
Department of Political and Social Sciences

# Explaining and Assessing Independence: National Competition Authorities in the EU Member States

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## Abstract

This Ph.D dissertation aims at answering two questions, which are closely related to each other:

1. How do politicians decide about the independence they give to regulatory agencies?

2. Is there a link between the amount of independence which an agency enjoys and the way in which it performs its tasks?

The first question investigates the factors that lead politicians to delegate in the field of competition policy. The second question concerns, more broadly, the relationship between costs and benefits of delegation. This dissertation focuses on national competition authorities (NCAs) in the EU member states, being antitrust one of the few really "European" policies, enforced in the same way in all the countries by the European Commission and by the NCAs.

The main empirical analysis (Chapter 3) tests a theoretical framework, based on both original hypotheses and previous contributions. In order to measure formal independence, an index based on several features of agency autonomy has been developed. The results confirm the two original hypotheses advanced in this work. On the one hand, the degree of independence of NCAs is influenced by political polarisation and by the presence of big firms in the national economy (the higher the polarisation, the higher the negative impact of big firms on independence). On the other hand, independence is related to EU membership: the longer the country has been member of the EU, the more independent the NCA is. These findings have been "cross-checked" with a series of interviews with expert and members of competition authorities in France, Italy, and Greece (Chapter 4). In Chapter 5, the hypothesis of a relationship between independence and performance has been tested. According to the results of this statistical analysis, greater formal independence leads competition authorities to investigate more cases and to issue more decisions.

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# Chapter 1

# Introduction

## 1.1 The diffusion of Independent Regulatory Agencies

The widespread creation of Independent Regulatory Agencies (IRAs) in the last 30 years is an extraordinary and puzzling phenomenon on many levels. Particularly in advanced market economies, from 1980 onwards we have observed an «explosion» of IRAs in a wide variety of policy-making sectors (for an overview, see Jordana et al. 2011). Thatcher (2002: 126) distinguishes «agencies regulating the operation of markets» from agencies «responsible for promoting 'public interest' goals other than competition». The first include «utility regulators, general competition authorities and financial bodies», whilst the second group «includes agencies for the environment, safety (at work or of food, for instance), and racial and gender equality».[1] Whilst the United States has had a system of administrative agencies set up since the beginning of the Twentieth century (see Eisner et al. 2000), European countries have undergone this change only in a relatively recent period. In Europe, the creation of administrative agencies has occurred predominantly between the mid-Eighties and the mid-Nineties (Gilardi 2005b: 86).

[1] Although in principle the contributions reviewed in this chapter apply to all IRAs, this introduction is mainly focused on the first group of agencies, above all because competition authorities are a sub-group of the agencies regulating markets.

As the United States and the European countries differ with respect to the periods in which they established IRAs, they also diverge with regard to the political framework in which the creation of independent agencies took place. In the United States the establishment of independent agencies coincided with an age of increasing regulation: the great majority of the agencies were created between the end of the Nineteenth century and the middle of the Twentieth century,[2] and their main function was to counteract the *laissez-faire* ideology that had characterised the US economy since the creation of the country. In Europe, converesely, IRAs have developed in what is commonly regarded as the de-regulation and privatisation era. Levi-Faur (2005: 18) shows that independent regulators were created when the states abandoned the direct control of important economic sectors such as energy and telecommunications at similar. This process has been identified as the «rise of the regulatory state» (Majone 1994) or as the emergence of a «post-regulatory» state (Scott 2004): market liberalisation has been accompanied by a proliferation of rules and authorities in charge of enforcing them (Vogel 1996).

The explanations proposed for this phenomenon have been varied. From a chiefly economic perspective, the creation of IRAs has been accounted for as a necessary step in the «market-making» process (Héritier and Schmidt 2000). The characteristics that led to the establishment of state monopolies in some sectors were not only their importance for the security of the countries, but also the existence of market failures due to economies of scale and scope, non-redeployable assets and broad range of users (Levy and Spiller 1996a: 2-3). These features are likely to create contracting problems that produce an inefficient allocation of the resources in the economic system (see Williamson 1988; North 1990). Moreover, there were also *political* reasons for the state intervention, namely the need to «satisfy [...] requirements of universal access, security, continuity, and affordability»

[2] The first independent agency was the Interstate Commerce Commission, established in 1887. The Food and Drug Administration was created in 1906, the Federal Trade Commission in 1914, the Federal Communication Commission in 1934, the Security and Exchange Commission in 1934, the Federal Aviation Administration in 1958, the Environmental Protection Agency in 1970, the Federal Energy Regulatory Commission in 1977.

(Héritier and Schmidt 2000: 554). Public utilities also employed an important percentage of citizens, thus setting up a form of «informal welfare state» (Schwartz 2001).

Even though deregulation and privatisation had allowed private actors to access new markets, the structure of these markets remained as it was, and all the features that called for state ownership turned out to call for market-making and market-regulation by the state. If public monopolies had become undesirable, then private monopolies were certainly worse (because the monopoly profit does not serve any public interest in such case), and further net losses for the ultimate users of privatised services had to be avoided.

Independent authorities have been seen as a functional prerequisite for market-opening, liberalisation and privatisation of important economic sectors (Tenbücken and Schneider 2004; Levi-Faur 2005; Grande 1994). Liberalisation in sectors like telecommunications and energy has habitually followed regimes in which only one national state-owned firm existed. Although the property of these state-owned incumbents has been, partially or completely, privatised, the state still remained an important actor with a relevant market power and an absolutely dominant position in some sectors. IRAs were the institutional instrument devised in order to grant fair conditions to both potential competitors and ultimate users. As Tenbücken and Schneider (2004: 247) argue with regard to the case of telecommunications,

> «[t]he central dilemma of the transition from a monopoly situation to that of stable and functioning competition in telecommunications entails guaranteeing new network administrators and service providers fair access to the market and controlling the dominant position of the former Public Telecommunications Operator (PTO) on the market. [...] Hence, the need to ensure competitive markets for new entrants and for consumers alike was the major reason behind the creation of new regulatory bodies and the implementation of new regulatory rules [...]».

Other scholars have developed a more general approach that takes into ac-

count the characteristics of the political systems, the incentives that politicians face, and the problems of credible commitment that they have (see Moe 1990; Levy and Spiller 1996b). The most eminent contribution in this field comes from Majone, who has repeatedly (1994; 1996; 1997; 1998) focused on the credibility that the state would acquire by establishing IRAs: in a global economy, in which investors are free to move capitals from one country to another very easily, it is crucial that economic regulation is delegated to institutional actors that cannot be directly influenced by governments and parliaments (see below, Section 2.6). For modern states, «the possibility of achieving policy objectives by coercive means is severely limited; credibility, rather than the legitimate use of coercion is now the most valuable resource of policy-makers» (Majone 1996: 13). IRAs are tools both rigid enough to ensure that no abrupt changes are adopted by the legislators in the short-run, and flexible enough to allow the continual redefinition of long-term objectives. As Majone (1996: 14) summarises:

> «[...] because a legislature cannot bind another legislature, and a government coalition cannot tie the hands of another coalition, public policies are always vulnerable to reneging and thus lack long-term credibility. Hence, the delegation of policy-making powers to independent institutions is a means whereby governments can credibly commit themselves to strategies that would not be credible in the absence of such delegation».

If not only the conditions for fair competition and efficient market functioning have to be created, but also to be enforced in the long-run, then permanent, public and independent agencies are the best-suited instrument, because the making and the protection of such conditions requires some characteristics that only these bodies possess: the need to balance private and public interests, especially when this entails the distribution of relevant costs and benefits, requires the establishment of stable bodies that can accumulate expertise and best practice models as time passes. Moreover, given the fact that the tasks assigned to these agencies are often very complex, they must be equipped with sufficiently sized staff that can be constantly devoted to these activities (Selznick 1985: 364).

Not all scholars, however, are fully satisfied with a purely «economic» explanation of the creation of IRAs. In particular, some of them have attempted to conceive of a more encompassing and sociologically-oriented approach. Without claiming to be exhaustive or complete, I want to briefly summarise the concepts brought forward by these contributions. Some scholars have emphasised the role of *policy learning* (Sabatier 1988; Eising 2002; Meseguer 2005), stressing the importance of the exchange of information in supra-national organisations, cross-national corporate entities, peer-to-peer meetings (Lazer 2005), where some countries propose successful strategies and others «watch and learn». Rather than the result of a «struggle among groups with different resources and values/interests» (Sabatier 1988: 157), policy change would be due to the actors' «incentives to learn more about the magnitude of salient problems, the factors affecting them, and the consequences of policy alternatives» (Sabatier 1988: 158). In the field of economic regulation, it has been hypothesised that the rise of the regulatory state has been «the consequence of a process of learning from failed experiments with more interventionist policies» (Meseguer 2005: 68). The idea of policy learning entails a rational process through which an actor observes and compares different possibilities and, assessing the success or failure of previous experiences, takes a decision. A very similar concept is that of *lesson drawing* (Rose 1991; Majone 1991).

The notion of policy learning and lesson drawing is different from that of *emulation*, *imitation, policy transfer*, which occur when the adoption of similar policy and institutional choices are not rationally driven (for a general overview of diffusion processes, see Elkins and Simmons 2005; McNamara 2002; Simmons et al. 2006). As Meseguer (2005: 73) points out:

> «Governments may imitate what peer countries do simply because they are peers, or governments may imitate what apparently successful countries do simply because they are high-status countries that are considered to know best».

In most cases, rational and non-rational processes may coexist, as well as voluntary and coercitive institutional changes. International organisations are often places where ideas are spread and best-practices illustrated, but

the pressure they exert on the members resembles in some cases an indirect coercion (Dolowitz and Marsh 2000: 11).

Whatever the reason(s) for this fast and widespread diffusion of IRAs, their «mushrooming» is a fact. As has been shown, the causes of this sudden increase have been investigated in a relevant number of works that have yielded valuable results, but much research still has to be done. In particular, studies on IRAs have been either very general, including many different types of agencies and trying to account for their creation in a very all-embracing way (see for example Majone 1994, 1996; Gilardi 2002, 2005a; Levi-Faur and Jordana 2005; Levi-Faur 2005), or focused on particular sectors of public policy. In the latter case, most contributions have been devoted to telecommunications (see for instance Grande 1994; Levy and Spiller 1996b; Levi-Faur 1999, 2004b; Tenbücken and Schneider 2004; Edwards and Waverman 2006). In this dissertation, I will focus on a particular type of independent agencies regulating the operations of market, competition authorities, and on a particular feature of theirs, formal independence. The reasons for these choices are explained in the following sections.

## 1.2 Why competition policy?

Competition authorities are a particular type of IRA. They do not regulate or supervise one sector of the economy, nor do they simply grant the enjoyment of some particular rights. Their role lies in the middle between these two. On the one hand, their activity certainly belongs to the category of «economic regulation», and they have many tasks in common with sectoral agencies: they are meant to prevent economic actors from acquiring dominant positions in the market, or from adopting anti-competitive practices. On the other hand, these tasks are not restricted to a sector (like the telecommunications or the energy market), their mandate is broader and more general, and it can be said that they safeguard rights that we consider «fundamental» in our societies.[3]

[3] Another aspect which distinguishes competition authorities is that their activity is focused only on *ex-post* regulation, market supervision in particular – although they have a

Competition enforcement refers to the implementation of competition (or antitrust[4]) law. By this term, we mean a series of national and (in the case of the European Union) supra-national norms that prevent any supplier of goods or services from adopting commercial practices which are likely to: *a)* restrict the other suppliers' right to compete for a greater share of the market; *b)* impose on the consumers prices that are higher than if they were the result of a fair competition. Examples of anti-competitive practices are (Karagiannis 2007b: 20):

- horizontal agreements aiming at price-fixing or market-sharing (so called *cartels*);
- non-price horizontal collusion (such as collusive tendering or advertising restrictions);
- vertical agreements aiming at price-fixing;
- non-price vertical agreements (such as exclusive or selective distribution agreements);
- abuses of dominant positions (excessive pricing, predatory pricing, predatory investments, boycotts, raising rivals' costs, etc);
- horizontal or vertical mergers which are likely to create a distortion in the market.

role of «policy advisor» of politicians in competition-related matters, their advice is not binding for the parliament and the government. Most other sector agencies, instead, are mainly focused on *ex-ante* regulation, such as determining end-user prices or drafting technical regulations for firms conducting business in a particular sector.

[4] The term *antitrust* is commonly used in the US. As a matter of fact, this branch of the law was born in the US with the Sherman Act (1890), which was (literally) an *anti-trust* legislative act. It gave the federal government the power to investigate and punish «every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations» (15 U.S.C. §1). This legislation has been expanded and broadened in scope through the decades, and now it includes many other trade-related practices, such as price discrimination, exclusive dealings, mergers that can restrict competition, abuse of dominant position. In the US, however, the term *antitrust* has remained predominant, whilst in the rest of the world this category of the law is known as «competition law». In this book, the two terms will be used interchangeably.

Competition law was born in the United States with the Sherman Act (1890), and it was later expanded by the Clayton Act (1914). Together with the adoption of the Clayton Act, the Federal Trade Commission (FTC) was established. In the US, competition enforcement is shared between the FTC and the Antitrust Division of the US Department of Justice, established in 1933. The Sherman and the Clayton Acts are still today the main pillars of the US antitrust law.[5] These acts have inspired the adoption of similar pieces of legislation in many other countries of the world. After the US, the area of the world which has to the greatest extent developed competition law is the European Union (EU) and its member states. Regarded since the Sixties as a prerequisite for the creation of an integrated market between the member states, competition law has been consistently promoted by the European Commission (EC or «the Commission» henceforth), both at the European level and in the legislation of its member states (see McGowan 2005).

What makes competition law so important? Generally but also fundamentally, competition law aims at finding a balance between private property rights and public interest (Peritz 1990), in order to avoid that some people's freedom turn into «coercion, impositions on others» (Amato 1997a: 2). From this point of view, there would be also general agreement on the argument that protecting competition is fundamental for every democracy: competition is nothing but «economic» democracy, and there cannot be real political democracy if the economic power resides in the hands of few. Despite the general agreement on these principles, in little more than one century there have been numerous oscillations and endless debates on the true nature of the «public interest», and on what competition law should actually allow and prohibit, as well as by which means and rules it should be promoted by the state.

After being introduced in the US at the end of the Nineteenth century, antitrust law grew in both size and scope throughout the first half of the

[5] Other pieces of legislation which are worth mentioning are the Robinson-Patman Act (1936), which banned price discrimination, and the Celler–Kefauver Act (1950), which amended and strengthened the Clayton Act.

Twentieth century. The new bills that were adopted increased the number of forbidden practices and broadened the application of the previous acts. This expansion gradually led to a sharp reaction in the academia, which was framed by a group of scholars belonging to the so called Chicago School (see Stigler 1955, 1966; Posner 1969; Bork 1978; Landes and Posner 1981). According to this group of scholars, amongst whom there were both economists and lawyers, antitrust enforcement had gone far beyond its original aim. By sanctioning a number of supposedly harmful practices, the competition regulators and the courts had neglected that antitrust law should be meant to primarily protect the consumers: therefore, only behaviours which reduce the consumers' welfare should be prohibited. Bork (1978: 406), for instance, argued that practices such as vertical agreements and discriminatory prices should be allowed, as long as they do not damage the end users.

Concurrently, in the last thirty years, competition enforcement in the US has been influenced by these theoretical disputes. Although the Chicago School's approach has been contested (see Hunt and Arnett 2001) and the actual antitrust enforcement has been sometimes found to have had inconsistencies and unexplained effects (Sproul 1993), there is general agreement on the basic theoretical premises of antitrust law − i.e. that monopolies and cartels are mostly inefficient and costly for the community (Posner 2001: 9 ss.), and competition enforcement is important because it is meant to protect the market from such distortions. Practices or situations that cause a net loss for the society (or for a relevant part of it) must, thus, be discouraged. The inner implications of competition law are intrinsically linked to the concepts of freedom and democracy. As Amato (1997a: 2-3) sharply points out:

> «[p]ower in liberal democratic societies is, in the public sphere, recognized only in those who hold it legitimately on the basis of law, while, in the private sphere, it does not go beyond the limited prerogatives allotted within the firm to its owner. Beyond these limits, private power in a liberal democracy (by contrast with what had occurred, and continues to occur, in societies of other inspirations) is in principle seen

> to be abusive, and must be limited so that no-one can take decisions that produce effects on others without their assent being given».

In sum, economic power and economic freedom cannot coerce or hinder others' economic freedom. In turn, the state, in order to grant that everyone's economic freedom is not abused by anyone, must in some cases adopt restrictions on private properties and rights. As we can see, the state faces two limits: on the one hand, it cannot let anyone destroy other people's freedom; on the other, in doing so, it cannot destroy the same freedom that it aims to protect. Every country must reach a certain balance between these two boundaries (Amato 1997a: 3 ss.).

The instruments that free-market countries have employed for this purpose are what we call competition authorities.[6] They are public bodies with a specific expertise and the task of enforcing antitrust law, which usually enjoy a certain degree of independence from the legislative and executive bodies. They have the power to conduct investigations on alleged violations of competition law, and they can impose sanctions on the economic actors who do not comply with it. As is true for all IRAs, the position of competition authorities in the classical scheme of division of powers is not very clear: although they are separated from the legislative and the executive powers, they do not belong to the judiciary power, and their functions are a mix of legislative production, administrative implementation and judicial enforcement.[7]

## 1.3 Why competition authorities in the EU?

Today, every member of the European Union has a national competition authority (NCA). The first country to establish this was Germany, in 1954,

[6] The US Department of Justice publishes on its web site (http://www.justice.gov/atr/contact/otheratr.html) a list of 86 countries having an antitrust enforcer. Not all these countries can be considered democracies.

[7] In the US, where the division of power doctrine is particularly important, the question of «where IRAs stand» has been very much debated (see e.g. Rogers 1937; Cole 1942; Arpaia 1956; Miller 1986; about the Italian case, see Longo 1996; Patroni Griffi 1996).

and in 2007 Luxembourg was the last,[8] whilst most EU members established their competition enforcer during the Nineties. Although the European Commission has always been a strong promoter of competition law, and although (because of the Commission's action) the member states have had to gradually introduce the principles of free market and competition in their legal systems, no European legislative act has ever formally required a member of the EU to establish an independent competition authority. It is true that the countries which acceded to the Union in the 2000's were evaluated, among other things, on the basis of their compliance with competition law (see EC Council regulation 1267/1999, Annex I), but all these countries had already established competition authorities before joining the EU.[9]

European Council regulation 1/2003, which establishes how EU competition law must be applied by the member states, takes for granted that every country has a «competition authority»: though it does not explicitly require the existence of such a body, the application of the regulation would be practically impossible without this being the case. EC regulation 1/2003 certainly does not specify whether the competition authorities must be independent from the political bodies and to what extent. Therefore, the member states are completely free to set for their agencies the degree of autonomy they prefer. Another crucial provision of this act states that all the national competition authorities (and the national courts) must apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[10] (art. 5, EC Reg. 1/2003).

The two articles in question represent the core of the EU antitrust law. Article 101 (ex art. 81 of the Treaty of the European Community) prohibits

[8] Until 2004, Luxembourg did not even have a national law on competition. The *Loi du 17 mai 2004 relative à la concurrence* has established a *Conseil de la concurrence* and an *Inspection de la concurrence*, a department of the Ministry of Economy which assists the *Conseil* in the investigations on suspected infringements of competition law.

[9] Hungary, Poland and Slovakia established a competition authority in 1990, Bulgaria and Czech Republic in 1991, Lithuania in 1992, Estonia in 1993, Slovenia in 1994, Malta in 1995, Romania in 1997, Latvia in 1998. According to what a member of the DG Competition affirms (Interview of 23 June 2010), the Commission, when assessing the compliance of the candidate states with the principles of competition, mainly looked at whether the competition authorities in these countries were functioning.

[10] Called «Treaty of the European Community» before the Lisbon Treaty.

«all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market». This norm covers both horizontal and vertical agreements, as well as practises such as price fixing and trade discrimination. Article 102 (ex art. 82 of the Treaty of the European Community) forbids «any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it», as well as unfair commercial practises that may derive from this kind of abuse.

The provision contained in article 5 of Regulation 1/2003 is meant to ensure that the application of EU competition law is uniform in all the member states. In order to grant this uniformity, member states cannot adopt an antitrust legislation which is in contrast with the EU treaties and the regulations implementing them. Accordingly, national competition authorities cannot refuse to use their powers when a violation of articles 101 or 102 is concerned, and they cannot take decisions running counter to a decision already adopted by the Commission on the same subject (art. 16, EC Reg. 1/2003).[11] To reinforce this rule, the Commission is given several instruments of control and intervention:

- whenever a national competition authority initiates an investigation on an alleged infringement of articles 101 or 102 TFEU, it must inform the Commission within 30 days (art. 11.3);
- whenever a national competition authority intends to conclude an investigation with a decision «requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation», it must inform the Commission within 30 days (art. 11.4);
- the Commission has the power to begin an investigation on any case

[11] The same article also states that «[national competition authority] must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated».

> involving a violation of EU competition law, either if the national agency is not acting or if it has already started a proceeding (art. 11.6).

Even if the power to «avocate» a case has never been *publicly* used so far,[12] its mere existence is a strong incentive for the national authorities to enforce competition law according to the Commission's previous rulings.

Having said that, it is evident why national competition authorities in the EU member states represent a stimulating case study. They are public bodies whose functions and tasks are almost completely determined *outside* the countries[13] (by the EU legislation, which the member states can control and influence only in a very marginal way), and, by contrast, whose institutional shape is entirely settled by the national legislator. The states have delegated at the European level a great power to determine what these public bodies must do, whilst retaining a complete discretion in deciding on every organisational feature of theirs.

Two aspects are equally interesting to explain in this process. The first regards the almost complete delegation of powers, in the field of competition, towards the Commission. Why is this policy area so crucial that divergence at the national level is not admitted? This question has been dealt with by Karagiannis (2007b), who analyses the development of EU competition law and concludes that antitrust policy is a field in which the member states, France and Germany in particular, have managed to reach an equilibrium between effectiveness and reciprocal commitment (2007b: 325). By subjecting competition enforcement by the DG Competition to the rule of collegiality within the Commission, the member states have made sure that every antitrust decision could be bargained between commissioners. In this way, competition enforcement at the EU level has remained sensibly weaker than it would have been if a European competition authority had been created. On the other hand, by managing to create a network

[12] In practice, the allocation of cases between the Commission and the NCAs takes place within the European Competition Network, and mainly in an informal way.

[13] Even before Regulation 1/2003 was passed, some scholars had argued that NCAs acted somewhat like decentralised agencies of the Commission (Merusi 2000).

together with the national competition authorities (by Regulation 1/2003), the DG Competition has acquired considerable autonomy from the Commission (Karagiannis 2007b: 308).[14]

In this dissertation, rather than expand on the EU long-term strategy and working method, I will focus on the other aspect of this institutional development: the puzzling lack of any top-down uniform strategy at the national level. Discretion at the national level could be explained as a compensation for the full supra-national delegation, as if it was meant to work as a sort of safety valve to be used in case of an «emergency». Nonetheless, one must ascertain exactly how this discretion is used by the member states. How much autonomy do they give to competition agencies? How do they regulate the procedures that these authorities must follow? How do they select the civil servants that sit in these bodies? How stringent are the checks and balances they impose onto their activities? These and other issues relate to the broader question of the *independence* of these agencies, which is the ultimate subject of this dissertation.

## 1.4 Why independence?

As said, every member of the EU has a competition authority. Besides setting up the rules regarding the intervention and cooperation of national regulators and the Commission, EC Council Regulation 1/2003 has also established the creation of the European Competition Network (ECN),[15] which is composed of the national competition authorities and the Commission. Although the Network does not have autonomous powers or competences, it serves as a forum for discussing allocation of proceedings, uniform application of antitrust law, particularly relevant cases, strategies and «best

[14] Some could claim that it was also in the interest of the member states to create a network in which members of the NCAs could somehow «control» the Commission.

[15] Regulation 1/2003, (15): «The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation».

practices».[16] In this respect, the member states seem to have reached a great uniformity in the implementation of competition law. But what about the institutional autonomy that each competition authority enjoys with respect to the national political bodies? As Regulation 1/2003 is completely silent with regard to this, countries are free to determine the degree of independence that they deem most appropriate for their regulators.

It is interesting to look at the degree of formal independence from a political science perspective, because there is an evident contradiction between what policy makers (and also scholars) affirm about independence, and the reality that we observe. Policy makers often justify the establishment of IRAs by referring to their functions. But if the functions of all the competition authorities in the EU member states are the same, why do they differ so much with respect to their independence? Clearly, there are reasons that politicians do not recognise, or that they recognise but do not speak of.

The existence of differences with regard to this aspect indicates that not all the countries perceive the role of competition authorities in the same way. Some countries allot a degree of autonomy that places these competition authorities amongst the most prestigious public bodies and makes them almost impermeable to any political influence. In other countries, competition authorities represent little more than simple bureaucratic departments. It is puzzling that the member states set up these bodies to perform *exactly the same functions* in such greatly differing manners.

As said, politicians (as well as scholars) usually account for formal independence as if it were entirely induced by the functions that a body performs, or by the role it has in the political and economic system. Independence is often regarded as an intrinsic prerequisite for bodies that deal with the enjoyment of quasi-constitutional rights. Competition authorities, in particular, do not have strictly «regulatory» competences; they rather decide on concrete cases, applying only the law (Amato 1997b: 647): this characteristic makes their functions almost judiciary, and entails that they must be, to a relevant extent, independent (see also Predieri 1997; Merusi

[16] See the «Commission Notice on cooperation within the Network of Competition Authorities» (2004b).

2000). Linked to this argument is the claim that independent regulators are meant to «shield market interventions from interference from captured politicians and bureaucrats» (OECD 2002: 95), in order to attract private investments and create a business environment that cannot be influenced by political fluctuations. In this line of reasoning, independence is treated as a normative prerequisite, not as a feature that can vary.[17]

Another argument that is often made is that these public bodies have been mostly established when countries were shifting from a state-controlled economy to a full free-market economy. In this transition, there still existed former state-owned monopolists which retained a great share of the market and which often controlled the basic infrastructure of a specific business. Competition authorities were expected to prevent the state from taking advantage of this «conflict of interests» (see Clarich 2004).

The theoretical explanations advanced in the political science literature to account for bureaucratic independence will be extensively reviewed in Chapter 2. For the moment, it suffices to note that the reasons commonly offered in the political discourse seem to lack an adept explanation concerning the pronounced differences that we observe between the EU member states vis-à-vis their competition authorities, as they do not appear to diverge substantially in the functions they perform and in the law they apply. In each of these countries, there is a political arena that might influence economic regulation, and from which antitrust agencies can provide a sort of guarantee of non-interference. All of these countries have also experi-

[17] If IRAs, and competition authorities in particular, are established with the purpose of «convincing» economic actors that they can trust a country, then independence must be both from the politics and from other economic interests. As Wilks and Bartle (2002: 151) argue,

> «Political independence is intended to reduce improper lobbying and the pursuit of party political advantage. It is a guarantee of impartiality, fairness, and consistency which is typically seen as essential if the public is to have confidence in an agency. [...] For economic regulation, political independence may also be seen as a proxy for independence from business. Since business can mobilise massive financial and political pressures, politicians are especially susceptible to business lobbying. The real argument for the independence of competition agencies is to insulate them from the unholy alliance of politicians and business».

enced the shift from an economy mainly controlled by the state to a more free-market economy.

For these reasons, the first purpose of this dissertation is to *explain the differences* in the degree of formal independence of competition authorities. But there is another aspect related to independence to which not enough attention has been devoted so far, namely *whether independence has an impact* on how these agencies perform their tasks. Whilst the first research question addresses an empirical puzzle and aims at resolving it, the second embraces a more normative point of view and seeks to find out to what extent the delegation of powers is justified by an improvement in terms of policy output.

Modern democracies, parliamentary systems in particular, are organised as «chains of delegation» (Strøm 2000; Strøm et al. 2003) in which the citizens, «those authorized to make political decisions», «[...] conditionally designate others [...] to make [...] decisions in their name and place» (Bergman et al. 2000: 257). But delegation clearly does not stop at this first step: some power is delegated from the parliament to the government, the government itself delegates the implementation of specific policies to the ministers, ministries themselves have their own bureaucracy, and so forth. At first sight, IRAs seem nothing more than another link in the same chain, ultimately connected to the voters. But their peculiar condition, their *independence*, supposedly insulates them from political control, and thus from the voters' control.

Delegation of powers entails some accountability for the agent towards the principal (Bergman et al. 2000: 257). Delegation is not absolute and irrevocable, but rather conditional to the task that the principal commits to the agent. Delegation has an aim, and if the aim is not fulfilled, the principal has the right to rescind the contract. Common examples of accountability mechanisms are the elections, in which the citizens can reward or punish political parties for how they performed. Another is the vote of no confidence, by which a parliament dismisses an executive that does not act in accordance with its preferences. By the same token, as in a hierarchical relationship, the minister can remove a bureaucrat from an office, and every

principal in general can assign a task to another agent, if this does not satisfy her demand.

How do IRAs fit this model? Any delegation contract may have clauses that make it not automatic for the principal to revert the relationship, once it has been established. An employer can rarely directly fire an employee: as institutions, contracts are «sticky» and usually do not allow for abrupt changes. Indeed, they are built precisely in order to secure relationships and make them more stable. However, this is seldom the case when the government is concerned. Ministers can be changed whenever the parliament wants, and in cases in which the agent cannot be changed, as in ministerial bureaucracy, still the control and the decision about what to do is firmly in the hands of the political principal.[18]

*Independent* IRAs seem to lack both the possibility for the principal to easily change the «agent» and the possibility to determine the policy that the agent carries out. Why does this happen? To state plainly: legislators, to whom a considerable power is delegated by the voters, voluntarily take some of this power away from themselves.

As Moe (1990: 221) has persuasively argued, «[p]olitics is fundamentally about the exercise of public authority and the struggle to gain control over it». As in the field of economics, the assumption is that the actors aim at maximising their income, we can assume that in politics actors want to maximise their power, simply because power is the means by which they can obtain every other desired outcome.[19] This assumption, obviously, does not exclude delegation of powers, but helps us understand that delegation is reasonable only when the net benefit outweighs the net costs: a «gross» loss of power (like any delegation is) is a «net» gain only under certain circumstances. For instance, it is a net gain if the time saved by delegating is employed in other activities that bring other goals about. Similarly, the

[18] In the language of Principal-Agent modelling, the principal can always redesign the contract.

[19] This assumption is analogous to that enunciated for the first time by Mayhew (1974) as regards the re-election goal. In Mayhew's theoretical framework, congressmen aim, above all, at being re-elected, because the pursuing of every other goal is subject to the fact of staying in power.

advantage of delegation can consist in a better informed decision producing an outcome that the principal would not have achieved with her knowledge alone.

When the delegation of powers, the «transfer of political property rights» (Majone 2001: 114), is so wide as in the case of some IRAs, the question arises whether the final outcome is a net gain or a net loss for the legislators, and consequently for the voters. Higher levels of delegation should be correlated with better agency performance. If there were no correlation between independence and performance, there would be a lack of any evidence that independence serves any purpose. To mitigate this conclusion, one might argue that their function is mainly symbolic, that competition agencies affect the «state of the world» by just being there, like surveillance cameras that deter thieves from stealing. In this case, the «net impact» of delegation to IRAs should be measured by testing that, *ceteris paribus*, countries with a more independent competition authority are able to attract more investments.

In summation, the second research question consists in testing whether, in the case of antitrust agencies, independence brings an *added value* in how the state regulates the economy. If this were not the case, we should conclude that the great transformation that has taken place in many countries has given an ineffective answer to the objective needs that the countries faced. The most benevolent conclusion would then be that independent agencies have not brought the added value that we hoped they would have been able to produce. The concept of «performance» is certainly very difficult both to define and to measure. Answering the second research question will require to choose a definition that is restricted enough to be a meaningful indicator of performance, and broad enough to be applied to the activity of all the competition authorities included in this analysis.

## 1.5 Conclusions and summary of the book

In this introductory chapter, I have illustrated the rationale that guides the choice on the subject of this dissertation. I have explained why competition

regulation is a fundamental policy for every democracy, and why it cannot be analysed or understood without comprehending the functioning of the bodies that are entitled to enforce it. I have then discussed why the case of national competition authorities in the EU member states is particularly thought-provoking, and why its analysis can yield especially interesting results. Finally, I have stated the two research questions to which I aim to answer in this work.

Far from being the mere application of *laissez-faire* principles, antitrust enforcement is rather a constant «taming» of capitalism. Its main objective is to ensure that both suppliers and consumers are not harmed by agreements between firms that restrict access to the market and keep prices inefficiently high. Whilst in the US this branch of legislation has arisen between the end of the Nineteenth and the beginning of the Twentieth century, in the European countries it has developed mainly under the pressure of the European Commission, as a prerequisite for the creation of a common market between the EU member states. Between the 1980's and the 1990's, this supra-national pressure was combined with a worldwide wave of liberalisation. This overall change, however, has not brought about a simple withdrawal from the control of the economy by the state, but rather the creation of new rules and new public bodies entitled to enforce them: competition authorities.

Competition authorities have been established in a large number of countries, and they have been delegated the power to investigate and sanction violations of competition law. From a political science perspective, their most interesting characteristic is their (supposed) independence from the politics. Like many other Independent Regulatory Agencies created during the same period, competition authorities have been established with a particular stress on their decisional autonomy. The rationale behind regulatory independence is that the legitimate interests that parliaments and governments represent must not influence the decisions that IRAs take. Hence, particular emphasis is put on the length of the appointment of their members, the difficulty (or impossibility) in dismissing them, the expertise requirements, and other similar provisions.

However, these features are not the same for every competition authority: some of them are more, and some less independent. This is somehow puzzling, when policy makers and experts claim that independence stems from the tasks that these public bodies carry out. To solve this puzzle, national competition authorities in the EU member states represent a very suitable subject. In fact, one could claim that differences in the degree of independence of different authorities are due to differences in their tasks or functions. But this claim cannot hold in the EU, where all the national competition authorities are bound to apply *the same antitrust law* (following EC Council Regulation 1/2003). If differences exist between these agencies, they must be due to institutional, political or economic reasons related to the countries in which they are settled.

Therefore, there is, first of all, an empirical puzzle that has to be solved: are all the reasons behind the degree of independence always enunciated in the political arena? The mismatch between the official public discourse and what we empirically observe calls for an appropriate explanation. But once I will have unveiled the real motivations that lead the countries to give (or not to give) independence to competition authorities, another question will remain yet unanswered, a question which has actually never been expressly addressed thus far: does independence make a difference? All in all, scholars and politicians have until now taken for granted that independence serves some purposes. In the literature, we find good reasons to believe that autonomous regulators will improve the credibility of the countries in which they operate, and that they will be stricter in enforcing rules than if they were under the direct control of the government and of the parliament. Provided that this improvement can be measured by empirical indicators, I will attempt to find confirmation for this commonly accepted albeit conjectural claim.

To summarise, the research questions I wish to answer, using the empirical analysis which will be presented in this dissertation, are:

1. *What explains the differences in the degree of independence of national competition authorities in the EU member states?*

2. *Does independence bring an improvement in how these agencies perform their tasks?*

The book will be structured as follows. In Chapter 2, I will present an overview of the relevant literature in the field of delegation and regulatory independence, aiming at tracing theoretical accounts and hypothesis that can be employed in order to answer both the research questions. In Chapter 3, I will describe the empirical analysis that I have carried out to explain the differences in the varying degree of independence of the national competition authorities in the EU member states. I will explicate how I measure independence, how I operationalise the hypotheses derived from my theoretical framework, and will present the outcome of the statistical analysis performed. In Chapter 4, I will show the result of a series of interviews with experts, members of the parliament and of the government, as well as members of the competition authorities, that I have conducted in France and Italy in 2010. Chapter 5 will be devoted to answering the second research question: I will present the hypotheses derived from the literature and from my own theoretical framework, and I will test a statistical model, showing the results of the analysis. In Chapter 6, I will draw general conclusions about the results of this empirical analysis and I will outline the possible future development of this research.

# Chapter 2

# Delegation, regulation, and the independence of regulators

## 2.1 Introduction

The concept of delegation of powers is intrinsically tied to the functioning of modern democracies. As Strøm (2000) points out, modern democracies are structured as «chains of delegation»: voters delegate to representatives, representatives delegate to the government, the government then delegates to bureaucracy. Although substantial differences exist between parliamentary and presidential systems (Strøm 2000: 269), delegation appears as a distinctive and unavoidable characteristic of both.

Relationships of delegation – first in economics, then in political science – have been traditionally interpreted and studied via the Principal-Agent (P-A) model, an approach that, besides being simple and intuitive, can be adapted to a very broad range of situations. And indeed, P-A model is capable to grasp most delegation relationships: all those in which the main problem for the principal is to control and supervise how the agent acts, and to avoid that she shirks; all those in which the principal finds herself in the potentially troublesome state of being responsible for something over which she does not have full control. Relations between an employer and her workers, or between a minister and bureaucrats, they all fall into this

category. In all of them the main concern of the principal is to make the agent work in accordance with her preferences.

Unfortunately, in the study of IRAs such a model reveals its weak points: since politicians treat these agencies as independent, (at least) one of their aims is to appear somewhat distant from them, or not to be held responsible for the decisions that they take. And if there is no clear «responsibility chain», then it becomes difficult to treat the relationship between political principals and IRAs as P-A relationships. On the other hand, others could claim that controlling the agent might still be the main concern for the principal, and the stress on independence might be nothing but a symbolic statement.

Independence is usually regarded as a positive characteristic for IRAs (see Section 1.4): they are supposed to judge facts impartially, like tribunals; they are supposed to show that the government will not use its power to favour «national champions» or state-owned firms. However, it is quite straightforward that these are not the only motivations that politicians have in mind when they decide on the amount of independence to be given to IRAs, and this is evident precisely in the case of competition authorities in the EU member states. Indeed, as has been said, all these regulators apply the same law: if their independence were decided only for reasons related to their tasks, they should all be very similar in this respect. However, since we do observe relevant differences, we must look for other explanations, which are not exclusively related to principles of fairness, impartiality and economic efficiency. The question is very intricate, and only a rigorous and accurate empirical analysis can help solve this puzzle.

In my opinion, a literature review on independent authorities must investigate this topic trying to include any contribution that clarifies the question of delegation to IRAs – although this literature undoubtedly suffers from a lack of systematisation and coherence. It can be easily noted that the different theories which will be reviewed in this part of the dissertation often posit completely different assumptions as regards the actors involved in the decision-making process, their preferences, and the most likely outcome of delegation. For instance, the classic theory of «congressional dom-

inance» (see Section 2.3.1) assumes that the legislature always wants to control any policy as much as possible, so that delegation would take place only when it makes control more efficient; other theories that stress the importance of credibility and credible commitments postulate that, on the contrary, in some cases politicians gain from giving up control over administrative agencies; other approaches treat delegation of power as the consequence of institutional features, making it almost independent from the preferences of the politics. Also with respect to the empirical tests (see Section 3.1), some authors prefer to examine only theories that share the same assumptions, disregarding parts of the literature that do not match, whilst others combine different approaches, but often without making clear what distinguishes them from each other.

For this chapter, I will review all the theoretical contributions which might offer useful insights for answering the questions put forward in the introduction. To do so, I will necessarily run into conflicting approaches. Nevertheless, I believe that, as long as the differences will be clearly pointed out, such a review will help build a coherent albeit comprehensive theoretical framework, based on the assumption of bounded rationality.

The chapter is organised as follows: first, I will present the so-called «economic theory of regulation»; then, I will review various insights sharing the P-A model as common approach; after that, I will introduce explanations that approach the topic by considering delegation (also) a way to insulate some policies from further changes or from undesired interferences; then, I will present the theory, put forward by Majone, that delegation to IRAs, being characterised by the need of the principal for credibility, is completely different from any other kind of delegation; finally, I will present other contributions that account for regulatory independence focusing on the institutional set up of the countries, and in particular on the role of veto players.

## 2.2 The economic theory of regulation

As this chapter seeks to review explanations of delegation, one may question whether it makes sense to start from a group of contributions that do not

specifically address the issue of delegation, but rather that of regulation. As a matter of fact, although they indicate clearly different concepts, the two terms are closely linked. The debate over administrative agencies was born in the US together with the discussion about the tasks of these agencies. Before scholars began to treat delegation as a process that deserved to be studied *per se*, the first analyses did not distinguish the administrative status of the agencies from the reasons for which they were established. Whilst the first studies on regulation were mainly historical and case-centred (see e.g. Fainsod and Gordon 1941; Kolko 1965; Purcell 1967) the Seventies brought more systematic contributions, specifically addressing the question of why regulation occurs and what purposes it serves. Following Mitnick (1980: 79), we can make a distinction between «Public interest» and «Private interest» theories of regulation. The first views regulation as a means for achieving some general purposes, assuming that at least some preferences of the politicians are in a «genuine and terminal» way favourable for the public interest (Mitnick 1980: 91). In this framework, regulation is generally seen as the output of a cost-benefit assessment (Wilson 1974) or as an incentive to provide «certain services in quantities and at prices that a free market would not offer» (Posner 1971: 41). «Private interest» theories, instead, share an actor-centred approach which treats both public and private actors as utility-maximisers. These theories have brought the concepts and tools of economics into political science, and for this reason they can generally be labelled as «economic» theories of regulation.

The first of these was illustrated in an article by George Stigler, published in 1971 with the title «The Theory of Economic Regulation». In this article the author argues, with the support of empirical data, that economic regulation is often promoted by the actors operating in a specific market with the purpose of imposing restrictions on competitors, especially new operators trying to enter that market. Stigler (1971: 8) shows, for example, that the weight limits imposed on trucks in different states of the Union were positively correlated with the number of trucks owned by farmers (measuring the strength of this group of interest) and with the length of average railroad haul (measuring the competitiveness of the railroads against the trucks, and

so the lack of interest in keeping the limit low). The author also points out that the introduction of administrative requirements for exerting a certain profession was positively correlated with the presence of many competitors working in a specific field, again arguing the importance of strong and determined interest groups in promoting limitations on free market. The author argues that these benefits, enjoyed by some economic actors, «gratify» the regulator in the form of financial support for re-election.

Stigler's «capture» theory has been extended and refined by other scholars, in particular Sam Peltzman and Gary Backer. The former (1976) points to the fact that legislators do not always pass regulation that favours and protects big business groups, in this way developing the argument that regulation (intended as protectionist regulation) does not only have benefits but also costs for whoever passes it. In Peltzman's view, policies that impose relevant losses on consumers/voters are perceived by them as implicit taxes; hence, they represent a net cost for the politician. Becker's (1983) contribution refines and extends this approach by introducing the concept of «deadweight losses», i.e. all the costs that legislators do not re-capture in other forms and that they tend to minimise for this reason. Becker's interest is mainly focused on competition among pressure groups rather than on regulation itself, but his findings are noteworthy as they shed more light on the complex relation between legislators, electors and economic groups.[1]

Although it might not seem so, these contributions are particularly stimulating for the subject of this dissertation. All these authors have pointed out the risk that highly organised economic groups may benefit from sectoral regulation, extracting rent from barriers to entry and other privileges, and paying back the regulator with various benefits. Such a behaviour is known in the literature as *regulatory capture*. One may note that these authors have not made distinctions between politicians and regulators, implicitly arguing that the latter do not enjoy real independence from the political principals. Therefore, there would seem to be no point in trying to test a theory which explicitly neglects IRAs on IRAs. Nevertheless, theories are sometimes more

[1] For an overview of the economic theory of regulation and its main implications, see Peltzman et al. 1989.

far-reaching than their creators think they are. The concept of regulatory capture remains useful even if we assume that regulation is carried out by agencies which enjoy a certain degree of discretion. In the case of IRAs, the «capture game» would have three players (legislators, firms, regulators) instead of two (legislators and firms). Rather than economical support for re-election, capture could consist of other forms of compensation, such as the «revolving doors» phenomenon: regulators who gratified regulatees during their office could be rewarded and hired by companies when their appointment expires.

The question that arises in such a framework is that of the preferences of the actors and the risks for the effectiveness of the regulatory activity. If regulators can be captured, politicians might prefer not to give them too much independence, because this could enhance the possibility that regulators become responsive only towards the regulatees. This possibility is discussed and analysed by Laffont and Tirole (1991). Assuming that that the legislator (the parliament) is a sort of benevolent dictator aiming at maximising the public welfare, and that the inefficient regulation is produced by the agent's (the regulator's) shirking, the authors design a system by which the agent has an (economic) incentive not to take full advantage of her informational asymmetry. A more realistic approach would probably lead us to assume that the legislators themselves can be captured; the degree of autonomy that they confer on the IRAs, in this case, might indicate how much they aim to influence the regulatory output.

## 2.3 The positive theory of delegation and the Principal-Agent model

The P-A model was formulated in the early Seventies in economics (see Ross 1973) and rapidly came to be a powerful tool for political science analysis, especially in the study of bureaucratic control and the role of IRAs (see e.g. Mitnick 1974; Goldberg 1976). Generally speaking, we can employ a P-A model every time that there are two parts and «one, designated as

the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems» (Ross 1973: 134). Following Lupia and McCubbins (2000), we can indicate three main assumptions of every P-A model:

1. there may be information asymmetry between the agent and the principal; in particular, the agent is usually assumed to be better informed than the principal;
2. the principal and the agent may have divergent preferences;
3. the principal is able to design a contract that minimises the possibility for the agent to diverge from the principal's preferences (so-called *agency losses*).

With respect to information asymmetry, it is quite straightforward that the agent has much more chances to be better informed on what he or she does and on what the «state of the world» is. On the one hand, the agent has the advantage of dealing with «first-hand» information; on the other, she has more time to collect and analyse it, whilst the principal must mainly rely on what others (included the agent) let her know.

Considering an over-simplified model of delegation (see Bendor et al. 2001: 242), policy outcomes are yielded by the policy which is chosen plus a random shock:

$$X = P + \varepsilon$$

A P-A model assumes that only the agent is capable of observing the random shock and of choosing the outcome that he or she prefers, whilst the principal only observes the final result. Hence, delegation is convenient for the principal every time that this helps her obtain a result which she would not pursue otherwise, because of her lack of information. More in general, this is one of the core reasons for the existence of bureaucracy: politicians have preferences for outcomes but do not know what technical decisions must be taken; they are «unsure about the substantive details of their most desired policy» (McCubbins et al. 1987: 261).

As regards divergent preferences, it must be noted that if principal and agent had the same preferences, there would be no agency losses, since the agent would choose the principal's ideal point, and information asymmetry would not cause inefficiencies. In as much, the second assumption approximates the reality most accurately. Assuming an exclusively utility-seeking agent, he or she will be interested only in his or her income – hence the risk of shirking and collusion, and the tendency to maximise the budget (see Niskanen 1971; 1973) – and by definition will not have any substantive interest in pursuing the principal's goal. But even hypothesising an agent who is also policy-seeking, this agent would be very likely to select objectives and priorities differently from the principal.

Finally, for what concerns the possibility of offering a contract which minimises agency losses, this assumption follows from the acknowledgement that such a relationship implies a hierarchical control over the agent by the principal. Hierarchy does not imply mere supervision, but also the possibility to submit to the agent a scheme of incentives and disincentives related to his or her activity. If an agent does not have any incentive to comply with the principal's preferences, he or she will be very likely to shirk. But if the agent is offered a contract according to which he or she obtains more when reducing the principal's losses, the agent will tend towards the principal's ideal point, and both the parts will be better off.

An interesting part of the literature on delegation (which will not be treated in detail because of its mainly theoretical and normative aim) tackles this question by formulating abstract models of delegation that show how agency losses such as collusion and shirking can be foreseen and minimised by the principal. For every potential loss there is always a contract that produces a second-best solution (see e.g. Tirole 1986; Aghion and Tirole 1997; Laffont 2000; Laffont and Martimort 2002).

In general, in every P-A model there is a trade-off between the aspects identified by these assumptions: information asymmetry is a drawback, but it reflects the advantage of being able to obtain a certain result without need for caring about the practical implementation of a policy; divergent preferences can be minimised and controlled by the choice of the agent and

of the contract which is offered to him or her. As Bendor et al. clearly put it, the principal's problem can be summed up with this question: «Is the gain produced by delegating the decision to a more informed party worth the loss produced by having someone with different preferences make the choice?» (Bendor et al. 2001: 242).

### 2.3.1 Bureaucratic or congressional dominance?

As said, departing from the P-A model, a series of influential studies developed in the US between the Seventies and the Eighties. The label that is usually assigned to these contributions is known as «congressional dominance». All the scholars who adhered to this paradigm departed from a rejection of the popular and common-sense theory that Congress is actually unable to control the bureaucracy. The view they opposed was nothing but the logical continuation of Weber's reasoning about the tendency of bureaucracy to become more and more specialised and independent, and less and less accountable towards the politics.

Weber (1978 [1922]: 957) notes that the main characteristic of modern bureaucracy is that it is stable, and it uses standard procedures in order to produce policy output and store information. Although the bureaucrat's power derives from an initial delegation (so that the bureaucrat formally depends on the appointment of the principal), such delegation is in practice very difficult to revert:

> «When the principle of jurisdictional "competency" is fully carried through, hierarchical subordination − at least in public office − does not mean that the "higher" authority is authorized to simply take over the business of the "lower". Indeed, the opposite is the rule; once an office has been set up, a new incumbent will always be appointed if a vacancy occurs».

All in all, Weber's claim is that control over bureaucracy is practically impossible:

> «The power position of a fully developed bureaucracy is always great, under certain conditions overtowering. The political "master"

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> always finds himself, vis-à-vis the trained official, in the position of a dilettante facing the expert. This holds whether the "master", whom the bureaucracy serves, is the "people" equipped with the weapons of legislative initiative, referendum, and the right to remove officials; or a parliament elected on a more aristocratic or more democratic basis and equipped with the right or the *de facto* power to vote a lack of confidence [...]» (1978 [1922]: 991).

Even though Weber does not use the terminology of modern political science, the notion of *informational asymmetry* is already present in his analysis. Such asymmetry derives from the amount of information that the bureaucracy collects and stores, and it becomes particularly severe in democratic systems, where the political principals are constantly being replaced by voters, whilst the bureaucrats remain stable in their office. A similar concern is also expressed by Dahl (1967: 23), according to whom «in pluralistic democracies the tendency is to find ways by which [...] policies can be made by smaller groups of like-minded people who enjoy a high degree of *legal* independence».[2]

These intuitions were extensively developed in the US during the Seventies (Lowi 1969; Niskanen 1971, 1973; Niskanen 1975; Wilson 1975), as they appeared to be supported by strong evidence. Indeed, oversight hearings or congressional investigations seldom occurred, the appointment of the heads of the agencies was carried out with scarce interest, and the Congress, even at the committee level, seemed to pay little attention to the consequences of the choices taken by the agencies (see Weingast and Moran 1983: 766-770). Moreover, since bureaus, agencies and any sort of public offices had both grown (in number and size) and seen their funds regularly increase, it seemed reasonable to conclude that this had happened because bureaucrats had succeeded in gaining power and discretion vis-à-vis the Congress and in maximising their budget.

Accordingly, the starting point of Niskanen's pioneer research is that bureaucrats are primarily interested in maximising the budget that the political authority sets for them. As the author himself points out (1971: 36):

[2] Emphasis mine.

> «Most of the literature on bureaucracy [...] has represented the bureaucrat either as an automaton or as maximizing some concept of general welfare, the latter usually considered to be identical with the objectives of the state. For a positive theory of bureaucracy, though, the beginning of wisdom is the recognition that bureaucrats are people who are, at least, not entirely motivated by the general welfare or the interest of the state».

The consequence of this assumption is that, according to Niskanen, bureaucrats aim at maximising their budget (1971: 38):

> «[a]mong the several variables that may enter the bureaucrat's utility function are the following: salary, perquisites of the office, public reputation, power, patronage, output of the bureau [...]. All of these variables [...] are a positive monotonic function of the total *budget* of the bureau during the bureaucrat's tenure in office».

In sum, the combination of the bureaucrats' tendency to want to maximise their budget and the Congress' difficulty to control them led many scholars to conclude that bureaucratic control was so difficult to attain that, at some point, for the legislature it was not even worth trying to do so.

Conversely, what congressional dominance theorists (cf. Fiorina and Noll 1978; Weingast and Moran 1983; McCubbins and Schwartz 1984; Fiorina 1986; McCubbins et al. 1987; North and Weingast 1989; Calvert et al. 1989; Ferejohn and Shipan 1990) claim is that Congress acts as a principal with agencies, setting up a system of incentives that leads agencies to act in accordance with the legislators' preferences. If congressmen do not often actively intervene, the reason lies in the fact that they do not need to do that: agencies already follow the right track, and a direct intervention becomes necessary only when big deviations take place (Weingast and Moran 1983; McCubbins and Schwartz 1984).

This system of incentives, as Weingast and Moran (1983: 769) point out, is made of three main tools. The first is budget allocation: every year, many agencies compete to get funds for their activity, and for the legislators it is quite easy to «punish» those which did not comply with their preferences by assigning them less money than they need or expect. The second

instrument that politicians can employ is passing legislation that restricts or hinders an agency's activity, as well as new norms that impede some project in which the agency has a strong interest. The third tool, perhaps the most powerful, is the faculty to appoint the head and the other members (if any) of the agency: the parliament will tend to appoint an agent whose preferences are as close as possible to its own. Furthermore, if reappointment is possible, an agent who wants to be designated again will not have any incentive in openly opposing the principal. The different implications of the congressional dominance approach are discussed in the following sections.

### 2.3.2 Police patrols, fire alarms and blame shifting

A «classical» article explaining delegation as a product of a deliberate choice of the legislators is McCubbins and Schwartz's (1984) «Police Patrols versus Fire Alarms». Here the authors argue that what has been regarded for a long time as a lack of interest or ability, is actually a very refined oversight tactic. According to McCubbins and Schwartz, there are two kinds of oversight, which they name as «police patrol» and «fire alarm». The first – «police patrol» oversight – consists of those activities in which «Congress examines a sample of executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations», and it is direct, active and characterised by a high level of centralisation. «Fire Alarm» oversight, instead, occurs when «Congress establishes a system of rules, procedures, and informal practises that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself» (McCubbins and Schwartz 1984: 166).

The authors claim that scholars often make the mistake of considering only the first kind as real oversight, because in that case there appears to be some «activity». On the contrary, they not only show that «fire alarms» are by any means a supervision over the implementation of legislation, but also that they can be more effective than police patrols. The drawbacks of

«police patrol» oversight, according to the authors, consist in the fact that congressmen (McCubbins and Schwartz 1984: 168)

> «[...] inevitably spend time examining a great many executive-branch actions that do not violate legislative goals or harm any potential supporters, at least not enough to occasion complaints. They might also spend time detecting and remedying arguable violations that nonetheless harm no potential supporters. For this they receive scant credit from their potential supporters».

Instead, by a more decentralised oversight, legislators set rules in such a way that enables them to receive signals and intervene only when their direct action is needed. A police-patrol procedure tends to miss many complaints that may arise but would not find a way to reach the people to whom they are addressed. According to the authors, another major advantage of the second procedure is that it gives the Congress the opportunity to «spell out its goals more clearly» (1984: 172), remedying the unavoidable generality of legislation. As legislative goals are continuously reshaped and redefined, «fire alarms» permit the legislative to receive information on new instances, adjustments or proposals of change. Moreover, fire-alarm oversight can be also employed in order to protect constituencies that are very important for congressmen, but usually poorly organised.

McCubbins and Schwartz conclude arguing that (1984: 174-175):

> «Although Congress may, to some extent, have allowed the bureaucracy to make law, it may also have devised a reasonably effective and noncostly way to articulate and promulgate its own legislative goals — a way that depends on the fire-alarm oversight system. It is convenient for Congress to adopt broad legislative mandates and give substantial rule-making authority to the bureaucracy. The problem with doing so, of course, is that the bureaucracy might not pursue Congress's goals. But citizens and interest groups can be counted on to sound an alarm in most cases in which the bureaucracy has arguably violated Congress's goals. Then Congress can intervene to rectify the violation. Congress has not necessarily relinquished legislative responsibility to anyone else. It has just found a more efficient way to legislate».

Another potential advantage deriving from the setting up of a system of decentralised agencies is constituted in the possibility for the legislator «to take as much credit as possible for the net benefits enjoyed by his potential supporters» and «to avoid as much blame as possible for the net costs borne by his potential supporters» (1984: 167). Such an attitude has been labelled in the literature as «blame shifting». The idea is that politicians try to avoid responsibility for unpleasant consequences of their choices or for policies which they deem necessary but whose political costs they are not willing to sustain. This view is indeed popular (Fiorina 1982; Schoenbrod 1993; Goodman 1998; Hood and Rothstein 2001) and appealing, because it tickles our imagination by seeming to offer a scientific background for something that we often ponder.

However, blame-shifting has always been treated as an assumption rather than as a hypothesis worth testing. This is to be observed even in the most famous and most cited article on blame-shifting, the first in which the concept is employed in a model of explanation of the behaviour of the US Congress (Fiorina 1982). In this article, Fiorina criticises the ways in which both historians and economists had dealt with regulation. Historians, he says, aiming at naming the people and the interest groups which have pushed for regulation in a certain moment, tend to analyse documents, letters or speeches, not being always able to place them in a coherent scheme of preferences. On the other hand, economists, Fiorina says, focus on ex-post acknowledgement of which groups have benefited from a certain regulation framework (see e.g. Stigler 1971). In the author's view, one must actually pay attention to the calculation made by legislators when passing a law. This is why, in his model of choice between legislative or administrative control (i.e. between «command and control» enforcement or delegation to administrative agencies), Fiorina first assesses what value congressmen maximise when legislating.

From both the «public choice» set of assumptions and the particular configuration of the American electoral system (he acknowledges the contribution of Mayhew 1974), Fiorina maintains that every member of the Congress calculates, for every regulatory decision, if the net costs borne by her elec-

toral district outweigh the net benefits or vice versa. If costs outweigh benefits, then the legislator will go for administrative enforcement, i.e. for the creation of an agency. If the balance is opposite, «command and control» enforcement will be preferred because it will give the legislator the opportunity to claim direct responsibility for the advantage enjoyed by the electoral district (1982: 41).

A positive aspect of Fiorina's model lies in its clarity and in the fact that it provides an explanation that is simple but adaptable to many policy areas. On the other hand, it also presents some lacks of specificity. For instance, it considers only the benefits for the voters of a district, disregarding the importance of lobbyists, especially in a system like the American one. Moreover, it also makes the strong assumption that the electorate behaves as a unified actor in each district and that it is not organised into pressure groups. Nonetheless, these critiques could certainly be faced by recognising that there is always a trade-off between denotation and connotation, and that Fiorina clearly wanted to conceive a very general model.

For what concerns the testability of the model, however, some problems may arise. For example, Fiorina refers to «costs» and «benefits» in general, but these categories can include various types of decisions: in the most straightforward conception, such a definition makes us think of redistributive policies, where some districts give more money than they receive. But is this the only case in which delegation occurs? It does not seem to be so. First, delegation takes place in many policy fields where there is no redistribution. Second, even admitting that almost every policy entails some redistribution, this does not necessarily comes to be as a from-district-to-district one. Third, what could be said of countries where districts do not exist? May not the blame shifting hypothesis apply to them as well?

Such an approach could be framed in a more general fashion by simply referring to *constituencies* instead of districts. Politicians might want to shift the blame for policies which are unpopular in the eyes of their voters, and claim credit when their constituencies (or one of them) benefit from a policy that they have carried out. From this perspective, the spreading of IRAs could signal an increase of unpopular choices being made by the gov-

ernments. Another way of formulating the blame shifting hypothesis could be that of spelling it out as a trade-off between potential costs and potential benefits: the higher the cost/benefit ratio is, the more delegation will likely be able to take place. To rephrase more simply, politicians might want to shift blame in policy fields where if things go well response is low, and if things go bad negative response is highly probable. Unfortunately, these attempts to re-define the blame shifting theory suit only for explaining differences between policies or sectors, and they fail to identify a distinction between authorities of the same sector but in different countries – that is exactly the case of the present analysis. For the purpose of this dissertation, the blame shifting theory will be tested by identifying «losers» and «winners» from a competition policy perspective. Depending on the countries, we should have more independent competition authorities where the losers from competition policy are more numerous.

### 2.3.3 Uncertainty and «deck-stacking»

Another popular theory about delegation to regulatory agencies has been devised by McCubbins, Noll and Weingast (1987), and has become famous because of the term «deck-stacking», coined by the authors to identify a way in which legislators employ authorities. To formulate their theory, the authors depart from the assumptions of uncertainty and information asymmetry. The need for creating agencies arises from the difficulty that politicians have in translating their constituencies' requests into substantive policies. As has been noted in Section 2.3, legislators may know the results that they want, but they may not be able to determine which measures are necessary for pursuing them. Bureaucracy in general, and agencies in particular (as they are supposed to be highly specialised in their policy field), can serve the purpose of producing these results, but they must be controlled, in order for them not to deviate from the objective of their principal(s). The authors maintain that an agency, if not properly supervised, might tend to shirk its tasks. In their words (1987: 244):

> «Procedural requirements affect the institutional environment in which agencies make decisions and thereby limit an agency's range of feasible policy actions. In recognition of this, elected officials can design procedures to solve two prototypical problems of political control. First, procedures can be used to mitigate informational disadvantages faced by politicians in dealing with agencies. Second, procedures can be used to enfranchise important constituents in agency decisionmaking processes, thereby assuring that agencies are responsive to their interests. [...] By controlling processes, political leaders assign relative degrees of importance to the constituents whose interests are at stake in an administrative proceeding and thereby channel an agency's decisions toward the most substantive outcomes that are most favored by those who are intended to be benefited by the policy. Thus, political leaders can be responsive to their constituents without knowing or needing to know, the details of the policy outcomes that these constituents want».

On the track of McCubbins and Schwartz's (1984) theory about «fire alarms» oversight, the authors argue that the Congress can use many legislative and administrative instruments to ensure that the agency will comply with its duties. These instruments include (McCubbins et al. 1987: 255-264):

- *incentives to gain relevant political information*; agencies, before taking decisions or enacting certain measures, must announce them to the Congress, which becomes then capable to intervene or make proposals;
- *the requirement that the procedures must be public*, so that also the constituencies can check them and ensure some responsiveness by the agencies;
- *evidentiary standards*; agencies must present evidence in support of their decisions;
- *deck-stacking*; legislators, via administrative law, can facilitate some constituencies in accessing the agency, by requiring it to hear them in some circumstances, or by designing procedures that make it difficult

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for some groups to influence the process, etc.; with these tools, the coalition that created the agency for a specific purpose is sure that it will not be able to seek the favour of another set of interest groups or that, if the «balance of power» will change, the new equilibrium will have to be defined taking into account the initial mandate;

- *decentralised enforcement by the courts*; imposing that every decision of the agency can be subjected to judicial review is another way to make sure that no major deviations will take place without a different political input.

As can be noted, like all the other «congressional dominance» theories, this one assumes that the legislature is capable of controlling IRAs and reducing agency losses. A similar argument is also developed by Fiorina (1986), who distinguishes between courts, which are «faithful» enforcers of the law, and agencies, which are «biased» enforcers, and are meant to ensure that the result of a political equilibrium is maintained. Nonetheless, McCubbins et al. add one more point, by hypothesising that control may somewhat last even when a coalition falls. Although this theoretical argument does not lead to any hypothesis about the degree of independence (or discretion) that the agency is given, it is very helpful in listing the checks that politicians can impose on the authority.

### 2.3.4 The ally principle and the trade-off between expertise and control

A corollary of the P-A model is the so-called «ally principle». If the principal faces the above mentioned problems of information asymmetry and possibility that the agent have divergent preferences, one of the tools that he or she can employ in order to reduce her losses is the appointment of a person whose preferences are as close as possible to hers.

Considering a principal and a set of possible agents $a$ having single-peaked preferences over outcomes in a one-dimensional space, the principal will choose the agent whose ideal point ($x_a$) is the closest to hers ($x_p$),

minimising the following function:

$$-(x_p - x_a)^2$$

Obviously, this representation of the model is over-simplified, because here the only decision that the principal can take is whether to delegate or not. If the principal delegates, then he or she acquires for sure the ideal point of the agent, who observes the random shock ($\varepsilon$) and chooses a policy that leads to that outcome. If the principal does not delegate, and passes the policy, the outcome (given $\varepsilon$) will not be exactly what he or she desires.

In real world decisions, two assumptions of this stylised model do not hold: first, the preferences of the agent are not exogenously formed, but part of the decision to delegate; second, the principal never delegates entirely, but rather *to a certain extent*. As regards the first distinction, it is crucial to discriminate between models in which the ultimate decision is taken by the legislators (and the behaviour of the agent is mainly a consequence of this decision) and models which are based on a game-theoretic approach (in which the preference are exogenous to the game and the equilibrium is yielded by how much information the agent is forced to reveal). The «deck-stacking» theory that I have just reviewed (and all the congressional dominance theories in general) explicitly embraces the first «vision», whilst a more orthodox P-A approach would better fit the second.

With regard to the other distinction – what is the optimal extent to which to delegate, if any – it is worth analysing the contribution of Bawn (1995). Most authors that we have seen until now model the discretion conferred on the agent and the problem of control as if they were analytically distinct: they consider the expertise of the agent and the better information that he or she can gather as a reason that pushes the principal to delegate, but they do not explicitly link these two aspects. Bawn, instead, summarises their relation as a trade-off. Since delegating to an agency with no independence is equivalent to legislating the policy itself (Bawn 1995: 68), to take advantage of the benefits of agency the principal *must* give some leeway to the agent. As if the two actors were exchanging their goods, the principal offers discretion and wants expertise, whilst the agent offers expertise and

wants discretion. This transaction does not become a «game», because the relationship between the two remains hierarchical: it is still a decision of the legislative in which the output of the transaction must be foreseen and anticipated.

Bawn builds a model of administrative delegation by distinguishing between intrinsic *technical uncertainty* and *procedural uncertainty*. The first is due to «incomplete knowledge of natural processes (e.g., dispersion patterns from a smokestack) and economic responses (relocation of industry)» (Bawn 1995: 64); it is defined as «intrinsic» because the aim of the legislator is to reduce it by having recourse to an agent. The second is related to the administrative procedure that is chosen, and it grows as the discretion given to the agency grows. A major contribution of Bawn's analysis lies in the fact that it keeps together two aspects that are too often treated separately: the decision on *whether or not* to delegate, and the decision on *how much* to delegate. In Bawn's model, the final decision is taken depending on the ratio between technical and procedural uncertainty (the more the first exceeds the second, the more discretion will tend to be given), and the ratio between drawbacks and advantages of delegation (shirking and improvement of technical knowledge).

Thus, giving independence without exerting control has no practical utility – this had already been shown in many ways – but neither is it possible to control the agent without lessening him or her capability of being useful. What we can deduce from this model is, first and more generally, that delegation is not necessary to the same extent in every policy field, but only where a reasonably high specialisation is required. Second, we can denote that the principal should choose agents who have a low relative tendency to shirk – this is probably why the statutes that establish IRAs so often require that their members be long-careered civil servants, academics, (former) judiciaries, etc. In other words, people that politicians believe they can trust.[3] The hypothesis that can be drawn from this theory is that more independence will be given where/when more expertise is needed.

[3]The importance of the appointment is also discussed by Calvert et al. (1989).

## 2.4 Delegation and political uncertainty

From some points of view, I was tempted to treat this theory together with the «deck-stacking», because they reach a very similar conclusion. Nevertheless, it must be recognised that their foundations lie on different grounds, and these distinctions are worth analysing.

The hypothesis that I label as «political uncertainty» is drawn from the works of Moe (1984; 1990; 1995). These contributions are actually a broader reasoning about institutions, their genesis and their role. Moe finds in what he calls «the New Economics of Organization» (a name by which he means both P-A and transaction-costs approaches in political science) a tendency to analyse politics, and consequently its institutions, as if it were economics. Scholars like Weingast, McCubbins, Fiorina and others explicitly regarded bureaucratic institutions (and agencies in particular) as solutions to collective-action problems – be they «between the legislature and the agency, between legislators and their constituents, or among factions within the enacting coalition itself» (Moe 1990: 224).

Yet, Moe argues, institutions are also «weapons of coercion and redistribution. They are the structural means by which political winners pursue their own interests, often at the great expense of political losers» (1990: 213). According to the author, solving collective-action problems is only one of the two main purposes that institutions serve, and the other is in fact to redistribute power among political actors, usually from the losers to the winners – both temporary, of course. Moe argues that «positive theorists» have intentionally neglected one side of the story, because they have employed analytical tools created and developed by economists for studying phenomena which are peculiarly economical – i.e. which pertain to voluntary exchanges between autonomous actors. However, Moe argues, politics are a different matter. Politics lack the main basic precondition of every economic transaction, that is property rights. In the author's words (1990: 219):

> «At bottom, the difference [between politics and economics] is that political actors cannot simply engage in market exchange, as economic

> actors can; they must make decisions under majority rule, which is inherently unstable as a result of the insurmountable transaction problems of striking durable contracts. Political actors therefore face transaction problems that economic actors do not − problems that are "fundamentally political in origin" [...] because of their anchoring in majority rule».

Positive theorists are right, according to Moe, in claiming that political institutions help overcome instability and grant greater efficiency in policy implementation. But majority rule also implies that whoever has the majority has the right to pass binding norms for everyone (1990: 221):

> «The unique thing about public authority is that whoever gets to exercise it has the right to tell everyone else what to do, whether they want to do it or not. When two poor people and one rich person make up a polity governed by majority rule, the rich person is in trouble. He is not in trouble because majority rule is unstable. Nor is he in trouble because the three of them will have difficulty realizing gains from trade. He is in trouble because they will use public authority to take away some of his money. Public authority gives them the right to make themselves better off at his expense. Their decisions are legitimate and binding. They win and he loses»

This is something that cannot happen in economics. Analysing legislators and bureaucracy as though they were part of one public firm in which the former are the boss and the latter is the agent is limited because it ignores that, unlike in economics, in politics property rights are not secure, and the incumbent boss can easily be replaced by another. This is the other «side of the story».

Moe introduces the concept of «political uncertainty» stressing that, as political authority by definition does not belong to anyone, one of the politicians' main concerns is to protect the decision that they take when they govern, to preserve the institutions they create, to insulate them from further attempts to change or redefine their function. Here the author's and McCubbins et al.'s conclusions look quite alike: both state that legislators want agencies to carry on exactly the task that they have been established

for. Nevertheless, their differences regard not only – as has already been explained – the underlying motives, but also the question of whether there is control or not and what is the effect of such measures. Regarding the «nature of being» question, McCubbins et al. maintain that what seems a lack in oversight is rather a very sophisticated form of control, whilst Moe seems to get back to the pre-Eighties literature on bureaucracy, claiming that agencies are really insulated from political control; the incumbent accepts to bind him or herself on condition that also his or her successor will be bound (Moe 1990: 227-228):

> «[Legislators] can fashion structures to insulate their favored agencies and programs from the future exercise of public authority. In doing so, of course, they will not only be reducing their enemies' opportunities for future control; they will be reducing their own opportunities as well. But this is often a reasonable price to pay, given the alternative. And because they get to go first, they are really not giving up control − they are choosing to exercise a greater measure of it ex ante, through insulated structures that, once locked in, predispose the agency to do the right things. What they are moving away from − because it is dangerous − is the kind of ongoing hierarchical control that is exercised through the discretionary decisions of public authority over time».

For what concerns the effect, whilst McCubbins et al. basically argue that the set of checks enacted by the legislators manages to reach an efficient outcome, in which both the preferences of the Congress and the right of the citizens to receive adequate services are satisfied, Moe contends that there are no guarantees that institutions created in such a way will also be effective – because effectiveness is not the reason for which they are set up.

Moe's hypothesis has been tested by Gilardi (2005a; 2005b) with regard to its impact both on the establishment of agencies as well as on their independence, and the impact has been proved to be statistically significant and positively related to independence. Nonetheless, the indicators employed to explain the effect on regulatory discretion are questionable [4], and in any case, a further test of this hypothesis on a different data set can increase the

[4] As Gilardi himself recognises (2005a: 154). See also Chapter 3, Section 3.5.2.

confidence in its explanatory power.

## 2.5 Alignment between legislative and executive

Another important contribution to the study of delegation is the work of Epstein and O'Halloran, particularly their influential book «Delegating Powers» (1999). The theory which the authors advance and test out in this work is, from many points of view, tightly linked to the positive theory of delegation. Firstly, the «environment» which the authors study is the same: the US Congress and its relations with the other branches of government, namely the Presidency and the various administrative agencies. Second, like in all the positive theory of delegation, the focus is on the legislators and on their benefits-costs calculation regarding whether it is convenient or not for them to devolve powers. On the other hand, one aspect that utterly distinguishes the authors' method from other positive theorists' is their use of P-A approach. Whilst positive theorists force the original model – a two-actors game where the principal can mainly choose among agents with different preferences – by making the role of the agency practically non-existent, or at least completely absorbed by the incentive-driven administrative rules that the Congress imposes on it, Epstein and O'Halloran employ a more strict version of the model,[5] assuming that the Congress can only choose whether to delegate or not, and, if so, then to whom. The authors' theory also relies on the «ally principle» assumption (see Section 2.3.4), as legislators tend to delegate to the body whose preferences are closest to theirs. On the contrary, a feature of the model which does not conform that much to the P-A approach is the little importance given to control mechanisms. In the authors' theoretical framework, agency losses cannot be minimised by using a set of incentives, but are rather seen as a *hold-up*[6] problem (Epstein and

[5] In fact, they refer to theirs as a model based on Transaction Costs Economics (TCE), but nonetheless they explicitly state that P-A is a «building block» of the TCE model. As Karagiannis (2007a: 3) persuasively argues, the authors' attempt to combine two approaches which rely on contradictory assumptions leaves them open to criticism.

[6] The *hold-up* problem is a situation, described by TCE literature, in which one firm decides to move close to another one, for instance because it needs the raw material produced

O'Halloran 1999: 47)

The authors carry out a detailed analysis, collecting information on 257 relevant legislative acts passed by the Congress from the end of the second world war to 1990, and calculate for each act how much discretion is given to the executive power (considering both the government and other agencies).[7] The two most important findings of the authors, for what concerns this dissertation, are that:

1. in case of divided government (when the President's party does not hold the majority of the seats in the Congress), the legislative tends to impose more constraints on the executive branch in general;

2. in case of divided government, delegation to agencies which are not part of the federal government increases.

Epstein and O'Halloran's analysis is extremely detailed, and it yields very solid and convincing results. Still, those who aim at applying their methodology to European countries, and to IRAs in particular, might find some obstacles on their path. First, theirs is a one-country case study. Even though nothing impedes the application of the authors' logic to European cases, some clear differences between the US and most European countries should be carefully considered. The two most relevant ones are the form of government – the US represents a presidential system, whilst the great majority of European countries are parliamentary systems – and the party system – two dominant parties, with little ideological and territorial cohesion in the US,

by it. But the producer could then exploit the proximity of the other firm to raise the price of the raw material. The first firm would then be *held-up*. The concept has been developed by Joskow (see Joskow 1985).

[7] The discretion ($d_i$) associated with a certain act $i$ is defined by Epstein and O'Halloran as:

$$d_i = r_i - c_i$$

where:

$r$ = *delegation ratio*, i.e. the number of provisions in a law which contain delegation to the executive branch over the total number of provisions;

$c = r \cdot f$ = *relative constraints*, where $f_i$ is the number of constraints imposed on the executive in a law over the total number of existing constraints.

versus multi-party systems with stronger cohesiveness throughout Europe. Yet also other aspects, such as the importance of congressional committees and the role of lobbies in the legislative process, should be taken into account.

Furthermore, Epstein and O'Halloran's analysis is not focused on explaining either bureaucracy nor independent agencies: theirs is a theory of legislation; they aim to show why and how much the Congress delegates depending on certain specific factors. The question concerning to which bodies the legislative delegates only has secondary importance.

That said, the interpretation of the second finding remains undoubtedly fascinating: is such a tendency only related to divided government in a presidential system or does it suggest a pattern which could be translated in the language of parliamentarianism? Apparently, it could be generalised as though delegating to IRAs were a way for the parliament to subtract the implementation of legislation to the executive. However, discovering the parliamentary equivalent of divided government is not an easy task.

## 2.6 Need for credibility

The theory that will be analysed in this section differs widely from the ones that I have dealt with until now both in terms of the motives as well as the effect. In the positive theory of delegation, politicians are treated as rational self-interested actors who maximise their chances of being re-elected. Within this framework, delegation is a means to solve information-gathering and agenda-setting problems. Scholars of this field reject the common-sense judgement that bureaucracy is largely independent and uncontrollable, by claiming in fact that the Congress, although it only rarely intervenes in a direct manner, exerts its control via legislative provisions and administrative rules: delegation would not be an abdication but rather a very refined way of exploiting the advantages of agency relations. As regards Moe, we have seen that he criticises this approach for being partial and for disregarding the question of power allocation that is always at stake in modern democracies. Yet, Moe does not discuss the assumption of self-interest in

the politicians' behaviour; he just claims that they pursue another objective, and that this goal does not necessarily match with efficient policy outcomes. Finally, Epstein and O'Halloran's approach is probably closer to the first in that it keeps the focus on the Congress as the body which is ultimately responsible for every decision; on the other hand, they do not seem to take on the question of how much the legislators manage to control agencies.

The theory that identifies in the need for credibility the main reason for delegating has been devised and put forward by Giandomenico Majone (1996; 1997; 1998; 2001), although some of its elements can be traced in previous works by other scholars (see Kydland and Prescott 1977; Barro and Gordon 1983, 1984; Arrow 1985; Rogoff 1985; Giavazzi and Pagano 1988; Shepsle 1991; North and Weingast 1994; Weingast 1995). Majone's argument can surely be generalised in the field of delegation to IRAs, although the author has conceived his theory as mainly directed towards the explanation of supranational delegation to the European Union.

The author's major innovation in the study of delegation lies in his assumption about control. In all the contributions listed up to this point, all the authors assume that politicians aim to control bureaucracy and agencies as much as possible. When some discretion is left to the bureaucrat, this happens because the politician actually increases his power (and his chances to stay in power) by doing so. In all the previous approaches (as it is common in the US literature), politicians are self-interested, they maximise their own utility. Majone, instead, does not claim either that control is ineffective, nor that it is impossible, or necessary in order to bind future incumbents. Instead, he claims that it is undesirable, and that the aim of the politicians who establish an IRA must be to give it discretion intentionally. Thus, the perspective is completely overturned: lack of control is not a loss (or the lesser of two evils), but a resource.[8]

[8] The argument of credibility has been advanced also in other forms. Giavazzi and Pagano (1988) for instance, writing about inflation-prone countries which entered the European Monetary System, claimed that the politicians ruling these states practically «tied their hands», because they accepted to pay a high cost if they were not capable of maintaining a reasonable inflation rate. A similar argument has been proposed by Lohmann (2003), who argues that, creating central banks, politicians also create «audiences» towards which they

To focus on the author's reasoning, we must direct our attention to the previous economics literature on central banks and their capability to grant a stable inflation rate (see Kydland and Prescott 1977; Barro and Gordon 1983; Rogoff 1985), towards which the author recognises his debt. The cornerstone of his argument about credibility and credible commitment is constituted by the concept of «temporal inconsistency». Following Kydland and Prescott (1977), Majone argues that temporal inconsistency occurs «when a policy which appears to be optimal at time $t_0$ no longer seems optimal at a later time $t_n$» (Majone 1996: 2). As the author points out (1996: 4):

> «[...] in a democracy political executives tend to have short time horizons − shorter, for example, than their counterparts in the private sector − so that the efficacy of reputational mechanisms [...] is more limited in the political sphere. It is also well known that in any situation of collective choice there are many possible majorities, and that their respective preferences need not to be consistent. Because political property rights are attenuated − a legislature cannot bind a subsequent legislature and a majority coalition cannot bind another − public policies are always vulnerable to reneging and hence lack credibility».

Politicians tend to change their policy preferences over time, either because elections yield government alternation or because incumbents, in order to gain popularity, shift from previous commitments. Despite what politicians may think, economic actors often anticipate these decisions, which thus produce two unwanted consequences:

- the objective that the incumbent aimed to achieve is no longer pursued;
- economic actors will expect that such a behaviour will be repeated in the future, and will not trust politicians when they will commit to some other objective; in other words, their *credibility* will be damaged.

The example of monetary policy is illuminating with respect to this argument. Even though increasing the monetary supply can yield positive ef-

are responsible and which can monitor their future actions.

fects in the short term, the ultimate consequence of such a policy is the rise of inflation. Since it does not take much time to «learn the game», if the government tries again to have recourse to this means, everyone will already know that prices will go up, and this will produce an anticipated increase of inflation without even the initial positive effect. Or, all else equal, greater and greater increases of the monetary mass will be needed to get the same result, leading to an inefficiently high inflation rate (see Barro and Gordon 1983). To sum up, contrarily to the initial intentions of the politician, the long-term effect of his or her policy will be a diminution in social welfare (see also Bendor et al. 2001: 261).

The solution that Kydland and Prescott propose is to have fixed rules that leave no room for discretion to the incumbent. But, Majone argues, since regulation consists of applying general rules to concrete cases, a certain amount of discretion is unavoidable (Majone 1996: 3):

> «Because regulation consists in applying general rules to particular situations, regulatory discretion is unavoidable. But there are other methods for increasing policy credibility. Especially important in the present context is the delegation of policy-making powers to institutions which, by design, are not directly accountable to voters or to their elected representatives; in other words, delegation to non-majoritarian institutions»

IRAs cannot be bound to follow too detailed provisions, and even if they could, it would not be practically possible for anyone to design rules that apply to any situation. Yet, there is another resource that IRAs may provide and that can be exploited to solve the credibility problem, according to Majone. The author puts forth the example, illustrated in Table 2.1, of the so-called «trust-game» (Kreps 1990: 100; Milgrom and Roberts 1992: 261).

Let us suppose that there are two actors $A$ and $B$, playing a game in which $A$ must first decide whether to trust $B$ or not. If $A$ does not trust, no transaction takes place and the pay-off for both the players is 0. If $A$ trusts, $B$ can either honour her trust or abuse it: in the first case, both gain 10; otherwise, $B$ gains 15 and $A$ only 5. If the game is played only once, it is very likely that the players will end up in the trust/abuse box, but if

| | honour | abuse |
|---|---|---|
| trust | *10, 10* | *5, 15* |
| not trust | *0, 0* | *0, 0* |

Table 2.1: The trust game

we suppose that $N$ interactions occur, then $B$ has two options: gaining 15 in the first game and 0 for the future, or honouring $A$'s trust and gaining $N \cdot 10$. If $N \cdot 10 > 15$, then cooperation is mutually convenient.

Let us imagine that $A$ is a generic investor and $B$ the state. A problem of temporal inconsistency would arise, for instance, if the state first promises not to increase inflation, and then it does so anyway. Actors who have invested in the country's currency will find that the value of the currency they bought has decreased, and their pay-off will be less than they had expected. The country has probably fulfilled a short-run objective, but in the future it will be more difficult for it to attract investments, since fewer investors will trust it.

In Majone's view, if some public policy is taken away from the voters-parliament-government circuit, the incentive in pursuing short-term goals should decrease. The independent actor, indeed, does not have any incentive to «cheat», because its objective is actually to maximise its credibility. The example often brought forth for the explanation of such a self-binding commitment is that of Ulysses and the sirens (see Elster 1979). However, this is only partially true. Whilst Ulysses is tied to the mast and cannot move, the state that delegates remains sovereign and can overrule delegation at its discretion. Conferring some powers and discretion to an authority makes it more difficult to go back (Shepsle 1991: 249), but it does not impede it.

In more recent works of his (La Spina and Majone 2000; Majone 2001), Majone makes another important argument with respect to the classical definition of «agent», as it has been considered in the previous literature. The author argues that the relationships between elected politicians and agencies to which very much discretion is given cannot be analysed within the P-A framework, because some of them resemble much more fiduciary than

agency relations. Bringing as examples various provisions of the EC treaty, Majone claims that in some policy domains the European Commission acts as a trustee of the member states, and not as their agent: although it pursues general objectives that the national governments have assigned to it, it has nearly absolute leeway as regards both the agenda-setting and the effective decision-making. In such situations, according to Majone, the delegate (no more agent, but *trustee*) benefits from a complete transfer of «political property rights» (Majone 2001: 114; see also Moe 1990).

## 2.7 Veto players

Although it has already been employed in many research areas, the concept of *veto players* has been developed quite recently in political science. In contrast to the theories reviewed in the previous sections, this theoretical framework does not focus on the preferences of the actors, but on the costs of decision-making. Aiming at explaining variations in stability and responsiveness of the political system in different countries, it focuses on the number of actors involved in a change of the *status quo,* predicting that the higher this number is, the more difficult it is to find an agreement between the actors − and, consequently, to pass a new law. As concerns the issue of delegation, as in all the previous theories, the preferences of the actors are assumed from the P-A approach: politicians employ delegation as a second-best solution, to solve problems wherein disadvantages outweigh the potential loss of control over the policy outcome.

The invention of the concept of veto players is to be credited to George Tsebelis (1995; 2000; 2002), who defines them as actors whose agreement is necessary for a changing of the *status quo* (i.e. for passing a new piece of legislation). There can be *institutional* and *partisan* veto players. The former are those who are established by the constitution of a country; in the US, for example, both the Chambers of the Congress must agree on the same text and then the President must sign the bill. It only takes one of these three bodies not to give its consensus to the new law, and it will not be passed. Partisan veto players, instead, are those who are generated by

the political game inside institutional veto players: they exist although they are not produced by legally binding rules. For instance, if in a legislature there is a single-party majority, then there is only one political veto player; but if the parliamentary majority is composed of three parties, the number of political veto players increases accordingly (Tsebelis 2002: 79).

From Tsebelis' point of view, for instance, Italy and the USA do not differ very much in this respect, because both have a high number of veto players and so tend to have high political stability (2002: 4). It must be noted, however, that veto players produced by the party system can very easily disappear or lose power: they are much less «resistant» than veto players established by the constitution. Tsebelis' core argument is that the greater is the number of veto players, the more difficult is to build a coalition that can support a change of the status quo. Therefore, systems with many veto players should produce more stable policy outputs.[9]

But how is this reasoning linked to the creation and the conferring of discretion on IRAs? Actually, the theory tells us that more veto players should be associated with fewer policy changes, or with greater difficulty in legislating. To apply the theory to a practical case, then, it is necessary to argue how the ability of a country to legislate relates to delegation. In this respect, two hypotheses have been devised (and tested) in the literature.

The first relates the presence of veto players to the issue of credibility, discussed in the previous section − this theoretical framework is actually a more rigorous articulation of Majone's theory of credible commitment. According to that hypothesis, states need independent agencies because they

[9] Tsebelis does not take sides regarding whether responsiveness or stability is to prefer (2000: 443):

> «For some (mainly political scientists), the variable [how easy it is to change the status quo under different institutional arrangements] is called responsiveness of the political system. The argument is that political systems ought to be able to adapt to new conditions, and therefore change existing policies when the situation requires it. For others (mainly economists), the political system ought to be able to credibly commit that it will not alter the rules of the game and interfere in the arrangements that private actors are making. The first are interested in policy change, the second want "rules rather than discretion."».

might change their policy preferences, and this would reduce their credibility. So, IRAs should be more necessary for countries which tend to change their policy preferences very frequently. The argument is that a limited number of veto players make the policy output at time $t_1$ very likely to differ from the policy output at time $t_0$. As a consequence, in policy fields where stability is an added value, IRAs can mitigate uncertainty and shield unstable countries from risks related to this problem. Some scholars in the field of regulation analysis (Spiller 1993; Levy and Spiller 1994) have argued that veto players perform the same function as independent authorities, assuring investors that the regulatory environment will not be subject to abrupt alterations. Henisz (2002) comes to the same conclusion as regards infrastructure investments, pointing out that the presence of many institutional actors limits the possibility of a policy change. Gilardi (2002; 2005a) has found some evidence for this hypothesis in his works, proving that the presence of veto players acts as a disincentive (making IRAs not necessary). In his analysis of regulatory independence in some European countries, and across different sectors, he claims that the effect of the presence of veto players on the independence of the regulators is negative.

The second hypothesis about the effect of veto players on the independence of IRAs argues the opposite. Studying the independence of central banks, some authors (Moser 1999; Keefer and Stasavage 2003) have advanced and proved that a greater number of veto players is more likely to be associated with more independent bodies. The rationale behind their argument is that economic actors need not only be assured that the central bank is free to pursue its policy, but also that politicians will not overrule its decisions. If there are no checks and balances, for the legislative it is easy to reverse a decision of the central bank, and thus delegation of powers – for however extensive it may be – is not effective: countries with fewer veto players are less credible even if they set up formally independent agencies. On the contrary, if there are many veto players, it will be difficult to overrule a central bank's decision, and therefore delegation can be fruitfully used. This theory does not explicitly argue for a direct causal relationship between veto players and independence; it rather states that having a sys-

tem with important checks and balances is a precondition for successful delegation.

Similar conclusions have been drawn also having recourse to another explanation. Hallerberg (2002) claims that in principle politicians are willing to control the central bank, because they can use it to support their expansive policy in pre-electoral periods. Nevertheless, monetary policy, unlike fiscal policy, cannot be targeted to specific interest groups, nor can it be fragmented to produce different effects in different domains: it is like a monolith. Actors agree on keeping the central bank under the authority of the political power only if they can reasonably control the output of its decisions. But with many veto players, Hallerberg argues, this will be hard both because of the intrinsic characteristics of monetary policy and because of the difficulty of gaining an agreement among many actors with different preferences. According to Hallerberg's findings, countries with a federalist structure and multi-party governments tend to have more independent central banks.

Summing up, we have:

- one test on IRAs that asserts the existence of a negative relation between veto players and regulatory independence;
- one test on central banks that contends the opposite – and it does so using a theoretical argument that could be generalised and applied also to other independent agencies (i.e. that credibility must be accompanied by the guarantee that overruling the IRA's decision will be problematic);
- one test on central banks that also claims the existence of a positive relation between veto players and independence – with both a policy-specific argument (the intrinsic characteristics of monetary policy) and a general one (the more the veto players, the more difficult an agreement between them).

As can be seen, the literature is not clear on the role of veto players. Depending on which of the above cited theories is closer to reality, we might

find that their impact on the independence of competition authorities is either positive or negative, or in fact that it is not significant, either due to the intrinsic characteristics of competition policy, or because the veto players framework is not able to explain the adoption of socially efficient reforms, as Lindvall (2010) argues.[10]

## 2.8 Europeanisation, learning, emulation

The last set of theories that I take into account embraces a different perspective, namely the possible effects of the European Union membership on the independence of the national competition authorities. Even though such an approach might appear to deviate from the assumption of bounded rationality, this is not the case. Like the theories that have been reviewed so far, this one links delegation to some cost-benefit assessments. The fact that each country finds itself in a particular environmental condition when it takes the decision to delegate, and that this condition affects its decision, does not make such determination irrational. I assume not that countries take some decisions unintentionally or automatically, but that they simply respond to incentives which are brought about by certain characteristics of the environment.

Although no explicit argument has been made about a relation between the EU membership and the independence that a country confers on its regulatory agencies, the literature on «Europeanisation» is well-established and can help formulate a hypothesis with regard to this phenomenon. The term is employed to identify different processes «by which domestic pol-

[10] Lindvall's argument is that veto players theory (as formulated by Tsebelis) does not take into account «side payments». Tsebelis simply predicts that more veto players will produce more stability and fewer reforms, but empirical studies on welfare state reforms have demonstrated that «significant reforms have occurred both in countries with few veto players and in countries with many veto players» (Lindvall 2010: 360). According to Lindvall, if the reform increases the social welfare, the coalition that passes it will always be able to offer a compensation to the social group which would otherwise oppose the reform (2010: 368-69). If this is true, then the veto players theory fails to explain socially-efficient reforms. With regard to the subject of this dissertation, if the establishment of an independent competition authority makes the country better off in general, then we should find no correlation between the number of veto players and the independence of the authority.

icy areas become increasingly subject to European policy making» (Börzel 1999: 574). Héritier (2001: 3) defines Europeanisation as «the process of influence deriving from European decisions and impacting member states' policies and political and administrative structures». A broader definition is given by Radaelli (2003: 30; see also Featherstone 2003), according to whom the concept of Europeanisation refers to:

> «Processes of (a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies».[11]

Accordingly, the object of this study can be seen as a EU-driven phenomenon: the establishment of national competition authorities in the EU member states has much to do with the creation of the single market and the promotion of a European competition policy by the European Commission. Most of the Europeanisation literature focuses on how the EU obliges the member states to pass some reforms, or it gives them incentives to adopt certain policies; this literature also analyses the different responses that member states generate (see Héritier 1997; Kassim et al. 2000; Verdier and Breen 2001; Levi-Faur 2004a; Knill 2007). The Europeanisation framework is also compatible with the divergence observed among NCAs, as it has been repeatedly shown that Europeanisation does not imply *convergence* among the member states (Héritier and Knill 2001; Kassim 2003: 88; Radaelli 2003: 33).[12] However, it is difficult to identify which acts or decisions at the EU-level have produced an impact on the domestic choices regarding the independence of national regulators. Since there is no rule that prescribes a certain level of independence for NCAs (and not even their creation!), we should hypothesise that the Commission's influence is exerted through informal channels − which are complicated to observe and to identify.

[11] For other definitions and meanings of Europeanisation, see also Featherstone and Radaelli (2003), Olsen (2002) and Levi-Faur (2004b).

[12] This does not mean that convergence is not possible. See for instance Harcourt (2003).

Even though Europeanisation, as defined above, is a chiefly *top-down* process, the implementation and adaptation of EU policy at the domestic level does not exclude innovation driven by mutual exchanges of knowledge and expertise between the member states. The fact that the same policies need to be adopted in several countries has led some states to copy «features of the coordination systems of others that are considered successful» (Kassim 2003: 102). Another consequence of Europeanisation is cross-national learning: in many policy fields, national decisions may be influenced by the presence of elites that have «become accustomed to the process of working together and learning from each other» (Goldsmith 2003: 128). Two main mechanisms of exchange are possible: there can be a mutual «learning», favoured by the presence of many key political actors in the same arena (Eising 2002; Meseguer 2005; Radaelli 2008), or there can be emulation, triggered by the existence of a common «epistemic community» and by psychological proximity between the members (Simmons et al. 2006; see also McNamara 2002). Whilst the concept of «learning» suggests a rational design, that of «emulation» entails a more sociological and non-rational motivation (see Section 1.1). Both mechanisms, though, in contrast to *top-down* Europeanisation, imply convergence amongst the actors who learn or copy from each other.

At first sight, both these approaches (*top-down* Europeanisation on the one hand, learning or emulation on the other) seem to have problems in accounting for different degrees of independence of NCAs. The first has a practical disadvantage. If there has been (and there still is) an influence of the Commission on the member states' choice regarding the autonomy of NCAs, it is an informal influence. Therefore, it is difficult to identify. The second approach has a mainly theoretical problem: how can a theoretical framework that aims at explaining increasing *similarities* among the members of the same organisation account for *differences* between the EU member states? A third problem, which is common to both approaches, is that there appears to be no connection between the *establishment* of competition authorities and the countries' EU accession dates: Western-European countries (with the exception of Germany) have created independent com-

petition regulators many years after they joined the Community; in most Eastern-European countries, instead, competition authorities were established far before joining the EU, without having had any apparent connection with their accession.[13]

Should we then conclude that this branch of the literature is not useful as to the first research question of this work? I deem that it is not, at least for what concerns the *top-down* Europeanisation framework. Even though there can be problems in identifying the underlying mechanisms, it is possible to measure the «exposure» of member states to the EU influence. Competition policy has always been at the core of European integration, and the impact on the member states' legal systems has been more evident in this field than in any other (McGowan 2005; see also Schmidt 1998; Levi-Faur 1999): most countries have adopted an antitrust legislation and established a competition authority only because the EU law evolution and the creation of the single market obliged them to do so. As I will argue in the next chapter (see Section 3.5.1), on the one hand there can be incentives for older EU members to give more independence to their antitrust enforcers; on the other, a greater autonomy of the competition authorities could be due to the fact that older members have been «exposed» to the influence of the Commission in this field for a longer time.

## 2.9 Conclusion

Throughout this chapter, I have reviewed various theories that might be useful in explaining why some NCAs are given more independence than others. To provide some clarifications, these theoretical frameworks are summarised in Table 2.2. I recognise that such an extensive and heterogeneous literature may disorient the reader, and even give rise to criticism. One might say that the hypotheses and theories that have been presented do not share the same theoretical framework, and that they come in account for delegation from very distant starting points.

[13] Be it enough to mention that the last EU member state to establish a competition regulator was a founder member: Luxembourg.

| Authors | Motives | Relationship | Control | Result/Effect |
|---|---|---|---|---|
| Fiorina 1982 | blame-shifting | positive | control may not take place | legislators shift blame |
| Weingast & Moran 1983; McCubbins & Schwartz 1984; Fiorina 1986; McCubbins et al. 1987; Bawn 1995 | lack of information, uncertainty, need for expertise | * | control takes place | the agency complies with the legislator's preferences (delegation is efficient) |
| Moe 1990 | insulating policies | positive | control may not take place | agency does not necessarily comply with the legislator's preferences (delegation is not necessarily efficient) |
| Epstein & O'Halloran 1999 | alignment between legislative and executive | negative | control may not take place | the agency complies with the legislators' preferences |
| Majone 1996; 1998 | need for credibility | positive | control must not take place | the state gains credibility |
| Levy and Spiller 1994; Henisz 2002; Gilardi 2002, 2005 | presence of veto players | negative | control takes place | veto players already perform the function of IRAs |
| Hallerberg 2002; Keefer and Stasavage 2003 | presence of veto players | positive | control does not take place | cost of decision-making is reduced |
| Héritier 1997; Kassim et al. 2000; McGowan 2005 | Europeanisation | * | * | states are influenced by what the EC promotes |

Table 2.2: Summary of the theories presented in Chapter 2

Scholars like Fiorina and McCubbins are mainly concerned with proving whether the Congress manages, or not, to control the agencies that it establishes. Moe, instead, approaches the topic from a more «institutionalist» viewpoint, arguing that the main function of institutions is to redistribute power. Epstein and O'Halloran somewhat combine the previous attempts to explain delegation, but still remain in a purely cost-benefit perspective, where the content of the policy does not help account for the degree of discretion conferred on the agency. Majone, in contrast, relies on an almost normative argument, when he claims that politicians delegate because they want the state to be credible and know that they would not be able to grant this credibility; Majone's politician appears to be very distant from a merely utility-maximiser actor. All the theories that link regulatory independence with the presence of veto players assign great importance to «environmental» factors, whereas all the others are more actor-centred.[14] Finally, the Europeanisation literature certainly has even less connection with all the other approaches, as it is based on mainly sociological assumptions. It goes without saying that I treated all of the above-mentioned theories because I deem that in any one of them there is something that may contribute to a comprehensive explanation of the phenomenon addressed by this work.

As stated at the very beginning of this chapter, no one can deny that the literature on the creation of agencies and on bureaucratic discretion is extremely fragmented. Having recognised that, I faced two possibilities: either I could keep following the trend, focusing on one part of the literature and disregarding others, maybe because they do not fit the ideas I have in mind; or I could aim to trace a common path between apparently different traditions, hopefully trying to combine them, where possible. In this dissertation I have chosen for the second option. In the next chapter, I will present my own theoretical framework, and at the same time I will try to test the theories that I have traced in the literature. To do so, I will need to turn these theories into testable hypotheses, and to find empirical indicators that will allow me to assess their impact on the independence of competition

[14] The contributions of McCubbins, Fiorina, Epstein and O'Halloran, focusing exclusively on the American case, cannot take into account environmental factors.

authorities.

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# Chapter 3

# Measuring and explaining formal independence

This chapter will be devoted to the testing of the theories and hypotheses which have been reviewed in the Chapter 2. There are some reasons for which such a test is necessary: first, only some of these theories have been tested; second, some tests have given contradictory responses with regard to the effect of the explanatory factors; third, no theory has been verified on a sample including only competition authorities, although these have characteristics which distinguish them from other IRAs.

I will first briefly review previous attempts to explain regulatory independence. Then I will discuss how independence can be measured: what indicators should form an index of independence, what is not satisfactory in the indices developed by other authors, how I have devised my own independence index. Finally, I will empirically test a theoretical framework based both on original hypotheses and on previous contributions: I will list the hypotheses derived from this framework and I will describe their operationalisation; then I will analyse the data and illustrate the most relevant findings.

## 3.1 Previous empirical tests on regulatory independence

As I pointed out previously (see Sections 2.4 and 2.7), the most important contribution in the study of the independence of IRAs has been made by Gilardi (2002; 2005a), who has tested some of the theories presented in Chapter 2 on a dataset containing IRAs of different sectors in Western European countries. The hypotheses tested concerned the effect of:

- need for credibility
- political uncertainty
- veto players

on the formal independence of IRAs. According to his statistical analyses, these three hypotheses significantly explain the independence of the agencies: need for credibility and political uncertainty are positively correlated with independence, while the presence of veto players is negatively correlated. A similar analysis has been carried out by Elgie and MacMenamin (2005), who have tested similar hypotheses on a population including all the independent agencies in France. According to their analysis, the two variables that influence agency independence are:

- the need for credibility (similarly to Gilardi's finding)
- the complexity of the policy delegated.

A more recent article (Wonka and Rittberger 2010) has presented a similar analysis on 29 EU agencies, confirming again the credibility and the political uncertainty hypotheses.

These tests represent an important starting point for the purpose of explaining the independence of NCAs in the EU. However, these analyses can be improved and complemented in two ways: first, by employing better empirical indicators; second, by adding other hypotheses that these authors have not considered. Changes (or at least careful reconsiderations) are suggested by the fact that the same hypotheses are operationalised differently

in the papers mentioned above, and that the indicators used are not always convincing (see this chapter, Section 3.5.2).

The sample chosen for this statistical analysis contains the whole population of the national competition authorities of the European member states. I made this choice because, to my knowledge, all previous analyses of regulatory independence have been carried out on economically advanced countries' authorities, mainly the US and Western European countries' (see Gilardi 2002, 2005a; Elgie and McMenamin 2005; Edwards and Waverman 2006). Whilst one can understand that these countries have longer-established political institutions and more available data, excluding states that have experienced a more recent transition to democracy and free market is not easily justifiable. Rather, I find it extremely important to take into account also countries that, despite a fast and mainly exogenously-driven path to liberalisation, have created competition authorities and have designed them according not only to what Brussels bureaucrats told them, but also to their national background. Moreover, including all the member states of the EU allows me to draw conclusions that are valid for all the 27 EU countries.

The theories presented in the previous chapter will be tested using an OLS regression model. The dependent variable will be an index of statutory independence built from a survey collected among all the 27 national competition authorities. For the independent variables, specific empirical indicators will be selected in order to test their effect.

## 3.2 Building an index of independence: what features to include?

When it comes to the practical problem of measuring independence of European national competition authorities, the complexity of the issue immediately emerges. What is independence? And from whom or what are these agencies independent? Is it a feature that must be drawn from laws and statutes or from how agencies actually work?

I consider independence as the condition of being able to take decisions without interference from other people or bodies (see Elgie 1998: 55; Koop and Hanretty 2009: 5). In the present case, I want to focus on the independence of national competition authorities from the national political bodies, namely the parliament and the government. I take into account only formal (or statutory) independence – what is written down in laws and statutes – and not *de facto* (or actual) independence. This last point deserves some clarifications. Although attempts have been made (see Maggetti 2007), it is still very arbitrary to assess which characteristics do really shape de facto independence, and it is also difficult to distinguish between, on the one hand, permanent features of an agency's behaviour which do not find any justification in the statutes and, on the other, contingent conditions or perceptions. It must be also considered that attributes which in one country are not due to formal requirements might be prescribed by the law in another country. By focusing on formal independence, I certainly restrict my capability to encompass whatever is related to regulatory discretion, but I believe that I gain in precision, accuracy and comparability of the results. Finally, formal independence is particularly interesting because it is a variable that parliaments can modify by drafting a new legislation, whereas features of *de facto* independence are often embedded in the customs and traditions of a country. If the aim of a study like this is not only to account for variations, but also to indicate political decisions that can produce a better regulatory performance, then it is crucial to assess the causes and the impact of legislative provisions.

Many different indices have been devised to measure formal independence of regulatory agencies (including central banks), and there is no common agreement on what should be included in such indicators. If we go through the (not very extensive) literature in the field, we see that an index of independence can contain just data on how the head and the board of the authority are appointed and on the powers that the agency has (Elgie and McMenamin 2005); it can exclude the powers but include data on the relationship between the authority and the political bodies (Cukierman et al. 1992; Gilardi 2002; Koop and Hanretty 2009); it can be formed by a mix of

these elements plus data on sectoral competences (Edwards and Waverman 2006).[1] It follows from this brief overview that, with the lack of a commonly recognised approach, building an index entails making some choices.

After close scrutiny, I have found that Gilardi's (2002) index, which is mainly based on the one of Cukierman et al. (1992), is the most comprehensive and accurate, and also the most suitable for this data set.[2] Therefore, I have used it as a starting point to devise my survey, which has been filled in by all the 27 national competition authorities of the EU member states. Relying also on the work of Koop and Hanretty (2009), I have supplemented it with additional questions. A complete list of the questions asked in the survey can be found in Appendix 1.

## 3.3 Building an index of independence: how to weigh items?

Devising a list of items which are more or less likely to be related to independence is only the starting point for assessing the *independence* of national competition authorities. The most important (and most problematic) step is the «translation» of 32 characteristics in one single value. Performing such an operation entails the following assumptions:

1. independence is an *abstract* feature that subsumes and encompasses a certain number of *concrete* features;

2. all the features drawn from the questions of the survey are in principle related to independence.

In the language of measurement theory, we can say that independence is a *latent trait* that all the concrete features (*items*) share to a different extent. Obviously, it is very unlikely that all the items be related to the latent trait in the same way: some characteristics might contribute to independence

[1] A good summary of the main attempts to measure agency independence can be found in Koop and Hanretty (2009).

[2] The index developed by Edwards and Waverman (2006), for instance, is specifically designed for telecommunications agencies.

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more than others; some items might contribute so little that they can be neglected. As we can see, building an index requires a careful consideration of how much relevance is to be assigned to the different indicators that compose it.

Surprisingly, this issue has been generally neglected by all the authors who have dealt with this kind of measurement. For example, Cukierman, Webb and Neyapti, in their study on the independence of central banks, use weights that they consider «most plausible» (Cukierman et al. 1992: 361), without explaining in detail why they do so.[3] Gilardi, in his works on the independence of IRAs, recognises that such a problem exists. However, he then argues that «combining variables is unavoidably arbitrary» and decides to «cut this Gordian knot in the simplest way, by attributing the same weight to each variable» (Gilardi 2002: 880).[4] In my opinion, assigning a weight to an item on the basis of no objective criterion is arbitrary, and not easily defensible. For this reason, it must be attentively examined whether ways to discriminate between the items exist. And if the response is affirmative, then it makes more sense to untie the knot (instead of cutting it).

In order to find out how items can be weighted in a less arbitrary manner, I employ *latent trait analysis*. By this definition, statisticians mean methods of analysis (such as Factor analysis, Mokken scaling, Item Response models) which aim to discover a certain number of *latent variables* in a data set and to assess how the items relate to it. Latent trait models were originally applied in educational and intelligence testing, where scholars are interested in determining which questions are more difficult than others, which responses discriminate more in terms of the latent trait (e.g. intelligence), which questions' high scores imply high scores in another question, and so forth. There are no indications to say these techniques cannot be employed also in political science questionnaires, and indeed they are widely used. Whenever we have many questions that we regard as related to one or few

[3]The authors explain that, in their analysis, the index with the weights chosen by them and another index with equal weights give similar results.

[4]However, this is not completely true. Gilardi in fact groups items according to the aspect of independence that they measure, and then builds his index computing the mean of each of these categories.

dimensions, we face the same problem described above, and are able to use this techniques to address them.

Data and measurement theory helps us find out which is the right method to use. Jacobi (1991: 16-22), following Coombs (1964), distinguishes between four kinds of data, according to *a)* whether variation is only among one set of objects or between two sets and *b)* whether between the «respondents» and/or the items there is a dominance relationship or a proximity relationship. In the case of the present work, we have variation between two sets of objects: NCAs and the features to which the questions of the survey refer. As regards the second distinction, we want to know how high competition authorities score for every response, in other words to what extent they «dominate» them. Therefore, we have what Jacoby calls «Single stimulus data»: we assume that all the items manifest a certain amount of the latent trait.

Due to the assumption that it is possible to order items from the least to the most difficult, single stimulus data are usually analysed with scaling methods: Guttman scales, Mokken scales, Rasch scales, Graded response models. These models can be either dichotomous, if the item can take only two values, namely 0 and 1, or polytomous, if the items can take more than two values. In this respect, in almost all the questions of the survey there are more than two possible answers. Therefore, a polytomous latent trait model is needed. This reduces the choice to factor analysis or a graded response model. Between the two methods, however, we are bound to choose the first, because it is the only one which allows us to calculate scores − that is, values that summarise how the single observations (the competition authorities) perform with regard to the factor. If we assume that the first factor, the main latent trait, represents formal independence, factor scores gives us an indication of how independent each authority is.

As concerns how suitable factor analysis is for single stimulus data, Jacoby argues that it is (1991: 47), although this claim is quite debated. It could be enough to mention that Jacoby himself proposes factor analysis as the appropriate method to deal also with a different kind of data, and it is not completely clear how the same method can fit data which have an ut-

terly dissimilar structure. Beyond this, it has been shown that, when in the data there is an evident dominance relationship, factor analysis can yield inaccurate results, showing multiple dimensions where there is only one (Van der Eijk 2007). However, in this analysis my aim is not to map the structure of the dataset; I rather assume that the structure is already known, and look at the first factor only. Moreover, (un)fortunately data and measurement theory is a branch of statistics where orthodoxy is weaker than in others:[5] although I do not think that the method I use to build the index is impeccable, it seems to be significantly more accurate than those used by others in similar contexts.

Alternatively, I could have produced different independence proxies according to different «dimensions» of independence – e.g. political, organisational, decisional. In this case, only the items relating to a particular dimension would have been used to derive the indices. Such an approach could have some advantages. It would allow one to assess in which dimensions a country prefers to grant independence to the NCA. Moreover, one could test whether some factors have an impact on one type of independence but not on others. However, for this study I preferred to use a single indicator, for two main reasons. First, I believe that, although independence can be disentangled into several dimensions, these dimensions are closely interlinked. For a member of a NCA, having decisional autonomy means nothing if he or she can be removed from office rather easily. Second, using a single indicator I am able to compare the findings of this analysis to those of similar studies which have been carried out by other scholars.

## 3.4 The independence index

As argued in the previous section, the hypothesis of one-dimensionality of the data suggests that only the first factor should be retained after the factor analysis. This assumption is corroborated by the difference between the explanatory power of the first factor and that of the others. The first factor

[5] Thanks to Mark Franklin for pointing this out.

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has an eigenvalue of 7.26 and it explains 21.37% of the variance.[6] On the whole, factor analysis shows 12 factors with an eigenvalue greater than 1. However, the difference between the first and the second factor is 3.35, whilst for all the factors from the second to the twelfth is 0.25 on average. If we reject (theoretically) that this data set may have 12 dimensions,[7] we can confidently conclude that the first factor is the main latent trait we are interested in: formal independence.[8]

In Table 3.1 we can see the factor loadings (i.e. the correlation with the factor) for each item derived from the survey.[9] The correlation can be either positive or negative, meaning that some features which are expected to bring independence to the authorities turn out to be negatively correlated with the «independence factor» (and with most other items). It is easy to note that the items differ very much between each other as to their correlation with the first factor. Some of them indicate a high level of independence (for instance, the length of the appointment, both for the authority head and for the members of the board); others have almost no importance in this respect (the control of the budget and on the personnel, whose correlation coefficients are close to zero); a few are negatively correlated with

[6] Factor analysis has been performed on a data set including all the variables drawn from the survey, using the principal-component factor method. Since there were some missing values (and factor analysis by default deletes all the observations with missing values), I needed to impute them using multiple imputation. The original dataset contained 99 missing values out of 1053 values (9%). However, it must be considered that 8 authorities had 9 missing values each because they do not have a board – therefore, they could not answer the questions of the survey which regarded the board. If we exclude these 72 «inevitable» missing values, the missing values due to a lack of answer were only 27 (2.5%). The Multiple Imputation command (in PASW 18) has generated five imputed data sets. To obtain the matrix for factor analysis, I have calculated the mean across these five replications for every value in the data sets.

[7] If there were multiple dimensions, according to Van dei Eijk (2007), factor analysis would not detect them correctly.

[8] I have also tried to calculate the independence index using the same method as Gilardi (2002): I have sorted the items according to five aspects (head of the authority, board of the authority, administration and management of the authority, relationship of the authority with other public bodies, competences of the authority) and calculated the mean for every category. Then I have computed the mean of the five categories. This index is correlated at 0.87 with the factor scores.

[9] Since only one factor had been retained, no rotation was performed. The scores were calculated using the standard regression method.

the factor. The item «Obligations vis-à-vis the parliament» is one of these strange cases. One would expect an authority which has a few or no obligations towards the parliament to be very independent − and this was the expectation when the survey was designed. However, this item is negatively correlated with the «independence factor»: this suggests that, whilst independent NCAs have few or no obligations towards the executive, they are very much accountable vis-à-vis the parliament. Being accountable towards the parliament is apparently a sign of independence. Most likely, this relate to the fact that the two kinds of accountability are alternative: countries prefer to choose either one or the other[10]. Their factor loadings tell us that independent NCAs are more likely relieved of obligations towards the government, rather than of obligations towards the parliament.

Figure 3.4.1 shows the formal independence of the 27 national competition authorities. At first sight, we do not notice clear distinctions in the order of the agencies. For instance, although among the highest-scoring authorities there are the Italian, the French and the Spanish ones, there is no absolute dominance of Western European countries among the most independent agencies (also Hungary and Romania perform quite well in this respect), nor are there other evident cleavages. This suggests that to explain the differences in the formal independence they are given, we need to consider multiple factors and the interactions between them. For the moment, let us just note that the two oldest European competition authorities, the German Bundeskartellamt and the British Office of Fair Trading, are placed in the right-hand part of the graph, among the least independent agencies. Also the Scandinavian authorities do not appear to have a high formal independence. Given the fact that these countries are commonly considered as an example in this field, these results appear puzzling. Nevertheless, we must not forget that it is *formal* independence that we are measuring here. One may argue that countries where the bureaucracy has a good reputation of fairness and impartiality need not give much independence to their agencies. These considerations will be taken into account in the formulation of

[10] In fact, their coefficient of correlation is -0.21.

| Items | Factor loadings |
|---|---|
| *Head of the authority* | |
| Fixed term of office | 0.54 |
| Length of the appointment | 0.71 |
| Who appoints the head? | 0.52 |
| Explicit provisions on the dismissal | 0.31 |
| Possible to dismiss the head? | 0.53 |
| Explicit provisions on incompatibility | 0.70 |
| Is there incompatibility? | 0.29 |
| Possible to renew the appointment? | 0.58 |
| Independence as a requirement | 0.20 |
| *Board of the authority* | |
| Is there a board? | 0.40 |
| Fixed term of office | 0.60 |
| Length of the appointment | 0.71 |
| Who appoints the board? | -0.17 |
| Explicit provisions on the dismissal | 0.09 |
| Possible to dismiss the board? | 0.40 |
| Explicit provisions on incompatibility | 0.60 |
| Is there incompatibility? | 0.12 |
| Possible to renew the appointment? | 0.50 |
| Independence as a requirement | 0.27 |
| *Relationship with parliament and government* | |
| Explicit mention of independence | 0.51 |
| Decisional autonomy | 0.39 |
| Financial autonomy | 0.41 |
| Organisational autonomy | 0.31 |
| Obligations vis-à-vis the government | 0.22 |
| Obligations vis-à-vis the parliament | -0.60 |
| Overturning body | -0.18 |
| Source of the budget | 0.62 |
| Control on the budget | 0.01 |
| Internal organisation | 0.53 |
| Personnel | 0.00 |
| *Other prerogatives* | |
| Powers in case of overlapping competences | 0.19 |
| Possibility to set up rules of procedure | 0.64 |
| Possibility to adopt interim measures | 0.28 |
| Possibility to impose sanctions | 0.12 |

Table 3.1: Factor loadings of the items derived from the survey

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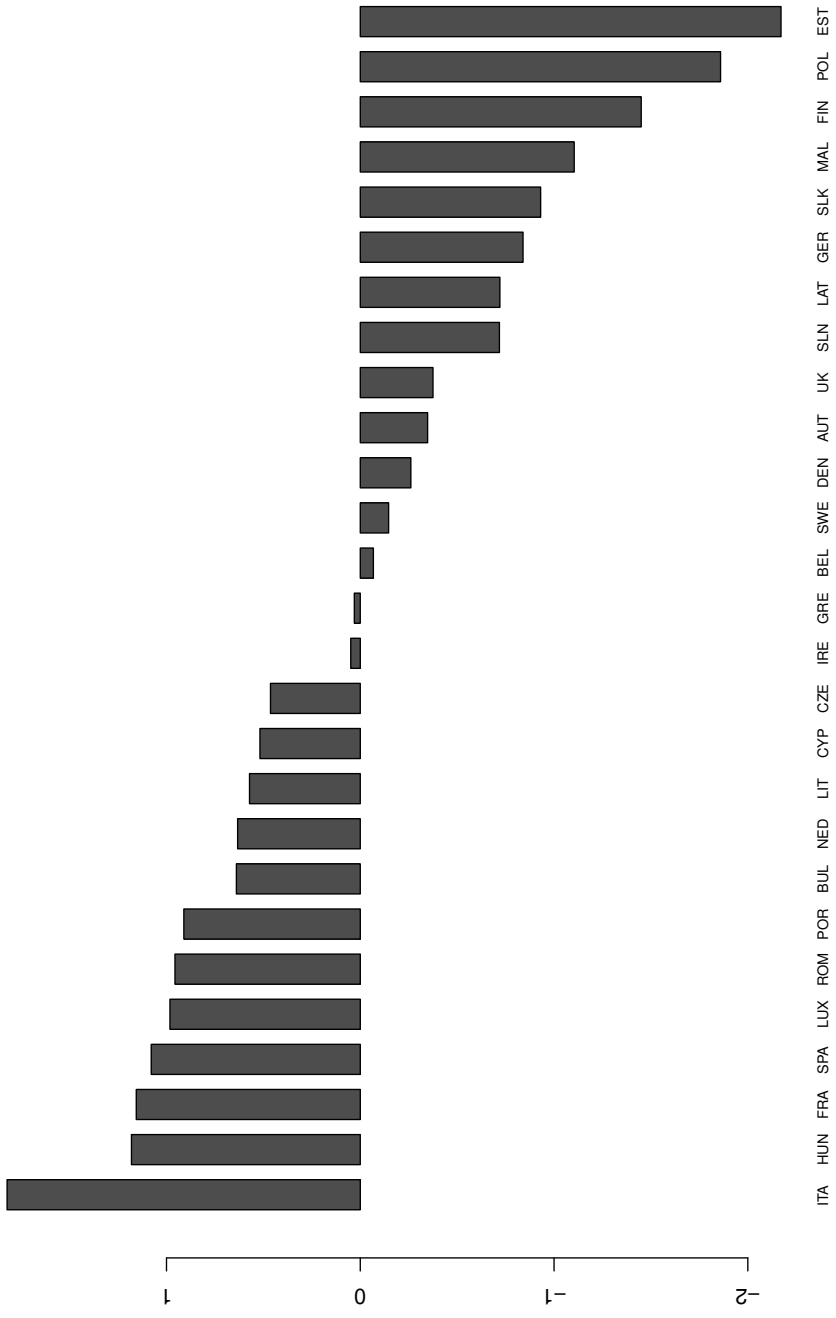


Figure 3.4.1: Formal independence of the 27 national competition authorities (standardised values).

the model.

## 3.5 Empirical test

To be tested, the theories listed in the previous chapter must be translated into hypotheses that fit this particular population of IRAs. As a matter of fact, whilst some of those hypotheses can more easily be applied to every context (the veto players hypothesis, for example), others express more abstract cause-effect relationships, and must be adapted to the specific policy field in which delegation takes place. Suffice it to mention the blame-shifting theory, which implies that politicians want to avoid being blamed by the actors who lose in a certain policy process; but to test if such blame is shifted or not, one needs to assess in advance who would win and who would lose.

Adopting a policy-domain centred research design, as I do, generally implies a different strategy as regards to the formulation of hypotheses, compared to cross-sector analysis. Cross-sector analyses let us test certain hypotheses, but also prevent us from testing others. Simply put, in order to verify the effect of a factor across different sectors or policy domains, it is necessary to assume that this factor can be identified by the same indicator in all of them. Where this condition is not met, hypotheses cannot be tested. Taking again the example of blame shifting, it is highly plausible that blame is avoided from different actors in different policy domains; and this is a kind of situation that makes it impossible to have the same indicator across various sectors, and ultimately to test the theory.

What has been said with respect to cross-sector analysis applies also to the analysis that I carry out here. Also comparisons between countries in the same policy sector do not let us test certain hypotheses. If we consider all the theories that point to uncertainty, lack of information, or need for expertise[11] as the factor that triggers delegation, we see that there cannot be variation among the cases that I have. Looking at the literature, we clearly

[11] As Bawn's theory of delegation (Section 2.3.4).

find that uncertainty is always associated with the information needed to enact a policy. Thus, it may well vary among sectors, but not among countries – unless one hypothesises that members of the parliament or ministers of a country are subject to some factor that makes them less informed (or less capable to get informed) on a certain policy. As a consequence, some of the theories reviewed in the previous chapter will not be tested in this statistical analysis, even though they might still turn out to be useful when discussing the results and draw general conclusions from this study.

### 3.5.1 Theoretical framework and hypotheses

In spite of the evident differences they have, all the theories and hypotheses listed in the previous chapter maintain the assumption that delegation ultimately depends on a choice made by the legislators. Also in the theoretical framework presented here, are the actors whose preferences are analysed to draw testable hypotheses the lawmakers. Henceforth, by the terms «legislators», «lawmakers» and «politicians» I will refer to members both of the parliament and of the government. As a matter of fact, especially in the countries studied here, it is impossible to attribute political decisions either to one body or to the other: in all the EU member states (except Cyprus), the government must have the confidence of the parliament, and thus distinguishing between the two makes little sense.

The first hypothesis that I propose stems from the economic literature on regulatory capture (Stigler 1971; Peltzman 1976; Becker 1983; Peltzman et al. 1989, see Section 2.2). This literature has emphasised the risk that organised groups of firms may «capture» the regulators and obtain favours by sharing with them the rent created by an inefficient regulation. The work of Stigler, Peltzman and Becker represents politics as an activity in which politicians maximise the utility that they can obtain from different interest groups (firms, consumers, workers). Any attempt to adapt these theories to the study of IRAs shall consider that capture and utility maximisation involve two different albeit closely linked actors: the bodies that firms may want to capture are the agencies, but the actors who maximise their util-

ity are the politicians. What is the possible causal link between these two occurrences?

Let us maintain that, in the field of competition policy, national politicians try to maximise the utility of two groups, consumers and big firms (I say big firms because only if a company has a relevant market share will its activities be likely to arouse the interest of the competition authority). We can posit that these two groups have opposed preferences about the independence of the competition authority: the first want it as independent as possible, the latter want it to be controlled by the politics as much as possible. Since EU countries do not sensibly differ with respect to the weight and the influence of the consumers, but they do with regard to the weight of big firms in the national economy, I will focus on the latter, as they are the real «variable» in this case.

Big firms do not like to deal with a very independent competition authority, because they are those which have most to lose from strict competition enforcement. Since big firms have, by definition, a relevant share of the market, they are more likely than other firms to be charged of dominant position, and they cannot acquire other companies or merge with them without being carefully scrutinised by the authority. Because of their size, every decision they take is likely to affect the market, so competition agencies will always «keep a close eye» on them. Coming to the core question of this chapter, does the independence of NCAs make a difference for big firms in this respect? I hypothesise it does: in every occasion wherein the authority intervenes or might intervene, it is easier for big firms to deal with a regulator that can be influenced by the parliament and the government. Indeed, they often present good arguments to convince politicians to protect their interests, for two reasons. First, in most European countries, they have links with the political system that date back to when the economy was mainly regulated by the state. Second, big firms can claim that a decision will force them to reduce the number of the employees, or to move the production to other countries. And, if the firm has many employees and/or strategic assets, these threats can turn out to be very convincing.

In regards to the argument that big firms might be more interested in

colluding with the authority rather than with politicians, we must notice that occurrences like the «revolving doors» are not likely to happen in competition regulation. In the regulation of specific economic sectors, where the IRA deals with a handful of firms, it may occur that regulators and regulatees develop «special relationships» which facilitate the migration from one side to the other. But competition authorities regulate the whole economy: they deal with hundreds of firms, and it is neither feasible nor convenient for their members to set up such relationships. Moreover, NCAs do not have the «sectoral expertise» that many big firms often need.

If the presence and the weight of big firms has such an effect, then it can be hypothesised that their number affects the politicians' attitude towards the independence of NCAs:

HYPOTHESIS 1(A) («CAPTURE»)

*The greater the weight of big firms in a country, the less independence is likely to be conferred on the competition authority*

On the other hand, the influence of powerful economic interests might also have an opposite effect, if blame-shifting motivations prevailed. The previous hypothesis assumes that the legislators are not genuinely interested in competition enforcement, and that they choose to create a very independent regulator only if there are not many big firms in the country which could be harmed by such an agency. But it could also be to the contrary: politicians could be really committed to ensure that antitrust norms be strictly enforced in their country. In this case, they would very likely want to shift the blame that may arise from those who are mostly jeopardised by competition enforcement.

Competition policy is generally regarded with favour by the voters (i.e. the consumers), because its main aim is to grant better quality and better prices to them. If we ask ourselves who wins and who loses from this policy, we conclude that the potential «losers» are usually big enterprises which are prevented from increasing or consolidating their market power or dominant position, or whose collusive behaviours are sanctioned by the

authority. If blame-shifting appears in competition policy, the actors whose criticism politicians would most like to avoid, would be that of big companies. As Wilks and Bartle (2002: 157) state, «[w]hen powerful companies and industrial interests come clamouring to politicians or bureaucrats it is immensely helpful to assert agency independence just as they would assert judicial independence». If this were the most realistic hypothesis, the relationship between the number of big firms and the independence of NCAs should be positive: more firms would mean more potential blame; higher risk of blame would result in greater autonomy for the competition authority. Therefore, an alternative formulation to the previous hypothesis could be stated as follows:

HYPOTHESIS 1(B) («BLAME SHIFTING»)
*The greater the weight of big firms in a country, the more independence is likely to be conferred on the competition authority*

Another important incentive for the legislators comes from the EU membership and from the role of the European Commission («the Commission» henceforth). As has been said in Section 2.8, competition policy has always been one of the core policies of the EU. Since the Treaty of Rome (1957), antitrust principles have always been promoted and enforced by the Commission, which has undoubtedly had a propulsive role in encouraging the member states to accept policies that were initially at least unfamiliar to most of them.

The powers of the Commission and of the national authorities in this field are defined by the above mentioned Regulation 1/2003, which entered into force on 1st May 2004. Since this law does not prescribe the degree of independence that national agencies ought to enjoy, member states are free to set for them a level of autonomy that they prefer. However, this law contains provisions that may affect this choice. Indeed, authorities are not given an exclusive competence on national cases: the Commission (in practice, the Directorate-General for Competition[12]) can initiate a procedure for

[12] The Directorate-General for Competition is headed by the commissioner responsible

the adoption of decisions, if a national agency has not acted on a case. And, even if the agency is already examining a particular case, the Commission can initiate its own investigation, after having consulted with the agency. In any case, the decision by the Commission to begin a proceeding «relieve[s] the competition authorities of the Member States of their competence to apply» Articles 101 and 102 of the Treaty (Reg. 1/2003, art. 11.6).

An intervention by the Commission might be particularly undesirable for a member state. First of all, if the Directorate-General for Competition initiates a case for the inactivity of the national agency, the final decision is very likely to be tougher for the national firms than if the agency had dealt with the case. As the Commission has always promoted the adoption of competition legislation among the member states, it will be a stricter enforcer, more so because it does not have to pay a political price for its decisions. Second, and more importantly, the Commission's intervention will be considered an informal sanction for the national authority and national politicians. Especially in countries which have been members of the EU for a very long time, politicians want to avoid being openly reprimanded by Brussels, particularly when this could damage their country's reputation and credibility in this important field.

Older members of the EU have been «exposed» to the principles of competition for a longer time than their newer counterparts, and in as much, they could have been affected by a «rebounding Europeanization». As McGowan (2005) puts it, «the member states created a European competition regime, which in turn has influenced both directly and indirectly the development of national competition rules whose application can now be utilised through 'uploading' to inform European decision-makers, which in turn influences the national authorities, and so the process continues» (McGowan 2005: 999-1000; on Europeanisation in economic regulation see also Héritier 1997, and Schmidt 2001). Obviously, these Europeanisation «rebounds» do not necessarily turn out to strengthen and make stricter the enforcement of a policy: there are many cases in which the application of EU directives

for competition, and acts as a EU competition authority – even though all its decisions are subject to the vote of the other commissioner and of the President of the Commission.

or the implementation of regulations has been hindered, delayed, or weakened by the member states. Explaining why, in some policy fields, the Commission manages to break through the member states' reserve, whilst it does not succeed in others', would be a more than interesting issue to investigate. Unfortunately, in this analysis there is no room for answering such a question. It is fair enough to acknowledge that in the field of competition policy the Commission has progressively increased the scope and the relevance of its powers. As a consequence, all the EU member states must now apply to the same (European) law regarding competition enforcement, and, with the creation of the European Competition Network (ECN), NCAs have become *de facto* branches of the DG Competition. Higher independence from the national politics means a closer relationship with the Commission.

If the decision on the independence of competition authorities has been influenced by this continuous process of Europeanisation, we should expect countries which have joined the EU earlier to have agencies with greater autonomy. First, because they assign more importance to competition enforcement; second, because they want their authorities to have a better reputation vis-à-vis the Commission. Therefore, with respect to EU membership, we can hypothesise that:

HYPOTHESIS 2 («EUROPEANISATION»)
*The longer a country has been a member of the European Union, the more independence is likely to be conferred on the competition authority*

Along with these two hypotheses, three other ones, related to issues of credibility, will be tested. The motivation is twofold: on the one hand, as has been shown (see Sections 1.1 and 2.6), credibility is deemed to be one of the major reasons for establishing independent agencies; on the other, all of these three hypotheses have been found to significantly affect agencies' independence in other empirical analyses (Gilardi 2002; 2005a; Elgie and McMenamin 2005; Wonka and Rittberger 2010).

The third hypothesis implies that politicians may want to insulate some choices that they have made from the threat that their successors would

weaken, modify or revert them. If an independent competition authority is set up to reassure investors that the regulatory environment will not be changed abruptly, governmental instability and polarisation are an obvious problem for any country. If government alternation is frequent in a country, and the ideological distance between the coalitions is wide, investors might not trust that country: they could prefer to put their money to use elsewhere, and that country would be damaged by its lack of credibility. To compensate for this potential deficit, politicians need to show that, even if the elections are won by parties or coalitions which oppose competition law, antitrust enforcement will be preserved, because it is not directly relational to the government. As I have already pointed out (Section 2.6), giving independence to a competition authority does not prevent any incumbent from reducing the autonomy of the agency (or even dissolving it). However, it works as a deterrent, making such a decision more costly than it would be if there were no institutional independence from the politics.

As we will see in the next section, government instability and ideological distance between executives are indicators that economists and political scientists usually employ to measure political uncertainty. The assumption is that both negatively influence the credibility of a country. Hence, the third hypotheses can be formulated as follows:

HYPOTHESIS 3 («POLITICAL UNCERTAINTY»)
*The higher the government instability and the ideological distance between the executives, the more independence is likely to be conferred on the competition authority*

But credibility is also a matter of perceptions. We have seen that, according to Majone, delegation to an independent body is a means to resolving problems of temporal inconsistency, which occur when the legislators are not trusted by the economic actors. It follows that, in order for the politicians to solve such problems, there must be a relevant transfer of «political property rights». If this should not be the case, the authority would not

be trusted by the economic actors and its mere creation would not be a resource. Therefore, we expect that, if states delegate because of their lack of credibility, they will tend to give much independence to the regulator, so that it appear as though it is easily influenced by the government.

Majone's theory does not consider credibility as a characteristic that states would possess in general, but rather that they do so with regard to specific policy domains. For instance, if a state has abused the trust of the economic actors so that they no longer believe the government when it says that it will control inflation, more discretion should be given to the central bank. The lack of credibility pertains to a certain domain (monetary policy), and it is solved by giving more independence to the authority which regulates that domain (the central bank) other than the government. Without a doubt, identifying the domain in which NCAs enhance the credibility of a country is not as easy as in the case of monetary policy. Nevertheless, I believe this theory can be applied to competition authorities as well, and I try to advance a plausible hypothesis formulation.

Let us think of what is a good environment for investments. In spite of having stable majorities and governments (the case of the previous hypothesis), a country could still be perceived as an unfavourable environment for private investments, due to a variety of reasons: high levels of corruption, inefficient judiciary system, the presence of organised crime. These are all indicators that international investors will observe very carefully. Giving independence to the competition agency can be one of the ways in which to remedy or to mitigate these perceptions, if the body to which some functions are committed is perceived to be more credible than the government.

This formulation fits Majone's «credible commitment» argument quite well. It represents a case in which the legislators, for whichever reasons, are unable to sort out structural weaknesses of the system. They know that this failure is likely to damage the credibility of the country and to discourage investments. Therefore, they establish a very independent competition authority as a «shortcut» to compensate their lack of credibility.

According to this formulation, we are then able to hypothesise that:

HYPOTHESIS 4 («CREDIBLE COMMITMENT»)
*The worse the perceptions of the investors about the regulatory environment, the more independence is likely to be conferred on the competition authority*

Veto players can also influence the credibility of a country. As shown above (Section 2.7), there is no consensus amongst scholars concerning the actual role played by veto players in the process of delegation to IRAs. While some authors claim that the relationship between the presence of veto players and the independence of regulatory authorities is positive, others affirm the opposite. The rationale of the two rival hypotheses is also entirely different. Since I have no particular expectation regarding the plausibility of either, I formulate this hypothesis as two rival ones:

HYPOTHESIS 5(A) («VETO PLAYERS AS STABILISERS»)
*The greater the number of veto players in a country, the less independence is likely to be conferred on the competition authority*

HYPOTHESIS 5(B) («VETO PLAYERS AS REINFORCERS OF DELEGATION»)
*The greater the number of veto players in a country, the more independence is likely to be conferred on the competition authority*

The last hypothesis that I will test is drawn from Epstein and O'Halloran's (1999) transaction cost politics theory, which I will adapt to parliamentary democracy. In every democracy, every law must be pass through parliament. In the classical scheme of division of powers, the parliament passes the laws, and the government implements (gives execution to) them. In the US, as we have seen in the previous chapter (Section 2.5), delegation to IRAs increases when the President does not belong to the Congressional majority. In such a case, the assembly prefers to leave the implementation of its legislation to a body which is as independent as possible from the executive. At the same time, if the legislative and the government have more similar policy preferences, the game between them is more cooperative and the Congress is more willing to leave the implementation to the executive.

Before translating this hypothesis for European parliamentary democracies, it is necessary to consider that almost all of them will not institutionally allow the government to diverge from the parliament's preferences, because of the requirement of the confidence vote. All the EU member states, with the exception of Cyprus, have an executive that must be supported by the parliament. In a classical «Westminster system», divergent preferences between the parliament and the executive are simply not possible: the party which holds the majority is also represented in the government. There can be individual divergences, but these do not affect the form of government. In such a system, there is no room for testing Epstein and O'Halloran's theory.

However, there may be a particular configuration of parliamentary democracy which resembles in some respects the legislative-executive relationship that we observe in presidential systems. I argue that this configuration exists, and it is represented by minority governments. When an executive is not supported by a party or a coalition which retains the majority of the seats in an assembly, those parties which support it

- are less tied to the government (are more independent from it);
- have much more control over the action of the government,

similarly to what happens in presidential systems when there is a «divided government» situation. Whilst in the case of a «majority government» executives increasingly dominate their majorities, in the case of minority governments the executive must gain the confidence of the assembly on every vote. This also means that the government is held more accountable towards the parliament, and that the latter tends to exert a more stringent supervision over the implementation of legislation. This implies that delegation to IRAs, as a «check» on the activity of the executive, should be greater in scope in countries which have minority governments, compared to others in which parties do not form minority governments.

The sixth hypothesis can then be stated as follows:

HYPOTHESIS 6 («MINORITY GOVERNMENTS»)

*The more often a country experiences minority governments, the more independence is likely to be conferred on the competition authority*

### 3.5.2 Data and operationalisation

In this section, I will describe the operationalisation of the explanatory variables. With regard to the indicators that I will use, it must be made clear that the availability of information for the dependent variable forces me to adopt a particular research design. Since all the knowledge about the formal independence of competition authorities in this thesis is drawn from the responses to the survey (sent in October 2009 and collected by the end of that year), for this variable I have only values for one point in time. Therefore, I am unable to analyse the data as if they were a time-series, looking at how changes in the explanatory variables influence formal independence through time. On the other hand, neither I can assume that the situation of an authority in the year 2009 is caused by the effect of the explanatory variables in that exact year.

Everyone can recognise that institutions are, by definition, «sticky»: they are often yielded by agreements between different actors that crystallise a balance of power. They shape the expectations and the behaviour of many actors. For these reasons, institutions are not usually easy to change and often evolve following slow and incremental tracks. It can be also noted that most (if not all) the indicators employed in the statistical analysis of this thesis are very stable through time: this confirms the assumption that they represent rather constant characteristics of the countries. Hence, it is better to conceive of the explanatory factors as exerting their effect over more extensive periods of time. For this reason, I have collected the values for the independent variables as mean values across preceding periods of time.

Attention should also be paid to the fact that the formal independence of NCAs in 2009 is not necessarily the same as that which was conferred upon the agencies when they were created. Some authorities have not undergone any changes since their establishment, with respect to the degree

of autonomy, while others were reformed after their creation, some even shortly before this survey.[13]

CAPTURE / BLAME SHIFTING. For testing Hypotheses 1(a) and 1(b), an indicator of market concentration will be employed. Indices of market concentration are usually calculated by antitrust agencies within specific sectors to assess if some firms enjoy a dominant position in that segment of the market. However, for the purpose of this analysis, computing a measure like the Herfindahl-Hirschman index in a number of sectors is problematic for three reasons. First, there is no database of market concentration from which such data can be extracted, and this information would have to be collected from many firms, in many sectors, for 27 countries (provided that it were feasible). Second, pre-selecting which sectors should be included – and which ones should not – could be regarded as arbitrary, and it is not simple to think of reasonable criteria by which to choose them. Third, on condition that a reasonable choice could be done, there would still be many countries in my data set for which such sectoral-specific data are not available.

Therefore, a second-best solution must be applied. On the ground that competition authorities supervise all the economic environment of a country, and not just one or few sectors, I have concluded that an indicator based on the number of big companies that operate in the national market could be an appropriate proxy for concentration. The database from which I have drawn my indicator is Amadeus, provided by the Bureau van Dijk, which contains the main financial and business accounts for over 14 million companies all over Europe – although the version I have accessed includes only data on large and very large companies.[14] To have a measure of the weight of very big firms, I have split, for each country, the available companies into four groups, according to their turnover.[15] Afterwards, I have calculated the

[13] For instance, the Spanish competition authority (*Comisión Nacional de la Competencia*) was reformed in 2007, the French *Autorité de la concurrence* was reformed in 2008.

[14] This means, however, a total population of over 350.000 firms in Europe. To be considered «large» or «very large», companies must fulfil at least one of these three criteria: *a)* turnover at least equal to 15 millions Euros; *b)* total assets at least equal to 30 millions Euros; *c)* number of employees at least equal to 200.

[15] The first group includes companies with more than 50 millions Euros of turnover, the second companies with turnover between 20 and 50 millions, the third between 10 and 20

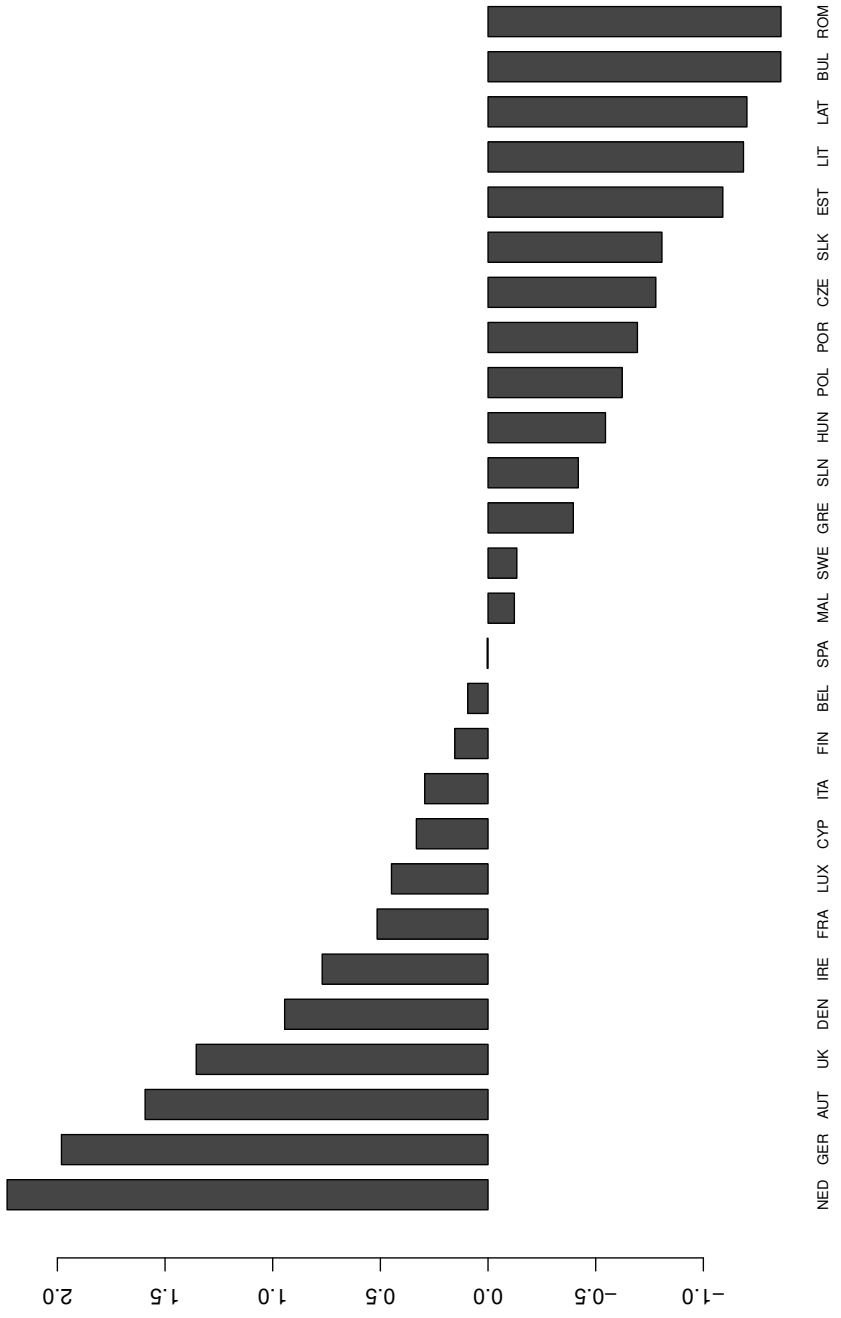


Figure 3.5.1: Weight of the biggest companies in each country (standardised values)

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ratio between the companies in the first group (those having more than 50 millions Euros of annual turnover) and the total number of companies present in the data set for that country. The market concentration proxy, for each country $(i)$, is calculated as such

$$BF_i = \frac{1}{N} \sum_{y=2005}^{2008} \frac{C_y^1}{C_y^1 + C_y^2 + C_y^3 + C_y^4}$$

where:

$y$ is the year[16];

$C_y$ are the number of companies belonging to each of the four groups for each year.

EUROPEANISATION. To test the Europeanisation hypothesis, I have simply calculated how many years have passed starting the year in which a country joined the European Union until 2009 (when the survey has been collected).

POLITICAL UNCERTAINTY. In his works on regulatory independence, Gilardi has operationalised political uncertainty employing a measurement first conceived by Franzese (2002), the so-called *replacement risk*. This indicator takes into account two separate values, on the basis of which the author assumes that politicians feel more or less «secure» about their power. The first value is called *hazard rate* $(HR)$, and it is the inverse of the duration $(D)$ of the government in years (or fraction of years):

$$HR = \frac{1}{D}$$

One might deem that the fact that in a state executives last very little represents already a great political uncertainty for the incumbent. But Franzese considers also the *political distance*, in terms of a left-right scale, between the governments that alternate. A state might have very short government

millions, the fourth under 10 millions.

[16] The segmentation of companies into four groups was available in Amadeus for the years from 2005 to 2008.

terms, but if the parties that support the executives remain similar, the fall of an executive does not mean that all the «political property rights» will go to a new government with completely different preferences.

I measure political distance by calculating the standard deviation of the left-right value of each government in a given period. My procedure is slightly different from Franzese's, in that he was interested in analysing time-series data (because he had different values for his dependent variable through time), whereas I have only the value yielded by my survey. Thus, I have chosen to include all the governments from 1990 to 2008 in the calculation. The year 1990 has been included because many countries in the data set began having regular elections around that year; going backwards would drastically reduce the number of available observations for many members of the population.

For the hazard rate, I have computed the mean value in the period, as follows:

$$HR = \frac{1}{N} \sum_{i=1990}^{2008} \frac{1}{D_i}$$

This formula considers the actual duration of the government in charge for every year. For instance, if a government was in its third year in 1990, that country receives a value of 3 for 1990. If in a single year two governments take office, that country receive a value of 0.5 for that year, and so forth.

As regards the average political distance $(PD)$ between governments in a country $(i)$ in a given period, I calculate it as the standard deviation of the executives with respect to the left-right axis:

$$PD_i = \sqrt{\frac{1}{N} \sum_{y=1990}^{2008} (LR_y - \mu LR)^2}$$

where:

$y$ is the year (from 1990 to 2008);

$LR_y$ is the left-right value, on a scale going from 0 (maximum left) to 10 (maximum right), for country $i$ in year $y$;

$\mu LR$ is the mean of this value across the period of interest.

To calculate the left-right positioning of each government I have relied on the data contained in the ParlGov database,[17] which codes all the parties in parliaments and governments from 1945 to present, for all the European countries plus Australia and New Zealand. The information includes the duration of each legislature and executive and, for each party, the left-right value,[18] the number of seats in the parliament, and the number of ministers in the government.[19] I have calculated the left-right position ($LR$) for each year ($y$) using the mean of the left-right positioning of each party that supported that country's government in that year, weighted by the number of seats that it had. The formula for $LR_y$ is the following:

$$LR_y = \left( \frac{1}{\sum_{x=1}^{N} S_x} \right) \sum_{x=1}^{N} LR_x S_x$$

where:

$LR_x$ is the left-right positioning of party ($x$) in the government;

$S_x$ is the number of seats that party $x$ retains in the parliament.

For each year, the value has been computed for the government which was in charge. If in the same year there has been more than one government, their mean value is taken.

According to Franzese (but see also Gilardi 2002, 2005), both duration and political distance should be positively correlated with independence. This is why they test the product of the two indicators, calling it replacement risk. As regards political distance, the rationale is clear: a political environment where the executives tend to diverge very much with respect to their preferences would discourage economic actors from investing in a certain country. This lack of trust would be compensated by an independent competition authority that cannot be influenced by political fluctuations.

[17] http://www.parlgov.org. The project leaders are Holger Döring (European University Institute) and Philip Manow (University of Heidelberg).

[18] The data on left-right positioning included in ParlGov are taken from several sources: Castles and Mair (1984), Huber and Inglehart (1995), Benoit and Laver (2006), Bakker et al. (2012).

[19] The database also contains data on European elections.

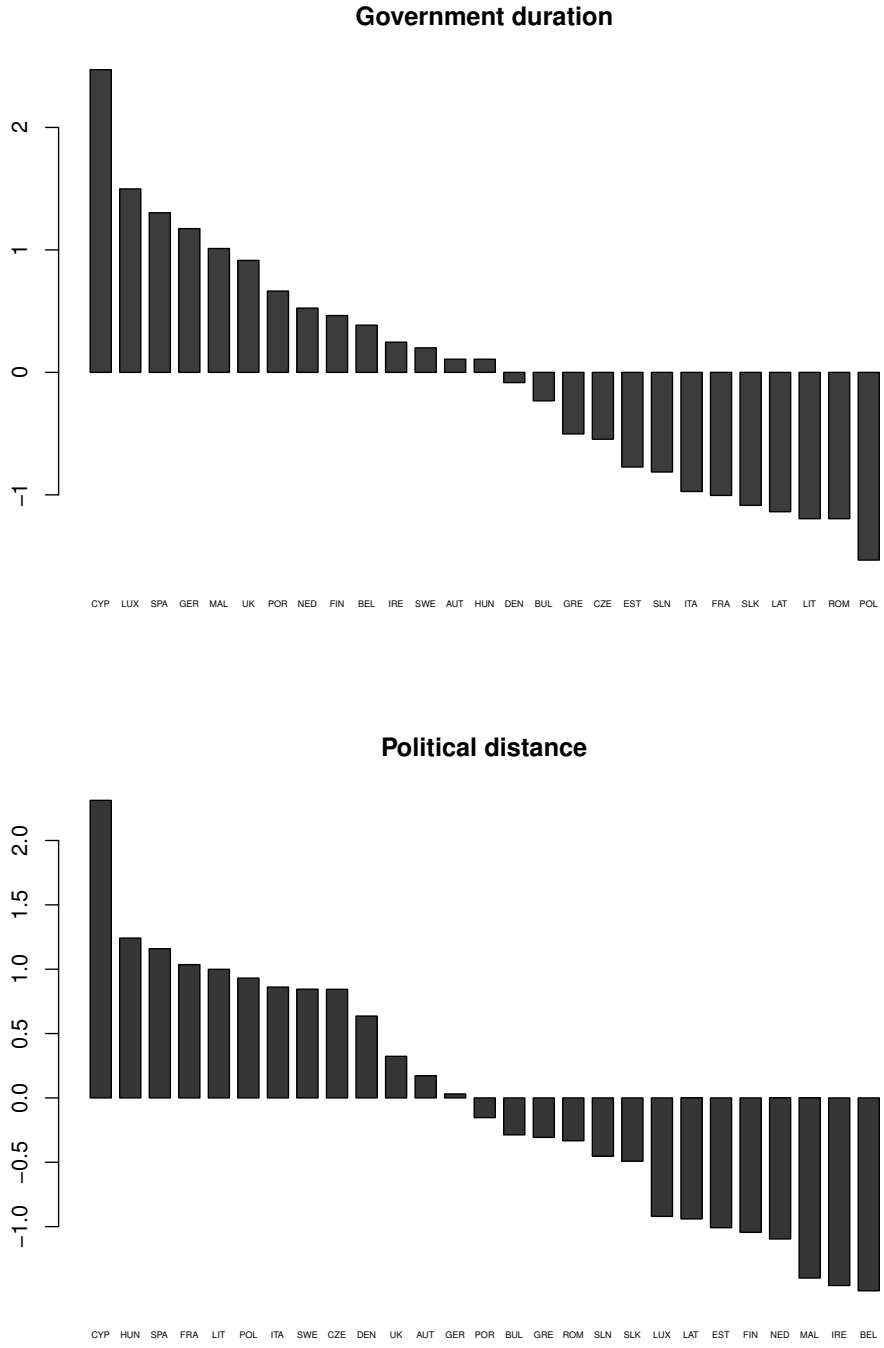


Figure 3.5.2: Average government duration and political distance in the 27 countries (standardised values)

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With respect to the first indicator, government duration, the logic is apparently similar: short executives produce uncertainty, and countries having this problem should opt for giving independence to the competition agency. However, I believe that in countries where governments tend to have short terms, other incentives may prevail for the incumbents: executives with a short-run perspective might not be able to take decisions concerning the credibility of the country, and might prefer not to delegate too much if this means relinquishing some of the limited power that they have. The values of government duration and political distance for all the countries are shown in Figure 3.6.2.

CREDIBLE COMMITMENT. For the «credible commitment» hypothesis (Hypothesis 4), the perceptions of the investors about the regulatory environment are operationalised with the World Bank indicator of «regulatory quality»,[20] which «captures perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development».[21] In my view, this indicator is more appropriate and reliable than others employed in similar analyses. For instance, Gilardi (2002, 2005), Elgie and McMenamin (2005) and Wonka and Rittberger (2010) all operationalise the need for «credible commitments» as a policy-specific factor. Therefore, they distinguish either between the policy field in which the authorities operate (Gilardi 2002, 2005; Wonka and Rittberger 2010) or according to the circumstance that the agencies regulate a sector that has been subject to market-opening (Gilardi 2002, Elgie and McMenamin 2005).

However, such an operationalisation implies that agencies with the same functions across countries (the case of this analysis) are «equal» and not comparable. The reason for using a different proxy in this analysis is that evidently, even in the same policy field, not all countries enjoy the same credibility in the eyes of the investors. The strength of this indicator lies in the fact that it is built on the basis of the perceptions of firms and experts, which are exactly the actors that governments want to reassure, according

[20] Data available at http://info.worldbank.org/governance/wgi/index.asp.
[21] See http://info.worldbank.org/governance/wgi/pdf/rq.pdf.

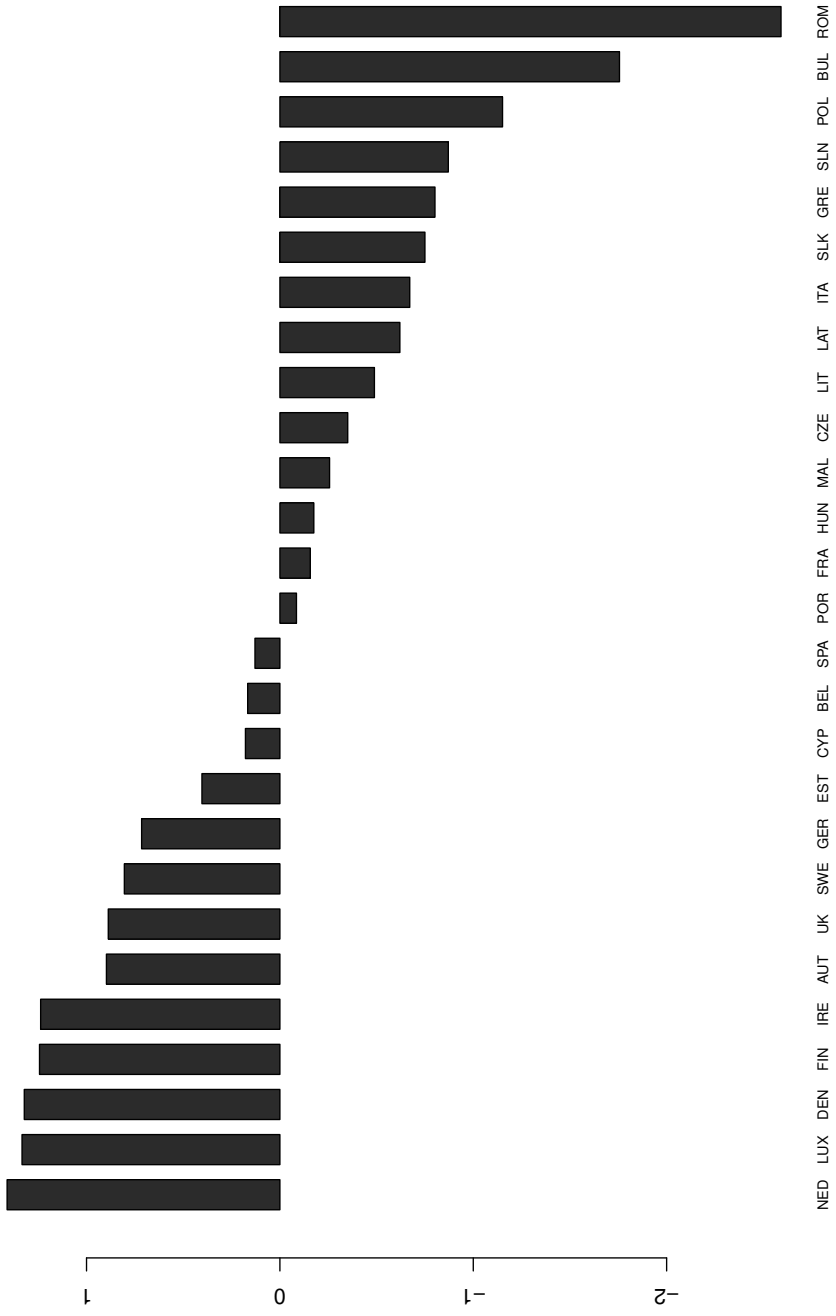


Figure 3.5.3: Index of perceived regulatory quality for the 27 countries (standardised values).

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to this hypothesis. The expectation is that the lower is the perceived regulatory quality, the higher will be the need for credibility. In order to control for annual fluctuations, I employ the mean value of the indicator in the period 1998-2008.[22] The values of the index of regulatory quality for the EU member states are shown in Figure 3.5.3.

VETO PLAYERS. Measuring veto players is always problematic, as a certain arbitrariness cannot be completely avoided. However, the main components of every veto players' index rest on Tsebelis' distinction between institutional and partisan ones. The indicator that I will employ in this statistical analysis is the variable *checks* from the Database of Political Institutions (DPI, see Beck et al. 2001; Keefer and Stasavage 2003). In contrast to Gilardi, I have used neither Henisz's Political Constraints dataset (Henisz 2000, 2002) nor Tsebelis' veto players data. The first has not been employed because there are some inconsistencies between the data provided by the author in different articles, although the calculation method should be the same (thanks to Chris Hanretty for pointing this out). Regarding Tsebelis' database,[23] the reason is that it contains data only on 14 out of 27 European countries.

The variable *checks* simply counts the number of veto players. For every year, it takes values from 1 upwards: the starting value is the number of institutional veto players; then, this value is reduced if these institutions have the same political preferences[24] or is increased if, for instance in a parliamentary system, there are more parties in the government coalition. For this statistical analysis, I have calculated the average value for each country in the period 1990-2006.[25] A representation of the 27 countries ordered on the basis of their number of veto players is shown in Figure 3.5.4.

[22] 1998 is the first year available in this dataset.

[23] Available at http://sitemaker.umich.edu/tsebelis/veto_players_data.

[24] In presidential systems, for example, «if elections are conducted under closed-list rules and the president's party is the largest government party in a particular chamber, then the DPI assumes that the president exercises substantial control over the chamber and it is not counted as a check» (Beck et al. 2001: 170).

[25] The database contains data for 177 countries from 1975 to 2006.

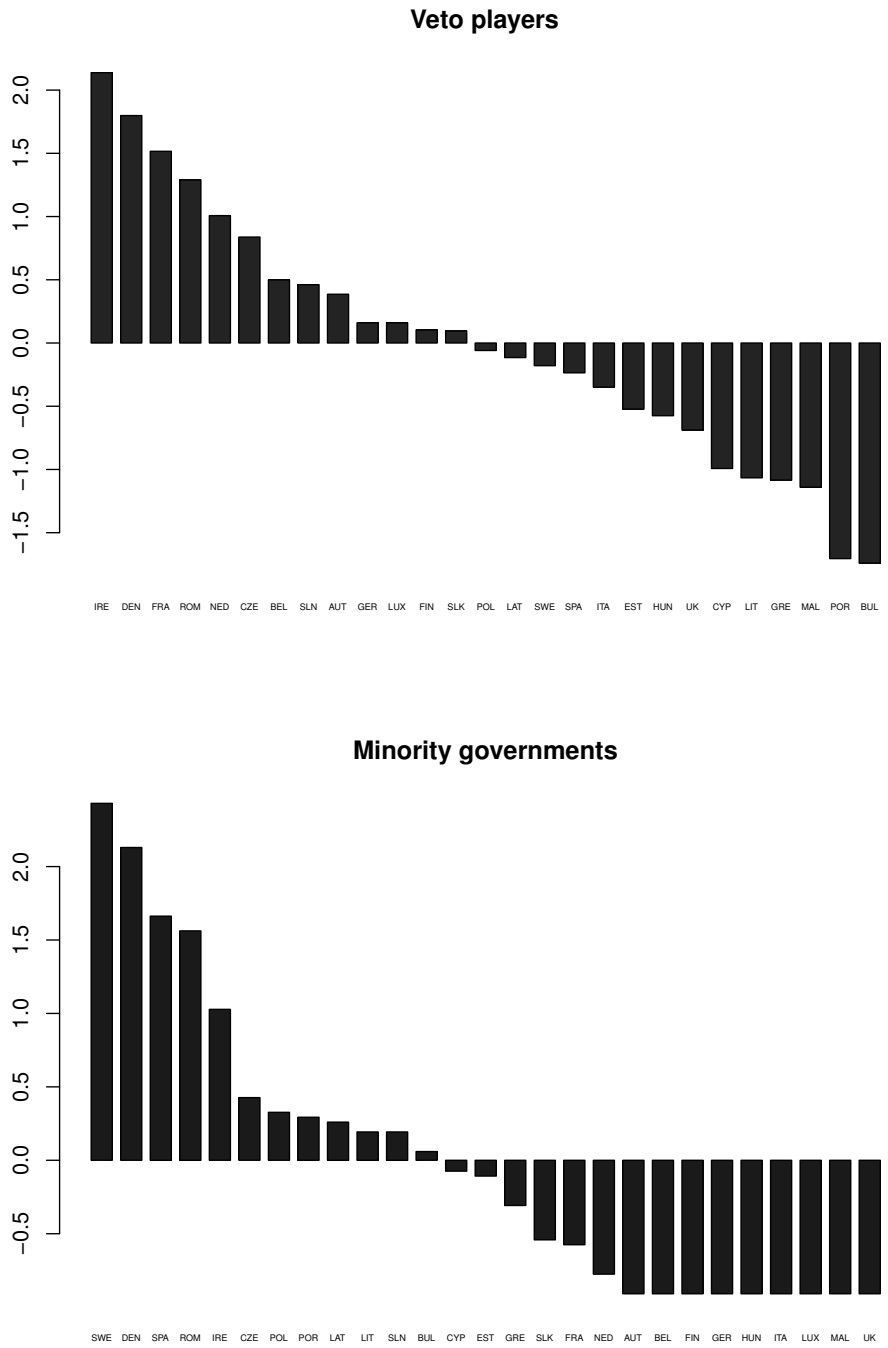


Figure 3.5.4: Average number of veto players (standardised values) and proportion of months with a minority government (standardised values) in the 27 countries.

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| Variables | Range | Mean | St. deviation |
|---|---|---|---|
| BIG FIRMS | [0.0673, 0.4716] | 0.2204 | 0.1125 |
| EU MEMBERSHIP | [2, 57] | 22.96 | 21.3334 |
| POLARISATION | [0.4147, 2.657] | 1.297 | 0.5885 |
| AVG. GOV. DURATION | [0.8859, 5] | 2.458 | 1.03 |
| REGULATORY QUALITY | [0.1671, 1.717] | 1.171 | 0.3872 |
| VETO PLAYERS | [2.375, 6.412] | 4.187 | 1.0409 |
| MINORITY GOVERNMENTS | [0, 1] | 0.272 | 0.299 |

Table 3.2: Explanatory variables (descriptive statistics).

MINORITY GOVERNMENTS. The last hypothesis is going to be tested with a proxy that measures the frequency of minority governments in a country. Employing again the ParlGov database, I have checked how many months each country has had between 1990 and 2008 with a minority government, and then I have divided this by the total number of months:

$$MG = \frac{m_{MG}}{m_{TOT}}$$

Figure 3.5.4 shows the standardised values of $MG$ for all the countries of the data set. We can see that, whilst nine countries have had no minority governments at all within these 19 years, others appear very much accustomed to them. The former include, amongst the others, Germany, Italy, United Kingdom, Belgium and Finland. Amongst the latter, we find the two Scandinavian members of the EU with very high values (Sweden and Denmark), followed by Spain, Romania and Ireland.

| *Explanatory variables* | *Models* | |
|---|---|---|
| | *1* | *2* |
| BIG FIRMS (*log*) | -0.631* | -0.469* |
| | (0.288) | (0.221) |
| EU MEMBERSHIP | 0.82*** | 0.834*** |
| | (0.174) | (0.161) |
| POLARISATION | 0.676*** | 0.625*** |
| | (0.142) | (0.118) |
| AVERAGE GOVERNMENT DURATION (*log*) | 0.532** | 0.441** |
| | (0.182) | (0.142) |
| REGULATORY QUALITY (*log*) | -0.375° | -0.448* |
| | (0.18) | (0.165) |
| YEAR OF ESTABLISHMENT | 0.415** | 0.36** |
| | (0.131) | (0.116) |
| VETO PLAYERS | 0.228 | |
| | (0.185) | |
| MINORITY GOVERNMENTS | -0.226 | |
| | (0.161) | |
| BIG FIRMS (*log*) * POLARISATION | | -0.326* |
| | | (0.155) |
| *Intercept* | | 0.011 |
| | | (0.107) |
| Adj. $R^2$ | 0.64 | 0.69 |
| *F* | 6.791*** | 9.232*** |

Method: OLS regression. N=27.
Standardised variables.
In Model 1, the coefficient of the intercept is $\approxeq 0$, with $Pr(> |t|) = 1$.
Estimators' significance: *** < 0.001 ** < 0.01 * < 0.05 ° < 0.1

Table 3.3: Multiple regression models

### 3.5.3 Method of analysis

The data are modelled with OLS regression.[26] In Model 1, the following equation is tested:

$$\begin{aligned} FormalIndependence &= \beta_1 + \beta_2 \cdot \log(BigFirms) + \beta_3 \cdot EuMembership + \\ &+ \beta_4 \cdot Polarisation + \beta_5 \cdot \log(Avg.Gov.Duration) + \\ &+ \beta_6 \cdot \log(Reg.Quality) + \beta_7 \cdot Year + \\ &+ \beta_8 \cdot VetoPlayers + \beta_9 \cdot MinorityGovernments \end{aligned}$$

As can be seen, in this model all the indicators listed in the previous section are included, together with a variable indicating the year in which the authority was established. The reason for the inclusion of this control variable is to ascertain whether there is a time effect, and how it influences formal independence. All the variables are standardised. For three out of the nine indicators, (BIG FIRMS, AVERAGE GOVERNMENT DURATION and REGULATORY QUALITY) I use the natural logarithm, as they would not have a normal distribution otherwise. We observe that all the indicators except VETO PLAYERS and MINORITY GOVERNMENTS are significantly correlated with the formal independence of the NCAs. The coefficient of determination indicates that about two thirds of the total variance is explained by the model. Given that the observations are not so many (27) for this method of analysis, whilst the number of explanatory variables (8) is relatively high, tests on multicollinearity, heteroscedasticity and on the presence of deviant cases must be carried out with great attention. Concerning the risk of a selection bias, it is enough to say that this analysis does not aim at generalising to the whole population of IRAs or competition authorities in the world. Nevertheless, as regards competition agencies in the EU member states, the whole population is included in this empirical test: hence, if the analysis points out significant relationships, they can be considered valid in this area.

Model 1 does not seem to suffer from heteroscedasticity. Constant error

[26] The statistical analysis and the graphs presented in this chapter have been produced with R, version 2.11.0.

variance has been checked with three different tests: the Breusch-Pagan test (Breusch and Pagan 1979), the Goldfeld-Quandt test (Goldfeld and Quandt 1965) and the Harrison-McCabe test (Harrison and McCabe 1979).[27] None of the tests have rejected the hypothesis that the model is homoskedastic.[28] As regards possible issues of multicollinearity, the computation of the variance inflation factor for all the explanatory variables suggests that there are no problems in this respect.[29]To conclude with the tests for Model 1, also the presence of outliers and influential cases has been verified. The analysis of the studentised residuals shows that there are no observations with a Bonferroni p-value greater than 0.05. Therefore, the model is in line with the assumption of ordinary least-squares regression also with regard to this aspect.

In Model 2, I have taken out the two indicators that are not significant in Model 1 (VETO PLAYERS and MINORITY GOVERNMENTS) and I have added an interaction between BIG FIRMS and POLARISATION. The resulting model is:

$$\begin{aligned} Formal\,independence \;=\; & \beta_1 + \beta_2 \cdot \log(BigFirms) + \beta_3 \cdot EuMembership + \\ & + \beta_4 \cdot Polarisation + \beta_5 \cdot \log(Avg.Gov.Duration) + \\ & + \beta_6 \cdot \log(Reg.Quality) + \beta_7 \cdot Year + \\ & + \beta_8 \cdot \log(BigFirms) \cdot Polarisation \end{aligned}$$

The reason for testing this interaction lies in the fact that the two variables define opposite albeit strictly related concepts: the first measures the condition of uncertainty of the legislator, the second measures the strength of the counterpart. It is therefore plausible that their effects reinforce each

[27] The tests have been performed using the package `lmtest` in R (Zeileis and Hothorn 2002).

[28] The p-value for the three tests is, respectively, 0.82, 0.46, 0.78.

[29] The variance inflation factor (VIF) is less than 2.5 for all the variables except BIG FIRMS (which has a VIF equal to 6). Although it would be preferable that all the VIFs were $< 4$, VIFs $< 10$ are usually not regarded as a concern. Moreover, there seem to be no problems in the estimation of the coefficients. The variance inflation factor (VIF) test has been performed using the package `car` in R (Fox 2009)

other, as the analysis confirms: according to the results of the regression, the interaction has a significant coefficient. The impact of BIG FIRMS varies for different values of POLARISATION; in particular, as the latter grows, the negative effect of the first grows. Overall, Model 2 has a higher explanatory power than Model 1, besides being more parsimonious, as the higher F statistics points out.

Also Model 2 does not present problems as regards heteroscedasticity[30] and multicollinearity[31]. The analysis of the studentised residuals shows instead that the Polish competition authority is a potential outlier.[32] The Cook's distance of this observation is, indeed, greater than 0.5. However, running the same regression excluding the Polish authority yields very similar coefficients; therefore, the model can be meaningfully interpreted.

### 3.5.4 Discussion of results

As has already been observed, the indicators employed to test Hypotheses 5 and 6 (VETO PLAYERS and MINORITY GOVERNMENTS) are not found to be significantly correlated with the variation of the formal independence of national competition authorities. The coefficient is positive for VETO PLAYERS and negative for MINORITY GOVERNMENTS: even though these estimators cannot fully be trusted, among the two alternative hypotheses, 5(B) seems to be more realistic than 5(A); Hypothesis 6, instead, is not only rejected because not significant, but also because the estimated effect opposes what was hypothesised. The lack of confirmation for the veto players hypothesis may be due to the fact that the establishment of an independent competition authority is a change of the status quo that increases the social welfare. Therefore, veto players that would oppose such change can be compensated with a «side payment», as suggested by Lindvall (2010).

Regarding Hypothesis 1, the results show that the weight of big firms

[30] The p-values for the three heteroscedasticity tests are, respectively: 0.37, 0.29, 0.37. None of them is significant at 0.05.

[31] The VIF for all the variables is $< 2.3$, except for BIG FIRMS, which has a value of 4.09 (significantly lower than in Model 1).

[32] The observation has a Bonferroni p-value lower than 0.05.

negatively influences the independence of competition authorities. Hence, the blame shifting hypothesis is utterly rejected. The data indicate that, among the two alternative formulations, 1(A) is closer to reality: politicians seem to care more about the presence of big firms in their country than about avoiding being blamed for antitrust enforcement. Model 2, in particular, yields a notably interesting finding: the negative effect of BIG FIRMS on formal independence changes with the level of POLARISATION of the country. The results of the interaction help us understand what can be retained from the mechanism hypothesised in the formulation of Hypothesis 1(A). In fact, the analysis demonstrates that the capture of politicians does not occur in every scenario, but rather where politicians are more uncertain about the preferences of the future incumbent, as if in such a situation they were «weaker» and more preoccupied with not displeasing big firms − or, at least, more willing to control the competition regulator, and less willing to give it complete leeway.

As Figure 3.5.5[33] and Figure 3.5.6 show, for low values of POLARISATION, the impact of a shift from the first to the ninth decile of BIG FIRMS is almost equal to zero, but, as political uncertainty grows, the negative effect of BIG FIRMS becomes more and more pronounced. Simply put, not in every European country politicians tend to establish less independent agencies when they deal with a relevant number of big firms; this happens in a more noticeable way where the uncertainty about the preferences of the future government is higher. The data show that where the policy output is stable (when polarisation is low), big firms do not benefit from any «appeasement» efforts by politicians; vice versa, if the differences between the coalitions are greater, the result is as hypothesised.

Hypothesis 2 is also fully confirmed. The EU MEMBERSHIP indicator is strongly significant in all the models, and the effect on agency independence is positive, as hypothesised. Since the indicators for the explanatory

[33] The graph in Figure 3.5.5 has been produced in R with the package plotrix (Lemon 2006). Simulated first differences have been obtained using the function `sim` in the package Zelig (Imai et al. 2008, 2009). The procedure followed is the one suggested by Brambor et al. (2006). For a discussion of the logic and the implications of stochastic simulation, see King (1997: 141 ss.). Expected values have been obtained through bootstrapped simulations.

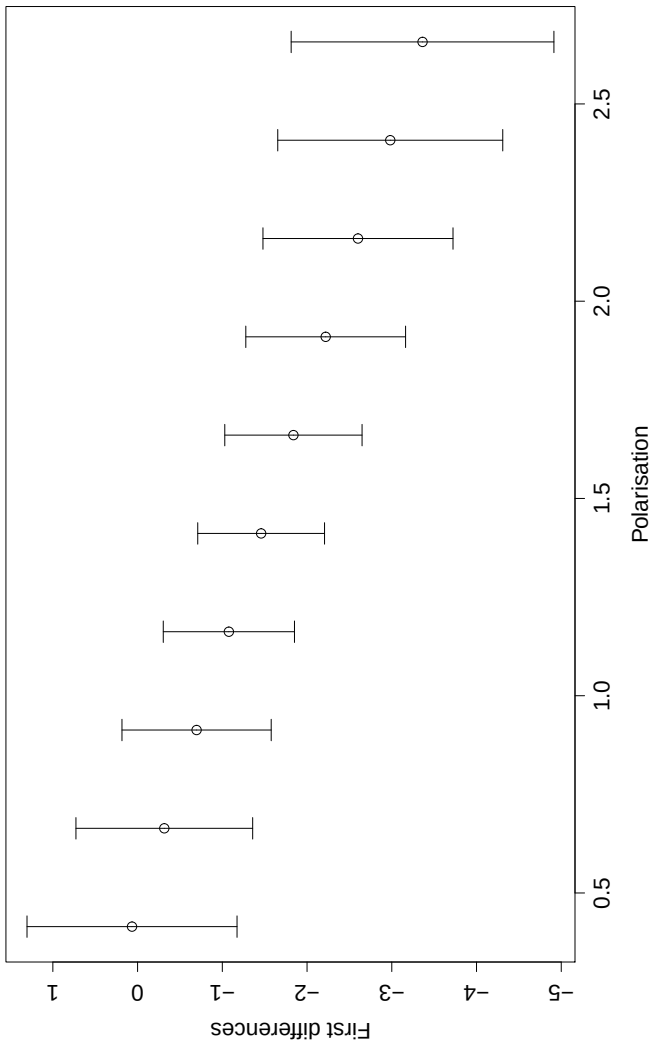


Figure 3.5.5: Simulated first differences between expected values of FORMAL INDEPENDENCE for BIG FIRMS at its 1st decile and expected values of FORMAL INDEPENDENCE for BIG FIRMS at its 9th decile, given different levels of POLARISATION. Vertical bars indicate 95% confidence intervals.

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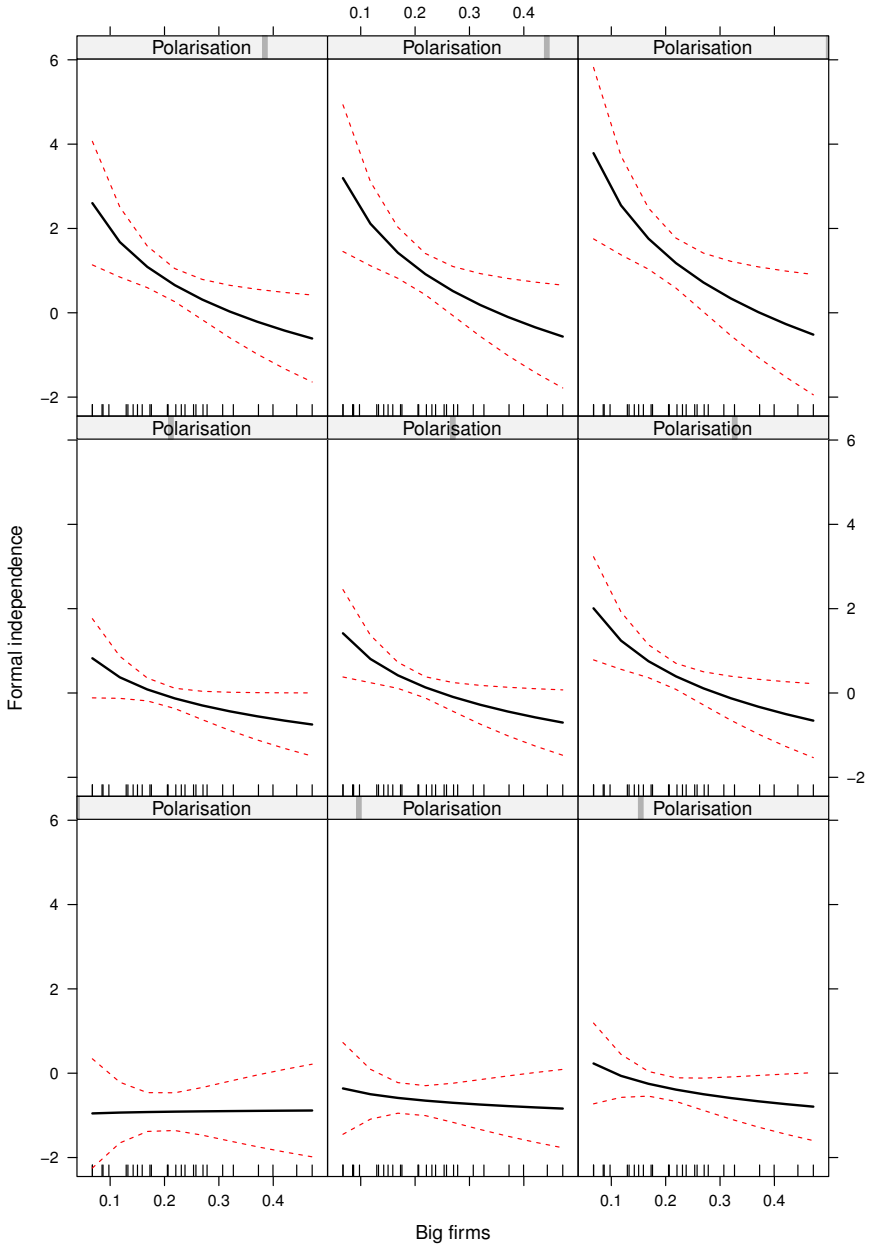


Figure 3.5.6: Effect of BIG FIRMS on formal independence for different levels of POLARISATION.

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variables have been standardised, their coefficients can also be used to compare the magnitude of their influence on the dependent variable. In this respect, we can affirm that this variable contributes more than any other to the overall effect. The year of establishment is also positively correlated to independence in all the models, meaning that agencies created later in time enjoy greater independence than the older ones.

As concerns the political uncertainty hypothesis, the POLARISATION indicator is strongly significant in both models, proving that, in countries where executives are uncertain about the political preferences of the future incumbents, competition agencies are more independent. The indicator for the AVERAGE GOVERNMENT DURATION, contrarily to what would be expected, instead has a positive correlation with the formal independence of the authorities. At least for the cases presented in this analysis, countries with higher government instability do not tend to have more autonomous agencies. As a consequence, the assumption behind the construction of the replacement risk indicator (that polarisation is positively correlated, and government duration is negatively correlated to independence) is not confirmed in this analysis. Further investigation is certainly necessary in order to understand whether this finding signals a general tendency or rather a peculiarity of this population.

The REGULATORY QUALITY indicator is also found to clearly affect the independence of national authorities. The variable is significant in both models, demonstrating a systematic relationship between perceived reliability of the countries in promoting and regulating private investments and the degree of formal autonomy of their competition agencies.

Table 3.4 summarises the effect of the explanatory variables on the dependent variable for a shift in the former from the $1^{st}$ decile to the $9^{th}$ decile. First differences have been calculated with the following procedure. First, I have created two groups including all the explanatory variables; then, the variable of interest was set at a low ($1^{st}$ decile) value in the first group and at a high ($9^{th}$ decile) value in the second one; all the other variables were kept constant in both the groups. Then, I have run 1000 bootstrapped simulations on both the sets of covariates, estimating the expected value of the

| *Variables* | E(Y\|X) (1st decile) | E(Y\|X1) (9th decile) | Difference |
|---|---|---|---|
| BIG FIRMS | 0.70 | -0.56 | −32% |
| EU MEMBERSHIP | -0.78 | 1.22 | +51% |
| POLARISATION | -0.74 | 0.49 | +31% |
| AVG. GOV. DURATION | -0.77 | 0.34 | +28% |
| REG. QUALITY | 0.28 | -0.41 | −18% |

Table 3.4: Simulated first differences between expected values of the dependent variable (Model 2).

dependent variable for each of them. The value of FORMAL INDEPENDENCE that corresponds to the first set (with the variable of interest at its first decile and all the others at their average) is shown in the first column of the table; the value corresponding to the second set is shown in the second column. The third column displays the percentage difference between the high and the low value.

As can be observed, the most relevant effect is yielded by the variable EU MEMBERSHIP, for which a change from 5 to 57 years is associated with an increase in FORMAL INDEPENDENCE greater than 50%. Also BIG FIRMS, POLARISATION and AVERAGE GOVERNMENT DURATION produce notable differences when shifted from a low to a high value: for all of the three indicators, the first difference amounts to about 30%. REGULATORY QUALITY, instead, has a lower effect on formal independence.

First differences allow us to compare the magnitude of the explanatory variables' effect on the dependent variable. All the indicators listed in the table refer to hypotheses whose coefficients are significant in the statistical analysis. However, if we want to assess to what extent the legislators are influenced by the different factors, a closer look to the *net impact* of the variables is necessary. In particular, since not all the hypotheses postulate the same incentives as regards the motivations for delegating, it is worth assessing what is the weight of the different types of motivations. Excluding POLARISATION, which has been operationalised as a the condition under which the impact of big firms vary, we can notice that the importance of

factors that indicate self-interested motivations (BIG FIRMS, AVERAGE GOVERNMENT DURATION) is greater than that of EU MEMBERSHIP, which signals a mainly sociological rationale. The indicator that points out a chiefly public-interest motivation (REGULATORY QUALITY) is the one which has the smallest impact on formal independence.

## 3.6 Conclusion

In this chapter, I have sought to provide statistical evidence for an original theoretical framework, which combines the well-established literature on delegation as a means to acquire credibility with new hypotheses focused on the attitudes of politicians towards big firms and on the constraints and incentives deriving from EU membership. It is demonstrated in this chapter that, in polities characterised by high political uncertainty, big firms manage to obtain the establishment of a less independent competition authority from the government. At the same time, this pressure is balanced by the effects of EU membership: incentives produced by the European competition legislation (especially Regulation 1/2003), potential reputation issues as well as time of exposure to «rebounding Europeanization» in the field of competition, are all factors that lead the legislators to increase the degree of independence enjoyed by national agencies. In accordance with what was hypothesised, the results prove that the formal autonomy of competition authorities is positively correlated with the length of EU membership of a country.

With respect to the other hypotheses, the findings are more mixed. No support has been found for neither the hypothesis which states a greater number of veto players should negatively (or positively) influence the authorities' autonomy,[34] nor for the hypothesis that establishes a link between minority governments and tendency to delegate more to IRAs. The relationship between political polarisation and independence of the agencies,

[34] If Lindvall (2010) is right, it should be possible to analyse which veto players were not in favour of giving independence to the NCAs, and how they have been compensated by the coalition which passed such reform. See Chapter 2, note 10.

instead, has been confirmed to be positive, while this is not the case for the government duration variable. According to the results of the statistical analysis, polarisation damages the credibility of the countries, which respond by establishing more independent authorities. Shorter government terms, on the other hand, are not associated with more formal autonomy for the agencies: these tend rather to be more independent in countries that have more stable executives. This finding suggests that shorter lasting governments may rather have a short-run perspective that does not push them to delegate. Also the perceptions about how a country is able to promote private investments play an important role: the worse these perceptions are, the more the agency is independent. At first sight, this relationship could appear counterintuitive, because it seems to imply that countries which have a more independent competition authority are, in spite of that, perceived as a less suitable environment for private investments. Does this mean that formally independent competition authorities, all in all, are not useful in creating a good regulatory background? These questions cannot be answered in the present chapter, but I will address them in Chapter 5, where I will test the relationship between statutory independence and the way in which the authorities carry out their tasks.

In general, the statistical models illustrated in this chapter have a relevant explanatory power, and they help shed light on how the decisions on the institutional independence of these authorities are made. The overall picture shows that the legislators base their choices on two opposed pressures: on the one hand, big national firms press for a less independent agency; on the other, obligations deriving from the EU membership, expectations of international investors as well as other credibility issues push the governments to increase the autonomy of the authorities. In this contrast between anti- and pro-competition forces, each country finds a particular equilibrium. If we want to assess how these two tendencies are balanced, it is possible to claim that the factors pushing towards more independence prevail. Indeed, the influence of big firms is limited to the cases of high political uncertainty, while all the other significant indicators suggest that countries give independence in reaction both to supranational inputs and to

external perceptions as well as expectations.

An interesting follow-up to this analysis would be to examine in greater detail how big firms exert their influence on politicians. Beside the explanation formulated in this chapter, it should be ascertained whether some countries try to «protect» their big firms because of a purely collusive behaviour, or if this is instead due to a different way of regulating the economy: the «varieties of capitalism» approach (Hall and Soskice 2001) can offer a stimulating basis for discussion on this topic. Moreover, with regard to the effects of Europeanisation, further research must be carried out about the role of the EU both as a supranational legislator and as a connector of political elites. This analysis suggests that, in a field like competition policy, European countries retain limited decisional autonomy, and that their differences are mainly explained by the need to comply with internal and external pressures.

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# Chapter 4

# A qualitative analysis

The statistical analysis presented in the previous chapter has brought to light the existence of a relationship between the formal independence of competition authorities and certain factors, namely the presence of big firms, the length of a country's EU membership, the political polarisation and, finally, the perceived regulatory quality. Although the results are robust and significant, it can be useful to look for confirmations and to cross-check the findings of the quantitative analysis with a qualitative analysis. Aiming at strengthening the conclusions illustrated above, I have conducted interviews with members of NCAs, competition policy experts as well as members of the parliament and of the government.

This choice can be explained and justified with the goal of this part of my research. The aim of these interviews is not to formally test hypotheses, but rather to comprehend, in more detail, the dynamics that lead to certain institutional arrangements, and to receive suggestions on how to operationalise and test the second research question of this dissertation. Since the impact of formal independence on the agencies' performance has not been theorised so far, the knowledge and the expertise of specialists is crucial in order to develop a theoretical framework and to conceive of plausible hypotheses. Moreover, talks with members of NCAs were also useful in that they enabled me to better theorise what kind of relationship links the people's representatives to these «boards of experts»: is it a real P-A relationship, with a clear

mandate and instruments of control, or are such elements vague and almost non-existent? If the latter is true, how can we define such a relationship?

The two main cases that I have selected for this investigation are Italy and France, for three main reasons. First, it is interesting to observe that the two countries come from well-established systems of public intervention in the economy. Understanding how the shift from a state-controlled economy to a competitive one has happened is a useful insight, and will be especially useful in order to better understand what role the EU has played in this respect. Second, with regard to the four variables that the statistical analysis has highlighted, the two countries suit a *most similar systems* design (Mill 1843; Przeworski and Teune 1970), because they are equal (or very similar) in all the variables except for the perceived regulatory quality. The interviews can help confirm that this factor explains the higher formal independence that the Italian authority enjoys. Finally, both the countries have a competition agency that has operated for quite a long period of time, with well-established relationships to the political system as well as a high level of expertise. The presence of all these factors combined is useful for the kind of information I need to gather. In addition to these two countries, I have also had interviews also with members of the Greek competition authority. I have chosen Greece as a third case because it varies greatly from the two other countries with regard to all the explanatory variables. Therefore, it should avert the danger that important causal mechanisms are left out in this analysis.

In order to complement the analysis, I have also conducted interviews in Brussels, at the Directorate General (DG) for Competition. Besides acting as the European-wide competition authority, the DG Competition coordinates the European Competition Network (ECN), a forum where the competition agencies of the EU member states meet to exchange information about the practises they adopt and how they organise their activities. The Network cannot force the countries to adopt rules or behaviours, but it has gained considerable importance by informally promoting uniform procedures among the agencies. The interviews with the staff members of the DG Competition were particularly useful in clarifying the role of the Com-

mission in the decisions made sorrounding the independence conferred on the national bodies.

The selection of the interviewees has been guided by the need to cover as many different positions and points of view as possible. As regards the establishment of competition authorities and the decisions about their independence in the member states, my aim was to hear what both the «principals» (the politicians) and the «agents» (the members of NCAs) had to say. Moreover, this information was complemented with expert input, which is supposed to lie neutral between the two. The decision to interview members of the DG Competition had two purposes: on the one hand, collecting information on the involvement of the Commission in national policy-making; on the other hand, hearing about the position of a counter-actor of both national politicians and national regulators.

In total, I have conducted 16 semi-structured interviews with members of the DG Competition and various experts involved in the decision-making on the competition authority in France, Italy and Greece. Namely, in Brussels, on 23 June 2010, I conducted two interviews with members of the DG Competition responsible for the European Competition Network. In France, between the 22$^{nd}$ and 30$^{th}$ of June 2010, I interviewed three members of the board of the authority, as well as a deputy and one member of the Ministry of Economy. In Italy, between the 19$^{th}$ and the 22$^{nd}$ July and on the 4$^{th}$ of October 2010, I interviewed two members of the authority (including one member of the board), two members of the parliament with a relevant expertise in this field as well as three academics. Two phone interviews with members of the Hellenic Competition Commission (HCC) were also conducted in July and November 2011.

This chapter is organised as follows. I will first discuss of the nature of the relationship between representatives and competition authorities, according to the observations made by the interviewees. Then, I will present the clarifications and explanations that I received from the experts on the explanatory variables employed in the statistical analysis of the previous chapter. Finally, I will go over the comments and suggestions that the interviewees have given with regard to the second research question of this

dissertation.

## 4.1 Accountability of authorities and the role of parliament and government

With this qualitative analysis I wanted to examine more in depth the relationship between the political bodies and the competition agencies. Could the NCAs be considered agents with a principal? And if the answer is affirmative, towards which body would they be accountable and responsible? This issue is closely related to the first research question that I addressed in this dissertation. As regards the explanation of why some authorities are more independent than others, the previous chapter has already offered some interesting answers. We have seen that countries prefer not to give independence to the NCAs, if they can help it; independence is a kind of «last resort» for national political bodies. However, it remains unclear what type of control they exert, and which body, parliament or government, actually supervises the activity of the authorities.

Formally, the statute of every authority (the «contract» of a supposed P-A relationship) is passed by the parliament, so the «principal» should be identified with the legislators. In the case of France and Italy, the authorities are also officially accountable towards the parliament, where their members are heard

- if their advice is asked during the discussion on a law, and
- once a year, for the presentation of the annual report by the president.

The interviews with the members of the authorities and the deputies show a picture that does not correspond to a typical P-A model. In these, the relationship with the parliament is described as very weak, and limited to the occasions mentioned above. The hearings are usually very formal: when the president presents the annual report, he usually reads a speech about which there is usually no debate; when the president or the members of the board are heard during the discussion of some laws, there is little room

for a real «dialogue». If the parliamentary majority wishes to engage in a closer collaboration with the authority, it prefers to delegate the task to the government.[1]

In all cases, a real control over how the authority performs its tasks seems to be missing, and this regards both the parliament and the executive. Asking advice is certainly not a form of control over the agency, but rather a way to take advantage of its expertise. The parliaments never discuss the decisions taken by the authorities, and every attempt to evaluate the agencies' performance is usually seen as an infringement of their independence. Members of the Italian competition authority clearly claimed that they experienced no practical accountability towards the government or parliament.[2]

The existence of a P-A model, in principle, implies that all the incentives for the agent are included in the initial contract, and that the agency would have no reason for shirking − even though, in practice, a contract could be incomplete because the principal cannot calculate at the beginning all the possible «deviations» of the agent. Yet, if the principal really aims to prevent the agent from shirking, he or she also has other tools that can help: namely, the principal can threaten to reduce the budget of the agency, or he or she can have regular hearings of the members.[3]

Whilst the first seems to be generally used, if nothing else because the national budget has to be approved every year, the second is not employed at all in the cases that I have examined. And this is even more striking if one thinks that the supervision over the agency's activity should be the natural consequence of a delegation decision. In the US literature on «congressional dominance», the oversight carried out by the committees is viewed as the

[1] Interviews with members of the Italian and of the French competition authorities, 28 June and 19 July 2010. The interlocutors pointed out that also the authorities prefer to deal with few people in the government, rather than with many more in the parliament.

[2] Interviews with members of the Italian competition authority, 19 July 2010.

[3] All the people that I have interviewed in France stressed the importance of the accountability of the authority towards the democratic bodies, and they all claimed that the condition for accepting that more powers were given to the authority was that it became more accountable. However, there does not seem to be other tools by which the parliament and the government control the activity of the agency, except the two that I have listed.

main tool to steer the agency, and it is successfully employed. Why is this not the case in France and Italy (and in most European countries)?

The most straightforward answer is that neither the parliament nor the government really act as principals, and that the relationship between them and the competition authority is not a P-A relationship. This explanation would encourage one to look more into theories that identify the reasons for delegating in this field with other motivations rather than information asymmetry and efficiency: need for credibility, external pressures, political uncertainty, as the statistical analysis indicated. Another possible explanation would be that there is a P-A relationship, but the lack of expertise and knowledge of the field does not enable the parliament to exert its control. Apparently, there is little expertise concerning competition in the parliament: very few understand what it is about, and it is thus unsurprising that no one is interested in scrutinising how the authority works: they would be unable to do so because of their lack of expertise.[4] However, this cannot be the reason (at least not the only one) for which politicians choose not to control. Every P-A model assumes that the principal delegates exactly because he or she lacks expertise, but this does not prevent him or her from exerting some control. It is assumed that the principal can control the *result*, even if he or she is unable to control the *process* that leads to it. Therefore, there must some other reason that accounts for this lack of control. Again, the most reasonable explanation is that these are not P-A relationships in the strict sense. Majone's distinction between agency and fiduciary relationships (Majone 2001) is certainly the starting point for every theory of delegation processes to IRAs, at least in Europe.

Of course, the sample on which I conducted the interviews is too small to draw general conclusions on this question. These interviews are rather useful to identify the main issues upon which to focus. On the one hand, they have confirmed that in parliamentary democracies the distinction be-

[4] Interviews with Italian deputies, 20 July and 4 October 2010, and with Italian expert, 21 July 2010. This had been suggested to me also by the difficulty in finding members of the parliament that could talk with me. The deputies that I interviewed said that they would like to exert this control, but that they are too few and their colleagues do not support them (Interviews with Italian deputies, 20 July and 4 October 2010).

tween parliament and government makes little sense in practice. Although the parliament is formally responsible for every delegation act, the authorities perceive that, if they want to influence or acquire information on the legislative process, they must address the executive. On the other hand, these interviews have reinforced the intuition (brought about by the statistical analysis of Chapter 3) that the relationship between elected bodies and competition authorities is very difficult to define as a P-A relationship, because it lacks some constitutive elements of it: a clear mandate, instruments of control, actual control.

## 4.2 Hypotheses' cross-checking

In this section, I illustrate the findings of the series of interviews that I have conducted as regards the general plausibility and the causal mechanisms of the hypotheses verified in the statistical analysis.

### 4.2.1 The role of big firms

In Chapter 3, I found that the higher the number of big firms in a country, the less independent the NCA is. This hypothesis was derived from the assumption that big firms prefer to have a competition authority with little independence, in order to better exert their influence on it through politicians, when needed. This explanation was supported by the evidence that such a relationship is more pronounced when the political polarisation of a country is higher, i.e. when the incumbents are less legitimised by their opponents: it makes sense that «weaker» politicians are more inclined to meet the big firms' needs. In the interviews, I have sought to receive confirmations for these findings.

In general, all the interviewees confirmed that big firms do lobby when the legislatures discuss changes on the powers of the authorities or their organisation. In France, where the competition agency was recently reformed (in 2009), representatives of big national firms have lobbied members of both coalitions (not only the right-wing majority). According to a socialist

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deputy:

> «people came and explained that [creating a very independent authority] could be dangerous for the French enterprises, and my colleagues of the majority have received even more "lobbyists" that came and explained that this could be dangerous»[5]

Big firms seem to be particularly concerned about the antitrust powers of the authorities, rather than about the merger control. The most striking complaints come when antitrust procedures are initiated or brought to an end, while, during the evaluation of proposals of mergers, firms usually remain silent.[6] In France, when changes in the statute of the *Conseil de la concurrence* were discussed by the parliament, representatives of firms wanted to be heard, and some of them appeared to be «clearly in favour of a competition authority that could not work».[7] In other words, they wanted it to work for mergers (when they are interested that the authority carry out its work quickly) but they did not want it to work for antitrust investigations, because they were afraid that too much independence (lack of accountability, from their perspective) would not guarantee fair judgement.

Intense lobbying on the side of big firms was confirmed also by the staff of the DG Competition. This is another confirmation of how important competition issues are for the firms and how often they lobby when they see their interests at stake. According to the DG Competition staff, strong lobbying occurred in the European Parliament when Regulation 1/2003 was about to be approved, with respect to the abolishment of notifications and clearance decisions. These decisions were very useful to the firms, in that they allowed them to ask for prior approval from the Commission before starting certain operations. This also prevented the Commission from sanctioning such behaviours at a later stage. Industrial and service associations made serious efforts to convince the members of the parliament not to pass

[5] Interview with French deputy, 29 June 2010.

[6] Interview with member of the Italian competition agency, 19 July 2010, and with members of the French competition authority, 28 June 2010.

[7] Interview with members of the board of the French competition authority, 28 June 2010.

this change. Despite the fact that they did not succeed, this fact confirms that competition enforcement is always a salient issue for those that are more likely to be sanctioned on its basis (about the issue of lobbying at the EU level, see Dür and Mateo 2012).

One might note that competition is not necessarily something which firms must be afraid of. In many situations, the economic actors that take advantage from a decision issued by an authority are more numerous than those which receive a fine or a punishment. And most firms, not just consumers, profit from a well implemented competition law. The actors that have reason to be cautious are the very large firms, precisely because they have more chances to run into antitrust enforcement, given their size and their market power. The fact that in France and in Italy the interviewees did not describe an intense lobbying is exactly what I expected, considering the data available for the statistical analysis: neither country has a particularly high concentration of big firms compared to the total number of firms.[8] Further proof of this finding is given by the fact that in Greece, where the presence of big firms is even lower, the commissioners I interviewed claimed that, to their knowledge, most enterprises are strongly in favour of the NCA's independence, because they perceive it increases their business opportunities.

### 4.2.2 EU membership

The «EU membership» hypothesis, for which the statistical analysis has provided a solid confirmation, was proposed in this dissertation for the first time. Although several scholars have theorised and demonstrated (see Section 2.8) the effect of EU membership on policies adopted at the domestic level, none has hypothesised the reinforcing effect of EU membership in the adoption and execution of this policy. It has been shown that countries which have been part of the EU for a longer time have more independent NCAs. Obviously, a single test is not sufficient. Especially for this hypothesis,

[8] Indeed, France has a higher concentration than Italy, which may explain why the French interviewees talked more about lobbying than the Italian ones.

for which there was not much theoretical background, the interviews may help improve understanding of the causal mechanism behind it. In order to avoid a self-reinforcing output, I have investigated any kind of process that could link EU membership and independence of NCAs. In particular, I have kept in mind the dichotomy, found in the literature, between *top-down* influence by the Commission and *bottom-up* pressure among the member states.

With regard to the first, it has already been pointed out that EU Regulation 1/2003, which sets the rules for the relationships between the Commission and the member states in the field of competition, contains no mention of how independent the national authorities ought to be (see Section 3.5.1). Hence, the Commission does not have any formal instrument to even suggest the degree of autonomy that national agencies should enjoy. It remains to be seen whether the Commission and the DG Competition may exert informal pressure on the member states, and how.

The DG Competition was able to provide a clear answer regarding this point. According to the DG Competition staff, not only does the DG does not encourage member states to change or to adopt certain standards in this respect, but it also does not recommend any particular solution when member states are in the middle of a reform process or when they are establishing their competition agencies. Even in the pre-accession procedures of former communist countries, the Commission simply required that a competition authority *existed* in those countries and that it dealt with a sufficient number of cases each year.[9] The independence of these agencies was not taken into account and evaluated by the DG Competition.[10]

Today, the DG Competition exchanges information with various actors at the national level, and it receives complaints related to the relationship between authorities and political bodies. There are members of the national assemblies and of the European Parliament that denounce the governments' attempts to influence the agencies, firms dissatisfied with the agencies, members of the national authorities dissatisfied with the pressure of the

[9] They wanted to be sure that the competition authority was functioning.
[10] Interview with member of the DG Competition, 23 June 2010.

governments, and so forth. Nevertheless, the DG always refuses to publicly intervene or to suggest institutional changes.[11]

On the same point, the answers which I received from experts working in the member states were noticeably different. It was indeed argued that the emphasis the DG Competition puts on independence often sounds like an incentive to enhance the autonomy of the national agencies.[12] The national authorities can «sell» these statements to their political principals as if they were recommendations. As to the recent reform of the *Autorité* in France, members of the competition agency apparently asked for support from Brussels, when the reform process started in France. Thus, they obtained an *informal* endorsement from the DG Competition, which made it easier for the authority to receive more independence than before.[13] In sum, it is true that the Commission never openly recommends changes in the institutional rules or a particular level of independence for the NCAs. However, the interviews have suggested that, at a more informal level, some contacts take place, though it is not possible to «prove» them beyond any reasonable doubt.

It is still unclear why this strategy would work better for the member states which have been in the EU for a longer time, and there are two possible answers: either because their national political bodies are more responsive to the Commission's opinion (as has been hypothesised in the theoretical framework of the previous statistical analysis, see Section 3.5.1) or because they often ask for more support from the European Commission. Even though both the explanations are plausible, from what the interviewees have said on this point (not much, indeed) the first is preferable. In fact, the second hypothesis implies that obtaining more independence is an incremental process, whilst this is not always the case: most authorities have maintained the same degree of independence since they were established (the Italian authority is a good example of this), but others have received more formal independence years after their creation (like the Spanish or the French ones). Moreover, the people interviewed at the DG Competition

[11] Interview with member of the DG Competition, 23 June 2010.
[12] Interview with member of the Italian competition authority, 19 July 2010.
[13] Interview with member of the French Ministry of the Economy, 30 June 2010.

have confirmed that with some countries (namely the older members) the contacts are much more frequent and intense than with the others. This makes it more plausible that it is not a question of «quantity» of requests, but of «quality» of the response.

Also regarding the second possible account for the «EU membership effect» (i.e. a *bottom-up* effect), some confirmations and suggestions were made on how the process could be explained. All of them point to the role of the ECN, where the members of the national agencies regularly meet and exchange opinions on every question related to their activity. If we consider the countries as members of a «social group» (the EU), the existence of values that are shared and promoted in the group could explain increasing similarities among the members. The ECN encourages the states to increase the uniformity of their institutions, rules and procedures, in a typical «soft-law» framework. For members of NCAs, approaching the government with a claim that authorities of other countries have some prerogative or power that they do not have is apparently a successful strategy.[14] But again, we need not explain the similarities, but the differences between member states. Why would the older members receive more independence?

Answering this question from this point of view requires one to employ the concept of «peer pressure».[15] Although the tendency to adopt similar institutions, and in particular to set up competition agencies with more independence, exists for every country, this process could be more intense for those that perceive themselves as «peers» − the oldest EU members, in this case. A confirmation of this interpretation is offered by the French case. According to the interviews, the strongest arguments advanced by those who sought the *Autorité de la Concurrence* to be more independent was that other «peers» had a very independent authority, and so also France ought to have one.[16]

I acknowledge that, even after this cross-checking, the causal mecha-

[14] Interview with member of the DG Competition, 23 June 2010.

[15] Interview with member of the Italian competition authority, 19 July 2010, and with Italian expert, 21 July 2010.

[16] Interview with member of the French Ministry of the Economy, 30 June 2010.

nisms underlying this hypothesis remain partially unsatisfactory. First, because the interviews have shown that there is not only one possible mechanism, but that there are several. There could also be a combination of processes, and it is not very easy to distinguish between them, both in theory and in practice. Second, because the sources of information for this (or these) causal mechanism(s) are rather limited, mostly anonymous, and always bound to confidentiality. This is an obstacle that no increase in the number of sources can help overcome. Third, because the behavioural assumptions of these causal mechanisms are quite ambiguous. These explanations do not rely on the «classical» assumptions of self-interested behaviour or competition among states, but, on the contrary, on concepts like imitation, emulation, and peer-pressure, which are more used in psychology than in political science. That said, the effect of such processes at the state level has been studied by several scholars in recent years, especially in the field of regulation (Knill and Lehmkuhl 2002; Eising 2002; Meseguer 2005; Radaelli 2008; Schmidt 2008). Therefore, this hypothesis is certainly worth being analysed and tested in further research.

### 4.2.3 Political uncertainty

In the previous chapter, the political uncertainty hypothesis, operationalised with the polarisation indicator, has been found to be highly significant in all the models, in accordance with the theoretical prediction. However, it was difficult to confirm this finding in the interviews. In most of them, the respondents did not mention this factor. Only one Italian expert explicitly stated that if the political process is perceived as being less legitimate, promoting non-majoritarian institutions is easier.[17] Such a statement implies a wider definition of legitimacy: it does not only mean that the government is accepted as legitimate by the voters, but also that it is accepted by its political opponents. When there is higher polarisation, the second kind of legitimacy is lower, and the delegation of powers to an independent body can be a solution to enhance reciprocal confidence.

[17] Interview with Italian expert, 21 July 2010.

Still, it remains to be explained why the partakers in this decision-making process (and that should be aware of the motivations more than anyone else) are so unwitting about this mechanism. Two reasons can be advanced to explain this behaviour. First, the level of political uncertainty is something in which political actors live, and which affects them in a way that is almost entirely subliminal. It is a stable environmental factor that is not necessarily considered, at least not consciously. Second, there are good reasons for arguing that it is a factor that does not specifically affect the competition authorities, but also other bodies which exert functions delegated by the state. Therefore, people dealing with the specific sector of competition policy might not notice what is an overall national feature.

### 4.2.4 Credibility and regulatory quality

Also with regard to the fourth hypothesis, related to the need for credibility and operationalised with the regulatory quality indicator, I have not received much feedback from the interviewees. Most did not raise the subject when talking about the debate(s) held about the creation of the authorities and their independence. The creation of the *Autorità garante per la concorrenza e il mercato* (AGCM), however, was described in a way that could suit the credibility hypothesis.[18] According to this narrative, in 1990 there were doubts on whether Italy would have been able to fulfil the commitments that it had made by signing the Single European Act. Creating a very independent competition authority was a signal to the other member states: Italy wanted to enhance competition in its national economy, in order to join the European common currency. The fact that Italy has continued to experience difficulties in the following years could explain why the autonomy of its competition authority was never reduced or questioned. The general lack of acknowledgement of this factor amongst the interviewees might be due to the same reason mentioned in the previous section: as national credibility is an environmental factor, it is likely to be ignored by national actors simply because it affects every economic or political decision in a more or

[18] Interview with Italian expert, 21 July 2010.

less streamlined manner.

In other interviews it was claimed instead that the need for credibility would be better indicated by the state control over the economy.[19] Credibility would be needed both *a)* because when the authorities were created the states were moving from being «managers» to being «regulators» of the economic system, and *b)* because national governments continue to control (directly or indirectly) strategic firms in the national market. If governments were the only antitrust enforcers, their conflict of interests would make them not credible in front of the economic actors, international investors in particular. Granting independence to the competition authority from the government is a way to acquire this kind of credibility.

One example that was cited to support this claim was that of the US, where antitrust enforcement is carried out by the Antitrust Division of the Department of Justice, which is under the authority of the Secretary of Justice and of the President. According to some of the interviewees, this proves that the US government, not being involved in the property of national firms, needs less than European governments to be perceived as distinctly separated from the competition authority.[20]

Such a theory could not be tested among the cases that I had for this analysis, although I cannot exclude that European countries where the state ownership of big firms is greater do have a more independent competition authority. Indeed, operationalising this hypothesis in such a way would require me to build a consistent index of state control of the economy: it is probably feasible, but the variety and the complexity of the means by which governments control national firms suggests that such a test should be postponed to a later time. With regard to the scope of this qualitative analysis, the fact that Italian experts were more willing to talk about credibility problems indirectly confirms that this factor is more present in this country and might explain why the Italian authority is more independent than the French one.

[19] Interview with Italian expert, 21 July 2010, and interview with member of the Italian competition authority, 19 July 2010.

[20] See also interview with member of the DG Competition, 23 June 2010.

## 4.3 The nature of independence and its impact on the agencies' activity

Besides cross-checking the findings of the statistical analysis presented in the previous chapter, I have also used the interviews also for receiving information on how independence is perceived by the authorities (and by politicians). First, I asked the members of the NCAs, the members of the parliament and the experts how they described the authority in terms of independence, to see if their assessment matched the independence index that I have developed. Second, I inquired about whether they thought that independence was beneficial for their activity, and if there are other factors that influence the NCAs' performance. The latter issue relates to the second research question of this dissertation, i.e. whether formal independence affects the performance of NCAs in EU member states. This series of questions is certainly not exhaustive in this respect, and it must not be considered as a pre-test. A careful testing of this hypothesis will be carried out in the next chapter. Finally, the interviews were mainly meant to secure the possibility of having overlooked any important explanatory variable in the next empirical analysis.

In order to verify whether my independence index is sufficiently accurate, I have asked how the interviewee defined the authority of its country with regard to its independence. Italy and France, according to the index, are countries with two very independent authorities (the first and the third respectively), whilst Greece has an average value (see Figure 3.4.1). It goes without saying that, if an expert had expressed that he or she did not think either the Italian or the French competition authority were independent, a reconsideration in how their independence was assessed would be needed. However, there were no such answers. All interviewees in France and Italy acknowledged that the *Autorité de la concurrence* and the AGCM are very independent authorities. Particularly in France, where there had been changes in this respect the year before the interviews took place, they stressed very much that the independence of the *Autorité* had increased, and that now it was among the most independent NCAs in Europe. On the other hand,

the members of the Hellenic Competition Commission insisted less on this aspect: though they claimed the HCC is independent,[21] they also claimed to find it important that an NCA were not an «ivory tower», but that it were embedded in the social and political environment.

Beyond this question, another issue which was investigated regarded the real importance of independence, that is the ultimate aim of this research. Do the interviewees think that independence sensibly affects the way in which the agencies perform their functions? Or are there other factors that might have an impact? Moreover, is it possible to evaluate the performance of the authorities? And how can this performance be measured?

Regarding the first question, this analysis does not provide a clear answer. It was generally acknowledged that in principle independence is a positive attribute and, therefore, it certainly improves the agencies' performance, as well as their ability to enforce antitrust law. It was claimed that a certain amount of independence is necessary, given the semi-judiciary function that competition agencies perform:

> «[...] being [the competition authority] an agency that has to decide on the enjoyment of individual rights, it is inefficient in any case that this is dealt with by a body under political control, which can decide on the basis of political criteria. [...] It is the same reason for which some tasks are assigned to judges»[22]

However, this does not explain why some agencies are much more independent than others, while all performing the same functions. In France, it appears that the government and the parliament had decided to increase the independence of the *Autorité* because they believed that this would improve its ability to carry out its tasks.[23]

However, except for these rather vague statements, most answers pointed out that formal independence by itself could hardly produce good perfor-

[21] One interviewee said it is «very independent» (interview of 12 July 2011).

[22] Interview with Italian expert, 21 July 2010.

[23] Interview with members of the board of the French competition authority, 28 June 2010.

mance.[24] With regard to factors affecting the agencies' performance, an element that was often mentioned as crucial was the annual budget that the parliament sets for the authority. If the money available for the agency is insufficient, the agency will investigate fewer cases, it will discover fewer violations of competition law, and it will probably issue fewer infringement decisions. All members of the three authorities underlined the importance of the budget, in a way that signals how, in their view, it is a means to control the agency and to keep it accountable.[25]

The interviews reported no general agreement on whether this is a positive or a negative fact. In France, the negotiation on the budget was viewed as a positive sign of accountability of the authority towards the parliament and the government, in a dialogue which ensures that the authority is not unresponsive towards the elected bodies. In Italy, on the contrary, scepticism prevailed, and the members of the agency claimed that the constant reductions in the budget have progressively forced them to investigate and bring to fruition fewer cases. Whilst in France I was shown the virtuous aspects of this bargaining, in Italy the experts pointed out its potential arbitrariness. Greek members of the competition authority claimed they were quite satisfied about the budget they received for antitrust enforcement. First because, in spite of the harsh cuts faced by all public agencies because of the economic crisis, the competition authority saw almost no reduction in its budget. Second, because the HCC's source of funding does not depend on the annual budget law, but it is calculated as a share of each capital increase of joint-stock companies.

Finally, with regard to my intention to measure the authorities' performance, I was warned about how complicated it might be. A rough quantification of the number of investigations and decisions can give an idea of the amount of work an authority does, but it does not necessarily say *how* it enforces competition. Some investigations can take much more time than

[24] Interview with member of the Italian competition authority, 19 July 2010.

[25] Such statements make us think that theorists of congressional dominance (see Section 2.3) were probably right when they pointed to the budget as one of the tools employed by the legislature to ensure that the agencies not shirk. However, a formal test of the relationship between budget and performance will be carried out in the following chapter.

others; some sanctions can have far more relevant effects on the economy than others. Also, the authority can engage in a time-consuming inquiry that in the end does not yield a final decision. All these aspects will have to be taken into account when I will attempt to measure performance. At the same time, however, in order to compare the 27 national authorities, I will also have to neglect some of these distinctions and, to some extent, simplify.

## 4.4 Conclusions

Although their importance and significance must not be overestimated, these interviews helped shed light on some questions that the statistical analysis had left unanswered. From a general point of view, they have confirmed that NCAs in Europe do not exactly know towards which body they are accountable, and that neither the parliament nor the government really seem to control them as a «principal» would be expected to do. Regarding the hypotheses formulated and tested in the previous chapter, the interviews have confirmed the plausibility of the conclusions that I had drawn, though they cannot be considered to be conclusive. With respect to the last part of this dissertation, they have offered useful advice both about the meaning of independence and about its importance for the agencies' performance.

As for the role of big firms, the interviewees have acknowledged that enterprises with a relevant market power try to lobby in order to have a competition regulator that is as accountable to politicians as possible. In particular, this concern is greater for the powers concerning antitrust enforcement than for those regarding mergers: big firms fear more to be investigated and punished, given their size and their relevance in the market. For what concerns the EU membership hypothesis, the interviews have confirmed the plausibility of the explanation advanced in the previous chapter. Although the DG Competition does not explicitly request a certain degree of independence and does not officially intervene in the choices of the member states, it may happen that the authorities themselves, or the actors supporting them, would try to attain an informal endorsement from the DG and use it in the national arena. Concurrently, countries that have been members of

the EU for a longer time are more likely to have «internalised» the assumption that competition authorities ought to be independent. Nevertheless, it is still unclear if one or the other mechanism operates, or rather a combination of both. The process that links EU membership and NCAs independence certainly requires more in depth study.

Regarding the questions of the meaning and the impact of independence, I have gathered a number of suggestions that I will make use of in the further steps of this research. The importance of the budget in shaping the activity of the authorities could be considered even trivial, but it still deserves to be tested, especially in comparison with the importance of independence. It is noteworthy that the impact of formal independence on the agencies' performance has been considered as negligible by most interviewees. This makes it even more urgent to test whether such a relationship exists. It might seem strange that the members of NCAs themselves have not stressed the importance of formal independence, as we would expect, at least in order to justify the autonomy that they enjoy. However, it must be noticed that the contested importance of formal independence was mentioned together with the very high relevance of budget. It is easy to imagine which one NCAs would prefer to increase, if they could. In the next chapter, I will employ the information collected in the interviews, in order to follow up and strengthen the findings that have been observed so far.

# Chapter 5

# Measuring performance

In Chapter 3, I have shown which factors influence the institutional independence of competition authorities in the EU, whilst in Chapter 4 I have investigated more in depth the mechanisms behind these causal relationships with a series of interviews with experts. According to the empirical analysis carried out, the main motivations that push legislators to give independence to the authorities are the weight of big firms in the national economy (in combination with high political polarisation), the length of a country's EU membership, and the need for credibility. At first sight, none of these motivations seems to be strictly related to the activity that competition authorities perform: the influence of big firms pertains to forms of collusion with powerful economic interests; the length of EU membership has mostly to do with the long-run influence of the European legislation in the member states and with the «rebounding Europeanization» phenomenon (McGowan 2005; see Section 3.5.1); the confirmation found for the credibility hypothesis mainly signals that lawmakers want to send a «message» to the market. In sum, there does not seem to be any purely functionalist reason in the decision to confer independence on competition agencies.

This is puzzling particularly, given that independence is considered as an important prerequisite for these authorities. It is often claimed (see for instance OECD, 2002: 95) that independence *per se* would make IRAs more efficient, because an autonomous body would pursue its goals without

«playing a waiting game» to favour some firms and without being influenced by the preferences of politicians. In the interviews as well, many experts argued that independence helps the agencies be more efficient in carrying out their tasks. In the end, however, none have offered concrete facts or examples that support this claim, either in the academic literature or in more policy-oriented works. In this chapter, I aim at empirically testing this hypothesis, which − in the way in which it has been formulated thus far − resembles much more an assumption.

## 5.1 How to measure performance

When it comes to measuring a vague and ambivalent value such as «performance», it is very difficult to choose an indicator, or a set of indicators, that correctly represent this concept. What is an «effective» competition authority? The first possible answer to this question is that a competition authority is «effective» if it investigates many cases and adopts many decisions. *Quantity* is certainly an aspect to consider. On the other hand, it might also be worth considering the *content* of NCAs's decisions. What is their impact on the economy? What are the net benefits for consumers? The difficulty in defining performance was described well by the words of a member of the Italian competition authority:

> «An independent authority is certainly more willing to enforce and promote competition, but its efficacy depends [...] on its ability to adopt the correct decisions. [...] It is a sort of "art" [...], it is not a mechanical application of rules, there are many discretionary choices. It depends on how the authority is able to understand the problem, to analyse it and to take the correct decisions».[1]

In some cases, decisions that are apparently taken in order to restore fair competition conditions among the firms could, paradoxically, result in a disadvantage for the consumers. In an interview, an expert has addressed the example of Google,

[1] Interviews with members of the Italian competition authority, 19 July 2010.

> «[...] which is destroying the rather competitive market of web search and advertising, and concentrating much power in its hands. And on what basis? On the basis of legal distortions? No: Google does not enjoy any particular legal privilege, [...] it is simply more innovative; it has discovered a technology which the consumers appreciate very much, and it satisfies a demand [...]. Being "the best", it is creating a sort of *de facto* monopoly. But can you sue Google for abuse of dominant position? In theory you can. [...] Can you "destroy" that capacity, that service that Google offers to the market? A competition authority could do that. But in the end, would the consumer be better off?».

A corollary of this consideration was that competition authorities should be very severe in breaking cartels, but they should be very cautious when it comes to sanctioning abuses of dominant positions. The expert concluded that «competition is not a static situation, but the constant creation of monopolistic advantages yielded by innovation». In some cases, by sanctioning the leader of a market, competition authorities could be sanctioning the most innovative company.[2]

To conclude this brief digression on the difficulty of defining what is effective competition enforcement, we must mention the fact that, in some cases, different competition enforcers have adopted different rulings on similar issues. In this respect, the way in which the US Department of Justice and the European Commission have dealt with the case of the alleged abuse of dominant position by Microsoft is illuminating. In the US, Microsoft was obliged[3] only to disclose part of its application programming interfaces with other companies: neither limitations to the tying of its software with the Windows operating system were imposed, nor were fines charged. In a very similar case ruled by the European Commission and by the European Court of First Instance, a fine of 497 million Euro was imposed on Microsoft, and the company was forced to provide a version of its operating system that did not contain the pre-installed web browser Internet Explorer.[4]

[2] A similar argument is developed by Segal and Whinston (2007).

[3] US District Court for the District of Columbia, United States vs. Microsoft Corporation, Final Judgement, 12 November 2002.

[4] Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty.

Which antitrust enforcer has safeguarded competition in a better manner? Both of them have investigated a case and reached a conclusion. Yet, it is not easy to say which of them has produced the better impact on the consumers' welfare. This example and other cases that were mentioned during the interviews (some interviewees argued that in some cases, paradoxically, an authority might enhance the consumers' welfare even by *not acting*) suggest that, although performance is not just a matter of *quantity*, assessing the *quality* of antitrust enforcement in a comparative perspective is particularly problematic. From this point of view, the most advanced attempt to empirically assess the effectiveness of antitrust enforcement has been carried out by Dutz and Vagliasindi (2000). However, on the one hand the authors employ micro-level data which are not available for all the EU member states;[5] on the other hand, they also rely on assessments of legal practitioners and experts, which are not necessarily an accurate and comparable source of information.

When measuring an abstract concept with an empirical indicator, in an empirical analysis that embraces a relevant number of cases, some simplification is needed. If one drew coherent conclusions from what legal scholars and experts point out, every case dealt with by every authority should be carefully scrutinised to ascertain whether it improved the consumers' welfare, and to what extent. Moreover, one would also have to agree on what could be defined as an «improvement», which would open another Pandora's box. Moreover, as Carlton (2009: 89) claims, analysis of individual cases cannot substitute for quantitative analysis, and the two are hardly compatible. After some attempts to verify if such an operationalisation was feasible, I have concluded that it is not for a number of reasons. First, it would be too troublesome to reach a satisfying definition of what is «good performance» and what improves or damages the consumers' welfare. Second, even if that were possible, classifying all the cases for all the countries included in the empirical analysis on agencies' independence would require an amount of

[5] In particular, they used the World Bank enterprise-level survey on the business environment and enterprise performance (BEEPS). See: http://beeps.prognoz.com/beeps/Home.ashx

time that is not compatible with the time frame of a Ph.D thesis. Third, gaining in precision would imply anyway to lose in generality. Fourth, as the result would still be a very generic operationalisation of the concept of performance, I deem it would bring little benefit to the comprehension of the phenomenon, and to the conclusions of this research.

Hence, this research will focus on quantitative data that can be more easily compared, being conscious that they shed light only on one aspect of performance. The elements of the agencies' activity that I take into account to measure the efficacy of the authorities are the *number of investigations started* and *the number of (envisaged) decisions issued* by them. I have chosen to focus on these two indicators for a theoretical and a practical motivation. Theoretically, these indicators summarise the agencies' activities related to the enforcement of the articles 101 and 102 of the Treaty on the functioning of the European Union – i.e. of the articles which all the EU national competition authorities apply indiscriminately in every country, and on which they share their competence with the DG Competition. Therefore, these data are homogeneous and can be meaningfully compared. This leads to the practical motivation for employing them. Since any investigation initiated and any envisaged decision issued from 2004 on has to be communicated to the DG competition, we have a reliable and accessible source for these two kinds of acts.

## 5.2 Data on investigations and decisions

The statistics on investigations and envisaged decisions are available on the DG Competition website.[6] Unfortunately, they are not disaggregated by year. Thus, I have chosen to consider the period ranging from when the collection of these data started (2004, when Regulation 1/2003 came into force) to the end of 2010. The data are illustrated in Table 5.1 and in Figure 5.2.1.

As we can see, there are huge differences between the authorities, both

[6] http://ec.europa.eu/competition/ecn/statistics.html

| | Investigations started | Envisaged decisions | Decisions/ Investigations ratio |
|---|---|---|---|
| Austria | 27 | 6 | 0.22 |
| Belgium | 36 | 8 | 0.22 |
| Bulgaria | 12 | 4 | 0.33 |
| Cyprus | 3 | 0 | 0 |
| Czech Republic | 12 | 8 | 0.67 |
| Denmark | 62 | 33 | 0.53 |
| Estonia | 7 | 3 | 0.43 |
| Finland | 16 | 9 | 0.56 |
| France | 194 | 71 | 0.37 |
| Germany | 132 | 61 | 0.46 |
| Greece | 33 | 24 | 0.73 |
| Hungary | 81 | 20 | 0.25 |
| Ireland | 13 | 1 | 0.08 |
| Italy | 86 | 61 | 0.71 |
| Latvia | 10 | 3 | 0.3 |
| Lithuania | 13 | 7 | 0.54 |
| Luxembourg | 1 | 0 | 0 |
| Malta | 1 | 0 | 0 |
| Netherlands | 77 | 34 | 0.44 |
| Poland | 23 | 10 | 0.43 |
| Portugal | 35 | 12 | 0.34 |
| Romania | 21 | 3 | 0.14 |
| Slovak Republic | 9 | 9 | 1 |
| Slovenia | 26 | 13 | 0.5 |
| Spain | 81 | 38 | 0.47 |
| Sweden | 36 | 17 | 0.47 |
| UK | 54 | 11 | 0.20 |

Table 5.1: Number of investigations started and infringement decisions (2004-2010)

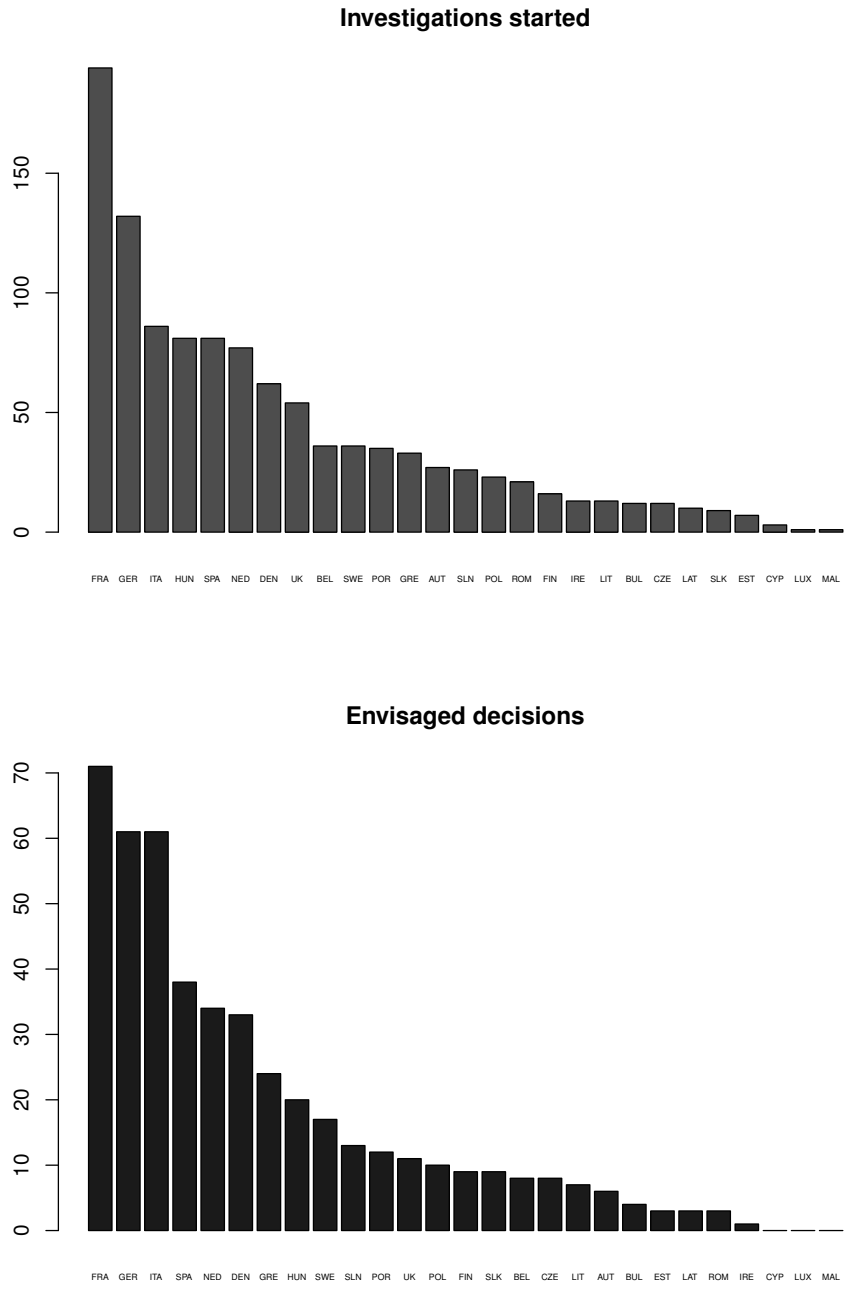


Figure 5.2.1: Investigations started and envisaged decisions per authority (2004-2010)

in the number of investigations started and in the amount of proceedings concluded with decisions. France and Germany are the countries whose competition authorities get the highest values in both the activities. The Italian agency has started fewer proceedings, but it has a higher rate of investigations that are concluded with decisions. A great part of the variation that we observe is undoubtedly due to the size of the countries' economies. In fact, the countries in the left part of the graph in Figure 5.2.1 are the largest economies of the continent. They have more firms, more economic activities, more consumers: therefore it is not surprising that their authorities deal with a higher number of cases. Nevertheless, some cases look quite strange at a first sight. The British authority, for instance, has initiated fewer investigations in the 2004-10 period than the Hungarian agency, despite the fact that the UK's economy was more than ten times as big as the Hungarian one.

It is worth remembering again that these data must be interpreted *cum grano salis*. One the one hand, a smaller number of investigations could simply signal a more competitive economy, in which fewer interventions by the competition authority are needed. Therefore, it will be necessary to control for this source of variation. On the other hand, the statistics on decisions do not include proceedings that are concluded with «commitments», i.e. when the firm(s) subject to an investigation present(s) binding commitments to an authority, which verifies that these are respected, and closes the proceeding without a formal sanction. Unfortunately, only some competition authorities issue statistics on the proceedings closed in this way, and it is difficult to have a clear picture of their overall impact. In this chapter, I will assume that the different kinds of conclusions in various investigations are equally distributed among the countries. A last obvious remark regards the fact that in this analysis investigations and decisions are simply counted, although everyone knows that they all take a different length of time, and a different amount of funds and personnel, to be concluded.

## 5.3 Hypotheses

The main purpose of this dissertation is to establish a connection between formal independence and performance of competition agencies. As explained in Chapter 1, independence is a «net loss» of control for the elected bodies, and consequently also for the voters. Hence, independence is justified in terms of democratic accountability only if it brings some tangible improvement in the performance of these IRAs. Various theoretical frameworks assume that independence improves the way in which the authorities operate, and from a more policy-oriented point of view, independence is often regarded as a positive characteristic for IRAs. However, no solid proof has ever been offered with regard to the relationship between independence and performance.

In this section, I will illustrate the hypotheses by which I aim to explain the authorities' performance. Obviously, formal independence is the main factor whose impact I will test. Additionally, I will also take into consideration two features of *de facto* independence, namely the budget and the average duration of governments in a country. The first because, beyond representing a natural limit to the agencies' action, budget is a means to hold the authority accountable; the second because, all else equal, there can be informal influence of the government on the agencies only when the two actors (executive and agency) play repeated games − a condition that is hardly met where governments do not last long.

### 5.3.1 Formal independence

Almost everyone seems to agree on the fact that independence is a good feature for regulatory agencies, and competition authorities are certainly not an exception. But in spite of this common agreement, there has been little theorising about the reasons for which independence would be good and about how it would improve the agencies' activity. A causal link is often implicitly established between expertise and the ability to analyse concrete cases, but no empirical tests have been carried out to test if a relationship

between the degree of autonomy and the actual performance exists.

The few attempts that can be found in the literature do not suugest a direct correlation between independence and performance. Majone's theory of credible commitment (Majone 1996) rather indicates that independence, yielded by credibility, contributes to the better functioning of the market, because the economic actors will be confident that the authority will strictly sanction any violation of competition. In other words, independence creates credibility, credibility creates trust, trust improves economic transactions. Autonomy from the political power would have an intrinsic effect on the expectations of the regulatees, but not necessarily on the performance of the regulator.

Another academic contribution that suggests a relation between independence and performance has been proposed by Bawn (1995, see Section 2.3.4), who argues that the optimal agency performance depends on the balance between technical and procedural uncertainty. In other words, provided they have a certain amount of technical expertise, agencies should be given as much discretion as possible, as long as this does not allow the authorities to deviate too much from the preferences of the lawmakers. If the «technical uncertainty» is the same for all the competition authorities in the EU,[7] we should observe a positive correlation between independence and performance.

In the interviews that I conducted in 2010, I asked the experts whether they thought such a relationship existed. The responses were mixed. Every interviewee stated that, in principle, independence is regarded as positive and that, therefore, it should improve the agencies' performance, and their ability to enforce antitrust law. However, no expert has given a clear description of this relationship. An Italian expert claimed that a certain amount of independence is necessary, given the semi-judicial functions that the competition agencies perform (see Section 4.3, p. 129).

This statement implies that a relationship between autonomy and performance exists, but the effect would be on the *quality* of the performance

[7] Since the policy that they enforce is the same, this is a reasonable assumption.

rather than on the *quantity*. And such an effect, as argued before, is almost impossible to analyse from a comparative perspective. A member of the French competition authority argued that, when the government and the parliament decided to increase the independence of the *Autorité*, they were mainly interested in improving its power to advise the parliament; competition enforcement was not so much part of the goal.[8]

In general, except for a few rather vague statements, in most of their responses the interviewees concluded that formal independence by itself can hardly produce a good performance. According to the practical experience of people who directly deal with competition regulation, we should observe no concrete effects of independence on the regulatory output in terms of number of cases investigated and sanctioned.

Nonetheless, I deem the relationship to be worth testing. As a matter of fact, formal independence consists of many characteristics that may have an impact on quantitative performance. With more formal independence, the members of the authority are less likely to be «punished» or «rewarded» for the decisions that they make, whether these decisions are opposed or favoured by the political principals; the members are also less likely to have had previous relationships with the firms they regulate; the authority is more likely not to be told on which cases it has (or has not) to focus, and so forth. I posit that a less autonomous body should show more self-restraint in a number of potential competition violations, when economic interests of important firms are concerned. I therefore hypothesise that:

HYPOTHESIS 1 («FORMAL INDEPENDENCE»)
*The higher the independence of a competition authority, the higher the number of cases that it will investigate and sanction*

### 5.3.2 Informal independence: the budget

Another factor apparently related to the way in which the authorities operate is the budget the parliaments set for them every year. The source of

[8] Interview with members of the board of the French competition authority, 28 June 2010.

the budget (whether the authorities are entirely dependent on government funding or if they can also count on fees levied from firms) is a feature of the index of formal independence described in Chapter 3, and whose impact will be tested with Hypothesis 1. Nevertheless, the influence of the agencies and of politicians on the budget is often considered as a component of informal (or *de facto*) independence (see Gilardi and Maggetti 2011; Maggetti 2007). Similarly, theorists of congressional dominance (see Section 2.3.1) convincingly argued that the budget is one of the instruments by which the legislature controls the agencies: by bargaining every year with the agency on the money that it will allocate for its activities, the government holds it accountable.

The budget has been spontaneously mentioned in various interviews, especially by members of the competition agencies. These were the words of a member of the Italian competition authority:

> «In the current period, especially because of the economic crisis, we have experienced a considerable decrease in our budget. Although the formal independence has remained the same, budget cuts represent a decrease in our *de facto* independence. [...] What is more, whilst the budget has been decreasing, our tasks have been constantly growing.»[9]

The substance of this claim is fairly simple: if the money available for the agency is insufficient, the agency will have to investigate fewer cases, it will probably discover fewer violations of competition law, and it will adopt fewer decisions than if it had adequate funding. With this formulation, this argument seems hard to reject: *ceteris paribus*, if the budget of an agency is reduced, the resources that the agency can «invest» in discovering and sanctioning violations of competition law are likely to diminish, and the total output should vary accordingly.

From the point of view both of informal independence and of the practical availability of resources, we can hypothesise that:

[9] Interview with member of the Italian competition authority, 19 July 2010.

HYPOTHESIS 2 («BUDGET»)
*The higher the budget of a competition authority, the higher the number of cases that it will investigate and sanction*

### 5.3.3 Informal independence: duration of governments

Another feature of *de facto* independence is the duration of governments. Executives can have some influence on the NCAs' activity by many means, both formally and informally. Depending on the legislation of each country, a government (or its parliamentary majority) may appoint the members of the agencies or dismiss them, it may set the main objectives of the authority's action, it may scrutinise its activity and, as illustrated in the previous subsection, set its annual budget. In principle, the average duration of governments should not affect these practises, because they are supposed to take place on a regular basis.

Nevertheless, an executive that remains in office for a longer time is more likely to establish a «dialogue» with the authority: it may allocate the money according to whether it deems that they agency spent it well or not (it might punish or reward the agency), or it may modify some legislation that affects the activity of the agency. More generally, the literature on bureaucracy (see Section 2.3) has emphasised a crucial concept: governments change, but bureaucracy remains. In normal conditions, bureaucratic offices retain much discretion in carrying out their functions, and the legislature can affect the final outcome only by using complex incentives (McCubbins et al. 1987; Shepsle 1992). This is especially true for IRAs, which enjoy more autonomy than normal bureaucracy.

In consequence of that, the more frequently parliamentary majorities and governments change, the less they can be preoccupied with influencing the agency and signalling their preferences to it. First, because it takes some time for the government to assess how the agency works and how it can be influenced. Second, because the authority itself will perceive itself as more autonomous if ministers change before they can even get to know their departments.

It may be noted that there is a contradiction between this hypothesis and the findings of Chapter 3 about the positive relationship between formal independence and government duration. In that chapter, I hypothesised that short-lived executives were afraid that future incumbents might overrule the decisions taken by them; therefore, the expectation was that longer executives would allot less independence to the competition authorities. As has been shown, the results demonstrate the opposite: short-lived executives tend to delegate less, because they most likely prefer to deal with competition issues without the intervention of an IRA. In this chapter, formal independence is just one of the explanatory variables, and government duration is a proxy for informal independence. If independence in general is positively correlated with performance, then government duration (as an indicator of informal independence) should be negatively correlated with performance. On the other hand, government duration (according to the results of Chapter 3) is positively correlated with formal independence, which is expected to be positively correlated with performance. This could be seen as a contradiction, but it must be considered that government duration only has a limited effect on formal independence. Hence, it is possible that such an indicator is negatively correlated with performance, although it has a positive relationship with formal independence.

Following the same assumption as Hypothesis 1, we can hypothesise that a competition authority that enjoys less informal independence (because of longer average duration of governments) is more likely to «step back» in situations in which the politicians oppose an intervention. In sum:

HYPOTHESIS 3 («GOVERNMENT DURATION»)
*The shorter the government duration in a country, the higher the number of cases that the competition authority will investigate and sanction*

## 5.4 Data and operationalisation

### 5.4.1 Dependent variable

In Section 5.2, we have seen that two indicators are available to measure agency performance: the number of investigations initiated and the number of decisions adopted. Are there reasons for preferring one over the other? The number of investigations started is a proxy for the capacity of an authority to discover potential violations of competition law: it signals to what extent the agency actively looks for infringements and responds to complaints and reports. On the other hand, the number of decisions indicates the ability of an authority to bring proceedings to an end, sanctioning the alleged violations.

Since neglecting one indicator in favour of the other would be very problematic to justify, I present a solution which includes both the variables, creating a unified indicator.[10] To do so, I have run a principal components analysis, retaining the scores of the first component, which captures 97% of the variance of the two variables. The frequency distribution of the two variables is very skewed, as shown in Figure 4.2.1. Thus, a logarithmic transformation of the original values has been performed.[11] The values of the principal component scores for the 27 competition authorities and their logarithmic transformation are shown in Figure 5.4.1.[12] As the frequency

[10] If two regressions are run with investigations and decisions (respectively) as dependent variables, the results are as follows. If the number of investigations is the dependent variable, the coefficients of the explanatory variables, the F and $R^2$ are the following: Formal independence 14.07*, Average government duration -10.32°, Budget -0.10, GDP 52.48***, Rule of law 15.41, Intercept 29.15°; F statistics 12.76***, Adjusted $R^2$ 0.69. If the number of decisions is the dependent variable, the coefficients of the explanatory variables, the F and $R^2$ are the following: Formal independence 4.31, Average government duration -2.19, Budget 0.36, GDP 20.89***, Rule of law 2.14, Intercept 8.70; F statistics 10.3***, Adjusted $R^2$ 0.64.

[11] The formula used for this transformation is the following:

$$P = \log\{p + [-\min(p)] + 1\}$$

where:
$P$ is the performance index used as dependent variable in this analysis;
$p$ is the principal component score of investigations and decisions for each authority.

[12] The principal component scores have been computed with the function `princomp` in R.

distribution of the logged variable is much more regular, it is more suitable for OLS and helps avoid heteroscedasticity problems.

### 5.4.2 Explanatory variables

The formal independence indicator is the independence index employed in the previous chapter. The method followed in building this index is explained in Section 3.4. The dependent variable of the previous statistical analysis becomes the main explanatory variable in this one. As regards the second hypothesis, the value of the budget used in this statistical analysis is the mean value, in millions of Euro, in the period 2004-2010. These data have been mainly drawn from the annual reports on the authorities' activity, available on their website. When this information was not available, members of the staff of the competition agencies were requested to provide it.[13] The indicator for Hypothesis 3 is the average duration of governments, but the conding is not the same as in the earlier analysis. In this case, the duration refers exactly to the period 2004-2010, and the average value is that of the governments whose office terminated during these years.

### 5.4.3 Control variables

Besides the three indicators illustrated in the previous subsection, two control variables will be used. In fact, the total number of investigations and

[13] The value of the British authority, the Office of Fair Trading (OFT), has been corrected. This has been necessary because the average budget of the Office of Fair Trading in the period 2004-2009 seems too high when compared with the others − almost four times as much as the Italian authority's budget (the second highest one), five times as much as the German Bundeskartellamt's. After asking members of the staff of the OFT, I have been told that the agency deals both with competition enforcement and consumer protection, and that only 25% of the personnel works on competition enforcement. Therefore, I have taken one fourth of the total budget as value for the OFT in this statistical analysis. A minor correction has been done also for the value of the Dutch competition authority, the *Nederlandse Mededingingsautoriteit*. In 2007, the agency become also responsible for the regulation of the transport and energy markets, and its budget was increased. In order to control for this «spurious» increase, the proportional difference between 2006 and 2007 has been subtracted from the last three years.

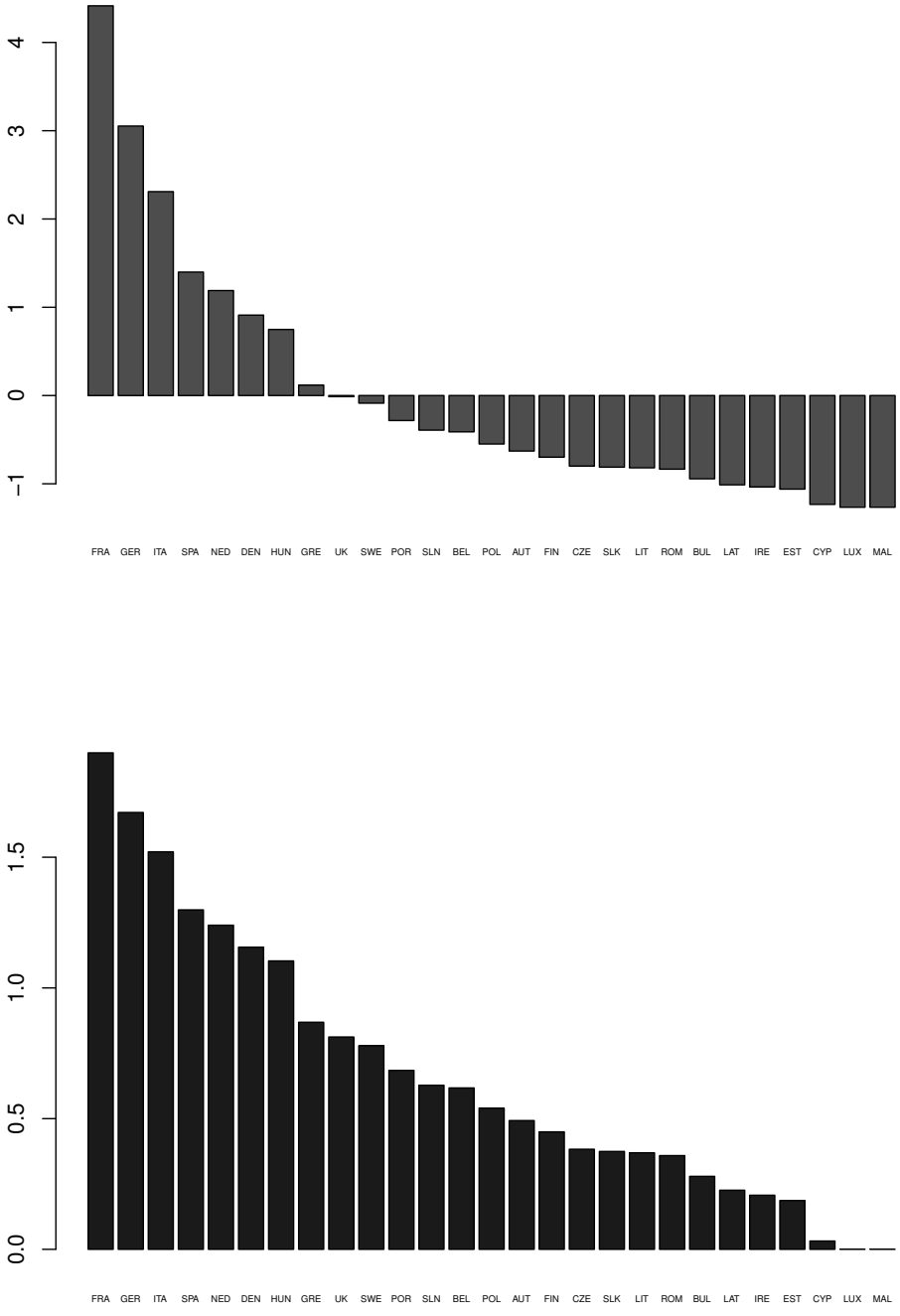


Figure 5.4.1: Principal component scores of investigations and infringement decisions (above) and their logarithmic transformation (below) (2004-2010)

| | Range | Mean | St. deviation |
|---|---|---|---|
| DEPENDENT VARIABLE | [0, 1.899] | 0.673 | 0.519 |
| FORMAL INDEPENDENCE | [-2.15,1.805] | 0 | 0.99 |
| BUDGET | [0.0165, 39.96] | 8.082 | 8.92 |
| AVG. GOV. DURATION | [0.886, 5] | 2.461 | 1.027 |
| GDP | [0.0076, 2.269] | 0.435 | 0.618 |
| RULE OF LAW | [0.122, 1.951] | 1.114 | 0.625 |

Table 5.2: Variables employed in the statistical analysis (descriptive statistics)

decisions shown in Table 5.2.1 (from which the dependent variable is derived) is very likely not to be caused only by the formal and actual independence of the agencies. As said in Section 5.2, some authorities discover and sanction more cases just because, to some extent, they operate within economies where more firms work. To capture this difference, which is not due to the main explanatory variables, and to control for it, I employ two indicators: the gross domestic product and the perceived rule of law of the country.

The gross domestic product value used in this statistical analysis is the mean value in the period 2004-2010, in thousands of billions of purchasing power standard at current prices (in 2010).[14] This value is a rough indicator of the size of an economy, and it is certainly useful in order to estimate how much potential workload an authority has, depending on the country in which it operates. The second control variable is a «rule of law» indicator. This proxy, like the regulatory quality indicator employed in the statistical analysis of Chapter 3, is provided by the World Bank,[15] and it is based on the perceptions that economic actors have about a country and the way in which it enforces rules. It contains evaluations on whether there are losses

[14] Eurostat data. The data have been converted from millions into thousands of billions in order to show coefficients of reasonable magnitude.

[15] See http://info.worldbank.org/governance/wgi/index.asp and Kaufmann et al. (2010).

and costs due to crime, if there is trust in the judiciary system, if the judicial process is responsive and quick enough, how adequate is the protection of private property, what is the effectiveness of the police for the security of people and goods, etc.[16] Beside the gross size of the economy, this indicator should allow us to control more accurately for the number of firms and companies present in a country. Indeed, the more investors «trust» a country, the higher is the economic activity. Despite what one might expect, this indicator is negatively correlated with the formal independence one. This demonstrates that the two variables do not belong to the same dimension.

## 5.5 Statistical analysis

The multiple regression models of the statistical analysis are shown in Table 5.3. In Model 1, the three explanatory variables and the two control variables have been included in the regression. As can be observed in the table, among the explanatory variables, only FORMAL INDEPENDENCE has a significant effect on the dependent variable. In accordance with Hypothesis 1, the variable has a positive effect on competition agencies' performance. AVERAGE GOVERNMENT DURATION has a negative effect on the dependent variable, but its standard error is larger than that of FORMAL INDEPENDENCE. Contrarily to what is claimed in Hypothesis 2, the BUDGET of the authorities does not seem to affect the number of investigations and decisions. Both the control variables are positively related to the dependent variable, as hypothesised, but only GDP's coefficient is significant. The value of the adjusted R-squared shows that two thirds of the variance is explained by this model. As a result of the removal of the budget indicator, Model 2 turns out to be better specified than Model 1, as the higher F value proves. Moreover, AVERAGE GOVERNMENT DURATION's coefficient becomes statistically significant. Overall, the variance explained remains almost unchanged. In Model 3, also the RULE OF LAW indicator is removed.

[16] A more detailed documentation can be found at the web address http://info.worldbank.org/governance/wgi/pdf/rl.pdf.

| | *Model 1* | *Model 2* | *Model 3* |
|---|---|---|---|
| FORMAL INDEPENDENCE | 0.129° | 0.161* | 0.134* |
| | (0.067) | (0.063) | (0.062) |
| BUDGET | 0.012 | | |
| | (0.009) | | |
| AVERAGE GOVERNMENT DURATION (2004-2010) | -0.104 | -0.134* | -0.104° |
| | (0.061) | (0.057) | (0.055) |
| GDP | 0.493*** | 0.585*** | 0.621*** |
| | (0.121) | (0.098) | (0.098) |
| RULE OF LAW | 0.116 | 0.161 | |
| | (0.108) | (0.104) | |
| *Intercept* | 0.512** | 0.597** | 0.681*** |
| | (0.179) | (0.169) | (0.165) |
| *Adjusted* $R^2$ | 0.68 | 0.67 | 0.65 |
| *F* | 12.18*** | 14.42*** | 17.35*** |

Dependent variable: investigations initiated and decisions in the period 2004-2010 (principal component scores).
Method: OLS regression. N=27.
Estimators' significance: <0.001 *** <0.01 ** <0.05 * <0.1 °

Table 5.3: Multiple regression models

As regards possible violations of linear regression assumptions, no multicollinearity problems arise in this statistical analysis.[17] Also heteroscedasticity does not appear as a severe issue: the absolute values of the residuals are not correlated with the fitted values, and the studentised Breusch-Pagan test confirms that the error term has an almost constant variance.[18] With respect to the presence of outliers and influential observations, neither Residuals vs. Leverage plots nor the Bonferroni t-test suggest particularly problematic cases in any of the models. Nonetheless, specific tests have been carried out on the impact of four cases: Germany, Netherlands, UK and Luxembourg. The first two have a considerably high hat value,[19] the latter have a Cook's distance higher than $4/N$ in Models 1 and 2 (UK also in Model 3).[20] Running different regressions without these observations, however, does not yield sensibly different results. Therefore, the models appear robust and the estimation of the coefficients can be considered solid and can be confidently interpreted.[21]

## 5.6 Discussion of results

The statistical analysis provides a confirmation for two out of the three hypotheses advanced in Section 5.3. Formal independence appears to positively influence the performance of the authorities. This means that independence does not only yield a «reputation» effect, but it also brings an improvement in the objective performances of the competition agencies. The

[17] No variable has a variance inflation factor higher than 2.2 in Model 1, higher than 1.22 in Model 2 and higher than 1.06 in Model 3. VIF tests have been performed with the package `car` (Fox 2009) in R.

[18] The hypothesis that the models suffer from heteroscedasticity are statistically significant at 0.72, 0.59 and 0.98 respectively (Breusch-Pagan test performed with the command `bptest` in the package `lmtest` in R (Zeileis and Hothorn 2002).

[19] Germany's hat-value is around 0.48 in all models, higher than twice the mean. Netherlands has a very high hat-value in the first regression (0.82) and a normal value in the second one − this is due to the fact that the value of the dependent variable for the Dutch authority is particularly abnormal compared to its budget (see Section 5.4.2, note 13).

[20] Which, according to Bollen and Jackman (1990), indicates the presence of potential outliers.

[21] In particular, the main explanatory variable (FORMAL INDEPENDENCE) remains significant in all the regressions run without the potential outliers.

argument − always made as an assumption until now − that an independent antitrust authority is more willing to prosecute competition violations is empirically verified. Figure 5.6.1 provides a clear representation of this relationship.

From the analysis of Chapter 3, we have drawn the conclusion that countries tend to give independence to their competition authorities depending, among other things, on the *need for credibility*: countries that do not experience high polarisation and that already have a good reputation in encouraging and promoting private investments end up establishing less independent agencies. Such a tendency is apparently due to the perception that *institutional* independence serves a symbolic purpose. However, the statistical analysis carried out here suggests that, while this may indeed be true, formal independence plays an additional role, and it could have been underestimated to a great extent. The analysis also suggests that parliaments and governments should regard it as a measure by which the loss of democratic control can be compensated by significant improvements in policy output.

As concerns the budget hypothesis, its rejection is somewhat surprising, because various experts and members of the authorities had described it as the main constraint on their activity. Nevertheless, Model 1 shows that the variable is very far from having a significant effect on the dependent variable. Why is it so? Figure 5.6.1 helps us understand how the two variables are related. Besides the remarkable case of the Netherlands, whose competition agency has an unusually high budget, all the other countries are «clustered», with no important differences in the budget and vast variation in the level of investigations and decisions. Countries with a similar budget can differ in a relevant way with regard to performance, and countries with very different levels of funding can deal with a very similar number of cases. Obviously, the fact that no significant relationship is found with these data does not imply that budget does not affect the agencies' activity. The budget of the authorities covers several tasks that are not captured by the dependent variable: merger control, regulatory activities shared with other IRAs, *ad hoc* tasks. The agencies also employ a part of their budget in these activities, and the amount of money that they spend beyond investigations

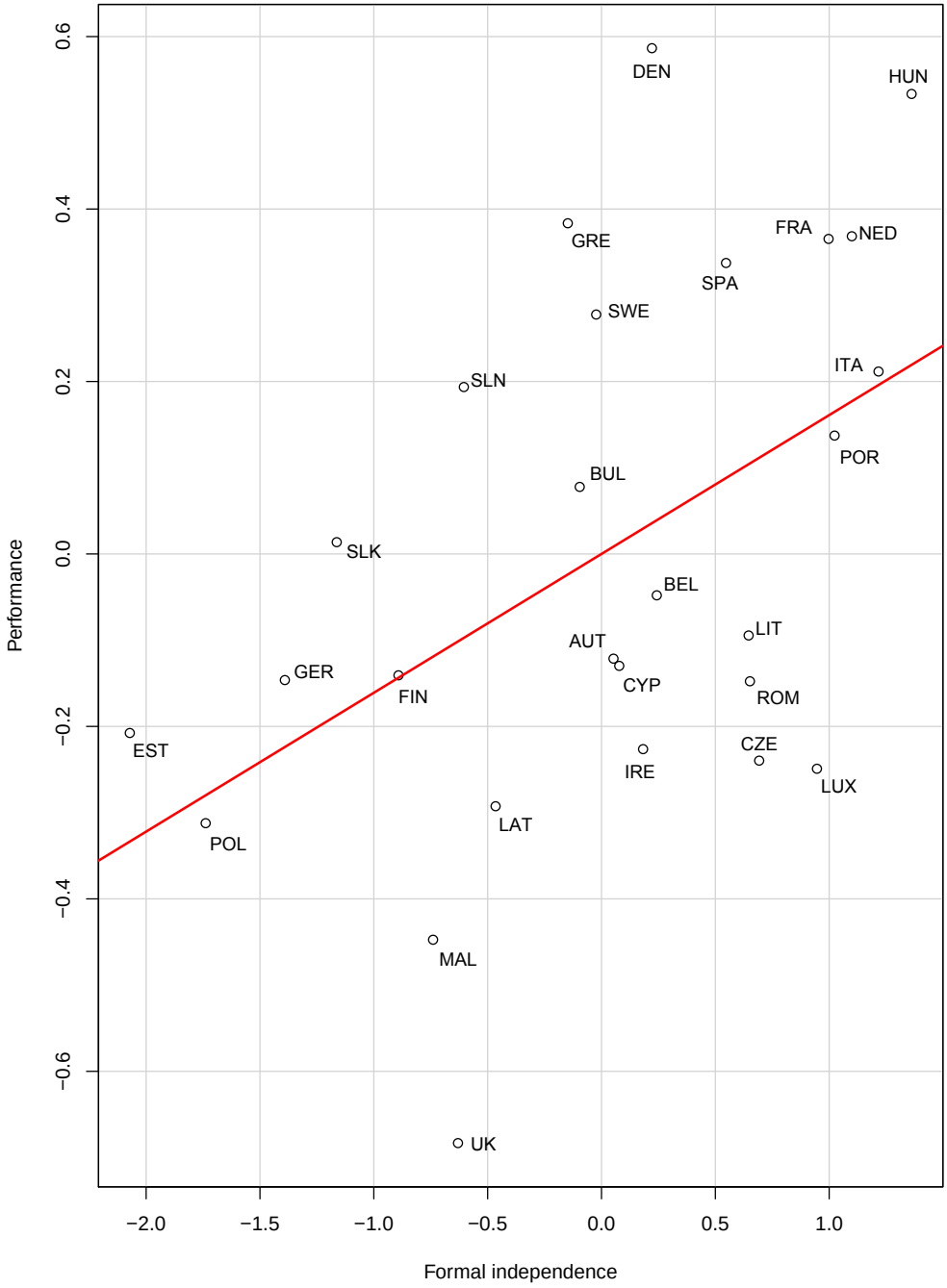


Figure 5.6.1: Partial regression plot (FORMAL INDEPENDENCE vs. PERFORMANCE, *Model 2*)

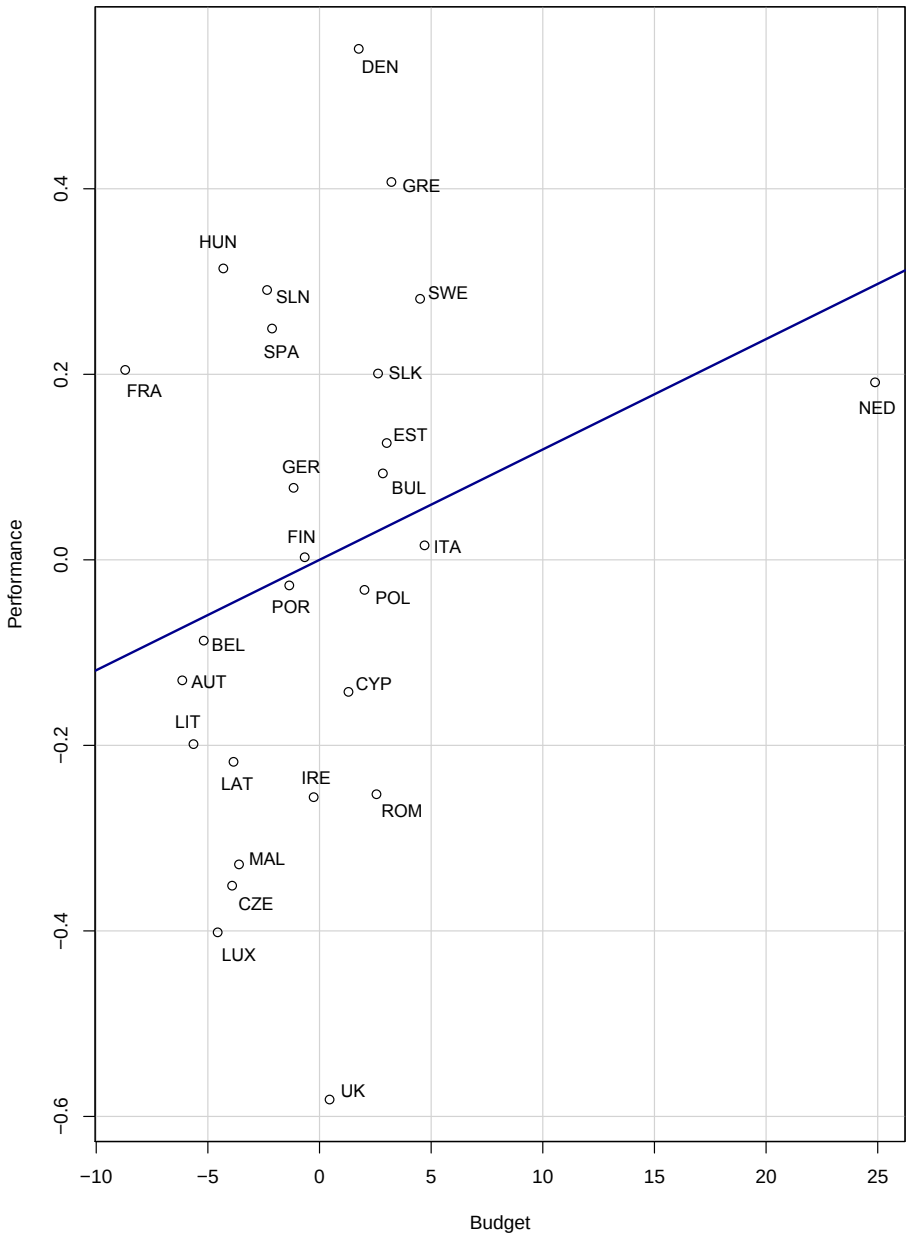


Figure 5.6.2: Partial regression plot (BUDGET vs. PERFORMANCE, *Model 1*)

on cartels and other antitrust infringements may not be the same for all of them.

The other indicator for *de facto* independence, the average duration of governments, is instead positively correlated with the number of investigations and decisions. All else equal, competition agencies operating in countries where governments last less long tend to deal with more cases. According to the hypothesis, this is the result of two concurrent processes: on the one hand, shorter executives are less likely to interfere with the activity of the authorities, as they have less time for signalling their preferences to the authority and engaging in a sort of «dialogue» with them; on the other, the authorities themselves tend to act in a more autonomous way if they are more stable than governments.

With regard to the control variables, GDP is positively related to the number of proceedings dealt with by the agencies, as expected, and its coefficient has a strong statistical significance. This is not the case for the rule of law indicator.

In order to find out what is the «net impact» of formal independence, I have run 1000 bootstrapped simulations for two quantities of interest of this explanatory variable: in the first set of simulations, the variable was set to its first decile; in the second set, to its ninth decile.[22] The average increase in performance for a shift from the first to the ninth decile of formal independence is 0.38, which equals about 20% of its total variation. This means that politicians do have an instrument they can use to significantly enhance the authorities' performance. All the other variables in the model represent conditions or occurences over which politicians have little power and which, in any case, they cannot regard as means to boosting the agencies' performance: GDP, economic actors' perceptions of the regulatory quality of a country, and even the duration of governments, all these variables are ultimately environmental characteristics, which do not depend on regulatory choices. The only variable over which the national legislators can have

[22] The simulations have been run using the package `Zelig` (Imai et al. 2009) in R. For a discussion of the logic and the implications of stochastic simulation, see King (1997: 141 ss.).

a direct impact is formal independence: through that, they can noticeably enhance the authorities' performance.

## 5.7 Conclusions

The analysis presented in this chapter confirms the hypothesis that formal independence positively affects agency performance, at least in terms of regulatory output. This result was not easily predictable. As pointed out previously, most literature on independence of regulatory agencies is strangely silent when concerning the practical consequences of formal autonomy. Supranational organisations like the OECD, as well as the European Union, often recommend that independence to IRAs be granted, but they do so in rather vague and abstract terms, making it very hard to ascertain whether such advice is given with the objective of improving IRAs' performance, and to what extent. In the end, no formal requirement of independence is imposed on the member states in the field of competition enforcement, and this uncertainty reflects on the significant differences observed among the EU countries.

If independence *matters*, then the EU should be more explicit in recommending it, and national governments should commit themselves to confer more autonomy on their agencies. However, this will happen only if executives and national lawmakers are genuinely convinced that having a strong and credible competition authority is in their own interest. Unfortunately, the analysis in Chapter 3 leaves us quite pessimistic in this regard, as it showed that governments have mixed incentives, and that their institutional decisions regarding antitrust agencies are not based on functional requirements, but rather on a blend of external constraints and attempts to meet the needs of big firms.

This analysis also demonstrates that there is no «net loss» for lawmakers and voters from the point of view of democratic accountability: the more these agencies are set free from the constraints of public bodies − i.e. the less they are accountable towards parliaments and governments − the more actively they perform their tasks. If the loss of control is compensated by a

gain in terms of policy output, then delegation in this field can be considered a successful strategy, and it should be pursued with greater confidence.

Furthermore, it is interesting to notice that the duration of executives has, not surprisingly, an opposed correlation with formal independence and with performance. In Chapter 3, we saw that shorter-lasting governments tend to give less institutional autonomy to competition agencies because of their short-run perspective, but also because they perceive that government instability already provides some sort of *informal* independence to these authorities. In this chapter, this finding has been reinforced by the effect found of average executives duration on performance: competition agencies that operate with higher government instability are less tied to the incumbent, and more likely to investigate and sanction violations of antitrust law. All these findings make governments look more like an obstacle than as an aid with respect to competition enforcement: they give independence only if they are somehow obliged by the insufficient credibility of their country. If there is high polarisation, they prefer to collude with big firms. They enhance the authorities' performance only, unintendedly, when they fail to exert their influence upon them.

For legislators interested in improving their competition authority's ability to perform its tasks, the findings shown in this chapter should be worth examining. They suggest that these agencies do not work just as «boards of experts» that employ their specialisation, nor are they like scarecrows, which just need to be there in order to have an impact on the economy. The performance of competition agencies depends, amongst other factors, on how distant they are from the political power, both formally and in practice, as well as on how free they are to select their targets without being influenced by lawmakers.

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# Chapter 6

# Conclusions

This chapter offers an overview of the main contributions of this dissertation and of its implications for future research. In the first section, I will summarise the work carried out in this thesis. I will recall how the subject and the research questions were selected, and how the literature has been analysed in order to develop and test the hypotheses. I will then summarise the main findings of the empirical analyses that have been conducted. In the second section, I will examine the implications of this work for past and future research, both from a theoretical and from an empirical point of view. Finally, I will discuss what are the possible developments of this work, considering what could be done to improve and refine the findings of this dissertation, and how these findings could be tested in other research areas or with different data.

## 6.1 Main arguments and findings

The idea for this dissertation stemmed from the literature on the establishment of Independent Regulatory Agencies. From the very beginning, this literature has highlighted the novelty represented by the establishment of bodies which seemed to place themselves somewhat in between the three traditional powers of the state. They were born (both in the US and in Europe) as administrative bodies, empowered to implement particular pieces

of legislation. However, in many cases their functions entail the *creation* of law (within the principles established by the legislature) and the power to punish those who do not comply with the law they implement. In the US they have existed since the end of the Nineteenth century. In Europe they have spread only in the two last decades of the Twentieth century. In the US, the study of «agencies» has been carried out within the broader literature on bureaucratic control. In Europe, instead, a specific branch of political science literature on IRAs has developed in the 1990s, and it has focused more distinctly on the reasons for the diffusion of such agencies.

The decision to focus on competition agencies was made because they are among the most important IRAs (as they regulate the whole economy), though no relevant study has dealt with them so far. In particular, competition authorities guarantee fair access to the market for all economic actors, and ensure that no one abuses dominant positions. The rationale behind antitrust enforcement is that cartels and other distortions of the market not only put the economy, but also democracy itself at risk.

If competition authorities are in and of themselves a stimulating object of study, they become primarily interesting if studied in relationship to the European Union, i.e. with the creation of the single market and with the evolution of antitrust legislation and antitrust powers of the Commission. In fact, in the field of competition there is now a unified EU law, applicable in every member state. Competition enforcement is carried out by the Commission in coordination with national competition authorities, which act as subordinates of the EC: they must communicate every investigation they initiate, and every decision they wish to take on a case. Moreover, the Commission has the power to take up cases whether or not NCAs are already investigating them.

The puzzle that led me to formulate the first research question of this dissertation derived from two (apparent) contradictions we can observe among NCAs. The first was that, in this field, there had been an extensive delegation of powers to the EU, especially as to the definition of the policy enforced by national authorities, and, at the same time, the states had remained very free to determine the degree of independence of these bodies. The second

contradiction lays in the fact that very different bodies perform the same functions, as if independence had (almost) nothing to do with the tasks assigned to NCAs.

The second research question stemmed from a more empirical and policy-oriented interest. This study has sought to test, at least in a general fashion, whether independence affects agency performance. The reason for this test was that only the presence of such a relationship would justify taking certain policies away from the political arena. The fact that the parliament and the government cannot discuss or question the activity of a particular administrative body (like NCAs) means that, on this issue, the voters are also prevented from evaluating and, ultimately, deciding. The most important consequence of the establishment of IRAs − a consequence that is often underestimated or neglected − is that the range of decisions that can be influenced through democratic procedures is reduced. This reduction, I have argued, is justified only if it improves the general welfare. Therefore, it becomes crucial to assess whether more independence results in more active competition enforcement.

In the third chapter, all the contributions that could help answer the first research question better have been reviewed, whilst the works concerning the second research question, being very few, have been dealt with in Chapter 5. The review began with a branch of economics literature (the «economic theory of regulation») that represents the first serious attempt to theorise the establishment of regulatory agencies, though it does not explicitly try to explain their autonomy. Then I reviewed the political science literature on delegation and control by the US Congress − often labelled as «congressional dominance» literature: the work of scholars like Fiorina, McCubbins, Noll, Weingast (among the others), who studied the way in which the Congress controls bureaucracy (and agencies in particular). After that, my attention turned to two other theories of delegation devised by American scholars reacting to the theory of Congressional dominance. The first is the contribution given by Moe in some of his articles, where he claims that institutions are set up in order to allocate power for the future. In this framework, the creation of independent agencies can serve the purpose of

making it more difficult for future incumbents to change particular policies. The other work that has been examined is that of Epstein and O'Halloran, who (studying delegation in the US) established that there is more delegation when the Congress and the Presidency share the same preferences.

The three other approaches reviewed in that chapter were the theory of «credible commitment», the veto players theory and the Europeanisation theory. The theory of credible commitment was developed by Majone (building upon the work of scholars like Kydland and Prescott, and Rogoff), and it states that delegating some tasks to IRAs is, for a country, a means to gain credibility in a particular policy domain. The veto players theory, developed by George Tsebelis, links policy choices to the number of veto players present in a political system. The prediction of this theory is that the more veto players have to agree on a change of the status quo, the more the policy output will be stable. Finally, I have reviewed the literature on Europeanisation, according to which the participation of a country to the European Union can trigger processes of domestic change influenced by the policies formulated at the EU level.

Although the theories taken into account differ widely in the way they account for delegation to IRAs, they are all compatible with the assumption of bounded rationality. They all assume that actors (countries in this case) decide on the basis of a cost-benefit assessment. Of course, this assessment can be inaccurate, because the information available is not enough to take the decision and because it is impossible to foresee all the potential consequences of a particular choice. All the theories maintain that the choice of delegating depends on both the preferences of the actors and environmental constraints, though some stress more one over the other.

In the theoretical framework tested in Chapter 3, I have kept this distinction, identifying some common preferences of the countries and analysing how the presence of different exogenous factors affect the final outcome. In this respect, it must not come as a surprise to the reader that, given all the environmental constraints, the actors are subject to contrasting incentives: some push to give more independence to the NCA, others do the contrary.

From the theories reviewed in Chapter 2, six hypotheses[1] were derived and tested with several OLS regression models. Some contributions could not be translated into testable hypotheses with this particular population. This has been the case with some theoretical frameworks developed by US scholars, that could not be applied to European countries.

In the first statistical analysis, the operationalisation of the dependent variable was the most critical step. Several ways to calculate indices of independence were available, but none of them completely satisfactory. Therefore, after having collected information on all the features concerning formal independence of NCAs with a survey, I employed a standard method of latent trait analysis to derive the value of formal independence for each authority.

The results of the analysis in Chapter 3 showed that the presence of big firms results in negative effects on the independence of NCAs, in correlation with political polarisation: the higher the polarisation, the greater the effect of big firms. Also the length of EU membership proved to be an important determinant of NCAs independence. Moreover, the countries' credibility in promoting private investments is positively correlated with formal independence. Also an (unexpected) positive correlation between average government duration and formal independence was found.

The main purpose of the qualitative analysis carried out in Chapter 4 was to cross-check the findings of the first statistical analysis and to get feedback and suggestions on the testing of the second research question. This has been achieved by conducting several interviews with members of the DG Competition and with members of NCAs, experts and politicians in France, Belgium (DG Competition, Brussels), Italy and Greece.[2] The interviews proved useful in confirming the plausibility of the causal mechanisms hypothesised in the theoretical framework. In some cases, I obtained answers that corroborated the assumptions of the hypotheses. In other cases, the interviews made less notable contributions. However, no interview find-

[1] In fact the hypotheses are eight, because for Hypotheses 1 and 5 I have formulated two alternatives.

[2] In Greece I have interviewed only two members of the competition authority.

ings plainly disconfirmed the theoretical framework. As regards the suggestions on the testing of the second research question, the main one was that of including the budget among the factors that explain the performance of NCAs.

In Chapter 5, I conducted a statistical test of the relationship between formal independence and performance. Besides the main explanatory variable (the independence index developed in this work), two features of informal independence of NCAs − namely, budget and government duration − and two control variables − GDP and rule of law − were included. The theoretical framework for this analysis is less elaborated upon, and the findings are not necessarily definitive. This is for two reasons. On the one hand, for what concerns this research question, there has been almost no previous theorising. On the other hand, the dependent variable in this analysis was more complicated to measure. For simplicity's sake, I focused on the number of investigations and decisions, but it is evident that these data measure only a part of what agency performance is. In particular, this approach forced me to neglect both the content of the decisions and their effect on the economy. It must be said, however, that measuring whether a certain decision renders the economy more competitive (and to what extent) is a complex exercise. In as much, the results of this analysis are preliminary, but certainly useful and worth exploring more in depth.

## 6.2 Main contributions

This dissertation contributes both theoretically and empirically to the research on IRAs and competition policy. Aiming at simplifying this distinction, one may say that the first research question has a mainly theoretical value, whilst the second one is particularly important for its empirical contribution. Speaking more in general, this work tries to establish a dialogue between theory and practice. Both these aspects of the two research questions are crucial. Understanding the reasons for which NCAs are provided with more or less independence helps better define the theory of delegation, and at the same time it helps clarify what is true and what is not in

the public discourse about these authorities. Finding out whether independence affects agency performance is important in order to assess whether these bodies make our societies better off or not.

### 6.2.1 Theoretical contributions

The most important theoretical contributions can be found in the third chapter of this thesis. In particular, amongst the hypotheses that have been confirmed, there are two which had never been formulated before: the «big firms» and the «EU membership». Although both of them are derived from previous theories and approaches, the way in which they are framed in the present work is original.

As for the «big firms» hypothesis, it is an attempt at translating capture theory in a field where there is no «traditional» capture – because the firms are many, and there is no day-to-day relationship between regulators and regulatees. That said, what was borrowed from the literature on capture theory is nothing but the concept of capture itself. In developing the hypotheses, attention was paid particularly to clarifying who could be captured and by whom, as well as for which reasons. The literature is ambiguous about whether «special relationships» are established by firms with politicians or with regulators. «Traditional» capture theorists (Stigler 1971, Becker 1983, Peltzman et al. 1989) do not analytically distinguish between politicians and regulators (or «bureaucrats»), assuming either that the latter are agent of the former (and so that they implement policies according to the preferences of the principals)[3] or that they can both be captured by firms, with similar means and results.[4] Moreover, these authors do not put

[3] See for instance Peltzman et al. (1989: 6): «For clarity and simplicity, Stigler ignores both the fact that regulators are usually agents of an executive or legislature rather than agents of voters and the many problems of stability and existence of equilibrium political modeling. He assumes that regulators do the bidding of a representative politician who has the ultimate power to set prices, the number of firms, and so on».

[4] See Becker (1983: 396): «Politicians and bureaucrats are assumed to carry out the political allocations resulting from the competition among pressure groups. Just as managers of firms are hired to further the interests of owners, so too are politicians and bureaucrats assumed to be hired to further the collective interests of pressure groups, who fire or repudiate them by elections and impeachment when they deviate excessively from these interests».

capture in relationship with independence. Other authors (Maggetti 2007; Gilardi and Maggetti 2011), instead, explicitly model capture as a «lack of independence» from the regulatees, opposed to independence from politicians.

My approach has been to first look at the policy. As has been stressed several times throughout this work, IRAs differ vastly one another, and it makes little sense to test theories that do not match the empirical conditions. In the case of NCAs, once acknowledged that regulators could hardly be captured through offers of «revolving doors», I tried to establish a link between the two approaches above. I related capture to independence, but without treating politicians and regulatees as if they were *ex ante* independent from each other. As the decisions on independence are made by politicians, the theoretical focus was on their preferences and incentives, and on those of the big firms. As the purpose of this work was to analyse a legislative choice, it was assumed that the preferences of the regulators could not affect this choice.

In the model, the preferences of big firms and politicians are held stable. What changes is the relative strength of each: big firms are stronger when more numerous; politicians are stronger when less polarised. The analysis of the interaction between the «strength of the big firms» and the «strength of the politicians» proved to be particularly insightful. This model, in its simplicity, provides a good understanding of the reasons for formal independence of NCAs. In a field which has first seen the predominance of economics-based theories, and then the rise of politics-centred ones, mine is an attempt at taking both into consideration. Especially in economic regulation, both politics and economics matter, and neither can be neglected.

The second original hypothesis presented in this work, which links formal independence of NCAs to the length of EU membership, is also innovative and promising for future research. This is so, in so far as that none of the scholars studying Europeanisation have hypothesised the length of EU membership affecting the extent to which a policy is implemented at the domestic level. The stress has been put on different local conditions and «traditions». EU membership was considered as a constant among the mem-

ber states. In the case of the present work, instead, it was hypothesised that there are different «degrees» of EU membership, and that they influence the position a country has on a specific issue (the formal independence of its competition authority in this case) at a specific point in time.

For the two original hypotheses that were already mentioned, further verifications are certainly welcome. They can be applied in the explanations of similar phenomena and can be confirmed, refined or improved. In addition to this original contribution, my dissertation also tested other theories that had been previously formulated and verified. In particular, the confirmation of the «credible commitment» hypothesis demonstrates that this explanatory framework is solid and appropriate when interpreting the delegation of powers to IRAs. In the test of this hypothesis there has also been an original contribution, as credibility has been operationalised as related to competition policy for each country, and not as a sector-specific variable. The results shown in Chapter 3 should encourage other scholars to try similar operationalisations, which are more rigorous and closer to the rationale of the theory they want to test.[5]

Two theories that were tested found no confirmation in this work: veto players theory and legislative/executive alignment. As regards the first, this test surely does not challenge the theory's general validity. It is plausible that the number of veto players does not affect this particular decision, or that its impact is so thin that it is not detected as being significant. We must bear in mind that in principle the number of veto players is supposed to affect every decision taken in a political system. There can be differences, however, as to the intensity of the effect in different policy domains. The best way to test veto players theory is by comparing countries as whole entities, and not sub-sectors of their legislative activity. Turning to the legislative/executive alignment hypothesis, which was inspired by the work of Epstein and O'Halloran, its rejection probably confirms that the theoreti-

[5] This theory is based upon the work of scholars like Rogoff (1985) and Barro and Gordon (1983) on the expectations of economic actors about monetary policy. If the same theory is going to be tested in another policy domain, credibility has to be «measured» with respect to that policy.

cal framework proposed by the two authors works only in the US, with its particular configuration of divided government and non-cohesive political parties.

### 6.2.2 Empirical contributions

The most relevant empirical contributions can be found in the testing of the second research question of this thesis. The statistical analysis has confirmed that a relationship between formal independence and performance exists for NCAs. As it measures performance only from a quantitative view point, this test is neither definite nor complete. It is, nevertheless, very relevant, because it represents the first attempt to systematically link independence and performance. At the same time, also in answering the first research question, I attempted to highlight the empirical implications of that analysis.

The widespread and sudden creation of IRAs has so far led scholars not to focus on their performance, but rather on other aspects concerning these bodies, such as the establishment of IRAs itself, its historical, social and political causes, the goals of these authorities. Much has been written on why and how these agencies have been created, on who promoted them, as well as on the purposes of the creators. However, as, for most authorities, several years have passed since the establishment, it was the purpose of this work to look back at the reasons which motivated their creation, and to see if the results matched the expectations.

Both the empirical analyses (and the second one in particular) aim to compare what is publicly said by politicians with what we observe in reality. In the case of the first research question, the answer points out that most of the variation in formal independence amongst NCAs is due to reasons that are not spelled out in the public discourse: big firms' influence and political polarisation are never said to influence the choice regarding agency autonomy. The contrary happens with credibility, which is often invoked when discussing IRAs. The second research question is even more important: whatever the reasons are for the establishment of NCAs, does their independence pay off? The answers provided here can be interesting

and useful both for politicians and for citizens who aim at holding their representatives accountable.

As said before, the main empirical contribution of this work lies in the second research question, because that is a point which deserves more attention than any other, in the study of «independent» agencies. In principle, there is nothing wrong with taking a number of issues away from the decision domain of alternating political majorities. There are policies in which elected politicians would tend to supply some public goods in a quantity that is not efficient, leading to suboptimal equilibria. Monetary policy is one of these. In general, there are cases in which the politicians' preferences must not influence policy enforcement. There are policies which are better enforced if there is no direct influence of the parliament on them. However, my argument was that such feature cannot be exclusively determined *ex ante*. In many situations, the creation of IRAs has been seen as a natural development of the changes in economic regulation, and the choice of independence has appeared to be consequent. In other cases, IRAs have been established because of diffusion processes (Jordana et al. 2011) between countries and sectors. The question put forward is whether the creation of an independent regulatory agency is always the best choice. The answer is that, very likely, it is not. Therefore, an *ex post* assessment of the «added value» provided by formal independence is necessary.

In the literature review, we have seen that some agencies can be established because politicians want to shift the blame for unpopular measures. In the first quantitative analysis, it was confirmed that not all the reasons for establishing IRAs are related to the functions they have. If, for instance, an IRA is created just because politicians do not want to be held accountable (and responsible) for a certain policy enforcement, and if the autonomy of the agency does not improve the way in which such policy is enforced, then social welfare is not increased by this decision to delegate. The citizens are not better off, because they do not receive any economic or social advantage, whilst at the same time they are prevented from judging their representatives on certain issues.

As regards competition agencies in Europe, we have seen that formal

independence has a positive impact on − at least − the number of investigations that they commence and the number of decisions they make. What was proved is that independence makes them «more active». Further analyses on the way in which NCAs carry out their tasks, and on the results they obtain, will certainly make this finding more robust.

Another finding that has a strong empirical value is the lack of relationship between performance and budget. Since such a relationship had been suggested by members of competition authorities themselves, my expectation was to confirm it in the statistical analysis. Instead, the effect is not confirmed among all the members. This means that not all the authorities use their budget in the same way. It can be that some of them mainly «invest» it in discovering cartels and antitrust violations, whilst others spend most of their money on other activities. It is also possible that some authorities are more efficient than others, being able to carry out more cases than others with the same amount of funding. In-depth analyses of single cases are most likely the best way to learn more about this finding.

## 6.3 Further steps

This work has potentially opened a new field of research, and many of the issues dealt with in this thesis deserve further investigation. The next steps that might be taken can be classified in two groups. On the one hand, there are further analyses that could be carried out on the data used in this dissertation, in order to improve and refine the findings of this work. On the other hand, the hypotheses developed and the approaches and techniques that were employed could be applied to study other agencies or other sectors.

### 6.3.1 Further analyses on the data used in this work

As regards the first empirical analysis, one of its limitations lies in the fact that it does not properly examine the temporal dimension. Since only one point in time was available for the dependent variable, I adopted a «static»

research design, though I introduced variables that also take into account time.[6] An equally interesting approach would be to replicate this analysis with a time series research design. In fact, for some authorities the degree if independence has not remained stable through time, and this raises the question of why and under which conditions autonomy is increased or decreased.

To answer this question, it would be necessary to «map» the changes in independence for every year in which an NCA has existed. Similarly, yearly data should be gathered for the explanatory variables. Then, it would be possible to discover what factors cause changes in independence once an authority has already been established. It would certainly be worth testing the same model as was tested in Chapter 3 − adapting the indicators to the new research design − and verify how long it takes for each factor to give rise to an institutional change. Very likely, some of the indicators used in the analysis of Chapter 3 remain fairly stable through time, whilst others may vary.

A potential problem of this approach could be the long time span that would need to be covered, as well as the fact that the creation of competition authorities in EU member states is not normally distributed through the years. The first competition authority created in Europe was the German *Bundeskartellamt* in 1958; the British Office of Fair Trading was established 15 years later, in 1973; then, after 13 years, it came the French *Conseil de la concurrence*. From 1988 onwards, there was an impressive acceleration, with 20 competition agencies created in 10 years. Such a distribution would imply that for many years there would be only one or two cases, which is certainly not ideal. If one decides to pursue this approach, it must be carefully considered how to to deal with this unbalanced distribution.

With regard to the second empirical analysis, the most significant improvement would consist of finding a more complex and comprehensive way to measure performance. The number of investigations and decisions is one aspect of the agencies' activity, but there are others which deserve closer

[6] The «EU membership» and the «Year of establishment» variables serve this purpose in that analysis.

attention. For instance, performance could be measured with respect to the effect that NCAs exert on the economy that they regulate: one could analyse whether more independent authorities make the economy more competitive (lower prices of goods and services) or if they cause companies to have less market power (fewer concentrations and fewer dominant positions).

It would be interesting also to verify what is the effect of formal independence on the way in which NCAs carry out their tasks, i.e. if they focus their attention on big or small companies, if they tend to investigate more cartels than individual violations of antitrust law, how long their investigations last, how often they make use of leniency. In other words, how they employ their sources, with respect to both targets and time. This could help improve comprehension of how they use their budget, and why some NCAs seem to use much more money than others.

### 6.3.2 Tests of the findings in other sectors

Throughout this dissertation I have advocated the analysis of regulatory agencies sector by sector. I have argued that we should aim at developing hypotheses which relate to the policy enforced by each kind of agency. Motivations such as the need for credibility, blame shifting, EU influence, can be present in one policy sector and not in another one, and they must be operationalised differently in different sectors and countries. Not paying attention to this crucial point may lead one to making serious mistakes in the research design. If one wants to operationalise variables like «need for credibility» across countries and sectors, the only way is to code the degree of credibility by country (as if a country were credible to the same extent in all sectors) or by sectors (as if all the countries, regardless of their differences, had the same credibility in a given sector). In the study of IRAs, scholars have often chosen the second option, attributing more «need for credibility» to some sectors rather than to others.[7]

[7] Gilardi (2002: 891), for instance, argues that sectors like «electricity, telecommunications and financial markets», being part of what he defines «economic regulation», require more credibility than sectors like «food safety and pharmaceuticals», as the latter belong to «social regulation». Therefore, he operationalise such categorisation as a dummy variable,

The present work demonstrates that it is possible to develop theoretical frameworks and hypotheses which take into account the policies enforced by the agencies we analyse. In this way, we avoid studying independent agencies as such − which is not always meaningful − and instead we study independent agencies as policy enforcers. Why do agencies need to be independent in order to enforce a particular policy? How is this useful? I would welcome any attempt to transpose, in other sectors, the approach adopted in this dissertation.

More in particular, it would be very important to test in other sectors the two original hypotheses developed in Chapter 3, the «big firms» and the «EU membership». As for the first, it should be easier to map the number of firms and their size in specific market sectors, like energy, telecommunication or pharmaceuticals, rather than in a whole country. Another very interesting sector (and very salient these days) is the stock exchange regulation, for which the data on the companies in each country are almost available off-the-shelf. If the data are easier to collect for sectoral regulation, it should also be possible to examine the evolution of the market, and the effect of the formal independence of regulators on market structure. As regards the «EU membership» hypothesis, it need not be adapted and could be tested as it is. Furthermore, there could be other ways (though not necessarily alternative) to operationalise the effect of membership in the EU, such as measuring the compliance of a country with EU law.[8]

With regard to the second empirical analysis, it would be advisable to extend this kind of test to as many sectors and agencies as possible. This could really constitue a major development for this branch of political science, and it would be extremely interesting for academics, practitioners and political actors (voters included). In every sector or domain in which there has

coding the agencies in the first group as 1 and the agencies in the second group as 0. The assumption of this approach is that all the countries need the same amount of credibility in a given sector. Moreover, the author also assumes that sectors like electricity or telecommunications do not have any difference as to credibility, whatever is the country in which the authority operates. It is evident that this kind of approach risks to be too simplistic and inaccurate.

[8] That could be done by counting the infringement procedures initiated by the Commission against that country.

been a delegation of powers to IRAs, and in which enough time has passed for the authorities to take effective decisions, it should be possible to verify whether independence helps the agencies to better enforce policies or not. The research design should be similar to the one adopted in this thesis: first it would be necessary to build an index of independence of the authorities, then their performance should be compared in a statistical model. The only method that allows one to verify whether independence makes a difference is to compare authorities enjoying various degrees of autonomy.

The aim of such a research, which could be conducted across many countries and sectors, would be to make sure that independence is really needed in every domain in which it has been used. It would also be interesting to adopt a country-centred approach and see if all the countries benefit from independence to the same extent. There could be countries where particular institutional or political characteristics make delegation to IRAs not necessary and not useful, at least not in every sector. A deeper comprehension of the effects and implications of regulatory independence will help IRAs themselves to remain successful.

## 6.4 Conclusion

In this chapter, I have summarised the main premises, theoretical frameworks and findings of this dissertation concerning the explaining and assessing of independence of NCAs in the EU member states. I have illustrated what I deem can be learnt from the results of the empirical analyses, both in theoretical and empirical terms. Finally, I have outlined the possible further steps that might be taken in order to take full advantage of the contribution offered by this work.

IRAs still offer an enormous amount of material for political scientists to research. With my thesis, I have focused on one type of regulatory agency – competition agencies – because this brings about a more rigorous approach, more precise hypotheses and more salient findings. As independent authorities cease to be a novelty in modern democracy, and become an ordinary channel of policy enforcement, thus also the study of their causes and ef-

fects must become more defined, detailed and sharpened. Since they are now deeply embedded in our societies, we ought to be particularly aware of their function, of their strengths and weaknesses. Hopefully, new studies in this field can contribute to a reconsideration of the role IRAs are meant to play. We might need to encourage or strengthen delegation to IRAs in certain policy domains and diminish it in others.

This dissertation stresses that we must not underestimate the political costs of delegation, in terms of loss of control for parliaments, parties and voters, and loss of accountability for some branches of public administration. Such costs must be constantly compared to the benefits that IRAs provide. In conclusion, discovering that independent regulatory agencies are not the best recipe for every occasion should not be regarded as a failure, but as a remarkable achievement.

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# Appendix A

# Survey on the formal independence of national competition authorities in the EU

**I – The Head of the Authority**

*1) Does the head of the authority have a fixed term of office?*

Yes

No

*2) If there is a fixed term, how long is it?*

< 4 years

5 years

6 years

> 6 years

*3) Who appoints the head of the authority?*

One or two ministers

The prime minister

The government collectively

The government and the head of the state
The head of the state
The legislature
The presidents of the chambers
The legislature and the government combined

*4) Does the law contain explicit provisions about the dismissal of the head of the authority?*
Yes
No

*5) Can the head of the authority be dismissed?*
Can be dismissed for reasons related to policy
Can be dismissed only for reasons not related to policy
Cannot be dismissed

*6) Does the law contain explicit provisions about the incompatibility of the head of the authority with other public offices?*
Yes
No

*7) Can the head of the authority hold other offices in government?*
Yes, with permission of the government
Yes, in some cases specified by the law
No

*8) Is the term of the head of the authority renewable?*
Yes, more than once
Yes, once
No

*9) Is political independence a formal requirement for the appointment of the head of the authority?*
Yes
No

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**II − The board of the authority**

*1) Does the authority have a board?*

Yes

No

*2) Do the members of the board of the authority have a fixed term of office?*

Yes

No

*3) If there is a fixed term, how long is it?*

< 4 years

5 years

6 years

> 6 years

*4) Who appoints the members of the board of the authority?*

One or two ministers

The government collectively

The government and the head of the state

The legislature

The presidents of the chambers

The minister consulting the head

The head of the authority

*5) Does the law contain explicit provisions about the dismissal of the members of the board of the authority?*

Yes

No

*6) Can the members of the board of the authority be dismissed?*

Can be dismissed for reasons related to policy

Can be dismissed only for reasons not related to policy

Cannot be dismissed

*7) Does the law contain explicit provisions about the incompatibility of the members of the board of the authority with other public offices?*

Yes

No

*8) Can the members of the board of the authority hold other offices in government?*
Yes, with permission of the government
Yes, in some cases specified by the law
No

*9) Is the term of the members of the board of the authority renewable?*
Yes, more than once
Yes, once
No

*10) Is political independence a formal requirement for the appointment of the members of the board of the authority?*
Yes
No

**III – Formal relationship of the authority with the parliament and the government**

*1) Is the independence of the authority explicitly stated in the law?*
Yes
No

*2) What kind of autonomy is the authority granted? [multiple answers possible]*
Decisional autonomy
Organizational autonomy
Financial autonomy

*3) What are the formal obligations of the authority vis-à-vis the government?*
The authority must present reports more than once a year for approval
The authority must present only one annual report that must be approved
The authority must present an annual report for information only
The authority has no formal reporting obligations

*4) What are the formal obligations of the authority vis-à-vis the parliament?*

The authority must present only one annual report that must be approved
The authority must present an annual report for information only
The authority has no formal reporting obligations

*5) Who, other than a court, can overturn an authority's decision?*

The government, in specific circumstances
A specialised body
None

*6) What is the source of the authority's budget?*

Government funding only
Fees levied on firms subjected to the authority's action and government funding

*7) Who controls the authority's budget?*

The government alone
Both the authority and the government
The accounting office or court
The authority alone

*8) Who decides on the authority's internal organization?*

Both the authority and the government
The authority alone

*9) Who is in charge of the authority's personnel policy?*

Both the authority and the government
The authority alone

**IV – Other prerogatives of the authority**

*1) What are the powers of the competition authority vis-à-vis sectorial agencies in case of competence overlapping?*

Sectorial agencies have priority over the competition authority
None has priority: agencies have to coordinate
The competition authority has priority over sectorial agencies

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*2) Does the authority have the power to set up its own rules of procedure in its activities?*

No, never

Only in some activities

Yes, in every activity

*3) Does the authority have the power to adopt precautionary measures during investigations?*

No, never

Only in some domains of investigation

Yes, in every domain of investigation

*4) What kind of sanctions can the authority impose?*

It can impose fines

It can impose changes in the undertaking's governance

It can close the undertaking

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