appear to be autonomous if principals do not apply sanctions, but this may be due to controls being so effective and agents rationally anticipating principals’ responses that sanctions do not need to be used. Given these factors, the best approach is not to investigate autonomy directly, but instead to look at the use of formal controls empirically, and to examine different hypotheses that are compatible with the data (Thatcher 2005). Hence this paper examines the use in practice by elected politicians of their key controls, namely the appoint-
ment of IRA members; dismissal of IRA members; setting the financial and staffing resources of IRAs; reorganising IRAs.

III. IRAs and elected politicians in Europe

This section looks at two sets of figures for use of the aforementioned five controls. First, it takes aggregate figures that allow a general picture for IRAs to be developed. These figures refer to all market IRAs in Britain, France, Germany and Italy 1990-2001 (i.e. sectoral IRAs plus general competition authorities - for the relevant IRAs, see Table 1) (see Thatcher 2005). Second, it offers more specific figures for the two sectors that are at the heart of the current research project, namely communications and financial IRAs in Britain, France and Germany. However, it should be remembered that the scope of these IRAs differs. Thus for instance whereas Oftel (until 2000) and the ART (until 2005) only covered telecommunications, in Germany the RegTP (until 2005) covered telecommunications and postal services while AGCOM in Italy covered all communications. Similarly, the SIB and FSA in Britain had much broader responsibilities than the CONSOB in Italy. Thus direct comparisons across countries must be handled with care.

III.1 Politicisation of IRA members

A key issue in post-delegation relationships concerns the appointment of IRA members. Elected politicians may seek to control IRAs by selecting past elected politicians or aspirant ones: the former may have party and personal affiliations, as well as a mind-set, while the latter may wish to curry favours to gain future preferment. Table 2 examines party politicisation. It takes two measures. The first is the percentage of IRA members who have held national government office or stood for legislative or local elections. The second measure is more subjective, being the percentage of IRA members who have a publicly-known party affiliation; this broader indicator deals with the possibility of appointing party activists or supporters.

| % holding or standing for public office (local, national or European) before or after term on IRA | Britain | France | Germany | Italy |
| % publicly affiliated with party | (1 of 33) | (4 of 46) | (2 of 13) | (6 of 26) |
| % publicly affiliated with party | (1 of 33) | (21 of 46) | (5 of 13) | (20 of 26) |

Table 2: Party Activism and Public Affiliations of IRA Members 1990-2001

1. Coverage: Britain: members of all sectoral IRAs; only heads of OFT, Competition Commission and predecessor Monopolies and Mergers Commission, 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 Bundeskartellampt, Bundesaufsichtsamt für den Wertpapierhandel and RegTP; 1 Vice-President of Bundeskartellampt excluded due to lack of information. Italy: All members of AGCOM, AEEG and AGCM.

As can be seen, the majority of IRA members are not party politicians. Even the broader measure shows that a minority have publicly-known party affiliations, with the exception of Italy where most members of AGCOM, the communications IRA, have known political affiliations (this may be linked to the mode of designating AGCOM members - apart from the President, they are elected by the two houses of the legislature) and with issues of media ownership by elected politicians (notably Silvio Berlusconi) and politicisation of the main...
publicly-owned broadcaster, the RAI. The measures do not mean that IRA members lack political views, but do suggest a degree of ‘relational distance’ between them and elected politicians.

Detailed examination of IRAs for securities trading and communications illustrates the above general picture.

### Table 3: Party Activism and Public Affiliations of Members of IRAs covering securities trading and communications 1990-2001

<table>
<thead>
<tr>
<th>Securities IRAs</th>
<th>Communications IRAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>% holding or standing for public office (local, national or European) before or after term on IRA</td>
<td>18% (2 of 11)</td>
</tr>
<tr>
<td>% publicly affiliated with party</td>
<td>27% (3 of 11)</td>
</tr>
</tbody>
</table>

Notes: Coverage: Securities regulators - the Presidents of the COB and Consob, Chairman of the SIB/FSA and the President and Vice-President of the BAWe) between 1990 and 2001. Communications Regulators: Oftel, ART, RegTP and AGCOM - all members.

The table shows that the majority of securities/financial and communications IRA members in the two sectors are not party politicians.

### III.2 The backgrounds of IRA members

Given that the majority of IRA members are not party politicians, what kind of background do IRA members have? This is highly relevant to two debates: ‘capture’ discussions, through revolving doors between IRAs and regulatees; the skills and expertise of IRA members.

Due to data difficulties (notably lack of detailed information about precise responsibilities held- for instance within a merchant bank or consultancy) it is impossible to establish aggregate data that precisely pinpoint industry revolving doors. Instead, it is possible to find data that divides those IRA members whose background is mainly in the public sector and those who come from the private sector and/or find private sector jobs after to it. Table 4 provides such data.

### Table 4: Percentage of IRA members whose main background is public sector 1990-2001

<table>
<thead>
<tr>
<th></th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>% IRA members from public sector (previous occupation)</td>
<td>29% (9 of 31)</td>
<td>74% (14 of 19)</td>
<td>92% (11 of 12)</td>
<td>76% (19 of 25)</td>
</tr>
</tbody>
</table>

1. Coverage: as Table 2.
2. Principal occupation taken
3. Sources: IRA websites and Annual reports, Who’s Who and newspaper reports.

The figures suggest that regulators in continental Europe are mostly drawn from the public sector. More detailed analysis shows that certain well-established professions predominate, and that these differ across nations. Thus for instance, many IRA members in France are drawn from the grands corps, while in Germany lawyers are significant. In Italy, academics account for a significant share of IRA members.
When IRAs for communications and securities are examined, the figures are similar. Thus two thirds (8 of 12) of securities regulators came from the public sector, but in Britain, one of the three heads of the SIB/FSA had mostly public sector backgrounds. For communications IRAs, half (13 of 26) had mainly public sector backgrounds.

III.3 Early departures of IRA members

One method of controlling or influencing IRAs could be by dismissing their members or forcing them to resign. The former is often legally very difficult as legislation sometimes has no provisions for dismissal or makes it very difficult. However, other methods can be used to ‘persuade’ IRA members to depart before the end of their terms—ranging from coercion to inducements such as other posts. Table 5 shows departures by IRA members before the end of their term.

<table>
<thead>
<tr>
<th>% resigning before end of term (or retirement if permanent post)</th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>(5 of 33)</td>
<td>15%</td>
<td>13%</td>
<td>17%</td>
<td>19%</td>
</tr>
<tr>
<td>% resigning of IRAs existing 1990-2000</td>
<td>29%</td>
<td>18%</td>
<td>0</td>
<td>23%</td>
</tr>
<tr>
<td>(5 of 17)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1. Coverage: as Table 2
2. Sources: IRA websites and Annual Reports.

A sectoral investigation of IRAs covering securities trading and communications presents a similar picture.

Table 6: Resignations of members of IRAs covering securities trading and communications end of term 1990-2001

<table>
<thead>
<tr>
<th>% resigning before end of term (or retirement if permanent post)</th>
<th>Securities IRAs</th>
<th>Communications IRAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1 of 11)</td>
<td>9%</td>
<td>18%</td>
</tr>
<tr>
<td>(10 of 57)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The figures show that most IRA members stay the full length of their term. Moreover, of those who leave, some may have personal reasons for doing so that have no link with political pressure. However, it is noteworthy that the percentage of early departures is higher for communications IRAs than those covering securities trading.

III.4 Length of tenure

Tenure of IRA members is important for the power and autonomy of IRAs. Long tenure allows IRA members to accumulate expertise and informal networks—both in a sector and with civil servants. This is important since in many sectors there are tight ‘policy communities’ built around ministries, regulatees and experts (cf Jordan and Richardson 1979). Long tenure also allows IRA members to ‘wait out’ ministers, who may go before they do (on average, ministers last 1.5-2 years in a post). Hence in the event of a disagreement between a Minister

---

4 Coverage: SIB/FSA- Chair; COB- only President; BAW- Pres and vice president; Consob- President.
and an IRA, lengthy tenure means that the latter’s members may have greater knowledge than
the former and in any case can simply play for time until the former has departed.

Table 7 shows the average tenure for senior IRA members of financial regulators in Britain, France and Italy (Germany is excluded because the BAWe was only created in 1994) and for comparison, general competition authorities (communications IRAs have been set up at different dates and often too recently to provide a good and comparable sample across the four nations).

<table>
<thead>
<tr>
<th>Securities Regulator</th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>5 years</td>
<td>6 years</td>
<td>7 years</td>
<td>4.1</td>
</tr>
<tr>
<td></td>
<td>(3)</td>
<td>(2)</td>
<td>(2)</td>
<td>(4)</td>
</tr>
</tbody>
</table>

1. Average tenure: only those members who left during period 1990-2002, except if appointment renewed; where term of office began before 1990, time is included.
2. Coverage: SIB/FSA chairman, Presidents of COB and Consob; President and Vice-President of BAWe, note the BAWe only created in 1994.
3. Sources: Annual Reports and websites

The figures indicate lengthy tenures, well above the average for government ministers.

III.5 Resources

One method elected politicians can use to control IRAs is to limit their resources. Assessing whether they do is difficult: resources are relative to needs; freedom over the application of resources and decisions about their composition may be as important as total amounts (for instance, being able to hire specialists or pay market rates in order to attract suitable staff).

Nevertheless, budgets and staffing levels allow some assessment of the size of IRAs.

<table>
<thead>
<tr>
<th></th>
<th>FSA</th>
<th>AMF</th>
<th>Bafin</th>
<th>Consob</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spending (euros)</td>
<td>369m</td>
<td>54m</td>
<td>133m</td>
<td>46m</td>
</tr>
<tr>
<td>Number of staff</td>
<td>2256</td>
<td>360</td>
<td>1475</td>
<td>402</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Ofcom</th>
<th>ART</th>
<th>RegTP</th>
<th>AGCOM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spending (euros)</td>
<td>182m</td>
<td>18m</td>
<td>132m</td>
<td>49m</td>
</tr>
<tr>
<td>Number of staff</td>
<td>783</td>
<td>152</td>
<td>2233</td>
<td>240</td>
</tr>
</tbody>
</table>

Direct comparisons of IRAs across countries are difficult. The main reason is that the scope of each regulator differs- for instance, the FSA has a wide scope as the main financial regulator covering all financial service, whereas the Consob has a much narrower remit. Similarly, Ofcom covers all communications, the RETP both telecommunications and postal services, whereas the ART only dealt with telecommunications. However, the figures indicate that although IRAs remain relatively small, but also that they have grown both in total size and in
scope through mergers and extensions of their remits. Thus for instance, the FSA was created by merging several different financial regulators and is much bigger than its main predecessor the SIB (which had a budget of 18m euros in 1990 and 178 staff, while the RegTP was replaced by the Bundesnetzagentur in 2005, covering most network industries and the ART became the Autorité de regulation de communications électroniques et des postes, covering both telecommunications and postal services in 2005. Thus IRAs seem to be growing.

III.6 Reorganisation of IRAs

One method available to elected politicians to control IRAs is to use their powers to alter the organisation of IRAs and notably to punish recalcitrant IRAs by abolishing them or reducing their scope. However, table 1 suggests that most IRAs are relatively long-lived: reorganisations are periodic, and perhaps occur less often than reorganisations of ministries. In the financial services sector, this is shown by the relative longevity of most IRAs: the COB was established in 1967 and only merged with other bodies in 1996 and 2003; moreover, on both these occasions, the COB appeared to take over those other organisations rather than be taken over by them. Similarly, the Consob has existed since 1974. In Britain, the SIB lasted from 1986 until 1997. In telecommunications, although the IRAs are often more recent, they too have lasted significant periods: OfTEL from 1984 until 2000 and the ART and RegTP from 1996 until 2005.

Furthermore, reorganisations have seen an expansion of the sectors covered by IRAs. Thus for instance, the SIB’s successor, the FSA has obtained powers over the entire financial services sector, including taking powers from the Treasury and Bank of England. Equally, Ofcom was born of the merger of several organisations, including units that had previously been within government ministries such as the Radiocommunications Agency. In France, the ART was given responsibilities for postal services in 2005. The most dramatic change came in Germany, where the RegTP has been given powers over a host of networks—electricity and gas, and in the near future also railways. These changes suggest an increase in the power of IRAs.

IV. Conclusion

Elected politician have not, in general, used their formal powers to appoint party politician or known party supporters. Equally, they have not dismissed IRA members or rarely forced them out of office before the end of their terms. Instead, most IRA members serve relatively long periods, well beyond those of the average minister, and in France, Germany and Italy they are drawn from the public service and well-established and highly-regarded professions. Although IRAs have limited budgets and staff, these appear to have grown over time and to be substantial, especially have new broader IRAs been created. Finally, elected politicians have not abolished IRAs frequently. When changes have been made, they have expanded the scope of IRAs.

It is impossible to tell without detailed process tracing why these changes were made – and especially if they were undertaken because IRAs were compliant with the preferences of elected politicians. However, the data do show that several condition that favour the influence of IRA members relative to elected politicians (and regulatees), notably long average tenure, growing resources and scope and long-lived organisations.
V. References


