

THE IMPORTANCE
OF NON-FUNCTIONAL FACTORS
IN EXPLAINING DELEGATION
TO NON-GOVERNMENTAL
AGENCIES:
THE CASE STUDY OF RADIO
SPECTRUM

By

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Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of a PhD (Doctor of Philosophy) Degree is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged in the text of my work.

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ABSTRACT

This thesis examines the non-functional factors explaining the growth and variation of delegation to independent agencies. The literature argues that delegation is more likely in sectors subject to market opening, like telecommunications or energy. The functional reasons for the creation of independent agencies such as credibility, complexity or expertise, explain the growing incidence of delegation to independent agencies. However, there are still wide variations in the level of independence given to independent agencies. The literature has identified a number of the non-functional factors which may explain the variations in the levels of independence. The non-functional factors are concerned with the role of political traditions; isomorphism, specifically the role of the European Union, and blame-shifting.

This thesis examines the delegation process in the UK, Ireland and the Netherlands. It examines Telecommunications as a sector subject to market opening but specifically examines the delegation of radio spectrum management. Radio spectrum is a key operational responsibility of Telecommunications regulatory agencies however it has been delegated through different institutional solutions. An examination of radio spectrum delegation will help to explain the

non-functional factors for delegation and offer a better understanding of the delegation process.

This dissertation highlights the importance of the non-functional factors in the decision to delegate. Radio spectrum management is not delegated, without constraints on the agent, in cases where policy actors believe they need to retain control over the financial rewards of radio spectrum licences. The review of the delegation process also highlights that the non-functional factors differ at a national level. In some cases blame shifting is a factor, in others it is not. Political traditions can act both for and against delegation depending on the political culture. The importance of the European Union is reinforced in these case studies and is considered a key driver behind the creation of independent agencies.

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ABBREVIATIONS

UMTS	Universal Mobile Telecommunications System, also referred to as third generation mobile (3G)
CDa	Christen Democratisch Appèl (Netherlands)
CEPT	Européen Conférence of Postal and Télécommunications Administrations (Conférence Européenne des Administration des Postes et des Télécommunications)
ComReg	Commission for Communications Regulation (Ireland)
DCMNR	Department of Communications Marine and Natural Resources (Ireland)
DTI	Department of Trade and Industry (UK)
DTEC	Department of Transport Energy and Communications (Ireland)
DCMS	Department of Culture Media and Sport (UK)
DPE	Department of Public Enterprise (Ireland)
EU	European Union
GSM	Groupe Spécial Mobile (second generation operating standard for mobile telephony)
HDTP	Division of Communications and Post (division within Dutch department of water and national resources)
IRTC	Independent Radio and Television commission (Ireland)

ITU	International Telecommunications Union
KPN	Koninklijke PTT Nederland (Dutch Telecommunications company formerly state run company)
RDR	Radio Communications Division, part of Dutch department of water and national resources)
NRA	National Regulatory Authority
NMa	Nederlandse Mededingingsautoriteit (Dutch competition authority)
ODTR	Office of the Director of Telecommunications Regulation (Ireland)
Oftel	Office of communications (UK)
Ofcom	Office of communications (UK)
OPTA	Onafhankelijke Post en Telecommunicatie Autoriteit (Dutch Telecommunications Regulatory Authority)
SMAG	Spectrum Management Advisory Group (UK)
TND	Directorate of supervision of network and services (Netherlands)
VVD	Volkspartij voor Vrijheid (People's Party for Freedom and Democracy)
ZBO	Zelfstandige Bestuursorganen (Dutch semi autonomous specialist agency)

INTRODUCTION

The growth of independent regulatory agencies, particularly in the European Union (EU), has been an institutional innovation over the past two decades. In sectors where former state utilities have been privatised and markets opened to competition, such as energy and telecommunications, all EU countries have created independent regulatory agencies. The growth of these quasi-autonomous agencies extends to other sectors, with independent agencies created for food safety and pharmaceuticals. There are also independent agencies dealing with competition issues and financial services.

The literature on delegation to independent agencies has focused on why these independent agencies are created. The reasons put forward in the literature are both functional and non-functional. Functional theories focus on the principal-agent literature and indicate that delegation is functional in areas of policy complexity (Pollack M., 2002). Where there is a need for credibility (Gilardi, 2005), it is a strategy for policy makers to delegate. Credibility theories argue that governments will wish to enhance the credibility of their policies by delegating decision making to an independent regulatory agency thereby reducing political uncertainty via a change of government in the future. Levy and Spiller (1994)

have argued that credibility is the most plausible explanation for the creation of independent regulatory agencies, where the sector has been recently opened to competition. Minimising policy uncertainty through credibility is important, particularly for those wishing to invest in newly opened markets (North & Weingast, 1989). There are other factors that explain the delegation of authority to independent regulatory agencies. Governments will delegate unpopular decisions to independent agencies to shift blame (Fiorina, 1977), or through a process of institutional isomorphism (Majone 1996). Thatcher (2002) argues that the decision to delegate may be influenced by state traditions or through political leadership.

Gilardi (2003a) has concluded that credibility theories explain to a large extent the political actor's decision to create independent regulatory agencies. Once created the agencies exhibit variations in the level of formal independence. Gilardi (2003a) shows that the level of independence is not influenced by a country or a sector. This variation needs to be explained in more detail to understand the motivations of political actors in creating independent agencies. Gilardi (2001) argues that some of the variations in the level of independence are explained by the level of veto players in a country. He also concurs with Levy and Spiller (1994) who argue that the level of independence is higher in economic sectors recently subject to market opening. Non-functional factors also

impact the level of formal independence such as political leadership or tradition, blame shifting or isomorphism. McNamara (2002) posits that formal or informal pressures from organisations where member states may have a legal dependence, for example, member state obligations to the European Union, can result in a coercive form of isomorphism.

The combination of factors which influence the creation of an independent agency and the level of independence is therefore still unclear. It is also unclear what influences policy actors when they decide on the operational remit of an agency. The operational remit needs to be distinguished from the formal or organisational independence as the operational remit is concerned with the actual responsibilities delegated by policy actors. For example, an agency can be established through legislation with organisational independence from the policy actor. However, to ensure the agent does not significantly deviate from the preferences of the policy actor, the remit of the agency is limited through the use of ex-ante and ex-post controls.

The literature has focused on research using broad data sets and covering several sectors. This research has concentrated on testing hypotheses using measures of formal independence to test the relevance of policy complexity, veto players and credibility (Elgie, 2005; Majone 1994; Epstein & O' Halloran, 1999; Gilardi,

2002b; Levy & Spiller, 1996), Thatcher (2002b). Others have examined non-functional reasons, in many cases using individual country experience, for example the experience of the United Kingdom (UK), to support their arguments.

This thesis will deepen our understanding of delegation by examining systematically the creation of independent agencies and charting the evolution of agencies, assessing whether independence has materially changed in the period following the creation of the agency. The case studies will give a concentrated examination of the creation of the independent agency. The case-studies will allow a comparative analysis of detailed primary sources such as interviews with political actors, examination of legislation and reports which informed the decisions of political actors prior to the creation of an independent agency. The case-studies selected will concentrate on economic sectors which have been subject to market opening. Using only these examples, the case-studies will control for credibility as an explanation for the creation of the independent agency. By controlling for credibility, the case studies will therefore try to explain why the levels of independence differ in these countries. The cases will be selected from the telecommunications sector where delegation to independent agencies is most extensive and where market opening has occurred. The sector also has the same EU legislative framework.

The thesis will concentrate on the non-functional factors evident in the creation and evolution of the independent agency in telecommunications. However, it will also examine the variation in independence which occurs where political actors create independent agencies but constrain the independence of the agency through limitations on the operational remit of the agency. The thesis will do this by assessing the extent of delegation of a key operational responsibility of an independent telecommunications agency, the management of radio spectrum. As a national resource radio spectrum has historically been managed by the state, however, due to market opening this resource is capable of delegation to an independent agency.

Radio spectrum is the range of frequency wavelengths which, through advances in technology, is now the basis of communications services, including the development of mobile telephony. The allocation and licensing of this resource should, as part of the functioning of the market, be delegated to independent telecommunications agencies. Radio spectrum responsibilities are accepted as a key operational activity of independent telecommunications agencies. Along with responsibilities for numbering, licensing and interconnection, radio spectrum is accepted as a competence of the independent telecom agency in promoting market opening. However, when examining the types of activities normally delegated to independent agencies as part of their operational remit, there are

high levels of variation in the delegation of radio spectrum management across the EU. In some cases, the management of radio spectrum has been delegated to the independent agencies, in some countries there is co-responsibility for radio spectrum management and in a small number of countries radio spectrum has not been delegated and is retained within the Ministry.

The examination of the experience of delegation in the telecommunications sector will therefore concentrate on the non-functional reasons and contribute to the literature on the non-functional reasons for delegation. The examination of radio spectrum management will allow an examination of the delegation of an operational function and offer reasons, based on the cases examined, as to why this operational activity has not been delegated.

Chapter 1 discusses the delegation of powers to independent regulatory agencies and identifies the factors evident in the literature for the creation of regulatory agencies. The broad range of factors both functional and non-functional is examined. In chapter 2, radio spectrum is introduced and the key responsibilities within radio spectrum management, which could be delegated to agencies, are examined. The Organisation for Economic Co-operation and Development (OECD) has identified key responsibilities which for typical telecommunications agencies should be delegated. These responsibilities include licensing and

management of numbering. They also include radio spectrum allocation and management. The OECD has found that key responsibilities are in general delegated to an independent agency, however with radio spectrum the level of delegation differs from country to country.

In chapter 3 the methodology that underpins the study is discussed. The need to examine case studies of delegation for one sector within the EU allows for a systematic consideration of the factors discussed in chapter 1. Such a detailed analytical examination of the decision to create an agency requires a detailed narrative discussion of the process. The narrative is presented chronologically to ensure that the key decisions are examined in sequence, to allow consideration of the factors raised in the literature and to assess their importance in each case.

The consideration of the decision making process allows a review of primary sources such as reports, Parliamentary debates and primary legislation. In addition, in all cases the key decision makers, both politicians and the officials who drafted legislation have been interviewed. Interviews can be unreliable, particularly if the events being discussed are in the recent past and recollections may be conditioned by recent events. A broad range of interviewees, not only politicians, but Government officials were interviewed to give sufficient depth to the evidence and to ensure no individual bias in the conclusions.

The case studies follow in chapters 4, 5 and 6. The countries selected for analysis were firstly differentiated by a comparison of the level of independence given to each agency and secondly by the approach to radio spectrum responsibilities in each country. The cases selected were Ireland, UK and the Netherlands. In Ireland the telecommunications agency has one of the highest levels of functional independence measured by a number of sources. A number of studies (Edwards, 2004; Gilardi, 2001; Cukierman, Webb, & Neyapti, 1992; Tenbucken & Schneider, 2004) have also measured independence in terms of operational independence. The Irish telecommunications agency has a high degree of independence in allocating and licensing radio spectrum. The UK, in the studies measuring formal independence, is neither measured with high or low independence; however its management of radio spectrum has evolved from a non-independent executive agency in 1990, to the inclusion of radio spectrum management responsibilities within a converged independent agency. Finally, the case of the Netherlands is important to examine as it has decided not to delegate radio spectrum responsibilities. The Dutch telecommunications agency's operational remit is limited despite being institutionally independent and studies measuring formal independence show the Netherlands telecommunications agency has low formal independence.

Research to date has focused mainly on broad datasets, mainly to differentiate the experience of delegation across sectors. Research on the non-functional factors has also been based on broad data sets. The empirical evidence presented through comparative detailed country studies will give an understanding of the factors which led to the creation of independent agencies and the evolution of the delegation process. The case studies will also examine the factors which impact on the operational remit of the agencies. The focus on radio spectrum management, as a key operational responsibility of independent telecommunications agencies, will answer the question why governments have, in a number of instances, not delegated this function consistently to independent agencies.

The core argument of this thesis is that policy actors in delegating responsibilities to independent agencies are making complex decisions which are influenced not only by national circumstances but by transnational pressures from the European Union. The creation of independent agencies, particularly in economic sectors subject to market opening, is motivated by concerns around credibility. However, the level of independence given to independent agencies is influenced by the non-functional factors. These factors are reflected in the operational remit of the agency and constraints placed on agency independence. Policy actors will not

delegate in cases where policy actors believe they need to retain control over the financial rewards of market opening.

CHAPTER 1: LITERATURE REVIEW

INTRODUCTION

As independent agencies have emerged across Europe, the scholarly literature has focused on why, at this time, this institutional model is being widely used by policy actors. This chapter will discuss the literature on the growth of independent agencies. Specifically, it will examine why governments delegate authority to independent agencies. It will also examine the literature on why the level of independence given to these agencies varies. The variation is not only cross national but also within the same sector. Independent agencies for the purposes of this thesis can be defined as governmental agencies that:

‘(a) Possess and exercise some grant of specialised public authority, separate from that of other agencies, but

(b) Are neither directly elected by the people, nor directly managed by elected officials’ (Thatcher & Stone Sweet, 2002, p. 1)

The literature on delegation and the growth of independent agencies has been developed using established public administration frameworks. Public

Administration theory is the study of political decision making which is a broad complex area encapsulating public policy, politics and administration. Frederickson and Smith (2003) note that although public administration has been practised for thousands of years, the development of theories in the field has been relatively recent. Public administration theory can be approached using frameworks developed in other disciplines such as economics and organisational theory. Frederickson and Smith (2003) identified eight approaches to Public Administration theory which they argue encapsulate the key theoretical compartments which underpin Public Administration theory. The 8 approaches to public administration theory highlight theories such as bureaucracy and institutional networks; rational choice theories which draw on economic theories to explain public policy decisions and New Public Administration theories which seek to apply to public administration theories on organisational design and leadership.

The approaches to public administration theory identified by Frederickson and Smith are not sealed and impermeable. Rather a number of concepts emerge, all of which are important to the understanding of delegation. Key concepts such as the principal-agent problem, new public management and institutionalism reoccur in the public administration approaches. Bendor, Glazer and Hammond (2001) argue that delegation theory is linked with a range of formal and informal

models, particularly models which focus on non-cooperative game theory. Such models draw on principal-agent relationships and the rational choice approaches referred to by Frederickson and Smith. These theories specifically influence delegation through our approaches to explaining why delegation occurs. Functional reasons like credibility draw on the rational choice and principal-agent frameworks which argue that public administration is driven by rational individuals seeking the most efficient or functional solution in decision-making. Non-functional reasons for delegation focus on institutional theories which focus on the mimic effects of isomerism, for example, to example the growth of institutional models.

Delegation does not happen in a void: governments have a number of choices at the point of delegation and can retain competence over agencies by drafting legislation which retains control. Alternatively, governments can delegate statutory authority to independent agencies by delegating statutory powers previously in the remit of government, to agencies independent of influence from government. A definition of delegation offered by Thatcher and Sweet Stone:

‘an authoritative decision, formalised as a matter of public law, that transfers policy making authority away from established, representative organs (those that are directly elected, or are managed directly by elected

politicians), to an independent institution, whether public or private'
(Thatcher & Stone Sweet, 2002, p. 2)

Although governments have delegated authority to independent agencies for some time, the number of independent agencies, and the number of sectors subject to supervision by independent agencies, has increased exponentially. The growth of independent agencies has led to studies which have focused on the 'rise of the regulatory state' (Majone, 1994). Although a number of countries have created independent agencies throughout the last century, the literature examining the issue of delegation was initially based on American studies which examined the relationship between the US Congress and US regulatory agencies, many of which have been in existence for some time (Pollack M. , 2002). The European experience of delegation has been more recent, and the literature has focused on the reasons why governments delegate, and additionally the issues of institutional design and the levels of formal independence (Pollack M., 2002). Recent research on the growth of independent agencies in Europe has focused on the differing levels of formal independence given to agencies, and the reasons why, at the point of delegation, some governments choose to differ in terms of the levels in formal independence (Gilardi, 2002b).

The debate has focused on a range of issues which could explain why delegation

occurs and equally why there is variation in the levels of independence. There are functional theories like credibility, which encompass issues like time-inconsistency, expertise and the role of veto players. There is also the factor of political uncertainty, which influences the decision by political actors to delegate. There are also non-functional reasons. These are more difficult to quantify. Examples of the non-functional reasons include political leadership, political traditions and isomorphism. Gilardi (2002b) has attempted to quantify the significance of the hypothesis that credibility alone explains the reason why governments delegate. He concluded that credibility alone cannot fully explain delegation but does explain, to a large extent, the reason for delegation. Therefore, along with credibility, the non-functional factors may more fully explain the reasons for delegation.

The degree of delegation is also significant. Gilardi (2003a) has shown that independence differs both across sectors and across countries. Cuikermann, Webb, and Neyapti (1992) argue that the level of independence given to central banks differs across a range of countries. The OECD (2000) shows, in terms of delegation in the telecommunications sector that the level of independence, including the operational remit of agencies, differs across countries. Functional factors, therefore, offer a starting point for analysing delegation (Thatcher, 2002a). Thatcher argues that contextual, non-functional factors offer a more

complete explanation for the reasons to delegate. Thatcher particularly examines three factors:

- policy learning and institutional isomorphism;
- state traditions and structures in regulation;
- political leadership and the broader institutional context in West European countries.

Where credibility and functional factors will be present in each decision to delegate, the level of independence and institutional design will differ in specific cases. For example, Moran (2001) has argued, in relation to the UK, that the rise of the regulatory state is a mix of exhaustion with old methods of intervention coupled with the new pressures from supranational agencies like the European Commission. He highlights that there are new pressures as a result of scandals, the rise of the ‘risk society’ and a growing role for ‘audit’ to counter the externalities in economic and social areas.

This chapter will look at the reasons offered in the literature as to why policy actors choose to delegate specific degrees of responsibility to independent agencies. It will firstly examine the functional reasons centred on the principal-agent theories and detail the attempts to measure this factor as a primary

motivation for delegation. Secondly, this chapter will examine the non-functional reasons for delegation. These theories suggest that rational choice functional explanations of delegation are not sufficient to understand the diffusion of independent agencies and the relative levels of independence afforded to independent agencies. Thatcher (2002b) makes the point that many of the pressures for changes and the advantages of delegation have been present in most countries for some time, but the growth of independent agencies and the large degree of delegation has occurred only recently. If one accepts credibility as a driving force why has credibility become more important in recent decades? The next section looks at credibility and the functional explanations of delegation.

CREDIBILITY & FUNCTIONAL EXPLANATIONS OF DELEGATION

The study of the reasons why governments delegate to independent agencies has been examined using rational choice theories where the decision to delegate derives from the government's need to credibly commit to particular policies (Gilardi, 2002b; Majone, 1994; Thatcher, 2002a; Elgie & McMenamin, 2005). It is also argued that there is need to credibly commit where governments have faced increasing pressures from technical or market requirements, particularly in the area of market opening (Levy & Spiller, 1996).

Gilardi (2002b) argues that the credibility hypothesis is theoretically well founded but empirically untested. Majone (1997) defines the hypothesis as:

'Political sovereigns are willing to delegate important powers to independent experts in order to increase the credibility of their policy commitments' (Majone, 1997, pp. 139-140)

The literature on the functional factors which influence delegation decisions and the creation of independent agencies is influenced by the principal-agent models. These models emerged initially in the economic literature and have been applied

in the political literature in terms of its applicability to political agencies.

The literature emerges in part from the New Public Management (NPM) literature which was used by governments since the 1980s to modernize the public sector. The NPM hypothesis is based on the view that a more market-oriented public sector would result in greater cost-efficiency for governments. The basis of NPM was economic theory based on the self-interested rational individual. The optimal organisational structure for the public service was therefore more decentralized with efficiency realised through delegation to agencies. The rational choice models which have emerged offer a framework to help understand delegation. Specifically, using non-cooperative game theory, again drawn from the economic literature, theorists can develop formal models based on the behaviour of principals and agents.

A key aspect of the principal-agency theory is the issue of transaction costs. Pollack (2002) argues that there are three aspects of the political environment that influence the transaction costs of policy making, particularly the decision to create an agency.¹

¹ Transaction costs have been broadly defined as any costs that are due to human relationships (or their absence) rather than physical or technological costs of production. Economists then ask which kinds of relationships (firms, markets, franchises, etc.) minimize the transaction costs of producing and distributing a particular good or service. The transaction cost considered in the cost related to creating an institution and the costs dictate whether the transaction should be undertaken.

Firstly, the transaction costs relate to the maintenance of policy-relevant information. This argument is straightforward as it argues that policy makers face demands for policy-related information or expertise. Policy complexity and the need for expertise is a functional reason for delegation. Epstein and O'Halloran (1999) argue that the degree of core executive control will be less extensive in areas that are more complex or technical. They argue:

'where the policy area is complex, making the link between policies and outcomes more uncertain, legislators will prefer bureaucratic policy making' (Epstein & O' Halloran, 1999, p. 84)

The degree of agency discretion should, in theory, increase as the issue area becomes more complex. For example, Shipan (2005) argues that increasing complexity and the increasing need for expertise led the Irish government to create the Irish Environmental Protection Agency. Majone (2004) posits that the increasing numbers of European directives have added complexity to some former government activities and that this complexity requires delegation to experts. Expertise is also linked with credibility as a motivation to create independent agencies. Sometimes a lack of public confidence in the status quo

and a belief that an expert agency can add some credibility to the decision making process and remove somewhat difficult and complex decisions from political interference, is a driver of delegation.

The second reason suggested by Pollack argues that principals will see a need to credibly commit to policy objectives. Pollack (2002) posits that:

'we should expect legislative principals to delegate powers, not (only) in issue areas marked by relative uncertainty, but also in issue areas where legislators find themselves unable to commit credibility to a particular line of policy' (Pollack M. , 2002, p. 208/9)

Credibility explains delegation as a political actor's attempt to overcome political uncertainty and time inconsistency in decision making. Political uncertainty arises because, unlike economic actors who, in democratic countries, are guaranteed their property rights, the long-term property rights of political actors, by the very nature of democracy, are not guaranteed. Political actors can have policies reversed or amended by subsequent events and governments. Delegation is designed to stop political actors from doing this. Political actors will therefore be interested to secure their property rights. The uncertainty of political property rights is then much more likely to play a key role in the design of political

agencies in these situations. For example, the policy of liberalisation and delegation of key responsibilities for that sector to an independent agency is more difficult for a new government to reverse. Equally, the delegation of responsibility for fiscal management of the economy to an independent central bank is a difficult decision for subsequent governments to reverse even if it was their preference.

Gilardi (2007) continues specifically in relation to the formal independence of independent agencies:

'formal independence of regulatory agencies increases as the risk for a government of being replaced by a coalition with different preferences (replacement risk) increases, while that of central banks decreases as replacement risk increases' (Gilardi, 2007, p. 306)

Time inconsistency in policy making is a further factor supporting the view that political actors will need to credibly commit to ensure policy objectives are protected. The risk inherent with time inconsistency is that policies are mitigated by the role of veto players. The seminal article on time inconsistency is Kydland and Prescott (1977). Time inconsistency exists in political decision making because the policy preference today, t , may be the sub optimal policy option at,

$t+1$. It is important therefore in terms of commitment to policy options, and the credibility of those commitments, for governments to delegate. Gilardi (2002b) notes:

'there is a potential conflict between policy-makers discretion and policy optimality, which on the contrary, can be enhanced by the capacity of policymakers to credibly commit themselves i.e. bind themselves to a fixed and pre-announced course of action' (Gilardi, 2002b, pp. 874-875)

Gilardi's hypothesis goes on to make a clear link between the risk of time inconsistency and the role of veto players in the decision to delegate authority. Gilardi argues:

'policy stability is a function of the number of veto players, their distance and their cohesion' (Gilardi, 2002b, p. 877)

Veto players have the capacity to influence policy change (Tsebelis, 2000). Veto players represent political and commercial interests in a state. Their relative strength or weakness has an influence on government policy. The impact of veto players is based on the assumption that more veto players will induce more discretion to agencies - the presence of a large number of veto players reduces the

incentives to control bureaucracies because each player has the opportunity to influence the process at some stage. Gilardi (2002b) argues that more veto players should lead to less delegation. He argues that veto players are ‘functional equivalents of delegation’. His view is supported by Stasavage (2000) who argues that governments with low checks and balances and fewer veto players need to address the issue of time inconsistent policy making and will do so by credibly committing to policies via delegation.

Moser (2000) argues, however, that veto players have a positive impact on the level of independence. In looking at the decision to create independent central banks, Moser concludes that those systems characterised by ‘stronger horizontal and vertical checks and balances’ are better capable of credibly providing independent central banks. Gilardi (2007) has highlighted the differences between independent agencies like central banks and similar independent agencies represented as sectoral regulators. Specifically in relation to the role of veto payers, Gilardi (2007) argues:

‘Central banks tend to be more independent in countries characterised by many veto players while the reverse is true for regulatory agencies’
(Gilardi, 2007, p. 306)

The role of veto players is therefore unclear and according to Gilardi depends very much on the sector being reviewed. It is reasonable to conclude therefore that there is a significant link between veto players and delegation. Any functional approach which aims to assess the factors that influenced the creation of independent agencies would need to consider the impact of veto players in any empirical case study analysis.

The third and final factor discussed by Pollack concerns the political uncertainty created by principals with conflicting preferences. Huber, Shipan and Pfahler (2001) highlight the variables that influence a principal's decision to delegate. These involve divided government, divided legislature, the professionalism of the legislature and the availability of a post hoc legislative veto. Furthermore, Huber, Shipan and Pfahler (2001) show that legislators are more likely to limit bureaucratic discretion when the government is divided, or when the legislature is more professionalised, and when the legislature does not have easily available options for non-statutory controls. Huber and Shipan (2002) focus on 'corporatism' as one of the key determinants of the degree of bureaucratic discretion. They argue that there is a link between cabinet stability or tenure and the degree of bureaucratic autonomy. Epstein and O'Halloran (1999) show, that as conflict increases the benefits of granting autonomy to independent agencies increases. In addition, portfolio volatility between ministers and political parties

can be an influence on particular policy areas subject to delegation.

There is a further area of potential conflict. There can be uncertainty in the conflicting preferences of principals but similar uncertainty exists in the conflicting preferences of principals and agents. A key assumption in credibility theories is that policy actors will not be able to influence the preferences and the actions of independent agencies. Policy actors, however, designing independent agencies may wish to maintain some oversight on the preferences of the agency and may wish to ensure that the policy preferences of the government are understood and followed by the independent agencies. To be credible, principals need to ensure their preferences are not necessarily aligned to agents. The ‘ally principle’ in the principal-agent theories argues that principals will delegate to agents with similar goals. According to Gilardi (2007):

‘The peculiarity of credibility problems is that their solution requires delegation arrangements that are counter-intuitive from a principal-agent perspective, namely an infringement of the ‘ally principle’, which postulates that the principals delegate to agents with similar goals. Delegation can increase the time-consistency and credibility of the policy choices of decision-makers who are subject to preference reversals but only if the agent is not prone to the same kind of behaviour and the

principal has not the opportunity to influence his or her decision'
(Gilardi, 2007, p. 304/5)

Principal-agent theory argues that principals will try and avoid moral hazard i.e. the risk that the preferences of the principal are not followed by the agent. By designing agencies which include either ex-ante or ex-post controls on the agency, principals ensure accountability and protect against the hazard that the agent will not follow the principal's preferences. Agencies therefore may have ex-ante controls written into legislation in terms of remit, policies or funding. The legislator may impose ex-post controls, for example, the requirement to report annually on activities of the agent or to issue a report on activities to the Minister. The balance between ex-ante and ex-post controls may in some scenarios limit the independence of the agency. The balance of these controls is important when one considers the differing levels of independence given to agencies. These ex-post and ex-ante controls also serve to diminish the political uncertainty referred to above when the risk of a change in government may change the preferences of the principals (Moe, 1990). Typically, when ex-ante controls are weak, ex-post controls are needed to compensate. Gilardi (2007) however highlights that principal-agent relationships are better understood if one considers the institutional context of the delegation. He shows that there are contradictions inherent in the principal-agent theories. These are evident in the role of veto

players, political uncertainty and credibility and can be explained if one considers, for example, the motivations of policy actors in delegating to independent central banks as opposed to independent regulatory agencies. According to Gilardi (2007):

‘Delegation to independent regulators is most extensive when political uncertainty is high, while the opposite is true for delegation to central banks, which are most independent when political uncertainty is small’
(Gilardi, 2007, p. 320)

Gilardi (2003a) also assesses whether the level of delegation differs if the sector is either social or economic. Gilardi concludes that the economic nature of regulation and the interaction with national institutional features like veto players explain a good deal of the cross-national and cross-sectoral variation in agency independence. Gilardi’s thesis that delegation is more likely in economic rather than a social sector is essentially based on the view that investors require government to credibly commit to market opening policies. However, Gilardi argues that for social regulation, where consumers rather than investors are the main target of policies, credibility is less of a motivation for policy actors to delegate. Majone (1993) agrees in terms of European policy making. He posits that social and economic regulation has a different emphasis:

‘Social regulation is still far from possessing the same political and institutional significance as competition policy, for example, but it no longer occupies a peripheral position in European policy-making’
(Majone, 1993, p. 166)

Shipan (2005) argues that credibility is seen to be an important issue in the creation of a number of regulatory agencies not dependent on investor sentiment, notably in environmental protection.

Gilardi (2002b) discusses a further issue related to credibility - linked to the idea of complexity - in that delegation is more likely in sectors which have been subject to market opening. Gilardi links market opening to credibility as governments will wish to credibly commit to policies which ensure necessary investment in recently opened markets. According to Gilardi:

‘Governments have incentives to delegate regulation to an independent authority because they need to credibly persuade investors that the market functioning will not be biased by the nationalisation legacy, typically in favour of the formerly state-controlled monopolist. Governments must then be able to credibly commit to an investor-friendly

course of action’ (Gilardi, 2002b, p. 877)

North and Weingast (1989) make a similar link between investment and credibility:

‘For economic growth to occur the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them’ (North and Weingast, 1989, p. 803)

North and Weingast (1989) argue that economic actors need incentives in the same way political actors do. The comparative advantage a state or government has over economic actors can lead to issues of enforcement and compliance with agreements. This ex-post concern can be addressed through devising institutional constitutions which minimise the risk. North and Weingast argue that this view implies:

‘the development of free markets must be accompanied by some credible restrictions on the countries ability to manipulate economic rules to the advantage of itself and its constituents. Successful economic performance, therefore, must be accompanied by agencies that limit economic intervention and allow private rights and markets to prevail in large

segments of the economy' (North & Weingast, 1989, p. 808)

The issue of private investment and the link with independent agencies is tied closely to the role of veto players, policy uncertainty and policy stability. Stasavage (2002) develops this issue of political uncertainty and private investment. Stasavage argues:

'While having multiple veto points increases the likelihood of policy stability, governments in systems without multiple veto points can establish credibility for their economic policies through other means'
(Stasavage, 2002, p. 44)

Other functional factors which may explain the spread of independent regulatory agencies have been examined in the literature. Gilardi (2003b) has attempted to test both spurious and symbolic diffusion of independent agencies as a means of trying to explain the growth in the numbers of independent agencies. In spurious diffusion political actors are responding to concomitant functional pressures to create the same institutional model. Political actors in creating independent agencies are responding to functional pressures in terms of credible commitments and resolving political uncertainty. The political actors are therefore acting independently of each other. In symbolic diffusion the political actors are

influenced by each other. Gilardi (2003b) concludes:

'Interdependent diffusion, in the form of symbolic diffusion, has driven the spread of IRAs in Western Europe, but only in part: spurious diffusion, in the form of credible commitments and political uncertainty has played an important role too' (Gilardi, 2003b, p. 19)

Gilardi used diffusion models to test a number of hypotheses and concluded that privatisation and liberalisation had a significantly positive impact on the likelihood that an independent regulatory agency would be created. This conclusion is consistent with the work cited above testing the credibility hypothesis and the view that market opening was an influence in the creation of independent agencies. The creation of an independent agency was more likely in competition and financial markets than in other regulatory domains. The reasons cited for this stem from the credibility hypothesis:

'economic regulation, where credibility problems are more acute than in social regulation and it is this incentive to delegate regulatory competence to IRAs are higher, is positively associated to the creation of IRAs after controlling for the impact of the number of existing IRAs' (Gilardi, 2003b, p. 12)

The functional reasons which explain delegation are based primarily on credibility theories. They explain to a large extent the reason to delegate and the various levels of independence evident across sectors and countries. However, it does not explain why there has been an increase, particularly in the past decades, in the adoption of this form of decision making to solve particular problems. There are also anomalies in various countries between the absolute levels of delegation across all sectors and variations between what can be called social and economic regulators. In some cases, using Gilardi's analysis, there are social regulators with higher absolute formal independence than economic regulators. It is also important to note that the quantitative analysis undertaken to date to test credibility theories have concentrated on measuring independence at the institutional level and not examining the operational remit of agencies which would give a deeper insight into the independence given to agencies. This is particularly important when considering the balance of ex-ante and ex-post controls the principal places on the independent agent.

The functional approach to explaining delegation is based on rational choice models which, as discussed above, assume rational actors will make utility maximising decisions. Rational choice models assume utility maximising decisions by policy actors under conditions of uncertainty. Given an array of

options the policy actor will choose the decision which gives him the greatest welfare. The rational choice model is based on the individual as opposed to groups or institutions. Rational choice has been seen as one model under the umbrella of 'new institutionalism' which offers reasons for the growth of delegation. Gilardi (2004) describes three models of institutionalism, one of which is rational choice, another is sociological institutionalism and the third is historical institutionalism. Millar (2003) argues that institutionalism offers an approach to the policy process which puts weight on the institutional context of a decision, specifically the influence factors such as culture, social norms and conventions have on the political decision. Sociological institutionalism, for example, argues that delegation to independent agencies occurs because the institutional solution is taken for granted as the most appropriate organisational form to deal with delegation. Historical institutionalism focuses on the effect of path dependent processes as arrangements to mediate functional pressures where radical change occurs, particularly when the mechanisms sustaining institutions weaken.

Sociological institutionalism has been discussed briefly above in terms of spurious or symbolic diffusion of agencies as an explanation of the growth of independent agencies. Sociological institutionalism argues that policy actors will act interdependently when deciding to create an independent agency. Policy

actors are therefore reacting to other policy actor's organisational forms in creating independent agencies. As, Gilardi (2003b) above argued, the diffusion of independent agencies is symbolic and this driver is at the heart of sociological institutionalism. Gilardi (2004) argues that the empirical evidence for the sociological institutional hypotheses is strong enough to justify further research.

Historical institutionalism is focused on the historical context and specifically the path dependent processes which may limit the opportunities of political actors to consider other institutional solutions. Historical institutionalism depends on critical junctures which lead to the adoption of an institutional path such as independent agencies. Thatcher (2002c) and Thatcher and Stone Sweet (2002) argue there are contextual national factors which mediate against the functional factors discussed above under rational choice models. The factors referred to are policy learning, isomorphism, political leadership, state traditions and structures, and broader state reform processes. This approach argues that reform is mediated within existing national institutions and is therefore reliant on path dependent arguments.

It is clear that the three institutionalism models have clear claims in relation to explaining the rise of independent agencies. Rational choice functional factors go some way to explaining the rise of independent agencies as a solution to

increasing functional pressures on policy actors, specifically in the economic sectors subject to market opening. There are, however, other factors influencing the decision to delegate and influencing the levels of formal independence given to agencies. These non-functional factors are more difficult to measure but are important to understand. Gilardi (2004) argues:

'it appears clear from this comparison that there is no best theory. Rather than being a relativistic conclusion, this observation highlights the weaknesses that each theory has to overcome if it wants to supply a good explanation of institutional change in regulation' (Gilardi, 2004, p85)

The non-functional factors raised in the sociological and historical institutionalism models therefore need to be examined in more detail to gain a better understanding of the growth of independent agencies but also the level of independence which varies cross country and cross nationally.

NON-FUNCTIONAL EXPLANATIONS OF DELEGATION

This section of the chapter will examine the non-functional factors argued as reasons for delegation to independent agencies. Gilardi's quantitative work has tried to measure the impact of functional factors on the level of independence. Gilardi concedes, 'credibility hypothesis cannot explain all the variation we observe in agency independence' (Gilardi, 2002b, p. 889). Therefore, other factors must be at work.

There are a number of non-functional reasons which may impact on the decision to delegate. Among these factors are the impact of policy learning and institutional isomorphism. It is argued that policy makers are also influenced by state tradition and national leadership in solving problems via the creation of independent agencies. It is difficult to construct a quantitative analysis of these factors and in many cases they are based on an historical view of institutionalism in a given country or group of countries.

Thatcher (2002b) argues that the political problems being addressed in sectors that have created independent agencies have been present for some time. Why

before the 1980s had the institutional solution of independent agencies not been pursued? The presence of independent agencies, particularly in the United States, as an institutional solution to these problems, has been an option for policy actors for some time. In Germany in the 1950s a very powerful Cartel Office and independent central bank was formed long before the other sectors had independent agencies. In France, the expression ‘Autorité administrative indépendante’ was first introduced in 1978. It is not sufficient just to argue that policy actors, responding to issues of credibility, will then create an agency and delegate responsibility. There are a number of other issues, which need to be considered in the analysis of the decision to delegate to an independent agency. The situation in Germany has already been cited, yet in recent decades Germany has been slow to create independent agencies and has existing restrictions on creating federal agencies because of constitutional arrangements with various German regions. Gilardi (2003a) comments on the situation of Italy where there is a high level of independence and coherence which is surprising given Italy’s lack of tradition of independent agencies. Therefore, a more qualitative discourse is required to offer a fuller understanding of the motivation of policy makers in creating independent agencies at this point in time.

The increasing importance of European directives and European supranational agencies as a factor in the decision to delegate is important to consider,

specifically in the sectors where independent agencies have been created. Sectors like telecommunications are typified by an increasing number of European directives and policy initiatives from the European Commission. The European Commission, for example, suggest that governments following market opening should not be directly influencing the market and should therefore create an independent agency for this purpose. The EU would appear to recommend independent agencies possibly for functional reasons related to credibility. Individual member states transposing directives may feel obliged to create an independent agency either because the directive leaves little choice to the member states or because a large number of other member states adopt the policy of creating independent agencies and member states copy the institutional model. The activities of the European Commission contribute to the debate that institutional isomorphism is an explanation for what Majone (1994) argues is the 'rise of the regulatory state'. Shipan (2005), Majone (1994) and others have highlighted the growth and importance of EU directives and the EU generally as a contributory factor in the growth of independent regulatory agencies.

Majone (1994) argues that administrative regulation has accelerated in the past two decades. This acceleration comes from a perception that there exists a mismatch between existing institutional capacity at national level and the growing complexity of policy problems:

'policing financial markets in an increasingly interdependent world economy; controlling the risks of new products and new technologies; protecting the health and economic interests of consumers without impeding the free flow of goods, services and people across national boundaries; reducing environmental pollution' (Majone, 1994, p. 85)

It is the significance of this supranational dimension to the economic and social issues which is promoting the role of the European Commission. Although complexity is recognised as a functional factor in explaining delegation, it is important to distinguish the increasing role and importance of the European Commission in originating directives and policies which lead to a perception that certain policy areas are complex. In the telecommunications sector, for example, there has always existed technical complexity, which it would appear did not provoke policy actors to delegate to independent agencies until recently. However, the progressive liberalisation of telecommunications markets and the increasing role of the European Commission in this process have resulted in a proliferation of directives, recommendations and policy initiatives which have made the telecommunications sector more complex for policy actors to manage. The argument then is that complexity of itself is a clear functional motivation to delegate but the increasing administrative role of the European Commission is a

separate non-functional factor in a number of sectors. The growth of the role of European regulation is also explained through the motivation of the European Commission in wishing to increase its influence by expanding its competencies mainly as a means to expand its budget, and the preference of multinational companies to deal with one single regulatory authority as opposed to individual countries.

Moran (2001) supports this view and argues that a further reason for the rise of a regulatory state is the growing influence of the European Commission. Moran shows that the European Commission particularly has contributed to the expansion of regulatory measures in workplace health and safety, environmental protection and the regulation of previously self-regulated spheres like financial services. Majone (1994) has highlighted that the European Commission has sought to increase its influence over countries by expanding the scope of its regulatory authority. The diffusion of agencies needs to be considered in the context of the role of the European Commission across both economic and social areas. The importance of the European Commission could be resisted by countries wishing to retain administrative and regulatory control in their member state. Majone (1994) argues that the European Commission has a number of advantages over national regulators or administrations. Firstly, the credibility of policies, whether economic or social, depends to a large extent on enforceability

and as a supranational institution the European Commission can enforce directives on regulated firms more strictly than national agencies. Countries may be willing therefore to cede regulatory oversight to the European Commission. This is particularly the case in competition policy. Majone (1994) highlights that the European Commission is more likely to operate at a technical expert level with national administration officials. Through a myriad of advisory committees, expert advisors and well qualified staff, the European Commission can be seen to take the lead on regulatory policy in the community.

A particular sector where the influence of the European Commission has been recognised is in the area of telecommunications regulation. Schneider and Werle (1990) demonstrate that the European Commission was the policy driver for telecommunications reform. They argue that the European Commission used Treaty of Rome provisions to gain the policy initiative over countries. From the publication of the 1987 Green Paper (Commission of the European Communities, 1987) which set out policy and objectives for a liberalised telecommunications market, the European Commission developed a series of directives which culminated in the 1997 Open Network Provision (ONP) directive, (European Parliament and Council, 1997) which set a date for liberalisation of voice telephony markets across Europe. Thatcher (1999) argues that in fact the European Commission worked in partnership with countries to develop this

policy. The 1997 ONP directive recommended the creation of independent agencies in telecommunications to address the conflict of interest that would exist in a number of countries where the Ministries were shareholders of the main telecommunications company and also the principal regulatory authority. This provision made clear, certainly in the telecommunications sector, the preferred institutional response to newly liberalised markets. The European Commission, in other economic sectors particularly for energy, also recommended the creation of independent agencies.

A further reason for the increasing incidence of independent agencies is argued to be policy learning and institutional isomorphism. Thatcher (2002b) argues that once a successful model of an agency was created there was a 'snowball' effect and the model was copied for other sectors. Thatcher cites the example in the UK of Oftel (the Office of Telecommunications) which was rapidly copied in other sectors in the UK, notably Ofwat and Ofgas. Gilardi argues that agencies:

'are not established as a legitimisation device, but simply because other options are not even considered, while IRAs (independent regulatory agencies) have become the normal or obvious thing to do in given contexts' (Gilardi, 2003a, p. 24)

In this context the number of independent agencies increases as legitimacy increases and the organisational form becomes more accepted. Levi-Faur (2002) describes the process of isomorphism as herding. McLean (2004) describes this institutional mentality as:

‘..the next least risk-averse person(nation) joins the first. Which in turn induces the next least risk-averse...and before long, the whole herd has followed its leader, ending with (respectively) the collapse of the regime and the liberalisation of telecoms in the Maldives’ (McLean, 2004, p. 58)

This argument of institutional isomorphism has been advanced as the reasoning behind the rapid increase in independent central banks. In the case of central banks, McNamara (2002) shows there was limited evidence to show that governments interfered with money supply for short-term political gain, yet this was the main reason cited for the creation of independent central banks. A further reason cited for the creation of independent central banks was the policy goal of low inflation. The economic debates of the 1970s had developed price stability as the key policy objective of governments, including those of the left who would have traditionally considered unemployment and Gross Domestic Product (GDP) growth as the main policy objectives. Independent central banks with responsibility for money supply and interest rates were the institutional answer

increasingly suggested by both the EU in terms of the development of the European Monetary Union and suggested by the International Monetary Fund. McNamara says:

'we should examine whether or not the material economic circumstances in advance of the decision to delegate do indeed match the conditions that independence is meant to improve on' (Mc Namara, 2002, p. 56)

McNamara (2002) goes on to argue that when EU countries set up independent central banks it was at a time of low inflation. It is clear there are other factors involved in explaining the growth of independent central banks. McNamara argues:

'it is the symbolic properties of central banks independence that carry substantial weight in explaining policy diffusion, rather than the expressed functional properties of delegation' (Mc Namara, 2002, p. 59)

Particularly in the case of central banks, the argument is that in the 1990s it became *de rigueur* to have an independent central bank. McNamara (2002) posits that the process of institutional isomorphism, both normative and coercive, is evident in the diffusion of independent central banks. Political actors are

borrowing the institutional models they see as successful, even though the motivation for the independence of the central bank may be decoupled from the functional objectives of the agency. In the case of coercive isomorphism, the creation of the independent central bank results from both formal and informal pressures exerted on organisations by other organisations upon which they are dependent. Such cohesive pressures can be seen not only in the context of central banks but from the European Commission. Thatcher (2002b) argues that ‘coercive isomorphism’ was evident in the EU Commission’s attitude to Germany in relation to electricity policy and to Italy in relation to competition policy when they asked both countries to create independent agencies for these sectors.

McNamara’s views on central banks offer some explanation as to the increasing diffusion of the independent regulatory agencies as an institutional model. A similar example is the diffusion of independent competition authorities which has been described as an ‘orgy of borrowing’ (Wilks & Bartle, 2002) from other jurisdictions and countries. Wilks and Bartle (2002) highlight those political actors, who recognising the benefits of independent agencies in some areas of policy and created independent agencies to solve political problems. The role of knowledge elites, particularly banking and legal professionals has put pressure on governments to adopt independent agencies as they perceive the model works in

other jurisdictions or believe that the area of policy should not be a government concern. Thatcher (2002b) argues that the decision to delegate has to be examined in the context of the role of interested parties. For example, lobby groups or vested interests and even scandals motivate elected officials to reform the institutional landscape and conclude that direct control over certain domains are no longer advantageous.

In creating the Environmental Protection Agency in Ireland, the pressures arguably came as much from the growing influence of Dublin smog and the pressures of business and agriculture sectors to resolve the ineffectiveness of local authorities in dealing with the growing environment legalisation (Shipan 2005). Moran (2001) also posits that many innovations in regulation in the last quarter of the century have been precipitated by scandals. The creation of an expert agency has been considered therefore for the more cynical reason of blame shifting. The motivation of the policy actor to delegate to an independent agency is a process of shifting responsibility to independent agencies, particularly in areas where unpopular decisions may need to be taken. The argument is that politicians use independent agencies to avoid being caught in the crossfire between different sets of interest groups and constituents. Epstein and O'Halloran (1999) argue that the degree of discretion will vary as a function of the issue concerned. For example, they argue that governments will wish to retain a greater

degree of control over agencies whose actions are likely to be published. Similar arguments are made by Fiorina (1977) who posits that legislators will focus on non-controversial issues and delegate responsibilities for policy areas to ensure re-election.

A less developed debate has centred on state traditions and leadership as reasons for the development of independent agencies. This is particularly argued in the case of the UK where privatisation policies led the way with the introduction of regulators to monitor the new competitive utility markets. Thatcher (2002b) argues that state traditions, structure and political leadership are important mediators in the creation of independent regulatory agencies. Thatcher argues that there are historical precedents for independent regulatory agencies as a solution to difficult problems in the UK. Such precedents for problem solving do not exist in some other European countries. Thatcher argues that the political leadership of a country is an influence on the extent of delegation to independent agencies. The UK Conservative government was a supporter of privatised industries and many utilities were opened to competition. The creation of independent agencies in certain sectors was to protect consumer interests and to promote competition. Other EU countries did not follow this trend until later in the process. Thatcher (2002b) argues that other countries have varying attitudes to the creation of independent agencies. In the case of Germany, for example, the

state traditions are informed by federal structures and self-regulation. In a number of countries the respective roles of the legislature and the executive inform the views on independent regulation.

Finally, Thatcher (2002b) also considers it important to be aware of the broader European context in assessing the growth of independent regulatory agencies. He argues that governments adopted best practice public management techniques by introducing performance management and efficiency measures into the public sector. In these cases some activities, considered not core activities to the public sector, were hived off as agencies. In many cases, however, these agencies were still staffed by public servants and controlled by the Ministry. The creation of independent regulators in some utilities sectors also required competition authorities and new doctrines on public management.

The non-functional issues presented here are generally based on country-specific analysis. Issues such as state traditions and leadership are difficult to measure in trying to assess the extent of their impact on the decision to delegate and the level of independence given to an agency. However, in any decision to delegate these non-functional activities are important to assess and need to be considered to ensure a complete picture of the delegation process.

CONCLUSIONS

The functional explanations for the increase in independent regulatory agencies explain to a large extent the proliferation of independent regulatory agencies and their levels of formal independence. Gilardi's quantitative evidence confirms the importance of political uncertainty as a variable in the creation of independent agencies and confirms the motivation of principals to credibly commit to policy objectives, particularly in the areas of market opening where private investment is a factor. However, Gilardi has accepted that the credibility hypothesis cannot explain all the variation we observe in agency independence; other factors like institutional isomorphism, state traditions and political leadership have a role. The creation of independent central banks shows that policy actors may not be acting alone in designing institutional forms. The influence of other country's institutional models and the supranational agencies such as the European Commission influence the decision to delegate authority.

The range of sectors and services subject to independent and administrative bureaucracy is growing as the institutional form becomes more widely accepted. The key task therefore is to examine further why this institutional form and the

varying levels of independence are favoured by legislators in Europe.

The studies to date have concentrated on cross sectoral analysis to try and explain both the reasons for the creation of an independent agency and its level of experience. The functional reasons put forward centre on the principal-agent theories, which are well founded. Gilardi's work, particularly in the area of credibility, has given a qualitative basis to the view that functional reasons are the primary reasons for the creation of independent agencies. The question remains however that a large number of independent agencies have been created in the last decades despite the functional pressures having been present for some time. In addition, the functional explanations alone cannot explain the variation in independence in sectors like telecommunications where market opening suggests the functional reasons for delegation would be strong. The non-functional explanations which have emerged, have concentrated on certain sections or developments, for example, the growth of independent central banks. The non-functional reasons need to be examined using systematic case studies and assessed against the actions of policy actors.

CHAPTER 2: RADIO SPECTRUM

INTRODUCTION

The literature to date has identified a number of factors which may explain the growth of independent agencies. Credibility, particularly in sectors where there is market opening, is the principal reason explaining why policy actors delegate. However, other factors also contribute to the decision to delegate. The other factors which may contribute to the decision to delegate may not be the principal reason but may explain the wide variations in levels of independence.

This chapter will examine why telecommunications as a sector and the management of radio spectrum in particular are appropriate areas to consider. They are particularly appropriate for testing the non-functional factors identified in the literature. Tenbucken and Schneider (2004) argue:

‘the telecommunications sector is the only sector in which, next to liberalisation and privatisation measures, almost all reform-oriented nations have established National Regulatory Authorities (NRAs) to guide

the process of market opening' (Tenbucken & Schneider, 2004, p. 247).

This chapter will firstly consider the telecommunications sector as an appropriate sector to examine the factors explaining delegation to independent agencies. The chapter will then examine key responsibilities capable of delegation to independent agencies, and will then examine radio spectrum as the key responsibility where delegation to independent agencies has been erratic in the EU. The chapter will continue with a review of the history of radio spectrum; the increasing commercialisation of radio spectrum, and finally why radio spectrum regulation is important to consider, specifically in relation to the non-functional explanations of delegation.

TELECOMMUNICATIONS

The telecommunications sector has been the subject of regulatory oversight in the United States since the 1930s and in the UK since the 1980s and has been the subject of much transnational debate and reform in the EU and across the countries of the OECD. Prior to the 1980s all EU countries controlled telecommunications as an arm of government. The public telecommunications operator held a monopoly in all aspects of telecommunications supply, including equipment, access to infrastructure and services. The public operator was generally staffed by civil servants with focus on the provision of a public service as opposed to any consideration of commercial or market activities. There was generally no delegation of expert or regulatory functions to independent agencies, and any regulation of the sector was within the civil service and directed by a Minister.

There were two distinct pressures on this regime. Firstly, technological change in the 1960s and 1970s led to new dynamics in telecommunications. The extent to which one could argue that telecommunications was a ‘natural monopoly’ because of large investments with low returns was questioned by rapid product

development, lowering of costs and thereby a lowering of the barriers towards entry to markets. A second pressure was the growing view that public telecommunications monopolies were inefficient. Wright (1994) argues:

'Skepticism about the efficacy of state intervention has become manifest in many countries, and notably in right-wing circles in the UK, Portugal, and Sweden. Yet even in socialist France clearly expressed its doubts, as it quickly discovered the constraints of the international economy, and 'rediscovered the firm'- the principal instrument of wealth generation'
(Wright (ed), 1994, p. 3)

The break up of AT & T's monopoly in the United States, and the creation of British Telecom, which was created from the telecommunications' activities of the public entity originally the monopoly provider in the UK, introduced competition into markets which had previously been perceived as markets primarily offering public goods. There were a number of large multinational telecommunications who now competed in the newly opened markets. Wright (1994) argues:

'If the traditionally reluctant management of Telekom, Germany's state telecommunications monopoly, has become increasingly pro-privatisation

it is because it is aware that BT, US Sprint and many others can now transmit data across borders for German companies, and even carry voice messages around international private networks of companies, their suppliers and customers' (Wright (ed), 1994, p. 3)

Changes in Britain, and in the United States, and lobbying by companies wanting to expand into other markets, led to pressures for regulatory change in the EU (Thatcher 2002b, Noam 1992). The EU had been developing closer relations with countries and more contact between senior officials, public operators and Ministers led to more cooperation in the development of telecommunications policy.

In 1986 a specific directorate was created within the European Commission to provide more expertise and focus on telecommunications. The early cooperation concentrated on opening parts of the market like the supply of telephone terminals. Despite slow progress, in 1987 the European Commission published a green paper on the future of telecommunications and specifically promoting liberalising of telecommunications markets (Commission of the European Communities, 1987). A series of directives followed, which proposed liberalising parts of the market and preventing national monopolies in each member state. Among the significant pieces of legislation were:

- The Open Network Provision (ONP) directive of 1990 (90/987) which proposed to harmonise public access to telecommunications networks;
- Services Directive of 1990 (90/388) which provides for the gradual removal of special or exclusive rights granted in countries to telecommunications operators for certain value added and data services;
- Public Voice Telephony and Infrastructure Directive of 1996 (96/19) was one of the central pieces of legislation opening the countries markets to full competition with an implementation date of 1st January 1998;
- Commission directive 96/2/EC amending directive 90/388/EEC with regard to mobile and personal communications;
- European Parliament and Council 97/33/EC on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision.

The European Commission also published a number of reports to support the legislative agenda, notably the high level group on the Information Society, the so-called Bangemann Report published in 1994.

The directive on interconnection is significant in that it proposed that regulation

of the sector should be performed by an organisation outside the Ministry. This proposal was to avoid any conflict of interest which may exist where the Ministry still retained a shareholding as the former public telecommunications operator. The provisions of the directive dealing with the competitive environment in telecommunications indicate the kind of independent agency the European Commission envisaged:

‘In order to guarantee the independence of national regulatory authorities:

- national regulatory authorities shall be legally distinct from and functionally independent of all organisations providing telecommunications networks, equipment or services,*
- countries that retain ownership or a significant degree of control of the organisation providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control’ (European Parliament and Council, 1997, Article 5a)*

The development of the European framework provides a useful legislative umbrella to examine delegation and the factors influencing the creation of the independent agencies which would in turn influence the level of independence

given to the agencies.

As telecommunications was the first public utility to come under such scrutiny at a national and European level, a number of studies have examined the institutional solutions in place across Europe. Noam (1992) looked at the impact of liberalisation on telecommunications markets. Thatcher (1999 & 2001) has examined the politics of telecommunications liberalisation and specifically examined the role of the European Commission and member states as partners in the development of telecommunications policies. Wright (1994) examined the experiences of privatisations in Western Europe. Equally, Moran (2001) has examined the development of the regulatory state with specific emphasis on the UK.

As discussed in previous chapters the existing research shows for telecommunications that the level of independence varies across countries, despite a consistent telecommunications legislative framework. A number of comprehensive datasets have been collated which attempt to measure the delegation process in more detail. The datasets measure the level of independence in terms of institutional independence. For example, the institutional independence can be measured by comparing the provisions involving the appointment and removal of the head of the independent agency. The datasets

also show the delegation to agencies of operational duties, for example, the responsibility for national numbering ranges or interconnection between telecommunications operators. Edwards and Waverman (2004), for example, identify a number of core functions of telecommunications agencies which are standard functions required irrespective of the institutional framework creating the regulator. Tenbucken and Schneider (2004) have also developed a dataset which includes operational indicators and gives a detailed measure of both institutional independence and operational independence. Much of their research for these studies comes from original research by the OECD. The OECD has reviewed the core functions of telecommunications agencies. These functions are core activities related to the proper running of markets open to competition. The regulation of prices; issuing of national numbers; the process of licensing and interconnection are basic activities of all telecommunications agencies. These activities are important to the functioning of an agency and there is very little discretion left to the legislator in delegating powers. In most cases when the agency is created these powers are delegated.

These datasets have been developed primarily to assess the quality and effectiveness of agency decisions and their impact on markets. No studies to date have looked at the delegation of these activities. The datasets can help to give a better understanding of the motives of policy actors when creating independent

regulatory agencies. The core activities of telecommunications agencies, as defined by these datasets are:

- Market entry
- Interconnection
- Numbering
- Price Regulation
- Universal Service
- Spectrum Management

The activities reflect the increasing complexity of managing a market that was previously served only by a state enterprise. Therefore, there are key operational tasks around entry into the market, interconnection of operators in the market and regulation of the price of the former state run enterprises' market prices. These activities are central to the activities of the independent agency. In relation to market entry this normally refers to the licensing of operators, offering either fixed or mobile services. The OECD makes the distinction because for mobile operators there is a requirement not only to have licences but also to have radio spectrum from which the mobile operator can offer a service. The OECD shows that in the case of licensing operators this task is delegated to independent agencies in all cases, but for mobile licensing this responsibility is linked with the institutional solution for radio spectrum management discussed below.

Responsibility for numbering and universal service is delegated to the independent agencies. In some cases there is a supervisory role for the Ministry, mainly to ensure that the agency has in place a national numbering plan which complies with international standards. In the case of universal service this refers to the obligation on the old state run entity to provide a telephony service, to everyone in the member state. In each European country there is either a mechanism to allow this or there is no universal service obligation. In all cases the responsibility for the mechanism is with the agency.

In most cases therefore core responsibilities are delegated to independent agencies; however the exception to this condition appears to be the management of radio spectrum. In some jurisdictions the management of radio spectrum is delegated to an independent agency, whereas in other cases it is a separate agency under the remit of a Ministry. The level of independence given to regulators to manage this responsibility is indicative of the institutional independence intended by legislators for the independent regulatory agency. The management of radio spectrum involves a number of discrete steps, discussed in more detail below. The retention of any or all of these steps can allow the legislator to retain strategic control over radio spectrum and ensure some constraints on market opening. The position of radio spectrum is interesting in that radio spectrum is

increasingly seen as a commercial asset, licensed to operators in competitive markets and, as such, should be delegated to an independent agency. However, as we will see, the level of independence given to regulators in terms of radio spectrum varies across countries. Given the importance of these radio spectrum tasks to the proper functioning of the newly opened market why have these responsibilities been delegated in different ways in each European country? Also, if the remaining key core tasks have been delegated, why is radio spectrum treated differently? Finally, could an examination of radio spectrum delegation explain in more detail the delegation process and specifically offer a better understanding of the non-functional reasons for delegation?

It would be appropriate therefore, at this point, to review the history of radio spectrum regulation prior to the market led and political changes in telecommunications discussed above.

HISTORY OF RADIO SPECTRUM REGULATION

Radio spectrum is increasingly seen as a vital resource in areas such as telecommunications and broadcasting. Radio spectrum is essentially the use of radio waves to connect people. This is particularly evident in the growth of mobile phones. Gruber (2005) argues:

‘An important year was 2002, when the number of world mobile subscribers for the first time exceeded the number of fixed lines. The number of mobile subscribers was close to 1.2 billion at the end of 2002, while the number for fixed lines was slightly below 1.1 billion’ (Gruber, 2005, p. 1)

Table 1: Evolution of mobile and fixed telecommunications subscribers, 1996-2001

	Lines 1996 (ml)	Lines 2001 (ml)	Annual Growth (percent) 1996-2001	Penetration rate 1996	Penetration rate 2001
<i>Mobile</i>					
OECD	120	612	39	11.0	53.9
Non-OECD	24	328	69	0.5	6.5
World	144	940	46	2.5	15.3
<i>Fixed</i>					
OECD	500	517	1	45.8	45.5
Non-OECD	230	518	18	5.0	10.3
World	730	1035	7	12.7	16.8

Source: ITU data, derived from Gruber (2005), P34

The history of radio spectrum starts in the nineteenth century with Heinrich Hertz's discovery that an electric spark of sufficient intensity could be transmitted at an emitting end and be captured at a receiving end. Guglielmo Marconi was the inventor who exploited Hertz's discovery and he invented a 'radio' which permitted the transmission of signals over distances. In 1899 the signals were transmitted across the English Channel and in 1901 across the Atlantic Ocean. Initially transmissions were limited to pulses of electric current which were deciphered using Morse code. Technological advances before the

First World War, particularly amplitude modulation (AM), allowed the transmission of voice and music. The perceived drawback of radio spectrum transmission was a lack of privacy which in fact, following the First World War, was the basis of its commercial success as radio broadcasting took off, particularly in the USA. In Europe, the first regulation of radio spectrum was introduced through the licensing of wireless sets. State radio broadcasters were set up and their transmissions were received by the increasing number of 'wireless' radios which were licensed by the government. The proliferation of radio stations was creating problems with interference and in 1927 the first attempt at international regulation was brought about by the need to ensure that the proliferation of radio stations was managed internationally. The frequency band 550 HMz to 1.5 MHz was allocated internationally to broadcasting.

Developments in technology and regulation centered on broadcasting until after the Second World War when the development of private mobile radio during the war for military purposes was commercialised, particularly for taxi, police and emergency services. The regulation and management of radio spectrum throughout this period in all European countries became the responsibility of governments. More forward-looking governments, like those in Scandinavia, were allocating large sections of radio spectrum for mobile communications but for the most part private mobile radio was a stand-alone activity, not integrated

with fixed telephony and therefore not interfering with the traditional public telecommunications operator.

Due to these technological developments there was an increasing need for international cooperation, mainly to minimise the risk of interference, but also to promote equipment standards. International cooperation had begun from the early years of telegraphy but was put on a more organised basis in 1934 with the establishment of the International Telecommunication Union (ITU) which created an umbrella international organisation covering all aspects of telecommunications and adopted radio regulations. These regulations set down the allocating frequencies from the radio spectrum for particular services. In Europe, following the signing of the Treaty of Rome in 1957, the original members of the union created the Conférence Européenne des Administrations des Postes et des Télécommunications (CEPT) which was responsible for the coordination of the management of radio spectrum for the members of the EU.

The development of other applications which would use the radio spectrum was slow after the Second World War. Bell Laboratories in 1947 developed the concept of cellular communications which would not be commercialised until the 1980s. This technology underpins the development of mobile telephony, allowing mobile handsets to roam from cell to cell and was a more efficient use of radio

spectrum. The first licences for cellular mobile telecommunications were issued in the early 1980s; these were analog systems, so called first generation (1G). The development of digital cellular systems and cooperation on the European Groupe Spécial Mobile (GSM) standard started to be adopted in 1990. This is called the second generation of mobile telephony (2G). EU directives required countries to grant at least two GSM licences in each country, thereby introducing competition in the mobile sector.

Technological changes in the latter end of the twentieth century have opened up the wider use of the radio spectrum and a growing appreciation of its importance. The EU recognised this growing use of what is a scarce resource in most countries and published in 1998 a green paper on radio spectrum management which attempted to address the growing demand. Radio spectrum itself is a finite resource and choices on allocation would have to be made. The Green Paper on radio spectrum recognised this:

‘As demand for radio spectrum has increased, the co-ordination and management tasks have grown more complex as compared to the past’
(European Commission, 1998, p. 1)

The EU recognised that the commercial environment surrounding radio spectrum

had changed and that radio services and equipment were becoming more global. The increasing complexity and globalisation of radio spectrum is shown in the growing importance placed on the co-ordination bodies tasked with regulating the radio spectrum.

Along with the focus on coordination and increasing use of the scarce radio spectrum, the investment required to launch 1G and then 2G digital mobile services was very large. The cost of rolling out new transmission networks, switching equipment, and in many cases the cost of subsidising handsets to encourage subscribers onto your network was a substantial cost in a new technology. Gruber (2005) estimated that, per subscriber, the investment cost for digital GSM network operator was \$2,400. In addition, the licensee had to pay a licence fee for the use of radio spectrum which for early licensees was a nominal fee as most licences were given to the then public telecommunications operator. However, as GSM 2G licences were being issued, governments considered these licences lucrative.

In the UK in 1997 legislation was introduced to charge an ‘economic value’ for radio spectrum. Governments were increasingly aware of the value of radio spectrum particularly as radio spectrum for the next generation of mobile phones, called 3G, and were being discussed at the international fora. It is important to

note that allocation of radio spectrum takes two forms. Firstly, as radio spectrum waves do not respect borders, a high degree of international coordination, referred to above, is required to ensure development of equipment and to avoid interference. The allocation of radio spectrum therefore takes place at World Radio Conferences which occur every three years. The allocation of bands for what became 3G mobile telecommunications systems were agreed in 1992 by members of the CEPT. Secondly, governments have the discretion to identify the number of licences, the allocation mechanism and ultimately the price of this radio spectrum.

The increasing commercialisation of radio spectrum is worth considering as the investments required by operators are substantial. They were made at times when, in most cases in the EU, the allocation process for 3G was being considered and at the same time as technological developments were allowing other services to be deployed in other parts of the radio spectrum.

INCREASING COMMERCIALISATION OF SPECTRUM

The Green Paper in 1998 (European Commission, 1998) initiated a debate on radio spectrum policy and particularly highlighted that those institutional arrangements for co-ordination and planning of radio spectrum needed to be revised to take account of the liberalisation and globalisation of radio spectrum.

The European Commission argued:

‘These institutional arrangements have come under pressure from commercial interests who pursue interests which do not necessarily coincide with those administrations representing them in the organisations concerned’ (European Commission, 1998, p. 2)

The privatisation of utility markets, like telecommunications, opened markets to other operators who may require radio spectrum. New operators had to compete with incumbent operators who may have been allocated spectrum as a public entity. The increasing demand for radio spectrum from commercial organisations and the fact that demand is placed on relatively scarce radio spectrum prompted countries to review the valuation of radio spectrum licence fees. In most EU

countries, demand for this radio spectrum exceeds supply and governments have placed high valuations on particular radio spectrum bands.

Table 2: Radio Spectrum based sectors and activities

Sector	Activity
Telecommunications	Mobile phones, Wireless Internet, Private Business radio (Taxis), Paging
Broadcasting	Terrestrial television, Satellite TV, Radio, Teletext
Transport	Air traffic control, RTT road transport, Rail communication, Maritime
Government	Defence, Environment, Emergency services, Law enforcement

Source: European Commission Green Paper on Spectrum Policy, 1998

The most relevant example of this was the licensing of UMTS or 3G mobile radio spectrum. The discussions at the World Radio Conferences and the international allocation process referred to above, coupled with the ongoing success of 2G digital mobile services highlighted to governments the value of this particular radio spectrum. There was increasing speculation that this allocation of radio spectrum could raise significant sums for governments. For example, in the 1997 UK legislation the Secretary of State was allowed to decide the allocation mechanism and licence fees for radio spectrum. Within the economic community there was discussion in the economic literature on the allocation mechanism available. For example, Klemperer (2002) and Hazlett (1998) discussed the

various allocation methods and the allocative efficiency of each. There were typically four ways to allocate radio spectrum:

- First-come, first served
- Lottery
- ‘Beauty Contest’
- Auctions

The economic theory regarding the allocative efficiency of each approach is not the concern of this thesis. However, irrespective of the mechanism chosen, the process of awarding these licences raised significant sums for the national governments and created significant uncertainty in the mobile sector during the two years it took for the radio spectrum to be allocated across the EU. The decision, for example, to choose auctions as a market based approach to radio spectrum allocation gained significant academic support at this time. Governments, where they had the ability to influence the mechanism, were driven by the motive to maximise revenue from radio spectrum. As Gruber (2005) argues:

‘the profit maximising incentive was thus thought to coincide with the public interest’ (Gruber, 2005, p. 229)

Table 3: 3G Licence Assignment in the European Union

Country	Incumbent Firms	3G Licences planned	3G Licences granted	3G Licences not assigned	Assignment method	Licence fee/population (€)
UK	4	5	5	0	A	634
Germany	4	4-6	6	0	A	615
Italy	4	5	5	0	BC+A	212
Netherlands	5	5	5	0	A	186
Austria	4	4-6	6	0	A	101
Denmark	4	4	4	0	A	96
Ireland	3	4	3	1	BC	92
Greece	3	4	3	1	A	45
Belgium	3	4	3	1	A	44
Portugal	3	4	4	0	BC	40
France	3	4	3	1	BC	21
Spain	3	4	4	0	BC	13
Finland	3	4	4	0	BC	0
Sweden	3	4	4	0	BC	0
Luxembourg	2	4	3	1	BC	0

Note; A=Auction, BC=Beauty Contest

Source: (Gruber, 2005, p. 280)

The outcome for markets generally was a perception that licence fees had been too high. A number of mobile operators returned licences to governments because of the excessive cost of rolling out services. Many regulators and policy makers were asked to change the conditions of the licences awarded. There are two key issues here. Firstly, the allocation of radio spectrum can detrimentally affect the market and is therefore significant in terms of firm behaviour and decisions to invest. The institution that decides the allocation mechanism and/or

the licence fee influences the number of licences to be offered and directly impacts on the post-entry competitive environment. The second important issue is the value of radio spectrum. Firms bidding for this radio spectrum may have shown excessive exuberance for the prospects of the mobile telecommunications market and such exuberance was checked following the licence award. This is clear from the examples across Europe of licences being returned or requests to change licence conditions. Either way it shows the importance of radio spectrum to the investment strategy of telecommunications firms.

The traditional users of radio spectrum in sectors such as public sector broadcasting and defense, who have received the use of the radio spectrum typically without charge, are now the focus of debate, particularly as other parts of the radio spectrum become commercialised and demand for radio spectrum increases. The market-based approaches to allocation of radio spectrum does not fit with the traditional allocation of radio spectrum for public services like broadcasting, particularly when many of the services being offered by broadcasters are less about public service and more commercial. Convergence of products and services in telecommunications means that broadcasters and telecommunications operators are frequently offering the same kind of service. Cave (2002) argues that central planning of spectrum in a changed market environment inevitably gives rise to inefficiencies and rigidities with the result

that radio spectrum may be trapped in inefficient uses. However, it has been argued, particularly by Cave in his review of radio spectrum for the UK Treasury, that in the longer term a significant amount of current spectrum frequency planning could be devolved to commercial spectrum management organisations. This would involve radio spectrum pricing for all users including those who currently do not pay for radio spectrum, typically security and defense users and public broadcasters.

There are a number of areas, therefore, where, it could be argued, governments could and should delegate radio spectrum responsibilities to expert independent agencies. Aspects of radio spectrum policy could be retained by government arguing that some of the uses of radio spectrum are for the public good, namely defense, broadcasting and policing services. However, as argued by McNamara (2002) in relation to delegation by governments to central banks, the independent agency was given the role of policy maker. If one, therefore, takes the view that all tasks related both to policy and operational management of radio spectrum are potentially open to delegation, then the key tasks open to delegation are:

- Radio Spectrum Planning: this would involve frequency plans being published and advised to prospective investors;
- Radio Spectrum Coordination: this involves liaison with supranational

agencies like CEPT and ITU to participation in policy setting and coordination at an international level;

- Radio Spectrum Allocation: this involves the issuing of licences for users of defined spectrum including mobile users and public users;
- Radio Spectrum Pricing: this involves the regime for pricing licences and the process of pricing particularly valuable pieces of the Radio Spectrum;
- Radio Spectrum Fees: this involves the setting of fees for spectrum users, either on a licence issuing or spectrum administration fee and who collects and retains the revenue.

The market opening policies of many countries and the delegation of authority to independent agencies has been explained by both functional and non-functional factors discussed in earlier chapters. However, the debate to date has discussed these factors generally in terms of institutional design. Earlier studies have not discussed what operational responsibilities have been delegated and why, if not delegated, they are retained by government. It is useful therefore to take an activity such as radio spectrum policy and assess how it has been delegated. For example, if the policy actor has created an independent agency, but is concerned to retain responsibility for radio spectrum, they can delegate responsibility for administrative functions. The setting of radio spectrum fees and the allocation mechanism can be retained by the Ministry. As we can see from the 3G licence

experience, the allocation mechanism and fee is a key decision. The levels of fee, and number of licences issued, impacts the market and investment. If delegation is to be effective then all of these functions for radio spectrum should be delegated. An argument can be made for some policy oversight on international allocation or on radio spectrum strategic planning, but all functions related to market facing activities like fees, allocation and assignment should be made by an independent agency.

The creation of an independent agency is the result of functional factors such as credibility. As Levy and Spiller (1994) argue, credibility is most important in sectors where there has been market opening. Telecommunications is a sector subject to market opening, and, subject to a consistent legislative framework, agreed with the European Commission. The independent agencies created on the basis of this market opening however, have not been given the same institutional independence or operational responsibilities. This is particularly the case in relation to radio spectrum management. The variation in levels of independence is argued to be a product of the non-functional factors which may be country specific issues such political traditions. An investigation of the delegation of radio spectrum would offer a deeper insight into the non-functional issues which affect the decision to delegate. It would be useful therefore to examine the institutional solutions to radio spectrum management adopted by countries and

appreciate how the delegation process has been implemented.

INSTITUTIONAL SOLUTIONS

As discussed earlier in the chapter the responsibilities for key activities such as interconnection, price regulation and market entry is consistently delegated to independent telecommunications regulatory agencies. Responsibilities delegated, in respect of radio spectrum activities in the EU, have been less consistent.

The key tasks in radio spectrum management, discussed above, can either be delegated as a complete set of tasks to an independent agency, possibly with some referral to ministers for approval or review. For example, table 4 at the end of the chapter, shows that in some countries the planning for radio spectrum is retained by the Ministry, normally with close cooperation with the independent agency. In all cases the responsibilities are clearly stated in primary legislation, normally in legislation creating the independent agency. Also, in most cases there exists within the Ministry or an agency of the Ministry, the key personnel involved in the management of radio spectrum. The delegation process therefore involves re assigning this group to the independent agency.

Governments, in some cases have delegated in full, or to a large extent, the key radio spectrum functions to an independent agency. For example, this is the case

in the UK and Ireland. In some cases the shared responsibilities extend to allocation, for example in Italy. In a number of countries, however, the government creates an agency to manage radio spectrum which is separate from the Ministry and the independent telecommunications agency. This is the case in the Netherlands. In France, the agency is managed by representatives from the Ministry and the telecommunications and broadcasting regulators. The radio spectrum agency has direct responsibilities to the Minister but has clear collaborative responsibilities with other agencies in the sector.

The delegation of responsibilities for radio spectrum differs from the other key tasks for telecommunications regulators. Why is radio spectrum treated differently in terms of delegation? The key issue, particularly in those countries with separate agencies is to understand why the political actors created an independent agency for all other telecommunications activity, but decided for radio spectrum management to create a separate agency which typically remains under the remit of the Ministry. The increasing commercialisation of radio spectrum would appear to be a key issue which provokes governments to seek an institutional solution. There is also increasing complexity of radio spectrum use and the policy of market opening. Do governments, for functional reasons such as credibility, create independent agencies, but for non-functional reasons, not delegate aspects of telecommunications activities to independent agencies?

CONCLUSIONS

This study will complement earlier work on the reasons why independent agencies are created but will pay particular attention to radio spectrum management as an aspect of telecommunications activities which, despite market opening, has in some cases not been delegated.

One could assume investors would be encouraged to invest if independent agencies had the power to licence radio spectrum and raise clearly published fees for its use. Investors would, no doubt, have concerns, particularly with the perceived high value of radio spectrum that the fees and competitions to get these licences were in the gift of the Ministry. The fear for investors would be the government's attitude of extracting the maximum rent from such a licence. Also of concern to investors is the willingness of government to retain spectrum for broadcasting and defense uses which would not be managed by an independent agency and would not be subject to a licence fee. Having created an agency to manage other complex issues and to enhance credibility, are governments retaining key aspects of telecommunications activities for non-functional reasons?

Radio spectrum is an important, distinctive function of telecommunications regulation and one where the pressures of liberalisation and market opening are heightened by a desire of legislators to retain control over a natural asset that is perceived as having an economic value to government. It is important therefore to understand why this is the case and consider what non-functional factors were important to the decision to delegate.

Table 4: Responsibility for Telecommunication Regulatory Activity

<i>Country</i>	<i>Market Entry</i>	<i>Interconnection</i>	<i>Numbering</i>	<i>Price Regulation</i>	<i>Universal Service</i>	<i>Spectrum Management</i>
Austria	R	R	M/R	R	R	M
Belgium	R	R	R	R	R	R
Denmark	R	R	R	R	R	R(M involved in planning)
Finland	R(M for Mobile)	R	R	No Regulation	No Mechanism	R
France	R	R	R	R	R	R/ANF responsible for Spectrum Planning only

Germany	R	R	R	R	R	<i>R/(M consultation required for usage plan</i>
Greece	R	R	R	R	No Mechani sm	<i>R</i>
Ireland	R	R	R	R	No Mechani sm	<i>R</i>
ITALY	M	R	R	R	R	<i>R/M for Spectrum Allocation</i>
Netherlan ds	R/(Mobile – RCA)	R	M/R	R	No Mechani sm	<i>RCA</i>
Portugal	R	R	R	R	R	<i>R</i>
Spain	R/(M- mobile)	R	M/R	R	R	<i>M/SRA</i>
Sweden	R	R	R	R	No Mechani sm	<i>R</i>
<i>UK</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>

Note: R= Regulator, M=Ministry, RCA – Dutch spectrum agency, SRA –Spanish spectrum agency (proposed), ANF – French Spectrum Agency
Source: OECD(2005)

CHAPTER 3: METHODOLOGY

INTRODUCTION

We have already examined the research on independent agencies which concludes that functional factors to a large extent explain delegation to independent agencies. Non-functional reasons were also evident in some decisions to delegate. Specifically, the non-functional reasons help to explain the variations in the levels of independence to agencies. The research to date suggests that the non-functional factors should be examined further to deepen our understanding of the motivations of policy actors who delegate to independent agencies. The empirical work to date has mainly concentrated on the institutional independence of agencies through an examination of the characteristics of the agency. Factors such as source of funding, and the appointment of senior management of independent agencies, have been measured (Gilardi, 2001). There is significant work on independent central banks (Cukierman, Webb, & Neyapti, 1992) and (Elgie, 1998). These studies have concentrated principally on the legal instrument, typically primary legislation, which has created the agency. However, more recent studies have included operational indicators which give a deeper understanding of the remit of the agency and are also important to consider in the overall level of independence given to agencies (Edwards, 2004) and (Tenbucken

and Schneider, 2004).

In the last chapter radio spectrum responsibilities were examined; as they are firstly part of an economic sector, and secondly, part of a sector which has been subject to market opening. Levy and Spiller (1994) have argued that in these sectors credibility is the most likely explanation of delegation to independent agencies. The treatment of radio spectrum responsibilities in terms of delegation to independent telecommunications agencies, unlike other telecommunications activities, has been erratic. The models discussed in the last chapter show that although all EU countries have independent agencies created to manage the telecommunications market, not all countries have fully delegated responsibility for radio spectrum. Radio spectrum is accepted as a key responsibility for telecommunications agencies but many Ministries have retained some oversight on the allocation or pricing of radio spectrum. In some EU countries the radio spectrum responsibilities have been delegated to an agency which remains within the remit of the Ministry.

The differing treatment of radio spectrum needs to be examined and considered in relation to the non-functional factors influencing the delegation decision. This chapter will examine the most appropriate methodological approach to answering these questions.

This chapter will initially discuss narrative approaches as the most appropriate approach to measure the non-functional factors considered in the literature review and will argue for the use of case studies as an appropriate methodological approach to presenting this narrative. The chapter will continue by assessing, for the purposes of case selection, the development of indices which seek to measure the level of institutional and operational independence evident in independent agencies. The selection of an appropriate index will identify potential case study countries.

Finally, this chapter will select appropriate cases which will best develop a deeper understanding of the factors influencing the levels of formal independence and additionally the levels of operational independence in relation to radio spectrum.

NARRATIVE STORIES & CASE STUDIES

In chapter 1, it was noted that Gilardi (2002b) attempted to quantitatively measure some of the functional factors identified as important reasons for delegation to independent agencies. Gilardi used quantitative measures to conclude that credibility, in situations where there was market opening and privatisation, explained to a large degree the decision to delegate to an independent agency. However, other factors identified, such as political leadership or institutional isomorphism, are more difficult to measure quantitatively. These factors require a more holistic review of the decision to create an independent agency.

The non-functional factors are embedded in the decision to delegate and these contextual factors are therefore difficult to measure. The case study method deliberately places the factors we wish to examine within the context of other decisions. A quantified analysis would divorce the factor from the context of the decision being reviewed. A case study can, for example, examine several factors within the context of the decision being examined. Yin defines a case study as:

‘...An empirical inquiry that investigates a contemporary phenomenon within its real life context, especially when the boundaries between phenomenon and context are not clearly evident’ (Yin, 2003, p13)

King, Keohane and Verba (1994) argue that decisions on case selection are vital as ‘poor case selection can vitiate even the most ingenious attempts, at a later stage, to make valid causal inferences’ (King, Keohane and Verba, 1994, p 115). There is the possibility of random selection when approaching case selection. The benefit of random selection is it removes the risk of research bias or selecting cases on the basis of possible explanatory variables. There is a risk of selecting cases which may not be independent and therefore invalidate the inferences or conclusions from the research. Shively (2008) argues that too often researchers gravitate to case studies where the outcomes are interesting. The optimal approach, therefore, is case selection on independent variables. Shively (2008) argues that this approach is particularly useful for large sample studies but less for intensive studies of one or a few cases. Shively (2008) proposes:

‘Choosing instead cases that represent varying instances of your explanatory variable allows you to examine the full range over which your explanation is meant to apply, but it does not fiddle with at all with the likelihood that the outcome occurs, and so allows you to

examine straightforwardly where the chips fall under the varying circumstance' (Shively, 2008, p109)

Although case studies suffer in the methodological literature as an approach which is less scientific than other methodological approaches to theory development, there are distinct advantages. Case studies are generally strong in areas where statistical methods or formal models are weak. There are particular strengths in case study methods. Case study methods allow a high level of conceptual validity to the theoretical concepts under review. Case studies require a detailed consideration of contextual factors, which is more difficult in large sample statistical studies. Case studies can aid theory development through examination of variables identified through quantifiable methods and through further examination can derive new hypotheses capable of broader statistical review. Case studies also allow for exploration of causal mechanisms which may appear in detailed single case analysis.

A further advantage of case studies is the ability of the researcher, in case study research, to examine complex interactions and effects which may not be evident in large sample studies. The broad range of primary sources and research methods including survey, questionnaire and interviews allow sources to be compared and complex interrelations explained.

In case study approaches therefore, case selection and data collection is crucial to ensure the strengths of case study research, which, as identified above, can lead to valid conclusions and evidence which can be extrapolated to new hypotheses or further research.

There are pitfalls and limitations to the case study method. There is a straightforward trade-off in terms of case selection. The research needs to balance depth and richness of research on single cases against the generalisations that may emerge from large sample research. The outcome can be to limit extending conclusions in a small sample of cases to the wider population of potential cases. There are also issues with case selection bias, where the cases selected are not optimal to answering the research question. Case studies are limited in terms of their ability to measure conclusions. It is likely that further quantifiable research is needed to develop theory across a wider population. This limitation also means that in case study approaches there is a potential inability to discriminate between competing explanations of theory based on the case study evidence.

A narrative approach, where the story of the creation of the institution would allow consideration of a range of factors contributing to the final decision to delegate, would appear to be the most appropriate methodological approach to

present these factors. A narrative approach allows for an exploration of other factors which may not have emerged in research to date and allows scope for exploring some factors in depth, if this is appropriate to the case. For example, Peters (1998) argues:

'statistical explanations tend to leave unmeasured a number of factors that might be central to the most descriptive and convoluted explanations provided through configurative analyses. A methodology based on a large quantifiable statistical analysis tells us more about whether a hypothesis holds as opposed to why it holds.' (Peters,1998, p. 7)

Pollack (2002), in relation to studies conducted on United States data and specifically examining the principal-agent relationships, comments that case studies have:

'..the advantage of tracing the respective preferences and interactions between principals and agents, focusing on the methods used by principals to exert pressure on agents (for example, the threat of legislative overruling) and the timing and nature of concessions by the latter' (Pollack M. , 2002, p. 206)

There are limitations to the use of narratives as a means to identify factors which may be relevant to one case but do not extrapolate to other narratives. Where appropriate, factors identified in narratives need to be measured using quantitative techniques or confirmed from other sources, or confirmed through further comparative analysis.

There are well established common approaches to comparative analysis and the selection of cases. The national patterns approach suggests that there are national characteristics which exert a major impact on policy decisions. Using this approach would involve one country or a two case comparative study where variations would be explained by national characteristics or traditions.

The policy sector approach claims that national patterns are not as important and instead suggests there are similarities across sectors irrespective of national conditions. The international regimes approach emphasises the extent and depth of reforms of international regimes. The temporal patterns approach suggests a diachronic examination of national, sectoral or international regimes, and may reveal critical, remarkable events, which influence the political landscape.

Table 5: Common Approaches to Comparative analysis

Approaches	Cases to be compared	Predictions as to variations	Predictions as to similarities
National patterns approach (NPA)	Nations	Across nations	Across sectors, time and international regimes
Policy sector approach (PSA)	Sectors	Across Sectors	Across nations, time and international regimes
International regime approach (IRA)	International regimes	Across international regimes	Across sectors, time and nations
Temporal patterns approach (TPA)	Politics before and after major event	Across time	Across sectors, nations, and international regimes

Source: (Levi-Faur D. , 2004)

The most appropriate comparative approach is dictated to a large extent by the questions being asked in the research. Using narratives in case studies, as an approach, helps to establish what events happened prior to the creation of the agency, and the motivations of political and other actors in the formulation of the

legislative basis of the agency. The objective in developing the cases should be to construct a logically persuasive and empirically valid account that explains how and why events occurred.

In terms of case study selection the option of a single case methodology examining the experience of one country might be considered. A single case analysis has the advantage that it allows more carefully focused analysis. The examination of a single case would allow a detailed review of a single decision to delegate but does not allow for the factors evident in the single case to be accepted as true for other decisions to delegate in other sectors or other countries. Whereas a large dataset of cases would by definition have the disadvantage of not allowing the researcher to go into great detail, a broader approach could be to select a range of decisions across sectors in one country. A single country case study would allow a cross-sectoral analysis which would involve examining delegation across both economic and social regulation and would be subject to variables not easily comparable to other countries. Case study results from single case analysis or even single country case studies cannot be generalised to other cases. A more convincing approach is through comparable case studies which allow case selection on the basis of independence measures that are clearly different across the same sector and within similar economic and legislative frameworks. Using comparative case studies one can establish trends and factors

which expose differences at national level in developing policies to address similar economic problems. This approach would equate to the national patterns approach. The key challenge is to select comparison countries which include variables which best answer your research question.

It would be feasible considering the factors already identified by others in the literature to examine the experience in each state on a factor-by-factor basis. An approach could be to examine the evidence, for example, for policy learning as a motivation for the creation of independent agencies in the telecommunications sector across the EU. The advantage of this approach would be a thorough examination of a factor which could then support that factor as a non-functional reason for delegation. This approach would reveal more detailed evidence supporting a factor but it would not be able to examine other factors, and the relative importance of other factors, to the decisions of policy makers.

The analytical narratives, through case studies, are preferable as it allows us to consider the non-functional factors. A comparative case study approach allows a thorough examination of the factors influencing the delegation decision and allows fuller explanation of all factors. It will also, to the extent that the cases selected are appropriate, allow a better understanding of why in terms of radio spectrum responsibilities policy actors have taken different approaches.

The above analysis argues for a narrative methodology as the most appropriate methodology to answer the question of variations in the levels of independence afforded to independent agencies and assess the factors influencing the delegation of radio spectrum responsibilities. Whereas there are some quantitative approaches which could be taken to measure a number of the factors contributing to independence, many more factors cannot be measured or assessed without a qualitative assessment.

A weakness of case design can come from the effect of third variables or ‘concomitant variations’. The selection of cases needs to minimise the risk of extraneous error and ensure they are capable of answering the research question defined. This risk can be limited by ensuring case conditions are fairly uniform. Peters (1998) argues in case selection that using a range of countries that appear to be similar in as many ways as possible would minimise the risk of ‘extraneous’ variance weakening the case outcomes and observations. It is a trade-off for the researcher between a large ‘N’ sample and small ‘N’ sample, where a large ‘N’ sample would minimise the risk of extraneous error but the size of the sample may be impractical to complete. Levi-Faur (2004) argues:

‘A more convincing argument for the effect of domestic politics and

national agencies would have come from a study of countries that are as similar as possible (MSSD²) on the relevant control variables' (Levi-Faur D. , 2004, p. 190)

In examining delegation one could examine the levels of independence across a number of sectors and jurisdictions. Gilardi (2002a) has examined regulators across a number of sectors and cross-nationally. A limitation to the narrative approach is the ability to understand in great detail all the factors that contributed to the delegation decision in all of the jurisdictions and sectors examined. The narratives in these cases would be exhaustive and could lose in their detail the true variations in the factors explaining variations in independence.

One could consider a cross-sectoral, cross-national analysis of the factors leading to differences in the levels of independence across a number of agencies. However, a clearer methodological approach would be to limit the research to a single sector and consider variations cross-nationally. This would usefully combine both the national patterns approach and the policy sector approach of comparative analysis. A cross-country comparison, for example, an examination of a number of regulatory agencies in the same jurisdiction could be considered. However, the weakness of such an approach would be the inability to examine

² Most Similar System design

factors such as political leadership or state traditions, which could only be examined and compared cross nationally.

Additionally, the legislative basis supporting each agency would differ and it would be difficult to compare, for example, an environmental agency and a telecommunications agency, where the impact of European-wide directives, specific to the sector examined, would be difficult to assess.

The most effective methodology would be, therefore, to select cases from one sector which would minimise these difficulties. If the selection process examines those sectors where credibility has been argued to be strong, the variables in the level of independence are more likely to be explained by the non-functional factors. The next section examines the feasibility of using telecommunications as a sector.

TELECOMMUNICATIONS

Gilardi (2002a) suggests that sectors with economic regulators and with market opening are the most likely to show credibility as the primary motivation to delegate. Choosing a sector which conforms to Gilardi's thesis would limit, to some extent, variations in independence not explained by these factors. One could examine the Gilardi view and compare social and economic regulators to assess the accuracy of Gilardi's conclusions. However, it would appear a more robust approach to understanding delegation to independent agencies if the Gilardi thesis was supported in terms of scope.

There is a need therefore to construct a framework within which some criteria can be applied to reduce the dataset of sectors and countries to a level which allows more precise case selection.

In comparative analysis the key aspect is the removal of alternative explanations for variations (Peters, 1998). The cross-sector analysis opens the possibility of a number of extraneous factors which could explain reasons and difference in the levels of delegation given to independent agencies. Peters argues that cases

should be as similar as possible.

It is appropriate therefore when examining delegation, and the factors influencing government in delegating authority, to consider the development of the telecommunications sector. The sector has been the subject of regulatory oversight in the US since the 1930s and in the UK since the 1980s. The sector has also been the subject of much transnational debate and reform in the EU and across the OECD.

To limit extraneous factors impacting the level of independence the cases selected should be from EU countries. In most sectors the legislative framework for most EU countries is consistent and can be compared across countries. For that reason it is also useful to limit the dataset to a single sector. Gilardi (2002a) specifically identified economic regulation, market opening and privatisation as the key factors contributing to the levels of independence to independent agencies. All three factors are present in the telecommunications sector. The markets in all EU countries have been opened under the liberalisation process and independent agencies exist in all EU countries. The EU countries examined are subject to the same EU directives and recommendations. As Edwards and Waverman (2004) argue, studying all EU countries eliminates many of the difficulties of heterogeneity in cross-country analysis. It is also important to

emphasise that the comparison should be based on the membership of the EU post-1995 but prior to the expansion of the EU in 2004.³ These countries, as the countries with most experience of delegation and privatisation in Telecommunications, have been subject to a series of directives and recommendations from the EU on the telecommunications sector since the publication of the Green Paper in 1987 (Commission of the European Communities, 1987). The group of countries who joined the EU in 2004 have only created agencies recently and it is difficult to assess the legislative transformation which, in some cases, not been completed.

The need, identified earlier, for a logical supportable limit to the dataset of possible case studies to be examined to a dataset and, using consistent rules which are manageable, can be addressed through telecommunications. A dataset which is limited to the EU countries defined, and concentrates on the telecommunications sector, ensures a dataset within a consistent EU legislative framework, a dataset of economic regulators operating in open markets.

To answer our research questions therefore, it is important to have clear methodological approach to case selection. The questions firstly examine the

³ The EU 15 refers to the membership of the EU prior to enlargement in 2004. The countries are UK, Ireland, France, Denmark, Finland, Sweden, Germany, Spain, Netherlands, Belgium, Austria, Portugal, Luxembourg, Italy and Greece.

non-functional reasons for delegation. As our dataset is derived from a sector where it is argued that credibility is a strong factor in delegation, it follows that case selection should be based on the levels of independence of these agencies. Ideally, in answer to this question, selecting the most and the least independent agencies, and for comparative purposes an agency with mid range independence, would allow sufficient data to assess the non-functional factors which have impacted both the decision to delegate, and the level of independence. Therefore it is important to have a list of telecommunications agencies ranked in terms of level of independence. In relation to factors influencing the delegation of radio spectrum the EU is also useful in answering this question as all independent agencies under the same EU framework are capable of delegating radio spectrum responsibilities to agencies. The case selection approach should therefore be based secondly on the institutional solution to radio spectrum across the EU dataset as defined above.

The first step is to select potential cases based on a well founded measure of independence. There have been a number of attempts to measure independence and the next section examines this research and assesses whether they form a basis for case selection.

ASSESSING AGENCY INDEPENDENCE

This section will aim to examine the issue of delegation to regulatory agencies via measures of independence across countries. Research to date, developed initially to measure the independence of central banks (Cukierman, Webb, & Neyapti, 1992), has been used to test independence in utility and social regulatory agencies and specifically in telecommunications. The indices have been developed to test theories on diffusion of agencies (Gilardi, 2005), and more recently in telecommunications, to develop some understanding of regulatory decisions (Edwards & Waverman, 2004).

When examining the motivations of elected officials in creating independent agencies it is important to consider the level of formal independence. It is at the point of creation that the legislator has most discretion to shape the level of independence, and the ex-ante and ex-post controls considered necessary to address the policy or political issues the legislator is trying to address. The construction, not only of the agency, but also its operational remit, is important to assess when assessing levels of independence.

Theory on the measurement of independence initially concentrated on the

independence of central banks. The initial measures of independence were based primarily on statute and a legal interpretation of independence. However, later analysis (Cuikerman Webb Neyapti 1992) developed a number of additional criteria which tried to incorporate a broader range of indicators and included indicators examining the organisational structure of the central bank including the appointment and term of office of the Governor. Indicators also examined policy formulation and objectives which were clearly set out in legislative texts. The aim of this literature was to test whether policy outcomes were affected by the levels of independence afforded to central banks. Issues like price stability, budget deficits and the management of money and credit in the macro economy were the stated reasons why central banks were given more independence. Cuikerman et al. (1992) were examining this hypothesis by examining policy outcomes in countries where an independent central bank had been created. To test policy outcomes Cuikerman et al. (1992) added further characteristics to the independence index which examined the ability of the central bank to achieve these policy outcomes. Cuikerman et al. (1992) therefore looked at objectives stated in legislation and powers in terms of policy formulation.

Cuikerman et al. (1992) advocates the use of several different indicators of independence because:

‘in addition to the noise that they contain, each indicator captures a somewhat different aspect of independence’ (Cukierman, Webb, & Neyapti, 1992, p. 355).

Practical measuring was straightforward, with each indicator given a score of one for full independence or zero for no independence.

Others have developed this framework, particularly to group indicators for political independence and economic independence in the case of central banks (Elgie, 1998). With this distinction between political independence and economic independence, the level of independence can be better understood with some indicators measuring institutional design and other indicators measuring accountability and assessing ability to achieve policy outcomes and objectives. This multi-layered approach to indicators allows more detailed analysis of the independence measure and more opportunity for cross-sector and cross-national comparisons.

However, the early development of independence indices is not without criticism (Forder, 2002). Constructing measures based on statute reading does not determine the true power of the institution. A statute driven analysis does not give a full picture of independence, as statutes over time can be changed and this

gives government ultimate control over policy outcomes. If the institutional design is not achieving the objectives set by policy makers, the government can amend the statute. Ultimately, the ability to change statute may be a sufficient threat to induce cooperative behaviour (Forder, 2002).

It has been argued however, in response to the criticisms above that the measures have great heuristic value; ‘they help us to make informed time-series observations and cross-national comparisons, albeit ones that admittedly are neither truly scientific nor objective’ (Elgie, 2002)

Gilardi’s (2002a) work is of particular interest as he measures independence for independent agencies across a number of sectors. Gilardi (2002a) has developed a measure of formal independence, which consists of 21 indicators grouped under five equally weighted dimensions:

- Status of agency head,
- Status of members of board of management,
- Relationship with government and Parliament,
- Financial and organisational autonomy,
- Regulatory Powers.

For each indicator a score of 0 or 1 is given with a score of 1 being full independence.

The measure of independence therefore is linked with the legislative basis of the agency concerned. The degree of independence using these indicators is concerned with the influence a Ministry or legislator has on the composition of the management of the agency or its funding, and the regulatory powers delegated to it under legislation.

Full independence would depend on the status under the above headings at the time of creation of an agency. The key issues with the agency head and the management board are the length of time of appointment, who appoints the head and under what grounds can that person be removed. The appointment of a head, or senior management officials, without interference from the government, which allow for ministers, or government, to remove officials easily, would count against a high independence score. The independence of the agency in terms of its financial autonomy and its ability to hire and maintain what it considers to be an adequate staff, without interference from government, would also warrant a high independence score. Finally, the abilities of the agency in terms of expertise to perform its task would be further evidence of independence and score highly.

Gilardi (2003a) accepts that this measure of independence is not without criticism. The criteria used for example are not weighted and it is difficult to assess in a qualitative fashion the relative levels of independence. Gilardi's measures do not extend to measures related to objectives and policy outcomes. Gilardi's motivation is to examine the reasons behind the creation of agencies and later to use his independence index to try to explain the diffusion of regulatory agencies across his dataset. Unlike Cuikerman et al., Gilardi's initial motivation is not to test policy objectives or outcomes. Gilardi is using his independence index as a dependent variable to better understand the factors which influence the decision to delegate authority. Gilardi argues that measuring independence is:

'an unavoidable step for any research aiming to study independent agencies in a comparative way, and is particularly important because the institutional design of independence agencies, as is often stressed, is characterised by extreme heterogeneity' (Gilardi 2003a)

Gilardi's measurements build on the work of the OECD (2000), where a range of factors have been measured by the OECD to help develop country profile reports. More recently, in the interests of developing theory on the effectiveness and quality of regulation, more refined independence measures have been developed.

Edwards (2004) has developed a database of independent telecommunications agencies capturing the characteristics of the agencies and including some quality indicators for the period 1997-2003. The dataset covers 17 institutional elements, measured either as 0 or 1 to indicate the level of independence. The dataset is restricted to the membership of the EU prior to the accession of new members in 2004.

The International Telecommunications Union (ITU) has also developed profiles of telecommunications regulators, particularly across Europe. Their dataset specifically examines, not only the institutional factors examined by Gilardi to measure formal independence, but also characteristics which attempt to measure the operational independence and remit of the agency. These factors are important as the operational tasks of telecommunications agencies, identified in the chapter on radio spectrum, are important in assessing the level of independence of a telecommunications agency.

The ITU and OECD datasets have been further developed by Tenbucken and Schneider (2004) who examined the diffusion of regulatory reform in the telecommunications sector. Tenbucken and Schneider differ from Gilardi in that they only examine telecommunications agencies but they also expand the range of criteria examined. The authors include criteria not only on legislative

independence but also examine operational indicators. These competencies cover licensing, radio spectrum management, numbering, interconnection and pricing. The authors argue that their index assesses the material independence of agencies and covers 27 OECD members.

In terms of organisational independence, Tenbucken and Schneider have included similar characteristics to Gilardi and are consistent with criteria identified by others for Central Banks. However, the authors have collected and measured competence indicators from source data collected by the ITU⁴. These indicators assess the power of the authority to regulate prices, to licence and to resolve interconnection disputes. They argue these additional characteristics are required to assess the material independence of the institution as many countries have created independent agencies but the powers of these agencies are in some areas restricted. One example of the benefit of broadening the range of criteria beyond the organisational characteristics is the view that a policy actor, to ensure credibility, may create the agency and make the agency legislatively independent, but in delegating the agencies operational remit the policy actor limits the range of operational remit of the agency. Tenbucken and Schneider (2004) have identified South Korea and Turkey from their database of OECD countries where there is evidence of organisational independence but limited functional

⁴ see www.itu.int/ITU-D/treg/profiles/regprofile.asp

delegation of competences, they argue:

‘Both have created NRAs⁵ which possess rather high levels of independence as regards their organisational characteristics and the lowest scores as regards their functional profiles. This asymmetry most probably originates in the fact that the creation of an NRA was a rather symbolic move to comply with harmonization requirements at the OECD and WTO level and to enhance policy credibility in order to attract foreign direct investment’ (Tenbucken and Schneider, 2004, p. 261)

The broad criteria demonstrate what Tenbucken and Schneider refer to as divergent convergence in the title of their article (Tenbucken and Schneider, 2004). The broadening of the criteria assessing independence and the deployment of competence based indicators is also consistent with those assessing the independence of central banks.

The Tenbucken and Schneider analysis is therefore a valuable dataset to look at in the context of case selection. It addresses the criticism of Forder (2002), referred to earlier, which argues that independence measures are restricted to a review of legislation. The inclusion of operational criteria gives a fuller picture of

⁵ National Regulatory Authorities

the independence given by the principal to the agent.

This thesis could develop a dataset of independence indices and use this index to select appropriate cases. A brief questionnaire could be developed and issued to telecommunications regulators. However, the level of detail and factors available through other sources appear sufficient for the purposes of case selection. The ITU dataset, used by Schneider and Tenbucken, has robust indicators on institutional independence and the structure of the regulator. The dataset will also allow cross-country analysis and allow case selection on a wide range of criteria. Additionally, the criteria include not only institutional criteria but operational criteria and therefore allows for case selection based on a deeper understanding of the level of independence in each country. Additionally, the operational indicators for radio spectrum cover criteria like allocation and planning of radio spectrum. The only missing criteria is funding for radio spectrum activities, which is missing from the criteria listed by the ITU. Although operational authority to collect and retain funds from radio spectrum activities are important to an understanding of the level of independence in an agency, the additional criteria would not materially impact the outcome of the result as it would only be one criteria across several and if collected is unlikely to make any major impact on the independence values presented by Tenbucken and Schneider. The funding of radio spectrum activities and the associated funding allocations will be an

issue addressed in the case studies themselves.

The selection of cases on the basis of the Tenbucken and Schneider independence index will allow case selection to answer the question on the non-functional factors. However, does it also allow us to answer our second question, trying to address the erratic delegation of radio spectrum?

Before proceeding to case selection, the institutional solutions for radio spectrum responsibilities discussed in the previous chapters needs to be included in the methodological approach to case selection. Radio spectrum responsibilities have either been delegated in some fashion to independent agencies or retained within the Ministry and in some cases retained in the form of a non-independent governmental agency. Case selection purely on the basis of independence of telecommunications agencies may include agencies where the radio spectrum responsibilities are not included. The Schneider and Tenbucken dataset does assess independence, including radio spectrum criteria, and should therefore be able to distinguish the level of independence given on radio spectrum activities. The only further methodological check should be to ensure selection of cases on the basis of an institutional solution where the radio spectrum responsibilities have not been delegated to the independent telecommunications agency. In this case the independence index would not be able to measure radio spectrum. There

is a need, having assessed the appropriate cases on the basis of the independence dataset, to look at the institutional solutions to radio spectrum to ensure case selection will allow an examination of the role of radio spectrum as a non-functional factor in delegation. The next section will therefore propose a two stage methodology for case selection. Firstly: on the basis of an absolute independence index and secondly: on the basis of the institutional solutions to radio spectrum responsibilities.

CASE SELECTION

The Tenbucken and Schneider independence index is the starting point for case selection. The index provides a dataset of independence values which would allow case selection, not only on the basis of variation in institutional independence, but also on the basis of operational characteristics. The operational characteristics are particularly relevant to the discussion of delegation of operational responsibilities, such as radio spectrum management.

Peters (1998) argues that the most crucial issue facing the researcher in case selection is whether to choose the most similar or most different systems. The cases selected therefore need to have similarities in terms of their overall suitability. The Tenbucken and Schneider database is therefore reduced to EU countries for the reasons discussed above on the similarity of the EU legislative framework. A further issue is the relative importance of institutional and operational characteristics and their importance in case selection. The institutional characteristics are to a large extent more important than the operational as the process of creating an agency, and its structure and powers, is a major decision for policy makers. The operational characteristics, although giving the researcher a more detailed view of independence, are to some extent

subordinate to the institutional.

Tenbucken and Schneider's operational measures use a simple binary 1 or 2 score to denote independence. If the regulatory authority has complete independence the score is 2. There is a score of 1 for some competence remaining with the Ministry. In relation to institutional measures there are scores of 1, 2 or 3 on the criteria listed in table 6 below i.e. the more independent the agency, the higher the score. The dataset can therefore recognise if there is a shared competence or an institutional factor which may need some further assessment. For example, the independence measure is higher if the term of office of the agency head is equal to or longer than 6 years.

**Table 6: Tenbucken and Schneider
agency institutional and operational
criteria**

Code	Institutional Criteria	Operational Criteria
RI	Regulatory Agencies	
ST	Staff per inhabitant	
IP	Independence from political power	
RT	Who does agency report to	
AD	Autonomy in decision	

	making	
OD	Who can overturn decisions	
AB	Approval of Budget	
FF	Source of Finance	
CB	Size of collegiate Body	
AH	Appointment of Head	
TO	Term of Office	
FL		Fixed Voice Licensing
ML		Mobile Voice Licensing
OL		Licence Requirements
MA		Merger Approval
IC		Interconnection charges
DR		Dispute Resolution
SP		Spectrum Planning
SA		Spectrum Allocation
NP		Numbering Planning
NA		Numbering Administration
RP		Regulatory Body (Pricing)
FP		Fixed Price Regulation

Tenbucken and Schneider's source data is derived from the ITU data, across both institutional and operational measures, as detailed above. In terms of both sets of measures the table below highlights the average mean value by country. The

mean values are then combined to give a combined average mean score for both institutional and operational criteria.

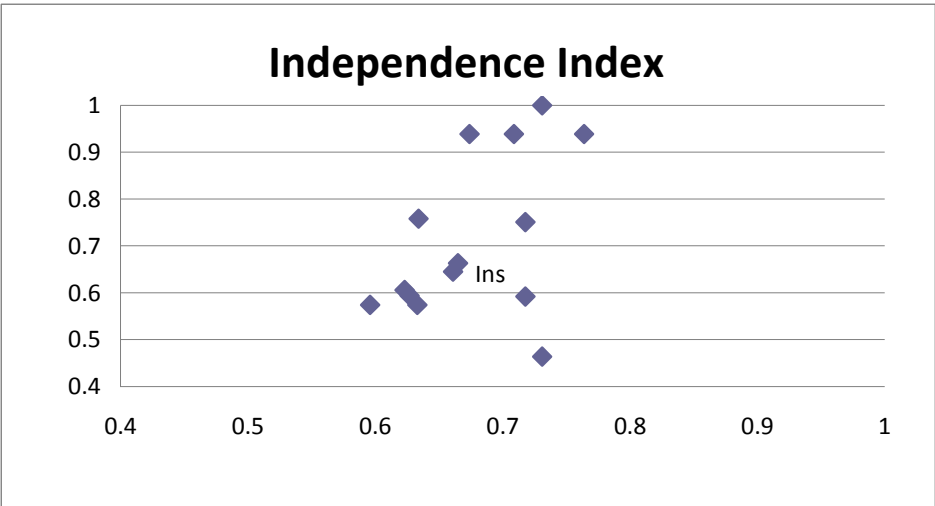
Table 7: Tenbucken and Schneider Independence ranking⁶

Rank	Country	Institutional Value	Operational Value	Joint Value
1	Germany	.731	1.0	.866
2	Ireland	.764	.939	.852
3	Portugal	.709	.939	.824
4	Sweden	.674	.939	.807
5	Italy	.718	.751	.735
6	Denmark	.634	.758	.696
7	Austria	.665	.663	.664
8	Finland	.718	.592	.655
9	Belgium	.661	.645	.653
10	France	.623	.606	.615
11	UK	.627	.594	.611
12	Spain	.633	.574	.604
13	Greece	.731	.464	.598
14	Netherlands	.596	.574	.585

⁶ Luxembourg is not included in the data collected by Tenbucken and Schneider

The dataset can be graphically displayed as follows:

**Table 8: Schneider and Tenbucken’s
Independence Index – scatter chart**



Tenbucken and Schneider comment on the results of their analysis, pointing out in terms of institutional independence and organisational profile, RegTP in Germany and ComReg in Ireland are the most independent and have measures close to the USA. They posit:

'the agencies often labeled by the literature as classic examples of independent NRAs, such as Oftel (since 2002, Ofcom) in Great Britain or OPTA in the Netherlands, demonstrate a surprisingly low degree of independence' (Tenbucken and Schneider, 2004, p. 263)

It is unusual to find the UK towards the bottom of the independence index considering the UK has the longest history in the EU of institutional reform in telecommunications. Comparing the findings of the independence index with other independence indices, the results appear consistent. Edwards (2004) shows that Ireland is consistently among the high independence category, with the UK and the Netherlands towards the end (Edwards & Waverman, 2004, p. 50). Gilardi in several studies (Gilardi, 2003a) and (Gilardi, 2002a) show that Ireland has consistently been recognised as creating agencies across several sectors which exhibit higher than average independence scores when compared across the EU.

The highest joint value in the dataset is Germany, with the second highest institutional independence in the dataset. In other independence indices however Germany is not placed so highly. In the Edwards (2004) dataset Germany is mid table and in Gilardi (2002a) Germany is not considered a country with a tradition of independent agencies across sectors. Gilardi's score for RegTP is not the

highest in the sample he has chosen.

On the basis of the table above the country with the highest institutional value is Ireland and the lowest is the Netherlands. On the basis of the comments of Schneider and Tenbucken regarding the unusual score of the UK an interesting mid-range country could be the UK. As the country with the longest experience of independent agencies in telecommunications, the UK is also a very interesting case to examine.

As discussed above, before deciding on these countries the selection needs to be assessed against their institutional solution to radio spectrum management in each country. In the previous chapter the responsibilities for each telecommunications agency was detailed. In relation to radio spectrum in most countries the regulator has primary responsibilities for radio spectrum. In Austria, France, Netherlands and Spain the Ministry retains responsibility for most radio spectrum activities. In Austria there is no separate agency, but in France, Netherlands and Spain there is a separate agency, under the direction of the Ministry, with sole responsibility for radio spectrum. In terms of case selection it would be relevant to have in the countries selected a case where there is a separate government agency for radio spectrum. This reinforces the view that the Netherlands should be one of the countries examined.

In terms of the UK and Ireland both countries have delegated radio spectrum responsibilities to independent agencies. The Tenbucken and Schneider independence index measured the extent of delegation for operational factors like radio spectrum. The index gave Ireland among the highest value in the EU and gave the UK among the lowest. The UK is also a useful case study because it has tried a number of institutional solutions to manage radio spectrum. In 1984 it created Oftel as an independent agency dealing with telecommunications but did not delegate any radio spectrum responsibilities. In 1990 the UK created the radio communications agency which was a Government run agency dealing with radio spectrum. In 2003 this agency was merged with Oftel and other media agencies to create Ofcom. The various institutional decisions, including the final decision which in effect made radio spectrum activities more independent of policy actors, make the UK a compelling example for inclusion.

The case studies selected, based on the Tenbucken and Schneider independence index and a review of radio spectrum responsibilities, are the UK, Netherlands and Ireland.

CASE STUDY APPROACH AND METHODOLOGY

In terms of the source data to be examined in each particular case, it is important to consider:

‘ in a configurative approach, the primary purpose is the thorough description of a case or cases, so that the consumer of the research will be capable of comprehending the logic of political life in that limited number of settings ’ (Huber and Shipan, 2002)

The data used allows an examination of the processes involved in not only the creation of the agency, but also an examination of the delegation of operational responsibilities. The role of ex-ante and/or ex-post controls in constraining the independence of the agency will also be important to consider. The detailed examination will review such powers and changes to the initial legislative basis and how this has evolved over time. The source data from Parliament and national debates will be supplemented with one-to-one interviews with policy making officials and officials involved in the delegation process.

The interviewees selected for each case study will be selected based on their involvement in the key legislative decisions in each country. By definition a large

majority of these will be civil servants and politicians. The period under examination runs from the early 1990s to 2003 and there is a risk that the passing of time and events will distort the recollection of interviewees. For example, in Ireland the initial legislation setting up the regulator was quickly seen as flawed, and the changes proposed in subsequent legislation were designed to correct the problems perceived by the civil servants with the initial legislation. The civil servants and politicians interviewed may use hindsight to reflect on earlier events. In oral history terms this is referred to as 'elite' oral history (Seldon and Pappworth, 1983). In an attempt to mitigate against this, the composition of interviewees in each case is balanced with external experts, regulatory staff and a range of politicians. This is to try and recreate, in so far as possible, the motivations of policy actors at the time of drafting the legislation.

The interviews will be a dialogue as opposed to a survey approach listing set questions only. There will be a series of set questions which will establish initially the involvement of the interviewee in the process and their seniority. It will also be important to ascertain the interviewee's attitude to the various factors identified in the literature and their importance in the case being discussed. A dialogue approach will allow the maximum use of the interviewee's time and their experience, to delve into the part in the delegation process which most involves their role. A mixture of political and public service interviewees will

allow a balance to be drawn on the issues being prioritised during the delegation process. For this purpose all interviews will be face to face and none will be conducted over the telephone or via written correspondence. In a number of cases it will be necessary to have more than one conversation with the interviewee if subsequent interviews raise concerns about their recollection of events.

All interviewees will be asked if they would prefer their contributions to be confidential or quoted in the thesis. The option allows, particularly public officials, to be free to express their views under the cover of anonymity.

The case studies need to examine the decision to create the agency under review and by definition will be an historical assessment of the factors evident at the time the decision was taken. However, the agencies selected have been subject to legislative changes since their formation. Subsequent legislative changes may have impacted the level of either operational or institutional independence of the agency. The timeframe will therefore have to cover the initial legislative process and the most recent legislative process.

The cases will concentrate on the factors identified in the literature as the non-functional factors. It will also examine the process of delegating radio spectrum and offer a better understanding, in the cases selected, why there are such widely

divergent institutional solutions to radio spectrum. The analysis will also consider exogenous institutional factors at the EU and transnational level, to assess to what extent the developments in other jurisdictions, and at the EU, influenced the decisions to delegate. In building this story it will be necessary, for the countries selected, to examine the debates surrounding the delegation of powers from the executive. In this area, work by the OECD, ITU and European Commission is useful in reporting events and constraints on decision making but also local press and informed comment and reviews will contextualise the decision making process.

The various levels of delegation in each member state have developed over the past number of years. The key developments in this period have been market opening and the increasing commercialisation of radio spectrum usage. The institutional solutions adopted however, deserve consideration given that delegation to independent agencies follows from credible commitments to liberalise markets, and the level of investments potentially available to countries will be reduced if governments are seen by investors to intervene in the newly liberalised markets, specifically in relation to radio spectrum.

CONCLUSION

This chapter has outlined the methodological approach best suited to assessing the extent of non-functional factors in the decision to delegate. The chapter initially considered the appropriateness of narrative stories and comparative case studies as the appropriate methodology to understand the wide range of factors, particularly factors not capable of quantitative analysis. The chapter continued to assess independence indices as the appropriate data source for identifying cases. The chapter discussed the most appropriate independence index to be used to consider further analysis and considered the independence index developed by Tenbucken and Schneider to be the most comprehensive available. The approach of selecting an independence index on the basis of one sector cross-nationally was also discussed.

Using the analysis from Tenbucken and Schneider, it was decided to examine in more detail the ‘story’ of delegation in telecommunications in the UK, Ireland and Netherlands. These countries were selected as they were the countries with the least independent agency measured by institutional factors, and the most independent by institutional factors. A final case was selected as the country with a mid range independence score, but with a varied approach to delegation, specifically for radio spectrum.

The case studies will examine the ‘story’ of delegation via primary and secondary sources, and interviews to establish the decisions and motivations not only of political actors but also of others influencing the outcome. The chapters on individual experiences will be compared in a conclusion which will seek to identify common themes and contrasts in the cases examined.

The first case study to be examined is the UK. The UK has the most extensive experience of delegation and market opening. The UK delegation process has a number of legislative steps starting in 1984 and concluding with the creation of Ofcom in 2003. As the country with the most comprehensive treatment of delegation in telecommunications it is appropriate to start with the UK.

CHAPTER 4: THE EVOLUTION OF TELECOMMUNICATIONS REGULATION IN THE UK WITH SPECIFIC REFERENCE TO RADIO SPECTRUM REGULATION

INTRODUCTION

The UK is an early adopter of the liberalisation agenda in telecommunications. In 1984 the British Government created a fully privatised British Telecom and at the same time created the telecommunications regulator, Oftel. The Telecommunications Act (1984) established the regulatory body as a non-Ministerial government department under a Director General of Telecommunications who, for the duration of his appointment, was independent of Ministerial control. The independence indices discussed in the previous chapter position the UK at mid or below the average level of independence. The UK would have the most experience in the EU of institutional solutions to solve issues of market opening in the telecommunication sector. Also, the UK dealt with radio spectrum, firstly as an executive agency, and then as part of a converged agency, Ofcom. It is clear from the organisational independence of Ofcom that merging radio spectrum functions with Ofcom represented a more independent treatment of radio spectrum. In the view of Jim Norton, a former chief executive of the radio communications agency, the agency was in the ‘face

of the minister' when required, but as part of a converged agency radio spectrum management had more freedom in terms of allocation of spectrum and the setting of radio spectrum fees.

This chapter will examine the key events which changed the institutional approach to telecommunications regulation and radio spectrum in the UK. It will examine the creation of the Radio Communications Agency in 1990 and examine its powers and responsibilities. It will also examine the Wireless Telegraphy Act (1998) which was the first major piece of radio spectrum legislation since 1949. This legislation was an opportunity to assess the institutional approach to radio spectrum under a new Labour government. The chapter will then examine the creation of Ofcom and the debate on the converged regulator, specifically examining the Office of Communications Act (2002), which was the paving legislation creating Ofcom, and the more comprehensive Communications Act (2003) which detailed Ofcom's functions and duties.

The objective of this case study is to assess the motivation of policy actors and assess these motivations against the criteria identified in earlier chapters on reasons why policy actors delegate. A large number of studies and reports on telecommunications regulation have been published in the years since the privatisation of British Telecom in 1984. There are Parliamentary debates and

government command papers which are useful sources of government thinking on telecommunications regulation. Also, the Communications Act (2003), which was the major piece of legislation creating Ofcom, was the subject of pre-legislative scrutiny. The scrutiny was in the form of a Joint Committee which took evidence and conducted hearings on the broad range of issues raised by the Communications Act. The Parliamentary debates, reports, command papers and independent studies which looked at the evolution of telecommunications regulation in the UK are a key source in assessing the motivations of policy actors. The evidence presented in these reports is also supported by interviews, mainly with those who did not have a voice directly in the Parliamentary proceedings but were key influencers behind legislation or government policy throughout the period.

As there were a large range of primary sources available, particularly in relation to the creation of Ofcom, there was a limited need for an extensive use of interviews. The main interviewees were either involved in the radio spectrum policy issues as advisors or chief officers of the radio communications agency, or were officials or advisors to government in the 1990s when most of the policy debates in telecommunications were being formulated.

Table 9: List of Interviewees for UK case study

<i>Name</i>	<i>Current title</i>	<i>Reason for interview</i>
James Purnell MP	Secretary of State for Work and Pensions	Member of influential advisory think tank, Institute for Public Policy Research (IPPR), in 1990s and advisor on communications policy to the Prime Minister in first Labour government
Dominic Morris	Chief of Staff to Ofcom Chief Executive.	Member of the Downing Street strategy team 1995-1997 and advisor to deputy prime minister, Michael Heseltine
Jim Norton	Advisor to Institute of Directors and independent consultant	Former Chief Executive of the Radio Communications Agency in the mid-1990s
Professor Martin Cave	Professor at Warwick business school	A leading academic writing on regulation and author of study into Future of Radio Spectrum commissioned by Chancellor Gordon Brown in 2001
David Hendon	Senior official at Department of Trade and Industry	Former Chief Executive of the Radio Communications agency and head of the 'bill team' on the Putnam committee examining the Communications Act 2003
David Cleevely	Former Managing director of Analysys consulting, independent consultant and member of Spectrum	Advisor on radio spectrum strategy to Downing Street Strategy Office and founding member of SMAG, advisory body on

	Management Advisory Group (SMAG)	radio spectrum to Ministry
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This case will firstly examine the evolution of radio communications regulation, the creation of the radio communications agency, and the development of its role through the Wireless Telegraphy (1998) Act.

THE DEVELOPMENT OF RADIO COMMUNICATIONS REGULATION

Before assessing the institutional regulatory framework in the UK it is important to consider the history of radio spectrum regulation in the UK. Radio spectrum is defined in more detail in the earlier chapters. However, in terms of innovative radio spectrum management and innovations generally in telecommunications markets the UK was an early leader. In 1901, Guglielmo Marconi, the inventor of radio, sent the first radio communication across the Atlantic Ocean from the UK. With the development of Morse code, communication via radio became more popular. In 1912 following the sinking of the Titanic, the Postmaster General claimed that 700 lives had been saved by Marconi's invention.

Aside from the use of radio spectrum for telegraphic communications the next technological development and use of radio spectrum was the introduction of radio broadcasting which began in the UK with test broadcasts in 1920. In 1922 Marconi set up the London broadcasting station. In 1932 the British Empire Service, the forerunner of the British Broadcasting Corporation (BBC) World Service, was launched and in 1936 the BBC Television Service was launched. In

1955 the first independent television station was launched in the UK, with ITV. In 1964 BBC2 was launched.

The uses of radio spectrum for most of the century were essentially telecommunications and broadcasting. The use of fixed telephony (i.e. communication via fixed copper wires) overtook the use of telegraphs following the Second World War and radio spectrum became increasingly more important. Radio spectrum moved into more commercial communication areas with the launch of cellular phones by Cellnet and Vodafone in 1985. Radio Spectrum's range of uses also expanded as the use of private business radio expanded and radio spectrum was used to extend networks for cable television and fixed telecommunications voice and data applications, like wireless broadband.

The growing acceptance of radio spectrum as a key resource was recognised early in the UK. In 1904 the UK adopted the first Wireless Telegraphy Act which introduced the concept of licensing for the use of radio spectrum. The administration of the radio spectrum was a matter for the Post Office and the Postmaster General. In 1918 the Wireless Telegraphy Board was created within the General Post Office and was required to manage the interference between radio spectrum users.

The next major legislative change was the Wireless Telegraphy (1949) Act which introduced fees for radio spectrum and passed the management of the radio spectrum to the General Post Office. This Act, which updated the management of radio spectrum to reflect its growing use and importance, was the main legislative document for the next fifty years. In 1969 the responsibility for the management of radio spectrum was transferred to the newly formed Department of Posts and Telecommunications. In 1973 the Department of Posts and Telecommunications was dissolved and the Radio Regulatory Division was created within the Home Office. In 1983 the Radio Regulatory Division moved to the Department of Trade and Industry and in 1986 it was renamed the Radio Communications Division. The semi-independent nature of the unit and the specialised services it offered meant it was a clearly defined distinct unit with the Department of Trade and Industry. One interviewee, Dominic Morris, suggested that it was made an executive agency for the simple reason that most of the Radio Communications Division was located in a separate building in London's docklands and there had been little integration into the main Department of Trade and Industry.

Radio Communications Agency

The Radio Communications Agency was created in 1990 as an executive agency of the Department of Trade and Industry. The management of the radio spectrum for the armed forces remained within the remit of the Department of Defence.

The concept of Executive Agencies was introduced in the Ibbs Report published in 1988. The Conservative governments in the 1980s had been concerned about the performance and size of the civil service. The Ibbs report was commissioned to see how structurally these issues could be addressed. Ibbs recommendations were:

‘to ensure that the organisational structure and skills of the Civil Service are adapted to deliver government services as effectively as possible’
(Ibbs, 1988,p4)

Ibbs recognised the need to professionalise the civil service and ensure improved performance through target setting. Ministers were increasingly overloaded with additional work and Ibbs argued:

‘Because of other pressures on Ministers, and because for most time management is not their forte and they don’t see it as their function, better management and the achievement of improved performance is something that the Civil Service has to work out for itself’ (Ibbs, 1988, p. 4)

Ibbs also identified that across the civil service there was a lack of clear accountability and responsibility for performance. There was a need to focus on results and outputs as opposed to inputs in the civil service. Ibbs’ main recommendation, therefore, was an organisational change to create executive agencies.

Ibbs defined his agencies as:

‘part of government and the public service...We use the term ‘executive’ agency not in its technical sense but to describe any executive unit that delivers a service for government’ (Ibbs, 1988, p. 9)

Ibbs argues, *‘the choice and definition of suitable agencies is primarily for Ministers and senior management in departments to decide’ (Ibbs, 1988, p. 9).* Ibbs recommended that Ministers and senior Department officials set out the

strategy framework within which the agency should be held accountable. There should be clear accountability in terms of performance to the senior officials and the Minister, particularly in relation to sensitive political issues.

The agencies created following the Ibbs report were mainly created by departments and their Ministers. There was no need for primary legislation although Ibbs did envisage that some agencies may need to be created within a legislative framework. Ibbs did see agencies as primarily units that deliver services for government. He believed that once the policy framework was set then the management of the agency should be as independent as possible in deciding how the framework objectives were achieved. The oversight of these agencies by Department officials and their lack of independence from the parent Department suggests that executive agencies are not independent agencies as detailed by Thatcher (2002b) in earlier chapters.

The Radio Communications Agency had wide discretionary powers to ensure the 'nuts and bolts' of managing radio spectrum was conducted separately from the principal Department. Jim Norton, a former chief executive officer of the Radio Communications Agency, explained that, although the agency and the Chief Executive reported to the Minister, the Chief Executive's line managers were assistant secretary grade in the Department of Trade and Industry. The Chief

Executive had little discretion in terms of hiring and structuring the agency. The senior managers in the agency were all career civil servants who did not report to the Chief Executive directly. The agency, although far from independent, was generally free of Ministerial interference⁷. To a large extent independence was not an issue for the agency. Interviews with both Jim Norton and his successor David Hendon identify that independence from the Minister was never considered in any discussions during their period of office as Chief Executives of the agency. This period covered the preparation of the Wireless Telegraphy (1998) Act, and the change of government from Conservative to Labour in 1997. It also covered the years just prior to the merging of the agency into Ofcom. Generally the agency acted as part of the principal Department and the Chief Executive was generally a career civil servant who returned to a position in the Department of Trade and Industry, once they had completed their stint in the agency.

The institutional solution found for radio spectrum in 1990, retaining control as part of the Ministry, raises a number of issues with the theory. Credibility theories suggest that in cases where there is policy uncertainty and complexity policy actors will delegate those activities to independent agencies to ensure their policy decisions are credible. Levy and Spiller (1994) show that these decisions

⁷ Interview, Jim Norton

are most likely in cases where there are market opening policies. For investors the key issue is the assurance of independence from Ministerial interference. In the case radio spectrum this meant no Ministerial interference with the allocation of radio spectrum licences. It appears from the evidence presented by two Chief Executives of the Radio Communications Agency that Ministerial interference was never an issue and therefore independence was never an issue. David Cleevley, a member of the Spectrum Management Advisory Board (SMAG) which was set up after the Wireless Telegraphy (1998) Act to advise the Minister on radio spectrum policy, argued that it would not occur to Ministers or the Radio Communications Agency to be independent as the agency was full of ‘boring people performing some ‘black art’ that most people did not understand’.⁸

The main concern, and the main reason the agency remained within the Ministry, was to ensure the efficient management of radio spectrum. An argument presented in support of this, from one interviewee, is that in terms of industrial policy the UK had to be at the forefront of innovation and promoting UK industry. This interviewee argued that it was the view of successive UK governments from Harold Wilson’s Labour government, first elected in 1964, which promoted the ‘white heat of the technological revolution’ of UK industry

⁸ Interview with David Cleevley

in the 1960s, to the Thatcher free market policies⁹ that there was a focus in the UK on promoting innovation. Radio spectrum policy was considered part of this approach. The key objective for Ministers was to ensure radio spectrum policy did not fall behind and did not hinder UK industry and hamper innovation. Therefore, it needed close political oversight. Jim Norton argued that the Radio Communications Agency had a clear objective to be transparent in its processes and decisions. It could not therefore be accused of political or Ministerial interference. The agency published strategy documents and annual plans to assist those who may wish to invest and apply for a licence. The agency never had a policy role, but Jim Norton argued that the close working relationship with the parent Department promoted policy stability, which in his view was a key promoter of investment in the sector. A final argument which may be put forward to explain the agency's lack of independence was the nascent commercialisation of radio spectrum. In the early 1990s it was not the case that radio spectrum was seen as a commercial asset by government. Prior to the Wireless Telegraphy (1998) Act radio spectrum licences were issued for a small administrative fee.

A further issue to be considered at this stage is the decision not to include radio spectrum as part of Oftel in 1990. The decision not to merge may have been a reflection on the limited role of Oftel. In the early stages of liberalisation in the

⁹ Interview with David Cleevely

UK, Oftel was concerned mainly with the management of British Telecom and one other competitor, Mercury. Jim Norton's view was that at that stage in the evolution of the telecommunications sector, radio spectrum was not considered an important component of a telecommunications market. It was only in the early 1990s that a full liberalisation agenda was adopted. Also the remit of the radio spectrum agency, as constituted in 1990, was broader than just telecommunications. It had responsibilities for broadcasting which was managed by other agencies such as the Radio Authority and the Independent Television Council (ITC). Jim Norton argued that radio spectrum was seen as a government resource. As a wholesaler, the agency's role was to ensure efficient management of the radio spectrum. Jim Norton argues that there was limited conflict in this role with other agencies or with government. There were departmental committees and liaison with the Department of Defence, particularly on radio spectrum planning. The general impression given by all interviewees is that the agency, particularly in its early years, was performing a technical and in many cases highly complex, but essentially bureaucratic role.

These arguments do not undermine the view that credibility is a key functional reason for the creation of independent agencies. The motivation of policy actors, as evidenced in the Ibbs report, was efficiency and public sector reform. The concern of government was to ensure the strategic management of radio spectrum

at a time when the pressures of market opening in telecommunications did not impact on the commercial value of radio spectrum. In the early 1990s the importance and commercial value of radio spectrum was not recognised and the need to credibly commit to a policy did not have the same importance it was to have by the end of the 1990s.

The next major development in radio spectrum management was the decision to value radio spectrum licences based on market values, not on administrative charging. The Radio Communications Agency, recognising the growing importance of radio spectrum started to lobby in the mid-1990s for more flexibility in awarding licences. The commercial uses of radio spectrum were increasing, particularly in relation to mobile telephony. The lobbying started under John Major's Conservative government. The Conservative government had been re-elected in 1992 for a third term. The fiscal environment was difficult for the government at the time and the argument that government could raise additional funds from radio spectrum was very welcome. The growing commercial importance of radio spectrum is illustrated in an anecdote recounted by a number of interviewees. The Radio Communications Agency proposed changes to the wireless telegraphy legislation to allow for radio spectrum to be sold at market-based prices. The agency recognised, however, that parts of the radio spectrum, particularly for next generation mobile telephony, could raise

significant funds if based on market prices. If this approach was adopted the radio spectrum licences would be valued well in excess of costs. The proposed legislation was discussed with the then deputy Prime Minister, Michael Heseltine, who was told speculatively that the radio spectrum for next generation mobile could be valued at up to stg£5billion. This raised awareness of the issue in the Conservative government and the draft legislation was approved at one of its last cabinet meetings. The valuation of radio spectrum also featured in the 1997 election campaign when the Labour Party election literature included a valuation of stg£10billion for radio spectrum licences.¹⁰

It is important to consider the growing strategic and commercial importance of radio spectrum and consider what changes were proposed in the Wireless Telegraphy (1998) Act. This is particularly important in relation to the institutional independence of the Radio Communications Agency as the legislation was the first opportunity to address the agency's institutional status.

Wireless Telegraphy (1998) Act

The increasing importance of radio spectrum was recognised by the Radio Communications Agency who consulted on the 'Future Delivery of Spectrum

¹⁰ David Cleevley - confirmed that the Sunday Times had a story on the value of radio spectrum in April 1997, prior to the general election

and on Spectrum Pricing' in 1996. The legislation which followed this consultation, the Wireless Telegraphy (1998) Act, changed the way radio spectrum was valued and introduced the concept of radio spectrum pricing. The Minister, introducing the Wireless Telegraphy bill in the Commons, argued:

'The Bill will bring about a radical change in the way in which the spectrum is managed. It will enable--indeed, require--my right hon. Friend the Secretary of State, when setting fees, to take account of a range of criteria connected with the efficient management of the spectrum, rather than, as at present, simply applying administrative costs'. (John Battle, 29/10/97,col.925,House of Commons)

The debate on the Wireless Telegraphy (1998) Act was extensive, despite all-party support. The Conservative Party 1997 election manifesto said:

*'We will keep Britain in the vanguard of new mobile service development - including mobile telephone and information services - by introducing a pricing system for the radio spectrum to achieve more efficient allocation of radio frequencies'*¹¹

¹¹ Conservative Election Manifesto 1997 located at www.psr.keele.ac.uk/area/uk/man/con97.htm

The Labour government supported this concept and the Wireless Telegraphy Bill was one of the first Bills published by the new government. The main areas of debate centered on the rights of existing users, and the extensive powers being devolved to the Secretary of State that would allow him or her to decide on radio spectrum auctions, and radio spectrum pricing. It is interesting to note that the debate did not discuss the institutional arrangements of the Radio Communication Agency status as an executive agency. This was the first opportunity for Parliament to assess the powers delegated to the Secretary of State and, prior to the 1998 Act, the Radio Communications Agency had the power to set administrative fees which essentially covered their costs of issuing licences. Under the proposed legislation the agency could recognise the economic value of radio spectrum and charge above costs for these fees. It also proposed that the Secretary of State could set fees via auctions which could raise significant sums for the UK Treasury. The Conservative opposition contribution to the debate did not focus on the power of the agency or the role of the Secretary of State. The Conservative opposition argued that the change to economic charging for radio spectrum was a tax on business. In fact the demands from industry that the legislation may to a broader remit for the Radio Communications Agency were addressed by the Minister during the debate on the Act when he agreed to set up an advisory committee:

'We recognise that there are enormous resources of knowledge, expertise and experience in the radio industry. It is to everyone's advantage that we draw upon them in getting the Bill right...The decision to set up the spectrum management advisory group, together with the Bill's provisions and the agency's commitment to consultation, should demonstrate beyond any doubt our total commitment to ensuring that the interests of users are placed at the heart of policy making in this area' (Mr. Battle, 29/10/97, col.932, House of Commons)

Institutionally, it appears from the debate that there was widespread support for the central role played by the Secretary of State in directing not only radio spectrum policy but also the role of the Radio Communications Agency as the expert administrative group under the direct control of the Secretary of State.

The approach adopted by both Conservative and Labour governments to radio spectrum reflects the debate in earlier chapters in relation to decisions by governments to delegate in areas of complexity. The notion that governments delegate powers to independent agencies in areas where there is increasing policy complexity was discussed in the literature review and will emerge in other case studies. In this case a motivation to create the telecommunications regulator was to address the complexity of managing a liberalised market and in the case of

radio spectrum increasingly complex spectrum licensing, commercialisation and allocation. Interviewees confirmed that the Wireless Telegraphy (1998) Act was not about institutional arrangements for radio spectrum but rather to pave the way for future spectrum auctions which would raise large sums of money for the Treasury. The future direction where UK telecommunications policy was heading, particularly in relation to institutional solutions, was raised once in the debate in the Wireless Telegraphy (1998) Act, where it was proposed:

'I hope that my hon. Friends the Ministers will consider a small suggestion. There is a plethora of regulators in broadcasting and communication. In the past we advocated rationalisation, and I believe that the system that is proposed--in addition to the advisory committee, which I welcome--might work better, allocating licences on a qualitative assessment of bids, if it were made part of the remit of an external regulator, such as the Ofcom that was proposed to replace the Office of telecommunications. Ministers might care to consider that in detail. The provisions in clause 4 give the Secretary of State the power to do something along those lines, should she wish. I certainly hope that it will be given careful consideration' (Dr Moonie, 29/10/97, col.953, House of Commons)

It could be argued that the new Labour government, despite having a commitment to a converged independent regulator included in their 1997 election manifesto, considered it too early to suggest institutional solutions in 1998 and were more focused on the economic value which could be gained from radio spectrum.

The Wireless Telegraphy (1998) Act is important to consider in two respects. Firstly, it was an opportunity to consider the functional structure of the agency as it would be responsible for the management of radio spectrum that was universally agreed would be more valuable. Secondly, because the provisions in the 1998 Act, which allowed the Secretary of State to decide, not only the policy in relation to radio spectrum, but also allowed the Secretary of State to decide on the mechanism to allocate spectrum, was a provision debated at length in the later Communications (2003) Act. The radio spectrum auction for next generation '3G' radio spectrum, which was held just after the passing of the Wireless Telegraphy (1998) Act, raised £22.5 billion for the Treasury and the powers delegated to the Secretary of State were therefore given more scrutiny.

What is clear from the creation of the Radio Communications Agency through to the Wireless Telegraphy (1998) Act is that radio spectrum was considered a natural resource by the government. As we see in the UK and in the cases to

follow, radio spectrum management is not delegated to independent agencies in cases where policy actors believe they need to retain control over the financial rewards which result from the allocation of radio spectrum licences. The increasing commercial value of the radio spectrum was being recognised in the 1998 legislation and it is clear from the contributions to the debate on the 1998 legislation that the Labour government was considering institutional change; however, this change was an evolution of the existing agencies into a more converged structure.

TELECOMMUNICATIONS REGULATION AND THE CREATION OF OFCOM

Chronologically the next major legislative event after the Wireless Telegraphy (1998) Act was the creation of Ofcom. This section will first examine the debate surrounding the converged regulator and specifically the White Papers published by the Labour Government in its first term of office. It will also examine the debate surrounding the radio spectrum role within a converged regulator. This is particularly influenced by the radio spectrum auctions which netted significant revenue for the Treasury in 2000. Secondly, the section will examine the pre-legislative scrutiny which was a particular feature of the legislative process for the Communications (2003) Act. Finally, it will assess the delegated powers of Ofcom and the radio spectrum provisions of the Communications Act and assess these considering the criteria identified in the literature on delegation.

As discussed above Oftel had operated a ‘duopoly policy’ which allowed limited competition to British Telecom from only one operator, Mercury. Oftel’s remit was broadened in the early 1990s when the market was opened further and other telecommunications operators were allowed to compete with British Telecom.

The convergence of services to consumers, encompassing both traditional telecoms and broadcasting companies, led to the view that a single regulatory authority was required to manage the markets covered by electronic communications. Such changes were also driven by changes in European legislation as telecommunications markets were liberalised across the EU. There was also tension between the agencies and duplication of activity. These factors increased the calls for a converged regulator¹².

The UK's institutional approach to independent regulation, prior to the debate on the single regulator, had been to create non-Ministerial departments generally staffed by civil servants but with the power and authority held by a Director General. Oftel had a number of Director Generals, some of whom exercised significant independence from Ministerial authority. The personalising of regulation was a particularly UK innovation which was taken up by other countries. It has been argued:

'The statutory and media personalisation of the OF-Type DGs created an impression of regulatory monarchs who were masters of all they surveyed, and whose imperious whims could affect the fates of giant

¹² Interview Dominic Morris, confirmed that conflict existing between Oftel and the ITC

corporations and millions of consumers' (Hall, Scott, & Hood, 2000, p. 61)

The public profile and importance of such individuals should not be underestimated. On several occasions the Director General of Oftel, Dan Cruickshank, at the time of John Major's government, threatened to resign if his proposals were not supported and such public resignations could have led to the fall of the government¹³. The cult of personality was a deliberate policy of civil servants when Oftel was created. The intention was to have a clear public image which could compete against the much larger resources of British Telecom.

The converged regulator

The review of the regulatory framework for communications was undertaken following the change of government in May 1997 and had been less radical than anticipated (Vass, 2001, p. 74). Government White Papers in the early years of the Labour government concentrated on modernising the regulatory framework with a clear focus on competition and consumers. One interviewee argued that

¹³ Interview with Dominic Morris

the Labour Party differed from the previous Conservative governments in that the Labour governments placed a greater importance on competition and competitive markets unlike the Conservative Governments who put the emphasis on companies ahead of markets and competition¹⁴. The process creating a converged regulator emphasised the importance of promoting competition and changes in industry structure and technological innovation. The pace however was evolutionary, as opposed to revolutionary.

The thinking process behind the creation of Ofcom started in the mid 1990s with a number of policy papers. In May 1995 the Institute of Public Policy Research (IPPR) published ‘Regulating in the public interest; looking to the future’, in which recommendations were made on the most appropriate regulatory structure to match the changes in market structure identified in the policy paper:

‘...the regulatory structure must adapt to match the industrial structure that it regulates and needs to regulate in future. Telecommunications and broadcasting transmission uses the same technology to do the same thing – to move bits of data from one place to another. Their infrastructures compete with and complement one another. All regulatory functions concerning the digital transmission of information – whether in oftel, the

¹⁴ Interview James Purnell

ITC or elsewhere – should be brought together in a single regulatory authority'. (Souter, p4, 1995)

The paper foresaw the move to more digital networks; increasing convergence and investment as the key drivers in the sector. The perception, in the heat of the 'dot com' explosion, was that digitalisation of telecommunications would create problems for the existing institutional structure. A converged regulator, with both of the telecommunications networks, media content and media regulators combined into one more effective agency, would more efficiently manage the converged marketplace. The proposals at this stage however did not extend to the regulation of content services. Where the regulation of transmission networks was economic, content delivered on these networks was social and therefore should be regulated separately.

A further contribution to the debate was made a year later in 1996 when Murrioni, Collins and Coote published 'Converging Communications: Policies for the 21st Century'. The authors argued that the media and communications sector was governed by too many regulators, fourteen in total and with overlapping responsibilities. The authors noted that the situation concerning conditional access requirements in broadcasting were covered by both the Independent Television Commission and by OfTel. The authors believed two changes to the

current regulatory framework were required. Firstly, a set of regulatory principles needed to be applied to regulation in the future and secondly, there needed to be a rationalisation of the regulators covering the media and communications sectors.

The authors argued:

'We propose that the confusing and wasteful plurality of regulators in the UK be reduced to a single statutory regulator in charge of both content and carriage matters. For our purposes we call this OFCOM. Although content regulation and the regulation of markets are different tasks, they are necessarily best done by separate bodies.' (Murrone, Collins, & Coote, 1996, p. 52)

These policy papers should not be underestimated in terms of their impact on Labour Party policy. The proposals argued that convergence would undermine the separation of regulators and the Labour Party manifesto in 1997 did recommend a single regulatory agency in response to convergence. The IPPR policy papers were supported by a number of influential people like Chris Smith MP, Patricia Hewitt MP and James Purnell MP who went on to be Ministers and/or advisors in the first and second Labour Governments. The proposal to have a single regulatory authority was also raised in the business manifesto of the Labour Party published in 2000, prior to the 2001 general election. The

arguments made in the policy papers are cited again as the reasons for the converged regulator. At the end of the first term of the Labour government, the Department of Trade and Industry published the Communications White Paper, titled 'A new future for Communications'. The paper proposed the converged regulator and is recognised as the start of the process which led to the creation of Ofcom and the Communications Act in 2003.

Communications White Paper: A new future for Communications

The start of the legislative process to create Ofcom was the White Paper, 'A New Future for Communications' published at the height of the dotcom boom in December 2000. The extent of the remit of the White Paper is indicated by the fact that two government departments, the Department for Trade and Industry and the Department of State for Culture, Media and Sport were sponsors. The paper is filled with excessive hyperbole and government objectives for the sector. One of the government objectives states:

'We want to unleash the potential for these convergent communications technologies to extend choice, deepen democracy, enrich entertainment and enable learning' (Department of Trade and Industry & Department of Culture Media and Sport, 2000, p. 10)

The growth of digital television and increasing blurring between the markets regulated by the number of content, telecoms and media regulators is the main motivation for converging with the regulator. The White Paper argues:

‘Reform to bring together the existing regulators more closely would be a second-best response. We need more radical measures. That is why the centerpiece of this White Paper is the creation of a single regulatory body for the communications and media industries – an Office of Communications (Ofcom)’ (Department of Trade and Industry & Department of Culture Media and Sport, 2000, p. 11)

The White Paper proposed that Ofcom would be a unified regulator responsible for the communications sector. It proposed that the regulator was to be independent and act at arm’s length from the government, but will work closely with the Department of Trade and Industry (DTI) and other relevant departments. The paper argued that the new regulator needed to have delegated powers to act independently in response to fast-changing circumstances. Ofcom would be a body corporate with a chairman, board and a chief executive.

Table 10: Agencies merged to become Ofcom

<i>Agency</i>	<i>Responsibility</i>	<i>Type of Agency</i>
Oftel	Regulation of the telecommunications industry	Non-Ministerial Government Department
Independent Television Commission (ITC)	Licensing and regulation of all commercial TV services	Statutory Corporation
Radio Communications Agency	Management of the non-military radio spectrum in the UK	Executive agency of the Department of Trade and Industry
Radio Authority	Licensing of all commercial radio stations	Statutory Corporation
Broadcasting Standards Commission	Maintaining Standards and fairness in TV and Radio Broadcasting	Non-departmental public body

In relation to radio spectrum policies it was proposed in the White Paper that the Radio Authority, which dealt primarily with the licensing of broadcast radio, and

the Radio Communications Agency, would be merged with Ofcom. The rationale was explained as:

‘the growing importance of decisions on spectrum assignment for the promotion of competition and economic growth makes it no longer sensible to separate the economic regulation of communications from the provision of spectrum’ (Department of Trade and Industry & Department of Culture Media and Sport, 2000, p. 21)

The consultation process led to some disagreement about what should be merged, but according to the considered opinion at the time, ‘the overall decision to merge was not highly contentious’ (National Audit Office, 2006). David Hendon, during interviews, confirmed that the Radio Communications Agency was not supportive of the proposal to be part of the converged regulator but as a government agency the agency itself was prohibited from responding publicly to the consultation process. David Hendon argued in private with Ministers that the Radio Communications Agency had a specialised expertise. He argued, with new enhanced powers delegated via the Wireless Telegraphy (1998) Act, it was not the right time to merge them with other agencies. He argued that the agency was a world leader and would be subsumed within a larger organisation. Other interviewees confirmed that there was resistance to merging the radio spectrum

agency within the wider Ofcom. James Purnell argued that there was no rational reason to exclude it from the converged regulator. If the objectives of the converged regulator were to reflect the changing market circumstances, then it did not make sense to have businesses approach several agencies before they could launch a service. David Hendon cited an example of this confusion when he referred to the creation of a new satellite channel, Info-TV, which was required to get approval from several agencies prior to its launch. A further factor which militated against the Radio Communications Agency going alone was the view that the agency's culture was not appropriate to a market based approach. One interviewee, David Cleevely, argued that there had been little cultural change in the agency. He argued that Jim Norton as Chief Executive had started on the road to reform the agency and to modernise, but had got 10 miles in a 1,000 mile journey. He argued that there was a perception that the people in the Radio Communications Agency did uninteresting jobs and were 'pipe-smoking tweed jacket' people who would be redundant in the future as the newly opened market would allocate radio spectrum without the need for an agency.

The perception that the market would in the short term remove the need for any regulation of radio spectrum was a popular view at the time and was reinforced by the sale of mobile spectrum licences and a growing belief that radio spectrum management could be managed by the market. In March 2001, the Treasury and

the Department of Trade and Industry commissioned Professor Martin Cave to review the future of radio spectrum management. The review was conducted against the backdrop of the review of communications policy discussed in the White Paper, 'A New Future for Communications' published in December 2000. The policy document was published following the auctioning of valuable radio spectrum licences used for advanced mobile telephony. These licences raised £22.5 billion for the government and also raised expectations in government that radio spectrum licences would be a new source of revenue for government. The review conclusions, published a year later in March 2002, proposed that a more market based approach should be adopted for the management of radio spectrum. The argument made by Professor Cave was that spectrum was becoming commercialised and the existing regulation needed to be rowed back to allow companies to trade spectrum. The review concluded that there was a reduced role for regulation in the short to medium term, *'in the long run the move to spectrum trading would lead to a reduction in work associated with designing, pricing and monitoring some spectrum licences'* (Cave, 2002, p. 33)

The review did make a number of recommendations on the respective roles of Ministers and the proposed converged regulator, Ofcom. The review proposed:

'In addition to clarifying the objectives of Ofcom with regard to spectrum management, the Communications Bill should establish clearly the dividing line between Ofcom's independence in spectrum matters and the continuing role for Ministers in giving Ofcom political direction' (Cave, 2002, p. 14)

Professor Cave's review did recognise the role of government in strategic decisions in relation to both commercial and non-commercial spectrum and it was appropriate for the government in the forthcoming Communications Act to provide for some power of direction over Ofcom to ensure such strategic oversight, however, Professor Cave concluded:

'...it should not be necessary for Ministers to take further powers to direct Ofcom in the specifics of its spectrum assignment, licensing and charging activities. This could risk undermining the regulatory independence of Ofcom in carrying out its well defined remit, potentially creating uncertainty in the market about the stability and direction of spectrum regulation....As with other spheres of economic activity, the review considers that the government should aim to bolster the independence of the statutory spectrum regulator and reduce Ministerial

involvement in the detail of specific regulatory decisions' (Cave, 2002, p. 15)

The respective duties of regulator and Minister in relation to radio spectrum were debated further when the draft Communications Bill was discussed by the Joint Parliamentary Committee reviewing the proposed legislation. It is important, therefore, to consider the deliberations of the Joint Committee as they examined in detail the draft Communications Bill and discussed these issues with a number of stakeholders.

Pre-Legislative Scrutiny - the Puttnam Committee

The idea of pre-legislative scrutiny was a relatively new idea which allowed more time for Members of Parliament, and the general public, through public session of committees, to contribute to the detail of major pieces of legislation. The government published the draft Communications Bill in May 2002, following consultations on the White Paper and the general election in 2001. The government indicated its desire to have a Joint Committee examine the Communications Bill in April 2002 and a committee chaired by Lord Puttnam was formed and met first on the 9th May 2002, two days after the publication of the Draft Communications Act. The government had decided to publish and

enact a smaller Office of Communications Bill in 2002 which was to create the legal entity and the establishment of Ofcom to allow for the transition proposed in the Communications Act. David Hendon confirmed that the reasons for the pre-legislative scrutiny were as much to keep the focus on the Bill during the summer recess. The Bill was so long and complex it was believed it could not get through both Houses of Commons and Lords in the session prior to the summer 2002 recess. The pre-legislative scrutiny was important to retain a focus on the Bill, and try to resolve some of the more contentious issues before getting it into the Parliamentary debates.

The Communications Act covered a wide range of activities and touched on several key policy areas for government, only one of which was the convergence of the regulators. The Bill had 259 clauses and 13 schedules and covered areas like the governance of the BBC, cross media ownership and issues of content regulation. The Joint committee met from May 2002 to July 2002 and published their report on the 22 July 2002 (Joint Committee on the Draft communications bill report, HL paper 169-I, HC 876-1, session 2001-02).

The Committee heard evidence from the legacy regulators, the sectoral operators and the ministers responsible for the legislation. The Committee commissioned reports on various aspects of the legislation, including a report on radio spectrum.

The expert report on radio spectrum received by the Committee, written by Peter Kiddle, on radio spectrum gives a view very similar to the view which was being expressed privately by the Radio Communications Agency. The final comments of the Kiddle report are worth quoting in detail:

'Radio spectrum issues, frequency allocations and appropriate technical requirements of licences are at present dealt with by the RA (radio Communications Agency). The RA would appear to be the odd spoke in the OFCOM wheel as primarily being a technical and engineering organisation including the necessary technical research capability to support these functions. Additionally they are the only one of the regulators which is a Government Agency with wide powers and as such, represents Government on spectrum and standards issues in the International fora, being the UK signatory to many International agreements. They also have significant enforcement powers and applications for search warrants and powers of seizure of apparatus may be more relevant to Government than OFCOM.

The committee may therefore wish to consider that OFCOM, considered by many to be primarily the regulator for the entire broadcast and media sector, would be more focussed and possibly stronger without the addition of the RA which would remain a government agency with only

those staff associated with broadcast/media being integrated into OFCOM. The RA would of necessity, provide the appropriate technical and spectrum support to OFCOM, whilst itself concentrating on the major issues of spectrum efficiency, Interference management and International and European spectrum and standards harmonisation for the future. It is also worthy of consideration that the relationships and trust established over several decades by the RA not only in the UK but within Europe and the rest of the world with their equivalent Government bodies may take considerable time to re-establish by the much wider regulatory and non governmental OFCOM organisation' (Report of the Joint committee on draft communications bill, annex 8 Kiddle report.).

This proposal from Kiddle mirrors proposals which one interviewee, David Hendon, said were discussed during the negotiations of the Bill. It was proposed that only those staff dealing with broadcasting and telecommunications issues would move into Ofcom. However, David Hendon believed that this represented the core of the agency staff and the decision was one of status quo or complete assimilation. Hendon said there was strong pressure from Downing Street for an independent regulator¹⁵.

¹⁵ Interview David Hendon, CEO of the Radio Communications Agency at the time of the review. David Hendon at the time of Joint Committee deliberations was in fact in charge of the 'Bill Team', a team of

Most of the contentious issues with the legacy regulators were resolved prior to the Joint Committee. When Mike Goddard, the Chief Executive of the Radio Communications Agency, who succeeded David Hendon in 2002, appeared in front of the committee he was asked for his views on the merging of the Agency with Ofcom:

'...radio spectrum is at the heart of the communications revolution. Putting spectrum management at the heart of OFCOM will provide a more effective regulatory regime and create conditions conducive to the success of the communications sector, which is so important to future prosperity and social goals. I look forward to OFCOM continuing and building on the Agency's achievements in managing the radio spectrum to foster a successful and competitive economy and enhance quality of life'
(Mike Goddard, Joint Committee on Draft Communications Bill, proceedings from the committee, 27/5/02)

The Committee members were expecting a least some resistance or complaint, the Committee in replying to Mr. Goddard said:

officials supporting the committee on the detail of the legislation. David Hendon was succeeded by Mike Goddard.

‘..you are the fifth regulator that has told us that you are happy with the Bill, that you are happy with the powers and that you are happy with the staff that you are going to be given under this, and yet this is a Bill that the Government tells us is going to be lighter of touch, slimmer, etcetera. Do you not think we should start smelling a rat somehow about this Bill?’
(Lord McNally, Ibid, 27/5/02)

The committee did quiz the legacy regulators and the politicians, on the detailed provisions of the Bill. Lord McNally was concerned that with Ofcom responsible for telecoms and spectrum that issues related to radio spectrum would be marginalised and become a Friday afternoon job. Tony Stoller, Chief Executive of the Radio Authority, argued:

‘OFCOM will have telecoms and spectrum management, so we are worried it might not be a Friday afternoon job so much as a going-down-the-lift-at-the-end-of-Friday-evening job!’ (Tony Stoller, Ibid, 27/5/02)

David Edmonds, Director General of Oftel, restated his support for the Bill on the basis that it emphasised Ofcom as an independent regulator but in relation to

radio spectrum he was concerned about the powers retained by the Secretary of State:

'I think in allocation of spectrum I do have some doubts. I think you have said what are the pros? The pros are the allocation of spectrum that can be perceived to be industrial policy in that sense rather than regulation, therefore the Secretary of State is retaining a power I can see the justification for. On the other hand, were I the Secretary of State I would be worried that I would be subject to lobbying from interest groups from different directions and I am not sure I would want that' (David Edmonds, Ibid, 27/5/02)

The Spectrum Management Advisory Group (SMAG) created under the 1998 Wireless Telegraphy Act also expressed concern that advisory committees to Ministers were not mentioned in the Act:

'..SMAG feels strongly that there is a need for clarity in the respective roles of Ministers, OFCOM, and various Advisory Committees. There are a number of potentially conflicting issues that emerge in the Bill, such as the indication that Ministers wish to retain powers of intervention in the allocation of spectrum, but wish to introduce spectrum trading which will

restrict those powers' (Memorandum submitted by SMAG, Ibid, discussed 10/6/02)

The Joint Committee also interviewed Professor Martin Cave and questioned him on the proposed powers delegated to the Secretary of State in relation to spectrum management. Professor Cave argued:

'My preference would be for a division of labour which put that particular aspect of the regulatory activity on the OFCOM side of the fence rather than the Secretary of State's side of the fence. I say that because I think it is essentially a sort of subordinate technical function rather than a strategic issue; and secondly, I think that in the long term the Secretary of State might be glad not to be intimately involved in what might be very difficult technical decisions for which he or she will be subject to a great deal of lobbying' (Prof Martin Cave, Ibid, 10/6/02)

The committee asked the Bill team, the supporting civil servants responsible for examining the provisions of the bill to the Committee, to explain the powers of the Secretary of State:

'(Mr Green) There is a fairly strict test or hurdle for the Secretary of State to overcome before giving a direction. It is clearly not something that is done lightly or every day of the week. For example, it is necessary for the Secretary of State to go to Parliament and effectively get the direction confirmed; otherwise it ceases to have effect. So what the Bill tries to balance is the degree of intervention on the one hand by ministers on matters which are of wider public interest, with ensuring a degree of transparency and Parliamentary accountability'.

Professor Cave was asked if his concerns over the oversight the Secretary of State were assuaged by the constraints placed on the political oversight. Professor Cave replied:

'On that footing, the thought comes to my mind that if the Secretary of State did not use the power then perhaps it might be better, in the interests of certainty, for the power not to be available to the Secretary of State' (Mr. Green, bill team, Ibid, 10/6/02)

The debate continued with an attempt to explain the oversight powers of the Secretary of State being required for reasons of policy and the public interest. Mr Green of the Bill team argues:

'When one comes onto spectrum, I guess the question is the extent to which ministers need to be involved in the wider public interest, bearing in mind that, for example, the remit of OFCOM on spectrum management will go much wider than just telecommunications and broadcasting spheres, so across the broad spectrum... Then, there is a legitimate question, it seems to me, which is, are we saying, or should the Committee consider, that that is something that ministers should not be involved in at all, it should be left totally to the independent regulator? The other point of view is that this is a matter of major national strategic importance bearing various implications for public policy, and it is right that ministers should be allowed to become involved, subject, of course, to the Parliamentary accountability that I referred to earlier'

Professor Cave responded:

'I would certainly regard it as being appropriate for the Secretary of State, for example, to decide whether spectrum should be allocated to public service broadcasting or to a commercial use. I would regard that as being a decision which related to a key policy output, and that, in my view, is the appropriate sphere for Secretary of State decisions, whereas

the ways and means of conducting auctions—first-price auctions, second-price auctions, things of that kind—seem to me to be something better done by the appropriate agency’ (Prof Cave, Ibid, 10/6/02)

When the respective Ministers appeared before the committee, the committee members resumed the debate on the balance of powers retained by the Secretary of State and the independence of Ofcom. Patricia Hewitt MP replied:

‘On the powers that are kept, as it were, the direction-making powers for the Secretary of State, those particularly apply to spectrum matters. I think the starting point here is just the recognition that radio spectrum is the raw material for the communications sector, and it is a hugely important and, as it happens, very valuable economic and social resource, and the decisions that we make about its management will have a huge impact on whether or not we achieve our aim of making Britain one of the world leaders, the most dynamic and competitive communications markets in the world’ (Patricia Hewitt MP, Ibid, 8/7/02)

The decision was taken that Ministers ought to be able to intervene on grounds of national security, public safety and health, and international relations. Patricia Hewitt MP argued that there were wider public interest considerations which

would lead Ministers to set the strategic allocation of radio spectrum. Patricia Hewlett concludes:

'I really cannot imagine that we or any government would want to leave the decision on switching off analogue television to an independent regulator. It seems to me that is a decision that ought to be made by ministers, and ministers should be held accountable for it...I think our view at this point is that it can be very difficult to separate the strategic decisions from the management specifics, and certainly if one thinks about 3rd generation mobile spectrum, the decision whether or not to have a 5th licence, which from one point of view is a specific of spectrum management, was a hugely important issue that will actually determine how competitive the market is' (Patricia Hewitt, Ibid, 8/7/02)

David Hendon confirmed this was the view of officials in the Ministry and the Radio Communications Agency. Specifically, the issue of the use of radio spectrum available in the market as a result of the switch from analogue broadcasting to digital broadcasting, which was argued to be a decision for Ministers not for the regulator. The Minister was questioned on her role vis-à-vis the independent regulator and the policy framework and asked whether she could resist getting on the backs of the regulator. Patricia Hewitt replied:

‘There is a huge range of decisions here that will be entirely matters for OFCOM, and OFCOM will have to make the judgement within its statutory duties, and it will be accountable to Parliament for those decisions. Once we have established an independent regulator or a regulator with a very significant degree of independence, then I am very clear that the role of ministers is to be a robust defender of that policy framework, ... But I think in the narrower but nonetheless very important area of spectrum, the first thing we have to do is decide where we set that boundary. Having set it, I am very clear that any Ministerial direction would have to be published. In the case of the direction of spectrum management, it would have to be confirmed by Parliament with an affirmative resolution procedure. We would have to be able justify it to Parliament and persuade both Houses that it was the right thing to do. It is not something either of us would envisage using, particularly routinely’
(Ibid, 8/7/02)

The debate above was concluded with the Joint Committee’s final report where they seem to accept the Secretary of State legitimate need to be involved in policy formulation:

'there is a wider public interest in the allocation, assignment and management of spectrum that OFCOM, even with its duty to further the interests of all citizens in its optimal use, may not be best placed to judge'. (Joint committee response, HL 169-I, HC 876-I)

In their reply to the Joint Committee's recommendations the Department of Trade and Industry agreed:

'to meet the concerns of the committee and the independent review, we intend to amend the Bill to require approval by Parliament of directions under the clause to be prospective instead of retrospective except in the case of urgency. In addition, we propose to add a requirement that the Secretary of State should consult OFCOM and other stakeholders before giving a direction except in case of urgency'. (Department of Trade and Industry, 2002)

In the final version of the Communications Act the provisions remained unchanged and the Secretary of State, albeit with Parliamentary oversight, has the power to intervene and allocate spectrum in the public interest.

The exchange above, quoted at length, is vital to our understanding of the powers delegated to independent agencies. There is an acceptance that Parliament or policy actors have a policy role in terms of communications strategy. The solution in the Communications Act for radio spectrum was ex-ante controls which restricted Ofcom's discretion in terms of allocation of radio spectrum. The non-functional reasons discussed in chapter 1 accepted that credibility is a key driver creating independent agencies. They suggest that policy actors would delegate decision making powers but would impose ex-ante or ex-post controls to address the risk that agents may not reflect the preferences of principals. The controls placed in the legislation reflect this principal-agent relationship and confirm Gilardi's (2007) view that the ally principle cannot always be assumed in decisions to delegate to independent agencies. The decision to allocate radio spectrum is complex and requires expertise therefore the need for Ofcom, without interference from Ministers, to decide on allocation. There is a need for the Secretary of State to protect the public interest and ensure the potential revenue from radio spectrum allocations are maximised. The Communications Act recognises this need to retain some ex-ante control on allocation, albeit limited. In situations where there is market opening, policy actors want to ensure investors, and those operating businesses in these newly owned markets, that the market will operate free from political interference. However, the discussion above highlights that in certain cases the delegation is tempered by the view that

the radio spectrum asset is valuable and political expediency requires the Secretary of State not to have forgone the opportunity to intervene and ensure the maximum benefit for the government. The Secretary of State does not want to be blamed for letting go of the opportunity to generate public funds by delegating authority completely to an independent regulator¹⁶

The Communications Act, having been scrutinised in the Joint Committee, did address many of the contentious issues which made the debate in the Commons generally non-contentious in terms of controversial issues to be raised.

Communications (2003) Act

The Communications (2003) Act gives effect to the reforms set out in the Communications White Paper and gave effect to the functions and duties of the Office of Communications (Ofcom) which combines the activities of a number of previously separate agencies. The agencies remit covers broadcasting, telecommunications and radio spectrum. In the debate on the Act in the House of

¹⁶ Interviews with David Hendon confirmed this view. He lobbied for this power to be retained by the Minister on the basis of the risk of future spectrum auctions not being controlled by Ministers.

Commons, e-commerce Minister Stephen Timms MP, summed up the rational thinking behind the converged regulator:

'Higher capabilities of mobiles, rapid take-up of broadband, growing use of wireless for fixed communications and the spread of digital television are all blurring the old distinctions. Bringing the Regulators together is, therefore, clearly the right action...What is important, however, is that those who make judgments about how these matters should be regulated, will be in one place rather than in different agencies. Increasingly, more than one of those regulators has had to get involved in a particular case. Ofcom will be the place where these decisions are made, which is clearly a big improvement' (Stephen Timms MP, col 852, 3/12/02, House of Commons)

Ofcom had in fact been created in the Office of Communications 2002 Act, which was paving legislation to create Ofcom and allow it to exist prior to the Communications Act being adopted. The 2002 Act is important as it sets out the structure of Ofcom. Essentially Ofcom is a Board whose members shall not be less than three and not more than six. The size of the Board and the appointment of the Chairman shall be by the Secretary of State. Executive members can be

appointed and a Chief Executive Officer position is established, who will be part of the Ofcom Board. The Chief Executive is appointed by the Chairman with the approval of the Secretary of State. The executive members shall not exceed the non-executive directors. Section 9 of the Act states that Ofcom is not a body exercising functions on behalf of the Crown and no person by reason of employment or membership of Ofcom can be considered a servant of the Crown. In a majority of cases in the legacy regulators the employees were considered civil servants and servants of the Crown. This is especially the case for the Radio Communications Agency. The Ofcom board can appoint *'such other employees as they may determine and make other such arrangements for the staffing of OFCOM as they think fit'* (Office of Communications Act, 2002)

In terms of finances, Ofcom cannot borrow money unless authorised to do so by the Secretary of State, and it is its duty to ensure their revenue matches its costs. Any surplus will be allocated in a manner the Secretary of State, after consulting Ofcom, may direct. Ofcom have obligations to publish an annual report and to have accounts audited by Comptroller and Auditor General. In terms of the institutional independence of Ofcom, compared to other European telecommunications regulators, scores mid-range in various studies discussed in earlier chapters. Ofcom is more independent than the regulators it converged with. This is mainly by virtue of its freedom to hire employees under contracts

which are not subject to civil service contracts. Interestingly, the Secretary of State did not impose a cap on staff levels at Ofcom, which may have been difficult and unwise considering the merging of existing regulators. It was the case that the aggregate headcount of all the legacy regulators was higher than the Ofcom headcount and savings were made as a result of the merger.

The independence of the Ofcom board is the main area where institutional political oversight is most evident. The appointment of the chairman and a majority of the directors would ensure some degree of control over the institution and may have been justified in the context of the wide media remit of Ofcom. One interviewee, James Purnell, commented that Ofcom as an institution was useful to the government. He argued it would be inappropriate for the Government to criticise aspects of ITV's content, but perfectly acceptable for the regulator to tackle such an issue. The role of chairman and the appointment of Lord Currie as the first Chairman of Ofcom, raised a number of concerns about Ofcom's independence. In the House of Commons debate on the Communications Bill, one MP commented:

'I believe that Lord Currie has a very good reputation, and I have no personal criticism of him whatsoever, but I consider it a very great pity that so many key appointments in the Government's gift go to known

Government supporters. It is no surprise that there is an issue of Tony's cronies, in which connection we might just mention the BBC, where the chairman, the director-general and the political editor are all known Government supporters. This is a very serious issue about impartiality, but Labour Members just sit there and laugh (Mr Robathan, 3/12/02, col 850, House of Commons)

Ofcom's duties and functions relate to its functional independence. The issue of Ofcom's operational independence in relation to radio spectrum is discussed later however in terms of a general overview of Ofcom it is clear the Communications (2003) Act sets out broad functions and corresponding duties on Ofcom, some of which mitigate independence. Ofcom, like most telecommunications regulators, have an obligation to promote the interests of consumers and promote competition. All of the functions and duties of the legacy regulators have also been transferred as part of the Communications (2003) Act. The Act also requires Ofcom to create regional offices and to create a number of boards, the composition and activity of which are detailed in the Act. Ofcom are obliged to create a consumer panel, a content board and an elderly and disabled people's advisory committee. In most cases the membership of these groups is within the remit of Ofcom, with certain conditions on suitably experienced participants. In most cases the groups advise Ofcom or advise the consumer panel. The consumer

panel is more important in that the membership is subject to approval by the Secretary of State and the panel is obliged to report on their activities annually and Ofcom is obliged to publicly explain its actions where it differs from the advice of the consumer panel.

Functionally there are further accountability and ex-ante controls to ensure Ofcom is held to account for its activities. All of Ofcom's decisions have to be transparent, accountable and proportionate. There is an obligation to prepare impact assessments and regular reviews of regulatory burdens. Ofcom is obliged to set promptness standards with an oversight from the Secretary of State and to actively promote media literacy. The cumulative effect of these provisions is to provide a network of safeguards, both ex-ante and ex-post, which will ensure accountability, and limit the independence of the regulator.

In the House of Commons the debate concentrated on regulating the BBC and Ofcom's role in relation to the BBC. There was also interest in cross media ownership and particularly in the ownership of ITV. There were more parochial issues discussed particularly regional representations on the various committees to be created under the Communications Act and managed by Ofcom. There was cross party support for the idea of a converged regulator. Individual legacy regulators were criticised as ineffective.

The key powers of the Radio Communication Agency are conferred on Ofcom automatically. These principally refer to powers of assignment, to issue licences and to raise fees. The 2003 Act obliges Ofcom to give advice, conduct research and maintain records in relation to radio spectrum. Ofcom are also obliged to manage the radio spectrum by assessing demand for future radio spectrum and to publish a UK Plan for Frequency Authorisation. Under section 156 the Secretary of State may issue directions relating to radio spectrum. The Secretary of State is retaining the powers to allocate certain bands, under auction conditions and at whatever fees the Secretary of State sees fit. Interviewees considered it appropriate that the Secretary of State had reserve powers. James Purnell, although disliking the concept of interference with the independence of Ofcom, said these provisions were necessary to ensure the policy objectives of government were respected. This provision reflects the debate surrounding the third generation mobile licences which generated significant windfalls for the Treasury.

The sum of the Communications (2003) Act and the earlier Ofcom (2002) Act was a regulator which was more independent than the legacy regulators which preceded it. The independence of Ofcom in terms of its funding, and its ability to resource itself, were constrained through the provisions which allow the

Secretary of State to make key appointments and in the Secretary of State role in the consumer panel. These ex-ante provisions are generally not measured in an analysis of independence and therefore, although Ofcom is independent, it is still not as independent as other regulators across the EU despite the fact the Ofcom remit is broad and the market has been liberalised for some time.

Based on the Parliamentary debates and the supporting interviews there appears in the UK an acceptance of the role of the Secretary of State in key policy decisions, such as radio spectrum. This is consistent with the example in Ireland where policy directions are allowed under the Communications Regulation (2002) Act to ensure policy objectives of government are supported by regulatory actions. The UK, however, goes further, particularly in relation to radio spectrum and the consumer panel, which allow interventions by policy actors in the operational management of the regulator. In the Parliamentary debates there was little comment on these issues. In fact one can point to a number of references in the debate where the MPs questioned whether the Secretary of State had enough oversight.¹⁷ The only critical examination of the power delegated to Ofcom was on radio spectrum in the Puttnam Committee, where, despite some tough questioning, the Secretary of State retained the power to intervene.

¹⁷ Rev Martin Smith questioned the Secretary of State should have more oversight on Broadband, Nick Harvey also suggested that the Consumer panel should be appointed by the Secretary of State

The provision allowing the Secretary of State to intervene in certain allocations of spectrum was as much the legacy of the 3G mobile spectrum auctions referred to above, which showed the government the economic value of radio spectrum and ensured that the Secretary of State would not delegate her scope to raise for the Treasury large sums of revenue from the spectrum auctions of the future.

In earlier chapters it was discussed how important political leadership was in deciding to create an independent regulator so it is important to consider the role of political leadership and tradition in the UK and assess whether these were factors in the creation of independent regulatory authorities. It is also important to assess other non-functional factors raised in the literature.

NON-FUNCTIONAL EXPLANATIONS OF DELEGATION IN THE UK

The evidence presented in the earlier chapters argued that there were a range of non-functional reasons explaining variations in the level of independence to agencies. Political leadership and tradition were important factors to consider in the decisions to create independent regulators (Thatcher, 2002b). It is argued by Thatcher that in the UK, since the election of the Margaret Thatcher MP government in 1979, there has been clear political leadership to promote market liberalisation and promote small government which has been an impetus to the creation of independent regulators. The UK was the first to privatise utility sectors, not only in telecommunications but in energy and transport. McLean (2004) argues that there were three phases to the Margaret Thatcher governments, each roughly covering the length of a Parliament. McLean argues privatisation took centre stage after the 1983 General Election. He argues that privatisation was not promoted in terms of economic efficiency but rather by the need to open markets to competition. McLean argues that there were better economic arguments for privatisation which followed the 1987 General Election when railways, electricity and coal were privatised.

**Table 11: Principal UK
Privatisations 1983-87**

Company	Gross Proceeds of sale, £ml	Date of Share offer
British Telecom	3916	3/12/84
British Aerospace	550	14/5/84
Cable & Wireless	602	13/12/85
TSB	1360	10/10/86
British Gas	5603	8/12/86
British Airways	900	11/2/87
Rolls-Royce	1360	20/5/87

Source: McLean (2004), p61

The issue is not the privatisations themselves but the extent of the programme which required an agency to monitor the emerging market. The regulator's main function was to control the prices of the privatised company. The key issue was that the UK government created separate agencies to perform these tasks.

This philosophy was not initially supported by the Labour opposition, but successive Labour governments since assuming power in 1997 have not

overturned the privatisation trend. Speaking in the debate on Ofcom, one Conservative member said:

'I have served in the House for a number of years, and I have been a member of Committees that scrutinised Bills that created XOfthis", XOfthat" and XOf-the-other"—I have not regretted scrutinising any of those Bills, particularly the one on XOf-the other". The particular matters that came before us encountered resistance from the Labour party, but as time has gone on, all those bodies have been welcomed and have come to be regarded as good things. They have gone from strength to strength' (Richard Page MP, 3/12/02, Col.816, Commons).

Vass (2001) argues:

'The strength of the underlying regulatory framework in the UK regulatory system has been demonstrated, by the continuity of policy between the Conservative administrations over the 1979-97 and the new Labour government elected in May 1997' (Vass, 2001)

The history of privatisations shows that the UK was a policy leader on privatisations and the creation of regulatory bodies and this would explain to

some extent the factors which led to the creation of Oftel in 1984. However, Oftel, as a non-Ministerial agency, was not as independent as its successor, Ofcom. For example, employees of Oftel retained civil service status. Also the remit of Oftel was limited even in terms of telecommunications. During the first phase of market liberalisation, Oftel operated a 'duopoly policy' which allowed competition to British Telecom from only one operator, Mercury. In March 1991 the Conservative government's White Paper '*Competition and Choice: telecommunications policy for the 1990s*' expanded the telecommunications market to allow cable and other public telecommunications operators to compete with British Telecom. This differed from the regulators created in the 1990s across Europe which were created specifically within a framework to manage newly liberalised markets. Radio spectrum management was not moved to Oftel and remained part of a government Department until 1990 when the Radio Communications Agency was created as an executive agency. Despite being a separate agency the Radio Communications Agency was an agency under the direction of the Secretary of State.

The UK institutional approach to independent regulation, in other utility sectors, has been to create non-Ministerial departments generally staffed by civil servants but with the power and authority held by a Director General. Gilardi (2005a) has argued that in comparing the level of independence across a number of European

countries, the UK is surprisingly mid-table, which suggests that although there was political leadership in terms of privatisation and an ideological attitude in favour of market based approaches to utilities, it does not necessarily follow that the agencies created to police the newly created markets were independent regulators as discussed by Gilardi and others in earlier chapters. Levy and Spiller (1994) have shown that liberalisation and privatisation policies have led to delegation to independent agencies and this is the case in the UK. However, it would appear that the political tradition ensured that these agencies were created with more Ministerial oversight, certainly in their early manifestations, than would be expected. This conclusion would support the view that there is more than just issues of political leadership or tradition which define the extent and remit of independent regulators.

CONCLUSIONS

The evolution of independent regulation in the UK is important to examine as the UK has approached telecommunications regulation with a number of different approaches. At first, with the liberalisation of the market, the UK government created Oftel which although a non-Ministerial agency was an independent regulator in the same way independent regulators were created across Europe following liberalisation in the 1990s. The UK also addressed the issue of radio spectrum management through an executive agency, not necessarily to give a credible commitment to a certain policy approach to radio spectrum, but rather to address inefficiencies in the civil service and to address policy complexity in the late 1980s.

The developments within the communications markets and the evolution to independent agencies promoted the idea, early in the new Labour Government, that a converged regulator with wide remit would be the most effective way to regulate the increasingly complex and competitive communications market. The convergence of the regulators into Ofcom in 2003 was a genuine promotion of independent regulation with non-Ministerial agencies replaced by an agency which was institutionally independent of government. This was particularly the

case for radio spectrum. An indication of the lack of independence of the Radio Communications Agency can be found in the preamble to the Communications (2003) Act where each legacy agency, converged into Ofcom, is mentioned by name with the exception of the Radio Communications Agency, where powers are transferred from the Secretary of State:

‘...in so far as she has a role in respect of the allocation, maintenance and supervision of non-military radio spectrum in the UK. This role is exercised through the radio Communications Agency, an executive agency of the Department of trade and Industry’ (Communications Act 2003 p2, House of Commons publications)

The non-functional factors considered in earlier chapters, which should influence the policy actors in deciding on the level of independence delegated to an independent agency, have been referred to throughout the chapter. It is important, in relation to radio spectrum, to restate the importance of the recognition in the Wireless Telegraphy (1998) Act of the economic value of radio spectrum. In the UK the government was interventionist. This was supported by senior officials in the Department and the Radio Communications Agency. There was a clear belief that officials in the Ministry could better manage the process than an independent agency. This is evident in the close working relationship existing between the

Ministry and the Radio Communications Agency in the 3G auction process in 2000, and the advice given by senior officials in the debate on the pre-legislative scrutiny. The legislative provisions related to radio spectrum limit the independence of Ofcom in relation to radio spectrum management. However, these limitations should be understood in the context of ex-ante controls and a consideration of the 'ally principle'. The motivation of the Secretary of State, stated during the pre-legislative scrutiny, is to protect the public interest. All interviewees mentioned the importance of radio spectrum to the government, both in terms of revenue generating and also in terms of industrial policy. It is clear therefore, that the intention was to delegate powers to an independent body which had clearly not been delegated before. A number of limited functions were retained by the Secretary of State. There were further provisions in the Communications (2003) Act which allowed the Secretary of State to issue directions to Ofcom in relation to general policy issues.

In the next case study the government decided to delegate extensive radio spectrum management responsibilities to the independent regulator, including the power to set the number of licences for advanced mobile telephony. The power of the independent regulator to set licence fees, allied to the mix of responsibilities, led to conflict between the independent regulator and the government.

CHAPTER 5: DELEGATION OF RADIO SPECTRUM FUNCTIONS AND THE CREATION OF THE IRISH TELECOMMUNICATIONS REGULATOR

INTRODUCTION

This chapter will examine the delegation of radio spectrum activities in Ireland and the creation of the independent agency, the Office of the Director of Telecommunications Regulation (ODTR). The decision to delegate radio spectrum is closely linked to the decision to create an independent telecommunications regulator in Ireland. The creation of the regulator was driven by events leading to the opening of the telecommunications market and the concurrent privatisation of the state telecom company, Telecom Éireann. The radio spectrum functions delegated resembled the radio spectrum management functions of the Minister under various pieces of legislation. There appeared to be little innovation in the transfer of powers from Minister to the independent agent. One interviewee argued that radio spectrum was technical so therefore it was part of a regulatory function.¹⁸

¹⁸ Interview with John Breen

As discussed in previous chapters, Ireland is a relevant case to consider as it has both one of the most independent telecommunications regulatory agencies in the EU and has delegated significant operational independence to the regulator. Specifically, in relation to radio spectrum, where other EU countries have either limited the functions delegated and/or imposed legislative constraints on the delegated authority. In Ireland, a wide range of radio spectrum functions were delegated.

This case study will initially detail the history of regulation of radio spectrum in Ireland from independence to the 1990s. The key event in the 1990s is the creation of the telecommunications regulatory agency. The chapter will examine the events and the thinking leading to this decision, and will examine the delegated powers given to the Office of the Director of Telecommunications Regulation (ODTR). Unlike the UK, Ireland did not have a separate agency for radio spectrum so it is important to examine the delegated powers of the ODTR as the range of radio spectrum functions delegated would be influenced by the institutional independence of the ODTR. The case study also examines the evolution of telecommunications regulation through the subsequent Communications Act (2002), which dissolved the ODTR and created the new telecommunications regulator, the Commission for Communications Regulation (ComReg). Again, it is important to consider this, firstly as an opportunity for

policy makers to change the delegation of powers to the agency but also an opportunity to examine the effectiveness of the institutional management of radio spectrum.

Table 12: Key legislative changes in radio spectrum management in Ireland

Date	Event
1905	First Major Wireless Telegraphy Act introduced concept of licences
1926	Wireless Telegraphy Act - first post independence wireless legislation imposed obligations and fees for licences
1968	Radio spectrum responsibility moved to Department of Posts & Telegraphs
1984	Creation of Telecom Éireann as separate commercial entity. Radio spectrum remains part of residual Department of communications
1987	Broadcasting Act creates Independent

	Radio and Television Commission (IRTC) to regulate private radio and creates regulatory responsibility for Technical division in Ministry
1994-5	Telecommunications Strategy Report prepared and completed
1995-97	EU Liberalisation Directives published and finalised in 1997
1996	Telecommunications Act creates ODTR
1999	Telecom Éireann sold to private investors, renamed Eircom
2002	Communications Regulation Act creates ComReg

This case study has drawn on a review of Parliamentary debates, internal Department of Transport Energy and Communications (DTEC) reports; a review of DTEC internal files and primary legislation. These documents are supported by interviews with key officials and politicians. Interviews were conducted with officials in the DTEC who were involved in the regulatory or policy divisions and involved in either the drafting of legislation leading to the creation of the ODTR in 1997, or individuals involved in the Telecommunications Strategy

Report which preceded the decision to create a regulator. The interviews also include members of the Technical Division of the DTEC which prior to the creation of the regulator was the centre of expertise for radio spectrum. Most of the officials interviewed continued in senior positions in the Department of Public Enterprise (DPE), which was the successor to the DTEC following the election of the Fianna Fáil-Progressive Democrat coalition in 1997. The officials interviewed, therefore, offer an insight into the policy objectives and thinking prior to the creation of the ODTR, and the evolution of thinking on telecommunications regulation and regulation in general. Interviews were also conducted with key politicians, particularly with senior Labour Party TDs who were in power throughout the formative stages of telecommunications liberalisation and regulation.

Unlike the UK case the creation of the independent regulator was not subject to significant Parliament scrutiny. The key piece of legislation, the Telecommunications (Miscellaneous Provisions) Act 1996 concentrated mainly on the sale of a portion of the government's shareholding in Telecom Éireann. Consequently, the creation of the ODTR was not the primary area of comment or concern by Irish Parliamentarians. Also, unlike the UK, there was limited external activity by way of reports or investigations prior to the Telecommunications Strategy Group in 1994. For these reasons more interviews

were required from both political and administrative opinion formers as there is less transparency of the decision making process. Many of the same civil servants remained in influential positions throughout the initial delegation process and the evolution of the legislation. It is important therefore to treat some of the opinions critically. It was clear, for example, in the Irish case that tensions existed between divisions within the Department. This is clear from the exclusion of the technical division from the drafting process until the final stages. A number of interviewees referred to the pressure of time during the drafting of the 1996 legislation. This pressure to draft legislation trying to create a regulatory framework and sell government shares in the main telecommunications company was an ever present backdrop to the internal dialogue. To balance these perceived biases it was important to interview officials and politicians outside of the drafting team. A key source of additional information was having access to the key DTEC files surrounding the creation of the ODTR in 1995 and 1996. Access to these files is normally restricted under the 30 year rule. There was free access to the file; however, restrictions were placed on documents which were considered documents for cabinet which were not allowed to be copied.

Table 13: List of Interviewees for Irish Case Study

Name	Title & Key Responsibility	Role in creation of ODTR
Brendan Touhy	Former Secretary General of Department of Public Enterprise and Department of Communications, Marine & Natural Resources	Member of the telecommunications Review group and assistant secretary of Department and subsequently secretary general during evolution of functions of ODTR
Eamonn Molloy	Assistant Secretary of Department of Communications, Marine & Natural Resources	A member of the telecommunications Review group and assistant secretary of Department during evolution of functions of ODTR
Regina Finn	CEO of Ofwat, and former Commissioner for Electricity Regulation	Assistant Principal in the Department of Transport energy and communications and part of team drafting the 1996 act
Sean McMahon	Principal Officer in the Land registry	Head of regulatory division prior to the creation of ODTR
Etain Doyle	Ex-Director of	First Director of ODTR

	telecommunications regulation	
Mary O' Rourke	Former Leader of the Seanad	Minister for Public Enterprise 1997-2002
Emmet Stagg	Labour Party TD	Minister of state at DTEC from 1994-1997
Ruairi Quinn	Labour Party TD	Minister for Finance in Rainbow coalition from 1994-1997
Alan Dukes	Former CEO of Institute of European affairs	Minister of DTEC from December 96- June 97
Avril Doyle	Fine Gael MEP for Leinster	Minister of state at DTEC from 1994-1997
Peter Scott	Head of Unit, policy unit, DG Information Society, European Commission	Head of Unit, policy unit, DG Information Society, European Commission, division responsible for telecommunications directives
John Breen	Senior spectrum expert in	Senior advisor in technical unit in DTEC

The evidence available through the variety of sources listed above shows, for the case of Ireland, that the management of radio spectrum was an adjunct to the decision to delegate telecommunications to the independent agency. There

appears to have been no review of spectrum policy or specific internal reports which examined the role of radio spectrum. The legislation creating the ODTR was not considered in detail during Parliamentary debates. The legislation went through the Oireachtas committee process but the proceedings were not conducted with the same level of detail as the scrutiny of the Communications Act in the UK. Equally, during the evolution of thinking on regulatory policy in the period from 1997 to 2002, radio spectrum management and the institutional solutions were not re-examined. Where radio spectrum is mentioned, either in reports or in interviews, the evidence is evaluated in the case study. It is indicative of the approach of the Irish government in formulating policy for the telecommunications sector that little thought was given to radio spectrum management.

The interviews, reports and Parliamentary debates, where available, will also be used to find evidence of the reasons discussed in earlier chapters to explain the creation of independent agencies. The Irish case is a relevant example as it is one of the most independent agencies in the EU. Based on the functional theories advanced for credibility, policy uncertainty, complexity, we should see this level of independence across all EU countries. We should therefore not find many of the non-functional factors among the reasons for the creation of the ODTR.

THE DEVELOPMENT OF RADIO SPECTRUM REGULATION

The management of radio spectrum for much of the twentieth century was concerned with broadcasting. The legislative history of radio spectrum is mirrored to some extent by legislation developed in the UK. Pre-independence legislation on Wireless Telegraphy was the same between the two jurisdictions. In 1926, the first post-independence legislation, the Wireless Telegraphy (1926) Act was passed. It dealt with the regulation of wireless apparatus. Any person wishing to operate a wireless apparatus needed a licence issued by the Minister.

The influence of the Minister for Finance was important in these early provisions. Prior to the passing of the Wireless Telegraphy (1926) Act, the Minister for Finance had lobbied, as part of the Ministers and Secretaries Act (1924), to have the post of Postmaster General abolished and the management of radio spectrum placed in the Department of Finance (Hall E. G., 1993, p. 106). The Wireless Telegraphy (1926) Act allowed the Postmaster General to set licence fees only with the consent of the Minister for Finance. The provisions in part 1 of the 1926 Act relating to the regulation of wireless apparatus are important as they remain the key legislative provisions relating to the management of radio spectrum

during the preparation of the 1996 Act creating the ODTR. The particular provisions which relate to the Minister's responsibilities for radio spectrum were transferred, generally without amendment, in the Miscellaneous Provisions (Telecommunications) Act (1996), to the ODTR.

The second part of the 1926 Act dealt mainly with the creation of a national radio service and, as with the UK, most of the developments related to radio spectrum in the subsequent Acts, were to address issues of radio or television broadcasting. For example, the 1926 Act was amended at various stages through the century to allow for the introduction of licences for televisions, cable television provisions and for citizens' band radio. Hall (1993) argues, that even in the area of broadcasting there was very little legislative or institutional change happening until after the Second World War:

'By the 1950s, Ireland was one of the few democratic countries in the world where broadcasting was operated as part of the civil service' (Hall E. G., 1993, p. 151)

In 1952 Ireland signed international agreements to agree particular wavebands for broadcasting, and, in 1953, Comhairle Radio Éireann, an independent board, was created to manage the radio and television services.

The single most important issue related to radio spectrum in the 1960s and 1970s was the growth of unlicensed radio. Through legislation in 1968 and 1972, the Department of Post and Telegraphs was given responsibility to close down such pirate stations. The demands for the liberalising of the radio market grew louder and louder and a number of Broadcasting Bills were proposed but not presented until, finally in 1987, the Minister for Posts and Telegraphs, Ray Burke, introduced the Sound Broadcasting Bill. The Bill, however, encountered opposition and was amended at the Committee Stage to the Radio and Broadcasting Act (1988) which created a market for independent private radio. The Act also created the Independent Radio and Television Commission (IRTC). Cullen (2002) details the proactive, high-profile role Ray Burke had in the drafting of the legislation and his desire to keep the process of awarding a licence firmly in his control (Cullen, 2002, pp. 171-173). The market was now to be regulated by the IRTC which issued an agreed number of licences for independent radio stations. As the licences required radio spectrum to be allocated for the broadcasters the licence was issued by the Minister for Communications.

The management of radio spectrum, irrespective of the radio spectrum used by state or independent broadcasters began to be more complex in the 1980s.

Increasingly, telecommunications companies like Telecom Éireann and the cable television companies were using 'radio links' to extend and upgrade networks. The World Radio Conference in 1979 agreed many fundamental changes to the international coordination of radio spectrum. According to one interviewee, who joined the Department of Post of Telegraphs in 1980, the requirements for Ireland to attend more conferences on radio spectrum increased the demands on the technical division in the Department, and there were repeatedly requests for more resources¹⁹. In 1984, following the breakup of the Department of Posts and Telegraphs into An Post, Telecom Éireann and the 'residual' Department of Communications, the Telecommunications and Radio (Technical) Division had no regulatory responsibility for radio spectrum management. The Telecommunications (1984) Act had transferred the technicians dealing with radio spectrum management to Telecom Éireann. Personnel in the Department of Communications realised, following the 1984 split, that a separate radio spectrum regulatory function was needed, which would regulate Telecom Éireann. However, under the 1984 Act Telecom Éireann did not require Wireless Telegraphy licences and was therefore unregulated. In the Radio and Broadcasting Act (1988) provisions were inserted obliging Telecom Éireann to hold Wireless Telegraphy licences and thereby moving regulation of radio spectrum back to the Department of Communications.

¹⁹ Interview with John Breen

The complexity of radio spectrum management increased because of technological developments. The duties which the technical division mainly dealt with were the growth in radio links licences which were radio spectrum licences issued to Telecom Éireann allowing it to extend its network geographically. These were also issued to An Garda Síochána (Irish Police Force). In the mid-1980s the start of mobile telephony with the Total Access Communications System (TACS) licence issued to what was to become Eircell, was a further development, requiring oversight by the technical division. The growth of cable television also impacted the work of the technical division as the cable operators were increasingly using wireless technologies to extend the reach of their services.

In 1992, following a change of government, the Radio and Broadcasting Division in the Department of Communications was moved to the Department of Arts, Culture and the Gaeltacht. The technical division remained in the renamed Department of Transport, Energy and Communications (DTEC). However, technical personnel were now acting across a number of departments and advising on radio spectrum management not only in traditional communications sectors, but also advising on broadcasting policy. Interestingly at this time, due to the broad responsibility of the technical division they argued that as a technical

and complex section they should be independent of one Department. John Breen, a member of the technical division, argued the issue of independence of the technical division; and resources for the division were raised with government via the civil service unions in 1992. The proposal was not taken forward despite additional resources being allocated²⁰. The proposal, however, is indicative of the independent nature of the work and the fact that the work was becoming increasingly complex and was being operated across a number of departments.

At the time of the Miscellaneous Provisions (Telecommunications) (1996) Act, radio spectrum management functions were retained within the technical division of the DTEC and this division of 25 people was moved completely to the ODTR in 1997.

The organisation of radio spectrum management in Ireland reflects the perceived technical nature of the functions and the policy issues related to spectrum were always kept separate from the technical group. The group were belatedly given the responsibility of regulating Telecom Éireann and given additional resources. Unlike the UK the responsibility of the technicians dealing with radio spectrum management was across a number of government departments. Interviewees responsible for examining the future institutional requirements of the sector did

²⁰ Interview with John Breen

not consider a separate agency for radio spectrum. One reason for this lack of focus on radio spectrum management suggested by other interviewees was the relative scale of the technical division. In the UK, the Radio Communications Agency had several hundred employees located geographically, separate to their host Ministry. The technical division in DTEC was not of the same scale and there was no precedent to create a separate agency in the Irish public administrative set up.²¹ In 1992, although proposals to open telecommunications markets were being discussed at European level, Ireland's radio spectrum policy was not being influenced by market opening. Issues of credibility, therefore, did not emerge as motivations to separate the technical division from the parent Department.

The next section looks in detail at the decision to create the telecommunications regulator and specifically the development of key legislation, Miscellaneous Provisions (Telecommunications) (1996) Act.

²¹ Interviews with Brendan Touhy and Eamonn Molloy

TELECOMS REGULATION IN IRELAND

This section will examine the creation of the Office of the Director of Telecommunications Regulation (ODTR) and will examine the factors considered by officials and Parliament prior to the creation of the ODTR. It will also trace the evolution of the independent regulator and consider how regulation has evolved in Ireland. This evidence will be assessed against the arguments presented in earlier chapters and will make specific reference to the radio spectrum functions delegated as part of the Miscellaneous Provisions (Telecommunications) (1996) Act.

As discussed in previous chapters before looking specifically at the operations delegated in relation to radio spectrum it is important to consider the institutional independence of the ODTR through the provisions of the 1996 Act. An agency can be given high operational independence from the executive; however, the institutional independence to exercise this operational freedom is important to consider, particularly the extent to which the functions delegated can be enforced. In Ireland, it is important to firstly consider the institutional independence given to the ODTR.

The evolution of strategy in the Department of Transport, Energy & Communications (DTEC) leading to the 1996 Act creating the ODTR offers insights into the reasons behind the creation of the ODTR. Hall (1993) argues that from the late 1970s the role of the Minister as policy driver, regulatory and commercial manager of the telecommunications sector was unsustainable. Reports in 1969 and in 1978 had tried to address the dual role of Minister as policy maker and business manager for the sector. Hall (1993) argues:

'In an atmosphere of deteriorating service with a management directly under the control of a government Department the spirit of deregulation inevitably gained momentum' (Hall E. G., 1993, p. 115)

The Telecommunications (1984) Act creating Telecom Éireann and An Post, was an attempt to divorce from the civil service, the commercial functions of both the telecommunications and the postal sectors. A recognised need for investment in the telecommunications sector was a key driver. In the early 1990s there was increasing pressure on the institutional arrangements which allowed the Minister to manage both regulatory and shareholder responsibilities. The Culliton Report made reference to high telecommunications tariffs and to potential regulatory regimes that were evident elsewhere:

'The complex question of providing competition for as many of Telecom's services is as feasible, in order to ensure downward pressure on these price levels should be actively explored. Mechanisms to allow for competition to Telecom Éireann in the provision of such value added services, including allowing the re-sale of leased lines, should be set in progress. A systematic regulatory framework is also needed to ensure that those services that are not opened to competition are provided at efficient cost-based tariffs and, to the extent possible, service contracts should specify penalties for failure to meet the specified quality' (Culliton, p. 47)

Hastings (1994) likewise sees this period as a crisis in semi-states, not just in telecommunications:

'Irish commercial semi-state companies are undergoing unprecedented levels of change. Their markets are under threat from new more aggressive low cost operators; their economic justification is being challenged and the regulatory environment within which they operate is being dictated by European rather than purely national considerations' (Hastings, 1994, p. 1)

Hastings (1994) alludes to further pressure on the existing regime from Europe where the 1988 Green Paper on telecommunications had started the process of liberalisation across Europe. Significantly the UK in 1984 and the US, with the break up of AT&T in 1982, had pushed the liberalisation debate to the point where it was accepted that governments should open up their markets to competition. These developments created an international climate in support of liberalisation and created a number of opportunities for Ireland to open its telecommunication markets. A particular incident was highlighted by one interviewee as an important impetus to a review of the telecommunications market. In the early 1990s Cable & Wireless approached the Taoiseach, Albert Reynolds TD, with a proposal to buy Telecom Éireann. While the offer was refused it provoked debate in the Department of Transport, Energy and Communications and a strategy review was initiated to assess the future development of the sector.²²

A Private Members Bill by Fine Gael in 1993 proposed to create a Director of Telecommunications, a post which would assume a number of the Department's responsibilities, including control of tariffs. The Fine Gael Bill argued that one of the reasons for the creation of an independent regulator with a remit on tariffs

²² Interview Brendan Touhy

was to divest the Ministry of its dual role as policy maker and watchdog. Fine Gael Deputy Michael Noonan TD argued:

'If an independent office holder, appointed under a statute enacted by the Houses of the Oireachtas had considered the case made by Telecom Éireann last spring, borne in mind the interests of the consumer, including small businesses, those who provide telephone advisory services and old people and made recommendations, the rescheduling of charges would have carried far greater authority than one authorised by the Minister' (Dáil debates, 2.11.93)

In the debate on the Fine Gael Bill the Minister, Brian Cowen TD, advised the Dáil that he had set in motion a reorganisation of the Department to address the conflict of interest issue. The Minister advised that he was predisposed to increasing competition and to independent regulation as these go hand in hand:

'It is also clear that independent regulation of the sector to ensure transparency and fairness is a necessary precondition to full competition'

The Minister continued:

‘I have already announced that the setting up of an independent regulator authority is under urgent examination in my Department and we are now examining this question with a view to having the appropriate structure identified and the necessary legislation prepared. As a first step, the relevant divisions of my Department have been reorganised so that the regulatory function can be operated separately from the functions which pertain exclusively to general policy formulation and to the shareholder vis a vis Telecom Éireann’ (Dáil debates, 9/11/93)

The Department was reorganised into a policy division, regulatory division and a technical division which, as discussed earlier, managed radio spectrum. The reorganisation is important for two reasons. Firstly, the Department was starting to recognise the functions it would in the future consider regulatory functions. Secondly, the staff assigned to the regulatory division would draft the legislation and ultimately form the main core of the first staff of the regulator. It is interesting to note even at this stage in the development of regulatory policy the option was open to the Department to create an independent regulator. Progressive democrat, Desmond O’Malley TD, speaking in the Dáil debates in 1993 addressed the issue of separation of regulatory from operational functions and argued:

‘The way to deal with this difficulty which has been recognised and, I think solved in every other country, is to set up a regulatory office which is independent of the Department’ (Dáil debates, 9/11/93)

In 1994 the DTEC set up the Telecommunications Strategy Group which included internal departmental officials and external experts. The group was an innovative development by government and followed the Strategic Management Initiatives of the early 1990s which promoted better government and more strategic policy making. The group examined developments in telecommunications markets nationally and internationally. It identified the issues which would unlock the potential of the sector and identified the principal target position for the sector in Ireland. The report recognised the key drivers of the sector in terms of technological and demand changes. The report argues:

‘Markets are being increasingly liberalised and the regulatory regime has had to be adopted to cope with a much more complex and changing structure’ (Department of Transport Energy and Communications, 1994)

The group subscribed to the view that there was an imperative to create an effective telecommunications system driven by the private sector and private investment concluding:

‘for many developing economies, the commitment to establish an effective telecommunications system and the timetable for doing so have often become a litmus test for a government’s commitment to effective economic development’ (Department of Transport Energy and Communications, 1994)

A key component for public policy makers was the need for an independent regulator. The report concluded:

‘The group strongly supports the intention to establish an independent regulatory agency which we urge should be proceeded with without delay. We believe that a properly empowered and resourced agency will act as a powerful catalyst for constructive change in the industry in the directions we are recommending’ (Department of Transport Energy and Communications, 1994)

Following the publication of the report the Department and the government set about creating the regulatory environment and the priorities for government at

this stage were identified by a number of interviewees²³. Firstly, there was a need to identify a strategic partner for Telecom Éireann. This would ensure much needed management expertise was introduced to Telecom Éireann. Secondly, it was identified that the government needed to introduce an independent regulatory framework which would reflect the functions of the existing regulatory division in the Department.

By 1995 the regulatory division of the Department was separated from the policy division. The Annual Report said:

‘The increasing number of companies in the telecommunications business requires a restructuring of the regulatory functions carried out by the Department to ensure orderly development, fair competition and protection for consumers. The Department developed the regulatory principles which will apply in a liberalised market and a decision was taken by government to establish an independent regulatory authority in 1996’ (Department of Transport Energy and Communications, 1995)

It is clear from the Annual Report that there was a strong recommendation to proceed to a liberalised market and the creation of an independent regulatory

²³ Interviews Brendan Touhy, Regina Finn and Eamonn Molloy confirm the follow up strategy to the report

authority. Interviews with a number of the participants in the Telecommunications Strategy Group confirm that it was the Department's strategy, independent of events in Europe, to liberalise the market and introduce an independent regulatory regime.

This evidence supports the conclusions of Levy & Spiller (1994) discussed in earlier chapters where the creation of an independent regulator was a consequence of market opening and liberalisation. The additional need to find a credible partner for Telecom Éireann meant that an independent regulator, removed from the government shareholder, had to be created. The thinking, evident in the Telecommunications Strategy Group report and interviews with officials close to the strategic thinking of the Department at the time, shows strong evidence for the view that credibility; particularly the ability of the regulator to operate without Ministerial interference was an important concern. Although for obvious reasons the issue of Ministerial interference was not discussed in the Telecommunications Strategy Report it was cited by interviewees as an issue. Departmental officials cite the influence of Telecom Éireann unions and their access to senior Ministers as indicative of this interference. Interviewers cite the example of Telecom Éireann lobbying for licences to be granted to them and not to competitors as a key feature of radio spectrum regulation. The subsequent allegations of corruption which surrounded

the Minister, Ray Burke TD, in relation to the awarding of the Century radio licence in the early 1990s, were known by officials in the Department at the time (Cullen, 2002).

Additional reasons cited by interviewees for the creation of the independent regulator were increasing in complexity, and highlight the need to delegate rule making and to focus the Department on policy development issues. One interviewee, Regina Finn, a key member of the regulatory division, points to the increasing time spent by officials on dispute resolution issues. These issues grew as various parts of the market were liberalised. Regina Finn argued that a key reason for having an independent regulator, as opposed to a regulatory division within the Department, was the ability of the parties to disputes to directly lobby the Minister in relation to their dispute.

The increasing complexity of regulation and the need to remove this administrative function from the Department was a clear driver in the creation of an independent regulator. Brendan Touhy, Secretary General of the Department of Communications Marine and Natural Resources (DCMNR), argues:

‘the response of governments to globalizations and the need for economies to increase their competitiveness and to attract foreign direct

investment has been to remove state monopoly and to open up these protected sectors to competitive forces' (Touhy, 2005)

The recommendation of the Telecommunications Strategy Report was not to seek derogations from the European Commission which would have the effect of delaying full market opening. The report recommended that liberalisation should proceed without delay. However, these recommendations were not acted upon. It is important to consider the reasons why the recommendations were not acted upon. An important influence on the issue of the derogation and the pace of liberalisation was the political landscape in Ireland in the 1990s.

The liberalisation of the telecommunications sector was supported by a number of political parties in the Dáil. Both major parties, Fianna Fáil and Fine Gael supported the liberalisation of telecommunications. One of the smaller parties, the Progressive Democrats, also supported the policy. Fianna Fáil and the Progressive Democrats had been in government from 1989 until 1992 when, following a general election, Fianna Fáil changed coalition partners to the Labour Party. The Labour Party attitude to liberalisation was conditioned by their concerns about possible job losses at Telecom Éireann. Interviewees argue that the Labour Party's reluctance to privatise Telecom Éireann was also based on a

concern that the company was not ready to compete in a liberalised market²⁴. During the early years of this government, as we have seen from the discussion above, some changes were made in the structure of the Department but the Fine Gael Bill to create a director of telecommunications was not accepted. In 1994 the government composition changed as the Labour Party withdrew its support for Fianna Fáil and a 'Rainbow' coalition of Fine Gael, Labour and Democratic Left assumed power. It was the rainbow coalition government that sought a derogation extending the deadline for liberalising of telephony markets from 1998 to 2000. Despite the derogation it was in the three year period of the rainbow coalition from 1994-1997 that the legislation to create the independent regulatory agency was prepared and enacted. McDowell (2000) argues that the attitude of the Labour Party is central to the development of market opening:

'It is useful to reflect that as recently as 1992 the post-election negotiations which preceded the formation of a government were dominated by a demand from the Labour Party to which Fianna Fáil assented, that there would not be a programme of privatisation of the public sector commercial agencies. Yet within a few years, and now with other partners in Government, the Labour party had accepted the principle of limited privatisation' (Mc Dowell, 2000)

²⁴ Interview with Emmet Stagg TD, Regina Finn and Brendan Touhy

The fair-weather attitude of successive governments to telecommunications policy can be reflected in the attitudes to the derogation. Massey and Daly (2003) argue:

'In the case of telecommunications Ireland sought two year derogation from liberalisation. The government subsequently did something of a u-turn apparently triggered by newspaper reports that a major industrial project had been lost because of inadequacies in the telecommunications network' (Massey & Daly, 2003)

It is important to stress the conflict which existed between Department officials and the politicians who were against the idea of an independent regulator. Regina Finn, in interviews, argued that the Minister of State, Emmet Stagg TD, had ideological problems with the idea of an independent regulator. Emmet Stagg TD, in interviews, said that Labour Party policy had been opposed to the privatisation of Telecom Éireann, but as the Bill was being finalised, the Labour Party changed its view. He argued that his concern was in relation to the fact that a very independent regulator was being proposed. He was advocating that the government should sell all of its interests in Telecom Éireann which would have removed the conflict of interest and therefore regulation could stay within the

Department. While the aim of the officials was to remove Ministerial influence, Emmet Stagg TD was arguing the need to ensure that stronger accountability measures were in place. In his view the independent regulator, created by the 1996 Act, was not accountable. The issue of accountability was raised in the discussion on the 1996 Act in the Dáil, and this was linked in particular to the independence of the Director of the ODTR, specifically if the position was to be a civil servant position. Desmond O'Malley TD, a member of the Progressive Democrats argued, for example, that:

'The regulator should be somebody from outside the public service who is appointed because he or she has, or is capable of having, a consumer orientation or background' (Dáil debates, 26/9/96)

Éamon Ó Cuív TD, a member of Fianna Fáil, was concerned at the level of accountability of the Director:

'The Director will be independent and can do what he or she wants within the minimalist controls proposed in Section 7. The Director should be answerable to this House or the Minister and we should retain the power to direct him or her in certain fundamental directions...I would find it very difficult to agree to a provision which states that the Director

shall be independent and not answerable to anybody, including the members of the houses of the Oireachtas' (Dáil debates, 3/10/96)²⁵

The conflict between the officials and the politicians is reflected in the literature where, despite the need to ensure an independent regulatory authority is created on the basis of credible commitments, there is a concern about accountability to policy actors and Parliament. These concerns are normally addressed through either ex-ante controls or ex-post controls on the agency. There is no evidence that the views of the Labour party or the Minister of State, Emmet Stagg TD, changed the structure of the bill. A review of the files and discussions with the drafting officials confirm this. Emmet Stagg TD confirmed that he had difficulty getting his views across. Emmet Stagg TD was the junior Minister in the Department. He had been responsible for Energy policy and was asked by the senior Minister, Michael Lowry TD, to get involved as, in the opinion of Stagg, the Minister found the issues too complicated. A number of interviewees from the Department involved in the drafting of legislation complained that the Minister was not close to the issues of liberalisation. One interviewee said the

²⁵ The deputy is consistent in his opinion of the accountability of regulators as he made similar comments in the debate on Deputy Noonan's bill see Dáil Debates 9/11/93

Department had arranged meetings specifically to brief the Minister on the draft 1996 legislation but on many occasions he did not turn up.²⁶

Emmet Stagg TD was asked to steer the legislation through the Dáil and Seanad (upper house) despite not being close to the issues. He complained that his concerns were raised late and therefore did not have the impact he had hoped. Regina Finn confirmed that the Minister attended few meetings on the issue. The lack of political oversight of the process is evidenced from a number of interviews and is in contrast with the active participation of both senior civil servants and a range of politicians, in the pre-legislative scrutiny of the Communications Act in the UK.

The debate of the draft Bill in the Oireachtas, therefore, should have addressed the issue of independence and accountability. However, Emmet Stagg TD argued that Dáil Deputies did not understand the Bill, and were more concerned about the ownership of Telecom Éireann. A review of the Dáil debates on the Miscellaneous Provisions (Telecommunications) (1996) Act, shows that the main issue of concern was the ownership of Telecom Éireann. The consequences of neglecting to address the accountability issues led to a number of changes in the

²⁶ Interview Regina Finn

subsequent legislation. It became clear that the officials were not satisfied with the ex-ante or ex-post controls they had on the ODTR.

The conclusions of the Telecommunications Strategy Report were evident in the opening statements in the Dáil and the Seanad. Supporting the arguments of Levy and Spiller (1994), there was a clear acceptance that an independent regulator was required when liberalising a market. There was acceptance that the liberalisation of the market precipitated the creation of an independent regulator. The Minister, Michael Lowry TD, argued:

‘With the emergence of competition in the Irish telecommunications market, it is appropriate that the regulation of the sector be seen to be independent from the Minister’s shareholding and sectoral development functions. This separation is also a feature of telecommunications development in most of our EU partners and a requirement of pending EU legislation’ (Dáil debates, 3/10/93)

The Minister argued that the telecommunications sector was evolving rapidly and these developments were extending the range of services and increasing the importance of the telecommunications sector to the economy. The Minister concluded:

‘These forces of chance are calling into question the current structure of the telecommunications industry and are creating new opportunities and threats for all players in the industry’ (Dáil debates, ibid)

The forces of change and the associated need to have a regulatory framework introduced with market opening is further evidence of the Levy and Spiller (1994) view on credibility as the main driver creating independent regulators. This is clear in the first instance from the Telecommunications Strategy Report and secondly from the Minister’s second stage speech introducing the Bill. However, there are clear tensions with introducing the concept of an independent regulator, mainly from politicians. Emmet Stagg TD, the Minister of State in the DTEC, was clearly unhappy with the level of independence and lack of accountability. In the Dáil a number of politicians questioned the agency’s perceived accountability. Further evidence that credibility was one factor but not the only factor in the decision to create the independent agency is found in the timing of legislation. The 1996 Act followed a series of EU policy documents and directives, starting in 1988, which had given a clear road map for EU members to open their markets and to create regulatory regimes.

To gain a better understanding of the process and the extent to which the EU, or other factors, influenced the process, it is important to review the drafting process.

Drafting the telecommunications (Miscellaneous Provisions) Act, 1996

The files of the DTEC dealing with the drafting of the Act do reveal the thinking behind the functions and powers of the independent regulator. The relevant files concerning the creation of the ODTR and the Miscellaneous Provisions (Telecommunication) (1996) Act covers the period from early 1995 to mid 1997. The files are in the archive of the DTEC and were made available by the Secretary General of the Department of Communications Marine and Natural Resources. All the files are subject to the Freedom of Information Act. The only restriction placed on the review of the files was the prohibition on copying any documents which referred to advice given to cabinet which would be confidential under the 30 year rule.

A review of the Departmental files documenting the creation of the regulator leads to a conclusion that the departmental officials drafting the Bill based their initial drafts on a precedent which was not independent. An explanatory note in an early draft of the Bill explains the thinking of the Department:

‘This provision is intended to set up an independent regulatory office within the Department of transport, energy and communications that is capable of adaptation and incorporation into an independent regulatory authority following more comprehensive legislation in due course. The model used is that in the Consumer Information Act, 1978. It balances the need for simplicity and urgency with the need for legal independence in the execution of the delegated regulatory type functions previously held by the Minister’²⁷

The initial provisions, therefore, were based on the Director of Consumer Affairs and the temporary nature of the provisions were a consequence of the Bill being a temporary measure in advance of more expansive legislation. This is a key feature of the evolution of the Bill as it was drafted. Eamonn Molloy, a senior official in the policy unit of the DTEC, responding to some late proposals in October 1996 argues that the urgency and willingness to defer some issues to later legislation was an important feature in the drafting of the 1996 Act:

‘The agreement of all Telecoms divisions was that the legislation was not designed to cover all regulatory issues. The Bill does not provide for new

²⁷ DTEC TR 5/5, vol 1 draft heads of telecommunications bill, draft 4, undated

*enforcement provisions for the regulator precisely because it did not set out to do so. Enforcement, along with other issues, was agreed to be a matter for the Omnibus Bill (Utilities Regulatory Commission) and if relevant the legislation relating to the establishments of a multi-sector structure*²⁸

The level of independence, therefore, in the final Bill is hard to reconcile with these comments which suggest an agency, within the Department, and without clear powers. Interviewees have argued that despite this there was a genuine desire to create a legally independent entity, as envisaged by the policy reports above and the existing regulatory structure in the Department.

An important factor, which influenced the officials, was the strategic alliance proposed for Telecom Éireann. The Telecommunications Strategy Report had expressed concern at the level of expertise of the management of Telecom Éireann and had proposed that an alliance should be sought with a large Telecommunications company to import this management expertise into Telecom Éireann. The Bill was proposing to sell a proportion of the government's shares in Telecom Éireann to enable this alliance and a consortium incorporating two large European telecommunications companies had expressed interest in this

²⁸ DTEC TR 5/5, vol 4

alliance. Interviewees argued that a condition of their participation in the alliance was the precondition that an independent regulator would be created to manage the liberalised market. The concerns of the consortium of KPN and Telia reflect the need for credibility and the assurance that post liberalisation there would be no government interference in the market. The 1996 Act would legislate for this alliance by facilitating the sale of 35% of the government's shares in Telecom Éireann to KPN-Telia. Another reason, raised by a number of interviewees²⁹ explaining the level of independence of the ODTR, was the view that the Bill was being drafted by officials in the DTEC who believed they would be the regulator in the future, and therefore wanted to make the regulator as independent as possible. This view is confirmed by other interviewees in the Department and by Regina Finn. Regina Finn and Sean McMahon were the principal officials, in the regulatory division, who were in charge of drafting the Bill. Their aim was to ensure that the regulator was as independent as possible³⁰. There is a risk with the use of interviews on these issues as the interviewees in question may have a motivation to exaggerate their role or their importance. Regina Finn's view was not supported by Brendan Touhy or Eamonn Molloy, both senior officials in the policy unit of the DTEC. Both of these officials would have been close to the drafting of the Bill. Both Brendan Touhy and Eamonn Molloy argued that the

²⁹ Interviews with Ruairi Quinn and Emmet Stagg but in particular with John Breen who argued he was excluded from the drafting

³⁰ Interviews Regina Finn and Sean McMahon

level of independence in the 1996 Act was intentional and not the product of self-interest. However, it is clear from a reading of the files that Regina Finn and her regulatory unit were the lead group drafting the Bill. Additionally, one interviewee, Ruairi Quinn, the Minister for Finance in the Rainbow coalition, was monitoring the evolution of the Bill and the view of his officials in the Department of Finance was clearly that the drafting of the Bill was being run by a small number of officials. This factor is difficult to quantify or measure, but it is no doubt a factor in the ultimate design of the ODTR.

In relation to radio spectrum regulation, the above debate is important as the approach of the DTEC to the 1996 Act also applied to their approach to radio spectrum regulation. Regina Finn argued that the transfer of powers via the 1996 Act for radio spectrum management from the Minister to the regulator was a 'tick box' exercise. Where existing legislation gave the Minister responsibility in relation to radio spectrum management these provisions were passed to the regulator without question. The role of the officials drafting the legislation was to ensure such provisions were listed in the 1996 Act. A review of the Departmental files shows that the document most referred to by officials and with the most redrafts on file was a list of the provisions from previous legislation to be transferred, without amendment, to the regulator. The 1996 Act lists in its supporting schedules details of legislation where the Ministerial authority is

being delegated, word for word, to the regulator. The Telecommunications Strategy Report did not refer specifically to radio spectrum despite the recognition of its growing importance and the increase in resources prior to the strategic review. Interviewees involved in the Telecommunications Strategy Review confirmed that radio spectrum was not considered in detail in terms of strategy. Brendan Touhy argued that it was not questioned that the radio spectrum technical division would be transferred to the regulator as their task was essentially complex and expert. The strategy of the Department at the time was to concentrate resources of the Department on policy related matters³¹.

The files reveal that there were concerns about the broad sweep of powers delegated to the ODTR and specifically in relation to radio spectrum. There were conflicts, evident from correspondence on DTEC files that the regulatory Division and Technical division differed in the relative responsibilities of both the Minister and the ODTR. Similar to the debate in relation to the institutional independence discussed above, the intention of the regulatory division was to transfer all relevant powers to the ODTR. The technical division, responsible prior to liberalisation for radio spectrum issues, had concerns that the early drafts of the 1996 Bill delegated too much power.

³¹ Interviews with Brendan Touhy and Eamonn Molloy from the Telecommunications Strategy Group. This attitude to radio spectrum management is also confirmed by John Breen a member of the technical group.

John Breen from the Technical division writing in May 1996 advised the head of the Technical division, John McQuaid:

‘The regulator should have responsibility for the issue of licences for mobile and personal communications. The Department should have a role however in determining the timing of awards around certain classes e.g. GSM, DCS 1800 and in the determination of competition parameters, selection criteria etc... The ‘narrow bill’³² should therefore reflect requirement for advance Ministerial approval for certain actions’³³

This note is further expanded by John McQuaid in a note to Martin Brennan who was in overall charge of the telecommunications section of the Department on the 8th July 1996:

‘My preference is for a regime where the Minister publishes clear policies for the telecommunications sector including policies and conditions for the grant of licences and the regulator is obliged at all times to be

³² Throughout the DTEC files the 1996 Act was referred to as the ‘narrow bill’ or the ‘wee’ bill as the intention was to bring in more comprehensive legislation later.

³³ DTEC files 5/5 & Leg/Tel

*satisfied that the policies published by the Minister are being complied with*³⁴

The request by the technical Department reflects the debate discussed in the case study in the UK where the Radio Communications Agency were advising their Minister on the increasing commercialisation of radio spectrum, and the inherent value of the spectrum to the Treasury. The radio spectrum quoted above is the third generation spectrum which was sold in a number of jurisdictions for large sums of money. John Breen, in interviews, confirmed that his motive in sending this memorandum was to retain Ministerial control over radio spectrum. The functions transferred to the ODTR obliged them to seek the consent of the Minister for Finance for radio spectrum fees but, unlike the UK, not on the allocation of the radio spectrum. In the event the Director allocated this spectrum in 2001, but the Minister for Finance, Charlie McCreevy TD, withheld consent on the basis that the allocation scheme did not maximise the revenue to the State. The awarding of the licences was delayed almost a year because of the dispute. Arguably, the provision requesting the consent of the Minister for Finance was only in the 1996 Act because it was directly transposed from the Wireless Telegraphy (1926) Act. The dispute raises the issue about the role of principals if the ‘ally principle’ discussed in chapter one becomes an issue. The independence

³⁴ Ibid

of the agent can only be constrained by ex-post and ex-ante controls which aim to ensure the agents' preferences are allied to the principal's preferences. In the case of the allocation of third generation radio spectrum, the principal had imposed an ex-ante control on the actions of the agent. The conflicting preferences which resulted in the protracted dispute between the Minister for Finance and the Director shows the importance of ex-ante controls particularly in resolving conflicting preferences. In the UK such conflicts were anticipated and the awarding of the radio spectrum, conducted mainly by the Radio Communications Agency, happened in advance of the discussion on the 2003 Ofcom Act. The legacy of the dispute between the Minister for Finance and the Director was the increasing focus on ex-ante controls on the regulator in the Irish Communications Regulation (2002) Act which we shall discuss in more detail below.

There were specific issues with the transfer of powers under section 6 of the Wireless Telegraphy (1926) Act which would allow the Director to issue licences without reference to the Minister for new services, and to decide on the selection criteria and conditions related to a licence. The regulatory division responded to the memos and the proposed amendments from the technical division by arguing:

‘...the proposed amendment to the bill restricts the regulator's independence to an unacceptable degree. It is worth noting that the

*function of licensing the use of frequency spectrum is being transferred in its entirety to the regulator. In addition, the function of making regulations which will govern the form and content of such licences is also transferred to the regulator but the consent of the Minister is necessary to any such regulations. This gives the Minister a powerful veto over the licensing of any part of the frequency spectrum and is considered a more than adequate control in this case’.*³⁵

The regulatory division memo gave an overview of their interpretation of the balance of power between the Minister and the regulator:

*‘In brief, the Minister should retain the powers necessary to enable him to settle sectoral policy for example determining USO/PSO and overall strategic approaches to allocation of frequency spectrum. The regulator must have complete independence in regulating the market, including the granting of individual licences, arbitrating in disputes such as those about interconnection, and ensuring equity of treatment of all players in the market’.*³⁶

³⁵ Memo from Regina Finn to head of regulatory division, Sean Mc Mahon, TR 5/5

³⁶ Ibid

The compromise reached became Article 3.5 of the 1996 Act which requested that the Director should publish a plan known as the 'Radio Frequency Plan' and Article 3.8, which obliged the Director in formulating revising and implementing the radio frequency plan, complied with any direction given by the Minister. The Minister's remit in terms of policy however was questioned when the final Bill was debated in the Dáil. Jim Higgins TD, member of Fine Gael, speaking on the 2002 Communications Act, commented on the duplication and over sight of a Minister in being able to consent to regulation and issue policy directions:

'I am also puzzled by the fact the Minister can, in addition to the power to issue policy directives, block radio spectrum regulations made by the ODTR. Why is it necessary to have both the authority to consent to these regulations and to give policy directives on the same subject? If the Minister's aim is to speed up the making of licence schemes, she is doing the exact opposite' (Dáil debates, 18/4/02)

A review of the departmental files, the Dáil Debates and interviews with both politicians and officials shows that there was little consideration of the specific functions being transferred for radio spectrum. There was some discussion about, but general support for the delegation of powers to the ODTR. Regina Finn argued that there was a conservative bias in the technical division. She argued

that there should be no Ministerial involvement, particularly with big commercial issues, not only in telecommunications but broadcasting. John Breen in the technical division argued that the technical division was excluded from the drafting of the 1996 Act as radio spectrum suffered from a view in the Department which perceived it as technical and not important in terms of enabling policy.

The drafting of the 1996 Act did take a short period of time from the end of 1995 to the early months of 1996. It is important to review the final legislation.

The Telecommunications (Miscellaneous Provisions) Act, 1996

The Act creating the ODTR is a very short piece of legislation. It is clear from departmental documents and interviews that the Act was an interim measure introduced to allow for the sale of shares in Telecom Éireann. It was not meant to be the final word on the regulatory regime. There was a proposal in 1996 to introduce a full Utilities Bill which would create a single regulator for energy and telecommunications. However, with the Utilities Bill seen as the future regulatory legislation the 1996 Act, creating the ODTR was seen more in terms of the sale of the government's share than in relation to creating the first independent regulator.

The purpose of the Act is two-fold. Firstly, it creates the position of the Director of Telecommunications and the office of the ODTR, but also allows the sale of shareholding in Telecom Éireann to support the strategic alliance referred to above. The Act clearly states that the Director will be independent in the exercise of his or her functions. The Director is appointed by the Minister and holds a senior civil service position. Her term of office was six years and she could only be removed by stated misconduct or ill-health. There were also accountability provisions where the executive in the form of the Minister could exercise some accountability on the activities of the ODTR. The Director, for example, was not funded by the State but by levies imposed on operators licensed by the ODTR. The Director had full discretion in setting these fees and levies. The Director, however, had to account to the Comptroller and Auditor General in respect of Annual Accounts and was obliged to report annually to the Minister. It is debatable whether the discretion to hire and maintain a staff was clear. Section 5 of the Act states:

‘The Minister shall make available to the Director, on a request being made by the Director, such staff, premises, equipment, services and other

*resources as the Minister may determine from time to time in consultation with the Minister of Finance*³⁷.

However, the first schedule goes into more details and does allow some discretion for hiring of staff that the Director may feel he or she needs. This is subject to an overriding provision that with, the consent of the Minister of Finance, the Director may determine a total number of staff.

The functions transferred to the Director were essentially those functions already in the remit of the regulatory division of the DTEC. There appears to have been limited innovation in relation to the functions of the regulator.

In relation to radio spectrum issues, the prevailing piece of legislation which needed to be delegated was the Wireless Telegraphy (1926) Act. Under this Act the Minister for Posts and Telegraphs was responsible for regulating wireless telegraphy apparatus. Under section 5, the Minister was given the power to oblige anyone in the state having possession of wireless telegraph apparatus to hold a licence. The Minister had the power to define the scope of the licence (section 6). The Minister had the power to set fees, subject to the consent of the Minister for Finance. There were powers to collect information and to prosecute those without

³⁷ Telecommunications (Miscellaneous Provisions) Act 1996, section 5

licences. These provisions survived as the key legislative powers for the Minister of Posts and Telegraph in relation to radio spectrum management until the 1996 Act creating the ODTR. The 1996 Act transfers, from the Minister to the Director, responsibility for the licensing regime which is detailed in section 3 of the Wireless Telegraphy Act (1926). The ability to grant a licence and set a fee for the licence which again is delegated from section 5 and section 6 of the Wireless Telegraphy Act (1926) is also passed on to the ODTR. The legislation extended to the scope of a licence and gave the Director information gathering powers. A number of provisions introduced by the Minister via statutory instrument were also transferred to ODTR. The ODTR was also obliged to publish a radio frequency plan and is obliged in formulating, revising or implementing the plan to comply with any direction from the Minister.

The remaining sections of the Act and the more contemporaneously controversial sections of the Act deal with the sale of a government stake in Telecom Éireann which appears to have exercised the Parliamentarians. The practical effect of the 1996 Act was to move the regulatory division and the technical division from the Department into the new independent regulator. A review of the files and interviews with key officials dealing with the drafting suggest that the final Act presented to Parliament went through a number of significant changes the effect

of which was to make the ODTR and the Director more independent than had originally been envisaged.

The creation of the ODTR was motivated by functional factors and specifically credibility. The Telecommunications Strategy Report recognised the importance of an independent regulator. The key driver was market opening and the need to avoid the perception of Ministerial interference in the newly opened market. This is particularly the case as the telecommunications companies who were part of the strategic alliance with Telecom Éireann insisted on an independent agency to regulate the market. In Ireland, however, the independent agency was very independent and there were very few constraints on the agency. As the legislation evolved did the independence of the agency raise concerns? In relation to radio spectrum management were there issues with the lack of political oversight of the allocation process? These concerns were evident in the UK case and were the justification for ex-ante controls on the allocation of specified radio spectrum.

Evolution of telecommunications regulation

The provisions of the 1996 Act were revised through primary legislation in 2002. The Communications Regulation Act (2002) made changes which were

discussed in policy documents in the intervening years. The office was to have a three-person commission as opposed to single person Director and the office was to be subject to policy directions by the Minister. The provisions on structure and funding remained the same. This is important to consider as this was an opportunity for the policy actors to change the institutional arrangements, even in relation to key functions such as radio spectrum. An additional change since the 1996 Act was the government's sale of all shares in the renamed Eircom. Consequently, the Department had no conflict of interest and arguably could have initiated a review of the need for a separate agency to manage the telecommunications market. This point was referred to in the Dáil debate on the Communications Regulation (2002) Bill. Deputy Brian O'Shea TD, from the Labour Party argued:

'When the office of the ODTR was established, the state was still an operator in the telecommunications sector but privatisation took place under the Minister's stewardship. The state is neither operator nor a regulator in that area now. Given the strategic importance of the telecommunications network, not just economically but also socially, is there not a case for keeping that part of regulation within the state framework?' (Dáil Debates, 18/4/02)

The Minister, Mary O' Rourke TD, Fianna Fáil, replied, ' *I see your point*' (Dáil debates, 18/4/02)

However, the issue was not addressed by the Minister in her reply to the debate. When interviewed she argued that there was no need to change the institution as the regulator was created and doing such a good job.³⁸ The change of government following the 1997 general election had not changed significantly the attitude to the role of the independent agencies. The Fianna Fáil-Progressive Democrat coalition had created the second utility independent regulator, the Commission for Energy Regulation, in 1999. Mary O'Rourke TD described her relationship with the first Director of the ODTR, Etain Doyle as very cordial and good. She argued that the Director had a job to do and she let her do it. The attitude of the senior civil servant at the time, Brendan Touhy, was much different. There were obvious tensions as Etain Doyle asserted her independence in relation to staffing issues but in the early years of the ODTR a number of accountability issues did emerge which raised the tension and provoked the changes which would eventually be proposed in the 2002 Bill.

The first accountability issue, however, emerged very soon after the change of government in 1997 as a consequence of the Director's decision not to appear in

³⁸ Interview Mary O Rourke TD

front of an Oireachtas committee, stating no legal obligation to do so. The decision not to appear provoked a furious response from committee members and a consequent perception of a lack of accountability. Although Eoin Doyle explained her reasons for not appearing, the refusal to appear before a Parliamentary committee led to concerns about the accountability mechanisms in place. The committee wanted to discuss a number of broadcasting and radio spectrum issues which were the subject of ongoing consultation and the Director argued that she was not in a position to discuss in public her position. The broadcasting issues were related to an issue which was legally sensitive and the Director felt she had to follow a clear consultative process. The former Fine Gael Minister for DTEC, Alan Dukes TD, supported the Director's viewpoint arguing that it was not the correct time for the Director to discuss the issue with Parliamentarians³⁹.

A second issue, closely related to radio spectrum, was the award of radio spectrum licences for third generation mobile telephony (3G). The dispute is discussed in detail earlier in the chapter but the important issue raised by the debate was the inability of government to resolve the lines of responsibility between the Minister for Finance and the Director. The legislation had not anticipated, what was anticipated in the UK, that the Minister for Finance, on one

³⁹ Interview Alan Dukes TD

side, would want to maximise revenue for the government from 3G radio spectrum licences, and arguably had a political responsibility to do so. On the opposite side the Director had a legal responsibility to promote competition. There was a need therefore in evolving the legislation to ensure clear lines of responsibility were stated.

The renamed Department of Public Enterprise, responded to this debate and other concerns surrounding the accountability of the regulator by publishing new proposals in a document ‘Governance and Accountability in the Regulatory Process’. The Minister in the foreword to this document argued:

‘The separation of regulatory functions from the other duties of government and their transfer to independent statutory bodies involves a delegation of power from the centre. The interests of democracy demand that such delegation of responsibility to regulators be accompanied by clear and defined accountability mechanisms’ (Department of Public Enterprise, 2000)

In interviews with both the Minister and the senior officials in the Department at the time, the main concern was the wide remit and lack of accountability under

the control of one regulator⁴⁰. The measures proposed in new legislation were designed to bring forward accountability measures and not major institutional reform. The officials argued that there was never a view to remove the independence provisions from the Act. Their view was that the European Commission, irrespective of the change in ownership of Eircom, would be critical of such a decision. This view does not reconcile with the provisions of the directive quoted above. The directives made explicit the view that the need for an independent agency was required because the parent Department could not only be regulator of the incumbent telecommunications company but also shareholder of the incumbent telecommunications company. The dual role was incompatible in a liberalised market and therefore an independent agency was needed. The European Commission in its Implementation Reports, assessing the effectiveness of implementation across the EU on telecommunications liberalisation directives, did express concern about the independence of the ODTR in its 4th Annual Report published in 1998. Referring to a number of countries, including Ireland, the European Commission said:

‘In some countries concerns are reported that the structures in place do not ensure that regulatory decisions are not influenced by state ownership

⁴⁰ Interviews Mary O Rourke TD, Brendan Touhy, Eamonn Molloy

*considerations. In these cases the necessary separation of the control of the incumbent and the regulatory powers should be re-examined'*⁴¹

This would appear to be a widening of the criteria for an independent agency. The assumption from the above quotation was that irrespective of shareholding an independent regulatory agency is required. A year later, following the sale of the Government stake in Eircom, the European Commission commented:

*'The concerns about ODTR's independence...have now been fully addressed following the full privatisation of Eircom. As an increasing number of previous Government functions are being transferred to independent regulatory bodies, the Minister is planning to launch a consultation procedure to discuss the issue of the accountability of regulators'*⁴²

There appears to have been an acceptance of the institutional validity of the ODTR, irrespective of the government's shareholding in the incumbent telecommunications operator. The issue following the creation of the ODTR was

⁴¹ European Commission, 4th Implementation report,
http://ec.europa.eu/information_society/policy/ecom/implementation_enforcement/annualreports/previousyears/index_en.htm

⁴² Ibid, 5th Implementation Report

therefore to strengthen the accountability provisions of the 1996 Act. Brendan Touhy speaking to the OECD argued:

‘The separation of regulatory functions from the other duties of government and their transfer to independent statutory agencies involves a delegation of specific powers from the relevant Government Minister. The interests of society demand that such delegation of responsibility be accompanied by clearly defined procedures and accountability mechanisms. Regulators, be they state controlled or independent, must balance the wider societal interest against that of the regulated sector’
(Touhy, 2005)

The checks and balances set out in the 1996 Act were designed to ensure in the first place independence by placing ex-post controls on the operation of the ODTR. The 1996 Act requested that the ODTR produce an Annual Report and allow accounts to be audited by the Comptroller and Auditor General. There were now further provisions, included in the 2002 Bill, which included reducing the term of office of Commissioners from 6 to 4 years; the obligation to publish a strategy statement and the requirement to appear in front of Oireachtas committees.

The institutional independence of the ODTR and subsequently the Commission for Communications Regulation (ComReg) was largely retained in terms of funding and freedom to manage finances. However, the new Commission was less independent using the criteria quoted in earlier chapters. The dilution is important when considering the issue of the ‘ally principle’. The ‘ally principle’ in sectors other than central banks is assumed. Gilardi (2007) argues that principals assume agents will have similar policy preferences to principals. There is therefore no need to impose ex-ante or ex-post controls on agents. In Ireland, the lack of controls on the agent regulators confirms this ‘ally principle’ as the evolution of the legislation confirms the view that if preferences diverge then principals will constrain the independence of the agent.

There had been political consensus in 1996 that there was a need to create an independent agency. The opposition political party at the time of the 1996 Act, Fianna Fáil, was supportive of the regulatory proposals and had committed to an independent regulator during their previous administration between 1992 and 1994. The changes to the regulatory structure as a result of the 2002 Act underlined this commitment to a separate independent regulatory authority which had wide political support. The changes proposed were, in fact addressing issues of accountability which had emerged since the original Act. The changes proposed allowed, for example, for Ministerial directions on issues of policy. The

provision in the 2002 Act would allow a Minister to direct the regulator to perform a certain activity. It is a clear constraint on the independence of the regulator. Specifically in relation to radio spectrum, section 13(5) of the 2002 Act states in relation to radio spectrum management:

‘may include directions in relating to –

- 1. The allocation of particular bands of spectrum for specific categories of service, and*
- 2. The means by which entitlements to use such spectrum may be assigned (including appropriate fees), and in giving such direction the Minister shall have regard to principles of good frequency management’⁴³*

The ability of the Minister to both issue directions and be involved in detailed regulations was also in the Dáil Debate on the Communications Regulation (2002) Act. Jim Higgins TD of Fine Gael, as quoted above, was puzzled by the Minister’s power both to issue directions and block regulations. The ability of the Minister to have both policy and radio spectrum management powers reflects the debate in the UK on the role of the Secretary of State. There was little opposition or debate on this aspect of the Communications Regulation (2002) Act. The all-party support for the institutional arrangements in place and the focus on a lack of

⁴³ Communications Regulation Act, 2002, Houses of the Oireachtas, Stationery Office, Dublin

accountability ensured that Parliament did not question the dilution in independence.

NON-FUNCTIONAL REASONS FOR DELEGATION IN IRELAND

The case study to date has outlined in detail the creation of the independent agency for telecommunications regulation with particular discussion of radio spectrum management. The agency created was among the most independent regulatory agencies in the EU at the time and its remit on radio spectrum was equally broad. It is clear from the Telecommunications Strategy Report that credibility and functional factors were significant drivers in the creation of the agency, however, it is unclear why the agency was given such wide powers. A view has been put forward that this was partly self interest by those drafting the legislation. Also, it is clear from the evolution of legislation that although the independence of the agency was preserved, there was a clear intention in the Communications Act in 2002 to introduce constraints on the ODTR and to impose additional ex-ante controls.

In this section the non-functional factors which may have influenced the policy actors throughout this process are discussed and may explain the initial high independence and the subsequent change of policy following the 1996 Act.

Firstly, this section will look at the development of other agencies in Ireland to see if the creation of the ODTR was influenced by a political tradition of delegation or policy leadership. Secondly, this section will look at the role of the EU in promoting the creation of independent agencies to manage telecommunications markets, and finally this section will look at blame shifting and other non-functional factors. Specifically, was the motivation on the part of policy actors to delegate specific authority on radio spectrum to the ODTR to avoid having to deal with a highly contentious issue on broadcasting spectrum?

Political tradition and leadership

It is important initially to contextualise telecommunications regulation against the development of other regulatory bodies in Ireland. In earlier chapters it was discussed that one factor which may explain the level of delegation to independent regulators was political tradition or leadership. Thatcher (2002b) argues that the decision to privatise a wide range of utilities in the UK was a result of political leadership and commitment to the concept of privatisation and liberalised markets.

In Ireland, a number of independent regulators have been created in recent years. Gilardi (2005a) compared independence indicators across seven sectors and

seventeen countries and he considered that Ireland has some of the most independent agencies across seven different areas covering both social and economic sectors. The creation of regulatory authorities and agencies in the UK was the result of policies reducing the influence of government and particularly policies related to privatisations and liberalisation. Levy and Spiller (1994) have argued that there is strong correlation between market opening policies and the creation of independent regulators and from the UK case study it is clear a number of utility regulators were created following the privatisation of utilities and the opening of markets. Ireland did have a series of privatisations starting with Irish Ferries and Irish Life in the 1980s but the extent of privatisations was not on the same scale as the UK. Barrett (2004) argues that privatisations in Ireland were the result of events in the sector as opposed to any political tradition or leadership. McDowell (2000) argues that the UK privatisations:

‘Took place against a background of ideological conviction on the part of the British Government that privatisation was desirable in itself’ (McDowell, 2000, pp. 49-50)

McDowell argues that the Irish tradition and approach to privatisation was pragmatic and not driven by an ideological commitment to privatisation or market liberalisation. McDowell argues:

‘there has been no real policy decision on the issue of state, as opposed to private sector, production of goods and services in terms of social and economic efficiency of the alternative modes of economic organisation. This undoubtedly suits the ‘pragmatic’ approach to policy decisions favoured by most Irish politicians and civil servants. It enables them to avoid causing what they see as unnecessary offence to interest groups or ideological opponents’ (Mc Dowell, 2000, pp. 49-50)

In terms of utility regulation it would appear that the timing of the creation of utility regulators coincided with similar developments in other EU countries and the developments proposed by European directives. This is particularly the case in both telecommunications and electricity where Ireland lagged behind a number of other EU countries, notably the UK, in the creation of regulatory agencies.

Given the reluctance of successive Irish governments to delegate authority, as argued above, and to deregulate markets, the creation of the telecommunications regulator, the first utility regulator, is an anomaly which warrants further investigation. If there was no political leadership or tradition supporting this drive to further delegation we assume a prime motivation was credibility in the context of market opening? However, the timing of the creation of the

telecommunications agency coincided with the developments on market opening across Europe.

The Impact of EU policies

One of the factors considered in the theory on independent regulation is the view that regulators were created because of institutional changes at the EU level. There is no doubt that there was a growing number of directives, council resolutions and green papers decided in Europe which were important in driving the liberalisation and regulatory agenda. The Terminal Equipment Directive⁴⁴, transposed in Ireland in 1991, liberalised the market for telecommunications equipment whereby other operators could offer consumer's handsets for home use ensuring subscribers did not automatically have to take equipment from Telecom Éireann. Responding to European developments Minister Marie Geoghegan-Quinn TD, speaking in 1992, seemed to reflect the growing importance of Europe in the policy formulation:

‘...in the light of EU developments it may be that there is a need for the setting up of a body, separate from my Department, to regulate the telecommunications industry in Ireland. The cost of establishing and operating such a body would, judging by the experience of other

⁴⁴ Terminal Equipment Directive, 91/263/EEC

countries, be an inhibiting factor but I am keeping the need for the setting up of such a body under review’ (Dáil debates, 26/2/92)

The EU had proposed to accelerate liberalisation of telecommunication services and these proposals were reflected in the Telecommunications Strategy Report. The report argued that national policies cannot operate in isolation from the overall thrust of the strategy at the European level:

‘Our assessment of recent trends is that countries are increasingly tending to push ahead with telecommunications liberalisation more rapidly than strictly required to comply with EU Directives...Ireland cannot escape the impact of liberalisation at EU or at member state level...the view of the Group is that prompt implementation of EU requirements without availing of derogations should be the minimum policy approach’ (Department of Transport Energy and Communications, 1994)

It is clear from the Telecommunications Strategy Report, discussed above, that changes in other EU markets and the inevitability of change were a motivation in the creation of the regulatory environment. Westrup (2002) argues that the debate about regulation was driven by events in Europe:

‘It was the privatisation programme of the public utilities, beginning with British Telecom in 1984, and the EU adoption of a policy of market liberalisation for the utility sector, that has brought the debate to Ireland’
(Westrup, 2002)

Where there is clear evidence to support the views that policy complexity and credible commitments were important factors in the creation of the ODTR, the timing of the 1996 Act appears to have been driven by both national and European events. There is a clear indication of this in the opening statements to the 1996 Act given in the Dáil by Minister for Transport, Energy and Communication, Michael Lowry TD. The Minister stated:

‘The European Commission has been the driving force behind the liberalisation of telecommunications in the EU...the task of developing the regulatory package to ensure that competition and that regulatory measures are uniform throughout the union falls to the council and Parliament’ (Dáil debates, 3/10/96)

There was acceptance that the liberalisation of the market across Europe precipitated the creation of an independent regulator. The Minister argued:

‘With the emergence of competition in the Irish telecommunications market, it is appropriate that the regulation of the sector be seen to be independent from the Minister’s shareholder and sectoral development functions. This separation is also a feature of telecommunications development in most of our EU partners and a requirement of pending EU legislation’ (Dáil debates, ibid)

Although at the time of the Dáil Debate there was no obligation in European directives to have a separate regulatory authority, the European Commission proposals were clear and drafts of directives were being discussed by officials and Ministers in the Telecom Council from the mid-1990s. The European Commission’s objective was to create separate agencies particularly in cases where the government retained a shareholding in a regulated entity. The provisions of the 1997 Directive dealing with the competitive environment in telecommunications indicate the kind of independent regulator envisaged by the European Commission. Desmond O’Malley TD, during the Dáil Debate on 1996 Act, also supports the timing of the creation of the regulator as driven by EU requirements:

‘The establishment of an independent office for the regulation of the telecommunications industry is a significant departure from traditional policy and as such I welcome it, even if it forced on us against the wishes of, presumably, the Government and the Department by European requirements’ (Dáil debates, 26/9/96)

Departmental officials involved in the drafting of the 1996 Act were asked if an independent regulator would have been created irrespective of developments in the European Commission and obligations in the liberalisation directives. All responded that the directives were important in terms of timing; however, they argue it is clear that a regulatory regime and the opening of the market had been anticipated under several Ministers⁴⁵. Regina Finn argued that the European directives and liberalising agenda were the ‘tail wagging the dog’ but argued that the main driver was to privatise Telecom Éireann. She argued there was a need to bring external, commercial management expertise in Telecom Éireann in order to help it succeed as a private entity. The developments in Europe were a secondary pressure.

An argument advanced by one interviewee was that the attention given to the European directives in the Dáil Debates was a political decision to allow the

⁴⁵ Interviews specifically with Brendan Touhy, Regina Finn and Eamonn Molloy

Labour party, a member of the Rainbow coalition, to bring along their supporters who at the time were questioning the merits of opening the telecommunications market. The interviewee argued that this was particularly the case in drafting the Minister's opening remarks, quoted earlier, on the importance of Europe in the debate. The government is arguing almost that they had no choice but to open the market and introduce a regulatory regime.⁴⁶ It appears from the evidence that the European dimension was important in terms of timing of the Act and to some extent the leverage given by extending the derogation helped to bring along those who may not have supported the liberalisation agenda on its own merits.

Prior to the publication of the 1996 Act the Government had conducted one major piece of strategic research into the future of the telecommunications sector that recommended an independent regulator should be created on the basis of arguments supporting credibility theories, complexity and, in the case of radio spectrum, expertise. There is clear evidence linking the timing of the creation of the regulator with market opening policies, however, there is also clear evidence that the European developments and gradual opening of telecommunications markets contributed at least to the triggering of the legislation. One interviewee confirmed that the Department had looked at a number of regulatory models as

⁴⁶ Interview with Brendan Touhy

part of its planning for the regulatory regime⁴⁷ which supports the isomorphic arguments also presented in the theory. The DTEC documents reviewed also show that it was the intention of the Department to propose a much larger agency covering the regulation of other sectors. Due to the urgency of the telecommunications issues the Department pressed ahead with the ODTR but it is clear there were proposals for a ‘super regulator’ to encompass energy regulation too.

The issue remains, however, that the 1996 Act created a very independent regulator with functions that were clearly designed to mirror the functions of the regulatory division of its parent Department. The administrators in the Department were keen to remove political oversight on market-based regulation and this was also clearly an objective.

Blame Shifting and other factors influencing the independence of the ODTR

A motivation argued in the literature for the creation of independent agencies has been blame shifting, where policy actors may wish to delegate authority to

⁴⁷ Interview Brendan Touhy and Regina Finn, a report was prepared on regulatory models evident in other member countries

agencies in order to avoid blame for unpopular decisions. Fiorina (1977) argues that politicians will delegate unpopular decisions to independent agencies. At the time of the drafting of the 1996 Act for example, the radio spectrum powers were scrutinised on the issue of deflectors and on the controversial award of the second mobile phone licence. It could be argued, particularly in relation to the deflector issue, that the policy actors were guilty of blame shifting, especially in ensuring that the ODTR assumed, via their responsibility for radio spectrum management, the control and management of the deflector issue.

Television signal deflector was a major political issue in the 1997 General Election. In the 1997 General Election deflector campaigners supported a number of independent candidates. Tom Gildea was elected in Donegal on the issue of deflectors.

Deflectors are illegal retransmissions of broadcast TV signals, generally community based systems, which allow local residents to have multi-channel viewing in areas where the only available TV broadcasting were the national terrestrial channels. Deflectors raised a knotty legal issue for the Rainbow coalition as cable operators had been awarded the exclusive franchise for multi channel TV distribution by the previous Fianna Fáil Minister, Ray Burke TD. In 1995 the growing importance of deflectors in supplying multi-channel TV,

particularly in rural areas, was highlighted in the Carrigaline case. Carrigaline Television, trading as South Coast Community Television, had brought the Minister to the High Court, challenging the decision made by a former Minister for Communications, Ray Burke TD, to award to certain cable companies exclusive licences to broadcast multi-channel television. The deflector company lost the case and the cable companies were therefore legally entitled to exclusive contracts. However, the deflector companies carried on without a licence, contrary to section 6 of the Wireless Telegraphy Act 1926, and thus infringing copyright legislation.

The Taoiseach, John Bruton TD, in May 1996, during a by-election campaign in Cork had committed his administration to bring in legislation to legalise deflectors. In the final stages of the adoption of the Miscellaneous Provisions (Telecommunications) (1996) Act, there is a note on the DTEC files which is from the Department of the Taoiseach:

‘The Taoiseach on reviewing the draft memo for Government commented that ‘the Cork television issue’ should be sorted before the Bill is brought forward’⁴⁸

⁴⁸ DTEC TR5/5, vol5

The political sensitivity of this issue was demonstrated in the Dáil debates on the 1996 Act. Deputy P.J. Morley argued:

‘During the last Cork by-election the Taoiseach (John Bruton) gave a commitment to the people of Cork that one of the first things he would do would be to have the (deflector) system licensed. I have gone into this in detail because I fear that appointing a regulator is a way of ducking what is clearly the government obligation to this matter’ (Dáil debates, 6/11/96)

The licensing of radio spectrum deflectors delegated to the independent regulator could be argued as blame shifting. The Minister of State, Emmet Stagg TD, debating this issue seems to accept this accusation:

‘The biggest issue raised was deflectors systems. Under the bill, the Ministers current powers will be transferred to the regulator. There is an understandable concern that this represents a washing of hands by the Government’ (Dáil debates, 6/11/96)

The contributions from several Deputies and Senators allude to the fact that the powers being transferred would allow the Minister to pass the responsibility for

deflectors to the regulator. Fianna Fáil proposed an amendment to the 1996 Act which proposed:

‘before transferring to the Director any functions relating to television retransmission services or matters connected herewith, introduce regulations providing for the continuance in operation of the deflector systems of television transmission’⁴⁹

The amendment was not successful and the Minister of State tried to assure the Dáil that within the period prior to the creation of the regulator the government would endeavor to bring forward regulations to resolve the problem. Interviews with departmental officials and politicians at the time confirm however that the transfer of radio spectrum functions to the ODTR which included the licensing of retransmission deflector systems was seen as a key advantage of the Act. From the point of view of the officials it was a clear motivation for the politicians to ensure that the 1996 Act was on the statute books⁵⁰. Regulations were brought forward, on the instruction of the Taoiseach, to licence the deflectors in the final months of the Rainbow coalition and the Minister, Alan Dukes TD, confirmed in interview that the coalition did try to resolve the issue before leaving office. The

⁴⁹ Dáil debates, Amendment filed by Deputy Seamus Brennan TD, 6.11.96

⁵⁰ Specifically in interview with Alan Dukes, Minister of Communications who succeeded Michael Lowry in December 1996

regulations were withdrawn prior to the final Rainbow coalition cabinet. Two interviewees, Ruairi Quinn TD and Alan Dukes TD, members of the Rainbow coalition Cabinet, confirmed that the legal advice was that the Government would be acting illegally in licensing such systems when cable operators had been awarded exclusive licences for retransmission. Following the election the new Minister for Public Enterprise in the new Fianna Fáil-Progressive Democrat government, Mary O'Rourke TD, confirmed that she was glad that the ODTR had the powers to deal with the deflector issue as this was the first crisis she faced as Minister and could easily argue the matter was for the ODTR.

The deflector debate highlights the growing importance of radio spectrum in the commercial activities of the country. The licensing power being delegated was considered by the Fianna Fáil-Progressive Democrat government, assuming office after the creation of the ODTR, a case of blame shifting. The deflector issue for the Rainbow coalition was more problematic as they had committed to solving the problem before leaving office. The creation of the ODTR, although helping to ensure these issues were not on the agenda of the next government, did not resolve the problem in the short term.

Another issue which appeared to have helped the passage of the 1996 Act and the delegation of radio spectrum powers was the growing allegations around the

awarding of the second mobile phone licence. Scandals have been discussed as a non-functional factor in the creation of independent agencies. The accusation of political interference in the awarding of the licence to Esat Digifone and the subsequent tribunals investigating the award have focused on the government's role and specifically the role of the Minister Michael Lowry in issuing these commercial licences to private entities; although the award of the second mobile phone licence and the third mobile phone licence, which was conducted by the ODTR, were carried out by expert consultants and officials. The accusation of Ministerial interference would always remain if the powers were retained within the Department. The justification for keeping the allocation of radio spectrum away from politicians was only re-enforced by these scandals.

Unlike the deflectors' issue the award of the second mobile phone licence did not have the 'taint' of political interference which it acquired as the subsequent tribunals unfolded. A number of interviewees were involved in the project team awarding the second mobile licence. They argued that the award of the second licence was not a major issue in the lead up to the 1996 Act. It was confirmed by the officials, as discussed elsewhere, that a decision of this nature should be taken independent of Ministerial oversight. Irrespective of the subsequent controversy on the awarding of the second mobile licence, the power to licence would have been transferred to the independent regulator.

A final issue which needs to be addressed is whether the Department at any time in the policy thinking, framing or drafting of the 1996 Act considered the introduction of a separate radio spectrum agency. Such an agency was evident in the UK case study and had existed in the UK since 1990. It was highlighted earlier in this chapter that the technical division had a wide brief to advise on spectrum issues not just to the DTEC but also on broadcasting issues to the Department of Arts and Culture. An argument had been made in the early 1990s that this remit and additional resources would merit the technical division being considered as an independent unit advising Government. The proposal made by the Civil and Public Service Union (CPSU), following a reorganisation in 1992, was not taken forward. It does not appear from departmental records or reports that the option of creating a separate agency for radio spectrum was ever considered. Early drafts of the 1996 Act refer to the transfer of functions performed by the Minister under the Wireless Telegraphy Act (1926), so it was an early intention to delegate these functions to the regulator. Interviews with departmental officials involved in drafting the 1996 and 2002 legislation, specifically Brendan Touhy, who was promoted to Secretary-General of the Department of Public Enterprise following the 1996 Act, argue that a country of Ireland's size could not justify the creation of a separate radio spectrum agency. It does seem reasonable to conclude that a separate agency was not justified for a

small country. However, one can also conclude that the fact that the policy was not extensively discussed in the Department is indicative of the level of scrutiny radio spectrum was given prior to delegation.

The issue of converged or individual regulators is relevant here also. As a small country, consideration was given to the Utilities Regulatory Commission which was discussed by the Rainbow coalition and the successive Fianna Fáil-Progressive Democrat coalition. The 1996 Act was prepared on the assumption that a multi-sector regulator would be created in the near future. In the UK at the same time many commentators were discussing the concept of a converged regulator. The proposed creation of Ofcom, bringing together various communications regulators, was an early proposal of the first Labour government. The Irish government's policy document in 2002 (Department of Public Enterprise, 2000) discusses the appropriate level of regulation and argues:

'At present, it seems that regulation at the sectoral level is probably the most appropriate for the utilities in Ireland. This level of regulation allows for an approach focused on the particular circumstances of the various markets while comprehending the competition/complementarity between industries operating (or potentially operating) in the same market. As markets develop the justification for detailed sectoral

regulatory intervention may diminish over time. The question of a supra-sectoral regulatory authority might, therefore, be more relevant in that context and the issue could be re-examined at a future date, in the context of dealing with residual regulatory functions across the various sectors and achieving synergies' (Department of Public Enterprise, 2000, p. 10)

This view is consistent with the activities of the Fianna-Fail-Progressive Democrat government where new sector regulators were created for electricity and aviation, and where existing regulators like the ODTR were given regulation of the postal sector, which although a separate industry, was considered to be part of the communications sector.

The Utilities Regulatory Commission appeared to be relevant up to early 1997. DTEC documents discussing the job description and the functions of the new Director are annotated with reference to the 'super regulator' specifically in relation to the Director's office and position having to be subsumed into a larger regulator. There is no documentation or Dáil discussion on the demise of this concept and the Utilities Regulatory Commission was never created. Interviews with politicians and officials suggest that with the creation of the ODTR the pressing regulatory and market issues, which had been behind the super regulator solution, disappeared. Issues such as the strategic alliance, deflectors, and

disputes between service operators in the communications' sector were all resolved in early 1997 by transferring these issues to the ODTR. The politicians interviewed, specifically Alan Dukes TD, the responsible Minister who was appointed in December 1996, following the resignation of Michael Lowry, said that the reason the Utilities Regulatory Commission did not get going was that officials and politicians realised what a powerful creation they would have in a 'super regulator'. He argued in interviews that the super regulator would be a 'behemoth' for a country like Ireland. The view could also be taken that the super-regulator legislation was unlikely to be completed in time for the election in mid-1997 and the Rainbow coalition just ran out of time. The new Minister, Mary O'Rourke TD, had accepted the idea of a super-regulator; however, her proposal was a super-regulator regulating the regulators. The issue for the new government appeared to be more in relation to accountability. The Minister is quoted as follows:

'The question ultimately is, who regulates the regulators and how can that work be to the consumer benefit'⁵¹

The policy maker's choices in Ireland were initially to favour a super regulator. The creation of smaller agencies, like a radio spectrum agency, was rejected

⁵¹ Irish Independent, August 17th 1999

based on the scale of the Irish economy. However, in 1999 the policy makers in the Department of Public Enterprise created a separate energy regulator, the Commission for Energy Regulation (CER), which had different governance criteria. Specifically, it was led by a Commission of three people as opposed to the ODTR model of one Director. The policy makers had moved on from the creation of the ODTR in 1996 to raise issues of accountability and process in 2000. A number of events, including the dispute with the Minister for Finance on third generation licences, had woken up the Department up to the true independence of the ODTR and very soon after the creation of the ODTR they started to draft amendments which would limit the institutional power of the ODTR.

CONCLUSIONS

It is clear from the evidence reviewed above that the creation of independent regulation was driven in part by a policy of liberalisation and market opening. The decision to create a regulator was principally for reasons discussed in earlier chapters around the issues of credibility and complexity. However, the lack of a policy discussion of the functions and structure of the regulator led initially to the creation of a regulator which was more independent than was seen as appropriate by policy makers. Subsequent legislation has addressed this issue by introducing a greater degree of accountability. The timing of these events was dictated by European Commission demands and to that extent isomorphism arguments discussed in earlier chapters also need to be considered.

The Dáil Debates at the time of the 1996 Act show clear support for an independent agency free from Ministerial interference. But equally, it is clear that the focus of Parliamentary debates during the 1996 Act was on the sale of a government stake in Telecom Éireann. The Fianna Fáil opposition view concentrated on the strategic alliance which formed the second part of the debate. Deputy Brendan Daly TD argued:

‘Fianna Fáil is opposing the bill mainly on the grounds that the sale of a percentage shareholding in Telecom Éireann was a bad deal. Apart from that, we would agree with most of what the Minister said’ (Dáil debates, 14/11/96)

The widespread acceptance of the need for an independent regulator meant that there was little discussion about the powers of the regulator. Specifically, when examining the operational delegation of powers in relation to radio spectrum it is clear that the decision to delegate functions in terms of the management of the radio spectrum was completed without a fundamental review of radio spectrum policy or legislation. It was delegated on the basis of the existing regulatory responsibilities in relation to radio spectrum which resided in the Department of Transport, Energy and Communications (DTEC).

The Telecommunications (Miscellaneous Provisions) Act in 1996 was the first major piece of legislation to delegate significant powers to an independent agency in Ireland. The agency created is accepted to be a very independent regulator by EU criteria. The concern, following a review of the documents and the interviews, is whether the ODTR operational and institutional independence was created by accident or design.

The Department's clear intention was to create an independent regulator. The Telecommunications Strategy Review group cited very good reasons for creating such a regulator, many of which support the credibility theories and policy complexity arguments put forward in previous chapters. The constant refrain from officials involved in the process was the clear desire to remove Ministerial involvement in day-to-day market-based regulation. The creation of the regulatory division within the Department was an early commitment to further delegation and the division responsible for the legislation, as discussed above, was a clear advocate for independence. However, the Act creating the regulator was less clear on the independence of the ODTR. The Act was based on the legislation which created the Director of Consumer Affairs, an office which was staffed by civil servants. Interviewees argued it was difficult to find another suitable model in Ireland. The early drafts of the Act envisaged a Director with civil service staff, responsible to the Department. It is also clear that it was the intention to retain civil service staff in the ODTR and to constrain the Director from hiring people outside the civil service or from having a more active input into the organisation of the regulator. This is particularly evident in 1999 when Etain Doyle, the first Director, attempted to change the status of civil servants by urging them to leave the civil service.⁵² Etain Doyle in interviews argued that there was a strongly held view that her staff should be civil servants. She argued

⁵² Irish Independent, 19/10/99

that following her decision to offer key staff private contracts outside the civil service she was 'star chambered' by senior level civil servants to encourage her to retain her civil service staff. The ability of the ODTR to hire staff with the appropriate skills for the operational responsibility it had is a key indicator of independence. Although legislatively the ODTR was independent there were informal constraints and norms which applied to limit this independence.

There is also the evolution of the drafting of the Act against the backdrop of the larger Utility Commission proposal being enacted later and this, combined with the urgency created by the strategic alliance with KPN-Telia, led to an Act which can be interpreted as creating a very independent regulator, but without the conviction that this was the political intention of the Act.

In relation to radio spectrum functions there were concerns at official level around the relative responsibilities of the Minister and the regulator. The Act does delegate wide powers to the regulator with some justifiable oversight by the Minister in terms of policy. However, the powers to allocate, plan and collect fees for radio spectrum are clearly delegated and it was the clear intention of the regulatory division to ensure these powers were delegated. The documentation from the Department shows a clear desire to remove Ministerial influence on radio spectrum allocations which had been an issue certainly in terms of state

commercial companies such as Telecom Éireann and Radio Telefís Éireann (RTÉ) lobbying against radio spectrum allocation for services in the past. However, there is a lack of documentation or strategy on radio spectrum which suggests that little discussion seemed to take place on the actual functions to be delegated and there are only brief exchanges in relation to the licensing regime for radio spectrum. The issue of deflectors certainly helped the progress of the Bill and once enacted, Ministers could effectively argue that deflectors were an issue for the ODTR.

The impact of European directives is important in terms of the timing and impetus to create an independent agency. The progressive liberalisation of the market in the early 1990s and the insistence by European directives of structural separation of the regulator from the political process was a key driver of the project in the Department. Equally the European directives served as a framework for the officials in drafting the legislation, as many of the functions in terms of market opening and licensing were being debated and laid out in directives leading up to the creation of the ODTR. There is no doubt, based on the early internal departmental reports and the globalisation of communications markets, that Telecom Éireann would have been privatised. Therefore, the need for a credible regulatory framework would have led to the creation of an independent regulator. The pace of this change, however, was driven by the

European directives which accelerated liberalisation, privatisation and the strategic alliance.

CHAPTER 6: TELECOMMUNICATIONS REGULATION IN THE NETHERLANDS: THE NON-DELEGATION OF RADIO SPECTRUM

INTRODUCTION

The introduction of telecommunications regulation in the Netherlands has many parallels with the previous case studies. Many of the legislative and institutional changes were timed to coincide with legislative changes in Europe. The progressive liberalisation of the telecoms market and the privatisation of the telecom operator, which was noted in the Irish case study, also occurred in the Netherlands. The main telecommunications operator was privatised in the 1990s and the telecommunications regulator was created via legislation in 1996. However, although Ireland, UK and Netherlands worked within a common European regulatory framework, the Netherlands chose to deal, at a national level, with the institutional challenges in a different way to the cases we have looked at so far.

The Netherlands was the only member state not to delegate radio spectrum responsibilities to a separate or converged independent telecommunications regulator. In the UK a Ministerial agency was created in 1990 and later was merged in 2003 within an independent converged regulator. In Ireland, the

responsibility for radio spectrum was delegated to the independent telecommunications regulator under legislation in 1996. In the Netherlands the radio spectrum authority is a separate agency under the control of the Ministry and has remained separate from the telecommunications regulator despite several debates in the Netherlands on the institutional arrangements for the liberalised telecommunications market.

This case study will examine the key decisions of the Netherlands' administrations as they liberalised their market. Firstly, the case study will examine the history of telecommunications regulation and specifically the regulation of radio spectrum. Secondly, the legislative decisions creating the independent regulator, particularly the Interim (1996) Act will be examined. The key drivers and influencers of policy makers leading up to the enactment of the Interim (1996) Act will be assessed. Finally, the case will examine the non-functional factors, particularly political leadership, and whether there is evidence that delegation of authority or otherwise was the product of political leadership or tradition.

The sources in this case differ to the previous two cases. This is mainly due to the fact that Parliamentary debates are not in English. Therefore, interviews have been conducted with key politicians active at the time of the legislation. Unlike

the other cases however there is very little legislative and Parliamentary activity. The Dutch political system places a strong reliance on the role of the Minister and his or her accountability to Parliament. There is only one piece of legislation to be considered, so key ministers and key officials in the Ministries have been interviewed. It was also important to discuss the role of the separate radio spectrum agency with both agency officials and Ministry officials. Finally, as with other cases, there are common personalities who have made the transition from Ministry to independent agencies and these individuals are key to an understanding of the process of institutional change in the Netherlands. A useful source to complement the interviews is a number of OECD and academic studies which have reviewed the Netherlands telecommunications market and its regulatory framework.

Table 14: List of interviewees for Netherlands case study

Name	Title & Key Responsibility	Role in creation of OPTA
Annemarie Jorritsma	Minister for Transport and Economic Affairs from 1994-2002 and deputy prime minister from 1997-2002.	Minister who was responsible for Legislation and senior member of VVD party

John Derkson	Radio communications agency	Involved in both Ministry and radio communications agency. A liaison official with OPTA
Hans Houdjink	Radio communications agency	A senior director in the Radio Communications Agency
Hans Bakker	Officer in Ministry of transport, general manager of OPTA and consultant	Key official in Ministry drafting legislation and senior member of regulator until 2002
Jens Arnbak	First chairman of OPTA 1997-2004	
Chris Fonteijn	Current chairman of OPTA	
Jos Huigen	Official in Ministry of Economic Affairs	Senior official in Ministry of Economic affairs and in the regulator
Mark Frequin	Director of Telecom Section : Ministry of Economic Affairs	
Lauren van Brinkhorst	Minister for Economic Affairs 2003-2006	Mr. van Brinkhorst was the Minister for Economic Affairs in the second cabinet of Jan Peter Balkenende of the Netherlands formed on May 27,

		2003.
Marjet van Zuijlen	Partner/Director at Deloitte Netherlands	Labour spokesperson and member of Parliament during passing of telecommunications act

THE HISTORY OF RADIO SPECTRUM REGULATION IN THE NETHERLANDS

Telecommunication regulation and policy remained unchanged for most of the 20th century in the Netherlands. The process of radio spectrum regulation is common in the Netherlands with the experience in the other cases. In most European countries the management of radio spectrum was a matter for government civil servants. The Telephone Act (1904) created a state enterprise, PTT Nederland (Post Telegraph and Telephone), which was a division of the Ministry of Transport, Public Works and Water Management. Similar to other cases the treatment of radio and broadcast was different. The Radio Broadcasting Transmitter Act (1935) removed the responsibility of radio and television broadcasting from PTT Nederland and it has remained separate ever since.

In 1989, PTT Nederland was transformed into a state-owned private limited corporation, again a process which mirrored developments in the UK in 1984

with the creation of British Telecom and in Ireland in 1983 with the creation of Telecom Éireann. The new entity was called Koninklijke PTT Nederland ('KPN'). KPN would be progressively privatised in the 1990s. The legislation creating KPN, in Dutch 'Wet op de telecommunicatievoorzieningen', abbreviated to the Wtv Act, also created a monopoly concession for KPN which was gradually reduced by various amendments to the Wtv Act in the 1990s, reflecting changes in EU directives. The monopoly concession was similar to the UK progressive introduction of competition from 1984 until the early 1990s. The market was completely liberalised by the Competition Act (1998) which enacted the ONP (Open Network Provision) Directives.

During this period, regulation of all telecommunications services and radio spectrum was reorganised in the Ministry of Transport, Public Works and Water Management. From 1989 to 1995 the new division of communications and post (hereinafter in Dutch HDTP) was split into a policy affairs directorate and a Functional affairs directorate. However, by 1995 the policy affairs directorate could not adequately regulate and supervise the parties operating in the market. According to Eijssvoogel there was also an issue with operating as most important shareholder of KPN and at the same time managing an increasingly liberalised market (Eijssvoogel, 1997).

The supervision and regulation of the market was transferred to the newly created, Directorate Supervision of Networks and Services (hereinafter TND) and the Functional affairs directorate was replaced by the Radio Communications Agency (hereinafter RDR). Eijsvoogel (1997) argues these agencies were designed to be future independent agencies but in 1995 were still under direct Ministerial control. The respective remits of these agencies at this time is important to consider. TND was essentially the regulator responsible for issuing licences and permits. TND also monitored compliance with licence conditions and regulations. Finally, TND had responsibility for the dispute resolution and interconnection between parties operating in the liberalised market. The RDR, like its UK counterpart, the Radio Communications Agency, had responsibility for radio spectrum including issuing licences and monitoring interference.

In many ways this mirrors the evolution of regulatory responsibilities in Ireland and to a lesser extent in the UK. The UK at this time had a separate non-governmental agency, Oftel, dealing with the telecommunications sector. The RDR in the Netherlands was no different to the Radio Communications Agency. In fact there are many parallels. The regulation of radio spectrum remained the responsibility of the Ministry. Interviewees argued that the RDR remained under the Ministry and remained in the north east city of Groningen for regional and

historical reasons⁵³. This is similar to the arguments made by interviewees in the UK where the distinct geographic location of the Radio Communications agency in London's Docklands was highlighted as a reason for its separation from the Ministry. The radio spectrum responsibilities, which had been the responsibility of KPN, were carried out by a unit based in Groningen. When these tasks were passed to the Ministry it was logical to keep the same staff and offices in Groningen. Over the subsequent years, interviewees confirmed that proposals to bring the agency to The Hague, or to merge it with the independent telecom regulator, were resisted by local politicians who argued that Groningen needed the jobs⁵⁴. Officials from the RDR agreed with the historical reasoning for having the agency in Groningen but argued that there were specific spectrum issues related to interference which meant that Groningen was an appropriate location.⁵⁵

Interviewees from both the agency and others involved in the political process at the time argued that its technical expertise was also a factor in keeping the technical spectrum experts from KPN in Groningen and not losing that expertise. There are further parallels here with the Radio Communications Agency in the UK. Both were Ministerial agencies historically located outside their Ministries

⁵³ This was specifically mentioned by RDR interviewees but also by Jens Arnbak

⁵⁴ Specifically interviews with Jens Arnbak and Hans Bakker

⁵⁵ Interviews with John Derkson and Hans Houdijk. Groningen geographically had been the location for a number of unlicensed radio stations and the agency were located in this area to tackle such illegal broadcasting

and both remained distinct units because of the perceived expertise and autonomy of the units prior to their creation as separate agencies.

TELECOMS REGULATION IN NETHERLANDS

This section will examine the creation of the telecoms regulator, its powers, its remit and the legislation in 1996. As discussed earlier, the reorganisation of the Ministry of Public Transport led to the split between radio spectrum matters which were managed by the RDR and telecommunications regulatory functions, managed by TND. Telecommunication privatisation policies began in 1982. The initial policies adopted were essentially public sector reform. The aim of these policies was initially aimed at reducing the size of government by transferring activities to the private sector, or by contracting out non-core activities to agencies. The reforms were driven by a number of key members of the government and senior civil servants. According to Yesilkagit and De Vries the agenda was stated clearly:

‘...next to deregulation and decentralisation, privatisation forms a crucial part of government policy: achievement of budgetary savings, the improvement of administrative control, and the strengthening of the market sector’ (Yesilkagit & De Vries, 2004 , p. 965)

The ability to drive this agenda was helped by agreement with private sector unions and employers. The second Lubbers coalition also had agreements with the public sector unions where pensions and jobs were protected. Jens Arnbak argues that the political leadership shown by these coalitions in the 1980s was driven by changes in the market elsewhere, like the UK. Jens Arnbak was appointed by Mrs Smit-Kroes, the Minister for Transport, in 1989 to research the future regulatory models and privatisation options. He agreed that their report emphasised particularly the developments in the UK⁵⁶. The report of the ‘three wise men’ recommended the privatisation of the telecom company and the creation of an independent regulator along similar models to the UK. In relation to radio spectrum it did not make any special recommendations but did recognise the importance of radio spectrum in the future development of the market.⁵⁷

From 1991 the emphasis was placed on the creation of agencies. Yesilkagt and De Vries (2004) describe these agencies as ‘Agentschappen’. They are defined as:

‘...independent in terms of financial and personnel management but remain part of the Department’ (Yesilkagit and De Vries, 2004 , p. 959)

⁵⁶ Interview Jens Arnbak

⁵⁷ Interview Jens Arnbak

The reforms initiated by the first Lubbers coalition and subsequent coalitions in the 1980s and early 1990s were achieved without much resistance from the polity. Despite several changes of government, the drive towards privatisations was continued. In these coalitions the Christian Democratic Party (Cda) was the key part. One of its Ministers, and the key driver of the agenda for privatization, was Mrs. Neelie Smit-Kroes, the current competition commissioner in the European Commission. Jens Arnbak, the first head of the regulator and an expert advisor to Mrs Smit-Kroes, argued that the privatisation agenda particularly in telecoms was driven by her⁵⁸.

In 1994, Annemarie Jorritsma, the opposition spokesperson on telecommunications for the Volkspartij voor Vrijheid (VVD) or People's Party for Freedom and Democracy, tabled a motion calling for the establishment of an independent regulator. The VVD is the most vociferous supporter of private enterprise in the Netherlands and months later as Minister, Mrs. Jorritsma, was obliged to support her own motion and start the process of writing legislation to create the independent regulator.

She created a small team to draft the legislation and also created a Commission to advise her on policy. The Commission's advice had to be followed by the

⁵⁸ Interview Jens Arnbak

Minister and, if it wasn't, the Minister had to explain her decision, to differ from the advice, to Parliament. In 1997 when the regulator was created all of those employees in the TND were moved to the Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA), the independent regulator. The RDR's status, however, remained unchanged at this time and was considered an 'Agentchappen', a distinct agency within the Ministry. It is important to note that there is no legislative basis for the RDR. Similar to the UK's Radio Communications Agency, created in 1990, the creation of the agency was an executive decision.

It is important to examine the creation of the telecom regulator and then examine the role of the RDR and finally examine the importance of EU policies on the institutional changes.

The Creation of the Regulator, OPTA and the Telecommunications Act 1996

The drafting of legislation to create the independent regulator was initially directed by a staff of five people in the TND. Hans Bakker, the head of the unit, said that the process was slow. Although there was Ministerial support for the measure and consensus in Parliament, the civil service in the Netherlands was cautious towards the creation of an independent agency outside of the Ministry.

Bakker recalls that at a conference of civil servants to discuss the proposed institutional changes, a civil servant suggested that the regulator should be like a Greek temple with an impressive façade, but with nothing to support it. Bakker had difficulties with a number of Ministries trying to get the legislation finalised because, he argued, the proposal, although accepted by civil servants, they wished to minimise the influence of the agency⁵⁹.

Within the Ministry of Transport, the drafting of the legislation was delayed by capacity issues as the senior civil servants argued that there were not sufficient resources available to draft the legislation. The Ministry of Economic Affairs resisted the legislation as they were in the process of creating a Dutch competition authority, the Nederlandse Mededingingsautoriteit (NMa), and in their view the regulator should be part of the Competition Authority not a separate institution. The Home Office was concerned at the concept of independent regulation. It resisted every power proposed by the draft legislation. They argued against giving the regulator the power to fine and said this should only be done by a Minister. They resisted the legal status of the regulator, arguing that it should be an agency of the Ministry. Each of these issues was addressed, either by a combination of Ministerial will or negotiation. The outcome, however, was a slower process of drafting. Chris Fonteijn, the current chairman of OPTA,

⁵⁹ Interview with Hans Bakker

although not involved at the time, can attest to the difficulties raised by some Ministries to the creation of OPTA. He commented that outside his office in OPTA is a framed letter from the Minister of Interior Affairs to the Minister for Transport, Mrs. Jorritsma, Minister for Transport which, paraphrasing Mr. Fonteijn, says you can have your OPTA⁶⁰.

The resistance continued even when the legislation had been agreed by government and was before Parliament. In the final discussions in Parliament, the Minister for Economic Affairs proposed an amendment which would refer all decisions of the regulator for prior approval by the competition authority. Hans Bakker argued that throughout this process, he needed to get supportive members of Parliament to question the Minister and to push the agenda forward. He explained that although Mrs. Jorritsma was a Minister and a member of government she needed broad cross party support for the creation of OPTA.⁶¹ This is confirmed by Mrs. van Zuijlen, who was a member of Parliament for the Labour party. If Hans Bakker had a difficulty with the civil service or political difficulties from other Ministries, Hans Bakker would contact Mrs. van Zuijlen to get her to raise the issue in the Dutch Parliament. The Minister, who was equally frustrated by other Ministers and Ministries, would welcome the question. She

⁶⁰ Interview Chris Fonteijn

⁶¹ Interview Hans Bakker

would return to her Ministry arguing the Parliament wanted such a change in the legislation.

The use by civil servants of the Parliament in this fashion is unusual. There is a risk that Hans Bakker, as an interviewee, may be overstating his role. However, other interviewees have confirmed his account of events. Mrs. van Zuijlen confirmed she had asked questions given to her by Hans Bakker, and Jens Arnbak confirmed that Hans Bakker continued the practice when he joined OPTA. The Minister for Economic Affairs from 2003-2006, Lauren van Brinkhorst, confirmed also that Hans Bakker's tactics in the lead up to the legislation, and during his time in OPTA, annoyed many people in the Ministry, and Mr. van Brinkhorst. In interviews Mr. van Brinkhorst said one of his first duties as Minister was to ask Jens Arnbak to sack Hans Bakker from OPTA because of his divisive relationship with the Ministry.

Mansell, Davies and Hulsink (1996) reflect on the general confusion and lack of clear strategy in the Ministry at the time:

'From 1993 until the summer of 1995 preparations were made for new telecommunications legislation. The intention was to establish an infrastructure 'duopoly' whereby PTT Telecom would compete with a

second fixed infrastructure licensee. However the duopoly policy appeared to be abandoned in the summer of 1995. Draft legislation called for a 'double duopoly' comprised of a consortium of trunk/national and local/regional operators and a licensing regime giving separate licences to local/regional and trunk/national operators. In June 1995 the draft legislation was rejected by Parliament for its complexity' (Mansell, Davies, & Hulsink, 1996)

The Interim Act (1996) which created OPTA did make the regulator explicitly independent. The regulator was to be run by a full time Chairman supported by two part time members of a board. All the members of the board were appointed by the Minister. The law does not specify any specific expertise however one of the board members is a lawyer and the other is an industrialist. A number of interviewees have said that the appointment of Jens Arnbak as the first chairman of OPTA was apolitical. The appointment, according to Mrs. Annemarie Jorritsma, was not political. Mrs. Jorritsma also argued that the appointment of Jens Arnbak was important because the appointment needed to be credible. She pointed out that Professor Jens Arnbak was not a member of her political party but a member of the Labour Party. Other interviewees have argued that consideration was given to former senior industry figures as potential chairmen, but Mrs. Jorritsma was keen to give the agency credibility from its inception and

therefore appointed an academic and former advisor as opposed to an industry figurehead.

The Act allowed OPTA to operate free from interference. The staff of TND was moved to OPTA and the offices physically relocated away from the Ministry. Funding for OPTA came from an industry levy with some funds from the Ministry for advice. The Ministry, however, did approve the budget of OPTA and can therefore indirectly influence the activities of the regulator. One interviewee, Hans Bakker, the first general manager of OPTA, argued that this influence was never more than bluster from the Minister as the Ministry could not really propose changes. He argued that there were many meetings in the early years where the Ministry complained of the cost of the regulator but OPTA was never compromised on funding. Ministry officials however, disagree with this and believe that the power to approve the OPTA budget is a strong leverage over the activities of the regulator. They argue that they have managed to reduce the OPTA budget. From either perspective it is a clear diminution of independence.

OPTA is accountable to the Minister but not officially to Parliament. The role of Parliament in the Netherlands is important. Interviewees from the Ministry and former ministers rejected the view that OPTA had any accountability to the Parliament. The Ministry always advised OPTA not to appear before Parliament.

Mr. van Brinkhorst, a former Minister, confirmed that one of his first acts as Minister was to write to all agencies under his remit, including OPTA, explaining that his remit was to explain policy and he had, therefore, political responsibility to Parliament as such agencies did not have political responsibilities.⁶² OPTA did appear before Parliament, normally as Jens Arnbak described, to explain their decisions only. This separates OPTA from the many other Ministerial agencies created at this time in the Netherlands.

The view of the government was that once the European directives had been agreed, the Netherlands should liberalise their telecoms market as quickly as possible. Mrs. Jorritsma argued that the Netherlands looked to the experience of the UK and saw, as a first mover, how their industry was developing, so the decision was to open the markets and create the regulator as quickly as possible. Mrs. Jorritsma's view was that the market should be left to function without regulation if not needed. This is important as it defined the relationship between the Minister and the first regulator, Jens Arnbak, who at times disagreed with the views of the Minister on what was the role of the regulator.⁶³

⁶² Interview Mr. van Brinkhorst.

⁶³ Interviews with Mrs. Jorritsma and Mr. Jens Arnbak.

Mrs. Jorritsma argued that her preference, and that of her party, was for the regulator to be a department of the NMa (Dutch Competition Authority) and the debate around the Interim Act (1996) and subsequent establishment of the NMa in 1998 was whether institutionally the agencies would merge. Following the re-election in 1998 of the 'Purple coalition', Mrs. Jorritsma assumed the role of Minister for Economic Affairs and Deputy Prime Minister. She transferred the responsibilities for OPTA and the Radio Communications Agency into the Ministry of Economic Affairs. The move was recognition that these agencies needed to work more closely together. Interviewees have remarked that the Ministry of Transport was an infrastructure department dealing with waterways and it seemed appropriate for the telecommunications activities, now part of a liberalised market, to be under one economic Ministry.⁶⁴

It is clear from interviews and previous discussion of the political culture that the creation of OPTA was a fiercely resisted proposal. The regulator created is not very independent. Although nominally in terms of staffing and funding it is independent, the budget and major appointments require Ministerial approval. It is also significant that the remit of OPTA at inception was limited with both radio spectrum and numbering not delegated. The next section will look at the

⁶⁴ Interview with Hans Bakker and Mrs. Jorritsma

regulation of radio spectrum and the developments of the Radio Communications Agency.

THE REGULATION OF RADIO SPECTRUM IN THE NETHERLANDS: THE RADIO COMMUNICATIONS AGENCY

The Interim Act (1996) led to the creation of OPTA, which was officially established in August 1997. The Act however makes it clear that the Minister retains large areas of responsibility, one of which is granting licences for the use of radio spectrum. The creation of OPTA did not lead to a legislative solution for radio spectrum. Although, as mentioned above, the reorganisation of the Ministry of Transport was designed to create two agencies, only OPTA, under the Interim Act (1996), was created. One interviewee, involved in the drafting of the Interim Act, argued that there was very little contact with the Radio Spectrum Agency (RDR) and very little discussion of radio spectrum being part of the regulator's remit.⁶⁵ The Interim Act was designed to create the institution but not necessarily address the remit of the regulator. An example of this was the issue of numbering. The national numbering range is a core task delegated to all

⁶⁵ Interview Hans Bakker

regulators (see earlier chapters). However, this task was not delegated via legislation to OPTA in 1996. It was retained by the incumbent operator KPN until 1998.

Interviewees argued that the creation of the regulator represented the allocation of new powers required for a liberalised market not a transfer of existing powers. Considering the issues raised above, and the resistance to an independent institution, the argument that the delegated powers were new powers is a strong argument and explains to some extent the view that there was no appetite to tackle the issue of radio spectrum.⁶⁶ Also, Mrs. Van Zuijlen argued, from the perspective of the Parliament, that issues raised by the creation of OPTA were the main concern of members of Parliament. Radio spectrum responsibilities were not discussed, and the remit of the regulator was not an issue in the Parliamentary debates.

The attitude of industry is also interesting. Despite the views expressed in earlier chapters that the creation of an independent regulator, without Ministerial interference, would promote investment, one interviewee argued that those operators already in possession of radio spectrum wanted to maintain the status quo and they tended to be the larger operators. The political feeling therefore was

⁶⁶ Interview Hans Bakker

that creating the independent regulator was enough. All interviewees agreed that investors did not ask at the time, or subsequently, for a delegation of radio spectrum activities to OPTA or any other agency.

There was a consensus view from all interviewees that radio spectrum was considered in the Netherlands as a scarce resource and therefore was more political. The Netherlands is a densely populated country so interference and radio spectrum usage would be of more concern than possibly in previous case studies in Ireland and the UK. A further issue, also raised in the context of the UK case, was the growing importance of radio spectrum and the increasing commercialisation of parts of the radio spectrum and the potential revenue to the government. Similar to the UK in the draft of the Wireless Telegraphy Act (1998), the ‘purple coalition’ in the Netherlands and Mrs. Jorritsma recognised the potential value of radio spectrum. When asked why she did not consider including radio spectrum in the remit of the independent regulator she replied that the decision was influenced by the Minister for Finance. They both wanted to ensure control of the allocation of key parts of the radio spectrum, particularly through auctions.⁶⁷

⁶⁷ Interview Mrs. Jorritsma

Mrs. Jorritsma and interviewees from the RDR agreed that there were a number of other factors which may have influenced the decision to keep the radio spectrum agency part of the Ministry and not move it to the independent regulator. There was a long history of disputes over radio frequencies, particularly pirate use of frequencies and interference. John Derkson argued that because of the high profile of radio frequencies, particularly in relation to broadcasting, it was considered important to keep an agency that could look at the Netherlands strategically and address interference issues. Equally Parliament did not raise the issue of radio spectrum management at the time of the debate on OPTA.⁶⁸

The agency is organisationally independent of the Ministry, but procedures between the Ministry and the agency are not covered by legislation, so any existing rules of engagement are subject to change by the Minister. All employees of the radio spectrum agency are employees of the Ministry of Economic Affairs. The level of contact, however, with the Ministry is informal. Interviewees from the agency pointed to their geographical distance from the Ministry, which is located in The Hague. The agency can advise the Minister on policy issues and has a role to comment to the Minister on proposals by the regulator, OPTA. The agency's funding is mainly from licence fees with

⁶⁸ Interview with member of Parliament Mrs. van Zuijlen

approximately 20% coming from a number of other sources including funds from the Ministry to compensate them for the costs of offering advice and funds from public sector broadcasters for their use of radio spectrum.

The institutional relationship between the Ministry, the radio spectrum agency and the independent regulator was criticised by the OECD (OECD, 1999a). The OECD argued that despite the legal separation from the Ministry and KPN, the independent regulator was closely related to the Ministry, particularly in areas related to numbering and interconnection. They argued:

‘...retaining these functions within the Ministry reduces transparency and enhances the possibility of conflict between the different roles of the government as a regulator and a shareholder.’ (OECD, 1999a, p. 12)

The OECD specifically mentioned radio spectrum as an area of concern and an area where they recommended further delegation of responsibility to OPTA:

‘...the granting of spectrum licences should be carried out in as transparent and independent manner as possible. Although responsibility for establishing the overall frequency plan could be retained within the

Ministry, responsibility for granting licences should be devolved to OPTA' (OECD, 1999a, p. 12)

The Implementation Reports⁶⁹ published by the European Commission advise on the effectiveness of the implementation of the telecommunications liberalisation directives and normally comment on institutional issues where there is an implementation problem, however, for the Netherlands, the issue of separation of institutional responsibility between OPTA and the Radio Communications Agency is not referred to in the reports. The reports note that OPTA had exercised its independence and notes in the 6th report that OPTA's advice on the number of licences to be used for 3G (UMTS) Radio Spectrum was not taken by the Ministry. Despite this, they have not commented. Interviews with European Commission officials involved in the process suggest that this reflected the interpretation of the directives by the European Commission, which, although requiring an independent regulator where the Ministry retains a shareholding in the principal operator, does not prescribe views on the remit of the regulator and on obligations to include radio spectrum as part of the responsibility of the regulator. The European Commission argues this is a matter for states to decide.⁷⁰ It is hard not to conclude that in relation to the creation of the independent

⁶⁹ http://ec.europa.eu/information_society/policy/ecom/comm/doc/implementation_enforcement/annualreports/

⁷⁰ Interview Peter Scott. Peter Scott is listed as an interviewee in the Irish case study but he was interviewed in relation to the implementation reports in both countries.

regulator the Minister proposed the minimum level of delegation required by EU directives. This was a compromise solution against fierce resistance from the civil servants in a number of Ministries.

Before assessing the role of the non-functional factors, like the impact of the European directives, on the decision to create OPTA, it would be appropriate to view the evolution of the institutional arrangements following the Interim Act in 1996.

Evolution of Telecommunications Regulation, specifically Radio Spectrum

Unlike the other cases studies, there has been no institutional evolution in the Netherlands. The Interim Act 1996 is still the principal piece of legislation covering OPTA. Interviewees confirmed that some debate had taken place around the status of the competition authority (NMa) and OPTA. For example, at the end of 2002 OPTA started discussions with the NMa, the competition authority, to discuss bringing the agencies closer together. Jens Arnbak and Hans Bakker both confirmed this was in many ways self-preservation as politicians and Ministers had discussed moving the regulator into the Competition Authority. Mrs. Jorritsma had expressed the view, in interviews, that she would prefer such a solution. The regulator thought that by pre-empting the discussion they could

try to maintain some influence over any future institution, or achieve a consensus with the NMa which would ensure some survival for the regulator. These views were based on a perception that OPTA was a temporary institution. The philosophy of the government was summed up in a view of the OECD on the 1998 Act:

‘The Act foresees the government (including the independent regulator’s agency) remaining as a key player in the market until it can be shown that the market or specific segments of the market are sufficiently competitive to allow the Government to forebear from regulation’ (OECD, 1999a, p. 7)

This temporary status influenced the views of many in Parliament and the agencies. For example, the Radio Communications Agency interviewees argued it could not be merged with the OPTA as its role was strategic and could not be associated with a ‘temporary’ organisation.⁷¹

The proposal to merge OPTA and the NMa was discussed by the two agencies and an agreement reached. According to one interviewee, the proposal was

⁷¹ Interviews John Derksen & Hans Houinj. During interviews there is a general air of dismissiveness towards OPTA, seeing OPTA as the petulant child who should know its place.

greeted in the Ministry of Economic Affairs with ‘some surprise’, the Minister, retorting that he was not interested in institutional issues⁷². Mr van Brinkhorst explained that he was concerned at that time with relationships between the regulator and KPN, and the relationship with the regulator and the Ministry officials, both of which were difficult. He argued that it was not the right time to consider merging. He was particularly concerned that some personalities in OPTA, specifically Hans Bakker, were seen as the root of disagreement with KPN and with the Ministry. The Minister was concerned individuals may have more influence in a larger merged entity.

The role and status of the Radio Communications Agency was reconsidered in 2003 by the Minister for Economic Affairs. The Minister established the Radio Spectrum Policy Commission under the chair of Gerrit Jan Wolffensperger. The review was initiated, as described in the 2005 Policy memorandum as a result of:

‘A combination of technological developments, market developments and a changing outlook on spectrum utilization prompted the Government to evaluate its radio spectrum policy’ (Ministry for Economic Affairs Netherlands, 2005, p. 4)

⁷² Interview Hans Bakker

The Commission's recommendation related more to the future of radio spectrum usage and the allocation methodologies. The Commission recognised the growing importance of the market and made similar observations to the Professor Cave report referred to in the UK case study. However, the Commission, unlike the Cave report, recommends:

'...the Minister of Economic Affairs should bear ultimate responsibility for integral radio spectrum policy' (Ministry for Economic Affairs Netherlands, 2005, p. 5)

Following the work of the Commission, the Minister for Economic Affairs published the new memorandum on Radio Spectrum policy. The Minister makes it clear, unlike the other case studies, that the government has a role beyond just setting policy:

'As far as the radio spectrum policy is concerned, the government's role has planning, allocative and supervisory aspects, because frequencies for specific applications are scarce and because the use of frequencies may result in interference affecting other users, both within and outside the borders of this country and because it is important to safe guard

applications of a public interest' (Ministry for Economic Affairs Netherlands, 2005, p. 7)

The responsibilities are clearly stated later in the memorandum:

'Under the new more transparent system, tasks and powers will be entrusted to a single Minister, which means that the Minister who takes the decision on whether to grant a licence' (Ministry for Economic Affairs Netherlands, 2005, p. 7)

Interviews with senior officials in the Radio Communications Agency argued that part of the reason for the report's findings was a perception that the agency was doing well. They argued that they do not receive complaints from industry or others, about the agency being part of the Ministry. John Derkson argued that what investors want is certainty and transparency. He argued that clear allocation procedures were the main demand of those acquiring radio spectrum.⁷³ This view is supported by the 2005 Radio Spectrum policy memorandum which argues:

⁷³ Interview John Derkson

‘...it has been found that users, with the exception of commercial broadcasters, are generally satisfied with the radio spectrum policy pursued’ (Ministry for Economic Affairs Netherlands, 2005, p. 4)

The Radio Spectrum policy memorandum in 2005 restated the view that the role of radio spectrum management is strategic and therefore a part of government. There is currently no consideration of including radio spectrum management as part of the regulator. However, interviews confirmed that the Ministry of Economic Affairs is considering how to address changes in the market place and assess the success of the Ofcom model. The Dutch government, according to one interviewee, is concerned that independence may not be required in future institutional regimes⁷⁴. The market is competitive and therefore the need for an independent regulator is less important, and the role of the Competition Authority is therefore more important. However, the Competition Authority as currently constituted under the 1998 Dutch legislation is not independent of the Ministry. The Commission which heads this agency is semi-independent but the staff and resources are all Ministry staff.

⁷⁴ Interview Jos Huigen

The debate, according to one interviewee in the Netherlands, is focused on the accountability of the Minister to Parliament and not agencies⁷⁵. OPTA reports directly to the Minister and unlike the other case studies the regulator should not report to Parliament. This is designed to ensure that Ministers are accountable. The argument made for creating independent agencies in earlier chapters was that credibility was a key factor. Decisions in liberalised markets should be non-political. To a large extent because, particularly in the Netherlands, the markets are competitive and less politicised, the issue of political interference does not exist. The formerly state-run enterprises are in private hands and the only concerns are policy related.⁷⁶

The lack of legislative changes and the limited remit of the independent regulator suggest that the Netherlands differs from the other cases as the creation of OPTA is considered an isolated incident. The decision to create an independent regulator for telecommunications has not been followed in other sectors where for example the preference is for regulators to be part of a semi-independent competition authority. The approach in the Netherlands reflects their historical consensus approach to policy formation. The OECD called for the NMa to be made more

⁷⁵ Interview Hans Bakker

⁷⁶ Interview Jos Huigen

independent in 1999 but according to interviewees it is likely the pendulum has swung back to more direct Ministerial oversight.

The next section will examine the non-functional factors mentioned in the literature, as factors explaining the creation of independent agencies, and will consider whether there is evidence of these factors being important in the Netherlands.

NON-FUNCTIONAL EXPLANATIONS OF DELEGATION IN THE NETHERLANDS

The decision to create a telecommunications regulator may, as discussed in previous chapters, be influenced by a number of the non-functional factors, some of which may be external to the telecommunications sector. They reflect issues related to policy tradition, political leadership or new public management reform which drives the creation of regulatory agencies as institutional solutions (Thatcher, 2002b). There are also factors such as blame shifting and the isomorphic effect of the European Union. This section will examine whether these factors were drivers of the reforms in the Netherlands and whether they can explain the institutional decisions taken by policy actors in the telecommunications sector.

Independent Regulation in the Netherlands

In each case study we have examined whether there existed in the country a political tradition or political leadership which influenced the decision to

delegate. The OECD has commented on the culture of cooperation which existed in the Netherlands until the market reforms of the 1990s:

‘Achieving a balance between necessary regulation and desirable competition will be a particular challenge in the Netherlands, because of the country’s long tradition of self-regulatory structures’ (OECD, 1999a, p. 8)

The OECD argued that prior to the 1990s the Dutch approach to competition had been lax with a culture of private agreements between companies. It was perceived that the benefits of EU policies to promote international competition and the benefits for economic prosperity were more important for the Netherlands to pursue. For political leadership or tradition to be a factor there would need to be evidence of cross-sector reforms which at an institutional level promoted the concept of independent agencies in a number of sectors. The political culture in the Netherlands, throughout the period of liberalisation promoted consensus building and was therefore a deliberate, slow process. All interviewees commented on this culture and argued that the concept of independent regulation, an agency outside the accepted established agency structures, was a difficult concept for the executive and the civil service to accept.

Christensen and Yesilkagit (2005) argue that the Netherlands has a weak executive dominance of Parliament and an integrated policy making structure which allows vested interests a strong voice in policy making. Interviewees confirmed this analysis, arguing that the Minister is the key individual in the Dutch Parliamentary process⁷⁷. Irrespective of the independent nature of agencies where they exist, Parliament expects Dutch ministers to take responsibilities for such decisions. However, one interviewer from Parliament argued that at times resistance to delegation of authority is not from Parliament, on the issue of telecommunications there was a clear desire for an independent regulator.⁷⁸

The Parliamentary party structure in the Netherlands is not as disciplined as the Westminster-model. Individual Dutch members of Parliament take positions which may be contrary to party policy. Former Minister for Economic Affairs, Mr. Laurens van Brinkhorst, argued that it was in the Dutch political character to 'propose A, and propose the opposite of A at the same time'. Mrs van Zuijlen argued that Parliament was there to resist policies from the executive if Parliament were against them, irrespective of whether the Minister was from the same political party. She argued that if she got together with a spokesperson from

⁷⁷ Interviews with officials in the Ministry of Economic Affairs, Mark Frequin, Wijnand Smit and Klaus Bouma

⁷⁸ Interview Marjet van Zuijlen, Labour party spokesperson 1994-2000

another political party and they opposed a proposed measure their collective arguments could ‘break a Minister’⁷⁹

The argument that political leadership drove the privatisation agenda which in turn created the need for regulators has been discussed in earlier chapters. It is evident from the policies adopted and their consistent, albeit slow, implementation in the Netherlands that there was a clear consensus towards the creation of an independent regulator. However, there is no clear ideological leadership for such a policy. For example, one interviewee disagreed with the view that Mrs. Smit-Kroes was the driver of privatisation and regulation in the Netherlands. Mrs Smit-Kroes was a key economic Minister and member of the government in the late 1980s which is associated with a more radical approach to state ownership. He argued Mrs. Smit-Kroes interests were to protect the incumbent operator not promote competition⁸⁰. Andeweg (1994) argues specifically in relation to privatisation, that the driver was not ideological:

‘It is important to note the roots of Dutch privatisation are neo-corporatist/bureaucratic, not part-political, and that, other than in the UK, privatisation never became an ideological quest: the trumpets of

⁷⁹ Interview Marjet van Zuijlen

⁸⁰ Interview Hans Bakker

'popular capitalism' have never been sounded in the Netherlands, and privatisation was merely regarded as a pragmatic solution to specific administrative and economic problems' (Andeweg, 1994)

For most of the last twenty years a similar composition of parties has formed the constituents of coalition governments in the Netherlands. Jens Arnbak, referring to the Dutch political party system, explained that there are many political parties in the Netherlands with only slight differences in policy between them.⁸¹ Further evidence that the privatisation agenda was more pragmatic than ideological can be seen in the period 1990-1994 when the composition of the coalition included the Labour Party and the Sociaal Democratische Arbeiders Partij, (SDAP) leader and Minister for Finance, Wim Kok, who redefined privatisation as 'autonomatisation'.

In 1994, for the first time since 1945, the Christen Democratisch Appèl (CDA: Christian Democratic Party), was not in government and the 'purple coalition' composed of more conservative and liberal coalition parties, restated its aims for privatisation. Under new Minister, Annemarie Jorritsma, the privatisation of KPN was accelerated and legislation prepared to create the telecoms regulator.

⁸¹ Interview Jens Arnbak

In other sectors, despite the public reforms, political leadership did not exist in the Netherlands to follow an agenda which opened up markets and promoted independent regulators. For example the Netherlands liberalised its energy markets around the same time as the telecommunications market but decided to include energy as part of the Competition Authority. Gilardi (2003a) assessing the extent of delegation in seven sectors in the Netherlands concludes:

'A first sharp difference is that between the electricity and telecoms regulators. The former has very weakly autonomous powers, decision-making powers but quite extensive regulatory powers, while the latter has fewer competencies but higher independence for the agency head and management board, as well as more autonomy for financial and organisational matters, leading to a higher overall independence score'
(Gilardi, 2003a, p. 12)

It is notable that Gilardi considers the electricity regulator to be an independent regulator, despite the fact that the regulator is part of the Competition Authority. Interviewees confirmed the status of the Competition Authority. The Authority is headed by an independent commission of legal and economic experts however the staff and funding for the Authority comes from the Ministry of Economic Affairs. Gilardi recognises this:

‘A second point is the resemblance between the competition and electricity, IRAs, in spite of the former’s almost null independence for decision makers and more extensive organizational autonomy. The similarity is not surprising since the electricity regulator is in fact a chamber of the competition authority’ (Gilardi, 2003a, p. 13)

Interviewees from the Ministry of Economic Affairs did hold the view that the Competition Authority was independent and that it was purely administrative simplicity to have all the employees defined as civil servants⁸². Interviewees referred to the pendulum of Netherlands politics where at times there was an acceptance of independent regulators and delegation from the executive, but the pendulum would swing back to a desire to have all activities under the control of a Minister. Specifically, the pendulum in favour of independent agencies and delegation was at its height during the 1990s and the Ministry of Annemarie Jorritsma, from the liberal Volkspartij voor Vrijheid en Democratie (VVD). Interviewees also commented on the legacy of cooperation and consensus referred to earlier by the OECD⁸³. One interviewee referred to the pyramid of politics in the Netherlands with the Crown at the top and political control within a

⁸² Interviews specifically with Mark Frequin the head of the Telecoms directorate in the ministry of economic affairs but also all others interviewed from the Ministry of Economic Affairs

⁸³ Interviews with Hans Bakker and Jos Huigen

narrow range, and subject to accountability mechanisms in the executive and Parliament. Independent regulators do not easily fit into that structure⁸⁴.

A particular institutional solution, in relation to public sector reform, has been the growth of ZBOs (*Zelfstandige Bestuursorganen*) which are agencies separate from the civil service, managed by boards which generally supervise areas which are specialised with certain technical expertise or areas where independent judgment is required. The Telecommunications regulator, OPTA, is considered a ZBO. Christensen and Yesikagit (2005) argue that many of these agencies are small and deal with specialised areas and in relation to the debate on delegation generally, the growth in agencies since the 1950s in the Netherlands shows that:

'First, policy-makers have always to some extent relied on delegation to non-majoritarian agencies in regulatory administration, but this has mostly served the purpose of integrating the political environment into executive administration. Second, the conclusion is that departmental ministers and governments have been able to secure themselves a strong platform when it comes to providing leadership and control to regulatory administration' (Christensen & Yesilkagit, 2005)

⁸⁴ Interview Hans Bakker

One can make the argument, however, that political tradition instead of working in favour of ideological ideas of small government and privatisation actually worked against such concepts in the Netherlands. Interviewees and commentators have all argued that the process of policy making which allows for a weak executive and the focus of authority on the Minister does not promote the idea of delegation in countries such as the Netherlands. Christensen and Yesilkagit (2005) argue that the specific corporatist approach to policy making and a weak executive evident in the Netherlands raises particular problems for the creation of independent regulatory authorities:

'Parliamentary government makes the political executive accountable to Parliament and with a relatively weak executive Parliament rather maximizes its influence on regulatory administration by insisting on forms of organisation that ensure hierarchical integration. With this form of organisation, the majority can hold departmental ministers accountable for any administrative detail; this is not the case if they allow for delegation to independent regulatory administrations'
(Christensen & Yesilkagit, 2005)

Political tradition and leadership are therefore relevant to the factors influencing the creation of the independent regulator, its independence and crucially its remit.

All interviewees for this case study agreed that the Dutch political system does not like independent regulators and have created very few independent agencies. If, as we see above, there was no political leadership or tradition for delegating powers to independent regulators, the creation of OPTA in 1996 did represent the creation of an agency independent of the Minister, which was unique in the Dutch political structure. Marjet van Zuijlen argued that everyone except the Minister and sections of the Parliament were against it. Although there have been ZBOs which are independent and created under private law, their role is limited specifically to narrow specialised areas and although they have grown in number they represent a long tradition in the Netherlands which is as much about public sector efficiency as opposed to delegation.

The Impact of EU policies

As discussed in previous chapters and in the other case studies, the EU with the publication of their Green Paper (Commission of the European Communities, 1987) started the process of progressively liberalising the telecommunications markets. In the mid 1990s the European Commission was focused on the liberalisation directives which, if transposed, would require countries to establish independent regulators. The issue for this section is to consider how influential is the work of the EU, and to what extent did the inevitability of liberalisation drive the decision to create the regulator?

In the Netherlands this issue is important as there is no obligation to create an independent regulator with a wide remit. Interviewees have differed slightly on the impact the EU had on the creation of the regulator. Hans Bakker argued that without the EU directives there would not have been an independent regulator and he cites the decisions in the early 1990s to open the markets to a limited number of licences with the intention, he argues, of developing a duopoly market which would protect KPN.

Mrs. Jorritsma argued that Europe was a driving force, but albeit slower in the Netherlands. The purple coalition was committed after 1994 to a policy of liberalisation that would have entailed an independent regulator. Mrs. Jorritsma's preference however was for a strong competition authority. Jens Arnbak would agree also that the Netherlands had been liberalising in their 'own Dutch way', starting with Mrs. Smit-Kroes in the 1980s and the European directives forced the government to make decisions in the 1990s which they may have delayed otherwise.

It is clear from the interviewees, and from the slow progress towards liberalisation that the Dutch governments, although seeing the benefits of competitive markets, did not have a culture of independent regulation and the Interim Act in 1996 represented the least they had to do to comply with the directives. Former Minister, Mr. van Brinkhorst, argued that the Dutch culture is to resist change and this would have an impact on the implementation of EU directives. The Dutch he argues have a superior view of themselves compared to their neighbours. He argued that the Calvinist tradition in the Netherlands is strong and can be summarised as a perception, 'thank you my lord, I am a bit better than my neighbour.'⁸⁵

⁸⁵ Interview Mr. van Brinkhorst

The role of Europe in the creation of the independent regulator is therefore crucial to understanding why the Netherlands created their agency. Unlike the other case studies, the Dutch struggled with the concept of independence. It is important to consider here whether Gilardi's (2001) argument that veto players are a 'functional equivalent' of delegation led to the view that what was needed was a minimalist approach to independence. The Parliament's main concern was the risk that the incumbent KPN was close to the Ministry and without a regulator the essential separation of authority in a liberalised market would not have been realised⁸⁶. The need to have an agency regulating an open market seems to be accepted. However, the status of the agency as an independent agency was a concept not accepted by the Dutch. The decisions of the governments, subsequent to the passing of the Interim Act in 1996 and the establishment of the regulator in 1997, are therefore important to get a better understanding of the political culture following liberalisation.

Blame Shifting and other factors influencing the independence of the Regulator

In other case studies it has been clear that other factors identified in the literature played some role in the decision to create an independent regulator. It is clear

⁸⁶ Interviews Hans Bakker & Marjet van Zuijlen

from the Netherlands case that the narrow range of factors which led to the creation of the independent regulator was driven as much by Europe as any other single issue. However, were other factors important to the decision?

One issue, examined in other case studies, is blame shifting which argues that policy makers will delegate responsibility for unpopular decisions to avoid blame. In the Netherlands all interviewees, when asked for examples of blame shifting, said it was not an issue. Mrs. Jorritsma was clear that in her view she was accountable for policy and what she was not accountable for was apolitical and she did not interfere or shift blame to the regulator. This is despite the fact that OPTA in its opening years as regulator rebalanced prices and there was adverse publicity, Mrs. Jorritsma did not hide behind the legislation. Mr. van Brinkhorst when asked about the benefits of blame shifting from a political perspective did not see any occasion when it was considered appropriate. In fact his role on occasions was to support the regulator in relation to price changes and interventions.⁸⁷ The only reference to blame shifting, which is slight, was made by one interviewee who recounted that the most senior civil servant in the Ministry of Transport, when the final Dutch name of the regulator was being discussed, insisted that the first nominee include the word ‘independent’, so the agency would not be associated with the Ministry.

⁸⁷ Interview Mr. van Brinkhorst

Non-functional factors are important in the Netherlands. The role of Europe and the political traditions in the Netherlands played against each other to ensure the slow drafting of legislation to create OPTA. The Netherlands significantly have not reviewed the legal basis of OPTA. In the UK and in Ireland in 2003 there were reviews and changes to the institutional arrangements. European telecommunications directives passed in 2002 were a catalyst for the reviews and were a reason to return to the primary legislation. In the Netherlands, however, the directives did not change the institutional arrangements. The opportunity to update the 1996 Act passed. Again, the pressures evident in the political culture reinforce the view that having created OPTA there was no appetite for more institutional change.

CONCLUSIONS

In the Netherlands it appears there has been limited real institutional change. The independent regulator has been created, as much to comply with the European directives as to create organisationally distinct agencies. In comparison with the other cases discussed there are both similarities and differences. The Dutch and Irish followed a similar privatisation and legislative agenda although the Irish regulator had a wider remit from the beginning. The radio spectrum agencies in the UK and the Netherlands were institutionally the same and the views of Ministers and civil servants in both jurisdictions were similar in relation to delegating authority to independent agencies. The Netherlands however, differs from the other cases in limiting the remit of independent regulation and not evolving the institutional landscape in the ten years since the creation of the regulator.

Officials surveyed at the time the interim legislation creating OPTA was being drafted suggested that the existing political process was:

‘...not regarded as being satisfactory. For example, it was said to be slow and lacking in transparency’ (Mansell, Davies, & Hulsink, 1996)

Mansell, Davies and Hulsink continue in relation to the creation of the independent regulator which suggests little strategic thinking on the role of the regulator:

‘There was a wide range of views on the need for an Independent regulatory agency, which is advocated by the European Commission as a measure to address these problems. When the interviewees in this study recommended the establishment of an independent regulatory they did not have specific views as to how this should be accomplished’ (Mansell, Davies, & Hulsink, 1996 , p. 287)

A key feature of the Dutch institutional response to privatisation was the legacy of co-operation and consensus building which predicates legislative change in the Netherlands. Chris Fonteijn described this system as the ‘Polder Model’, which is a Dutch word for a piece of land under the water level surrounded by dykes. The model tries to explain Dutch decision making. Dutch policy making is governed by the Polder and the view that if you are sinking underwater you will work harder to gain a consensus to get you above water. This decision making model

explains the unique circumstances in the Netherlands and the view that leadership on policy is not often evident if consensus can be achieved. Bruff (2003) argues that despite the dramatic decline in the traditional religious pillars of Dutch society over the past 35 years, the Netherlands has become more, rather than less, fragmented. Policy uncertainty is not an issue as policy moves ahead at a slow agreed pace and the role of veto players becomes more important. Therefore, you can argue for the Netherlands that delegation for functional reasons are not as applicable to this political system as they have been in the other case studies. Yet the fact that there was delegation reinforces the view that the non-functional factors, such as the role of the EU, are important to the creation of independent agencies. Indirectly you can argue that the EU in directing member states to functionally separate from their Ministries the regulatory activities into independent agencies, were promoting credibility arguments. Mansell, Davies and Hulsink (1996) argue that the policy makers wanted to:

'Design a policy and regulatory framework in the Netherlands that builds on the strengths of the consensus style of political decision-making, incorporates both the social and economic objectives, and sends clear signals concerning the behaviour of the players in the dominant market'
(Mansell, Davies, & Hulsink, 1996 , p. 288)

They argue that the positive effects of this consensus style of decision making could be replicated in the decision making of the independent regulator. There was little need for the independent agent model if there were no principal-agent differences and no credibility issues for the agent to address in the liberalised market.

The Dutch approach to telecom regulation and the creation of the regulator was influenced primarily by EU directives and, as the directives did not specify a remit, the remit for OPTA was narrow. The political tradition argument discussed above, and by Thatcher in the literature, is a feature in this case. In the literature the arguments for political traditions or leadership support the view that institutional changes and delegation happen as a result of ideological reasons. In the Netherlands one can argue that political tradition had the opposite effect. Political tradition in the Netherlands promoted consensus-based decisions within the framework of Ministers accountable to Parliament. Independent regulatory authorities, delegating authority away from the centre, was not part of the culture.

CONCLUSIONS

This thesis has examined the non-functional factors explaining the growth of delegation to independent agencies. The delegation of responsibilities to independent agencies has been growing in recent decades and in some sectors regulatory functions previously carried out by Ministries and state administrations are being performed by agencies independent of government.

The literature argues that delegation is more prevalent in economic sectors, specifically sectors subject to market opening. The independence of these agencies is explained principally by functional reasons based on the principal-agent theories which argue that policy actors will delegate to independent agencies to credibly commit to certain policies, such as market liberalisation.

However, despite the importance of credibility as a factor explaining delegation to independent agencies, there are still wide variations in the level of independence between countries and sectors. This suggests that the non-functional factors do influence the level of independence. It is critical therefore to our understanding of the process of delegation to have a clearer understanding of the non-functional factors influencing policy actors in their decision to delegate to independent agencies.

To concentrate on the non-functional factors this thesis has controlled for the functional factors in delegation in two ways. Firstly, by choosing telecommunications, which is an economic sector subject to pressures of market opening, and secondly by choosing countries in the European union where the market opening legislative framework was developed through common directives of the EU. By choosing this sector one can argue variations in the level of independence must be due to non-functional reasons. Additionally, choosing case studies on the basis of not only of legislative independence criteria but also using more operational criteria the analysis gives a deeper understanding of the delegation process.

The literature on the non-functional factors has not looked at the reasons behind the operational remit of independent agencies. A review of the operational remit allows us to consider the constraints placed on the independent agency. One of the constraints placed on independent agencies are ex-ante controls. These controls have the effect of ensuring that policy actors' preferences are allied to the agencies. In telecommunications one of the key responsibilities identified for independent agencies in newly liberalised markets is the management of radio spectrum. This specific operational responsibility has been delegated erratically

in the EU. This thesis has therefore selected cases also on the basis of the institutional approach to delegation of the management of radio spectrum.

The case studies examined the process of delegation in the UK, Ireland and the Netherlands. The case studies examined the initial decision to delegate to an independent agency and the evolution of the delegation decision through subsequent legislation. They specifically examined the treatment of radio spectrum management as an operational responsibility. The conclusions, across all cases, are that despite the common framework in the telecommunications sectors, the institutional response of the three countries selected differed.

In terms of the non-functional explanations for delegation each case highlighted national factors which influenced the approach to delegation. For example, in Ireland the decision to include in the same piece of legislation the sale of shares in Telecom Éireann and the creation of the independent telecommunications agency, had the effect of concentrating policy makers' time on the sale of shares not on the agency being created. It also had the effect of focusing the civil servants on the provisions around the sale of shares and it is clear from the Irish case study that the design of the ODTR emerged from a small group of civil servants. National factors are also important in terms of political traditions and political leadership. It is clear from the UK case study that the UK did exhibit

evidence that the institutional changes were provoked by the political leadership of the Margaret Thatcher governments and the privatisation agenda. The argument that state traditions influence the decision to delegate is also clear in the Netherlands case study. The consensus, referred to by many interviewees as a Calvinistic approach to political decision making, is evident in the telecommunications sector where nearly all interviewees expressed the view that the Dutch have a tradition of not wishing to delegate responsibilities away from the executive. The need for the Minister to account to Parliament for all activities makes the decision to create agencies, totally independent of government, very difficult. The Dutch case highlights that political traditions can work both for and against the creation of an agency.

The role of the EU in mandating the creation of an independent agency was also a key factor in cases where there was no previous delegation of responsibilities. From the evidence of interviews it would appear coercive isomorphism of the EU was an important factor. Many interviewees in the Netherlands argued that without the stick from Brussels they would not have created an independent regulatory agency. The additional support for this argument is the fact that the Netherlands have not changed their legislation and the current regulatory authority is considered a temporary solution. In Ireland the influence of the EU was important in the timing of legislation. Interviewees argued that Ireland was

moving along the road of creating an independent agency for telecommunications but were pushed faster as a result of EU directives.

What is clear across all the cases is that the non-functional factors differ from case to case. There is little evidence that blame shifting was a consideration in the Netherlands. In Ireland there is little evidence to support the view that there was any political tradition which influenced the decision to create the independent agency. In the UK the isomorphism evident in the other cases was not a factor mainly because an institutional solution was already in place. We can conclude, therefore, that non-functional factors are vital to our understanding of delegation. In cases where functional reasons should pre-dominate there remain national factors which influence the delegation process.

The treatment of radio spectrum management highlights the importance of the non-functional factors as it is central to the operational responsibility of an independent telecommunications agency. In Ireland there was very little scrutiny of the delegation of these powers and consequently the powers delegated were broad. The evidence from the Irish case study shows the problems of delegating for policy actors without ex-ante controls. In Ireland the management of radio spectrum was delegated, with only a consenting role for the Minister of Finance over the level of fee for radio spectrum licences, yet the allocation and licensing

was the responsibility of the independent telecommunications agency. In this case the conflicting preferences led to a standoff between the agency who had allocated the radio spectrum, and the Minister who held the view that the proposed revenue from the radio spectrum licences would not maximise the revenue potential for the government. The standoff led to a delay in the awarding of the radio spectrum licence, but crucially it ultimately led to changes in legislation which imposed more ex-ante controls on the re instituted agency. If political actors are delegating key national resources, such as radio spectrum, they need to ensure the preferences of the agent cannot conflict with the expectations of the policy actor. In the UK, for example, a senior official argued that the Secretary of State retain the right, albeit limited, to allocate and charge for specific types of radio spectrum. The official argued that to delegate this responsibility to an independent agency could expose the secretary of state to criticism for not being able to raise the revenue from this specific piece of radio spectrum. In the Netherlands, the political tradition mitigated against delegation. However, this need to maintain operational control over the key national resources of radio spectrum meant that no delegation occurred. In radio spectrum management therefore, the conclusion is that policy actors will not delegate complete responsibility and will retain ex-ante controls, where the policy actor believes there is financial reward to the government from retaining control.

In all cases the evolution of the initial delegation decision is a valuable contribution to our understanding the delegation process. In the Irish case the regulatory unit within the Department was responsible for drafting the legislation and had a major influence on the format of the legislation which created a very independent agency. However, the preferences of the policy actors were in conflict with the preferences of the agents and the subsequent legislation attempts to constraint the agent through changes to the agency's leadership structure and clear provisions for the Minister to intervene. In the Netherlands the reluctance to delegate was evident in the interviews with Ministry officials. There was a clear reluctance to delegate radio spectrum management. The role of the EU was important therefore in forcing the Dutch to delegate. The evolution of this decision reinforces this as the Dutch have not changed their legislation and still consider the agency, a temporary solution.

More research is needed on the evolution of delegation. There is a clear trend, based on principle-agent motivations, for aspects of social and economic government oversight to be delegated to independent agencies. This does not hide the tensions which may exist between the policy actors and the agents. For policy actors such independent agencies are useful for blame shifting reasons and from a functional perspective they can be a solution to managing complex policy areas. However, the need for policy actors to ensure agents reflect their

preferences will be shown in the ex-ante and ex-post controls on agencies and more importantly on the evolution of the delegation decision.

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