Controlling non-majoritarian institutions: the case of independent regulatory agencies in Europe

MARK THATCHER
Department of Government
London School of Economics
m.thatcher@lse.ac.uk

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Governments and legislatures in Europe have created or greatly strengthened independent regulatory agencies (IRAs). Yet they also retain many formal controls over those agencies. The article analyses whether elected politicians have used their powers to create IRAs in their own image and kept IRAs under tight control or whether they have allowed IRAs to become a distinct set of actors, and hence a ‘third force’ in regulation. Principal-agent (PA) theories, largely based on US experience, emphasise the importance of certain formal controls for elected politicians to limit ‘agency losses’. However, analysis of four European nations between 1990 and 2001 shows that elected politicians did not use their powers to appoint party politicians, force the early departures of IRA members, reverse IRA decisions or reduce IRA budgets and powers. Using PA theory, two interpretations of this apparent puzzle are offered, each with differing implications for agency autonomy. One is that elected politicians used alternative methods of control; hence they suffered low ‘agency losses’ and IRAs in practice had little autonomy. The other is that elected politicians found that the benefits of IRA autonomy in practice and the costs of applying their formal control outweighed agency losses and hence accepted agency autonomy.

A central element in the reform of market governance has been the delegation of powers by national governments to independent regulatory authorities (IRAs). Traditionally, very few IRAs existed in Europe—they were very much an American specificity. Instead, regulation in European nations was dominated by two sets of actors—governments and regulatees. However, the 1980s and 1990s saw the creation and/or strengthening of IRAs in Europe. The most significant changes concerned IRAs for market competition—general competition authorities, utility regulators and financial regulators.

The spread and strengthening of IRAs raises two related sets of issues for analysis. First, why did governments delegate powers to IRAs and what form did that delegation take? These questions concern formal delegation and institutional design. They are touched upon here, but are used to examine a second set of issues, namely how the new institutional framework has operated in practice, and in particular, how elected politicians use their formal instruments of control over IRAs. The article asks whether they have created IRAs in their own image and kept them under tight control through application of their formal powers or whether they have allowed IRAs to become a distinct set of actors, separated in practice, and hence representing a ‘third force’ in regulation, in addition to governments and regulatees.
There are good empirical and theoretical reasons for studying post-delegation relations between elected politicians and IRAs. Empirically, relatively little comparative work across both European nations and policy domains has been done on this. Instead, most analyses have looked at the creation of IRAs and their institutional form. Theoretically, the dominant PA models of delegation, largely developed in the US, have focused on how elected politicians can create certain formal controls over bureaucratic agencies—for instance, over nominations, budget setting and reversal of agency decisions—that limit their ‘agencies losses’ from delegation. Yet the operation of that framework in practice is vital both to understand the governance of markets and to assess the significance of formal controls. Study of IRAs in Europe allows consideration of the application and importance of those controls outside the US. It also raises the crucial question of the interpretation of the use of formal controls for agency autonomy in practice.

The article finds an apparent puzzle. Initial expectations of separation of IRAs from elected politicians in Europe were low. National traditions in Europe were unpropitious. Moreover, elected politicians were given many formal powers identified as important in the US-based PA literature over IRAs. At the same time, they faced very few formal constraints over how they could use those powers. There were thus good reasons to expect the powers to be used fully. Yet the article shows the opposite. It argues that elected politicians have chosen, in terms of membership, to constitute IRAs as a separate set of actors, usually appointing non-party politicians, and rarely exercising other controls such as forcing early departures of IRA members, reversing IRA decisions or reducing IRA budgets and powers.

How can this apparent puzzle be explained? The article offers two interpretations. The first suggests that IRAs largely followed the preferences of elected politicians, who therefore did not need to use their formal controls. In this case, IRAs may have been a distinct set of actors from elected politicians but lacked autonomy from them. The second interpretation is that due to the balance of costs of applying the formal controls examined in the article and the benefits of having autonomous agencies, elected politicians chose not to use formal controls available to them. Under this interpretation, IRAs are not only distinct from elected politicians but do enjoy real autonomy from them.

The empirical cases concern key IRAs regulating markets, both general competition authorities and sectoral regulators in important and traditionally very state-dominated sectors—telecommunications, energy, railways, postal services and stock exchanges. Four countries are analysed—Britain, France, Germany and Italy—chosen both because of their economic importance and because they represent very different ‘varieties of capitalism’. We can therefore consider whether they represent general trends across Europe or whether developments are highly nation-specific.

The article begins with a brief theoretical and methodological discussion of IRAs and their relationship with elected politicians, using PA models. It then sets out the spread of IRAs in Europe in key market domains and the formal institutional framework governing the relationship between elected politicians and IRAs. Thereafter, it provides data to show that post-delegation use of formal powers appears to run counter to that expected by the PA literature on agencies. Finally, using the PA framework as a source of ideas, the article offers two interpretations of the uses made by elected politicians of their powers over IRAs and discusses the implications of each as well as how research could adjudicate between them.

ANALYSING RELATIONSHIPS BETWEEN IRAS AND ELECTED POLITICIANS

IRAs are a type of bureaucratic agency created by delegation by elected politicians. PA analyses are the dominant framework for studying delegation to agencies. One half of PA work considers when and why elected politicians create agencies and transfer formal
powers to them. It suggests that principals delegate because they believe that agencies will fulfill important functions for them, such as dealing with information asymmetries, taking blame and increasing credible commitment (on regulatory agencies, see Horn, Levy and Spiller, Majone). The other part of PA analyses considers relationships between elected politicians and agencies, especially the autonomy of the latter from the former. PA analyses focus on the ‘problem’ of ‘agency losses’—ie agencies acting contrary to the preferences of their principals, namely elected politicians. Such losses can arise from two sources: ‘shirking’, because the agent follows its own preferences which diverge from those of its principal(s); ‘slippage’ due to institutional incentives causing the agent to behave contrary to the wishes of its principal(s) (McCubbins).

PA theory suggests that principals are not helpless in the face of agency losses. Rather, they shape the formal institutional design of delegation to reduce losses. They determine the powers delegated to agencies and the degree of statutory discretion they enjoy in making policy (for major recent analyses see Epstein and O’Halloran; Huber and Shipan). In addition, before agencies begin to act, elected politicians set the overall institutional design, notably the statutory objectives of the agencies and ex ante controls, particularly administrative procedures. (cf. Kiewet and McCubbins; McCubbins and Schwartz; McCubbins, Noll and Weingast 1987, 1989). They also create ongoing or ex post controls that can be used after delegation. Some of these may be exercised by third parties—interest groups or courts; these are not examined in this article. However, elected politicians also maintain their own on-going controls over agencies, which are the subject of the present article.

The US-based literature and more recent work on Europe underline the importance of certain formal ex post powers for elected politicians ability to control IRAs, notably nominations, budget-setting, legislative vetos and re-organisation (Huber and Shipan 2002, 28-29, 149-50; Weingast and Moran). Nomination of agency members can be important to influence the preferences of agents and hence the danger of shirking (Wood and Waterman). In the US, lengthy battles can take place in the legislature over nominations, most prominently over Presidential nominations that require Senate approval. In addition, elected politicians can have controls after nomination of agents, particularly dismissal of agency heads before the end of their term, setting the budgets of agencies and in some cases overturning the decisions of agencies (a ‘legislative veto’). Finally, elected politicians can seek to control an agency by legislating to alter its powers, duties or even existence.

However, as Moe points out, the ability of a principal to influence an agent depends on both control mechanisms and its use of those mechanisms. The latter cannot be taken for granted (Moe 1985, 1101). Principals must have the desire and energy to use the controls; many different applications of controls are possible (for instance, appointment powers can be used to select political cronies or independent-minded individuals) (Moe 1985, cf. Moe 1982). How will elected politicians use their control powers over agencies after delegation? PA analysis would expect elected politicians to engage in a cost–benefit analysis (cf. Huber and Shipan 2000). On the one hand, they must evaluate the likely agency losses and hence the benefits from applying controls that move agencies closer to their (i.e. the principals’) desired preferences. On the other hand, they must assess the costs of applying controls.

Costs to elected politicians of using their controls over IRAs may arise from at least two sources. First, applying controls may damage the functions IRAs are supposed to perform for the elected politicians—i.e. the reasons for which the latter delegated in the first place. Of particular importance for IRAs are functions of increasing credible commitment and taking blame; indeed, Majone (2001) argues that IRAs are ‘fiduciaries’ whose main task is to enhance credible commitment by being independent. Elected politicians may find that if they use their controls to reduce IRA autonomy in practice, they may reduce the value of those IRAs for them. Second, there are costs of applying controls such as time, legislative
resources, gathering information and bargaining with political partners. Costs can be expected to vary according to many factors. One is likely to be whether there are multiple principals, especially if they have diverse preferences, so that decisions require much negotiation and bargaining, or a single principal who does not have to face these decision-making costs. Decision rules for applying controls offer another factor: if rules are complex and involve many veto players and constraints (for instance, if special majorities are needed or complex and cumbersome procedures must be followed to exercise powers such as making appointments or altering agency budgets or duties and powers), then applying controls is likely to be more costly than simple decision rules with few veto players and much discretion over use of powers. Equally, the ‘default condition’ for decision making is likely to affect the costs of using controls: if a special procedure is needed (e.g. to overturn an agency decision or alter its head) costs are likely to be higher than if the default condition is that elected politicians must take a decision for the agency to continue (e.g. they must make new appointments to replace those on fixed terms) (cf. Pollack 2003a, 44).

Although PA frameworks have increasingly concentrated on formal institutional design (Pollack 2003b), they also provide a useful starting point for analysis of post-delegation relationships, if only in structuring discussion and offering assumptions and concepts. First, they underline that whatever legal terms are used to define agencies, including ‘independent’, IRA autonomy from elected politicians is not total but varies. Second, they point to the importance of formal controls and institutional frameworks in the behaviour of IRAs and their relationship with elected politicians. These structure the nature of the relationship between the two: they set powers and duties, they determine ex ante controls and, most important for our analysis, they give elected politicians ex post controls. Moreover, the US-based literature points to certain formal controls that it expects to be important—appointments, dismissals, budget-setting, reversal of agency decisions and institutional reforms to alter the position of the agency. Finally, it also suggests that we need to look both the benefits and the costs for elected politicians of using their controls over IRAs.

While offering these benefits, applying and testing PA frameworks in the study of post-delegation behaviour also faces certain pitfalls. The concepts of agency ‘autonomy’ and ‘control’ by elected politicians are difficult to define and even more tricky to identify empirically (cf. Moe 1987). They encounter the problems that principals may have incentives to hide whether IRAs are following their own preferences. Moreover, 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, thereby producing ‘observational equivalence’—i.e. the same data can be used to support agency autonomy or lack of autonomy (Weingast and Moran). The approach taken here is to set out first the formal institutional framework governing elected politicians’ ex post controls over IRAs highlighted by PA analyses and then examine the use of those controls in practice across domains and countries. This not only provides valuable evidence on the context in which IRAs and elected politicians relate to each other but also allows us to test whether expectations derived from US-based PA work are fulfilled. Explaining the data would face the aforementioned methodological problems and would require both specifying hypotheses and large-scale quantitative and qualitative studies. Hence, a more modest approach is taken of offering two interpretations derived from the PA framework, one relating to agency losses, and the other focused on the benefits of delegation and the costs of using ex post controls for elected politicians. These interpretations point to the further evidence required to sustain them and suggest specific factors for investigation. The article thus seeks to present data and an interpretive approach as a step towards understanding the relationship between IRAs and elected politicians in Europe in practice.
IRAs IN EUROPE: FORMAL INSTITUTIONAL FRAMEWORKS AND INITIAL EXPECTATIONS

In most European nations until the 1980s, regulation—better known as industrial policy in Europe—was largely a closed game between government and suppliers (public or private), into which occasionally other actors such as trade unions intruded (cf. Cawson et al; Grant; Hayward; Schmidt).

This position ended from the late 1970s onwards, as IRAs were created in all major European nations (cf. Thatcher 2003; Gilardi; Levy and Spiller; Doern and Wilks). Each country has its own legal doctrines and definitions: Italy and France have ‘independent administrative authorities’. In Germany, there are several types of agency—public and private law agencies, federal and Land agencies, most within or subordinate to ministries (Döhler). Britain does not have a legal doctrine of independent agencies and many IRAs are formally non-ministerial government departments. Moreover, the term ‘agency’ can be used for bodies that are in fact legally subordinate to ministers. Given the diversity of appellations, here the minimum requirements for inclusion as an IRA refer to the formal institutional position and comprise: the agency has its own powers and responsibilities given under public law; it is organisationally separated from ministries; it be neither directly elected nor managed by elected officials. Table 1 offers an overview of IRAs in key market domains in the four largest European countries, Britain, France, Germany and Italy. Dates refer to the legal creation of the current IRA, and dates in brackets to when an IRA was first established in the domain.

Table 1
Independent Regulatory Agencies for Market Competition in Britain, France, Germany and Italy in Selected Domains.

<table>
<thead>
<tr>
<th>Domain</th>
<th>Britain</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water</td>
<td>Ofwat (Office of Water Services 1989)</td>
<td></td>
</tr>
<tr>
<td>Railways</td>
<td>Office of Rail Regulator 1993 and Strategic Rail Authority 1999 (1993)</td>
<td></td>
</tr>
<tr>
<td>Postal services</td>
<td>Postal Services Commission 1999</td>
<td></td>
</tr>
</tbody>
</table>
1. Empty cells—no sectoral IRA; for a discussion of the German model, see Coen, Héritier and Böllhoff; Böllhoff; Eberlein; Lodge.
2. There are often several financial regulators—the most important regulator for stock exchanges is taken; for Germany, analysis relates to Bundesanstalt für Wertpapierhandel, which was absorbed into BaFin in 2002.

Legally, IRAs are given significant powers—for instance, to enforce licences, to regulate anti-competitive behaviour, and sometimes to issue licences and levy fines. Their heads are often appointed for fixed terms of several years. The objectives set for IRAs are often very broad. Similarly, the legislation offers little detail on matters such as IRAs determining their strategies or over activities such as publicising themselves, establishing procedures for consultation or creating networks with other actors. Thus the formal institutional framework gives considerable powers, independence and discretion to IRAs (for an analysis of formal independence, see Gilardi).

Nevertheless, expectations of the independence in practice of most IRAs from elected politicians in Europe were low at the moment of their birth. Previous experience had seen a very high level of politicisation of decision making. Many states had no tradition of IRAs and their judicial doctrines of state power that ran counter to strong IRAs—notably in continental Europe (Chevallier; Cassese 2000, Chapter 1; Döhler). Moreover, at times, IRAs were established almost as an afterthought to accompany privatisations and with little political debate controversy (for instance, in telecommunications in Britain in 1984—Thatcher 1999, Chapter 7).

Such expectations appeared to be well founded in the institutional framework of IRAs. Elected politicians enjoy considerable controls over IRAs. In particular, they enjoy powers over:

- the nomination of the heads of IRAs. This is decided either by the executive (for example, in Britain and Germany), or by a combination of heads of the executive and the legislature (for instance, heads of lower and upper houses or election by the legislature), methods common in France and Italy;
- the power in Britain to reappoint IRA members, who are often appointed for limited terms;
- determination of IRAs’ budgets and sometimes their staffing levels—budgets come from public sector funds within annual budgeting and even if raised from industry levies, are set by government ministries;
- powers to overrule IRA decisions—for instance, in Germany, the Economics Minister can overrule a Bundeskartellampt refusal of a merger/takeover, while in Britain until 2003, the Secretary of State for Industry had the power to accept or reject the Director General Fair Trading’s ‘recommendations’ as to whether a merger should be referred to the Competition Commission (formerly the Monopolies and Mergers Commission); he/she also had the power to reject the Competition Commission’s advice.
- the ability to alter the organisational basis, powers and duties of IRAs by legislation.

What are the costs of applying these controls? Very few formal restraints were placed on the use of these powers by elected politicians. Thus for example, there are almost no criteria over qualities that appointees should have, or else such criteria at set at a very general level (for instance, members of the French telecommunications regulator, the ART, must be ‘qualified persons’). Equally, there are few special legislative procedures for selecting appointees such as public hearings. IRAs rarely enjoy any constitutional protection, and elected politicians only need pass ordinary legislation to alter the formal institutional framework, a possibility helped by disciplined government legislative majorities. The main institutional constraint on elected politicians concerns dismissal of IRA members, which is either not defined or else is permitted only on grounds of
incapacity. However, the ‘default condition’ is that IRAs cannot continue unless new members are appointed to replace those whose terms have expired or they are given new budgets annually. Thus the costs of applying controls would seem limited, especially relative to the US.

In the four countries, and for most IRAs, the types of powers held by elected politicians identified as important by PA analyses are broadly similar—over nominations, budget setting and staffing. There are some differences over the organisational status of the IRA and the allocation of powers over nominations. In France and Italy, IRAs have the status of independent authorities, unlike Britain and Germany. The main variation across nations concerns the number of principals for nominations. In France and Italy, the executive and the legislature (as a whole or the heads of its houses) often have nomination powers whereas in Britain and Germany, such powers are usually held only by the executive. For most IRAs, the number of actors is lowest in Britain (powers held by single-party governments) and highest in France and especially Italy (powers held by different parts of the legislature and executive, with the latter often being multi-party governments).

Overall, analysis of the formal institutional framework thus reveals that elected politicians have many of the powers identified as important by US-based literature on agencies, and that they enjoy great discretion in the use of most of those powers. Insofar as variations exist, they suggest that IRAs have greatest formal status as independent bodies in France and Italy, and that the costs of utilising controls should be highest in these two countries due to the higher number of actors involved in nominations.

THE USE OF FORMAL CONTROLS BY ELECTED POLITICIANS

This section looks at the use by elected politicians of the key formal controls that are identified as important by PA analyses and whose formal institutional form has been analysed above: nomination and dismissal of IRA members; setting IRA resources, notably budgets and staffing; overturning IRA decisions; legislation to alter the institutional position of IRAs.

The empirical data covers the market IRAs set out in Table 1—i.e. general competition authorities, utility regulators and financial regulators—except in Tables 5 and 6 which look at a subset of IRAs. The figures on individuals refer to the heads of IRAs (i.e. presidents/chairmen) and members of IRA boards appointed by elected politicians.

Nomination and Dismissal of IRA Members

Nomination of IRA members is claimed to be the most visible and effective formal control available to elected politicians (Majone 1996, 38; Wood and Waterman). Given the lack of formal controls over choice of nominees, one possibility is that elected politicians seek to control IRAs by appointing party politicians—either past politicians who owe ‘debts’ and/or may wish to re-enter politics—or aspirant politicians who use IRA membership as a route into politics.

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

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

<table>
<thead>
<tr>
<th>% holding or standing for public office (local, national or European) before or after term on IRA</th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>% publicly affiliated with party</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>3%</th>
<th>9%</th>
<th>15%</th>
<th>23%</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1 of 33)</td>
<td>(4 of 46)</td>
<td>(2 of 13)</td>
<td>(6 of 26)</td>
<td></td>
</tr>
</tbody>
</table>

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.

2. Information derived from biographies, newspaper reports and Who’s Who.

The figures show that in Britain, France, Germany and Italy elected politicians have usually not used their appointment powers to choose party activists; even the broader category of publicly-known party affiliations covers a minority of IRA members and generally arises in communications regulators. Britain is an extreme case: only one regulator between 1990 and 2001 had been recently politically active or linked to a party. This does not mean that regulators lack political views but does show that individuals with public ties to parties have not been appointed. Italy is a partial exception in that almost all members of AGCOM, the communications regulator, have clear party political affiliations and almost quarter have stood or held public office (della Cananea).

Where are IRA members drawn from? Table 3 shows the proportions who are drawn from the public sector.

Table 3

Public sector origins of IRA members 1990-2001

<table>
<thead>
<tr>
<th>% IRA members from public sector (previous occupation)</th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>29%</td>
<td>74%</td>
<td>92%</td>
<td>76%</td>
</tr>
<tr>
<td>(9 of 31)</td>
<td>(14 of 19)</td>
<td>(11 of 12)</td>
<td>(19 of 25)</td>
<td></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 show that the overwhelming majority of IRA members come from the public sector, with the exception of Britain. More detailed analysis shows that many had had experience of public life at a high level as officials or policy advisors. Thus for instance, all three heads of German competition authority since 1976 had been heads of department in government ministries, while most senior IRA members in France are members of a *grand corps*, many of whom have served in ministerial cabinets and form part of the administrative-politico elite (48% -- 22 of 46 of the sample in Table 3; cf. Dreyfus); in Italy, 62% of the sample were *professori*, often having held senior official positions.
Thus elected politicians have chosen people who are not party politicians but who have taken part in policy advice and administration.

Premature departure from office provides another indication of the relationship between IRAs and elected politicians. No IRA member has been formally dismissed in the sample. Even resignations have been relatively rare, and have often been for personal or professional reasons, including taking other attractive posts, rather than pressure from elected politicians. There is little evidence of IRA members leaving office when the party in government changes hands. Table 4 shows both total numbers of IRA members resigning and those who left from those IRAs that existed throughout over the period 1990-2001 (the latter to correct for biases due to different lifespans of IRAs, since several were created during the 1990s).

Table 4
Resignations of IRA members before end of term 1990-2001

<table>
<thead>
<tr>
<th></th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>% resigning before</td>
<td>15%</td>
<td>13%</td>
<td>17%</td>
<td>19%</td>
</tr>
<tr>
<td>end of term (or</td>
<td>(5 of 33)</td>
<td>(6 of 46)</td>
<td>(2 of 12)</td>
<td>(5 of 26)</td>
</tr>
<tr>
<td>retirement if</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>permanent post</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% resigning of IRAs</td>
<td>29%</td>
<td>18%</td>
<td>0</td>
<td>23%</td>
</tr>
<tr>
<td>existing 1990-2000</td>
<td>(5 of 17)</td>
<td>(5 of 28)</td>
<td>(0 of 5)</td>
<td>(3 of 13)</td>
</tr>
</tbody>
</table>

1. Coverage: as Table 2
2. Sources: IRA websites and Annual Reports.
It may be thought that politicisation of appointments and early departures may be greatly linked to the characteristics of sectors—especially whether they are highly salient in party politics. One good comparison is between communications IRAs (telecommunications and broadcasting), which lie in highly contentious fields, and general competition authorities, which are generally less salient for party politics. Table 5 analyses party politicisation and resignations across the two groups of IRAs.

Table 5
Party activism and public affiliations of communications and general competition IRA members 1990-2001

<table>
<thead>
<tr>
<th></th>
<th>Communications IRAs (telecommunications and broadcasting)</th>
<th>General Competition authorities</th>
</tr>
</thead>
<tbody>
<tr>
<td>% holding or standing for public office (local, national or European) before or after term on IRA</td>
<td>16% (9 of 56)</td>
<td>18% (5 of 28)</td>
</tr>
<tr>
<td>% publicly affiliated with party before term end or retirement if permanent post</td>
<td>48% (27 of 56)</td>
<td>43% (12 of 28)</td>
</tr>
<tr>
<td>% resigning before end of term (or retirement if permanent post)</td>
<td>18% (10 of 57)</td>
<td>22% (6 of 28)</td>
</tr>
</tbody>
</table>

Coverage—AGCOM and AGCM in Italy; CSA, ART and Conseil de la Concurrence in France; OfTEL, ITC, OFT and MMC/Competition Commission in Britain; Germany—RegTP and Bundeskartellampt.

A comparison between the two sets of IRAs suggests that, perhaps surprisingly, the extent of politicisation is only slightly higher in communications than in general competition IRAs, despite the political sensitivity of the former. A similar picture of lack of great cross-domain differences emerges from resignations of IRA members. Cross-domain differences in party politicisation and early departures appear much smaller than cross-national variations.

Finally, the average length of tenure of regulators is high—well above that of ministers or even governments: longer tenure not only offers greater expertise, but also allows IRA members to ‘wait out’ a minister. Table 6 looks at the tenure of senior members of general competition authorities to allow cross-national comparability, since such authorities have existed throughout the 1990s in all four countries. It takes those senior members who finished their term or whose appointment was renewed.

Table 6
Average tenure of senior members of general competition authorities 1990-2001

<table>
<thead>
<tr>
<th></th>
<th>Britain</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average tenure</td>
<td>6.4 years (5)</td>
<td>7.5 years (17)</td>
<td>7.7 (3)</td>
<td>5.3 years (7)</td>
</tr>
</tbody>
</table>
1. Average tenure: only those members who left during period 1990-2000, except if appointment renewed; where term of office began before 1990, time is included; excludes those deceased in office; for Germany, only Presidents of the Bundeskartellampt are included.

2. Coverage: for France, all members of the Conseil de la Concurrence included; if only the President is included, average tenure would be 5.5 years. For Italy, all members of AGCM included; for Britain, DGFT (Director General of Fair Trading) and Chairman of Competition Commission/MMC (Monopolies and Mergers Commission).

3. Sources: Annual Reports and websites

Overall these data show that IRA members are not party politicians, and they usually serve out their terms and hold office for significant periods. However, a high percentage in continental Europe is drawn from the public sector.

IRA Resources—Budgets and Staffing

PA theory emphasises the importance of elected politicians’ powers to set agents’ budgets and staffing and to overrule agents’ decisions. Tables 7 and 8 show the spending (in real terms) and staffing levels of general competition IRAs in Britain, Germany and Italy between 1993 and 2002. These are taken since they existed over the entire 1990-2002 period in the three countries.

Table 7
Spending of General Competition IRAs in Britain, German and Italy 1993-2002 (Real Terms)

<table>
<thead>
<tr>
<th>Year</th>
<th>MMC/CC—pounds sterling—million</th>
<th>Bundeskartellampt—Euros-million</th>
<th>AGCM—Euros-million</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>4.11</td>
<td>11.63</td>
<td>12.25</td>
</tr>
<tr>
<td>1994</td>
<td>5.71</td>
<td>11.47</td>
<td>14.98</td>
</tr>
<tr>
<td>1995</td>
<td>4.80</td>
<td>10.57</td>
<td>n/a</td>
</tr>
<tr>
<td>1996</td>
<td>7.11</td>
<td>10.74</td>
<td>15.29</td>
</tr>
<tr>
<td>1997</td>
<td>5.81</td>
<td>9.86</td>
<td>16.21</td>
</tr>
<tr>
<td>1998</td>
<td>5.67</td>
<td>9.79</td>
<td>15.37</td>
</tr>
<tr>
<td>1999</td>
<td>6.78</td>
<td>14.48</td>
<td>14.72</td>
</tr>
<tr>
<td>2000</td>
<td>7.33</td>
<td>15.75</td>
<td>16.14</td>
</tr>
<tr>
<td>2001</td>
<td>7.82</td>
<td>15.08</td>
<td>24.4</td>
</tr>
<tr>
<td>2002</td>
<td>12.90</td>
<td>13.78</td>
<td>19.73</td>
</tr>
</tbody>
</table>


Table 8
Staffing of General Competition IRAs in Britain, German and Italy 1993-2002

<table>
<thead>
<tr>
<th>Year</th>
<th>MMC/CC</th>
<th>Bundeskartellampt</th>
<th>AGCM</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>97.5</td>
<td>257</td>
<td>107</td>
</tr>
<tr>
<td>1994</td>
<td>102</td>
<td>253</td>
<td>132</td>
</tr>
<tr>
<td>1995</td>
<td>81.5</td>
<td>260</td>
<td>138</td>
</tr>
<tr>
<td>1996</td>
<td>97</td>
<td>259</td>
<td>146</td>
</tr>
<tr>
<td>1997</td>
<td>84</td>
<td>256</td>
<td>167</td>
</tr>
<tr>
<td>Year</td>
<td>Staff</td>
<td>Budget (000s)</td>
<td>Staff</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>--------------</td>
<td>-------</td>
</tr>
<tr>
<td>1998</td>
<td>78</td>
<td>245</td>
<td>174</td>
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<tr>
<td>1999</td>
<td>84</td>
<td>257</td>
<td>172</td>
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</tr>
<tr>
<td>2001</td>
<td>109</td>
<td>276</td>
<td>179</td>
</tr>
<tr>
<td>2002</td>
<td>152</td>
<td>279</td>
<td>187</td>
</tr>
</tbody>
</table>

1. Source: IRA annual reports and annual finance bills.
2. For MMC/Competition Commission: until 1995, part-time staff counted as 0.5; from 1996, no breakdown between part and full-time staff given

The figures indicate that IRAs are relatively small in terms of numbers and spending. They may hence be dependent on support from government departments. Nevertheless, although budgets and staffing may be important, the activities of IRAs, especially rule-making, may not require many staff. Indeed, specialist expertise may be equally important. While IRAs may be disadvantaged vis-à-vis large, well-resourced powerful firms and hence prone to capture or reliance by such firms, our interest lies in the power of IRAs relative to elected politicians. A comparison of the two in terms of specialised expertise offers a more complex picture than that of figures for total staffing and budgets. Many heads of IRAs have existing high levels of knowledge of their domain—and/or relevant general skills, such as law, economics or accountancy. In contrast, ministers are rarely regulation or domain specialists. Naturally IRA members and elected politicians rely heavily on their staff. Here both the number and composition of staff may be extremely important—notably such as the presence of domain specialists, lawyers and economists. Legislatures are generally very under-resourced in terms of specialists relative to IRAs—for example, the 2003 House of Lords Constitution Committee conducted a review of independent regulators with one specialist advisor. Even governments frequently have fewer specialised staff than IRAs. Thus for instance, the German government abolished its Posts and Telecommunications ministry and transferred all the staff to the regulator, the RegTP. In Britain, most senior officials at the Department of Trade and Industry are policy generalists, not regulation specialists or economists or lawyers.

Comparing across countries is fraught with difficulties such as differences in accounting or the scope of national IRAs (for instance, Britain has a separate investigative body for general competition policy, the Office of Fair Trading). It is more valuable to examine trends over time to see if there are sharp changes in IRA budgets or staffing that might indicate electing politicians using their powers to punish or reward IRAs. The figures show considerable stability in Germany and Britain in the 1990s. Staff numbers rose in Italy over the period and in Britain after 2000. Budgets (in real terms) were also relatively stable until the late 1990s, but in the period from 1999-2002, they rose sharply. The data thus do not suggest that elected politicians used their powers to reduce budgets and staffing. Instead, for many of the years examined there was considerable stability and over the entire 1993-2002 elected politicians have increased the budgets and staff numbers of general competition IRAs.

Reversing IRA Decisions

If IRAs take decisions that elected politicians dislike, the latter sometimes have formal powers to overturn those decisions. Although there are few publicly-available data, the figures are very striking. Thus for instance, in Germany, under the 1973 amendment of the competition law, the Federal Economics Minister can overturn a refusal by the Bundeskartellampt to allow a merger (cf. Baake and Perschau). However, only six decisions have been overturned between 1973 and 2000, with the last dating back to 1989. In Britain, until 2003, the Secretary of State for Industry had the power to accept or reject the Office of
Fair Trading’s ‘recommendations’ as to whether a merger should be referred to the Competition Commission (formerly the Monopolies and Mergers Commission); he/she also had the power to reject the Competition Commission’s advice (Wilks, 194-242). Use of the two powers was extremely rare: the OFT’s recommendations were rejected in only 14 cases between 1990 and 1997, and only four cases have been found for the MMC’s report (source: MMC annual reports).

**Institutional Reforms of IRAs**

An important control for elected politicians is to alter the institutional basis of IRAs—increasing their own powers over IRAs or changing the competencies, duties and organisational basis of IRAs. Such institutional reforms would be expected to be much easier in European nations than in the United States, particularly given governments with disciplined legislative majorities. Legislative changes to control IRAs should be particularly easy in countries with single-party governments and/or with weak constitutional limits over the freedom of legislatures to pass new legislation, such as Britain.

Analysis of institutional reforms shows that, far from reducing IRAs’ formal powers or independence, elected politicians have passed legislative reforms in the opposite direction. Three aspects can be underlined. First, almost no market IRAs have been abolished; instead, the tendency has been to widen the competencies of IRAs, sometimes by merging them and sometimes by transferring powers from other bodies. Thus, for instance, Ofcom in Britain, established in 2003, covers telecommunications and most of broadcasting, while Ofgem, created in 2000 is responsible for gas and electricity; both represented the amalgamation of several previous IRAs. In financial services, the Financial Services Authority (FSA), established in 1997, took powers from the Securities and Investment Board (SIB), the Bank of England and the Treasury, while in France, the AMF (Autorité des Marchés Financiers) in 2003 was born of the fusion of the COB (Commission des Opérations de Bourse) and the self-regulatory CMF (Commission des Marchés Financiers). An Energy Act currently underway in Germany (2004) makes the telecommunications and postal regulator, the RegTP, also responsible for the energy sector. Today single IRAs hold powers over large and economically strategic domains—financial services, energy, communications.

The second characteristic of institutional reforms is that elected politicians have increased the formal independence and powers of IRAs. Reform legislation has often formally confirmed IRAs’ status as independent regulators—for instance, Italian legislation in 1986 declared that the stock exchange regulator, the CONSOB, was an independent authority with its own legal personality, while the same was undertaken for the COB and AMF in France in 1996 and 2003 (Cassese 2000, 260-5; Guerlain). IRAs have been given additional powers—for instance, to impose sanctions, require information, license or prevent trading by refusing authorisations. Thus the UK Competition Commission was empowered by the 1998 Competition Act to impose large-scale fines for anti-competitive behaviour (up to 10% of a firm’s turnover) (Wilks), while in 1998-9, the Bundeskartellampt’s ex ante powers to prevent anti-competitive mergers were increased by requirements of pre-notification and it was allowed to grant anonymity to firms reporting anti-competitive dumping. Perhaps the most spectacular expansion of powers has concerned financial regulators in Britain and France. Originally, the French COB (Commission des Opérations de Bourse, established in 1967) had few powers and functions, these being mostly to gather information (Decoopman: 17-37). By the 1990s, it had sweeping powers to open inquiries, prevent trading by refusing mandatory authorisations, issue orders to cease trading, take cases to court and levy fines (see Conec 2002, part 1). The same direction of change was seen in Britain: the SIB, established in 1986, was given powers to license ‘self-regulatory organisations’, approve their rules and establish rules itself (Black). Its successor,
the FSA, directly regulates financial services and has powers to take civil and criminal actions.

Elected politicians have at times reduced their own powers over IRAs, offering the third feature of institutional change. At times, this has been explicit: thus the 2003 Enterprise Act in Britain ended the powers of the Secretary of State for Industry to decide whether to follow the Office of Fair Trading’s recommendations to refer a merger/takeover to the Competition Commission, while in 1989 and 1996 the COB was given enhanced powers to undertake legal proceedings itself instead of having to rely on the Justice Ministry. Equally, the budgetary dependence of IRAs on elected politicians has been reduced by reforms that allow IRAs to recover their costs by charging fees for services and by imposing levies on sectoral actors (for instance, for the FSA, CONSOB and AMF). Even the powers of elected politicians over nominations have been reduced for some IRAs. Thus in Britain, appointments to IRAs have been subjected to procedures such as those recommended by the Nolan Report, including advertisement and ‘open selection,’ while in France, whereas all members of the COB were freely nominated by elected politicians, by the 1990s legislation stipulated that many of its members must be drawn from specified judicial, professional and financial bodies (Conec 30-31; Bézard).

INTERPRETING THE DATA

The data show that elected politicians rarely used their formal controls to appoint party political IRA members, to overturn IRA decisions or to punish IRAs with budget changes. These findings apply across the four countries, despite differences in formal IRA status or the costs of controls, as well as across domains. The sole major exception to this general finding seems to be party politicisation in Italy.

The findings appear to run counter to the literature emphasising the importance of formal controls, especially appointment, budgets and reversing agency decisions. Explaining the results would require a full-scale study with both quantitative methods and detailed case studies that are not possible in a short article. Moreover, as noted there are definitional and methodological difficulties in assessing agency independence from the use of sanctions. Instead, what is offered here are two interpretations, using the PA framework as a starting point. These are very much preliminary—detailed work is needed to develop and apply them. Their value is to point to possible specific reasons why elected politicians chose not to use their formal controls, reasons that can then be investigated in further studies. The first interpretation suggests that elected politicians did not need to use their formal controls because other methods to control IRAs were effective and hence they did not face agency losses. The second is that elected politicians did not choose to use their controls because agency losses were outweighed by the benefits for them of IRA autonomy and the costs of using formal controls.

Interpretation 1. Low Agency Losses Due to Alternative Effective Methods of Controlling IRAs

If elected politicians face low agency losses from delegation to IRAs, they do not need to use formal controls, especially in visible ways such as party politicisation or dismissal of regulators. The issue is thus what alternative methods to the application of formal controls as expected from the existing PA literature exist in Europe to prevent agency losses from delegation to IRAs.

Agency losses might be limited due to the operation of the formal institutional framework governing relations between elected politicians and IRAs, but in ways that differed from those seen in the US. One reason for low agency losses would be if IRAs had
similar preferences to elected politicians—i.e. shirking was low. There is some evidence to support this in Europe. Although party political appointments were largely avoided, control may have taken place through appointments based on policy preferences rather than party political affiliation. Thus for instance, in Britain, the most depoliticised of the four countries, heads of the competition authorities and of OfTEL, the telecommunications authority have mostly been economists, businessmen and lawyers; many known for their publicly-stated belief in competition. These views were similar to the policies of British governments (including the Labour government after 1997) in favour of competitive markets.

Another explanation of low agency losses would be that the overall institutional design gave strong incentives for IRAs to follow the views of elected politicians—i.e. slippage was low. In both the US and Europe, IRAs depend on elected politicians for many resources—budgets, enforcement, information and new powers. However, in Europe there are often fewer veto players than in the US over the application of those powers; in particular, most are held by governments, either directly or indirectly through their control of legislatures through disciplined party majorities. Moreover, those governments face few constraints over the application of their powers—for instance, often they do not need the legislature’s approval. As noted, European IRAs are small in terms of staff and budgets. Equally, governments retain important powers—for instance over licensing in most utility sectors or over remaining nationalised industries—that affect the ability of IRAs to perform their tasks successfully. IRA members may have rationally anticipated their government’s ability to wield controls, so that elected politicians in Europe do not even need to apply them. Instead, IRAs have engaged in positive exchange relationships with governments—following their preferences and winning rewards. Thus IRAs have structural incentives to follow the wishes of elected politicians and according to this interpretation, since they have done so, they have been rewarded (for instance through new powers, increased budgets and renomination).

Effective non-statutory controls offer another route whereby IRAs can be kept sensitive to the preferences of elected politicians. The combination of the activities of third parties, such as courts or interest groups, and the institutional features that mould the influence of such actors over IRAs (for instance, administrative procedures may lead agencies to make choices desired by elected politicians (cf. Kiewet and McCubbins; McCubbins, Noll and Weingast 1987, 1989; McCubbins and Schwartz). Few specific administrative procedures were devised for most IRAs in Europe, but their decisions are subject to judicial review, while they have been engaged in intense relationships with their regulatees (Coen, Héritier, and Böllhoff; Prosser). This non-statutory factor would thus involve showing how courts and regulatees have kept IRAs close to the preferences of elected politicians.

Informal relationships between IRAs and elected politicians offer a more direct non-statutory control. Although IRAs are legally and organisationally separated from governments, the two often enjoy close informal relationships in European nations. They form part of expert policy communities that include IRAs and senior officials from government ministries. At the senior levels, in France and Italy, IRA members are drawn from similar groups to elected politicians—for example, the grands corps and ministerial cabinets in France and the professori in Italy. Many IRA members have had lengthy experience of public life, albeit outside elected office, having held senior posts in or close to government or served on public committees and commissions. Furthermore, IRA members face incentives such as the prospects of further public appointments in the future and social prestige from public honours. At lower levels, many IRA staff are drawn from government departments and sometimes return to departments. IRAs have frequently been created by transferring civil servants from the relevant government ministry—for example, the German and Italian telecommunications regulators, the RegTP and AGCOM. This position remains true even in well-established IRAs: thus although OfTEL was established in 1984, its deputy
director general 1994-98, Anna Walker, was a civil servant from the department of Trade and Industry, with which she maintained close links and to which she returned in 1998 (cf. Hall, Scott, and Hood 74-77). The result of these recruitment patterns are a web of personal ties linking IRAs with policy makers, leading to frequent consultation that can produce agreement between IRAs and governments (either because IRAs follow government wishes or because each influences the other to reach an agreed set of policies). An interpretation based on low agency losses would require evidence that IRAs have introduced policies desired by elected politicians. It then directs explanation of lack of use of formal controls to alternative methods whereby elected politicians ensured that IRAs followed their preferences. It would explain the exceptional use of controls by the failure of these alternative methods. Further research is needed to show which alternative methods operated and how and when they were effective.

This first interpretation implies that despite their titles, IRAs have little effective independence from elected politicians. Features such as low party politicisation or reduction of IRA budgets indicate successful control of IRAs by elected politicians. The two sets of actors may be distinct, but the first has little autonomy from the second.

Interpretation 2. Agency Losses were Outweighed by the Benefits for Elected Politicians of IRA Autonomy and the Costs of Using Formal Controls

Elected politicians should, following the PA framework, decide whether and how to apply their formal powers by a rational balancing of costs and benefits (cf. Huber and Shippan 2000). Although agency losses have not been estimated here, this interpretation assumes that they have occurred (in contrast to the first interpretation). It suggests that elected politicians may have chosen to accept these losses because they were outweighed by the benefits of autonomous IRAs and the costs of applying sanctions.

PA models underline that elected politicians delegate to IRAs in order to perform useful functions—enhancing credible commitment, taking blame for unpopular decisions, increasing technical efficiency of regulation (for instance in terms of information). The same benefits that explain formal institutional delegation can be applied to why elected politicians have allowed IRAs considerable autonomy in practice.

One benefit of independent market regulators strongly underlined in the general literature is increased credible commitment to investors, who fear future expropriation from government policy (Levy and Spiller; Majone 2001). In Europe, many IRAs have been set up in industries that are being or will be privatised, especially in utilities such as telecommunications and energy. The sums raised have been very large and crucial for other government policies such as reducing debt, deficits or taxation (cf. Feigenbaum, Henig and Hamnett; Wright). Moreover, governments have often sought large-scale inward investment—for instance, in the sale of 3G mobile licences in the late 1990s or in financial services. Thus autonomous IRAs may have helped governments to increase the value of privatisations and inward investment by enhancing credible commitment to investors.

In many market domains, technical complexity has increased. In particular, liberalisation in industries such as telecommunications and energy has led to very intricate and specialist issues such as setting interconnection conditions among suppliers, determining cost allocations for setting prices or determining the costs of capital. Moreover, IRAs have had to grapple with unpopular decisions and decreased choices at the national level. In the utilities, price rebalancing after liberalisation and privatisation has disadvantaged certain users, especially residential ones (for Britain, see Ernst; Palast, Oppenheim, and MacGregor). In general industrial policy, governments have increasingly moved away from rescuing ‘lame ducks’ or preventing mergers and takeovers on the grounds of loss of employment, and have left general competition authorities to make
controversial decisions on approving industrial restructuring. EC regulation in fields such as the utilities has expanded rapidly. It has generated ever more detailed EC regulation with high information demands. It has also limited choices available within member states over matters such as whether to have monopolies, cross-subsidisation or using suppliers for social and industrial policies.

Thus elected politicians may have wished to have autonomous IRAs which offer them benefits in terms of credible commitment, efficiency and taking blame. Instead of attempting to control substantive policy decisions in fields in which they have delegated to IRAs, they may have focused on more rewarding domains. Indeed, given the benefits of delegation, if elected politicians had used their controls over IRAs, they would have damaged the functions that IRAs fulfilled for them.

The dangers to elected politicians of reducing IRA independence through their post delegation controls are well illustrated by the case of railways in Britain in the late 1990s (cf. Lodge 181-93). The case offers an exception to the general pattern of elected politicians not using their formal controls to intervene directly in regulation, and the costs of so doing. The sectoral IRAs have been reformed several times, notably the Strategic Rail Authority (formerly the Office of Passenger Rail Franchising), ministers have intervened directly in the decisions of SRA and several major IRA resignations have occurred. However, the government rather than the railway IRAs, has been held to blame for many of the difficulties of the industry. Financially, the costs to the government have been high: following strong public and political pressures, it had to increase subsidies to the industry. At the same time, loss of credible commitment concerning the protection of privatised firms increased the costs of borrowing for investment for the privatised track operator, Railtrack; faced with a financial crisis at the company, the government then put Railtrack into administration in 2001 and replaced it with a new not-for-profit company, Network Rail, whose borrowings are underwritten by the government. Government interventions in railway IRAs damaged credibility for investors and left it with both financial costs and blame.

Elected politicians also face costs of implementing controls—for instance, agreeing on new nominations, passing legislation to alter the institutional framework or following special procedures to overturn IRA decisions. Some of these costs seem to be low in countries such as Britain, due to single-party governments with disciplined legislative majorities (cf. Huber and Shipan 2000, 42-43), but may be higher in countries with coalition governments. However, in all four countries dismissing IRA members is usually very difficult as their tenure is protected by law and often requires exceptional circumstances. Moreover, elected politicians may face other forms of costs, such as public criticism and claims of misuse of powers. Thus for example, when President Jacques Chirac appointed Jean-Michel Hubert, formerly a Paris city council official when Chirac was Mayor, as head of the new French telecommunications regulator, the ART in 1996 instead of a highly-qualified technical expert (Bruno Lasserre), he was attacked (La Tribune Desfossés October 20, 1996; Les Echos October 30, 1996). Finally, formal controls such as appointments, dismissal or reducing budgets may be ineffective. They are blunt instruments for gaining greater control by elected politicians. Lower budgets may not influence senior officials, can reduce IRA effectiveness and increase costs for third parties, while the political appointees nominally at the top of IRAs are in fact highly dependent on lower-level staff and can face strong organisational cultures (cf. Dunleavy, Chapter 7; Moe 1987; for a detailed empirical study of power within a regulator, see Hall, Scott, and Hood on OfTEL).

If politicians fail to use their powers to control IRAs, why did they create them in the first place? One reason may be to be able to choose whether to leave IRAs autonomy, depending on future costs and benefits. Another may be that despite initial expectations, the costs of using controls and the benefits of IRA independence were higher than foreseen at
the time of delegation, causing an unexpected failure by elected politicians to use their
controls as had been anticipated. Finally, those politicians may have learned over time,
realising the value to them of not politicising and controlling IRAs.

This second interpretation of agency losses suggests that IRAs in practice enjoy real
autonomy from elected politicians. It requires evidence of differences between the
preferences of elected politicians and IRAs. It then directs our attention to the benefits to
elected politicians of IRA autonomy in practice and the costs of using formal controls.
Exceptional uses of formal controls are explained by low benefits for elected politicians
from delegation to IRAs and/or low costs of applying controls.

CONCLUSION

Whereas previously regulation of markets in Europe was largely a matter between
governments and suppliers, today there are also IRAs that are organisationally and legally
separated from government. However, do they constitute a third force in practice? Using the
PA framework, we have examined the use of key formal controls by elected politicians in
practice. The data suggest that elected politicians have made limited use of their powers of
appointment to select party loyalists (with the partial exception of Italy). Nor have they
forced out IRA members before the end of their terms, even when governments have
changed, with most IRA members serving their full terms. The result has been IRAs with
longer-lasting members than the majority of ministers or governments. Equally, elected
politicians have made almost no use of powers to overturn IRA decisions. Indeed, they have
frequently increased the powers of IRAs in subsequent reforms. These results were not
expected when IRAs were created. Moreover, they mostly apply across the four countries,
despite differing national traditions and ‘varieties of capitalism’.

Thus IRAs are a ‘third force’ in terms of constituting a separate group of actors from
elected politicians. However, whether they are a third force in terms of their independence
in practice depends on understanding why elected politicians rarely used their formal
controls. Using the PA framework as a starting point, two interpretations of the evidence of
use of formal controls have been offered. The first is that elected politicians have found
methods other than applying the formal controls investigated to ensure that IRAs follow
their preferences. It would suggest that agency losses have been low as IRAs have followed
the desires of elected politicians and hence IRA autonomy in practice has also been low.
The second interpretation is that elected politicians have found that the benefits of IRA
autonomy in practice and the costs of applying their formal control outweigh agency losses
from the autonomy that IRAs have enjoyed in practice.

How can we adjudicate between the two very different interpretations of IRA
independence in practice? Ultimately, agency autonomy is seen in policy making and
implementation. However, any study that relies on external data—e.g. decisions taken or
public statements—faces the problem of ‘observational equivalence’ as the same evidence
can be used to support IRA independence or the converse. Indeed both IRAs and elected
politicians have incentives to misrepresent their true positions—for instance, the politicians
may not wish to admit that IRAs are out of their control if those IRAs are seen as successful
or take popular decisions. In the opposite circumstances, if IRAs are making unpopular
choices or are seen as unsuccessful, politicians may not wish to acknowledge that they in
fact control those IRAs. Hence detailed case studies showing the preferences of elected
politicians and IRAs and relations between them are required. The two interpretations
suggest paths for such research. They invite analysis of the choices of different forms of
control enjoyed by elected politicians, their relative effectiveness and their costs and
benefits. The first interpretation of low agency losses directs our attention to mechanisms
other than the formal controls investigated—be these anticipation by IRAs of use of formal
controls, the role of third parties or informal controls— that enable elected politicians to prevent agency losses. The second interpretation points towards the factors that influence the costs of applying formal controls and/or the value of IRA independence. Detailed historical case studies using process tracing are needed to see whether elected politicians fail to use their formal controls as expected because they have better alternative methods of controlling their agents, or whether they allow those agents considerable independence because of the high costs of control and the benefits of agent autonomy.

NOTES

1. Although there are studies of the most long-established IRAs, notably general competition authorities (see Gerber; Wilks).
2. For comparative analyses of European nations, see, for instance, Giraudi and Righettini; Gilardi; Thatcher 2003.
3. In particular, the long debate in the US on whether there is a "runaway bureaucracy" or congressional 'abdication'—for a recent concise overview, see Huber and Shipan 2002, Chapter 2.
4. Cf. Cassese and Franchini; Giraudi and Righettini; Gobbo and Zanetti; Martinelli; Perez, 1996. For France, see Colliard and Timsit; Conseil d’État; Guédon; Teitgen-Colly.
5. Thus for instance, the Director General of Oftel had two primary duties under the 1984 Telecommunications Act: to ensure that "all reasonable demands" for telecommunications were satisfied throughout the UK, except if not reasonable practicable"; to ensure that suppliers could finance the provision of such services. He/she then has a series of secondary duties that are equally broad and likely to conflict with each other.
6. The Conseil de la Concurrence is excluded due to data problems.
7. Thus for example, for competition IRAs: in Italy, all three heads (Saja 1990-94, Amato 1994-97 and Tesauro 1998-present) were lawyers; for Germany two Presidents of the Bundeskartellampt were lawyers (Kartte 1976-92 and Wolf 1992-99) and one an economist (Böge 2000-present), for Britain, see above; in France, two of the three presidents of the Conseil de la Concurrence were senior members of the Conseil d’État, with expertise in administrative law (Laurent 1987-93 and Hagelsteen 1998-present).
8. Although even here the data have problems due to changes in definitions and accounting conventions—e.g. in the treatment of office rents.
9. Notably of Of tel, the ITC (Independent Television Commission) and the Radiocommunications Agency for Ofcom, and of Of fer and Ofgas for Ofgem.
10. The heads of the OFT were Sir Gordan Borrie (Barrister and legal academic) 1976-92, Sir Bryan Carsberg 1992-94 (accountant), John Bridgeman (1995-2000 (senior business executive) and John Vickers 2000-present (academic economist); for the MMC, the most recent have been Sir Sidney Lipworth 1988-93 (senior business executive), Graeme Odgers 1993-97 (senior business executive) and Derek Morris 1997-present (academic economist); the heads of Of tel have been: Sir Bryan Carsberg 1984-92 (accountant), Don Cruickshank 1988-93 (accountant and business executive) and David Edmonds (civil service and senior business executive).
11. John Swift in 1998 from the ORR and John O’Brien in 1999 from OPRAF, and then Sir Alisdair Morton from the SRA in 2001

REFERENCES


