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Regulatory Agencies, the State and Markets:
A Franco-British Comparison

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ISSN 1028-3625

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
<http://www.eui.eu/RSCAS/Publications/>
<http://cadmus.eui.eu>

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Abstract

The article examines whether and how independent regulatory agencies (IRAs) have altered the strategies, relationships and power of French policy makers in markets and whether they led to convergence with Britain in state-market relations. It relates these questions to broader debates about the extent to which previous policy-making systems have been transformed, whether Europe has one regulatory state or several, whether France has become a form of 'liberal market economy' and the power of the state after reform of markets. It argues that although, as in Britain, France has established IRAs with responsibilities for ensuring competition in key economic domains, French state strategies remained very different from British ones and markets operate very differently in the two countries. Moreover, the break with the past has been limited: public policy makers continue to have significant capacities to mould markets and delegation to IRAs has often reinforced the power of existing elites and aided the adaptation of traditional French industrial strategies to new conditions. Thus even if France has adopted the formal institutions of competitive markets, it has not converged with a liberal market economy such as Britain in terms of strategies and behaviour. State forms and instruments may have altered, but an activist French industrial policy is alive and well.

Keywords

regulation, independent regulatory agencies, electricity, 3G mobiles

Introduction*

Independent regulatory agencies (IRAs) form part of sweeping regulatory reforms that have transformed the governance of markets and the role of the state in Europe. IRAs have been given significant formal independence from elected governments and important powers over competition. Their rise in France raises several questions. Why have they been created? How have they altered the strategies, relationships and power of French policy makers in markets? Have they led to convergence in state-market relationships with other countries that also have IRAs? The first question has been extensively researched, both specifically in France and comparatively in Europe (Elgie and McMenamin 2005, Elgie 2005, Thatcher 2002a, Gilardi 2002). Hence the article focuses on the second and third issues of change and cross-national convergence that are less researched. It relates them to a broader literature on the 'regulatory state' which is both a starting point of analysis and a means of linking the case of IRAs in France back to broader debates about the extent to which previous policy-making systems have been transformed, whether Europe has one regulatory state or several, whether France has become a form of 'liberal market economy' and the power of the state after reform of markets.

The article compares IRAs in France with those in Britain, which is used as a benchmark but whose experiences are not the primary focus of explanation. There are several reasons for this comparative research strategy: Britain represents a very different 'variety' or model of capitalism to the French one (Schmidt 2002, Hall and Soskice 2001); similar domains are covered by IRAs; Britain is often seen as a leader in regulatory reform in Europe.

The article puts forward two central arguments. First, it shows that although, as in Britain, France has established IRAs with responsibilities for ensuring competition in key economic domains, French state strategies remained very different from British ones, notably in terms of regulation of incumbent suppliers, control of monopoly power and Europeanisation. Differences are seen in the timing and triggers for the creation of IRAs, and in the powers, staffing and role of IRAs. In practice, regulated markets in France operate very differently from those in Britain. Second, it argues that the break with the past has been limited. Public policy makers continue to have significant capacities to mould markets. Indeed, delegation to IRAs has often reinforced the power of existing elites and permitted the adaptation of traditional French industrial strategies.

Overall, the argument is that even 'statist' countries such as France can adopt the formal institutions of a regulatory state or liberal market economy. But, far from one regulatory state, within a 'liberalised' regulated market with IRAs, different forms of nationally-specific state-business relations and strategies endure. Indeed, new regulatory institutions may aid existing actors to protect or even improve their positions and ambitions.

The article focuses on IRAs for markets- both sectoral bodies and 'horizontal' general competition authorities. These lie at the heart of arguments about the regulatory state and are the most powerful IRAs. It begins by highlighting claims made by the regulatory state literature and current comparative political economy debates and the power of the French state in industrial policy. It then looks at the strategies of policy makers in France and Britain concerning the spread of IRAs in the two countries, their organisational position, powers, staffing and their role in practice in industrial policy. Thereafter it examines two important case studies that are politically highly significant, and allow analysis of the interactions between IRAs, elected politicians and powerful suppliers: third generation ('3G') mobile licensing; regulation of electricity supply. The concluding section returns to broader issues of the regulatory state and the nature of the French state and markets.

* The author thanks Emiliano Grossman, Vivien Schmidt and an anonymous referee for comments.

IRAs, the regulatory state and French capitalism

A significant literature claims that a general European trend exists in which the previous ‘positive state’ has been replaced by ‘the regulatory state’ (Majone 1996, 1997; McGowan and Wallace 1996). In the former, the state’s main function was redistribution through budgetary allocations. Policy making was led by political parties, civil servants and corporate groups acting through parliaments, ministerial departments and nationalised industries. Elected politicians enjoyed a high level of discretion, although they also engaged in a corporatist approach to policy making. However, the positive state was undermined by external developments, notably increasing European integration and increasing international competition, as well as its own internal failures and the loss of faith in Keynesian economics. Policy makers have responded by turning to more indirect forms of governance labelled ‘the regulatory state’. Formal institutions have been altered through the ending of legal monopolies, privatisation and reallocation of powers, notably to IRAs. But, according to the regulatory state hypothesis, the changes go further, in terms of new actors entering policy making, such as judges, single issue groups and experts. Moreover, IRAs and new actors have led to a rule-bound culture and a pluralist style of decision making. Overall, the regulatory state is based on rule-making, and in markets, IRAs lie at its heart in terms of holding expertise and producing and enforcing rules.

France offers a good case to test the limits of the regulatory state model and to develop it. On the one hand, between the mid-1960s and 1980s, it epitomised the successful, entrepreneurial state. ‘*Grands projets*’ in telecommunications, transport and energy were led by a strong central state, coordinating and leading public and private actors to create world-class technology (Cohen 1992; Thatcher 1999; Schmidt 1996). Politically, it had a high degree of centralisation, at least in terms of aims and official policy with great fear of fragmentation (Hayward 1983). Legally, jurists were suspicious of ‘delegation’ of powers (Chevallier 1986). On the other hand, many of the pressures identified by the regulatory state model applied to France. Studies have underlined how European integration and globalisation have created difficulties for traditional French *dirigisme* (Hall 2006, Schmidt 1996, 2002, Culpepper 2006, Wright 1997), while others have pointed out the increasing failures of the *grands projet* strategy (Cohen 1992; Cohen and Bauer 1985), the weakening of corporatism in firms and the central state’s increasing need for civil society partners (Hancké 2002, Levy 1999). Thus overall, France offers a case of a country whose past makes it unpropitious for the regulatory state but which is facing many of the pressures on traditional governance identified by the regulatory state hypothesis.

IRAs are a vital aspect of the regulatory state. Hence their spread and behaviour offers a good test of the development of the regulatory state in France. Two line of analysis are pursued here. The first concerns cross-national convergence. Here the question is whether Europe has one type of regulatory state or several (Thatcher 2002b). The regulatory state model claims the existence of a general European trend. But, comparative political economy analyses argue that France has a different form of economy both from ‘liberal market economies’ such as Britain and ‘coordinated market economies’ such as Germany (Hall and Soskice 2001, Schmidt 2002). Even if change has taken place, it may involve the reconstitution of existing complementarities in different forms, maintaining cross-national diversity (Hancké, Rhodes and Thatcher 2007). Work on Europeanisation increasingly points out that European integration (a key factor in the regulatory state model) has differential effects from one country to another or may depend on how domestic policy seek to use it (Green Cowles, Caporaso and Risse 2001, Grossman 2006). Finally, convergence of formal institutions across nations may arise from diverse reasons and processes, so that extrapolating similar explanations from similar outcomes may be misleading (Thatcher 2007a). Comparison of France with its traditional *frère ennemi* and liberal market economy neighbour Britain allows consideration of which aspects of governance of markets have converged (or not) and why.

The second line of analysis concerns the extent to which IRAs have altered policy making and regulation of markets. France offers an interesting case, as it has adopted some of the institutions of a liberal market economy but still has an activist state with a tradition of direct intervention, leading to a

debate about whether it is a statist, LME or mixed market economy (cf. Schmidt 2002, Hall 2006, Culpepper 2006). Several comparative studies have argued that the degree of alteration in other aspects of the regulatory state such as privatisation has been less in France than in other nations (cf. Wright 1994, Feigenbaum, et al 1999). In addition, the persistence of informal institutions, linkages and complementarities based on factors such as the tentacular *grands corps* and close relationships between firms and government has been underlined (Hancké 2001, Hayward 1997). Finally, liberalisation of markets does not mean the end of state activity, for 'freer markets' are sustained by state rules over how that competition operates and regulatory regimes can develop in very different ways (Vogel 1996, Coen and Héritier 2005). Hence it is possible that traditional French policies are maintained, albeit through different means than under the previous *dirigiste* approach.

Similar state structures, different strategies: IRAs in France and Britain

The spread of IRAs in similar domains

For almost all of the twentieth century, France and Britain had very few IRAs, which were an American 'exception' in the field of regulation. Instead, national governments held most powers, both as rule-setters and as owners of key industries, especially the utilities. However, from the 1980s onwards this altered. Britain began to create new IRAs. Thereafter, IRAs for markets were also created in France, and now mirror those found in other European nations, including its traditional rival and opposite, Britain (Thatcher 2002a). By 2006, both countries had a similar coverage of IRAs, including general competition authorities and sectoral regulators for telecommunications, financial services, energy and postal services; only in water and railways does Britain have an IRA and not France.¹

There is no single Europe-wide definition of an IRA.² As a result, countries have different terms, legal doctrines and indeed legal forms for their IRAs. France itself has a broader category of *autorités administratives indépendantes*, which include both IRAs and other bodies with formal independence from the government (Elgie 2006; Elgie and McMenamin 2005, Conseil d'Etat 2001, OPEL 2006). To allow comparison and avoid definitions based on the often fortuitous labelling of legislation, three *de minimis* conditions referring to the formal institutional position are set for a body to qualify as an IRA: the agency has its own powers and responsibilities given under public law; it is organisationally separated from ministries; it is neither directly elected nor managed by elected officials (cf. Thatcher 2002a). Using these criteria, table 1 summarises IRAs for markets in 2006; the date in brackets refers to the first time an IRA existed in that domain, and the other date to the creation of the current IRA:

Table 1 IRAs in Britain and France in key markets in 2006

Domain	Britain	France
General competition	Competition Commission 1998 (1948) and Office of Fair Trading 1973	Conseil de la Concurrence 1986 (1977)
Tele-communications	Ofcom 2003 (OfTel- Office of Tele-communications 1984)	Autorité de regulation de communications électroniques et des postes (2005) (Autorité de Régulation des Télé-communications 1996)
Energy	Ofgem (Office of Gas and Electricity Markets) 2000 (Offer- Office of Electricity Regulation 1989)	Commission de Régulation de L'Energie 2003 (Commission de Régulation de l'Electricité 2000)

1 For railways, the Conseil Supérieur du service public ferroviaire lacks sufficient independence to qualify as an IRA.

2 For a good overview of diversity across Europe, see Geradin, Munoz and Petit 2005

Domain	Britain	France
Water	Ofwat (Office of Water Services) 1989	
Railways	Office of Rail Regulator and Strategic Rail Authority 1999 (1993)	
Postal services	Postal Services Commission 1999	Autorité de regulation de communications électroniques et des postes (2005)
Media	Ofcom 2000 (Independent Television Commission 1954)	Conseil Supérieur de l'Audiovisuel 1989 (La Haute Autorité de la communication audiovisuelle)
Stock Exchange/ shares	Financial Services Authority 1997 (Securities and Investment Board 1986)	AMF (Autorité des Marchés Financiers) 2003 (COB-- Commission des operations de bourse 1967 and Conseil des Marchés de Valeurs 1996)

Differences in the creation, form and legal powers of IRAs

The similar spread of IRAs in Britain and France conceals important differences in the strategies adopted by public policy makers in the two states. There have been marked contrasts in the timing and triggers for creating IRAs, the extent of separation with the traditional state administration and their powers.

In Britain, although weak general competition regulatory agencies were set up in the late 1940s and 1950s, most IRAs are sectoral agencies which were established in the 1980s at the time of privatisation of incumbent suppliers (subsequently several have been merged and hence have altered their names- for instance, Ofcom in communications and Ofgem in energy). They were created to perform functions such as enhancing credible commitment of policy makers (given a history of 'interference' by elected politicians in the nationalised industries) and dealing with the market power of dominant vertically-integrated incumbents; indeed, initially, policy makers believed that such agencies would be temporary, 'holding the fort' until full competition made them unnecessary (Veljanovski 1989). Thus for instance, Oftel (the Office of Telecommunications) was set up when a majority share in British Telecom was sold in 1984; it formed part of the package of measures that allowed BT to be sold as a dominant vertically-integrated company, and was designed to deal with problems of continuing monopoly (Thatcher 1999). Similarly, Ofgas (the Office of Gas regulation) was created in 1986 when British Gas was privatised, including the gas transmission network and Ofwat (Office of Water Services) was set up when most of the water industry was sold in 1989. The EU was entirely absent from British debates over creating IRAs.

Studies of French IRAs show that enhancing credible commitment was an important factor in their establishment (Elgie and McMenamin 2005, Elgie 2005). However, in contrast to Britain, French IRAs were not created when suppliers were privatised- on the contrary, many incumbents were publicly owned when IRAs were set up (for example, France Télécom, EDF and GDF). Instead, IRAs were often directly linked to the European context rather than market power (cf. Schmidt 2002). There is evidence of cross-national learning and isomorphism, as French policy makers looked at other EU member states (Elgie 2005). Moreover, EU liberalisation requirements triggered legislation and rethinking of institutional arrangements; indeed, IRAs were often established to regulate competition that was being permitted to meet EU requirements. Thus for instance, the ART (Autorité des Télécommunications) was established in 1996, in the same legislation that ended France Télécom's monopoly as part of implementing EU requirements and the CRE (the Commission de Régulation de l'Electricité, now la Commission de l'Energie) was created in 2000 by the same law that ended EDF's

monopoly, again to meet EU legislation.³ EU requirements that regulation be undertaken by an organisation separated from market suppliers were used to justify the creation of a body independent from the government, which is not mandated by EU law.⁴ Hence for example, the Jospin government wished to keep regulation of electricity within the industry ministry, but opponents (such as the Economic and Social Council that represents all social partners) argued that such an option lacked credibility vis-à-vis Brussels, especially since the government owned the main incumbent, EDF.⁵

Contrasts between the two countries also appear in the extent of rupture with past institutions. In Britain, IRAs marked a clear break with the previous regulatory arrangements based on government departments. IRAs have been clearly separated from the general government civil service. Legally, most IRAs are ‘non-ministerial government departments’; some were even created as private companies to avoid being tied to civil service pay and conditions (for example, the Securities and Investment Board in 1986 and its successor the Financial Services Agency in 2000). Several IRAs in Britain have moved after 2000 towards a structure of chairman, chief executive and a board, again underlining the break with traditional public administration. In contrast, French IRAs have closer links to the traditional civil service than their counterparts in Britain. Indeed, traditionally, France did not recognise IRAs but only different forms of *administration*. Even when organisations that were separated from the general civil service were created, they were labelled as some form of *mission* (for example, the stock exchange regulator the COB, created in 1967). During the 1970s, a new form was accepted- *Autorité Administrative Indépendante* (AAI)- a disparate group, and include many bodies that are not IRAs (Conseil d’État 2001, OPEL 1996, Elgie 2005). But, the central administration kept many powers over AAIs, both formally and in practice, as will be seen below. Finally, IRAs are usually headed by commissions, with several members, often nominated by different parts of the state, thereby allowing several different actors to influence the composition of an IRA and also increasing the likelihood of diversity with them (for instance, if the President and the presidents of the National Assembly and Senate are from different political formations and all have powers to nominate members, as is the case with several IRAs such as the *Commission de Régulation de l’Energie* and the *Autorité de regulation de communications électroniques et des postes*).

In both Britain and France, the functions of IRAs include ensuring fair competition and the effective functioning of previously monopolistic markets. In both countries, they have been given important powers to enforce the licences under which suppliers operate and to ensure that competition is ‘fair’. These powers include legal action and imposing financial sanctions. But, IRAs in France have not been given some of the powers that their British counterparts enjoy.

Three major examples include licence amendment, tariffs and mergers/takeovers. Sectoral IRAs in Britain can amend licences, either with the consent of the licensee or through a more complex procedure whereby they refer a licence condition to the general competition authority, the Competition Commission (formerly the Monopolies and Merger Commission) and if the latter finds that the condition referred is ‘against the public interest’, they can impose a licence change on the licensee. In contrast, French IRAs cannot alter licences nor to refer a licence condition to general competition authorities for modification.

With respect to tariffs, prices for services are usually conditions within the licences of major suppliers. Hence British IRAs have powers to alter price controls through licence amendments. In France, tariffs for regulated services for final users are usually set directly by the Minister of Finance

3 Loi no 2000-108 du 10 février 2000 relative à la modernisation du service public de l’électricité

4 The legal requirements of the EU’s 2003 electricity directive concerning IRAs are a matter for debate. Although independence from the government was not mandated, but only from suppliers, regulation by the government ministry would have raised issues when suppliers were state-owned; moreover, in contrast to the earlier directives, the legislation laid down the tasks and capacities that IRAs should have. However, it should be noted that France created the CRE for electricity and then for energy before the 2003 directive.

5 Les Echos 13.5.98, 15.9.98.

after the IRA has given its ‘advice’ (*avis*)- for instance, for residential services not yet open to competition.⁶ Hence the government retains important powers over the day-to-day functioning of markets and over crucial issues in regulation such as the ‘regulated tariffs’ of dominant state-owned suppliers such as EDF or GDF, which in practice set the conditions for competition (seen below in the case study of electricity supply).

Mergers and takeovers are central to market structure. Since 2003, the general competition authorities in Britain decide on approval of mergers and takeovers without needing ministerial approval. In particular, the Office of Fair Trading investigates as to whether the takeover or merger could be expected to operate ‘against the public interest’ and if so, can refer the matter to a second general competition authority, the Competition Commission (previously called the Monopolies and Mergers Commission), which then decides whether to permit the takeover or merger. However in France, the investigation and approval of mergers and takeovers are decided by the government- the general competition authority, the *Conseil de la Concurrence* can be consulted and give its *avis*, but this is not binding.

Senior IRA members

Differences in state strategies towards IRAs between Britain and France are highly visible in decisions over the nomination of senior IRA members- both the institutional allocation of powers of nomination and the type of person chosen.

In Britain, IRA members are nominated by the government (usually the Secretary of State for Industry or for financial services, the Chancellor of the Exchequer). However, levels of party politicisation have been very low, as measured by whether IRA members have held office before or after their term or a wider criterion of whether they are publicly known to be linked to a political party. In terms of background, a majority of regulators are drawn from the private sector. Sometimes they combine this with temporary senior managerial experience in the public sector. Thus for instance, Sir Howard Davies (head of the Financial Services Authority 1998-2002) had been Deputy Governor of the bank of England and head of the Audit Commission, Sir Callum McCarthy (head of the energy regulator Ofgem 1998-2002 and then head of the Financial Services Authority 2002-today) had previously been both a senior civil servant and worked in the private sector (banking), while the current Chief Executive of the communications regulator Ofcom, Stephen Carter had worked in the communications industry. However, almost no IRA members had previously worked for the dominant incumbent supplier- indeed, this would have been regarded as a major bar to serving. Moreover, while some regulators had experience in their regulated industry, few were academically specialized or trained in their domain. Thus for instance, the head of the Office of Fair Trading 2000-2005, Sir John Vickers, was a university economist known for his work on privatization, while the chairman of Ofcom, Lord David Currie, is an academic macro-economist.

Responsibility for choosing IRA members in France is generally divided: the head of the IRA and several members are usually nominated by the President of the Republic on the proposal of the Prime Minister, but other members are also appointed by the heads of the National Assembly and Senate. Thus for instance, the *Autorité de Régulation des Communications Electroniques et des Postes*, created in 2005, is headed by a Commission of seven- four nominated by the President, and two by the heads of the National Assembly and Senate respectively. Other IRAs for financial services and the general competition authority have even greater dispersion of powers of nomination, including by judicial bodies; they can extend to those nominated after consultation with regulatees.⁷ Thus

6 There are a few exceptions- for instance, the CRE can set some tariffs for network access.

7 The *Autorité des Marchés Financier* (AMF) is headed by a President nominated by the President of the Republic, but also includes members nominated by the Cour de Cassation, Banque de France, head of the Senate, National Assembly, Conseil économique et social, members nominated by the Economics minister after consultation with representatives of

potentially a much wider range of IRA members are possible in France than Britain given greater dispersion of nominating powers.

Perhaps surprisingly for a country known for the high politicisation of its administration, relatively few French IRA members have been active politicians, in the sense of standing for or holding elected public office. But, on the wider measure of publicly-known affiliations to a political party, a much higher proportion are politicised than in Britain, although still just under half. Table 2 compares the two countries using the two criteria.

Table 2 Party activism and public affiliations of IRA members 1990-2001

	Britain	France
% holding or standing for public office (local, national or European) before or after term on IRA	3% (1 of 33)	9% (4 of 46)
% publicly affiliated with party	1 (1 of 33)	46% (21 of 46)

Notes: (1) Coverage: Britain: members of all sectoral IRAs; only heads of OFT, Competition Commission and predecessor Monopolies and Mergers Commission, SIB/FSA and ITC; excludes temporary interim regulators. France: All members of sectoral IRAs; President of Conseil de la Concurrence and COB

At the same time, and perhaps more significantly for the operation of IRAs, most IRA members in France have come from the public sector (74% (14 of 19) for the period 1990-2001)⁸ to which they often return. This is in sharp contrast to Britain, where most IRA members come from the private sector, to which they return after their IRA service. Table 3 shows the proportion of IRA members whose main previous occupation was in the private sector, and then their destinations after serving on an IRA.

Table 3 Business origins and destinations of IRA members 1990-2001

	Britain	France
% IRA members from private sector (previous occupation)	71% (22 of 31)	26% (5 of 19) see note 3
% IRA members going to private sector after departure	93% (13 of 14)	17% (1 of 6)

Notes: (1) Coverage: as Table 2. (2) Principal occupation taken. Business includes: firms; self-employment- e.g. as barrister or consultant; associations representing companies. (3) France: if ordinary members of the *Conseil de la Concurrence* are included in addition to President, then the proportion from business is 28% (13 of 47), an unsurprising result since one of the three 'colleges' is composed of nominees from the private-sector.

Many senior IRA members are drawn from the elite *grandes écoles* and *grands corps*. Thus for instance, 4 of the 7 members of the ARCEP in 2006 were from ENA or Polytechnique.⁹ Similarly, of the 7 members of the CRE in June 2006, 2 were *enarques* and one is from *Ponts et Chaussées*. Typically, IRA members had held senior posts in the *administration*. Thus for instance, 5 of the 7 CRE

(Contd.) _____

investors and other market actors. Similarly, the Conseil de la Concurrence has members from the Conseil d'Etat, Conseil de Cassation, persons chosen because of their expertise, and others due to having held posts in industry, services, craft industries or the liberal professions.

8 If ordinary members of the Conseil de la Concurrence are included in addition to President, then the proportion from business is 28% (13 of 47), an unsurprising result since one of the three 'colleges' is composed of nominees from the private-sector.

9 Source: ARCEP website.

and 3 out of 7 ARCEP members had been *directeur de cabinet* of a minister or member of a ministerial *cabinet*. A further important characteristic is that a high proportion of IRA members have high sectoral expertise. Thus for instance, the president of the ARCEP, Paul Champsaur, is an economist/statistician with expertise in telecommunications, as are two other members (Nicolas Curien and Michel Feynerol). Sometimes IRA members have spent extensive periods in the incumbent operator (for instance, 3 out of the 7 ARCEP members had worked for France Télécom). Thus more IRA members than in Britain have close links with the sector that they are regulating.

The creation of IRAs in Britain and France has had rather different effects on the composition of policy makers. In Britain, it has increased the role of those with private sector experience, and favoured those who combined this with some temporary public sector posts. This is a change from twenty or thirty years ago, when policy making was dominated by civil servants and ministers, but reflects a wider change in public management of giving senior administrative posts to those with private sector experience. In France, however, the creation of IRAs has not led to an influx of new actors. Instead, they have overwhelmingly been colonised by the '*grands serviteurs de l'Etat*' (or more pejoratively, 'technocrats')- public sector officials with senior administrative experience who move in and out of senior positions in the public and private sectors. Like their elected politicians, they belong to the *grands corps* elite which has spread across politics, business and the senior administration. Unlike Britain, the private sector has provided few IRA members. Thus overall, many IRA members in France have close links with the sector they are regulating and/or with the central administration.

The effects of IRAs on economic and industrial policy

It is difficult to disentangle the effects of IRAs from those of other factors, such as altered government policy or privatisation. However, it is possible to examine the role of IRAs and its place within the strategies and relationships of policy makers.

In Britain, IRAs have been at the forefront of making the promotion of competition the central aim of regulation. Already in the 1980s, Sir Bryan Carsberg (head of Oftel between 1984 and 1992) developed a 'conceptual framework' based on competition.¹⁰ It had two main 'legs'. The first was promoting 'effective competition' as the highest priority, because it would benefit consumers. The second was developing 'incentive regulation' where competition was not possible by establishing a regulatory framework that 'mimicked' a competitive market. The conceptual framework provided a basis to interpret the broad legislative framework and to justify regulatory action either to ensure that competition was fair and effective or to produce similar incentives and pressures to those offered by competition. Other regulators often followed this approach, as did the government, which in later legislation often made promotion of competition one of the primary duties of IRAs. Equally, general competition authorities in Britain have insisted that their primary, if not sole, objective is to promote effective competition in decisions about mergers and takeovers; they have paid no attention to industrial policy considerations of creating British national champions. Thus for instance, overseas takeovers of many electricity and water companies have been accepted. No attempt has been made to block attempts by overseas companies such as Deutsche Börse, the Swedish exchange OM and the US exchange NASDAQ to take over the London Stock Exchange.

In France, the position is more complex. Here we see a paradoxical divide. On the one hand, IRAs form part of political discourse that France is abandoning industrial policy (cf. Schmidt 2002, 2006). On the other hand, closer examination of decision making reveals that despite competition, French suppliers continue to be highly protected. Furthermore, industrial policy remains, albeit in a different form and through different instruments than in the 1960s-1980s period. The strategy involves both creating European or international French industrial champions through overseas expansion and ensuring a profitable domestic base for those champions, aims that hark back to those of the 1960s-

¹⁰ See Oftel, *Annual Reports*, especially those of 1984 and 1985; Carsberg 1989.

1980s (cf. Hayward 1997). The major innovation lies in the means of achieving those goals, with a mixture of old and new policies including the partial privatisation of publicly-owned suppliers, gradual liberalisation of home markets, continued protection of French suppliers in their domestic markets and most of all, aiding French suppliers to expand abroad.

IRAs play a significant but not predominant role in this industrial strategy. They have been responsible for enforcing liberalisation and competition and have been at the forefront of decisions concerning the technical aspects of a regulated competitive market such as interconnection costs or the conditions for local loop unbundling (*'dégroupage'*) in telecommunications. They have also publicly supported opening of markets. They have opened markets at a gradual pace, thereby allowing suppliers such as France Télécom or EDF time to adjust.

At the same time, IRAs have sought to ensure a profitable home market. They have supported 'rebalancing' of tariffs by French incumbents, making the latter less vulnerable to entry and unwinding previous subsidies. In particular, they have supported moves by incumbents such as France Télécom or EDF to increase tariffs that lie below costs, including those that bear heavily on individual users (for instance rental charges). They have also balanced the objective of competition with other aims, such as 'long-term innovation' or profitability of suppliers, and sometimes have even actively used instruments to keep out undesired overseas entrants (see the case of 3G mobile licensing below).

Finally, IRAs have aided overseas expansion by French firms. In part, this has been indirect, as liberalisation of the French domestic market has been used by French suppliers to legitimate their acquisition of foreign suppliers, entry into overseas markets and appeals to the European Commission when faced with obstacles from other governments (notably in electricity in Italy and Spain- see below). IRAs have also not opposed moves by incumbents to take over competitors or potential competitors- for example, the proposed merger between GDF and Suez that will create one large French supplier that is well placed to expand abroad (and to resist entry into the French domestic energy market).

Case studies of IRAs: 3G mobiles and electricity

The roles of IRAs in shaping markets and industrial strategies, and the contrasts between Britain and France can be seen in two important cases studies: the licensing of third generation (3G) mobile networks; electricity supply. The two raise issues at the core of the functioning of competitive markets and the behaviour of IRAs: protection of incumbent suppliers; entry by overseas firms; the relationships between IRAs, suppliers and the government; the powers of IRAs and their use of those powers.

Third Generation Mobile (3G) licensing

Until the late 1990s, mobile licences were given at very low cost to national telecommunications companies without much competition in both Britain and France, as in most EU countries. In the late 1990s, 3G mobile networks offered major innovations, including high-speed transmission of voice, data and images. EU legislation (European Parliament and Council 1997, 1999) required that at least two suppliers be permitted and that licences should be allocated in a 'fair and transparent manner'. But, national policy makers were responsible for allocating licences. Moreover, EU legislation did not specify the mode of allocation, notably the choice between two models, namely an auction or a 'beauty contest' in which policy makers chose the best bidder according to several criteria, with bidders presenting their diverse plans for a network.

In Britain, the telecommunications IRA Ofcom consistently pressed for greater competition in telecommunications, as did the Radiocommunications Agency, a unit within the Industry Ministry that later became part of the communications IRA Ofcom. Both the Conservative government that ended in 1997 and its Labour successor accepted the need for greater competition and decided that licences

should be allocated by auction. After taking advice from the Radiocommunications Agency and experts, and despite some reluctance by British Telecom, the government decided to allocate 3G licence by auction. Moreover, it specifically designed the process to increase competition (Börger and Dustmann 2003: 229-30; Binmore and Klemperer 2002: 80-5). It decided to issue five licences, ensuring that there would be at least one additional supplier compared with the existing four mobile companies; the five licences were of three unequal sizes, and hence value, further aiding entry for operators with lower financial capabilities. Moreover, one licence was reserved for a new entrant to the UK market— i.e. a bidder who did not already possess a 2G licence. Finally, a ‘simultaneous ascending’ form of auction was chosen, which allowed bidders to decide the prices they could pay over time; furthermore, low reserve prices and minimum payments (relative to the bids in fact made) were set.¹¹ Thus the auction was designed to attract the maximum number of bidders and to increase competition to existing suppliers. It is important to note that it was not designed to raise large sums; expectations of total bids were £1.5b to a maximum of c£4b.

The results of the auction were well beyond expectations. There were 13 bidders and the auction continued for 150 rounds in 2000 (for details, see NAO 2001, Börger and Dustmann 2002). The five successful bidders included the four existing 2G licence holders.¹² However, the total cost was £22.5b (37b euros), approximately 15 times the original estimates of the revenues to be raised and representing a cost of 642 euros per heads of population. Thus existing suppliers had to pay high prices for licences and faced increased competition from a new entrant.

3G licensing in France followed a very different pattern. The telecommunications IRA, the *Autorité de Régulation des Télécommunications* (ART) was headed by Jean-Michel Hubert, a member of the elite *corps des ingénieurs des télécommunications*, and former member of France Télécom’s research centre the CNET as well as a former member of a ministerial *cabinet* and employee in the Paris *mairie* with close links to President Jacques Chirac (formerly mayor of Paris). Equally, of the other four members of the ART between 1997 and 2000, two were from the *grands corps* and had served in ministerial cabinets, whilst a third had been a *depute*, and three had held posts in or closely linked to the telecommunications industry and/or were experts in the sector. Hence the ART members had close links with both the industry and central government.

The ART played a major role in domestic debates about how to allocate licences. It argued consistently and very strongly against an auction and sought to protect the existing French suppliers.¹³ It claimed that an auction would damage innovation and development of new services, by raising the cost of licences. These are classic arguments in favour of the state ensuring sufficient profitability for domestic suppliers in a *grand projet* strategy. Thus the ART supported traditional French industrial policy. Interestingly, it was opposed by the Ministry of Finance, which was attracted by the prospects of large revenues, having looked at the British and German examples.¹⁴ Only a few ‘liberal economists’ supported an auction, together with potential new entrants such as Deutsche Telekom (cf. Chamoux 2000, Penard 2002: 50-2; *Les Echos* 19.5.2000). Another issue concerned whether four or five licences should be offered. The question at stake was again foreign entry and the financial viability of the operators versus increasing competition. Existing French mobile operators – France Télécom, SFR and Bouygues Télécom- pressed for a choice to offer maximum protection against entrants, a position supported by the ART (*Les Echos* 13.10.99, 26.5.2000, 30.5.2000).

The outcome of the debates was a compromise between the incumbents and ART on the one hand, and the Finance Ministry on the other. France decided to use a high cost beauty contest, with the aims

11 For details of the auction, see Binmore and Klemperer 2002, Börger and Dustmann 2002

12 In addition to the 4 existing 2G network operators, a Canadian company, TIW obtained Licence A, reserved for a new entrant; soon afterwards it sold the subsidiary that owned the licence to Hutchinson Whampoa.

13 *Les Echos* 13.10.99, 5.4.2000, 12.5.2000

14 *Les Echos* 12.4.2000, 3.5.2000, 5.5.2000

of both raising considerable revenues and at the same time permitting the ART and government to select candidates and to ensure that existing French suppliers obtained a licence. Four licences were made available, rather than five. The cost of each licence was set at 4.9 billion euros per licence, the figure being calculated from the sums raised through auctions in the UK and Germany! (Penard 2002: 51; cf. Curien 2002: 150-1) The ‘beauty contest’ conducted by the ART was based on points allocated to criteria such as the coherence and credibility of the project and business plan, scope and speed of service deployment and employment. These were all rather vague and hence left much room for ART discretion (Penard 2002: 51).

The outcome of the beauty contest differed greatly from that in Britain. Foreign bidders rapidly pulled out, as did possible French new entrants such as Suez or La Lyonnaise des Eaux. By the last few weeks, it was clear that only the three existing French mobile operators would bid. Politically, France Télécom and SFR had little choice but to bid, since the former was majority state-owned and the latter’s main shareholder, Vivendi (then headed by Jean-Marie Messier), was deeply enmeshed in dealings with policy makers. But Bouygues Telecom lacked capital (being part of the family-owned Bouygues group) and withdrew at the last minute. Thus the government failed to raise revenue and indeed potentially reduced competition, creating a duopoly for 3G instead of the three suppliers for the 2G networks. Although the high technology stock market crash was very significant in the lack of bids, the combination of a beauty contest and clear policy by the ART and government to protect existing suppliers greatly discouraged potential entrants.

The final part of the story is equally telling in terms of protection of existing suppliers. The government sought to attract a bid for the third licence, as the existing third French mobile operator Bouygues had no 3G licence. But, to attract Bouygues, it was obliged to offer a lower price, which in turn forced it to re-negotiate licence fees with SFR and France Télécom; the new terms, such as longer licences and lower prices, greatly reduced the revenues to one eighth of the original licence fee (each licence was now priced at 0.619b euros each or 41 euros per head – Cartelier 2003: 79-80). Thus today, the three French incumbents not only retain the 3G licences but at a considerably lower cost than in other countries such as Britain. (In 2007 a fourth UMTS at the same price as the earlier ones was made available for bids, with a decision due after July 2007). The ART played a significant role in this outcome, by supporting a beauty contest rather than an auction, by pressing for only four licences and by supporting low cost licences. Table 4 summarises the comparative outcomes in Britain and France of 3G mobile licensing

Table 4 Outcomes of 3G mobile licensing

	Britain	France
Number of bids	13	2 (3 rd later)
Number of licences allocated	5	2 (3 rd later, 4 th possible in 2007)
Total cost of licences (billion euros)	C37 (£22.5b) ¹⁵	a) first round- 9.8 b)second round 1.86
Cost of licence per head of population (euros)	C642	a) 163 b) 31

Regulation of Electricity supply

The Office of Electricity Regulation (Offer) was created when the incumbent operator, the CEGB (Central Electricity Generating Board), was privatised in 1989. It made the extension of competition its central policy objective. Hence it pressed for liberalisation to be extended from large users to all

¹⁵ Depending on exchange rate used; figures cited for euros from NAO 2001, Börgers and Dustmann 2002.

customers; this was achieved by 1998, almost ten years before required by EU legislation. It also refused to follow a nationalistic approach to regulation. Thus when British suppliers faced takeover bids by other companies, notably from abroad both from the US and, paradoxically given its domestic strategy, EDF, Offer did not attempt to protect British suppliers from such bids. When mergers between suppliers were discussed, Offer focused almost exclusively on their implications for costs and competition, seeking price reductions or internal changes to prevent 'unfair competition' (e.g. in EDF's takeover of London in 1999- Offer 1999). The lack of protection by public policy makers (both the government, whose golden shares expired in most companies and Offer) allowed many electricity suppliers to be taken over by overseas firms; indeed, between 1995 and 1997 no fewer than eight of the twelve regional electricity companies were taken over by US utilities (although they were later sold), while in a paradoxical move, EDF is now one of the largest owners of electricity in Britain, notably through London Electricity. Moreover, competition has spread, even for residential users, so that by 2006, the share of the retail electricity market held by former monopolists had fallen below 50% (Ofgem 2006).

The French electricity market has been dominated by EDF, which was nationalised and given a monopoly over distribution and transmission in 1946, and also accounted for c96% of electricity production, notably thanks to its nuclear power stations. But by the 1990s, there were considerable forces for change (Finon 2003). The EU passed legislation in 1996 requiring member states to liberalise part of the electricity supply market, notably for large users, and to separate supply and regulation (but not to create an IRA); this was followed by further legislation in 2003 requiring full liberalisation (including domestic users) and well-functioning IRAs by 2007 (Cameron 2002, 2005). Domestically, EDF found that its prices were held down by governments, who at the same time took substantial payments as owner; it also bore the cost of a generous pension scheme for its employees. Finally, it began to expand abroad, but faced obstacles from other governments who sought to protect their domestic market, particularly in Italy and Spain.

Initially, France was reluctant to modify regulatory arrangements (Lauriol 2005, Finon 2003). It only transposed the EU's 1996 directive in 2000, with a year's delay and with the minimum liberalisation required by the directive. Even after the creation of an IRA, the CRE, the government maintained important powers, notably to set EDF's 'regulated prices' for residential users who were still under EDF's monopoly (only large users in the liberalised section of the market could choose to leave regulated tariffs and negotiate their own prices with EDF or other suppliers). The CRE could set prices for access to the electricity grid but not other tariffs, not could it modify EDF's licence.

The CRE was a break with past formal institutional arrangements for electricity. But, it was led by members of the traditional technocratic French elite, namely the *grands corps*. Moreover, many individuals had close links with French energy suppliers. Thus for instance, the first president of the CRE, Jean Syrota, was a member of the elite *corps des ingénieurs des mines* and had worked for almost twenty five years in the public sector dealing with electricity, ending as head of the state-owned nuclear fuel company COGEMA (now called AREVA) between 1988 and 1999. Equally, his successor, Philippe Ladoucette, was member of the *corps des Mines*, a former head of the French coal company Charbonnages de France, had served in several ministerial *cabinets*, and had close links with the new head of EDF, Pierre Gadonneix (*Les Echos* 31.3.2006). In June 2006, 5 of the 7 members of the CRE had been through a *grande école* (including Sciences Po, Paris) 5 out of 7 had served in ministerial *cabinets*, and 5 out of 7 had worked for energy suppliers.

In practice, the CRE has pursued a strategy that aids French suppliers, notably EDF, as part of a modified industrial policy to support French suppliers and aid their expansion, especially in Europe (cf. Gallon 2000, Chevallier 2003, Lautier 2003). Three linked elements can be identified: gradual liberalisation of the domestic market linked to overseas expansion for French suppliers; protecting the home market from overseas entrants despite legal liberalisation; ensuring a profitable domestic market.

The CRE pressed hard for opening the French market to competition. Thus it helped to create a virtual power plant market, whereby EDF was obliged to sell generating capacity to competitors, which accounted for 56% of the supply of EDF's rivals in 2005 and a spot market for energy in 2003 (*Le Monde* 14.7.2000, *Les Echos* 10.4.2006; Morin 2004). It also sought to ensure fair access to EDF's transmission network for other suppliers (Morin 2004; *Le Figaro Economie* 19.2.2001, *Les Echos* 11-12.1.2002, *Les Echos* 9.1.2006). It set rules to facilitate switching of suppliers (*Le Figaro Economie* 13.1.2006). But liberalisation was gradual- France largely followed the EU's timetable for extending competition, with full liberalisation only being introduced in 2007. The CRE underlined that it was following EU requirements (cf. Syrota 2003). The CRE was concerned that EDF should be able to 'adapt to competition'. Moreover, the CRE's policy formed part of a wider French strategy designed to promote overseas expansion by EDF. French policy makers sought assistance from the EU Commission to reduce entry barriers to EDF in other EU member states, notably Italy and Spain where governments passed regulations specifically designed to prevent EDF from controlling companies in which they had bought large (and expensive) stakes.¹⁶ They used the ending of EDF's monopoly to argue that overseas companies now had access to the French market, and hence reciprocity in entry to markets applied. Indeed, EDF itself argued for the end of its domestic monopoly in order to obtain reciprocal access to other EU markets (*Les Echos* 5.10.2000, *Libération* 16.11.2000).

A second element was de facto protection of the French market from overseas suppliers. EDF lowered its tariffs for non-regulated users, greatly limiting its loss of market share (to less than 10% of final the total market in 2005- Enjeux *Les Echos* October 2005). Its low prices (based on low marginal costs for nuclear power and state-owned enterprises carrying costs of decommissioning and treatment) made entry by overseas competitors difficult. Paradoxically, liberalised sections of the market saw sharp price rises after 2004 as oil prices rose; by 2006, a study estimated that regulated tariffs (which the government had refused to increase for a year) were 40-66% below unregulated tariffs (NUS consulting study, *L'Humanité* 31.5.2006; *Libération* 29.6.2006). Indeed, parliamentary deputies and industrial users pressed and obtained from the government the return of regulated tariffs in the 2006 law that allows majority privatisation of the gas supplier GDF, in order to provide lower EDF tariffs! (*Libération* 29.6.2006). Moreover, the government restructured the market to ensure that likely competitors to EDF would be French. In 2001, it sold a large share in the second electricity producer in France, CNR (Compagnie nationale du Rhône, 3% of French production) to the privately-owned Suez group; alternative overseas buyers were excluded (*Libération* 29.8.2001). Then in 2006, the government altered legislation to privatise GDF in order for it to merge with Suez, so that the most likely second operator would be a French company with a large public sector stake!

The third element was maintenance of a profitable home market, albeit within political constraints. The CRE ensured that EDF (and its grid subsidiary, the RTE) obtained high (and sometimes increased) rates of return on their distribution networks (CRE 2006: 78, *Les Echos* 7.10.2005). 'Regulated tariffs' set by the government saw more complex debates. In particular, conflicts arose as the government resisted EDF requests for politically-unpopular tariff increases (for instance, in 2002) (*Le Monde* 27.11.2002, 28.3.2003). The CRE 'advised' the government on EDF's regulated tariffs. It argued that prices should be based on costs, and hence that sometimes regulated prices should rise (CRE 2006: 2, *Le Figaro* 6.7.2006). It proposed substantial tariff increases, based on oil prices and general inflation (for instance, 4.6% in 2003). In 2006, it warned that EDF's regulated tariffs for firms would have to increase, in order to cover production costs and hence comply with legal requirements on fair competition (*Les Echos* 6.7.2006). Although the government often scaled down such proposals, the CRE played an important role in supporting EDF and in legitimating price rises. Thus for instance, after nominal decreases between 1997 and 2000, EDF tariffs for residential users were raised by 1% in 2001, 3% in 2003 and 1.5% in 2005 (*Les Echos* 15.9.2005).

16 Montedision in Italy and Hidrocantabrico in Spain.

The results of the strategy have been remarkable for EDF. It is the largest electricity company in Europe. In 1999 it set an objective of generating 50% of its turnover from outside France, an aim achieved in 2003 (*Figaro Entreprises* 15.12.2003); the figures included 3.1b euros in Britain (notably via ownership of London Electricity) and 8.6b in Germany in 2004 (*Témoignage Chrétien* 17.6.2004). In 2005, it made a 3.5billion euro net profit (on income of 31 billion euros).

Conclusions

The formal institutional governance of markets has been greatly altered in France. This article has focused on one important aspect, namely the spread of IRAs. At first sight, IRAs represent a sharp break with traditional French economic institutions and a rapprochement with those in 'liberal market economies' such as Britain.

However, closer examination reveals significant differences between the two countries and also important continuities in France. The timing and triggers for the creation of IRAs in France differed from those in Britain. In particular, Europeanisation was important in France, whereas Britain created IRAs to deal with the privatisation of incumbents with market power. Significant contrasts existed in the powers, staffing and leaderships of IRAs. Moreover, well-established technocratic elites in France have maintained their power, taking a large proportion of the posts of senior IRA members. The French government has retained many powers. Finally, the behaviour of IRAs has varied between Britain and France. Whereas British IRAs pursued internationally competitive markets, French ones formed part of a national strategy to create internationally competitive firms, especially in increasingly liberalised European markets. Although traditional French industrial policy has been altered, it remains nationalistic and designed to promote French suppliers.¹⁷

These findings allow two broad arguments to be advanced related to claims of a Europe-wide movement to 'the regulatory state' and comparative political studies concerning France that were set out at the start of the article. First, they suggest that even if different countries adopt the formal institutions of a regulatory state, those institutions can be adopted for different reasons and operate in very different ways, giving rise to diverse forms of markets. Similar institutions can conceal various state strategies and the result are several regulatory states not one. Equally, a country such as France may adopt the formal trappings of a liberal market economy, but the operation of the state and markets remains very different from a 'proper' liberal market economy such as Britain.

A second argument concerns change. IRAs certainly represent a new form of state organisation in France. They are another actor in the complex 'game' of industrial policy, in addition to traditional players such as the government, suppliers and trade unions. But, there are also strong elements over continuity with industrial policy from the previous decades, notably over the aims of policy, the position of the *grands corps* and the ability and desire of public policy makers to mould markets and competition. IRAs in France are part of a strategy of adapting to changing international and domestic conditions whilst pursuing well-established ambitions and protecting existing elites. State forms and instruments may have altered, but an activist French industrial policy is alive and well.

17 Cf. Hayward 1995, Schmidt 1996.

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