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What deficit? Legitimacy and Accountability of Regulatory Agencies


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Abstract

The paper addresses the accountability and legitimacy of regulatory agencies (IRAs). IRAs’ relevance has risen substantially in the past decades, which has led to debates on their legitimacy and accountability. First, it is frequently claimed that democratic institutions have lost terrain vis-à-vis non-majoritarian institutions, due to resource restrictions and policy complexity. Second, literature detects a dilemma in so far, as accountability is seen as the primary mechanism to legitimize these agencies, but at the same time interferes with desired independence. This paper’s main contribution is a theoretical review of the concepts of legitimacy, independence, and accountability, arguing that both accountability and democratic institutions remain more important than conventionally expected. It then applies a regime approach to agency accountability, which make use not only of de jure accountability rights, but also of de facto powers of accountability fora. Finally, it outlines tentative empirical results on accountability regimes in Switzerland and Germany, which largely support theoretical premises. Even though the empirical analysis has to be developed further, it can be concluded that deficits of accountability (and hence, of agency legitimacy) are rather an empirical than a theoretical matter.

Acknowledgements

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1. **Introduction**

Regulatory agencies are more and more relevant in many sectors of today’s politics. Their increasing importance is in conflict with the restricted democratic control due to their independence, representing a challenge for their legitimacy. Accountability is widely seen as the main feature to ensure agency legitimacy. However, much of the literature detects a trade-off between accountability (and hence, legitimacy) on the one hand, and independence on the other. Accordingly, accountability is assigned a limited role, in order not to interfere with agency independence, which has become a core value of regulatory institutional design. At the same time, it is doubted that democratic institutions in general have kept the power to play a major role in holding agencies to account.

The paper argues that the differences to other kinds of agencies are frequently overestimated and that, from a theoretical perspective, both accountability and democratically elected accountability fora (DEAF) are less limited in their role than regularly expected. It does so by reassessing theories of agency legitimacy, accountability and independence, finding only limited differences between IRAs and “ordinary” agencies. Moreover, it is argued that accountability regimes, built upon cooperation between DEAF and holders of horizontal accountability, may be able to overcome resources limitations and provide effective accountability structures. The paper uses then a proposal for the empirical assessment of agency accountability (Biela/Papadopoulos forthcoming) to identify specific weaknesses in sets of accountability relations or accountability regimes. First results strengthen the argumentation of the paper, but as well underline the fact that effective accountability is a matter of empirical investigation.

The paper proceeds as follows: The next section introduces independent regulators and the rationales for their rise, while section three reviews the literature on the effect of IRAs’ independence on legitimacy and accountability. Sections 4 and 5 depict the theoretical arguments on the role of accountability in the case of IRAs and of democratically elected accountability fora (DEAF) in particular. Section 6 provides an empirical approach and tentative results on four agencies from Switzerland and Germany. Section 7 concludes.

2. **The rise of independent regulators**

The last decades faced important changes in the organization of the state, which severely reduced the role of national governments and parliaments, while (international as well as domestic, public
as well as private) non-elected actors have gained power. Political power in the last decades has shifted away from parliament and other classical democratic institutions, and particularly towards „non-majoritarian institutions” (Majone, 2001; Vibert, 2007; Maggetti, 2010). That „rise of the unelected” (Vibert, 2007) took place at international and supranational level (“upwards denationalization” to e.g. the European Commission, international organizations such as OECD, WHO, WTO, or international networks) but also at domestic level (“sideward” and “downwards denationalization”). Independent central banks come into play, expert and private bodies, agencies, industrial self-regulation, or independent regulatory authorities (Vibert, 2007; Héritier and Lehmkuhl, 2011: 51). The above-mentioned developments have inspired several authors to write of a shift “from the positive to the regulatory state” (Majone, 1997) or of “regulatory capitalism” (Levi-Faur, 2005).

One of the most visible effects of that phenomenon is the increasing number and importance of independent regulatory agencies (IRAs) since the 1980s. (Thatcher and Stone Sweet, 2002; Coen and Thatcher, 2005; Levi-Faur, 2005; Maggetti, 2007; Gilardi, 2008). An IRA defined as:

“an unelected body that is organizationally separated from governments and has powers over regulation of markets through endorsement or formal delegation by public bodies” (Coen and Thatcher, 2005: 330).

The reasoning behind this development has been investigated quite extensively (Gilardi, 2005). First, agencification is claimed to be more efficient, by producing faster and expertise-oriented decisions (Maggetti et al., 2013). Moreover, the independence of regulators means an increased policy stability. We can differentiate here two lines of argumentation: The first perspective borrowed the so called “credible commitment” argument from the literature on independent central banks (Kydland and Prescott, 1977; Barro and Gordon, 1983b; Franzese, 2002; Keefer and Stasavage, 2003). In this view, IRAs help to generate a credible commitment to regulatory policies, unaffected by short-term political interests. This in turn should prevents regulatory capture (Laflont and Tirole, 1991) and serves the interests of the business sector by reducing investment risks and promoting growth (Kydland and Prescott, 1977; Majone, 1999; Alt, 2002). The second line of argumentation rests upon public choice literature predicting the decisions of governments under the conditions that they are uncertain about their re-election. Under that uncertainty, politicians have an incentive to delegate authority to independent actors in order to reduce the effects of an eventual government turnover (Horn and Shepsle, 1989; McCubbins et al., 1989; Moe, 1990).
3. The “challenge for democracy”: effects of independence on legitimacy and accountability

In sum, these arguments rest upon a rather economic rationale of better outcomes. What has remained under-investigated in the debate is the impact of the new state structures on democracy (Christensen and Lægreid, 2011: 140), in particular on legitimacy and accountability. Due to their ‘non-majoritarian’ character (Majone, 2001), questions of IRAs’ democratic legitimacy have aroused (Majone, 1994; 1999; Feldman and Khademian, 2002; Van Kersbergen and Van Waarden, 2004; Coen and Thatcher, 2005).

“The key question is whether the increasing dependence of modern democratic societies on unelected bodies presents a new danger to democracy” (Vibert, 2007: 1).

The most prominent conceptualizations of legitimacy in the present context have been developed by Scharpf (1970; 1999), who differentiates between input- and output-oriented legitimacy. Input legitimacy is based on the responsiveness to citizens’ preferences (i.e., government “by the people”), whereas output legitimacy requires acting in the public interest (in other words, “for the people”). From an input perspective, “[p]olitical choices are legitimate if and because they … can be derived from the authentic preferences of the member of a community.” In contrast, output legitimacy is given if and because choices “effectively promote the common welfare of the constituency in question” (Scharpf, 1999: 6).

Issues scholars have with IRAs’ legitimacy relate both to input as well as to output legitimacy: First, input legitimacy is said to be weakened in case of IRAs. IRAs enjoy substantially more discretion (at least in principle) than ordinary bureaucracy (Gilardi, 2008) and operate “at arm’s length” of government. In cases of strongly pronounced independence, the “democratic deficit of such institutions is most striking. The European Central Bank is (or at least had been) a case in point (Gormley and de Haan, 1996; Berman and McNamara, 1999; Elgie, 2002). The complexity of regulatory tasks and (often multi-level) governance systems (Zürn, 2000; Papadopoulos, 2003; Curtin et al., 2010) make it difficult to keep pace with for democratic institutions. Together with the increased power of domestic bureaucracies and international networks (Rhodes, 1995), it is thus unsure if parliaments and institutions of representative democracy in general have kept the power and resources to effectively keep pace with their agents (Pierson, 2004; Rosa, 2005). Moreover, Finally, IRAs are likely to receive selective input based on resources (Papadopoulos, 2003), thus might be biased in favor of narrow and myopic interests,
and hardly take externalities of their decisions into account (Føllesdal, 2011: 82). Similar applies to output legitimacy: In contrast to central banks, IRAs face regularly multiple objectives (Goodhart, 2001; Quintyn et al., 2007) which are moreover quite difficult to measure (Maggetti, 2010). Due to the technical complexity of tasks, extreme information asymmetries make it doubtful that IRAs can be monitored effectively (Binderkrantz and Christensen, 2009).

As countermeasures for these challenges, foremost two things have been identified: widened citizen participation (Zürn, 2000; Sosay, 2006), and accountability (Aucoin and Heintzman, 2000; Flinders, 2001; Mulgan, 2003; Pollitt, 2003; Bovens, 2010). To increase agency accountability, being widely accepted as crucial to ensure agency legitimacy and to prevent a democratic deficit (Van Kersbergen and Van Waarden, 2004; Busuioc, 2009), entails also a problem. Busuioc summarizes it for the EU case:

“Given that the ‘independence of agencies is often seen as the most central principle of good governance’ and that a large number were established specifically in order to remedy, through their independence, credible commitment failures of the Commission, jeopardising this independence would defeat the very purpose for which they were created” (Busuioc, 2009: 601).

Busuioc states correctly, that most of this perceived trade-off stems from conceptual ambiguities and an unclear and incomplete understanding of the concept of accountability as a measure of control (Smith and Hague, 1971; Romzek and Dubnick, 1987). Also more recently, Majone (2001) stressed the importance of monitoring procedures and transparency, but at the same time adheres limits to accountability in order not to interfere with agency independence. To solve the problem of agency legitimacy, he describes the relationship to agencies’ democratic principals as “fiduciary”, building mainly on trust and peer control (Maggetti, 2010).

From a different perspective, scholars of central bank independence have shown that accountability does not necessarily hamper independence, but in contrast might even enhance the performance of the respective agency and is a necessary complement to independence (Lohmann, 1992; Briault et al., 1995; Eijffinger et al., 2000; Quintyn et al., 2007; Amtenbrink and Lastra, 2008; Laurens et al., 2009). They thus support Busuioc’s conclusion:
“[T]he dilemma of accountable independence is a myth owing its existence to lack of conceptual clarity. Independence and accountability can and actually should co-exist” (Busuioc, 2009: 614).

However, the details of Moe’s ideal that “no one controls the [agency] …, yet it is clearly under control” (Moe, 1987: 291) are yet to be clarified. Scholars continue seeing accountability and independence as strongly antagonistic:

“The empirical distinction between the procedures for implementing independence and accountability is far from trivial and unproblematic. The two properties might occasionally overlap and thus conflict in practice.” (Maggetti et al., 2013: XX).

Or, as Busuioc states:

“[I]t has been repeatedly pointed out that one of the central challenges with regards to non-majoritarian agencies is to strike the right balance between independence, on the one hand, and control/accountability, on the other.” (Busuioc, 2009: 601).

From my perspective, most of these views still suffer from an overly narrow view onto accountability. In effect, the role assigned to accountability in the context of IRAs is too limited. This holds in particular for accountability to democratically elected actors. This paper’s goal is thus twofold: Section four shows that accountability plays a larger role in the context of IRAs than some of the literature expects. The argument is that – explicitly or implicitly – many scholars understand accountability as a form of control, which runs short of a number of additional purposes. The next section offers a more differentiated conceptualization from which is derived that independence interferes with accountability only to a very limited extent. Moreover, if we take into account accountability regimes and cooperation between actors, DEAF may have a stronger role than often predicted.

4. The theoretical perspective: Functions of accountability

Accountability is a tricky concept: While the term accountability has been in use for a long time in social sciences, it has gained more attention in the past years (Lindberg 2013: 203). However, there is still no consensus in the literature about the content and limits of the concept of
accountability (Bovens, 2010). It is conceptualized in many different ways, and almost every author used his or her own definition and understanding of accountability (Curtin et al., 2010). Over time, more elements have been classified as part of accountability, turning it into an “ever-expanding concept” (Mulgan, 2000). As a pattern behind the expanded use of the notion, the underdeveloped distinction between its normative and descriptive contents has been identified: Bovens argues that in the understanding of some scholars, “being accountable” has become a kind of “virtue” of organizations. Accountability studies from that tradition hence often focuses the “actual and active behavior of public agents” in order to assess the legitimacy of public officials and public organizations (Bovens, 2010: 947-8).

In contrast, another strand of literature treats accountability rather as a descriptive mechanism, and “employ a restricted definition of accountability that focuses on the mechanisms with which actors in public administration are hold accountable” (Schillemans, 2011: 389).¹ In this sense, accountability is understood as a social relation between two actors - an actor and a forum (Bovens, 2007; 2010), an accountor and an accountee (Pollitt, 2003), or a principal and an agent (Pratt and Zeckhauser, 1985; Lupia, 2003) that “involves an obligation to explain and justify conduct” (Bovens, 2010: 951). This strand of literature does not deal with the question “whether the agents have acted in an accountable way, but whether they are or can be held accountable ex post facto by accountability forums” (Bovens, 2010: 948). To follow that second understanding of accountability implies to acknowledge that accountability can be used to maintain or increase control over an agent, but as a neutral instrument, it can be used also for other purposes. Reviewing literature, accountability is seen to serve two broad purposes: a) to prevent the misuse of power (e.g. Thomas, 1998) and b), to ensure adequate performance (Peters, 2007).

Misuse of power is mainly prevented by ensuring agents to behave according to the public will and in compliance with law. The first one is widely called responsiveness; the second one is known as compliance, or with Peters “responsibility”. Responsibility here means “ensuring that the behavior of officials corresponds to (is responsible to) the law or a code of ethics in office” (Peters, 2007: 16). Responsibility can be assured by a superordinate institution, such as a board or a parent ministry, or by courts. In contrast, “the idea of responsiveness is that the good civil servant is one who is willing to take direction from above, to attempt to serve the public, and,

insofar as possible, to provide the public with what it wants” (Peters, 2007: 16). The idea to generate responsiveness through accountability is widespread:

“Accountability is a broad and rather stretched concept that reflects a range of understandings rather than a single core paradigm. In democratic polities, it also appears intimately related to electoral representation, reflecting a looped relationship between authorization of parties and their governments through ex-ante mandates, on the one hand, and, on the other, the evaluation of their performance in office through ex-post controls (Andeweg 2003), with the ultimate sanction being the capacity to ‘throw the rascals out’” (Curtin et al., 2010: 930).

Building upon the idea of retrospective voting (Fiorina, 1978), a large strand of literature on electoral accountability has been developed (for an overview, see Ashworth, 2012). At least equally prominent is the idea of accountability with regard to public administration. Agency theory (Pratt and Zeckhauser, 1985; Lupia, 2003) sees the relation between a democratically elected politician and a bureaucrat as a delegation of power from a principal to an agent that occurs because of limitations of the principal with regard to expertise and resources (Gilardi and Braun, 2002). The delegation hence implies an asymmetric distribution of information. Given their preferences diverge, the agent can pursue his preferences on the cost of the principal’s ones. The principal accordingly aims to establish structures to monitor the agent’s actions, e.g. via reporting requirements (McCubbins and Schwartz, 1984). In sum, the main task of accountability from this perspective is to delimit the gap between agency outputs and the wider public’s will. It thus contributes rather to the input dimension of legitimacy.

The other basic purpose, performance, is in contrast strongly linked to output legitimacy. It is often argued that accountability is a necessary condition for good performance (Aucoin and Heintzman, 2000; Shah, 2007; Gasmi et al., 2009). This notion can be derived from two quite different arguments: Agency theory stresses the effect of sanctions: In anticipation of severe consequences ex post, agents show higher efforts than if this is not the case. In contrast, other approaches see the political decision-making as an iterated process of learning and adaption under uncertainty. From that perspective, accountability is a mechanism that provides some feedback information on previous decisions and provides additional information for further improvement (cf. Sabel, 2004). In any way, the claimed positive effects of accountability on
performance) are disputed. In contrast, “accountability overloads” (Schillemans and Bovens, 2009) and “multiple accountability disorders” (Koppell, 2005) might lead to demotivation (Ossege, 2012) and symbolic action (Bovens, 2010; 957; Flinders, 2011).

A last purpose of accountability can be subsumed under the aspect of efficiency. Efficiency in a very wide sense is also the main issue of classical agency theory, assuming that insufficient monitoring ends up in the agent pursuing his own goals. These goals are not necessarily policy-oriented (this case has already been dealt with in the paragraph on responsiveness), but can characterized by the maximization of budget (Niskanen, 1971), the minimization of effort (Migué and Bélanger, 1974) or the maximization of “slack” (Wyckoff, 1990) in the sense of spare resources that can be used for anything in the agent’s interest.

I have outlined that from a theoretical perspective, accountability serves not only to exercise control, but has other functions as well. I am now going to reassess the arguments in favor of agency independence and show that accountability is only affected by these arguments in two respects. As mentioned in the outset, independence of regulators is mainly based on an argument known as “credible commitment”, which has first been applied to central banks (Barro and Gordon, 1983a; b; Keefer and Stasavage, 2003). The argument models the monetary policy as being subject to time-inconsistent preferences. Time inconsistency means that an actor interested mainly in short-term advantages takes decisions, which entail negative effects in the long run. Applied to monetary policy, politicians might favor lower interest rates that in the short run reduce unemployment (and improve their chance of being reelected), while in the long run that interest rate means a (welfare-decreasing) rise of inflation rates. Similarly, in the case of regulation, it is argued that politicians’ short-term orientation (in gains from state-owned ex-monopolists) and high uncertainty created by eventual government turnovers might hamper private investments. From that perspective, the establishment of an IRA is an instrument to solve that “principal’s moral hazard” (Miller, 2000).

In light of the functions of accountability outlined before, the commitment argument exclusively relates to responsiveness. In order to fulfil their tasks, central banks or IRAs should be isolated from shortsighted political influence. This applies foremost to every-day decision-making of agencies and banks: Much of the central bank literature refer to Debelle and Fischer’s (1994) differentiation between goal and instrument independence. Quintyn et al. (2007) use the term “operational independence”. It can be derived from the literature that, while instrument independence is economically useful in the case of central banks, goal independence is not
Since goals are normally fixed in regulatory law, we can transfer this insight to our typology of accountability functions by stating that rather than responsiveness, responsibility (which is compliance with rules) is a core function of accountability in the context of IRAs. Responsibility is regularly ensured by judicial review, peer and expert monitoring, and other mechanisms (Majone, 1998; 1999; Van Kersbergen and Van Waarden, 2004). Also, performance measures as an aspect of output legitimacy remain an undisputed function of accountability (Majone, 2001).

In sum, applying theoretical argumentation in favor of independence to the typology of accountability functions developed, two qualifications have been identified: First, responsiveness is not a desirable goal in the context of IRAs. Second, accountability can still serve to ensure effectiveness, efficiency, and responsibility of agencies. As a restriction, the latter one should not be ensured by the government, but by judicial or expert bodies.

5. The empirical perspective: Accountability regimes as strengthening factors

We have now argued that accountability is a core mechanism to ensure democratic legitimacy of IRAs. There are only two differences compared to ordinary bureaucracy. However, according to the literature, IRAs are challenging democracy in a second aspect: the claimed reduced importance of democratically elected accountability fora (DEAF). I argue that a more integrated empirical assessment of accountability, taking into account the various mechanisms of cooperation and information-sharing existing in reality, can possibly remedy the stated weaknesses, which are mostly based on a lack of resources and expertise. First, I reassess common definitions of accountability in order to depict the development of a broadened understanding of accountability. Second, I present theoretical and empirical arguments from literature indicating an increasing complexity of accountability relations, referred to as accountability networks and accountability regimes. In sum, these findings suggest that, in order to assess agency accountability correctly, it is necessary to take into account cooperation between DEAF and e.g. expert bodies or stakeholders, which is done in the following section.

Classical approaches, mainly from the strand of agency theory (see for overviews Bendor et al., 2001; Gilardi and Braun, 2002; Miller, 2005), model the relation between a principal and an agent as a delegation of power from the principal to the agent. The delegation in turn implies the problem of adequate control mechanisms, since the principal has to assure the agent acts in her interest. These approaches have in common that they assume a linear, hierarchical relationship
between principals) and agents, mainly characterized by mechanisms of monitoring, control, and sanctioning. Strom (2000) speaks in this context of a “chain of delegation” from voters to members of parliament, a government head, government ministers, and bureaucrats.

In line with this, accountability has been used in political science for a long time primarily in two contexts: a) accountability of democratically elected politicians to their electorate, and b) accountability of bureaucrats to their administrative and political leaders. The former is generally labelled as political or electoral accountability, the latter one as administrative or bureaucratic accountability. However, this classical understanding of accountability makes increasingly less sense, and has been proven too narrow (Roberts, 2001): “Traditional measures of accountability that rely upon line or top-down measures do not necessarily provide a good guide to the accountability culture as a whole.” (Considine, 2002: 37).

Consequently, the understanding of accountability has been widened: A court, for instance, is no one’s principal (the court has no powers to delegate) but nevertheless can held other bodies to account. In fact, ombudsmen, accountors (Mainwaring and Welna, 2003; Moreno et al., 2003), judicial review, as well as professional peers (Papadopoulos, 2007) and civil society (Smulovitz and Peruzzotti, 2000) play an important role in holding political bodies to account. Table 1 depicts the differences between several accountability definitions.

<table>
<thead>
<tr>
<th>Definition entails ...</th>
<th>Group 1</th>
<th>Group 2</th>
<th>Group 3</th>
</tr>
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<tbody>
<tr>
<td>... the right to access certain information</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>... the right to request specific information</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>... the right to enforce information requests</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>... the right to pose sanctions for agency conduct</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>... the ability to pose sanctions based on de facto power (non-institutionalized accountability)</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>... accountability with regard to any aspect of conduct</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
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Table 1: Simplified summary of accountability definitions

Group 1 entails agency theory inspired approaches, which define fora rights-based, focus on performance, and sanctions. The second group consists mainly of scholars who aimed to widen the understanding of accountability. They include also non-institutionalized fora (e.g., the media) and define fora rather power-based, than rights-based. Moreover, these scholars explicitly add an information dimension to accountability. This widened understanding is seen critical by the scholars of the third group, which consider formal rights to get informed as the decisive aspect of accountability.
Groups 2 and 3 reflect the more recent, non-hierarchical relationships regularly tagged with the notion “horizontal” or “diagonal accountability” as opposed to “vertical accountability” (Bovens, 2007). Vertical accountability is characterized by a hierarchical principal-agent relationship, but horizontal accountability is not:

‘Horizontal accountability’ refers to mechanisms of accountability that do not address the political principals of agencies -hierarchical or vertical accountability - but address other significant stakeholders such as clients, professional peers, or semi-independent overseeing boards” (Schillemans, 2009: 2).

Some scholars see horizontal accountability as a replacement of more traditional ones (Barberis, 1998), others underline the importance of hierarchical relationships and see horizontal accountability as complementary (Mulgan, 2003; Papadopoulos, 2007; Schillemans, 2008; 2009; Héritier and Lehmkuhl, 2011: 136). Schillemans summarizes:

“There are several reasons why horizontal accountability—as it was found to work—can not be seen as a potential substitute for ministerial responsibility. To begin with, horizontal accountees do not act as deputies for the minister. ... Furthermore, these new mechanisms do not create an alternative form of accountability to democratically legitimized accountees. ... For these reasons, horizontal accountability must be considered as something that differs from the democratic control through ministerial responsibility. What horizontal accountability adds, however, is that it stimulates the learning capacity of agencies” (Schillemans, 2008: 190).

The findings on horizontal accountability reinforce the idea that accountability is based on “cumulative effects of various mechanisms of control“ (Thomas, 1998: 349) and is a product of complex interactions between actors (Harlow and Rawlings, 2007). As Scott points out:

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2 Bovens called diagonal accountability the relationships in which a forum has direct access to information, but has to rely on a third party to implement sanctions (e.g., an audit office that reports to the parliament).
The extended mechanisms of accountability in the regulatory state are not linear ... Rather, they are premised on the existence of complex networks of accountability" (Scott, 2000: 49-50).

For these networks, the term ‘accountability regime’ has been proposed (Scott, 2000: 55; Bovens et al., 2008; Schillemans, 2008: 179). The term regime was first used in the context of international relations (Krasner, 1983: 1). The regime concept has found entrance into the comparative analysis of political institutions (Kaiser, 2002) as well as into regulatory policy analysis (e.g. Vogel, 1996). Biela and Papadopoulos (forthcoming) define an accountability regime as the full set of actors, institutions, norms and rules that are of importance for the accountability of a given agent.\(^3\)

To sum up, in the theoretical part of the paper, I have argued that accountability and DEAF play a larger role for IRAs than conventionally expected. Only minor restrictions apply with regard to functions of accountability and DEAF, and the latter may have a chance to compensate their resource restrictions by adequate cooperation with third fora. In the next section, I briefly present both an empirical approach to agency accountability (Biela and Papadopoulos, forthcoming) that addresses the above-mentioned criteria and tentative empirical results from four Swiss and German agencies (Biela, 2014).

6. Agency accountability: A tentative empirical assessment

The conceptual reviews above now provide us with the tools to assess agency accountability and to check it for potential deficits: We can identify the fora based on clear criteria, differentiate between three levels of agency action that correspond to the basic purposes of accountability in the IRA context. For the empirical analysis, we make use of the operationalization in Biela and Papadopoulos (forthcoming), depicted in table 2.

The approach proposes to distinguish between three levels of agency action: a political, an operational and a managerial level. Commonly, literature differentiates between managerial and political accountability (Day and Klein, 1987). The former form is a ‘neutral, technical exercise involving bookkeeping and arguments about whether what is being done is being done efficiently and effectively’ (Christensen and Laegreid, 2002: 271). Political accountability, in contrast, is

\(^3\) The formulation rests upon Eberlein and Grande, defining a regulatory regime “as the full set of actors, institutions, norms and rules that are of importance for the process and the outcome of public regulation in a given sector” (2005: 91).
generally understood as political responsiveness to the principals’ preferences. Justified by the theoretical underpinnings of delegation to regulatory agencies, we add a third level of action, which includes single-case decisions, and in general application of regulatory instruments by the agency. Furthermore, the approach focuses not only on the formal rights of accountability fora to gather information or pose sanctions, but also their de facto ability to use these rights, determined by their capability to process information and the credibility to use their sanctioning rights. Table 1 summarizes the indicators used for the approach.

<table>
<thead>
<tr>
<th>Fora</th>
<th>Aspects of agency conduct</th>
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<tbody>
<tr>
<td>All political or societal actors in a accountability relation with</td>
<td>Political accountability: achievement of statutory goals, outcome</td>
</tr>
<tr>
<td>the agency, i.e., with relevant information and/or sanctioning</td>
<td></td>
</tr>
<tr>
<td>rights</td>
<td>Operational accountability: adequacy and legality of single regulatory decisions, output</td>
</tr>
<tr>
<td></td>
<td>Managerial accountability: Efficient use of resources (staff, funding), throughput</td>
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<tr>
<th>Formal information rights</th>
<th>Information capability</th>
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<tr>
<td>Extensive (+): forum has direct access to primary documents and</td>
<td>Resources: time, staff, expertise</td>
</tr>
<tr>
<td>forum can demand specific information</td>
<td></td>
</tr>
<tr>
<td>Moderate (o): forum has no direct access to primary documents but</td>
<td>Cooperation: cross-memberships, information exchange with third fora or expert bodies</td>
</tr>
<tr>
<td>can demand specific information</td>
<td></td>
</tr>
<tr>
<td>Limited (-): forum has neither direct access to primary documents</td>
<td>Limited (-): situational effect at individual level (e.g., disciplinary measures to</td>
</tr>
<tr>
<td>nor can demand specific information</td>
<td>staff)</td>
</tr>
<tr>
<td></td>
<td>Sanctioning credibility</td>
</tr>
<tr>
<td></td>
<td>Internal structure of forum: composition, appointment rule, decision rule, heterogeneity</td>
</tr>
<tr>
<td></td>
<td>Coordination between fora: division of competencies, probability of deadlock and blame</td>
</tr>
<tr>
<td></td>
<td>shifting</td>
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<td></td>
<td>Political interest</td>
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Table 2: The assessment of agency accountability (Biela and Papadopoulos, forthcoming).

In section four, I concluded that there are three remaining functions of accountability in the context of IRAs. At the strategic level, accountability is still required to ensure performance and facilitate learning. Second, operationally, agency decisions still need to be reviewed in terms of responsibility. Here applies a restriction: Due to agency independence, this has to be done by an institution independent from the government, frequently an agency board. Moreover, agency actions have to be subject to judicial review and hence legal accountability. Third, at managerial level, agencies remain responsible for their internal management and the use of their budget, in short, for acting efficiently. We can conclude thus that, at least from a theoretical, perspective, accountability remains crucial also in the case of IRAs. This holds with only a slight restriction for democratically elected actors such as governments and parliaments.
Moreover, the approach differentiates between formal rights and de facto power to hold an agency to account (Lægreid and Verhoest, 2010; Gilardi and Maggetti, 2011). The approach attempts to evaluate a forum’s capacity to gain information and to appraise agency action, based on the fora’s time, level of expertise, and extent of cooperation with other fora. On the sanctioning side, it is about the likeliness that the forum actually imposes consequences, taking into account its internal structure, and the side costs of sanctions (Biela and Papadopoulos, forthcoming). In a recent working paper, I applied the approach to four agencies from Swiss and German telecommunications and financial sectors (Biela, 2014). A summary of the findings is depicted in tables 3 and 4.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Bafin</th>
<th>Finma</th>
<th>BNetzA</th>
<th>ComCom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political acc.</td>
<td>0</td>
<td>o</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Operational acc.</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Managerial acc.</td>
<td>+</td>
<td>o</td>
<td>0</td>
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</tbody>
</table>

**Table 3:** Overall assessment of accountability regimes (Biela, 2014: 17).

<table>
<thead>
<tr>
<th>Agency</th>
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<th>BNetzA</th>
<th>ComCom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political acc.</td>
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<td>-</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Operational acc.</td>
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<td>-</td>
<td>None</td>
</tr>
<tr>
<td>Managerial acc.</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>-</td>
</tr>
</tbody>
</table>

**Table 4:** Accountability vis-à-vis governments and parliaments (Biela, 2014: 17).

All agencies except the ComCom are subject to at least a reasonable level of accountability. However, we see both cross-case and cross-level differences: Swiss agencies seem to be less accountable than their German counterparts are. Biela (2014) assigns that to scarce resources and less frequent cooperation in the Swiss cases. The comparison of agency action levels proves first, that accountability indeed varies between levels. The differentiated approach we took thus have led to additional insights. Second, comparing the overall accountability level (table 3) with accountability to DEAF, accountability is still present, but its level decreases. The most striking difference is at the operational level, where accountability to government or parliament is either weak or non-existent. So far, this is what I expected. On the other hand, DEAF are (with exceptions) also far from being strong fora at political and managerial levels. This goes beyond our expectation and has to be corroborated in a sounder analysis. Moreover, there are cases suggesting either a level specific or even a general deficit of accountability structures. This is most clearly the case if we look at the Swiss ComCom.
7. Conclusion

This paper argued that the role of accountability and democratic institutions in legitimizing independent regulators is often seen overly pessimistic. It reviewed concepts of legitimacy, accountability, and independence and argued that despite independence, accountability still can play a major role. The aim was to show that the power of agency accountability is rather a matter of empirical investigation than of theoretically argued trade-off. In detail, there are only two restrictions applying to IRA accountability: First, responsiveness is not a desirable goal. Second, the compliance with rules has to be monitored rather by fora such as courts and expert bodies, rather than by parent departments. The second argument was, that democratic institutions have maintained much more power than often predicted. An empirical approach taking into account the network or regime structure of accountability can shed light on that fact.

My aim was not to declare all issues with democratic legitimacy of IRAs to be unreasoned. It was rather to specify the role accountability plays and argue that accountability deficits are a matter of empirical scrutiny. The analysis has shown that accountability indeed remains strong in many respects. DEAF keep within their role as important accountability fora, except at operational level - which is predicted by theory. However, this is only part of the story. DEAF are rarely the strongest fora, neither at political, nor at managerial levels. Moreover, there are cases where a accountability deficit is indeed likely. Sometimes only at certain levels of agency action, or regarding a certain kind of fora. In at least one of the four cases under scrutiny, however, the accountability deficit is quite comprehensive. Thus, the challenge of democracy might be smaller than often expected, but apparently it is far from nonexistent. The empirical results are rather tentative, however. Only four cases are covered, and the operationalization has to be improved. Further versions of the paper will have to extend that part.

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