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Regulatory Governance

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Introduction

Perhaps the most significant change to the formal institutions of Irish governance over the past decade has been the establishment of independent regulatory agencies. These agencies are designed to be independent or non-majoritarian — they have been delegated specific regulatory powers for which the traditional hierarchical institutions of government are considered to be inappropriate.[i] They are significant in terms of governance because of the decision of political actors to delegate important policy making powers to agencies outside their immediate control and for the consequent challenge of how to reconcile the apparent paradox of preserving independence while maintaining accountability to the political system.

The focus of this chapter is on the evolution of these new regulatory actors and the gradual emergence of regulatory governance as a distinctive form with its own pattern of interaction between state and private actors. It argues that regulatory governance has taken time to evolve and that its uneven path can only be understood by reference to Ireland's existing configuration of institutions and the corresponding preferences of key actors. In particular, the combination of a high concentration of executive authority, a corporatist style of policy-making, and a parliament with little interest in oversight posed significant challenges to the emergence of a new regulatory regime (See Hardiman, ch. 1).

However, an examination of the institutional constraints that confronted the regulators serves the purpose of illuminating a wider set of questions about governance in the Irish political system and the system's ability to adapt to the demands and preferences of a broader range of both public and private actors.

The initial decision to create regulatory actors was in the Irish case prompted largely by the demands of EU legislation that prevented the government from both owning and regulating utilities.[ii] The result, particularly in the case of Telecom—where the state has sold its entire stake—is an obviously important shift in the role of the state, from owner to regulator. However, the decision to delegate powers to regulators, initially made somewhat reluctantly in the case of the utilities, has proven to be increasingly attractive to political actors, so that regulatory governance has emerged as an increasingly popular institutional choice.

Thus what has emerged in terms of the functions of the state is what Rhodes describes as a "hollowing out," as the state chooses to divest itself of a series of regulatory functions (Rhodes 1994). Osborne and Gaebler describe the result of delegation as a shift in the role of the state from "rowing to steering" (Osborne and Gaebler 1993).

Analytical Framework

As Table 1 indicates, a plethora of regulators and agencies with significant regulatory responsibilities have been created over the past fifteen years.[iii]

Table 1: Irish Regulators

SECTOR	*AGENCY/REGULATOR*	*YEAR CREATED*
Accounting	Irish Auditing and Accounting Supervisory Authority (IAASA)	2003
Aviation	Commission for Aviation Regulation	2001
Competition	Competition Authority	1991
Electricity	Commission for Energy Regulation (CER) (originally the Commission for Electricity Regulation)	1999
Environment	Environmental Protection Agency (EPA)	1992
Financial Markets	Irish Financial Services Regulatory Authority	2002
Food Safety	Food Safety Authority of Ireland	1998
Pharmaceuticals	Irish Medicine Board	1995
Taxis	Commission for Taxi Regulation	2004
Telecommunications	Commission for Communications Regulation (ComReg) (originally Office of the Director of Telecommunications Regulation, ODTR)	1996

Source: compiled by author

The chapter focuses upon three particular cases of regulatory reform: telecoms, energy, and financial markets. The rationale behind the choice of these cases is firstly their importance in a modern economy meaning that state and private actors can be assumed to have highly developed interests and policy preferences. The second rationale is methodological in that the evolution of these interests and policy preferences can be assessed over time which allows for process tracing.

In the cases of telecoms and energy, a regulatory regime was created from scratch, whereas in financial regulation, a new single regulator was created that replaced existing actors. The analysis uses a principal/agent framework whereby the principals are the government and the Oireachtas and the agents are the regulators. This approach allows for an identification of the shifting preferences of the key actors over time. It also allows for an analysis of what Kathy Thelen has identified as the need for institutions to maintain and nurture political support if they are to evolve and flourish (Thelen 2004).

History of Independent Regulators

The concept of an agency with a specific regulatory mandate but separate status from the hierarchal institutions of government was traditionally an American phenomenon that dates back to the end of the nineteenth century (Eisner 2000). As Shipan describes, the initial rationale for an independent regulatory commission came from the "scientific management school" that argued that to achieve optimal policy outcomes, politics and administration needed to be separated, and that the creation of agencies that were outside both the executive and the legislative branches was the most appropriate means of achieving such an objective (Shipan 2006). The political appeal of these new actors saw the creation of a bundle of agencies during the twentieth century, with a particular peak at the time of the New Deal (Eisner 2000).

The Thatcher government in Britain is credited with being the first government to create regulatory agencies with similar-type powers outside the United States. The need for these new institutional actors followed the Conservative government's decision to privatize previously publicly owned utilities, notably British Telecom and British Gas. Privatization meant that a regulator independent of government was required to oversee the firms, due both to the state's continued ownership of significant stakes but also because of the firms' continued monopoly or at best duopoly status. The paradoxical result was, as Steven Vogel pointed out, that the Conservative government's ambition to deregulate and liberalize utility markets actually resulted in re-regulation and the creation of what became new and powerful regulatory actors (Vogel 1997).

From an Irish perspective, the passing of the Single European Act in 1986, with its objective of a single market by 1992, proved to be particularly significant in the evolution of regulatory policy. The result of the SEA was a swathe of directives across a broad range of policy areas that led to what Mark Thatcher describes as "a rapid and sustained expansion of regulation in Europe" and the emergence of what Majone has described as the emergence of the EU as a "regulatory state" (Thatcher 2001; Majone 1996). It was therefore "top-down" Europeanization, understood as the mechanisms by which EU policies and directives affect the domestic policies and institutions of member states, that has proven important in explaining the emergence of much of Ireland's regulatory policy (Radiaelli 2003; Borzel 2005). The institutional implication of the Europeanization of regulatory policy has depended upon the "goodness of fit" with member states' existing regulatory architectures (Schmidt 2002). With respect to utility regulation, for the Irish case, like the majority of EU states, it meant the creation of new regulatory agencies with a significant level of independence from the existing hierarchical government structure (Thatcher 2002). However, in the case of financial and other important areas of regulation, the EU has not mandated any particular institutional design or level of independence from government, so member states have had the freedom to implement directives to suit their particular institutional preferences. As a result, Gilardi has found evidence of considerable variation in terms of regulatory design and independence (2002). But the result of the emergence of the EU as a regulatory state is that for Ireland, as for all EU member states, regulation is firmly, in Putnam's terms, a two-level game, played out at both an EU and a domestic level (Putnam 1988). However, it is important to emphasize that the decision to delegate regulatory responsibility is not just a result of Europeanization but reflects other political incentives.

Why independent?

Why do politicians decide to delegate important powers to actors that are beyond their immediate control? There is, not surprisingly, a great deal of academic debate regarding the apparent paradox as to why political actors should voluntarily choose to weaken their powers. Three rationales are pointed to. First is to ensure the credibility of a regulatory decision, also called the credible commitment rationale (Kydland and Prescott 1977; Levy and Spiller 1996). If, it is argued, the market recognizes that regulatory decisions will be overturned due to changes in public opinion or government, the result will be uncertainty and ultimately a less desirable policy outcome. The credible commitment rationale is key to the argument as to why central banks are given autonomy in terms of monetary policy, where it is claimed that the outcome is lower rates of inflation than a monetary policy regime directly influenced by partisan concerns could provide (Grilli et al., 1991; Cukierman 1992). The argument also conveniently gives a reason for politicians to tie the hands of future governments by making it difficult for them to overturn existing policies.

The second rationale for why delegation occurs is that it insulates politicians from the fallout of unpopular decisions by shifting the blame to the regulator (Weaver 1987;

Egan 2004). By definition, regulators must adjudicate on important policy issues with significant distributional outcomes, so it can be of obvious political advantage for governments to avoid taking responsibility for decisions that could alienate important interest groups and potential voters.

The third rationale is to ensure a high level of expertise in the making of regulatory decisions. It is argued that regulation frequently involves policy issues of high technical complexity that pose significant difficulties for existing government departments due to their lack of sufficient expertise (Majone 1997, 2001). The creation of a regulatory agency therefore allows for the cultivation of such expertise, both in terms of allowing for high levels of staff specialization and in the ability to recruit outside of normal public service guidelines.

How to hold regulatory actors accountable

If there are clear arguments as to why governments should consider delegating powers to regulatory agencies, there is a thriving academic literature analyzing how government and legislative actors can ensure agencies remain accountable to the political system. Democratic theory assumes that at a certain level there should be a link between the citizens of a country and its policies. There is also an assumption that in most cases citizens must delegate responsibility to elected politicians to create and enact policies, and that if citizens do not like them, they can choose to vote their elected representatives out of office. The creation of agencies that are, to some degree, outside the control of politicians but responsible for important decisions, obviously serves to weaken further the direct link of delegation. The political challenge is therefore how to minimize the trade-off between the advantages of independent agencies and the apparent threat to the normal process of democratic accountability.

The most widely applied theoretical framework used to analyze this trade-off is that of principal/agent, derived largely from economics of organizations, where the government and the legislature are considered the principals and the regulator is considered the agent (Moe 1984; Weingast and Moran 1983, Epstein and O'Halloran 1999)[iv]. The principals are assumed to seek to minimize "agency losses', defined as a situation where agents act contrary to the preferences of the principal, because of "shirking", where agents act to pursue their own preferences. The degree of independence is shaped therefore by *ex ante* mechanisms such as the legislative mandate that describes the role and objectives of the regulator and by a series of *ex post* mechanisms requiring the regulator to report on its actions to the principals. In terms of *ex post* mechanisms, McCubbins and Schwarz describe how legislative committees can choose between two styles of oversight: police patrols or fire alarm. In the case of police patrol, regulatory oversight is "centralized, active and direct" and includes legislative hearings and special inquiries, whereas fire alarm is less active and indirect, and encourages citizens to bring agency discretion to the attention of principals (McCubbins and Schwarz 1984).

While the principal/agent framework has limitations—notably in the European context in identifying exactly who are the regulatory principals given the important role of EU institutions—it is a useful lens by which to analyze the incentives of the different actors that make up the domestic regulatory regime and the success or otherwise of the accountability structure.

Cases: the Irish Context

Before laying out the details of the telecom and electricity cases, it is important to emphasize that prior to the establishment of the regulators—given the state's long-term ownership of both monopolies—there was no explicit regulatory policy or objective. Instead the state had a diverse set of policy preferences that included employment generation and regional development, often at the expense of efficiency and profit (Guiomard 1995). The result was that policy outcomes tended to reflect the interests of producers rather than consumers, and given the importance that state actors placed upon social partnership during the 1990s, challenging the entrenched interests in both firms had proven to be difficult. They also reflected the institutional design of the partnership process, where there was no explicit role for the interests of consumers (OECD 2001).

In terms of political institutions, the predominance of producer interests reflected the incentives predicted by a PR electoral system, as suggested by Lijphart and Crepez (1991). It also reflected the preferences of state actors, focusing upon employment growth following the economic turmoil of the 1980s, and the need to satisfy the requirements of the Maastrict criteria.

Telecoms

The immediate catalyst for the creation of an independent regulator was the government decision to sell a stake in Telecom in 1996 to a foreign consortium, KPN Telia. This was motivated largely by the need to invest in Telecom's infrastructure, but the government was constrained by the obligations of the Maastricht criteria from doing so from its current spending (Chari and McMahon 2003).

The sale of the stake prompted the passing of the Telecoms Miscellaneous Provisions Act (1996), the Act that set up the Office of the Director of Telecoms Regulation (ODTR). While the state had obtained derogation in terms of opening up the domestic market to full competition, the EU, through a range of directives, had a stated ambition to end national monopolies and ensure competition. Telecom's monopoly was clearly coming to at an end (Thatcher 2002). Once the decision was made to sell a stake in the firm, EU directives demanded the creation of a regulator independent from government. [v] However, from a government perspective, the other rationales described earlier were also clearly important. First, in terms of credible commitment, KPN Telia as the new owner of the significant minority stake was unlikely to agree to a situation where the state continued to be both a shareholder and the de facto regulator. Second, given the increasing complexity of telecoms as a policy issue, there was also an obvious need for expertise. Third, telecoms policy was politically controversial so blame shifting can also be seen as a further attraction. While telecoms pricing was always contentious in an Irish context, issues such as levels of competition and the need to encourage technological innovation were also becoming controversial in a way that further explains an incentive to shift the responsibility for decisions.

However, the 1996 legislation—the crucial *ex ante* mechanism—neglected to signal any formal objectives for the ODTR either in terms of promoting competition or performing a social welfare function. The legislation stipulated that the ODTR was to be "independent in the course of its functions," but did not clarify how the new regulator was to interact with the legislature (ODTR 1996). It also contained no requirement to set up a consumer panel, which was the usual mechanism for ensuring a formal role for consumers in the formulation of policy.

The most immediate result was a major controversy that erupted when the Director of the ODTR refused to appear before an Oireachtas committee in January 1998 on the grounds that it could compromise the agency's independence. This prompted a political furor, with the relevant committee changing its terms of reference to compel the director to appear. However, the controversy sparked broader questions about accountability when the then Attorney General stated: "[L]egislators should not stand over any system which takes away the rights of citizens to hold to account individuals that affect their everyday lives" (Byrne 1998).

The other damaging implication of the 1996 legislation was the lack of powers it gave to the ODTR to take firms, particularly Telecom, to task for their tardiness in implementing the requirements of various EU directives. Consequently, decisions of the ODTR were consistently appealed to the judicial system, resulting in long delays and the subsequent hindrance of competition. The result was high prices for telecom services, as Telecom maintained a virtual monopoly in fixed line and a duopoly in mobile, and consequently low levels of innovation, with long delays in the unbundling of the local loop (OECD 2001).

However, despite its clear inadequacies as a regulator, the creation of the ODTR can be seen, in retrospect, as a turning point in terms of Irish governance. First, the creation of a regulator with statutory powers did mean a formal shift away from traditional governance structures to a rule oriented, arms length style of governance, emblematic of the regulatory state. Second, it meant a change in the way that policy was formulated. This included formal requirements for the ODTR to consult with relevant private actors; transparency, where the ODTR had to publish consultation papers; and finally, justification, where the ODTR had to explain its decisions. These changes in the way that regulatory policy was made can be understood to affect different actors' strategic options in terms of how they chose to interact with the regulator. Third, the decision to fund the ODTR from a levy imposed on the regulated firms, as opposed to a ministerial budget, gave it an important degree of financial independence that allowed it, over time, to build up its resources and expertise.

The government's sale of its remaining stake in Telecom in 1999 did serve to reduce the conflict of interest with regards to regulation. This was made possible by an agreement between the government and the Telecom unions a year previously to an Employee Share Ownership Programme, under which the employees purchased fifteen per cent of the firm.

Commission for Energy Regulation

The Commission for Electricity Regulation (as it was originally termed) was formally established in 1999, following the 1996 EU directive that opened up domestic electricity markets to competition. The directive not only allowed for a certain level of third party access to the electricity network but also ended the domestic monopoly rights for the construction of power lines and power stations (Eising and Jacbo 2001). The result was again that a regulator was required under EU legislation to ensure the development of a market. However, unlike the telecom case, there was no change in the status of the Electricity Supply Board, which remained firmly under the ownership of the state.

If Europeanization was the undisputed key explanatory variable, the decision to create the CER fulfilled other political aims. The need to encourage other firms into the Irish market meant that the credible commitment rationale was clear, as was the need for regulatory expertise, and an interest in shifting the blame to the regulator for responsibility for energy costs. In terms of the accountability structure, the CER legislation did learn one lesson from the mishaps of telecoms regulation in so far as the obligation to appear in front of the Oireachtas was explicitly stated. However, no formal objectives for the regulator were established and no consumer panel was mandated (Westrup 2002). The result was again a regulatory policy that appeared to favor the interests of the incumbent producer at the expense of increased competition.

The government chose to expand the CER's remit to include gas regulation and changed its name to the Commission for Energy Regulation in 2002 but left its underlying remit unaffected.

Financial Regulation

With respect to financial regulation, the important institutional difference from the utility cases was that prior to reform there already existed a range of regulatory actors, the most important of which was the Central Bank.[vi] There was also a clear difference in the role of a financial regulator from that of a utility regulator. A financial regulator has two distinct objectives: first, to avoid a systemic failure of the banking system given its crucial role in allocating credit, and second, to counter the particular problem of asymmetric information where the consumers of financial services have difficulty assessing the risks and returns of products.

While the Central Bank's regulatory responsibilities were increased by successive governments during the 1980s and 1990s as a result of the need to implement a range of EU directives, there were some unusual features unique to the Irish regulatory regime. In particular was the lack of a specific regulator to oversee the securities markets, a responsibility that was delegated to the British Securities and Investment Board until 1995 when the Central Bank was given the task (Westrup 2005). This gap was surprising given how the scope and significance of financial regulation had grown during the 1990s as financial services had evolved into a key sector of the economy, and was given additional impetus from the success of the Financial Services Centre (McSharry and White 2000).

The catalyst for regulatory reform was a series of financial failures and scandals which suggested that the Central Bank was struggling to cope with increasingly consumer focused issues of regulation. An advisory group, appointed by the government in 1998, recommended that a regulator be established that was completely separate from the Bank, arguing that due to its monetary policy independence it could not be sufficiently accountable to the political system (McDowell 1999). However, the report set off a clamour from the banks and other financial services firms arguing for the retention of the Bank as regulator. The government, after deliberating for nearly two years, decided in 2001 upon a curious hybrid – the new regulator was established as part of a newly constituted Central Bank.[vii] Given that the decision was at odds with the recommendations of the expert group, it proved to be controversial, particularly as during the period in which the government was deliberating, the Oireachtas report on the

Deposit Interest Retention Tax scandal was published, suggesting that the Central Bank's regulatory oversight of the banking sector had been far from robust.

So why did the government decide to reject the advice of its own advisory group and opt for such an unconventional regulatory design? What is clear is that neither the key state nor private actors wanted a change in the Central Bank's regulatory role. The close relationship between the Department of Finance and the Central Bank was typified by the almost automatic appointment of the First Secretary of the Department to be Governor of the Bank. The result was reluctance by these key state actors for a regulator to be created that was outside their control. The aggressive lobbying by the banks and the financial firms located in the IFSC confirmed their resistance to change in the regulatory status quo (Westrup 2005).

Despite its peculiar relationship with the Central Bank, the new financial regulator, which finally opened its doors in May 2003, signifies an important break with the previous regulatory regime. For the first time, the regulator was given an explicit mandate to protect the interests of consumers.[viii] Again as in the utility cases, the decision-making processes of the regulator were open to greater scrutiny, as consultation documents and the responses of firms were to be published. Finally, the explicit funding of regulation by levies on financial firms rather than from the revenues of the Central Bank allowed for a more transparent form of funding.

Initial Misgivings

An overview of all three cases provides important common insights from the perspective of a principal/agent framework. The initial pattern of regulatory policy-making was characterized by a distinct reluctance by state actors to delegate sufficient powers to the utility regulators to allow them to challenge the positions of the incumbents. An analogy can be drawn with the case of financial regulation, where the existing regulator, the Central Bank, in conjunction with powerful private actors, was able to persuade the government to make an incremental reform rather than the decisive one recommended. The interests of producer groups, adept at using the existing institutional configuration to pursue their preferences, clearly remained predominant. In all three areas of policy there was evidence of a significant level of what Stigler identified as “regulatory capture,” where the regulatory regime reflected the interests of the regulated industry rather than the interests of consumers (Stigler 1971; Pelzman 1976). Indeed, in the case of the utility regulators, there was no formal recognition of the interests of consumers, while in the case of financial regulation they were recognized but very belatedly. The result was distinct policy outcomes that resulted in the continuation of comparatively high telephone, energy and banking charges and relatively constrained choices for consumers (OECD 2001; Competition Authority 2004).

In terms of principal/agent theory, we see initial reluctance by the key principal, state actors, to grant significant powers to regulators that were outside their immediate control. Indeed, in the case of the utilities, it is possible to argue that without the requirements of Europeanization, despite the other political benefits that accrued from delegation, the state would have chosen not to create independent regulators. The counterfactual is underpinned by the government’s decision not to create regulators prior to EU requirements and, once created, the reluctance to specify objectives and delegate sufficient powers to them to allow them to challenge the interests of the incumbent firms.

The oversight role of the other principal, the Oireachtas, despite protestations at the ODTR's initial refusal to appear, subsequently proved to be very limited. Indeed a study has indicated that the pattern of Oireachtas committee hearings with regulators in all three cases was infrequent and marked by long gaps (Westrup 2002). The comparative weakness of the committee system in terms of resources, allied with Gallagher's finding of the lack of political incentive to pursue an oversight role, meant that in McCubbins and Schwarz's terms, the Oireachtas has certainly not pursued a police patrol style of oversight (Gallagher 1999). While the fire alarm metaphor is a more accurate description, even that assumes a certain institutional capability which, despite the attempts of individual members, the Oireachtas committee system struggles to provide.

The result of the actions of both principals is that the initial stage of regulatory reform resulted in limited change in policy-making and very little change in policy outcomes. The creation of new regulatory institutions was therefore not sufficient to challenge the existing patterns of policy-making that were conditioned by the broader configuration and preferences of political actors and institutions.

Regulatory Change

However, if it is possible to identify an initial period of regulatory reform that began with the set-up of the ODTR in 1997, characterized by the continuation of existing patterns of policy-making despite the efforts of the new regulatory actors, there is also evidence of a second period, beginning in or around 2002, that has seen regulatory agencies gradually emerge as actors with real powers and political influence. This change reflects a gradual evolution in the preferences of key regulatory actors, particularly those of the state.

First, and perhaps most significantly, there has been a realization that the regulatory outcomes that resulted from the initial period of reform were in conflict with the state's broader economic development goals, particularly that of attracting technologically sophisticated international firms to Ireland. A lack of technological innovation in terms of the range of available telecom services and high telecom and energy costs are not attractive options for firms with many choices as to where to invest. A critical report by the OECD in 2001 that emphasized both the potential consequences of high telecom and energy costs and argued a key rationale was that "consumer interests are not well represented in policy debate and deliberation in Ireland, which remains dominated by producer interests" was particularly influential, judging by the policy response it evoked (OECD 2001).[ix] Preferences of previously significant insiders such as Telecom and its union members were no longer as important as those of a wider range of private actors.[x]

Second, there was a realization by state actors initially suspicious of delegating power to regulators that the other rationales for delegation were proving to be increasingly politically attractive. The decision to create the Commission for Aviation Regulation to regulate airport charges in 1999 was a decision triggered not by Europeanization but by a combination of credible commitment, blame shifting and the need for expertise. Indeed, the decision to create a taxi regulator in 2004, and subsequently a regulator to oversee the accountancy profession in 2005 is further evidence of the political appeal of this relatively new form of governance. This institutional innovation also provides evidence that senior civil servants have overcome much of their apparent aversion to change in terms of Irish governance, aided undoubtedly by the continued growth of the economy.

An indication of the changing preferences of state actors was a number of reports, high-level appointments and legislation designed to strengthen the efficiency of the existing regulatory institutions. The High Level Group on Regulation, appointed following the OECD report, produced a series of plans including *Towards Better Regulation* in 2002 that culminated in a White Paper in 2004 titled *Regulating Better*. This document set out a commitment to pursue a key recommendation of the OECD which was to mandate regulatory impact assessments (RIAs) as a means of targeting the effects of regulation.[xi] This reflected a government desire to ensure that regulation was both efficient but also proportional as business groups such as IBEC and the Financial Services lobby became increasingly vocal about the increased cost of compliance (IBEC 2004).

The first important legislative changes took place in 2002 when the government enacted many of the policy proposals first floated by the then Department of Public Enterprise in 2000 to improve the accountability and efficiency of the new regulatory regime (Department of Public Enterprise 2000). The legislation formulated broad objectives for the regulators that included promoting competition, increasing powers to fine firms, that regulatory decisions should stand while under judicial review, and a change in the executive format from a single director to a three-person commission. The Office of the Director of Telecom Regulation's name was also changed to Comreg, reflecting the inclusion of responsibility for postal services made in 2000. However, the

2002 legislation still did not specify that an explicit forum for consumers be established, which was the norm in the majority of other EU and OECD states.

A further significant institutional response was the government decision to strengthen the mandate of the Competition Authority – the Competition Act of 2002 was described as "a remarkable step forward" by its then chairperson (Fingleton 2004).[xii] Given the apparent lack of competition that resulted from the initial round of utility regulation, the dramatic strengthening of the powers and budget of the Competition Authority was a further indication that political and state actors were serious in their intent to challenge the regulatory status quo.

If state and political actors were choosing to define and strengthen the role of regulators, the regulators themselves were also beginning to assert their institutional authority and to build up their institutional capacity. Coen has demonstrated how regulatory actors develop this capacity over time both from interaction with private actors and institutional learning from membership in their relevant EU regulatory groups (Coen 2005). Given the important powers delegated to regulators and the particular style of policy-making characterized by a relatively high level of transparency and justification, Coen argues that firms and regulators have a mutual interest in exchanging information that develops the expertise of the regulator. Even if in the Irish case the initial regulatory pattern resembled capture, the strengthening of the regulators' powers in the 2002 legislation, in conjunction with the greater political commitment to making the regime work, suggest that the institutional capacity of the regulators has increased. The result is their emergence as significant actors in the regulatory game, with their own interests and preferences, developing an institutional clout that goes beyond their delegated legal powers. Obviously, the case of each regulator is somewhat different in this regard and is dependent on other factors such as the political entrepreneurship of the respective senior executives.

The final formal institutional change in the regulatory regime came in 2005 with the decision to create a National Consumers Agency with a specific mandate to promote the interests of consumers. While there has been an agency, the Office of the Director of Consumer Affairs, with responsibility for issues such as accurate display of prices, its mandate and resources have been very limited as compared to the stated objectives for the new agency.

While consumers as a lobby group often suffer from a collective action problem, this was clearly exacerbated by Ireland's particular institutional configuration. As we have seen, even the decision to create independent regulators did not lead to the establishment of consumer panels, as was usual in most EU states, to provide for the promotion of a consumer welfare function and some sort of balance to the interests of producers. The decision to create a consumer agency was a recommendation of another High Level Regulatory Group but can also be seen as a result of both political and media pressure as Fine Gael was promoting its Rip-off Ireland campaign and high profile television exposés.

So what we have is a situation where one set of principals, state actors, have chosen to strengthen the *ex ante* mechanisms as they laid out more explicit regulatory objectives but the other principal, the Oireachtas, has chosen to increase its *ex post* role only at the very margin. However, the establishment of an agency to promote the interests of consumers, along with an increased party political and media interest in regulatory policy may result in other actors taking on the *ex post* role, thereby increasing the level of oversight.

However, even with all these institutional changes over the past few years, there remains evidence that Ireland's regulatory outcomes are still characterized by signs of capture. The EU has found evidence that in both the cases of both energy and telecommunications, prices in Ireland are still comparatively high and levels of competition are low (Irish Times 15/2/06; Irish Times 21/3/06). The delays in opening up to competition the ESB generation and distribution networks, along with the state's continued ownership role, has meant that suspicions of continued conflict in terms of the preferences of state actors persist.

Conclusion

Effective regulatory governance remains a work in progress. This chapter attempts to highlight important changes in the preferences of key actors since the initial demands of the EU saw the establishment of the ODTR in 1997.

In theoretical terms, the evolution of Ireland's regulatory regime is a reminder that a formal decision to delegate powers does not automatically lead to the creation of powerful regulatory actors. Instead, policy regimes are slow to change, conditioned by existing institutional configurations, and as Thelen argues, require a continued political preference for the change to be sustained (Thelen 2004).

In terms of the wider issues of Irish governance, the introduction of independent regulatory agencies illustrates two important points. First, it emphasizes how one key interest, that of consumers, has consistently been prevented by the existing institutions and actors from having a distinctive voice in Irish policy-making. The result has been that issues of competition and consumer choice have struggled to find a place on the political agenda. Second, it highlights the continued weakness of the Oireachtas in the pursuit of an oversight role. As regulatory governance continues to become a more important part of the way the state operates, such a gap promises to become even more significant. The Oireachtas' role may be compensated for in part by other actors, but in normative terms, it remains a significant issue for the future evolution of Irish governance.

More broadly, regulatory governance is likely to become an even more important part of Irish politics. This reflects not only the demands of the European Union, which ensures that regulation will remain a multi-level game as actors use both the European and the Irish political processes to argue for their interests, but also reflects the

increased attraction of regulators to political actors at a time when the traditional hierarchical institutions of government are struggling to cope with the increasing complexity and visibility of many policy issues. Blaming the regulator looks set to remain a popular political choice.

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[i] Coen and Thatcher define a non majoritarian regulator as "an unelected body that is organizationally separate from governments and has powers of regulation of markets through endorsement or formal delegation by public bodies" (Coen and Thatcher 2005, 330).

[ii] However, as Charles Shipan has described, the Environmental Protection Agency was given a level of independence from the Department of the Environment in 1993 (Shipan 2006).

[iii] Deciding upon a list of agencies with regulatory responsibilities is obviously a subjective task as a wide range of government and private agencies possess certain regulatory powers. Indeed, it could be argued that agencies such as the EPA and the Medicines Board should be distinguished from regulators such as the CER and ComReg

because they carry out a range of functions that do not entail regulation. However, given the importance of their regulatory

[iv] However, in a Westminster style government, the government and the legislature can often be considered as a single principal, as the government party virtually always has a majority in both the legislature and on the relevant parliamentary committee. See Gallagher 1999 for further discussion.

[v] Independence of the regulator from the shareholder is an EU requirement set out in Directive 90/388/EEC and amplified by the Court of Justice.

[vi] The regulator for the insurance sector was the Department of Enterprise, Trade and Employment.

[vii] The new regulatory structure was unique in terms of its design in the EU and the OECD as states either decided upon a stand-alone single regulator, such as Germany or the U.K., or to maintain the role of the Central Bank such as France, Spain and Italy (Masciandaro 2005).

[viii] The legislation also created a consumer panel which the regulator had to fund and consult with.

[ix] The Department of the Taoiseach immediately held a press conference to announce the setting up of the High Level Group on Regulation made up of senior civil servants and regulators to respond to the OECD report.(See http://www.betterregulation.ie/index.asp?docID=41 for a fuller description).

[x] The comments of the Taoiseach, Bertie Ahern in 2004, are a confirmation of this change in view. Acceptance by the Taoiseach in November 2004: “For too long, producer interests have shaped the policy agenda.” www.betterregulation.ie/index.asp?docID=68.

[xi] The government had previously committed itself to such a process in 1999 with the Regulating Red Tape initiative, but the OECD argued that the process was not followed through with sufficient rigor (OECD 2001).

[xii] The Act established the Authority as a public body with its own budget and proceeded to play a high-profile role in examining a range of policy areas.

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