Strengthening the Accountability of Independent Regulatory Agencies:

From Performance back to Democracy

by

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Abstract

The autonomy of Independent Regulatory Agencies (IRAs) raises concerns about how to keep them accountable. Remarkably, the process of Europeanisation has led to the emergence of a multilevel regulatory system linking IRAs to national and supranational actors but, on the other side, this process has influenced the capacity to make IRAs accountable. The literature about the accountability deficit of IRAs has tried to address this question, but the interplay between delegation, 'multi-levelisation' and accountability has not been thoroughly investigated yet. Notably, theoretical analysis of IRAs' accountability in multi-level regulatory environments is still scarce. This article is aimed at contributing to the debate by pointing out that any theoretical discussion about the accountability of IRAs should be framed in normative terms and, precisely, should reconsider a crucial dimension neglected so far, that is, the goals accountability is expected to achieve. The article, in fact, argues that in multi-level regulatory environments the impact of devices adopted to improve the accountability of IRAs is generally weakened by the presence of a 'neutral' idea of accountability, which diluted its power. The only way to strengthen the effect of accountability is to bring politics and democratic values back into the regulatory process.

Keywords: Independent regulatory agencies, accountability, multi-level regulation, principal-agent model, accountability pitfalls, democratic goals.

Introduction

The delegation of regulatory competences to non-elected bodies has become a reality almost everywhere. As a consequence of public utility liberalisation, economic integration, Europeanisation, and reforms of Public Administration started in the 1980s, a gradual process of 'agencification of regulatory functions' (Jordana and Levi-Faur 2010, 343; Levi-Faur, 2011, 7) has paved the way for a widespread diffusion across the world of a particular type of non-elected body: Independent Regulatory Agencies (IRAs, hereafter)[1]. IRAs could be defined as organisations made by impartial experts, independent from external pressures, charged by political actors with specific regulatory powers (La Spina and Majone 2000, 7).

Although IRAs' diffusion is now accepted as a matter of fact, their independent nature raises concerns about how to keep them under control or *accountable*. In broad terms, accountability refers to the obligation for an individual or organisation to account for his/her conduct toward another person or organisation (Bovens 2007, 450). Accountability entails an obligation for an actor, the accountability holder (Behn 2001, 2), to regularly *render account* and to *justify* his/her actions to a specific forum that can *sanction* him/her for possible misconduct (Bovens 2007, 455-457; 2010, 952; Busuioc 2009; 2012). Two distinguished features of this process are, therefore, the dialogic nature of the relationship between the accountability holder and the forum and the risk to face sanctions.

The notion of accountability is central within the democratic theory because it represents the mechanism through which politicians are called to explain and to justify their actions to the electorate who, in turn, could sanction them for inappropriate conduct. As bureaucracies and agencies gained relevance and autonomy in the policy-making process, responsibility for decisions has been distanced from voters. IRAs' insulation from political interference was meant as necessary to guarantee that their decisions were time-consistent, credible, and impartial. However, on the other side, the delegation of powers from political institutions to

IRAs creates accountability problems because 'the spread of independent regulators means that more and more aspects of our lives are shaped by decisions made by institutions that are not elected and that are not under the direct control of elected officials' (Gilardi and Maggetti 2011, 202). Voters, in fact, cannot directly sanction IRAs through elections because these agencies are isolated from the electoral cycle; thus, citizens should rely on scrutiny and eventual sanction made by elected politicians 'on their behalf'.

The delegation of regulatory powers from political actors to IRAs, indeed, has been complicated by other dynamics, particularly European integration. The process of Europeanisation that occurred in several policy sectors has led to the emergence of regulatory systems linking national IRAs to national governments, administrative courts, domestic firms, transnational networks and other stakeholders. Moreover, within these multi-level regulatory regimes, IRAs are called on to support the Commission in implementing 'controversial decisions' at the national level (Thatcher 2003, 133) and in supervising the correct functioning of competition and market integration. Multi-level processes have modified the regulatory environment in terms of actors involved and relationships between them and have finally influenced the capacity to make IRAs accountable. In this respect, Scott argues that new forms of accountability have flanked formal patterns of control over public agencies and that now 'it is possible to conceive of a concept of 'extended accountability' within which traditional accountability is only part of a cluster of mechanisms through which public bodies are in fact held to account' (2000, 48).

Recent literature about the accountability of IRAs has tried to address these questions. Some studies have dealt with the implications of empowering non-majoritarian institutions according to the normative theory on democracy (Majone 1996b). Other studies have described mechanisms deployed by actors in various regulatory sectors and across countries to keep IRAs accountable (Schillemans 2008, 2011; Maggetti 2010; Verhoest *et al.* 2012).

Other scholars have developed models to assess accountability practices (Maggetti, 2010; Baldwin *et al.* 2012; Lodge and Stirton 2012; Biela and Papadopoulos 2014; Fernández-i-Marín *et al.* 2014). However, the interplay between delegation, 'multi-levelisation' and accountability has not been thoroughly investigated. Notably, theoretical analysis of IRAs' accountability in multi-level regulatory environment is still scarce. This is mainly due to the normative nature of the debate and to the fact that, as Bovens clearly affirms, 'accountability as a virtue' is a highly contested concept (2010, 949).

The article is aimed at contributing to the debate by stating that any theoretical discussion about IRAs' accountability should be framed in normative terms and, to be exact, should clarify which virtue accountability is. To move forward in the theoretical and empirical analysis of accountability of IRAs, we need to reconsider a crucial dimension that has been neglected so far, that is, the goals that accountability is expected to achieve. In the principal-agent model, accountability serves to prevent IRAs from drifting from the contractual terms of delegation. Other approaches such as the 'credibility thesis' (Majone 1997; Gilardi 2008) emphasised other (and implicitly more relevant) goals to be pursued through accountability, such as regulatory efficiency and procedural fairness. Empirical research has widely accepted this thesis and supported it though the identification of possible accountability mechanisms without questioning their normative implications.

In this article, indeed, I argue that in multi-level regulatory environments, the impact of devices adopted to improve the accountability of IRAs is generally weakened by the presence of a neutral idea of accountability focused on the achievement of good performance and/or fairness. However, when the notion of accountability is detached from its normative nature and, in particular, from democratic values, its power is diluted, and control on IRAs can be ineffective or manipulated to pursue other ends. The only way to strengthen the effect of accountability is to bring politics and democratic values back into the regulatory process.

The paper is structured as follows. Part 1 critically reviews the literature on the accountability of IRAs. It first concentrates on problems of *ex ante* and *ex post* controls in principal-agent relationships. Second, it analyses the accountability of agencies as a question of democratic legitimacy, and then it focuses on the main implications for holding IRAs accountable in current multi-level regulatory regimes. Part 2 assesses what I call 'accountability pitfalls', i.e., problems emerging when accountability arrangements are put in place in multi-level regulatory environments. The discussion draws upon existing empirical research on regulation and, in particular, on data presented in Righettini and Nesti (2014)[2]. In Part 3, different types – and visions – of accountability are identified: accountability as a democratic value, accountability as a mechanism to improve regulatory performance and/or fairness, and accountability as a strategic opportunity for purpose-oriented forums. The paper concludes by discussing the political nature of accountability and suggests possible solutions to bring politics and its responsibilities back into the regulatory process.

1. Theoretical Approaches to study the Accountability of IRAs

The debate about IRA accountability has been framed within at least three approaches: the principal-agent theory, the democratic theory and the empirical study of independent regulation.

In the first approach, the delegation of regulatory powers to IRAs is conceptualised as a relation between a political principal (generally the executive) and a bureaucratic agent (the IRA). The principal would delegate powers to the agent for at least four reasons (Majone 1996a, 1996b, 1997; Thatcher and Stone Sweet 2003, 4; Gilardi 2008, 30). First, through delegation, political actors try to obtain expertise in highly technical policy domains where regulatory tasks are particularly complex to manage. Second, delegation and insulation of regulatory decisions from political 'fluctuations' aim to enhance credible commitment in

crucial policy sectors where market players need stability for their investments. Third, delegation reduces decision-making costs for reaching agreements and for overcoming information asymmetries. Finally, delegation through agencies creates a 'scapegoat' to be blamed for unpopular decisions or policy failures. The rationale behind the IRAs' diffusion, therefore, assumes that political actors would transfer part of their regulatory powers to IRAs because IRAs are highly technical organisations with the proper expertise to achieve effective policy outcome, the proper stability to ensure a reliable regulatory environment for business and the proper independence to control firms and to protect the public interest.

Delegation, nevertheless, entails some risks or agency losses (Gailmard 2014, 92-93). First, the principal may be unable to select the most appropriate agent because the principal may not have enough information about the competencies and preferences of the agent (raising the problem of *adverse selection*). Second, the agent, once selected, may pursue his or her own interests instead of, or that could be adversarial to, the principal's interests (raising the problem of *moral hazard*). Principals should therefore adopt measures to reduce information asymmetries. Moreover, they should monitor agents to prevent them from exercising delegated powers in an arbitrary and discretionary way.

Agency losses can be contained *ex ante* by the principal through contract design or screening and selection mechanisms (Strøm 2000, 12). In the first case, the principal pre-defines the system of incentives available to the agent and the reciprocal gains deriving from delegation. In the second case, the principal outlines the criteria for the selection of the correct agent.

Agency losses can also be contained *ex post*, after the delegation has been made. According to McCubbins, Noll and Weingast (1987), control may be exerted through three types of devices. The first type of device is the adoption of police-patrols. These mechanisms usually include the obligation for the President of an agency to undergo parliamentary

hearings and/or to report to Ministries, to regularly illustrate the agency's activities and/or to respond to specific interrogations and to submit budgets to audit commissions. Another type of control is fire alarms, i.e., monitoring made by constituents to assess whether the agency acts in a fair way. Finally, controls can include deck-stacking, that is, administrative procedures and rules that constrain the agency behaviour. Deck-stacking, in particular, refers to the ability of the coalition that created the agency to maintain the decision-making environment and the bargaining struck among members stable over time (McCubbins *et al.* 1987, 255).

The democratic theory discusses the problem of accountability of agencies as a problem of democratic legitimacy. The reasons behind the need for making independent regulation accountable derive from the normative principle that agencies should be prevented from exercising delegated powers in an arbitrary and discretionary way. Deviation from mandates, in fact, would break the delegation chain and eventually weaken the citizens' democratic control. According to the normative theory of democracy, the IRAs' legitimacy represents a problem because agencies are not obliged to give voters explanations and justifications for their actions, and consequently, IRAs may not be sanctioned for their actions (Bovens 2007, 451). An attempt to solve the problem of IRAs' legitimacy has been to justify their creation on the basis of their efficiency, their problem-solving capacity and their expertise (Majone 1996b, 296; Thatcher and Stone Sweet 2003, 19-20). In other words, a shift of focus from 'input' to 'output legitimacy' (Scharpf 1999, 2007)[3] occurred, and accountability, according to this perspective, has become the mechanisms through which different forums, namely citizens and all of the relevant stakeholders, assess the IRAs' capacity to achieve the expected policy results.

Following Majone (1996b), empirical studies of IRAs proposed to reframe the concept of accountability in procedural terms by taking into consideration the emergence of European

networks of IRAs (Cohen and Thatcher 2008; Maggetti 2010, 4). In multi-level regulatory environments, in fact, trans-national networks can promote accountability through peer reviews and mutual controls. IRAs participate in networks, cooperate with other IRAs through the exchange of information and expertise and can be judged for their activities. Sanctions, in this case, rest much more on blame and loss of reputation than in material consequences. Indeed, reputation, which is 'a set of symbolic beliefs about an organization, beliefs embedded in multiple audiences' (Carpenter 2009, 10), is a crucial resource for regulators to enhance trust in future cooperation and to bind them to reached agreements (Downs and Jones 2002). Multi-level accountability mechanisms operating at the EU level incentivise IRAs to maintain a high reputation to be credible and to be positively judged by the European Commission and other national IRAs.

All of the three approaches illustrated above tried to address the problem of accountability of IRAs through the adoption of a different perspective. In the principal-agent model, the core element is the direct, hierarchical oversight conducted by political principals on IRA organisation and behaviour. In the democratic theory, the focus of the IRAs' legitimacy is shifted from the input to the output side. Legitimacy, in this case, depends not on the anchorage of IRAs' decisions to voters' preferences but rather on the IRAs' capacity to produce effective policy outcomes. Accountability is the mechanism through which stakeholders can evaluate the IRAs' performance. Finally, empirical research on independent regulation stresses the importance of procedural devices in keeping IRAs accountable and places particular emphasis on transnational European networks as means to induce IRAs to adopt the expected conduct.

From a theoretical point of view, the debate about accountability of IRAs seems not to have moved too far. However, two critical issues emerge from the literature: First, there are some 'hidden traps' within each of the aforementioned approaches that make the promotion

of accountability more complex in practice than it appears in theory. Second, the issue of accountability has been primarily addressed by taking into consideration only some questions (i.e., 'to whom, about what and how the IRA should render account') but leaving almost underexplored a crucial one: Why are IRAs still expected to be accountable to a forum?

In the following, I will introduce the main drawbacks of the debate about the accountability of IRAs, and I discuss them with reference to some empirical evidence from research on the telecommunications sector. Then, I turn back to the issue of the relevance of accountability by arguing that the analytical frames adopted so far hamper the possibility to move the discussion ahead because they are too focussed on actors and modes of accountability while leaving unresolved a crucial question: What is the purpose of accountability in regulatory regimes?

2 Accountability Pitfalls

2.1 Competing Principals

The principal-agent theory rests on the assumption that the chain of delegation is simple, as in the case of the Presidential system in the US, where voters directly elect some offices, and which heavily relies on *ex post* controls (Strøm 2000, 13). In parliamentary systems, on the contrary, there are more stages of delegation, and control depends on *ex ante* oversight (Strøm 2000, 14). However, multi-level regulations transformed the governance approach to public service delivery from hierarchical steering to a more decentred and diffused policy style, where actors from different institutional levels and with different natures interact to produce regulatory decisions. Within this system, vertical and hierarchical links between the agent, i.e., the IRA, and the principal, i.e., the parental Ministry, have been complicated by the emergence of multiple 'executives' responsible for regulation.

In multi-level regulatory environments, a linear delegation chain hardly emerges because principals are composite and may have incoherent or competitive preferences that weaken their capacity to control the agent (Thatcher and Stone Sweet 2003, 6). *Ex ante* controls, in fact, can be diluted by the unbalanced distribution of delegating powers between the European Commission and Member States due to their shared regulatory competencies. An example is the case of telecommunications, where the organisation and specific competences of IRAs are not detailed by European legislation. According to Directive 2009/140/EC[4], for instance, IRAs are solely expected to fulfil some regulatory duties (identification of relevant markets, definition of terminal rates, regulation of access and interconnection to communications networks, definition of Universal Service obligations, etc.) and to cooperate with the European Commission to guarantee the correct implementation of the EU regulatory framework at the national level. However, the definition of additional and/or specific regulatory tasks and of criteria to appoint IRAs' heads is left to the Member states' discretion (Righettini and Nesti 2014, 86). There are, therefore, two principals (the Commission and Member States) in the delegation chain with concurrent powers, but *ex ante* controls over the agent are concentrated in the hand of only one principal (each Member State). Thus, the Commission and Member States may have competing preferences about developments and regulation of specific policy sectors. Moreover, unclear preferences of the principal regarding the distribution of functions among different actors in the regulatory arena may lead to the delegation of competing mandates among agents, as in the case of telecommunications, where IRAs often have overlapping competences with antitrust agencies (Righettini and Nesti 2014, 92-93). The direct consequence is that delegation is jeopardised among member States.

2.2. 'Trivial' Accountability

The unclear role assigned to the Commission also weakens *ex post* controls. Again, the telecommunication sector offers an interesting example. Article 7 and Article 7a of Directive 2009/140/EC call on IRAs to identify and analyse communications markets taking into account the Commission Recommendation on relevant markets[5] and its guidelines on market analysis and assessment of Significant Market Power. Through the notification procedure, IRAs inform the Commission about the draft measures that they will implement. The Commission can express its concerns about an IRA's decision and can ask it to explain its choices. The IRA, in turn, should answer to each doubt cast by the Commission by explaining its conduct in a detailed way. Whenever the Commission considers that a measure proposed by the IRA is in contrast with Community law or creates a barrier to the Single Market, it *may* ask the agency to suspend, to amend or even to withdraw it. Hence, the notification procedure could be an important accountability device to ensure the consistent implementation of EU regulations across member States. Yet, the power of the Commission as an accountability forum is purely symbolic because IRAs should *take utmost account* of Commission requests to review their measures, but they can finally do what they want if they provide a reasoned justification for their choices (European Commission 2013).

In parallel, *ex post* accountability exerted at the national level is also weak. Public reporting and budget scrutiny represent essential fire alarm mechanisms that allow Parliaments to monitor IRA behaviour and to prevent the IRAs' deviation from the political mandate (Baldwin *et al.* 2012, 340). However, hearings are generally used by Parliaments and Ministries to ask IRAs for technical advice on specific issues rather than to control them (Righettini and Nesti 2014, 131). Moreover, there is no clear empirical evidence that hearings result in an effective imposition of sanctions on IRAs or in a consequent change in their regulatory behaviour (Schillemans and Busuioc 2015, 203). This probably due to the fact that several IRAs in the EU are not truly autonomous in managing their tasks and governments

still maintain strong roles in the regulatory arena (Thatcher 2003, 139). Furthermore, in many policy sectors, regulations have become so technical that governments are forced to grant specific regulatory tasks to IRAs because of their expertise, but, at the same time, these tasks seem to not be so salient as to require strong political control.

In short, if the Commission and national political actors simply do not exert a strong control over IRAs and/or if they exercise their prerogatives as accountability forums only in a limited way, then the credibility and effectiveness of IRAs can be hardly assessed.

2.3 Symbolic participation

Some concluding considerations can be made about accountability traps in multi-level regulation.

The first relevant problem relates to openness and transparency of regulatory processes. In several policy sectors, IRAs are called on to organise public consultations and public hearings with relevant stakeholders to discuss their decisions. Consultations with interested parties are mandatory in the telecommunications sector when IRAs have to issue measures with significant impact on relevant markets (ex art. 6 of the Framework Directive) and when user rights are at stake (ex art. 33 par. 1-2 of the Universal Service Directive). The opening-up of channels for direct participation in decision-making processes is the most common form of 'participatory systems of control' of IRAs (Levi-Faur 2011, 14). As an accountability device, consultations enable regulated firms, citizens, and associations to engage in dialogue with IRAs and to ask them for different courses of action (Righettini and Nesti 2014, 101). In the words of Ofcom: 'Consultation is an essential part of regulatory accountability the means by which those people and organisations affected by our decisions can judge what we do and why we do it' (2007).

The real impact of stakeholder participation, nevertheless, remains questionable. As already emphasized by literature, in multi-level governance systems only defined social partners that represent selected interests of civil society are involved (Piattoni 2010, 204). This general trend is also confirmed in the telecommunication sector, where private companies tend to participate more than common citizens in consultations (Righettini and Nesti 2014, 128) [6]. Furthermore, the real impact of stakeholder recommendations in reframing the content of regulation is difficult to assess.

Thus, although accountability to private stakeholders through participation is moderately strong, accountability to citizens remains weak. In Van Kesbergen and Van Waarden's words: 'Privatization and delegation to 'independent' regulatory agencies give citizens fewer chances to control such agencies through voice' (2004, 160).

2.4 Strategic gaming

Another relevant characteristic of multi-level regulatory processes is the increased involvement of the judicial power in decision-making, that is 'part of a broader tendency of increasing juridification of social relations' (Van Kesbergen and Van Waarden 2004, 153). Judicial review is recognised as an important mechanism to keep IRAs accountable (OECD 2012, 29; ITU-infoDev 2004). As affirmed by the UK Department for Business Innovation and Skills, in fact, 'appeals are a key way of holding regulators to account, and are a means by which regulatory decisions can be corrected where appropriate' (BIS 2013, 23).

However, judicial review can also be a strategic opportunity for regulated firms to control IRAs' behaviour. European and national regulations, in fact, often grant firms the possibility to contest IRAs' decisions, and firms fully seize this opportunity because they can rely on more legal resources than IRAs to be engaged in lengthy appeals[7].

Moreover, the predictability of the regulatory process can be undermined by the possibility for courts to suspend the decision of an IRA submitted to appeal, to judge only procedural aspects of it or, finally, to review it on its merits[8]. The 'on the merit review' was originally aimed at granting certainty to the regulatory process, ensuring that any error made during the decision-making stage could be corrected in the end. Nevertheless, as recently argued by the UK Government, merit-based appeals 'could reduce the credibility of the regulator, particularly where there is a concern that the appeal body could act as a second regulator 'waiting in the wings', and in turn negatively affect regulatory certainty' (BIS 2013, 23).

Legal accountability is defined as 'the most unambiguous type of accountability, as the legal scrutiny is based on detailed legal standards, prescribed by civil, penal or administrative statutes, or precedent' (Bovens 2007, 456). Hence, judicial review is invoked as the most impartial way to keep IRAs accountable. Our discussion, indeed, reveals that judicial review is far from a neutral activity. First, litigation can be a strategic option for all of the well-resourced operators that find a positive trade-off between engaging in a costly legal action and delaying wherever possible the regulatory enforcement. Although some authors are sceptical about the real impact of 'gaming the system' since litigation for firms is 'costly, uncertain, diverts management time and attracts adverse attention' (Veljanovski 2010, 97), nevertheless, empirical research reveals that regulated firms tend to appeal IRAs' decision systematically to cause prejudice to IRAs and other firms, even if the result of appealing is uncertain (Righettini and Nesti 2014, 160). Second, administrative courts are not neutral actors in the accountability process (de Figueiredo 2005) because they are interested in expanding their influence on the regulatory environment, due to the possibility that they have to examine the merit of decisions and eventually to replace them.

2.5 Undemocratic networking

The last relevant characteristic of multi-level regulatory environment is the creation of European transnational networks made by national IRAs and the European Commission, aimed at coordinating and supervising the implementation of regulations. Within networks, IRAs exchange their experiences, define common guidelines to cope with regulatory consistency across member States and engender mutual learning. Majone, in particular, emphasises their importance as accountability forums and labels them 'bearers of reputation' (1997, 272). Through peer reviews, in fact, networks informally and formally constrain IRAs (Maggetti 2010, 4) and force them to conform their actions to the networks' expectations. For some scholars, participation in networking is an opportunity to improve controls over the IRAs' behaviour because deliberation, peer review, cooperation and exchange of good regulatory practices enhance procedural forms of accountability (Majone 1999; Cohen and Thatcher 2008; Maggetti 2012). However, not all scholars agree with such an optimistic vision. Papadopoulos (2010), for instance, questions the democratic anchorage of governance through networks because they lack visibility and they are uncoupled and remote from democratic institutions. European regulatory networks, in fact, usually operate outside formal policy-making but in cooperation with the European Commission. Additionally, within networks, tensions often arise. Members, in fact, can use bargaining to impose their policy idea on other IRAs and also on the Commission. Thus, relationships within networks are not necessarily cooperative but rather they can also be highly dialectical (Saz-Carranza and Longo 2012), and accountability is substantially weakened by the complex nature of such relations (Papadopoulos 2010, 1039). In the same vein, Piattoni argues that loosely coupled relationships among actors in multi-level systems, albeit open and in a sense much more democratic, render delegation and accountability lines unclear (2010, 226-227).

2.6 Accountability Stalemates

To sum up, multi-level regulation opens up new venues for accountability at the vertical and at the horizontal level, but *de facto*, these venues barely guarantee effective control over the IRAs' behaviour.

Vertical accountability is complicated by the presence of multiple principals (the European Commission and national governments) with divergent and possibly unclear preferences about the regulatory goals and is weakened by the lack of effective interest at the national level to keep IRAs under control. In such a context, the structure of incentives available to principals to steer agents' behaviour can be narrow – due to limited powers held by supranational principals – or at least symbolic – due to limited and/or not salient functions delegated to the agent.

Horizontal forms of accountability primarily entail stakeholders participation, networking and judicial review. Scott (2000) argued that extended accountability is structured around actors who depend on each other to exchange resources (information, expertise, authority) and who are mutually constrained by each other's behaviour. Empirical research, nevertheless, reveals that in horizontal accountability, forums often have a pure symbolic nature. Accountability, in fact, depends on the effective capacity of a forum to impose sanctions on IRAs (Biela and Papadopoulos, 2014), an option that is not realistic, for instance, in the case of an individual citizen participating in consultations. Moreover, forums can act in an opportunistic way, using accountability to pursue their strategic goals, as in the case of appeals to courts.

In multi-level regulatory regimes, in sum, there are little opportunities to implement effective accountability mechanisms to keep IRAs under control because the responsibility for oversight of IRAs is fragmented, the power to sanction them is scattered among different

actors and rationales for accountability ultimately rest on the forums' view of what accountability should serve.

3 The Aims of Accountability

The last point introduces my final argument. The proliferation of agencies in several regulatory domains at the national level, coupled with the process of agencification that has occurred at the European Union level, indicates that delegation to independent regulatory bodies has been viewed as a particularly attractive solution to improve technical policy-making. At the same time, the fact that IRAs are placed at an arm's length from politics casts doubt on their legitimacy and raises concerns about the possibility that they act in an arbitrary way. Several theoretical and empirical studies have tackled the question of how to control agencies, but, at the end, these studies have only come to prove how difficult and, to a certain extent, ineffective this task could be. The accountability of IRAs is problematic because the notion and, in particular, the aims of accountability are framed in terms that are too neutral.

Two main tendencies, in fact, have characterised the debate about the legitimacy of IRAs so far. First, there has been a gradual shift in the academic discourse from the term 'control' to the term 'accountability'. As Busuioc (2009) already pinpointed, the two concepts entail different logics regarding oversight and different relationships between actors. Control refers to the direct steering made by an actor of another who is subordinate. Accountability entails dialogue, justification and possible sanctions and involves actors not necessarily in a hierarchical relation. This semantic shift was driven by the diffusion of multi-level and network approaches that theorise the redistribution of decisional powers among different actors, in contrast to the hierarchical relationships depicted in the principal-agent model. In these models, horizontal interactions prevail and political actors share their decisional power

with other actors not necessarily subordinated to them. Hence, the role of politics in the accountability relationship is definitely weakened.

The second parallel and correlated tendency has been the reframing of the term accountability. The transfer of regulatory competences to 'runaway bureaucracies' has been viewed with suspicion by democratic theorists yet justified in terms of regulatory efficiency, credibility, and market stability. International organisations and national governments have also placed emphasis on regulatory performance. The OECD and the ITU, for instance, highlighted the importance of accountability to promote credibility and trust in regulation (ITU-infoDev 2004; Jacobzone 2005, 74). In the UK, the House of Lords (2004) has stressed the importance of accountability as a tool for improving regulatory effectiveness and protection of public interest. Making independent regulators accountable should enable, in fact, the Government and the Parliament 'to review regulation and ensure that the legislation remains fit for purpose' (House of Lords 2004, 16).

Following this trajectory, the idea and the aims of accountability have also been transformed. Other notions of accountability have gradually replaced the traditional, democratic concept of accountability referred to as Parliament oversight on behalf of voters. Accountability becomes a means to promote policy effectiveness and/or fair treatment of all of the stakeholders in the regulatory process (Behn 2001, 9-11). The theoretical and empirical analysis on accountability and all of the related pitfalls illustrated in the previous sections confirm this idea. Simple delegation chains between governments and bureaucracies have been complicated by the creation of IRAs and by the redistribution of regulatory powers between national and supranational arenas due to European integration. This process is part of the more general trend of 'relocation of politics' (Bovens *et al.* 1995, cited in Hupe and Edwards 2012, 177) through which political decisions have been moved outside the traditional democratic circuit (Bevir 2013). Within this scenario, IRAs can barely be held

accountable in pure democratic terms. The literature assumes that the IRAs' compliance with voters' preferences is irrelevant for at least three reasons. First, IRAs are not elective bodies, so voters cannot directly sanction them. Second, IRAs are independent bodies that should maintain a certain degree of autonomy to perform their regulatory tasks efficiently. Democratic accountability has therefore become simply irrelevant because, again, *politics* has become irrelevant compared to the importance of expertise. As also shown by empirical research, the political oversight of IRAs at the national level is now declining (Baldwin *et al.* 2012, 349). Democratic forums that are supposed to control IRAs, such as Parliaments and or parental Ministries, in fact, seem not to have enough power or simply the interest to do this (Schillemans and Busuioc 2015, 205). But the lack of political control is not compensated for by political checks operating at the European level because neither the Commission nor the European Parliament have the formal authority to hold national IRAs accountable. This tendency has been exacerbated by the need for the Commission to reach compromises with national Governments and IRAs to ensure regulatory compliance. In Lowi's words (1986, 318-319), the parts, due to their relatively weak position in the multi-level regulatory environment, negotiate their interests to reach a reciprocal satisfactory agreement on regulatory outputs (*compromise through weakness*). However, they also agree to render regulatory goals sufficiently vague to mould them to their expectations (*compromise through vagueness*). This means that IRAs cannot be held accountable for goals that are not specified but 'you can't have accountability without expectations. If you want to hold people accountable, you have to be able to specify what you expect them to do and not to do' (Behn 2001, 7).

Lacking democratic aims to guide accountability and strong political forums capable of pursuing them, other forums can manipulate the process to achieve their own interests. The

only way to avoid drawbacks is to reinforce the democratic and political dimensions of accountability.

Conclusions

In this article, I have analysed the issue of accountability of IRAs as a normative problem. I illustrated that the notion of accountability changed over time and that its focus has shifted from democracy to performance and fairness. This process has made accountability rationales vague and, consequently, mechanisms to ensure them ineffective. I also argued that this attempt to frame accountability in neutral and de-politicised terms has been supported by several theories and justified in practice by invoking the need for regulatory consistency and effectiveness. This idea collides, nevertheless, with the empirical evidence that any regulatory process is inherently political and that actors within the regulatory arena can pursue their own strategies. Mechanisms to hold IRAs accountable can be part of these strategies.

To be meaningful, accountability should be considered as a means to improve not only policy performance but also, and rather, the governance of public goods and as a way to protect the public interest. Reframing accountability in political terms implies that political actors should be charged with more responsibilities for regulatory activities. A remedy could be to define the delegation chain and to redistribute the authority between principals. At the European level, more power to steer the multi-level regulatory process should be assigned to the Commission and more power to oversee it should be granted to the European Parliament. The European Parliament, in fact, has increased its relevance as watchdog of EU agencies (Kelemen 2012, p. 398), but its role in multi-level regulatory processes and its capacity to keep national IRAs accountable is still underdeveloped. At the national level, Ministries could delegate some function to IRAs, but Ministries should also remain finally responsible for

policy outcomes whereas National Parliaments should participate in the accountability process more actively.

A final remark should be made about the role of citizens within the accountability process. In their outline of four worldviews of accountability, Lodge and Stirton (2012, 361) identify two different conceptions of the role of citizens in the accountability process. In the first conception, the 'consumer sovereignty', providers of goods and services are usually accountable on a voluntary basis because transparency and accountability are a good 'marketing strategy' to attract more customers. Citizens, for their part, are totally informed consumers who exploit the accountability 'venue' to take the best choice in their interest. The second view, the 'citizen empowerment', emphasises the relevance of citizen participation in the accountability process. In the same vein, Hupe and Edwards (2012) find in deliberative democracy a strategy to democratise complex governance settings. Examples of such practices can be drawn from the European telecom sector, where citizens are involved in the regulatory process through consultations or participation in consumers' committees. In all of these approaches, indeed, individual citizens are supposed to be well-informed actors. However, this situation hardly occurs, especially in highly technical policy sectors, because regulation entails information asymmetries that citizens can barely overcome. Empirical analysis, in fact, revealed that citizens do not participate very actively in public consultations. Moreover, consumers' committees, albeit present, seem not to have enough power to alter significantly the regulatory process in their favour (Righettini and Nesti 2014, 126-128).

From a democratic point of view, therefore, citizens cannot be engaged in the accountability process only to protect their interests as consumers, and they cannot be empowered only through deliberation because these approaches imply a selective voicing of *specific* interests and definitely weaken the pursuit of the *public* interest. Again, political accountability is unavoidable.

To conclude, independent regulation should be anchored to democratic circuits, and the accountability of IRAs, to be effective, cannot be detached from its democratic rationale. Otherwise, we should accept the notion that '"nonmajoritarian" is little more than a euphemism for "undemocratic"' (Bevir 2013, 144).

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Notes

[1] For recent accounts of origins and diffusions of IRAs, see Gilardi (2008), Jordana and Levi-Faur (2010), Jordana, Levi-Faur and Fernandez-i-Marin (2011).

[2] The research was supported by the University of Padova (grants CPDA 11535/11 and 60A16-1482/10).

[3] According to Scharpf (2006), "input legitimacy" is ensured where political decisions mirror the electorate's preferences and where policy-making allows for its participation - in this sense, it could be conceived as "government by the people". Instead, "output legitimacy", or "government for the people", derives from the decision makers' capacity to adopt effective policies.

[4] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337/50, 18/12/2009.

[5] Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council.

[6] A possible explanation of this tendency is that IRAs manage consultations in different ways in terms of duration, documents available to the public and formulation of texts submitted to consultations. Firms are more incentivized than citizens to participate because they have the necessary competencies to fully understand the content of consultation.

[7] The European Commission has reported since 1999 that member States have long appeal procedures that make the regulatory process in the telecommunications sector unpredictable.

Larouche and Taton (2011, 108) have estimated that the average length of appeal proceedings across member States is 18 months, but significant variations are present at the national level (in France, the average length is 14 months, in the UK, the average length is 15 months and in Italy the procedure could last up to 4 years).

[8] Judicial review looks at the 'integrity' of the process through which the decision has been made, whereas the 'on the merit' standard assesses whether the decision was reasoned and if those reasons were correct (Smith, 2012, 174-175).