

The London School of Economics and Political Science

**The Independence of Regulatory Agencies In Practice:**

**The Case of Telecommunications Regulators  
in the United Kingdom and France**

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## **Abstract**

The PhD thesis examines the independence in practice of telecommunications regulatory agencies in France and the UK. It builds on existing literature, which has selectively focussed on formal delegation and institutional design of 'independent' regulators, in particular, on the statutory provisions defining their formal resources and formal constraints.

This thesis' central research question is whether the independence of regulatory agencies in practice reflects their formal independence. The thesis aims to explain whether and how factors other than different formal institutional arrangements influence the policy-making of the two agencies examined. It develops and applies an analytical framework for studying whether and how regulatory agencies exploit, or are hindered by, formal and informal policy resources.

Building on Nordlinger's work on state autonomy, which is defined as translating preferences into action, five non-formal indicators are proposed to assess the independence of regulators in practice. Participants and resources, preferences, processes, time-length of decision-making, and outcomes, are the indicators applied to selected sub-cases that help to evaluate the autonomy of the two telecommunications regulators, the Autorité de Régulation des Télécommunications (ART) and the Office of Telecommunications (Ofcom).

The findings counsel a comprehensive review of the conceptualisation of regulatory independence. The thesis shows that policy preferences guide whether and how formal institutional arrangements are used. The preference convergence and/or divergence that regulators face shape which policy resources will be deployed in support of, or in opposition to, the agencies as they pursue their policy preferences.

Three of the four sub-cases relating to 3G licensing and local loop unbundling (LLU) policies developed by the two regulators show that to achieve preferences persuasion was applied more than imposition. Only in one sub-case, the French regulator actively sought to use formal resources as well as non-statutory ones. Crucially, the thesis shows the significance of non-statutory resources such as policy expertise, informal ties and 'physical' assets for the regulators and other policy participants to pursue their preferences notwithstanding national formal arrangements.



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## **Declaration**

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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## Introduction

### **I. Research Purpose**

The spread of independent regulatory agencies across Europe constitutes a key element of the 'regulatory state', claimed to have replaced the 'positive state' as the mode of governance of markets from the mid-1980s<sup>1</sup>. The scholarly interest in the institutional change represented by the creation of 'independent' regulatory agencies bodies has fuelled a select body of research 'measuring' their formal independence from Governments. Exponents of the formal institutionalist approach assess and explain variation in regulatory agencies' independence according to variation in formal institutional arrangements.

Instead, this PhD thesis examines the independence<sup>2</sup> of national regulatory agencies in practice. It therefore explores whether regulatory agencies are 'independent', without tying the concept to formal independence, by asking two sub-questions that help to develop a new analytical approach. First, in the presence of a set of policy-specific constraints, is the regulator able to reach its policy objective? Second, is the achievement of the policy objective based on the regulator's degree of formal independence, or can the agency's exploitation of non-statutory, 'informal'<sup>3</sup>, resources be important?

Regulatory agency independence in practice, or autonomy, is here defined as the regulator's ability to translate a policy preference into action. This definition is consistent with Nordlinger's 'state autonomy' approach which describes how the unitary democratic 'state' he analyses pursues its preferences vis-à-vis powerful (non-state) 'societal actors'<sup>4</sup>. Nordlinger's analysis applies only to the preference fulfillment of the state vis-à-vis societal actors, and so needs some refinement in order to delineate preference fulfillment by regulatory agencies. The thesis therefore adapts and develops Nordlinger's analytical framework to allow an analysis of the extent to which one part of the state, the regulatory agency, is able to translate its preferences into action with respect to other parts, as well as

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<sup>1</sup> Majone, G 1994 "The Rise of the Regulatory State in Europe", 17 *West European Politics*; pp.77-101; (ed.) 1996 "Regulating Europe", London: Routledge; and 1997 'From the positive to the regulatory state: causes and consequences of changes in the mode of governance', *Journal of Public Policy* 17(2): 139-167

<sup>2</sup> For the sake of clarity and convenience, throughout the thesis, the terms independence and autonomy will be used interchangeably

<sup>3</sup> The analytical focus on formal independence thus far means that the use of the adjectives 'non-formal', 'informal' or 'non-statutory' in this thesis simply aims to distinguish from indicators, or instruments, directly tied to statutory arrangements governing the regulatory activity of the selected agencies

<sup>4</sup> Nordlinger, E 1981, "On the Autonomy of the Democratic State", Harvard University Press

with respect to societal actors, notably regulatees. Building on Nordlinger, the thesis develops an analytical approach which distinguishes three types of regulatory autonomy:

- Type III autonomy - preferences are achieved in the absence of divergent preferences between regulatory agencies and other policy participants, such as elected officials with formal powers and regulatees;
- Type II autonomy - the regulator persuasively shifts the preferences of key actors that have divergent preferences from it (hereafter referred to as divergent actors), before translating its own preference into action; and,
- Type I autonomy - the regulator acts upon its preference irrespective of divergence with the preferences of predominant actors - hereafter also referred to as divergent actors.

The proposed analytical framework addresses the key issues of variation in agencies' 'independence' from policy to policy, and the consideration of dynamic and 'informal' factors present in regulation in practice. Both issues are neglected by formal institutionalists, but are shown to be important herein.

The selected case is telecommunications regulation in France and in the UK. The sector's development is 'strategic' for its direct impact on other industries<sup>5</sup>, and has featured a high degree of Government intervention<sup>6</sup>. Comparing telecoms regulators' independence in practice in France and in the UK is especially interesting given non-institutional similarities but dissimilar formal institutional arrangements.

The sub-cases examine salient policies concerning high-speed broadband internet provision through mobile and fixed telecoms networks. The 3G licensing policy sub-cases analyse the Governments' sale of unique national spectrum for the transmission of advanced mobile services. The local loop unbundling (LLU) sub-cases examine the introduction of fixed broadband competition by allowing new entrant operators to access incumbent operators' local access networks, reaching end-users across the two countries. The selected sub-cases are comparable because both policies were developed in France and in the UK around the end of the 1990s.

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<sup>5</sup> Thatcher, M 1999, "The Politics of Telecommunications - National Institutions, Convergence and Change", pp.22-3, 66-7, Oxford University Press (OUP)

<sup>6</sup> Hulsink, W 1999, "Privatisation and Liberalisation in European Telecommunications - Comparing Britain, the Netherlands and France", p.5, Routledge

The empirical evidence is that while the regulators faced preference divergence over both policies, three of the four sub-cases show Type II autonomy. The British and French regulators both showed Type II autonomy for one policy (3G licensing), despite different formal institutional arrangements. Instead, the same regulator, the French ART, showed variation in its autonomy types across policies (3G licensing and LLU). So, in three sub-cases regulators' preferences were achieved through dialogue and persuasion, and only in one through imposition. Besides highlighting the importance of preferences, the sub-cases explain the impact on policy development of controlling key sector-specific 'physical' assets, but most importantly the centrality of regulators' policy expertise and informal ties with influential actors to fulfill their preferences.

The wider implications of the thesis, therefore, are that scholarly work focussing on formal independence of regulatory agencies omits 'informal' analytical factors that need to be researched in order to assess regulatory autonomy, especially by examining the resources held and exploited by preference divergent and convergent actors, whether Governments, regulatees or other policy participants.

## **II. Existing Approaches**

The thesis proposes a new way to conceptualise and operationalise regulatory agency independence in practice. The framework has been developed by examining the body of existing research relating to agency independence, which focusses on the limits of the pervasive explanatory emphasis attributed to formal institutional arrangements (chapter 1). It is developed as a critique of the current literature. Early research from the United States, where 'independent' agencies were first created, has recently evolved into cross-country comparisons of Governments' delegation of formal authority to regulatory agencies.

The scholarly attention to formal independence can be explained in terms of principal-agent theory. A 'principal' (in this context, a Minister, Government or Parliament) creates an agent (here, the independent regulator) to perform a task to maximise the benefits of

delegation, but does not want to incur 'agency losses'. To avoid 'shirking' (the agency follows its own policy preferences), principals retain controls<sup>7</sup>.

Formal institutionalists assume that more formal Government controls over the agency, including powers of nomination and budget-setting, mean less agency independence. Fewer controls are associated with more independence. Different levels of formal control explain variation in formal independence. Selected indicators of formal powers delegated to regulators and controls maintained by Governments are also used by writers such as Gilardi, and Edwards and Waverman, to construct 'independence indices' allowing quantitative comparisons of formal independence between agencies within and across countries<sup>8</sup>.

Close scrutiny of formal institutionalists' approach, however, unearths important analytical limitations. Firstly, using different indicators to construct similar formal independence indices per se yields very different and contradictory independence values for the same agencies, undermining this method. Secondly, to 'measure' independence based on formal institutional arrangements means doing so at a set point in time, thus assuming that agency independence is a constant. Thirdly, and most importantly, whether formal arrangements regarding a single regulator lead to independence in practice remains unanswered.

Greater delegation of formal instruments to a regulator, compared to others, does not entail their use or explain their usefulness in practice for a given policy. Institutional arrangements are incomplete, and powers and controls can be used in many different ways. To test the explanatory power of formal independence, including verifying whether specific formal resources are more significant than others, agency independence in practice must be examined by considering how regulation is implemented after formal delegation.

Moreover, the non-statutory resources of actors without formal authority over regulators may affect regulatory autonomy, challenging an analysis based on independence from Government alone. The Chicago school theory suggests that, by providing financial

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<sup>7</sup> For example, McCubbins, M, Noll, R G & Weingast, B R 1987 "Administrative procedures as instruments of political control", *Journal of Law, Economics and Organisation*, 3(2): 243-86; 1989 "Structure and Process, Politics and Policy: Administrative arrangements and the political control of agencies", *Virginia Law Review*: 75, pp.431-482

<sup>8</sup> Gilardi, F December 2002, "Policy credibility and delegation to regulatory agencies: a comparative analysis" *Journal of European Public Policy*, pp.873-893; Edwards, G and Waverman, L 2006, "The effects of public ownership and regulatory independence on regulatory outcomes", *Journal of Regulatory Economics*, Vol.29(1), pp.23-67



support to regulators and politicians, concentrated interest groups in the form of regulated firms try to influence regulatory decision-making in their favour, which exponents define as “capture”<sup>9</sup>. More recently, Coen et al have found that informal dependencies and relationships between regulators, competent ministries and regulatees in British and German utilities affect regulatory behaviour<sup>10</sup>.

Regulatory independence may, therefore, not be manifested in practice, or it may operate through the deployment of influential non-statutory resources unaccounted for in formal institutional accounts. Indeed, the thesis explains that it is essential to assess the ‘informal’ linkages that affect policy-making, identifying any repercussions on the regulator’s independence from all potentially influential actors rather than just from Government. The formal institutionalist approach is therefore static, and omits dynamic policy-specific factors that influence outcomes, which must be allowed for in an analysis of agency independence in practice.

### **III. The Analytical Approach**

The framework developed in this thesis to examine agency independence in practice is developed from Nordlinger’s dichotomous analysis of ‘state’ autonomy, identified as the unitary state’s ability to translate preferences into action, in response to society-centred claims that the state acts upon society’s wishes. He specifies that the definition does not relate to a set of institutional arrangements, which cannot be said to have preferences on the making of public policy. Nordlinger argues that variations in state-society preferences go a long way in determining the outcome of authoritative actions, and are the most important basis for distinguishing between different types of state autonomy.

Thus, though not part of the regulation literature, the value of Nordlinger’s approach to this thesis is precisely that he defines and examines ‘state autonomy’ as a dynamic practice (preference achievement), not an endowment. Nordlinger uses preferences to identify what the ‘state’ wants to achieve, introducing policy objectives as explanatory variables, notwithstanding the preferences of well-resourced ‘society’ actors, which may be divergent and hence oppose the state, or may not be divergent.

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<sup>9</sup> Stigler, GJ 1971, “The Theory of Economic Regulation”, *Bell Journal of Economics*, Vol. 2(1), pp.3-21

<sup>10</sup> Coen, D, Héritier, A and Bollhoff, D 2002, “Regulating the Utilities: Business and Regulator Perspectives in the UK and Germany”, Anglo-German Foundation (Coen et al)

Nordlinger identifies three types of state autonomy. In Type III autonomy cases, the state translates its preferences into action in the absence of divergent societal preferences (non-divergence). In Type II autonomy cases, the state works to shift the divergent preferences of key societal actors. In Type I autonomy cases, the state works to translate its preferences into action regardless of divergent societal preferences.

Nordlinger indicates an array of strategies and associated options at the state's disposal to fulfill its preferences consistent with each of the three autonomy types. Since the state can achieve its preferences in three distinct scenarios, and in different ways even when 'societal actors' are preference divergent (whether persuasively in Type II cases or forcefully in Type I cases), it follows that autonomy depends on more than one explanatory variable, hence not just on formal institutional arrangements.

#### **IV. The Thesis' Contribution: Operationalising 'Agency Independence in Practice'**

Since the actor of reference in this thesis is the 'independent' regulatory agency, which is only part of the unitary state discussed by Nordlinger, his dichotomous state-society framework constitutes a 'first-level' of analysis. Chapter 2 is fully dedicated to adapting and refining Nordlinger's framework into a 'second level' of analysis. Transposing Nordlinger to examine autonomy at the regulatory level, including the causal significance of formal arrangements, entails the creation of a meso-level analysis, which takes differences between the 'state' and regulators into consideration. Building on Nordlinger, the chapter presents five generalisable indicators to examine whether agencies fulfill their preferences and how they seek to do so. These are used to develop three analytically distinct scenarios reflecting each of Nordlinger's types of autonomy.

The five indicators of independence are participants, preferences, processes, time-length of decision-making and outcomes. In each sub-case, the thesis first identifies key policy 'participants' and their influential resources; whether of a formal nature or not. Second, 'preferences' are identified, indicating when regulators face opposition and whether they do so from actors with key formal powers or others with highly influential non-statutory resources. Third, 'processes' undertaken for each type of autonomy are analysed to establish whether regulators develop policy by exercising formal arrangements, and the resources that are deployed if they do not. Fourth, the 'time-length of decision-making',

showing whether regulators formally expedited policy or prolonged its course, is analysed. Finally, the 'outcomes' are assessed. The five indicators provide a comprehensive picture of policy development from its inception to its accomplishment.

### ***Indicator 1: Participants and Resources***

Indicating policy 'participants' at the regulatory level is important. One key distinction between Nordlinger's state and regulatory agencies is that analysing the latter must allow for a wider set of actors than the two-dimensional, dichotomous, dynamic of state autonomy. Nordlinger identifies the state as a whole, and another set of actors which he generically calls 'societal actors'. Since regulators are only a part of the state, 'other state' actors may also participate in policy-making apart from Nordlinger's 'societal actors'. Conceptually fragmenting the state is particularly important when examining whether formal controls retained by Government officials over regulatory agencies are the central explanation behind the latter's preference achievement or not.

Another reason for identifying participants is that Nordlinger never specifies how his 'weighty' and 'best endowed' actors are influential. Yet, state actors may possess relevant formal authority over regulators or have non-statutory resources with which to influence a specific policy. Certain non-state actors, particularly regulated firms, may have significant non-statutory resources too.

Thus, in the thesis, actor-specific resources are identified to trace their effect on policy in each sub-case. Some participants will be more influential than others, and the number of influential participants will vary in given policy scenarios, causing different degrees of resource concentration.

When analysing the three autonomy scenarios, Nordlinger projects a wider range of participants involved in Type II autonomy scenarios - in addition to divergent ones, policy participants can be indifferent and/or convergent - and, accordingly, a more varied set of strategies than for Type I. The implication seems to be that there is a larger range and/or higher number of participants at the Type II regulatory level. So, for Type II autonomy, at the start of a policy, it is expected that key resources are spread among distinct actors, unlike Type I where resources would be more concentrated. Instead, with Nordlinger referring to 'best endowed' and 'significant' non-divergent actors separately, the implied

Type III scenario at the regulatory level is that the actual number of participants can vary. Participants could be few or many.

### ***Indicator 2: Preferences***

Identifying 'preferences' is critical to assess agency independence because preferences reveal what the regulator and other influential policy participants want to achieve, directing their use of resources accordingly. Without specific preferences to pursue, sectoral actors with influential resources will not participate in a given policy. Preferences indicate what significant opposition, or support, the regulator may face. Indeed, once participants and preferences are considered, each sub-case indicates whether the regulator faces obstacles, from whom and what kind (statutory/non-statutory), in fulfilling its preferences.

Type III autonomy's central feature is 'preference non-divergence' (convergence and/or indifference), whether between the state and societal actors, or regulatory agencies and other policy participants. So, regardless of the distribution of resources, preferences of influential participants in Type III autonomy cases will not differ from those of the agency. In Type II autonomy cases, preferences of influential participants over agency proposals are expected to differ at the policy-start. Facing both preference divergence and non-divergence in Type II cases entails that the agency can rely on some influential support, hence, on useful resources it does not control directly, from the outset. Instead, in Type I autonomy cases, preferences of influential actors at the start of a policy are expected to differ from those of regulators.

### ***Indicator 3: Process***

Once the distribution of resources and preferences is established, the thesis examines the policy process to understand the extent to which formal powers are used by political principals to instruct or block agencies and, importantly, whether the regulators deploy statutory instruments to regulate industry. The process indicator outlines how regulators proceed to fulfill their preferences consistent with each type of autonomy, entailing that regulators do not operate in a single way. Critically, 'process' shows whether agencies regulate by way of formal authority, or if alternative mechanisms and processes are used in order for regulators to fulfill their preferences.

Nordlinger's analytical framework usefully highlights a wide range of different strategies and options, statutory and non-statutory, with respect to each type of autonomy. However, there are a number of ambiguities arising from the apparent overlap of certain of the strategy options he identifies. Since participants and preferences identified for the three scenarios point regulators to adopt distinct processes, the indicator is developed here to provide a clearer analytical focus, in particular with reference to the use of formal authority that can be expected for the three autonomy types.

Since Type III autonomy is defined by non-divergence, by developing Nordlinger's model for application at the regulatory level, the thesis expects that, instead of pursuing a policy by exerting formal authority, regulatory efforts are directed towards sustaining non-divergence. This implies controlling the presentation and communication flow of agency actions. It is thus expected that regulators' preferences under Type III are furthered by: (i) selective divulging of information; (ii) projection of competent engagement and policy-making; (iii) transmitting apparent neutrality.

Shifting the preferences of divergent actors is at the heart of Nordlinger's Type II autonomy. Given the presence of influential divergence and non-divergence from the start of policy, the regulator alters divergent preferences of actors and restrains their use of key resources by prioritising negotiation over imposition. In Type II cases, it is expected that preferences are shifted by: (i) making compromise proposals; (ii) repeated bargaining; (iii) exploiting influential actors with convergent preferences to avoid confrontation.

Type I autonomy processes present a radically different approach to preference divergence. Still, even in this confrontational scenario, the thesis expects that to diminish the constraining effects of the few divergent influential actors, who control key resources, the regulator alternates informal with formal approaches, deploying either to enact its preferences. Under Type I, agencies act upon preferences by: (i) identifying and widely exposing obstacles to direct policy as preferred; (ii) exploiting ties to construct a framework, against divergent preferences; (iii) using deterrents to address non-compliance.

#### ***Indicator 4: Time-length of decision-making***

Together with the additional ‘regulatory level’ analysis on policy ‘participants’ and the more focussed ‘process’, the thesis presents a subtle but important indicator by proposing to examine the ‘time-length of decision-making’, further refining the three types of autonomy. Though frequently omitted or overlooked, the distinct processes can be expected to require different and dynamic timeframes to translate preferences into action. Formal arrangements may not define minimum or maximum timescale powers for agencies to impose decisions. Yet, where timescale powers are available, it is interesting to examine if regulators use them and, if so, in what circumstances.

Type II autonomy includes a time dimension; preferences are not acted upon until those of divergent actors are shifted. Thus it is expected that in Type II cases regulators largely neglect available timescale powers and apply policy forbearance, prolonging the process, to translate preferences into action. In Type III scenarios agency officials will use available timescale powers unless this is likely to engender divergence. Regulators are also likely to apply available timescale powers under Type I, but in such cases to confront divergence. Any delays in the regulator fulfilling its preference are likely to have been forced on it.

This indicator also shows whether regulators deploying non-statutory resources to overcome the preference divergence of participants can hasten or slow policy development without having or using timescale powers.

#### ***Indicator 5: Outcomes***

Once the factors affecting the course of policy are analysed, verifying the explanatory power of the formal independence of individual regulators, ‘outcomes’ indicates the success of the regulator in translating preferences into action. In Type III, the regulator’s preferences are implemented because of acquiescence. In Type II, the agency implements its preferences after divergent actors are persuaded to shift theirs, but makes some concessions. In Type I, preferences are fulfilled without the intention to compromise.

## V. The Case Study

The independence in practice of telecommunications regulators in France and the UK represents a particularly interesting case study since a considerable body of the regulation literature has studied the sector extensively, for instance Thatcher and separately Hulsink<sup>11</sup>, without focussing on the issue of interest here. Telecoms is considered a strategic sector, worth around 2% of GDP in both countries in 1999, around the time the selected policies were developed. Respective formal arrangements have referred to the sector in terms of national security, and it is one which through its development and growth has a significant impact on other economic sectors, notably the financial industry's reliance on high-speed communication.

In analysing whether the French and British regulatory agencies fulfilled their preferences, the thesis looks at two sub-cases, 3G (third generation) spectrum licensing and local loop unbundling. The policy selection covers the different segments of the telecoms sector, allowing for different sectoral issues and players (mobile and fixed). Both sub-cases relate to the highly salient spread of high-speed internet, or broadband, which received increasing attention in both countries, and in the wider European Union (EU), between the 1998-2002 period focussed upon, spanning the eventful 'telecoms boom and bust'.

The interest in these salient, comparable, national policies to establish the extent that the agencies' independence in practice depended on formal independence is heightened by the fact that, despite progressive convergence, the two countries continued exhibiting significant institutional dissimilarities as indicated in chapter 3.

## VI. Chapter Structure

Chapter 1 provides an overview of the studies examining agency independence. It focusses on formal institutionalist literature examining the formal independence of regulators from Governments, identifying its limitations, but includes studies that focus on the influence of industry on regulatory agencies. The chapter ends with an account of the useful analytical elements arising from Nordlinger's state autonomy approach, which includes preferences and strategies, and goes beyond formal independence. Chapter 2 transposes Nordlinger's

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<sup>11</sup> Thatcher 1999; Hulsink 1999

approach to create a framework operationalising agency independence in practice, consistent with the key features of the three distinct types of autonomy, through the five indicators explained above.

Chapter 3 compares the formal institutional arrangements regarding the British and French telecoms regulators. Similarities and marked cross-country differences are set out. For instance, in terms of similarities it is explained how single Government Ministers, the UK's Secretary of State (SoS) for Trade and Industry and the French Minister for Telecommunications, retained significant formal controls over regulators with which they shared statutory objectives. Among the major differences, it is explained that the French Government possessed full formal policy-making authority with respect to the national regulator, unlike in the UK. The UK regulator could determine policy through licence modifications with operators' consent, and even without it if supported by the Competition Commission - subject to no ministerial veto. In France, despite considerable enforcement powers including pecuniary sanctions, the regulator had no authority to determine policy and could only advise the Government.

Sub-case chapters 4 to 7 analyse how the two regulators pursued their respective policy preferences despite relatively different national formal institutional arrangements. It assesses their causal impact by applying the framework developed in this thesis.

Chapter 4 analyses how, when facing preference divergence from the four influential 2G incumbent mobile operators, Oftel pursued its preference for new entry in the nascent 3G licensing market, showing Type II autonomy. The chapter explains that, notwithstanding opposition from the incumbent operators, Oftel did not seek to deploy formal authority to fulfill its preference. Oftel avoided confrontation with the operators and exploited influential convergent actors. These were the Government, which had spectrum licensing powers, and its spectrum agency the Radiocommunications Agency (RA), which conducted 3G policy development through a working group comprising Oftel from March 1998. The RA had no formal powers over Oftel. However, at meetings with key industry actors, it presented Oftel's position on several occasions, following a private accord between them. Oftel influenced policy by intervening and providing input selectively.

The regulator's advice to allocate five licences rather than four as initially foreseen was upheld by the RA and the Government, which statutorily determined policy. Moreover, Oftel had formal powers to modify licences and insert a condition requiring incumbents to



grant new entrants access to the former's 2G networks (roaming). Yet, despite the convergent Government's urgency to auction 3G licences, Oftel persistently bargained and sought consensus from divergent incumbents through informal exchanges. To persuade the adversely affected operators, it delayed implementation and revised roaming details without losing sight of the key objective, 'shifting' their preferences by the end of 1999.

Chapter 5 examines how, notwithstanding preference divergence from the French Government which possessed key formal powers, the ART pursued its 3G policy preferences, showing Type II autonomy. The ART exploited prior work on 3G by a spectrum advisory body, and launched a consultation, not formally set out, to develop a 3G licensing policy in early 1999, which it had no formal powers to determine. The regulator's proposals received overwhelming industry support, especially from 2G incumbent mobile operators. It prepared to finalise a document for the Government comprising its preferences of a 'beauty contest' licensing procedure allowing it to select licensees, and allocating maximum four licences.

However, a new Finance Minister risked opting for a different choice from the ART's to improve state finances. His Ministry comprised the divergent Telecoms Minister with the relevant powers. The proposed beauty contest, comprising the low fixed-fee the ART proposed, contrasted with the French Government's wish to maximise revenue from selling valuable 'state' 3G spectrum, following the huge sums gained by the British Government's auctioning of five licences. The chapter explains that to make its case publicly and privately with Ministers, by exploiting its policy expertise, the ART built on the public pressure exerted by influential convergent mobile incumbents, which were opposed to foreign operators outbidding them in auctions, and their ties with senior Government officials. Furthermore, the regulator bargained with Ministers, indicating the possibility of revising its proposal to include higher entry fees for a beauty contest. It assuaged the Government and ensured a beauty contest allocating four licences.

Chapter 6 examines how, although the UK's ex-state monopoly operator BT opposed competitors' entry into the new ADSL broadband market by exploiting its unique network access to users through phone lines across the country, Oftel pursued its local loop unbundling (LLU) preference, showing Type II autonomy. The chapter explains that Oftel had licence powers to impose LLU from the start, but sought BT's consent given the degree of network access the policy required and the need to define clear competitive entry terms. Starting in December 1998, the regulator launched two successive 'informal'

consultations. Major industry actors (except BT) and the parliamentary Trade and Industry Select Committee strongly supported the competitive development of broadband services through LLU, increasing the issue's public exposure.

Through its policy expertise, Oftel made compromise proposals, selecting two different technical options with distinct competitive implications. One accommodated BT, the other (LLU) did not. The regulator engaged in repeated bargaining, before formally consulting on and inserting a new condition in BT's licence, adding to its powers. Oftel met with BT's management privately to persuade them.

Oftel's policy implementation continued with limited intervention even after the condition applied. BT made essential access to its sites and unique information very difficult for rivals through the second-half of 2000, delaying entry and advancing its first-mover advantage in ADSL. As entrants and the select committee complained, the European Union (EU) adopted a binding end-2000 Regulation deadline expanding national regulators' LLU powers. Nonetheless, Oftel exploited the increased interest of an influential junior Minister, Patricia Hewitt, who confronted BT's management in private. Thus the regulator prioritised dialogue, limiting its use of powers, exploiting its expertise and allowing delays. Instead, following Oftel's input among others, Hewitt forcefully asked BT to respect the EU deadline privately. BT reluctantly expedited entry, ultimately coming closer to complying with the deadline agreed with Oftel.

The Chapter 7 sub-case differs from the others in that the ART pursued its preference without having the powers to determine the policy and without seeking consent from key divergent actors, consistent with Type I autonomy. The regulator sought to introduce competition in the local access market for competitive broadband provision through LLU. It faced preference divergence from the then majority state-owned incumbent operator France Télécom (F-T) that controlled the local access network, the French Government, which had powers to introduce LLU, and vocal left-wing Members of Parliament (MPs) part of the Government coalition. Neither national nor EU legislation required LLU. The chapter explains that, without the Government's powers, the ART first raised LLU in its annual report to the Government and Parliament in mid-1998, then sought the 'analysis' of a specialised advisory body, setting up two working groups.

Subsequently, the regulator launched a consultation on LLU identifying and exposing F-T's network dominance, which was likely to generate huge commercial broadband advantages.

Many 'private' operators, seeking competitive access to end-users, responded supportively and campaigned publicly in LLU's favour, putting pressure on the Government. Significantly, the ART exploited informal ties with the European Commission to help frame an EU Recommendation, which was then turned into a Regulation binding all Member States to implement LLU. Thus the Government's withdrawal of a national law amendment following coalition dissent over LLU did not stop the regulator. The Government passed a national decree in September 2000 to comply with EU legislation. The ART repeatedly ordered F-T to stop obstructing entry, before achieving a workable reference offer in July 2001.

The concluding chapter 8 summarises how the two regulators developed the two selected policies domestically. Considerable variation in formal independence did not prevent the agencies from applying a similar Type II autonomy approach, based on persuasion rather than statutory powers, to fulfill 3G licensing policy preferences. The regulators showed their autonomy in different circumstances. The UK regulator avoided confrontation with preference divergent actors in both sub-cases, achieving its preferences by means other than by deploying all formal resources at its disposal. Instead, in Type I autonomy style, the French regulator found the means to push through its LLU preference without the relevant statutory authority and despite opposition from influential actors, including the Government with key powers and the most powerful industry regulatee.

The thesis demonstrates the importance of the preferences of key policy actors to examine regulatory independence in practice. The fact that, compared to others, a Government retains more powers over one or more national regulators, must not be assumed to entail less regulatory agency independence in practice. Preferences shape the use of available resources. In both French sub-cases, the Government with key powers was initially opposed to the national regulator pursuing its preferences, unlike most industry actors. Conversely, in both UK sub-cases, the Government had preferences that were not dissimilar from those of the domestic regulator, unlike key industry actors. Where Governments retain considerable formal authority, their preferences can be highly influential as they inhibit or sustain regulators' preferences.

Foremost, the evidence in this thesis shows that non-statutory resources are critical for regulators to achieve their preferences, through both persuasive and confrontational processes, thus demonstrating that agency independence in practice does not reflect formal independence. More specifically, findings indicate that Governments' formal powers to

veto regulators' policy-making were not determinant, both in the UK sub-cases, when the Government and the regulator were not in disagreement, and in the two French sub-cases, when they had divergent preferences.

The key non-statutory resources emerging from the sub-cases are the ability to understand and exploit policy information or 'policy expertise', informal ties, ownership of physical (network) resources and to a lesser extent the ability to influence public opinion, whether through media or public venues such as Parliament. The need for further research on influential resources in other regulatory policy domains emerges from this thesis. Most importantly, the thesis has found that 'measuring' static formal institutional arrangements is inadequate to analyse regulatory agency independence in practice, which requires instead a dynamic policy examination of participants, their resources and preferences to establish the key resources that allow agencies to fulfill their objectives.

## Chapter 1: Existing Theories on Regulatory Agencies' Independence and 'State Autonomy'

### I. Introduction

There is a growing literature on regulatory independence. Several studies have provided analyses of independence discussing its positive implications<sup>12</sup>, while others have questioned its effectiveness<sup>13</sup>. These have complemented a wide body of literature examining more theoretical, and occasionally normative, elements explaining why agency independence has become a widespread instrument for governments<sup>14</sup>, particularly to deal with market failures in different sectors<sup>15</sup>. This is in line with claims that the 'regulatory state' has gradually replaced the 'positive state'<sup>16</sup>, with independent regulatory agencies playing an essential part in it and growing in numbers across Europe since the 1980s, albeit with sectoral and national variations<sup>17</sup>. This trend has redefined the governance of markets<sup>18</sup>.

The 'regulatory state' model explains that the delegation of powers to independent agencies by elected politicians is a functional response for the latter to maintain a credible

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<sup>12</sup> For arguments in favour of central bank independence; Alesina,A 1988, "Macroeconomics and Politics" in NBER Macroeconomics Annual Vol.3, MIT Press pp.13-52, especially pp.38-45; Goodhart,CAE 1993, "Central Bank Independence", Special paper 57, Financial Markets Group - London School of Economics, and Fischer,S & DeBelle,G 1994, "How independent should a central bank be?", Federal Reserve Bank of Boston, Conference series; n.38, pp.195-225

<sup>13</sup> For a brief but subtle insight challenging the merits of independence and why it might only be a complementary factor in terms of effective sectoral regulation, Stern,J 1997, "What makes an independent regulator independent?", *Business Strategy Review*, Vol.8(2), pp.67-74.

<sup>14</sup> Majone,G 1997, "Independent Agencies and the Delegation Problem: Theoretical and Normative Discussions", pp.139-156 in "Political Institutions and Public Policy: Perspectives on European Decision-Making", (eds.) Steunenberg,B & Van Vught,F, Kluwer Academic Publishers. Perhaps, Elgie's April 2006 paper exploring eight hypotheses explaining delegation to agencies provides among the most comprehensive analyses: "Why Do Governments Delegate Authority to Quasi-Autonomous Agencies? The Case of Independent Administrative Authorities in France", in *Governance: An International Journal of Policy, Administration, and Institutions*, Vol.19(2), pp.207-227. The choice of France as a case study and the examination of agencies including the ART make it especially appealing, although the scope of Elgie's paper is only tangential to the argument made in this thesis

<sup>15</sup> For a thorough analysis of different market failures, Breyer,SG 1981, "Regulation and its reform", Harvard University Press; also chapter 1, Baldwin,R and Cave,M 1999, "Understanding Regulation - Theory, strategy and practice", OUP, for a more nuanced reference Ogus,A 1996, "Regulation - Legal Form and Economic Theory", Clarendon Press

<sup>16</sup> Majone 1994, 1996, 1997. Also Moran,M 2002, "Review article: Understanding the regulating state", *British Journal of Political Science*, Vol.32(2), pp.391-413, in which he sums up Majone's insight on the EU as a reflection of "historical context and institutional constraint", p.404

<sup>17</sup> Thatcher,M December 2002, "Analysing regulatory reform in Europe", *Journal of European Public Policy* 9(6), pp.859-872

<sup>18</sup> Thatcher,M and Coen,D 2005, "The New Governance of Markets and Non-Majoritarian Regulators", *Governance*, Vol.18(3), pp.329-346

commitment in specific policy areas<sup>19</sup>. It is meant to limit the lack of discipline associated with elected policy-makers and the uncertainty deriving from their time-inconsistent actions<sup>20</sup> which, some argue, are especially likely prior to elections<sup>21</sup>. It is similarly meant to constrain future Governments from changing regulatory policy-making, thus reducing sectoral unpredictability and providing investment incentives.

To achieve their statutory objectives, independent regulators are meant to operate at arms-length from governments. This may be on the grounds of greater area-specific expertise compared to the generalist government departments covering the respective sectors before the creation of such agencies. Similarly, agency independence is expected to overcome the information asymmetries arising in technical areas of governance, and enhance the economic efficiency of rule making. Elected officials are meant to enjoy the additional benefit that the blame for any unpopular policies endorsed will be attributed to regulators<sup>22</sup>.

Thus, elected officials delegate powers to regulators for the latter to be, at the very least, considered responsible for specific policy areas. Some agencies are legally qualified as independent. This is the case in France where regulators, like the *Autorité de Régulation des Télécommunications (ART)*<sup>23</sup> covered here, have been statutorily defined as ‘*autorités administratives indépendantes*’<sup>24</sup>. Accordingly, the extent to which political officials delegate powers to - or retain some form of institutional checks and balances<sup>25</sup>, like veto players<sup>26</sup>, over - agencies has been a straightforward, and rather uncontested, way to define independence. This explains why the formal institutional design of agencies has been the

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<sup>19</sup> Majone (see fns. above); Thatcher, M, & Stone Sweet, A 2002, “Theory and practice of delegation to non-majoritarian institutions”, *West European Politics*, Vol.25, pp.1-22; Thatcher, M 2002 “Delegation to independent regulatory agencies: Pressures, functions and contextual mediation”, *West European Politics*, Vol.25, pp.125-147

<sup>20</sup> Kydland, F and Prescott, E 1977, “Rules rather than discretion: the inconsistency of optimal plans,” *Journal of Political Economy*, 85(3), pp.473-491, suggested that in a situation of changing economic conditions, policy-makers following a particular policy would renege, hence not implement it, as soon as they realise that adopting a different policy may constitute an easier route to fulfill their ultimate goals

<sup>21</sup> Nordhaus, W exposed this theory in April 1975 “The Political Business Cycle”, *Review of Economic Studies*, Vol. 42, pp.169-190. But Alesina has contested this view among others: 1988 paper cited-above, and Alesina, A. 1989, “Politics and Business Cycles in Industrial Democracies”, *Economic Policy*, Vol.8, pp.55–98, in which he also discussed the benefits of delegation to independent Central Banks

<sup>22</sup> Thatcher and Stone Sweet, and Thatcher, both in WEP Jan.2002. Also, Thatcher, M December 2002, “Regulation after delegation: independent regulatory agencies in Europe”, *Journal of European Public Policy* 9:6, pp.954-972

<sup>23</sup> The extension of its regulatory role to the postal sector led to its name being changed to “*Autorité de Régulation des Communications Electroniques et des Postes*” (ARCEP) in May 2005. Since the selected case studies refer to the agency’s earlier guise, the acronym ART is retained throughout the thesis nonetheless

<sup>24</sup> Elgie 2006 gives an account of how these authorities developed in France

<sup>25</sup> Kiewiet, DR and McCubbins, MD 1991, “The Logic of Delegation: Congressional Parties and the Appropriation Process”, University of Chicago Press

<sup>26</sup> For a study on the wide-ranging importance of veto players, Tsebelis, G 2002, “Veto Players: How Political Institutions Work”, Princeton University Press

focus of studies on regulatory independence<sup>27</sup>, particularly given the difficulties in comparing it across countries<sup>28</sup>.

Variation in formal institutional arrangements is, therefore, assumed to denote variation in regulatory agency independence. Yet, whether they determine regulatory independence in practice remains questionable, because past studies have not challenged this approach in-depth in order to verify their explanatory power. Goodhart's definition of regulatory independence, or autonomy as he calls it, relates precisely to "the powers used to achieve the statutorily defined objective", but not to the freedom of choosing objectives<sup>29</sup>.

Referring to agencies' independence in terms of their instruments rather than in terms of their goals<sup>30</sup> constitutes a complementary rather than a focal element of the analysis that follows. The underlying point remains that regulatory independence has been, and largely continues to be, formulated in formal terms. Assessing regulatory agency independence requires a thorough review of existing assessments and forms the research question of this thesis, which asks whether formally independent regulators are independent in practice and, if so, whether powers granted through formal institutional arrangements are the determinant factor.

The thesis, therefore, aims to examine independence in practice, in particular by exploring the extent to which it reflects formal independence. It does so by comparing the regulatory activity of telecommunications agencies in France and the UK via four selected, salient sub-cases. In order to analyse independence in practice, it is necessary to develop non-formal indicators of independence. First, however, the literature that advocates formal institutional design as the source of independence is reviewed in this chapter. Its weaknesses are discussed to strengthen the case for the adoption of a different approach.

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<sup>27</sup> Levy and Spiller emphasise the importance of 'institutional endowment' in 1996's "A framework for resolving the regulatory problem", in "Regulations, Institutions and Commitment - Comparative Studies of Telecommunications", (eds.) Levy, B. and Spiller, P. T. Cambridge University Press. Also Gilardi Dec.2002

<sup>28</sup> Thatcher Dec.2002, pp.954-955; Gilardi Dec.2002; Levy and Spiller's comparative case-study analysis

<sup>29</sup> Goodhart 1993, p.6, and 2003 "The Constitutional Position of the Central Bank", p.3, in Friedman, M and Goodhart, C. A. E., "Money, Inflation and the Constitutional Position of Central Bank" IEA Readings 57, Institute of Economic Affairs

<sup>30</sup> Grilli, V, Masciandaro, D and Tabellini, G October 1991, anticipated that: "Political independence is the capacity to choose the *final goal* of monetary policy, such as inflation or the level of economic activity. Economic independence is the capacity to choose *the instruments* with which to pursue these goals", p.366 in "Institutions and Policies - Political and monetary institutions and public financial policies in the industrial countries", Economic Policy, pp.341-392.

Then, in order to integrate non-formal and dynamic elements into the analysis, a new framework is proposed in the form of Nordlinger's preference-based approach. This presents three distinct types of autonomy. For Nordlinger, the autonomy of the state is understood in terms of its achievement of preferences vis-à-vis societal actors through a variety of strategies and their related multiple 'options', when neither policy specific preferences nor strategies can be read off statutes.

Nordlinger's approach assumes a binary 'state-society' distinction. However, when considering regulatory independence, it is necessary to disaggregate the state and separate analytically the regulatory agency from other state institutions. Therefore in chapter two, Nordlinger's approach is translated and adapted to make it relevant at the regulatory level, since his conceptualisation of autonomy is based on the state as a single actor.

Accordingly, to establish whether regulatory agencies demonstrate a type of autonomy consistent with one of Nordlinger's three typologies, five non-formal indicators, which take into account the differences between Nordlinger's state and regulatory agencies, are developed. 'Preferences' are retained as a central factor and his proposed strategies are refined into overall 'processes' consistent with the respective autonomy types. 'Participants', 'time-length of decision-making' and 'outcomes' are three additional indicators introduced here to challenge the assumption that formal provisions alone determine the independence of regulators in practice. By applying the five indicators at the agency level and explaining relevant variations, three autonomy types are created for regulators.

The statutory arrangements projecting both the similarities and the differences regarding the formal resources and constraints of the two selected regulators are set out in detail subsequently. The awareness of formal provisions helps trace and examine, in the four sub-case chapters that follow, what their impact is, whether any other intervening variables have a relatively more pronounced impact on the independence of the selected French and British regulators and, where so, how.

## **II. Historical background**

To put the scope of this thesis and its contribution into context, it is critical to stress that the first scholarly contribution on regulatory independence is not recent and was largely



focussed on formal institutional design. This renders the question examined here - whether identifying formal independence alone is sufficient to 'measure' regulatory independence in practice - all the more essential since only limited conceptual and analytical progress has been made for over a century. A novel attempt to define and explore regulatory independence in practice is overdue. Indeed, the importance awarded to formal institutional attributes of regulatory agencies dates back to the early literature on US 'independent regulatory commissions', which followed the 1887 creation of what is considered the first specimen; the Interstate Commerce Commission (ICC). The legislative struggle surrounding the form that the ICC had to take with regard to its constitutional position, hence, its statutory mission, authority and constraints, as well as those concerning the creation of subsequent commissions have been vividly described by Cushman<sup>31</sup>.

In a detailed account about fifty years after the ICC's birth, Cushman explains how from the start he was asked to join the President's Committee on Administrative Management and prepare a memorandum setting forth precisely: the statutory basis of the commissions, an analysis of their relations to the three major federal government departments, and any possible alternative to independent commissions as administrative devices undertaking regulatory tasks. Yet, while focussing on formal arrangements<sup>32</sup>, besides portraying the political resistance to the setup of these bodies even before their creation, Cushman reports that shortly after the ICC's inception, although it was relatively weak in formal terms, regulatees "refused to obey the orders of the commission regardless of their reasonableness"<sup>33</sup>. Similarly, once its statutory powers were subsequently expanded, regulatees submitted proposals for other bodies to supplement or even take over the tasks carried out by the ICC<sup>34</sup>.

Thus, regulatory independence has been closely associated with formal independence since the first relevant study, despite indications that non-statutory factors matter in policy-making. This approach has largely persisted thereafter. Fesler added to the insight by acknowledging that the independence of commissions could be interpreted to have different meanings but, like Cushman, focussed his analysis on the "institutional

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<sup>31</sup> Cushman, RE 1941, "The Independent Regulatory Commissions", OUP, refers to the 'growth of the commission movement'. It also contains a brief account of the British experience on regulatory structures and functions until the late 1930s

<sup>32</sup> He defines an 'independent' commission "entirely outside any...executive department,...isolated from the integrated administrative structure of the executive branch,...subject to no direct supervision or control by any Cabinet Secretary or by the President", p.3

<sup>33</sup> *ibid.*, pp.65-66

<sup>34</sup> *ibid.*, p.119

safeguards...that promise to increase an agency's degree of independence"<sup>35</sup>. He suggested that the supposed means was "the organizational status of 'independence' or isolation from political and economic centres of power"<sup>36</sup>, although a more notable, and more cited, contribution of his has been to label 'myths' both "complete independence from, and complete subordination to, the chief executive and the legislature"<sup>37</sup>.

Fesler also poignantly observed that two key political factors "important in freeing agencies...not recognised in the statutes" are the "alliance of agencies with pressure groups whose...power is sufficient to protect their wards against even such controls as are authorized by law" - a key issue expanded in the framework presented below -, and the "ability...to develop political power sufficient to resist the chief executive's encroachment"<sup>38</sup>. The implication appears to be that the exclusive assessment of formal institutional arrangements constitutes a formalistic and static approach to independence, one which does not reveal much about how regulators actually behave or about their relationships with other actors.

In his operational account of the US Federal Trade Commission (FTC), Katzmann has unambiguously stated that "lack of precision in statutory language and the absence of unambiguous directives with respect to policy ends are the sources of wide discretionary authority"<sup>39</sup>. The view that statutes, and the powers and resources that are attributed through them, do not tell the whole story reflects Fiorina's consideration that "legislated regulation and realized regulation are not identical"<sup>40</sup>.

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<sup>35</sup> Fesler,JW, p.192, "Independent Regulatory Agencies", pp.191-218 in (eds.) Morstein-Marx,F 1946, 1959 "Elements of public administration", Prentice-Hall

<sup>36</sup> *ibid.*p.191

<sup>37</sup> *ibid.*p.192. Regarding dichotomous interpretations, Moe has pointed out that "the term independence has always been an ambiguous one, used to describe varying degrees of political insulation as well as simply the location of agencies outside the regular executive departments", specifying "it has remained unclear how these agencies are supposed to fit into the network of political influence and governmental authority" in 1982, "Regulatory performance and presidential administration", *American Journal of Political Science*, 26(2), p.199

<sup>38</sup> Fesler 1946, 1959, p.195

<sup>39</sup> Katzmann,RA 1980, "Regulatory bureaucracy: The Federal Trade Commission and Antitrust Policy", p.5, MIT Press

<sup>40</sup> Fiorina,M 1982, "Legislative choice of regulatory forms: legal process or administrative process?" p.40, *Public Choice*: 39, pp.33-66, objects to the assumption that calculations, made by actors involved in a given regulatory process, will necessarily result in expected outcomes. While Fiorina emphasises that he does not believe that events occurring in regulatory contexts are merely accidental, he underplays the idea that outcomes are pure consequences of intentionality

A key related point is that while the “primary axis of regulatory independence is freedom from control by government”<sup>41</sup>, agency independence in practice must also be explored with respect to the way they monitor the activities of regulatees. Formal institutionalist studies largely circumvent this issue, subtly disguised in Fesler’s phrase ‘independence from’ and focussed upon by public choice ‘capture’ analysis discussed in s.III.2. Fesler’s reference to the usefulness of alliances that agencies create with powerful groups above suggests ‘capture theory’ ignores questions about who is using who in the relationship between regulators and regulatees. Nonetheless, ignoring regulatees appears a serious analytical omission since it conceals a whole dimension of regulatory agency independence.

Indeed, thus far, with formal institutionalists studying the independence of regulators from senior elected officials retaining statutory controls, and ‘capture’ scholars examining (lack of) agency independence from influential regulatees, analyses have remained theoretically entrenched, not combining the approaches to provide a comprehensive assessment of agency independence. Thus an in-depth exposition of whether formally independent regulators are independent in practice from regulated firms must be applied. Indeed, practising regulators have described the respective influence of both sets of actors distinctly<sup>42</sup>. So, the question of whether “formal independence is...a façade”<sup>43</sup> needs testing with respect both to independence in practice from political actors and from regulated firms.

### **III. Existing Analytical Approaches**

#### **III.1 Principal-Agent Theory**

A central reason for the study of delegation of formal powers to agencies being associated with regulatory independence from elected officials is the framing of independence through the influential principal-agent model, elaborated by US rational choice scholars<sup>44</sup>. The model accounts for the wishes of elected officials to exploit the benefits of creating bureaucracies for the reasons indicated above, while incorporating the risk that agents, in

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<sup>41</sup> Wilks, SM & Bartle, I January 2002, “The Unanticipated Consequences of Creating Independent Competition Agencies”, p.151, *West European Politics*, Vol.25(1), pp.148-172

<sup>42</sup> Cary, WL 1967, “Politics and the Regulatory Agencies”, McGraw Hill. He was Chairman of the Securities and Exchange Commission (SEC), before becoming Law Professor at Columbia University

<sup>43</sup> Wilks and Bartle 2002, p.151

<sup>44</sup> Pollack, MA January 2002, “Learning from the Americanists (Again): Theory and Method in the Study of Delegation”, pp.200-219, *West European Politics*, Vol.25(1)

this case regulators, may implement preferences differing from those of their political principals. The cost of agents acting differently from the wishes of their principals<sup>45</sup>, commonly known as 'agency loss', is one the principals want to minimise.

Thus, when designing regulatory agencies, political principals ensure some control mechanisms are retained as they remain accountable to the electorate for the actions undertaken in the respective domains. McCubbins, Noll and Weingast have stressed that if politicians cannot control agency-related administrative procedures, and thus outcomes, it would be hard to explain why their performance in office should matter to voters when assessing their candidates<sup>46</sup>.

Accordingly, 'shirking' by agencies is limited through the adoption of a variety of measures, including institutional design enabling principals to learn about agency proposals, and hence keep the latter's activity under some control<sup>47</sup>. Claims have been made that direct forms of control by principals, notably 'police patrols' of legislators conducting audits of agencies' activities, are less common than 'fire-alarm' oversight, which is arguably less centralised and interventionist as legislators establish rules, procedures and informal practices enabling third parties to examine administrative procedures to seek remedies from agencies<sup>48</sup>.

Procedural rules can help to lead to agencies generating the outcomes desired by principals, unlike ex post legislation, as they establish the sequence of decision-making<sup>49</sup>. Principals establishing administrative agencies can manipulate the latter's structure and design, 'hardwiring' or pre-programming them accordingly<sup>50</sup>. The initial hardwiring, which entails defining the mission of the agency, is essential to attract 'right-thinking staff'<sup>51</sup>, and

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<sup>45</sup> For a detailed account of transaction cost analysis relating to the P-A model, chapters 2-3, Horn, MJ. 1995, "The Political Economy of Public Administration", Cambridge University Press

<sup>46</sup> McCubbins, Noll and Weingast 1987, pp.244-246

<sup>47</sup> McCubbins, M and Lupia, A August 1994, "Who controls? Information and the structure of legislative decision-making", pp.361-384, *Legislative Studies Quarterly*, XIX

<sup>48</sup> McCubbins, M and Schwartz, T 1984, "Congressional oversight overlooked: Police Patrols versus Fire Alarms", pp.165-179, *American Journal of Political Science*, Vol.28(1) p.166. For a refined and 'reconstructed' discussion on these forms of oversight, McCubbins, M and Lupia, AD April 1994, "Learning from Oversight: Fire Alarms and Police Patrols Reconstructed", *Journal of Law, Economics and Organization*, pp.96-125

<sup>49</sup> McCubbins, Noll and Weingast 1987, 1989

<sup>50</sup> Macey, JR 1992, "Organizational Design and Political Control of Administrative Agencies", *Journal of Law, Economics and Organisation*, 8:93-110, p.101

<sup>51</sup> Shepsle, KA 1992, "Bureaucratic drift, coalitional drift and time consistency: a comment on Macey", p.113, *Journal of Law, Economics and Organisation*, 8: 111-118. When citing the 1977 Senate Committee on Governmental Affairs, Moe, T 1982, "Regulatory performance and presidential administration", *American Journal of Political Science*, 26(2), p.202, also referred to the importance attributed to "right-minded people" for regulatory decisions to be consistent with the wishes of the US President, especially with average

influence policy subtly. Indeed, some argue that a critical control instrument held by political principals is the selection of the head or the management of an agency, making the appointment process a critical factor to influence future decisions before the agency constructs its own policy path<sup>52</sup>.

Wood and Waterman have provided an extensive account supporting the fundamental political importance of appointments in US agencies, indicating that “the greater the centralization of agency decision-making processes, the greater the executive control over bureaucratic outputs”<sup>53</sup>. Moe too has discussed the significance of appointment powers, but he has also emphasised how political principals’ controls over the allocation of agencies’ budgets risk affecting their performance<sup>54</sup>.

Budgets have organisational implications for agencies, since they determine the extent of non-financial resources that can be exploited. Noll has pointed out that “the extent of information dependence and professional bias in an agency is also to some degree under the control of political overseers...(since)...the magnitude of the agency’s budget in relationship to the scope and complexity of its responsibilities affects the extent to which the agency can assure itself of multiple and independent sources of information”<sup>55</sup>.

Therefore, existing literature has suggested that there are a range of institutional factors that allow political principals to maintain some control over agencies, and the more extensive such controls, the greater agency responsiveness towards those political principals.

More recently, Gilardi has argued that the creation of formally independent regulatory agencies entails only some control mechanisms are present and overall ‘they are much less relevant than for ordinary bureaucracy’<sup>56</sup>. Yet, while playing down the above-mentioned control mechanisms, Gilardi acknowledges that in certain circumstances administrative

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commissioners leaving office well before their fixed terms expired, allowing him to rapidly appoint a majority to a board contrary to formal design. However, Noll,R has argued that in practice Presidents do not exercise the authority they could over regulatory agencies, 1971 “Reforming Regulation”, p.36, Brookings Institution

<sup>52</sup> McCubbins,M, Calvert,RL & Weingast,BR 1989, “A theory of political control and agency discretion”, *American Journal of Political Science*, 33(3): 588-611, p.604

<sup>53</sup> Wood,BD and Waterman,RW September 1991, “The Dynamics of Political Control of the Bureaucracy”, *American Political Science Review*, Vol. 85(3), pp.810-828, p.822

<sup>54</sup> Moe 1982, p.200-1

<sup>55</sup> Noll,RG 1989, “Economic perspectives on the politics of regulation”, p.1279, in (eds.) Schmalensee,R and Willig,RD, “Handbook of Industrial Organisation”, Vol.2, pp.1254-1287. Brackets added

<sup>56</sup> Gilardi Dec.2001, p.10

procedures ‘stacking the deck’<sup>57</sup> in favour of well-organised constituencies might apply, as may institutional checks in the form of general competition authorities that share competencies with regulators, and ministers retaining some powers. Accordingly, the thrust of Gilardi’s analysis is that the principal-agent model is useful to evaluate comparative constraints on regulators, which entails that “the extent of independence varies significantly between agencies”<sup>58</sup>.

Gilardi has made an important contribution to the operationalisation of formal agency independence by refining an ‘independence index’<sup>59</sup>, previously elaborated by scholars measuring that of central banks<sup>60</sup>, some acknowledging the need for non-formal independence indicators<sup>61</sup>. He based his findings on the formal authority delegated to regulatory agencies across Europe; thirty-three in a first instance, more recently expanded to one-hundred-six<sup>62</sup>. To explore the degree of formal authority renounced by time-inconsistent senior political officials, thus addressing principal-agent theory, he identified indicators for independence and divided them among five categories: the agency head status<sup>63</sup>; the management board members’ status; the general frame of the relationships with the government and the parliament; financial and organizational autonomy, and the extent of delegated regulatory competencies.

In terms of explanatory intent, rather unambiguous indicators include: who appoints chairmen and boards; term of offices - on the grounds that terms longer than the duration of the legislature and the executive being in office indicate that agency officials are supposedly less politically sensitive; dismissal procedures; whether management board members can hold other offices in government; who, other than a court, can overturn an agency decision where it has exclusive competency; the source of the budget; how the budget is controlled; who is competent for sectoral regulation. Similarly unambiguous indicators for a formal analysis of independence, but seemingly less valuable given their

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<sup>57</sup> McCubbins, Noll and Weingast 1987, p.255

<sup>58</sup> Gilardi 2001, p.9

<sup>59</sup> Gilardi Dec.2002, pp.879-884

<sup>60</sup> Grilli, Masciandaro, and Tabellini 1991

<sup>61</sup> Alesina 1988, p.40, includes informal relationships and contacts between Central Bankers and members of the executive, but states that quantifying these elements is not easy

<sup>62</sup> Gilardi, F 2002; 2005 “The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors”, *Swiss Political Science Review* 11(4): 139-167; 2008, “Delegation in the Regulatory State”, Edward Elgar

<sup>63</sup> Wilson, J has commented: “no agency head can ever achieve complete autonomy for his or her organization (since) politics requires accountability”, 1989, “Bureaucracy - What Government Agencies Do and Why They Do It”, Basic Books, p.188

yes/no operationalisation, are those asking whether independence is a formal requirement for appointment at management level and if agency independence is formally stated.

Each indicator was coded and scored between 0 and 1<sup>64</sup>. Factors identifiable with independence received a score closer to 1. So, the less *formal* say political principals had in the management of, and policy conducted by, the regulatory agencies the more independent. Only four of the seventeen European countries examined averaged over 0.5 on Gilardi's independence scale<sup>65</sup>. More importantly with regard to this thesis, France and UK were two of them, although Ireland was awarded the highest independence value.

### III.2 'Capture' Theory

One limit of Gilardi's index is that it does not consider regulatory activity with respect to regulatees; presumably an essential justification for regulation being in place. A host of theoretical literature by the 'Chicago school' has made claims that regulation does not in fact work in the public interest or, in any case, according to the statutory mandates attributed to regulators. Stigler argued that small and well-organised interest groups manage to promote demands for specific and narrow regulatory policies benefiting their own economic status<sup>66</sup>. For example, organised groups of regulatees are keen that controls over new entrants be implemented so as to reduce the chances of competition and increase their economic benefits at the expense of consumers, who are generally broad, diffuse groups. Peltzman claimed that organised "interest groups can influence the outcome of the regulatory process by providing financial or other support to politicians or regulators"<sup>67</sup>.

Regulators struggle to be independent from regulatees. Reasons include that their resources, financial or otherwise, are frequently inferior to those of certain firms they regulate. Agencies will have some formal powers to control regulatees, and possibly be able to sanction breaches of conduct. However, in aiming to carry out their statutory duties,

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<sup>64</sup> Scores for individual indicators were added for each category to derive the aggregate mean. By applying the same process to the five categories and averaging the scores out values were obtained

<sup>65</sup> Gilardi 2005, Figure1, p.141

<sup>66</sup> Stigler 1971

<sup>67</sup> Peltzman, S 1989, "The Economic Theory of Regulation after a Decade of Deregulation", Brookings Papers: Microeconomics, pp.1-59

regulatory agencies suffer from the same problem that political principals suffer with respect to their behaviour, namely information asymmetries<sup>68</sup>.

Regulators are at a disadvantage vis-à-vis regulated firms because critical information - that may cause certain policy decisions instead of others - is only possessed by a single regulatee or a group of them. Therefore, the agency bears an information dependency, which restrains its 'independent' outlook and decision-making. Another impediment may be staff shortages, with regulators not paying as much as regulated firms, as may be the 'revolving door'<sup>69</sup>, with regulatees joining regulators and then returning to private sector jobs. Thus, the professional characteristics of regulators are likely to be important<sup>70</sup>, as is evidence of little conflict between the two sides<sup>71</sup>.

Indeed, Bernstein's earlier analysis of captured agencies, framed in his life-cycle hypothesis, interprets the ongoing relationship between regulator and regulatee as the cause for the public interest being subordinated to the prevalent interests of the regulated industry. Subtly identifying time as an important factor for policy outcomes unlike Stigler and Peltzman, Bernstein's rationale was that if the regulator does not make the effort to analyse its regulatory problems 'objectively', it would tend to accept the arguments of the industry's dominant players and, thus, favour their preferred policies, mistaking them for the public interest. Over the years, weighted down by the paraphernalia of due process, the regulator faces a weakened capacity to evaluate important economic regulatory issues and formulating programmes to resolve them<sup>72</sup>.

The increasing closeness between the two parties makes the 'independent' regulator learn more about the regulatee, including the latter's operational difficulties. The agency starts empathising with the dominant regulatee it interacts with frequently and is led to adopt a favourable treatment. According to Bernstein, to retain its independence from organised groups trying to capture it, the regulator must show due consideration for rival demands,

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<sup>68</sup> 'Information asymmetry' literature owes a lot to 2001 Economics Nobel Laureate George Akerlof's 1970 "The market for lemons: quality uncertainty and the market mechanism", *Quarterly Journal of Economics*, Vol.84, pp.488-500. While the original article focuses on the risks of purchasing products from second-hand markets, because of lack of publicly available information on their quality, the relevant underlying concept is simply the problem of dealing with a counterpart that holds more information

<sup>69</sup> Makkai,T and Braithwaite,J 1992, 'In and out of the revolving door: making sense of regulatory capture', *Journal of Public Policy* 12(1): 61-78

<sup>70</sup> For a quantitative evaluation of the type of academic and professional skills of supervisory staff at central banks and supervisory agencies, Goodhart,CAE, Schoenmaker,D and Dasgupta,PS January 2002 "The Skill Profile of Central Bankers and Supervisors", *European Finance Review*, Vol.6(3)

<sup>71</sup> Thatcher Dec.2002, p.958

<sup>72</sup> Bernstein,MH 1955, "Regulating Business by Independent Commission", Princeton University Press, p.144



and assess the extent to which its authority should be used to modify the relationships among major groups in the industry of its competence<sup>73</sup>.

#### IV. Quantitative Evidence

Recent studies have sought to 'measure' the independence of regulatory agencies by identifying quantifiable indicators. Some of Gilardi's comparative findings on formal independence of regulators covering five sectors in seven countries have been surprising. For example, despite having a reputation for taking decisions in its own right, the UK's Oftel scored 0.74, compared to France's ART relatively high 0.65<sup>74</sup>, considering its reputation for experiencing significant state involvement in its policy-making procedures<sup>75</sup>. In fact, the values for both regulators are higher than the average formal independence values found by Gilardi in 2005 for the respective countries, making them stand out as especially 'independent'. Since Oftel and the ART scored higher on the formal independence scale than other sectoral agencies, it is all the more appropriate to examine their independence in practice.

Edwards and Waverman also produced an interesting piece of work, particularly relevant here because of their focus on telecoms regulators, based on quantitative insights<sup>76</sup>. Instead of Gilardi's independence values between 0 and 1 derived from the averages of five categories comprising selected indicators, Edwards and Waverman's index is composed by the sum of 12 measures relating to formal institutional features of the agencies, hence giving scores between 0 and 12. Crucially, the latter's findings contradict those of Gilardi, whereby they project a higher independence value for the French regulatory institution (6.5) than the British one (5.75), with both remaining unaltered over time. By translating the indices to make them comparable<sup>77</sup>, data by Edwards and Waverman also suggests that both the French and British regulators are much less formally independent than portrayed by Gilardi. Respective values of 0.54 and 0.48 for the ART and Oftel make the latter 0.26 'less independent'; a drastic drop out of a maximum score of 1.

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<sup>73</sup> *ibid.* p.155

<sup>74</sup> Gilardi 2002, p.879

<sup>75</sup> Daßler, T and Parker, D 2004, "Harmony or disharmony in the regulation and the promotion of competition in EU telecommunications? A survey of the regulatory offices", *Utilities Policy* 12, pp.9–28, Elsevier, refer to Thatcher 1999, p.10

<sup>76</sup> Edwards and Waverman 2006

<sup>77</sup> Comparable index values are obtained by simply dividing total scores for each regulator by the number of indicators accounted for in the index. So, Edwards and Waverman values were divided by 12

The considerable difference in values is very significant given the similar conceptualisations of independence. Comparing the two quantitative assessments reveals that minor differences in the formal measurement and interpretation can translate into different degrees of independence for the same agencies, raising even more questions about how each index is constructed. Notably, Edwards and Waverman ask whether the agency has been in operation at least 2 years<sup>78</sup>, a point that is excluded by Gilardi. Quite aside from raising the question of why 2 years of existence are important and not longer or less and how this minimum period ties with formal independence, how can the impact of one or more specific, additional, indicators on an agency's independence index be established? Also, how do Edwards and Waverman define and quantify the term 'adequate' when using it for certain formal institutional design indicators?<sup>79</sup> Indeed, does the subjective implication of the term not undermine the predominant use of formal indicators to define independence?

These simple questions address the fact that formal definitions of independence are imbued with more subjectivity than their propagators convey and thus do not provide a full picture. As such, they raise concerns about the value of the indices in terms of independence in practice. In fact, Gilardi has admitted there is a need to devise comparative indicators of informal or de facto independence<sup>80</sup>, buttressing the purpose of the informal indicators identified in the next chapter and the scope of the thesis overall.

Edwards and Waverman's paper is nonetheless relevant for the scope of this thesis, because they assess agency independence in terms of regulatory outcomes concerning the European telecommunications sector by examining interconnect charges national incumbent operators imposed on new entrants. Their real contribution of interest is that the role and implications of majority or part public (state) ownership of incumbent operators are recognised, even at a basic level, as impinging on what is reputed to be regulatory agency independence. For example, a Government facing a seriously indebted

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<sup>78</sup> see their fn.40, p.41

<sup>79</sup> The normative judgment is applied to several institutional 'elements' they use to measure independence, namely, whether the regulator has 'adequate': powers regarding interconnection issues; and resources (staff and budget)

<sup>80</sup> Gilardi 2005, p.157. For a fuzzy-set analysis, Maggetti, M 2007, "De facto independence after delegation: a fuzzy-set analysis", *Regulation and Governance*, Vol.1(4).pp.271-294; shortcomings of quantitative 'measurements' indicated herein remain. Maggetti recognises the "ultimate" value of a qualitative and systematic analysis of explanatory factors of de facto independence; 2009 "The role of independent regulatory agencies in policy-making: a comparative analysis", p.465, *Journal of European Public Policy* 16(3), pp.450-470. Moreover, his work separates conceptually and empirically agency independence from elected officials and regulatees unlike the analysis developed here

majority state-owned company for which it has direct or indirect management and financial responsibilities is likely to be especially sensitive to the firm's needs<sup>81</sup>, and accordingly would have a resonant, though reasonable, interest in 'adverse' decisions by an 'independent' regulator.

Regression results from the interaction between regulatory independence and public ownership are worth reporting since they indicate that "at the mean value of the index in the sample, a fully government owned PTO will enjoy a local interconnect rate 0.464 Eurocents higher than if it were fully privatized. However, the addition of an extra formal element promoting independence of the NRA from the government will reduce this advantage by 0.199 Eurocents. A level of independence...two points above the mean should therefore come close to neutralizing the bias in favour of an entirely government owned PTO"<sup>82</sup>.

Edwards and Waverman also point to the insignificant coefficient of the regulatory independence effect on interconnect outcomes. They stress that it matters only when in conjunction with Governments holding an ownership stake in the PTO<sup>83</sup>. Instead, a Government that has divested itself of all shares is likely to be less informed and interested in regulatory policy technicalities, though this may also depend on their political impact; say, preferences on national employment levels.

Although the index values awarded are based on formal independence criteria much like Gilardi, acknowledging the existence and effect of political factors that are not explicitly laid in statutes granting independence is an important step forward per se. An additional merit of Edwards and Waverman is that they compare formal independence index values at two different points in time (1998 and 2003), thus showing variation over time and giving a dynamic perspective on how agency independence can change, however it is examined. A key implication of the paper remains that political intervention into the management of regulation by agencies might be subtly taking place, and formal delegation of powers is a shrewd but insufficient method of examination to account for such activity.

Thatcher has put forward a set of slightly different, more nuanced, quantitative indicators comparing the autonomy of regulators across the four largest EU economies (Germany,

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<sup>81</sup> Edwards and Waverman, p.37

<sup>82</sup> *ibid.*p.47 PTO stands for Public Telecommunications Operator, here intended as national incumbent operator, NRA means national regulatory agencies

<sup>83</sup> One of the selected French sub-cases expanded upon below (ch.7) illustrates this quite vividly

UK, France and Italy) using averages or aggregate data over set periods of time<sup>84</sup>. Party politicisation of appointments, departures (dismissals and resignations) of 'independent regulatory agencies' (IRA) members before their term ended, the average tenure of the latter, financial and staffing resources of IRAs as well as the use of powers to overturn IRAs' decisions by elected officials were used to define agency independence from politicians.

Italy was found to be the country where politicisation of regulatory agencies was most pronounced by far. There was no evidence of formal dismissal of agency officials or informal pressures for them to leave<sup>85</sup>, and it was suggested elected officials made limited use of powers to overturn decisions. So, the collected data suggests formal powers were not used by elected officials to influence regulators, supporting the scope and sense of the questions posed in this thesis. While Thatcher's data does not prove that the regulators analysed were independent from political officials, it entails that more subtle forms of control, if any at all, must have been at work, such as the creation of resource dependencies or informal relationships<sup>86</sup>.

To examine the occurrence of capture - or at least establish the 'relational distance'<sup>87</sup> between regulators and regulatees -, revolving doors, the number of mergers blocked or made subject to conditions and the number of legal challenges brought by regulatees against regulators were evaluated<sup>88</sup>. The evidence provided suggests the revolving door is considerably more present in the UK than in the continental countries studied. The trend concerning legal challenges brought by regulatees indicated they are more frequent on the Continent than in the UK. Although the UK witnessed slightly more merger rejections in

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<sup>84</sup> Thatcher Dec.2002, pp.954-972; 2005 "The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe", *Governance*, Vol.18(3), pp.347-373

<sup>85</sup> The 2005 case of the, albeit delayed, resignation of former Bank of Italy Governor, Antonio Fazio - who could not be formally dismissed by Government without new legislation being passed - following the controversy concerning his regulation of the Italian banking sector and the ensuing pressures, unequivocally challenges the suggestion that formal dismissal procedures reflect degrees of independence. If formal independence matters in practice, why did the Governor feel the need to resign when he could not be removed, especially since he had explicitly chosen not to quit straight after the outbreak of the controversy?

<sup>86</sup> Coen et al 2002

<sup>87</sup> Black,DJ 1976, "The behaviour of law", New York. The reference to Black's term should not suggest that a direct association is being made between capture and 'relational distance'. The latter's impact is nonetheless dependent on the scope, frequency, length of interaction, as well as the nature and number of links. Quoting Black - "People vary in the degree to which they participate in one another's lives. This defines their intimacy or relational distance", p.40. As Hood,C, Scott,C, James,O, Jones,G and Travers,T stress in 1999 "Regulation Inside Government", especially pp.60-65, OUP, the concept is a key theme in the business-regulation literature; it shapes the conditions in which law is used to order social relations, and law enforcement. Reflecting on Grabosky,P and Braithwaite,J 1986 "Of Manners Gentle", OUP, Hood et al have suggested indicators concerning the effect of relational distance on regulatory formality

<sup>88</sup> Thatcher Dec.2002, pp.962-966

proportional terms, overall, few mergers were stopped by the regulatory agencies in all four countries.

## V. Problems with 'Measuring' Independence

The complexity of finding relevant indicators and data suggests that attempts to measure independence deserve much praise, given the interesting results drawn so far. Some measurement weaknesses remain nonetheless, underpinning a new effort to review evaluation techniques. Moe observes that popular models of regulation as well as quantitative empirical work have tended to focus on very small parts of the whole either for reasons of clarity and mathematical tractability or for data collection and measurement problems<sup>89</sup>.

Indeed, in their study on Central Bank independence, Cukierman et al distinguished between 'legal' independence, which they acknowledge as "only one of several elements that determine...actual independence"<sup>90</sup>, and two sets of distinct informal indicators. The latter were: (i) turnover of Central Bank Governors and (ii) "responses to a questionnaire that was sent to a non-random sample of specialists on monetary policy in various Central Banks"<sup>91</sup>. While this added a less formalistic touch to their analysis of independence, none of the indices was closely correlated<sup>92</sup>.

The fact that quantifying a subtle concept such as independence over-simplifies complex realities is exposed in other studies. One limit of Gilardi's analysis, which, unlike Edwards and Waverman<sup>93</sup>, he openly acknowledges, is the equal weighting of all the indicators supposed to measure independence<sup>94</sup>. This approach is, for example, in stark contrast to Wood and Waterman's finding that the political appointment of heads of bureaucracies is a

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<sup>89</sup> Moe,T 1985, 'Control and feedback in economic regulation: the case of the NLRB', *American Political Science Review* 79(4): 1094-116, p.1095

<sup>90</sup> Cukierman,A, Webb,SB and Neyapti,B 1992, "Measuring the Independence of Central Banks and its Effect on Policy Outcomes", *World Bank Economic Review*, Vol.6(3), pp.353-398, p.361, while concerning Central Banks only, is an especially insightful and cited study

<sup>91</sup> *ibid.* p.367

<sup>92</sup> *ibid* Table 6, p.369

<sup>93</sup> Edwards and Waverman 2006, p.41,fn.41, just state that "the approach is consistent with previous approaches to the construction of the indexes of regulatory independence"

<sup>94</sup> Gilardi Dec.2002, p.880

key instrument for elected officials (more specifically the President and Congress, in the US) to influence future regulatory policy<sup>95</sup>.

Similarly, Noll has stressed the importance of the authority allocating agency budgets because of their likely impact on other resources<sup>96</sup>. Those of 'independent' UK utility regulators have been approved by Parliament and require some negotiation with the Treasury<sup>97</sup>. Yet, the importance of budgets, and hence of who allocates them, is likely to vary. At times of expanding markets, the degree of autonomy to budget for contingent needs, such as the external contribution of specialised consultants or the purchase of information from 'gatekeepers', may impede regulators in their quests, whereas at quieter times less generous budgets approved by Parliament may be more than sufficient to tackle the most important policies at stake. It, therefore, appears that the question of how indicators are weighted is a moot point. Subjectivity, in scoring independence indicators, is inherent<sup>98</sup>.

A further point raised above is that measuring independence by examining institutional arrangements at one point in time, as done by Gilardi and Thatcher, means independence is assumed to be a constant. If agency independence is variable across countries, is it possible to assume that it will not be variable over time within the same country, given particular contexts<sup>99</sup>? In Thatcher's case it may be possible to break data between periods of time rather than looking at aggregate values over a number of years. For example, it would be interesting to know in which years political affiliation was strongest and relate the findings to any major issues that had arisen at those times.

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<sup>95</sup> Wood and Waterman 1991, p.822

<sup>96</sup> Noll 1989

<sup>97</sup> McCarthy,C April 2003, (then Chairman of UK energy regulator Ofgem and subsequently Chairman of the UK's Financial Services Authority), "The Independence of the Regulation Authority - Why Independent Regulators?", (speech at Sciences-Po - Paris), p.10

<sup>98</sup> Quite exceptionally Cukierman et al 1992, weigh differently indicator categories for the 'legal' independence index of Central Banks (p.358-9), and their emphasis is on generic indicator categories common to the other studies comprising indexes, such as appointment and dismissal of CEOs; statutory rights over policy formulation and; specificity of key policy objectives and Central Bank authority over elected officials with respect to them. Indicators concerning activities specifically undertaken by Central Banks with respect to Government are weighted less instead. More importantly in terms of understanding independence in practice, the rationale for weights is not clearly explained, as is not that for the weights of indicators in the questionnaire on independence sent to specialists. In addition, the authors do not deny that "the judgments of those responding to the questionnaire are subjective and not entirely uniform", p.367, suggesting an inherent flaw in their exploration of non-legal independence and limiting the benefits of this more dynamic analysis of operational aspects

<sup>99</sup> Hood,C, Hall,C & Scott,C 2000, "Telecommunications Regulation - Culture, chaos and interdependence inside the regulatory process" Routledge p.84 have stated that "the relative power of (regulatory) actors...is likely to change over time" (brackets added)

More notably, allowances are not made for particular policy issues which are of significant interest to different parties with opposed preferences. These are likely to see the agency under greater pressure than ones which cause little political debate and/or unrest among regulatees and consumers. When regulators are under pressure from elected officials for having badly managed a policy receiving considerable media coverage, does the duty to submit an annual report to Parliament impinge on their independence as much as the potential prospect of being dismissed by relevant ministers? More to the point, can 'visible' factors set out in formal institutional arrangements be the only forces at work affecting regulatory policy?

Buiter has only very recently raised renewed attention over the importance of non-formal independence, depicting a prominent institution like the European Central Bank (ECB) as 'the most independent central bank in the world'. More crucially, he added: "While the treaty and protocols do not give the ECB the power to set either the ultimate targets of monetary policy or the operational targets, they do grant it an extraordinary degree of operational independence...There is only formal accountability - reporting duties, that is the obligation to provide certain information and to explain its actions to the European Parliament"<sup>100</sup>, clearly sustaining the argument made here that formal institutions have limited explanatory power in terms of agency independence. Ranking indicators associated with formal independence, therefore, appears a useful but dry approach to examine regulators' independence in practice. The arbitrary practice of adopting quantitative indicators<sup>101</sup> and even weighting them does not resolve the issue of accounting for specific complexities through rigorous, qualitative, interpretation of cases. The summary exercise undertaken through these indicators requires interpretation and judgment.

To the applied mathematician, using case studies and little or no quantitative data may seem a fuzzy and blurred approach. Nevertheless, if independence in practice has to be evaluated without incurring the limitations indicated above and by looking at the comprehensive influence exerted by elected officials and regulatees on the process undertaken by regulators on complex policies of wide interest as intended here, this appears somewhat necessary. Political scientists exploring different issues by applying

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<sup>100</sup> Buiter, WH 19/1/07, "High degree of ECB independence in securities sector is undesirable", Letters to the Editor, Financial Times

<sup>101</sup> At the start of the PhD, a LSE Professor well-versed in European electricity regulation suggested, with a touch of irony, that I measure the independence of French regulators by examining how many of their senior officials had studied at the 'grandes écoles'. Perhaps, for the sake of 'measuring' independence, this is as good a quantitative indicator as others

empirical quantitative methods admit to it too<sup>102</sup> since, however useful, such indicators do not tell the whole story. Maggetti's fuzzy-set analysis combines quantitative and qualitative elements to challenge suggestions that formal independence explains de facto independence<sup>103</sup>. At the least, the quantitative approach does not allow for dynamic mechanisms among core actors, which Moe identifies as 'mutually adaptive adjustment', where each one is responsive to the decisions of each of the others and reciprocal relationships balance the system<sup>104</sup>.

In this sense, Coen et al's study<sup>105</sup> examining how the relationships between regulators, competent ministries and regulatees, and the respective power balances, evolved in the key utilities sectors of telecoms, energy and rail in both Britain and Germany provides an interesting portrait of regulatory (in)dependence. It draws out the issue of how informal dependencies and relationships affect regulatory behaviour, assesses independence from both elected officials and regulatees and, while not giving formal arrangements prime importance, it does not undermine them.

Two preliminary but distinct conclusions can thus be drawn from the literature overview regarding regulatory independence. First, agency independence can be 'measured' with respect to different sets of actors. Second, there is little agreement on how agency independence is defined, except for the questionable tendency to associate it with formal institutional design. The largely unsatisfactory and conflicting conceptualisations presented in scholarly work thus far should not distract from the need to examine agency independence by considering how regulation is implemented in practice after formal delegation. Indeed, besides noting that institutional arrangements are incomplete, thus mirroring Fesler's earlier claim that "legislatures despair of defining in crystal-clear terms the norms of conduct to govern economic or social life"<sup>106</sup>, Thatcher has crucially observed how powers and controls can be used in many different ways<sup>107</sup>.

Such claims raise important but distinct implications, which deserve to be addressed from a fresh perspective. The incompleteness of institutional arrangements, which to an extent is

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<sup>102</sup> Allan, J and Scruggs, L. 2006, "Welfare-state decommodification in 18 OECD countries: a replication and revision", *Journal of European Social Policy* Vol.16(1): 55-72, p.57

<sup>103</sup> Maggetti 2007, suggests that regulatory agencies' age, veto players and membership of European agency networks matter

<sup>104</sup> Moe 1985, p.1095

<sup>105</sup> Coen et al 2002

<sup>106</sup> Fesler 1946, 1959, p.196

<sup>107</sup> Thatcher Dec.2002, p.955



unavoidable and defines agencies' "zone of discretion"<sup>108</sup> - explained as delegated powers minus formal controls retained by principals -, is the underlying factor in the critical exposition of existing approaches raised above. Quite aside from whether, comparatively, regulators have considerable formal powers or are subject to extensive statutory controls, this raises the question of whether other, informal, factors influence agency independence.

A separate, highly significant, point, which can be drawn from Thatcher's remark, and is largely omitted in existing analyses on regulatory independence, is that agencies do not deploy formal, or informal, resources strictly according to their availability. The fact that regulators deploy them on a varying basis implies they decide to, or not to, do so, whatever the degree of powers actually held<sup>109</sup>. Thus, due consideration must be given to agencies' policy preferences. The latter signal the propensity to act, and lead to the exploitation of available resources. Indeed, preferences of non-regulatory actors, who may have other resources, also need to be examined to understand who achieves their preferred policy outcomes. Therefore, to examine regulatory independence in practice, there is a strong need for an adaptable, relevant, framework that integrates analytically both the combination of preferences of different actors as well as the distribution of resources between them, to evaluate which ones matter for given policies.

## **VI. State Autonomy: Definition and Types**

The preceding sections have indicated that defining independence as a static state is inadequate. Nordlinger's approach to state autonomy<sup>110</sup>, defined as "a seminal analysis" by some<sup>111</sup> and "most ambitious" by others<sup>112</sup>, provides many useful elements and a 'first level' of analysis that deserves due consideration to assess regulatory independence. He identifies the autonomy of the state with the ability to translate its policy preferences into authoritative actions, poignantly clarifying that the definition should not refer to a set of

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<sup>108</sup> Thatcher and Stone Sweet, p.5

<sup>109</sup> Black, J refers to "the ability and willingness to use them"; 2003 "Enrolling actors in regulatory system: Examples from UK financial services regulation", reprinted from *Public Law* - Spring 2003, Sweet and Maxwell Ltd, pp.63-91, p.73

<sup>110</sup> Nordlinger 1981

<sup>111</sup> Smiley, D 1984, "Federal States and Federal Societies, with Special Reference to Canada", *International Political Science Review*, Vol.5(4), pp.443-454, Pluralism and Federalism, p.450

<sup>112</sup> Krasner, S January 1984, "Approaches to the State: Alternative conceptions and historical dynamics", *Comparative Politics*, Vol.16(2), pp.223-246, p.231

“institutional arrangements” since it cannot be said that institutions have preferences; a condition for the “*making* of public policy”<sup>113</sup>.

By treating preferences and the diverse state strategies deployed to achieve them as the central aspects of his framework, Nordlinger presents autonomy as a practice aimed at achieving a policy preference rather than just as an endowment. He usefully identifies three types of autonomy, based on different preference scenarios for which different sets of strategies are used by the state to fulfill the preferred policy, as summarised in Table 1 and discussed in detail further below. The range of autonomy types reflects the key concept that there is variation in the practice of being autonomous. Hence, different factors other than formal arrangements must be attributed due explanatory power, and preferences cannot be overlooked.

**Table 1: Nordlinger’s State - Autonomy Type scenarios; Own Labels<sup>114</sup> (Level 1)**

Types of Autonomy	Preferences	Strategies
Type III	Absence of divergent state-society preferences	State translates preferences into authoritative action when state-society are non-divergent by: (i) <b>preservation</b> (ii) <b>entrusting</b> ; (iii) <b>apathy</b>
Type II	Combination of divergence, indifference, convergence	State shifts preferences of divergent societal actors over time by: (i) <b>inducement</b> ; (ii) <b>appeasement - conciliation</b> ; (iii) <b>enfranchisement</b> ; (iv) <b>empowerment - reinforcement</b>
Type I	Predominant divergence, similar preferences in the background	State translate its preferences into authoritative action without altering societal preferences from the start by: (i) <b>counterbalancing - offsetting</b> ; (ii) <b>obstruction</b> ; (iii) <b>confrontation - disincentive</b>

<sup>113</sup> Nordlinger, pp.8-9

<sup>114</sup> Note that each one of Nordlinger’s strategies, which are fully explained below in the lengthy fashion he does, are specifically attributed shorthand labels here, not found in the original text

Nordlinger's propositions on autonomy form part of the scholarly movement to 'bring the state back in'<sup>115</sup>, in response to society-centred perspectives claiming that the state acts upon society's wishes. Yet, his arguments are relevant here because they mirror debates on who in politics gets what, when, how and on the "struggle of us against them"<sup>116</sup>. Part of the exercise to examine policy-making independence is to understand that the concept is not static or rigidly definable - as contradictory findings from otherwise similar analyses of formal institutional arrangements demonstrate. So, the preference-based approach is valuable because, unlike formal institutionalist work, it incorporates dynamic policy-making factors to evaluate autonomy in practice.

Variations in the patterns of state-society preferences are considered by Nordlinger to go a long way in determining the outcome of authoritative actions<sup>117</sup> and are important to understand 'who gets what'. Nordlinger claims that whether state-society preferences are divergent or non-divergent, therefore whether actors have different or similar preferences, serves as the most important basis for distinguishing between the different types of state autonomy<sup>118</sup>. The combination of preferences he refers to - whether the state faces convergence, divergence and/or indifference - generates complex scenarios requiring a range of respective processes comprising the different strategies and options (discussed in the following sections) which Nordlinger identifies to explain how the state achieves its preferences. Thus allowing for a variety of preference patterns widens enormously the settings in which autonomy can be verified. Neither preferences nor the complex and varied processes engendered to achieve them are reflected in statutory definitions exhaustively, and could not be expected to do so within the context of specific policy issues.

Before going further, the importance of preferences in Nordlinger's framework and for the scope of the thesis requires an upfront clarification regarding the conceptualisation of preference-based state autonomy. Nordlinger distinguishes between what he calls 'behavioural (or objective) and subjective autonomy'. The latter refers to the self-generation of preferences, derived from internal attributes. Instead, the former reflects his definition - the state is independent in acting as it chooses to act - and is the one retained here.

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<sup>115</sup> Especially the introduction in Skocpol,T, Evans,PB, Rueschmeyer,D, (eds.) 1985, "Bringing the state back in", Cambridge University Press

<sup>116</sup> Lasswell,H 1958 "Politics: Who gets what, when, how", World Publishing Company, also referred to in Krasner, p.225

<sup>117</sup> Nordlinger, p.17

<sup>118</sup> *ibid.*p.20

Thus, like Nordlinger, the thesis does not examine independence by looking at whether preferences are internally generated. Nordlinger warns that it would be “unrealistic to expect any social entity to come even close to being fully autonomous in this subjective sense”<sup>119</sup>. He explains this by pointing to a reciprocal learning process in a given environment, with an increased effect when interactions are fairly close and frequent. The implication is that because of this shared learning process among different actors there might be some common ground on how an issue is looked at. This explains, at least in part, why non-divergent preferences are a possibility<sup>120</sup>, notwithstanding the largely dichotomous approach to assess state autonomy, with preferences always achieved vis-à-vis ‘societal actors’ whoever they may be.

By defining autonomy as preferences translated into authoritative actions, Nordlinger observes that a state acting upon its preferences viz. societal actors under conditions of non-divergence is just as autonomous as one under conditions of divergence: “the distinction between a state acting on its preferences under conditions of divergence and one doing so under conditions of non-divergence is hardly unimportant. But it is advisable to use the term autonomy inclusively, and then go on to differentiate among types of autonomy on the basis of the fit between...preferences”<sup>121</sup>. Thus, the theory suggests that ascertaining autonomy does not have to be exclusively associated with elements of confrontation. Similarly, achieving state preferences does not always involve the alteration of private behaviour or structure.

Autonomy characterised by non-divergence constitutes a novel concept, especially compared to other perspectives on state autonomy which Nordlinger associates with Skocpol and Krasner. He indicates how their emphasis is on state actions running counter to the long-run interests of the economically and politically dominant class. This entails excluding cases in which the state acts on its preferences in the absence of such conflicts. Yet, “surely there is no a priori reason to refer to such actions as non-autonomous...or societally constrained; nor is it unreasonable to view them as autonomous actions”<sup>122</sup>.

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<sup>119</sup> *ibid.*p.25

<sup>120</sup> This conflicts starkly with the top-down concept of ‘deck-stacking’, which assumes that where preferences are similar it is because of the influence of principals over agents rather than some input parity

<sup>121</sup> Nordlinger, p.24

<sup>122</sup> *ibid.*pp.23-4

While suggesting that non-divergence between state and societal actors can constitute autonomy<sup>123</sup>, Nordlinger insists that there is excessive reliance on societal constraint assumptions. He contends that the state's preferences are not translated into actions only because of societal consent, countering the pluralist tenet which takes the state's role insufficiently seriously. Nordlinger refutes the argument that the state aggregates and processes societal demands, mediating and arbitrating among different groups, adding marginal contributions to policies at best. He contends that, in a non-divergence context, little if any acknowledgement is given to the state's impact in shaping societal preferences<sup>124</sup>. Nordlinger admits being more concerned with the frequency with which the state acts on its preferences than the frequency with which societal preferences are translated into public policy. Nonetheless, he argues "it is patently appropriate for the state to constitute the vantage point"<sup>125</sup>.

Thus, examining autonomy through preferences generates greater causal variation and complexity than the more orderly conceptualisation of independence based on degrees of formal authority and powers. The implication is that the making of public policy under different circumstances, determined by distinct patterns of actor preferences, entails varying types of state autonomy for which Nordlinger identifies a wide range of deployable strategies, many of which do not reflect formal or hierarchical resources.

With these premises, three potential autonomy types are set out below, depicting the state's ability to translate its preferences into authoritative actions with or without opposition. The three Types of autonomy (III, II and I) reflect the different scenarios and factors Nordlinger identifies to explain state autonomy. His definition of autonomy rests on two dimensions: preferences and strategies, the latter subdivided in multiple options, which vary in line with the typologies<sup>126</sup>. Variations in preferences and strategies lead to the respective achievement of desired outcomes. The three types of autonomy that Nordlinger finds for the state are subsequently redefined at the regulatory level, in chapter 2.

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<sup>123</sup> *ibid.*p.20

<sup>124</sup> *ibid.*p.43

<sup>125</sup> *ibid.*p.18

<sup>126</sup> Contrary to the elaborate effort to explain the strategies open to the state, Nordlinger remains slightly more evasive about specific resources decisive to achieve the three Type autonomies. The detailed options are suggestive of non-formal instruments deployed nonetheless

## VI.1 Type III Autonomy

Type III accounts of autonomy are the most straightforward, albeit interesting because of their premises. Public officials translate their preferences into authoritative actions in the absence of divergent state-society preferences. This occurs because: of preference convergence between the state and the most powerful private actors; and/or the latter deferring to the state's preferences; and/or being indifferent towards them<sup>127</sup>. Nordlinger reiterates nonetheless the rejection of the society-centred perspective that the state is "able to act upon its preferences *because* of societal support or the absence of societal opposition"<sup>128</sup>. Clarifying this point appears particularly relevant in a scenario of general non-divergence.

Nordlinger disputes that societal preferences should be taken as the analytical reference point because "there is little justification for putting forward one-sided interpretations...Private actors must share the actual or hypothetical explanatory honours with the state when their preferences converge"<sup>129</sup>. He challenges the assumption that the state acts on its preferences only because societal actors want or allow it to do so. Where society defers or is indifferent to state preferences the latter enjoy "at least some explanatory priority...In terms of the substantive cast given to authoritative actions, the state's preferences have patent priority"<sup>130</sup>.

Fundamental ideas, or the 'grand issues' of politics, as Nordlinger calls them, are believed to cause convergence between the two sides, occasionally to the extent that they represent non-issues<sup>131</sup>. For example, if a government announces it intends to pursue economic growth or improve the health service it is unlikely to meet much opposition, yet how it goes about it may prove more complex. Another example is given by Krasner who argues that in the raw materials markets there is a convergence of preferences between the state and societal actors since "the state's desire for secure and stable supplies may lead to policies that further the profits, growth or market"<sup>132</sup>. The clearly identified needs of the state can simply coincide with the economic interests of firms.

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<sup>127</sup> Nordlinger, ch.3

<sup>128</sup> Nordlinger, p.80

<sup>129</sup> Nordlinger, p.83

<sup>130</sup> *ibid.* Thus Nordlinger challenges 'observational equivalence'; the fact that achieving preferences under non-divergence could be used to suggest its lack of autonomy (see Thatcher July 2005, p.351)

<sup>131</sup> Nordlinger, p.75

<sup>132</sup> Krasner, SD 1978, "Defending the national interest: raw materials investments and US foreign policy", Princeton University Press, p.75

Nordlinger also argues that both crisis periods and routine decisions can be instances of non-divergence. In crises periods, the 'weightiest' societal actors might have preferences that may or may not diverge from those of the state, but deference to the latter is overriding. For instance, national states taking control of banks to recapitalise and save them during the 2008 financial crisis, despite private shareholders losing out on their controlling rights. For 'fairly routine decisions', private actors might not know the effect of one policy over another on their interests, allowing public officials to act as they prefer. Clearly, the claims sustain the importance Nordlinger attributes to preferences, but equally reflect the importance of issues and their salience<sup>133</sup>.

When societal actors are not totally indifferent, public officials can rely directly on 'policy levers' nonetheless. Nordlinger refers to 'strategies' when describing the various opportunities available to the state to implement its preferences. Strategies are identified to address the combination of societal actors whom state efforts are directed at and, particularly, the way in which preferences can be accomplished. Each strategy has more detailed 'options', which point to "real, diverse, and meaningful choices" for public officials<sup>134</sup>.

Three main autonomy-enhancing strategies are identified for the state to reinforce non-divergence among societal actors in Type III autonomy, through fifteen 'options' in total<sup>135</sup>. The first strategy suggested, termed here 'preservation', sees public officials maintaining or strengthening the degree of commitment of those societal actors whose preferences converge with those of the state. One option is to control the spread of information casting doubts on the mutually preferred policy by restricting public knowledge of intra-state policy disputes. Other options include making ambiguous statements and taking contradictory actions for societal actors to read their preferences into them, or publicly overdoing the success of a policy undertaken. Discouraging consideration of divergent preferences by discrediting those trying to put challenging issues on the agenda - for example by calling them extremists, and relating state actions to widely shared values and symbols - such as efficient administration, complete the options.

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<sup>133</sup> Wood and Waterman 1991, p.823

<sup>134</sup> Nordlinger, p.90-91

<sup>135</sup> Nordlinger, especially pp.92-98

The second strategy is working to maintain or solidify deference to the state by those actors wanting it to act on its own preferences, termed here 'entrusting'. Recruiting renowned experts for high official positions, exposing that societal problems are dealt with by seeking and developing relevant remedies, playing up situations and the consequent need for decisive action, capitalising on statist traditions and deferential attitudes towards authority, or generating the belief that they are highly competent to deal with a problem, are the options that Nordlinger believes public officials might exercise.

Thirdly, the state can maintain or foster indifference among societal actors with unaligned preferences. This strategy can be thought of engendering 'apathy'. The state may stress impartiality among different groups, or declare that decision-making responsibility lies elsewhere. Alternatively, it may give the impression of evaluating policy options rationally and apolitically, portray high responsiveness to societal expectations, or adhere to formal-legal procedures when considering policies - for example by stating the formal powers of the state units within which they were made.

Thus, apart from rare exceptions like the last option mentioned, the Type III autonomy strategies of 'preservation', 'entrusting' and 'apathy' largely prioritise the use of approaches employing non-formal resources. Indeed, the exploitation of top-down features, consistent with relationships based on formal control, might engender divergence, hence, denying Type III autonomy success. Nordlinger openly accepts that there are several constraining implications for these autonomy-enhancing strategies, and that they are not equally applicable to all issues or societal actors, nor that where applicable they are equally effective. He suggests policy complexity makes it easier to convince other actors that the state's chosen path is preferable. Similarly, he concedes that Type III strategies are expected to achieve more commitment from actors whose active involvement in given policies is lowest and whose awareness is limited.

Nordlinger also argues that the higher the number of strategies which can be jointly used, the more likely preference convergence is maintained since several are deemed compatible and, therefore, mutually reinforcing. He suggests the use of options will be frequent to avoid the potentially constraining effects of divergence. Since public officials using the options are likely to be viewed as furthering societal preferences, the effect would be that chances of 'societal sanctions' being imposed on the state are low<sup>136</sup>.

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<sup>136</sup> Nordlinger, p.98



## VI.2 Type II Autonomy

Divergence between state and societal preferences requires Nordlinger's state to actively pursue its own preferences in dynamic ways. Type II and Type I autonomies introduce considerably different circumstances compared to Type III, both in terms of distinct preference patterns and the strategies adopted to translate them into actions. Type II portrays public officials producing a shift in the preferences of those societal actors who hold divergent preferences from those of the state. This is in contrast to the assumption of pluralism, with its 'cash register' interpretation of the state's behaviour, which suggests the state would be dissuaded from trying to shift external preferences because of potentially unacceptable societal sanctions.

Nordlinger contests this assumption, for excessively downplaying the state's ability to turn divergence into non-divergence, its autonomy-enhancing capacities and opportunities, the willingness of public officials to use such capacities, and reasonable chances of success when trying<sup>137</sup>. He rejects as overly presumptive assumptions suggesting the scarcity and ineffectiveness of autonomy-enhancing capacities as well as the high risks associated with them, while accepting that weak states facing a substantive distance between their preferences and societal ones may experience a considerable obstacle. This would be the case particularly when issues at stake strongly affect the interests of private actors controlling a range of resources that can hold the state back.

Yet, raising the strong-weak state comparison between France and the United States allows Nordlinger to observe poignantly that since American congressmen have undertaken successful policy initiatives, it is "all the more likely that officials in very different kinds of institutional settings also engage in Type II autonomous actions"<sup>138</sup>. Given varying institutional settings and resources available to public officials across countries, in practice there have to be alternative, less visible, explanations for the occurrence of Type II autonomy within countries. Nordlinger refers to Heclo and his findings on income maintenance policies in Britain and Sweden<sup>139</sup>, indicating that bureaucratic explanations - civil servants identifying deficient policies, taking the initiative in formulating remedial

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<sup>137</sup> Nordlinger, pp.99-100

<sup>138</sup> *ibid.*p.106. Skocpol also refers to the capacity of weak states, claiming that "autonomous state contributions to domestic policy making can occur within a 'weak state'", 1985 "Bringing the State Back In: Strategies of Analysis in Current Research" pp.3-44 in Skocpol et al p.13, based on her previous work with Finegold, K. 1982 "State Capacity and Economic Intervention in the Early New Deal", *Political Science Quarterly*, pp.255-78

<sup>139</sup> Heclo, H 1974, "Modern social politics in Britain and Sweden", Yale University Press

changes and, orchestrating support for the preferred corrective policies - deserve the greatest attention.

Krasner is also cited as a proponent of autonomous state actions although, unlike Nordlinger, he does not distinguish between Type II and Type I autonomy. In his research exploring American foreign raw materials investment policies, Krasner anticipated a Type II analysis stating that public officials can alter divergent preferences “by offering a compelling interpretation of events”<sup>140</sup>. Nordlinger draws particular attention to Krasner’s notion of ‘political leadership’ by the state. He observes nevertheless that Krasner’s conceptualisation is predominantly applicable with respect to oligopolistic corporations rather than many small units. Moreover, Krasner does not identify ways in which officials can exploit societal divisions, so that less prominent actors can help the state enhance its autonomy at the expense of the large, divergent corporations.

Nordlinger believes there are four strategies which bureaucrats can engage in to shift societal preferences *away* from the status quo<sup>141</sup>, for a total of sixteen options. Their deployment hardly refers to formal authority, in spite of the manifest intent to shape policy. The labels for the four strategies given herein are: (i) inducement; (ii) appeasement<sup>142</sup>-conciliation; (iii) enfranchisement; (iv) empowerment-reinforcement.

The first Type II strategy is labelled ‘inducement’ because it revolves solely around the persuasion of divergent societal actors by public officials. As such it is highly indicative of the uniqueness of Nordlinger’s analysis on autonomy and its largely non-formal scope. Public officials aim to persuade those with divergent preferences to alter them, or to instil uncertainty about their merits, rather than dictate policy. Thus, the state: plays up and plays on shared interests and values, by appealing to shared loyalties; advocates that state and societal goals are the same but the former’s policy preferences are more effective; or convinces societal actors that their real interests are not what they think, offering an alternative interpretation of reality.

In the second strategy, ‘appeasement-conciliation’, public officials can try to minimise the extent societal actors with divergent preferences choose to deploy the resources they control, which counts the most Type II options. They can: point out that the endorsement

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<sup>140</sup> Krasner 1978, p.75

<sup>141</sup> Nordlinger, p.107

<sup>142</sup> Intended as to pacify or placate

of the state preferences will also result in their societal rivals incurring value losses - for example by issuing data projecting the latter's financial losses; highlight the visibility of the preferred policy's advantages compared to its negatives; assert that despite divergence they are not motivated by the wish to negate societal actors' interests; or offer them every chance to alter the public officials' preferences, perhaps by inviting them into private discussions. Public officials can also capitalise upon the ways in which they continue to promote and fulfill societal actors' other interests, or propose mutually advantageous exchanges that are practically costless to the state, such as offering to promote other policies that are jointly favoured.

A third strategy, 'enfranchisement', entails the mobilisation of support from indifferent actors. Altering the definition and the wider perception of the issue causing divergence, by drawing their attention to indirect consequences would be one path. Another is to superimpose the issue upon existing divisions, for example, by revealing that divergent actors concentrate in one societal segment in order to raise interest among those excluded from it. Public officials can also try to generate an emotionally charged response to the issue, for example by playing upon societal fears or, perhaps, more effectively aim to make them feel their support is highly important and needed, by referring to loyalties and responsibilities.

The fourth strategy is working to increase the level and weight of political resources deployable by actors with convergent preferences and those wanting the state to act on its own, reflecting 'empowerment-reinforcement'. Public officials can: induce them to mobilise and deploy more resources than their related interests would dictate, like offering to place an issue of mutual concern on the formal agenda and perhaps deal with it rapidly; providing them with special advantages, such as additional visibility to facilitate their organising efforts; and, facilitating the effective use of their resources by helping to build an 'issue coalition', for example by establishing quasi-public advisory committees<sup>143</sup>.

Thus, Nordlinger's Type II autonomy-enhancing strategies entail wide-ranging solutions to preference divergence, none of which is unusual or requires fairly scarce skills for the state to be effective. The options are suited for issues of different degrees of complexity. Nordlinger indicates nonetheless that, unlike for Type III, public officials cannot combine any of the options which might seem most effective. Options from the first two strategies

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<sup>143</sup> Nordlinger, p.112

could be combined, as could those from the third and fourth. But mixing options from the two sets is expected to be less effective since the former are more appeasing strategies than the latter.

The risk of societal sanctions is expected to rise from “low to moderate”, if action reflects strategies one and two, to “decided” if three and four are applied, since the state would be “visibly, purposefully and actively attempting to transform today’s resource-predominant winners into tomorrow’s losers”<sup>144</sup>. So, Type II autonomy proposes distinct strategies, some with shades of confrontation. It, nonetheless, remains a distinct scenario in which the state refuses to be actively conflictual and coercive with societal actors, despite wishing to take authoritative action. The strategies reflect an exceptional interpretation of the workings of the state, whereby the approach is to adopt policies after achieving a shift in the divergent preferences of certain societal actors to make them ‘congruent or consonant’ and thus prioritise dialogue unlike Type I autonomy.

### VI.3 Type I Autonomy

Type I is the most radical and direct account of autonomy, whereby public officials translate their preferences into authoritative actions when state-society preferences are divergent. Nordlinger claims the state’s Type I autonomy-enhancing capacities for freeing itself from societal constraints have been given less attention than Type II counterparts since Type I is directly at odds with societal constraint assumptions<sup>145</sup>. A key particularity of Type I cases, which goes beyond the presence of overcoming preference divergence, is that the societal actors the state acts contrary to are “the best endowed actors who predominate consistently within society”<sup>146</sup>.

The aim of autonomy-enhancing capacities in this case is to ensure that the state is not stopped from implementing its preferences because of the divergence of the ‘politically weightiest actors’. Krasner’s leadership explanation contends, among other things, that public officials “can themselves redefine a dispute and change both its scope and the arena in which it is decided”<sup>147</sup>. Contrary to Type II, public officials avoid attempting to alter societal preferences or resource distribution, which are accepted as they are. This

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<sup>144</sup> *ibid.*, p.116

<sup>145</sup> *ibid.*, pp.118-9

<sup>146</sup> Nordlinger, p.118

<sup>147</sup> Krasner 1978, p.86

acceptance frees public officials from their constraining impact, allowing the state to turn its preferences into public policies<sup>148</sup>.

Type I entails three autonomy-enhancing strategies focussing entirely on societal actors with divergent preferences, although closely scrutinising the sixteen options suggests some latent convergence. The first Type I strategy is 'counterbalancing-offsetting'. While not denying the importance of privately controlled resources deployed by actors holding divergent preferences, public officials neutralise or diminish their constraining effects. Options include employing state resources or those controlled by it to neutralise similar private resources, such as state generated data to offset information imbalances with respect to societal actors; using a decision-making style hard to interpret, such as taking authoritative actions in an informally nuanced, or possibly even secretive, manner; or selecting decision sites whose occupants are relatively insulated from societal pressures, for example, to state units made up of securely tenured civil servants.

Other 'counterbalancing-offsetting' options are: taking visible, formal authoritative actions that conform to societal preferences, while negating these publicly proclaimed goals in less visible ways; serving as ostensible mediator between opposing societal groups, possibly, by manipulatively negotiating compromises that favour groups with convergent preferences, and; turning to actors with convergent preferences for substitute support, taking advantage when rival groups control almost equally weighted resources.

The second strategy, 'obstruction', provides a set of options for public officials to mitigate the extent and effectiveness with which societal actors can deploy their resources. One option is disengaging or co-opting some of the leaders or group members, possibly by distributing rewards. Similarly, the state can fracture the unity of societal actors, disaggregating the issue to isolate coalition members with different interests, or work to exacerbate divisions previously considered marginal and cause mistrust, weakening societal cohesion and pressure on the state. Alternatively, public officials can work so that societal actors channel some of their resources toward other non-divergent issues, or drain their resources by prolonging the policy information process.

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<sup>148</sup> Nordlinger, p.129

The third strategy is to dissuade<sup>149</sup> actors with divergent preferences from exploiting most of their resources and exerting implacable pressure on the state, which is labelled the ‘confrontation-disincentive’ strategy; the full list of strategies is contained in Table 1 above. Confrontation options include: threatening societal actors with the implementation of other, undesirable, policy preferences or reminding them of their dependence on the state; demonstrating reluctance in the provision of particular ‘benefits’, for example by interceding with other officials processing their requests or applications; or jeopardising their position vis-à-vis rival societal actors, by extending equivalent privileged representation to the latter. Other available options are to alter their advantageous relations with the state by cutting back on the openness of consultations, or directly endangering their organisational cohesiveness.

Thus, Type I portrays autonomy largely identifiable with authority-based confrontation. It projects a state applying a more assertive approach in the presence of divergence with powerful private actors, portraying its formal role. Opting for direct and private communication is only suggested as part of the third strategy<sup>150</sup>, unlike the more conciliatory approach envisaged for Type II. Nordlinger specifies that, with respect to this direct strategy, “occasionally carrots can be dangled openly, but sticks, which is what these options are, must usually be brandished informally”<sup>151</sup>. He observes how the last two options (cutting back consultation openness and endangering their organisational cohesiveness) reflect the importance of relations, which seem advantageous to societal actors but equally enable public officials to put them at risk.

More importantly for the argument here, Type I scenarios acknowledge that public officials ‘periodically rely(ing) upon the inherent powers of the state’, whereby they have exclusive authority, including regulatory powers. In fact, Nordlinger explains how non-cooperation between actors with divergent preferences is prohibitively costly, and that it might not be in the interest of societal actors to act upon their dispositions and apply sanctions. If the probabilities of societal sanctions are not minimised through “soft and passive” options, the state has “hard and active” ones. So, the state is described as acting diversely in confrontational Type I scenarios. Moreover, unlike Type II where to translate state

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<sup>149</sup> Note that while Nordlinger claims the state’s third Type I strategy aims to “dissuade”, p.132, the options are emphatically less conciliatory than what the term suggests, bolstering the need for the strategy labels attributed here

<sup>150</sup> *ibid*, see option 15

<sup>151</sup> Nordlinger, p.133

preferences into action the importance of convergence is more striking, in Type I the use of formal authority is distinctly more prominent.

## VII. Nordlinger's State

Thus Nordlinger identifies and compares three considerably different scenarios in which the state translates its preferences into action, as a single autonomous actor facing society. Through this analysis, he argues that the state's decision-making is not determined by society's preferences and that it can take action to overcome them in case of divergence. Accordingly, Nordlinger does not examine the state in its disaggregated form, hence, the autonomy of specific state actors, such as regulatory agencies.

In fact, while depicting the state as a whole, unified actor for the purposes of his argument, Nordlinger acknowledges the possibility that two (or more) coalitions, each composed of public and private actors, might confront one another. Indeed, he provides examples of factors constituting possible sources of intrastate conflict; changes in state units' formal powers relative to one another or in policy implementation responsibilities, which impinge differentially on private interests<sup>152</sup>. Accordingly, he claims, in such instances state autonomy is assessed independently of the private actors who support public officials<sup>153</sup>, based on the balance of intrastate resources.

Thus, besides indicating an uneven distribution of resources among diverse state actors as well as between state and non-state actors, Nordlinger subtly raises the key possibility that distinct state actors may have divergent preferences. Both elements are otherwise neglected in his dichotomous state-society analysis. Yet, these two issues crucially portray one part of the state 'winning' over others, thus deserve special attention when examining rival regulatory institutions pursuing their preferences, as is the case in sub-cases presented further below and as the studies on agency independence from Government discussed above suggest.

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<sup>152</sup> Nordlinger, p.78. Also, distinct state actors may have overlapping functions or competencies of interest to unrelated actors and, given divergent preferences, could be part of opposed coalitions; say, government ministers in disagreement with each other, with a bureaucracy, or Parliament, over a given issue. For example, Ministers handling budgetary concerns may not welcome a Bank of England decision to raise interest rates; a decision likely to be favoured by savers and strongly opposed by borrowers and a split among financial institutions too

<sup>153</sup> *ibid.* p.20

## VIII. Conclusion

This chapter has provided an account of key literature on the independence of regulatory agencies so far. It has explained that despite the spread of regulatory agencies across Europe since the mid-1980s, analytically, their 'independence' remains closely associated with formal institutional arrangements. The degree of formal controls that Governments relinquish and the powers they delegate to sectoral regulators remain a widespread way of assessing agency independence.

Yet, by simply comparing different 'independence indices' comprising the same agencies, the chapter has exposed significant weaknesses in the formal institutionalist approach to 'measuring' agency independence. There is inconsistency in the selection of useful formal indicators. The latter are equally weighted despite separate research indicating that specific formal controls are more important than others. Tellingly, formal independence indices generate contradictory results. Moreover, degrees of formal independence neither specify whether Governments exercise the formal controls they retain nor if agencies actually apply powers delegated to them, treating independence as a static endowment. Most significantly, formal independence neglects research suggesting that other non-statutory factors and actors, namely regulatees, can influence regulatory activity.

To develop a different conceptualisation of independence, the chapter has set out Nordlinger's approach to 'state autonomy'. By identifying preferences and strategies as key analytical features, Nordlinger provides a basis to challenge formal institutionalists whose approach to analyse independence assumes away dynamic aspects that statutory arrangements cannot incorporate. His approach makes it possible to depict what occurs after delegation. Nordlinger indicates that policy preferences are focal factors and that the 'state' applies diverse strategies to achieve their implementation. He proposes three possible types of autonomy, which rather than providing a single measure of independence simply showing variation across countries, based on formal institutional arrangements, indicate variation within a state too.

The chapter thus explains the usefulness of Nordlinger's approach to autonomy, which is not reliant on formal arrangements alone. Equally, however, it briefly raises the substantive issue that differentiates his unified state-society analysis from an assessment of the independence in practice of regulators, which is that the latter are part of the state, not all of it. The analytical implications of the differences between Nordlinger's state and the



central actors in this thesis, independent regulatory agencies, are addressed in chapter 2, when a more complete set of indicators is identified to operationalise the types of autonomy that regulators show, before undertaking empirical analysis.

## **Chapter 2: Creating a New Framework for Analyses on Independence - Indicators and Autonomy Scenarios**

### **I. Introduction**

The previous chapter illustrated how the debate on regulatory independence is relatively circumscribed. The focus on formal institutional arrangements remains intact despite the considerable conceptual and empirical inconsistencies made evident by reviewing it. The implication is that 'measurement' techniques applied to assess regulatory independence in practice need to be developed. Nordlinger's framework on state autonomy provides a valuable starting point, and constitutes an important first level of analysis to examine independence in practice, because of its integration of key variables; preferences and a range of strategies that do not focus solely on formal provisions.

Given the inadequacies of the formal institutionalist literature, developing a framework that incorporates rather than eschews a comprehensive range of formal and informal factors that determine regulatory independence in practice means filling a real scholarly gap. This chapter reviews the usefulness of Nordlinger's approach with regard to assessing regulatory independence, then explains its limitations and, accordingly, develops a new analytical framework composed of the five indicators put forward below to examine agency independence in practice.

### **II. Distinguishing Between 'State Autonomy' and Regulatory Independence**

As explained in chapter 1, Nordlinger's framework on state autonomy indicates that the state has preferences that it translates into action, whether in the presence of divergence or non-divergence with societal actors, by deploying a significant range of autonomy-enhancing strategies and options comprising formal and non-formal elements (see Diagram 1 below). In Type III autonomy cases, the state works to maintain a situation of preference non-divergence with societal actors. In Type II cases, the state works to 'shift' the divergent preferences of key actors before acting on its own preferences. In Type I cases, the state acts on its preferences regardless of key actors' preference divergence. Thus preference patterns and the strategies undertaken indicate the type of autonomy.

Nordlinger's conceptualisation of autonomy is valuable for the research question posed because it allows examining the actual impact of either formal or non-formal resources, or both, on the translation of preferences into action. His strategies and options depict the state's deployment of formal authority and non-formal resources to fulfill preferences. Thus, he has expanded the possible factors explaining autonomy, allowing case evidence to illustrate their respective influence over policy. Applying Nordlinger allows the tracing of distinct paths on how state autonomy can be achieved by identifying three typologies. The latter are useful to order the empirical information investigated, making it possible to describe, classify and compare what type of autonomy is achieved.

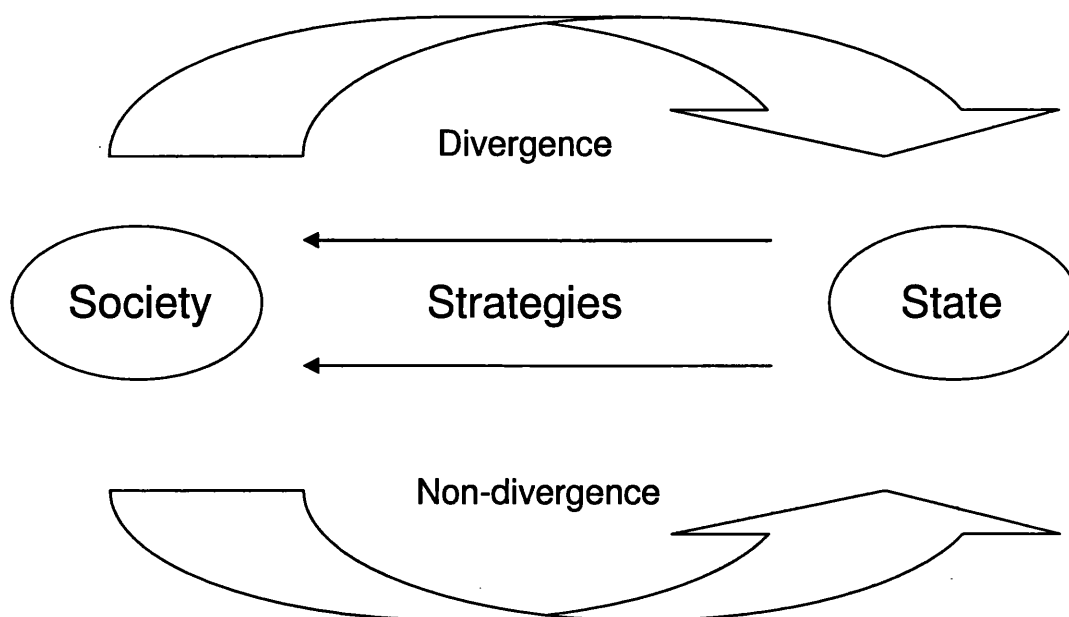
By identifying three types of autonomy for his ('state') unit of analysis, Nordlinger suggests more than one benchmark for evaluating and comparing autonomy, unlike formal institutionalists. The three typologies indicate that there are different ways of accounting for autonomy, and hence there is variation in autonomy. Indeed, "a single-explanation theory of regulatory politics is about as helpful as a single explanation of politics generally...Distinctions must be made, differences examined"<sup>154</sup>.

Having recognised the value of preferences and strategies in order to define different types of autonomy, of course, some substantive differences remain between Nordlinger's study and the research question examined here. To proceed with the analysis it is imperative to present the issues that need to be developed distinctly from his work on state autonomy, to set out indicators that help to explore the independence of regulators in practice.

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<sup>154</sup> Wilson, JQ 1980 "The Politics of Regulation", p.393

**Diagram 1: State preferences translated into action vis-à-vis society**



A defining difference between the autonomy of Nordlinger’s state and of regulators is that he largely refers to a two-dimensional dynamic, in which the reference point is the state identified as a single all-encompassing actor facing another whole labelled ‘societal actors’. This thesis is, instead, about a ‘second level’ of analysis referring to regulatory agencies. The latter are part of the state, but the specific independence of regulators within it is what matters at the sectoral level, quite separately from that of other state actors. Indeed, as illustrated above, formal institutionalists examine the independence of regulators by measuring what statutory powers senior government officials in key positions have to constrain the agencies, thus basing their approach on a statutory division between different state actors.

Ellis, in his critique of work presented by state-centred proponents, rightly observes that the grounds for referring to the state as “a unitary actor is a separate question from whether or to what extent those in the state are autonomous from those in society”<sup>155</sup>. Clarifying the latter is crucial since Nordlinger claims “state autonomy refers *solely* to legislatures, legislative committees, cabinets, presidents, *bureaucratic agencies*...and so forth”<sup>156</sup>. Thus, despite creating a highly valuable framework regarding the autonomy of the

<sup>155</sup> Ellis,RJ Summer 1992, “Pluralist Political Science & The State: Distinguishing between Autonomy and Coherence”, Polity - Northeastern Political Science Association, Vol. XXIV(4), p.571

<sup>156</sup> Nordlinger, p.20 (emphases added)

state as a whole vis-à-vis society, Nordlinger shows limited precision and depth in identifying which part or parts of the state can be autonomous.

Scholars praising Nordlinger raise the limits of his monolithic conceptualisation of the state too. Smiley's state-centred paper on federalism in Canada reflects on the differences in the centralist tendencies of the French and English provinces among other things, thus presenting the Canadian state as a divided entity, composed of different actors battling for distinct priorities. In the process, he points to Nordlinger's reflection on the US that, while being autonomous, any display of weakness by the American state occurs because of fragmentation within it<sup>157</sup>, which severely conflicts with Nordlinger's presentation of the autonomous state as a single actor.

In its simplest form, the point is made effectively by Riddell-Dixon. While endorsing Nordlinger's statist approach, she points out that "it does not take account of the fact that the state is more complex (in a federal system)" and, perhaps more relevantly here, that "he fails to distinguish between politicians and government bureaucrats"<sup>158</sup>. Different authors therefore suggest that Nordlinger underplays divisions within the state, hence relative autonomies between state actors, such as those of regulatory agencies with respect to elected officials or other civil service officials. Ambler criticises Nordlinger, specifying that he "seeks to factor out such untidy phenomena as intrastate conflict and public-private coalitions, when in fact the essential character of the policy process would seem to be the *interaction* among elected officials, government agencies, political parties and private interest groups"<sup>159</sup>. In other words, understanding how regulatory agencies deal with complex intra-state divisions is as important as evaluating how they deal with non-state actors. Studies have been dedicated to the complexity of inter-agency collaboration<sup>160</sup>.

Thus, transposing Nordlinger at the regulatory level entails the creation of a meso-level analysis, which applies the key features of his framework in a rigorous and clear way, while taking into due consideration the differences between his 'state' analysis and regulators focussed upon here. Nordlinger's framework needs to be refined to be applicable at the regulatory level by extending the key indicators arising from his approach, making

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<sup>157</sup> Smiley p.452 and Nordlinger pp.182-92

<sup>158</sup> Riddell-Dixon, E 06/1988, "State Autonomy and Canadian Foreign Policy: The Case of Deep Seabed Mining", Canadian Journal of Political Science, Vol.21(2), pp.297-317, p.299

<sup>159</sup> Ambler, JS September 1988, "French Education and the Limits of State Autonomy", The Western Political Quarterly, Vol.41(3), pp.469-488, p.470

<sup>160</sup> Bardach, E 1998, "Getting Agencies to Work Together - the practice and theory of managerial craftsmanship", Brookings Institution Press

allowances for intra-state fragmentation<sup>161</sup> and the conflicts that an agency's policy may engender among various state actors, as well as public-private ones.

One way of presenting the distinction between 'state' actors to analyse agency independence is that of the United Kingdom's House of Lords Select Committee on Constitution which, in a 2004 report on regulatory roles and activities, stated: "The consequence of this unbundling of the regulatory state has been to sharpen the accountabilities of specific regulators, Ministers and Parliament in relation to their respective roles and responsibilities, emphasising the interconnectedness of the various parties within the regulatory framework as a whole. If regulators are independent for a particular purpose...It is independence within Government, rather than independence of Government *per se*"<sup>162</sup>.

The distinction between regulators and 'other state' actors critically underlies the question of whether regulatory agencies are more or less independent from political principals according to the extent of formal powers and instruments delegated to them, as formal institutionalists indicated above argue and as examined here in practice. Compounding the limits of a framework inhabited by two unitary participants alone - state and society - is Nordlinger's vagueness in repeatedly referring to the 'weightiest' actors. He never specifies how they are 'weighty' or influential, thus what key resources they possess and exploit, which is of prime interest here and is investigated through the sub-cases below.

One can, nonetheless, infer that identifying participants is highly important for an analysis of regulatory independence. By turning the regulatory agency, and its specific policy preferences, into the point of reference - removing the ambiguity of what the dominant state preferences are and to which part of the state they belong -, one can establish which type of autonomy it achieves vis-à-vis a range of influential policy actors and how.

Yet, an implication ensuing the assessment of regulatory independence through the lens of Nordlinger's framework on autonomy is that, precisely because of intra-state fragmentation, the likelihood that an agency faces preference divergence vis-à-vis other actors is higher than what may be the case for Nordlinger's state, and the single 'societal'

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<sup>161</sup> For examples of intra-state fragmentation causing conflict, Riddell-Dixon 1988 and Ambler 1988

<sup>162</sup> HL68, 31/3/04 "Sixth Report - The Regulatory State: Ensuring its Accountability", see ch.2 "The roles of Parliament, Ministers and independent regulators", para.40

dimension it confronts (shown in diagram 2). The larger the number of policy participants, the less likely preferences will be similar overall, hence, divergence.

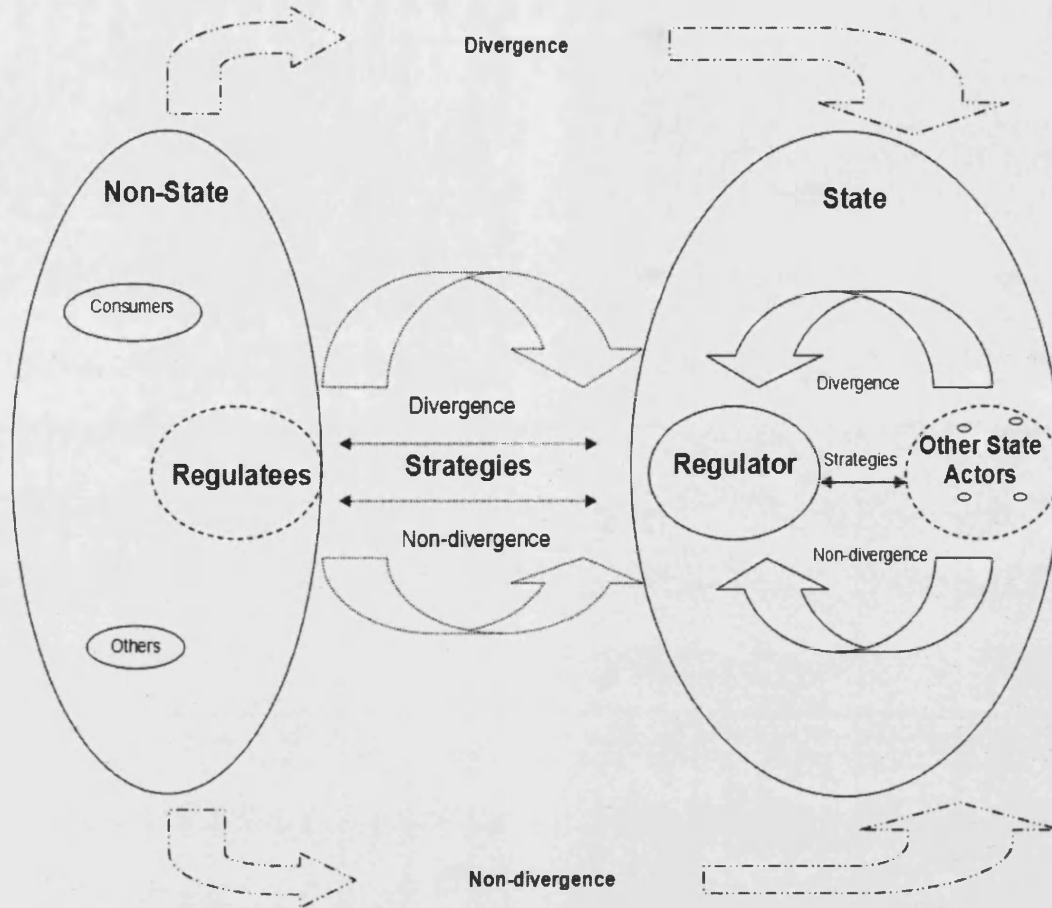
Accordingly, Type III state autonomy strategies of ‘preservation’, ‘entrusting’ and ‘apathy’ discussed in chapter 1 are developed at the regulatory level below consistent with Nordlinger’s valuable exposition of Type III autonomy. The selected indicators proposed below are applied to illustrate a scenario of regulatory independence consistent with this typology, which does not feature the active use of formal instruments to achieve policies. For instance, key industry actors may converge with the regulator’s policy proposal or be indifferent because of its formulation. Meanwhile there may be intra-state indifference because of technical complexity or because the issue is not covered saliently by the media, causing MPs and, hence legislative committees, not to be interested, and other civil servants to avoid getting involved since it does not affect them directly.

Nevertheless, the exercise of refining Nordlinger’s valuable framework at the regulatory level, carried out through this chapter, requires due awareness that with a non-dyadic set of participants, reflecting the fragmentation among state and non-state actors over a given policy, it would appear rather exceptional that all preferences are similar. In fact, Nordlinger concedes that convergence does “not regularly include entirely identical, precisely shared preferences”<sup>163</sup>. Given the meso-level explored, which widens participation, and the preference-based conceptualisation, it is intuitively suggested that the likelihood that regulatory agencies encounter Type III autonomy is not as high as for the other two types involving divergence.

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<sup>163</sup> *ibid.*p.78

**Diagram 2: Regulatory preferences translated into action vis-à-vis 'n' actors**



Central to Type III autonomy is not just whether a regulator has, and applies, formal or informal resources as might be argued for Type II or I cases. Type III strategies are not questioned per se since maintaining non-divergence does not involve formal action, or at most infrequently, thus challenging formal institutionalist scholars of independence. Rather, given the additional set of actors a regulator has to 'guard itself from' to translate its preferences into actions - most notably in the regulatory independence literature, senior elected officials, not part of Nordlinger's work - an agency is likely to face more 'sources of divergence' than the 'state' both conceptually and empirically. More actors entail more preferences, making a non-divergence scenario less likely. Type III strategies suggest that the state is uniquely blessed with privileged information, with a quasi-monopoly vis-à-vis societal actors, and is especially capable of exploiting it to maintain overall preference non-divergence. However, at the sectoral regulatory level there are diverse, competing industry



actors that pool and exploit information at the expense of different parties<sup>164</sup>, furthering the possibility of divergent preferences.

Even if there is overall agreement regarding a 'grand-issue' its implementation is likely to raise some divergence. Otherwise, the existence of any polarising issue, whether between industry actors, or between industry and senior elected officials, implies that some policy actor is divergent with the regulator whatever its preferences. Moreover, it is unlikely that all sectoral actors will avoid being vocal about a policy, since it might prevent them from fulfilling their preferences. Similarly, with many industry actors possessing technical knowledge, policy complexity cannot be assumed to secure non-divergence in all cases.

To reduce the likelihood that including more actors in the analysis leads to preference divergence, the autonomy of regulators from regulatees and from other state actors could be examined separately, as has happened so far. Formal institutionalists analyse the independence of regulators from senior elected officials retaining statutory controls. Capture theorists examine (lack of) agency independence from influential regulatees. Yet, this would alter the scope of this thesis, which aims to examine regulatory independence in practice. This deserves to be done by considering elected officials and regulatees jointly, particularly since past literature on this subject has largely avoided doing so.

Identifying two separate autonomies for a given policy would, paradoxically, weaken the analytical utility of Type III autonomy. If a policy scenario must be broken down and re-interpreted, the implication is that, in practice, Type III autonomy's central feature - non-divergence among all actors involved in a policy - is less likely than suggested here. This would undermine plausible Type III autonomy scenarios, implying it is not a significant conceptual contribution to the debate on autonomy; something not intended here.

What is suggested upfront instead is that, given wider policy participation presupposing more individual preferences, overall non-divergence at the regulatory level is not as likely as for the unified state described by Nordlinger. More importantly for the scope of this thesis, analysing types of agency autonomy from elected officials and from regulatees separately would also prevent a scenario in which they share preferences contrary to the regulator's<sup>165</sup>. This would not make it possible to verify whether regulators can overcome both other

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<sup>164</sup> See Baldwin and Cave 1999; for industry examples (eds.) Helm,T and Jenkinson,D 1999, "Competition in Regulated Industries", OUP; (eds.) Mayer,C. Bishop,M and Kay,J 1995, "The Regulatory Challenge", Oxford University Press

<sup>165</sup> see the chapter 7 sub-case

influential state and non-state actors when they share preferences and jointly deploy respective resources. Instead, the independence of regulators should be 'measured' by examining whether agencies achieve their policy preferences on the whole, regardless of the influential actors they face and that may be thought to constrain them, as this thesis sets out to do.

Thus, assessing the verifiability of Type III in practice, as done here, should not be interpreted to undermine the value and applicability of Nordlinger's overall approach to operationalise regulatory independence. It is instead part of an attempt to stress its strengths and recognise minor weaknesses which arise by applying as fruitfully as possible the framework at the, more complex, agency level. Most crucially, by relying on policy preferences and processes that are not rigidly defined in statutes, Nordlinger avoids identifying autonomy solely with a limited set of explanatory variables directly relating to formal institutional arrangements. Thus the question that arises is how best to develop Nordlinger's autonomy types at the sectoral level?

### **III. Indicators Operationalising the Assessment of Regulatory Independence**

Clear indicators are crucial to conduct assessments of agency independence in practice that apply to different countries, to different sectors and, particularly herein, to specific regulatory issues. Having set out the differences between Nordlinger's state-society analysis and regulatory agencies operating as part of the state, five generalisable indicators are developed analytically and set out below. They help develop a refined version of Nordlinger's state autonomy framework for the regulatory level (see Tables 2-4 below, summarising the three types of regulatory autonomy).

Identifying 'participants', 'preferences', 'process', 'time-length of decision-making' and 'outcomes' permits systematic research on how any regulatory agency conducts its pursuit of policy preferences, so whether showing Type III, Type II or Type I autonomy, ultimately revealing what resources really matter within the 'regulatory space'<sup>166</sup>.

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<sup>166</sup> First coined by Hancher,L and Moran,M. 1989 "Organising Regulatory Space", in Hancher,L and Moran,M (eds.) "Capitalism, Culture and Regulation", OUP, later developed by Scott,C. Summer 2001 "Analysing Regulatory Space: Fragmented Resources and Institutional Design", Public Law, pp.329-53

The selected indicators provide a sequential guide to assess whose preferences a regulator has to overcome - responding to the 'independence from whom' question -, how the agency attempts this in the presence of given influential actors, and whether its preference is achieved. Of these, 'preferences' and 'outcomes' are directly drawn from Nordlinger. The 'process' indicator tries to narrow down the scope of the varied, loosely articulated and occasionally overlapping strategies and options he presents for each type of autonomy<sup>167</sup> (abbreviated, at the state level, with the labels in Chapter 1/Table 1), and hence make them both relevant and easier to identify at the regulatory level.

Furthermore, the process indicator is critical to establish the importance regulators allocate to available formal instruments. A careful analysis of processes will help reveal which resources are deployed by, and vital to, the regulator to achieve its preferences. It will constitute an important contribution to understanding whether formal powers delegated to regulatory agencies are necessary, necessary but not sufficient, or unimportant for independence in practice.

To transpose the framework appropriately at the regulatory level, the dimensions of 'participants' and the 'time-length of decision-making' are added here. Following on from the earlier discussion about Nordlinger's simplified state-society dichotomy, identifying policy participants indicates actors' significant resources that are useful to pursue respective policy preferences. Preferences indicate what actors want from a regulatory policy. But, in addition, the policy involvement of fellow state actors with defined roles, such as government ministers with specific statutory controls, and/or regulatees with specific attributes, helps to understand the type of obstacles that an agency must surmount. The time dimension is a subtle but important additional factor to understand the 'process' undertaken. It shows the extent an agency decides and manages to act upon its preferences with immediacy, taking into account formal powers available. The combined indicators respond to independence indices that restrain the analysis to formal institutional arrangements, contributing to what could be labelled a 'policy independence index'.

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<sup>167</sup> For example, option 5 of Type III's preservation strategy for convergent actors is "relating authoritative actions to widely shared, largely unquestioned values and symbols", with option 1 of Type II's inducement strategy for divergent actors being "playing up and playing upon shared interests and values"; respectively, pp.93,111

### III.1 Participants and resources

The composition of policy participants with their respective levels of influence, referred to by Nordlinger as “relative weights of the political resources”<sup>168</sup>, is a determining factor of issue-specific ‘regulatory space’. Policy participants have different attributes. Setting out who the participants are and what attributes characterise them, as proposed here for each type of autonomy, subsequently allows a much clearer identification of what particular resources, which may or may not be statutory powers, matter in order for certain actors to fulfill their preferences. The three scenarios of participants for each type of regulatory autonomy follow, adapting Nordlinger’s analysis on the three types of state autonomy.

In Type II autonomy scenarios, Nordlinger indicates a wider range of participants - he talks about divergent, indifferent and convergent actors<sup>169</sup> - and, accordingly, a more varied set of strategies than for Type I. The implication at the Type II regulatory level, therefore, seems to be a larger ‘space’. Thus, for Type II regulatory autonomy, at the start of a policy, we would expect to see significant resources spread among distinct actors. In Type II cases, different participants have valuable resources to exert influence, whether statutory in nature or not, otherwise their involvement would not be worthy of mention.

Instead, the fact that, for Type I autonomy cases, Nordlinger refers to ‘best endowed’ and ‘predominant’ actors<sup>170</sup> suggests that key resources to exert influence are held by relatively few participants at the start of policy. Regarding Type III scenarios, since Nordlinger refers to ‘best endowed’ and ‘significant’ non-divergent actors separately, it is suggested here that at the regulatory level the actual number of participants can vary; there may only be a few actors with key resources, or several of them.

Policy participants possessing significant resources will deploy them according to their preferences. The latter signal whether such resources will be used to support or oppose the regulator. Nonetheless, the importance of participants and their resources should not be

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<sup>168</sup> Nordlinger, p.108

<sup>169</sup> It is worth clarifying that dividing participants in the three groupings ‘divergent, indifferent and convergent’ is not done simply to echo Nordlinger’s preference-based approach. It avoids identifying concrete examples, thus, anticipating empirical evidence, which make the case more clearly. However, labelling participants indicates that they have limited common ground. While regulatory preference formation is not the subject of the thesis, setting out participants and resources separately from preferences from the outset, ultimately, helps understand why some actors might be prone to have certain preferences and interact accordingly, for example, when resources are shared among several actors. Indeed, although preferences are not mentioned explicitly, in her paper assessing financial regulation, Black 2003 not only agrees that the systematic identification of actors matters, but also “how they might (or might not) be interconnected”, p.70

<sup>170</sup> All divergent

based purely on actor preferences as is clear from Fesler's question, independence 'from whom'<sup>171</sup>. The resources that participants can deploy in the 'regulatory space' are important in addition to their preferences. Nordlinger implies this continuously without ever saying it when referring to the state's strategies to minimise, neutralise or dissuade divergent actors from using their resources, mobilising indifferent actors, or turning to convergent actors for more support.

To fulfill policy preferences, certain participants' resources, which this thesis argues do not have to be statutory, must be more effective than others. Using 'participants' and 'preferences' as distinct indicators is, therefore, sequentially valuable to understand how complex policies develop and who achieves their goals. Having preferences does not entail having the ability to pursue them. So participants must be assessed in terms of their significant resources. By identifying respective resources used to achieve expressed preferences, ultimately, their value is revealed. This points to a further shortcoming of Nordlinger's analysis that is crucial for regulatory independence analysis; he avoids specifying which resources are critical for his 'state' to achieve its preferences even when they underlie his strategies and options.

Coen, for example, has examined comprehensively the importance of relationships, and developing 'clear lines of access'<sup>172</sup>, focussing on the modus operandi of regulatory agencies. While Coen's research has predominantly looked at relations between regulators and business<sup>173</sup> unlike the analysis herein, the issue about the underlying importance of relations remains important, as evoked by Bernstein long before. The nature of relations varies significantly, potentially creating policy insiders and outsiders<sup>174</sup>.

Nordlinger also suggests the importance of relations since, as indicated in the previous chapter, several state autonomy strategies portray some interaction between the state and certain societal actors, whatever the nature and development of these relations. For instance, for Type III he suggests "discouraging" and "encouraging", for Type II he explicitly mentions "private discussions" and the need to establish "issue coalitions". Relational elements appear prominent in confrontational Type I strategies too, when

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<sup>171</sup> Fesler 1946,1959

<sup>172</sup> Coen,D and Willman,P 1998, "The Evolution of the Firm's Regulatory Affairs Office", *Business Strategy Review*, Vol. 9(4), pp.31-6, p.32

<sup>173</sup> Consideration of intra-state regulatory relationships is relatively more present in Coen et al 2002, compared to the bulk of his work

<sup>174</sup> Coen,D 2005, "Business-Regulatory Relations: Learning to Play Regulatory Games in European Utility Markets", *Governance*, Vol.18(3), pp.375-398.

referring to “cutting back on the regularity or openness of...consultations”<sup>175</sup>. So, the state exploits a multiplicity of relationships to pursue policy, irrespective of their nature. Given its significant policy interaction, it has even been argued that state “autonomy develops through relationships”<sup>176</sup>, though this seems no less of a hazardous exaggeration than attributing sole explanatory power to formal institutional arrangements.

So while network analyses do not offer substantive explanations on initial distribution of resources<sup>177</sup>, the key implication is that relational ties are a resource exploited to fulfill respective preferences. In fact, Coen’s research has also drawn attention to the fact that informal relationships, and the effect of insiders/outside, particularly over time, can affect degrees of expertise among actors involved in the regulatory process<sup>178</sup>. He also reveals how the regulatory focus on certain relationships may be a consequence of the expertise possessed by one or more counterparts<sup>179</sup>.

In a wider non-regulatory setting, the importance of weak ties with regard to the diffusion of influence and information was previously stressed by Granovetter, who indicated that their removal may be more damaging to transmission probabilities than would that of average strong ones<sup>180</sup>. He refers to research suggesting that behaviour may be shaped and constrained by one’s network, but also to ways in which individuals can manipulate these networks to achieve specific goals<sup>181</sup>. Transposing the claims at the regulatory level may explain why, rather than being static, “organisational alliances are constantly forming and reforming” with no “reference to a conventional public-private divide”<sup>182</sup>. A study on ‘bureaucracy’ has indeed argued that “multiple networks (have given) agency officials an independence from politicians, allowing them to build manifold coalitions around their favoured programmes”<sup>183</sup>.

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<sup>175</sup> Nordlinger, pp.111-2 and p.132

<sup>176</sup> See ch.3, Smith,M 1993 “State autonomy and policy networks” in “Pressure, power and policy”, Harvester Wheatsheaf, p.55

<sup>177</sup> Thatcher,M 1998, “The Development of Policy Network Analyses - from modest origins to overarching frameworks”, *Journal of Theoretical Politics*, Vol.10(4), pp.389-416, pp.410-411

<sup>178</sup> In particular, Coen,D, Willman,P, Currie,D and Siner,M 2003, “The Evolution of Regulatory Relationships: Regulatory Institutions and Firm Behaviour in Privatised Industries”, *Industrial and Corporate Change*, Vol.12(1), pp.69-89

<sup>179</sup> Coen et al 2002, pp.21,29, and Coen 2005 especially p.390 when stating “In terms of access to the regulatory process being a function of expertise...incumbents had the most favoured position in the early rounds”

<sup>180</sup> Granovetter,MS 05/1973, “The Strength of Weak Ties”, *American Journal of Sociology*, Vol.78(6), pp.1360-80, p.1366

<sup>181</sup> *ibid*.pp.1369-70

<sup>182</sup> Hancher and Moran 1989, p.276

<sup>183</sup> Carpenter,DP 2001, “The Forging of Bureaucratic Autonomy - reputations, networks and policy innovation in executive agencies, 1862-1928”, p.5, Princeton University Press

Of course, non-statutory resources may be exploited at the expense of regulators' preferences, by actors with divergent preferences. Nordlinger eschews the possibility that ultimately the state does not fulfill its preferences but, while not elaborating on their implications, repeatedly mentions potential threats to preferences in the guise of "societal sanctions". In this study, such "sanctions" are not eschewed, or mentioned in abstract terms. They are presented as part of the influential resources that different policy participants can deploy (and which feed into processes and outcomes). Hence, they are revealed and integrated in the case analysis.

### III.2 Preferences

When transposing Nordlinger's framework at the regulatory level, agency preferences and those of other influential policy participants represent the guiding indicator to examine independence. Their importance is manifold. Regulatory agencies have formal objectives providing generic policy direction for which they are accountable. However, statutory vagueness is unavoidable, allowing for the agencies' policy formulation to ensue<sup>184</sup>. Indeed, while the specification of multiple statutory objectives may constrain regulatory discretion since a failure to meet them could open decisions to litigation<sup>185</sup>, their competing nature could also be used by the agency to justify its actions. In case of no formal prioritisation of the statutory objectives, preferences reflect the policy initiatives of agencies not directly readable off statutes.

The main reason for focussing on initial policy preferences here is, clearly, that they are Nordlinger's key element of analysis. Preferences help to assess whether regulators act on theirs regardless of the preferences of influential senior elected officials and regulatees. Attributing prime importance to preferences for analyses of agency independence can, also, allow scenarios where regulators and senior elected officials have divergent preferences, thus undermining models claiming that "the actual choice of policy is traceable not to bureaucratic preferences but to the preferences of legislative and executive politicians"<sup>186</sup>. It

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<sup>184</sup> For a discussion on how "agency independence and public accountability can be complementary and mutually reinforcing rather than antithetical values": Majone, G. 1994 "Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe", p.2, EUI Working Papers No 94/3 ; also Majone 1997, p.152

<sup>185</sup> Spiller, PT and Vogelsang, I 1996, "The United Kingdom: A pacesetter in regulatory initiatives", in eds. Levy, B and Spiller, PT, p.100

<sup>186</sup> McCubbins, Calvert, Weingast 1989, p.589

follows that where the appointment and dismissal of regulatory chairmen or the management board is decided by senior political officials, or that the latter have a formal say on funding, this has no automatic impact on the agency's policy direction. Similarly, cases in which the preferences of agencies and powerful industry actors are divergent conflict with capture claims.

Agency preferences may contrast with those of any single 'regulatory space' participant or a combination of them, which, moreover, undermines claims of 'hard' or 'soft-wiring'<sup>187</sup>. Indeed, unless preference convergence is consistently witnessed between a regulator and a specific set of actors, whether political principals possessing formal powers or influential interest groups that participated in defining the statutory framework enacted, one cannot assume that the agency's behaviour is pre-determined. The critical implication of some preference divergence with different political and business actors is that there are limits to the extent that any set of actors delineates the agency's decision-making lastingly<sup>188</sup>.

More importantly, preferences constitute powerful explanatory factors because they guide the use that individual participants make of any available influential resources, formal or non-formal. Once key participants are identified and preferences are established, the question of who the regulator needs to overcome is revealed.

Thus, having explained the centrality of preferences, to continue refining Nordlinger at the regulatory level, it is imperative to set out what preferences influential participants are expected to hold in each autonomy scenario. In Nordlinger's Type III state autonomy scenarios, actors hold convergent preferences, want the state to act on their behalf, and/or there are indifferent actors (see section VI.1), in other words they are non-divergent. Accordingly, while key resources at the Type III regulatory level may be spread among distinct actors or held by few as suggested in the 'Participants' section above, the derivable scenario is that preferences of influential participants do not differ from those proposed by the agency. Non-divergence, comprising preference convergence and indifference, implies that, on balance, the regulator benefits from influential support at the start of the policy.

In Type II state autonomy scenarios, there is neither full preference convergence, nor does the state intend to impose its preferences on the divergent from the start. Moreover, in the 'Participants' section, it has been established that at the Type II regulatory level key

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<sup>187</sup> Wilks and Bartle 2002, p.165

<sup>188</sup> Carpenter 2001, pp.11,14



resources are spread among distinct actors. Combining the three conditions suggests that at the regulatory level preferences of influential participants over agency proposals differ at the policy-start<sup>189</sup>. The regulator faces both actors with divergent and non-divergent preferences with influential resources. Among these are convergent actors that will deploy their valuable resources in line with regulatory decision-making. Thus, Type II preferences at the regulatory level entail that the agency can rely on a degree of support, hence, on key instruments it does not control directly, to try to shift actors with divergent preferences from the outset.

Instead, Type I state autonomy cases indicate the prominent divergent preferences of the 'best endowed private actors', which the state does not intend to shift. Since Type I regulatory level influential resources are held by few participants, at the start of a policy, preferences of influential actors are expected to differ from those of regulators. Due to insufficient influential support, regulators may not be able to shift preferences even if they wish to.

### III.3 Process

The next key step in examining independence in practice is to apply Nordlinger's approach to analyse how agencies translate their preferences into action in the presence of different preference patterns held by well-resourced policy participants. This means examining whether agencies regulate by way of formal authority, or through alternative mechanisms and 'processes' for regulatory preference fulfillment.

To clarify and distinguish the distinct 'processes' undertaken by regulators for the three differing autonomy scenarios, Nordlinger's strategies and numerous options must be refined. While drawing from them to retain key relevant concepts, the aim is to translate them into a simple but also more precise form so that they can be directly understood as one of the three processes consistent with the three types of autonomies applicable to agencies.

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<sup>189</sup> Some might argue that even though there are a number of actors and resources are spread, the latter might be possessed by divergent actors only. However, this would simply be inconsistent with the greater prominence Nordlinger attributes strategy-wise to convergent actors in Type II than for Type I. If participants who are preference convergent from the outset do not have valuable resources, why generate an entirely separate strategy relying on their support?

Instead of making vague references to the use of formal authority, the degree to which formal provisions are exploited in practice at the regulatory level is indicated more clearly. This more specific analysis leads to some changes in terminology between the shorthand labels given earlier and illustrated in Table 1, *en lieu* of Nordlinger's wordy first level of analysis, and the 'second level' that follows below referring to the regulatory level.

As stated in chapter 1, given the central feature of non-divergence, for Type III autonomy to occur, state preferences are achieved when preservation, entrusting, and apathy strategies are applied successfully. Since influential actors only hold non-divergent preferences, at the regulatory level, agencies will aim to avoid any divergence in preferences emerging. Thus, instead of openly exercising formal authority to pursue the policy of interest, regulatory efforts are directed towards prolonging and sustaining this non-divergence from the start. Accordingly, as part of the overall regulatory level Type III process (see Table 2 below), it is expected that agencies will try controlling the presentation and communication flow of their actions.

To avoid divergence at the state level, Nordlinger has drawn significant attention to the importance of how state preferences are perceived. Yet, perpetuating Type III preference non-divergence at the regulatory level requires greater containment, since there are more policy participants than in the dyadic state-society scenario. Thus, discouraging serious consideration of divergent preferences is a real test for agencies. To allow for the policy to develop in the preferred way, it is therefore expected that a regulator's Type III process will entail being selective about the information they divulge.

Similarly, just as the state exploits the 'entrusting' strategy, the projection of competent engagement and policy-making at the regulatory level is a further Type III factor that could explain deference by convergent actors to agencies and their policy preferences. "Recruiting well-known experts" and "making it known that (public officials) are...actively looking for remedies"<sup>190</sup> can be reassuring for participants favouring the policy.

Furthermore, whether there is indifference among political principals or influential regulated firms about agency preferences, regulatory officials will be keen to give "the impression that they evaluate policy alternatives in a highly rational, apolitical

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<sup>190</sup> *ibid*

manner...highlighting adherence...to formal-legal procedures”<sup>191</sup>. Thus, rather than as a recurring tool to formally direct other participants towards the preferred outcome, the use of authority constitutes a circumscribed procedure bolstering credibility<sup>192</sup>. To limit controversy about policy choices, the aim seems to be not to politicise, or even de-politicise, an issue. ‘Apathy’ is, therefore, retained at the regulatory level by transmitting, apparent, agency neutrality.

Type II autonomy involves shifting preferences of divergent actors. As discussed in chapter 1, Nordlinger tells us that at the state level this is done by: persuading or instilling enough uncertainty about the desirability of divergent preferences - ‘inducement’; minimising the extent actors who are divergent deploy their resources - ‘appeasement-conciliation’; mobilising indifferent actors - ‘enfranchisement’; and, increasing the weight of resources held by convergent actors - ‘empowerment-reinforcement’<sup>193</sup>. Accordingly, given the existence of influential divergence and non-divergence from the start of policy, it is expected that, as part of the overall Type II regulatory process, an agency will try altering actors’ divergent preferences and restrain their use of key resources by prioritising negotiation over imposition.

Nordlinger’s Type II scenarios envisage avoiding running “counter to societal preferences”<sup>194</sup>. To alter preferences implies portraying policy in more acceptable terms to divergent actors, “making the case that...goals are the same”<sup>195</sup>, besides “offering them every opportunity to alter public officials’ preferences”<sup>196</sup>. By applying the same principles, the regulator takes a conciliatory stance and, without sacrificing its key preferences, works towards a solution that it finds reasonably suitable as do the divergent actors. So, divergence is not exacerbated by undertaking prescriptive, command-and-control, “going by the book” regulation<sup>197</sup>, but rather “solving the problem”<sup>198</sup> by searching for ‘responsiveness’. Rather than instructing or even threatening divergent actors, which may

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<sup>191</sup> *ibid.* p.94

<sup>192</sup> While Deputy Governor of the Bank of England, now Governor Mervyn King coined the phrase “boring is best... A reputation for being boring is an advantage - credibility of the policy framework helps to dampen the movement of the (economic) see-saw”, in “To the Plymouth Chamber of Commerce and Industry’s 187th Anniversary Banquet, 14 April 2000”. Also, “Reform of the International Monetary Fund At the Indian Council for Research on International Economic Relations (ICRIER) in New Delhi, India - Monday, 20 February 2006”

<sup>193</sup> s.VI.2 above

<sup>194</sup> Nordlinger, p.115

<sup>195</sup> Nordlinger, p.111

<sup>196</sup> *ibid.*

<sup>197</sup> Bardach, E and Kagan, R.A. 2002, “Going by the Book-The Problem of Regulatory Unreasonableness”, Transaction Publishers

<sup>198</sup> *ibid.* p.xxi

or may not be statutorily possible, Type II regulatory preferences are achieved informally, by making compromise proposals that through persuasion and repeated bargaining can appease divergent actors.

Since Nordlinger claims “sometimes it is possible simultaneously to talk and to oppose, to negotiate and to fight, with mutually reinforcing effects”<sup>199</sup> while qualifying that constantly relying on these conflicting approaches might not be effective, an alternative way for regulators to translate their preferences into action is to exploit influential actors with convergent preferences. With the latter actively opposing divergent participants, agencies avoid confrontation and make progress.

For example, when regulators and regulatees have convergent preferences opposed by senior government officials, agencies can outline policy proposals and explain their validity with the support of industry actors campaigning against the position of senior political officials even though the latter may hold powerful formal instruments to overturn agency decision-making. Agencies could also increase pressure on divergent senior elected officials by interesting actors that are unaware or not directly involved but have opinion-shaping capabilities. Or, regulators may launch a policy that key industry actors vigorously oppose, but encourage discussions projecting reciprocity distinctly from any convergence. By containing the exposure to conflictual situations, regulators act consistent with their wish to try shifting preferences. Type II autonomy reflects processes in which, where possible, agencies choose to deploy an informal approach over formal authority, ones in which statutory arrangements have limited impact on regulatory activity.

Type I processes suggest a radically different approach to preference divergence. The fact that key resources are in the hands of few actors who can, therefore, exert significant influence in the ‘regulatory space’ on a given policy constitutes a threat to agency preferences. Nordlinger’s strategies are unequivocal in the tougher approach Type I reflects, whether it is by neutralising or diminishing the effects of societal actors’ resources - ‘counterbalancing-offsetting’, mitigating the extent with which they are able to deploy their resources - ‘obstruction’, or dissuading them from deploying most resources and exerting implacable pressure - ‘confrontation-disincentive’.

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<sup>199</sup> Nordlinger, p.115

Particularly for the second strategy, Nordlinger notes that “there is no hiding the actions of public officials in mitigating the extent and effectiveness with which societal actors holding divergent preferences are able to deploy their resources” before claiming that “private actors are strongly disposed to inflict sanctions upon public officials”<sup>200</sup>. Accordingly, as part of the overall Type I process to diminish the constraining effects of preference divergent influential actors, regulators are expected to react by alternating and coalescing formal and informal approaches, switching them to enact preferences.

Regulators facing Type I preference divergence are expected to display a firmer approach than in Type II, where working with divergent actors is portrayed as being important and taking formal action is avoided. Whether to “fracture the unity” and “endanger the cohesiveness” of actors with divergent preferences or to “jeopardise their position vis-à-vis rivals”<sup>201</sup>, the fact that regulators would proceed with the preferred policy irrespectively suggests that under Type I they identify and widely expose the obstacles representing the divergence to be overcome.

Nordlinger points to a state undeterred by conflict since, with rare exceptions, its options “all involve visible, direct, oppositional efforts to free the state from the constraints of the potentially weightiest actors”<sup>202</sup>. Thus, to translate preferences into action in the midst of strong divergence, agencies act intransigently and may need to exploit available ties to construct specific policy frameworks, possibly by “selecting decision sites whose occupants are relatively insulated from...pressures”<sup>203</sup>.

Ultimately, regulators could undertake deterrent measures to address confrontation, for example, by “threatening the realization of their other policy preferences, being less forthcoming in providing services (and) putting their advantageous relations...at risk”<sup>204</sup>, which may cause further conflict. Thus, Type I processes depict scenarios in which agencies carry on with their preferences without cooperation from divergent actors, and suggest that the Type I likelihood of using statutory instruments to pursue policies is greater than for Type II cases.

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<sup>200</sup> *ibid.* p.135

<sup>201</sup> *ibid.* pp.131-2

<sup>202</sup> Nordlinger, p.134

<sup>203</sup> *ibid.* p.131

<sup>204</sup> *ibid.* p.132

### III.4 Time-length of decision-making

The temporal dimension of a policy is frequently omitted or overlooked. Regulators may have several means to overcome the preference divergence of participants with influential resources. The distinct features of the processes associated with different types of autonomy can be expected to require different and dynamic timeframes to translate preferences into action.

Using time as an indicator at the regulatory level is not a straightforward exercise. Statutory frameworks may not define minimum or maximum decision-making timeframe powers for agencies to impose, irrespective of whether other actors have the authority to formally shorten or extend them. Thus, setting arbitrary time-periods within which agencies are expected to translate their preferences into action according to autonomy types may be relevant to one regulator but not to another. Moreover, applying such formal criterion without analysing its scope undermines the research question presented here. Instead, it is important to understand whether regulators apply relevant formal instruments available to fulfill their preferences and, if yes, in what circumstances.

Nordlinger explicitly recognises that Type II autonomy includes a time dimension<sup>205</sup>. The reasoning is straightforward since the state can be thought of taking longer to shift those with divergent preferences, than carrying out its preferences without hesitation as Type I autonomy suggests. Making the Type II case - “unless and until”<sup>206</sup> divergent actors are persuaded -, entails that resources have to be deployed to discuss how to make progress in line with the state’s policy preferences. The implication that seems to need testing at the regulatory level is whether agencies largely use or neglect available timescale powers, and apply policy forbearance to translate preferences into action.

Under conditions of non-divergence - Type III scenarios -, the state will be in a position to fulfill its preferences as long as societal preferences do not change. The implication at the regulatory level seems that agency officials will seize available timescale powers to expedite the preferred policy outcome unless they fear that this will raise questions and, potentially, engender divergence.

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<sup>205</sup> *ibid.* p.29

<sup>206</sup> Nordlinger, p.99

Under Type I, the state shows 'leadership' by undertaking its preferences while accepting the existence of societal divergence, hence, the possibility of sanctions that may come with it. Transposing this non-conciliatory approach at the regulatory level suggests a scenario in which preference divergent participants will react by opposing agency policy through their most effective resources. Contrasting the immediacy of the regulatory approach with the divergence of certain actors suggests that agencies are likely to apply timescale powers, where available. Accordingly, delays in preference fulfillment are expected to be forced.

### **III.5 Outcomes**

The indicator measures the success of regulators in translating their preferences into action, after the different factors affecting the course of policy as mentioned above are accounted for. Type III autonomy portrays preference fulfillment because non-divergence is secured. It is thus expected that a regulator's preferences are implemented because of acquiescence too; see Table 2 below exhibiting a summary of the Type III autonomy scenario at both the state (Level 1) and the regulatory level (Level 2). Type II autonomy says state preferences are translated into public policy after those of divergent actors are shifted to make them "congruent or consonant". Yet, regulator's preferences should be implemented after actors with divergent ones are persuaded to shift theirs, allowing for some concessions (Table 3). Instead, since under Type I state preferences are translated into public policy without shifting those of divergent actors, at the regulatory level agency preferences are expected to be fulfilled without the intention to compromise, despite the conflictual nature of Type I autonomy suggesting that 'sanctions' are sought by actors with divergent preferences (Table 4).

**Table 2: Type III Autonomy: State and Regulatory scenarios (Levels 1 and 2)**

Empirical Indicators	Level 1 – Nordlinger’s Type III	Level 2 - Regulatory level Type III
<b>Participants and resources</b>	Best endowed actors hold preferences convergent with those of state, or significant actors indifferent to them	At start of policy, <b>key resources spread among distinct actors or held by few</b>
<b>Preferences</b>	<b>Absence of divergent state-society preferences</b>	<b>Preferences of influential participants do not differ</b> from regulator’s proposals. <b>Influential support</b> because of preference convergence, <b>and/or no opposition</b> from indifferent actors
<b>Process</b>	State translates preferences into authoritative action when state-society are non-divergent by: (i) <b>preservation</b> (ii) <b>entrusting</b> ; (iii) <b>apathy</b>	To sustain non-divergence, <b>regulator controls presentation and communication flow of its actions</b> . Preferences furthered by: (i) <b>selective divulging</b> of information; (ii) <b>projection of competent engagement</b> and policy-making; (iii) <b>transmitting apparent neutrality</b>
<b>Time-length of decision-making</b>	Public policy undertaken as non-divergence holds	<b>Timescale powers applied unless expediting policy raises questions and divergence</b>
<b>Outcomes</b>	State preferences translated into action by securing non-divergence	<b>Regulator’s preferences implemented given acquiescence</b>



**Table 3: Type II Autonomy: State and Regulatory scenarios (Levels 1 and 2)**

Empirical Indicators	Level 1 – Nordlinger’s Type II	Level 2 - Regulatory level Type II
<b>Participants and resources</b>	Range of societal actors: those divergent from the state seek to obstruct its preferences; also actors with similar preferences to the state supporting it (convergent), and those without strong expressed preferences	<b>At start of regulatory policy, key resources spread among distinct actors;</b> with preferences similar to regulator and with divergent ones. <b>Different participants have valuable resources to exert influence</b>
<b>Preferences</b>	<b>Combination</b> of divergence, indifference, convergence	<b>Preferences of influential participants differ</b> over regulator’s proposals. <b>But not only influential divergent preferences;</b> <b>some influential support</b> from outset for agency to shift preferences
<b>Process</b>	State shifts preferences of societal actors over time, by: (i) <b>inducement</b> ; (ii) <b>appeasement - conciliation</b> ; (iii) <b>enfranchisement</b> ; (iv) <b>empowerment - reinforcement</b>	To alter preferences of opponents or restrain their use of key resources, <b>regulator prioritises negotiation over imposition.</b> Preferences shifted by: (i) making <b>compromise proposals</b> ; (ii) repeated <b>bargaining</b> ; (iii) <b>exploiting influential actors with convergent preferences to avoid confrontation</b>
<b>Time-length of decision-making</b>	Public policy not undertaken ‘unless and until’ actors with divergent preferences are persuaded	<b>Timescale powers largely neglected; policy forbearance</b>
<b>Outcomes</b>	State preferences translated into public policy after those of divergent actors are shifted to make them ‘congruent or consonant’	<b>Regulator’s preferences implemented</b> after actors with divergent ones had been persuaded to shift theirs, <b>with some concessions</b>

**Table 4: Type I Autonomy: State and Regulatory scenarios (Levels 1 and 2)**

Empirical Indicators	Level 1 – Nordlinger’s Type I	Level 2 - Regulatory level Type I
<b>Participants and resources</b>	Range of actors but predominant societal actors hold preferences divergent from the state and obstruct its preferences	<b>At start of regulatory policy, key resources to exert influence held by few actors</b> with divergent preferences (dissimilar from regulator)
<b>Preferences</b>	<b>Predominantly divergence</b> , similar preferences in the background	<b>Preferences of influential participants differ from agency proposals. At start only influential divergent preferences;</b> insufficient influential support to shift preferences
<b>Process</b>	State translates preferences into authoritative action when state-society are divergent by: (i) <b>counterbalancing - offsetting</b> ; (ii) <b>obstruction</b> ; (iii) <b>confrontation - disincentive</b>	To diminish the constraining effects of influential actors with divergent preferences: agency alternates <b>informal with formal approach, deploying either to enact its preferences</b> . Acting on preferences by: (i) identifying and <b>widely exposing obstacles to direct policy as preferred</b> ; (ii) <b>exploiting ties to construct a framework, against divergent preferences</b> ; (iii) <b>deterrence to address non-compliance</b>
<b>Time-length of decision-making</b>	Public policy undertaken accepting that state and societal preferences are divergent	<b>Available timescale powers applied; delays forced</b>
<b>Outcomes</b>	State preferences translated into public policy without a shift in those of divergent actors	<b>Preference fulfilled without intention to compromise</b>

Thus, the past section has accounted for the five indicators selected to examine the independence of regulatory agencies in practice. The indicators have been largely developed from Nordlinger's preference-based state autonomy framework, making it possible to transpose his three autonomy type scenarios at the regulatory level through a careful elaboration of their key identifiable features. The latter are contained in the three tables above. Accordingly, in chapters 4 to 7, the indicators are applied to policies conducted by Ofcom and the ART to establish policy-specific types of autonomies and evaluate the extent that independence in practice reflects formal independence, hence, verify whether any other resources matter for the agencies to implement their preferences successfully. Chapter 3 examines respective formal institutional arrangements. First, however, the next section discusses the methodology of this thesis, including why the sub-cases examine the telecoms sector in France and in the UK.

#### **IV. Research Design and Methodology**

Given the doubts expressed about the merits of past quantitative analyses to examine regulatory independence and the framework detailed above, the research design centres on qualitative tools. The joint techniques of 'process tracing', within four single sub-case studies, and of comparison are used to produce an empirical appreciation of agency independence in practice, in order to develop a more elaborate conceptualisation allowing for more sophisticated research in this field in the future.

The regulation of the telecommunications sector in France and Britain is the case selected for the depth of research required<sup>207</sup> to examine the independence of regulatory agencies in practice. Although the two countries are comparable because of non-institutional structural similarities<sup>208</sup>, including Gross Domestic Product (GDP)<sup>209</sup>, population, geographic position, and membership of the European Union (EU), past studies have raised differences between respective industrial policies and government-industry relations<sup>210</sup>. The

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<sup>207</sup> Dogan, M and Pelassy, P 1990, "How to Compare Nations – Strategies in Comparative Politics", Chatham House Publishers, observe that a case study "may bring to light significant factors and variables neglected in many comparisons" p.123

<sup>208</sup> Thatcher 1999, p.22

<sup>209</sup> International Monetary Fund (IMF) March 2007, Annual International Financial Statistics (IFS) Series

<sup>210</sup> Shonfield, A 1965, "Modern Capitalism: The Changing Balance of Public and Private Power", OUP; ch.7 in Zysman, J 1977 "Political Strategies for Industrial Order - State, Market and Industry in France", University of California Press; Hall, P A 1986 "Governing the Economy - The Politics of State Intervention in Britain and France", Polity Press; Cawson, A, Morgan, K, Webber, D, Holmes, P and Stevens, A 1990, "Hostile Brothers", Clarendon Press, especially ch.3

choice of countries seems balanced since, a “‘regional’ strategy is tied up with the risks of confinement it conceals... (but) a comparison between contrasting countries often tends to concentrate on extreme almost ‘abnormal’ types... (which) become a means of distorting the reality instead of representing it”<sup>211</sup>.

The telecoms sector is highly relevant, especially since the 1998-2002 period focussed upon spans the ‘telecoms boom and bust’ period. In his sectoral study covering Britain and France as well as the Netherlands, Hulsink claims that the “telecommunications sector has traditionally been characterised by a high degree of government intervention”<sup>212</sup>, strengthening the case for analysing regulatory independence from elected officials in the two countries. Thatcher has referred to the sector’s ‘strategic’ attributes, especially given its direct impact on a range of other industries<sup>213</sup>. The effects of developing regulated communication networks have stretched further than domestic telecoms and internet domains, into those of international political economy. With the advent of globalisation, the development of advanced communication networks and services impacted directly on financial services growth<sup>214</sup>. In 1999 the telecoms sector constituted a notable portion of GDP for both countries<sup>215</sup>, suggesting that policy implications extend beyond sectoral interests.

Instead sectoral institutional dissimilarities have persisted between Britain and France, even though institutional divergence between them ended in 1990, followed by progressive convergence<sup>216</sup>. Since “variations are the most powerful engines of causal analysis. Without variations we cannot establish associations between variables, and without associations the causes, processes, and outcomes... remain obscure”<sup>217</sup>. Since the scope of the thesis encompasses establishing whether formal institutional arrangements lead to differences in

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<sup>211</sup> Dogan and Pelassy 1990, pp.134, 146

<sup>212</sup> Hulsink 1999, p.5. Also Cawson et al’s.ch.4

<sup>213</sup> Thatcher 1999, pp.22-3, 66-7

<sup>214</sup> Marsden,CT Summer 2001, “Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society”, p.356, Law Review of Michigan State University Detroit College of Law, pp.355-421

<sup>215</sup> The similar national economic significance of the sector strengthens the case for labelling it ‘strategic’ and using it for a cross-country comparison. Sectoral contribution to UK GDP in 1999 was about 2.25-2.5% according to an Office of Communications Telecoms Review chart (AnnexF: The Role of Telecoms in the Economy, 18/3/2005). The French telecoms sector equated to 1.9% ca. of GDP in 1999. The figure was calculated by dividing the sector’s 1999 worth in million euros in the “Observatoire des marchés - Les services de télécommunication en France au 1er trimestre 2000” (Table1) by IMF GDP data in billion euros; Annual IFS on France - 3/2007

<sup>216</sup> Thatcher 1999, p.310; Hulsink 1999; also Gilardi 2002,2005, Edwards and Waverman 2006

<sup>217</sup> Levi-Faur,D 7/2003 “Comparative Research Designs in the Study of Regulation: How to Increase the Number Of Cases Without Compromising the Strengths of Case-Oriented Analysis”, Centre on Regulation and Competition, Institute for Development Policy and Management, University of Manchester

independence in practice, institutional dissimilarity is particularly valuable to examine the independence in practice of respective national regulators on similar policies. Thus far the premise among scholars of formal independence has been that differences in formal frameworks within which national regulators operate determine the extent of regulatory independence. That is precisely what is tested here, while also ‘controlling’ for the sector.

Two salient and distinct policy issues are examined. Hence, four sub-cases provide empirical data for a ‘third level’ of analysis, following the ‘second level’ of analysis shaped by Nordlinger’s theory and constituted by the five selected indicators developed from it. This reduces the scope for ‘selection bias’ as well as for suggestions that different outcomes may be based on national differences only and, hence, widens the meaningfulness of findings. So, this research reaches beyond the common one country-one sector studies on regulation, since a cross-country and a cross-policy comparison is undertaken. Through a Medium-N (more than two and less than circa fifty (sub-)cases<sup>218</sup>), the thesis works to achieve the balance between “depth and breadth”<sup>219</sup>. One policy is the licensing of Third Generation (3G) mobile services<sup>220</sup>, the other is local loop unbundling (LLU)<sup>221</sup>.

Both are linked to the national spread of high-speed internet. Nevertheless, the selection of distinct policies is especially relevant in the telecoms sector, where the different types of industry actors (fixed and mobile) may generate different findings on regulatory independence. Dogan and Pelassy claim that “binary comparison can be used not only for increasing, through contrast, our knowledge of two different systems...it can also contribute to an understanding of general phenomena”<sup>222</sup>. At the simplest level, one benefit of the joint cross-national and cross-policy comparison will be to avoid relying on a unique set of events, hence, assume that evidence on one regulator on a given issue constitutes a benchmark for independence.

Thus, the ‘comparative method’, which is associated with a systematic and careful analysis of a small-N with many variables<sup>223</sup>, is adopted to assess in detail both the similar and

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<sup>218</sup> Levi-Faur 2003, p.3 (brackets added)

<sup>219</sup> Levi-Faur quotes Ragin, CC 2000, “Fuzzy-Set Social Science”, p.22, Chicago University Press

<sup>220</sup> Broadly, voice, internet-related services, images, data transmitted via a broadband digital network.

<sup>221</sup> National incumbent operators making available the pairs of copper-wires, or lines, they own to other network operators, so the latter can incorporate them in their networks to provide broadband (i.e. high-speed internet) to end-users

<sup>222</sup> Dogan and Pelassy 1990, p.127

<sup>223</sup> Collier, D 1993, “The Comparative Method”, ch.5, in eds. Finifter, AW, “Political Science: The State of the Discipline II”, American Political Science Association; Lijphart, A 1971 “Comparative Politics and the

different factors that affect whether the two regulators translate their preferences into action and how, in different countries and on different issues. Lijphart claims: “the intensive comparative analysis of a few cases may be more promising than a more superficial statistical analysis of many cases”<sup>224</sup>. Comparing findings from selected cases avoids that “those less sensitive to the limitations of aggregate data would make unwarranted claims about these countries (or policies) being alike or different”<sup>225</sup>, as similarities or differences based on studies assessing formal institutional arrangements have induced.

The four sub-case studies also help portray changes in the policy stance of specific actors over time, adding an inter-temporal element to the analysis. This reflects process tracing, which reveals ‘causal mechanisms’, or “the causal processes and intervening variables through which causal or explanatory variables produce causal effects”<sup>226</sup>. The technique “directs one to trace the process in a very specific, theoretically informed way. Between the beginning (independent variable[s]) and end (outcome of dependent variable), the researcher looks for a series of theoretically predicted intermediate steps”<sup>227</sup>. This is clearly set and carried out through the framework and selected indicators, developed from Nordlinger’s autonomy-types, which guide the research in a sequential manner to draw attention on the specific combination of factors and mechanisms that determine regulatory independence<sup>228</sup>, and possibly help to establish their magnitude. A benefit of the technique is that process tracing allows for ‘equifinality’, “or similar outcomes occurring through different causal processes (hence) the possibility of mapping out one or more potential causal paths that are consistent with the outcome and the...evidence in a single case”<sup>229</sup>. Thus, the combination of methods is useful in terms of providing explanations for specific cases and to refine available theories, to produce generic knowledge on regulatory independence in practice.

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Comparative Method”, *American Political Science Review* Vol.65(3), pp.682-693, for the strengths and weaknesses of the comparative method versus alternative techniques.

<sup>224</sup> *ibid.*, p.685

<sup>225</sup> Ashford, DE 1992, “Introduction: Of Cases and Contexts”, p.14, Ashford, DE. (eds.) “History and Context in Comparative Public Policy”, pp.3-26, University of Pittsburgh Press, (brackets added)

<sup>226</sup> George, ALG and Bennett, A 17-19/10/97, “Process Tracing in Case Study Research”, p.2, Paper presented at the MacArthur Foundation Workshop on Case Study Methods, Belfer Center for Science and International Affairs (BCSIA), Harvard University

<sup>227</sup> Checkel, JT 2005 “It’s the Process ‘Stupid!’ Process Tracing in the Study of European and International Politics”, p.5, prepared for Audie Klotz (ed.), *Qualitative Methods in International Relations*, Arena

<sup>228</sup> Roberts, C 1996, “The Logic of Historical Explanation”, Pennsylvania State University Press, refers to the “tracing of the sequence of events that brought (complex events) about” in terms of historical studies, with George and Bennett, p.13, claiming: “A causal path may include many necessary steps, and they may have to occur in a particular order”. Both substantiate the sequential use of selected indicators to establish causal paths generating autonomy types

<sup>229</sup> George and Bennett, p.7

## V. Sources

The argument developed in the thesis is based on documentary sources in the form of consultations, market data, statements and decisions published by the two regulators, government documents, national and supranational legislation, transcripts of parliamentary debates and committee hearings, non-confidential industry views and responses, press releases and press sources. The documents were obtained from several sources, both in paper form and electronically. Five UK semi-structured interviews were carried out:

- three anonymous senior and middle-management UK regulatory officials (Ofcom/Ofcom);
- the Radiocommunications Agency's former Chief Executive, David Hendon;
- National Audit Office 3G report Study Manager, Neil Carey.

Exchanges with French officials:

- telephone interview with then French regulator's (ART) Chairman Jean-Michel Hubert;
- electronically with a France Télécom senior management official (regulation).

Some exchanges were also undertaken with middle-management and secretarial staff at the regulators.

Several documents were procured from the British Library for Political and Economic Science (BLPES), others were obtained via direct communication. French-language press cuttings, including from *Le Monde*, *Les Echos*, *Le Figaro* (*Figaro-Economie*), were mostly sourced from archives at the Sciences-Po library in Paris. The other French press cuttings, like UK press material, largely from the *Financial Times*, *The Times*, *The Independent* and the *Guardian*, were retrieved from electronic databases (namely Nexis) accessible through BLPES.

## **VI. Limits of the study**

The study aims to widen the analysis, hence the understanding, on whether regulators are independent in practice. It avoids quantitative analyses of 'independence'. Part of the exercise of the thesis is to stress that independence is relative, not absolute. A regulator is not, and can rarely be defined as, dichotomously independent or not. Thus the thesis proposes a set of different explanations on how regulators may be able to conduct policy as they intend, beyond what can be drawn from their formal institutional design. While the framework presented in this thesis focuses on uncovering more than a single explanatory factor influencing agency independence, and does so systematically for a 'strategic' sector in two countries and by examining two separate policy issues, it does not establish whether the identified factors apply to all cases and sectors, hence whether they are exhaustive. In future studies, larger and more diverse (sub-)cases could be researched.

The thesis does not examine how participant preferences, at the centre of the framework, are formed. The analysis is developed on the basis of preferences stated in, or reasonably inferred from, the cited documentary sources, assumed to be representative. So, where regulatory preferences are similar to those of senior elected officials or regulatees from the start of a policy, questions about the 'independence' of preference formation may arise. However, deriving conclusions suggesting that the regulator is acting in line with the preferences of political principals or has been captured in such cases is a questionable assumption. Nordlinger stresses that it is unrealistic to expect any entity to come even close to being fully autonomous in the self-generation of preferences. Analysing different cases can nonetheless provide evidence regarding a greater similarity between the preferences of regulators and certain types of actors, compared to other types.

## **VII. Conclusion**

The preference-based framework developed in this chapter proposes to broaden the analytical assessment of regulatory independence in practice. The five selected indicators help examine the actual impact of respective formal institutional arrangements on the two agencies, particularly regarding their translation of preferences into action, and whether specific dynamic non-statutory factors and mechanisms are significant in explanatory terms. Thus the proposed framework forms a basis for a review of the importance of formal institutions and, particularly what they represent with respect to the governance of



markets. The study of two salient policies, carried out in the following chapters and concerning a key sector in two distinct countries, provides a more comprehensive basis to evaluate regulatory independence in practice, and is intended to make a sufficient contribution to the literature in order to generate further research. First, in chapter 3, the formal institutional arrangements of Oftel and the ART are set out. A clear picture of the powers delegated to the two telecoms regulators, as opposed to those possessed by other statutory actors, is necessary to illustrate in depth the factors that formal institutionalists consider important to measure 'regulatory independence'. Once formal frameworks are delineated, the analysis shifts to sub-case chapters four to seven showing the extent to which regulators depend on those formal frameworks to fulfill policy preferences.

## **Chapter 3: Formal Institutional Actors within**

### **National Regulatory Frameworks**

#### **I. Introduction**

This chapter examines the formal institutional arrangements relating to the selected telecoms regulatory agencies in the UK and France. The account of regulators' formal role is complemented with the relevant formal authority of other actors, whether because of veto or shared powers, and duties. It precedes the case studies, in which the regulatory autonomy framework presented in chapter 2 is applied. The chapter sets out the key elements of the formal institutional design of the two agencies to provide a comparative insight on the statutory attributes of sectoral regulation in the two countries. They are taken into account where relevant in the case analysis of the agencies' independence in practice. Accordingly, the explanatory power of statutory arrangements in practice is studied in subsequent chapters, rather than assumed as formal institutionalist literature does.

The chapter is divided into sections addressing sequentially the formal authority of regulators, ministerial and government powers, the role of other public 'state' bodies including those with concurrent powers, and finally the scope of judicial bodies. In each section, formal arrangements relating to the senior management of the regulators is identified first, followed by any licensing authority of the actors discussed, their enforcement powers and advisory role. Selected ancillary powers, providing a fuller picture of the formally relevant actors, are indicated. British regulatory actors are discussed first, followed by French ones, to allow for comparisons to be as consistent as possible, hence, show institutional similarities and dissimilarities. Table 5 at the end summarises Governments' and 'other state' bodies' formal controls over the two regulators<sup>230</sup>.

#### **II. The UK's Office of Telecommunications (OfTel)**

As the United Kingdom's telecoms sector was liberalised under the Telecommunications Act 1984, by the Thatcher Government, the Director General of Telecommunications

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<sup>230</sup> Citing statutes as published in 2003 and subsequently

(DGT) was vested with powers to perform assigned regulatory functions<sup>231</sup> for a maximum five-year term, but with the possibility of re-appointment<sup>232</sup>. He could resign in writing to the Government's Secretary of State (SoS) at any time<sup>233</sup>. The DGT's management powers during his tenure included appointing staff as he saw fit<sup>234</sup>, for the Office of Telecommunications (OfTel) agency he headed; a non-ministerial Government department replaced at the end of 2003 by the Office of Communications (Ofcom)<sup>235</sup>. He had to exercise functions and fulfill 'general duties', shared with the SoS. Nonetheless, anything the DGT was authorised or required to do under the Act, other than making statutory instruments, could be done by any other member of staff the DGT authorised<sup>236</sup>.

The DGT's two primary duties "in the manner which he considers is best calculated" were: (i) to ensure that all reasonable demands for telecoms services were satisfied throughout the UK; and, (ii) to ensure that suppliers could finance the provision of the services<sup>237</sup>. Subject to these two primary duties, the DGT, and the SoS, had to:

- (i) promote interests of consumers, purchasers and other UK users (especially those disabled and of pensionable age) regarding prices, quality and variety of telecoms services and apparatus supplied;
- (ii) maintain and promote effective competition between persons engaged in UK commercial telecoms activities;
- (iii) promote efficiency and economy;
- (iv) promote research, development and use of new techniques;
- (v) encourage major telecoms service users abroad to establish business in the UK;
- (vi) promote the provision of international transit services;
- (vii) enable UK telecoms services providers to compete effectively abroad;

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<sup>231</sup> Telecommunications Act 1984, Part I, Section 1(1), Halsbury's statutes of England and Wales, Vol.45, Butterworths 1985, henceforth the 'Telecoms Act' or 'Act'. The abbreviations DGT and OfTel are used. The DGT's powers were extended with the "Competition Act 1998", Crown Copyright 1998, effective from 1 March 2000. They are outlined in the 'Other Public Bodies and Concurrent Powers' section below. Nowhere in the Telecoms Act was there a reference to the DGT's or of OfTel's 'independence'

<sup>232</sup> s.1(2),p.125

<sup>233</sup> s.1(3). The SoS referred to is that formerly responsible for 'Trade and Industry'

<sup>234</sup> s.1(5)

<sup>235</sup> OfTel was merged into Ofcom with the Independent Television Commission, the Broadcasting Standards Commission, the Radio Authority, and the Radiocommunications Agency discussed in chapter 4, following Her Majesty's Government Communications Bill, drafted in June 2001, given progressive telecoms and media industry convergence. Ofcom has operated since end-2003

<sup>236</sup> Schedule1,para.8

<sup>237</sup> s.3(1)

(viii) and, to enable apparatus suppliers to compete effectively both in and outside the UK<sup>238</sup>.

The DGT and Oftel carried out duties by enforcing licences containing operators' obligations, mirroring the regulator's considerable powers. The DGT shared with the SoS the authority to institute proceedings vis-à-vis persons committing the offence of running unlicensed telecoms systems in England and Wales or Northern Ireland<sup>239</sup>.

The DGT had to be consulted before the SoS granted a licence, but he could only grant licences upon the SoS's authorisation<sup>240</sup>. Licences contained requisite conditions according to the SoS or the DGT, allowing connection to specified telecoms systems<sup>241</sup>. After establishing procedural details concerning granting the licences, they notified interested persons, and could refuse licences to applicants omitting required information. A notice was published as either of the two considered appropriate, bringing decisions to applicants' attention<sup>242</sup>.

Before granting applicants public telecommunications operators (PTOs) licences subject to special conditions<sup>243</sup>, the SoS or the DGT gave notice setting out effects, reasons and the time (not less than 28 days from the notice publication) within which representations, to be duly considered, could be made<sup>244</sup>.

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<sup>238</sup> s.3(2)

<sup>239</sup> s.5(7). Long, C 1995 "Telecommunications Law and Practice", p.39, Sweet and Maxwell, refers to s5 as the general prohibition constituting the foundation of UK telecoms regulation; anyone running a telecoms system was guilty of an offence unless authorised by licence under s7

<sup>240</sup> s.7(1)(a) There were three types of licences; general (to all persons), class or individual. Running a system compliant with 'class' licence terms entailed automatic validation without further formality; without notification procedures. However, upon breaches of conditions, the DGT could revoke by notice its application; Long pp.41,103. s7(3A) specified that the SoS and the DGT had to ensure compliance with EC Licensing Directive requirements. The DGT's April 1999 statement, "Rights and obligations to interconnect under the EC Interconnection Directive", indicated that "Throughout the EU, licensing policy is now governed by the...EC Licensing Directive. Thus member state rules on who gets interconnection rights must comply with the provisions of the Licensing Directive as well as the Interconnection Directive. The Licensing Directive requires Member State rules on licensing to be proportionate, non-discriminatory, objective and transparent", paras.1.6-7

<sup>241</sup> s.7(5)(a)(c)

<sup>242</sup> s.7A(1)(3)(4); s.7A inserted by the Telecommunications (Licensing) Regulations 1997

<sup>243</sup> s.9(3); Running a licensed public telecoms system to which section 8 applied, entailed more obligations such as: providing specified telecoms services; connecting to any telecoms system to which the licence related, or permitting connection to such systems; not showing undue preference to, or to exercise undue discrimination against, particular persons; publishing notices on methods adopted for determining charges

<sup>244</sup> s.8(5)

Once licences were granted, the DGT's formal authority was significant:

- his directions had to be complied with<sup>245</sup>;
- he could add to licensees' formal obligations with or without consent.

Licences modification by consent followed notifying affected persons, stating the proposed changes, the reasons and the timescale for representations (28 days minimum)<sup>246</sup>.

Alternatively, the DGT could overcome regulatees' dissent by referring a matter to the Competition Commission<sup>247</sup>, which investigated and reported, within six months, on whether the matter operated or could operate against the public interest and, if so, whether licence modification constituted a remedy. He could vary references to the Commission at any time, besides publishing details bringing references or variations to affected persons' attention, sending a copy to the particular licensee<sup>248</sup>. The DGT then received a Competition Commission report<sup>249</sup>, which took into account the DGT's and SoS's duties to determine whether the matter operated against the public interest<sup>250</sup>. A Competition Commission report favourable to a DGT reference allowed him to impose a licence change<sup>251</sup>.

The DGT could issue final or provisional orders for licence contraventions; he kept a public register, comprising licences granted, modifications and revocations<sup>252</sup>. Provisional orders depended on the extent someone was likely to suffer a loss or damage. Where necessary, the DGT confirmed provisional orders with or without modifications to ensure compliance. When general duties precluded making orders, or contraventions were trivial, he informed affected persons, and sent the operator a copy<sup>253</sup>.

Orders could be revoked at any time. Otherwise, complying was compulsory. Breaches causing loss or damage were "actionable at suit or instance of that person". The DGT could ensure compliance with orders by civil proceedings for an injunction or interdict or other relief for affected persons<sup>254</sup>. Also, if final, or confirmed provisional, orders were not

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<sup>245</sup> s.7(6)

<sup>246</sup> s.12

<sup>247</sup> Replaced the Monopolies and Mergers Commission created through the Fair Trading Act 1973

<sup>248</sup> s.13

<sup>249</sup> s.14(4)

<sup>250</sup> s.13(8)

<sup>251</sup> s.15

<sup>252</sup> s.19(1)(2)

<sup>253</sup> s.16(1)(2)(3)(4)(5)(6)(a)(c)

<sup>254</sup> s.18(5)(6)(a)(8)

complied with within three months of the SoS giving notice in writing accordingly, the licence was revocable<sup>255</sup>.

Procedurally, the DGT informed affected actors before making orders. He either obtained operators' consent or complied with requirements, allowing representations within minimum 28 days, to be duly considered. Final orders were made within two months of notices. Revoking final, or confirming provisional, orders entailed the same procedure<sup>256</sup>.

To carry out his duties, the DGT had significant powers to obtain information. Besides reviewing and collecting information on commercial UK telecoms activities<sup>257</sup>, the DGT could require persons to produce, by notice, any specified documents or information, except what could not be compelled in civil proceedings before a court<sup>258</sup>. Such information could *only* be disclosed without consent of those carrying out the business if it facilitated the SoS's, the DGT's or the Competition Commission's functions.

The DGT's ancillary Telecoms Act powers, amongst others, comprised<sup>259</sup>:

- making regulations prescribing performance standards designated operators should achieve (unmet standards entailed compensation), resolving disputes by orders<sup>260</sup>;
- investigating complaints if required to or if he thought fit<sup>261</sup>;
- establishing advisory bodies and appointing members, subject to the SoS not doing so<sup>262</sup>.

Thus, the Telecoms Act formalised sectoral regulation by the DGT, but his role stretched further. To co-ordinate Telecoms Act functions and the SoS's licensing powers under the Wireless Telegraphy Act (1949/1998), allowing spectrum allocation to mobile operators, the DGT gave the SoS advice on the exercise of such powers where he felt necessary or as the SoS requested. Advice related to granting, varying or revoking licences authorising the establishment, installation or use of wireless telegraphy stations or apparatus and the running of telecoms systems<sup>263</sup>.

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<sup>255</sup> Long, p.57 (ss.7,16,18)

<sup>256</sup> s.17(1)(2)(3A)(4)

<sup>257</sup> s.47(1)(2)

<sup>258</sup> s.53(1)

<sup>259</sup> see Telecoms Act 1984 for all the powers

<sup>260</sup> ss.27A(1)(4)(6), 27B(1)(2)(a)

<sup>261</sup> s.49(1)(3)

<sup>262</sup> s.54(1)(3)

<sup>263</sup> s.51(1)(3)

As explained below, even though the Director General of Fair Trading (DGFT) shared the additional authority, the March 2000 enactment of the Competition Act 1998 extended the DGT's powers.

### III. The Formal Weight of Ministerial and Government Powers

Notwithstanding the powers delegated to the DGT, the Telecoms Act 1984 left successive Conservative and Labour Governments with significant regulatory controls. HM Treasury's approval was required for numbers, and terms and conditions of service, of staff the DGT sought to appoint<sup>264</sup>. Otherwise, the SoS for Trade and Industry, who appointed the DGT and could reappoint or remove him on unspecified grounds of incapacity or misbehaviour<sup>265</sup>, was the elected official with most sectoral authority<sup>266</sup>.

National security or relations with Governments or territories outside the UK enabled the SoS to supersede anything done consistent with statutory duties<sup>267</sup>. The SoS could give the DGT general directions on the order of priority for telecoms matters to be reviewed. The DGT had to, voluntarily or when asked, give the SoS or the DGFT information, advice and assistance<sup>268</sup>.

Crucially, the SoS had the sole power to grant telecoms licences, after consulting the DGT, unless she authorised the DGT to grant them. Granted in writing, licences lasted for the specified period unless the SoS revoked them according to terms therein, and authorised connection to specified telecoms systems and apparatus, and the provision of specified telecoms services<sup>269</sup>.

The SoS designated 'public telecommunication operators', by order<sup>270</sup>. She established conditions regarding licensee rights exercisable by virtue of the Telecommunications

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<sup>264</sup> s.1(5)

<sup>265</sup> s.1(3)

<sup>266</sup> see Telecoms Act 1984 for ancillary powers

<sup>267</sup> s.3(3)(a). Having consulted specific persons in question including the DGT, the SoS could give directions as appeared requisite in the interests of national security or relations with foreign governments or territories. The particular thing required in any SoS direction had to be carried out notwithstanding other duties the Act imposed; s94

<sup>268</sup> s.47(3)(4)

<sup>269</sup> ss.7(1)(2)(3)(4)

<sup>270</sup> s.9(1)(2)

Code<sup>271</sup>, conferring operators powers to install and maintain apparatus to run their systems on third-parties' land<sup>272</sup>, and could make a public telecoms system cease to be a PTO temporarily<sup>273</sup>.

The SoS could veto licence modifications the DGT sought<sup>274</sup>. She had to be sent copies of proposed modifications sought through operators' consent. However, within the time allowed for representations, the SoS could direct the DGT not to make modifications, only if: (i) it appeared that they had to be based on a Competition Commission report, or (ii) national security interests or relations with foreign governments could have been jeopardised<sup>275</sup>.

Similarly the DGT informed the SoS of references to the Competition Commission. The SoS could direct the Commission not to proceed with references or give effect to variations within 14 days of receiving them, but only based on national security interests or relations with foreign Governments. The SoS appointed no fewer than three Commission members for the purpose of licence modification references<sup>276</sup>.

Otherwise, the DGT sent the SoS a copy of the Commission's reference report containing conclusions. If the SoS considered that publishing certain matters was against the public interest, or the commercial interests of any person, and directed the regulator to exclude any matter from the report before the end of the 14 day period since receiving it, the DGT had to do so<sup>277</sup>. Furthermore, if, within the time specified, the SoS directed the DGT not to apply modifications upon receiving a Commission's report copy specifying requisite modifications, he had to comply<sup>278</sup>. The DGT submitted annual reports to the SoS, comprising his and the Competition Commission's activities regarding references, which she laid before each House of Parliament and could publish<sup>279</sup>.

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<sup>271</sup> s.10(1)(2)(3). The code applied to persons to whom the special s8 conditions applied, or when the SoS considered that that person running a system would benefit the public, and that it was not practicable for the system to be run without the application of the code

<sup>272</sup> s.10, sub-s1 Notes, but also Schedule 2; the code defined. Regarding exercisable rights, para.2, for example, required that operators seeking to execute works, like apparatus installation or maintenance, on land owned or occupied by others required a written agreement conferring on the operator a right for statutory purpose

<sup>273</sup> s.9(4)

<sup>274</sup> s.12(5)

<sup>275</sup> s.12(6)

<sup>276</sup> ss.13(5)(6)(10); Schedule 7, paras.1&2 Competition Act 1998

<sup>277</sup> s.14(5)(6)

<sup>278</sup> s.15(5)

<sup>279</sup> s.55(1)(2)(3)



In exercising his Telecoms Act functions, to co-ordinate respective functions, the DGT had to consider the principles the SoS applied regarding her Wireless Telegraphy Act 1949 licensing powers<sup>280</sup>. The Competition Act 1998's introduction allowed the SoS to make rules concerning appeals and appeal tribunals, conferring functions on the Competition Commission's Appeal Tribunals President after consulting the President among others<sup>281</sup>. The Minister could make regulations to co-ordinate functions exercisable concurrently by the DGT and the DGFT under the Competition Act<sup>282</sup>.

#### IV. Other Public Bodies and Concurrent Powers

The role of statutorily significant sectoral actors other than Government Ministers also defined regulatory agencies' degree of formal authority. The British Parliament had selected but important powers. Oftel was funded by money voted by Parliament for the remuneration and other expenses of the DGT and his staff<sup>283</sup>. Moreover, powers to make regulations regarding telecoms service provision were exercisable by statutory instrument. Parliament could annul statutory instruments containing regulations the SoS made, through a resolution of either House<sup>284</sup>.

The Parliamentary Trade and Industry Select Committee (TISC) could not insist that Members of Parliament (MPs) or civil servants, such as Oftel staff, attended its hearings for public questioning, unlike for other persons. However, it had the power, unspecified in the Telecoms Act, to secure the production of written evidence on any topic of enquiry<sup>285</sup>.

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<sup>280</sup> s.51(2)

<sup>281</sup> CA 1998 – s.48(2)(3)

<sup>282</sup> CA 1998 – s.54(4); Schedule 10, Parts II,IV

<sup>283</sup> s.1(6). Yet, "Oftel's management plan 2002/3", 18/4/02 ch.4 states: "most...costs of the office are recovered through fees charged to holders of licences". "Under the EC Authorisation and Licensing of Telecommunications Directive (97/13/EC), the cost of certain areas of Oftel's activities cannot be recovered from licence fees. Based on Oftel's approved expenditure plans for 2002/3, some £0.8 million will be provided from Government sources to meet such costs"; para.4.19. For a breakdown of 1995 fees for different licence categories, Long p.54

<sup>284</sup> ss.46A(1),46A(2) Thatcher 1999 draws on s9 to indicate this; p.151. The SoS designated a public telecoms system by order to be presented to both Houses of Parliament and only in force after 28 days. Thus, though unable to modify licences, either House could block a PTO licence being issued by voting a resolution revoking the order

<sup>285</sup> House of Commons 5/03, "The Committee System of the House of Commons" pp.20-1. Whether a committee could formally demand civil servants to attend remained "something of a grey area" after Oftel ceased to exist; "Handbook of House of Commons Procedure", 2007, Select Committees and Joint Committees para.17.2.7, p.223

Instead, as explained above, the general competition authority, the Competition Commission investigated and reported on whether matters the DGT referred to it operated against the public interest, and whether licence modifications were remedies. Following a reference, the DGT had to satisfy any Commission request for information and other assistance in his power. The Commission issued a report within six months, having regard to the SoS' and DGT's duties. The DGT had to have regard to the Commission's report before making licence modifications<sup>286</sup>.

The Competition Act 1998, based on Articles 81 and 82 (formerly 85 and 86) of the EC Treaty and which established the Competition Commission<sup>287</sup>, assigned to the DGT wider competition functions and, especially information-gathering and enforcement, powers than the Telecoms Act from March 2000. Formally, the DGT's Telecoms Act 'general duties' did not apply when asked by the Director General of Fair Trading<sup>288</sup> to exercise functions relating to conduct detrimental to consumers of telecoms services and apparatus<sup>289</sup>. When exercising Competition Act functions, the DGT could have regard to Telecoms Act 'general duties' if the DGFT would have when exercising the same functions<sup>290</sup>.

Thus, the Competition Act assigned function 'concurrency', comprising significant enforcement powers (explained below) to the 'Directors General' but, formally, the DGFT represented a veto player. Provisions addressed agreements, decisions or concerted practices preventing, restricting or distorting competition (Chapter I Prohibition) and conduct amounting to abuses of a dominant position in a market (Chapter II Prohibition)<sup>291</sup>, regarding telecoms activities<sup>292</sup>. The preparation and publication of guidance on penalties<sup>293</sup> and making procedural rules<sup>294</sup> were the only functions exclusive to the DGFT, though he still had to consult the DGT among others on both<sup>295</sup>.

Concurrency meant that only the Act's non-binding guidelines, "not a substitute for the Competition Act 1998", specified that "agreements or conduct that relate to the

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<sup>286</sup> ss.13(1)(7)(8)(9)(9A)(10),15(2)

<sup>287</sup> Replaced the Monopolies and Mergers Commission on 1/4/1999

<sup>288</sup> Head of the Office of Fair Trading (OFT). The OFT, created under the Fair Trading Act 1973, aims to protect both consumers and businesses from unfair competition and unlawful activity

<sup>289</sup> ss.3(3b),50(1)

<sup>290</sup> s.3(3C)

<sup>291</sup> Telecoms Act s.50(3), as amended by the Competition Act. The latter fully defines the prohibitions ss.2,18

<sup>292</sup> s.50(2)(3)

<sup>293</sup> CA 1998, s.38(1-6)

<sup>294</sup> s.51(3)(4). Also OFT417, "Competition Act 1998 - The application in the telecommunications sector", pp2,4. Accordingly, while having regard for the DGFT's exclusive powers, to simplify and use references from the Competition Act 1998 consistently, the term Director is used here as in the Act

<sup>295</sup> CA 1998, ss.38(7),51(4) respectively

telecommunications sector will normally be dealt with by the DGT. However, the DGT and the DGFT will always consult with each other before a decision is made as to who will deal with a case in respect of which there is concurrent jurisdiction<sup>296</sup>.

Formally, either Director could publish general advice for telecoms operators about the application and enforcement of the prohibitions. He could publish revised advice or information, including how he would exercise conferred powers. In preparing advice or information, the DGT had to consult the DGFT, fellow regulators and others he considered appropriate<sup>297</sup>.

An important element of the Act was 'self-regulatory' notification<sup>298</sup> by operators, asking the Director whether a relevant prohibition was being infringed. He could grant individual exemptions regarding the Chapter I prohibition and immunity from penalties regarding the Chapter II prohibition. Besides varying, removing or adding obligations or conditions subject to conditions, he could cancel the Chapter I prohibition exemption, and could remove the Chapter II prohibition immunity<sup>299</sup>.

The Director could conduct investigations regardless of notifications if he suspected that either prohibition had been infringed. Any person could be required to produce requested documents or relevant information and give explanations. If not produced, he could require persons to state where documents were<sup>300</sup>.

Competition Act information-gathering powers were far wider than Telecoms Act ones. The Director could authorise his officers to enter any premises without a warrant and without notice if he considered that the occupier was either a party to the agreement investigated, or an undertaking the conduct of which he was investigating<sup>301</sup>. Officers could require the production of any relevant document. The Director could authorise officers to enter premises under a warrant issued by a court, to search premises and take copies of documents<sup>302</sup>.

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<sup>296</sup> OFT417,p.5 (underlined here, indicating discretion and suggesting private discussions between the two DGs)

<sup>297</sup> CA 1998, s.52

<sup>298</sup> No requirement existed; OFT417,p.5

<sup>299</sup> CA 1998, ss.4,5,16,23,24 including the conditions that applied regarding 'exemptions' and 'immunity'

<sup>300</sup> ss.25-26

<sup>301</sup> s.27(1)(2)(3)

<sup>302</sup> s.28(1)(2)

In enforcement terms, the DGT could give directions to end infringements of either prohibition and failure to comply authorised him to apply for a court order<sup>303</sup>. Furthermore, unlike the Telecoms Act setting Oftel's powers since its inception, under the Competition Act, if an infringement was committed intentionally or negligently the Director could impose a penalty of up to 10% of turnover<sup>304</sup>.

Under the Competition Act 1998, any party facing a decision by the Director, could appeal to the Competition Commission. Except in the case of an appeal against the imposition, or the amount, of a penalty, appealing did not suspend the decision's effect<sup>305</sup>. Any appeal against the DGT's decisions made to the Commission was to be determined by a Competition Commission Appeals Tribunal<sup>306</sup>.

## V. The Scope for Judicial Bodies

The role of courts largely related to challenges that operators could bring against Oftel by virtue of final or provisional orders under the Telecoms Act, of which they questioned the validity either on the ground that the DGT had not exercised his authority in a reasonable manner, or because of procedural impropriety. Operators could make an application to the High Court within 42 days of an order. If satisfied that the making or confirmation of the order was not within the DGT's powers or that he had failed to comply with requirements, it could quash the order or provisions therein<sup>307</sup>. Otherwise, courts could be involved by way of judicial review<sup>308</sup>.

## VI. France's Autorité de Régulation des Télécommunications (ART)

In France the setting up of an 'autorité administrative indépendante' for telecoms regulation occurred following a law passed in 1996, under Alain Juppé's Government, created the ART<sup>309</sup>, which started operating from 1997, hence, almost thirteen years after

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<sup>303</sup> ss.32(1),33(1),34(1)

<sup>304</sup> s.36(1)(2)(3)(8)

<sup>305</sup> s.46(1)(2)(4)

<sup>306</sup> s.48(1), schedules 7(27),8

<sup>307</sup> s.18(1)(2)

<sup>308</sup> Thatcher 1999, p.150

<sup>309</sup> Autorité de régulation des communications électroniques et des postes (ARCEP) since 20<sup>th</sup> May 2005

Oftel<sup>310</sup>. In management terms, rather than a single head, the ART had a board of five members, appointed because of their legal, technical and economic skills<sup>311</sup>. Decisions were to be taken collectively, by a minimum of three board members and by the majority of those present.

Once appointed, board members could not be dismissed. Thus, Governments could not threaten to remove senior ART officials. Furthermore, unless they had held office for a term not exceeding two years, board members posts were non-renewable<sup>312</sup>, reducing incentives to act according to Government policy. Board members appointed to replace members unable to complete their term, held office for the remainder of the term of the person replaced. Terms lasted six years, with one of three members appointed by decree leaving, hence replaced, every two years.

Holding the post of ART board member, remunerated according to the two highest senior civil servant administration grades, was incompatible with any professional activity, national elected office, and, direct or indirect interest in a company in the telecoms, broadcasting and information technology sectors. Board members could not:

- be part of the posts and telecoms public service commission (Commission supérieure du service public des postes et telecommunications, CSSPPT);
- disclose any information acquired during the post<sup>313</sup>.

Similarly to Oftel, wider staff management was an internal matter for the ART Chairman (*président*)<sup>314</sup>. The 1996 law established that relevant departmental staff would transfer from the Ministry responsible for telecoms to the regulatory agency according to functions conferred upon the latter<sup>315</sup>. Otherwise, the regulator could employ 'fonctionnaires publics'

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<sup>310</sup> Loi de réglementation des télécommunications n°96-659 du 26 juillet 1996. Some viewed it as a consequence of pressures stemming from earlier European directives fighting national monopolistic network industries; for example, Chevallier, J 1996, "La Nouvelle Réforme des télécommunications: ruptures et continuités", p.910, *Revue Française de Droit Administratif*, 12(5) pp.909-951. Maisl, H. 20/3/1997: "Droit des Télécommunications: Entre Déréglementation et Régulation - Les Transformations Récentes", p.215, in "L'Actualité Juridique - Droit Administratif", n.3 stressed this choice was focal to develop domestic competition

<sup>311</sup> Art.8, LOI 96-659, 26/7/96, also Art.L.36.1 of former "Code des Postes et Télécommunications" (now "Code des Postes et des Communications électroniques"). Henceforth, unless indicated otherwise, footnote references to articles will refer to the Code, instead of to articles in the aforementioned Loi for the reader's convenience. The law which established the ART, duly cited in the Code articles, has been amended. The laws amending it can be found when reading individual Code articles; [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)

<sup>312</sup> The regulator's website indicates that government appointee Dominique Roux, given a first term of two years, obtained a six-year reappointment, totalling eight years

<sup>313</sup> Art.L.36-2

<sup>314</sup> Art.L.36-3

<sup>315</sup> Art.22.V of the 1996 law

(civil servants), at the same conditions as those offered by the Telecoms Ministry, and external candidates<sup>316</sup>. All were bound by obligations of confidentiality.

ART funding came from charges levied for its services, licence fees and from public monies<sup>317</sup>. The ART proposed the funds estimated as necessary to the Minister in charge of telecommunications, who would include them in the annual budget. As for staffing, the ART's Chairman had discretion over spending. Accounts had to be submitted to the national auditing authority; the Cour des comptes.

Similarly to Oftel, the ART shared regulatory objectives with the Government Minister in charge of telecommunications<sup>318</sup>:

- i) the provision and financing of 'service public'<sup>319</sup>;
- ii) fair and effective competition in the interest of users;
- iii) developing sectoral employment, innovation and competitiveness;
- iv) establishing equitable terms of network access and interconnection;
- v) ensuring telecoms operators respected confidentiality of communications transmitted;
- vi) ensuring operators and service providers complied with defence and public security obligations;
- vii) due consideration of all geographical areas and users regarding access to services.

Also like Oftel, the ART carried out regulatory duties by enforcing telecoms licences, 'authorisations' specifying operators' obligations, and sanctioning breaches if necessary.

The ART's licensing authority was limited to independent, closed-user, networks. Refusals could only occur because of non-compliance with terms set by decree or those the ART established as part of its wider regulatory functions. No response within two months of applications meant the licence could be considered granted<sup>320</sup>.

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<sup>316</sup> Art.L.36-3

<sup>317</sup> Art.L.36-4

<sup>318</sup> Art.L.32-1.II

<sup>319</sup> Obligations imposed on operators, based on principles relating to the public interest - equality, continuity and adaptability - to be protected domestically

<sup>320</sup> Art.L.33-2

The regulator evaluated public telecoms network operators, including experimental ones, and public telephony services licence applications on the Minister's behalf. When licensing required a call for applicants, it published a report explaining the outcome of the selection procedure<sup>321</sup>.

The ART lacked Oftel's licences modification powers but comparably, after hearing the Conseil de la concurrence's (the competition authority) views:

- could request operators to modify interconnection conventions, which they agreed, but the regulator had to be notified of, to guarantee equality of terms for competition and service interoperability<sup>322</sup>;
- annually established which operators had significant market power (SMP)<sup>323</sup>, that is market share of over 25%. These operators were to be governed by special provisions.

The regulator:

- decided whether to approve technical and pricing terms of interconnection offers meant to be cost-oriented and reflect network usage, that SMP operators planned to publish<sup>324</sup>;
- could resolve disputes if asked (explained below)<sup>325</sup>.

To carry out his duties, besides commissioning expert evaluations and conducting studies<sup>326</sup>, the ART Chairman had the powers, as did the Telecoms Minister, to:

- collect any information from licensed operators to ensure compliance with principles and obligations pertaining to legislative or regulatory provisions, or those in their licences<sup>327</sup>;
- conduct relevant investigations, while ensuring non-disclosure of confidential information<sup>328</sup>.

Significant enforcement powers were combined with those to collect information. The

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<sup>321</sup> Art.L.36-7.1

<sup>322</sup> Art.L.34-8.I

<sup>323</sup> Art.L.36-7.7 based on turnover compared to market size, means of access to end users, operators' access to financial resources and their experience in the supply of market products

<sup>324</sup> Art.L.34-8.II

<sup>325</sup> Art.L.36-8/L.36-9

<sup>326</sup> Art.L.36-14. Operators had to provide annual statistical information on the use, coverage and means of access of their service

<sup>327</sup> Art.L.32-4

<sup>328</sup> Art.L.36-13

ART Chairman could institute proceedings to accomplish formal objectives<sup>329</sup>. Following a request from the Minister, business users' organisations, user associations, by individuals, or upon deciding so, the ART could sanction network operators and service providers breaching regulatory provisions relating to their activities<sup>330</sup>. If, for instance, an operator did not pay required 'universal service' fund contributions<sup>331</sup>, the regulator served a formal notice first, ordering remedial action within a set period, and could make the procedure public.

When no remedy was sought before the deadline, depending on the seriousness of breaches, the ART's sanction could entail:

- suspending completely or partially the licence, for up to one month;
- reducing its duration by maximum one year;
- revoking the licence, which was possible without notice if foreign composition of shareholders or of voting rights exceeded 20%, except European Union/European Economic Area actors<sup>332</sup>.

When breaches were not criminal offences, the ART could impose fines:

- of up to 3% of the previous year's turnover; or
- 5% on operators repeating the same offence.

If activity was insufficient to determine this threshold, the fine could not exceed one million French francs, or two million if the same breach was repeated. The fines were issued after the operator received notification of the order and had the possibility of examining the case and making representations.

So, the French agency, created long after the British regulator, was granted the formal power to fine first. The regulator could not be requested to look into three-year old matters not previously investigated<sup>333</sup>.

Besides sanctioning non-compliance following orders to remedy regulatory provision breaches, the ART applied sanctions for non-compliance with decisions regarding serious breaches of sectoral rules or dispute resolution having been called upon by aggrieved

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<sup>329</sup> Art.L.36-12

<sup>330</sup> Art.L.36-11

<sup>331</sup> Art.L.35-3.II.2

<sup>332</sup> Art.L.36-11.2

<sup>333</sup> Art.L.36-11.3



parties<sup>334</sup>. Dispute resolution causes comprised: interconnection refusals; failed commercial negotiations; interconnection or network access disagreements; conditions of shared facilities on public and private land<sup>335</sup>.

First, however, to resolve disputes, the ART:

- issued determinations after inviting parties' observations, specifying 'fair' technical and financial conditions.

For serious breaches of sectoral rules, it could:

- order 'protective' measures<sup>336</sup> to ensure continuity of network operations.

The regulator published decisions subject to confidentiality, notifying concerned parties<sup>337</sup>.

For different types of disputes between operators, upon requests of persons, professional organisations, user associations or the Telecoms Minister, the ART sought conciliation, prioritising it<sup>338</sup>. When conciliation failed, the Chairman referred the matter to the Conseil de la concurrence if relating to its competencies<sup>339</sup>. He referred matters regarding abuses of dominant positions or anti-competitive practices directly to the Conseil, which had to provide an opinion within 30 days when sought for emergency procedures<sup>340</sup>. He could seek the competition authority's advice on all other matters within its jurisdiction.

ART ancillary powers included<sup>341</sup>:

- allocating frequency and numbering resources to operators, and users, in objective and non-discriminatory terms for a fee covering related management costs, the Conseil d'Etat set by decree (more below)<sup>342</sup>;
- issuing, or designating which bodies could issue certificates of conformity to terminal equipment suppliers according to conditions the Conseil d'Etat set by decree<sup>343</sup>.

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<sup>334</sup> Art.L.36-11.2

<sup>335</sup> Art.L.36-8.I/II-2. See Art.L.47-48 on terms of use of public and private land by operators

<sup>336</sup> In French, 'mesures conservatoires'

<sup>337</sup> Art.L.36-8.I

<sup>338</sup> Art.L.36-9

<sup>339</sup> Art.L.36-9

<sup>340</sup> Art.L.36-10. The ART Chairman informed the 'procureur de la Republique' of matters constituting criminal offences

<sup>341</sup> See LOI n°96-659 26/7/96 for ancillary powers

<sup>342</sup> See jointly Art.L.34-10 and Art.L.36-7.6

<sup>343</sup> Art.L.34-9/L.36-7.2

Otherwise, the ART was given significant advisory functions, including being consulted by the Government on bills, decrees and regulations, which it would enforce<sup>344</sup>.

Separately, the law established that the number of licences issued could be limited given technical constraints relating to scarcity of frequencies. The ART proposed terms and conditions governing licence procedures to the Telecoms Minister in charge of publishing them<sup>345</sup>. The terms defining frequency allocation were to ensure effective competition.

Similarly, prior to ministerial approval, the regulator publicly issued advice on:

- universal service prices and related long-term pricing objectives,
- charges for non-competitive services<sup>346</sup>.

It advised the Government, with the CSSPPT which it could consult, on a report concerning the implementation of public service duties that the Government submitted to Parliament minimum once every four years<sup>347</sup>. Proposals concerned changes in technology, services and user needs, suggesting new services, hence, revising universal service obligations.

ART advice to the Telecoms Minister included appointees for two consultative commissions:

- radio networks and services Commission Consultative des Radiocommunications, CCR;
- networks and services Commission consultative des réseaux et services de telecommunications, CCRST,

which it could consult, and whose meetings the Chairman could attend, or send one representative, without deliberating<sup>348</sup>.

The ART issued an annual report to the Government, Parliament and the CSSPPT ahead of 30 June, advising regulatory or legislative changes it felt were needed in relation to sectoral, and competition, developments<sup>349</sup>.

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<sup>344</sup> Art.L.36-5

<sup>345</sup> Art.L.33-1.V

<sup>346</sup> Art.L.36-7.5

<sup>347</sup> Art.L.35-7

<sup>348</sup> Art.D97-3 (Art.D99-4 of the new Code)

<sup>349</sup> Art.L.36-14

## VII. The Formal Weight of Ministerial and Government Powers

This section shows that despite the powers delegated to the ART, the sectoral authority of successive centre-right and centre-left Governments remained considerable. The law specified that regulation would be undertaken ‘independently’ of the exploitation of networks and the supply of services, on behalf of the ‘state’, by the Government’s Minister in charge of telecommunications and the ART<sup>350</sup>.

Meanwhile, however, the ‘independent’ regulation the law required was challenged from the outset by other institutional arrangements not impinging on the ART’s powers. Another law passed at the time laid out that the ‘state’ remained majority shareholder of former state-monopoly France Télécom (F-T)<sup>351</sup>, and none of the civil servants working for the majority state-owned incumbent operator could be made redundant<sup>352</sup>.

The Government retained a significant say in the ART’s:

- management, as it appointed three board members by decree including the Chairman;
- participation in the preparation of French positions for international sectoral negotiations, and representation of France at international or European-level sectoral fora – both were dependent on the Telecoms Minister’s request<sup>353</sup>.

The Telecoms Minister’s formal authority, like the UK’s SoS, comprised licensing, following ART evaluations:

- public telecoms network operators and those intending to provide public voice telephony services<sup>354</sup>;

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<sup>350</sup> Art.L.32-1.I-3

<sup>351</sup> Art.1 “LOI no.96-660 du 26 juillet 1996 relative à l’entreprise nationale France Télécom”, Journal Officiel n°174, 27/7/1996, was passed simultaneously to the law instituting the ART as an ‘independent’ regulatory authority, creating a conflict of interest that successive governments did not alter long after the ART’s creation

<sup>352</sup> Changing a law effectively permitting tens of thousands of jobless reduced ministerial incentives to regulate France Télécom and open up near-monopoly market segments. Changes took place over seven years later; through “LOI n°2003-1365 du 31 décembre 2003 relative aux obligations de service public des télécommunications et à France Télécom” defining F-T’s organisational changes, and the “Décret n°2004-387 du 3 mai 2004 relatif au transfert du secteur public au secteur privé de la société France Télécom en application de la loi n°2003-1365 du 31 décembre 2003” authorising F-T to become majority private-owned and, formally, reducing the French state’s control

<sup>353</sup> Arts.L.36-1,L.36-5

<sup>354</sup> Arts. L.33-1,34-1,34-6

- service providers using spectrum not allocated by a telecoms authority, issued after the authority responsible for assigning spectrum approved the use of the frequencies<sup>355</sup>.

His only grounds to refuse licences were:

- national defence and public security concerns;
- technical constraints pertaining to limited availability of frequencies – in which case the Minister was responsible for publishing terms and conditions governing licence procedures<sup>356</sup>;
- applicants lacking the necessary financial or technical requisites for the provision of services; or,
- applicants had faced some form of sanction<sup>357</sup>.

Licences lasted fifteen years and set out obligations in the ‘cahier des charges’<sup>358</sup> for operators to comply with and the ART to implement. The Minister notified renewal conditions or reasons for refusing renewal at least two years before their expiry. Otherwise, he set the turnover threshold forcing large operators to provide accounting details of their single business activities with the Finance Minister<sup>359</sup>.

In fact, the ART collected sectoral information, applied regulatory provisions and enforced licences. However, the Telecoms Minister had to approve the sectoral rules the regulator established before they were entered into the Journal officiel, part of his extensive veto powers.

The rules that the ART could establish but required ministerial approval included:

- (i) rights and duties of all categories of network operators and service providers;
- (ii) prescriptions on technical and financial terms of interconnection;
- (iii) technical prescriptions for network and terminal interoperability, and good use of frequencies;

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<sup>355</sup> Art.L.34-3.2

<sup>356</sup> Art.L.33-1.V

<sup>357</sup> Arts. L.33-1,34-1,34-6

<sup>358</sup> The cahier des charges imposed wide-ranging obligations comprising: coverage; fair competition; national and security issues; licence fee payment; interconnection and interoperability conditions; the environment; universal service, such as regional cost differences to be spread in a non-discriminatory way. Also Chevallier 1996 p.930

<sup>359</sup> Art.L.33-1.I

- (iv) conditions for establishing and operating independent networks. A decree determined general terms, especially concerning essential requirements<sup>360</sup>.

The Telecoms Minister also authorised the contribution/s the ART proposed:

- to be added to the interconnection charge operators paid F-T, to finance the 'universal service' provided<sup>361</sup>;
- regarding a fund covering the costs of universal service obligations undertaken by various operators providing affordable services to unprofitable areas and customers, replacing the regime granting F-T the additional contribution.

Both Telecoms and Finance Ministers approved universal service prices, related long-term pricing objectives and prices charged by operators for services lacking competition, on which the ART issued its advice beforehand<sup>362</sup>.

The Government could therefore veto the ART on several issues, but lacked the ART's enforcement powers.

The Minister's ancillary powers included appointing, following the ART's advice, the 21 members of each of two advisory consultative commissions for:

- radio networks and services (CCR);
- networks and services (CCRST).

For each one, he appointed in equal numbers representatives of: network operators and service providers; business and home users; 'qualified persons'<sup>363</sup>. He could attend their meetings, or send one representative, without deliberating<sup>364</sup>.

The Minister or the ART consulted the commissions on all proposals concerning licensing procedures, on the setting out or modification of technical and operational terms, on technical specifications and provisions related to their specialised knowledge, as well as on interconnection and numbering issues. Accordingly, the commissions issued recommendations to them.

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<sup>360</sup> Arts.L.36-6,L.33-2

<sup>361</sup> Art.L.35-3.II

<sup>362</sup> Art.L.36-7.5

<sup>363</sup> Art.L.34-5

<sup>364</sup> Art.D97-3

## VIII. Other Public Bodies and Concurrent Powers

Formal arrangements allowed for actors other than the Government and the ART to be involved in sectoral regulation, with different degrees of formal authority. The key role for parliamentary figures was appointing the two ART board members not appointed by Government decree, selected respectively by the Presidents of the lower and upper Houses. Moreover, unlike the UK, parliamentary standing committees overseeing the sector could formally hear the ART and consult it on all regulatory issues<sup>365</sup>.

Otherwise, unless it passed new legislation, the French Parliament's regulatory role was relatively limited. Like the Government, Parliament and the CSSPPT commission it created received the ART's annual report recommending sector-specific legislative and regulatory changes.

The largely parliamentarian-run CSSPPT posts and telecoms public service commission<sup>366</sup> provided advice to the Minister regarding obligations in the 'cahier des charges' of universal service operator F-T<sup>367</sup>. It could call on the ART to monitor, and where appropriate sanction, operators required to respect to 'service public' and universal service obligations<sup>368</sup>.

Instead, the 'Conseil de la concurrence' upheld competition principles, collaborating with the ART according to respective jurisdictions and competencies. When the ART undertook conciliation procedures it would inform the Conseil which, if called upon the same matter separately, could decide to defer its ruling. Similarly, the Conseil informed the ART of any telecoms issues referred to it within the regulator's jurisdiction, seeking its advice on the practices referred<sup>369</sup>. If advised by the Conseil de la concurrence, operators with a non-telecoms infrastructure monopoly or dominant position were required to separate, if possible, the relevant infrastructure's activities at a legal level for competition purposes<sup>370</sup>.

The Conseil d'Etat, the legal advisor to the executive and supreme court for administrative justice, was the body that operators appealed to against ART decisions and sanctions for

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<sup>365</sup> Art.L.36-14

<sup>366</sup> Of its seventeen members, fourteen were members of the two houses, the remaining three were 'experts'

<sup>367</sup> Arts. L.32-2,L.35-2.I

<sup>368</sup> Art.L.32-2.I

<sup>369</sup> Arts. L.36-9,L.36-10

<sup>370</sup> Art.L.33-1.II

breaches of regulatory provisions. Regarding fines, pending appeals led to their suspension<sup>371</sup>. Otherwise, the Conseil d'Etat set out by decree:

- licence applications' content, specifying expected technical requirements to conform with essential obligations<sup>372</sup>;
- the timeframe within which the ART took dispute resolute decisions regarding parties unable to settle interconnection terms<sup>373</sup>.

The Conseil d'Etat also set out the decree establishing universal service financing mechanisms terms after hearing CSSPPT views<sup>374</sup>.

The Government spectrum agency, Agence nationale des fréquences (ANFR) tasks comprised:

- planning, managing and monitoring spectrum usage consistent with the jurisdictions of authorities to which radio frequencies had been allocated;
- coordinating installations of national radio stations to ensure the optimum use of available sites;
- preparing France's position and coordinating representation in international negotiations on spectrum issues.

The Executive Board included ART officials. Chairmanship of the ANFR and of the ART could not be held jointly<sup>375</sup>.

The CCR (radio) and the CCRST (network and services) were consultative commissions the Minister or the ART consulted given their respective specialised knowledge (see s.VII)<sup>376</sup>. Their remit included:

- deciding to investigate matters within their competencies if their Chairmen agreed with the majority of members, then informing the Minister and ART;
- creating/appointing specialised technical working groups for specific issues.

Recommendations would be transmitted to the Minister and the ART Chairman. Each commission had one secretariat assured by the ART and another by the Minister<sup>377</sup>.

Otherwise, operators required permission from the relevant authority defining installation

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<sup>371</sup> Art.L.36-11.4

<sup>372</sup> Art.L.34-2

<sup>373</sup> Art.L.36-8.I

<sup>374</sup> Art.L.35-3.-IV

<sup>375</sup> Art.L.97-1.I-II

<sup>376</sup> Art.L.34-5

<sup>377</sup> Arts.D97-1,D97-2

and operating specifications to occupy public carriageways<sup>378</sup>.

## **IX. The Scope for Judicial Bodies**

ART dispute resolution decisions on interconnection refusals, failure to reach commercial agreements on interconnection or network access or similar issues, could lead to an appeal or judicial review within one month of notification. Appeals did not suspend the decisions, but their implementation could be deferred if consequences could prove excessive or if new circumstances of exceptional gravity had arisen since. Protective measures the agency applied for serious breaches of sectoral rules could be subject to appeals or judicial reviews within ten days of notification. The 'cour d'appel de Paris' judged appeals, against these dispute resolute decisions or protective measures, within one month of notification<sup>379</sup>.

Otherwise, a court's authorisation, by order of the 'président du tribunal de grande instance' or a judge delegated by him, could allow ART officials to visit premises and obtain material accordingly. Either judge could stop the search at any time<sup>380</sup>.

## **X. Conclusions**

This chapter has set out in considerable detail the formal institutional arrangements comprising the different state actors involved in telecoms regulation in France and the UK following liberalisation, ranging from the selected regulators to formally relevant elected officials, competition authorities, sectoral agencies and judicial bodies. Drawing upon statutes less comprehensively has shaped the analysis of regulatory independence associated with indices in some of the literature explored in chapter 1.

Thus, as a first step, the chapter has crucially established the significant number of actors within respective national regulatory frameworks and the different ways for their formal role to be exercised, characterising a notable degree of formal intra-state fragmentation in both countries. Clearly, in formal terms, more actors than just Governments and their Ministers could play a sectoral role vis-à-vis the selected regulators and their different

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<sup>378</sup> Art.L.47

<sup>379</sup> Art.L.36-8.IV

<sup>380</sup> Art.L.40



statutory duties. As discussed in chapter 2, Nordlinger ignores intra-state fragmentation to examine state autonomy, but when assessing a regulator's independence it is critical to ascertain all the actors that, even without actual powers, can be involved in the agency's activity.

Secondly, this chapter has drawn out that a significant part of the formal role Governments continued playing post-delegation went beyond static ex ante powers and controls, such as appointing agency heads and board members - by a specific Minister in the UK or Government and Parliament in France, and ex post dismissal powers - possible in the UK but not in France.

In France, the ART formally shared its regulatory policy-making role with the Minister, resonating with Gilardi's independence index - constructed with similar but less 'subjective' equally-weighted formal independence indicators than Edwards and Waverman<sup>381</sup> - awarding Oftel 0.74 and the ART 0.65. Indeed, the chapter has identified the French regulator's considerable formal advisory functions, but also that Ministers retained extensive powers to determine policy. The chapter therefore depicts how analyses largely centring on Government controls over senior agency management (one or many board members, their terms, who appoints, renewal/dismissal) omit potentially critical formal indicators relating to actual policy-making.

In both countries, key powers determining sectoral market entry through licensing remained the prerogative of specific Ministers. At the same time, both regulators could exploit significant information-gathering and enforcement powers to carry out their duties.

Instead, notwithstanding the SoS's and the Competition Commission's respective veto roles<sup>382</sup>, Oftel's authority to modify licences, hence formally modify sectoral regulation and widen its powers, was markedly wider than the ART's, which for significant regulatory and legislative changes depended on Government and Parliament heeding its proposals. French Ministers retained many veto powers over ART policy-making.

Nonetheless, the ART possessed from its inception and before Oftel an array of sanctioning measures to enforce compliance, comprising significant fines, which the Government could not veto. To an extent, this resonates with Edwards and Waverman

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<sup>381</sup> ch.1, s.IV herein

<sup>382</sup> With vaguely qualified vetoing remits

giving the ART a higher formal independence score of 0.54 than Oftel's 0.48, taking Gilardi's scale<sup>383</sup>. Yet, Edwards and Waverman's 1998 and 2003 independence scores of Oftel did not change despite it acquiring key powers to fine up to 10% of operators' UK turnover under the Competition Act 1998, hence more than the ART's 3%-5%. Enforcement indicators were thus undermined.

More importantly, closely examining similarities and dissimilarities of statutes, the fragmentation they indicate and incomplete indices derived from them, does not provide a clear picture of the impact of formal arrangements on the independence in practice of regulators developing complex policies. At the very least, besides omitting preferences, formal arrangements underplay the role of industry actors. Thus, in the following four sub-case chapters, regulatory activity is analysed by applying the framework developed earlier in this thesis to selected telecoms issues, starting from Oftel and 3G policy in the UK, to uncover whether formal independence is the determinant factor for regulatory agencies to fulfill their policy preferences.

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<sup>383</sup> ch.1,s.IV

**Table 5: Summary of Formal Regulatory Arrangements: the ART and Ofstel**

	Regulators	Formal Agency Resources/Powers	Government/Ministerial Controls	Other 'State' Bodies' Role
Appointment of Board Members	ART	1. Five not dismissible – deliberations with 3, based on majority votes	1. Chairman and 2 other appointed by Government decree	1. Upper and Lower Houses Presidents appoint one each
	Ofstel	1. Powers vested in Director General of Telecommunications (DGT). Could resign writing to Secretary of State (SoS)	1. SoS appointed DGT, could revoke mandate for incapacity or misbehaviour	
Terms of Board Members	ART	1. 6-year non-renewable terms, except for members in office 2 years or less 2. Members unable to complete term replaced for remaining time	1. When ART first created, Chairman tenure 6 years. Other two for 2 and 4 years by random draw	1. When ART first created, 2 members' terms were of 4 and 6 years by random draw
	Ofstel		1. DGT 5-year term maximum. Re-appointment possible	
Staffing Autonomy	ART	1. Chairman discretion 2. Board could not hold other offices		
	Ofstel	1. DGT could appoint staff as saw fit	1. Treasury approved numbers and terms	
Funding Autonomy	ART	1. Partly service fees, partly taxes and other public money (e.g. licence fees)	1. ART submitted funding estimate to Telecoms Minister; in Budget d'Etat (Government proposed to Parliament)	1. Conseil d'Etat fixed funding terms in finance laws or via decree 2. Cour des comptes audited accounts
	Ofstel			1. Parliament funded expenses
Licensing, Rule-making, Enforcement	ART	ART: 1. Evaluated for Minister all public operators/service provider applications; if technical spectrum constraints proposed licensing terms 2. Established Significant Market Power operators; approved their interconnection offers; could ask to change interconnection agreements 3. Dispute resolution; via conciliation or sanctions 4. Called on Conseil de la concurrence for anti-competitive practices/abuses of dominant position 5. Sanctioned breaches. If order ignored: suspended, reduced duration or revoked licence. Or could fine up to 3% turnover, 5% where breach repeated	Telecoms Minister: 10. Licensed public network operators, telecoms service providers, spectrum usage 11. Approved ART rules including: (i) rights/duties of operators and SPs (ii) interconnection terms 12. Decided if ART represented France in international negotiations 13. Telecoms and Finance Ministers approved ART pricing advice on 'universal' and non-competitive services 14. Telecoms and Finance Ministers set turnover threshold for operators to itemise accounting details 15. Appointed members and could consult specialised commissions (see 20)	16. Appeals against ART access and interconnection-related disputes' decisions and protective measures, to cour d'appel de Paris 17. When trying reconciliation, ART informed Conseil de la concurrence which, if already called upon, could defer its ruling. If failed to reconcile called upon Conseil if its competency 18. Conseil d'Etat judged appeals against ART sanctions for breaches and disputes not in 14 19. CSSPPT advised on 'service public'. Consulted and was consulted by ART also on universal service 20. Specialised consultative commissions (CCR/CCRST) could investigate relevant matters and give advice

**Table 5 (continued)**

	Regulators	Formal Agency Resources/Powers	Government/Ministerial Controls	Other 'State' Bodies' Role
		<p>6. Power to collect information and investigate shared with Minister</p> <p>7. Consulted on bills, decrees or regulations by Government</p> <p>8. Annual report advising regulatory changes to Government, Parliament</p> <p>9. Could consult specialised commissions (see 20)</p>		
Licensing, Rule-making, Enforcement	Oftel	<p><b>DGT:</b> 1. Under Telecoms Act, power to institute proceedings viz. running unlicensed telecoms system (SoS too)</p> <p>2. As SoS, power to refuse licences for insufficient information</p> <p>3. Consent due for SoS to authorise compulsory PTO land purchase</p> <p>4. Modified licences with consent</p> <p>5. Upon dissent, could refer matter to Competition Commission</p> <p>6. Directed on licence matters to be complied with unless he consented</p> <p>7. Issued provisional or final orders to stop contraventions and secure compliance; could revoke either</p> <p>8. Could require documents unless unobtainable in civil proceedings</p> <p>9. Could assist any party in proceedings except operators</p> <p>10. Resolved performance standards and billing disputes</p> <p>11. Reviewed and collected telecoms information could arrange for publication for consumers</p> <p>12. Co-ordinated Telecoms and Wireless Telegraphy Acts advising SoS on licensing</p> <p>13. If SoS did not, DGT set-up advisory bodies as saw fit</p>	<p><b>SoS:</b> 14. Could supersede anything DGT did viz. duties, for national security or relations with foreign governments</p> <p>15. Granted licences, after consulting DGT, designating public telecoms system. Could adopt scheme making system transitionally cease to be PTO</p> <p>16. Established licensee land usage rights relating to Telecommunications Code</p> <p>17. Could direct DGT not to modify licence upon receiving copy of proposal if (i) it appeared it had to be based on Competition Commission report or (ii) national security interests or relations with foreign governments</p> <p>18. Owed copy of DGT reference to Commission. Could direct it not to proceed for reasons in 17(ii)</p> <p>19. DGT published Commission report unless SoS considered it against public interest, directing DGT to omit matters</p> <p>20. If directed DGT not to apply modification, DGT would comply</p> <p>21. Could give DGT directions on priority matters to be reviewed</p> <p>22. Could make regulations co-ordinating DGT/DGFT concurrent functions</p> <p>23. Made rules on appeals and tribunals; functions on Competition Commission Appeal Tribunals President</p> <p>24. Licensed under Wireless Telegraphy Act</p>	<p>25. Competition Commission investigated if matter in DGT reference against public interest, and modification prevented it. DGT to mind report</p> <p>26. Either House could annul SoS regulations by resolution. SoS laid before Houses annual DGT report</p> <p>27. High Court could quash final/ provisional orders upon application</p> <p>28. DGT exercised CA functions with regard to whether matter for Director General of Fair Trading (DGFT) too</p> <p>29. DGT/DGFT concurrency on most CA functions re: anti-competitive practices (Chapter I prohibition)/abuses of dominant position (Chapter II)</p> <p>30. Shared power to grant and cancel respectively exemption and immunity</p> <p>31. Could investigate infringements, authorising officers to enter premises without notice too, if suspected occupier was part of investigation</p> <p>32. Directions, or court orders for failure to comply</p> <p>33. Could impose 10% turnover fine</p> <p>34. Appeals to Competition Commission against DGT decisions determined by Appeals Tribunal</p> <p>35. Trade and Industry Select Committee could ask papers/records</p>

## Chapter 4: Oftel and 3G Policy in the UK

### I. Introduction

This chapter applies the regulatory autonomy framework developed earlier in this thesis to examine the introduction of 3G or Universal Mobile Telecommunications System (UMTS)<sup>384</sup> licences in the United Kingdom. 3G licensing in the UK provides a valuable first case to assess the regulatory independence in practice of the Office of Telecommunications (Oftel). The salience of 3G mirrors the progressive growth of the EU-wide mobile telephony market, with the UK acting as an innovator on policy and in service provision<sup>385</sup>. Given its role as sectoral agency, Oftel was in charge of regulating the licensed mobile telecoms operators intending to spread new, advanced technology in a segment of the telecoms market that had expanded enormously since its inception and continued to do so<sup>386</sup>. Other prominent actors played part in developing the policy nonetheless.

Notwithstanding the considerable uncertainty regarding both the economic value of the technology and customer demand for UMTS products<sup>387</sup>, the prospect of entering the new and advanced 3G market raised significant 'non-state' industry interest given the huge success of 2G (second generation) mobile telephony, also known as GSM<sup>388</sup>. Similarly, the Government's control of the radio spectrum, hence of the prospective sale of a scarce product in high demand, drove ministerial activity. The policy saw the active involvement

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<sup>384</sup> Third-generation (3G)/UMTS services are associated with voice, internet-related services, images, data transmission. The terms will be used interchangeably out of convenience. UMTS is one 3G technology, designed to succeed 2G GSM (Global System for Mobile Telecommunications) systems allowing for voice and basic data services like SMS (Short Message Service). For more on 3G technology, see International Telecommunication Union (ITU) (<http://www.itu.int/osg/spu/ni/3G>), an organisation within the United Nations system where Governments and industry coordinate global telecoms networks and services. This UN agency's mandate comprises allocating spectrum and registering frequency assignments

<sup>385</sup> Regarding early introduction of UK mobile services, Thatcher 1999, especially pp.294-296 and Tables 39-40 therein on rapid uptake; Hulsink 1999. On 3G, Thatcher, M 2005 "Sale of the Century: 3G mobile licensing in Europe" ch.5 in (eds.) Black, J, Lodge, M and Thatcher, M "Regulatory Innovation", Edward Elgar

<sup>386</sup> Over the period in which 3G licensing was being finalised (Q2 1999/00-2000/01; so, between July-September 1999 and 2000) mobile subscriber volumes rose 76%, to about 34 million units; charts 1-2, Table 2. Moreover, comparing the same quarters, total mobile operator revenues rose over 25%, with total Q2 2000/01 consumer mobile services expenditure above an estimated £1.85bn (Table 1). Oftel's "Market Information Mobile Update" 1/2001

<sup>387</sup> Börgers, T and Dustmann, R 2005 "Strange Bids: Bidding Behaviour in the United Kingdom's Third Generation Spectrum Auction", p.14, first appeared as mimeo, University College London, 2001, then printed in *The Economic Journal*, pp.551-578. Vol.115 (July). Also Schmidt, KM 2002, "Efficiency of the British UMTS Auction - A Comment on Börgers and Dustmann", *Ifo Studien*, Vol.48(1), pp.111-14, p.112. Börgers indicates his role as economic advisor to the Radiocommunications Agency for the UK's 3G licence auction

<sup>388</sup> GSM is the more popular of four main 2G standards in terms of million users, largely because of higher 2G mobile telephony adoption in Europe than elsewhere. Figures 1.1-1.2 and table 1.1, Selian, A 16/1/02 "3G Mobile Licensing Policy: From GSM to IMT-2000 A Comparative Analysis", ITU- GSM Case Study

of the Department of Trade and Industry's (DTI) executive agency responsible for planning and managing efficiently spectrum use, the Radiocommunications Agency (the RA).

By examining participants and the resources available to them, preferences, processes, decision-making time-lengths and outcomes, Oftel's pursuit of its competition preference, through additional market entry, vis-à-vis different influential industry actors is analysed. Drawing on the five selected indicators illustrates clearly that Oftel showed Type II autonomy. The chapter shows the limited extent to which the regulator's formal authority mattered. Aided by preference convergent influential 'state' actors with and without formal powers, respectively the Government and the RA, which mobilised their policy resources, in practice, Oftel pursued its preference by prioritising negotiation over imposition, dealing persuasively with influential divergent industry actors. In the process, the regulator eschewed formal powers it had at disposal. The regulator exploited decisively informal ties, exchanges and policy expertise, allowing it to understand and exploit key information, instead.

### *Outline of Events*

The British Labour Government launched a consultation on 3G spectrum licensing in mid-1997 indicating its intention to use auctions. Responses were overwhelmingly positive. Although licensing powers were held by the Secretary of State, between March 1998 and May 1999, the RA, the Government's spectrum agency, conducted working group meetings, comprising Oftel and industry members, to develop policy. Until February 1999, there were two key working premises. One was the licensing of four 3G operators. The second was the use of existing service provision obligations on the two largest 2G incumbent operators, Vodafone and BTCellnet, to provide possible 3G new entrants without a 2G network access to theirs.

In February 1999, Oftel reviewed mobile market competition and identified 3G licensing as an opportunity for new entry. The Government heeded the advice, allowing the auctioning of five licences and reserving one for a new entrant. Having reserved a licence for a new entrant, existing service provision obligations were now deemed not to provide sufficient guarantees for possible new entrants without 2G networks, potentially discouraging them from bidding. Accordingly, all four 2G incumbent operators were required to accept a

licence modification imposing 'roaming', allowing 3G new entrants to exploit incumbents' 2G networks for a long-enough period (end-2009) to build sufficient network capacity.

In-between informal discussions, Oftel formally consulted on roaming between May and June 1999. Meanwhile, one of the four incumbents, One2One, took legal action against the Government's decision that roaming should be a pre-condition to bid for 3G auctions. In October 1999, Oftel announced that Vodafone and BTCellnet had accepted the roaming condition, leading the Government to avoid imposing roaming through auction rules. In April 2000, the UK Government auctioned five licences, including one reserved for an entrant, raising £22.5bn.

## **II. Participants and Resources**

Despite its prominent formal role as the UK's telecoms regulator with significant statutory instruments deployable under the Telecommunications Act 1984, Oftel's 3G policy involvement in the early stages appeared circumscribed by several other key actors whose impact on policy depended on a range of factors that were not limited to those of a statutory nature.

At the 'state' level, the SoS retained significant statutory authority, particularly with its key Wireless Telegraphy Act (1949/1998) spectrum licensing powers. The SoS formally controlled the 'supply' of the 'physical' resource defining the whole policy. In practice, while 3G licensing meant that relevant licence modifications would ensue as Oftel required under the Telecoms Act, it was the DTI's RA, with no formal authority over Oftel, that developed policy under the infrequent and irregular public monitoring of Ministers.

The successful implementation of any regulatory policy meant market practicalities were important too. Among numerous participants discussing policy development, the structural/network, informational and financial positions of the four 'non-state' 2G incumbent mobile operators meant they were particularly well-placed to enter the 3G market compared to other interested actors. Regulatory and established industry players had been interacting for many years too, thus, unlike potential new entrants, knew the regulatory process well, if not each other, to help shape policy adoption discussions. This section shows that key resources, statutory and non-statutory, were spread among distinct actors that helped develop 3G policy, consistent with Type II autonomy.

A combination of regulatory actors, elected officials, mobile operators, equipment manufacturers and others proved eager to develop 3G technology and thus cohabited the policy's 'regulatory space' with Oftel. UK industry proponents promoted 3G emphatically from 1997 onwards. They argued its impact went from domestic service advancement to a global 'vision' anticipating an impact beyond the sector; "technologies and standards will be in demand in developing countries to provide extensive low cost access to modern telecommunications services"<sup>389</sup>.

Under the Telecoms Act, Oftel formally regulated telecoms systems as a whole by modifying and enforcing telecoms licences. However, the agency shared its regulatory role. This was particularly so for 3G, with competencies and authority fragmented among several 'state' actors. In statutory terms alone, apart from key powers to veto telecoms licence modifications<sup>390</sup>, the Secretary of State for Trade and Industry (the 'SoS') had licensing powers under the Telecoms Act and under the Wireless Telegraphy Act 1949 (WTA 1949), superseded, following a 1997 consultation, by the Wireless Telegraphy Act 1998 (WTA 1998)<sup>391</sup>. Mobile operators required both licences, but with 3G dependent on the radio spectrum for the exploitation of bandwidth allocated to transmit voice, data and images wirelessly, the WTA was of primary importance for licensing requirements.

Thus, formally, the SoS commanded extensive authority since licensing powers related to the key 'physical' asset, 3G spectrum, over which it had exclusive control. The position of the SoS was especially noteworthy when considering that the business use of radio constituted a £13 billion contribution to British GDP in 1995/96 growing at an annual rate of 11%<sup>392</sup>, and supporting over 400,000 jobs. Accordingly, 3G licensing was complementary to other significant issues.

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<sup>389</sup> DTI 2/97, "Developing Third Generation Mobile and Personal Communications into the 21st Century - An Industry Advisory Document Prepared by the UK 3rd Generation Mobile Group", Executive Summary

<sup>390</sup> ch.3 above

<sup>391</sup> The WTA 1998 repealed the WTA 1949 licensing arrangements. Its introduction reads: "to make provision about the grant of, and sums payable in respect of, licences under the Wireless Telegraphy Act 1949 other than television licences, and about the promotion of the efficient use and management of the electromagnetic spectrum for wireless telegraphy; and for connected purposes". The WTA 1949 did not allow licence auctioning

<sup>392</sup> RA 5/97, "Implementing Spectrum Pricing"



The SoS was the Government Minister heading the DTI<sup>393</sup> and its affiliated Ministers, steering departmental policy according to the political agendas of the day. The DTI was the 'umbrella' Government department encompassing and sponsoring the telecoms sector, with a strategic political interest in its performance since liberalisation<sup>394</sup>. So, successive Ministers holding telecoms as part of their portfolio could issue public statements on UMTS, and hence, draw attention over policy and shape its direction.

The DTI showed commitment to 3G as early as February 1997<sup>395</sup>, by publishing the industry advisory document prepared by the 'UK 3rd Generation Mobile Group'<sup>396</sup> entitled 'Developing Third Generation Mobile and Personal Communications into the 21st Century'. The DTI published the industry document despite the Science and Technology Minister's explicit claim that proposals and recommendations did "not necessarily reflect the views of Government"<sup>397</sup>.

The endorsement of a 3G policy by the DTI's Small Firms, Trade and Industry Minister, Barbara Roche, followed five months and eighteen comments later through a consultation in which the Government said it was "determined that the UK should play a leading role...both within Europe and internationally"<sup>398</sup>, with successive DTI Ministers getting involved at later stages. Indeed, the 'chain of command' at the DTI, with the SoS heading junior Ministers, meant the relevance and involvement of the department (not just the SoS) in developing 3G policy was wide-ranging - going beyond what was formally delineated in the Telecoms Act.

The operational body managing non-military radio spectrum on the DTI's behalf was its 'executive agency', the RA, directly reporting to the lead DTI Ministers<sup>399</sup> and, though the DGT sat on its informal administrative Steering Board<sup>400</sup>, with no powers over Oftel. The RA's role involved representation at the international level, commissioning research,

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<sup>393</sup> The three SoS during the earlier policy stages: Margaret Beckett (2/5/1997 – 27/7/1998), Peter Mandelson (27/7/1998 - 23/12/1998) (Resigned), Stephen Byers (23/12/ 1998 - 8/6/2001)

<sup>394</sup> Thatcher 1999; Hulsink 1999; Hood et al 2000

<sup>395</sup> Broadly when UK mobile subscriber uptake started incurring very strong growth, turning into the late-1990s 'telecoms and internet boom (and bust)'. see Fig.7, Oftel's "The UK Telecommunications Industry Market Information 2001/02" 3/03

<sup>396</sup> Industry body comprising the four mobile network operators, other operators, several manufacturers and other interested parties, to stimulate the development of third generation mobile personal communication systems in the UK

<sup>397</sup> DTI 2/97, 'Foreword by the Minister for Science and Technology'

<sup>398</sup> DTI 7/97, Foreword, "Multimedia Communications on the Move"

<sup>399</sup> Under the SoS, Under-Secretaries: Barbara Roche (May 1997-January 1999), Michael Wills (January-July 1999) and Patricia Hewitt (July 1999-June 2001) before becoming SoS

<sup>400</sup> Interview: David Hendon, RA Chief Executive, 1/4/09

allocating spectrum and licensing its use as well as avoiding technical radio interference. Thus, when consultative meetings starting from March 1998 were convened for all parties interested in 3G to participate, DTI Communications and Information Industries (CII) Directorate officials<sup>401</sup> attended in addition to RA officials chairing the sessions and conducting policy development. Creating and defining the agenda, and hence the issues to be discussed so as to allocate 3G licences, was therefore largely undertaken by the RA.

Domestically, RA activity with direct 3G licensing implications had taken the form of technically 'expert' discussions over spectrum pricing well before the DTI's July 1997 official consultation<sup>402</sup>. The agency had sought industry views on how to change pricing away from licence fees based on its fully allocated costs, via consultations, at least since 1994<sup>403</sup>, in order to improve efficient spectrum management.

Accordingly, the RA, with its strong engineering skill-set - of almost half of headquarters-based officials, including Chief Executive David Hendon<sup>404</sup> - relative to a small competition function<sup>405</sup>, was involved in policy development early on. Once the Government introduced draft legislation in Parliament (the Wireless Telegraphy Bill) to reform how fees were set for licences to install or use radio transmitting equipment, the RA launched another spectrum pricing consultation in May 1997<sup>406</sup>.

While focussing on administrative pricing<sup>407</sup>, the RA anticipated discussions on spectrum auctions, invoked in the DTI July 1997 consultation as the likely 3G licensing procedure subject to the Wireless Telegraphy Bill being passed. Its key regulatory role was heightened by its regular representation of the DTI in international fora<sup>408</sup>, such as those on technical standards in which it frequently took the lead<sup>409</sup>. Oftel attended as a distinct entity<sup>410</sup>, operating and airing its views separately.

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<sup>401</sup> RA "Minutes of first UMTS Action consultative group (UACG) meeting on 20 March 1998 at 1 Victoria Street, London" and all 'Meeting minutes' published thereafter on the old RA site, now: <http://www.ofcom.org.uk/static/archive/spectrumauctions/3gindex.htm>

<sup>402</sup> DTI 1996 White Paper "Competitiveness - Forging Ahead" s.14.8

<sup>403</sup> Radiocommunications Agency 3/94 "The Future Management of the Radio Spectrum"

<sup>404</sup> Interview: Hendon

<sup>405</sup> Interviews A,B,C

<sup>406</sup> RA 5/97

<sup>407</sup> Fees determined by regulation

<sup>408</sup> Interview: Hendon

<sup>409</sup> ETSI (European Telecommunications Standards Institute), CEPT (the Conference of European Post and Telecommunications Administrations), UMTS Forum and the European Commission undertook the international promotion of UMTS standards - DTI 7/97 p.5

<sup>410</sup> RA 5/97, DTI 7/97

Given its spectrum management role, the RA co-ordinated and conducted DTI 3G policy development from the start without statutory powers. At consultative meetings between March 1998 and May 1999, Oftel officials were repeatedly outnumbered by RA, and CII, officials. The RA's 'hands-on' management of 3G was demonstrated months before the first UMTS Action consultative group (UACG) meeting in which the Government's proposals for the auction of UMTS licences would be discussed by industry.

In October 1997, the RA sought tenders for financial consulting services for the then unconfirmed auctions, while forming an in-house team to oversee the 3G licensing process<sup>411</sup>. Three months later, before the first UACG meeting, the RA announced the appointment of NM Rothschild as the financial advisor that would handle the still unconfirmed auctions<sup>412</sup>. It selected consultants that would advise on technical aspects of spectrum requirements, assisting with commercial facets of technical decision, thus adding credibility<sup>413</sup>. The RA subsequently appointed University College London for auction design advice, thus pre-empting the passing of the Wireless Telegraphy Bill 1997 into law. Academic experts appointed were headed by economist Professor Kenneth Binmore, of the ESRC Centre for Economic Learning and Social Evolution, who would participate in and make presentations at relevant UACG meetings<sup>414</sup>.

Meetings were chaired by the RA's Jeremy Clayton, with Oftel always present. Clayton stated from the start that the "Group's input would help the Government reach appropriate and workable decisions on the various aspects of UMTS licensing. While there was as yet no final decision that UMTS licences would be the subject of an auction, this was currently the clear working assumption...UACG would avoid duplicating the valuable...more technical...work undertaken by the UK Third Generation Advisory Group UKTAG (e.g. on spectrum packaging)"<sup>415</sup>. Clayton chaired the Auction Steering Board comprising Oftel, DTI and Treasury officials<sup>416</sup>.

Telecoms operators and manufacturers expressed their views regarding creating a 3G market throughout the period following the DTI's consultation and beyond. Industry, hence 'non-state', actors constituted the vast majority of the 35 respondents to the DTI

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<sup>411</sup> "Radiocommunications Agency searches for consultant to assist with UMTS Licensing Process", 1/10/97

<sup>412</sup> "Radiocommunications Agency appoints financial adviser for Third Generation Telecoms Licensing Process", 28/1/98

<sup>413</sup> Interview: Hendon

<sup>414</sup> RA 28/1/98

<sup>415</sup> "Minutes of the UACG meeting on 20 March 1998 at New King's Beam House", London. Brackets added

<sup>416</sup> Interview: Hendon

July 1997 document<sup>417</sup>, bringing sectoral knowledge to the fore. The breadth of high-profile respondents included: the four existing 2G mobile network operators; big domestic operators, like Cable&Wireless and Ntl; US-based giant AT&T; manufacturers like Nokia, Eriksson and Lucent; satellite organisations like Inmarsat; telecoms associations. The significant participation and interest in UACG sessions by major domestic and global companies was reflected by the fact that the minimum attendance during the eight policy development meetings between March 1998 and May 1999 was thirty-three, with frequent peaks of forty participants and above<sup>418</sup>.

Clayton pointed to an excess of participation early on. He set 'regulatory space' boundaries, helping to cement cohesion among state and non-state players able to make a difference to policy development. In July 1998, at the third meeting, he asserted that membership was originally offered to organisations that responded to the July 1997 consultation, with subsequent additions limited to firms which strongly influenced the development of UMTS, such as manufacturers, limiting UACG size for "practical" reasons<sup>419</sup>. Restricting participation entailed furthering closer relations between regulators and regulatees<sup>420</sup>.

Although most participants represented well-known firms and had some UK operations, operators attending UACG meetings were characterised by significant disparity. Indeed, not all telecoms firms present at meetings were 'formally regulated' by Oftel. France Télécom UK had no licensed telecoms operations in the UK<sup>421</sup>. Participating in UACG meetings, and voicing views at them, was therefore an exceptional opportunity for some actors to try having some policy-shaping impact they would have otherwise lacked. Potential new entrants could try informing policy development by raising issues concerning them.

However, select industry actors were especially significant to develop policy given the key non-statutory resources each one possessed. The four incumbent mobile network operators were highly influential in many different ways. Vodafone, BT-owned Cellnet, One2One and Orange constituted the whole 2G market, giving them decisive first-mover advantage. Hence, they were best placed to develop 3G through existing networks and

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<sup>417</sup> DTI 18/11/97 "Next Generation of Mobile Communications Moves a Step Closer"

<sup>418</sup> see all UACG Minutes referenced

<sup>419</sup> "Minutes of the UACG meeting on 10 July 1998 at New King's Beam House"

<sup>420</sup> Originally, UACG members listed in early 1998 were 83; RA's former website, now on Ofcom's site

<sup>421</sup> Oftel's "The Public Register of Telecommunications Licences". Subsequently, the French incumbent company France Télécom controlled operating interests in the UK under its name (France Télécom Network Services), besides acquiring control of other licensed operators, notably Orange

acquired expertise. They had undertaken the 'sunk costs' of establishing 2G networks, considered the main obstacle to entering the telecoms sector. The incumbents' 2G businesses were complementary to 3G. Their roll-out costs for necessary 3G infrastructure (radio masts and the like) were substantially less than those of a new entrant, since they could 'piggyback' their 2G infrastructure.

Critically, incumbents had established customer bases, and hence existing relationships with them, and brand-name recognition. They were financially powerful too. Entrance into the 2G telecoms market had come at almost no licence cost, "in the region of just £40,000"<sup>422</sup>, followed by high returns<sup>423</sup>. These and network considerations loomed even larger in the early policy planning stages<sup>424</sup>. Several respondents to the DTI's consultation expected the four 2G operators to be the critical basis for 3G in the UK<sup>425</sup>. Otherwise, incumbents had been the sole focus of Oftel's mobile market regulation, giving agency officials the opportunity of learning in-depth about the operators' activities, and giving both sides the scope for direct contact and exchanges.

Notwithstanding similar resources, there were important resource differences between the four mobile operators too. Although their market operations came into effect in 1985, Vodafone and Cellnet were licensed prior to BT's privatisation, in May 1983<sup>426</sup>. A duopoly until 1991, they went unchallenged for about six years to recover initial investments, establishing their status as mobile operators ahead of subsequent entrants. Accordingly, Vodafone and Cellnet had been subject to Oftel's regulatory scrutiny for a longer time period and, for their more influential market position reflecting considerably larger networks, had to comply with more stringent licence obligations.

Vodafone and BTCellnet continued to possess 'Market Power' while 3G policy was developed<sup>427</sup>, which entailed the ability to charge higher prices despite increasing 2G competition<sup>428</sup>. Thus, they were already subject to licence conditions requiring them to provide wholesale airtime to independent service providers that did not have their own

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<sup>422</sup> Binmore and Klemperer 3/02, C90 in "The Biggest Auction Ever: The Sale of the British 3G Telecom Licences", C74-C96, *The Economic Journal* 112 (Royal Economic Society), p.C76

<sup>423</sup> Thatcher 2005

<sup>424</sup> Binmore and Klemperer, 3/02, p.C80

<sup>425</sup> Beddoes, T 4/6/98 'Dolphin Response to "Multimedia Communications on the Move"', Ionica's 27/10/97 response; Norweb Communications' Response to DTI Consultation Third Generation Mobile Licences' (undated); The Telecommunications Managers' Association, 16/10/97 "Multimedia Communications on the Move - Response to the Advisory Document by TMA"

<sup>426</sup> Hulsink 1999, p.149

<sup>427</sup> Oftel 2/99, "Competition in the mobile market"

<sup>428</sup> Intensification occurred because of Orange and One2One's entry

networks but wanted to compete through service provision; a formal, Telecoms Act, licence condition that Oftel had exempted Orange and One2One from since 1997<sup>429</sup>.

Similarly, given the new licence templates to be issued consistent with the EC Licensing Directive to take effect in June 1999<sup>430</sup>, during 3G policy development Oftel proposed to determine that Vodafone and BTCellnet would be subjected to a 'Market Influence' (MI) condition<sup>431</sup>. If triggered, they had to provide airtime to service providers if asked to do so, avoid undue discrimination or preference favouring their own providers, and publish prices and service terms<sup>432</sup>. Service providers (SPs) could agree commercial terms for new services if these were published by operators, but had no right to demand that either network operator provide services not already available.

Instead, One2One and Orange, respectively licensed in 1993 and 1994<sup>433</sup>, started competing with the ex-duopolists after 1991, when three personal communications networks (PCNs) licences were issued<sup>434</sup>. While the 3G policy was being discussed, 1998/99 total subscriber market shares still showed a clear divide. Vodafone controlled 37.5%, Cellnet 30.4%, Orange 17% and One2One 15.1%<sup>435</sup>. Estimated retail revenue figures indicated that Vodafone's mobile telephony operations were generating over £1.1bn more than Orange and One2One<sup>436</sup>.

Vodafone's DTI consultation response illustrated broadly the non-formal influence of 2G incumbents in the 3G market. Vodafone stressed it had "made a major contribution to the development of the UK cellular market and, by building the UK's second largest telecommunications network, created jobs for over 6000 staff. A larger number of jobs have been created in other sectors of the industry...to support Vodafone, such as service providers, dealers and manufacturers"<sup>437</sup>. So, its influence was especially pronounced, although the other three incumbents had considerable headway over potential 3G market new entrants too.

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<sup>429</sup> Oftel 4/97 "Fair Trading in the Mobile Telephony Market - Conclusions on future competition policy"

<sup>430</sup> Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services

<sup>431</sup> Oftel 2/99

<sup>432</sup> RA/UACG 98(18), 26/10/98, "Access to Second Generation Networks"

<sup>433</sup> DTI 7/97, p.1

<sup>434</sup> Hulsink 1999, p.149

<sup>435</sup> Oftel 3/03 "The UK Telecommunications Industry Market Information 2001/02", Table30, p.53, which presents Cellnet with its current name O2 (no longer BT-controlled) and, One2One as T-Mobile

<sup>436</sup> *ibid*, Table31, p.54

<sup>437</sup> "Response to "Multimedia Communications On The Move" by Vodafone Ltd' 17/10/97, p.3

Thus, consistent with Type II autonomy, this section has shown that different actors had valuable resources to exert influence from the start of policy. Building on the success of 2G mobile telephony, the United Kingdom's discussions on the introduction of UMTS, projecting innovative high-speed and high-quality mobile multimedia services, saw participation from 'state' and industry actors possessing key resources. These resources were dispersed, with no single influential group of participants.

### III. Preferences

Interest in 3G spectrum led a diverse range of state and non-state actors to participate in policy development, many of whom were influential because of key contributions they could, but also wanted to, make. The 3G policy preference scenario was a fairly divided one. Oftel, the Government possessing licensing authority, and the RA responsible for spectrum management, converged on promoting 3G competition with due attention to market entry. New entrants central to the regulator's policy preference, but with limited influence, supported them.

Instead, the incumbent 2G operators, which were best-placed to create a 3G market given their existing networks even according to other industry actors, displayed divergence. They wanted to exploit their advantageous position. Thus, this section shows that as Oftel pursued competition in the nascent 3G market, the preferences of influential actors differed. The regulator faced preference divergent actors but also had, from the outset, the support of key convergent 'state' actors, consistent with Type II autonomy.

Although the telecoms industry took the initiative to discuss what policy issues needed developing and Government Ministers expressed support early in 1997, by March 1998, when the Wireless Telegraphy Act received Royal Assent<sup>438</sup>, there was widespread consensus that a concerted effort was desirable to introduce 3G in the UK. Despite the reticence of most<sup>439</sup>, industry players had also broadly accepted that the Government's licence allocating mechanism would be auctions<sup>440</sup>. Within two months from the new Act's

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<sup>438</sup> DTI 18/3/98, "New Legislation on the Right Wavelength for Business, Consumers, Jobs", P/98/216

<sup>439</sup> "Inmarsat comments on Multimedia Communications on the Move" for strong opposition to auctions, but also "Response from the GSM MoU Association to the Consultation Document from the United Kingdom Department of Trade and Industry" 13/11/97

<sup>440</sup> "BT Response to Government Consultative Document: Multimedia On The Move" 17/10/97, p.2. One2One 10/97, p.19, offered to provide the auction design expertise of parent companies USWest and Cable&Wireless. In its separate response Cable&Wireless Communications expressed strong opposition to

introduction, on which the auctions depended<sup>441</sup>, DTI Minister Barbara Roche declared the firm intention to hold spectrum licence auctions in summer 1999 “subject to market and other developments and to final decisions nearer the time”<sup>442</sup>. So, auctioning 3G licences seemed to constitute a relatively uncontested platform to launch a new mobile market.

The Labour Government’s full announcement actually outlined three policy objectives: “(i) utilise the available UMTS spectrum with optimum efficiency; (ii) promote effective and sustainable competition for the provision of UMTS services; and (iii) subject to the above objectives, design an auction which is best judged to realise the full economic value to consumers, industry and the taxpayer of the spectrum”<sup>443</sup>. Of these, Binmore and Klemperer, the UACG’s primary auction designers, suggested and worked on the assumption that the first and third objectives were closely tied and that both were effectively covered with the decision to undertake an auction on efficiency grounds<sup>444</sup>, contrary to scepticism about the unambiguous efficiency of auctions among other scholars<sup>445</sup>.

In contrast to the RA conducting policy development on the Government’s behalf, Oftel was not driven by exactly the same policy objectives. The regulator never expressed a clear public preference, or concern, on the issue of spectrum efficiency. Similarly, it did not articulate its viewpoint on holding 3G licence spectrum auctions during the policy development stages. Yet, if formal provisions dictated the agency’s actions, the statute governing its regulation of the telecoms sector did not suggest that Oftel should have been passive about both issues.

The SoS had formal spectrum management duties specified in the Wireless Telegraphy Act, and hence of spectrum efficiency. Oftel’s Telecoms Act objectives did not precisely correspond to the Government’s spectrum efficiency policy objective. Oftel had no formal role set out in the WTA, hence, no duty in relation to UK spectrum and its efficient use. However, the Telecoms Act did say that the DGT had the duty to “promote efficiency and

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auctions “Multimedia Communications on the Move - submission by Cable&Wireless Communications”, 10/97. Also ‘Ntl response to the DTI Consultation “Multimedia Communications on the Move”. Vodafone did not express opposition to auctions

<sup>441</sup> DTI 7/97, p. 5

<sup>442</sup> DTI “Mobile Multimedia Communications” 18/5/98, P/98/393

<sup>443</sup> *ibid*

<sup>444</sup> For discussions on the efficiency of allocating property rights via auctions for radio spectrum, ss.2-3, Binmore and Klemperer 2002

<sup>445</sup> Van Damme,E 2002, ss.2-4 “The European UMTS-auctions”, *European Economic Review* 46(4/5), pp.846-858; Börgers,T and Dustmann,C 2002, “Rationalizing the UMTS Spectrum Bids: The Case of the UK Auction”, *ifo Studien* 48(1), pp.77-109



economy” among those engaged in the provision of telecoms services<sup>446</sup>, which had implications for network operators’ spectrum usage.

Perhaps more noticeably, the Government’s intention to design an auction that ‘would realise the full economic value to industry’ should have been of some concern to Oftel. One of two primary duties the DGT shared with the SoS was to “ensure that suppliers could finance the provision of the services”<sup>447</sup>. Yet, throughout policy discussions reported in minutes of UACG meetings and other documents, the regulator was unclear about whether it favoured auctions or opposed them. Therefore, formal provisions did not appear to impact on Oftel’s preferences vis-à-vis these two issues, nor did the fact that they were held by the Government.

Instead, Oftel had a preference for competition in the mobile market to get the best deals for consumers<sup>448</sup>, which, albeit not as specific as the terms it went on to define, did reflect one of its secondary statutory objectives. Although they were not necessarily in tension, the regulator thus put the competition preference explicitly ahead of efficiency (of spectrum), and of ensuring that suppliers could finance provision of service, which were also statutory duties, the latter actually being a ‘primary’ one. This occurred notwithstanding that section 3 of the Telecoms Act, mandating the promotion of competition as one of Oftel’s eight ‘non-primary’ duties, offered no “guidance to the relative weight to be attached to each” one of them, as acknowledged by a former DGT<sup>449</sup>.

Although Oftel’s February 1999 pronouncement came relatively late compared to the public positions of the RA/DTI and industry actors with whom it participated at UACG, the preference was unsurprising. The regulator acted consistently with a longstanding priority, shown by its quarterly publication of ‘Competition Bulletins’<sup>450</sup>, and upheld in different telecoms markets including mobile services<sup>451</sup>. Indeed, Oftel continued pursuing competition unaffected by the March 1998 appointment of David Edmonds, who replaced Don Cruickshank as DGT at a time when the WTA 1998 received Royal Assent and the first UACG meeting took place. In promoting its competition preference by undertaking a

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<sup>446</sup> see ch.3 above. For simplicity, hereafter, rather than referring to specifics of national statutes, “see ch.3” refers to ch.3 herein

<sup>447</sup> see ch.3

<sup>448</sup> Oftel 2/99

<sup>449</sup> Cruickshank, D 11/95 “Oftel’s Plan for 1995/96 and Beyond”

<sup>450</sup> Don Cruickshank’s Introduction, June 1996 bulletin

<sup>451</sup> Preface, Director General Don Cruickshank 5/96 “Fair Trading in Mobile Service Provision”. For historic accounts; Thatcher 1999, Hulsink 1999, Hood et al. 2000

consultative review of the whole mobile market, Oftel spanned different segments including issues relating to 3G policy<sup>452</sup>.

Oftel stated that 3G licensing provided “an opportunity for new entry by mobile network operators”<sup>453</sup>. The DGT only publicly acknowledged that he strongly supported the Government’s intention to offer five 3G licences subsequently<sup>454</sup>. Yet, the influence of the regulator’s preference for competition via new entry behind closed-doors was emphasised in the National Audit Office (NAO) report on 3G, among others<sup>455</sup>.

Oftel wanted new entry, but without excluding 2G incumbents either, thus avoiding recreating a market of four players<sup>456</sup>. Whilst not in disagreement, given less spectrum per operator, the RA was unsure about the technical feasibility of five licences for service practicality and prioritised building UK economic growth on spectrum usage to gain an advantageous understanding over other countries and exploit its 3G experience and networks<sup>457</sup>. Maximising auction proceeds was not a RA priority<sup>458</sup>.

While limiting references to 3G developments, in the February mobile review, Oftel was clear about its broader competition preference. Notwithstanding increasing competition, it warned that a market of four 2G operators could cause ‘collusive’ behaviour. Furthermore, Oftel referred to the operational gap in network terms between 2G incumbents and potential new entrants, and how 2G network coverage could curtail 3G competition. Customers were likely to wish to purchase advanced mobile services provided by 3G operators with voice services<sup>459</sup>. Entrants without 2G facilities would need to access some of incumbents’ existing infrastructure to provide services over comparable geographic areas. Without agreements with incumbent network operators, already benefiting from large customer bases, new entrants could struggle to obtain the necessary sites.

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<sup>452</sup> Oftel 2/99

<sup>453</sup> *ibid.* para.A33

<sup>454</sup> “Statement from David Edmonds (Director General of OFTEL) on the Secretary of State’s announcement to auction five third generation licences”, 8/6/99, p.11, RA, “The Next Generation of Mobile Communications” and; “Oftel’s review of the mobile market”, 7/99

<sup>455</sup> The NAO indicates Oftel strongly advocated the auctioning of five licences unlike the initial working UACG assumption, though this was not explicitly stated in early documentary evidence the regulator published. NAO “The Auction of Radio Spectrum for the Third Generation of Mobile Telephones” HC233 Session 2001-2002: 19/10/2001, para.4.4, p.37. Also Binmore and Klemperer 2002, fn.29

<sup>456</sup> Interview: Hendon

<sup>457</sup> *ibid*

<sup>458</sup> Interview: Neil Carey, National Audit Office 3G Report Study Manager 2000-01, 15/4/2009

<sup>459</sup> Oftel 2/99

So, though not emphasised in earlier publications referring to 3G, Oftel acknowledged that one option, which had been indicated in the DTI consultation and discussed by the UACG as a pro-competitive measure, was adopting roaming<sup>460</sup>. This would avoid sole reliance on commercial agreements between operators, since 2G operators were unlikely to allow entrants to access their 2G networks, reducing their market shares.

Potential new entrants voiced respective preferences through the DTI consultation, indicating their convergence with Oftel. However, obtaining a 3G licence would be insufficient for new entrants to compete on a par with incumbents, and new entrants needed the regulator to act. Responding in 1997, even major US telecoms operator AT&T had warned that entry barriers could serve to enhance the market power of existing players. It thus encouraged regulatory oversight and measures to ensure access for competing operators<sup>461</sup>.

Given its One2One affiliation and competition in the fixed market, Cable&Wireless Communications (CWC) unsurprisingly envisaged the application of market power licence conditions especially for BT, which had an interest in rival mobile operator Cellnet. CWC's proposal implied mandatory wholesale airtime provision to SPs. Yet, to establish a competitive environment, CWC also favoured roaming agreements between 2G and 3G operators<sup>462</sup>, which its group's mobile operator One2One would fight fiercely subsequently.

Less prominent telecoms players needing support to avoid market exclusion converged with Oftel. Given its preference that SPs supply 3G services, internationally operative independent service provider (ISP)<sup>463</sup> Cellcom commended existing licence conditions forcing operators to sell services to ISPs but argued that 3G-related regulatory obligations on network operators should be stringent too. For SPs belonging to network operators not to be excluded from the new market required that they be legally separated and that the operators not be allowed to show preference<sup>464</sup>, to prevent potential new entrants from being dissuaded for fear of incumbents' anti-competitive behaviour.

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<sup>460</sup> The use by a customer of one mobile operator of another mobile operator's network to make or receive calls, usually because the customer is out of range of his own operator's base stations

<sup>461</sup> AT&T's Comments on The Department of Trade and Industry Consultation 17/10/97

<sup>462</sup> CWC 10/97

<sup>463</sup> Not tied to mobile network operators

<sup>464</sup> Response by Cellcom Ltd to 'Multimedia Communications on the Move', 10/97; paras.7,10 and 11

The now defunct Dolphin Telecom, which before going into administration in mid-2001 was part of the Canadian TIW group<sup>465</sup> that ultimately won the fifth 3G licence, favoured redressing the significant disadvantages of new entrants to encourage them to bid. It advocated reserving at least one licence for new entrants, and roaming on 2G operators' networks<sup>466</sup>. Ionica, which had operated in the UK since liberalisation<sup>467</sup>, also welcomed prescriptive licence conditions for dominant players, but refuted the usefulness of resale over other networks including roaming, believing infrastructure competition would be weakened<sup>468</sup>.

Naturally, instead, the biggest threat to Oftel's preference were the 2G incumbent mobile operators critical for 3G development, which, notwithstanding minor specific differences, opposed new entry. One2One shareholder Cable&Wireless plc<sup>469</sup> wanted its large infrastructure investment protected, arguing that regulation should not devalue 2G business thus affecting returns. Indeed, notwithstanding being a relatively new incumbent operator like Orange<sup>470</sup>, One2One's opposition to Oftel's preference was radical. One2One neither welcomed new entry nor wanted to be equated to more established incumbents Vodafone and Cellnet.

One2One contested the idea that DTI proposals could equalise operators that had already committed billions of pounds and new players. The operator opposed any additional, inhibiting, obligations on incumbents. It wanted regulatory measures to allow its continued exploitation of its advantageous 2G status at the expense of new entrants. Referring to the German Administration's belief that extending the licences of existing 2G operators was acceptable and adding that there was an economic limit to the number of players, One2One refuted the DTI's interpretation of the EC Licensing Directive giving further network operators the opportunity to gain licences. It was "essential that sufficient UMTS licences (were) available so as not to force the exclusion of any existing operator from third generation"<sup>471</sup>.

Similarly, One2One opposed roaming between 2G and 3G networks as 'biased too much towards the new operator', 'understanding' instead the motives for mandating roaming

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<sup>465</sup> Electronics Times 6/8/01, "News Digest"

<sup>466</sup> Beddoes, T "Dolphin Telecom Response to 'Multimedia Communications on the Move'" 04/06/98

<sup>467</sup> Hulsink 1999, p.298

<sup>468</sup> Ionica, 23/10/97

<sup>469</sup> A distinct response from CWC's

<sup>470</sup> Orange's views were not made publicly available on the RA site

<sup>471</sup> One2One, p.3

between 3G operators; it would benefit from larger incumbents' 3G investments. Yet, One2One also warned that assuming all 2G operators ought to be considered equal was an error since, like Orange but unlike Vodafone and Cellnet, it did not possess market power in 2G.

BT clearly opposed competition via new entry too. The incumbent, who owned a large share of Cellnet, argued for the auctioning of three licences<sup>472</sup>, thus recommending a reduction in the number of 3G players compared to those in the 2G market. While recognising that "some potential bidders...might feel they are at a competitive disadvantage against incumbent(s)," it asked that the "need for regulatory intervention to control the joint activities of BT and Cellnet, or...of other affiliated fixed/mobile players, should not be pre-judged at this stage"<sup>473</sup>.

Despite opposing the immediate introduction of national roaming, since "all customers (would) only (have) access to one network...(and) the effect would be a monopoly network built by several players", BT oddly supported roaming between 2G and 3G operators. This would have made sense had existing 2G operators alone acquired the hypothetical three licences and BT's opposition to national roaming between 3G operators been endorsed.

Without encouraging entry, Cellnet's considerations regarding competition issues did not exactly match BT's. Cellnet claimed that introducing either type of roaming obligation could distort 3G market development. It argued that roaming between 2G and 3G systems be permitted, but had to remain a commercial matter<sup>474</sup>, not made compulsory. It did not specify how many licences should be auctioned, but associated new entrants with "Value Added, Service Provider and Content fields"<sup>475</sup>. Pushing for consortia bids based on a multi-tiered market structure implied incumbent operators would retain their advantageous positions. Otherwise, BT was not to be precluded from bidding, "with or without Cellnet involvement".

Having advocated innovative spectrum usage to grant maximum four licences, Vodafone opposed new entry unambiguously. It did "not support the need to reduce entry barriers"<sup>476</sup>, arguing that making 'as many licences as possible' available to incumbents was

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<sup>472</sup> Based on its considerations of spectrum requirement per 3G operator

<sup>473</sup> BT paras.4.1&4.4 (brackets added)

<sup>474</sup> "Cellnet response" 17/10/97, pp.26-7

<sup>475</sup> *ibid.*p.8

<sup>476</sup> Vodafone, p.10

in the customers' interest. UMTS infrastructure could be deployed most cost effectively alongside existing GSM networks. It reiterated the view differently stating that the competition focus should switch from furthering network operator competition to promoting increased use and deployment of new services, reducing regulatory attention on the company. Vodafone opposed compulsory roaming. Roaming agreements were to be free commercial decisions, only subject to consideration of anti-competitive or unlawful behaviour.

Some important actors other than the incumbents did not object to an incumbent-driven market either. Cable-operator Ntl reasoned that "it is likely that the present four UK cellular radio incumbents can place a higher value on the spectrum than a new 5<sup>th</sup> operator (with) no...support infrastructure in place"<sup>477</sup>. Mobile manufacturer Ericsson agreed: "To allow existing GSM operators to apply for a UMTS licence is not only fair, it is also a necessity to make UMTS viable in the short term. If UMTS should lose the support of existing operators, it will be very hard for that standard to establish itself on the market"<sup>478</sup>. Nevertheless, it observed that some regulatory intervention could be justified to secure roaming between present GSM operators and UMTS operators.

Preferences thus revealed a division between influential participants, with the regulator not isolated. While the Government, the RA and new entrants dependent on regulatory authorities for competitive terms were convergent, Oftel faced opposition from the four powerful 2G incumbents wanting to protect their significant market positions.

#### **IV. Process**

This section shows Oftel's Type II autonomy approach throughout 3G policy development. Oftel avoided confrontation by exploiting preference convergent state actors from the outset, collaborating at length with the RA, which had no formal authority over the regulator, nor licensing powers<sup>479</sup>. Oftel provided its policy-making input to the

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<sup>477</sup> Ntl para.3; also TMA 16/10/97, s.6.3; "AirTouch Response to DTI Consultative Document on 3rd Generation: "Multimedia Communications On The Move"" 17/10/97, p.2. AirTouch Communications merged with Vodafone in 1999;  
[http://www.vodafone.com/start/investor\\_relations/shareholder\\_services/faq/airtouch.html](http://www.vodafone.com/start/investor_relations/shareholder_services/faq/airtouch.html)

<sup>478</sup> Hellström, K and Grimsö, N 1/10/97, Ericsson consultation response, 'DTI Consultation: Multimedia Communications on the Move'

<sup>479</sup> In addition to Wireless Telegraphy Act licences, 3G licensees would have been eventually issued or reissued a Telecoms Act licence regulated by Oftel - RA "UMTS Licensing: Setting the Scene - UACG(98)1"; timetable

Government agency privately, which the latter presented at UACG meetings comprising officials of divergent incumbent operators.

Through its private exchanges with the RA and its competition expertise, the regulator influenced the Government's licensing of five operators. Subsequently, while the convergent Government exercised its formal authority to ensure that incumbents would allow 3G new entrants to access their 2G networks through roaming, which they opposed, Oftel avoided applying existing relevant powers, hence, imposition. Instead, it gradually tried persuading incumbents to accept licence modification, exhaustively negotiating proposals without compromising on its preference.

Oftel's wish to ensure 3G competition was buttressed from the outset by the convergence with the powerful Government which controlled the critical spectrum, and whose DTI Ministers the DGT could access if he felt necessary<sup>480</sup>. This convergence extended to RA officials who chaired the UACG working group. Preference convergence and collaborative ties with the RA helped Oftel advance its preference without expending formally-allocated resources or imposing measures from the start.

The convergent DTI agency mobilised more resources than its role dictated<sup>481</sup>, as it spread and bolstered Oftel's policy analyses by circulating Oftel's consultation documents and the DGT's statements and views at UACG meetings, publicising them as an important part of policy development. All RA steps involving Oftel at meetings took place in the presence of the regulator's officials who, having previously discussed issues behind closed-doors, consented that the RA speak on Oftel's behalf<sup>482</sup>.

Thus, early in the policy, before being at the forefront of decision-making, Oftel attended UACG meetings and provided input selectively, exploiting the activity of influential state actors with similar preferences and avoiding confrontation with preference divergent industry ones, consistent with Type II regulatory autonomy. During the informal discussions at the first UACG meeting in March 1998, the Chair, the RA's Jeremy Clayton, stressed that "the Government was keen to have new entrants in the mobile market"<sup>483</sup>.

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<sup>480</sup> Interviews Hendon and B

<sup>481</sup> see ch.1 above on Nordlinger's Type II 'strategy' options. For simplicity, hereafter, rather than referring to Nordlinger's book pages, paraphrasing his 'options' will be referenced as: "see ch.1; Nordlinger"

<sup>482</sup> Interviews Hendon and C

<sup>483</sup> Minutes of first UACG meeting, 20/3/98

In practice, it was the RA, which lacked powers over Oftel and, like the regulator, lacked powers over the SoS, that channelled discussions towards competitive outcomes on issues complementary to licensing, on the Government's behalf. The RA updated sectoral Ministers through the civil service practice of three-page 'submissions', and its Chief Executive met them regularly; some, such as eventual SoS Patricia Hewitt, on a first-name basis<sup>484</sup>. Stephen Byers, who replaced Peter Mandelson as SoS and head of DTI at end-1998 while the RA chaired UACG, had to become familiar with 3G to understand the different complex issues<sup>485</sup>.

For instance, regarding packaging available spectrum for auctioning, consultation responses had indicated the relative inferiority and undesirability of unpaired spectrum bands compared to paired spectrum bands. Yet, less spectrum would reduce the amount available to allocate to different operators, hence new entry prospects. The RA orientated spectrum advisory working group UKTAG and commissioned consultants Ovum and Quotient to consider several technical options illustrating how 3, 4 or 5 operators could be accommodated<sup>486</sup>.

Thus, having previously indicated that "consequences for the ability to offer services if four or five licences are made available are being investigated"<sup>487</sup>, the RA disregarded industry's technical indications. Several months and UACG meetings later, technical experts were assessing the maximum number of licences that could be auctioned<sup>488</sup>. So, even where the RA's expertise or dedicated staff was insufficient<sup>489</sup>, it could direct policy to further its 3G new entry preference and that of Oftel, which made its views public selectively.

The RA, without powers over Oftel, acted as agenda-setter shaping policy according to its role and areas of expertise. Policy inputs were largely non-statutory. The introductory document published before the first UACG meeting set out that inputs would take two forms; written material produced ahead of meetings and oral contributions at meetings. Written material was to be produced and circulated, in light of any concerns raised by members, as would minutes of meetings<sup>490</sup>.

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<sup>484</sup> Interview: Hendon

<sup>485</sup> McIntosh, B 18/6/99 "One2One launches legal challenge to mobile auction", The Independent

<sup>486</sup> RA/UACG (98)2, especially the attachment

<sup>487</sup> RA/UACG (98)1

<sup>488</sup> RA/UACG (98)7, 18/6/98, UMTS Spectrum Options for 3, 4 or 5 Operators and Their Implications Issue 1

<sup>489</sup> Interview: Hendon

<sup>490</sup> RA/UACG (98)1, para.3



Nevertheless, as the convergent RA chaired discussions, it raised and drew attention to issues consistent with Oftel's preferences, including those for the regulator to address. The division of WTA and Telecoms Act licence powers meant issues could not be determined by one actor. Yet, the fact that the RA conducted 3G policy did not affect the consensus with Oftel over competition, nor the latter's role based on its sectoral knowledge.

On the contrary, the shared understanding of central issues seemed to cement their working relationship. For example, regarding network roll-out, coverage, obligations on 3G licensees, the RA anticipated that, while obligations would be contained in the WTA licences, they would be "linked to condition 1 of the Telecoms Act so that the DG of Oftel could enforce them if necessary"<sup>491</sup>. Besides acknowledging Oftel's formal authority, the RA warned operators not to assume how the regulator would exercise its discretion, suggesting decisions would be taken by weighing information.

Thus, Oftel appeared not to be at the forefront of policy-making. However, the DGT was given prime coverage and support by the convergent RA. For instance, the DGT's Market Influence Condition trigger in the draft Telecoms Act licence discussed in November 1998 was deemed "somewhat vague"<sup>492</sup> by a UACG member.

3G entrants without 2G networks would be able to ask that incumbents with Market Influence provide network services already available, not new ones, and was the working hypothesis regarding the key competition issue of 2G network access for 3G entrants before roaming. Applying the condition was Oftel's formal responsibility<sup>493</sup>.

Clayton, a member of the RA and chair of the working group, responded instead, arguing the "statement provided a good level of comfort given that the DGT could not formally fetter his discretion"<sup>494</sup>. Thus Oftel shaped future 3G competition policy-making, 'shielded' vis-à-vis divergent incumbents, through exchanges and collaboration with the RA presenting issues at UACG.

The most significant intervention furthering Oftel's preference without the regulator imposing it on divergent incumbents was, nonetheless, by the Government's Telecoms

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<sup>491</sup> RA/UACG (98)1, 3/98, para.14

<sup>492</sup> UACG(98)18 Minutes, 13/11/98

<sup>493</sup> see 'Participants' section

<sup>494</sup> *ibid*

Minister, who was not involved at UACG level, but received RA 'submissions'. In February 1999, a week after Oftel published its mobile market competition review indicating 3G as 'an opportunity for new entry', DTI Minister Michael Wills told Parliament that the Government felt further consideration regarding issuing five licences and roaming was necessary<sup>495</sup>. If technical assessments enabled the auctioning of five licences, the largest one would have been reserved for a new entrant<sup>496</sup>.

Yet, the technical advisers Quotient had already established that a "smaller allocation (than initially considered) would make it technically feasible to fit 5 licences into the available spectrum"<sup>497</sup>. Wills confirmed the policy three months later<sup>498</sup>. He had mentioned 'a further brief consultation' on offering five licences, but the revised spectrum packaging proposals published within three days outlined two options, both with five licences<sup>499</sup>. A few months earlier the Government had advocated four licences; five "could also compromise the ability of all licensees to run effective UMTS networks"<sup>500</sup>.

Thus, Oftel's lack of licensing authority did not thwart its influence and ability to pursue its preference. The Telecoms Act 'only' granted the regulator advisory functions when the SoS licensed under the Wireless Telegraphy Act<sup>501</sup>. Yet, Oftel was central in shaping the Government's decision to introduce a 3G new entrant<sup>502</sup>, as licensing five operators was deemed technically possible. Accordingly, in the earlier stages, Oftel deployed informal resources as the convergent RA championed its preference. Subsequently, the Government acted with its statutory powers on the preferences jointly held with Oftel, hence on the latter's behalf.

Oftel's persuasive competition analysis and expertise, shaping Government choices opposed by incumbents, seemingly led the Minister to mobilise a level of political resources

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<sup>495</sup> RA/UACG(99)5, 9/2/99, "Announcement by Michael Wills, Telecommunications Minister, On Third Generation Mobile"

<sup>496</sup> DTI 9/2/1999 "Mobile Telecommunications - The Next Generation Government Sets Out Progress Towards 3G Auction", Press Release

<sup>497</sup> RA/UACG(98)17 13/11/98 "UMTS Spectrum Packaging: Taking forward the Working Hypothesis", (brackets added here); also UACG minutes

<sup>498</sup> RA/UACG(99)11, 6/5/99, "Announcement By Michael Wills, Telecommunications Minister, On Third Generation Mobile"

<sup>499</sup> RA/UACG(99)3, 9/2/99

<sup>500</sup> Borgers and Dustmann 4/03, "Awarding telecom licences: the recent European experience" p.230, *Economic Policy*, pp.215-268, claim the statement was made in November; it was in September, UACG(98)10

<sup>501</sup> see ch.3

<sup>502</sup> NAO 2001; Interviews Hendon and C

greater than initially intended<sup>503</sup>. While the Government previously harboured doubts about roaming too<sup>504</sup>, in February 1999, Wills was “minded to ensure that new entrants’ customers can roam onto existing second generation networks until their own networks are established”<sup>505</sup>. Oftel and the RA had agreed it was necessary<sup>506</sup>. Clayton stressed that consultation proposals had been drawn up with advice from legal advisers<sup>507</sup>. The Government intended to proceed firmly, despite the use of licence modification powers being Oftel’s.

So, besides discussing five licences, the RA presented the new hypothesis that all 2G incumbents should accept licence modification mandating roaming, albeit until end-2009, as a condition to bid for a 3G licence. Existing Telecoms Act licences regulated by Oftel did not include provisions forcing 2G licensees to enter into roaming negotiations when asked by new entrants. The condition was to give potential 3G new entrants sufficient confidence about accessing, hence offering their customers, basic competitive 2G services across the UK.

Oftel already had powers through ‘market power’ licence conditions to require Vodafone and BTCellnet to provide airtime to SPs, such as new entrants in the 3G market, and it proposed to introduce the Market Influence condition to the same effect. So, although the UACG roaming consultation was characterised by resoluteness and urgency, Oftel avoided highlighting its applicable statutory authority to require the two largest incumbents to provide new entrants with greater certainty.

The regulator’s overall approach contrasted with the convergent Government’s, which was ready to use its formal authority notwithstanding ongoing private exchanges with divergent incumbents<sup>508</sup>. Indeed, in a court case brought against it by One2One regarding the roaming pre-condition to bid for 3G licences, the High Court judge ruled that the Government applied undue pressure on operators to consent to changes of existing licences, which was beyond its power<sup>509</sup>.

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<sup>503</sup> see ch.1; Nordlinger

<sup>504</sup> UACG (98)18,para.6

<sup>505</sup> DTI 2/99

<sup>506</sup> Interview: Hendon

<sup>507</sup> UACG(99)2,para.4

<sup>508</sup> Interview: Hendon

<sup>509</sup> RA 26/8/99 “Government Appeals Mobile Phone ‘Right To Roam’ Decision”, UACG(99)29

One2One had argued its legal challenge was not against allowing rivals to 'roam' but centred on the principle of altering its licence without a chance to fight it since the auction forced licence modification without recourse to the Competition Commission. One2One opposed the formal imposition sought by the Government, but for Oftel to implement. Section 3 of the WTA 1998, granting the SoS discretion to introduce regulations to promote the optimal use of spectrum, did not take away existing licence modification rights under the Telecoms Act<sup>510</sup>. Orange supported One2One<sup>511</sup>. Despite no formal action, media reports claimed that privately BTCellnet did too<sup>512</sup>. Thus key industry actors usually competing against each other acted jointly.

Minister Wills reacted by claiming that concerns were unwarranted and: "if they don't want to bid for a third generation licence then they will not be forced to accept roaming"<sup>513</sup>. The Government appealed against One2One's successful judicial review<sup>514</sup>, subsequently overturned by a Court of Appeal in October 1999. The Court of Appeal ruled that the SoS was to determine how best to promote the optimal use of spectrum in the public interest. Nothing in 2G licences assured that incumbents could bid for new licences without accepting restrictions upon existing rights<sup>515</sup>, thus allowing the Government to impose roaming.

Instead, although first the RA, then Wills' firm intervention advanced Oftel's preference, the regulator's policy-making was more subtle, centring on persuasion and negotiation notwithstanding its licence modification powers to implement roaming<sup>516</sup>. The DGT's non-formal guidelines, part of the mid-February UACG document, illustrated a milder approach vis-à-vis incumbent operators.

The consultation guidelines indicated that the DGT did not intend to negate incumbents' interests<sup>517</sup>, setting out the approach he was "*likely* to take in applying the Condition so that

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<sup>510</sup> THE QUEEN - v -THE SECRETARY OF STATE FOR TRADE AND INDUSTRY EX PARTE (1) MERCURY PERSONAL COMMUNICATIONS LIMITED (2) MERCURY PERSONAL COMMUNICATIONS (A FIRM TRADING AS "ONE2ONE") Applicants, 6/8/99, CO/2162/99; p.15

<sup>511</sup> *ibid*

<sup>512</sup> The Independent, 18/6/99

<sup>513</sup> Teather, D 19/6/99 "One2One holds up mobile auction; smallest network complains about licence sell-off" The Guardian

<sup>514</sup> RA 26/8/99

<sup>515</sup> Mercury Personal Communications v Secretary of State for the Department of Trade and Industry, 14/10/99, QBCOF 1999/0934/4

<sup>516</sup> Unless licensees disagreed, which required the formal intervention and recommendations of the Competition Commission (see ch.3). Opposition from the SoS, who had overruling powers, was unlikely given the Government's convergence

<sup>517</sup> see ch.1; Nordlinger

interested parties are better able to assess for themselves (its) effect”<sup>518</sup>. Each case would be viewed on its merits and, significantly, the guidelines could be amended in light of experience, after consultation with interested parties. Oftel sought to enter into dialogue with incumbents resisting opening up their 2G networks to a licence-winning bidder on what executives defined as ‘non-commercial terms’<sup>519</sup>.

Oftel encouraged 3G new entry<sup>520</sup> shortly before the RA raised the Government’s roaming intentions that led to One2One’s court case, but avoided imposition. While finding that Vodafone and Cellnet continued possessing ‘market power’ and proposing to determine their Market Influence, Oftel referred to “strong indications” that competition had increased significantly and removed regulatory price controls for calls from mobile phones.

Thus Oftel did not just eschew formal powers but renounced them without compromising on its preference with the incumbents, offering a costless mutually advantageous exchange<sup>521</sup>. The regulator stated that effective competition was a prospect, and proposed a review more than a year-and-a-half later, refraining from putting further pressure on incumbents.

Oftel exchanged views with incumbents on roaming informally at length, offering them every opportunity to alter its preferences<sup>522</sup>. An Oftel Regulatory Policy Directorate official explicitly referred to the ‘informal consultation’ period preceding the launch of a formal consultation in early May 1999, clearly stating that comments had been ‘taken on board’<sup>523</sup>. The explanatory letter circulated at UACG indicated that comments had led to an amendment to condition 8 on undue discrimination.

Thus, following its earlier informal efforts to shape entry largely through the RA, the formal consultation text showed how much the regulator sought incumbents’ consensus on licence modification. All comments following the informal consultations and received “in an earlier round of discussions with the 2G operators in Autumn 1998 and meetings in

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<sup>518</sup> RA/UACG(99)2 “Draft guidelines National roaming licence condition” in Access To Second Generation Networks; italics added

<sup>519</sup> The Independent, 18/6/99

<sup>520</sup> Oftel 2/99. In parallel it issued “Customer choice: Oftel’s review of indirect access for mobile networks”, examining whether indirect access to mobile networks for indirect access operators and SPs would expand service choice, widen competition and lead to price reductions

<sup>521</sup> see ch.1; Nordlinger

<sup>522</sup> *ibid*

<sup>523</sup> Dhillon,D 7/5/99 “Oftel Consultative Document: Access to 2nd Generation mobile networks for new entrant 3rd Generation Mobile Operators - RA/UACG(99)12”

February and March 1999” had been considered. The condition had been redrafted in light of these discussions<sup>524</sup>.

The regulator did not need agreement to modify licences<sup>525</sup>, but raised issues aimed at persuading incumbents to accept roaming throughout the document. After spending months interacting with incumbents informally within UACG, Oftel used its only formal consultation to agree 3G entry terms to be adopted, which incumbents opposed. Making roaming a condition for 3G licence bidding was indicated as a consequence of the Minister’s February 1999 statement.

Portraying roaming as a useful measure, the regulator’s consultation eloquently indicated: “It is important...to be clear that Oftel would hope to see a roaming agreement reached commercially. The proposed licence condition is intended...as a backstop in the event of a failure to reach an agreement with...incumbent operators. It is also important...that it is not the intention that roaming would place an unfair burden on an incumbent operator or give the new entrant an unfair advantage”<sup>526</sup>.

Oftel argued roaming should commence once an entrant’s network covered 20% of the population, not 40%-50% as incumbents wanted. The entrant should launch a competitive service earlier than was possible without roaming. However, it understood incumbents’ “concerns” that entrants had to be required to build a substantial amount of their networks prior to roaming eligibility.

The regulator even tried to heighten the policy’s advantages<sup>527</sup>. From Vodafone and BTCellnet’s perspective, Oftel’s reasoning on the “overriding need for entrants to have certainty”<sup>528</sup> meant Orange and One2One would not be treated more favourably on roaming despite protestations. The condition would apply to all 2G operators winning a 3G licence.

Furthermore, Oftel highlighted the formal powers eschewed. More burdensome terms could have been inserted than those proposed. It avoided specifying charging structures to

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<sup>524</sup> Oftel, 14/5/99 “Access to second generation mobile networks for new entrant third generation mobile operators”, para.1.11. The consultation actually started a week after Oftel’s explanatory note was circulated at UACG with the formal consultation text

<sup>525</sup> see ch.3

<sup>526</sup> Oftel, 7/5/99, para.1.9

<sup>527</sup> see ch.1; Nordlinger

<sup>528</sup> Oftel, 7/5/99, para.2.17

arise from commercial arrangements<sup>529</sup>, and fixed timescales within which negotiations on roaming agreements were to be completed<sup>530</sup>. Technical reasons preventing roaming from being provided would exempt operators from the condition's obligations.

Most significantly, Oftel made a compromise proposal, negotiating consent with incumbents. Its carrot-like inducement<sup>531</sup> was to remove three formal provisions from the previous draft condition - to prevent unfair discrimination, cross-subsidies and also a requirement to provide accounting separation information, 'in light of responses'<sup>532</sup>. Subject to a minor wording modification of the undue discrimination condition, Oftel decided to deal with anti-competitive behaviour using existing conditions.

Oftel's July 1999 statement established that no changes were necessary to the proposed condition. It indicated important modifications to the guidelines instead<sup>533</sup>, highlighting the non-statutory instrument's significance. Oftel explained why incumbents should not oppose the condition, emphasising in bold print that it was intended to act as a backstop should parties not reach commercial agreements. The DGT would seek clear indications that parties had attempted genuine negotiations before accepting to resolve disputes. Moreover, despite licence modification and enforcement powers, Oftel did not intend to construct the main body of a roaming agreement.

Meanwhile, the Government exploited its formal authority. Having decided that incumbents wishing to enter 3G auctions had to accept roaming, hence, licence modification<sup>534</sup>, led its adoption to be decided in court, following One2One's legal challenge regarding "the validity of the Government's decision to require such a precondition"<sup>535</sup>.

This section has thus shown that, to fulfill its competition preference, Oftel repeatedly underplayed and eschewed statutory resources, including available licence enforcement powers. Instead, it prioritised persuasive exchanges and negotiation. In fact, the regulator lacked the formal authority of the SoS to license 3G spectrum, hence shape market entry.

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<sup>529</sup> *ibid*, especially paras.2.8-2.10

<sup>530</sup> *ibid*.para.2.14

<sup>531</sup> Nordlinger, p.116

<sup>532</sup> Oftel 7/5/99, para.3.4

<sup>533</sup> Oftel 29/7/99, "Statement on National Roaming", RA/UACG(99)23

<sup>534</sup> Clayton, J 9/6/99, "Clarification of Meeting Minutes of 14 MAY 1999 on Roaming Policy - RA/UACG(99)20"

<sup>535</sup> DTI Press Release P/99/549, referring to Minister Wills' vision for 3G "Mobile Phones - the Next Generation", 23/6/99

Moreover, in the early stages, policy development firmly appeared in the RA's domain, in conjunction with ministerial approval. The regulator pursued its preference nonetheless.

To shape new entry, Oftel exploited key 'state' actors with convergent preferences by influencing their decision-making on competition in private, while persistently avoiding confrontation with 2G incumbents with divergent preferences. Oftel did not apply the forceful approach deployed by the Government notwithstanding their convergence. Formal powers did not constitute Oftel's key resource. Besides exploiting convergent influential actors possessing statutory powers, to achieve its preferences Oftel prioritised dialogue and put forth persuasive 'compromise' proposals to the incumbents, demonstrating Type II autonomy.

## **V. Time-length of decision-making**

This section reveals that, consistent with Type II autonomy scenarios, the UK's telecoms regulator neglected available timescale powers and exercised policy forbearance to pursue its preference. Oftel's approach towards the execution of its preference was distinct from that of the formally powerful Government which, since disregarding industry reluctance from the early proposals to auction licences<sup>536</sup>, displayed firmness whenever opposed between July 1997 and April 2000.

Oftel did not appear to lead policy development when UACG was formed and members started meeting in 1998 to discuss 3G issues, hence, it did not publicly frame timescales. However, once it became formally entitled to introduce measures that could directly contribute to competition, the regulator acted without haste, notwithstanding convergence with the eager Government.

Oftel's statutory role required it to allow a minimum of 28 days to seek views of affected parties, for example, on policy issues entailing licence modifications and enforcement<sup>537</sup>; there was no maximum period of consultation. Consistent with its negotiating approach vis-à-vis 2G operators, it avoided asserting its formal authority based on the significant market power (SMP) condition in Vodafone and BTCellnet licences that could have

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<sup>536</sup> For example, BT's response 10/97

<sup>537</sup> see ch.3



significantly shortened the process for auctioning licences and consistent with its preference.

Instead, Oftel exchanged views with divergent 2G mobile operators at length, pursuing competition by addressing issues analogous to 3G but not explicitly targeting them. So, in February 1999, it launched the mobile market competition review, in parallel with the consultation on indirect access to mobile network operators. To the extent that it proposed inserting the Market Influence condition in Vodafone and Cellnet's licences, effectively extending the SMP condition according to the new EC Licensing Directive, the review was relevant to access to 2G networks, and hence to potential 3G new entrants.

Oftel issued an 'informal' document notwithstanding that UACG discussions on access to 2G networks had taken place since October 1998, and days before Michael Wills, the relevant Minister, expressly stated that he favoured roaming as a competitive measure. Indeed, while working towards gradual progress on licence modification regarding MI, Oftel acknowledged that "such a determination (on MI) would also need to be the subject of a subsequent formal statutory consultation"<sup>538</sup>. This implied a minimum of twenty-eight more days for views to be submitted as statutorily required to modify licences. Therefore, Oftel was raising the prospect of prolonging decision-making further.

The 'informal' review alone gave interested parties, including the two affected incumbent operators, over a month to comment. Moreover, Oftel went further than upholding its fairly standard, informal, procedure of allocating fourteen days for 'comments-on-comments', by allowing a few more days; eighteen in total. Thus, regardless of the urgency created by the Government's announcement that on top of mandating roaming it was "initiating a further brief consultation on...five licences"<sup>539</sup> to encourage entry in the 3G market, the regulator did not rush respondents formally or informally, including the key 2G operators, on issues that were at the very least complementary. Oftel took this stance while the Government was, on the one hand, delaying the auction to introduce the two entry measures but, on the other, granting incumbents only a few weeks of response-time<sup>540</sup>.

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<sup>538</sup> Oftel, 2/99 para.1.4

<sup>539</sup> Wills 9/2/99

<sup>540</sup> *ibid* and; RA/UACG(99)2

That the regulator was offering incumbents 'every opportunity to alter the public officials' preferences'<sup>541</sup> in line with Type II autonomy is indicated by the fact that the May 1999 statutory consultation announcement on roaming<sup>542</sup> - for which it was formally responsible given licence modification powers - did not coincide with its launch. The publication containing the redrafted licence condition text was circulated to UACG members one week before the consultation officially began, thus giving incumbents more time to develop and formulate any ongoing differences with the regulator over the insertion. More significantly, by the time Oftel made public any announcements or documents, three months had passed since the Government's statement favouring roaming.

So, Oftel did not act any more expeditiously once UACG proposals to auction five licences and roaming had been hastily put forward by the Minister, as late as February 1999. By then it was already too late to comply with the initial timetable, which assumed pre-qualified auction candidates would be decided by early 1999. Instead, the regulator's consultative work accommodated the revised timetable requested by UACG members following Wills' February statement<sup>543</sup>. It did not seek to undertake the policy 'unless and until'<sup>544</sup> preference divergent actors were going to give their consent, largely ignoring available timescale powers.

In setting out the roaming consultation, reflecting the persuasive approach examined in the previous section, Oftel decided to retain the informal practice of fourteen days for comments on responses, on top of the statutory twenty-eight consultative days, with the deadline set to 25<sup>th</sup> June. Another month passed before Oftel determined that the roaming licence condition would be left unaltered, but that guidelines had been modified. Meanwhile, in the preliminary Information Memorandum for potential 3G licence applicants, Minister Wills had reiterated that the Government was determined to keep the UK at the forefront of the global telecommunications. It was committed to increasing sustainable competition in the mobile telecommunications market to help spur a faster rollout of innovative services and development of the technology<sup>545</sup>, hence, soliciting decision-making.

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<sup>541</sup> see ch.1; Nordlinger

<sup>542</sup> Oftel 5/99 as presented in RA/UACG(99)12

<sup>543</sup> Illustrative auction timetable RA/UACG(99)7, 02/99

<sup>544</sup> see ch.1; Nordlinger

<sup>545</sup> RA, 6/99, p.2

Similarly, in the July 1999 final roaming statement, the regulator indicated that it had written to the incumbents asking them to consent to licence modification, but claimed it did not “expect a response from the operators before the outcome is known of the judicial review on the legality of requiring consent as a condition of bidding in the 3G auction”<sup>546</sup>. Whereas Oftel extended policy discussions to persuade 2G operators, the Government involuntarily prolonged the process by exercising its formal powers since the High Court upheld One2One’s legal challenge to the Government’s decision<sup>547</sup>.

Prior to the court’s ruling, reports claimed that One2One’s legal move reflected frustration among mobile phone company executives who believed Britain was losing a valuable first-mover advantage by delaying the introduction of 3G network frequencies<sup>548</sup>. The Minister recognised the uncertainty caused by litigation and that the chance of a delay was not in anyone’s interest in June 1999<sup>549</sup>. However, a few days later the Government announced that it would seek an early ruling by the courts to avoid delaying the auction if One2One continued with its action<sup>550</sup>. Ultimately, the Government appealed at the end of August 1999 against the ruling that 2G operators should not have to let new companies use their networks as a pre-condition to gain a 3G licence<sup>551</sup>.

Several months later the Government was successful in the Court of Appeal<sup>552</sup>. Yet, this came after Oftel’s success in getting the two largest mobile incumbents’ consent to modify their licences<sup>553</sup>. Indeed, upon winning the appeal, the Government seemed to reconsider its more forceful approach towards incumbents given Oftel’s achievement. The Government welcomed the fact that: “As long as either BTCCellnet or Vodafone (or a member of either of their groups) wins a 3G licence, the availability of roaming to new entrants on fair terms will be guaranteed”<sup>554</sup>. Accordingly, given the need to minimise uncertainty as the possibility of a One2One appeal to the House of Lords remained, the Government chose to avoid using the powers to impose the roaming condition through the auction rules.

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<sup>546</sup> Oftel, 7/99, para.1.3

<sup>547</sup> Clayton, J. 6/8/99 “Judicial Review of Roaming Decision”, (99)27

<sup>548</sup> The Independent, 18/6/99

<sup>549</sup> The Guardian, 19/6/99

<sup>550</sup> Note 6 in Wills 23/6/99

<sup>551</sup> RA/UACG(99)29, 26/8/99

<sup>552</sup> RA/UACG(99)33, 14/10/99 “One2One Judicial Review of Roaming Licence Condition: Appeal Court Judgement”

<sup>553</sup> RA/UACG(99)32, 8/10/99 “Licence Modification On Roaming: Operator Agreements”

<sup>554</sup> RA/UACG(99)33, 14/10/99

In fact, Oftel further integrated minor industry comments, thus newly revising the condition before Vodafone and BTCellnet consented to roaming, which was well received both by DTI Minister, and future SoS, Patricia Hewitt<sup>555</sup>, as well as by the RA Chief Executive<sup>556</sup>. Oftel decided that no statutory consultation was necessary since it had already given operators additional time and changes were 'not substantive'. Oftel granted the operators four more days nonetheless, thus giving them a final chance to agree and avoiding to proceed with a formal referral to the Competition Commission<sup>557</sup>.

## VI. Outcomes

The United Kingdom's five 3G licences were finally auctioned by the Government between start-March and end-April 2000, and generated the striking sum of £22.5bn<sup>558</sup>. The measures put in place by Oftel, the Labour Government and the RA to encourage applications from new entrants saw as many as thirteen operators bidding for the five licences; all qualified to bid<sup>559</sup>. Previously, the November 1999 Information Memorandum setting out the terms of the 3G auction indicated that there were no technical or financial pre-qualification requirements for entering the auction other than the provision of a deposit. In fact, details of ownership structures, the 3G technology to be used and confirmation of compliance with the rules of the auction were required, but bidders did not have to be telecoms operators<sup>560</sup>.

The auction saw the four 2G incumbents - Vodafone, BT Cellnet, Orange and One2One - win 3G licences<sup>561</sup>. However, the Canadian operator TIW<sup>562</sup> obtained the largest licence, which had been reserved for new entrants, and could exploit roaming as a 'safety-net'

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<sup>555</sup> RA/UACG(99)32, 8/10/99

<sup>556</sup> Hendon,D 21/10/99 "Next generation of mobile telecoms offers exciting opportunities in e-commerce – letters to the Editor", FT

<sup>557</sup> RA/UACG(99)31, 4/10/99 "Access to 2nd Generation mobile networks: Revised Roaming Licence Condition and Guidelines"

<sup>558</sup> Binmore and Klemperer 2002

<sup>559</sup> Hewitt,P 14/2/00 "Hewitt Confirms Qualified Bidders For 3G Mobile Licence Auction", P/2000/99

<sup>560</sup> RA and NM Rothschild, 1/11/99 "United Kingdom Spectrum Auction - Third Generation, The Next Generation of Mobile Phones", p.2

<sup>561</sup> The precise sums were: TIW £4.3847bn (Licence A); Vodafone £5.964bn (Licence B, which was the largest licence incumbents could bid for); BT3G £4.0301bn (Licence C); One2One £4.0036bn (Licence D); Orange £4.095bn (Licence E), Borgers,T and Dustmann,C 2002, "Rationalizing the UMTS Spectrum Bids: The Case of the UK Auction" p.84, Ifo Studien, pp.77-109

<sup>562</sup> Soon afterwards, TIW sold the subsidiary that owned the licence to Hong Kong-based Hutchinson Whampoa - Borgers and Dustmann 2003, p.254; Thatcher 2005, p.113,note 2

measure where it needed to. Thus Oftel's efforts to introduce competition in the new mobile market proved successful.

**Table 6: Oftel's 3G Type II autonomy**

Empirical Indicators	Level 1 - Nordlinger's state level	Level 2 - Regulatory level	Level 3 - Case Study - UMTS UK: Type II
<b>Participants and resources</b>	Range of societal actors: those divergent from the state, seeking to obstruct its preferences; also actors with similar preferences to the state supporting it (convergent), and those without strong expressed preferences	<b>At start of regulatory policy, key resources spread among distinct actors</b> ; with preferences similar to regulator and with divergent ones. <b>Different participants have valuable resources to exert influence</b>	<b>Dispersed resources and no single influential group:</b> - industry incumbents had 2G networks and finances - Secretary of State formal licensing powers under Wireless Telegraphy Acts 1949/98, over spectrum, and Telecoms Act 1984 - Government agency (DTI's RA), under SoS and Ministers, led policy with Oftel, which had formal licence modification powers - 'new entrants' key for competition but low influence
<b>Preferences</b>	<b>Combination</b> of divergence, indifference, convergence	<b>Preferences of influential participants differ</b> over regulator's proposals. <b>But not only influential divergent preferences; some influential support</b> from outset for agency to shift preferences	<b>Agency not isolated, with support of influential actors from start:</b> Oftel wanted greater <b>competition</b> like new entrants and crucially <b>as Government</b> agency (RA) and Ministers, since Government controlled key asset. <b>Incumbents opposed</b> entry
<b>Process</b>	State shifts preferences of societal actors over time, by: (i) <b>inducement</b> ; (ii) <b>appeasement-conciliation</b> ; (iii) <b>enfranchisement</b> ; (iv) <b>empowerment-reinforcement</b>	To alter preferences of opponents or restrain their use of key resources, <b>regulator prioritises negotiation over imposition</b> . Preferences shifted by: (i) making <b>compromise proposals</b> ; (ii) <b>using persuasion</b> , repeated <b>bargaining</b> ; (iii) <b>exploiting influential actors with convergent preferences to avoid confrontation</b>	<b>Agency avoids imposition and through dialogue gradually shifts preferences of opponents:</b> Through <b>private exchanges</b> with Government's RA, Oftel influenced number of 3G licences allocated <b>without licensing powers</b> . <b>Avoided</b> providing 2G network access to 3G entrants under <b>existing provisions</b> . While benefiting from <b>Ministerial support</b> , informal exchanges with 2G incumbents. Obtained licence modification enabling roaming <b>non-hierarchically</b> : redrafted condition before formal consultation, taking 2G comments into account; <b>three formal provisions removed</b>
<b>Time-length of decision-making</b>	Public policy not undertaken 'unless and until' actors with divergent preferences are persuaded	<b>Timescale powers largely neglected; policy forbearance</b>	<b>Lengthy regulatory process</b> due to <b>consultations and informal discussions</b> , despite <b>Ministerial pressures</b> for urgency and the <b>opposition of incumbents</b>
<b>Outcomes</b>	State preferences translated into public policy after those of divergent actors are shifted to make them 'congruent or consonant'	<b>Regulator's preferences implemented</b> after actors with divergent ones had been persuaded to shift theirs, <b>with some concessions</b>	<b>Oftel fulfilled its preferences after shifting those of incumbents</b> , also by removing specific provisions

## VII. Conclusions

The case of 3G policy in the UK has shown that Oftel displayed Type II autonomy as, with the support of a Government persuaded to sell five licences, it avoided using existing formal provisions to achieve its preference, applying its sectoral knowledge instead. Throughout policy development, the regulator's decision-making and preference fulfillment were not characterised by the extensive deployment of formal authority, but by dialogue and persuasion, including compromise proposals, consistent with Type II autonomy (see level 3, Table 6 above).

The SoS was in charge of licensing the key 'physical' 3G spectrum asset, and thus formally in control of policy. Spectrum's scarcity made it the very rare commodity and resource that all industry, and particularly divergent incumbents aiming to expand their market capabilities, wanted. The incumbents' desire for spectrum and the formal framework meant that they were supposed to be interested in, or rather concerned about and dependent on the decision-making of the SoS. In fact, Oftel's formal powers to fulfill its 3G preference were significant compared to those held by other prominent and publicly active 'state' actors, such as the RA which did not have the regulator's licence modification and enforcement powers.

Nonetheless, in practice policy progress was largely conducted by the DTI's spectrum agency, which had no formal powers over Oftel, the SoS or over operators. Crucially, while the RA chaired UACG meetings with its understanding of how specific issues needed addressing, Oftel was always present and influenced policy by intervening and providing inputs on selected issues according to its own policy analysis and expertise. The regulator prioritised competition with little concern for the other statutory objectives contained in the Telecoms Act, regardless of the fact that secondary formal duties were not ranked.

Preferences guided the scope and application of formal arrangements, having shaped the direction of discussions and policy development. Preferences led to the application of statutory provisions available to the regulator when it decided so. Oftel's preference was bolstered by convergence with Government Ministers, but particularly by the public and private collaboration with the RA, which overshadowed the fact that the SoS had licensing powers the regulator did not.

The shared preference with the Government, as well as with the RA, meant that, in practice, the formally most powerful actor, the SoS, deployed his decision-making authority in line with the regulator's policy objective. Furthermore, preference convergence meant that, ultimately, the licence modification sought by Oftel was not blocked by the SoS. Similarly, statements and interventions by DTI Ministers were all aimed at enhancing competition in some way. Oftel's analysis and advice was heeded as 3G spectrum was allotted in order to license a new entrant.

Subsequently, however, Oftel did not simply exploit the SoS' convergence to exercise its formal authority and introduce the roaming measure that would reassure new entrants and aid competition. The regulator granted divergent incumbents different opportunities, and considerable time, to voice their views on what issues needed to be developed.

Oftel's grasp of the coverage, pricing and technical details addressed to advance competition in the face of expressed preference divergence, illustrates the importance of its regulatory expertise. The regulator was able to bargain over individual licence terms without compromising on its wider preference. Rather than forcing preference divergent operators to endure a set of intricate measures they opposed, Oftel accomplished its preference by making allowances, including granting significant formal concessions, intended to make licence modification seem acceptable to incumbents. The invaluable resource of policy expertise that shaped 3G development had not been dictated statutorily, had been accumulated over time and did not require lump-sum expenditures from the formally allocated budget.

In addition to its in-house expertise and the collaboration of influential preference convergent actors, Oftel built on and exploited the informal ties developed over time with the established operators. The regulator identified and formulated competition-related issues without ever undermining the importance of the four 2G operators. Indeed, Oftel never made suggestions that the four incumbents were to be excluded from the 3G market, for example, by proposing that new entrants be allocated two of five 3G licences, or that one new entrant be allocated one of only four auctioned. In fact, despite having to concede entry to a new operator at the expense of their advantageous status quo, the four incumbents obtained a licence each and protracted their mobile market activity.

Unlike the Government, whose use of formal authority even led to a judicial review, Oftel showed the distinct willingness to take into account the positions of 2G operators, even



after extensive discussions had taken place. Oftel avoided using existing statutory powers vis-à-vis Vodafone and BTCellnet, as sole bearers of the market power/influence obligations, to grant prospective 3G entrants access to their 2G networks.

Similarly, at a time when the Government acted firmly, Oftel did not push to impose roaming on existing 2G operators as was formally possible. When the Telecoms Minister announced favouring roaming, the regulator did not launch an immediate statutory consultation either. Both moves were conciliatory. Oftel went as far as making some notable concessions, limiting and, perhaps even decisively, renouncing additional statutory provisions that it had initially planned to introduce.

Thus, Oftel's decision-making over 3G was dominated by the main features of Type II autonomy. The regulator persistently sought some consensus from divergent incumbents through several consultations. In delaying implementation to persuade the adversely affected operators, most eloquently by revising roaming details without losing sight of the key objective, it managed to 'shift the preferences' of Vodafone and BTCellnet as it removed specific provisions. The two larger 2G operators, which had indicated their opposition to more entry and to allowing roaming on their networks at the outset, ultimately, consented to licence modification, making superfluous the provision that allowed Oftel to refer the matter to the Competition Commission.

The case of 3G policy in the UK has thus shown that eschewing the deployment of formal provisions in favour of Type II autonomy processes of persuasion and negotiation, especially when offering reassurances and concessions can lead preference divergent actors to accept and agree to preferences pursued by regulators rather than opposing them. Factors not set out in formal arrangements, such as preference convergence with formally powerful state actors or with actors controlling 'physical' policy-defining assets, informal ties and policy expertise to shift divergent preferences, can be equally, if not more, decisive for independence in practice.

## **Chapter 5: The ART and 3G Policy in France**

### **I. Introduction**

This chapter examines how the Autorité de Régulation des Télécommunications (ART) pursued its preferences regarding 3G spectrum licensing in France. The chapter argues that the regulator successfully showed Type II autonomy by deploying persuasion and negotiation. It was able to do so because of its policy expertise and ties with industry incumbent mobile operators that in turn used their influence to pressure other state actors with formal powers to determine policy.

France was one of the last European Union (EU) countries to sell 3G licences<sup>563</sup>. Policy implementation was nonetheless pursued following the enormous domestic success of GSM, or second-generation (2G) telephony. The ART was the domestic regulator that actively promoted progress within the scope of the wider UMTS framework created at the European level. The chapter shows that, notwithstanding its largely advisory role and limited *ex ante* formal powers, the regulatory agency created the conditions to further its policy preferences vis-à-vis diverse influential actors interested in 3G.

With both state and industry actors participating in the process, the ART conducted the policy on technical and non-technical merits. It ensured that four licences were allocated through the 'beauty contest' method, as it desired, despite facing potentially determinant divergence. The ART's preferences were challenged by particular elected officials, including a Minister possessing overriding statutory authority. The preference divergent Minister in charge of telecoms - who had licensing and rule-setting powers over the selection process - advocated auctions; a preference shared by the Finance Minister. The French Government also controlled the frequency spectrum on which the policy centred and could seek to introduce specific legislation. The regulator's preferences were thus achieved with respect to a different set of divergent (state) actors and resources than those Oftel faced in the UK (non-state). Yet, it did so through a similar process.

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<sup>563</sup> Thatcher 2005, p.105

## ***Outline of Events***

In February 1999, the ART launched a consultation in which it advocated the licensing of 3G spectrum via a 'beauty contest' to a maximum of four operators. This followed earlier work by an advisory spectrum body working group comprising industry actors and the ART. In October 1999, the ART published a summary of responses reflecting overwhelming support for its preferences. However, the French Telecoms Minister and subsequently the Finance Minister advocated auctions instead, because they expected higher licensing revenues compared to a fixed-fee beauty contest and desired to improve state finances.

To pursue its preferences, before April 2000, the ART deployed persuasion through accumulated policy expertise and exploited the influential preference convergent industry actors to put pressure on the Government. By applying these resources after April 2000 and indicating the possibility of an increase in the fixed fee initially proposed, the ART's preferences were adopted in June 2000. However, in terms of outcomes, due to sectoral actors affected by worsening financial conditions withdrawing from the process, only two of the four licences were sold in January 2001. They were obtained by the two largest 2G incumbents, with the remaining incumbent acquiring a third at the end of 2002.

## **II. Participants and Resources**

The section shows that different actors participating in 3G policy development in France possessed valuable resources; clearly, not all were of a statutory nature. At the start of policy, key resources were spread among distinct state and non-state actors, consistent with Type II autonomy. The ART exercised its role of policy advisor to the Government, which held key statutory authority to determine policy. The three incumbent mobile operators possessed 2G networks as well as important ties to elected officials and to the media. As policy was developed, resources besides spectrum ownership, licensing, rule-setting powers, and network incumbency emerged, such as policy expertise, other informal ties and influence over public opinion, were spread among several, mainly domestic, participants.

Policy discussions regarding the development of UMTS in France started in 1998, a few months after the UK. In a year in which French mobile market users doubled,

demonstrating “exceptional” growth<sup>564</sup>, the development of a national 3G policy attracted strong participation. A range of regulatory actors, elected officials, mobile operators and equipment-makers were progressively involved. Among the diverse actors, domestic ones proved particularly influential.

Under the 1996 law determining France’s regulatory framework<sup>565</sup>, the ART regulated telecoms operators and service providers primarily by enforcing licences. However, the ART shared its regulatory functions. The Telecoms Minister held the authority to issue licenses to public network operators<sup>566</sup> and to providers of public telecoms services exploiting radio spectrum via a new network or due to changes to an existing one, much like the UK’s Secretary of State for Trade and Industry. The ART had to evaluate licence applications relating to public telecoms operators on behalf of the Minister and, when their allocation followed a call for applicants, it published a report explaining the outcome of the selection procedure.

Regarding spectrum licensing, the law specified that the number of licences issued could be limited based on technical constraints pertaining to the scarcity of frequencies. In such instances, the ART was to propose terms and conditions governing licensing procedures that had to ensure effective competition, but which the Minister was in charge of publishing. Accordingly, with regard to 3G policy, in addition to controlling the spectrum and having relevant licensing powers, the Minister also possessed rule-setting powers over the licensing process. Thus, while the ART was to undertake frequency allocation to operators and users in objective, transparent and non-discriminatory terms, the Minister had the formal authority to determine the manner of the sale of spectrum, the key asset the policy centred on.

In practice, the policy initially followed a rather similar path to the British experience, as other state actors appeared at the forefront. Unlike other telecoms policies conducted by the ART by way of its regulatory role, early discussions addressing 3G in France in 1998 were undertaken by an advisory body specialised in radio network and services issues, the Commission consultative des radiocommunications (CCR). Thus, like Ofcom in the UK, the French regulator seemed somewhat overshadowed by another state body with relevant expertise, over which a Government Minister held some authority.

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<sup>564</sup> ART, 13/1/99, “Les consommateurs et la téléphonie mobile – compte rendu”

<sup>565</sup> LOI n°96-659, 26/7/1996

<sup>566</sup> *ibid.* see ch.3 for formal institutional arrangements

The 21 CCR members, including seven 'qualified' individuals, were to be appointed by the Telecoms Minister upon ART advice<sup>567</sup>. So, the Minister's appointment powers over the CCR complemented his key formal policy role of licensing and rule-setting regarding the 3G licensing process. The CCR could be consulted by the Minister or the ART on all radio network and services issues concerning licensing procedures, the setting out or modification of technical and operational terms, technical specifications and provisions pertaining to its specialised knowledge, among other things. If the CCR Chairman agreed with the majority of members, the body could decide nonetheless to investigate matters relating to its competencies<sup>568</sup>.

Initially, the CCR seemed to determine the French 3G agenda. Without formal powers over the ART, in January 1998<sup>569</sup> it created a working group (CCR/UMTS)<sup>570</sup> aimed at providing recommendations on key implementation questions including the licensing method, a feasible timetable, frequency allocation and technical interface standards<sup>571</sup>.

So, an understanding of technical spectrum issues was important for policy progress regardless of who nominated CCR members. The CCR/UMTS working group was indeed headed by the former President of European Telecommunications Standards Institute's (ETSI) Special Mobile Group (SMG), Philippe Dupuis, whose technical knowledge reflected the extensive work carried out on 2G GSM technology<sup>572</sup>.

Twenty-five organisations joined with Dupuis in CCR/UMTS<sup>573</sup>, none of whom had formal authority over the ART. The work included, nonetheless, contributions from state

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<sup>567</sup> see ch.3 on CCR composition. In the CSSPPT postal and telecoms commission, qualified individuals included engineers from the French 'Ecoles' specialised in sectoral issues, at the time of writing; <http://www.telecom.gouv.fr/rubriques-menu/acteurs/acteurs-francais-reglementation-regulation-365.html>

<sup>568</sup> Art.D97-1 of the former Code des postes et des télécommunications, now Code des postes et des communications électroniques (Art. D99-4)

<sup>569</sup> Commission Consultative des Radiocommunications (CCR), 22/9/98, Groupe de Travail CCR/UMTS, "L'introduction de l'UMTS en France", Rapport n.1. Also ART, 16/12/98, "L'Autorité de régulation des télécommunications rend public le rapport de la Commission consultative des radiocommunications sur l'introduction de l'UMTS en France", Communiqué de presse

<sup>570</sup> Allowed under the afore-mentioned Code; Art.D97-3

<sup>571</sup> Setting frequency bands for data-rate services consistent with the modest expectations of the time occurred at the ITU's 1992 World Radiocommunications Conference (WRC), an international forum where Member States revise an international treaty. Its Radio Regulations provide technical, operational and regulatory conditions for the use of the radio frequency spectrum held every two to three years for changes in the Regulations. (<http://www.itu.int/ITU-R>; WRC section). Yet, the CCR claimed that the ITU did not possess ETSI's expertise to develop common and detailed technical specifications

<sup>572</sup> Dupuis edited with Hilderbrand,P 2002, "GSM and UMTS - The Creation of Global Mobile Communication", John Wiley and Sons, comprising the technical history of GSM and the early evolution of UMTS

<sup>573</sup> CCR 22/9/98, A3. 'Liste des Participants du Groupe',p.65

actors other than ART officials. Some represented the Agence nationale des fréquences (ANFR) whose board was actually formed by ART officials according to law too<sup>574</sup>. Others were from the Direction des postes et télécommunications (DPT)<sup>575</sup>; a regulatory policy unit internal to the Ministry for Industry<sup>576</sup>, whose portfolio included telecoms. DPT officials reporting to the Ministry were the closest to direct Government representation within CCR/UMTS; formally, though without right of deliberation, the Telecoms Minister could send a representative to CCR meetings on his behalf<sup>577</sup>. In the report's joint opening note, the three state agencies specified that their participation was to provide useful information to the working group, not influence its conclusions. Recommendations were not to be mistaken for their respective views.

In fact, of the seventy-two representatives participating in CCR/UMTS, state actors other than the ART were a small minority. The ANFR had four officials attending, the DPT three. With twelve officials representing it in these early policy discussions, one of whom acted as the working group's point of contact, the ART's involvement was the largest from a single organisation, without a statutory justification.

Similarly, Dupuis presided the seven plenary sessions attended by around thirty participants each, with four sub-groups addressing different 3G issues. In addition to the ART, industry actors played an active and important role, especially the established network operators. Their voluntary participation was critical to understand what issues potential 3G spectrum candidates considered needed addressing to develop policy.

Thus industry actors had a key non-statutory resource, which was the expertise to identify and resolve broad and specific operational issues on which 3G policy implementation depended in practice, pre- and post-licensing. Indeed, three of the four expert sub-groups were chaired by the two oldest and largest, domestic 2G mobile operators, France Télécom Mobiles and Cegetel<sup>578</sup>. Vodafone, the multinational mobile operator active in UK 3G policy too, chaired the fourth. The spectrum sub-group was conducted by the largest - state-controlled and ex-monopoly - domestic operator. The standards and licences sub-

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<sup>574</sup> see ch.3

<sup>575</sup> The DPT did not have statutory ties with the regulator

<sup>576</sup> The 'Ministry' for Industry and its Secretary were, then, part of the broader 'Ministère de l'économie, des finances et de l'industrie' the Finance Minister headed

<sup>577</sup> see ch.3

<sup>578</sup> In 1999, Cegetel's turnover would total just under 4.1bn euros, of which 3.7bn generated by mobile operations, with a 366mln euros profit. Escande, P 16/3/00 "Cegetel affirme que son accord avec Vodafone est compatible avec le pacte d'actionariat", Les Echos

groups were headed by the second largest fixed-line operator owner of the SFR mobile brand - a part of the global media conglomerate Vivendi Universal/Cegetel group. Vodafone chaired the services sub-group.

Crucially, the three French mobile incumbents had national 2G networks to build 3G facilities and services from, helped by their commercial experience too. Indeed, while not chairing a sub-group, the family-run, smallest, French 2G operator, Bouygues Télécom, which “owned politically important newspaper and media companies”<sup>579</sup>, and controlled the TF1 national television channel had more CCR/UMTS representatives than France Télécom (F-T) and Cegetel. The three mobile incumbents had nine, eight and seven representatives respectively.

Therefore, from the early policy stages, when the CCR ‘led’ initial 3G discussions, officials from ART and the three incumbents were more involved than other state actors and potential new entrants attending meetings. ART and incumbents’ officials alone constituted half of all CCR/UMTS participants. For the ART, this meant developing issues with operators it had regulated since becoming operational in 1997.

An important implication of 2G operators’ participation for the regulator was the acquired knowledge of their existing and prospective operations. The ART had also had more time to create closer working relations, and hence access to company officials and information, with the incumbents, as indicated below, than with potential new entrants. Thus, besides the formal relationship between regulator and regulatees, there had been informal interaction.

Non-incumbent participants also included large international business groups, such as operators Hutchinson and Lyonnaise Communication, and manufacturers Motorola, Nortel, Philips and Siemens. These companies operated worldwide, and in relevant technical fields, thus possessing considerable sectoral expertise. Yet, having borne huge costs, the three established 2G operators could build on the critical advantage of network incumbency in France, a highly influential asset, at least with regard to transitional technical and market arrangements from 2G to 3G<sup>580</sup>. 2G networks gave incumbents first-mover

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<sup>579</sup> Thatcher, 2005, p.105

<sup>580</sup> Renault,E and Jakubyszyn,C 10/6/99, “Les opérateurs de téléphonie mobile avancent prudemment sur internet”, Le Monde

advantages at a structural, technical and operational level<sup>581</sup>, given a direct understanding of French mobile service demand trends<sup>582</sup>.

F-T and Cegetel's mobile arm SFR had established their market presence since being licensed in July and December 1992 respectively. By the time the CCR issued its 3G recommendations, Bouygues had been operational for over two years too<sup>583</sup>. So, the participation of industry incumbents was partly explicable by FF100bn of 'sunk costs' spent to build their networks<sup>584</sup>, despite uncertainty about the success of the prospective market and the exact nature of services<sup>585</sup>. The two oldest operators generated returns of around FF1.9bn each in 1998<sup>586</sup>. Having entered later, thus bearing the more recent investment burden and smaller operations, Bouygues projected a FF3bn loss in 1999 instead<sup>587</sup>.

Other domestic factors made the incumbents influential. Besides the affiliation to important media and newspaper companies that could draw public attention to issues of interest, the two privately-owned operators, Cegetel/SFR and Bouygues, had high-level links to policy-makers and influential politicians, with one of Bouygues' major shareholders, Francois Pinault, reported to be a close friend of then French President Jacques Chirac<sup>588</sup>. Curien claims that ties between senior elected officials and French telecoms operators led the Government to strongly arbitrate in Bouygues' favour in 1996, regarding its GSM licence<sup>589</sup>. Being majority state-owned and given its previous status as a national monopoly, F-T had significant political connections too<sup>590</sup>. Within two weeks of being appointed as Finance Minister in spring 2000, Finance Minister Laurent Fabius met F-T Chairman Michel Bon<sup>591</sup>.

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<sup>581</sup> Barroux,D 23/2/99, "La France attribuera de nouvelles licences d'operateurs mobiles en 2000", Les Echos; 13/10/99, "L'ART prepare l'arrivee du telephone mobile du futur et de la boucle locale radio"

<sup>582</sup> La Tribune 17/3/99, "L'Europe de l'Ouest comble son retard sur les Etats-Unis en matiere de telephonie mobile"

<sup>583</sup> ART 4/98, "Perspectives d'évolution à moyen-terme du marché français du radiotéléphone - Etude menée par l'IDATE pour le compte de l'Autorité de régulation des telecommunications", p.5

<sup>584</sup> Renault,E 30/6/99, "L'ART réclame une baisse des prix des appels vers les telephones mobiles", Le Monde

<sup>585</sup> CCR report, p.8-9, para.2.3

<sup>586</sup> Renault 30/6/99; Barroux,D 30/6/99, "Appeler un client Itineris coutera 2,38 francs des demain", Les Echos

<sup>587</sup> Renault 30/6/99

<sup>588</sup> Maussion,C, Pons,F and Raulin,N 5/6/00, "Le trésor des mobiles", Libération

<sup>589</sup> Curien,N 2002, "UMTS en France et en Europe: Quelles procédures pour l'attribution des licences?" p.176, *Annals of Public and Cooperative Economics* 73(2), pp.149-79

<sup>590</sup> see Thum,M p.265 in Borgers and Dustmann 2003

<sup>591</sup> Ministère de l'Économie, des Finances et de l'Industrie, 14/4/00, "Agenda prévisionnel de Laurent Fabius", Communiqués de presse (all Ministry references are press notices; henceforth, left unspecified)



Indeed, the CCR ultimately proved to be an advisory body with limited scope, given its short-lived consultative role. The report arising from the CCR's work was submitted in September 1998 to both the Telecoms Minister and the ART Chairman<sup>592</sup>. It contained preliminary conclusions on distinct issues based on state and non-state input. Stated aims included providing interested French actors with a shared understanding of the impact of introducing UMTS, whether specific points had been raised by the CCR, the Telecoms Minister or the ART Chairman<sup>593</sup>. Thus the CCR acted as a conduit that produced a first important step towards a national policy through participant discussions and recommendations. Policy was not being imposed formally.

In fact, the CCR 'expert' report acted as the foundation for, and enhanced the scope of, the ART's subsequent course of action, which was calling for the launch of a public consultation to define regulatory policy. Accordingly, in February 1999, the ART provided an opportunity for 'all actors' to comment on policy developments. Thirty-two organisations responded<sup>594</sup>, up from the CCR's twenty-five. Several telecoms operators had not voiced their views previously. New respondents included significant operators Japan's mobile operator NTT DoCoMo, and Orange (not owned by F-T at the time), Belgacom, as well as now defunct Dolphin Telecom, which participated in the UK's policy discussions. The participation of industry actors entailed a spontaneous exchange of additional, not formally elicited, information useful for the ART to shape 3G policy.

Without powers to determine policy, the regulator remained nonetheless aware that selected Government officials, notably the Telecoms Minister, could formally challenge its policy orientations. The regulator acknowledged the Minister's statutorily influential role when it launched its consultation<sup>595</sup>. Shortly before the launch, Telecoms Minister Pierret had stressed publicly that the regulator's role was one of highly valuable 'technical' work. However, he also specified that the agency had been created to produce advice and 'regulate', not to determine policy<sup>596</sup>.

The Minister did not respond to the regulator's proposals, just as he had not participated in CCR/UMTS discussions, thus appearing uninvolved in the policy largely conducted by the

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<sup>592</sup> ART 19/2/1999, "Consultation publique sur l'introduction de l'UMTS en France"

<sup>593</sup> CCR 22/9/98, p.5

<sup>594</sup> "Liste des Contributeurs", ART 9/99, "Introduction de l'UMTS en France: synthèse des contributions a la consultation publique"

<sup>595</sup> ART 2/99, p.3

<sup>596</sup> Renault, M-C and LeGales, Y. 8/1/99, "Christian Pierret: 'Favoriser les prix les plus bas possibles'" Le Figaro

ART. Yet, at the European Council of Telecoms Ministers meeting in April 1999, Secretary of State for Industry Pierret did officiate and discuss the prospects of introducing 3G as a matter of industrial policy<sup>597</sup>.

Indeed, state and non-state actors that shaped policy development in practice became clearer as the ART consultation's initial momentum subsided. The progressive narrowing down coincided with the French Government's increased interest and participation in the spring of 2000, when the British Government auctioned 3G licences in the UK. The final phases of the British auctions roughly coincided with the appointment of a new Finance Minister, Laurent Fabius, who headed the then Ministry for economy, finance and industry.

Fabius displayed greater involvement in the public debate on 3G, especially, compared to his short-lived predecessor<sup>598</sup>. While lacking powers to dismiss junior Ministers to change the course of sectoral policy<sup>599</sup>, Fabius, a former Socialist Prime Minister, was in charge of the Industry Ministry<sup>600</sup>, headed by the Minister overseeing the telecoms sector, Secretary Pierret, with whom he had longstanding close ties aiding a collaborative relationship<sup>601</sup>.

Fabius became publicly involved with Pierret in how the Government developed 3G policy in the run-up to determining the licensing method, given the Telecoms Minister's formal powers. The two Ministers privately discussed policy terms directly with then Socialist Prime Minister, Lionel Jospin, involving him in 3G decision-making behind-closed-doors, particularly after the ART formulated its proposal<sup>602</sup>. Similarly, according to a report, then centre-right President Jacques Chirac agreed to meet Francois Pinault, personal friend and major shareholder of Bouygues, over 3G<sup>603</sup>.

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<sup>597</sup> "Intervention de Christian Pierret sur l'UMTS lors du Conseil européen des ministres des télécommunications de Luxembourg", 22/4/99, Industry Ministry Press notice,

<sup>598</sup> Christian Sautter, November 1999-March 2000. Raulin,N 28/3/00, "Désavoués, mortifiés, fatigués, ils quittent le gouvernement", Libération; Bonavita,M-L 5/4/00, "Une équipe longue à constituer", Le Figaro

<sup>599</sup> The dismissal of French Government Ministers is a power held by the President of the Republic, upon the Prime Minister's proposal, Art.8, French Constitution: Conseil Constitutionnel, "Constitution du 4 octobre 1958".

<sup>600</sup> La Tribune, 28/3/00, "Fabius charge 'd'incarner la réforme' a la tête de Bercy"

<sup>601</sup> Malingre,V 27/5/00, "Les éléments du dispositif de contrôle établi à partir de Bercy", Le Monde

<sup>602</sup> Fabius,L. "Assemblée nationale 2<sup>e</sup> SÉANCE DU MARDI 6 JUIN 2000"; Jakubyszyn,C and Renault,E 15/4/00, "Le gouvernement veut se constituer une cagnotte grâce au téléphone mobile", Le Monde; Maussion et al 5/6/00; Jakubyszyn,C and Renault,E 6/6/00, "La 'cagnotte' du téléphone pourrait attendre 100 à 150 milliards de francs", Le Monde; Lamm,P 7/6/00, "Habile compromis", Les Echos; Penicaut,N and Riche,P 7/6/00, "Un 'ni-ni' qui ne contente personne", Libération

<sup>603</sup> Maussion et al 5/6/00

Fabius officially announced the Government's decision over the 3G selection process to Parliament in June 2000<sup>604</sup>. Indeed, as the policy gained visibility and media coverage, the Government's progressive involvement in 3G also brought to the fore the preferences of other French Members of Parliament (MPs). They were not granted powers directly relevant to 3G in the 1996 law but, depending on their policy support, could publicly influence ministerial decision-making, ultimately voting on new legislation. Though late in the process, MPs scrutinised the Government's policy-making during several sessions, and by default that of the regulator<sup>605</sup>. MPs debated and put pressure to revise decisions on 3G regulatory issues by publicly questioning and exposing the judgment of cabinet Ministers<sup>606</sup>.

Around the time when political involvement into 3G spectrum allocation increased, ART Chairman Jean-Michel Hubert announced the domestic and foreign mobile operators that had expressed interest in 3G licences. Seven to ten did, thus comparatively fewer than the thirteen UK bidders<sup>607</sup>. Besides the three existing French 2G operators, French conglomerate Suez Lyonnaise (des Eaux) in a consortium with Telefonica, Deutsche Telekom, Telecom Italia and the Canadian TIW were likely candidates<sup>608</sup>. Apart from one Lyonnaise Communication official, none of these large non-incumbent operators had had representatives involved in the CCR's work shaping recommendations in its report. Hubert called on other operators to join the process, particularly the Japanese incumbent NTT Docomo which had responded to the ART's consultation.

Two potential new entrants (Deutsche Telekom and TIW) had participated successfully in the British auctions. Moreover, Deutsche Telekom and Telecom Italia, respectively German and Italian national incumbents, were bidding for domestic UMTS licences. Thus, some of the world's largest operators were looking to expand their 3G presence across Europe<sup>609</sup>. Entry into France too would help create pan-European 3G networks<sup>610</sup>. Foreign operators could apply their mobile sector expertise and financial muscle like the domestic operators. None, however, possessed network operations in France apart from Telefonica,

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<sup>604</sup> Fabius 6/6/00

<sup>605</sup> The ART's policy-making was criticised for its lack of democratic legitimacy by MPs frustrated with their lack of policy involvement after the licensing method had been decided. Carrez,G and Auberger,P "Assemblée nationale 3ème SÉANCE DU VENDREDI 20 OCTOBRE 2000"

<sup>606</sup> Before licences were allocated, Rossi,J and Soisson,JP "Assemblée nationale 1<sup>re</sup> SÉANCE DU 3 MAI 2000" questioned the doubts over which licensing method to apply, as did subsequently, Goulard,F "Assemblée nationale 2<sup>e</sup> SÉANCE DU 30 MAI 2000", who questioned why the selection process was not being debated and decided in Parliament

<sup>607</sup> Binmore and Klemperer 2002, fn.49, p.C90

<sup>608</sup> ART 7/00, "Interview de Jean-Michel Hubert à Radiocom & Télécoms Magazine"

<sup>609</sup> Henni,J and Mabile,P 30/5/2000, "France Télécom finalise sa plus importante acquisition avec le britannique Orange", Les Echos

<sup>610</sup> Henni,J 7/6/00, "Quatre favoris pour quatre licences", Les Echos

and, excluding Vodafone's participation through Vivendi/SFR<sup>611</sup>, none had the high-level political links of the three French incumbents.

The introduction of 3G in France thus saw a range of diverse actors interact with the ART from the start. Key resources were dispersed among several, mainly domestic, participants, hence, not part of a single influential group.

### III. Preferences

The section shows that, although key elected actors had divergent preferences from the regulator's on 3G licensing, the ART had some influential support from the outset, consistent with Type II autonomy. Following the ART's February 1999 consultation, the different 3G preferences of resourceful actors emerged. 2G network incumbents indicated their convergence over the regulator's preferred selection process of a modest fixed-fee 'beauty contest' for four licences. After realising that auctions could determine higher licensing revenues than a beauty contest, senior Government officials, including the Telecoms Minister with the powers to determine policy, focussed on the Finance Ministry's priority of improving state finances.

ART preferences emerged through its consultation. It asked policy participants to identify solutions for key issues drawn from the CCR's work. Several complex spectrum-related considerations were raised, such as the allotment of frequency bands, causing the initial debate to be deemed 'highly technical'<sup>612</sup>. Yet, the ART took a rather open stance on the more technical and commercial aspects, effectively delegating work to respondents. It was much more definite on licensing issues instead, leading to divergence with key elected officials.

So, to help spread 3G, the ART asked how operators would address the limited 3G network coverage in the short-term vis-à-vis 2G networks' extensiveness, enquiring about likely service provision, 2G and 3G network complementarity, and the scope for adopting

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<sup>611</sup> Thum 2003, p.265

<sup>612</sup> Thatcher 2005, p.106

roaming conditions<sup>613</sup>. French operators risked particularly expensive coverage requirements given a more dispersed population than other EU countries<sup>614</sup>.

Operators' likely reluctance to provide extensive coverage across France, especially to unprofitable areas, could hardly be ignored, given the ART statutory objective of providing access to services regardless of geography or users. Similarly, the regulator enquired about the different types of participants expected to enter the market (network operators, service providers, content providers) and what relationships they were likely to build; relevant to the formal objective of promoting 'competition in users' interest'.

However, the ART revealed its actual preferences clearly, stating the number of operators it was 'suitable' to let into the market, and 'proposing' a licensing procedure which would allow it to select the 3G operators among licence applicants<sup>615</sup>. The two objectives implied gaining control over market entry and structure, determining competition levels and who the ART would regulate. So, although the authority to license 3G spectrum, the key 'physical' asset, was the Telecoms Minister's, by achieving its preferences, the regulator would effectively determine how the Minister exercised his formal powers.

The preferences were not wholly consistent with the ART's formal duties. Licensing four 3G operators maximum meant limiting entry to one more operator than the 2G market. Thus, the regulator precluded the possibility of issuing five or more licences, unlike some other EU countries<sup>616</sup>. Besides promoting more new entry, and hence greater competition, licensing a fifth operator might have helped fulfill the ART's geographical statutory objective and that of developing employment, innovation and competitiveness too<sup>617</sup>.

The CCR had recommended the frequency blocks for the aggregate terrestrial supply of 3G services in France - the same as those adopted in the UK<sup>618</sup>, and suggested the amount of frequencies to be allocated per operator<sup>619</sup>. The 1996 French telecoms law set out that the number of licences issued could be limited based on technical constraints deriving from the scarcity of frequencies<sup>620</sup>. Yet, while four licences was an implicit choice given the

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<sup>613</sup> ART 2/99, ss.I.2-3 and II.3.2-3.3

<sup>614</sup> Curien 2002, p.175

<sup>615</sup> ART 2/99, points 19,29 respectively

<sup>616</sup> Tables 3-4, Borgers and Dustmann 2003

<sup>617</sup> see ch.3

<sup>618</sup> 2\*15MHz symmetrically coupled in the 1920-1980MHz/2110-2170MHz paired frequency bands and 5MHz in either the 1900-1920MHz or the 2010-2025MHz unpaired frequency bands. ART 2/99, Point 22

<sup>619</sup> 2x15MHz of paired spectrum plus 5MHz of unpaired spectrum

<sup>620</sup> see ch.3

recommended frequencies per operator, the CCR had not explicitly stated the number of operators it felt should be licensed.

The ART did not raise questions about recommended bands potentially leaving 15MHz of spare frequencies unused<sup>621</sup>, nor did it question whether frequency blocks could be split differently. Thus the regulator did not verify whether 3G operators would have been constrained had less spectrum been allocated per licence, to allow for an additional operator. It did not consider that larger spectrum licences be reserved for new entrants, with smaller licences for established operators, as had been decided in the UK.

Licensing four 3G operators entailed new entry. However, competition was not the ART's priority. The law allowing the number of licences to be limited for technical constraints also stated that frequency allocation had to ensure effective competition<sup>622</sup> - other EU countries allotting the same frequency bands issued more 3G licences. Limiting the number of licences was prioritised over the formal competition objective, aiding ART discretion to protect domestic operators from foreign entry through the licensing method<sup>623</sup>. Thus the regulator interpreted its vague formal objectives selectively to pursue its preference of determining the entry of maximum four 3G operators.

The ART's central and most debated preference related, nonetheless, to its favoured 3G licensing selection process. The article in the law stating that the number of licences issued could be limited given technical constraints due to spectrum scarcity also indicated that, in such instances, the ART proposed terms and conditions governing licensing procedures to the Telecoms Minister. The ART 'envisaged to propose' a 'beauty contest', also recommended by the CCR instead of an auction<sup>624</sup>, as the method to allocate 3G spectrum licences<sup>625</sup>. The ART was therefore proposing to extend its discretionary power beyond the formal provision allowing it to evaluate licence applicants on the Minister's behalf<sup>626</sup>.

The ART had the statutory duty to publish its reasons for the selection procedure undertaken and for applicants licensed<sup>627</sup>. Yet, adopting a beauty contest meant that the

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<sup>621</sup> ART 2/99, Points 18-19

<sup>622</sup> see ch.3

<sup>623</sup> Thatcher 2005, p.106; Renault, M-C and Visseyrias, M 19/5/00, "Que la France n'ait pas de réflexe nationaliste" Le Figaro

<sup>624</sup> CCR 9/98, para.7.2

<sup>625</sup> Barroux 23/2/99

<sup>626</sup> see ch.3

<sup>627</sup> ibid

agency was assuming the power to vet licensees, by applying 'objective' selection criteria which it decided<sup>628</sup>, however vague<sup>629</sup>, after operators 'qualified' according to other criteria it identified<sup>630</sup>. Therefore the regulator would select operators among those that had not been excluded because of its qualifying criteria. The ART suggested several selection criteria including time-limited coverage requirements, minimum service quality levels, and the financial outlay for the access and use of 3G frequencies.

So, the regulator's proposal comprised its preferred licensing method which, if formally adopted, would allow it to evaluate applications on the Minister's behalf and establish licensees according to its published criteria but with enormous control over the choice<sup>631</sup>. If the Government agreed, the ART would control the whole chain of 3G entry. Indeed, with applicants paying the same fixed 'administrative' entry fee, if more operators applied than licences were available, by evaluating applicants on the Minister's behalf, the agency's authority would include deciding between domestic and foreign operators<sup>632</sup>. The method was unlike the UK's policy to auction licences, which made the economic evaluation of licences by individual applicants the only criterion for entering the market<sup>633</sup>.

Initially, the ART's key preferences were largely unopposed. Most respondents agreed on allocating maximum four licences. Two specified that, initially, three licences were preferable<sup>634</sup>. One was former monopoly, France Télécom<sup>635</sup>. Only two respondents felt a smaller spectrum band was sufficient, allowing more for new entrants. Indeed, only about a year after responses had been submitted, did the chief of the multinational conglomerate

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<sup>628</sup> ART 2/99 point 29. Operators would have to comply with the 1996 law duties, distinctly from 3G selection criteria. LOI n°96-659, Art.L.33-1.-I for the eighteen duties that applied to all licensed PTOs

<sup>629</sup> Borgers and Dustmann 2003, p.247, indicate how one criterion would be "the contribution which the project makes to the multimedia mobile telephony market and...to the development of the information society in France". ART 2000, Décision 00-835, p.26

<sup>630</sup> The regulator first raised two 'qualifying' criteria: i) applicants with 2G licences should be allowed to apply for 3G licences - ultimately omitted, thus allowing 2G operators to apply; ii) cross-shareholdings of separate applicants was not permissible - retained. It was agreed 3G competitors should be separate entities. 3G licences had to be allocated to "real competitors". Several argued that those owning over 25% of a 3G operator should not own a competitor's shares, which applied to 2G operators. ART 2/99, 9/99; points 26-27

<sup>631</sup> It is worth reminding that the Government licensed 2G public telecoms operators in France before the ART was created

<sup>632</sup> *Le Monde* 15/4/00

<sup>633</sup> For discussions on auctions versus beauty contests: Curien 2002; Cartelier, L 3/2003 "Auctions Versus Beauty Contests: The Allocation of UMTS Licences in Europe", *Annals of Public and Cooperative Economics*, Vol.74, pp.63-85; Cohen, E 2004, "Régulation et procédures d'enchères: les discussions sur les choix d'attribution" pp.87-93 in (ed.) Frison Roche, M-A, "Règles et pouvoirs dans les systèmes de régulation", Presses de Sciences Po et Dalloz

<sup>634</sup> ART 9/99, p.26

<sup>635</sup> Henni, J and Mabile, P 26/5/00, "Feux croisés contre l'attribution d'une cinquième licence", *Les Echos*

Suez Lyonnaise des Eaux publicly propose five licences<sup>636</sup>, which Cegetel and Bouygues publicly opposed<sup>637</sup>.

Given the high costs of creating 3G networks, operators were concerned that five licences would be sold, yielding lower economic rents than with four. Secondly, they argued that fewer frequencies per operator would make delivering high-speed innovative services technically harder<sup>638</sup>. So, the regulator received significant support over the amount of frequencies it proposed for each eventual 3G operator, directly influencing the number of licences<sup>639</sup>.

Even more crucially for the ART, which would select the 3G entrants, an overwhelming majority agreed with the beauty contest proposal<sup>640</sup>. All respondents thought that auctions would raise the price of licences, hence of entry, enormously. In support of Curien's claim that the expected value, or price, of a licence constituted the main issue in France's 3G policy rather than the selection procedure<sup>641</sup>, the "negative experiences" of auctions abroad were raised. The maximisation of Government revenues was surmised as the only basis for auctions<sup>642</sup>.

Since industry actors wanted to minimise costs, they supported the ART's preferred allocation process too to avoid making the financial evaluation of spectrum the only determinant. Spectrum rarity meant bidding for 3G spectrum against powerful competitors could prove very expensive. The unpredictability of auctions for a highly valued, rare resource was undesirable compared to a fixed fee established by public authorities.

Only one consultation contributor had reservations about a beauty contest<sup>643</sup>. Fearful of protectionism and national bias, only months later did the Chief Executive of Germany's incumbent operator Deutsche Telekom raise doubts about the likelihood that French regulatory authorities would award foreign candidates a licence; an auction was the most

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<sup>636</sup> *ibid*; Pons,F. 26/5/00, "Mobiles: l'inconnu du cinquième élément. Christian Pierret hésite à attribuer une cinquième licence UMTS", *Libération*

<sup>637</sup> Henni and Mabille 26/5/00; Barjonet,C. 26/5/00, "Licences UMTS: Martin Bouygues met la pression maximale", *Les Echos*; Henni,J 30/5/00, "UMTS: les opérateurs mobiles opposés à l'attribution d'une licence supplémentaire", *Les Echos*

<sup>638</sup> *ibid*

<sup>639</sup> ART 9/99, points 17-18. It also incurred consensus over the early release of blocked frequencies, and allocating the spectrum primarily to PTOs; point 23

<sup>640</sup> *ibid.* p.30

<sup>641</sup> Curien 2002, p.151

<sup>642</sup> ART 9/99 p.31

<sup>643</sup> *ibid.*, p.30



“fair and transparent system”<sup>644</sup>. Instead senior executives of the three French mobile incumbents F-T, SFR and Bouygues, indicated their convergence on a beauty contest right after the consultation’s publication<sup>645</sup>, strengthening the consensus surrounding the ART.

Thus the ART received exceptional industry support, particularly from the players best-placed to deliver 3G in France fast, given established 2G network operations and market knowledge. Given the overwhelming support for a beauty contest fixing entry costs, only the possible selection criterion of a financial outlay for access and use of frequencies proved highly unpopular. Referring to the drawbacks of auctions, respondents objected to candidates evaluating financial contributions to be made. Fees should be fixed at “acceptable” levels to avoid hindering the development of 3G. Most preferred to make annual licence payments as for 2G<sup>646</sup>. Opposing auctions and attempting to minimise licence fees shows how candidates wanted to acquire 3G spectrum as cheaply as possible.

The regulator appeared on track to fulfill its preferences nonetheless, seemingly incurring Type III autonomy<sup>647</sup>. The overall agreement over a beauty contest and allocating four licences suggested that preference fulfillment depended on the regulator preserving consensus. A variety of industry players possessing 2G networks, financial muscle, political and media connections, international experience and technical expertise, supported the ART’s priorities.

However, the considerably different implications for state finances, of licensing based on the process and conditions promoted by the regulator vis-à-vis auctions, caused divergence with the formally powerful Government, creating a Type II preference scenario. The preference triggered the possibility that the ART would be obstructed by existing formal constraints, unlike Oftel in the UK.

Industry Secretary Pierret, the Minister in charge of telecoms who possessed licensing powers, indicated auctions were not to be excluded one day after the ART had published consultation findings<sup>648</sup>. While auctions were not “a French tradition”, Pierret claimed that

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<sup>644</sup> Renault,MC and Visseyrias,M. 19/5/00, “Que la France n'ait pas de réflexe nationaliste”, *Le Figaro*

<sup>645</sup> Musi,G. 19/11/99, “Les operateurs redoutent les couts de la 3e generation de mobiles”, *La Tribune*

<sup>646</sup> ART 9/99, point 30. In January 2001, the ART’s Chairman reiterated this issue’s importance given the downturn of the telecoms/internet market and the Government’s decision on licence prices, “Interview de Jean-Michel Hubert publiée dans *Les Echos* le 18 janvier 2001”

<sup>647</sup> see ch.1; Nordlinger

<sup>648</sup> *Le Figaro* 12/10/99 “Mobiles: futures licences aux enchères en France”; *Les Echos*, 13/10/99, “L’ART prepare l’arrivee du telephone mobile du futur et de la boucle locale radio”

a “réflexion” was taking place. The implication was improving the state’s finances through the one-off ‘sale’ of the unique and highly valuable spectrum ‘asset’ for 3G service provision. Different reports indicated that while maximising revenue was desirable, a compromise method was being considered instead of pure auctions, given the doubts about the ability of French 2G incumbents entering the market on a solely financial criterion, unlike powerful foreign rivals<sup>649</sup>.

Pierret nonetheless reiterated in a television interview the next day that his “preference was for auctions, although it had not been laid down”, the issue had to be considered in-depth, and was “an open debate”<sup>650</sup>. He reiterated the possibility of auctions one-month-and-a-half later, advocating their “advantageous transparency and best evaluation method for the rare spectrum”<sup>651</sup>, despite recognising the concern that 2G incumbents might have been excluded. Long after the licensing method was decided, Pierret stated again, in Parliament, that he had been a, “partisan”, proponent of auctions<sup>652</sup>.

Thus, a Government Minister with rule-setting powers<sup>653</sup> of a different political orientation from that who had appointed ART Chairman Hubert<sup>654</sup>, formerly Secretary-General and Finance Director during Jacques Chirac’s mayor-ship of Paris and his close ally<sup>655</sup>, did not share the regulator’s and key industry actors’ preferred licensing method. The French Government’s reaction to the British auctions and the prospects of German auctions marked the distance with the regulator, causing the ART’s formal 7<sup>th</sup> March 2000 proposal to be reviewed, as later revealed by Hubert<sup>656</sup>.

For newly appointed Finance Minister Laurent Fabius, the prospect of raising finance became more important than the licensing procedure given the opportunity to address macroeconomic concerns, particularly increasing France’s pension funds reserves<sup>657</sup> and reducing public debt<sup>658</sup>. Pierret had disclosed to a newspaper before then that a new

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<sup>649</sup> Les Echos 12/10/99, “Le gouvernement veut mettre aux enchères les licences de 3e génération”

<sup>650</sup> Les Echos 14/10/99, “Christian Pierret réaffirme sa préférence pour un système d’enchères”

<sup>651</sup> Les Echos 30/11/99, Christian Pierret: “Le degroupage sera introduit d’ici à 2001”

<sup>652</sup> Pierret, C. “Assemblée nationale 1<sup>re</sup> SÉANCE DU 20 OCTOBRE 2000”, p.7262

<sup>653</sup> ART 18-19/11/99, “Intervention de Jean-Michel Hubert, Président de l’Autorité de régulation des télécommunications, aux Journées internationales de l’Idate”

<sup>654</sup> The ART started operating start-1997, during Alain Juppé’s centre-right Government

<sup>655</sup> La Tribune 6/1/97, “Le gouvernement désigne les membres de l’Autorité de régulation”; Le Point 1/2/97, “État-major”

<sup>656</sup> ART 11/5/00

<sup>657</sup> Fabius, L. 16/5/00 “DÉCLARATION DU GOUVERNEMENT sur le débat d’orientation budgétaire”

<sup>658</sup> Maussion et al 5/6/00

scheme imposing both an entry fee and an annual licence charge was being considered<sup>659</sup>. There was, nevertheless, the awareness that the sum collected by the British Government was heavily influenced by the auctioning process.

Fabius first mentioned the possibility of auctioning French licences in early May 2000<sup>660</sup>; a week after the British auctions had ended. With the apparent support of most Government members<sup>661</sup>, Fabius informed the Assemblée nationale that the Government would decide the selection procedure within six weeks. This immediately led certain centre-right MPs to question Fabius, and a week later Pierret, over the decision-making slowness<sup>662</sup>; particularly the hesitation over auctions to the detriment of public finances.

One MP who challenged the centre-left Government's hesitancy over auctions, asking if they would take a decision based on ideology, was former Telecoms Minister, Francois Fillon<sup>663</sup>, who had belonged to the centre-right Government that had appointed Hubert. Without referring to the ART, in Parliament, Fillon, stressed the important financial impact that selling 3G licences would have on state revenues, but questioned how a left-wing Government that opposed liberalisation would consider auctions<sup>664</sup>. One report claimed that he welcomed a beauty contest the following month<sup>665</sup>, after the left-wing Government took the decision.

Based on then state-controlled F-T's acquisition of Orange, comprising its UK 3G licence, another centre-right MP challenged Fabius over not opting for auctions assertively around one month later. The MP asked why, if the Minister "authorised" that F-T purchase the UK mobile operator which had spent FF40bn (£4.095bn<sup>666</sup>) on a 3G licence, the price of a 3G licence in France should be any lower, benefiting operators' shareholders<sup>667</sup>. Thus, some centre-right MPs put pressure on the divergent centre-left Government to act against the key ART preference too.

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<sup>659</sup> Jakubyszyn and Enguerand 15/4/00

<sup>660</sup> Fabius,L "Assemblée nationale 1<sup>e</sup> SÉANCE DU 3 MAI 2000", p.3669

<sup>661</sup> Jakubyszyn,C and Malingre,V 13/5/00 "La France se divise sur l'attribution de licences de telephone par enchères", Le Monde

<sup>662</sup> Rossi,J (former Industry Minister; Thatcher 1999, p.215, fn.58), Soisson,JP. *ibid*; also Fillon,F. "Assemblée nationale 1<sup>e</sup> SÉANCE DU 10 MAI 2000"

<sup>663</sup> Thatcher 1999, p.158, fn.67. Fillon is French Prime Minister under President Nicolas Sarkozy at the time of writing

<sup>664</sup> Fillon 10/5/00

<sup>665</sup> Bezat,J-M 8/6/00 "Les parlementaires se familiarisent avec le dossier de la téléphonie", Le Monde

<sup>666</sup> Borgers and Dustmann 2002, p.84

<sup>667</sup> Goulard 30/5/00

Preferences thus revealed a division between influential participants but, from the start, the regulator was not isolated. While facing opposition from key elected officials, industry actors, especially influential 2G incumbents, were convergent.

#### IV. Process

This section examines how the ART risked forgoing its preferences, particularly the beauty contest, once divergence with the Government controlling key powers to license and to finalise the allocation process emerged. Rather than acting upon its preferences directly, which it could not do, the regulator shifted the Government's position, consistent with Type II autonomy<sup>668</sup>. It is shown that, despite the formal constraint of being a primarily advisory body, the ART exploited other resources, namely a clear understanding of policy choices, convergent preferences with influential domestic industry actors and informal ties and exchanges, to present key Government Ministers with a convincing case. Besides exploiting convergent influential actors, the regulator used persuasion, so that the Government accepted a compromise, and fulfilled its preferences.

The ART laid the ground to fulfill its preferences between February 1999 and June 2000, when Finance Minister Fabius announced the Government's decision on the terms of 3G licensing; a decision that was not conflictual, but consensual<sup>669</sup>. By the time Industry Secretary Pierret stated that the Government was considering 3G spectrum auctions towards end-1999, the regulator had ascertained the arguments for a beauty contest and commanded decisive support from influential established industry actors. Without the necessary formal authority, such key resources would be exploited thereafter to 'induce' a beauty contest.

Persuading the Government to adopt preferred policy terms began soon after the consultation ended and Pierret made his preference for an auction known. The regulator held several private discussions with the Minister<sup>670</sup>, to find a compromise<sup>671</sup>. To overcome statutory constraints, the ART pursued its preferences by exploiting information at its

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<sup>668</sup> Consistently with Type II autonomy, Rourke 1965 describes how in the 1950s in the US, where formally independent regulatory agencies were first established, "it was believed these agencies should emphasise persuasion rather than coercion in the exercise of their authority", p.189 "Bureaucracy and public opinion", in "Bureaucratic power in national politics", Eds. Rourke, FE., Little, Brown and Company

<sup>669</sup> Telephone interview: Jean-Michel Hubert, ART Chairman 1997-2003, 7/5/2009

<sup>670</sup> *ibid*

<sup>671</sup> Les Echos 13/10/99 "L'ART prepare l'arrivee du telephone mobile du futur et de la boucle locale radio"

disposal and its better understanding of issues than the Government, selecting supportive sectoral analyses. The UMTS Forum's report number 5 mentioned in the ART's consultation had recommended the minimum spectrum requirement upheld by the CCR, and equated to a maximum of four licences<sup>672</sup>.

ART Chairman Hubert publicly explained the case that he wanted the Minister to heed a month after publishing consultation findings, at a conference on the growth of French and European mobile markets<sup>673</sup>. Hubert provided a rationale for a beauty contest largely based on the CCR report and the ART consultation. Similarly to when the ART consultation was launched, Hubert publicly recognised the “determinant” effect that Secretary Pierret's decision on the licence allocation process would bear on the market's likely structure. Unable to determine policy terms, Hubert openly called on the Minister to assess advantages and disadvantages of the two methods carefully. Yet, the regulator markedly promoted the beauty contest preference.

To persuade Government Ministers that auctions were against their interests, Hubert started by offering his own interpretation of key issues<sup>674</sup>. According to him, traditional justifications supporting auctions could be summarised in two points: their “reputed” transparency, “supposedly avoiding multiple appeals over candidate selection” and; that “they should lead to a better valuation of spectrum”<sup>675</sup>.

Hubert thus worked to instil uncertainty<sup>676</sup> about the merits of auctions among Ministers, unlike in the ART's initial consultation when it had avoided mentioning auctions. While echoing publicly available CCR recommendations<sup>677</sup> for a beauty contest in both of its documents, the regulator first presented the consensus over the shortcomings of auctions in its summary of responses<sup>678</sup> and, as the Minister's preference emerged, compared them unfavourably. So, the ART exploited selectively inter-agency collaboration<sup>679</sup>, to portray

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<sup>672</sup> “Minimum spectrum demand per public terrestrial UMTS operator in the initial phase”, 1998. UMTS Forum is an international telecoms association promoting 3G mobile systems and services comprising telecoms operators, manufacturers and regulators

<sup>673</sup> ART 18-19/11/99

<sup>674</sup> see ch.1; Nordlinger

<sup>675</sup> ART 18-19/11/99

<sup>676</sup> see ch.1; Nordlinger

<sup>677</sup> ART 16/12/98, “L'Autorité de régulation des télécommunications rend public le rapport de la Commission consultative des radiocommunications sur l'introduction de l'UMTS en France ”

<sup>678</sup> Without identifying contributors

<sup>679</sup> Bardach 1998 states: “not all forms...threaten autonomy equally...Agencies will therefore attempt not just to eschew autonomy-threatening relationships but to recast necessary relationships in their least threatening form”, pp.180-1

auctions as an imperfect licensing method and make a beauty contest sound more suitable and appealing<sup>680</sup>.

The case for a beauty contest was, nonetheless, developed non-confrontationally. Hubert highlighted the convergent consultation responses during his November speech, indicating the overall consensus with sectoral actors. Consistent with Type II autonomy, Hubert exploited convergent actors from the start, pointing out how, despite shared optimism over 3G, contributors had strongly warned about the economic and market-related risks of auctions<sup>681</sup>.

The possibility that escalating bids could exclude French 2G operators was raised, subtly 'reinforcing'<sup>682</sup> the relationship with key convergent industry actors but also appealing to shared national loyalties with the Government<sup>683</sup>. Indeed, while expressing the auction preference subsequently, Pierret also indicated that the decision should not lead to 2G incumbents being excluded from the 3G market<sup>684</sup>.

Arguing that the ART could not ignore the consensus on the licensing method best adapted to France<sup>685</sup>, Hubert publicly suggested the Government should not do so either, months before submitting the proposal the regulator was formally entitled to frame. Yet, clearer evidence that, while making a case for a beauty contest, confrontation was being avoided is that he referred to the preferred licensing method "*if it is retained*"<sup>686</sup>. Hubert similarly underplayed divergence with the Government, indicating that a beauty contest meant 'state authorities' had a better chance to define licensing requirements and manage the spectrum, hence that goals were the same but that the agency's preferences were more effective<sup>687</sup>.

Thus the regulator gained a position of influence through a resource, the consultation, which was not laid down in the 1996 law but was created by the agency, and through the CCR's 'expert' report preceding it<sup>688</sup>. Handling responses, following its interaction and

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<sup>680</sup> The ART focussed selectively on thirty-seven points compared to about sixty CCR recommendations; CCR 9/98, pp.50-60

<sup>681</sup> ART 11/10/99, 18-19/11/99

<sup>682</sup> see ch.1; Nordlinger

<sup>683</sup> *ibid*

<sup>684</sup> Les Echos 30/11/99

<sup>685</sup> ART 18-19/11/99

<sup>686</sup> *ibid* (italics added)

<sup>687</sup> see ch.1; Nordlinger

<sup>688</sup> This included the input of many ART officials part of CCR/UMTS

exchanges within CCR/UMTS, meant that the ART consolidated its 3G policy development role with both state and non-state actors. In addition to acquiring useful knowledge to make its case, the regulator also knew how much support it had and from whom, publicly and privately.

Besides planning to take into account keenly engaged actors' preferences<sup>689</sup>, the ART had stated that lessons would be learnt from consultation responses in order to submit proposals to the Minister, echoing claims that: "procedural rules can cause agencies to generate the outcomes desired by the principals"<sup>690</sup>. Yet, while acting as though there were shared objectives, the regulator opposed rather than generating the principal Minister's desired 3G outcome.

In practice, the ART took control of the policy, overshadowing formally relevant bodies such as the Agence nationale des fréquences, and shaped the debate's direction, creating an "issue coalition"<sup>691</sup>. Indeed, when announcing his interest in auctions, after the ART had advocated a beauty contest sustained by industry, Pierret expressed caution over the contentious decision despite his formal authority<sup>692</sup>.

The proposal was presented as an analysis of domestic factors and international experiences reflecting "dialogue with other actors" and the "quality of the debate"<sup>693</sup>, thus conveying the level of consensus that the Minister had to overcome to ignore the ART proposal. So, unlike for other agencies, the ART's "information dependence and professional bias" was not "under the control of political overseers"<sup>694</sup>. Similarly, its budget did not determine the extent it could assure itself of multiple information sources. The regulator's efforts, comprising private discussions with Pierret, had almost ensured that a beauty contest would be retained in early 2000<sup>695</sup>.

Yet, the importance of the ART's arguments and the highly influential support secured showed particularly after Laurent Fabius' appointment. He seemed intent on exploiting the Government's formal authority to overturn the regulator's proposal. Following the ART's

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<sup>689</sup> ART 2/99, Introduction

<sup>690</sup> McCubbins, Noll, Weingast 1987, pp.244-246; 1989

<sup>691</sup> see ch.1; Nordlinger

<sup>692</sup> *Le Figaro* 12/10/99; *Les Echos* 14/10/99; *Les Echos*, 30/11/99

<sup>693</sup> "Intervention de Jean-Michel HUBERT, Président de l'Autorité de régulation des Télécommunications à la "Semaine des Télécoms" 1/12/1999

<sup>694</sup> Noll 1989, p.1279

<sup>695</sup> Interview: Hubert; *La Tribune* 12/1/00 "L'Internet rapide, dossier test pour la crédibilité de l'ART"; Renault, M-C 14/1/00, "Licences: la France repousse les enchères" *Les Figaro*

March 2000 submission, the Government asked the ART to “look again” at the number of licences to be issued, the licensing procedure, and the contributions expected from operators given “the thoroughly unexpected results of the UK auctions”<sup>696</sup>.

Prime Minister Jospin, previously expecting the adoption of a beauty contest<sup>697</sup>, was closely consulted<sup>698</sup>. While having to undertake a debate with its majority<sup>699</sup>, the Government could ultimately choose to legislate. Making Ministers comprehend the rationale for a beauty contest jointly with 2G incumbents became even more important for the ART.

The regulator continued holding discussions and exploited convergent influential actors that started exercising significant public pressure on Government. Ministers’ intention to raise considerable sums of money<sup>700</sup>, altering ART plans, fuelled a concerted campaign against auctions by operators. They acted largely through newspapers - in particular, Bouygues’ Chairman opposed auctions outspokenly in an interview<sup>701</sup> - but also through occasional private meetings. The ART kept interacting with all the policy actors<sup>702</sup>, while incumbents’ executives met privately and lobbied the Government<sup>703</sup>. State-owned F-T’s Chairman Michel Bon met Finance Minister Fabius privately in mid-April 2000, when the Government was evaluating the ART proposal, including the licensing method to adopt<sup>704</sup>.

By placing an issue of mutual concern on the formal agenda<sup>705</sup>, the ART had ‘empowered’ industry actors to assert their views as Fabius and Pierret did not commit to either procedure<sup>706</sup>. Fabius first mentioned auctions in Parliament at start-May, indicating he and Pierret would take a decision within six weeks<sup>707</sup>. Formal arrangements meant that other than not publishing the proposal and deciding to legislate separately, it was the Government that needed to apply effective persuasion vis-à-vis the regulator. As the British and German Finance Ministers pointed out to him, Minister Fabius privately

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<sup>696</sup> Hubert,J-M 29/11/00, “Analysys Conference/Mobility Futures: Competing visions of a 3G World/London”

<sup>697</sup> Jakubyszyn and Renault 15/4/00

<sup>698</sup> see Fabius 6/6/00 presentation of the final proposal to Parliament

<sup>699</sup> Jakubyszyn and Renault 6/6/00

<sup>700</sup> Maussion,C & Penicon,N 5/5/2000 “L’Etat ne bradera pas le domaine public”, Libération; Fabius 6/6/00

<sup>701</sup> Le Monde 10/5/00, “Mortelles enchères dans le téléphone”; Henni,J 5/5/00 “Tollé des professionnels des télécoms”, Les Echos; Del Jesus,T 3/3/00, “L’UMTS, le très cher enjeu des futurs téléphones mobiles”, La Tribune. Also Dague,T 18/5/00, “Un renoncement du gouvernement”, Le Parisien

<sup>702</sup> ART 11/5/00 “L’intervention de Jean-Michel Hubert sur les enchères UMTS”

<sup>703</sup> Maussion et al 5/6/2000

<sup>704</sup> Ministère de l’Économie, des Finances et de l’Industrie 14/4/00

<sup>705</sup> see ch.1; Nordlinger

<sup>706</sup> Fabius 3/5/00; Pierret,C. “Assemblée nationale 1<sup>re</sup> SÉANCE DU 10 MAI 2000”

<sup>707</sup> Fabius 3/5/00



emphasised to Jean-Michel Hubert the exceptional opportunity that 3G spectrum auctions represented for potential gains, and hence the difficulty to renounce them<sup>708</sup>.

Accordingly, the support the ART harnessed from industrially and politically influential convergent actors, possibly mobilising more resources than they would have otherwise done<sup>709</sup>, was very important. Their pressure on the Government persisted. The well-connected Martin Bouygues, Chairman of the smallest and financially weaker 2G operator, publicly argued that auctions would have risked translating into higher consumer prices and “killed the market”<sup>710</sup>, evoking consultation concerns shared by Cegetel and user associations<sup>711</sup>.

Apart from the licence cost, Bouygues estimated 3G network costs between FF20bn and FF40bn<sup>712</sup>. State-owned F-T emphasised a cost per operator around FF30-40bn without undergoing an auction<sup>713</sup>, which, moreover, entailed spending public money. One report claimed then F-T Chairman Michel Bon had expressed his reservations to the Prime Minister’s office<sup>714</sup>.

So, despite not having formal powers, the regulator capitalised on a strong policy alliance with industry. Being supported by the influential incumbents, whose use of informal resources sustained the regulator’s activity, did not stop the ART from pursuing its preferences through three weeks of intense private discussions with Fabius<sup>715</sup>. While incumbents campaigned for their industrial interests, the regulator also made occasional public statements, raising ‘national interests’ to present a beauty contest as less harmful than auctions<sup>716</sup>. F-T actually prepared for the possibility<sup>717</sup>. Yet, Jean-Michel Hubert considered that French operators lacked the resources to undergo auctions<sup>718</sup>.

Following a parliamentary statement in mid-May by Minister Pierret that the Government was caught between raising finance and assisting French operators to enter the 3G

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<sup>708</sup> Interview: Hubert

<sup>709</sup> see ch.1; Nordlinger

<sup>710</sup> *Le Monde* 10/5/00

<sup>711</sup> Henni 5/5/00

<sup>712</sup> Del Jesus 3/3/00; Dague,T 18/5/00 “Téléphone mobile: une polémique à 150 milliards”, *Le Parisien*

<sup>713</sup> Dague 18/5/00

<sup>714</sup> Maussion et al 5/6/2000

<sup>715</sup> Interview: Hubert

<sup>716</sup> ART 11/5/00; 31/5/01 “UMTS: Le point de vue de l’Autorité”

<sup>717</sup> Cherki,M 9/5/00 “France Télécom se lancera dans les enchères”, *Le Figaro*

<sup>718</sup> Interview: Hubert

market<sup>719</sup>, Hubert stated that a financial competition would force incumbents to win a bid to survive or become extinct through the expiry of their licences<sup>720</sup>. This resonated with Bouygues' argument that, if auctions were adopted, his company would either incur a "sudden death" by way of not winning a licence bid, or a "slow death" due to the difficulty of paying the high licence cost expected of auctions<sup>721</sup>. While wanting to get fair value for the rare spectrum, Prime Minister Jospin did not want large firms to be "handicapped" either<sup>722</sup>.

The regulator portrayed auctions as undesirable for a Government aiming to protect 'national champions'<sup>723</sup>, arguing that only the financially most powerful operators would obtain licences in several countries if the trend to exploit financially the sale of 3G frequencies via auctions spread across Europe<sup>724</sup>. Fewer operators competing within Europe would entail fewer opportunities for French operators to participate in the market<sup>725</sup>. Suggesting the latter views were taken into account, the previous day, Pierret had indicated that the licensing method had to take into account how "French operators in particular had to be in a position to present a good offer", and the final decision would be taken in the "national interest"<sup>726</sup>.

Hubert also capitalised upon the way his preference promoted Pierret's wish that all national users should benefit from 3G<sup>727</sup>, relating the appeal of collecting potentially significant sums to the economic consequences borne by taxpayers, consumers and shareholders<sup>728</sup>. Public discussions of auctions' economic risks, such as doubling network costs and consumers bearing the repercussions, saw the regulator's 'enfranchisement' of otherwise indifferent actors, but politically relevant to the Socialist Government. Trade

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<sup>719</sup> Pierret 10/5/00

<sup>720</sup> ART 11/5/00

<sup>721</sup> Le Monde 10/5/00

<sup>722</sup> Jakubyszyn and Renault 6/6/00

<sup>723</sup> For more on France's national champions policy in telecoms, Thatcher 1999; more broadly Zysman 1977 pp.62-3,89, California University Press

<sup>724</sup> See Benzoni,L on the greater concentration in the EU 3G market than in 2G, which much higher fees for 3G licences - sold at once unlike 2G licences - contributed to, notwithstanding that more 3G licences were sold per country. The chances of failure of 3G new entrants without 2G networks, or of the smaller 2G operators entering the 3G market, increased. "Concentration, segmentation et fragmentation dans l'Internet mobile", pp.267-280 in Didier,M and Lavezzi,J-H's 2002 report "Enjeux économiques de l'UMTS", Conseil d'Analyse Economique, La Documentation Française. In the same report, see Geoffron,P and Pogorel,G "Consolidation de l'oligopole européen des télécommunications", pp.281-292, for an analysis of the oligopolistic effects of 3G spectrum licensing across the EU

<sup>725</sup> ART 11/5/00

<sup>726</sup> Pierret 10/5/00

<sup>727</sup> see ch.1; Nordlinger

<sup>728</sup> ART 11/5/00

unions echoed the concerns diffused by the regulator on auctions<sup>729</sup>. Fearing high consumer prices and poor coverage for profitability purposes, trade union officials expressed dissent over the state's 'abdication' of "service public" goals<sup>730</sup>.

Thus, the regulator accumulated support from multiple sources. Influential state and non-state actors exerted pressure on Socialist Government officials. As the decision approached, the Government continued hesitating. Where possible, Hubert intensified his persuasive and negotiating efforts, capitalising on the collaboration over the Information Society objective the Government committed to as part of the EU's Lisbon Agenda<sup>731</sup>. He claimed the ART fully adhered to the objective and that the 3G proposal had been formulated taking it into account<sup>732</sup>.

However, given the "value of the spectrum and the State's interest"<sup>733</sup> noted by Pierret and Fabius' priority of raising substantial sums from 3G licensing<sup>734</sup>, the regulator suggested that a "reasonable solution" was to re-examine the fixed entry fees to be charged and an appropriate payment timeframe<sup>735</sup>, reflecting anticipated revenues.

The regulator's indication of an upwards review of fees acted as an effective 'carrot-like inducement' for Ministers, who had no formal obligation to accept it and could have introduced new legislation. The regulator indicated that the case for a beauty contest was made and that the Government's preference had been taken into account, consistent with Type II autonomy persuasion and negotiation.

Hubert claimed that the ART acted according to its mission to favour market development, and that he was willing to clarify anything for the Government, explaining that formal duties had been fulfilled but that evaluating the arguments and deciding was for Ministers. In practice, agreeing to the enticement meant endorsing the ART's key preference - the beauty contest<sup>736</sup>.

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<sup>729</sup> ART 9/99 p.31; Jakubyszyn,C and Malingre,V 13/5/00, "La France se divise sur l'attribution de licences de téléphone par enchères", *Le Monde*

<sup>730</sup> Khalfa 18/5/00

<sup>731</sup> In March 2000, when the ART submitted its 3G proposal

<sup>732</sup> ART 11/5/00

<sup>733</sup> Pierret 10/5/00

<sup>734</sup> Jakubyszyn and Renault 6/6/00, suggest Fabius strongly favoured auctions; Mabile,P. 5/5/00, "Téléphone mobile: Bercy ne privilégie pas les enchères mais veut une redevance élevée", *Les Echos*, Interview: Hubert

<sup>735</sup> ART 11/5/00

<sup>736</sup> Industry actors opposed high entry fee; not of direct interest to the regulator

Thereafter, while Ministers analysed the regulator's proposal, convergent 2G incumbents put more public and private pressure regarding the negative impact of auctions. Besides rejecting the possible allocation of five licences on technical grounds<sup>737</sup>, which the Government considered<sup>738</sup> following Suez Lyonnaise's suggestion<sup>739</sup>, senior Bouygues and Cegetel executives gave interviews strongly contesting the Government's auction preference.

Bouygues' Chairman threatened legal action, and claimed auctions or high fees were incompatible with European legislation; his firm was talking to the European Commission. If auctions were adopted, he would "ask the Government what to do", implying the firm's likely exclusion from the process<sup>740</sup>. Cegetel's deputy Director-General, who also headed the French Association of private telecoms operators (AFOPT), questioned whether the Government's interest lay in long-term sectoral development or short-term fiscal respite<sup>741</sup>.

The ART's argument about the unfavourable financial implications of auctions on national operators was especially resonant among elected officials concerned by possible effects on state-owned F-T and its strategic management decisions<sup>742</sup>. The 'tie' between MPs and the state-controlled former monopoly was subject to parliamentary scrutiny and debate, not strictly related to 3G policy-making. When a Socialist MP objected to auctions in Parliament, a close ally of the Finance Minister in the process of considering the option responded that the Government's role was not to defend the interests of Vivendi (Cegetel/SFR) or Bouygues<sup>743</sup>, without mentioning F-T.

A week before the final decision was taken, Communist MP Claude Billard, part of the Socialist Government's coalition, drew Fabius' attention to the high cost state-owned F-T had undertaken to acquire the whole of UK-based mobile operator Orange<sup>744</sup>. The former monopoly was financially weakened by acquiring Orange for FF283bn (about 41bn euro) in cash and shares, including Orange's 6.56bn euros outlay for its 3G UK licence<sup>745</sup>. Billard stressed critically that the financial operation led F-T to obtain a 3G UK licence that it had

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<sup>737</sup> Henni and Mabilie 26/5/00; Barjonet 26/5/00; Henni 30/5/00

<sup>738</sup> Del Jesus, T 25/5/00 "Bercy étudie la création d'une cinquième licence UMTS", *La Tribune*

<sup>739</sup> Henni and Mabilie 26/5/00; Pons 26/5/00

<sup>740</sup> Barjonet 26/5/00

<sup>741</sup> Henni 30/5/00

<sup>742</sup> Jaskubyszyn and Renault, 6/6/00

<sup>743</sup> Maussion et al 5/6/00

<sup>744</sup> Billard, C "ASSEMBLÉE NATIONALE - 2<sup>e</sup> SÉANCE DU 30 MAI 2000"

<sup>745</sup> Henni and Mabilie 30/5/00

been unable to win via auctions, and caused the French State's shareholding in F-T to fall. He thus opposed their adoption in France.

Fabius acknowledged the ambitiousness of the acquisition<sup>746</sup>, but justified the move to make F-T a strategically placed operator long-term, substantiated by the Government's decision to retain about 55% control, "allowing some margin to manoeuvre"<sup>747</sup>. Still, over two-and-a-half months after the ART submitted its proposal, the Minister avoided commenting on the selected licensing method.

Thus, the arguments delineated and diffused by the ART through the consultation led to the participation of several state and non-state actors with different preferences vis-à-vis the regulator's 3G licensing proposal. Despite lacking powers to determine policy, having fully exploited the force of its arguments, the pressure of preference convergent industry actors on the Government and by, ultimately, indicating that fees could be reviewed, the ART made it very difficult for Ministers to reject its proposal. Accordingly, this section has shown how the regulator pursued its preference by creating a persuasive case non-confrontationally, exploiting influential convergent actors and by accommodating the divergent Government's preference without sacrificing its own, consistent with Type II autonomy.

## **V. Time-length of decision-making**

The ART conducted France's 3G policy from its inception to the licensing of operators. The responsibility for framing the proposal for the Telecoms Minister to publish saw the agency involved in the period leading to the Government's decision over licensing terms in June 2000. Notwithstanding its involvement since CCR/UMTS discussions, the ART's primary role of licence enforcer and Government advisor meant that, unlike Oftel, it lacked powers to set timescales or deadlines other than those regarding compliance obligations<sup>748</sup>.

The lack of formal instruments to set the decision-making pace, and expedite it when necessary, did not stop the agency. Consistent with Type II autonomy, the ART undertook a relatively lengthy process, notwithstanding timeframes set by other authorities, which

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<sup>746</sup> *ibid*

<sup>747</sup> Fabius, L "ASSEMBLÉE NATIONALE - 2<sup>e</sup> SÉANCE DU 30 MAI 2000"

<sup>748</sup> see ch.3

helped it achieve its initial preferences after Government divergence emerged. Despite preference divergence and lacking powers to instruct the Government, it showed little haste in line with Nordlinger's Type II proposition that policy is not undertaken "unless and until" divergent actors are persuaded.

By the time the ART launched its February 1999 consultation, the European Union had adopted a Decision that Member States: "take all necessary actions in order to allow... (the) progressive introduction of the UMTS services...by 1 January 2002 at the latest and in particular shall establish an authorisation system...no later than 1 January 2000"<sup>749</sup>. The ART underlined the impact of the decision in its consultation; 1999 would have been used to define the terms introducing 3G.

Yet the regulator's intended timetable indicated that consultation respondents had until end-May 1999 to submit documents, a summary of responses would be published by July 1999, followed by the submission of its proposal to the Minister in September 1999 and the launch of the licensing procedure at an unspecified date during 2000<sup>750</sup>. Therefore, the ART planned from the outset for licensing to occur at a slower pace than decided at the EU level, notwithstanding that delivering licences following a calendar similar to EU neighbours garnered respondent consensus<sup>751</sup>. Its slower timetable did not correspond to the EU licensing calendar, which was not enacted in practice.

In practice, without formal powers to impose its decision upon interested actors, nor any public notice or reason, the ART granted itself a significant extension to examine and present the policy expertise collected from thirty-three organisations<sup>752</sup>. Although the licensing timeframe proposed was supported by most respondents<sup>753</sup>, the summary of responses was published in October 1999. So, after granting respondents over three months to comment, the ART took three more months than anticipated to assemble and disseminate the policy views reinforcing the arguments for its preferences. Furthermore,

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<sup>749</sup> Decision No.128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community. Art. 3 states: "Member States shall be granted on request an additional implementation period of up to 12 months...justifiable by exceptional technical difficulties in achieving the necessary adjustments in their frequency plan...filed before 1 January 2000. The Commission shall assess such requests and take a reasoned decision within...three months"

<sup>750</sup> ART 2/99, p.11

<sup>751</sup> ART 11/10/99 "L'Autorité de régulation des télécommunications publie la synthèse de la consultation publique sur l'introduction de l'UMTS en France"

<sup>752</sup> *ibid*

<sup>753</sup> ART 10/99 p.20, Implementation estimates differed considerably

after originally stating that it would have been hard to “anticipate long before start-2002”<sup>754</sup> the commercial launch of 3G services, the regulator stated that it was not required “before 2002 at the earliest”<sup>755</sup>.

Thus, about six months before the UK auctioned 3G licences, the ART prolonged the domestic timetable beyond the Decision of the European Parliament and the Council, which its own Government was bound by too. The agency was already behind its own original schedule.

As divergence emerged, it created further delays, seemingly to persuade the Government. After outlining the support received over adopting a beauty contest and issuing four licences, the regulator claimed it would “formalise” the content of its proposal to the Telecoms Minister<sup>756</sup>. The statement came one month after the ART had planned to submit the proposal to the Minister. Instead the proposal was submitted to the Government on 7 March 2000. So, five months after consultation responses were published<sup>757</sup>.

Between the time when consultation responses were published and the proposal’s submission, Pierret had revealed his preference for an auction, possibly mixed with elements of a beauty contest as in Italy. He raised his divergence with the ART over the licensing method and stated that the EU timetable had to be respected<sup>758</sup>.

However, given the 7 March submission, the ART did not expedite its referral according to the EU timetable requiring an authorisation system by 1 January 2000<sup>759</sup>. By delaying submission, the ART did not put pressure on the Government to respect the supranational timeframe and hastily endorse its 3G proposal by the start of 2000 either. Hubert specified that the proposal was to be published by the Government, and that the 3G auctions had led the latter to re-examine the implications of the proposed licensing method<sup>760</sup>. Yet, the regulator did not change its preference for a beauty contest or four licences before or after its 7 March submission. Thus, submission was not delayed beyond the EU timetable to heed the Minister’s 3G preference.

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<sup>754</sup> ART 2/99, p.11

<sup>755</sup> ART 11/10/99

<sup>756</sup> *ibid*

<sup>757</sup> ART 11/5/00

<sup>758</sup> *Les Echos* 30/11/99

<sup>759</sup> *La Tribune* 13/6/00 “Licences UMTS, la France se démarque en Europe”

<sup>760</sup> ART 11/5/00; 31/5/01

The Government lacked powers to expedite the policy process prior to the proposal's submission. However, following submission, the Government could reject the licensing terms compiled by the regulator, hence the beauty contest, and, potentially, legislate specifically, overriding the ART. It did not do so. Ministers did not exercise significant public pressure on the regulator to shorten timescales either, despite delays infringing the original EU timetable.

Thus, after over a year of consultations, Ministers evaluated ART arguments. Rather than reject the regulator's position shortly after the conclusion of the British auctions, Fabius announced that he and Secretary Pierret would finalise licensing terms within six weeks. Moreover, Fabius expressed uncertainty regarding the licence allocation process<sup>761</sup> until one week before the final statement<sup>762</sup>, when Pierret conceded auctions were unlikely<sup>763</sup> despite the opportunity he saw in them.

In the three months after the proposal was submitted, 2G incumbents campaigned publicly and privately against auctions. Instead, the ART Chairman met Ministers privately<sup>764</sup>, and made only one public statement reiterating the arguments depicting auctions unfavourably compared to beauty contests. So the regulator used the additional time to make its case.

Furthermore, when indicating that licence fees could be revised to assuage the Government and shift the latter's preferences towards a beauty contest, as it eventually did, the regulator stated that the payment timeframe required some elaboration<sup>765</sup>. Thus the agency avoided hastening Government Ministers again.

After hearing separate views, including of a private consultancy firm, Fabius himself shortened the six-week period he had announced to decide 3G licensing terms. So, albeit with higher entry fees than originally planned by the ART, which expressed "appreciation over constructive dialogue"<sup>766</sup>, the Government adopted the beauty contest and four licences the ART wanted.

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<sup>761</sup> Fabius 16/5/00

<sup>762</sup> Fabius 30/5/00

<sup>763</sup> Penicaut, N 1/6/00, "Nouveaux mobiles: les enchères s'éloignent" Libération; Le Monde 6/6/00

<sup>764</sup> ART 31/5/01

<sup>765</sup> *ibid*

<sup>766</sup> ART 6/6/00, "L'Autorité se félicite de l'ouverture prochaine du marché de téléphonie mobile de troisième génération"



The Minister indicated the significance of the time-dimension as he stated that after a “careful examination, the ART’s proposal appears to (the Government) as the most judicious...based on the arguments and in-depth analysis we wish to retain the...method recommended by the ART”<sup>767</sup>. After informing Parliament, Fabius substantiated the ART’s persuasiveness by presenting precisely the arguments raised repeatedly by the agency and preference convergent actors. Aside from the Government’s powers to set licence fees, Fabius stressed the hard choice between protecting the state’s property rights, not selling them off, and penalising consumers and operators<sup>768</sup>.

To shift the Government’s preference and accommodate higher fees while retaining a beauty contest meant that the ART had to modify licensing terms. Thus to achieve its preferences without having decisive formal powers, the regulator applied forbearance and prolonged the process. It integrated higher beauty contest fees in its proposal, instead of forcing the Government to legislate specifically<sup>769</sup>. The new ‘proposed’ terms, including fees and licensee requirements<sup>770</sup>, were formally published over two months later<sup>771</sup>.

Having secured the adoption of its two priorities and despite being almost eight months behind the original EU requirement of having a licensing procedure in place by 1 January 2000, the regulator was still not rushing changes. It felt that candidates needed six months to submit applications<sup>772</sup>. In practice, extending the decision-making timeframe negatively affected the Government’s preference, without preventing the regulator from fulfilling its preferences.

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<sup>767</sup> *ibid*

<sup>768</sup> Mabile,P and Madelaine,N 7/6/00, “UMTS: Un compromis qui devrait favoriser les opérateurs nationaux”, *Les Echos*, reported that this did not appeal to elected officials who viewed the procedure as an unsatisfactory compromise compared to auctions. Pogorel,G 2003, “Regulation and Competition - radio spectrum policy and management, a turning point?” *Communications and Strategies* 49, pp.109-117, indicates that the debate on whether spectrum should be considered and managed as part of the public domain, or whether private ‘property rights’ should be increasingly allocated, is ongoing

<sup>769</sup> ART “Décision n°00-835 de l’Autorité de régulation des télécommunications en date du 28 juillet 2000 proposant au ministre chargé des télécommunications les modalités et les conditions d’attribution des autorisations pour l’introduction en France métropolitaine des systèmes mobiles de troisième génération”; ART 24/7/00 “Interview de Jean-Michel Hubert à Radiocom & Télécoms Magazine”

<sup>770</sup> Comprising coverage, quality of service, competition. Requirements included that 3G licensees with 2G networks could not discriminate against operators without 2G infrastructures. The ART established a candidate points-allocation system reflecting three criteria groupings (technical, commercial and financial)

<sup>771</sup> For selection procedure details, ART 18/8/00 “Annexe à la décision n°00-835 de l’Autorité de régulation des télécommunications proposant au ministre chargé des télécommunications les modalités et les conditions d’attribution des autorisations pour l’introduction en France métropolitaine des systèmes mobiles de troisième génération”. The Government expected the call for applicants by end-June and the deadline for applications by end-2000 (Fabius 6/6/00; ‘Fiche 8, Chronologie et calendrier’). The ART finalised revised terms in end-July, published them and the call for applicants mid-August, ‘proposing’ the submission of applications by 31 January 2001. Both indicated 30 June 2001 as the latest the Minister would issue licences. Ministers did not block the ART’s terms

<sup>772</sup> Henni,J 7/6/00 “La nouvelle generation de mobiles en cinq questions”, *Les Echos*

## VI. Outcomes

When the French Government finalised the terms allocating four 3G licences by beauty contest, thus adopting the ART's key policy preferences, it priced each licence at FF32.5bn (4.95bn euros<sup>773</sup>), for a total of FF130bn (19.8bn euros). This was almost nine times the ART's March 2000 proposed licence fees of FF15bn for the four operators<sup>774</sup>. The Government established that candidates would pay half the fees, in equally split amounts, during the first two years of their fifteen-year long licences, with the outstanding amounts equally spread over the remaining thirteen years. Having indicated to the Government the possibility of higher fees, a concession not affecting the ART's preference consistent with Type II autonomy, Hubert avoided commenting on the sums until after the January 2001 beauty contest, finding them "high but reasonable"<sup>775</sup>.

Yet, delays coinciding with the Government's wish to revise licence fees upwards saw French and international consortia expected to compete<sup>776</sup> gradually withdraw. By mid-January 2001, less than two weeks before the applications deadline, Hubert claimed that the candidates would have been, at least, as many as the licences to compete for<sup>777</sup>. Instead, worsening market conditions, reflecting the rapid 'burst of the internet bubble', made the revised licence fees unattractive.

The financial strain led French candidates and likely licensees, the Suez-Telefonica pairing and 2G incumbent Bouygues<sup>778</sup>, to pull out respectively on 24 and 31 January. Only two applicants remained, incumbents F-T and SFR, which contrasted with twelve other EU countries that, by end-January 2001, had allocated 3G licences. Excluding Poland's three, France was the only country that had not allocated four licences<sup>779</sup>. At first, the ART argued that the duopoly situation, arisen before applications had been examined, had no impact on the procedure from a legal viewpoint<sup>780</sup>. Then, after beauty contest bids by F-T and SFR were accepted at end-May 2001<sup>781</sup>, the ART proposed that the Government

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<sup>773</sup> Cartelier 2003, p.79, claims the fee was based on British licence prices

<sup>774</sup> ART 31/5/01

<sup>775</sup> ART 24/7/00; 31/5/01

<sup>776</sup> Henni, J 7/6/00 "Quatre favoris pour quatre licences", *Les Echos*

<sup>777</sup> ART 18/01/01 in *Les Echos*

<sup>778</sup> Curien 2002, Cartelier 2003

<sup>779</sup> ART 31/1/01, "Conférence de presse UMTS le 31 janvier 2001"

<sup>780</sup> ART 31/1/01, "Clôture de l'appel à candidatures pour l'attribution des licences de troisième génération mobile Commentaires de l'Autorité de régulation des télécommunications"

<sup>781</sup> ART 31/5/01, "UMTS: Results of the allocation procedure for 3rd generation mobile metropolitan licences in France - ART's point of view". The two licences were valid for 15 years from the ministerial decree issued on 18 July 2001

launch a second round of bids by the first half of 2002 at the latest to favour competition<sup>782</sup>.

The regulator recommended that Ministers dramatically review the timetable for fee instalments for existing and potential 3G licensees too<sup>783</sup>. Subsequently, the management of Vivendi, SFR's holding company, threatened not to pay the first required FF4bn (619mln euros) instalment of the licence fee on 30 September, bolstering the regulator's view and 'blackmailing' the Government<sup>784</sup>. Similarly, Didier Quillot, Orange France (F-T) Director-General, requested the suspension of fee instalments for 2002 until licence terms for future 3G candidates were drawn. Ultimately, Ministers Fabius and Pierret compromised their original preference much further by reducing the 3G licence fee from 4.95bn to 619mln euros<sup>785</sup>. The measures the ART advocated, a second round of bids by start-2002 and attributing the remaining two licences through a beauty contest<sup>786</sup>, saw only Bouygues submit an application, for which it was allocated a 3G licence one year later<sup>787</sup>, thus replicating the operators competing in the 2G market. The allocation of a fourth 3G licence was still being discussed late in 2008, with the regulator advocating that it be attributed to a new entrant<sup>788</sup>. In January 2009, Prime Minister Francois Fillon announced that the French Government considered it urgent to allocate a fourth 3G licence, reserved for a new entrant, through a further beauty contest<sup>789</sup>.

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<sup>782</sup> This was earlier than what Hubert originally suggested to the parliamentary Finance commission. "Assemblée nationale - Commission des finances, de l'économie générale et du plan Compte rendu n°48 - Audition de M. Jean-Michel Hubert, Président de l'Autorité de régulation des télécommunications (ART), sur l'attribution des licences de téléphonie mobile (UMTS)" 2/5/2001

<sup>783</sup> ART 31/5/01 The ART advised that the Government maintain the first annuity corresponding to one-quarter of the licence fee (FF8.125 billion) but lower the second year's payment and those of the following four years to a level similar to that operators paid for 2G frequencies usage. The remaining dues would, hence, be spread over the rest of the licence duration

<sup>784</sup> Henni,J and Mabile,P 2/10/01 "UMTS: le conflit financier tourne a l'impasse politique", Les Echos; Girard,L 2/10/01 "SFR, filiale de Vivendi Universal, refuse de payer sa licence UMTS", Le Monde

<sup>785</sup> Ministère de l'Économie, des Finances et de l'Industrie 16/10/2001, "Le gouvernement annonce une révision des modalités d'attribution des licences UMTS". In November, the Finance Ministry launched a second round for UMTS applications, informing that besides the 619 million euros, licensees would pay a proportional charge equivalent to 1% of turnover; MINEFI 30/11/01 "Appel à candidatures UMTS". Licence duration was extended to 20 years

<sup>786</sup> ART "Décision n°01-1202 de l'Autorité de régulation des télécommunications en date du 14 décembre 2001 proposant au ministre chargé des télécommunications les modalités et les conditions d'attribution d'autorisations pour l'introduction en France métropolitaine des systèmes mobiles de troisième génération"

<sup>787</sup> Journal Officiel de la République Française 12/12/02, which also saw SFR and F-T's licences modified

<sup>788</sup> ARCEP website cites the then Chairman Paul Champsaur's interview to Les Echos on 24/12/08

<sup>789</sup> Hôtel de Matignon (PM's residence) 12/1/09, "Communiqué de presse", Premier Ministre - Service de presse. Fillon was formerly Telecoms Minister

**Table 7: The ART's 3G Type II autonomy**

Empirical indicators	Level 1 - Nordlinger's state level	Level 2 - Regulatory level	Level 3 - Case study - UMTS France: Type II
<b>Participants and resources</b>	Range of societal actors: those divergent from the state, seeking to obstruct its preferences; also actors with similar preferences to the state supporting it (convergent) and those without strong expressed preferences	<b>At start of regulatory policy, key resources spread among distinct actors;</b> with preferences similar to regulator and with divergent ones. <b>Different participants have valuable resources to exert influence</b>	<b>Dispersed resources and no single influential group:</b> - industry incumbents had 2G networks, high-level links to policy-makers and media - Minister had rule-setting powers for selection process - MPs could publicly question Ministers'/agency policymaking, raising attention on preference legitimacy - ART largely advisory but shaped policy by proposing policy terms, and examined applications for Minister - real 'new entrants' reliant on allocation process; no influence
<b>Preferences</b>	<b>Combination</b> of divergence, indifference, convergence	<b>Preferences of influential participants differ</b> over regulator's proposals. <b>But not only influential divergent preferences; some influential support</b> from outset for agency to shift preferences	<b>Agency not isolated, with support of influential actors from start:</b> ART wanted 3G spectrum licensed via <b>fixed-fee 'beauty contest'</b> and <b>allocation of four licences. Incumbents shared agency's former preference to avoid potential high cost-auction.</b> But French Government controlled spectrum and <b>aimed to maximise revenue</b> to reduce national debt
<b>Process</b>	State shifts preferences of societal actors over time, by: (i) <b>inducement</b> ; (ii) <b>appeasement-conciliation</b> ; (iii) <b>enfranchisement</b> ; (iv) <b>empowerment-reinforcement</b>	To alter preferences of opponents or restrain their use of key resources, <b>regulator prioritises negotiation over imposition.</b> Preferences shifted by: (i) making <b>compromise proposals</b> ; (ii) <b>using persuasion, repeated bargaining</b> ; (iii) <b>exploiting influential actors with convergent preferences to avoid confrontation</b>	<b>Agency avoids imposition and through dialogue gradually shifts preferences of opponents:</b> 'expert' (CCR) views and informal consultations <b>sustained ART position.</b> ART Chairman had <b>private exchanges</b> discussing with <b>Ministers.</b> Auction openly opposed by incumbents; <b>negatives of Government policy publicly stressed.</b> For Ministers with <b>formal authority hard to redefine ART proposals.</b> <b>Hierarchical scope reduced</b> given <b>informally agreed policy</b> with 2G industry actors
<b>Time-length of decision-making</b>	Public policy not undertaken 'unless and until' actors with divergent preferences are persuaded	<b>Timescale powers largely neglected; policy forbearance</b>	<b>Lengthy regulatory process.</b> With no relevant power, <b>long informal consultation periods saw regulator consolidate support before submitting proposals</b> to Ministers (03/00). Government took 3 more months to decide, but <b>time ART spent to garner support helped persuade Minister</b>
<b>Outcomes</b>	State preferences translated into public policy after those of divergent actors are shifted to make them 'congruent or consonant'	<b>Regulator's preferences implemented</b> after actors with divergent ones had been persuaded to shift theirs, <b>with some concessions</b>	<b>Despite ministerial authority and political divergence,</b> causing higher fees and delayed licence allocation, <b>Ministers endorsed key regulatory recommendations</b>

## VII. Conclusions

The chapter has examined 3G licensing policy in France, which provides a strong case of Type II regulatory autonomy. Without powers to determine the allocation of four 3G licences and particularly to adopt a beauty contest, the regulatory authority ART fulfilled its preferences despite divergence with the formally powerful Government. Conversely, the Government did not fulfill its preference despite having the formal authority to require the auctioning of 3G spectrum and increase the number of licences allocated, which Ministers hoped would maximise licence revenue put towards national fiscal goals. Notwithstanding the authority to finalise licensing terms and the possibility of seeking further legislation in Parliament, the Government did not alter the ART's proposal over the key issue of the licensing method constituting the fundamental source of divergence (see Table 7 above).

The case thus seriously challenges approaches suggesting the importance of formal institutional arrangements in assessing regulatory independence in practice. It substantiates, instead, the primacy of actor preferences and their ability to pursue preferences through non-statutory resources. The ART's two preferences were not inferred directly from formal objectives laid out in the 1996 telecoms law. The law did not specify in any way the type of licensing process the regulator was allowed to propose, giving it enormous discretion. However, the ART decided early in the process to opt for the allocation of maximum four licences and did not examine the possibility of using spare spectrum to allocate five or six, as happened elsewhere in the EU, despite a broad competition objective and one specifically set out for cases of spectrum allocation constraints. The regulator did not consider reserving a larger spectrum licence for a new entrant either, to help it vis-à-vis established operators.

Regarding the beauty contest preference, former Telecoms Minister Francois Fillon, under whom the ART was created and Chairman Hubert appointed, was critical about the Government's hesitant stance over auctions, thus implying some divergence with the regulator. Thus, whilst evidence is contradictory, the case does not wholly support claims attributing significant importance to 'hardwiring' and 'pre-programming' mechanisms. The sub-case evidence does not confirm claims that formal appointment of a regulator's head constitutes a critical factor to influence agency decisions.

In terms of process, the ART displayed features consistent with Type II autonomy because, notwithstanding the lack of decisive formal powers to achieve its preferences on 3G policy, it worked to shift the position of Government Ministers to achieve its preferences. The regulator used selected arguments repeatedly to persuade divergent Ministers, and exploited the support of convergent influential actors who were publicly and privately active. The inducement approach was largely possible because of technical expertise obtained through key information provided voluntarily, hence without expending limited regulatory budgets, by respondents to the ART's consultation; a useful instrument not set out by law.

By collecting information and ascertaining views, the ART drew support from convergent influential actors interested in 3G, notably established French 2G operators possessing 'physical' network assets, whose resources helped develop policy according to the regulator's preferences. The regulator's ties with senior elected officials, additional pressure from 'enfranchised' actors and raising the Government's right to review licence fees led Ministers to compromise and renounce auctions. The Government's decision to revise fees significantly upwards compared to those proposed by the ART caused a delayed selection of potential licensees. This coincided with a change in market conditions, which did not thwart the regulator's preferences but further reduced the Government's 3G licence revenues.

## Chapter 6: Oftel and LLU Policy in the UK

### I. Introduction

This chapter analyses how Oftel pursued its policy preference for local loop unbundling (LLU) to introduce broadband competition in the UK. It argues that the regulator demonstrated Type II autonomy by showing restraint in using its formal powers. Instead, it deployed persuasion and negotiation, exploiting its policy expertise and informal ties with preference divergent BT and with influential convergent actors, primarily state ones, who in turn put pressure on the incumbent operator privately.

In the late 1990s-start-2000 period, at the height of the 'internet boom', the UK's narrowband consumer market was growing rapidly<sup>790</sup> and proving highly competitive compared to those of other European Union Member States<sup>791</sup>. The spread of high-speed broadband internet access was the next internet benchmark, which Oftel decided to pursue by developing LLU<sup>792</sup>.

LLU entailed making it possible for new entrants, or other licensed operators (OLOs), to access the existing network facilities of former state monopoly BT and, accordingly, provide broadband services available to domestic consumers nation-wide in similar competitive conditions with the incumbent operator. It meant providing OLOs with access to BT's ubiquitous national telecoms network, particularly its paired copper-wires, in other words BT's telephone lines directly reaching most UK end-users. Such access would allow OLOs to incorporate BT lines into their networks. By attaching broadband equipment both to lines taken over from BT and at customer premises, entrants would be able to provide broadband in competition with the incumbent over the exclusive 'last mile' reaching end-users.

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<sup>790</sup> Oftel 12/01, "The UK Telecommunications Industry: Market Information 2000/01", Fig.5.1

<sup>791</sup> *ibid.* Fig.5.2; European Commission 28/11/01, "7<sup>th</sup> Report on the Implementation of the Telecommunications Regulatory Package", p.18 depicts Oftel's May 2000 initiative requiring BT to offer competitors' wholesale unmetered internet access ahead of other EU countries. For comparative October 2000-June 2001 EU internet access penetration, Annex1, p.63

<sup>792</sup> Cane, A 2/12/98 "Oftel to tackle telephone 'loop'", Financial Times (FT); 11/12/98, "Watchdog moves to unravel web of the 'local loop'"; 7/7/99 "Telecoms watchdog opens BT networks to competitors"; 1/12/99, "BT given deadline to open network to rivals"; Taylor, P 9/6/99, "BT slow to offer fast internet service"

Thus Oftel's policy addressed the entry barrier of BT's unique control over end-user access nationally, which the former monopoly could exploit to become dominant in a new and innovative key market. Similarly to the UK's 3G policy, the regulator's preference was achieved with respect to a non-state actor whose key resources excluded formal powers. It did so through a similar process, consistent with Type autonomy II.

### *Outline of Events*

In December 1998, Oftel launched a consultation comprising five options regarding the supply of broadband services across the UK, including LLU. Based on overwhelming industry support, excluding that of BT, in July 1999, the regulator published a new document focussing on two options, including LLU, in which it consulted on their development for an implementation deadline of July 2001. Notwithstanding existing powers to impose its implementation and even though OLOs considered the deadline too long, in November 1999, Oftel announced that LLU would be adopted by introducing a new condition into BT's licence.

As operational and technical issues were discussed, the new condition was inserted into BT's licence in April 2000, applicable from August 2000. Meanwhile, the European Commission developed a EU-wide framework that would bind Member States to a deadline of end 2000. As BT developed its own broadband services but withheld key information from competitors and obstructed policy development, thus delaying market entry, Oftel came under pressure from OLOs and a parliamentary select committee for not intervening sufficiently to address key issues.

After consulting with Oftel's Director General among others and endorsing his position, DTI Minister Patricia Hewitt became progressively involved in late 2000, met BT's senior management and put pressure on them to collaborate with Oftel and industry to comply with the EU deadline. In practice, Oftel largely continued developing LLU issues thereafter by seeking consent, consistent with its original July 2001 deadline.



## II. Participants and Resources

This section shows that key resources relevant to the UK's LLU policy development were spread among distinct actors from the start, consistent with Type II autonomy. Different participants had valuable resources to influence policy, several of a non-statutory nature. Oftel possessed licence modification and enforcement powers but also sectoral knowledge and ties. Industry actors with telecoms operations and expertise were fundamental to LLU policy. The parliamentary trade and industry select committee (TISC) publicly questioned actors about policy development, including Oftel. Junior Labour Minister Patricia Hewitt, rather than the SoS with key powers, became involved late in the process, using private access to key actors. The European Commission formulated supranational LLU policy.

Oftel initiated public discussions regarding developing LLU to spread broadband in December 1998, showing a clear understanding of technical and policy choices. The UK's 2 million narrowband internet subscribers market was growing 100% annually<sup>793</sup>. Thus, besides querying broadband demand<sup>794</sup>, the regulator asked whether barriers to supply new broadband 'Information Society' services for residential and small business users existed. It raised five options for "possible regulatory action", including 'unbundling' and variations of it, welcoming comments.

Over sixty diverse, almost all non-state, actors with different resources responded, placing Oftel at the centre of subsequent progress through further information-gathering that helped refine LLU policy-making and define the necessary regulation of BT's key 'physical' asset<sup>795</sup>. Largely sectoral actors commented on the scope of unbundling, or its variations, to create a consumer broadband market. Network operators included BT, Cable&Wireless (C&W), Energis, MCI Worldcom, and cable operators ntl and Telewest. Mobile firms, internet service providers (ISPs) and manufacturers also replied. Less obvious actors included Barclays and the Civil Aviation Authority<sup>796</sup>.

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<sup>793</sup> Oftel 12/98, "Access to bandwidth: Bringing higher bandwidth services to the consumer"

<sup>794</sup> Oftel indicated large companies' £1bn annual demand, and identified the US as an indicator for potentially successful UK products. Some US companies had started offering high-speed Digital Subscriber Line (DSL) internet through LLU. DSL, or xDSL, technology transforms ordinary phone lines into high-speed digital lines supporting advanced services like fast Internet access. 'x' stands for variant DSL types. For example, ADSL (Asymmetric DSL) is more common than HDSL (High data-rate DSL)

<sup>795</sup> Oftel 7/99, "Access to bandwidth: Proposals for action"

<sup>796</sup> Full list obtained from Ofcom, 9/04: "Responses to: Access to bandwidth 12/1998"

Certain participants stood out nonetheless. 'Non-state' industry actors besides BT had 'physical' network assets, hence, possessed significant expertise to address policy issues given extensive national and international operations. For example, UK operator Energis, in which the National Grid utility company had a major stake<sup>797</sup>, was expanding its network capacity in Brazil at the time with operators Sprint and France Télécom<sup>798</sup>.

Similarly, C&W and MCI Worldcom were investing in pan-European networks<sup>799</sup>. Some possessed operations for consumer broadband provision already. Energis owned a 3500 route miles high-technology network; reportedly the UK's largest national fibre-optic operator<sup>800</sup>. Operators with network assets were accustomed to the UK telecoms market, its regulation and its key state and non-state actors.

In fact, C&W was a formerly government-owned telecoms utility<sup>801</sup>, not subjected to the same public scrutiny and political intervention as BT<sup>802</sup>. C&W owned the operations of BT's only competitor before and during the UK's early liberalisation duopoly-period (1984-1991)<sup>803</sup>, Mercury Communications, created in 1981 as a fixed line UK subsidiary<sup>804</sup> and licensed in 1982<sup>805</sup>. It also partly controlled the original joint-venture partner of One2One's mobile operations (MercuryOne2One)<sup>806</sup>.

To enter the broadband market by exploiting ties, network and financial resources, many of these prominent non-state actors were among the sixty respondents outlining a more definite path following Oftel's July 1999 consultation<sup>807</sup>. Actors lacking such resources withdrew early on, once policy exchanges became more specific and technical. Certain consumer groups struggled with the first consultation's technical content, mistaking two of

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<sup>797</sup> The Independent, 20/1/99, "Outlook: NatGrid/Energis"; Cane 7/7/99

<sup>798</sup> Barham, J 6/1/99, "Brazil eliminates telecoms rival to Bell Canada grouping", FT; PRNewswire, 15/1/99, "National Grid, Sprint, and France Télécom win long distance "mirror license" in Brazil"

<sup>799</sup> Thal Larsen, P 4/2/99, "BT to invest pounds 5bn on making network faster for millions" The Independent

<sup>800</sup> PRNewswire 15/1/99; Taylor, A 20/1/99, "National Grid plans Energis sale", FT

<sup>801</sup> Hulsink 1999, p.126; Hood et al 2000, p.18

<sup>802</sup> Hulsink 1999, p.126

<sup>803</sup> The Duopoly Review ended exclusive competition between BT and Mercury; DTI 1991 White Paper, "Competition and Choice: Telecommunications Policy for the 1990s", Cmnd. 1461

<sup>804</sup> Hulsink 1999, p.126, Thatcher 1999 p.176-8. C&W and BP owned 40% each, Barclays Bank controlled the remaining 20%. C&W acquired full control in 1984

<sup>805</sup> Hulsink 1999, p.133; Thatcher 1999, p.176; Turner, A 23/11/99, "First, but not equal", The Times

<sup>806</sup> Hulsink 1999, pp.149,162

<sup>807</sup> Ofcom's 2004 correspondence "Responses to: Access to bandwidth: Proposals for Action, July 1999"

the hardest options as the easiest to implement<sup>808</sup>, indicating how valuable sectoral expertise was for Oftel and industry to pursue their preferences<sup>809</sup>.

In practice, the national network inherited from the UK's pre-liberalisation period made BT the central non-state actor. BT influenced and, simultaneously, was most exposed to the policy aiming to spread high-speed internet usage. Developing broadband through LLU or the other listed options entailed third-party access to the incumbent's infrastructure. BT's participation was essential and inevitable as policy centred on its key 'physical' asset.

In 1998, about 50% of UK households were reached by cable networks; only 16% were actually served by them<sup>810</sup>. In contrast, BT controlled over 85% of access lines to residential and Small and Medium Enterprise (SME) customers, through which wholesale broadband was deliverable by applying DSL technology and enhancing the bandwidth of BT's loop network<sup>811</sup>. BT's very strong position in the supply of access lines had key implications for eventual broadband supply.

'Physical' incumbency gave BT decisive first-mover advantage. It could test and provide commercial broadband services before competitors reliant on accessing its loops. Besides market dominance, by owning the exchanges extending loops to end-users, BT possessed unique information to restrict or at least delay competitors from accessing facilities. Controlling detailed information about its quasi-ubiquitous network was influential far beyond that purchasable through Oftel's formal budget and those of other actors<sup>812</sup>.

Furthermore, unlike new entrants, BT could count on dedicated specialist regulatory groups of sixty individuals or more<sup>813</sup>, to face regulatory demands. Its regulatory team complemented the 'exclusive' and long-standing "ménage-à-trois" ties with the Department of Trade and Industry<sup>814</sup>, headed by the SoS with licensing powers, and with Oftel since the

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<sup>808</sup> Response, Consumer Communications for England 24/3/99, regarding LLU options 1 and 2, explained below

<sup>809</sup> Hood et al 2000, p.92 indicate that industry viewed consumer groups "over-influential...considering how poorly they argue"

<sup>810</sup> Oftel 12/98; 38% households reached had subscribed

<sup>811</sup> DSL allows data to travel over the same voice line by using different frequencies, with speeds affected by customer distance from the incumbent's local exchange and traffic flow symmetry. Firth,L & Kelly,T 2001 "The Economic and Regulatory Implications of Broadband", ITU, p.9

<sup>812</sup> Interviews B,C

<sup>813</sup> Coen et al 2002, p.20

<sup>814</sup> The DTI and BT negotiated BT's licence terms at the time of privatisation. Thatcher 1999, p.177

inception of the UK's post-privatisation regulatory framework<sup>815</sup>, mirroring the regulator's 'informal' ties with 'other state' and industry actors shown further below. During LLU policy development, BT's Chief Executive, Sir Peter Bonfield, claimed Oftel's regulatory duties centred on BT's prime market position; "most of the regulation is really aimed at a very tight control on BT"<sup>816</sup>.

Under the Telecoms Act 1984, Oftel formally regulated telecoms systems by modifying and enforcing telecoms licences including BT's; the incumbent was not a specific regulatory target. Nonetheless, the DGT had key formal powers regarding LLU adoption, including modifying licences with consent, having duly notified licensees of intended changes<sup>817</sup>.

Alternatively, the DGT could modify licences without consent via a reference to the Competition Commission, if the latter agreed that the matter operated against the public interest<sup>818</sup>. Otherwise the DGT had comprehensive licence enforcement powers. He could also require licensees to produce almost any specified documents in their custody. Thus Oftel held significant authority to determine policy, as did the SoS who, besides having licensing powers, could veto licence modifications the DGT sought.

In practice, SoS's Peter Mandelson and Stephen Byers<sup>819</sup> were not among the active 'state' actors. Neither SoS publicly responded to Oftel's unbundling consultations, nor did they visibly engage in policy formulation. Of the formally relevant Ministers, only the then Chancellor of the Exchequer Gordon Brown, head of the Treasury, which could veto staffing numbers the DGT appointed at Oftel and their terms of service<sup>820</sup>, briefly intervened on LLU.

Brown met and consulted the DGT at the start of 2000, publicly affirming the need for infrastructure roll-out and low cost internet for business and consumers<sup>821</sup>, although this was not part of the Treasury's Telecoms Act remit. Brown claimed that BT "foot-dragging" would not be allowed and that internet access costs should be reduced to US

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<sup>815</sup> Hood et al 2000 describe how this 'relationship' evolved

<sup>816</sup> "Minutes of Evidence taken before the Trade and Industry Committee, 19/12/00, integrated in the TISC's HC90 20/3/01, "Sixth report - Local Loop Unbundling", para.310

<sup>817</sup> Telecoms Act s12(1)(2)

<sup>818</sup> see ch.3

<sup>819</sup> see ch.4 regarding their terms. Patricia Hewitt replaced Byers

<sup>820</sup> Telecoms Act s1(5)

<sup>821</sup> Brown, G 16/2/00, "Britain and the knowledge economy: speech given by the Chancellor of the Exchequer Gordon Brown to the Smith Institute in London", HMTreasury

levels by the end of 2002 but his intervention had a more immediate impact on BT's share price than on implementation as the incumbent temporarily turned into a takeover target<sup>822</sup>.

The DTI did not publicly comment on the regulator's document<sup>823</sup> despite claiming primacy over regulatory policy in the period after the Conservative Government had liberalised the telecoms sector<sup>824</sup>, including on broadband<sup>825</sup>. DTI (Labour) Minister of State for Small Business and e-commerce, Patricia Hewitt acknowledged the initiative at the end of 1999<sup>826</sup>. She became the highest ranking elected official under the SoS to be actively involved in LLU but, as explained below, only so in the second-half of 2000 and first privately, then publicly.

Instead, the 'state' parliamentary Trade and Industry Select Committee (TISC) became considerably involved early on. The Committee System of the House of Commons specified select committees could not "order" MPs and civil servants to attend hearings<sup>827</sup>. Yet, as Oftel developed LLU policy, its senior management was publicly scrutinised recurrently given an 'informal' understanding that government departments' senior officials would attend when requested<sup>828</sup>. In March 1999, shortly after Oftel raised LLU, its Director of Technology, Peter Walker, attended a hearing on the only partially related topic of e-commerce. Oftel responded in writing to TISC observations too<sup>829</sup>. In December 1999<sup>830</sup>, a year after the first consultation, TISC members asked Edmonds whether he was happy with Oftel's progress on LLU. In November 2000<sup>831</sup>, the DGT was questioned based on written evidence from several OLOs, acting as a 'fire alarm'<sup>832</sup> mechanism for the TISC.

Thus, the TISC judged the regulator by collecting documentation and arranging 'informal' but public hearings. The TISC could pressure the regulator given its stated intentions on

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<sup>822</sup> Cane,A 16/2/00, "BT limbers up for battle on local network access" FT; 17/2/00, "BT chief warns government not to meddle"; "LEX COLUMN: BT bypass", 17/2/00; Cane,A & Groom,B 18/2/00, "Brown accused of making BT a target"

<sup>823</sup> Although the SoS headed the DTI, he/she was singularly vested with Telecoms Act powers. It had no formal authority over Oftel

<sup>824</sup> Oftel did not always inform the DTI of publication contents in advance; Hood et al 2000, p.91

<sup>825</sup> DTI 1994 "Creating the Superhighways of the Future: Developing Broadband Communications in the UK", Cm.2734

<sup>826</sup> Hammersley,B 6/12/99, "Ringing changes", The Times

<sup>827</sup> see ch.3

<sup>828</sup> Oftel was a non-ministerial government department

<sup>829</sup> HC835 26/10/99, "Twelfth special report", Appendix 2, Recommendation (M)

<sup>830</sup> HC93-i 25/1/00, "The Work of Oftel", Hearing: 7/12/99

<sup>831</sup> HC90 20/3/01. Hearing:14/11/00

<sup>832</sup> see ch.1

the record, also informing public opinion through the media<sup>833</sup>. Persuading TISC members that regulatory policies satisfied the wider public interest mattered particularly when Oftel wanted to avoid questioning that would expose it to oversight from elected officials with formal powers such as the SoS.

In practice, in December 2000, the TISC held hearings with junior Minister Patricia Hewitt rather than with the SoS who licensed operators, formally appointed the DGT and headed the DTI<sup>834</sup>. Hewitt lacked Oftel's and operators' technical depth, but used her ministerial access to key actors to exert influence, since "local loop unbundling on the ground will really only work effectively if you have sensible working relationships"<sup>835</sup>.

A few months before the TISC hearing, she talked privately to senior Oftel officials, to major OLOs and BT<sup>836</sup>. Working in a 'regulatory space' beyond the traditional 'ménage-à-trois', she gathered respective policy views and conveyed the Government's position on policy progress made until then, as Oftel worked towards finalising LLU terms complying with the EU unbundling Regulation.

In July 2000, the European Commission published a draft Regulation<sup>837</sup>, applicable in all Member States from 2001 onwards<sup>838</sup>, explaining the increased immediacy of Government and 'other state' officials. EU institutions had supranational powers, hence, influenced the policy framework by formulating the Regulation, but were otherwise uninvolved in national decision-making.

Thus, LLU policy attracted many actors, with different resources dispersed among them, not controlled by a single influential group.

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<sup>833</sup> Ward, A 15/11/00, "BT 'held up' introduction of competition"; 6/12/00, "BT accuses regulator of 'posturing' over access", FT

<sup>834</sup> HC66-i 15/12/00 "Minutes of Evidence", "Annual Report from the e-Minister and the e-Envoy" paras.15, 28. Hearing: 13/12/00

<sup>835</sup> *ibid*, para.19

<sup>836</sup> Interview: B

<sup>837</sup> Oftel Press Release (hereafter, shortened to OPR) 12/7/00, "Oftel Statement on European Commission's proposed Regulation on Local Loop Unbundling"

<sup>838</sup> "Regulation (EC) No 2887/2000 of the European Parliament and the Council of 18 December 2000 on unbundled access to the local loop", Official Journal of the European Communities 30/12/00

### III. Preferences

As Oftel pursued LLU following the December 1998 consultation, the preferences of well-resourced state and non-state participants emerged rapidly. BT, owner of the key 'physical' asset which the policy centred on, indicated its preference divergence vis-à-vis Oftel immediately since it opposed rivals taking-over its lines and providing broadband and telephony directly to end-users. Conversely, new entrants with distinct network capabilities wanted to access BT's local loop network to provide broadband. The TISC, which was able to raise the public profile of issues, favoured competitive broadband provision, as did Oftel. Initially, other key actors that subsequently supported the regulator, such as Minister Patricia Hewitt and the European Commission, were not actively involved, but were not divergent. The section thus shows that, although the central industry actor's preference differed from the regulator's, the agency had some influential support from the outset, consistent with Type II autonomy.

Oftel's December 1998 consultation listed five non-mutually exclusive options to spread broadband competitively over BT's local loop if industry agreed there was consumer demand and regulatory intervention was required to supply it. Options 1 and 2 constituted unbundling, options 3, 4 and 5 did not. Thus, the regulator presented two distinct sets of preferences, entailing different policy choices (in summary, Table 8 below).

Broadly put, options 3-5 were wholesale broadband products which BT would supply to competing operators or ISPs at a regulated price, for resale to consumers<sup>839</sup>. Thus options 3-5 did not require entrants to invest in their networks to provide broadband, avoiding deploying costly equipment and facilities. BT would make necessary network upgrades, bearing the costs. However, BT would accordingly determine product features. Moreover, options 3-5 did not grant OLOs direct access to the 'last-mile' of BT's phone lines, and hence, access to end-users' homes to provide diverse broadband services.

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<sup>839</sup> Oftel 7/99, para.1.4

**Table 8: Summary Features of 5 Oftel Options Proposed**

Options	Advantages (for entrants)	Disadvantages
1	<ul style="list-style-type: none"> <li>- Access to/direct commercial relationship with end-users</li> <li>- Minimised dependence on incumbent for: deployment; innovation/service differentiation; service provision</li> </ul>	<ul style="list-style-type: none"> <li>- Slow &amp; very costly implementation</li> <li>- Selected coverage</li> <li>- Dependence on co-location offer (delays)</li> <li>- Shared spectrum/ interference management significant problem</li> </ul>
2	<ul style="list-style-type: none"> <li>- As option 1, but differed contractually, giving Oftel more control as a regulated 'telecoms service'</li> </ul>	<ul style="list-style-type: none"> <li>- As option 1</li> </ul>
3	<ul style="list-style-type: none"> <li>- Limited new entrant investments</li> </ul>	<ul style="list-style-type: none"> <li>- Incumbent determined product features</li> <li>- No entrant access to end-user loops to provide services</li> <li>- DSLAM equipment did not provide clean 'bitstream' data output</li> </ul>
4	<ul style="list-style-type: none"> <li>- As option 3; but, critically, fast commercial presence possible</li> </ul>	<ul style="list-style-type: none"> <li>- Similar to option 3; critically incumbent decided roll-out speed</li> </ul>
5	<ul style="list-style-type: none"> <li>- Meant to operate national broadband network as conventional telephony</li> </ul>	<ul style="list-style-type: none"> <li>- Similar to options 3-4; but, critically, no general broadband public switched network available</li> </ul>

LLU options 1 and 2 meant removing the key entry barrier that was BT's direct end-user access, as entrants took-over BT's lines. Entrants would face significant costs to develop broadband-enabled networks but could choose where to invest and would, crucially, have a direct relationship with their customers to tailor services, hence, be on a more equal footing and better placed to compete with BT.



Specifically, option 1, the unbundled local loop, meant making BT's lines available to OLOs to incorporate into their networks. After taking over BT lines, OLOs would co-locate, or place and attach their broadband equipment, like a DSL modem, to the local loop in or near BT's local exchange buildings<sup>840</sup>. OLOs would similarly provide end-users with matching equipment to supply broadband<sup>841</sup> and voice telephony services, instead of BT<sup>842</sup>. BT would only remain responsible for the circuit's physical integrity<sup>843</sup>. Option 2<sup>844</sup> resembled option 1, but differed contractually. Instead of providing a copper loop to the entrant, BT provided a 'telecoms service' with defined characteristics to the other operator<sup>845</sup> (implications below) - effectively a leased line between the customer and the local exchange.

Instead, under wholesale option 3, 'bitstream' access<sup>846</sup>, BT owned and operated equipment on each line. So, OLOs would not install their equipment at either end of loops, but connected to the broadband bitstream at BT exchanges, co-locating equipment to take data onto their networks. However, BT would retain a contractual relationship with customers for network access, and for telephony if users chose to retain BT. So OLOs provided broadband but lacked an exclusive relationship with end-users. Option 4<sup>847</sup> entailed BT providing OLOs with wholesale broadband access to end-users via DSL on the copper loop. This would be a data service between customer lines and the SP's or operator's own site at a different part of the network from a BT exchange, thus relying considerably on BT's network. Option 5, or Indirect Access to a broadband public switched network, would have mirrored the operation of conventional telephony and the dialling of customer numbers.

Thus, Oftel's five options to spread broadband across the country entailed some dependency on access to BT's local loop. The critical issue was what level of local access

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<sup>840</sup> The telephone exchange consumers are connected to

<sup>841</sup> DSL modems attached to end-user computers/devices turn the digital signal from the computer/device into an analogue signal transmittable over an analogue medium like phone-lines. OLOs' modems at BT exchanges convert the incoming analogue signal back to digital format. Oftel 12/98 Annex1

<sup>842</sup> Oftel 12/98, paras.5.2-5.4

<sup>843</sup> *ibid.* Annex3

<sup>844</sup> Partial Baseband Leased Circuit (PBLC), hereafter referred to as 'unbundling' or 'LLU', since Oftel excluded option 1

<sup>845</sup> Oftel 12/98 para.5.5

<sup>846</sup> Sequence of bits, or data-stream, transmitted continuously over a path one at-a-time

<sup>847</sup> Permanent Virtual Circuit access: 'Permanent' meant no call-by-call selection; customers connect to the same provider. 'Virtual' meant no physical circuit per customer, with data from many customers joined together and SPs recognising a connection between customers and data packets flowing on the circuit. Oftel 12/98 paras.5.11-5.12

Oftel wanted BT to accept, thus the extent to which it removed determinant entry barriers for OLOs. The decision affected whether, when OLOs provided services, BT retained any contractual relationship with end-users (options 3-5) or only with competitors (1-2).

By July 1999, Oftel discarded option 1 following indications of significant spectrum problems regarding managing interference between services over a loop controlled by an entrant and services provided over other loops by BT or other OLOs within the same cable. Two wholesale broadband products were also excluded. Oftel hardly mentioned 'bitstream' option 3 past December 1998 since relevant broadband equipment did not ensure a clean data output<sup>848</sup>. Option 5 was impractical in the short-term as there was no general broadband public switched network.

For relatively fast residential broadband provision, Oftel retained wholesale product proposal option 4 instead. Implementation complexities meant that unbundling (options 1 and 2) would take time<sup>849</sup>, whereas Option 4 involved BT upgrading its network voluntarily, enabling its loops to be used to deliver broadband.

BT had already developed significant ADSL roll-out plans since December 1998, and planned to announce broadband provision details shortly<sup>850</sup>. Under its licence, BT had to provide a wholesale interconnect product to OLOs and a wholesale access product to SPs on fair and non-discriminatory terms<sup>851</sup>. Option 4 was especially attractive to ISPs, stimulating service competition and innovation. New entrants could offer services with significant customer reach and limited infrastructure investment. Technical issues such as spectrum management would be avoided, facilitating mass market access. Oftel held powers to address anti-competitive behaviour<sup>852</sup>.

However, option 4 alone did not meet Oftel's goal of securing consumer choice through competition. Demand could remain unmet. BT controlled the pace and extent of network roll-out, adjusting it to match its own service development at competitors' expense. OLOs would be unable to deploy broadband services to areas that BT considered uneconomic.

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<sup>848</sup> DSL access multiplexers (DSLAMs)Oftel 7/99 para.6.1

<sup>849</sup> Oftel 7/99, paras.4.4,4.8

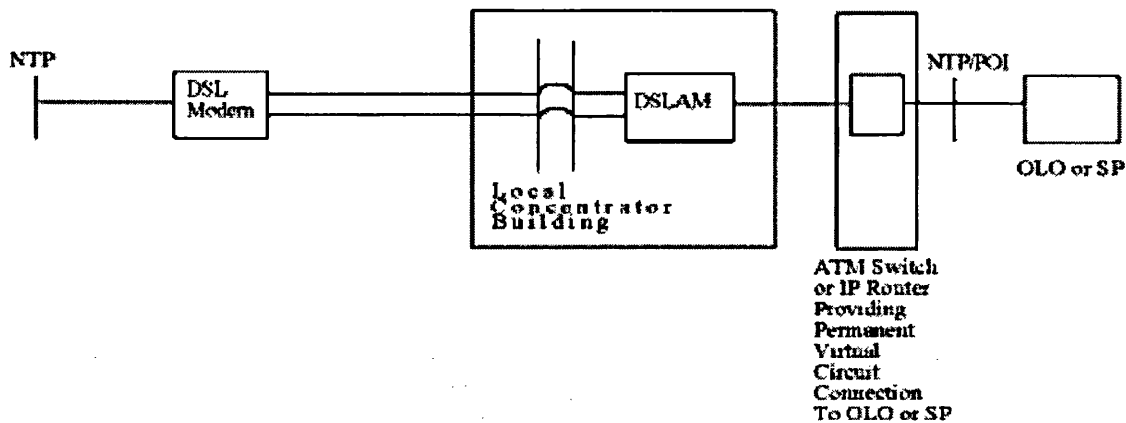
<sup>850</sup> Taylor 9/6/99; Oftel 7/99 para.1.6; Cane 7/7/99

<sup>851</sup> Oftel 7/99 para.4.5

<sup>852</sup> Oftel 7/99, para.5.3

The option left BT the entire choice of technology. Relying on option 4 risked exacerbating the impact of BT's network dominance on innovative broadband supply.

**Diagram 3: Wholesale Option 4 - BT provides OLO or SP with higher bandwidth access to the end-user (NTP<sup>853</sup>) via a point-to-point data service**



Source: Oftel 7/99, Annex B

Accordingly, Oftel pushed for option 2. Unlike option 1, the circuit remained part of BT's 'licensed system', which entailed continued regulatory oversight for loop provision. Option 2 constituted a 'telecoms service' for which, besides remaining in charge of the nature and quality of the communication service provided over its network, BT was formally regulated through its licence.

Thus, Oftel concluded early on that option 2 gave it greater legal clarity, hence control over the incumbent, than option 1, particularly as it was unclear whether option 1 could be required under the Telecoms Act<sup>854</sup>. Service provision conditions were similar, including the need for 'spectrum management' avoiding service interference. Owning the lines, BT would want to ensure that OLOs used approved equipment<sup>855</sup>.

As explained above, through unbundling OLOs would upgrade the loop by installing their equipment at BT's local exchange and at customer premises as they saw fit (see diagram 4).

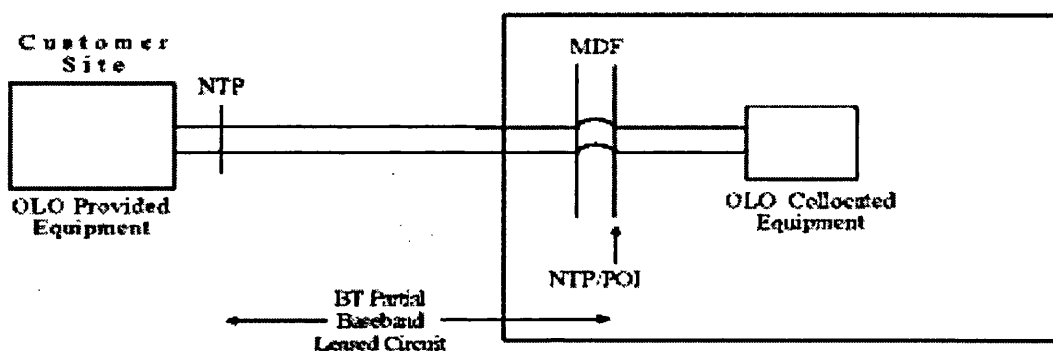
<sup>853</sup> Network Termination Point

<sup>854</sup> Interviews B,C

<sup>855</sup> Oftel 12/98 paras.5.5-5.7

OLOs would build networks, deciding which exchanges they provided services from. Thus while bearing investment risks, OLOs would not be subject to BT's commercial decision-making. Oftel argued that by promoting competition in the technological upgrade of BT's local loop, consumers would get the best service deal.

**Diagram 4: Option 2 LLU - BT PBLC between OLO equipment at customer premises and at BT exchange leased by new entrant**



Source: Oftel 7/99, Annex B

Oftel's preference for introducing competition to BT's 'local access network' was clear. Unbundling was unlikely to deliver short-term 'mass-market' roll-out; technical and practical issues needed resolving. Operational details for co-locating OLO equipment at BT exchanges needed to be determined. Nonetheless, Oftel indicated its significance to ensure that the necessary bandwidth was delivered as soon as possible. If progress developed as proposed, a trial was expected no later than the end of 2000 and LLU services no later than July 2001. Oftel advocated access to all BT's loops, unless there were "insuperable technical or practical difficulties"<sup>856</sup>.

For efficient entry, charges were to be based on Long-Run Incremental Costs (LRIC)<sup>857</sup> plus a mark-up to account for costs common to the line and to other BT services<sup>858</sup>, reflecting the economic value of a line in a market of competitively supplied loops. A

<sup>856</sup> Oftel 7/99, para.5.4

<sup>857</sup> On the basis of incurred forward-looking costs; Oftel 12/98, para.5.20

<sup>858</sup> Oftel 7/99, para.5.3

uniform LRIC+ charge also addressed the very different profitability of different customer lines, given the tariff structure. Charging arrangements should balance the development and take-up of broadband services over BT's network (option 4), and motivating BT and OLOs to invest in competing delivery routes providing greater choice medium-term (option 2)<sup>859</sup>.

Oftel's LLU preference under recently appointed DGT, David Edmonds<sup>860</sup>, had other implications. The consultation portrayed unbundling as, eventually, fulfilling the statutory primary duty of securing telecoms service provision to whoever made a reasonable demand for it across the country, plus the secondary duties of promoting consumers interests, and competition. Responses indicated broadband demand would develop. So, Oftel complied with its statutory goals when making the case for 'regulatory action'.

Yet, LLU was not strictly one of Oftel's formal duties, indicating a specific policy choice. How to implement competition was unspecified in statutory arrangements, and the previous DGT Don Cruickshank had pursued it very differently. Since the telecoms market liberalisation under the Conservative Government, competition had been pursued through the creation of alternative networks<sup>861</sup>, rather than over BT's network, which Oftel proposed with LLU instead. Cable operators were licensed following the 1991 Duopoly Review. Ntl stressed the policy change in its LLU consultation response, indicating that Oftel had explicitly rejected that OLOs access BT's loop when unbundling had been previously considered for basic telephony, as did other OLOs<sup>862</sup>.

When Edmonds took over as DGT, Oftel's policy was that LLU would be, at best, a distraction from achieving competition through different competing networks. Few European regulators were actively pursuing unbundling<sup>863</sup>. However, in December 1998, Oftel indicated that, while circumstances differed from elsewhere given the approach of encouraging constructing alternative telecoms networks, the UK should not lose its competitive advantage, revising the regulatory approach applied until then.

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<sup>859</sup> Oftel 7/99 AnnexC, paras.2,13

<sup>860</sup> March 1998

<sup>861</sup> Hulsink 1999, p.133; Thatcher 1999, pp.206-208,210,212; Harper,J 1997, "Monopoly and competition in British telecommunications: the past, the present, and the future", Pinter

<sup>862</sup> Ntl response 3/99, "Access to bandwidth"; Energis response 3/99, "Access to bandwidth"

<sup>863</sup> Memorandum submitted by Oftel" 8/12/00, Appendix 19, HC90 20/3/01

BT expected to supply broadband within months. Alternative supply routes, such as cable networks, were not expected to deliver residential broadband before the medium-term<sup>864</sup>, making most users reliant on services supplied over BT's local network until then. So, by July 1999, Oftel indicated that other companies should have the opportunity to specify the type of broadband services to be run over BT's local loop rather than simply follow BT when it felt it was commercially interesting to make them.

The new DGT's policy was to intervene directly on BT's local access network dominance, sustaining its primacy. At the end of 2000, Patricia Hewitt stated: "the policy of the last administration and the policy of previous directors general of Oftel was against local loop unbundling...The policy was...to pursue infrastructure competition through the cable companies, so that there would be an alternative network...rather than competition on the local loop. It was David Edmonds...in 1998, who changed that policy"<sup>865</sup>.

Indeed, while Oftel issued the first consultation, SoS Peter Mandelson launched a publication containing the Government's objectives of creating a knowledge-based economy and making the UK the best place to do business electronically by 2002<sup>866</sup>, without public references to LLU<sup>867</sup>. The White Paper advocated competition and consumer interests, which unbundling was meant to bring. Yet, the Government publicly prioritised e-commerce, suggesting that it was 'indifferent'<sup>868</sup> about how this was achieved. Hewitt first endorsed LLU publicly but briefly at the end of 1999<sup>869</sup>. Similarly, background support from the European Commission<sup>870</sup> became important when the EU Regulation was formulated in 2000.

The TISC showed preference convergence earlier. By August 1999, the committee indicated its support for Oftel's proposal, agreeing "that BT's monopoly ownership and control of the local loop could restrict the roll-out of vital new high-bandwidth services"<sup>871</sup>. Oftel was told to be proactive about competition in the UK's telecoms infrastructure. Residential users and SMEs should benefit from a choice of broadband technologies from

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<sup>864</sup> Interviews B,C

<sup>865</sup> HC66-i 15/12/00, para.15

<sup>866</sup> DTI Competitiveness White Paper 1998, "Our Competitive Future: Building the knowledge driven economy", Cm.4176

<sup>867</sup> Brown,K and Cane,A. 21/12/98, "Mandelson signals more industry deregulation", FT

<sup>868</sup> Nordlinger considers indifference non-divergence

<sup>869</sup> Hammersley 6/12/99

<sup>870</sup> Cane 2/12/98, Oftel 12/98

<sup>871</sup> HC648 9/8/99, "Tenth report"; 'Summary of recommendations and conclusions - Recommendation(M)'

different operators. Therefore, an important 'state' actor expressed its convergence with Oftel.

Support from industry actors was, broadly, overwhelming. Responses were highly detailed; OLOs were natural policy beneficiaries. The *circa* sixty responses to Oftel's first two LLU publications raised inevitable differences<sup>872</sup>. Nevertheless, OLOs welcomed the discussion framed by the regulator<sup>873</sup>. Both before and after July 1999, their overall preferred options were 2 and 4<sup>874</sup>. Major UK-based OLOs, like C&W and Energis among others, strongly advocated them, as did ntl though with some reservations about the need for regulatory intervention.

More specifically, Energis, for instance, preferred option 2 over option 1 due to the more clearly defined contractual relationship with BT, adding that customer benefits would be the same but would cost less<sup>875</sup>. C&W believed option 1's lack of service guarantees made it commercially unattractive. Co-location and spectrum management issues for option 2 were not insurmountable<sup>876</sup>. Oftel's expectation that loops would be available by July 2001 seemed the single unsupported issue. MCI Worldcom found the timetable "overly pessimistic"<sup>877</sup>, "with commitment and hard work from all parties, (LLU was achievable) before July 2001"<sup>878</sup>.

Despite LLU not requiring significant investments by BT, the incumbent was clearly preference divergent with Oftel. BT strongly opposed unbundling options, defining them "inappropriate"<sup>879</sup>, indeed issuing 'comments on comments' of its competitors<sup>880</sup>. BT claimed regulatory intervention was unnecessary, demand was being met, and Oftel and OLOs should focus on its wholesale ADSL product; trials and commercial negotiations were already occurring. Besides raising operational difficulties, BT questioned whether it

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<sup>872</sup> Oftel 7/99, Annex A

<sup>873</sup> Cane 11/12/98; 7/7/99; 1/12/99

<sup>874</sup> Oftel 11/99, "Access to Bandwidth: Delivering Competition for the Information Age" paras.2.10-2.16, Annex A

<sup>875</sup> Energis 3/99

<sup>876</sup> Cable&Wireless response, 3/99, "Access to bandwidth"

<sup>877</sup> MCI Worldcom 1/9/99, "Access to bandwidth: Proposals for Action"

<sup>878</sup> Cane 1/12/99

<sup>879</sup> BT 3/99 "Access to Bandwidth"

<sup>880</sup> BT's Comments on Responses to Access to Bandwidth, 26/3/99

could be forced to provide access to loops and exchange facilities<sup>881</sup>, subsequently stressing the need to define regulatory arrangements “satisfactorily”<sup>882</sup>.

#### **IV. Process**

This section shows that, despite significant formal authority, Oftel persistently prioritised persuasion and negotiation to shift BT’s preference divergence, consistent with Type II autonomy. The regulator eschewed available powers from the outset, choosing instead to use internal expertise, pool industry policy views without resorting to statutory consultations first, and discuss privately with the key preference divergent actor to obtain consent. Oftel built on ‘empowerment-reinforcement’ beyond collecting supportive consultation views from OLOs.

The regulator repeatedly avoided imposition of its unbundling preference even after introducing a specific condition in BT’s licence, exploiting the support of convergent actors that confronted BT instead. Oftel used the input of OLOs, which knew what entry terms could advance LLU broadband competition, to analyse and then address issues with BT, through dialogue. Subsequently, under public pressure from OLOs and the TISC about implementation delays, the regulator harnessed ‘informal’ meetings with a junior Minister to further its case. Patricia Hewitt confronted BT privately, asking it to comply with the binding EU-deadline the European Commission framed with Oftel’s input.

During the different policy stages, Oftel’s prevailing stance was one of extensive negotiations with BT based on agency expertise and on influential policy support it harnessed to persuade the incumbent. In November 1999, Oftel confirmed plans to deliver by July 2001, at the latest, unbundling in line with option 2 which BT opposed unequivocally, besides wholesale ADSL option 4, which BT supported. Nevertheless, having collected and disseminated information based on exchanges lasting almost a year, Oftel stated that unbundling would be introduced through a modification of BT’s licence following more informal pre-modification discussions<sup>883</sup>.

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<sup>881</sup> BT 3/99

<sup>882</sup> BT 9/99 “Response to Oftel’s second Access to Bandwidth Consultation”

<sup>883</sup> Oftel 11/99, para.4.18,AnnexC17



Oftel disregarded Energis' considerations regarding specific BT licence provisions appropriate to introduce unbundling<sup>884</sup>. More significantly, option 2 was a regulated "telecoms service not consisting in voice services" as defined in the Telecoms Act 1984, enforceable through existing condition 43.2<sup>885</sup>. Yet, Oftel understood the significance of introducing LLU for BT and OLOs. The service had to be clear to all for transparency and avoidance of doubt<sup>886</sup>.

Thus the regulator proposed that a new condition be inserted in BT's licence, specifying services to be provided to OLOs, enabling it to determine a clear pricing regime. Oftel framed issues to pursue its preference before applying the formal framework, turning its authority into a default, backstop mechanism - an approach that persisted throughout policy development. It intentionally avoided mentioning making a reference to the Competition Commission despite BT's divergence<sup>887</sup>. Besides being a long process, the outcome of a reference was "never clear cut", hence, represented "a risk"<sup>888</sup>.

Accordingly, Oftel sought BT's consent to pursue its preference, deviating from formal arrangements. Oftel intended to consult further informally and publish the new condition for formal consultation by April 2000, but acknowledged that discussions had already begun<sup>889</sup>. Similarly, following the first consultation, written responses aside, BT had "developed its case in further presentations to Oftel"<sup>890</sup> confirming intense exchanges between them.

Oftel created a persuasive case since proposing five options in December 1998, distinguishing between competition arising from unbundling and that from wholesale broadband access products, identifying the distinct implications. Four different but inter-related arguments were formulated nonetheless, 'asking' whether intervention was necessary for local loop access.

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<sup>884</sup> Energis 21/10/99, argued LLU could be required of BT, as a Significant Market Power (SMP) operator, under licence conditions implementing Article 4(2) of the Interconnection Directive and/or Article 16 of the Revised Voice Telephony Directive

<sup>885</sup> Oftel 11/99, AnnexC5

<sup>886</sup> Oftel 11/99, para.4.17

<sup>887</sup> HC90 20/3/01, para.5; see ch.3 on formal licence modification

<sup>888</sup> Interviews B,C

<sup>889</sup> Oftel 11/99, para.4.18,AnnexC17

<sup>890</sup> Oftel 7/99, para.1.6

Thus, although BT was undertaking trials for its wholesale ADSL access product, gaining first-mover advantage, Oftel did not force a focus on LLU. Days after the DGT described as “drastic” an EU proposal to compel SMP operators to rent local loops to rivals at cost-based prices<sup>891</sup>, Oftel stressed that it was not setting out a preferred approach<sup>892</sup>. It presented arguments justifying discussing LLU instead. Rapidly expanding new technologies delivering services over copper loop infrastructure, notably DSL, made LLU attractive. BT’s loop control was the best way to reach end-users and needed to be opened. Other arguments were less technology-related. The second was the upcoming 1999 EU telecoms law review. The European Commission intended to define rules for end-user access, including via unbundling, requiring industry and consumer views.

Thirdly, the Government valued a ‘knowledge-based’ economy for competitiveness and wanted to spread the benefits of new technologies<sup>893</sup>. Oftel implied that both infrastructure and services had to be provided, making LLU a policy contender. Fourthly, new rules were needed to ensure access to consumers and for the UK not to lose its competitive advantage, given US and EU regulatory changes. With limited network alternatives for broadband competition nationally, Oftel’s complementary arguments fuelled the rationale for LLU.

Oftel strengthened its case by exploiting convergent actors forming an “issue coalition”<sup>894</sup>, seeking consensus and support over the options to advance. It ‘empowered’ potential new entrants interested in accessing the incumbent’s loops, otherwise unable to, by providing a public platform, hence visibility, to raise relevant arguments and put pressure on BT.

OLOs’ input supporting Oftel’s unbundling initiative helped narrow the options from five to two in July 1999<sup>895</sup>. Unlike the first consultation, Oftel specified the desirable options, stressing many respondents’ agreement. While welcoming BT’s investments developing its wholesale ADSL product, it was “not right simply to leave” BT to provide services as and when it found it commercially interesting<sup>896</sup>. The broadband access product would likely

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<sup>891</sup> Cane 2/12/98

<sup>892</sup> Oftel 12/98, para.1.5; Cane 11/12/98

<sup>893</sup> DTI 12/98; Brown and Cane 21/12/98

<sup>894</sup> see ch.1 on Nordlinger’s Type II options

<sup>895</sup> Oftel 7/99, AnnexA; presented anonymously in the consultation

<sup>896</sup> Oftel 7/99

allow BT to dominate the wholesale broadband market against Oftel's competition preference and consumer interests<sup>897</sup>.

Given its expert understanding of policy choices, Oftel 'bargained' with BT to accept its unbundling preference. BT could develop its wholesale ADSL access product on a voluntary basis or it could be required to do so, with a timetable. Allowing BT to start selling the wholesale ADSL product without constraints, except existing service provision obligations, was a bargaining tool in exchange for accepting unbundling<sup>898</sup>.

Oftel presented the two options as a reciprocally advantageous exchange<sup>899</sup> but the analysis furthered its preference. OLOs should be able to specify the type of broadband services to be run over BT's local loop and to make the necessary investments, avoiding being BT's followers. Economic arguments by a non-state actor other than OLOs strengthened Oftel's case. Analysys consultants' cost-benefit analysis estimated LLU benefits between £120m and £440m<sup>900</sup>. Thus, besides eschewing powers, when deploying its formally-allocated budget, Oftel chose to bolster arguments supporting its preference.

Oftel's public and private persuasion brought some shift by July 1999. Publicly, BT kept arguing the wholesale ADSL product was most effective for 'broadband Britain'. Yet, notwithstanding "the right to maintain this position", BT would "work closely with Oftel and the industry to develop the commercial, technical and operational arrangements necessary (were unbundling to be) mandated following completion of the consultation process"<sup>901</sup>. BT's Group Managing Director for UK operations, Bill Cockburn, expressed resignation over LLU being introduced shortly after Oftel's November 1999 statement. Subject to no fixed voice market distortion, BT would agree to licence modification<sup>902</sup>.

BT's Chief Executive, Sir Peter Bonfield, highlighted the dialogue with Oftel in early 2000, when then Chancellor Gordon Brown publicly opposed BT's 'foot-dragging' given the July 2001 deadline, which he and especially OLOs considered too late<sup>903</sup>. Bonfield strongly rejected Brown's intervention, stating: "there will be no change to this date without our

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<sup>897</sup> Interviews B,C

<sup>898</sup> Oftel 7/99, paras.4.5-5.1

<sup>899</sup> see ch.1; Nordlinger

<sup>900</sup> Oftel 11/99, para.2.29

<sup>901</sup> Oftel 7/99, para.1.11

<sup>902</sup> Cane 1/12/99

<sup>903</sup> Cane 16/2/00

agreement. That would anyway be a matter for Oftel and BT - not for the Treasury<sup>904</sup>. BT accepted to introduce LLU only by Oftel's target deadline.

Meanwhile, practical unbundling complexities were discussed by industry advisory focus groups set-up as Oftel had proposed. So, besides putting LLU on the agenda and giving them a say, Oftel facilitated convergent OLOs' organising efforts and their effective use of resources by establishing quasi-public advisory committees<sup>905</sup>. Oftel encouraged the Operator Policy Forum (OPF) and the Network Interoperability Consultative Committee (NICC) to resolve operational and technical factors shaping commercial delivery with BT since July 1999<sup>906</sup>.

Although BT's licence already required key co-location forms<sup>907</sup>, Oftel expected such technical implementation issues, order handling and spectrum management among others, would be agreed through contractual arrangements between BT and OLOs<sup>908</sup>. Securing BT's commitment, followed by licence modification, was envisaged by MCI Worldcom<sup>909</sup>, which eventually chaired the OPF LLU subgroup. BT chaired the NICC DSL Task group.

With industry discussions shaping implementation, in December 1999, elected officials (who did not have powers to order the regulator to attend hearings) put their doubts to Oftel regarding LLU's negotiated pace of development. The parliamentary select committee reminded Edmonds that he had stated LLU would be addressed within six months in January 1999. Oftel's BT's licence modification timetable had been established 30<sup>th</sup> November<sup>910</sup>.

Edmonds indicated LLU had not been considered in the UK until twelve months earlier. Oftel had limited practical experience with LLU issues and faced significant information

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<sup>904</sup> Cane 17/2/00

<sup>905</sup> see ch.1; Nordlinger

<sup>906</sup> In Oftel 12/98, only NICC was mentioned

<sup>907</sup> Oftel 11/99, ch.7. OLOs needed to 'co-locate' to interconnect with the circuit; renting space at BT sites to install equipment and use facilities. Oftel identified three types: (i) 'Physical co-location' - at a BT local exchange building. OLO were provided separate rooms, or several could share a single room with cages protecting equipment. Reasonable access to rooms containing equipment was needed; (ii) 'Distant co-location' - at a nearby suitable site, not managed by BT, connected to the exchange by a tie circuit. No direct access to BT's facilities was required; (iii) 'Virtual co-location' - BT managed OLOs equipment, relaying specific set-up and configuration instructions. For a level-playing field, BT should provide physical co-location where space was available

<sup>908</sup> Oftel 11/99, paras.2.32-2.39,4.1-4.15

<sup>909</sup> MCI Worldcom 1/9/99

<sup>910</sup> HC93-i 25/1/00, para.56

asymmetry vis-à-vis BT<sup>911</sup>. Accordingly, it worked privately to ‘induce’ its preference and publicly spoke of the incumbent in ‘conciliatory’ terms notwithstanding available licence powers.

Asked if BT was ‘dragging its feet’ in the midst of negotiations before the formal consultation, Edmonds replied that BT was responding very effectively in terms of ADSL roll-out of its own network<sup>912</sup>. Mandating unbundling with a “quite tough” timescale had not been foreseen and, pointing to implementation practicalities, if ADSL trials proved successful, July 2001 would be the “very outside limit for the introduction of real competition”.

Edmonds showed unwillingness to affect working relations with the incumbent since it had to curtail BT’s chances of exploiting informational and structural advantages. Accordingly, it was “much better to get agreement which would lead to effective implementation”, with an agreed timetable and a licence amendment indicating in detail the framework mandating LLU by April 2000<sup>913</sup>. Oftel’s November 1999 statement “contained a large degree of agreement by BT”. Thus, when questioning Oftel about slow delivery a year later, the TISC publicly scrutinised BT’s Chief Executive and its Regulatory Affairs Director, Ian Morfett too<sup>914</sup>, albeit more mildly.

Instead, in her December 2000 TISC hearing, Patricia Hewitt expressed full confidence in Edmonds’ approach. The Government had just reappointed him<sup>915</sup>; around two-and-a-half-years from the initial three-year appointment<sup>916</sup>, despite the maximum term being five years<sup>917</sup>. The Minister stressed the European Commission’s view that “Oftel is regarded by many other national regulatory authorities as the benchmark for an independent, efficient, competent and pro-active regulatory authority”<sup>918</sup>.

Hewitt had hardly expressed previous policy backing publicly, indicating the informal exchanges between regulator and the Minister after Oftel exploited its informal ties with

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<sup>911</sup> Interviews B,C

<sup>912</sup> HC93-i para.61

<sup>913</sup> HC93-i 25/1/00, paras.56-57

<sup>914</sup> HC90 20/3/01, paras.307-359; Ward,A 20/12/00 “MPs praise BT for speeding up unbundling” FT

<sup>915</sup> Roberts,D & Shrimley,R 1/11/00 “Telecoms regulator has contract extended” FT

<sup>916</sup> Edmonds,D 27/3/03 “Memorandum by Oftel” in House of Lords, HC68-II, 17/12/03 “Constitution Minutes of Evidence”

<sup>917</sup> see ch.3

<sup>918</sup> HC66-i 15/12/00, para.15

BT. She became actively involved, despite having no direct formal authority over Oftel, well after the new condition required BT to unbundle and the operational *impasse* between BT and OLOs.

Oftel's account of events persuaded Hewitt, who bolstered Oftel's policy primacy. It had the necessary resources, associated with recruiting and retaining regulatory staff with "very valuable expertise", to do the job. The DGT gained Hewitt's support despite not acting firmly and formally with BT, and notwithstanding her concerns, from the end of summer 2000, about the absence of "sensible working relationships between the engineers and the other staff of the different operators". After meeting Edmonds, she privately confronted BT over unsatisfactory progress with LLU<sup>919</sup>.

Thus, having proposed LLU adoption, between the end of 1999 and the end of 2000 TISC hearings, the regulator exploited its ties with the influential Minister after driving policy development aided by convergent industry actors, rather than through its powers. In March 2000, MCI Worldcom's international affairs vice-president, Richard Feasey, stated: "Oftel is a good model of a regulator that takes its decisions transparently and independently (of political concerns)"<sup>920</sup>. Feasey praised Oftel's laissez-faire approach; Continental European agencies applied quasi-judicial procedures. Oftel had largely developed the framework through informal collaboration since the initial consultation, when it pursued LLU "informed by responses"<sup>921</sup>.

Yet, telecoms executives expressed increasing dissatisfaction with Oftel for not fully exercising its formal powers. Despite issue complexity, BT's obstructive behaviour<sup>922</sup> and operators having "teams of lawyers just to handle Oftel"<sup>923</sup>, OLOs became frustrated<sup>924</sup>. Eventually, many complained to the TISC. Thus Plc claimed that it was not until OLOs "specifically asked the Director General to invoke" that Edmonds sought the licence modification prescribing unbundling 'condition 83'; ongoing "co-regulation" reflected "regulation by Oftel and BT"<sup>925</sup>.

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<sup>919</sup> *ibid*, paras.18-19

<sup>920</sup> Parkes, S 15/3/00 "New government curbs on competitive madness" FT

<sup>921</sup> Oftel 12/98

<sup>922</sup> HC90 20/3/01: Memoranda submitted by: Energis Communications (8/11/00); WorldCom Appendix 11 (9/11/00); Colt Telecommunications, Appendix 16 (13/11/00)

<sup>923</sup> Parkes 15/3/00

<sup>924</sup> *ibid*; Purton, P 21/6/00 "Worldwide pressures to unbundle grow stronger", FT

<sup>925</sup> HC90 20/3/01, "Memorandum submitted by Thus Plc", Appendix 14 (13/11/00)

Kingston complained Oftel had relied excessively on BT's subjective policy information and only reacted to the latter's reluctance to unbundle. The process and its speed had been mishandled prompting too many determinations and complaints<sup>926</sup>. The CSSA described regulatory failure; a "stunning example of the captured regulator"<sup>927</sup>.

In practice, Oftel aimed to minimise the extent BT would exploit its resources<sup>928</sup>, including refusing licence modification engendering a reference to the Competition Commission but also information asymmetries<sup>929</sup>. Dialogue was prioritised as Oftel launched the March 2000 formal consultation<sup>930</sup>, to have the new condition in place by June 2000 (subject to the consultation outcome), for it to come into effect on a date that the DGT would determine<sup>931</sup>. The DGT expressed satisfaction with BT's and industry's commitment while consulting. Similarly; "Oftel will continue to work with BT to see if the timetable can be improved"<sup>932</sup>.

Oftel was actually given new enforcement powers under the Competition Act 1998, prohibiting anti-competitive agreements and abuses of dominance<sup>933</sup>, including fines for anti-competitive behaviour up to 10% of UK turnover for each year of infringement, for a maximum of 3 years<sup>934</sup>. However, Oftel's strategy and forecasting Director, Alan Bell, claimed the threat of fines placed the responsibility "for fair trading squarely where it belonged - with the operators"<sup>935</sup>.

Competition law was not useful since assembling relevant evidence was complex, making possible imposition of sanctions a lengthy process, especially since unbundling had been introduced under the Telecoms Act<sup>936</sup>. Oftel expected OLOs to mobilise more resources and to be informed when BT's behaviour echoed the forbidden 'prohibitions', signalling that it was not motivated to negate BT's interests<sup>937</sup>.

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<sup>926</sup> "Memorandum submitted by Kingston Communications" 11/00

<sup>927</sup> "Memorandum submitted by the Computing Services and Software Association", Appendix 2, 3/11/00

<sup>928</sup> see ch.1; Nordlinger

<sup>929</sup> Interviews B,C

<sup>930</sup> Oftel 10/3/00, "Statutory consultation on local loop unbundling licence condition"

<sup>931</sup> OPR 10/3/00, "Oftel announces a key new stage towards unbundling the local loop"

<sup>932</sup> *ibid*

<sup>933</sup> see ch.3

<sup>934</sup> para.2.21

<sup>935</sup> Parkes 15/3/00

<sup>936</sup> Interview: C

<sup>937</sup> see ch.1; Nordlinger

Implementation and commercial delivery were advanced regardless. In early-April 2000, before unbundling was formally required, industry had selected 14 companies to participate in trials<sup>938</sup>. Operators would place initial orders to rent space and co-locate in exchanges from September 2000. BT would build facilities within exchanges to house OLOs' equipment.

Then, Oftel obtained BT's agreement to insert licence condition 83<sup>939</sup> setting out service requirements; the 'Access Network Facilities' (ANF) agreement<sup>940</sup> providing legal certainty at a time when OLOs started signalling dissatisfaction. Edmonds complimented again BT on having "co-operated with Oftel", "this important work continues to move forward at a rapid pace"<sup>941</sup>. BT would not provide services only if the DGT felt it was unreasonably impractical. Reasons in writing were required when refusing or ceasing to provide a service, and reasonable notice had to be given when actions risked affecting OLOs' use of services adversely. Loop and internal tie circuit charges, determined by Oftel following consultation, had to be cost-oriented. Charges for other services would only be determined following unsuccessful commercial negotiations<sup>942</sup>.

Having achieved significant consent, Oftel tailored formal decision-making, selecting what and when to intervene on. Unbundled loop prices would be reviewed "regularly"<sup>943</sup>, but, as Kingston complained, Oftel used part of BT's work to refine the proposal as the regulator balanced OLOs' need not to be commercially penalised by charges with BT's cost-recovery.

BT's unique 'physical' asset made new statutory resources useful subject to the regulator's willingness to redress any non-compliance ex post but, equally importantly, subject to Oftel's ability to analyse and understand ex ante when and how BT could inhibit entry.

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<sup>938</sup> Colt, CWC, Easynet, Eircom, Energis, Fibernet, First Telecom, Global Crossing, Kingston Communication, MCI Worldcom, NTL, Telewest, Telinco, Thus. OPR 5/4/00, "Oftel announces significant progress on local loop unbundling"; The Guardian 6/4/00, "On message"

<sup>939</sup> OPR 28/4/00, "Legal framework for local loop unbundling now in place"

<sup>940</sup> Oftel 4/00, "Requirement to provide access network facilities [83]". Services supplied upon request included: Metallic Path Facilities (the loops); internal tie circuits linking MPFs in BT sites (or MDF (Main Distribution Frames) and OLOs' systems; co-location; external tie circuits linking MPFs and OLOs systems outside sites (for distant location); spectrum management information; charges

<sup>941</sup> OPR 28/4/00

<sup>942</sup> Oftel 4/00, para.17

<sup>943</sup> Oftel 5/00, para.12



Accordingly, OLOs were 'invited' to provide evidence to redress information asymmetries, directly contributing to their entry and limiting Oftel's use of formally-allocated resources.

The emphasis on dialogue was evident when Oftel consulted on Condition 83 provisions coming into force on 8<sup>th</sup> August<sup>944</sup>. The condition provided the legal framework so that "if any problems occur, Oftel can intervene swiftly, so that the timetable...remains on course"<sup>945</sup>. BT had to accept co-location orders from 1<sup>st</sup> September and complete work enabling OLOs to launch consumer services by July 2001<sup>946</sup>. Sir Iain Vallance, BT's then Chairman, claimed BT worked with OLOs, but that the July 2001 deadline was too tight<sup>947</sup>.

However, in May 2000 the European Commission adopted a Recommendation, and proposed a Regulation in mid-July<sup>948</sup>, asking Member States to mandate unbundling by 31 December 2000<sup>949</sup>. Edmonds had advocated the rapid framing of a Regulation with the European Commissioner<sup>950</sup>, with DTI support<sup>951</sup>, before seeking BT's licence modification consent. Thus just as Oftel's persuasion of BT occurred largely privately, informal exchanges with EU policy-makers<sup>952</sup>, over whom Oftel had no authority, resulted in a formally stronger national position. If BT resisted LLU once the proposed Regulation became hard law, it would breach European law.

Though unable to mandate national adoption, the Commission's framing of EU LLU policy, late but sooner than the UK's regulator had expected<sup>953</sup>, pressured the British Government to be seen to support the initiative, thereby helping Oftel. Information Society Commissioner Erkki Liikanen's spokesman remarked that the Commission was "acting upon the unanimous consensus of the heads of state in Lisbon. A clear political

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<sup>944</sup> Oftel 7/00, "Draft determination under condition 83.27 of schedule 1 to the Public Telecommunications Licence granted to British Telecommunications PLC concerning the entry into force of the condition 'Requirement to provide Access Network Facilities'"; OPR 8/8/00, "Oftel brings into force on local loop unbundling licence condition"

<sup>945</sup> OPR 11/7/00 "Oftel proposes to bring local loop unbundling condition into force" (italics added)

<sup>946</sup> *ibid*; Thackray, R 12/7/00 "Oftel gives BT September deadline", *The Independent*

<sup>947</sup> Vallance, I 18/7/00, "Taking a robust approach to unbundling", *FT*

<sup>948</sup> European Commission 7/00, "Proposal for a regulation of the European Parliament and of the council on unbundled access to the local loop" COM(2000)394

<sup>949</sup> Official Journal of the European Communities 29/6/00 "Commission Recommendation 2000/417/EC of 25 May 2000" Art.1.2

<sup>950</sup> Edmonds 14/11/00, HC90, para.6

<sup>951</sup> Hewitt 13/12/00, para.28

<sup>952</sup> OPR 12/7/00, "Oftel Statement on European Commission's proposed Regulation on Local Loop Unbundling"

<sup>953</sup> Edmonds 14/11/00, para.6; Interviews B,C

message was given from the highest level<sup>954</sup>. The proposed Regulation was subject to adoption by the Council of Ministers and European Parliament, but, given the new EU deadline and since BT insisted that July 2001 was the “earliest feasible target”, several OLOs considered taking group legal action<sup>955</sup>.

Notwithstanding the imminent EU deadline, Oftel continued working towards LLU services becoming available largely through informal instruments<sup>956</sup>. Having flagged the proposed Regulation and with condition 83 to be brought into force<sup>957</sup>, in July 2000 Oftel published draft ‘guidelines’ listing all facilities and services that BT had to offer by start-September<sup>958</sup>. The DGT planned to follow the guidelines not part of the licence, and without legal scope<sup>959</sup>.

Therein, Oftel indicated that regarding relevant LLU product information provision, for instance on the physical co-location ‘Hostel’ for entrants’ equipment, BT could only avoid disclosing confidential information on its customers or affecting reasonable security<sup>960</sup>. Oftel ignored BT’s resistance to non-binding guidelines on co-location delivery times. Loops were to be provided within three to five days once equipment was installed<sup>961</sup>.

Otherwise Oftel kept ‘heightening policy advantages’ to BT and showed it did not wish to ‘negate’ BT’s interests<sup>962</sup>. When Condition 83 setting out BT’s obligations came into force, Oftel conceded that not all required products would have been available simultaneously given the dependence on other unavailable services<sup>963</sup>. Oftel expected, sequentially: a reference offer; order acceptance; co-location delivered; maximum number of loops delivered as soon as practically possible, even with systems not fully in place to process initial orders. Thus, while BT published a reference offer by August 2000<sup>964</sup> amply

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<sup>954</sup> Hirst,C 9/7/00 “Clock counts down for BT monopoly; Brussels cuts high-speed internet deadline by half”, The Independent

<sup>955</sup> Hyland,A 20/7/00, “BT faces court over access” The Guardian

<sup>956</sup> Mathieson,C 12/7/00, “Local loop cannot be freed faster, says Oftel”, The Times

<sup>957</sup> Thackray,R 12/7/00 “Oftel gives BT September deadline”, The Independent

<sup>958</sup> Oftel 31/7/00 “Access Network Facilities - Oftel draft guidelines on Condition 83 of BT’s Licence”; Hyland,A 1/8/00, “BT must open up to rivals next year” The Guardian; Arthur,C 1/8/00, “BT made to speed local competition” The Independent

<sup>959</sup> Oftel 9/00 “Access Network Facilities: Oftel Guidelines on Condition 83 of BT’s Licence”

<sup>960</sup> A space fitted-out in a room with no separation between co-locating OLOs’ equipment. Bespoke arrangements could be requested for special needs

<sup>961</sup> OPR 21/9/00, “Oftel sets out timetable and conditions for Local Loop Unbundling”

<sup>962</sup> see ch.1; Nordlinger

<sup>963</sup> Oftel 8/00(1) “Bringing Condition 83 into effect”, para.9

<sup>964</sup> Oftel 8/00(2) “Access to Bandwidth: Conclusions on charging principles and further indicative charges”

complying with the EU Regulation deadline<sup>965</sup> (Of tel rejected proposed annual rental and connection charges<sup>966</sup>), Of tel's implementation efforts did not involve the significant application of new formal arrangements.

Indeed, pursuing its preference consistent with Type II autonomy, in September, Of tel made a significant operational compromise aiding BT when announcing that 28 OLOs could co-locate in 361 exchanges, but excluding those where demand for space exceeded supply; OLOs agreed<sup>967</sup>. Originally, OLOs asked the Electoral Reform Society to act as a neutral channel for their applications to access BT's exchanges. It ranked exchanges by popularity and passed the top 360 to BT to prepare space, but left unresolved how BT allocated oversubscribed sites<sup>968</sup>. Of tel, therefore, intervened upon request by the 'empowered' OLOs mobilising their resources<sup>969</sup>, to avoid that excess demand and indecision impeded entry. Decisions over excluded sites, which could be imposed, were postponed to November.

Edmonds claimed the location and nature of unbundling could not be left to BT. He would use powers wherever necessary, given complaints about BT's restrictive and ambiguous contract clauses. Yet, the DGT "insisted" that unfair terms be removed first<sup>970</sup>, again relying on OLOs' policy input, and refraining from enforcing applicable provisions despite BT not heeding requests to comply.

OLOs planned to sign BT's revised contracts but, frustrated by Of tel's slow intervention as they tried raising capital<sup>971</sup>, considered lodging a formal complaint with the regulator given the incumbent's "cosmetic" changes<sup>972</sup>. OLOs blamed Edmonds for underestimating BT's skill in "playing regulatory politics" and arranged to meet him privately; the media reported unfavourable comparisons with his predecessors<sup>973</sup>.

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<sup>965</sup> OPR 16/8/00 "Of tel sets out charging principles for provision of local loop unbundling"

<sup>966</sup> Of tel 8/00(2) paras.3.23-3.24

<sup>967</sup> OPR 19/9/00 "Operators allocated first exchanges for local loop unbundling"

<sup>968</sup> Daniel,C 14/9/00 "Unusual role for Electoral Reform Society", FT

<sup>969</sup> see ch.1; Nordlinger

<sup>970</sup> OPR 19/9/00

<sup>971</sup> Daniel,C 14/9/00 "Kingston considers Pounds 1bn expansion project", FT; Bennett,R & Roberts,D 19/9/00 "Telecom group says regulator is suffocating internet growth", FT; Shillingford,J 21/9/00 "Energis plans placing to raise Pounds 400m", FT

<sup>972</sup> Hirst,C 10/9/00 "BT rivals look to Europe for help" The Independent

<sup>973</sup> Durman,P 17/9/00, "Telecoms firms accuse Of tel of thwarting competition", The Sunday Times; Doward,J 17/9/00, "'Toothless' Of tel fails Blair's vision", The Observer; The Independent 19/9/00 "Of tel shambles"

BT had created a site “blacklist” requiring extensive work which delayed entry, while finding room for its own DSL equipment<sup>974</sup>. As OLOs pulled out<sup>975</sup>, or waited to see how LLU developed before entering the market<sup>976</sup>, the DGT acknowledged that intervention should have come earlier, and “stuck our oar in harder” in September 2000<sup>977</sup>. Yet, as policy terms were set, Edmonds defended his agency from public pressure too<sup>978</sup> and, despite dissipating industry support for its approach with BT, clearly attracted the key support of Patricia Hewitt<sup>979</sup>.

Before defending Edmonds at her TISC hearing, the Minister responded publicly to the head of cabinet for European Information Commissioner Liikanen, Olli Rehn’s<sup>980</sup>, criticism of Oftel and the Treasury’s dissatisfaction with Oftel’s handling of BT<sup>981</sup>. In a letter to the Financial Times, Hewitt emphasised: “It was the present director-general of Oftel, David Edmonds (not the European Commission), who decided that unbundling should happen and who negotiated the necessary licence amendment with British Telecom, which took effect...four months before the Commission’s proposed (unbundling) deadline”<sup>982</sup>.

In addition to consulting on shared access, or ‘line-sharing’<sup>983</sup>, required of EU fixed line incumbents<sup>984</sup>, Oftel proceeded with domestic entry-related practicalities<sup>985</sup>. While few chose distant location<sup>986</sup>, Oftel refined the ‘Bow Wave’ procedure for allocating space within selected exchanges<sup>987</sup>. Revised ‘recommendations’ taking into account consultants’ technical expertise and industry views granted a larger number of entrants physical co-

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<sup>974</sup> Roberts,D 29/9/00 “Going the last mile”, FT

<sup>975</sup> Bennett & Roberts 19/9/00; Mathieson,C 25/9/00, “Rivals may fight shy of joining BT loop”, The Times

<sup>976</sup> McIntosh,B 22/9/00, “Oftel responds to criticism of local loop unbundling”, The Independent

<sup>977</sup> Roberts,D 20/9/00 “Leaving the opposition out of the loop”, FT

<sup>978</sup> Edmonds,D 21/9/00, “Right of Reply: Oftel shambles” The Independent

<sup>979</sup> McIntosh,B 23/9/00 “Delay in unbundling of BT’s local loop ‘threatens 15bn in investment’”, The Independent

<sup>980</sup> EU Enlargement Commissioner at the time of writing

<sup>981</sup> Bennett,R & Roberts,D 22/9/00 “Telecoms watchdog ‘dictated to by BT’”, FT; Roberts,D 23/9/00 “BT unlikely to meet terms for break-up”, FT

<sup>982</sup> Hewitt,P 3/10/00 “Letters to the Editor - UK on track for first unbundled loops”, FT

<sup>983</sup> Besides OLOs’ LLU broadband, customers could receive telephony from them or BT

<sup>984</sup> Oftel 24/10/00 “Access to bandwidth: shared access”; not in condition 83

<sup>985</sup> Partridge,C 3/10/00 “Is Oftel failing the industry?”, The Times

<sup>986</sup> OLOs agreed to exclude it from Bow Wave to ease ordering processes; Oftel 10/00 para.1.7. Teather,D 26/9/00, “Redstone avoids BT’s local loop obstacles” The Guardian

<sup>987</sup> Oftel 10/00, “Consultation on Local Loop Unbundling ‘Bow Wave Process’” For detail, Oftel 11/00, “Statement and Determination on local loop unbundling ‘Bow Wave Process’”. It would help select popular BT exchange batches for co-location, until demand stabilised making it unnecessary. Initially its use was expected at three-month intervals. The next was due in December. para.2.5&3.31

location access<sup>988</sup>. Edmonds noted the allocation method's complexity but highlighted the success; other EU regulators were not experiencing similar demand<sup>989</sup>. The process was "on the basis of a collective industry view"<sup>990</sup>. Thus the regulator continued negotiating solutions, but produced results.

BT exploited operational advantages, controversially avoiding binding itself to the Bow Wave Code of Conduct selection process OLOs underwent. However, Oftel determined that non-discrimination requirements BT had consented to should not be breached, and thus that the Code applied to the incumbent<sup>991</sup>. Subsequently, BT told the TISC that it was "happy to have reached agreement with Oftel"<sup>992</sup>. Previous negotiations about space allocation and the ANF's 'quality', between BT and OLOs, had not resolved differences<sup>993</sup>.

Oftel's persuasion of BT was evident since LLU terms largely endorsed OLOs views regarding physical access to BT's network. BT "was not reasonable" in important areas<sup>994</sup>. 'Proposals' included an 'independent' expert verifying claims of space shortages and co-location charges. BT was bound to timescales and providing OLOs the same service it supplied its own business. Earlier in November, Oftel's draft annual rental and connection charges per loop<sup>995</sup>, respectively higher and lower than BT's proposal, satisfied OLOs too<sup>996</sup>. Oftel still avoided imposing reductions on all items, capitalising upon ways in which it promoted divergent interests<sup>997</sup>.

A few days later Oftel Deputy Director and former DTI official Anne Lambert announced BT's agreement to unbundle at least 600 loops by 1 July 2001, hence, beyond the EU year-end deadline, with 200 per month to follow thereafter. Preparing exchanges required "a lot

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<sup>988</sup> Initially, Oftel proposed that OLOs bid for three or six equipment racks within an exchange according to weighted priorities; Oftel 11/00, para.2.11. Ultimately, OLOs would bid in three-rack increments with additional racks awarded a lower priority, if room remained available; ch.3

<sup>989</sup> Edmonds,D 20/10/00 "Oftel and BT" The Times

<sup>990</sup> Oftel 11/00

<sup>991</sup> Oftel 11/00, BowWave ch.4 and AnnexD

<sup>992</sup> HC90 20/3/01 paras.348-9, stated 13/12/00

<sup>993</sup> Oftel 11/2000, "Local Loop Unbundling - Proposed Determination of the Terms of an Access Network Facilities Agreement"

<sup>994</sup> OPR 23/11/00, "Terms and conditions for Local Loop Unbundling published today by Oftel"

<sup>995</sup> Oftel 11/2000, "Consultation and draft Determination on charges for Metallic Path Facilities and Internal Tie-cables"

<sup>996</sup> Teather,D 7/11/00 "Loop levy points to pounds 10 a month bill" The Guardian; McIntosh,B 7/11/00 "Oftel proposes charge levels for BT loop access" The Independent

<sup>997</sup> see ch.1; Nordlinger

more work to be done". Yet, BT proposed a Service Level Agreement incorporating financial payments for late delivery, which Oftel would revise if unsatisfactory<sup>998</sup>.

So, Oftel's activity increased after summer 2000 without a marked change in its negotiating stance, notwithstanding mounting domestic pressure and the then non-binding draft Regulation's tighter deadline. Heightened national implementation efforts, while the supranational formal framework developed, saw Patricia Hewitt become involved. With 10% of the network expected to be open to competition by July 2001<sup>999</sup>, TISC members publicly questioned what they deemed limited progress before hearing Oftel<sup>1000</sup>, without powers to do so<sup>1001</sup>.

Edmonds rejected the claim that Oftel only acted in response to TISC views, but showed the influence of the select committee's critical public scrutiny despite its limited powers over Oftel, as he recounted his persuasion of BT. The DGT stressed the absence of a European Regulation<sup>1002</sup> and of primary domestic legislation requiring BT to unbundle. He argued that had the Regulation been in place the previous year, he could have "looked to statutory powers"<sup>1003</sup>, without mentioning the available licence condition overlooked at the end of 1999.

Negotiating seemed faster than asking Government for new powers<sup>1004</sup>. Furthermore, the level of detail undertaken to address BT's resistance was "some of the most intrusive Regulation that any British company has ever suffered"<sup>1005</sup>, substantiating the DGT's Type II approach. Edmonds referred to "trench warfare" with BT over allocating OLOs space in its exchanges, finding tempting sending its executives to jail, if given the powers<sup>1006</sup>. Nonetheless the imposition of an obligation was not taken lightly<sup>1007</sup>. Otherwise, defending selecting low-priority exchanges first, advantaging BT, Edmonds stressed that upon no industry agreement he rapidly produced a transitional allocation methodology however suboptimal, thus making a compromise proposal.

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<sup>998</sup> OPR 10/11/00 "Oftel announces further progress towards local loop unbundling"

<sup>999</sup> 600 out of about 6,000 local exchanges

<sup>1000</sup> Roberts,D & Bennett,R 13/11/00 "MPs to probe watchdog over 'problems with BT'", FT

<sup>1001</sup> see ch.3

<sup>1002</sup> Previously in 25/9/00 "LETTERS TO THE EDITOR: Facts speak for themselves", FT

<sup>1003</sup> HC90 20/3/01, paras.5-6

<sup>1004</sup> *ibid*, para.12

<sup>1005</sup> *ibid*, para.10

<sup>1006</sup> HC90 20/3/01, paras.35-37; Ward,A 15/11/00 "BT 'held up' introduction of competition", FT

<sup>1007</sup> "Memorandum submitted by Oftel", 8/12/00, Appendix 19

The DGT's informal input persuaded Patricia Hewitt who, before defending Oftel from the TISC, talked to unhappy operators once progress between BT and OLOs stalled. The Minister chaired a DTI meeting with OLOs to grasp the problems in early October 2000, then met Sir Peter Bonfield and his senior BT colleagues specifically on LLU, notwithstanding regular meetings with them. She presented the domestic implementation timetable's urgency given the Regulation, exhibiting her influence.

Following Oftel's and DTI officials' input, Hewitt took direct action, putting pressure on BT's management privately to ensure their speeding up of LLU roll-out given the EU end of 2000 deadline. She told Bonfield that BT envisaged a very small number of exchanges open to OLOs by July 2001. "From the Government's point of view that was not acceptable" and it "wanted to see...certainly no less than 600...opened up...no later than July 2001"<sup>1008</sup>.

Although Hewitt lacked licence enforcement powers, she showed how ministerial 'menage-a-trois' ties with the former state monopoly and the regulator still mattered by referring to the precise number of exchanges that the DGT had argued OLOs should be able to access by July 2001<sup>1009</sup>. The Bow Wave determination did not formally specify how many exchanges had to be opened. So, though the DGT had indicated 600 exchanges, BT's decision should have been of an exclusively commercial nature.

Thus Oftel used its informal ties and policy expertise to shape Hewitt's views on how BT was impeding the process, influencing her approach with the incumbent. Similarly, given a "professional discussion (and) relationship" with Oftel<sup>1010</sup>, Bonfield accepted the requests of its officials despite the reluctance and the view that it may not have been possible<sup>1011</sup>. He did not deny the legitimacy of OLOs complaint that BT had blacklisted exchanges to place its DSL equipment<sup>1012</sup>. Indeed Hewitt met BT's management few days before her hearing to ensure their ongoing commitment, and spoke to OLOs who acknowledged progress "as

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<sup>1008</sup> HC66-i 15/12/00, para.19; hearing held 13/12/00

<sup>1009</sup> OPR 27/11/00

<sup>1010</sup> HC90 20/3/01, paras.310. Hearing held days after Hewitt's hearing; 19/12/00

<sup>1011</sup> *ibid.* paras.322-23

<sup>1012</sup> HC90 20/3/01, paras.321,343

a result of the DTI's intervention and Oftel's action"<sup>1013</sup>. OLOs were "having direct one-to-one meetings" with BT too<sup>1014</sup>.

The private impact of the junior Minister on the former state monopoly proved highly useful to Oftel as BT offered to work towards the EU timetable and OLOs moderated their dissatisfaction. Furthermore, while considering Oftel's intervention "too little, too late", indicating that preference convergence does not entail 'capture', key OLOs expressed gratitude to Hewitt and Oftel at their hearing<sup>1015</sup>.

Indeed, Hewitt's support of Oftel came within months of OLOs asking that BT's wholesale network operations and retail business be structurally separated<sup>1016</sup>. BT's wholesale division could pass OLOs' operational details onto the retail division providing broadband, generating further competitive advantages. After hearing DTI officials, the DGT, and OLOs, Hewitt spoke incisively to BT without publicly proposing separation through the SoS's licensing powers, or Oftel's licence modifications powers<sup>1017</sup>.

Thus while using persuasion and negotiation with BT, besides using OLOs' convergence and operational expertise to pursue its policy preference, Oftel privately harnessed the Minister's support, whose informal confrontational approach helped make BT more amenable to LLU.

TISC scrutiny and the impending EU deadline focussed Oftel's attention on BT's operational advantages rather than fuelling the regulator's activity. Subsequently, Oftel received OLOs' praise for introducing compensation measures<sup>1018</sup>. A second bidding round for BT's "most popular" exchanges was announced in December<sup>1019</sup>. With the Regulation adopted 18<sup>th</sup> December, Oftel finalised charges, increasing annual rental but reducing the connection charge<sup>1020</sup>, and defined shared access terms<sup>1021</sup>.

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<sup>1013</sup> HC66-i 15/12/00, para.19

<sup>1014</sup> *ibid*

<sup>1015</sup> HC90 20/3/01, para.176; Bill Allan, Thus Plc Chief Executive

<sup>1016</sup> The Independent 3/10/00 "e-commerce will only thrive when we break-up BT"; Hirst,C 29/10/00

"Break-up BT now, say rivals" The Independent

<sup>1017</sup> Oftel 11/00, ANF ch.3. Oftel considered it "not proportionate"

<sup>1018</sup> Shillingford J 24/11/00 "Oftel gets tough with BT after rivals complain of obstruction", FT

<sup>1019</sup> OPR 13/12/00 "Oftel welcomes allocation of more BT exchanges for local loop unbundling"

<sup>1020</sup> Oftel 29/12/00, "Determination under Condition 83.16 of the licence of British Telecommunications plc relating to the final charges for the provision of metallic path facilities and associated internal tie cables"

<sup>1021</sup> Oftel 29/12/00, "Access to bandwidth: Shared access to the local loop"



Yet, the decisions were announced only two days before the Regulation came into force. Shared access could have been mandated earlier, based on Interconnection Directive 97/33/EC. Moreover, charges would be determined in April 2001, deviating from formal EU requirements despite shared access being one of the “minimum list of items” required in BT’s end of 2000 reference offer<sup>1022</sup>. This section has thus shown that the regulator avoided fully using statutory instruments and imposing decisions on BT, deploying persuasion and negotiating instead, and exploiting influential convergent actors to pursue its LLU preference.

## V. Time-length of decision-making

Oftel conducted LLU policy in the UK from the outset, strongly opposed by BT. It did so primarily by means other than the formal instruments possessed through BT’s licence and the Competition Act 1998. BT predictably hindered LLU<sup>1023</sup>, causing delays<sup>1024</sup>. Indeed the regulator did not fully abide by the EU Regulation end of 2000 timeframe notwithstanding pursuing its preference for over two years and timescale powers at disposal, consistent with Type II autonomy.

When undertaking licence modifications or enforcement, Oftel had to grant at least 28 days for affected parties to express views; no more. Even after informally obtaining BT’s consent to the statutory licence modification consulted upon 10 March 2000, it eschewed applying the 28-days minimum to expedite policy<sup>1025</sup>. Besides allowing representations until 7 April, Oftel granted eighteen more days according to its acknowledged ‘informal’ “practice...to allow further time (usually 14 days) for comments on these representations”<sup>1026</sup>. Meanwhile, operators like First Telecom and KPNQwest were starting DSL provision in Germany, suggesting the UK was two years behind on LLU<sup>1027</sup>.

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<sup>1022</sup> EC 2887/2000 30/12/00, Annex

<sup>1023</sup> Teather 7/7/99; HC90 20/3/01, para.46. TISC officials surmised Oftel should have realised it

<sup>1024</sup> For example, asking that inappropriate cost components be included in charges or drafting unfair ANF terms

<sup>1025</sup> Oftel 10/3/00

<sup>1026</sup> Oftel 11/99, Annex C17

<sup>1027</sup> Hyland, A 24/3/00, “Oftel first to offer consumer protection”, *The Guardian*. Germany had relevant primary legislation since 1997; HC90 20/3/01, para.39

When condition 83 was accepted and inserted in BT's licence<sup>1028</sup>, almost one-and-a-half-years had passed since the December 1998 consultation. Oftel granted almost four months for respondents to express their views on the detailed initial proposals, to be simply supported or opposed, including fourteen days for 'comments-on-comments'. During this lengthy period, BT told Oftel that it would work closely with Oftel and industry to develop unbundling arrangements. The regulator proceeded without haste nonetheless, exhibiting considerable forbearance.

In July 1999, Oftel consulted on options 2 and 4 already raised in December 1998, projecting an implementation timeframe of two more years for option 2, albeit as a maximum. While recognising the complexity of delivering LLU, preference convergent OLOs emphasised that July 2001 was too late a deadline and needed shortening by six to nine months, especially if BT was allowed to exploit option 4 products meanwhile<sup>1029</sup>. Yet, Oftel took almost five months, two-and-a-half for responses, before issuing the November statement confirming the introduction of LLU<sup>1030</sup>. Although working groups discussed technical and commercial issues meanwhile, rather than launching the statutory consultation formalising the framework immediately, Oftel prolonged the process by about three months, retaining the informal practice of fourteen days for comments.

Furthermore, once condition 83 had been accepted, despite powers to establish when it would apply, Oftel decided to grant BT three more months (28 April-8<sup>th</sup> August) during which provisions would not be complied with, after seventeen months spent creating a framework. The mid-July announcement<sup>1031</sup> came one day before the European Commission's 'proposed' Regulation setting the end-2000 deadline was published. With a deadline six months ahead, the Commission, the Council and the European Parliament signalled urgency.

The condition would apply months before the Regulation's adoption. Accordingly Edmonds expressed confidence that the legal framework would be in place before the end of 2000<sup>1032</sup>. The Regulation did not have to be transposed into national law. It applied

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<sup>1028</sup> OPR 28/4/00

<sup>1029</sup> Oftel 11/99, Annex A4-A6; Carew,S and Craig,A 28/7/99 "Telcos slam Oftel for delaying DSL" Network News

<sup>1030</sup> Initially intended for October. Oftel 7/99, para.5.9

<sup>1031</sup> OPR 11/7/00

<sup>1032</sup> OPR 12/7/00

directly<sup>1033</sup>, but the deadline was intended for providing unbundled loops<sup>1034</sup> rather than to finalise a legal framework as Oftel suggested, and which made it retain its initial timetable aiding BT. In July, OLOs like UK-based Colt knew they would offer DSL in Germany and the Netherlands by December 2000<sup>1035</sup>.

Oftel gave BT every chance to alter public officials' preferences, not undertaking policy "unless and until" BT was persuaded<sup>1036</sup>. The eight-month period between deciding to open BT's exchanges to competition in November 1999 and August 2000 exemplified Oftel's reluctance to expedite LLU. Edmonds claimed he was "heavily engaged" from the moment the licence was published in April through the summer<sup>1037</sup>. Yet, he proposed unbundling and by making a reference to the Competition Commission could have obtained the modification in less time, over the same period.

The Competition Commission was formally allowed six months to evaluate a reference. If upheld, Oftel would have then had to grant 28 days for representations before applying the modification<sup>1038</sup>, totalling a period of seven months if the reference was made when the statement was published. So, unless the Commission concluded that BT's local access control was not against the public interest, Oftel could have obtained a faster modification than negotiations achieved. The SoS could pose a veto, but the DTI, especially Patricia Hewitt, publicly supported the agency<sup>1039</sup>. Moreover, Oftel could have pushed BT to comply rapidly through directions thereafter<sup>1040</sup>.

So, Oftel avoided hastening the formal consultation within weeks of Gordon Brown announcing that the agency would try expediting delivery. Meanwhile, BT exploited its network access by equipping 416 sites to try offering DSL in April, and planned to reach 33% households, or 50% of internet users, by end-June through various forms of 'wholesale' products directly to users and ISPs<sup>1041</sup>. Oftel rarely used 28 days as benchmark to request comments on 'informal' consultations, indicating further discretion over timescales. Oftel allocated longer than the formally set timescale regardless of development

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<sup>1033</sup> Lambert HC90 20/3/01, para.3

<sup>1034</sup> EC 2887/2000, 30/12/00, Art.3(2)

<sup>1035</sup> Hyland 20/7/00

<sup>1036</sup> see ch.1; Nordlinger

<sup>1037</sup> HC90 20/3/01, para.8

<sup>1038</sup> see ch.3

<sup>1039</sup> Hammersley 6/12/99; HC66-i 15/12/00

<sup>1040</sup> see ch.3

<sup>1041</sup> Scales,I 13/4/00 "BT slams down phone on net rivals", The Times

phases: when first raising issues; before BT accepted condition 83; and after the acceptance, prior to the EU deadline cutting Oftel's timeframe.

Oftel faced pressure from UK elected officials, OLOs and the EU. Allocating 28 days remained exceptional. For example, the May 2000 indicative pricing principles consultation allowed for responses within that period, but final prices were actually due for December. The same timeframe was also allowed for Oftel's proposed June ANFP. Yet, this was following industry's inability to reach spectrum management consensus over seven months. A further case of 28 days consultation was the draft direction excluding distant location from Bow Wave, requested by the OPF after lengthy discussions. Indeed, since Oftel announced the 600 exchanges with unbundled loops by July 2001 a few days before a hearing, the TISC questioned timing, suggesting that Oftel acted according to the committee's concerns<sup>1042</sup>. Only two months before the EU Regulation came into force, respondents on shared access were still granted the additional fourteen days.

Media reports claimed that Oftel tried delaying the European timetable, with Hewitt's support when telecoms Ministers met over the proposed Regulation in October 2000<sup>1043</sup>. Reports included Member States amending proposals to avoid forcing LLU six months earlier than Britain planned, allowing national regulators to proceed more slowly in case of "technical problems"<sup>1044</sup>. Hewitt denied the claims<sup>1045</sup>, though the Regulation indicated that: "Requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity"<sup>1046</sup>. In practice, with no unbundled loops expected by start-2001 except at two trial exchanges<sup>1047</sup> and line-sharing planned well into 2001, Oftel openly prospected delays beyond the Regulation's deadline, despite its criticism of BT, that of OLOs, the Government, the Conservative Party and the European Commission<sup>1048</sup>.

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<sup>1042</sup> HC90 20/03/01, para.10

<sup>1043</sup> The Independent 7/10/00 "Outlook: Meddling Ministers"

<sup>1044</sup> Harvey,F & Roberts,D 27/9/00 "Move to water down EU telecoms legislation"; Roberts,D 3/10/00, "UK claims victory over pace of European phone network reforms", FT

<sup>1045</sup> Hewitt,P 11/10/00 "Letter: Loop Unbundling", The Independent

<sup>1046</sup> EC 2887/2000 Art.3(2)

<sup>1047</sup> Treanor,J 30/12/00 "BT begins to let rivals in", The Guardian

<sup>1048</sup> Hirst,C 17/12/00, "Rivals attack BT over high-speed net access" The Independent

## VI. Outcomes

At the start of 2001, Oftel notified BT of the Regulation's enactment. The SoS and the DGT considered whether Condition 83 needed changes to remove inconsistencies with EU provisions, superseding it<sup>1049</sup>. In practice, in late-December 2000 BT had opened its first exchanges to competitors, allowing initial installation. Energis claimed about four months were necessary between entering exchanges and commercial delivery, making late July a likely date for earliest OLO provision<sup>1050</sup>.

In January, the DGT publicly stressed that LLU would be a key project in 2001<sup>1051</sup>. Oftel brought forward access to BT's most popular exchanges and started investigating co-location space costs as fewer orders were placed than anticipated<sup>1052</sup>. MCI Worldcom, Global Crossing and Telewest withdrew<sup>1053</sup>, some deterred by obstacles delaying access to exchanges, as BT exploited its network advantage and rolled out retail products<sup>1054</sup>. Others feared unprofitability, given high costs and difficult equity markets faced by telecoms firms; many lacked finance following heavy infrastructure investment<sup>1055</sup>.

So, while BT attributed delays to OLOs not meeting deadlines for commissioning exchange surveys and agreeing on allocation, Energis planned scaling back DSL commitments given the uncertainty surrounding space allocation and the slow pace of access<sup>1056</sup>. Several OLOs expressed interest for 'distant location' instead of physical co-location, given lower costs of placing equipment outside BT exchanges<sup>1057</sup>. Some OLOs showed interest; regulatory shortcomings were not limited to the UK<sup>1058</sup>. Yet, as Oftel's comparative research depicted the UK's residential broadband prices unfavourably<sup>1059</sup>, BT's obstruction combined with worsening market conditions that reduced demand for exchange space.

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<sup>1049</sup> Lambert,A 3/1/01 "Letter to Ian Morfett Esq, Group Director, Regulatory Affairs, BT"

<sup>1050</sup> Ward,A 17/1/01 "BT accused of foot dragging", FT

<sup>1051</sup> Edmonds,D 17/1/01 "Letters to the Editor - A complex and difficult process", FT

<sup>1052</sup> OPR 18/1/01, "Oftel most popular exchanges to be brought forward for local loop unbundling"

<sup>1053</sup> Shillingford,J 17/1/01(1), "Battle for the local loop", FT

<sup>1054</sup> Ward,A 17/1/01, "BT accused of foot dragging", FT

<sup>1055</sup> Malkani,G 19/1/01, "Oftel orders BT to open up exchanges", FT

<sup>1056</sup> Ward 17/1/01

<sup>1057</sup> Shillingford,J 17/1/01(2), "Locations will not come cheaply", FT

<sup>1058</sup> Shillingford 17/1/01(1)

<sup>1059</sup> OPR 26/1/01 "Oftel publishes survey of international prices for high bandwidth services"; Roberts,D 27/1/01, "Internet users in UK 'paying more for high-speed access'" FT

The progressive fall in OLOs, including some significantly involved from early on<sup>1060</sup>, led to Bow Wave ending in April<sup>1061</sup>, when applications for space in exchanges could go direct to BT<sup>1062</sup>. In February, Oftel made amendments to Bow Wave, including allowing operators to jointly change terms without the DGT<sup>1063</sup>, and finalised LLU service terms (ANF) focussing on competitive measures<sup>1064</sup>, such as transfers of co-location space between OLOs to avoid inefficient use.

Oftel told BT to respect timescales and ensure service quality when making sites available, repairing or maintaining loops<sup>1065</sup>. BT and OLOs would negotiate further service level measures, but BT's failure to meet established levels would be compensated with specified standard rates. Significantly, Oftel signalled that physical separation between BT and OLOs' equipment was unnecessary where physical co-location space did not allow partitioning; in such situations BT had to provide 'bespoke' options<sup>1066</sup>.

Thus Oftel anticipated its June draft Direction requiring BT to satisfy reasonable 'co-mingling' requests<sup>1067</sup>. The initiative, not specified in the EU Regulation<sup>1068</sup>, entailed significant cost and time savings regarding equipment installation. Oftel priced shared access too<sup>1069</sup>. Having decided that BT's reference offer did not meet earlier requirements, Oftel set service compensation levels, proposing £10 per working day an unbundled loop was unavailable and £80 per operator per working day's delay in providing co-location facilities<sup>1070</sup>.

By then, the TISC compiled its LLU report describing stakeholder views and key events. The abandonment of the Bow Wave procedure, devised to indicate to BT which exchanges to prepare first and the order in which spaces would be allocated in cases of insufficient

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<sup>1060</sup> Roberts,D 1/2/01, "Kingston hangs up on internet contest with BT", FT; Barker,T. Nicholson,M and Roberts,D 6/2/01, "Broadband setback as another group quits", FT

<sup>1061</sup> HC197 20/7/01, "Local Loop Unbundling - Oftel response", Appendix 3B, in "First Special Report"

<sup>1062</sup> This was anticipated by the media in mid-February. Cane,A 19/2/01 "Oftel 'unbundling' pledge", FT; Teather,D 19/2/01, "Oftel cuts red tape around local loop", The Guardian

<sup>1063</sup> Oftel 2/01, "Statement and Direction on Local Loop Unbundling 'Bow Wave Process'"

<sup>1064</sup> Oftel 21/2/01, "Local Loop Unbundling: The Terms of the Access Network Facilities Agreement Statement and Determination"

<sup>1065</sup> *ibid.*ch.4

<sup>1066</sup> *ibid.*ch.3.5

<sup>1067</sup> Oftel 6/01 "Local Loop Unbundling: provision of co-location in the form of co-mingling"

<sup>1068</sup> Oftel 10/01 "Local Loop Unbundling: provision of co-location in the form of co-mingling",paras.2.19-20

<sup>1069</sup> OPR 27/6/01 "Oftel announces further measures to support local loop unbundling"

<sup>1070</sup> OPR 23/8/01 "Local loop unbundling: service level commitments and compensation"

room due to excess OLO demand, was defined “farcical”<sup>1071</sup>. Nevertheless, Oftel had started delivering LLU, against BT’s preference.

In April 2001, about two-and-a-half years since Oftel’s first LLU publication, but ahead of its own timetable, the first commercial LLU facilities were handed over, as were 15 distant location facilities<sup>1072</sup>. The European Commission’s 7<sup>th</sup> Implementation report identified the regulator’s achievements<sup>1073</sup>. While Oftel’s difficulties were indicated, the report described how, despite most being inactive at the time, thirty operators had an agreement for full unbundling in place with BT, and that since July 2001 a total of 163 lines, though mostly trials, were unbundled<sup>1074</sup>. Shared access had not been requested<sup>1075</sup>. Yet, the report recognised that low LLU uptake was not necessarily only related to practical problems. It could, at least partially, be attributed to other factors, such as a worsening financing climate<sup>1076</sup>. Having put the process in place, but not being disposed to dictate what operators should and should not do<sup>1077</sup>, Oftel delivered unbundling by largely eschewing deploying formal resources throughout.

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<sup>1071</sup> HC90 20/3/01, paras.21-22

<sup>1072</sup> HC197 20/7/01, Appendix3B

<sup>1073</sup> European Commission 28/11/01, pp.20-1

<sup>1074</sup> Annex3.15, p.301

<sup>1075</sup> Annex2, pp.71. Many EU countries did not provide shared access at all

<sup>1076</sup> Annex3.15 p.296

<sup>1077</sup> Barker,T 27/7/01 “BT has handed over only 163 lines to rivals” FT

**Table 9: Oftel's LLU Type II autonomy**

Empirical Indicators	Level 1 - Nordlinger's state level	Level 2 - Regulatory level	Level 3 - Case study - LLU UK: Type II
<b>Participants and resources</b>	Range of societal actors: those divergent from the state, seeking to obstruct its preferences; also actors with similar preferences to the state supporting it (convergent) and those without strong expressed preferences	<b>At start of regulatory policy, key resources spread among distinct actors</b> ; with preferences similar to regulator and with divergent ones. <b>Different participants have valuable resources to exert influence</b>	<b>Dispersed resources and no single influential group:</b> - incumbent (BT) dominant in 'local access' - DGT of Oftel had unique licence enforcement powers, but licence modification powers subject to Secretary of State - Parliamentary committee (TISC) could just ask for papers, records. But publicly questioned Oftel and junior Minister who intervened - 'new entrants' key for competition; influence mainly expertise and ties - EU institutions' authority mainly from supranational powers
<b>Preferences</b>	<b>Combination</b> of divergence, indifference, convergence	<b>Preferences of influential participants differ</b> over regulator's proposals. <b>But not only influential divergent preferences; some influential support</b> from outset for agency to shift preferences	<b>Agency not isolated, with support of influential actors from start:</b> Oftel <b>wanted LLU for new entrants to compete in broadband</b> . <b>BT anti-LLU</b> to advance its broadband position. <b>No stated Government preference on LLU initially (shared later)</b> but favoured knowledge-based (ICT) economy from start. Yet, like new entrants, <b>TISC favoured LLU for market entry</b> . <b>EC preference clear later</b>
<b>Process</b>	State shifts preferences of societal actors over time, by: (i) <b>inducement</b> ; (ii) <b>appeasement-conciliation</b> ; (iii) <b>enfranchisement</b> ; (iv) <b>empowerment-reinforcement</b>	To alter preferences of opponents or restrain their use of key resources, <b>regulator prioritises negotiation over imposition</b> . Preferences shifted by: (i) making <b>compromise proposals</b> ; (ii) <b>using persuasion</b> , repeated <b>bargaining</b> ; (iii) <b>exploiting influential actors with convergent preferences to avoid confrontation</b>	<b>Agency avoids imposition and through dialogue gradually shifts preferences of opponents:</b> <b>licence change sought with consent</b> from start. Framed broad consultation, proposed 5 options, <b>chose 2</b> . BT strongly opposed key one. Despite provisions in place, <b>Oftel negotiated</b> licence terms. <b>Informal exchanges with BT senior management</b> ; non-hierarchical. No obligation to attend TISC hearings and bear pressure, but LLU difficulties raised political interest. Still Oftel limited imposition. <b>Exchanges</b> with EU officials on <b>EC Regulation</b> , but <b>key ones</b> with junior <b>Minister</b> who told BT to expedite
<b>Time-length of decision-making</b>	Public policy not undertaken 'unless and until' actors with divergent preferences are persuaded	<b>Timescale powers largely neglected; policy forbearance</b>	<b>Lengthy regulatory process</b> since, to obtain BT consent, <b>Oftel granted longer response timescales</b> than forcibly possible; <b>continued after it persuaded BT</b> to accept <b>new licence condition</b>
<b>Outcomes</b>	State preferences translated into public policy after those of divergent actors are shifted to make them 'congruent or consonant'	<b>Regulator's preferences implemented</b> after actors with divergent ones had been persuaded to shift theirs, <b>with some concessions</b>	Despite key BT divergence, <b>preference fulfilled after negotiating</b> licence change. Oftel accepted <b>considerable operational delays</b>



## VII. Conclusions

The chapter has examined LLU policy in the UK, providing a clear case of Type II regulatory autonomy, and thus challenging the importance of formal institutional arrangements. Having identified BT, OLOs, the TISC, DTI Minister Hewitt and the EU as key participants, the chapter firstly depicts how, aside from Oftel, local loop unbundling policy was not developed by actors possessing formal resources laid down in the Telecoms Act 1984 governing sectoral regulation. Indeed apart from EU institutions holding supranational powers, producing the Regulation, policy progress was determined through non-statutory resources.

The policy centred on BT's unique 'physical' asset, the national local access network, and the related key information needed to implement unbundling and develop broadband competition. OLOs had operational and technical expertise to establish the necessary entry terms and facilities. The TISC raised the public exposure of its policy assessments, drawing the attention of senior elected officials and media. Hewitt exploited access and ties to policy actors without having formal authority over them, including Oftel. So, no policy participant could formally determine the regulator's decision-making. The SoS did not veto the licence modification. However, distinct participants possessed resources that influenced the policy.

Oftel proposed LLU, clearly signalling its preference. LLU constituted a significant policy change from the network competition approach of previous DGTs, and was not directly attributable to the duties set out in the formal institutional arrangements. The process of Oftel's preference fulfillment was influenced by BT's divergence. Nonetheless, Oftel avoided applying an existing licence condition to impose LLU provision and avoided making a reference to the Competition Commission as permitted in the Telecoms Act.

Instead, the regulator sought BT's agreement on a specific condition defining the unbundling framework through negotiation. Oftel undertook persuasive steps to shift divergence by constructing an informed case for unbundling through several 'informal' public consultations first, instead of statutory ones, and private meetings explaining why, to provide consumer choice in competitive broadband services across the UK, LLU constituted the preferable option.

Exchanging and understanding operational information regarding complex choices was a decisive factor to introduce unbundling. Besides deploying internal expertise, as the incumbent exploited its exclusive network access to prepare DSL consumer products, Oftel harnessed OLOs' analysis of specific issues to be addressed which they provided voluntarily. In contrast, the regulator limited the deployment of formally-allocated resources to pursue its preference, including budgetary ones.

While addressing unbundling issues, the regulator avoided fully imposing its authority on BT and 'negating its interests' even when the LLU licence condition came into effect, leaving confrontation to convergent OLOs. Rather than 'going by the book' to prevent delaying tactics, Oftel repeatedly sought dialogue with BT to ensure implementation, compromising on the order OLOs would receive services too, and thereby not fully inhibiting BT's first-mover advantage.

Subsequently, as BT stalled policy development, and the parliamentary TISC publicly exposed Oftel's forbearance critically and requested more forceful action, the regulator harnessed the ministerial support of Patricia Hewitt. The junior Minister privately exhorted BT to respect the shorter deadline required by the EU Regulation, for the end of 2000, and commit to faster access provision to its competitors. She publicly defended Oftel's activity from critical preference convergent actors too.

Thus, the chapter provides a clear Type II autonomy case (see Table 9 above). Despite no public divergence from the state actor that could formally prevent licence modification from occurring (the SoS), Oftel pursued its policy preference without focussing on its statutory instruments. The regulator used its knowledge of the telecoms market, and particularly the prospects of the incipient broadband segment, to propose unbundling, and that of convergent actors to argue in favour of its introduction with little reliance on existing formal institutional arrangements.

The regulator's exchanges with participants able to contribute to the policy, through its informal ties, led to a framework developed over time and according to key practical information. Significantly, this was obtained without statutory imposition or its formally-allocated funding being disbursed. When implementation faltered, key senior political officials who urged BT privately, and publicly spoke of and put pressure on its obstructive conduct, helped Oftel deliver unbundled loops before its own July 2001 deadline,

unconstrained by supranational requirements, albeit at a slow pace and weakened commercial demand.

## Chapter 7: The ART and LLU Policy in France

### **I. Introduction**

This chapter examines the regulatory independence, or autonomy, in practice of the Autorité de Régulation des Télécommunications (ART) regarding the introduction of local loop unbundling (LLU) in France. As explained in chapter 6, LLU constitutes a salient telecoms policy because of its potential to expand the provision of high-speed, broadband, internet nationally. At the height of the 'internet boom', France's narrowband internet market was growing very rapidly, given strong demand<sup>1078</sup>. The regulator sought to open France Télécom's (F-T) national local access network to competition from new entrants, which would apply ADSL technologies to F-T's telephone lines, to provide high-speed internet to end-users across France.

The chapter argues that despite facing opposition from key policy actors, the ART took 'authoritative action' to introduce unbundling, without initially having the necessary formal powers. In contrast to previous sub-cases, it provides a clear Type I autonomy case whereby, consistent with Nordlinger's framework, the regulator acted on its preference despite the critical resources deployed by divergent actors. In statutory terms, the ART had a largely advisory regulatory role, seriously challenging conceptualisations associating agency independence with degrees of formal independence.

The ART launched France's LLU policy in the late 1990s, and overcame the divergent preference of the key Government Minister. This was the case despite the fact that the Minister possessed overriding regulatory authority and initially favoured F-T's first-mover ADSL advantage. It also overcame opposition from left-wing parliamentary officials siding with the 'public operator'. F-T opposed granting rivals access to its local loops throughout policy development, to avoid losing market share. The ART exploited information and ties with convergent actors, namely 'private' entrants and eventually the crucially important European Commission (EC), to generate a framework. Implementation efforts, pursued also but not only through the powers acquired, were restrained nonetheless by the main preference divergent actor, F-T, due to its ownership of the key 'physical' asset.

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<sup>1078</sup> ART 7/01, "Rapport Annuel d'Activité 2000 - L'intégral:Tome 1", p.5

## ***Outline of Events***

After raising LLU in its first annual report to Government and Parliament in mid-1998 and asking an advisory body to analyse its scope in October 1998, the ART launched a consultation comprising five options for the supply of broadband services across France, including LLU, in April 1999. The Government Minister with key statutory powers had first spoken against unbundling in early 1999 and did so subsequently. However, having drawn overwhelming public industry support except from incumbent operator F-T, the regulator published a document focussing on LLU in October 1999. Under significant public pressure from entrants campaigning for LLU through the summer of 1999, the French Government backtracked, stating that some form of unbundling would take place and would be discussed in Parliament in 2000.

Meanwhile, between the end of 1999 and in 2000, the ART set up national working groups to discuss implementation issues, and worked with the European Commission to develop an EU-wide framework that would bind Member States to a deadline of end 2000. Thus, the regulator was not impeded by left-wing members of the centre-left Government coalition. Their actions contributed to the Minister withdrawing a law amendment introducing LLU in April 2000. Nonetheless, as the EU unbundling policy that the ART helped frame was consolidated, the Government passed a decree in September 2000, while holding the EU Presidency. F-T continued obstructing the ART, leading to four revised reference offers and several operators dropping out of the process before the July 2001 offer was deemed reasonable.

## **II. Participants and Resources**

This section shows that, at the start of LLU policy in France, key resources to exert influence were held by a few, tightly affiliated ('state') actors, marking a Type I autonomy scenario. F-T owned the key 'physical' asset of the local network. Moreover, the incumbent operator was majority state-owned, which was of significance to the Government that possessed the authority to determine sectoral policy, and particularly to its left-wing coalition members, that retained important ties with the company. Instead the very recent liberalisation meant that 'non-state' entrants had built rather limited operations in France and, apart from enforcing existing licence provisions, the ART's role was largely advisory. Nevertheless, since policy exchanges required specific knowledge to discuss the

implications and development of LLU, elected officials, including Telecoms Minister Christian Pierret possessing relevant powers, participated intermittently<sup>1079</sup>. The EC became involved comparatively late, but framed supranational policy-making with ART input.

Headed by President Jacques Chirac's appointee Jean-Michel Hubert<sup>1080</sup>, who had previously worked for France Télécom's CNET research centre<sup>1081</sup>, the ART led LLU policy from the outset. The ART first raised the issue of LLU, which would allow new entrants to reach end-users and provide services including broadband using F-T's local network, in mid-1998<sup>1082</sup>. Following the advisory work of the Commission Consultative des Réseaux et Services de Télécommunications (CCRST)<sup>1083</sup> identifying key questions on LLU development from October 1998, in April 1999 the ART launched a public consultation discussing its merits to provide new services<sup>1084</sup>. The French internet market's revenue-growth approximated 112% in 1998-99 and 109% in 1999-00<sup>1085</sup>, signalling prospective broadband demand. Five options allowing the deployment of DSL technologies were identified; 'unbundling' plus variations explained below.

Thirty-six diverse 'non-state' actors plus F-T responded to the local access competition consultation<sup>1086</sup>; no elected officials with or without formal authority did, and thus any views they might have had were expressed privately. Entrants lacked market prominence since competition was limited to long distance telephony, with sixty licensees acquiring 3-5% of the market segment over one year<sup>1087</sup>. Yet the data market was growing faster than that for voice, with local end-user access proving important. The ART claimed that around 7% of local communications reflected internet traffic in 1998<sup>1088</sup>, approximately 12% in 1999<sup>1089</sup> and estimated 50% within four years<sup>1090</sup>.

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<sup>1079</sup> Ministère de l'industrie 29/10/99 "Le développement des télécommunications et de la société de l'information en France"; Les Echos 30/11/99 "Christian Pierret: "Le dégroupage sera introduit d'ici à 2001"

<sup>1080</sup> Jacquier, J-F 3/1/98 "Les sages de l'ART", Le Point(nr.1320)

<sup>1081</sup> Centre National d'Études des Télécommunications. See, Thatcher, M October 2007 "Regulatory agencies, the state and markets: a Franco-British comparison", p.1038, Journal of European Public Policy 14(7), pp.1028-47

<sup>1082</sup> ART 7/98, "Rapport annuel d'activité 1997 - L'intégral"; Gadault, T 6/7/98, "L'ART veut faciliter l'accès à l'abonné aux opérateurs privés" La Tribune

<sup>1083</sup> The Telecoms Minister named the CCRST's twenty-one members (seven each of: network owners and service providers; service users; and, 'qualified individuals') upon recommendation from the ART; see ch.3

<sup>1084</sup> ART 2/4/1999, "Consultation publique sur le développement de la concurrence sur le marché local"

<sup>1085</sup> ART 7/01

<sup>1086</sup> ART 10/99, "Le développement de la concurrence sur le marché local: synthèse de la consultation publique", Liste des contributeurs

<sup>1087</sup> Le Gales, Y 18/5/99, "Télécommunications: la concurrence va s'accélérer" Le Figaro

<sup>1088</sup> Barroux, D 1/6/99, "L'ART tente de casser le monopole de France Télécom sur internet", Les Echos

<sup>1089</sup> ART 6/00, "Rapport annuel d'activité 1999 - L'intégral:Tome1", pp.8-9; excluded interconnection services

Different types of entrants signalled interest in the innovative telecoms market segment. Despite recent liberalisation and the infancy of competition<sup>1091</sup>, entrants knew the unbundled facilities, services and conditions needed to deliver retail broadband and compete with F-T, even without extensive French market activity. Internet service providers (ISPs), reliant on F-T's network until then<sup>1092</sup>, took an interest in LLU adoption and made their case.

Most respondents were network operators, some with international capabilities. Large companies such as Lyonnaise Communication of the French multi-utility company Suez replied, as did multinationals MCI Worldcom, involved in LLU in the UK, Belgian majority state-owned Belgacom France, and Tele2 France, part of the Tele2 companies.

A few also had media affiliations enabling the public exposure of opinion-shaping issues of interest to achieve their preferences. Notably, Cegetel, France's second largest operator<sup>1093</sup>, was part of the global media conglomerate Vivendi Universal/Cegetel. 'Directeur-Général' Philippe Germond expressed his views and attracted policy attention through interviews<sup>1094</sup>.

Telecoms associations AFOPT (Association Française des Opérateurs Privés en Télécommunications)<sup>1095</sup> and AOST (Association des Opérateurs de Services de Télécommunications), comprising individual respondents but providing a unitary viewpoint, replied too<sup>1096</sup>. However, neither included F-T, highlighting the industry divide between the incumbent and entrants.

Indeed, all industry entrants required F-T's participation to develop broadband through LLU. The incumbent's unique local access network was the key 'physical' resource determining the need to implement LLU to deliver ADSL competitively. Clearly, F-T could exploit its network ahead of all other actors, unobstructed. Control of the national local access market had highly advantageous financial implications. Chairman Michel Bon openly

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<sup>1090</sup> Barroux, D 1/6/99

<sup>1091</sup> Le Gales 18/5/99

<sup>1092</sup> See Grolier Interactive Europe's complaint, during the consultation, about F-T's preferential treatment towards its provider Wanadoo, to the Conseil de la concurrence (hereafter, the 'Conseil') competition authority; "Décision n°99-MC-06 du 23 juin 1999 relative à une demande de mesures conservatoires présentée par la société Grolier Interactive Europe/Online Groupe". The ART was involved too

<sup>1093</sup> Le Gales 18/5/99

<sup>1094</sup> Barroux, D 20/7/99 "Philippe Germond: Les règles du jeu concurrentiel sont faussées", Les Echos

<sup>1095</sup> AFOPT comprised 9Télécom, Bouygues Télécom, Cegetel Entreprises, Colt Télécommunications France, Completel, GTS Omnicom, MédiaRéseaux-UPC, LD Com, SFR. AOST comprised 9Télécom, AT&T, BT France, Cegetel, MCI Worldcom, Siris.

<sup>1096</sup> Gadault, T 27/7/99 "Les opérateurs privés portent plainte contre l'Etat", La Tribune

acknowledged F-T's structural and market dominance<sup>1097</sup>. The ART defined it an advantageous asymmetry requiring particular regulation only a few months later<sup>1098</sup>.

Bon recognised some market share loss from 100% was inevitable. Full competition was allowed from 1998. In practice, it remained limited. In 1998, F-T incurred the decade's highest volume growth at 6.6% and 5.2% revenue growth to 24.6bn euros (FF161.7bn)<sup>1099</sup>. When the ART consulted on unbundling in mid-1999, hence with one year of added growth, Cegetel forecast significantly lower revenues of FF30bn<sup>1100</sup>.

F-T's sectoral role was not confined to unmatched infrastructure and financial strength. It remained a state actor, regardless of sectoral liberalisation in 1996, when two relevant laws were passed<sup>1101</sup>. Whilst one law led to the ART's creation, for competition and regulation purposes<sup>1102</sup>, the other one established F-T's partial privatisation<sup>1103</sup>. F-T continued being majority state-controlled during LLU policy development, embedding ties between the incumbent and Members of Parliament (MPs) especially sensitive to policies affecting it<sup>1104</sup>.

The law transforming F-T from a fully state-owned monopoly into a majority state-owned 'national enterprise' did not fully dissociate key elected officials from the broad running of the company. The President and Prime Minister nominated the Chairman by decree<sup>1105</sup>. F-T's capital stock on 31 December 1996, just before shares were sold to the market, was established by the Finance and Telecoms Ministers<sup>1106</sup>. In 1997, around 25% of the company's shares were sold<sup>1107</sup>. A share exchange with Deutsche Telekom and an increase in capital left the state with 62% in 1998<sup>1108</sup>. Thus, the interests of Government and F-T's management were somewhat aligned, with the former entitled to represent its views at the highest company level.

Centre-left elected officials retained considerable ties with F-T in particular. Successive Governments had delayed liberalisation given repeated trade union opposition over civil

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<sup>1097</sup> La Croix 15/2/99, "Le prix des appels vers les mobiles doit baisser"

<sup>1098</sup> ART 7/99, "Rapport annuel d'activité 1998 - L'intégral: Tome 1", pp.7, 11-12

<sup>1099</sup> La Croix 15/2/99

<sup>1100</sup> Les Echos 2-3/7/99, "Accès à la boucle locale: le ton monte entre les opérateurs de télécoms"

<sup>1101</sup> See Thatcher 1999, especially pp.152-164, on the evolution of France's telecoms liberalisation, including the ART's creation

<sup>1102</sup> see ch.3

<sup>1103</sup> LOI no.96-660 du 26/7/96

<sup>1104</sup> The distinct state actors identified here sustain the chapter 2 analysis regarding the state's fragmentation, hence the decision to examine specific participants and resources in this thesis

<sup>1105</sup> Thatcher 1999, p.164

<sup>1106</sup> LOI n.96-660 26/7/96, Art.1

<sup>1107</sup> Hulsink 1999, p.258

<sup>1108</sup> Thatcher 1999, p.163



servant employees losing privileged job conditions, supported by the Socialist and Communist parties. Partial privatisation had thus occurred with significant concessions to unions and political parties. Indeed, in February 1999, to cover high costs due to excess staff, F-T planned expanding operations rather than reducing staff<sup>1109</sup>. Business decisions were tied to electorally sensitive issues.

Thus, F-T owned the central 'physical' asset, was financially powerful and, unlike most entrants, its management had access to senior Government officials. Within weeks of being appointed as Finance Minister in spring 2000, Laurent Fabius met F-T Chairman Michel Bon<sup>1110</sup>. Fabius, and his predecessors Dominique Strauss-Kahn and Christian Sautter, headed the Ministry comprising the telecoms portfolio. Accordingly, while access did not always lead to agreement or similar interests, policy impacting on F-T's operations made the Government an interested party directly and indirectly. The Government's regulatory authority and its ties with F-T meant that the arrival of industry entrants created two distinct, unequal sides; one sheltered and one relatively unprotected<sup>1111</sup>. The ART had to regulate both.

The ART's regulatory role was to enforce industry actors' licences<sup>1112</sup>. Otherwise its formal remit was largely advisory. So, in 1998, out of sixteen negative ART evaluations regarding new service charges F-T proposed, the Telecoms Minister rejected 50%<sup>1113</sup>. The Telecoms Minister also held licensing powers<sup>1114</sup>. The ART, in formal terms, simply evaluated them. Similarly, it was consulted by the Government on bills, decrees and regulations, and published an annual report to the Government, Parliament and to the postal and telecoms commission (CSSPPT), advising regulatory or legislative changes relating to sectoral and competition developments, such as raising unbundling. The Government retained the formal authority to adopt policy proposals.

Thus, when considering formal arrangements alone, the regulator's overall LLU role before policy adoption was giving advice. While the ART laid out an informal consultation, determining a framework was for Lionel Jospin's Government, formed by a coalition

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<sup>1109</sup> La Croix 15/2/ 99

<sup>1110</sup> Ministère de l'Économie 14/4/00

<sup>1111</sup> For a wider discussion on France's industrial policy regarding technology firms, Zysman 1977, p.49

<sup>1112</sup> see ch.3

<sup>1113</sup> Barroux,D 13/7/99, "L'ART menace d'user de son pouvoir de sanction", Les Echos; a power the Finance Minister shared, see ch.3

<sup>1114</sup> see ch.3

comprising left-wing parties<sup>1115</sup>. Indeed, left-wing politicians, part of the Government majority with formal authority over the ART, influenced the introduction of a national framework. By being able to publicly question or support the Government's policy-making, put pressure and vote, their views regarding opening F-T's local access market to competition mattered significantly to Ministers within public parliamentary debates. This was the case with the spring 2000 "nouvelles réglementations économiques" Government bill raising unbundling (see the 'Process' section below)<sup>1116</sup>.

The European Commission's supranational work influenced the national LLU debate and the ART's endeavours in 2000 too, well after the regulator raised the policy domestically. The Commission's prominence over LLU emerged when, under the Portuguese Presidency, EU Governments set the March 2000 Lisbon Strategy emphasising the 'knowledge-based economy'. One of the European Council's March 2000 conclusions was specifically to call on Member States to work with the Commission on LLU before the end of 2000<sup>1117</sup>. France would hold the six-monthly EU Presidency starting in July 2000. The French Government was therefore about to hold a position of policy leadership, scrutinised for its stance and domestic results on key policies such as the Lisbon Strategy vis-à-vis fellow European Member States.

By then, without getting involved in national unbundling policy discussions but by issuing a working document repeatedly emphasising the role of national regulators<sup>1118</sup>, the European Commission collected views on LLU, including the ART's<sup>1119</sup>. The ART had regular informal contacts and developed relations with the Commission since its inception<sup>1120</sup>. The Commission could generate non-binding policy Recommendations to Member States, and did so in May 2000<sup>1121</sup>.

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<sup>1115</sup> Thatcher 1999, p.162

<sup>1116</sup> For parliamentary debate on LLU including questions to Telecoms Minister Pierret: Marcovitch,D "Question N°: 1950 publiée au JO le: 16/3/2000", p.2003; on the bill, Baert,D and Billard,C "ASSEMBLÉE NATIONALE - 3<sup>e</sup> SÉANCE DU 25 AVRIL 2000"; de Chazeaux,O "Question N°: 2045 publiée au JO: 3/5/2000", p.3627

<sup>1117</sup> Lisbon European Council, Presidency Conclusions, 23-24/3/00, para.11

<sup>1118</sup> European Commission DG Information Society Working Document 9/2/00, "Unbundled access to the local loop"

<sup>1119</sup> ART 15/3/00, "Réponse de l'Autorité de régulation des télécommunications sur le projet de recommandation de la Commission concernant le dégroupage de la boucle locale"

<sup>1120</sup> ART 7/98, pp.210,212,213,254

<sup>1121</sup> Official Journal of the European Communities 29/6/00, "Commission Recommendation of 25 May 2000 On Unbundled Access to the Local Loop: Enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet"; C(2000)1259. Pierret and the ART's website portray the Recommendation's adoption occurring 26 April 2000. This was the Commission's Communication; C(2000)1059

Still, given F-T's local access dominance, its key ties to senior elected officials as majority state-owned operator and the Government's formal powers to determine LLU, early in the regulatory policy, influential resources were held by a few affiliated national actors.

### III. Preferences

This section shows that, consistent with Type I autonomy, in the early stages of policy development, predominant influential actors were preference divergent with the ART regarding introducing LLU in France. Both the majority state-owned F-T, whose local network the ART wanted to open to competition, and the Government, possessing the formal powers to adopt the policy, opposed the regulator's proposal. With market entrants the only convergent actors, at the start, the ART had no influential support.

The ART's April 1999 consultation defined opening the local access network to competition between France Télécom and new entrants as "essential". LLU was indicated as a competitive solution for existing local voice telephony services<sup>1122</sup>, and especially for innovative broadband ones through new technologies like DSL<sup>1123</sup>. The incumbent planned to launch commercial ADSL services within weeks. Without competitive pressures, F-T could gain a dominant position in the emerging broadband market, limiting innovation and downward price trends.

Similarly to the UK sub-case, the French regulator listed five different options (see Table 10 below<sup>1124</sup>), for entrants to exploit operational and commercial conditions similar to F-T. The ART's option 1, the unbundled local loop<sup>1125</sup>, entailed F-T providing paired copper-wires to competitors to incorporate into their networks. Entrants would co-locate (physically, distantly or virtually) and attach equipment to the local loop, thus accessing end-users homes. Entrants would build their networks, based on operational terms established with F-T. Issues included: the definition of what lines entrants could ask F-T to unbundle; whether it had to provide extra or new lines when asked. Respective operational responsibilities of F-T and entrants had to be delimited.

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<sup>1122</sup> As opposed to competition limited to long distance telephony then

<sup>1123</sup> ART 2/4/99, Introduction

<sup>1124</sup> To note the differences between the UK's and France's five options, jointly look at Tables 8 and 10

<sup>1125</sup> Hereafter, 'unbundling' entails option 1

Under option 2, entrants would 'co-locate' at F-T's exchanges, but the incumbent would install and operate DSL equipment on each access line. Entrants would not install their equipment at either end of a loop, hence, not access end-user homes. Entrants would connect to the data stream provided by F-T at its local exchange building, where they would co-locate equipment to take data onto their networks. End-users could choose to have broadband and telephony from the entrant, broadband from entrants and voice from F-T, or vice-versa.

Option 3 was a Permanent Virtual Circuit access service<sup>1126</sup>; a data service between customer lines and entrants' own sites. This would not be provided at an exchange building but at a different part of F-T's network. End-users could either have just broadband, or broadband and telephony from entrants too. Instead option 4 constituted the simple resale of local traffic for voice and data, with F-T billing the competitor rather than end-users; entrants charged as they chose. Option 5 entailed the resale of local traffic with the additional management of unspecified customer services, extending the entrant's management of the commercial relationship with customers.

Given different degrees of access to F-T's local network, the options entailed flexibility to invest in competing networks and services as entrants preferred<sup>1127</sup>. However the regulator intended to maximise local competition. Resale options 4 and 5 meant that marketing and prices were the only elements that entrants could be distinguished by vis-à-vis the incumbent. By reselling F-T's products, entrants could not differentiate services.

Options 2 and 3, which did not grant access to F-T's paired copper-wires, represented access to transmission capacities<sup>1128</sup>. Option 2's competitive nature was limited because F-T controlled end-user access. Entrants would, moreover, need to invest significantly in their own network. Under Option 3, entrants would not need to invest in significant infrastructure at F-T exchanges, entailing faster commercial delivery. Moreover, F-T retaining end-user access meant that, unlike option 1, entrants avoided spectrum management complexities regarding interference<sup>1129</sup>.

However, by relying on the incumbent's network particularly at users' end, the flexibility of entrants' service provision under options 2 and 3, hence competitiveness, would be

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<sup>1126</sup> Like Oftel's option 4

<sup>1127</sup> ART 2/4/99, s.3.1

<sup>1128</sup> ART 2/4/99, s.2

<sup>1129</sup> ART 2/4/99, p.19

impaired. Instead, by being in control of all service elements except the actual circuit remaining F-T's responsibility under option 1, entrants would determine their own, flexible, provision of competitive broadband and voice telephony. Accordingly, unbundling option 1 best promoted the regulator's goal of local access competition.

**Table 10: Summary Features of 5 ART Options Proposed**

Options	Advantages (for entrants)	Disadvantages
1	<ul style="list-style-type: none"> <li>- Innovation/service differentiation promoted</li> <li>- Dependence on incumbent to define service provision and deployment timetable minimised</li> <li>- Direct commercial relationship with end-users</li> </ul>	<ul style="list-style-type: none"> <li>- Slow &amp; very costly to implement</li> <li>- No national coverage</li> <li>- Dependence on co-location offer (delays)</li> <li>- Shared spectrum/ interference management</li> </ul>
2	<ul style="list-style-type: none"> <li>- Spectrum management/ interference managed by incumbent</li> </ul>	<ul style="list-style-type: none"> <li>- Dependence on incumbent re: technology &amp; deployment timetable</li> <li>- Entrants face commercial risk; F-T equipment at end-user's home</li> <li>- Little service differentiation from incumbent</li> <li>- Entrant loses some control of service quality</li> </ul>
3	<ul style="list-style-type: none"> <li>- National offer possible. Speeded up spreading of offers</li> </ul>	<ul style="list-style-type: none"> <li>- See option 2</li> </ul>
4 & 5	<ul style="list-style-type: none"> <li>- Completed long distance telephony providers' portfolio</li> <li>- Fast commercial presence possible</li> </ul>	<ul style="list-style-type: none"> <li>- No commercial differentiation from incumbent</li> </ul>

Source: ART 10/99

Yet, neither the national 'Code des postes et télécommunications', comprising the 1996 telecoms regulation law provisions, nor European legislation permitted the imposition of

unbundling<sup>1130</sup>. Thus, rather than proposing a policy adhering to the law, the regulator's preference meant that the law needed changing. Competition, which was why the regulator considered unbundling F-T's local loop important, was a statutory duty. However, the ART's seven statutory duties, all shared with the Telecoms Minister in the 1996 telecoms law<sup>1131</sup>, were not ranked in importance.

The centre-left Government, of a different political orientation from President Jacques Chirac's who had appointed Hubert, did not share the ART's preference of promoting telecoms markets competition broadly<sup>1132</sup>. Specifically, in mid-1997, Socialist Prime Minister Jospin formulated a broad internet policy and the Information Society's scope for France. While indicating the importance of effective regulation, Jospin suggested that F-T in particular was to find solutions to migrate existing communications services to internet-enabled networks<sup>1133</sup>. Similarly, the Government emphasised F-T's key role in service supply in its 1998 action programme emphasising the importance of increasing transmission speeds of each network component including local access<sup>1134</sup>. When he first raised unbundling in the ART's mid-1998 annual report, Hubert faced negative Government reactions<sup>1135</sup>.

Thus, the Government had different preferences from the ART, which posed a significant obstacle for the regulator given formal arrangements limiting its ability to determine policy. The Government's wish to spread the internet across France, promoting the Information Society objective, involved F-T's competitors far less than the ART intended, despite competition being a duty for the Telecoms Minister too. Even before the consultation, in January 1999, Secretary for Industry Christian Pierret, the single elected official with most formal powers vis-à-vis the ART, stated his opposition to unbundling F-T's local loop, praising the incumbent's diligence over 'public service' duties instead<sup>1136</sup>.

Besides stressing that LLU was neither laid out in domestic nor in European legislation, the Minister emphasised there were other policy options for end-user access. The Government favoured investments in alternative network infrastructure, referring to wireless local loop tests the ART launched; unbundling would be unfair towards operators undertaking

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<sup>1130</sup> Barroux,D 24/6/99, "Boucle locale: les parlementaires appuient France Telecom", Les Echos

<sup>1131</sup> see ch.3

<sup>1132</sup> Interview: Hubert

<sup>1133</sup> Jospin,L 25/8/97, "Discours prononcé lors de l'inauguration de l'Université de la Communication: Préparer l'entrée de la France dans la société de l'information, à Hourtaing (Gironde)"

<sup>1134</sup> Government action programme 1/98, "Preparing France's entry into the inform@tion society", p.50

<sup>1135</sup> Interview: Hubert

<sup>1136</sup> Le Gales,Y and Renault,MC 8/1/99 "Christian Pierret: ' Favoriser les prix les plus bas possibles'" Le Figaro

massive cable networks expenditure<sup>1137</sup>. Pierret reprised the arguments, adding that Parliament was not discussing changes to the telecoms law<sup>1138</sup>. In formal terms, the ART appeared isolated. The Minister overseeing the sector and who could sponsor the ART initiative across Government to introduce legislation expressed divergence long into 1999.

In June 1999, Pierret asked F-T to deliver ADSL to the market as rapidly as possible with Finance Minister Dominique Strauss-Kahn<sup>1139</sup>. They were, therefore, obstructing the purpose of the regulator's initiative, to enable entrants to compete in the broadband market with the incumbent by regulating its asymmetric network advantages<sup>1140</sup>. Allowing F-T to get a head-start challenged the incentives of entrants to make the necessary investments to exploit LLU. Yet, in mid-July, Strauss-Kahn and Pierret applied their formal authority, approving F-T's charges for the ADSL product planned for autumn<sup>1141</sup>, thus supporting the incumbent's broadband advancement notwithstanding the anti-competitive implications.

F-T, which controlled 99% of the local access market estimated at FF50bn<sup>1142</sup>, strongly opposed the ART's full local access competition preference<sup>1143</sup>. Without waiting for the ART's consultation responses' publication, F-T's Chairman Michel Bon publicly stated that "the wealth, investment and innovation created by unbundling equalled zero"<sup>1144</sup>.

Bon stated regulation had a crucial role in directing investments<sup>1145</sup> but, in the consultation response, F-T claimed it should not "bear the regulatory burden" alone<sup>1146</sup>. If unbundling was adopted, any operational delays required for implementation purposes would have to be accepted and a trial period undertaken<sup>1147</sup>. Yet Bon subsequently claimed that F-T would commercialise ADSL as soon as possible, echoing Government Ministers' earlier statements; France could not delay introducing a service contributing to an Information Society<sup>1148</sup>.

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<sup>1137</sup> *ibid*

<sup>1138</sup> Barroux 24/6/99; La Tribune 12/7/99, "Pierret: 'Il n'y a pas lieu de reviser profondément la loi sur les telecoms'"; 13/7/99 "Le marche local, enjeu de la concurrence"

<sup>1139</sup> Pierret, C "ASSEMBLÉE NATIONALE - 1<sup>re</sup> SÉANCE DU 2 JUIN 1999"

<sup>1140</sup> Jakubyszyn, C 7/8/99, "L'Autorité de régulation des télécommunications lance une offensive contre France Télécom", Le Monde

<sup>1141</sup> Ministère de l'Économie, des Finances et de l'Industrie 12/7/99, "Accès à Internet à haut débit"

<sup>1142</sup> La Tribune 13/7/99

<sup>1143</sup> Interview: Hubert; ART 29/10/99 "L'Autorité de régulation des télécommunications publie la synthèse de la consultation sur le développement de la concurrence sur le marché local"; La Tribune 18/8/99 "France Télécom se refuse au dégroupage"; 17/11/99 France Telecom garde la haute main sur l'Internet rapide

<sup>1144</sup> Les Echos 2-3/7/99

<sup>1145</sup> *ibid*

<sup>1146</sup> ART 10/99, p.12

<sup>1147</sup> ART 10/99, p.21

<sup>1148</sup> Le Gales, Y 3/12/99 "France Télécom n'a pas de monopole sur le telephone local" Le Figaro

Left-wing MPs, publicly sustaining F-T's opposition to unbundling, added to the ART's significant challenge a few months later. Communist MP Claude Billard unequivocally challenged the scope of introducing ADSL competition through LLU; other technologies could be deployed. Unbundling constituted "a legal constraint on the 'public operator'"<sup>1149</sup> given the cost-benefits accruing to 'private operators' accessing F-T's network to offer their services, while weakening the 'public' 'state' operator. Without directly questioning unbundling, Socialist MP Dominique Baert argued that the regulator should not replace Government and Parliament and decide on the politics of telecoms<sup>1150</sup>.

The only openly preference convergent actors with the ART from the start were market entrants relying on the regulator and the Government for a framework, indicating their low influence. Different network facilities, shaping their needs, made entrants advocate diverse uses of F-T's network. Yet, almost all defined F-T's local access monopoly position as a 'durable obstacle' to competition, given the incumbent's economies of scale<sup>1151</sup>. So, third-party access to F-T's network was largely considered the only solution to develop competition.

Two issues furthered F-T's local access advantages. Firstly, prolonged and exclusive access to end-users allowed targeting markets in greater demand, limiting entrants' ability to maximise returns upon investing in these markets. Secondly, F-T enjoyed rights-of-way, allowing network investments, acquired under more favourable conditions than those entrants faced. Given the investments required to develop competing networks, entrants advocated direct regulatory action providing a degree of market certainty. Some argued through the media that F-T could cross-subsidise more competitive segments where it lost market share, such as long distance telephony<sup>1152</sup>.

Numerous consultation respondents<sup>1153</sup> advocated maximum flexibility to widen their potential market, offer different services and choose between customer bases and costs<sup>1154</sup>. However, 'full' unbundling was widely identified as the preferable competitive route. Vivendi and Cegetel chief, Jean-Marie Messier, qualified unbundling as a "priority", as wireless local loop was not expected to represent over 10% of the local access market<sup>1155</sup>.

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<sup>1149</sup> Billard 25/4/00

<sup>1150</sup> Baert 25/4/00

<sup>1151</sup> ART 10/99, p.4

<sup>1152</sup> Including Cegetel's Germond, see Barroux 20/7/99; Les Echos 2-3/7/99

<sup>1153</sup> ART/ARCEP officials explained electronically that responses were not publicly available

<sup>1154</sup> ART 10/99, p.26

<sup>1155</sup> Les Echos 2-3/7/99



Cegetel's Directeur-Général Germond added that local competition was essential to stop F-T's increasing consumer prices<sup>1156</sup>. Respondents only considered option 3 a desirable complement. Entrants could compete in the consumer broadband market rapidly, reaching otherwise difficult geographic areas, while unbundling was being implemented<sup>1157</sup>.

Advocates of unbundling considered implementation in 2000 possible, but stressed that F-T should not commercialise ADSL, which it planned for November<sup>1158</sup>, prior to unbundling being introduced<sup>1159</sup>. Entrants wanted specific and detailed unbundling terms, with the ART responsible for dispute resolution<sup>1160</sup>. F-T's dominant position made negotiations prevailing in a competitive environment difficult, and thus wide-ranging prescription should include: communication of network information; service timeframes and quality; spectrum management<sup>1161</sup>. Physical co-location was favoured to supply the most competitive services, as were cost-oriented charges, which economist and ART board member Dominique Roux described as highly effective to regulate for competition<sup>1162</sup>.

Thus the ART faced preference divergence from key actors. The operator at the centre of unbundling opposed it, as did the sectoral Minister with key powers, whose support was fundamental to turn the policy into legislation. Left-wing Government coalition members opposed unbundling too. The only convergence at the start was of entrants aiming to operate in the local access market. The EC did not display active adherence to LLU until 2000.

#### IV. Process

Unlike the earlier sub-cases, this section argues that, as it faced divergent actors central to introducing LLU in France, the regulator did not try shifting policy preferences. Consistent with Type I autonomy, the ART acted on its preference nonetheless. The ART firmly proceeded with its local access competition preference, notwithstanding its advisory role and pervasive divergence among influential state actors. Without formal powers to

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<sup>1156</sup> Barroux 20/7/99

<sup>1157</sup> ART 10/99, pp.11-12

<sup>1158</sup> Faucon,B 30/9/99, "Les concurrents de France Télécom réclament plus de transparence", *Figaro-Economie*; Barroux,D 2/11/99 "La France évoque un 'dégrouperage total du réseau de' France Telecom", *Les Echos*

<sup>1159</sup> ART 10/99, p.32; Arabian,B 3/12/99, "Notre combativité a pesé dans l'infléchissement du ministre" *Le Figaro*

<sup>1160</sup> ART 10/99, p.34

<sup>1161</sup> *ibid.* pp.35-36

<sup>1162</sup> Roux,D 15/6/99, "Télécommunications l'analyse des coûts, outil de régulation", *Les Echos*

determine policy between 1998 and late-2000, the ART challenged F-T. It used policy information and expert analysis, and exploited useful domestic and supranational 'informal ties' to address obstruction and create a formal framework. Eventually, formal resources were applied where required. Thus, the agency alternated formal and informal instruments to pursue its preference.

To advance its preference without powers to determine a new policy, the regulator identified and exposed from the outset F-T-controlled resources as an obstacle in the local access market, mirroring Type I autonomy's 'best endowed actors who predominate'<sup>1163</sup>. The ART raised unbundling in July 1998, using its very first annual report due to Government and Parliament, which could determine policy<sup>1164</sup>. It indicated the importance of F-T's network to reach end-users and provide a full range of services rather than just long distance telephony. Besides highlighting that few actors competed over the local loop and that LLU would help entrants create broadband competition<sup>1165</sup>, it subtly compared France to Germany, which intended to apply unbundling to deploy new technologies like ADSL.

However, with the Government envisaging that F-T should spearhead the Information Society nationally, Hubert firmly took more action<sup>1166</sup> to counterbalance and offset the constraining lack of formal authority and the significance of the incumbent's key 'physical' asset. To prepare to launch a consultation on local access competition, the ART first requested the CCRST to analyse the scope of LLU in October 1998<sup>1167</sup>. The role of the commission specialised in networks and services was purely consultative<sup>1168</sup>. Yet, given its widely-sourced twenty-one-member composition, CCRST findings aided the ART's policy-shaping intentions.

Despite F-T's policy centrality, by entering into discussions jointly with F-T and other actors providing input<sup>1169</sup>, the regulator diluted the incumbent's issue-framing role. The regulator set up two CCRST working groups establishing key development issues<sup>1170</sup>; on the economics, and technical and operational aspects<sup>1171</sup>. Only F-T's Eric Debroeck was a

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<sup>1163</sup> see ch.1, Nordlinger's Type I autonomy

<sup>1164</sup> see ch.3

<sup>1165</sup> ART 7/98, p.262

<sup>1166</sup> Interview: Hubert

<sup>1167</sup> ART 2/4/99, Introduction

<sup>1168</sup> see ch.3

<sup>1169</sup> Interview: Hubert

<sup>1170</sup> Hubert, JM "SIRCOM - 25 novembre 1998, Intervention de M. Jean-Michel HUBERT"

<sup>1171</sup> ART 2/4/99

CCRST member<sup>1172</sup>. Thus, the ART employed 'state' resources or those controlled by it, in the form of the expert CCRST<sup>1173</sup>, to offset information imbalances benefiting F-T and neutralise its resources. Furthermore, it selected a decision site whose occupants were relatively insulated from pressures<sup>1174</sup>. The divergent incumbent neither conducted nor set terms of discussion.

ART Chairman Hubert spoke publicly about LLU at end-1998 too, broadening audiences before the April 1999 consultation which allowed F-T to officially counter the ART's and convergent actors' arguments<sup>1175</sup>. There was no exploratory public consultation suggesting an open-ended exchange on LLU<sup>1176</sup>, portrayed as having significant implications for employment and investment; beyond Hubert's formal remit, but part of the divergent Government's.

To crystallise policy, the ART exploited another instrument not in the law, thus creating non-statutory devices to pursue unbundling. Reprising CCRST analyses, the agency launched its only public unbundling consultation, pooling more expertise and furthering debate as F-T announced its plan to launch retail ADSL. Therein, after citing the Government's Information Society objective and the EC's 4<sup>th</sup> report assessing telecoms regulation and the grounds for LLU, the ART compared France's implementation stage again, but much more unfavourably than in the annual report. Besides emphasising the German experience, it pointed to the UK's plans and to the US' 1996 Telecommunications Act allowing LLU.

Without the formal authority to introduce unbundling, the regulator tried fracturing the unity of coalition members<sup>1177</sup>, notably the Government's backing of F-T. By reiterating that France lagged behind other Member States, thus combining the national and EU unbundling dimensions, the ART disaggregated the respective reasons for the Government and F-T to oppose LLU, isolating what ultimately proved distinct preferences. F-T wanted to retain dominance. The Government wanted to develop an Information Society as fast as possible, which it considered F-T the single likeliest operator to advance. The ART referred to EU discussions about reviewing the Open Network Provision (ONP) Directive in 1999, including the Commission's exploration of LLU. The Government was thus warned that it

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<sup>1172</sup> Journal Officiel 3/6/97, "Arrêté du 26 mai 1997 portant nomination à la commission consultative des réseaux et services de télécommunications", until mid-2000

<sup>1173</sup> The article in the law refers to 'qualified' individuals and the 'competent' committee

<sup>1174</sup> see ch.1; Nordlinger

<sup>1175</sup> Hubert 25/11/98

<sup>1176</sup> Unlike the UK's Oftel

<sup>1177</sup> see ch.1; Nordlinger

may be forced by supranational regulation to create a framework requiring F-T to unbundle.

The consultation raised five options to redress the threat F-T posed in the emerging broadband market, but option 1's endorsement was focussed on and effectively anticipated. Unlike with Type II autonomy, policy information was not selected to shift divergent preferences through persuasive exchanges. Questions on how to develop local access competition were given answers delineating likely advantages or difficulties according to the ART's preference.

The negative aspects of options 2 and 3 were highlighted upfront<sup>1178</sup>. They had neither been utilised nor attempted before<sup>1179</sup>, unlike option 1 which had been adopted in Germany and USA. The regulator indicated how entrants expressed concerns about option 2 technical difficulties before receiving responses, thus presenting a selective analysis before non-sectoral actors lacking the knowledge to understand the implications, such as MPs, assessed them.

The ART largely explored option 1 issues as though distinguishing between options was unnecessary. Evidence that the ART anticipated introducing option 1 was provided by the consultation's section on co-location; a key unbundling feature<sup>1180</sup>. Co-location was mentioned around twenty-five times, before responses on the options were received<sup>1181</sup>. Of the other four options, 2 also entailed co-location. However, the ART did not promote its adoption. Three months before publishing the consultation responses summary, Hubert reiterated that LLU was "indispensable" to develop effective local access competition<sup>1182</sup>.

By eliciting preferences and crystallising debate, the ART's consultation exacerbated divisions between those favouring and those opposing LLU<sup>1183</sup>, especially since F-T planned to deliver retail ADSL through its own ISP shortly<sup>1184</sup>. The regulator formally asked F-T to provide retail ADSL only upon supplying competing operators with the same technical elements and other ISPs the same service conditions as its own, thus delaying F-

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<sup>1178</sup> ART 2/4/99, p.16

<sup>1179</sup> *ibid*, pp.14-15

<sup>1180</sup> *ibid* s.2.2

<sup>1181</sup> Of tel's first unbundling consultation mentioned co-location once, the follow-up around ten times

<sup>1182</sup> Barroux 13/7/99; La Tribune 13/7/99

<sup>1183</sup> see ch.1; Nordlinger

<sup>1184</sup> Jakubyszyn, C and Renault, E 29/12/99 "Le gendarme du telephone dénonce l'attitude de France Télécom dans l'internet rapide", Le Monde

T<sup>1185</sup>. Rival network operators could not supply wholesale ADSL to ISPs without unbundling, entailing F-T could exploit a decisive first-mover advantage in the wholesale and retail ADSL markets, supported by Ministers<sup>1186</sup>.

Thus, the regulator remained steadfast<sup>1187</sup> and, while not planning to overstep its powers after the Government warned that LLU was a decision for legislators, at a time when EU institutions appeared unwilling to impose unbundling legislation on Member States<sup>1188</sup>, attracted mounting support from entrants. Following the annual report, CCRST findings and subsequent exchanges, the consultation showed that to develop policy the regulator's formally-allocated budget did not matter when it had the expertise to understand and frame issues, and convergent actors deployed their resources.

Entrants' ties with, and hence likelihood of privately influencing, senior elected officials did not match F-T's<sup>1189</sup>. However, the ART allowed entrants to capitalise on its consultation and campaign for unbundling over the summer of 1999<sup>1190</sup>. Through the media, Cegetel accused Minister Pierret of acting as F-T shareholder first, by siding with F-T and dismissing unbundling, rather than as consumer champion<sup>1191</sup>. Another operator claimed that unbundling would not occur without a "military coup"<sup>1192</sup>. Entrants, including the AFOPT, exerted public and private pressure, protesting against their exclusion from Government discussions shaping local access investments<sup>1193</sup>. They threatened to refer the matter to the Conseil de la concurrence if unable to provide ADSL when F-T was able to do so.

The Government increasingly backtracked. In early-September, Pierret specified that 'unbundling' would only provide entrants with the broadband component of lines, not voice telephony<sup>1194</sup>. By end-September, his Ministry commissioned a report indicating that

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<sup>1185</sup> Avis n°99-582 de l'Autorité de régulation des télécommunications en date du 7 juillet 1999 sur les décisions tarifaires de France Télécom n°99077 E relative à la création des services Netissimo et Turbo IP et n°99078 E relative à l'expérimentation du service Turbo LL

<sup>1186</sup> Pierret 2/6/99; Ministère de l'Économie 12/7/99; Jakubyszyn and Renault 29/12/99

<sup>1187</sup> Interview: Hubert

<sup>1188</sup> La Tribune 18/8/99

<sup>1189</sup> Barroux 24/6/99

<sup>1190</sup> Les Echos 2-3/7/99

<sup>1191</sup> Barroux 20/7/99

<sup>1192</sup> La Tribune 18/8/99

<sup>1193</sup> Faucon 30/9/99

<sup>1194</sup> Le Figaro 4/9/99, "Christian Pierret favorable à l'ouverture de la boucle locale"; Les Echos 6/9/99 "Le secrétaire d'Etat à l'Industrie se dit pour la première fois favorable au degroupage ADSL"

the regulation of competition among broadband suppliers, including local loop operators, deserved attention<sup>1195</sup>.

The regulator showed little intention of negotiating over its unbundling preference. In early-October Pierret reiterated that neither EU legislation nor French telecoms law prescribed LLU<sup>1196</sup>, claiming the Government favoured measured progress. Only a restricted form of 'unbundling' would be introduced, preventing entrants from installing equipment at F-T's exchanges<sup>1197</sup>. Pierret tellingly specified that the measure was not aimed at increasing competition but at spreading ADSL usage<sup>1198</sup>.

Nevertheless, once ART consultation findings exposing F-T as a lasting obstacle were published, Pierret indicated that the ART's work to fracture the Minister and incumbent's unity had prevailed<sup>1199</sup>. Referring to ART findings, Pierret praised the "important work carried out". Developing broadband access for business and residential users was a Government priority and operators intending to invest in broadband had to be able to access the local loop; competition would occur soon<sup>1200</sup>. Intended adoption seemed to exclude voice services<sup>1201</sup>, but Pierret pledged that the Government would promote LLU by discussing it with relevant parties, taking into account the ART's work<sup>1202</sup>.

While public pressure mounted, Hubert had met privately Pierret many times, presenting the arguments for unbundling and insisting that it was the ART's role to develop regulatory policies in France, adding that France was part of the European Union, which was looking into LLU<sup>1203</sup>. Ultimately Pierret accepted Hubert's position. Since the law did not prescribe unbundling, the key implication was constructing a framework redressing the lack of local access competition, which was not within the ART's powers, as F-T was about to launch retail ADSL<sup>1204</sup>.

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<sup>1195</sup> Ministère de l'industrie 29/9/99, "Le devenir des technologies de l'information et de la communication et le développement des réseaux"

<sup>1196</sup> Le Figaro, 12/10/99 "Paris veut ouvrir l'ADSL à la concurrence"

<sup>1197</sup> Les Echos, 12/10/99 "Christian Pierret préconise une ouverture à minima du réseau de France Télécom se refuse au dégroupage"

<sup>1198</sup> Ministère de l'industrie 7/10/99 "Mission de J.C. Bourdier sur le développement des réseaux à haut débit et leurs usages"

<sup>1199</sup> see ch.1; Nordlinger

<sup>1200</sup> Ministère de l'industrie 29/10/99

<sup>1201</sup> Barroux, D 2/12/99 (1) "L'ART se donne un an pour mettre fin au monopole de France Télécom sur le local", Les Echos

<sup>1202</sup> Ministère de l'industrie 29/10/99; Les Echos 2/11/99 "La France évoque un 'dégroupage' total du réseau de France Télécom"

<sup>1203</sup> Interview: Hubert

<sup>1204</sup> Barroux 2/11/99

Having pooled information and vocal support, the ART thus mitigated the extent and effectiveness with which F-T could deploy its resources, by disengaging or co-opting one of the divergent leaders or group members (F-T and the Government)<sup>1205</sup>. In the LLU consultation, unlike in the 3G one, the Government was never mentioned directly and no common purpose was suggested either. Moreover, responses were presented anonymously, except F-T's.

The ART exploited its discretionary formulation of policy responses, presenting overall agreement with the issues relating to its preference, and hence legitimising its intervention. The document outlined how to address operational issues, but was almost the same length as the consultation. A critical issue such as charging methodology, fuelling support for cost-orientation, was barely allocated two pages. The selected detail raised LLU obligations convergent entrants wanted F-T to bear, such as providing technical information regarding F-T's network<sup>1206</sup>.

Though formally weak vis-à-vis this policy, the regulator highlighted the underlying unbundling conflict, identifying F-T as the cause. F-T's comments were not given significant consideration except on technical aspects, such as minimising the complexities of operators using equipment and sharing spectrum<sup>1207</sup>. Definite policy conclusions were not drawn. Yet, by end-November, Pierret indicated the Government's commitment, anticipating parliamentary debate in the first half of 2000 and implementation by 2001. The unbundling law had to place France ahead among countries pursuing an Information Society favouring equal access to all<sup>1208</sup>, suggesting that the ART raising the example of other countries' LLU policies to fracture the unity of coalition members<sup>1209</sup> (F-T and the Government) had worked.

Meanwhile, the ART deployed powers to prevent F-T from gaining an excessive advantage in ADSL markets before LLU became available, thus alternating formal and informal instruments to pursue its preference. F-T ignored the ART's 7 July 'recommendation' requiring that the incumbent request to expand ADSL services and, in November, planned

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<sup>1205</sup> see ch.1; Nordlinger

<sup>1206</sup> ART 10/99, pp.35-6

<sup>1207</sup> *ibid* p.21-2

<sup>1208</sup> *Les Echos* 30/11/99 "Christian Pierret: Le dégroupage sera introduit d'ici à 2001"

<sup>1209</sup> see ch.1; Nordlinger

service delivery without competition. It was ordered to suspend the product by 10 January 2000<sup>1210</sup>.

The ART continued structuring a LLU framework by collecting information from policy supporters<sup>1211</sup>. Following Pierret's indication about a forthcoming law, Hubert asked operators to send him operational issues needing prioritising, before discussing them in working groups<sup>1212</sup>. Hubert expected long and complex discussions on pricing and co-location, and wanted the decision-making rationale to be clear before the parliamentary debate<sup>1213</sup>; difficulties over the passing of legislation were anticipated.

Statutory adoption would not resolve delivery complexities. Pierret considered LLU a "political decision" of which "France Télécom was starting to see the merits"<sup>1214</sup>. However, Michel Bon reiterated his divergence, insisting that F-T had no local communications monopoly<sup>1215</sup>, thus insisting that there were no grounds for LLU.

The ART pursued unbundling implementation regardless. In February 2000, it set up a working group chaired by Alcatel's Alain Bravo. Four sub-groups were created, with allocated chairs. The 'tests' sub-group was delegated to F-T, the 'technical' one to Lucent Technologies. The regulator gained policy control by chairing the 'operational' and 'pricing' sub-groups<sup>1216</sup>, enabling it to prioritise entry terms structuring F-T's eventual reference offer, hence, whether entrants would find unbundling commercially attractive. The ART's initiative was not of formal significance. F-T's network information was critical. The incumbent could not be coerced into participating, and uncertainty persisted over when legislation would be adopted.

Thus, following the Minister's indication that a law on unbundling would be introduced, F-T decoupled its public opposition to legislative developments and its involvement in LLU sub-groups<sup>1217</sup>. The regulator's working group initiative secured the incumbent's

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<sup>1210</sup> Décision n°99-1153 en date du 24 décembre 1999 de l'Autorité de régulation des télécommunications portant mise en demeure de France Télécom. F-T's prices were subject to ministerial approval following the regulator's recommendation

<sup>1211</sup> Arabian 3/12/99; Cegetel's Germond claimed credit for the campaigning helping the Government's policy change, though conceding that comparable EU states' situation mattered too

<sup>1212</sup> Barroux 2/12/99

<sup>1213</sup> *ibid*

<sup>1214</sup> Henni, J 1/12/99, "Le gouvernement impose le dégroupage à France Telecom avant fin 2000" La Tribune claims F-T's ADSL product was launched 3 November 1999

<sup>1215</sup> LeGales 3/12/99. Pogorel, G 1996, "Dominance, Regulation and Competitive" Communications and Strategies 23, pp.7-13, had noted the general unwillingness of former telecoms monopolies to recognise their market dominance when regulators introduce competition

<sup>1216</sup> ART 16/2/00 "Première réunion du groupe de travail sur le dégroupage"

<sup>1217</sup> Henni, J 28/4/00, "Dégroupage: les privés sont sous le choc", Les Echos



involvement, entailing some informal exchanges further jeopardising the operator's position vis-à-vis rival actors<sup>1218</sup>. As chair of key sub-groups, the regulator could serve as mediator, playing F-T and entrants against each other, developing implementation issues, manipulatively negotiating compromises favouring convergent groups<sup>1219</sup>. Thirty sub-group meetings in three months furnished considerable operational knowledge to determine LLU terms<sup>1220</sup>.

In 2000, F-T increasingly faced the conflation of domestic developments, shaped by the ART's LLU consultation and entrants' supportive responses, and evolving EU negotiations which had already combined to influence the Minister's position<sup>1221</sup>. The European Commission proposed an EU-wide 'Recommendation' on unbundling that the ART fully exploited by contributing its own input and perspective to shape a formal national framework, as explained below. By end-April, the Recommendation Communication invited Member States to adopt "appropriate legal and regulatory measures" by end-2000 where full unbundling was unavailable<sup>1222</sup>.

Though non-binding, the Recommendation was of significance. France would take-over the EU Presidency in July 2000, making its policy commitment especially visible. The text aimed for legislation in Member States soon after Governments pledged to make the EU "the most dynamic and competitive knowledge-based economy in the world" given their Lisbon Strategy<sup>1223</sup>.

The European Commission's Information Society Directorate-General (DG INFSO) had issued a working document on a LLU Recommendation in February 2000; "a basis for discussion with interested parties. It (did) not represent a formal position or legal analysis"<sup>1224</sup>. Nevertheless, national regulatory agencies' policy role was raised repeatedly, as three means of local loop access were indicated: full unbundling; shared access; and 'Bitstream' access<sup>1225</sup>.

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<sup>1218</sup> see ch.1; Nordlinger

<sup>1219</sup> *ibid*

<sup>1220</sup> ART 30/5/00, "Progression des groupes de travail et préparation des expérimentations"

<sup>1221</sup> Electronic exchange, Senior Management, France Télécom 5/09

<sup>1222</sup> C(2000)1059 26/4/00

<sup>1223</sup> Report from the High Level Group chaired by Wim Kok 11/04, "Facing the challenge - The Lisbon strategy for growth and employment"

<sup>1224</sup> European Commission 9/2/00

<sup>1225</sup> See above and especially ch.6 for more technical detail on these options

Echoing its regular exchanges with the Commission<sup>1226</sup>, the ART exploited the informal opportunity to comment on the working document's three solutions to shape the policy-framing Recommendation facilitating formal LLU adoption in France. Shared access had not been raised nationally. However, the Commission's solutions 1 and 3 mirrored the ART options raised one year earlier, and a supranational framework would supersede national legislative preferences<sup>1227</sup>.

Thus the ART bypassed national constraints to determine policy, exploiting ongoing domestic exchanges and building on ties with the European Commission, notwithstanding the latter's lack of powers to impose LLU on Member States. The ART advanced its preference through informal arrangements with the supranational body despite having secured the originally divergent Government's commitment to a national framework, further avoiding dialogue with F-T consistent with Type I autonomy. The regulator advocated precise rules to address incumbency and competition levels, and a clarified legal framework for each option, to strengthen the Recommendation.

Within the context of international regulatory exchanges, in March 2000, the ART sent officials on a mission to learn LLU lessons from its US counterpart, the Federal Communications Commission (FCC)<sup>1228</sup>, obtaining input that proved highly relevant subsequently. In the US, co-location had represented the key obstacle, especially space allocation at exchanges, pricing, site preparation delays and proper access conditions. The FCC had not defined strict formal procedures other than a non-discrimination principle and access within reasonable delays, since entrants provided different services.

However, ART exchanges with the European Commission proved fundamental since supranational activity expedited the introduction of a framework, undermining remaining national challenges. On the day the ART published its Recommendation response, Pierret informed Parliament that the Government was drafting a law for all operators who wanted to invest in ADSL technologies through unbundling from 2001<sup>1229</sup>. In April the Minister presented to Parliament the law amendment authorising LLU. Spreading retail broadband was a Government priority<sup>1230</sup>.

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<sup>1226</sup> ART 7/98, pp.210,212,213,254

<sup>1227</sup> ART 15/3/00

<sup>1228</sup> ART 5/00, "Dégrouper: les conclusions de la mission menée par l'Autorité aux Etats-Unis en mars 2000"

<sup>1229</sup> Pierret,C "ASSEMBLÉE NATIONALE - 1<sup>re</sup> SÉANCE DU 15 MARS 2000"

<sup>1230</sup> Henni,J 26/4/00, "Le gouvernement présente un texte autorisant le dégroupage", Les Echos

Left-wing MPs in the Government coalition forestalled the LLU debate soon after the amendment's submission<sup>1231</sup>. Communist MP Billard argued it should be "really" debated, not presented as a Government bill amendment<sup>1232</sup>. The "request by certain groups of the majority"<sup>1233</sup> led Pierret to withdraw the law amendment the next day, despite centre-right MPs - including the Industry, Post and Telecoms Minister at the time the ART was created - subsequently revealing that they favoured unbundling too<sup>1234</sup>. Hubert claimed that F-T requested that the Government present the bill to Parliament, aware that its private influence with left-wing MPs would produce a favourable amendment delaying adoption<sup>1235</sup>. Two weeks earlier F-T's Chairman Michel Bon had met Finance Minister Laurent Fabius, whose Ministry comprised the telecoms portfolio<sup>1236</sup>.

Nevertheless, the withdrawal of the law amendment, which left-wing MPs secured, only benefited F-T temporarily. As Pierret told Parliament, the initiative was being pursued by the EC and national regulators<sup>1237</sup>. Thus, through its exchanges on the amended Recommendation text in spring 2000, the ART was able to overcome national legislative constraints<sup>1238</sup>, with the Government passing a decree in September 2000 establishing that LLU would occur by the end of the year. Consistent with Type I autonomy, the regulator's informal actions shaping a binding supranational framework pressured the Government to adopt it at the expense of F-T, notwithstanding dissenting coalition members.

Thus, the lack of domestic statutory authority vis-à-vis the divergent Government comprising actors that publicly opposed LLU did not prevent the ART from achieving the formal adoption of its preference. Channelling policy through the convergent Commission which, albeit late in the process, exercised its EU advisory role, proved equally useful to the ART.

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<sup>1231</sup> Henni 26/4/00

<sup>1232</sup> Billard 25/4/00

<sup>1233</sup> Pierret,C "ASSEMBLÉE NATIONALE - 1<sup>e</sup> SÉANCE DU 26 AVRIL 2000"; Henni,J 27/4/00, "Concurrence dans le téléphone local: le gouvernement fait marche arrière", Les Echos

<sup>1234</sup> Borotra,F, Loos,F and Leroy,M "ASSEMBLÉE NATIONALE - SÉANCE DU 31 MAI 2000" Borotra's portfolio comprised the telecoms department junior Minister Fillon ran

<sup>1235</sup> Henni 28/4/00; Renault,E 28/4/00, "L'ouverture du marché des communications locales est retardée" Le Monde

<sup>1236</sup> Ministère de l'Économie 14/4/00

<sup>1237</sup> Pierret 26/4/00; Docquier,J 27/4/00 "Bruxelles entend imposer l'ouverture du téléphone local a la concurrence", Les Echos reports Information Society Commissioner Erkki Liikanen promoting the proposed EU telecoms regulatory framework package comprising unbundling

<sup>1238</sup> ART 4/00, "Commentaires de l'Autorité de régulation des télécommunications sur le projet de recommandation de la Commission sur le dégroupage de la boucle locale"

The European Commission's proposal in July 2000 that the European Parliament and Council approve a binding Regulation<sup>1239</sup> followed the non-binding May 2000 Recommendation. The proposed Regulation, adopted in December 2000 and binding Member States, reprised the input of national regulators, such as the ART, advocating a "strong legal base" to mandate LLU by 31 December 2000.

The importance of the regulator's supranational exchanges to overcome divergent domestic MPs and ministerial uncertainty showed since the French Government's draft decree emerged almost in parallel to the proposed Regulation text<sup>1240</sup>. Unsurprisingly, the ART formally expressed its favourable 'opinion' on the draft decree<sup>1241</sup>, as it had done for the Government's withdrawn bill<sup>1242</sup>. Yet, practical exchanges still lay ahead.

The ART's July 2000 draft decree response comprised policy issues raised domestically, through which it helped frame the EU Recommendation and proposed Regulation sustaining the provisions it wanted the Government to adopt. The agency exploited the thrust of national and supranational convergence to influence the framing of a national statute, since the LLU Regulation was still a proposal, and hence non-binding for Governments<sup>1243</sup>. The ART heard F-T's Chairman and AFOPT's President Richard Lalande before responding to the draft decree, seemingly as mediator between opposing groups<sup>1244</sup>, but ultimately urged the adoption of statutory measures contrasting with F-T's preference<sup>1245</sup>.

When in April 2000 the ART had produced a new set of comments on the revised EU Recommendation, it welcomed that the European Commission had taken into account significant elements of its March 2000 analysis on DG INFSO's February working document<sup>1246</sup>. In March, as the Recommendation was being developed, the regulator had stressed the urgency of a clear and flexible legal framework.

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<sup>1239</sup> EC COM(2000)394 12/7/00, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on unbundled access to the local loop (presented by the Commission)"

<sup>1240</sup> The opposition proposed a law amendment to avoid that the policy rest on challengeable legal grounds. Martin-Lalande, P, De Chazeaux, O "ASSEMBLÉE NATIONALE - 3<sup>e</sup> SÉANCE DU 28 JUIN 2000"

<sup>1241</sup> Avis n°00-748 de l'Autorité de régulation des télécommunications en date du 21 juillet 2000 sur l'avant-projet de décret modifiant le code des postes et télécommunications et relatif à l'accès à la boucle locale

<sup>1242</sup> Avis n°00-347 de l'Autorité de régulation des télécommunications en date du 5 avril 2000 sur l'avant-projet de loi relatif au dégroupage de la boucle locale. Not made public

<sup>1243</sup> Official Journal of the European Union 29/12/06 "Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Economic Community", Art.249

<sup>1244</sup> see ch.1; Nordlinger

<sup>1245</sup> ART 21/7/00, p.3

<sup>1246</sup> ART 4/00

In April, the ART also welcomed that the Commission had assessed implementation aspects, highlighting F-T's network centrality. The regulator argued incumbents should make network information accessible on non-discriminatory bases some six months before launching LLU to help entrants plan deployment. It wanted no single cost-orientation charging method prescribed. It thus sought to obtain maximum information from F-T, while retaining maximum discretion on how to use it to promote entry.

Echoing the US' FCC's insights, the ART pressed the Commission to set out that virtual and distant location only be permitted where space shortages prevented physical co-location<sup>1247</sup>. Closer access to local loops, hence end-users, enhanced entrants' competitive position. It also recommended specifying data transmission obligations, particularly for distant location, to help entrants provide similar service quality to F-T.

Thus, instead of formally removing entry barriers which it still could not do, to jeopardise F-T's influential 'position vis-à-vis rivals'<sup>1248</sup>, the ART exploited expertise acquired through informed exchanges and a non-binding Recommendation constructed with the aim of formalising policy.

EU-level exchanges on implementation mirrored domestic progress the ART advanced through the Bravo "tests" sub-group. Two trial phases were announced<sup>1249</sup> days after the European Commission adopted the Recommendation addressed to Member States in May 2000<sup>1250</sup>. One, in July, saw twenty-seven operators testing several DSL technologies in seven sites including Paris. The second was held in September, following first trial results ascertaining ordering processes, co-location and after-sale services among others.

The ART, whose powers included evaluating experimental network licence requests for the Telecoms Minister, expanded the range of actors accessing F-T's local loop, by opening tests to licensed and unlicensed operators despite no framework in place yet and F-T being the sub-group chair. Licences lasted throughout trials, gauging competition prospects. Besides Cegetel, the first phase involved international actors interested since the outset, like MCIWorldcom, and new players like Cable&Wireless and KPNQwest.

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<sup>1247</sup> Physical co-location was emphasised more in the Commission's Recommendation than in the Regulation (see Annexes; Sections B), though non-discrimination terms meant entrants should not face less favourable access to exchanges than incumbents

<sup>1248</sup> see ch.1; Nordlinger

<sup>1249</sup> ART 30/5/00

<sup>1250</sup> EC 25/5/00

Ongoing exchanges with industry and the European Commission allowed the regulator to shape what the Government, uninvolved in implementation, inserted in the July 2000 draft decree. Through its non-binding 'recommendation', the ART forged more obligations than originally suggested although F-T remained preference divergent and possessed key structural and informational resources, which remained critical after the ART obtained LLU powers.

The regulator 'proposed' measures precluding compromise with F-T, consistent with Type I autonomy. 'Shared access', which had been omitted from the ART's consultation but was in the European Commission's Recommendation, received significant attention. F-T's proposal was dismissed for the Commission's simpler, pro-entrant, solution. To ensure affordability, the ART accepted that cost-oriented charges contribute to F-T's line-renewal costs<sup>1251</sup>, but not those inhibiting entry. The ART favoured the cost-accounting method already applied and reflecting costs borne<sup>1252</sup>, limiting reliance on F-T's unclear 'replacement costs' model<sup>1253</sup>.

The US experience was drawn upon too. The regulator wanted that F-T provide, within reasonable periods, network information for entrants' investment plans and co-location orders, to abide by the start-2001 deadline. Requirements should apply at least six months before unbundling was delivered. Citing the EC Recommendation's Art.12, the ART advocated that the decree prescribe that reference offers fully describe facilities, terms, conditions and prices<sup>1254</sup>. So, the regulator sought formal instruments to impose terms, and force development<sup>1255</sup>.

The Government adopted the decree requiring unbundling by start-2001 in mid-September 2000<sup>1256</sup>, during France's EU Council of Ministers' Presidency<sup>1257</sup>. Powers applied from start-2001, but the ART could formally require F-T to provide entrants with necessary information from 1 October. F-T had to produce a reference offer by 1 December<sup>1258</sup>, one month before the EU requirement. The ART announced that it would publish the list of

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<sup>1251</sup> ART 21/7/00, p.7

<sup>1252</sup> *ibid* p.8

<sup>1253</sup> Assumed cost-recovery evaluation based on new technologies, rather than on the network's actual state or on savings from new facilities

<sup>1254</sup> ART 21/7/00, p.11

<sup>1255</sup> Interview: Hubert

<sup>1256</sup> Journal Officiel de la République Française n.212, 13/9/00, "Décret n°2000-881 du 12 septembre 2000 modifiant le code des postes et télécommunications et relatif à l'accès à la boucle locale"

<sup>1257</sup> ART 12/9/00, "L'Autorité se félicite de la publication du décret"

<sup>1258</sup> Ministère de l'Économie, des Finances et de l'Industrie, 13/9/00 "Décret du Gouvernement sur le dégroupage de la boucle locale pour permettre le développement rapide de l'internet à haut débit en France"

relevant costs and define the methodology to calculate Long Run Average Incremental Costs (LRAIC) by 1 November<sup>1259</sup>, thus giving F-T one month. Elements of the costing methodology which the ART had originally rejected<sup>1260</sup> were included<sup>1261</sup>, showing F-T's resistance and the Government's passive support. Nevertheless, cost-orientation was retained. The ART had dispute resolution powers to redress eventual breaches upon request<sup>1262</sup>.

One striking difference with the UK was that while both regulators issued broad charging principles, in France the incumbent set loop charges, not the regulator. The ART determined cost-calculation methods, but F-T interpreted and applied them. This caused delays to entry, particularly as F-T was the key cost-information source<sup>1263</sup>, notwithstanding the requirements that F-T publish a reference offer at start-December and provide information from October, for the regulator to verify non-compliance.

Significant elements of the 'informal' information-driven Type I approach, exploited by the ART before the Regulation came into force, persisted nonetheless. Soon after the decree's adoption, information exchanges still occurred without applying formal provisions. The ART met the Bravo working group to launch the planned second test phase, in four more sites, comprising twelve more operators<sup>1264</sup>. The importance of informal exchanges continued since, besides creating an internal LLU unit following developments from November, the ART issued guidelines, or 'recommendations'<sup>1265</sup>.

'Recommendations' were more than suggestive. F-T was to respect these non-legally binding guidelines changeable whenever necessary<sup>1266</sup>. The guidelines delineated expectations on many entry-related operational issues, including redress measures, showing how the regulator alternated formal and informal instruments. The essential general information to be provided, such as physical co-location space availability, was separated from detailed information on end-user service provision. 'Recommendations' included that

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<sup>1259</sup> ART 12/9/00

<sup>1260</sup> ART 21/7/00, pp.7-9

<sup>1261</sup> Henni,J 13/9/00 "Le décret autorisant le dégroupage doit paraître aujourd'hui", Les Echos

<sup>1262</sup> *ibid*; also ch.3

<sup>1263</sup> Le Figaro 13/9/00, "Dégroupage: dialogue difficile entre France Télécom et ses concurrents"

<sup>1264</sup> ART 29/9/00, "Après la publication du décret, l'Autorité réunit le groupe de travail "dégroupage" et lance une 2<sup>e</sup> phase d'expérimentations"

<sup>1265</sup> ART 30/10/00(1), "Recommandations de l'Autorité de régulation des télécommunications relatives à la définition des prestations d'accès à la boucle locale et à sa mise en oeuvre opérationnelle"

<sup>1266</sup> ART 30/10/00(2), "L'Autorité édicte des Recommandations pour la mise en oeuvre de la boucle locale"

F-T supply detailed line information, with entrants assessing whether they could offer DSL without placing definite orders.

The ART continued jeopardising F-T's predominance vis-à-vis rivals<sup>1267</sup>. F-T had to create and transfer new lines where unbundled ones were unavailable, or justify service refusals only allowed in extreme cases. Service timescales, such as eight days for line-transfers to entrants, were set without relevant powers. The regulator confirmed its informal ties with entrants, acknowledging that various participants except F-T wanted the 'guidelines'.

The significance of this informal instrument was considerable since the decree's requirement that F-T unbundle applied from start-2001, consistent with the EU Regulation. Yet, the ART set non-statutory 'recommendations' before knowing whether the EU Regulation would be adopted. The ART referred to the proposed EU Regulation's provision 'requiring' that the reference offer was sufficiently itemised, which allowed entrants' to avoid unnecessary services.

F-T's 2001 12.1% capital remuneration rate<sup>1268</sup>, cost-items due in the reference offer such as unbundled access and co-location costs, and applicable cost-oriented calculations were set formally<sup>1269</sup>. However, with F-T's reference offer due by 1<sup>st</sup> December and no indications of negotiations, the ART chose a method resembling F-T's "for reasons of pragmatism and efficiency"<sup>1270</sup>. Charges could not be derived from costs without making other hypotheses<sup>1271</sup>. A top-down model reflecting F-T's existing network architecture was adopted<sup>1272</sup>, and originally rejected 'replacement costs' were partly included<sup>1273</sup>, highlighting the complexity of regulating the incumbent's unique 'physical' and informational resources with formal powers.

Detailed non-binding guidelines on cost-information expected of F-T were established. Corresponding international reference offers and evidence of estimates and invoices of

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<sup>1267</sup> see ch.1; Nordlinger

<sup>1268</sup> This considered entrants' average cost if undertaking F-T's activities, comprising average interconnection costs, considered comparable to LLU. ART "Décision n°00-1067 de l'Autorité de régulation des télécommunications en date du 11 octobre 2000 fixant le taux de rémunération du capital pour l'année 2001 prévu par l'article D.99-24 du code des postes et télécommunications"

<sup>1269</sup> ART 31/10/00(1), "Décision n°00-1171 de l'Autorité de régulation des télécommunications en date du 31 octobre 2000 établie en application de l'article D.99-24 du code des postes et télécommunications"

<sup>1270</sup> ART 31/10/00(1),s.IV

<sup>1271</sup> *ibid* s.II-1

<sup>1272</sup> The EC recommended jointly applying top-down and bottom-up modelling to avoid that the bottom-up approach's efficiency principle, because of its lesser dependence on the incumbent's choices, was lost (s.I-2)

<sup>1273</sup> ART 31/10/00(1), Annex II-III(English version)



costs supporting its cost-modelling, would help verify cost-orientation. A certifying authority could be sought<sup>1274</sup>. Thus, after expanding its statutory authority, key ART resources remained internal analysis, entrants' operational indications and bilateral exchanges with F-T to examine and price access, identifying costs that only F-T knew precisely.

F-T's first, late-November, line-rental offer at 17euros per month compared unfavourably with the approximately 13euros in other EU states<sup>1275</sup> - the highest charge in Europe<sup>1276</sup>. Notwithstanding his initial divergence with the ART on LLU, during France's presidency of the EU, Minister Pierret, who ignored the analytical complexities the regulator faced, reacted publicly. Pierret stressed that broadband constituted a Government priority, expressing dissatisfaction with terms and prices. Pierret wanted F-T's offer to mirror EU partners', and pressured it to approach the ART to review conditions allowing "less onerous development of broadband for all"<sup>1277</sup>.

Yet, F-T continued obstructing unbundling after EU Governments adopted the Regulation in December 2000<sup>1278</sup>. Following entrants' requests for sanctions<sup>1279</sup>, F-T was ordered to provide operational information that had been withheld. The ART sought to avoid the US experience as entrants possessed no information on co-location space availability. Still, its new formal resources, at best, complemented non-formal ones<sup>1280</sup>, without resolving all entry-related issues. As the ART worked towards a reasonable reference offer, achieved in July 2001, statutory authority was exercised to deter F-T's persistent obstruction. This section has thus shown that, to introduce LLU in France despite no relevant powers, the regulator exposed F-T as a policy obstacle and especially exploited supranational ties to construct a formal framework, whilst developing forceful implementation terms informally. F-T exploited its key resources to delay entry, requiring deterrent measures.

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<sup>1274</sup> ART 31/10/00(2), "Décision n°00-1176 de l'Autorité de régulation des télécommunications en date du 31 octobre 2000 adoptant des lignes directrices relatives à la vérification de l'orientation des tarifs vers les coûts dans le cadre de l'accès à la boucle locale", Annex

<sup>1275</sup> Collen, V 24/11/00, "Dégrouper: bras de fer entre le gouvernement et France Télécom" Les Echos

<sup>1276</sup> Henni, J V 2/1/01, "Le réseau local de France Télécom ouvert à la concurrence" Les Echos

<sup>1277</sup> Ministère de l'industrie 23/11/00 "Offre de référence de France Télécom pour le dégroupage de la boucle locale"

<sup>1278</sup> EC 2887/2000, 18/12/00

<sup>1279</sup> ART "Décision n°00-1326 en date du 14 décembre 2000 de l'Autorité de régulation des télécommunications portant mise en demeure de France Télécom, en application de l'article L.36-11 du code des postes et télécommunications, de se conformer aux obligations de l'avant dernier alinéa de l'article D.99-23 du code des postes et télécommunications"

<sup>1280</sup> It issued non-binding shared access 'guidelines'; 22/12/00 "Recommandations de l'Autorité de régulation des télécommunications relatives à la définition des prestations d'accès partagé à la boucle locale et à sa mise en oeuvre opérationnelle"

## V. Time-length of decision-making

The ART conducted LLU policy in France resisted by F-T and elected officials, including a key Government Minister initially. It did so by means other than formal powers, which were only acquired late in the process. Before the decree, the regulator lacked powers to expedite policy and work towards the end-2000 EU deadline. Despite no powers to impose LLU, the ART achieved a framework within one-year-and-a-half of its consultation, a similar time-period to Oftel, which had wider powers from the outset. Thus, the ART produced a framework relatively quickly without powers.

Yet, with Government support missing, as F-T hindered progress after the decree, four formal revisions were required to establish a workable reference offer notwithstanding the extensive Art.4 Regulation “power to impose changes”. Policy development took well over two years before the ART deemed a F-T reference offer reasonable. This section shows that, once acquired, the ART applied available powers to expedite LLU implementation but faced forced delays, consistent with Type I autonomy.

In licence enforcement terms, the 1996 Telecoms law specified that for licence breaches the regulator could serve formal notices, ordering parties to take remedial action by a deadline it decided, as with F-T for not providing entrants with required information in December 2000. However, before the decree, the ART lacked the powers to set the LLU policy-making pace. It pursued its preference with considerable momentum nonetheless.

When the ART indicated the plan in its mid-1998 annual report, one-year-and-a-half years since its inception, the timing of the proposal surprised Minister Pierret and his aides<sup>1281</sup>. Yet, within three months, the ART asked the CCRST to explore LLU. By April 1999, it hastened the process by taking over policy development and launching its only consultation, despite the Government’s and F-T’s divergence.

Having launched a consultation, which was not within its formal powers, the ART published a summary of responses directing policy within seven months notwithstanding no powers to determine timeframes. In comparison, Oftel’s two ‘informal’ consultations spanned eleven months (December 1998-November 1999), in addition to the March 2000 statutory consultation. Thus, despite narrower powers, the ART took less time to construct

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<sup>1281</sup> Gadault 6/7/98

a similar policy to its UK counterpart. Both left significant operational work until after frameworks were finalised.

Without formal authority to expedite policy, and indeed facing divergence from elected officials with powers, the ART took seventeen months from the consultation launch to the September 2000 decree. Oftel took the same time to insert the condition in BT's licence. Yet, Oftel had the faster option, resonating with Type I autonomy, of seeking licence amendment without consent, granting interested parties no more than the required 28 days for views.

Accordingly, the ART tried advancing LLU policy before obtaining relevant powers. The ART's seventeen-month period included the four-and-a-half-months forced delay between Pierret's end-April 2000 bill withdrawal and the decree. Within two weeks, the ART launched a second test phase and instructed F-T to publish a reference offer by 1<sup>st</sup> December 2000 at the latest. This tight timescale aimed at expediting entry and competitive ADSL provision led to the difficult compromise of accepting F-T's top-down model for cost-calculation of 2001 LLU charges<sup>1282</sup>. Therefore the ART proceeded steadfastly after the decree.

The regulator hastily applied its new powers from December 2000 onwards as the EU Regulation was passed. Following the December 2000 order requiring information, and written exchanges<sup>1283</sup>, between February and June 2001 the regulator formally required F-T to revise its offer four times, specifying operational and pricing requirements. Orders to comply within set deadlines were issued, and a sanctions procedure initiated, although not seen through. Jean-Michel Hubert deemed statutory threats useful to speed-up implementation<sup>1284</sup>.

First, in February 2001, F-T was asked to take action over several issues in the October 2000 'informal' operational guidelines, thus formalising 'recommendations'. The ART had established that general network information would be provided within seven days of requests. Requirements comprised providing new lines within eight days of requests, purposely-created where necessary. Delays would be fined.

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<sup>1282</sup> ART 31/10/00(1)

<sup>1283</sup> ART "Décision n°01-135 de l'Autorité de régulation des télécommunications en date du 8 février 2001 demandant à France Télécom d'apporter des modifications à son offre de référence pour l'accès à la boucle locale"

<sup>1284</sup> Interview: Hubert

LLU required huge investments, operators were highly indebted and financial markets dried up<sup>1285</sup>. So, since F-T had included unauthorised costs, the ART also imposed significant charge cuts, including monthly rental for unbundled lines (15%) and for shared access (33%).

Thus, terms were specified to stop F-T from making entry conditions unattractive. It had two weeks to publish a compliant offer. On the same day F-T published a new reference offer, 23<sup>rd</sup> February, the ART announced that its relevant analysis would be forthcoming. The regulator stated at the same time that the offer did not comply with several aspects of the 8<sup>th</sup> February decision, which F-T had appealed against<sup>1286</sup>. Within ten days, all but one appeal claims were rejected<sup>1287</sup>.

Otherwise, F-T's February offer ignored requirements despite communications to External Relations Director Marc Fossier. A sanctions procedure requiring a compliant offer within nine days was initiated in April<sup>1288</sup>. The ART requested price modifications to the 23 February offer too, avoiding excess charging<sup>1289</sup>. Some charges had to be eliminated, some had to be revised within nine days. Three weeks later, the ART endorsed AFOPT and AOST allegations that co-location requests were not processed as required, ordering F-T to deal with requests in non-discriminatory terms within two weeks<sup>1290</sup>.

Therefore, the ART unmasked the limitations of statutory intervention as it used formal measures to hasten entry except fines. F-T's network helped postpone implementation, alleged breaches had to be verified. F-T claimed that around 27% sites in the twenty largest urban areas could not be opened to physical co-location, whilst installing its equipment

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<sup>1285</sup> Girard, L 2/1/01, "Faux départ pour la concurrence totale dans les télécommunications" Le Monde

<sup>1286</sup> ART 23/2/01, "L'ART va examiner dans les plus brefs délais le recours gracieux déposé par France Télécom à propos de sa nouvelle offre de référence"

<sup>1287</sup> ART 2/3/01, "L'Autorité se prononce sur le recours gracieux de France Télécom". F-T then appealed to the Conseil d'Etat; Renault, CM 3/3/01, "Dégrouper: France Télécom saisit le Conseil d'Etat" Le Figaro; Les Echos 5/3/01, "Dégrouper: France Télécom saisit le Conseil d'Etat contre l'ART"

<sup>1288</sup> ART "Décision n°01-354 de l'Autorité de régulation des télécommunications en date du 4 avril 2001 portant mise en demeure de France Télécom en application de l'article L.36-11 du code des postes et télécommunications de se conformer à certaines dispositions de la décision n°01-135 de l'Autorité en date du 8 février 2001 demandant à France Télécom d'apporter des modifications à son offre de référence pour l'accès à la boucle locale"

<sup>1289</sup> ART "Décision n°01-355 de l'Autorité de régulation des télécommunications en date du 4 avril 2001 demandant à France Télécom d'apporter des modifications à son offre de référence pour l'accès à la boucle locale"

<sup>1290</sup> ART "Décision n°01-377 en date du 26 avril 2001 de l'Autorité de régulation des télécommunications portant mise en demeure de France Télécom, en application de l'article L.36-11 du code des postes et télécommunications, de se conformer aux obligations de l'avant dernier alinéa de l'article D.99-23 du code des postes et télécommunications"

therein. So, by the end of April, F-T had installed equipment in over 500 sites and planned over 1,400 sites by end-2001.

By the end of January 2001, entrants had still not received feasibility studies for intended orders, which preceded signing contractual agreements, made in October 2000<sup>1291</sup>. By end-March, 468 feasibility studies had been ordered and 78 firm orders placed by operators for 33 Paris sites. Yet equipment could not be installed before August at thirty of them. The eight-week estimate period was respected very inconsistently.

So, by administering access to its key 'physical' asset and relevant information, F-T controlled entry timescales. To facilitate the process, the ART asked F-T to send estimates of available sites within two weeks, hastening it where possible. F-T was told to deal with entrants' co-location requests as though it handled its own needs; "by installing their equipment in existing F-T rooms"<sup>1292</sup>. Since neither the EU Regulation nor the decree set out either way, F-T had to stop separating its equipment from that of entrants. Without explicitly mentioning 'co-mingling'<sup>1293</sup>, which could cut installation times significantly, the ART dismissed F-T's network security arguments. Existing badge-entry arrangements sufficed.

In April, F-T published a revised offer, but more operational obstruction emerged<sup>1294</sup>. ART terms were not respected so a fourth order to comply was issued in June<sup>1295</sup>. F-T endangered the range and number of entrants, hence innovation, and the ART ordered the removal of constraints. F-T did not commit to eight-day provision, nor respected the four-month co-location works timescale. The ART ordered F-T to comply by 20 June, but the reference offer was delayed until 16 July<sup>1296</sup>.

Thus, aside from exercising powers available before the decree, the regulator repeatedly used its acquired formal authority to ensure entry as rapidly as possible. While creating a framework comparatively fast without powers, the ART's additional powers did not avoid

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<sup>1291</sup> ART 26/4/01, pp.3,8 (English version)

<sup>1292</sup> *ibid.*p.7

<sup>1293</sup> see ch.6

<sup>1294</sup> ART "Décision n°01-521 de l'Autorité de régulation des télécommunications en date du 6 juin 2001 portant mise en demeure de France Télécom en application de l'article L.36-11 du code des postes et télécommunications de se conformer à certaines dispositions de la décision n°01-135 de l'Autorité en date du 8 février 2001 demandant à France Télécom d'apporter des modifications à son offre de référence pour l'accès à la boucle locale"

<sup>1295</sup> Les Echos 13/6/01, "Dégroupage: France Télécom mis en demeure pour la quatrième fois"

<sup>1296</sup> EC 28/11/01, pp.20-1

F-T's significant delays, provoked through its unique structural and informational access to its 'physical' network asset, to postpone competition.

## VI. Outcomes

ART decisions thus led to a reference offer by mid-2001, creating the conditions for entrants to start competing on the local loop despite continuing operational obstacles. F-T claims that it would deliver necessary infrastructure by end-June and that by late-July seven operators would have access to 900,000 subscribers<sup>1297</sup>, contrasted with 600 available trial lines in July 2001<sup>1298</sup>. Nonetheless, trials proceeded. Jean-Michel Hubert warned that co-location should not just focus on Paris, but indicated that considerable co-location was occurring in the French capital<sup>1299</sup>. Hubert depicted the uncompromising Type I autonomy resolve, defining discussions with F-T as "rough, privileging pragmatism and market efficacy"<sup>1300</sup>.

The frustration of major entrants, such as Cegetel<sup>1301</sup>, mirrored F-T's unaltered preference of hindering implementation, even blaming ART decision-making for complaints about high charges<sup>1302</sup>. Difficult entry terms, and unfavourable financial conditions, saw approximately forty entrants involved in tests and expressing firm interest in 2000 fall to nine in mid-2001<sup>1303</sup>. While Minister Pierret advocated further action facilitating competition, five operators, including UK-based Colt and Easynet, signed an agreement with F-T<sup>1304</sup>. Jean-Michel Hubert rejected criticism stressing that the ART launched policy debate, that implementation was proceeding albeit slowly, that it had been the first regulator to revise reference offers and that despite dissatisfaction France was not far behind EU partners<sup>1305</sup>.

In fact, the EC's November 2001 7<sup>th</sup> Implementation Report was relatively critical of ART decision-making. With 20 fully unbundled lines by end-October<sup>1306</sup>, it questioned the

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<sup>1297</sup> La Tribune 21/6/01, "France Télécom se defend de retarder le dégroupage"

<sup>1298</sup> EC 28/11/01, Annex2 p.72

<sup>1299</sup> ART 24/8/01, "22ème Université d'été de la Communication"

<sup>1300</sup> ART 3/9/01, "Des avancées tout à fait réelles sur le dégroupage"

<sup>1301</sup> Les Echos 28/9/01, "Cegetel prêt à annoncer son retrait du dégroupage"

<sup>1302</sup> Renault,MC, 23/10/01, "Les principaux points d'affrontement" Le Figaro

<sup>1303</sup> EC 28/11/01, Annex3 p.187

<sup>1304</sup> Renault,MC 23/10/01, "Dégroupage: les opérateurs privés divisés" Le Figaro

<sup>1305</sup> Les Echos 31/10/01, "Des possibilités de partage de réseau existent dans l'UMTS"

<sup>1306</sup> EC 28/11/01, p.21

effectiveness of ART involvement in 2001, “in the absence of clear and effective sanction procedures”<sup>1307</sup>. The ART’s ‘considerable efforts’, and quick action, were acknowledged but entrants’ unhappiness with tariffs and implementation problems inhibiting competition was raised. Notably, LLU charges created a price squeeze, with contractual conditions not in the reference offer, such as insurance risk levels, also impacting cost-wise. Meanwhile, F-T benefited from its first-mover advantage in retail ADSL provision, resisting changes to wholesale charges. By late-2001, eight operators had signed agreements. Their co-location requests equated to 1% of switches, more than twice of those operational for LLU<sup>1308</sup>, allowing testing and installation at 83 co-location sites, covering 16% of all French fixed lines<sup>1309</sup>.

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<sup>1307</sup> EC 28/11/01, Annex3, p.187

<sup>1308</sup> EC 28/11/01, Annex2, p.72

<sup>1309</sup> EC 28/11/01, Annex3, p.188

Table 11: The ART's LLU Type I autonomy

Empirical Indicators	Level 1 - Nordlinger's state level	Level 2 - Regulatory level	Level 3 - Case study - LLU France: Type I
<b>Participants and resources</b>	Range of actors but predominant societal actors hold preferences divergent from the state and obstruct its preferences	<b>At start of regulatory policy, key resources to exert influence held by few actors</b> with divergent preferences (dissimilar from regulator)	<b>Key resources held by a group of affiliated actors, thus influence concentrated:</b> - incumbent (F-T) dominant in 'local access', ties to senior politicians; majority state-owned - Minister key licensing powers; Government special ties with F-T given majority state-control - MPs could publicly question agency policymaking - ART largely advisory but had enforcement and dispute resolution powers - EU institutions' authority mainly from supranational powers - 'new (private) entrants', some expertise, low influence
<b>Preferences</b>	<b>Predominantly divergence</b> , similar preferences in the background	<b>Preferences of influential participants differ from agency proposals.</b> At start <b>only influential divergent preferences</b> ; insufficient influential support to shift preferences	<b>Agency to pursue preference at expense of influential actors:</b> ART wanted local access <b>competition</b> via LLU, for broadband. <b>F-T anti-LLU</b> to advance its ADSL position. <b>Government relied on F-T</b> for its <b>Information Society</b> preference: initially <b>contrary to scope of LLU</b> . New entrants strongly pro-LLU. <b>EC support for LLU</b> clear at later stage
<b>Process</b>	State translates preferences into authoritative action when state-society are divergent by: (i) <b>counterbalancing-offsetting</b> ; (ii) <b>obstruction</b> ; (iii) <b>confrontation-disincentive</b>	To diminish the constraining effects of influential actors with divergent preferences: agency alternates <b>informal with formal approach, deploying either to enact its preferences.</b> Acting on preferences by: (i) identifying and <b>widely exposing obstacles to direct policy as preferred</b> ; (ii) <b>exploiting ties to construct a framework, against divergent preferences</b> ; (iii) <b>deterrence to address non-compliance</b>	<b>Agency acts hierarchically, imposing preference on opponents: no power to introduce</b> but formally requested 'expert' commission's views. Launched consultation, not in law. <b>Channelled LLU adoption against influential opponents:</b> F-T; Government initially supporting F-T; <b>left-wing MPs who obstructed LLU bill.</b> ART <b>set-up implementation working groups</b> ; chaired key ones. Bypassed national formal constraints; <b>exchanges with EC, shaped EU Regulation.</b> Government forced to apply by start-2001, unity with F-T fractured. With <b>decree</b> , ART defined terms
<b>Time-length of decision-making</b>	Public policy undertaken accepting that state and societal preferences are divergent	<b>Available timescale powers applied; delays forced</b>	<b>Lengthy process</b> given <b>no powers to expedite</b> until decree. Then provisions applied; tight deadline application at expense of competition too. <b>4 reference offer reviews required.</b> F-T <b>slowed process</b> given <b>network advantage</b>
<b>Outcomes</b>	State preferences translated into public policy without a shift in those of divergent actors	<b>Preference fulfilled without intention to compromise</b>	<b>ART preference fulfilled against preference of F-T, despite repeated obstruction</b> forcing significant delays



## VII. Conclusions

The chapter has examined the ART's LLU policy in France, providing a Type I regulatory autonomy case. It clearly challenges the association between agency independence and formal institutional arrangements establishing the statutory powers and instruments delegated to regulators, but does so differently from the previous three sub-cases.

Initially key resources were concentrated among few actors. Introducing unbundling entailed providing market entrants with access to the unique national local access network of France Télécom, the key 'physical' asset, which policy centred on. Furthermore, new Government legislation was necessary to create a national framework and as the majority state-owned incumbent operator, F-T had strong ties with 'other state' actors, comprising especially vocal left-wing MPs. F-T and senior elected officials thus held key resources. The ART neither possessed the formal authority to impose access to F-T's local network nor to instruct senior elected officials to provide it with the necessary statutory instruments. Its policy role was mainly advisory.

When the regulator first revealed its local loop competition preference, which was not prioritised or indeed prescribed among its formal objectives, it faced opposition from the actor with the asset which unbundling centred on and by 'other state' actors with the formal authority to force the policy. The only convergence was from 'non-state' entrants lacking both F-T's network capabilities and formal authority. Thus, to introduce LLU, the ART had to overcome actors who held key statutory resources, including the Telecoms Minister and Government coalition members, and those with key non-statutory resources, notably F-T's local access network reaching end-users across France.

The regulator did not negotiate and shift the preferences of the influential divergent actors nonetheless. Instead, it developed policy through expertise and ties with convergent actors, without exploiting formally-allocated budgetary resources in the process. After raising the issue with Government and Parliament in its first annual report, the ART first collected 'expert' CCRST recommendations on LLU, then launched policy discussions on the scope of local access competition via consultation, an instrument not set out in formal arrangements. It publicly divulged information that broadened debate on policy options, negatively depicting F-T as a lasting obstacle to competition in the emerging ADSL market increasingly important in the EU and beyond. Regulatory action harnessing entrants actively campaigning for unbundling, notably through media, pressured the Telecoms Minister who suddenly accepted to discuss legislation.

Still without formal powers, the agency pre-empted the formal framework, setting up an unbundling working group. Informed exchanges over operational, technical and pricing terms were developed with industry, including divergent F-T possessing exclusive knowledge about its facilities. The expertise accrued domestically and additional insight obtained from its US counterpart allowed the ART to exploit fully and decisively ties and exchanges with the European Commission, which became involved in early-2000.

The ART actively shaped the non-binding Recommendation to create supranational terms before the French Government withdrew its April 2000 unbundling bill under left-wing coalition members' pressure. Prospects of a binding EU Regulation led the Government holding the EU Presidency to pass a decree defining the national unbundling framework nonetheless, regardless of domestic party positions. The decree included significant powers for the ART. The adoption of the supranational Regulation, requiring LLU implementation by end-2000, followed.

Thereafter, with elected officials uninformed implementation-wise, the ART recurrently applied its authority uncompromisingly, mostly 'going by the book' to address F-T's persistently non-compliant reference offers. However, the regulator's use of its newly-acquired powers did not per se diminish the centrality of accessing F-T's network and related information, essential for entrants to compete. With its initial preference unchanged, F-T exploited network ownership extensively, delaying procedures, hence, obstructing local loop competition, while advancing its ADSL first-mover advantage. The ART repeatedly and hastily found in favour of entrants but never fined the incumbent despite available powers, and only after mid-2001 saw entrants sign agreements and install equipment in order to exploit the few unbundled lines available.

The chapter therefore indicates how the regulator's preference was hindered by actors with wider formal resources but especially by F-T, an actor which, through its non-statutory resources, influenced policy development decisively. Just as F-T succeeded in delaying LLU adoption through convergence with influential MPs and access to policy-shaping network information, the ART overcame the shortage of formal powers through policy expertise and ties with convergent entrants, and fellow regulatory bodies in the US and, more importantly, in Europe to obtain a framework. The ART succeeded in furthering its preference, acquiring formal resources despite divergence in the process.

Indeed, consistent with Type I autonomy (see Table 11 above), this chapter highlights the importance of informal ties with bodies that can exercise authority, or shape it, beyond

national boundaries, further challenging the argument that national formal institutional arrangements determine agency independence. In this case, ties with a supranational regulatory body, the European Commission, which itself lacked formal authority to impose unbundling nationally, proved a fundamental resource for the French regulator to construct a framework and pursue its preference despite opposition domestically. The value of the powers the ART obtained was nevertheless inhibited by the preference of the incumbent operator controlling the central non-statutory policy resource, its national local access network making the national supply of ADSL broadband easiest.

## **Chapter 8: Conclusions**

### **I. Introduction**

This thesis has examined the independence of regulatory agencies in practice and particularly the extent to which it reflects formal independence, by assessing the regulation of telecommunications across two countries based on two similar policies. It has indicated how Oftel and the ART developed 3G and local loop unbundling regulatory policies despite different national formal institutional arrangements. To do so, Nordlinger's preference-based approach to state autonomy has been developed and refined, in that, while he focusses primarily on 'strategies' used in the face of different preference-scenarios, here the resources used by regulators to further these 'strategies' have been looked at.

The research has shown the centrality of actor preferences in regulatory policy-making compared to formal institutional arrangements. With respect to the research question in particular, findings have demonstrated that different national formal institutions, defining agencies' statutory resources, alone do not determine independence in practice. All sub-cases have shown that select non-statutory, informal, resources were central to regulatory agencies' pursuit of specific policy preferences.

The thesis has demonstrated how sector-specific 'physical' assets, whether controlled by the 'state' or privately and whether held by divergent or convergent actors, shaped the selected regulatory agencies' efforts to fulfill their competition policy-related preferences. Most importantly, the four sub-cases have substantiated that regulatory agencies facing divergence largely pursued their preferences through expert policy understanding and ties with key policy participants, including those possessing formal authority or shaping it through public influence and pressure. The fact that Governments, whether initially convergent or divergent, used retained statutory authority consistent with agency preferences further substantiates that formal independence is a highly unsatisfactory explanatory tool to measure independence in practice.

Variation in the regulators' processes to fulfill respective preferences has been revealed. In three sub-cases, regulators worked to shift divergent preferences, in the fourth, the regulator developed policy despite key actors' preference divergence and notwithstanding insufficient statutory authority. Thus, while the thesis has shown that the French and UK regulators showed dissimilar types of autonomy on one policy (LLU), it has crucially shown

too that, despite dissimilar formal institutional arrangements, the two regulators demonstrated the same type of autonomy on another policy (3G). France's ART demonstrated different types of autonomy to develop the two national policies, notwithstanding the same set of formal resources to fulfill its preferences.

This chapter firstly reviews, in brief, how the research question was answered, challenging primarily the formal institutionalist approaches by testing the new analytical preference-based framework developed in this thesis. The chapter goes on to provide a summary of the findings from the four sub-cases, in order to draw wider theoretical implications.

## II. Theoretical Approach and Research Question Restated

Given the emergence of independent regulatory agencies as part of the 'regulatory state' Majone describes, it has been argued that "a detailed operationalisation of agency independence...is very much needed because, so far, we have had only a blurred understanding of what independence means"<sup>1310</sup>. Formal institutionalist scholars have nonetheless focussed on the extent of delegation of authority undertaken by elected officials, with only some differences in indicators<sup>1311</sup>. Their approach to 'measure' independence, sometimes applied comparatively, has been to examine controls or veto powers retained over regulators by elected officials, and powers allocated to agencies for internal organisation purposes and for policy-making. Formal institutionalists limit their analysis by concentrating on static statutory arrangements, without investigating the deployment of formal agency resources in practice, the existence of other non-statutory policy resources and of outcomes<sup>1312</sup>. Thus, their approach overlooks influential regulatees, and does not allow for the unveiling of any regulatory 'capture'.

This thesis has argued accordingly that a new approach to study agency independence and what shapes it in practice is necessary. One not associated with the regulation literature has been refined and applied. Nordlinger has claimed that the state is 'autonomous' from 'societal actors' when it achieves its preferences through a range of strategies and options, including largely unspecified "capacities" and "resources"<sup>1313</sup> not exclusively tied with formal authority. He has suggested that the state can demonstrate three different types of

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<sup>1310</sup> Gilardi 2002,p.874

<sup>1311</sup> Gilardi 2002,p.880; 2005,pp.145-9; Edwards and Waverman 2006,pp.25,28,37,41,42

<sup>1312</sup> Edwards and Waverman 2006 is a partial exception

<sup>1313</sup> Nordlinger 1981,pp.100,122,129

autonomy. Type III autonomy arises when state preferences are achieved when the “best endowed private actors” are non-divergent, allowing “public officials...to act as they see fit”, since the state faces no opposition<sup>1314</sup>. When opposition to a policy is encountered, the state can either resolve to shift the preferences of divergent actors (Type II), or act authoritatively contrary to the divergent preferences of “best endowed actors who predominate” (Type I)<sup>1315</sup>.

To ascertain regulatory agency independence, the thesis has thus developed and then applied a suitably adapted version of Nordlinger’s approach, examining whether regulators achieve their policy preferences. One particularly valuable aspect of the approach compared to that of formal institutionalists is that Nordlinger acknowledges the variation in types of autonomy. When the state has a policy preference, other actors may be convergent or divergent. Accordingly, to fulfill its preferences, the state may work to maintain convergence, shift divergent preferences, or take action notwithstanding divergence. The implication of a ‘state’ actor showing different types of autonomy is that policy-making cannot be put down to a single explanatory variable. The approach entails integrating key dynamic factors such as preferences and ‘strategies’ to explore policy outcomes, rather than solely measuring agencies’ formal independence.

Nordlinger’s useful initial template was nonetheless shown to be incomplete to ‘operationalise’ and assess regulators’ ability to pursue specific policy preferences successfully over a continuum. A new tailored framework based on five indicators removing incongruities with the state-society dichotomy has been created from his analytical foundations, and then systematically applied. Firstly each sub-case has identified policy-specific participants precisely because, unlike Nordlinger’s unitary state, sectoral regulators can incur divergence from ‘other state’ actors as well as from ‘private’ actors. Nordlinger refers to “best endowed” actors that “predominate”. However, with the state as his focus, the terms only relate to “societal” or “private” actors, excluding ‘other state’ actors potentially objecting to agency preferences.

Identifying actors and the resources possessed to influence policy via the sub-cases has been shown to be essential given the wider range of potential participants at the regulatory level than at the state level; whether in the ‘state’ or ‘non-state’ domains. ‘State’ and ‘non-state’ actors interested in aspects of a policy but without deployable resources do not have

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<sup>1314</sup> *ibid.* pp.74,77

<sup>1315</sup> *ibid.* p.118

the ability to see their preferences through. Indeed, the statutory controls that ‘state’ actors possess over the agency are the ‘resources’ that make formal institutionalists examine agency independence from Government or other senior elected officials. Similarly ‘capture’ theorists assert that regulatory policy is influenced decisively by non-statutory resources of powerful industry actors<sup>1316</sup>, as have others in more nuanced ways<sup>1317</sup>.

By discussing distinct sets of actors with resources enabling them to oppose agencies successfully, both theories question, more or less subtly, the ability of regulators to conduct policy in pursuit of their own preferences. Thus the emphasis in the thesis has been on actors possessing formal powers, but the sub-case analysis identified all relevant policy resources to examine their impact. Policy participants and, even more interestingly, their specific resources constitute an invaluable indicator omitted by Nordlinger, but which have been included in this thesis.

Subsequently, preferences guiding what use participants intended to make of available resources were identified in each sub-case. Well-resourced actors without specific policy preferences will not exercise their potential influence unless they are given a reason to do so. Thus, besides revealing how, indeed whether, statutory objectives guide regulatory policy, preferences informed whether the type of autonomy was of a non-divergent nature (Type III) or of a divergent one (Type II or Type I). Preferences, which are central to Nordlinger’s approach, determine whether a regulator has full support on a given issue or whether it faces some opposition.

When preference divergence occurs, which policy participant opposes the regulator becomes clear. Having already identified policy participants and their resources, sub-case preferences indicated the distribution of key resources between convergent and divergent actors, including the statutory powers that are emphasised by formal institutionalists. Preferences of differently resourced actors determined the significance of support and opposition that regulators faced when pursuing their preferences.

Upon examining what purposes participants wanted to deploy their resources for, the individual sub-cases sought to indicate whether formal resources were or were not determinant in practice within each policy’s ‘regulatory space’. Developing the ‘process’ indicator has required refining the multiple and occasionally overlapping ‘strategies’

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<sup>1316</sup> Stigler 1971; Peltzman 1989

<sup>1317</sup> Bernstein 1955

suggested by Nordlinger. The prime objective of examining regulatory agencies' processes has been to establish whether formal resources possessed by elected officials were deployed in policy-making. In particular, this thesis has examined whether these statutory resources were used to stop agencies from achieving their preferences, or whether agencies holding significant statutory authority applied their formal powers to pursue their preferences. Conversely, examining processes helped to explain how agencies without significant formal resources pursued their preferences, particularly in the case of divergence.

The significance of formal authority, or lack of it, has been unpicked systematically, in order to analyse the impact of non-statutory resources to emerge during policy processes. Verifying the time-length of regulators' decision-making complements the process indicator. It substantiates whether agencies took time to fulfill their preferences, in an attempt to persuade other participants consistent with Type II autonomy, or acted hastily given the disinterest for dialogue with divergent actors reflecting Type I.

Gilardi has claimed that regulators "do not suffer from the short time-horizons imposed by the democratic process"<sup>1318</sup> on elected officials. The cases have assessed whether, once regulators revealed their preferences, they applied available formal timescale powers to expedite policy or not and, if they had none, whether they tried and managed to hasten policy development nonetheless. Outcomes have indicated that regulators may accept compromises or make concessions to adopt selected policies. Where this was the case, it has been stated whether this was largely voluntary or forced, and if such decisions were determined by the formal institutional arrangements in place.

### III. The Selected Case-Study

The regulation of telecoms in France and the UK was the case study selected to analyse regulatory agency independence in practice in two comparable countries with different sectoral institutional arrangements. A considerable body of scholarly work has explored telecoms liberalisation and regulation in France and the UK during the past decade<sup>1319</sup>, including analyses of formal independence<sup>1320</sup>. Part of the explanation is a long history of direct government involvement in the industry, as the origins of both telegraph and

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<sup>1318</sup> Gilardi 2002,p.876

<sup>1319</sup> Hulsink 1999; Thatcher 1999, Hood et al 2000, Coen et al 2002; Daßler and Parker 2004

<sup>1320</sup> Gilardi 2002,2005; Edwards and Waverman 2006



telephone networks were tied up with the state in most countries<sup>1321</sup>. Thus, with specific research on agency independence in practice neglected, telecoms provided a good case to further the study of sectoral regulation of an industry of economic and 'strategic' importance raising significant interest.

Accordingly, the licensing of third generation mobile telephony (3G) and the unbundling of incumbent network operators' local loop (LLU) constituted especially valuable sub-cases to study regulatory agency independence through the preference-based framework explained. Firstly, the two policies were salient at the time and, by relating to the rapidly increasing demand for and usage of new multimedia services, and hence the importance of digital information and communication technologies (ICTs) providing high-speed broadband internet, remain highly topical. The policy impact of fast electronic communications has extended beyond sectoral boundaries over time, especially to financial services markets<sup>1322</sup>; perhaps an interesting topic of research in regulation in relation to the 2007-09 global financial crisis. Indeed, large banking institutions showed interest in Oftel's unbundling consultation at the time<sup>1323</sup>. Secondly, these novel markets constituted directly relevant and applicable sub-cases as they were developed in both countries around the same time.

Thus, the broadband internet-related sub-cases made studying the independence in practice of regulatory agencies in France and the UK interesting and comparable. Both countries' Governments subscribed to the EU's Lisbon Strategy objectives to create a 'knowledge-based economy'. The selection of similar policies was especially useful to reveal whether dissimilar formal institutional arrangements led the regulators to generate different outcomes and demonstrate different types of autonomy.

Furthermore, the two regulatory policies related to distinct segments of the heterogeneous telecoms market, thus avoiding inferring in-depth conclusions from sub-cases imbued with selection bias, or indeed constituting a unique set of events. While both sub-cases related to the development of high-bandwidth networks and services, 3G entailed the mobile transmission of advanced telecoms services, whereas LLU was intended for competitive high-speed internet provision through fixed telecoms networks of incumbent operators.

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<sup>1321</sup> Firth and Kelly 2001,p.3. Hulsink 1999; Thatcher 1999

<sup>1322</sup> Marsden 2001

<sup>1323</sup> see ch.6

The sub-cases have thus involved different participants and key resources. 3G licensing relates to the allocation of scarce spectrum by the state, whereas adopting LLU required the involvement of the dominant national industry actor for access to its local network. Accordingly, the 3G sub-case meant that senior Government officials were in charge of the key policy-defining 'physical' asset, providing a scenario in which regulators' preferences could be obstructed by authoritative Ministers through formal means. In contrast, LLU entailed that former state-monopoly incumbents, without formal powers over the regulatory agencies, controlled the central 'physical' resource shaping policy. The different sub-cases have, therefore, exposed the dynamics of how regulators pursued their preferences, and in particular the significance of their formal resources, given the varying preferences of respective participants, some of which controlled policy-shaping assets.

#### **IV. Summary of Findings and Arguments**

Based on the selected sub-cases, this thesis has shown that associating regulatory agency independence in practice with formal independence is inadequate and can be simplistic. Applying the preference-based framework developed from Nordlinger has demonstrated that formal institutional arrangements cannot be considered the determinant explanatory variable of agency independence, once independence is newly defined and understood as the regulator's ability to fulfill a set policy preference.

Despite rather different statutory resources, the UK's Oftel and the French ART did not consistently demonstrate dissimilar types of autonomy in practice. Three of the four sub-cases examined reflect preference-shifting Type II autonomy scenarios. So, the regulators showed different autonomy types for local loop unbundling. However, both agencies demonstrated Type II autonomy for 3G licensing policy, despite variation in formal independence.

The thesis has thus found that regulators' types of autonomy do not have to vary across countries even though formal arrangements<sup>1324</sup> might shape different processes and even if their powers differ. This finding contrasts with both Gilardi's independence index attributing different scores to Oftel and the ART: 0.74 and 0.65 respectively; and Edwards and Waverman's respective 0.48 and 0.54. Furthermore, the thesis has shown variation in

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<sup>1324</sup> For instance, licence modification with consent in the UK, omitted in France

one regulatory agency's types of autonomy notwithstanding the same set of formal powers. The single Type I autonomy sub-case has shown that the ART acted resolutely on unbundling despite key divergence and no relevant formal authority for a significant part of the policy. The finding that the ART exhibited the 'stronger' autonomy type for unbundling without possessing relevant statutory powers undermines Gilardi's higher score for Oftel, as well as Edwards and Waverman's low ART score.

In fact by demonstrating both Type II and Type I autonomy, the French regulator has shown that, unlike formal institutionalists suggest, agencies can achieve their preferences in different ways. It has thus been demonstrated that regulators can pursue their preferences through different processes, the two found being persuasion, and taking authoritative action even without sufficient statutory powers. It is accordingly clear that a set of other conditions and, especially, resources cause regulators to develop targeted policies.

The refining of Nordlinger's approach has revealed, case-by-case, the causal significance of factors other than the statutory authority delegated to regulatory agencies. The combination of preferences and identifiable resources has been documented. Clearly, the actors in control of the policy-defining 'physical' assets of 3G spectrum, the 'state' British and French Governments, and national local access networks eliciting LLU adoption, incumbent operators BT and F-T, were highly influential. These actors had property rights over exclusive, economically invaluable, telecoms network assets that other policy participants wanted to 'physically' access in the absence of comparable alternatives to provide market broadband internet services. Sole control of national 3G spectrum meant that late involvement did not affect the French Government's policy centrality.

The convergence and divergence of participants controlling the key physical assets heavily influenced the course followed by the selected regulators to achieve policy preferences distinctly from formal arrangements. Findings in all sub-cases have shown that for the regulators to construct their favoured policies, an expert understanding of key issues was a decisive resource. Policy expertise helped the agencies to create persuasive arguments and undertake negotiating efforts to shift divergent preferences in the three Type II sub-cases. It helped to raise, expose and forcefully address key issues, urging non-divergent actors to act against divergent ones too, in the Type I sub-case.

The sub-cases have shown that policy expertise allowed the regulators to curb information asymmetries or use them to their advantage. Ties with other participants, divergent and

non-divergent, were shown to be highly influential too, whether to exchange useful information, meet and discuss relevant issues, or engender different forms of support. Finally, the ability to influence public opinion regarding the preferences of actors controlling the key physical assets, through media or parliamentary initiatives, impacted on how policies evolved too.

#### IV.1 Summary of Arguments on Regulatory Policies in the UK

The UK telecoms regulator's preferences regarding 3G licensing and LLU related to entry measures promoting competition. The promotion of competition was only one of eight secondary formal objectives. Thus, the regulator used its discretion to prioritise competition among a range of non-primary statutory goals, and decided specifically how to carry it forward.

Pursuing market entry preferences rendered Oftel divergent with the predominant industry actors in both sub-cases. Previous research has indicated comparatively close and friendly relations between regulators and regulatees in Britain<sup>1325</sup>. Findings in this thesis clearly show that such close relations do not imply similar preferences. Indeed, besides suggesting that 'capture' was not occurring, preference divergence with key industry actors gave the regulator scope to apply available statutory powers. The four incumbent mobile operators opposed Oftel's 3G entry measures. Crucially, given its control of the central policy resource, BT opposed the competitive implications of Oftel's local loop unbundling's initiative providing entrants with access to its local network. Furthermore, while developing a policy opposed by the key industry actor, the regulator showed it was not acting as though 'captured' by new entrants expressing dissatisfaction either.

Conversely, Government officials, other MPs and, in the case of 3G policy, the Government's RA were convergent and collaborated closely with the regulator, albeit with differences in processes deployed. Previous work depicted UK regulators as the most "depoliticised" of the four largest EU economies, suggesting limited links and public distance with Government<sup>1326</sup>.

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<sup>1325</sup> Thatcher Dec.2002, p.964

<sup>1326</sup> Thatcher July 2005, p.364; Dec.2002, pp.959-60

So, while for LLU the actor controlling the policy-defining asset (BT) was divergent, making preference fulfillment difficult, in the case of 3G, the British Government, which controls spectrum, was convergent. The convergence between the British Government and Ofcom meant that, in practice, limits to the regulator's statutory powers were not of significance since Ministers overseeing the sector acted consistently with the regulator's preferences.

The sub-cases have thus substantiated that formal authority possessed by convergent actors, such as Government Ministers, and used in support of the regulator's policy preferences is as useful to an agency as if it possessed those powers. This corroborates the inadequacy of formal agency independence as a measure of independence in practice. Both sub-cases have, moreover, shown that Ofcom exploited policy expertise and informal ties with convergent and divergent actors, rather than enacting formal institutional arrangements and exercising powers, to achieve its preferences through persuasion and negotiation.

#### ***IV.1.1 Ofcom's 3G Policy and Type II Autonomy***

The sub-case about 3G policy in the UK has demonstrated that preference convergence over market entry between the regulator and the Government from the start was highly influential for the agency's ability to achieve its preferences. Convergence meant the regulator's preference was not impeded by the fact the state controlled the policy-defining spectrum, nor by ministerial powers to license spectrum, or powers to veto the regulator's modification of incumbents' licences to further new entry.

The uniqueness of 3G spectrum meant that, to gain access to it, divergent actors had to come to terms with preferences opposite to theirs. Ultimately the Government decided to license five operators, thus allowing one new operator to compete with the four established 2G operators, an option which they opposed but which the regulator strongly favoured. Meanwhile, instead of seeking to introduce the roaming measure through a formal reference to the Competition Commission, the regulator exploited expertise and ties persuasively and obtained key divergent actors' consent, displaying Type II autonomy.

In practice, the Government's spectrum agency, which had no formal authority over Ofcom, conducted 3G policy. The RA chaired meetings among 3G working group members, most

of whom industry licensees Oftel formally regulated. Yet, Oftel's officials attended all meetings and interacted with actors, including divergent ones. The RA, acting on the Government's behalf, shared the regulator's preference for promoting competition and actively supported it. At meetings, the RA circulated Oftel's policy-related documents, the Director General's statements and views. It drew attention to Oftel's related entry powers and measures providing access to 2G networks for 3G entrants, to avoid discouraging entrants from bidding for a 3G licence, months before the regulator formally consulted on a new roaming licence condition for the four incumbents.

Thus, the regulator advanced its preference through its involvement in a setting, with a Government agency and regulatees, in which it was not formally making policy. Different 3G spectrum issues beyond Oftel's statutory authority were covered, but the regulator influenced their direction nonetheless. Oftel was neither in charge of licensing under the Wireless Telegraphy and Telecoms Acts nor of spectrum issues. However, how many operators could be accommodated, hence licensed, within the available spectrum was discussed. Spectrum allocation had clear competitive implications of interest to the Government, which would license it, as well as to Oftel. Relevant expertise was deployed to define the maximum number of licences that could be auctioned. The RA's external consultants on technical issues found that five licences could be feasibly fitted<sup>1327</sup>.

Nevertheless, the RA substantiated the ties between the agencies, and acknowledged the regulator's expertise. Having paid for consultants' advice<sup>1328</sup>, the RA sought Oftel's views on the number of licences to auction<sup>1329</sup>. Oftel advocated the sale of five licences, rather than the four initially assumed by the working group. In its February 1999 review of competition in the mobile market, Oftel identified 3G licensing as an opportunity for new entry by mobile network operators.

Thus the regulator exploited ties and policy expertise to ensure that the RA and the Government, which held statutory powers and a convergent preference, as well as controlling the policy-defining asset, worked towards its preferred licensing outcome. Oftel advanced its competition preference without deploying formal powers, as the Government decided to apportion spectrum to allow for five licences, moreover allocating the largest one to the new entrant. Furthermore, the regulator's formal budget was of no significance

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<sup>1327</sup> UACG(98)17; UACG minutes 13/11/98

<sup>1328</sup> NAO 2001,p.30

<sup>1329</sup> *ibid*,p.37; Interview: Hendon

since the RA and the Government covered policy expenses through their funding resources.

Convergence was also significant given the Government's powers to veto the regulator's work to modify the four mobile incumbents' licences, to allow a 3G entrant to roam on their existing 2G networks until it developed an adequate network of its own to compete. Oftel eschewed using existing licence conditions, which entailed applying principles similar to roaming on the two largest operators, as the Minister expressed urgency to mandate the entry measure on 2G incumbents bidding for 3G licences.

In practice, Oftel achieved roaming through informed dialogue and private exchanges. It avoided the Government's more confrontational approach, which within one-and-a-half-years of the Director General's appointment suggests limits to agency responsiveness to senior elected officials. Although Oftel pursued a preference that the influential incumbents opposed, thus acting contrary to capture claims, instead of exerting available powers, the regulator overcame regulatees' divergence through persuasion and negotiation. Oftel consulted informally on a draft version of the roaming condition and non-legally binding guidelines setting out the DGT's likely enforcement approach. It had previously issued, simultaneously, two separate consultations relating to mobile competition, highlighting the disparity between network coverage and services of 2G incumbents and that of a 3G entrant, but giving the right-to-reply.

While establishing terms, to persuade divergent incumbents to accept roaming, the regulator made voluntary concessions that proved effective. Oftel redrafted and amended the draft roaming condition after considering the input received, by the time it launched the May 1999 statutory consultation; three months after the Minister's statement. After negotiating minor changes to another condition producing the same outcome, the regulator removed three formal provisions that it considered could be done without. Moreover, while One2One appealed to a court against the Government's position and the latter sought "an early ruling by the courts to avoid delaying the auction" in response<sup>1330</sup>, the regulator was successful in its persuasive efforts with the two larger, hence more influential, divergent network operators. This led the Government to reconsider imposing the condition on the two smaller incumbents if Vodafone or BTCellnet won a 3G licence, given their network reach.

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<sup>1330</sup> DTI P/99/549, 23/6/99

The sub-case has thus demonstrated the centrality of expertise and informal ties for a regulatory agency to achieve its preferences in practice. Vodafone and BTCellnet, which could have been compelled to accept new conditions under existing formal powers, accepted the regulator's roaming condition, applicable until the end of 2009, instead. Through dialogue, Oftel prevented the largest mobile operators from rejecting licence modification, thus avoiding a reference to the Competition Commission aimed at imposing roaming on the operators.

#### ***IV.1.2 Oftel's LLU Policy and Type II Autonomy***

The sub-case on local loop unbundling in the UK has demonstrated that BT's preference divergence was critically important for Oftel's market entry preference, given the incumbent operator's control of the policy-defining local access network. Similarly to 3G spectrum policy, the network's exclusivity, hence, property rights over a unique physical resource in high demand shaped the policy. The industry incumbent's preference regarding the asset's use represented the key impediment to expanding competitive provision of broadband internet in the UK. Despite the incumbent's prolonged obstruction, the regulator overcame divergence and allowed entry without relying on existing statutory powers. Rather than applying available provisions, the agency exploited policy expertise and sectoral ties, and introduced competition via unbundling through persuasion and negotiation consistent with Type II autonomy. A supranational formal framework expedited the process.

Preferences shaped policy decisively. The regulator did not face divergence from elected officials with formal powers regarding launching local loop unbundling. Thus, the Secretary of State's powers to veto Oftel's modification of BT's licence were not an obstacle towards the regulator's preference fulfillment. A junior Minister actively intervened long after the regulator initiated LLU policy, signalling Government convergence by supporting the Director General's central role. Despite never indicating LLU as a clear objective previously, the Government Minister publicly supported the regulator's policy almost two years after Oftel raised it. The Minister's intervention in support of the regulator's policy, after consulting the DGT and industry, occurred through private ties, discussions and pressure on the incumbent rather than by formal authority.



Instead, Members of the Parliamentary Trade and Industry Select Committee (TISC) favoured unbundling from the start. The TISC held several hearings of the regulatory agency based on an informal understanding that civil servants appear as witnesses, rather than on the authority to do so, in which members voiced their preference and divulged publicly influential views on policy development, based on relevant industry information.

The regulatory agency again demonstrated the ability to pursue its preference, to ensure that BT would unbundle, without using its powers given by existing licence provisions<sup>1331</sup>. The regulator outlined in detail five policy options based on internal expertise. It collected comprehensive views, framed policy development and generated considerable support for its preferred solution. It elaborated policy, taking the divergent incumbent's concerns into consideration. Indeed, it privately interacted with BT officials to discuss key issues throughout policy development.

Delegated statutory resources were, therefore, not used. The case for unbundling was made through staff expertise, information gathered from convergent consultation respondents and informal meetings. Early consultations were informal. Oftel used its budget only to bolster the argument and proceed with option 2 by presenting a cost-benefit analysis from external consultants. By then, divergent BT had already indicated that it would work closely with the regulator and industry to develop the necessary arrangements despite ongoing divergence.

The agency thus persuaded the incumbent not to reject a new licence condition, clarifying the exact nature of the service for all operators, and avoiding the statutory option of referring the matter to the Competition Commission. So, preference fulfillment was not shaped by the regulator's use of formal powers. In fact the agency's persistence with negotiation led to operational compromises and delays regarding entrants' access to the incumbent's network resource and to relevant information essential to plan investments, notwithstanding the new condition in BT's licence. To redirect policy-making, industry entrants and the TISC, without any formal authority, placed significant public pressure on the regulator to use its powers.

In practice, addressing BT's asymmetric network resource through unbundling required complex and detailed operational knowledge that only the incumbent possessed. Industry

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<sup>1331</sup> Oftel 11/99

entrants were unable to deal with the incumbent's reticence to disclose information and provide physical access through the negotiations the regulator advocated. They were equally unable to agree on a space allocation method that suited them given their competing demands. As the incumbent deferred operational progress to exploit first-mover broadband ADSL market advantage, the agency's forbearance delayed competitors' access to local exchanges. Accordingly, the regulator intervened to produce a space allocation method, albeit a sub-optimal one that excluded BT's prime sites initially, inhibiting the competition preference in the short-term.

Public reports and exposure of the regulator's unbundling policy-making had another important effect. Prospective EU LLU legislation, to which Oftel had contributed to informally, required domestic adoption sooner than the regulator had planned. Criticism about policy stalling, including that from senior European Commission officials, induced convergent junior Minister Patricia Hewitt to influence progress through the Government's informal ties with sectoral actors. Notwithstanding the regulator's newly inserted unbundling licence condition, Hewitt met policy participants privately to expedite progress.

The regulator conveyed its informed judgments about policy constraints before the Minister expressed her dissatisfaction with BT's progress behind closed-doors and obtained that the incumbent commit to faster, increased network access for competitors. Despite further obstruction, the agency continued exploiting sectoral knowledge and private exchanges rather than formal resources when addressing competition issues. Ultimately, Oftel achieved market entry according to its initial timetable.

## **V.1 Summary Arguments on the Regulator's Policies in France**

Like the UK, the French regulator's preferences were not specifically prescribed in formal institutional arrangements. Unlike the UK, however, the ART's preferences, a 'beauty contest' to license 3G spectrum and unbundling to remove entry barriers in the local access market, in both cases, fuelled divergence with 'state' actors, including senior Government officials. Thus, as previously claimed<sup>1332</sup>, French state actors were heavily involved in the policy-making of the regulatory authority, highlighting the intra-state fragmentation that Nordlinger's analysis does not include. Nonetheless, findings show that, despite possessing

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<sup>1332</sup> DaBler and Parker 2004,p.10

decisive policy rule-setting and veto powers, the Government did not inhibit the regulator's pursuit of its preferences.

The ART's preferred 3G licensing method excluded auctions that could have been highly lucrative, and therefore desirable, for the Government which had the powers to impose them. Similarly, senior French Government officials largely supported the incumbent's opposition to the competition implications of the ART's unbundling initiative. Conversely, industry actors, particularly 'non-state' ones, were always convergent with the regulator. The three 2G incumbent mobile operators actively supported the agency on adopting a 'beauty contest' allowing the regulator to select 3G spectrum licences. Similarly, industry entrants were convergent about the adoption of local loop unbundling. However, the most powerful industry actor, F-T, clearly disagreed with the ART, challenging suggestions of capture.

The preferences of senior members of the centre-right coalition Government that had appointed ART board members but who, except for President Jacques Chirac, were in opposition when the ART developed the selected policies were relatively ambiguous. Rather than supporting or opposing the regulator, senior centre-right officials' views emerged at advanced policy stages and seemed primarily driven by party-political opposition to the centre-left Government.

Thus, for instance, former centre-right Telecoms Minister Francois Fillon first stressed in Parliament the important financial impact that selling 3G licences would have on state revenues, but then questioned the ideological incongruence of a left-leaning Government considering auctioning spectrum. One report claimed he welcomed a beauty contest after the centre-left Government took the decision. Yet, centre-right officials not in Government at the time of ART appointments, who included Fillon's ministerial predecessor, did favour 3G auctions. Thus, on given policies, senior officials from both sides of the political spectrum were divergent with the regulator.

More importantly, respective policy preferences entailed that, in both sub-cases, the ART faced divergence from the actors with the central policy resources: (i) the Government for 3G spectrum; and (ii) F-T for unbundling. Fulfilling its preferences was, therefore, especially challenging for the ART. Unlike in the equivalent UK sub-case, the French regulator lacked support from the Government over 3G licensing. In fact, the divergence between the French Government and the ART in both sub-cases, at least initially, meant

that the agency's limited statutory powers should have been of decisive importance. Instead, notwithstanding divergent Ministers' formal authority, the agency fulfilled its preferences.

The French sub-cases have demonstrated the significance of selected non-statutory agency resources, but equally the importance of formal and informal resources deployed by non-divergent actors for the regulator to achieve its preferences. Thus, notwithstanding dissimilar formal regulatory arrangements, the French sub-cases have substantiated, like the UK's, the inadequacy of formal agency independence as a measure of independence in practice.

Both sub-cases have shown that the ART exploited primarily policy expertise and informal ties with convergent and divergent actors, rather than exerting powers, to achieve its preferences. Expertise and ties proved to be key resources whether to apply persuasion and negotiation (Type II), or to act resolutely and without seeking compromises by contributing to the creation of EU-wide formal arrangements (Type I). The use of public pressure by convergent actors had an important impact too.

### ***V.1.1 The ART's 3G Policy and Type II Autonomy***

The French 3G policy sub-case has shown that the regulator's non-statutory resources and those of preference convergent key industry actors were central to the adoption of the beauty contest licensing method. The significance of this sub-case is possibly more telling than the UK sub-cases, since the French Government controlled the central policy resource, the spectrum, and was divergent. The regulator's limited authority, confined to proposing the licensing method, was formally insufficient to pursue its preference. The divergent Government possessed exclusive 3G spectrum, and had licensing powers. Nevertheless, the agency achieved its preference, namely a beauty contest to allocate four 3G licences.

The regulator displayed Type II autonomy. Its formal 3G policy role was to propose to the Government terms and conditions governing spectrum licensing procedures and to evaluate licence applications on behalf of the Telecoms Minister. Moreover, the Government could introduce specific legislation to control allocation. Yet, the agency used policy expertise and informal interaction to generate a persuasive case, thereby shifting the

position of divergent Ministers, while convergent industry actors exploited private meetings and media influence to pressure them. Ultimately the Government decided to license four operators and formally adopted the licensing method the regulator wanted, thus forgoing the higher revenues expected from auctions and collecting the increased beauty contest fixed licence fees instead. Convergent preferences, policy expertise and informal ties proved decisive for the ART.

The French telecoms regulator conducted 3G policy with the contribution of key industry actors, following a report from the 'state' advisory consultative commission responsible for radio-communication issues, with no authority over the ART, the CCR. The regulator had been actively involved in the 'expert' CCR working group created in early 1998 on how to develop 3G in France, with the three 2G mobile incumbents.

The regulator's licensing proposal to the Government was based on a high level of information. It comprehensively addressed policy issues and generated considerable industry agreement, following the ART's 'informal' consultation mirroring the CCR's 'expert' policy exchanges. By meeting with established operators and exchanging views on 3G, the regulator consolidated informal policy ties with convergent actors it regulated. It thus set out the policy long before the Government published licensing terms in mid-2000.

The Government's divergent preference posed a threat to the agency's intentions. The lucrative outcome of the UK's 3G auctions alerted French Ministers to the possibility of raising larger sums than the ART initially proposed. However, the ART overcame the divergence over the preferred licensing method, by publicly and privately reiterating to the Government that the sectoral and wider economic arguments for a beauty contest remained unchanged. Thus, the regulator prevailed, notwithstanding ministerial rule-setting powers.

The regulator's persuasiveness was complemented by the well-connected industry actors who publicly contested auctions' merits and privately exploited ties with senior elected officials, including the French President, to put pressure on Ministers. Moreover, by indicating the possibility of higher fixed-fees than those initially proposed, an issue it had not openly indicated as a priority, the regulator achieved that the Government accept the beauty contest licensing method.

In developing its preference, the regulator neither drew upon its budgetary resources, nor seemed to decide according to the policy stance of a key elected official belonging to the centre-right Government that had appointed the majority of the regulator's senior board members. Former Telecoms Minister Fillon welcomed the incumbent Government's choice after the beauty contest decision was taken, whereas he had been previously ambiguous.

### ***V.1.2 The ART's LLU Policy and Type I Autonomy***

The sub-case on local loop unbundling in France has shown that, given its control of the central local access network resource, the incumbent operator's divergence was critically important for the regulator's market entry preference. The policy centred on the network's exclusivity, and hence, property rights over a unique physical resource in high demand. The industry incumbent's preference concerning the use of its asset hindered the expansion of competitive broadband internet provision in France. Preferences proved highly important also because, as for 3G, the Government opposed the regulatory agency's proposal. Ministers had the authority to impose the policy, thus compounding the incumbent's prolonged obstruction.

The French 3G sub-case is particularly interesting since, unlike the other three, the agency demonstrated Type I autonomy. It forcefully pursued and obtained the adoption of unbundling. The regulator overcame divergence despite the lack of statutory powers at its disposal to allow the entry of convergent operators. Notwithstanding the different autonomy type, the agency still developed the policy through policy expertise, and sectoral ties with entrants that put the Government under significant pressure, especially through the media. Furthermore, the regulator worked closely with the European Commission to produce a binding supranational framework that required the national Government to introduce unbundling.

The regulatory agency acted resolutely from the outset notwithstanding its lack of statutory powers and the divergent preferences of key Government officials who expected F-T to drive national broadband policy. The ART first advanced policy by requesting that the advisory CCRST 'expert' network and services consultative commission analyse the scope of LLU. Then the regulator broadened attention at public events and in April 1999

launched a consultation, which was not formally prescribed, to gather more information and support.

The agency elaborated policy by focussing on its preferred unbundling option out of the five proposed, neglecting the divergent incumbent's position. Furthermore, the ART exercised its advisory role with the competition authority to restrain F-T from exploiting its unique first-mover retail ADSL advantage and increasing entry barriers.

The sub-case has also revealed how the agency did not use its formally-allocated budget to proceed with unbundling either. Besides building on its expertise to exploit available information, including consultation findings towards the end of 1999, the regulator gave convergent entrants a platform to deploy their resources. National and international pressure, including unfavourable media reports, saw the Government reluctantly revise its stance on unbundling. The ART's approach led to the Minister, who had reiterated that neither EU nor national law required unbundling, accepting to discuss a law based on its work.

Similarly, the spring 2000 policy veto of divergent left-wing MPs in the Government coalition, regarding a law amendment introducing LLU, was made temporary and relatively ineffective by the regulator. By then, industry actors had discussed what operational issues needed prioritising at the working group that the agency had set up. The regulator chaired sub-groups framing pricing and operational issues to shape policy. F-T also participated in these sub-groups. Thus ART officials had essential informal exchanges on implementation with the incumbent, which remained the policy fulcrum given its exclusive network, despite divergence. The agency pooled the expertise of regulatory colleagues in the USA too, to draw upon unbundling policy lessons.

Crucially, through policy expertise and ties with other sectoral actors, the regulator bypassed the French Government by contributing to the creation of a supranational framework according to national specificities. The agency exchanged views with the European Commission (EC) on the latter's unbundling initiative, initially in the non-binding form of an EU Recommendation and subsequently as a Regulation that was binding for Member States. An EU framework counteracted national obstacles, including the opposition of left-wing coalition Government members.

Developing LLU policy at the EU level led the Government to adopt a national decree in September 2000 that translated the supranational requirement into domestic law, by which time some centre-right support for unbundling had emerged nationally. The ART set out what provisions needed sharpening through an ‘opinion’, effectively instructing the Government without possessing relevant powers, because of its policy understanding. The accumulated expertise allowed the regulator to work on measures defining entry conditions prior to the Regulation becoming enforceable at the end of 2000. To ensure implementation, the agency launched trials that included non-licensed operators, before commenting on the draft decree.

The sub-case has demonstrated that the regulator did not require formal LLU powers to follow a forceful approach. The impending EU requirement led the Government to enact the agency’s request to make two key provisions in the decree applicable before the EU Regulation came into force: the incumbent granting network information to competitors upon request; and a detailed reference offer. The agency published ‘guidelines’ which, while non-binding, were highly prescriptive, gave it significant decision-making discretion and carried an implicit threat of sanctions. Ultimately, formal powers were exercised to redress the incumbent’s repeated delays through non-compliant reference offers. The orders to comply reflected an operational understanding of the obstruction, and identified implementation requirements for market entry to occur, consistent with the regulator’s preference.

## **VI. Concluding Arguments on Independence in Practice for the UK and France**

The findings from the application of the preference-based analytical framework developed in this thesis, following Nordlinger’s conceptualisation of state autonomy, have demonstrated that there are stark limitations to the argument that agency independence in practice reflects formal independence. Firstly, evidence indicates that policy preferences formulated by the selected regulators could not be specifically read off statutes. The vagueness of statutory objectives, though somewhat inevitable, contributes to significant policy-making discretion for agencies, granting them considerable freedom to interpret and choose objectives<sup>1333</sup>.

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<sup>1333</sup> see Goodhart 1993



Secondly sub-case evidence has repeatedly and unequivocally shown that centre-left Governments in both the UK and France did not apply veto powers. This was not because of lack of oversight mechanisms such as ‘fire alarms’<sup>1334</sup>. On the one hand, these findings demonstrate the significant value of choosing a preference-based framework since Governments that are convergent do not veto regulators, as was the case for both UK policies.

On the other hand, the two French sub-cases have shown that even when a Government is preference divergent, ex post powers to veto or over-rule need not be applied. The divergent Government’s statutory controls did not inhibit, in either sub-case, the French regulator’s ability to achieve its preferences. Cases of a divergent Government eschewing veto or over-ruling powers clearly demonstrate how formal authority must not be assumed to define an agency’s ability to pursue preferences.

Thirdly, and crucially, the thesis has documented comprehensively that regulators pursuing policy preferences consistent with Type II or Type I autonomy scenarios do so notably through specific non-statutory resources. In practice, all four selected sub-cases have explained the centrality of informal ties and expertise for regulators to pursue their preferences in practice.

The sub-cases have shown that informal agency ties, providing access to divergent and non-divergent key elected officials and industry actors, were critical for the regulators to achieve preferred policy outcomes. The agencies developed policy largely by collecting relevant information through public consultations from industry actors which, in fact, the ART was not formally entitled to deploy but did nonetheless in both sub-cases.

Regulators had regular informal exchanges aiding their policy pursuits within advisory bodies and working groups, or privately. Key policy information and analyses were exchanged voluntarily, including by divergent predominant industry actors BT and F-T. Similarly, regulators had access to and meetings with Ministers or senior Government officials, and discussed policy issues privately with them rather than simply using formal powers. They also used informal ties with supranational actors to achieve their preferences.

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<sup>1334</sup> McCubbins and Schwartz 1984; McCubbins, Noll, Weingast 1987

Thus when policies were hindered or stalled, the ties of Oftel and ART staff allowed private interaction with key non-divergent actors to call upon their resources. They also used their ties with divergent actors, either to attempt persuasion or to assert firm intentions vis-à-vis state or non-state actors.

Crucially, the four sub-cases show that agency officials were able to frame, pursue and achieve their preferences. Regulators employed staff able to carry out intended policies that required an understanding of complex issues. They used and benefited from this resource both when formal arrangements were of hindrance to their preference fulfillment and when they were not. Furthermore, when Oftel employed consultants to produce a LLU cost-benefit analysis, findings, which were disclosed after the regulator had developed a case for its preference, bolstered the argument.

In the process, despite previous studies attributing significant importance to agency finances<sup>1335</sup>, evidence about budgets' limited importance has emerged herein, given the largely voluntary provision of information. The use of budgets has not stood out as a determinant resource for the two regulators' pursuit of policy preferences over a significant period of their lives, undermining *ex ante* formal controls regarding funding sources incorporated in Gilardi's, and Edwards and Waverman's independence indices.

What the sub-cases do suggest instead, given the significance of agency expertise and ties, is that, if applied, formal controls over the management of regulators' personnel policy and budgets, which Gilardi raises, might influence an agency's ability to fulfill its preferences in practice. For instance, by stopping agencies from targeting their financial resources to attract staff with sectoral expertise, given prior regulatory or commercial experience, and with industry or Government ties.

Fourthly, previous studies have also attributed significant importance to Government appointment powers as a measure of regulators' independence<sup>1336</sup>. Although assumed to entail the selection of senior "right-minded people"<sup>1337</sup>, in practice, influence through nomination of board members remains unsubstantiated by evidence regarding both agencies. Although preferences were non-divergent in the UK's case, there is no conclusive

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<sup>1335</sup> Moe 1982, Noll 1989

<sup>1336</sup> McCubbins, Calvert & Weingast 1989; Wood and Waterman 1991; Majone 1996,p.38

<sup>1337</sup> Moe 1982

evidence that the appointment powers exercised by the incumbent Labour Government over Oftel's Director General had a direct bearing on the regulator's policy-making.

With regard to 3G, and roaming in particular, Oftel promoted its entry preference in its own distinct way. The regulator did not show the same urgency as the Government. In contrast, the then newly appointed Director General initiated unbundling, as the Minister stressed subsequently. The Government acted as though it was uninterested until the policy stalled, only intervening following significant domestic pressure from new entrants and parliamentary (TISC) officials, and because of EU-wide policy and impending legislation. Oftel had advocated the rapid framing of an EU Regulation to the European Commission before seeking BT's licence modification.

As explained in section V.I above, evidence about preference alignment between senior representatives of the French centre-right Government that had nominated ART board members, and the regulator remains ambiguous and inconclusive. Thus, no direct link can be assumed between ART preferences and those of centre-right elected officials part of the Government that had appointed agency board members, despite the latter's relatively higher 'politicisation' in France than in the UK<sup>1338</sup>.

Rather than stating a preference, Francois Fillon, Telecoms Minister in the Juppé Government that had created the ART, challenged the centre-left Government's "ideological" coherence for considering 3G auctions. Right-leaning MPs had supported 3G auctions, entailing divergence with the regulator. Fillon apparently welcomed the left-wing Government's beauty contest decision after it was taken suggesting his convergence with the regulator was not emphatic. Regarding unbundling, centre-right officials including former Industry Minister Franck Borotra, whose portfolio had comprised Fillon's telecoms department, signalled policy convergence more clearly, but also did so at a late policy stage. Thus, as UK Ministers with Oftel, significant French centre-right elected officials appear not to have been divergent with the ART. There is no evidence that the Government that appointed ART board members influenced the agency's 3G and LLU preferences. The centre-right Government's appointment of both Michel Bon as F-T Chairman and, subsequently, of ART board members did not translate into similar unbundling preferences.

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<sup>1338</sup> Thatcher Dec.2002, p.960

Lastly, the thesis has analysed the explanatory role of formal powers, which elected officials delegated to regulators, with respect to the agencies' preference fulfillment. Besides examining agencies' activity in practice vis-à-vis senior elected officials retaining formal controls, the sub-cases have shown regulators' interaction and, at times close, relations with industry actors when pursuing preferences.

However, thesis evidence does not support 'capture' theory assumptions. The regulators pursued preferences which the most powerful industry actors opposed in three sub-cases out of four (Ofcom's 3G and LLU policies, and the ART's LLU one that showed Type I autonomy). In the fourth sub-case, to fulfill its 3G beauty contest preference the ART indicated that the divergent Government could fix higher fees, thus going against the preference of the convergent 2G operators for minimising entry costs. Accordingly, convergent industry actors faced regulators' decisions that they wanted to avoid. Indeed, new entrants were aided by Ofcom's LLU initiative, but heavily criticised the regulator nonetheless, indicating that convergence does not entail capture. The evidence demonstrates that the regulators and industry participants actively interacted with each other as they did with senior elected officials, mutually exploiting available informal ties, to further respective preferences.

## **VII. Wider Theoretical Implications of Findings and Future Research**

The preference-based framework applied in this thesis based on a refined version of Nordlinger's state autonomy theory has helped to examine the independence in practice of regulatory agencies, and particularly the regulation of telecoms in France and the UK. Having allowed for the additional participants that occupy the 'regulatory space', their resources and specific policy processes undertaken by agencies, the thesis has identified the centrality of preferences of actors participating in public policy for the independence of regulators in practice.

The thesis has clearly demonstrated the importance of preferences and the ability of putting them into practice. Preferences have been shown to guide the application of formal institutional powers and instruments. In specific instances, they have influenced the addition of formal provisions. In fact, regardless of what formal institutions allowed, variation in preferences has been shown to be crucial in actors' deployment of available resources.

The thesis has challenged in depth the conceptualisation of regulatory independence in practice as a reflection of formal independence. It has documented that the delegation of statutory authority from Governments to agencies responsible for the sectoral regulation of markets is an inadequate and therefore unsatisfactory measure of agency independence in practice. The thesis has rejected the conceptualisation of regulatory agency independence as an endowment, arguing instead that it is a dynamic practice.

To fulfill their policy preferences, regulators deploy a range of useful resources, frequently non-statutory ones and often not directly their own. Indeed the importance of non-statutory resources in particular, namely policy expertise and ties, was such that their application was critical regardless of the different processes the agencies applied. Findings arising from the analysis developed elicit important considerations on existing theories, providing a cue for further research.

### **VII.1 The Role of Preferences in Examining Agency Independence**

The conceptualisation of autonomy developed and applied in this thesis has been based on preferences and their achievement with respect to all interested policy participants, whether divergent or non-divergent. The application of a preference-based framework based on Nordlinger's work to examine the types of autonomy that selected regulators showed, has indeed revealed that the selected agencies fulfilled policy preferences notwithstanding the divergence of both key industry actors and senior elected officials.

As chapter 1 explains, other approaches have similarly examined agencies' preferences and their pursuit. Namely, 'principal-agent' analysis examines whether elected officials, who have no reason to allow agencies to administer policies over which they have no control if agencies do not follow the principals' preferences<sup>1339</sup>, manage to direct agencies' policy activity. 'Capture' theory claims powerful regulatees direct agencies' policies.

In his dichotomous state-society analysis, Nordlinger insists that there is excessive reliance on societal constraint assumptions and that society's preferences should not be taken as a vantage point when considering state autonomy. Thus, applying the preference-based

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<sup>1339</sup> McCubbins, Noll Weingast 1987, 1989; Thatcher and Stone Sweet 2002; Coen and Thatcher 2005

framework presented here to a larger number of cases, over time, may provide insights to test theories which seek to explain that regulatory agencies act according to the preferences of a select group of other policy participants.

There is significant scope for far greater longitudinal examinations of the variation between policy preferences of regulatory agencies and other actors through the process-tracing of many more cases providing further answers to the question 'independence from whom?', while analysing types of autonomy. Another interesting avenue of research could be to investigate whether preference convergence between political 'principals' and agencies varies in relation to different degrees of specificity of formal objectives.

## **VII.2 Agency Independence and the Role of Non-Statutory Resources**

The second and possibly most important issue arising from the thesis is the significance of resources that are not set out in formal institutional arrangements but shape the ability of regulators to achieve their preferences. The significance of non-statutory resources emerging from the framework applied constitutes a direct response to formal institutionalist analyses of agency independence. Associating independence with the formal powers political principals delegate to regulatory agencies is a hypothesis which the thesis has examined and found to be inadequate.

Rather, policy expertise and ties, allowing collecting and exploiting influential information among other things, have been identified as critical resources for agencies to influence policy and achieve their preferences. The causal importance of these non-statutory resources is substantiated by their relevance in both Type II and Type I autonomy scenarios. In fact while the thesis has documented process variation both by a single national regulator and between two agencies across countries, which some scholars may find of distinct interest per se, the impact of one process or another on preference achievement relates to resources at the regulator's disposal.

Thus, processes to achieve preferences may differ, but the deployment of selected resources remains essential for agencies to deal with specific policy asymmetries, informational or other. Indeed, the non-statutory resources identified have also been shown, through the Type I sub-case, to help regulators expand their formal resources, without possessing the authority to do so.

Overlooking agency expertise, as formal institutionalist analyses do, whether evaluated through relevant academic qualifications<sup>1340</sup>, prior commercial experience or both, neglects the importance of making an effective case to persuade divergent actors in Type II cases or of understanding how to circumvent them in Type I cases. Considering that regulatory regimes increasingly require sophisticated responses<sup>1341</sup>, from all participants, studies specifically examining the professional skills and policy expertise of agencies are exceptions in the field of regulation that should be expanded upon<sup>1342</sup>. Analyses of regulatory experts working for national sectoral agencies vis-à-vis those in relevant Government departments, or comparisons of sector-specific regulatory agencies' experts across countries, would provide a useful input for future research on agency independence in practice.

Meanwhile, thesis findings sustain the scope for the increased scholarly attention to the importance of ties, or 'relations' between agencies and other policy actors<sup>1343</sup>. Indeed, whereas the focus of the 'revolving door' literature has been on relational aspects of regulation regarding 'capture' assumptions<sup>1344</sup>, the door can swing the other way. The expertise acquired by agencies recruiting company professionals, given business-regulator relations, can contribute to agencies' policy expertise<sup>1345</sup>.

The thesis has demonstrated that preference divergence between regulators and powerful industry actors or senior elected officials subjected to strongly opposed agency policies does not imply severing key ties. Even in the Type I autonomy sub-case, to make operational progress and ensure a framework imposing its policy preference without the necessary powers, the French regulator exploited "clear lines of access"<sup>1346</sup> with the divergent actor, as well as key ones with all non-divergent participants.

Research has nonetheless found that the 'revolving door' is more present in certain countries than in others. Indeed notwithstanding similar numbers of legal challenges brought by regulatees, indicating equivalent levels of conflict and hostility in France and in the UK against regulators' decisions, in the UK the revolving door is much more

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<sup>1340</sup> Goodhart, Schoenmaker and Dasgupta 2002

<sup>1341</sup> Coen and Willman 1998, p.32

<sup>1342</sup> Goodhart et al 2002

<sup>1343</sup> Black 1976; Coen and Willman 1998; Coen et al 2002

<sup>1344</sup> Makkai and Braithwaite 1992

<sup>1345</sup> Coen and Thatcher 2005; Coen et al 2003

<sup>1346</sup> Coen and Willman 1998, p.32

present<sup>1347</sup>. It therefore seems appropriate that future research ask whether regulators with strong ties to industry, like the UK's, are less likely to show a Type I autonomy process than regulators without such strong ties.

### **VIII. Final Remarks**

To examine the independence of regulatory agencies in practice, the thesis has investigated a sector, the telecoms 'network industry', characterised by actors with especially asymmetric resources both in 'physical' and informational terms. The findings presented have indicated that these unique sectoral resources are important. Analyses about the regulation of other network industries, such as energy and rail, abound, substantiating the interest in the regulation of the strategic telecoms industry. Having covered a strategic network industry in this thesis, there is significant analytical scope to apply the framework on the independence of regulators in practice developed here, to different regulated industries and sectors.

Finally and consistently with Nordlinger's premise, the thesis has focussed on an analysis of agency independence in 'democratic' states; France and the UK. There is extensive scope to apply and address the merits and the limits of this approach by investigating agency independence in practice in other states with different regulatory institutions and at different stages of market liberalisation, further testing the conclusions reached here.

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<sup>1347</sup> Thatcher Dec.2002, pp.963-965



**List of Interviewees (interviewer: P.S. Dasgupta)**

Carey, N. 15/04/00, National Audit Office 3G Report Study Manager 2000-2001

Hendon, D. 01/04/09 Chief Executive, Radiocommunications Agency

Hubert, JM. 07/05/09 ART Chairman (*président*) 1997-2003 (Telephone interview)

Interviewee A (anonymous), 13/03/09, Middle Management Oftel/Ofcom

Interviewee B (anonymous), 25/03/09, Senior Management Oftel/Ofcom

Interviewee C (anonymous), 25/03/09, Middle Management Oftel/Ofcom

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- \_\_\_\_\_. 19/02/1999 “Consultation publique sur l’introduction de l’UMTS en France”
- \_\_\_\_\_. 02/04/1999 “Consultation publique sur le développement de la concurrence sur le marché local”
- \_\_\_\_\_. 07/07/99 “Avis n° 99–582 de l’Autorité de régulation des télécommunications en date du 7 juillet 1999 sur les décisions tarifaires de France Télécom n° 99077 E relative à la création des services Netissimo et Turbo IP et n° 99078 E relative à l’expérimentation du service Turbo LL”
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- \_\_\_\_\_. 10/99 “Le développement de la concurrence sur le marché local: synthèse de la consultation publique”, Liste des contributeurs
- \_\_\_\_\_. 11/10/99 “L’Autorité de régulation des télécommunications publie la synthèse de la consultation publique sur l’introduction de l’UMTS en France”
- \_\_\_\_\_. 29/10/99 “L’Autorité de régulation des télécommunications publie la synthèse de la consultation sur le développement de la concurrence sur le marché local”
- \_\_\_\_\_. 18–19/11/99 “Intervention de Jean-Michel Hubert, Président de l’Autorité de régulation des télécommunications, aux Journées internationales de l’Idate”
- \_\_\_\_\_. 24/12/99 “ Décision n°99-1153 en date du 24 décembre 1999 de l’Autorité de régulation des télécommunications portant mise en demeure de France Télécom, en application de l’article L. 36-11 du code des postes et télécommunications, de se conformer aux obligations de l’article 17.2 du cahier des charges annexé au décret n° 96-1225 du 27 décembre 1996”
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- \_\_\_\_\_. 11/10/00 “Décision n° 00-1067 de l’Autorité de régulation des télécommunications en date du 11 octobre 2000 fixant le taux de rémunération du capital pour l’année 2001 prévu par l’article D. 99-24 du code des postes et télécommunications”
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- \_\_\_\_\_. 30/10/00 (2) “L’Autorité édicte des Recommandations pour la mise en oeuvre de la boucle locale”
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- \_\_\_\_\_. 31/10/00 (2) “Décision n° 00-1176 de l’Autorité de régulation des télécommunications en date du 31 octobre 2000 adoptant des lignes directrices relatives à la vérification de l’orientation des tarifs vers les coûts dans le cadre de l’accès à la boucle locale”
- \_\_\_\_\_. 14/12/00 “Décision n° 00-1326 en date du 14 décembre 2000 de l’Autorité de régulation des télécommunications portant mise en demeure de France Télécom, en application de l’article L. 36-11 du code des postes et télécommunications, de se conformer aux obligations de l’avant dernier alinéa de l’article D. 99-23 du code des postes et télécommunications”

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