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## Independent Regulatory Agencies and Political-Administrative Relations in Contemporary European Democracies: Some Tentative Reflections

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**Abstract.** This essay provides a concise overview of the current state of political-administrative relations in Europe's Parliamentary democracy. It is more particularly focused on presenting the implications that the growth of independent regulatory agencies (IRAs) has had on such relationship, and on reviewing the empirical evidence in support of three distinct scenarios – one in which politicians abdicate their control power over IRAs to the benefit of interest groups; one where IRAs maintain and expand their autonomy or *de facto* independence both *vis-à-vis* politicians and interest-groups; and one where politicians regain control over IRAs and their decisions. I argue that even if the second scenario has received extended empirical support, politicization under the regulatory order could well be under-estimated – with broader implications for political-administrative relations that are briefly introduced.

**Keywords:** parliamentary democracy, independent regulatory agencies, principal-Agent, depoliticization, interest-groups, regulation.

### Nepriklausomos reguliavimo agentūros bei politiniai ir administraciniai santykiai šiuolaikinėse Europos demokratinėse valstybėse: keletas hipotetinių įžvalgų

**Santrauka.** Straipsnyje glaustai apžvelgiami dabartiniai politiniai ir administraciniai santykiai Europos parlamentinės demokratijos sąlygomis. Daugiausia dėmesio skiriama įtakai, kurią šiems santykiams padarė nepriklausomos reguliavimo agentūros (NRA), ir empiriniams duomenims, patvirtinantiems trijų skirtingų scenarijų galimybę: (1) politikai atsižada galios kontroliuoti NRA interesų grupių naudai; (2) NRA išlieka autonomiškos arba *de facto* nepriklausomos tiek nuo politikų, tiek nuo interesų grupių; (3) politikai susigrąžina NRA ir jų sprendimų kontrolę. Straipsnio autoriaus nuomone, net susiklosčius palankioms politinėms sąlygoms antrajam scenarijui įvykti, esant reguliavimui tvarkai nereikėtų nuvertinti politizavimo galimybes.

**Reikšminiai žodžiai:** parlamentinė demokratija, nepriklausomos reguliavimo agentūros, įgaliotasis ir įgaliotinis, depoliticizacija, interesų grupės, reguliavimas.

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## Introduction

In parliamentary democracies, political-administrative relations rest on a ‘mismatch of incentives and capabilities’, when politicians are tasked with deciding the law without being able to implement it and bureaucrats tasked with implementing the law without being able to decide it.<sup>1</sup> While bureaucrats are expected to act on behalf of elected officials, they may use their crucial role in policy implementation to pursue their own goals and motivations. To prevent that, politicians may write detailed status to determine what and how much policy making authority they wish to delegate and, once bureaucratic agencies are created or endowed with some decision making power, can ‘exercise their authority to restrict, monitor and sanction agency behaviour.’<sup>2</sup>

These elementary features, which involve ‘some kind of information asymmetry and presume some kind of principal-agent relationship between a bureaucratic agent and a political principal’,<sup>3</sup> are found in most studies of political-administrative relations in political science.<sup>4</sup> They also appear in normative debates about who should control the bureaucracy.<sup>5</sup> In effect, the relations between politicians and bureaucrats (as well as their very parameters) fundamentally question the weight given to expert adjudication vis-à-vis popular will in policy making and the crucial implications for political accountability and policy outcomes these relations entail.<sup>6</sup>

The potential subject matter, therefore, here is vast, and the study of political-administrative relations has been the focus of sustained and prolonged attention in political science and public administration. The focus of this essay will inevitably be much narrower. Based on prior research and on my own contribution to these debates, I would like to offer some tentative (and largely preliminary) reflections about the state and direction of political-administrative relations in European parliamentary democracies, given that much of the literature to date has focused on the U.S. political system and the relations between the Congress and the federal bureaucracy.<sup>7</sup> There is, however, a broader motivation for shedding light on the European condition. Over the last thirty years, many countries have indeed witnessed the rise and strengthening of independent regulatory agencies (IRAs) in all areas of government intervention (including healthcare, food, competition, finance, environment, among many others). While their formal status usually differs from a country to another, these administrative entities share some common institutional features. They all operate as agencies ‘that are not under the direct control of elected politicians’, that are institutionally and organizationally disaggregated from the ordinary bureaucracy and that are

<sup>1</sup> See Fiorina, M. Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities. In: *Congress Reconsidered* / Eds. L. C. Dodd, B. I. Oppenheimer, L. Evans. Washington: Congressional Quarterly Press, 1981, p. 332–348.

<sup>2</sup> Carpenter, D.; Krause, G. Transactional Authority and Bureaucratic Politics. *Journal of Public Administration Research & Theory*, 2015, Vol. 25, No. 1, p. 6, <https://doi.org/10.1093/jopart/muu012>.

<sup>3</sup> Gailmard, S.; Patty, J. Formal Models of Bureaucracy. *Annual Review of Political Science*, 2012, Vol. 15, p. 354, <https://doi.org/10.1146/annurev-polisci-031710-103314>.

<sup>4</sup> An area of contract theory, principal-agent theory and formal models typically involve ‘some actor (or group of actors) called an agent’ who undertakes ‘an action on behalf of another actor (or group of actors) called a principal’. In this setting, ‘the principal, for its part, can make decisions that affect the incentives of the agent to take any of its various possible actions’. It is this process of ‘structuring incentives for the agent’ that constitutes ‘the central focus of principal agent theory’. Quotes from Gailmard, S. Accountability and Principal Agent Models. In: *The Oxford Handbook of Political Accountability* / Eds. M. Bovens, R. Goodin, T. Schillemans. Oxford: Oxford University Press, 2014, p. 90–106.

<sup>5</sup> See e.g. McCubbins, M. Common Agency? Legislatures and Bureaucracies. In: *The Oxford Handbook of Legislative Studies* / Eds. S. Martin, T. Saalfeld, K. Strøm. Oxford: Oxford University Press, 2014, p. 567–587, <https://doi.org/10.1093/oxfordhb/9780199653010.013.0007>.

<sup>6</sup> See Krause, G. Representative Democracy and Policy-Making in the Administrative State: Is Agency Policy-Making Necessarily Better? *Journal of Public Policy*, 2013, Vol. 33, No. 2, p. 111–135, <https://doi.org/10.1017/S0143814X13000044>.

<sup>7</sup> See Benoît, C. Legislatures in the Administrative State: Political Control, Bureaucratic Politics and Public Accountability. In: *Handbook of Parliamentary Studies: Interdisciplinary Approaches to Legislatures* / Eds. C. Benoît, O. Rozenberg. Cheltenham: Edward Elgar, 2020, p. 255–274.

usually highly specialized in one regulatory area.<sup>8</sup> Over the years, IRAs have become the main governance form in an increasingly large number of policy domains.

A substantial body of literature has examined the formation, ways of operating as well as the formal and *de facto* independence of IRAs.<sup>9</sup> Yet these entities were rarely studied from the vantage point of political institutions or from a ‘principal’ perspective by Europeanists (see further). Their development, however, poses serious challenges for the future of political-administrative relations, both from a positive and from a normative perspective. On the one hand, the central role of IRAs in contemporary governance means that a sizeable array of policy decisions in Europe’s parliamentary democracies are now delegated to the unelected experts that populate these agencies. Politicians are far from powerless when it comes to monitor or sanction them, but the extent with which they actually use their powers to effectively impose their preferences over IRAs remain a largely open question. On the other hand, and from a more normative perspective, the growth of the regulatory order raises obvious issues in terms of political accountability, responsiveness and representativeness of the bureaucracy. Indeed, IRAs are not only formally insulated from their political principals. As I shall discuss further, they are also less bounded by strictly established rules. In other terms, their greater autonomy also manifests in their decision-making process per se.

The growth of ‘liberal’ (as opposed to more ‘legalistic’ or ‘Weberian’) bureaucracies thus questions well-established equilibriums between political and administrative realms.<sup>10</sup> It is with discussing these tensions and reflecting on their implications that this paper is primarily concerned. In the next (first) section, I offer a brief discussion of the rise of IRAs in Europe’s parliamentary democracies. After having mapped out the political mantras and motivations behind the growth of the regulatory order, I introduce the paradoxes generated by the importance taken by IRAs for political-administrative relations. In the second section, I discuss and synthesize the findings of existing contributions on the political control of these independent regulators. Here I also offer a series of tentative reflections on their implications for political institutions and political-administrative relations more broadly. The final section is a conclusion.

## 1. Regulatory agencies and ‘depoliticized’ governance

In Western Europe, the delegation of regulatory authority and competencies to agencies that are largely independent from political control initially came after the liberalization and privatization of industrial monopolies; typically in the railway, road and telecommunication sectors.<sup>11</sup> This significant transformation of governmental intervention in the economy was not restricted to these sectors though. Over the last three decades, IRAs in fact became the ‘standard institutional choice’ to deal with a broader range of policy issues, and they are now found in most areas with ‘regulation and agencification occurring and performing in tandem.’<sup>12</sup>

The legal status (as well as the very labelling of IRAs in administrative law) might significantly vary from a country to another. British non-departmental public bodies are not exactly similar to French *Autorité administrative indépendante* or to Italian *Autorità amministrativa indipendente* (both of these

<sup>8</sup> See Gilardi, F.; Maggetti, M. The Independence of Regulatory Authorities. In: *Handbook on the Politics of Regulation* / Ed. D. Levi-Faur. Cheltenham: Edward Elgar Publishing, 2011, p. 201–214, <https://doi.org/10.4337/9780857936110.00026>.

<sup>9</sup> See e.g. Hanretty, C.; Koop, C. Shall the Law Set them Free? The Formal and Actual Independence of Regulatory Agencies. *Regulation & Governance*, 2013, Vol. 7, No. 2, p. 195–214, <https://doi.org/10.1111/j.1748-5991.2012.01156.x>.

<sup>10</sup> On the distinction between different types of bureaucracies, see Dahlström, C.; Lapuente, V. Comparative Bureaucratic Politics. *Annual Review of Political Science*, 2022, Vol. 25, <https://doi.org/10.1146/annurev-polisci-051120-102543>.

<sup>11</sup> Cf. Benoit, C. The New Political Economy of Regulation. *French Politics*, 2019, Vol. 17, No. 4, p. 482–499. Retrieved from <https://hal-sciencespo.archives-ouvertes.fr/hal-02356384>.

<sup>12</sup> Christensen, T.; Lægrid, P. Agencification and Regulatory R0eforms. In: *Autonomy and Regulation: Coping with Agencies in the Modern State* / Eds. T. Christensen, P. Lægrid. Cheltenham: Edward Elgar, 2006, p. 10.

latter categories can be literally translated as independent administrative authorities'). There are, in other terms, various and persisting administrative styles and traditions. During the recent years, there were, however, in many countries, very similar attempts to 'strengthen the autonomy of professional and experts in the public policy process',<sup>13</sup> 'to keep regulators at arm's length from their political masters'<sup>14</sup> and to 'separate the responsibility for policy-making from the responsibility for regulation'.<sup>15</sup> If the development of IRAs in Western Europe was spectacular, this has thus not only been a Western European story: first, as several non-European countries (such as Australia, Canada and New Zealand) pioneered the development of IRAs; second, as this bureaucratic format rapidly diffused to other parts of the world. Central and Eastern European countries are a case in point. In their comparison of Hungary, Poland, the Czech Republic and Slovakia (the so-called Visegrád states), Roland Sturm and his co-authors initially argued that new regulatory regimes in Central and Eastern Europe were following a different path compared to Western European ones, as an overall 'innovative use' of regulatory policies was notably observed, preserving 'significant features' of these countries' 'socialist heritage'.<sup>16</sup> However, more recent contributions suggest that these differences were reduced over the years. Aurelija Pūraitė and Ieva Deviantikovaitė have, for instance, detected several agencies in Lithuania that are very close to Western European IRAs (including the Bank of Lithuania, the Radio and Television Commission and the Commission for Prices and Energy). Some differences persist regarding their formal degree of independence from politicians, as these entities are in principle still accountable to the legislature (the Seimas), the President or the government.<sup>17</sup> It is unclear, however, whether these elected officials effectively use these formal powers to control IRAs and, overall, the main institutional features of these very much resemble those of Western European regulatory agencies.

Consequently, the fact that IRAs constitute the building institutional block of advanced capitalism is widely accepted in the literature. In this context, their rise (and the mixture of privatization, liberalization and reregulation it entailed) has been simultaneously perceived as also involving a broader transformation of the State itself; a transformation which has been famously described by Giandomenico Majone as a transition from proactive (the 'positive' State directly governing the economy, typically through public ownership) to more distant forms of intervention (the 'regulatory' State).<sup>18</sup> IRAs epitomize this important shift. These 'liberal' bureaucratic agencies (combining a high degree of autonomy with a specialized and highly skilled workforce) contrasts with pre-existing rule-based administrations populated by civil servants loyal to politicians, particularly in continental European countries, where these principles were constitutive of various national administrative traditions.<sup>19</sup>

In this broad context, several studies have sought to identify the more medium-range variables accounting for the emergence and diffusion of IRAs per se. Fabrizio Gilardi, in particular, has shown that three main classes of factors explain much of this process in Europe. He contends that IRAs were first established in an attempt at improving 'credible commitment capacity' after the liberalization and privatization (essentially of) utilities 'and to alleviate the political uncertainty problem, namely the risk to a government that its policies will be changed when it loses power'. Governments also imitated each other in an overall process of emulation whereby 'the symbolic properties of independent regulators mattered

<sup>13</sup> Jordana, J.; Levi-Faur, D.; Fernández i Marín, X. The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion. *Comparative Political Studies*, 2011, Vol. 44, No. 10, p. 1344, <https://doi.org/10.1177/0010414011407466>.

<sup>14</sup> *Ibidem*, p. 1344.

<sup>15</sup> *Ibidem*, p. 1344.

<sup>16</sup> Sturm, R.; Müller, M.; Dieringer, J. Economic Transformation in Central and Eastern Europe: Towards a New Regulatory Regime? *Journal of European Public Policy*, 2000, Vol. 7, No. 4, p. 650–662, <https://doi.org/10.1080/13501760050165415>.

<sup>17</sup> See more Pūraitė, A.; Deviantikovaitė, I. Independent Administrative Authorities in the Republic of Lithuania. *The Lawyer Quarterly*, 2013, Vol. 4, No. 4, p. 283–295. Retrieved from <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/99>.

<sup>18</sup> See more Majone, G. From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance. *Journal of Public Policy*, 1997, Vol. 17, No. 2, p. 139–167, <https://doi.org/10.1017/S0143814X00003524>.

<sup>19</sup> See Dahlström, C.; Lapuente, V. *Comparative Bureaucratic Politics...*

more than the functions they performed'. The europeanization was a third and important driving force for creating IRAs, with several EU directives explicitly requiring the establishment of independent regulators in given areas, finance and telecommunications being once again cases in point.<sup>20</sup> The notion of independence has indeed been a key building block in the European legal and economic integration. Recent research even suggests that the EU has been a 'laboratory for the reinvention of the notion itself from negative institutional device (independence *from*) to a broad empowering technology of supra-national government connected to notions of general interest, professional expertise and discretionary powers (independence *for*)'.<sup>21</sup>

The various implications of the growth of the regulatory order (as well as the convergence between administrative and regulatory categories) are thus substantial for the shape of the bureaucracy and for the very perimeters of State intervention. But IRAs also symbolize a distinct form of relation between politicians and bureaucrats, and similarly, between popular will and expert judgement. Peter Burnham has described it as involving a depoliticization of political decisions; in his words, 'politics of depoliticisation'. If we follow P. Burnham, the development of IRAs shall in fact be understood through the lens of a wider 'process of placing at one remove the political character of decision-making',<sup>22</sup> a process crucially intended to serve 'a form of politics' (particularly visible, for instance, in the political agenda pursued by Tony Blair and other 'third way' leaders) seeking 'to change market expectations regarding the effectiveness and credibility of policy-making in addition to shielding the government from the consequences of unpopular policies'.<sup>23</sup> Through the creation of IRAs, crucial policy decisions are, under other terms, placed into the hands of nominally independent actors that are not directly accountable for the decisions they take. Granted, this is a response to the need to insulate regulation from politicians' short-term motivations and to ensure greater expertise in policy implementation and regulation.<sup>24</sup> But it would come with a high cost, namely a gradual loss of popular control over the actual implementation (if not the making) of such decisions. The 'politics of depoliticisation' described by P. Burnham has been echoed by many contributions in political science over the last two decades. In this vein, many have argued that the delegation of various competencies to independent bodies or experts reveals the broader political conditions in which European parliamentary democracies now find themselves. So does its corollary, namely the idea that only non-politician experts can discern the policy means to the ends that were equated with the collective good, to paraphrase P. Burnham. In such a context, electoral politics seems to be reduced, at least in principle, 'to the selection of mere functionaries responsible for allocating and assigning policy-making duties to more technically proficient and politically insulated technocrats'<sup>25</sup>: a tendency that could be, in turn, an important source of political disaffection among the general public.

The implications of the development of IRAs are thus many, and possibly consequential. As the previous discussion suggests, they epitomize the transition from 'positive' to 'regulatory' states. They constitute the standard institutional choice of advanced capitalism. More importantly, from the perspective of this article, they change the (as well as they are the result of changing) patterns of relationships between

<sup>20</sup> Gilardi, F. The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe. *The Annals of the American Academy of Political and Social Science*, 2005, Vol. 598, p. 84. Retrieved from <https://www.jstor.org/stable/25046081>.

<sup>21</sup> Vauchez, A. The Genie of Independence and the European Bottle. How Independence Became Europe's Most Contentious Political and Legal Category. *Forthcoming at International Journal of Constitutional Law (I-CON)*, 2021, No. 266, p. 2, <http://dx.doi.org/10.2139/ssrn.3958888>.

<sup>22</sup> Burnham, P. New Labour and the Politics of Depoliticisation. *British Journal of Politics and International Relations*, 2001, Vol. 3, No 2, p. 136, <https://doi.org/10.1111/1467-856X.00054>.

<sup>23</sup> *Ibidem*, p. 129.

<sup>24</sup> See e.g. Schrefler, L. The Usage of Scientific Knowledge by Independent Regulatory Agencies. *Governance*, 2010, Vol. 23, No. 2, p. 309–330, <https://doi.org/10.1111/j.1468-0491.2010.01481.x>.

<sup>25</sup> Hay, C. *Why We Hate Politics*. Cambridge: Polity Press, 2007, p. 94.

politicians and bureaucrats or experts in a way that could have broader political repercussions. The fact that IRAs and politicians are in a form of principal-agent relationship will, however, not be forgotten. In spite of the insulation of these agencies from various kind of political interventions (in terms, for example, of their sanctioning powers, their budget or their decision-making process), their prerogatives rest on formal rules and regulations that politicians might change or suspend. The principal remains ultimately responsible for the choice of governance structures and can modify the terms of any contract with the agent.<sup>26</sup> Apart from these structural choices (and even for agencies that are the most insulated from them), politicians possess various tools to force IRAs to remain faithful to their preferences (Table 1).

**Table 1.** What political principals can do to control IRAs?<sup>27</sup>

| <b>Structural choices</b>         |   |
|-----------------------------------|---|
| <i>Creating functions</i>         | Principals decide what the bureaucracy should do  |
| <i>Establishing organizations</i> | Principals set up organizations to perform the job<br>(Re)organize the bureaucracy, give and take away functions and powers                     |
| <b>Other methods of control</b>   |   |
| <i>Appropriations</i>             | Principals determine the financial resources of IRAs  |
| <i>Standards</i>                  | Principals provide guidance for IRAs and their members  |
| <i>Appointments and removals</i>  | Principals participate in appointments of IRAs members.<br>Principals may oppose upper / lower chamber or executive confirmations of appointees |
| <i>Review and oversight</i>       | Principals review and oversee IRAs and their activities through committee reviews and personal consultations with their members                 |

The key question is thus not whether politicians can control IRAs (and possibly, to reflect the changing preferences of their electorate) but whether they actually use such control powers. This is a key for evaluating the magnitude (and the very significance) of the politics of depoliticization foreseen by P. Burnham.

## 2. The politics of regulation under the regulatory order

IRAs are the fruit of a distinctive conception of political-administrative relations and, among the various challenges they pose to governance, the ‘challenge of depoliticisation’ is arguably a serious one.<sup>28</sup> But as the above discussion suggests, what IRAs *actually* do to political-administrative relations has for long remained a largely open question, at least in European parliamentary democracies. Now that a vast body of literature has tackled this question, it is possible to evaluate more accurately the explanatory purchase of three distinct sets of possible implications of the growth of the regulatory orders on political-administrative relations. One can indeed imagine a world where small and autonomous IRAs collaborate or are captured by the powerful interests and factions they are expected to govern. In that sense, the challenge for political-administrative relations is not so much that of a growing influence of technocratic governance over democratically elected representatives but, to a large extent, a sort of ‘interest-group liberalism’, where a fragmented and autonomous administration forges new linkages with private actors (see further). Alternatively, it is, of course, perfectly possible that IRAs gradually impose themselves as central players

<sup>26</sup> See Moe, T. The Politics of Bureaucratic Structure. In: *Can the Government Govern?* / Eds. J. E. Chubb, P. E. Peterson. Washington: Brookings Institution Press, 1989, p. 267–329.

<sup>27</sup> Adapted from Benoit, C. *Legislatures in the Administrative State: Political Control, Bureaucratic Politics and Public Accountability*, p. 255–274.

<sup>28</sup> For a discussion, see *The Technocratic Challenge to Democracy* / Eds. E. Bertson, D. Caramani. London: Routledge, 2020, <https://doi.org/10.4324/9780429342165>.

in the domains in which they operate, namely as a separate group of actors autonomous both from political actors and from the entities they regulate. Lastly, politicians could also use their control powers over IRAs to shape their decisions or, possibly, to ask IRAs to ‘re-delegate their authority’ through limiting independence of regulatory agencies.<sup>29</sup> In this third scenario, it is in fact politics that would trump good governance through independent regulation. These are, in a nutshell, the three broad scenarios (and sets of implications) of the massive delegation of competencies to IRAs for political-administrative relations in European parliamentary democracies, as well as for their outcomes, and for the general orientation of contemporary governance. We describe these scenarios in greater length in the next following pages. The findings of the literature in support of each of these scenarios are also briefly presented.

Let us first consider the abdication hypothesis, namely the scenario where politicians had ‘yielded up control over the apparatus of government’ to independent agencies, with the latter possibly influenced in turn by various other factions and interest groups.<sup>30</sup> The term ‘abdication’ was originally used in the 1970s to characterize the relationships between the United States Congress and a growing federal bureaucracy, and their overall consequences for democracy in America. In that respect, it is interesting to note that the current debates about IRAs in Europe echo older concerns of Americanists. Theodore J. Lowi, in particular, famously warned some forty years ago about the rise of ‘interest-group liberalism’ in the United States in part as a result of Congressional delegation of authority (including rule-making authority) to large administrative agencies. Delegation, he argued, gradually resulted in a stark decrease in politicians’ capacities to address on their own the pressing problems of the day as well as in new forms of linkages between politicians and interest groups.<sup>31</sup> It is yet hard to find a proper empirical assessment (or even an application) of this thesis to European parliamentary democracies, notably as it goes beyond the simple measurement of interest-group influence over regulatory decisions. On this latter, narrower, dimension, numerous and converging evidence, however, suggest a fair degree of *de facto* independence of IRAs from interest-groups and private actors more broadly. While evaluating the extent of revolving-door practices (including informal ties), the frequency of meetings or requests from private-sector actors, as well as their influence over the budget or the design of IRAs, Martino Maggetti found that independent agencies in fact enjoy ‘a considerable level of *de facto* independence’, and this ‘even if, under some circumstances, external actors may be occasionally able to influence the agencies’ conduct of regulatory tasks.<sup>32</sup> The conclusion of this study of a large sub-set of agencies in countries as diverse as Austria, Belgium, Finland, Germany, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom seems to indicate that interest-group influence over IRAs is an exception rather than a norm. Numerous case studies came to similar conclusions, with several suggesting that a dynamic combination of expertise and rule-making competences is an important explanatory factor of IRAs having *de facto* autonomy from private actors.<sup>33</sup>

More broadly, these findings seem to give credit to the second scenario: one where political abdication does not result in interest-group dominance but to the formation of a ‘third force’ in contemporary governance<sup>34</sup> and, perhaps, to the kind of peaceful ‘competence-based division of labour’ between democracy

<sup>29</sup> See Ozel, I. The Politics of De-Delegation: Regulatory (In)Dependence in Turkey. *Regulation & Governance*, 2012, Vol. 6, No. 1, p. 119–129, <https://doi.org/10.1111/j.1748-5991.2012.01129.x>.

<sup>30</sup> See e.g. McCubbins, M. Common Agency? Legislatures and Bureaucracies. In: *The Oxford Handbook of Legislative Studies* / Eds. S. Martin, T. Saalfeld, K. Strøm. Oxford: Oxford University Press, 2014, p. 567–587, <https://doi.org/10.1093/oxford-hb/9780199653010.013.0007>.

<sup>31</sup> See more Lowi, T. *The End of Liberalism: The Second Republic of the United States*. New York: W. W. Norton, 1979.

<sup>32</sup> Maggetti, M. *Regulation in Practice: The de facto Independence of Regulatory Agencies*. Colchester: Ecpr Press, 2012, p. 99. Retrieved from <https://www.zora.uzh.ch/id/eprint/66106/1/Maggetti-2012-1Regulation.pdf>.

<sup>33</sup> See first of all Ossege, C. Driven by Expertise and Insulation? The Autonomy of European Regulatory Agencies. *Politics and Governance*, 2015, Vol. 3, No. 1, p. 101–113, <https://doi.org/10.17645/pag.v3i1.75>.

<sup>34</sup> See e.g. Thatcher, M. The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe. *Governance*, 2018, Vol. 18, No. 3, p. 347–373, <https://doi.org/10.1111/j.1468-0491.2005.00280.x>.



and technocracy foreseen by G. Majone in his seminal contributions on the regulatory state.<sup>35</sup> According to this view, IRAs would thus enjoy sufficient decision-making or expertise capacities both to curb interest-group demands and to maintain their autonomy vis-à-vis variable political pressures. This idea of IRAs as a ‘third force’ has been introduced by M. Thatcher some fifteen years ago. Comparing IRAs in Britain, France, Germany and Italy under a principal-agent perspective, he found that ‘elected politicians did not use their powers to appoint party politicians, force the early departures of IRA members, reverse IRA decisions, or reduce IRA budgets and powers’<sup>36</sup> in the seven sectors compared (competition, telecommunications, energy, water, railways, postal services, media, and stock exchanges). Politicians, it seems, are not or rarely using their formal powers to keep IRAs under tight control. In other terms, principals appear to not necessarily care or seek to exert control over delegated agencies, contradicting a basic prediction of most principal-agent models.<sup>37</sup> More recent research, however, indicates that this situation is more than just a mere reflection of a disinterest from politicians for the activities of delegated agencies (or an immunity of independent regulators to politicization). A rich body of literature has argued that agencies themselves were largely involved in the maintenance and enhancement of their autonomy, notably through their active participation in the policy process. When examining the role of IRAs in policy-making in two sectors (finance and competition) and three countries (the Netherlands, Sweden, and Switzerland), M. Maggetti showed that *de facto* independence from politicians is a necessary condition for the maximum central role of agencies in policy making, which can become substantial.<sup>38</sup> More broadly, many studies have portrayed IRAs as proactively engaged in sectoral and transnational networks by building various coalitions of actors to reinforce their autonomy and their influence in policy formulation, as, for example, is illustrated in the survey of German agencies conducted by Tobias Bach and Eva Ruffing.<sup>39</sup> Other studies suggest that IRAs have deployed important public communication strategies, and this despite important variations across sectors and countries. Such strategies are typically used to inform the general public about possibly controversial decisions or as a soft tool of regulation of private actors.<sup>40</sup>

There is a rich literature that emphasizes the large autonomy often enjoyed by IRAs, at least in Western European democracies. From a more normative perspective, this seemingly supports the idea of a growing importance of expert adjudication vis-à-vis popular will, and a relative absence of political control of bureaucratic decisions or of interest group influence, which could perfectly manifest through similar kind of interventions on IRAs and their decision-making process. There is, however, an important limitation in most studies emphasizing the autonomy of agencies from political actors. Indeed, political interventions, and the motivations behind them, are hardly factored or explicitly measured in these analyses. The finding, for instance, that politicians rarely overturn the decisions taken by IRAs can in effect be considered as reflecting their large autonomy or *de facto* independence. Yet, it could also be explained by the fact that politicians do not have to directly intervene, as the decisions taken by IRAs would already generate the policy outcomes that politicians want them to generate. This observation

<sup>35</sup> A critical discussion of the argument of a ‘competence-based’ division of labour between democracy and technocracy appears, see Bickerton, C.; Invernizzi Accetti, C. Technocracy and Political Theory. In: *The Technocratic Challenge to Democracy* / Eds. E. Bertou, D. Caramani. London: Routledge, 2020, p. 45–70.

<sup>36</sup> Thatcher, M. The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe. *Governance*, 2018, Vol. 18, No. 3, p. 347, <https://doi.org/10.1111/j.1468-0491.2005.00280.x>.

<sup>37</sup> Cf. Maggetti, M.; Papadopoulos, Y. The Principal-Agent Framework and Independent Regulatory Agencies. *Political Studies Review*, 2018, Vol. 16, No. 3, p. 172–183, <https://doi.org/10.1177/1478929916664359>.

<sup>38</sup> See more Maggetti, M. The Role of Independent Regulatory Agencies in Policy-Making: A Comparative Analysis. *Journal of European Public Policy*, 2009, Vol. 16, No. 3, p. 450–470, <https://doi.org/10.1080/13501760802662854>.

<sup>39</sup> Bach, T.; Ruffing, E. Networking for Autonomy? National Agencies in European Networks. *Public Administration*, 2013, Vol. 91, No. 3, p. 712–726, <https://doi.org/10.1111/j.1467-9299.2012.02093>. For an analysis of how social networks contribute to improving the *de facto* independence of IRAs, see Ingold, K.; Varone, F.; Stokman, F. A Social Network-Based Approach to Assess *de facto* Independence of Regulatory Agencies. *Journal of European Public Policy*, 2013, Vol. 20, No. 10, p. 1464–1481, <https://doi.org/10.1080/13501763.2013.804280>.

<sup>40</sup> See e.g. Puppis, M.; Maggetti, M.; Gilardi, F.; Biela, J.; Papadopoulos, Y. The Political Communication of Independent Regulatory Agencies. *Swiss Political Science Review*, 2014, Vol. 20, No. 3, p. 388–412, <https://doi.org/10.1111/spsr.12118>.

is not new. It is backed by a very large (and spanning forty years) literature on U.S. politics, which has highlighted the ‘ingenious system’ established by the Congress ‘for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress.’<sup>41</sup> Politicians, according to this view, would use finer mechanisms (including subtle budgetary tools, pressures through review and oversight, appointments and various forms of indirect sanctions) to maintain IRAs under their control. We have, for now, little evidence in support of this thesis for the specific case of European politics, essentially as it has yet to be systematically tested with various indicators of political control. And I have argued elsewhere that there are good reasons to believe that the politicization of bureaucratic (including independent) agencies in the U.S. is certainly overestimated.<sup>42</sup> More recent research, however, tends to demonstrate that the magnitude of political control of IRAs in Europe is greater than usually assumed. While analysing about 700 top-level appointments to over 100 IRAs in 16 Western European countries between 1996 and 2013, Laurenz Ennser-Jedenastik showed that ‘individuals with ties to a government party are much more likely to be appointed as formal agency independence increases’,<sup>43</sup> in other terms, that ‘higher levels of legal independence are associated with greater party politicization.’<sup>44</sup> While examining the career trajectories of 338 top officials in 33 European Union agencies, Ixchel Pérez-Durán showed that ‘agencies performing regulatory tasks seem to be more inclined to have lower levels of *de facto* independence from politicians’,<sup>45</sup> notably through political appointments. By drawing on a study of a comprehensive dataset including all IRAs creating in France, I, together with with Ana-Maria Szilagy, have more recently shown that legislators were more involved in the design of agencies for which they anticipate higher levels of political appointments. Agencies with the same profile appear to be more frequently overseen once enacted.<sup>46</sup>

These early efforts thus sketch a more complex picture of agency politicization in European parliamentary democracies. More systematic analyses of this phenomenon are thus arguably needed and they could well challenge some established views of political-administrative relations in present-day governance. There is certainly much to gain, in that respect, from adopting a more dynamic approach to delegation, as it is exemplified by Fabrizio Di Mascio and coauthors’ study of Italian anti-corruption agencies over a period of twelve years, which has emphasized the intersection of multiple (including political) factors over time.<sup>47</sup> An equally important, though largely neglected, agenda relates to the implications of the growth of the regulatory order on the legislative process per se. A more decentralized approach to regulation and state intervention on the economy requires numerous, more substantial, detailed and sometimes heterogeneous laws and regulations. This trend is manifested by the rise of ‘omnibus’ legislation (notably at the EU level) or ‘monster’ bills. Olivier Rozenberg has recently argued that these texts might be a result of signalling, but also and crucially due to pressures from bureaucratic agencies seeking to promote their reforms with measurable implications in terms of work overload, interest-group politics and (decreasing) influence of non-specialized legislators.<sup>48</sup>

<sup>41</sup> Weingast, B. The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Application to the SEC). *Public Choice*, 1984, Vol. 44, No. 1, p. 148. Retrieved from <https://www.jstor.org/stable/30023940>

<sup>42</sup> See Benoit, C. Politicians, Regulators and Regulatory Governance: The Neglected Sides of the Story. *Regulation & Governance*, 2021, Vol. 15, No. S1, p. 8–22, <https://doi.org/10.1111/rego.12388>.

<sup>43</sup> Ennser-Jedenastik, L. The Politicization of Regulatory Agencies: Between Partisan Influence and Formal Independence. *Journal of Public Administration Research and Theory*, 2015, Vol. 26, No. 3, p. 507, <https://doi.org/10.1093/jopart/muv022>.

<sup>44</sup> *Ibidem*.

<sup>45</sup> Pérez-Durán, I. Political and Stakeholder’s Ties in European Union Agencies. *Journal of European Public Policy*, 2019, Vol. 26, No. 1, p. 1, <https://doi.org/10.1080/13501763.2017.1375545>.

<sup>46</sup> See more Benoit, C.; Szilagy, A.-M. Legislative Direction of Regulatory Bureaucracies: Evidence from a Semi-Presidential System. *The Journal of Legislative studies*, 2021, p. 1–20, <https://doi.org/10.1080/13572334.2021.1986281>.

<sup>47</sup> See more Di Mascio, F.; Maggetti, M.; Natalini, A. Exploring the Dynamics of Delegation over Time: Insights from Italian Anti-Corruption Agencies (2003–2016). *Policy Studies Journal*, Vol. 48, No 2, p. 367–400, <https://doi.org/10.1111/psj.12253>.

<sup>48</sup> See more Rozenberg, O. When Rationalization of Bureaucracy De-Rationalizes Laws and Legislatures: ‘Monster Bills’ in France. In: *Comparative Multidisciplinary Perspectives in Omnibus Legislation* / Ed. I. Bar-Simon-Tov. New York: Springer, 2021, p. 95–114.

## Conclusion

In this brief essay, I have tried to reflect on the current state of political-administrative relations in Europe's parliamentary democracies. I have, in particular, insisted on the manifold implications that the development of IRAs have had on such relationship, notably from the vantage point of the relation between democracy and technocracy. Drawing on the literature, I have discussed further an argument that I introduced elsewhere, according to which, if we have good reasons to believe that IRAs seem to enjoy a large degree of formal autonomy and *de-facto* independence, more accurate measures of interest-group and political influence are needed. Apart from filling an important gap in the literature, such efforts could provide larger benefits to understand present-day politics. Are political interventions on IRAs a mere reflection of interest-group demands or can we detect some attempts at re-politicizing (in the broadest sense of term) regulatory decisions, their political implication, and, perhaps, the current division between democracy and technocracy itself? The existing evidence presented in the previous sections suggest a rather negative response to these questions in the sense that they indicate a growing depoliticization of political choices, but they call for further more fundamental analysis. This seems particularly needed in a context where many European parliamentary democracies experience rise of populist forces and where their surge has been, in some countries at least, due to growing dissatisfaction generated by the depoliticization of economic choices and their delegation to (nominally) independent experts.

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