Delegation to Independent Regulatory Agencies in Western Europe

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The 1980s and 1990s saw sweeping reforms of regulation in Western Europe. Most attention has been focused on privatisation, the ending of state monopolies and the expansion of EC regulation.¹ However, a key element was the creation and role of independent or semi-independent regulatory agencies at the national level.² Such agencies have proliferated and their numbers continue to grow, spreading both across domains (for instance, in most utilities and environmental and food protection) and across countries which had previously few such agencies (for example, France and Italy). Once established, they have often become central actors in decision making.³ Moreover, their role raises issues of democratic legitimacy and accountability.

The creation, design and consequences of independent regulatory agencies represent a classic example of delegation to non-majoritarian institutions. They are created by legislation; hence elected officials are their principals. They are organisationally separate from governments and headed by unelected officials. They are given powers over regulation, but are also subject to controls, inter alia by elected politicians, both in the executive and legislature.

² In Western Europe, the extent of their formal independence from elected officials varies (for ease of reference, they are referred to henceforth as independent).
Cross-national comparison of delegation to regulatory agencies allows important theoretical issues to be addressed. Much of the principal-agent literature is based on experiences outside Western Europe, particularly of delegation by Congress to regulatory agencies.\textsuperscript{4} Hence its transferability to Western Europe can be considered. Moreover, comparing across countries allows the role of specific national factors to be analysed. Finally, the spread of delegation has taken place in an increasingly internationalised environment, thanks to the expansion of European integration, international epistemic communities\textsuperscript{5} and transnational technological and economic developments, aiding study of transfer and learning across countries and across domains.

The article adopts a critical analysis of principal-agent frameworks which are based on the functional logic of delegation (ie. calculations by elected officials acting as principals of the benefits and disadvantages for them of delegating to agencies) and the choice and effects of the formal structure of delegation. It argues that the creation of independent regulatory agencies did indeed respond to powerful functional logics. Elected politicians delegated for their own advantages such as overcoming information asymmetries, blame-shifting, commitment and dealing with complex, technical issues. However, cross-national and cross-domain comparisons reveal that functional logic is inadequate on its own to explain the timing, extent and forms of delegation. Moreover, the consequences of delegation to regulatory agencies were often unanticipated and indeed have not flown entirely from the formal institutional structures set up. The article therefore argues that three sets of factors must be included, in addition to functional logics and the formal structure of delegation, in order to explain delegation to regulatory agencies and its consequences: national


features such as state traditions and other inheritances; policy learning and isomorphism across countries and domains; the effects of time and experiences.

After a brief overview of principal-agent explanations of delegation to independent agencies, the article follows the Introduction by being structured in three parts: the decision to delegate- ie. the creation and strengthening of independent regulatory agencies; choices over the institutional form of delegation to such agencies; the consequences of new or strengthened regulatory agencies. Empirically, it offers examples drawn from four countries (Britain, France, Germany and Italy), across several domains, notably general competition regulation, the utilities, financial services, the environment and food safety.

I Principal-agent models of delegation to independent agencies

Principal-agent theory appears highly applicable to the creation of independent/semi-independent regulatory agencies. Elected policy makers decide to delegate regulatory functions to agencies because of the functions the latter will perform. Delegation involves legislation and conscious consideration of institutional design by legislators.

The decision to delegate and the institutional features of delegation have been examined more formally and systematically using transaction cost analysis by Murray Horn⁶, in terms of four sets of costs: decision making costs- passing legislative for governments and participation in decision making for private interests; agency costs- as agencies fail to comply with the intentions of legislators; commitment costs- the risk that future legislators may intervene; uncertainty costs concerning the future costs and benefit of legislation. These costs affect key features of institutional design, such as whether there is delegation to courts or independent commissions, the entrenchment of the agency (its protection from action by future legislatures to alter its organisational structure), its independence from the incumbent legislature and the extent of procedural rights given to private interests specially to participate in the agency’s decision making.

⁶ Op cit.
Regulation is argued to differ from most bureaucratic decision making in that interests are more likely to be concentrated, offering high benefits of participation for private interests, whilst information is not monopolised by regulators, lowering information costs and easing control and participation; on the other hand, the concentration of interests and the high level of information of interested parties means that uncertainty costs can be high, as affected parties are able to alter the agency’s role away from that intended at the time of enactment. Horn argues that the key factors are the concentration of interests, notably as between beneficiaries of regulation and those bearing its costs, and the degree of consensus or conflict in the regulatory arena. The importance of credible commitment is also underlined for regulation of industries that require large capital expenditure: private investors must have sufficient reassurance that they will recover their expenditures with sufficient profit- otherwise, they will not invest, causing major problems for countries.\(^7\)

II Creating and strengthening independent regulatory agencies: the decision to delegate

The 1980s and 1990s saw the creation or many new independent regulatory agencies in Western Europe. Two broad groups can be distinguished. The first were agencies regulating competition.\(^8\) Examples included utility regulators, general competition authorities and financial bodies. The agencies had powers over matters such as: investigating and preventing ‘unfair competition’ (for instance, illegal agreements and abuse of dominant positions), issuing enforcing and altering licences, determining interconnection among networks and determining price caps. They are sometimes called ‘economic regulators’ but the term is misleading since the agencies also received powers over ‘social’ matters, such as universal service, protecting consumers and aiding certain groups such as the poor, rural dwellers, the elderly or the disabled.

\(^7\) Levy and Spiller, op. cit.
The second group of regulatory agencies was responsible for promoting ‘public interest’ goals other than competition. It is a more heterogeneous group, although often labelled ‘social regulators’, the decisions of such agencies have economic impacts. Examples include agencies for the environment, safety (at work or food for instance), and racial and gender equality. They were given powers that included setting standards, issuing licences, prohibiting supply, enforcement of legal requirements and provision of information.

Existing agencies were also strengthened, especially in the 1990s. Thus, for instance, general competition authorities were given additional powers to enforce legal requirements, safety agencies received further responsibilities and enforcement instruments and the scope and legal standing of financial regulators such as stock exchange commissions and financial services authorities were reinforced.9

Governments and legislatures created and strengthened independent regulatory agencies, mostly through statute. Thus they delegated consciously and explicitly, devoting valuable time and energy, not least legislative, to delegation. They responded to strong functional pressures. Four major pressures can be identified: blame shifting; the technical nature of issues and information symmetries; credible commitments; dealing with international organisations, especially the EU.

Independent agencies allowed elected officials to shift blame for decisions that they believed would be unpopular.10 Thus for instance, promoting racial and gender equality was highly emotive and unpopular with large sections of the electorate. Creating specialised agencies for such as the Commission for Racial Equality in Britain or the Observatoire de la parité in France allowed governments to appear to...

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9 Examples include: the 1998 Competition Act in Britain, which for decades had been seen as a country with weak general competition authorities relative to Germany (cf. Wilks and Doern), the reform of the COB (Commission d’Operations de l Bourse) in France, the move from informal non-statutory regulation of the City to much more formalised rules underpinned by statute, notably by the 1986 Financial Services Act, the establishment of the FSA in 2001 and statutory regulation of Lloyds of London REFS.
pursue ethical policies but leave the difficult and unpopular tasks of enforcement to agencies. In the regulation of competition, agencies provided a buffer between unpopular decisions and the government. Thus, for instance, in the utilities, recently privatised incumbents often increased price increases, especially for domestic users who had been cross-subsidised by large, commercial ones; regulators responsible for regulating such firms could take part of the blame for tariff increases. A similar rationale applies to general competition bodies, where takeovers and mergers involved losers as well as winners, the former often including employees who lost their jobs after successful bids.

Regulation became much more technical in the 1980s and 1990s. In the regulation of competition, liberalisation was a crucial factor. Thus in the utilities, regulators had to grapple with the costs and terms of interconnection among networks, standard-setting and preventing abuses of dominant position. Even the more directly relevant (to voters) issue of price controls became enmeshed in questions of costs of capital, comparable rates of return, long-run incremental cost and tariff baskets—matters that were far from exciting for generalist civil servants and ministers. New issues that emerged onto the regulatory agenda were frequently highly complex and involved very high levels of scientific expertise. Recent examples include food safety and environmental protection; the BSE issue has exposed the difficulties for civil servants and ministers in even understanding the dangers, let alone forming an assessment of the risks posed. Juridification provided another powerful force for increasingly technical regulation. Public decisions had to be based on evidence and properly reasoned in order to withstand judicial challenges that became more common.

Governments faced powerful interests, not just companies but also non-governmental organisations (for example, environmental groups), with high levels of information and the resources and desire to take cases to courts that in turn, have shown ever-increasing willingness to intervene. Thus regulation offered fewer opportunities for elected politicians to produce clear benefits for voters and raised the costs of their participation. Effective regulation required greater information, as information asymmetries became more marked. Delegation of ‘unsexy’ highly technical functions to agencies that were better able to cope than generalist government officials and politicians with the information requirements.
Independent agencies offered governments and legislatures a means for making credible commitments. They were particularly important in domains and countries with long histories of unpredictable intervention by elected politicians. Thus the utilities had been subject to constant activity by governments for short-term and non-economic objectives. Almost all privatisations were accompanied by the creation of independent agencies, allowing government to provide more credible commitments to investors and hence boost their revenues from the sales.\footnote{Cf. Levy and Spiller, op. cit.} However the need for credible commitments has been broader than pleasing investors. Scandals involving food and environmental safety have been followed in many countries by the creation of independent agencies, as trust in governments fell; the most blatant case was the creation of the Food Standards Agency in Britain after the BSE scandal.

Greater regulation by international organisations has offered impetus for delegation to independent agencies. EC regulation has to be transposed and implemented by member states, and has accounted for a high proportion of national regulation.\footnote{Cf. Levy and Spiller, op. cit.} Although national governments may have great power at the EC level in deciding regulation, EC decisions can be controversial, difficult to implement and impose heavy costs. Thus for example, EC environmental and food standards are often not met and require high expenditure in ‘laggard countries’. When EC requirements run counter to traditional standards and ways of operating, they have frequently been unpopular— for instance, food requirements. In these circumstances, delegation by national governments to independent agencies has offered many advantages, notably offloading controversy, difficult implementation decisions and ensuring an interlocutor for Brussels. One example has been the creation of the Environment Agency in Britain (and its predecessor the National Rivers Authority) and the water regulator Ofwat, which have had to deal with the legacy of water and bathing standards that fell below EC standards after decades of under-investment, notably by water and sewerage authorities when in public hands.

Focusing solely on functional pressures for delegation is however, inadequate. It risks reducing into a simplistic deterministic model of institutional change. Several of the functional pressures on elected officials could have been met through institutional
reforms other than delegation to national agencies—such as strengthening government departments to deal with technical complexity, greater use of constitutional entrenchment to increase the credibility of commitments or increased powers for the EU to shift blame and implementation problems. Moreover, many of the functional pressures were long-standing, but had not led to delegation to independent regulatory agencies before the 1980s and the 1990s. Powerful functional pressures led to delegation in some countries but not in others. Thus, for example, despite its history, problems of racial conflict and powerful feminist movements, Germany has not created independent regulatory agencies for racial or gender equality, whereas Britain has done so. Finally, the principle of delegating to independent agencies was remarkably uncontroversial, given that it ran counter to traditional notions of political control and accountability in many Western European countries since at least 1945 whereby elected officials took decisions and were then called to account for them by legislatures and in elections. In the utilities, opposition by trade unions and employees was focused on privatisation; otherwise, disputes have concerned institutional form rather than the principle of creating independent agencies.

The choice of delegation to independent agencies in response to functional pressures must therefore be analysed in its context as well as such pressures. Certain factors triggered and aided delegation, whilst others hindered it. Indeed, there were important variations in the timing and extent of delegation across countries and domains. Cross-national and cross-domain comparison, plus inclusion of the process of reform, can aid a richer analysis that complements, or indeed rivals, a purely functional explanation. Four contextual factors are examined here: policy learning; state traditions; political leadership; the broader institutional context of West European states.

Policy learning and indeed institutional mimetism were important in the spread of independent regulatory agencies. Once an apparently successful model of an agency existed, it was copied in other domains. Thus for instance, in the 1980s and 1990s, the

12 Cf. Majone, Regulating Europe, op. cit..
example of Oftel (the Office of Telecommunications) was rapidly copied in other utility sectors in Britain. Such copying took place despite considerable contrasts in the features of the sectors. In France, Autorités Administratives Indépendantes were a rarity until the 1970s, but thereafter were gradually copied in the regulatory field. Cross-national learning was also important. The creation of Oftel was strongly influenced by the example of the Federal Communications Commission. In turn, Oftel served as an example for the spate of national telecommunications regulators that were established even in countries with little tradition of such bodies (for instance, Italy). Within Europe, the EC Commission brought together national regulators and encouraged cross-national fertilisation of ideas, aiding the spread of the new ‘model’ of independent regulators.

Learning about delegation across countries and domains was itself influenced by state traditions. The process was easiest in Britain, where regulatory commissions dated from the nineteenth century—for example, in the railways. Moreover, Britain found it easier than continental countries to import the independent agency model from the US where it was long-standing. In contrast, Italy had little tradition of independent agencies and it was only after the successful creation of the Competition Authority in 1990 that the model began to spread to other domains and policy makers looked abroad for examples. In France there also existed a long-standing suspicion of ‘independent’ agencies that would either not be properly independent or which fragmented the unity of the state. Germany provides an interesting case of opposing forces—on the one hand, successful Federal agencies existed (notably the Cartel Office), but on the other hand there were strong traditions of self-regulation and of regional autonomy that limited institutional isomorphism from existing agencies.

Political leadership was needed to establish independent agencies. Countries with strong leaderships could respond more quickly to pressures for delegation than those without such leadership. Thus reform was easier in Britain, with its single-party majoritarian system than in Italy during most of the period which was dominated by

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14 Ofwat was created for water, Ofer and Ofgas for electricity and gas (today merged as Ofgem), and the Office of Rail Regulator for the railways.
unstable weak governments. The contrast is best seen in information and communications- whereas the Thatcher governments rapidly created Oftel and reformed television broadcasting (notably by establishing the Independent Television Commission), it took several years in Italy to create the telecommunications and media regulator (AGCOM- the Autorità per le Garanzie nelle Communicazioni), due to difficulties over media ownership, one of the last countries to set up an independent telecommunications regulator in Western Europe. Political leadership also affected responses to new political and social movements. Perhaps oddly, in Britain governments acted on gender, racial equality and environmental concerns earlier than in other countries- the Equal Opportunities Commission and Commission for Racial equality were created in the 1970s, and even the Thatcher government of the 1980s set up the Environment Agency in 1988. In France and Italy, such political movements were weaker and governments were slower to respond. Only after the Jospin government of 1997, which included the Greens for the first time, were a series of environmental and food agencies created. Strong political leadership, notably the existence of a parliamentary majority and central government expertise, also allowed governments to move decisively when confronted with scandals- thus the British governments created and then strengthened financial services and food safety agencies in the 1980s and 1990s following problems such as pensions mis-selling, insider trading or BSE.

Delegation to independent agencies must also be seen in the broader context of reforms of state structures, especially privatisation, liberalisation and new public management. The creation of agencies to regulate competition in the utilities usually accompanied structural reforms such as the sale of suppliers, ending state monopolies or breaking up vertically-integrated public firms. In Britain, the creation of the utility regulators was undertaken in the same legislation that privatised the state firms. In Italy, the establishment of an electricity regulator accompanied the partial sale ENEL and liberalisation of the market. In France, the agency responsible for monitoring the use of the rail infrastructure, the CSSPF (Conseil Supérieur du service public ferroviare) was set up when the track infrastructure was separated from services in

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1997. Moreover, the greater the spread of new public management doctrines, the more agencies were created—such doctrines being more popular in Britain than in France and Italy.

III The institutional design of delegation

Delegation to independent regulatory agencies has taken many institutional forms. The extent of delegation to an agency, the institutional features of that agency and the formal controls placed over it have varied greatly across countries and issue domains.

Greater delegation has occurred in the regulation of competition than in social and environmental policy. Maximum delegation has occurred on privatisation of utilities—for instance, by transferring powers over licence enforcement and abuse of fair competition to sectoral and general competition agencies. Social and environmental agencies have tended to enjoy fewer powers—for example, over enforcement, where frequently they must resort to the courts or separate tribunals. Cross-national differences can also be found. In Britain and Germany, greater powers have been delegated to independent agencies in regulating competition than in France and Italy. Thus general competition authorities in Germany have greater powers to block mergers and takeovers and enforce competition rules, while utility regulators in Britain have powers not only to enforce but also to seek to modify licences. Moreover, in Britain, even in social/public interest domains, the Commission for Racial Equality and the Equal Opportunities Commission can launch their own legal action (even against the government). A further variation concerns whether a separate sectoral agency is created or whether powers are given to a broad ‘horizontal’ one. In Britain, France and Italy, sectoral agencies have been created—for example, in the utilities. In contrast, in Germany, only telecommunications and railways have sectoral agencies, with other utility sectors being covered by the Federal Cartel Office.

Functional pressures can explain some of the variation found in the degree of delegation. The need for credible commitment has been important. In selling utilities, governments found that investors have required reassurance. Hence they have delegated substantial powers to sectoral regulators. Scandals have also been followed by expanded greater delegation - for instance, concerning the environment or food safety - suggesting that blame shifting as well as credible commitments to ensure public confidence (and spending) is positively correlated with the degree of delegation. The existence of conflicting powerful, well-organised interests may also influence the extent of delegation. Thus for instance, competition policy has seen the creation of strong agencies. As other domains have become subject to more intense conflicts, so too has delegation increased - for example, racial matters or financial services. Increases in supra-national regulation appears to positively influence delegation to agencies - EC regulation appears to have been a factor in expanded delegation in fields such as competition policy, the environment and the utilities.

Nevertheless, cross-national comparison reveals the importance of national-level factors - state traditions, political systems and leadership - that also influence institutional design choices. At times, findings run counter to certain functional pressures. Thus although France and Italy faced more significant problems of credible commitment than Britain and Germany given their traditions of political interventions and instability, they have delegated fewer powers to their sectoral regulators. The spread of new ideas has been important - the greater powers given to agencies such as the Commission for Racial Equality and Equal Opportunities Commission in Britain compared with their counterparts (when they have existed) in France and Italy can be linked to the place accorded to gender and racial equality. Finally, ‘snowball’ effects appear to aid explanation of cross-national variations. Once greater powers were delegated to agencies in one domain, they have been copied across domains, even in the face of somewhat differing functional pressures. Thus in Britain, the model of Oftel was copied (almost to the letter) for other utilities such as water whose economic and political characteristics were far from identical to those in telecommunications.

Vivienne Schmidt, ‘After Liberalization: public-interest services in the utilities’ in F Scharpf and V
Independent regulatory agencies have also taken many forms—there is no one ‘European model’. Agencies enjoy differing constitutional positions, ranging from being non-governmental departments (the utility regulators in Britain) to being legally entitled to independence (e.g. the Italian Competition authority). The number of regulators varies. In Britain, single-person regulators have been used in the utilities during the 1980s and 1990s (although this is now being altered\(^1\)) whereas the general competition authority, the Commission for Racial Equality and the Equal Opportunities Commission are headed by Boards with a Chairperson. Regulators were nominated by ministers, without the need even for parliamentary approval. In contrast, on the Continent, agencies regulating competition have been headed by multi-person Boards. Complex arrangements have been made to ensure that the legislature and executive share nominations, and that different political formations are able to control at least some nominations. Thus, for example, in telecommunications, the Italian communications regulator AGCOM has nine members, with its head being nominated by the President on proposal of prime minister; four are elected by the Chamber of Deputies and four by the Senate, while in Germany, the telecommunications regulators are nominated by the Federal government on proposal of Advisory Council, composed of nine members from each the two houses of the legislature. Fewer arrangements for legislative participation in nomination of agency members exist for agencies in the environmental and social domains. The length of terms of agency members also varies greatly across domains and countries.

Explaining the forms of agency would require inclusion of many factors given the diversity across domains and countries. Nevertheless, a few hypotheses can be advanced. In a country with majoritarian political systems and few constitutional veto points such as Britain, it is possible to create single-person agencies nominated by the executive. This appears an exception. In most countries, multi-partyism and multiple veto points (for instance, between heads of governments and Presidents, or between the two legislative chambers) have encouraged an agency form that ensures representation for several parties and players. In addition, credible commitment may

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\(^{1}\) Cf. The 2000 Utilities Act setting up a Board for energy and water, and the proposed Communications Commission

have required such an agency form, to reduce the chances of reversal by subsequent governments.

The choice between specialised agencies and reliance on existing regulatory agencies appears to be highly influenced in some countries by the existence of strong respected regulators and by state structures and traditions. Thus reasons for the failure to create sectoral regulators in energy and other utilities (apart from telecommunications) in Germany have been reliance on the Federal Cartel Office, the tradition of self-regulation and the importance of the regions. In other countries, general competition authorities have been less well implanted and the subnational level is weaker and sectoral regulators have been created. In financial regulation, powerful existing regulators, notably central banks, have also kept their supervisory powers; only in Britain, in a swift move immediately after a landslide election victory was the Bank of England stripped of its banking powers (despite its strong opposition) and a powerful Financial Services Authority was created.

Almost all regulatory agencies face continuing controls, particularly by legislatures, through annual budget allocations and requirements to report to legislatures. In other respects, however, controls over independent regulatory agencies differ between agencies regulating competition and others. Nomination procedures are more complex and give a stronger role for the legislature for the former than the latter. However, ex post controls are much weaker— it is extremely difficult to remove their members or to reverse their decisions. The terms and conditions of members of utility regulators and general competition authorities are generally specified in legislation and involve fixed terms with removal only for serious misconduct. Legislation provides few powers for elected officials to reverse decisions. In contrast, less legislative detail is given for the terms and conditions of heads of other agencies such as the environment or food safety, their heads often being nominated on the Continent as ordinary civil service posts. Equally fewer restrictions are placed on the ability of elected officials to reverse their decisions.

Functional pressures offer one explanation for these differences in control mechanisms. The need for credible commitment in the regulation of competition may be greater than in other fields where the functions of agencies may be more those of monitoring, providing information and dealing with technical matters. Legislatures may wish to shift blame in fields such as racial and gender equality. Nevertheless, other explanatory factors exist, notably state traditions. There is a long history in most European countries of direct parliamentary and sub-national involvement in utility services, and legal and political doctrines that they are ‘public services’, thereby justifying greater legislative powers over agency nominations than in domains of more recent state action such as racial and sexual equality, which have been led by central executives.

IV The Consequences of delegation to independent regulatory agencies

Four sets of consequences are examined: the relationship between the principals and agents, including the use of controls; policy making, both in terms of substantive policies adopted and processes of decision making; further acts of delegation; accountability and legitimacy.

Initially, new regulatory agencies appeared to conform to national patterns of policy making. In Britain, regulators have tended to be drawn from ‘the great and the good’- ie. mostly non-party partisan experts and officials. In contrast, the allocation of posts in continental countries was more clearly party political, with nominees frequently being either party politicians or clearly identified with a party. Ex post formal controls have rarely been used, especially in agencies regulating competition- for instance, dismissals have been extremely infrequent and government powers to reverse decisions little exercised. In contrast, informal methods have been much more

20 Thus, for instance, the heads of the utility regulators were experts such as Professor Steven Littlechild (Offer) or Prof Sir Bryan Carsberg (Oftel).
21 For example, the head of the ART Jean-Michel Hubert, a Chirac loyalist, was chosen over the very experienced and respected Bruno Laserre, who had headed the regulatory unit within the PTT ministry for several years.
important-in many countries, government officials and regulators have been in continuous dialogue. Thus focusing on formal controls appears to be inappropriate—less formal networks of influence and linkages are the usual means whereby governments and legislatures have sought to control their agents. Indeed, the degree of public conflict between them has generally been very limited in the initial stages of agencies’ lives. They appeared relatively unimportant, with governments maintaining control and/or well-established relationships between regulatees and governments continuing—for instance, between large suppliers such as France Télécom or Telecom Italia and their governments.

Over time, however, the relationships between agencies and their principals have altered. Agencies have tended to gain power and importance. They have become key actors in decisions, acquiring expertise, reputations and political weight. They have developed objectives and conceptual frameworks that have structured their policy domains. Thus in Britain, the utility regulators have expanded their roles thanks to their expertise, information, constant contact with interested parties and conceptual frameworks, as well as the use of their formal powers. Even in countries with little tradition of independent agencies, such as France and Italy, the new regulators have gradually established their own separate profile and ideas; hence, for example, the Italian Competition authority has become a powerful and respected body, able to act effectively even in highly politically contentious fields. The agencies have become more independent of elected officials, able to challenge their views, sometimes even in public. Thus the Italian competition authority and the French telecommunications regulator the ART, disagreed publicly with government plans for licensing UMTS services in 1999-2001 and were partly responsible for changes in the government’s choices. Agencies in the social field appear to have developed less independence from governments, perhaps reflecting greater controls over them, but even so, some have become thorns in the flesh of their ‘principals’—for example, the British Equal Opportunities Commission has taken the British government to court on several occasions (and won).

23 For instance, it was important in decisions over privatisation, liberalisation and licensing in telecommunications and electricity.
24 The choice of an auction element in UMTS licensing, against earlier suggestions that a pure beauty contest would be used- the Authority insisted that a more open competitive system be used.
The consequences of creating new agencies have frequently been unanticipated at the time of their creation. Thus the British telecommunications regulator OfTEL was seen as a temporary measure designed to ‘hold the fort’ until competition arrived; seventeen years later is it still going strong.\textsuperscript{25} Similarly, utility and competition agencies in France and Italy were seen as likely to be highly politicised and under the control of elected officials due to their nomination procedures; yet they have become much more powerful and independent of governments than expected. Relationships among key actors have altered in unexpected ways and, moreover, ones that cannot be ‘read off’ formal arrangements. Thus although in all four countries sectoral utility regulators and general competition authorities have concurrent powers over competition law, in Britain, the Office of Fair Trading played almost no part in utility regulation, whereas in France and Italy the general competition authorities have been active participants. At times, the strategies of agencies have altered without institutional modification- for example, the CRE moved away from legal enforcement and towards a more ‘compliance-centred’ approach in the 1980s and 1990, whereas the Equal Opportunities Commission began to take a more legally active approach using EC law in the 1980s and 1990s.

Agencies have influenced policy making, sometimes in ways that were surprising given the formal institutional framework. They have altered the processes of decision making. Although delegation legislation offered few provisions, over time new procedures have been introduced- for example, public consultations and hearings, or consultation documents. New actors have been allowed to enter the ‘regulatory space’\textsuperscript{26} - new entrants, foreign firms and user groups. Much more information has been published. Closed cosy relationships between ministers, officials and privileged firms have been weakened, particularly those involving ‘national champion’ firms. Relationships between have become more legalistic, with a host of new formal rules replacing informal norms;\textsuperscript{27} this has been the case even in domains with strong inheritances of ‘self regulation’ such as financial markets, including the City of

\textsuperscript{25} Cf. Thatcher, The Politics of Telecommunications op. cit.
\textsuperscript{26} L Hancher and M Moran (eds), Capitalism, Culture and Regulation (Oxford: OUP, 1989).
London. The creation of agencies has frequently also been followed by greater antagonism and conflict between traditional ‘insiders’ and the state, on several occasions leading to court cases. Thus in Germany, the telecommunications regulator the RegTP has locked horns on many occasions with Deutsche Telekom, with the latter challenging decisions before the courts. Agencies also appear to have influenced substantive policy. Regulators of competition have frequently advanced policies of liberalisation and effective competition. In Britain, this was striking— in the original statutes, advancing competition was only a secondary duty in legislation creating agencies such as Oftel; yet they made it their primary aim. Even in France and Italy, agencies such as the general competition and telecommunications agencies have developed powerful norms based on fair competition. The expansion of EC regulation has provided another, largely unexpected alteration in the effects of agencies on policy making. National regulators have formed their own networks, learning across borders and developing relationships with each other and with the EC Commission. Thus, for example, in telecommunications, the Independent Regulators Group has emerged, while the Commission has established a High Level regulators Group as well as informal contacts with national agencies. These networks have participated in matters such as setting European benchmarks for interconnection costs and in determining EC Commission policy.

Agency behaviour has affected further delegation, for delegation has frequently been a process rather than a one-off event. Such processes have seen much learning, both from previous national experience and from overseas. In general, agencies have been given further powers, balanced by more refined monitoring controls over their actions for legislatures and also regulatees. Thus the Monopolies and Mergers Commission in Britain received powers to punish anti-competitive behaviour based on Articles 80 and 81 of the Treaty of Rome under the 1998 Competition Act. Following concerns about lack of clarity in objectives and transparency, together with lack of independent representation of consumers, the water and energy regulators were under the Utility Act 2000, which widened their powers to prevent and punish anti-competitive behaviour.

behaviour, but also tightened procedural requirements and provided consumers with their own Council.

The effects on accountability and legitimacy of delegation to independent agencies are complex. Independent agencies with their own policy-making powers pose problems for traditional West European models of accountability centred on legislatures that can be held to account by the electorate. They are unelected bodies that by definition enjoy discretion. Moreover, many were set up with few procedural guidelines and with broad objectives. However, in practice, the accountability and legitimacy of policy makers before their creation was often low. Regulation of domain such as the environment or the utilities was opaque at best, secretive at worst. Legislative control was largely a fiction in systems with strong executives enjoying disciplined parliamentary majorities and much greater information and expertise. Even within the executive, effective control by ministers was difficult and rare - they relied on civil servants who were often generalists and had limited knowledge and understanding of technical matters (a feature most prominent in countries with generalist policy makers who moved across policy areas - for instance, Britain). Thus delegation took place in a situation in which legislative models of accountability were closer to fiction than reality.

In practice, several forms of accountability and legitimacy have been developed for agencies. One has been the use of controls available to elected principals, such as appointments. More important has been ‘answerability’. Agencies have explained their actions and been obliged to face questioning for them. They have been answerable to legislatures - for example, by legal duties to produce annual reports, by their officials appearing before legislative committees and by being subject to administrative scrutiny bodies such as the National Audit Office in Britain or the Cour des Comptes in France. Answerability has extended to regulatees and consumers. Agencies have published consultation documents before taking decisions, set up public meetings and hearings in which they have explained their reasoning and listened to criticisms. They have provided reasons and explanations for their decisions, together with supporting data, thus making it easier to raise objections than previously when ministerial choices were announced with little further information. Occasionally, forms of appeal or challenge have been created; thus, for example, the
licence modification procedure for utilities in Britain whereby if a regulatee and regulator cannot agree the latter makes a reference to the Competition Commission, offers a form of appeal. More importantly, however, accountability via judicial control has increased: agency decisions have been challenged via administrative review, a process that has been much easier thanks to the much greater amount of information and reasoning provided.

Conclusion

Principal-agent frameworks offer an excellent starting place to analyse the creation of independent agencies. They point to the functional pressures that lead elected officials to delegate to agencies, such as desires to shift blame, the need for credible commitment and the need to respond to greater technical and international demands on national regulators. These factors were clearly powerful forces in the spread of independent agencies in the 1980s and 1990s in Western European countries. With respect to the institutional form of agencies, functional pressures offer fruitful factors for examination, notably in terms of credible commitment.

Yet a purely functional and formal institutional account of delegation using a principal-agent framework is inadequate. Its limits can be seen through comparison across countries and policy domains and over time. On several occasions, the findings run counter to those expected. The spread of delegation to independent agencies has differed across countries. Britain has had the greatest delegation in the 1980s and 1990s, establishing independent agencies in both the regulation of competition and in social and environmental fields. France and Italy have followed, but have had less delegation, despite facing greater problems of credible commitment. In terms of new agencies and delegation in the 1980s and 1990s, Germany has delegated least, due in part to independent agencies already having been created (for instance, the Federal Cartel Office and Environment Office) and to its federal system. In similar domains, countries have made different choices in whether to establish an independent agency and in its institutional form, despite facing functional pressures for delegation— for example, in telecommunication, electricity and food safety. In certain domains,
independent agencies have become the norm—notably telecommunications and general competition regulation. Other domains see greater variation, either in whether an agency is created or in institutional form—seen in gender and racial equality or the location of responsibilities for financial regulation. Functional pressures do not determine a single institutional response. Study of the processes of delegation reveals important roles for learning and isomorphism, as countries look to national examples and copy across domains (for instance, in the British utilities) and/or across countries. Such learning is itself influenced by state traditions and structures, as well as political leadership and can itself lead to surprising results (for instance, the German ‘exception’ of well-established agencies which are not copied into many new fields).

Principal-agent frameworks are perhaps weakest in considering the consequences of delegation to regulatory agencies. The role of power of agencies has altered over time within the same institutional framework, as they have acquired experience. One delegation has influenced later delegations. Agencies have progressively altered modes of accountability and legitimacy. Over time, feedback and learning effects have operated, which cannot be read of formal institutional arrangements.

Thus broader analysis is needed beyond principal-agent frameworks based on functional pressures and the formal institutional frameworks of delegation. Other factors have been important, notably the effects of learning, state traditions and structures and time. Inclusion of such factors allows the variety of responses to functional pressures for delegation of regulation to be understood, together with the ways in which independent agencies operate and develop.