Governance, Accountability, and Legitimacy of Regulatory Agencies:
Comparative Case Studies from the Telecommunications and Financial Sectors in Germany and Switzerland

Jan Biela
NCCR Democracy
University of Zurich
Affolternstr. 56
CH-8050 Zurich

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Abstract

Regulatory agencies are highly relevant in many sectors of today’s politics. Their increasing importance along with restricted democratic control represents a challenge for their legitimacy. It has been argued this challenge could be tackled by keeping agencies independent, yet accountable. Nevertheless, it remains unclear how accountability is ensured and which factors make an accountability deficit more or less likely.

The paper tackles that question by identifying factors from theoretical literature that are considered likely to hamper or promote agency accountability, such as the number of veto players, the public interest in a policy field, and the resources fora have available for agency monitoring. Based on these considerations, within the project agency accountability is then assessed empirically for the cases of telecommunications and financial regulation in two countries (Germany and Switzerland). The resulting four cases provide a wide range of institutional and sectoral variation, allowing for an exploratory test of the hypothesized causal mechanisms.

To assess agency accountability, we utilize a regime approach. The approach aims to combine advantages of quantitative and qualitative approaches: It takes care of the cases’ individual characteristics by using qualitative methodology, but applies a highly abstract and generalizable analytical framework in order to facilitate meaningful comparisons across time, sectors, and countries. First results indicate intriguing differences in accountability structures and their effectiveness, which indeed can at least partly be assigned to differences in the hypothesized scope conditions.

Key words: Accountability, regulation, agencies, public administration, political systems.

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Independent regulatory agencies have spread out over contemporary Europe. While their establishment has been repeatedly substantiated by policy credibility as well as economic efficiency arguments, the impact of these institutions’ independence onto accountability and hence the democratic legitimacy of independent agencies have been scrutinized less frequently (Føllesdal 2011; Verhoest et al. 2010). This paper contributes to that research gap by shedding light onto the accountability mechanisms regulatory agencies face. Accountability has been identified as an important feature to maintain democratic control over these new forms of governance (Majone 1999). The present paper thus tackles the following research questions:

- How accountability of regulatory agencies to democratically elected actors is institutionally ensured? Are there institutional differences with regard to the accountability regimes agencies face?
- Can we identify factors that make an accountability deficit more or less likely?

The paper identifies from theoretical literature three main factors (veto players, resources, and salience) with a hypothesized impact on accountability regimes. These factors come in play at two points in time: At the time of the establishment of the agency, its de jure accountability regime is designed. In everyday political work, it turns out if this regime de facto is effective. The paper presents four case studies of agencies in two policy areas (telecommunication and finance) and two countries (Switzerland and Germany). The case selection maximizes the variance of the identified factors and allows exploring the resulting accountability regimes and the effect of the hypothesized causal factors. In analyzing the accountability regimes, a novel approach to agency accountability (Biela and Papadopoulos forthcoming) is utilized. Based upon document analysis and expert interviews, we outline the accountability regimes of all agencies, elaborate their strengths and weaknesses and compare the findings to the initially stated hypothetical effects. The analysis shows that indeed accountability regimes at operational and managerial levels follow the expectations in the theoretical part. However, the pattern found with regard to political accountability is not so straightforward. In detail, several accountability fora turned out to be de facto ineffective (for example, the formal supervision rights of the parent ministry in the BNetzA’s case). Beyond these results, the paper demonstrates the applicability and usefulness of the approach to accountability for a wider range of cases. It allows for systematic, qualitative comparisons between (institutionally very different) cases and paves way for further large-scale testing of the causal relations identified.
The paper is structured as follows: In the next section, we outline the theoretical background for the raise of regulatory agencies, the importance of accountability for democratic legitimacy, and the factors contributing to accountability. Section three covers the selection of cases and the operationalization of accountability. In section four, we present and discuss the empirical results. Section five concludes.

**Theoretical outline**

Since the early 1980s, regulatory power has been delegated to an increasing extent to IRAs (Coen and Thatcher 2005; Gilardi 2008; Levi-Faur 2005; Maggetti 2007; Thatcher and Stone Sweet 2002). The percentage of European countries having a regulatory agency in the areas of each electricity, telecoms, finance, and competition raised from roughly 20 per cent in the early 1980s to more than 90 per cent in the mid-1990s (Gilardi 2005). Research has highlighted a variety of rationales for this striking development: A presumed higher efficiency in terms of output (Føllesdal 2011; Majone 1999), a higher effectiveness in terms of outcomes by generating credible commitment and hence long-term liability (Alt 2002; Kydland and Prescott 1977; Majone 1999), as well as strategic interests of political actors in order to reduce the effects of an eventual government turnover (Moe 1990a) or to avoid blame for unpopular decisions (Barberis 1998; Fiorina 1982; Hood 2002; Weaver 1986; Wilks 2007).

The reasons for the establishment of IRAs have been well under scrutiny. This does not hold however for the effect of agencification on democratic quality (but see Christensen and Lægreid 2011; Føllesdal 2011; Papadopoulos 2003, 2010). IRAs are regularly not under direct control by elected bodies but operate ‘at arm’s length’ of government. That ‘non-majoritarian’ (Majone 2001) character arouses questions about IRAs’ legitimacy (Coen and Thatcher 2005; Feldman and Khademian 2002; Majone 1994, 1999; Van Kersbergen and Van Waarden 2004) and accountability (Flinders 2001; Mulgan 2003; Pollitt 2003).

It has been argued that adequate institutional design, administrative procedures and forms of accountability could remedy these problems (Epstein and O'Halloran 1994; Héritier and Lehmkühl 2011; Horn and Shepsle 1989; Majone 1994, 2001; McCubbins et al. 1989; Saalfeld 2000). The interplay between autonomy of agencies on the one hand, and adequate accountability measures at the other, however, has rarely been systematically investigated so far (Laegreid and Verhoest 2011). It thus remains unclear which features of accountability arrangements contribute to Moe’s ideal that “no one controls the [agency] …, yet it is clearly under control” (Moe 1987: 291). This paper aims to scrutinize how accountability is
institutionally guaranteed, and to identify factors that contribute to the strength or weakness of these accountability regimes, de jure as well as de facto.

Accountability is defined here as a specific social relationship or mechanism ‘between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences’ (Bovens 2007: 450). In general, accountability involves an exchange of information (Romzek and Dubnick 1998: 6) between actor and forum on the one hand, and a right of the latter to impose consequences from this exchange (Bovens 2007; Mulgan 2003; Schedler 1999) on the other.

Analysing the accountability of agencies, we have to differentiate between de jure accountability mechanisms as well as on their de facto use (Lægreid and Verhoest 2010), as in the case of agency independence (Gilardi and Maggetti 2011). This goes along with a differentiation of two points in time: First, the moment (let us call it t₀) when the agency and its (de jure) accountability regime are established. Second, the de facto effectiveness of this very accountability regime in everyday work (t₁).

Which factors not contribute to a more or less effective accountability regime? We see arguments mainly from two strands of literature. Rational choice institutionalists in the tradition of Moe (1990b) and his successors (e.g. Bawn 1995; Epstein and O'Halloran 1994; Macey 1992; Yesilkagit 2004) mostly see the process of institutional formation as designed by rational and interest-driven political actors, which anticipate correctly the effects of their design decisions. The second strand of literature is inspired by theories of path dependence (Pierson 2004), see historical factors as decisive for institutional arrangements, mainly due to unwanted side effects, changing environment, or simply lack of experience with certain institutional arrangements. Theories of policy diffusion identified even more mechanisms how institutions are shaped, i.e. emulation, internationalization, or symbolic imitation (Gilardi 2005).

With regard to agency accountability, the second approach let us expect a predominant role of administrative traditions (Painter and Peters 2010). However, such an approach runs short on an explanation for the empirically detected rise of agencies in general and regulatory agencies in particular (Verhoest et al. 2012).

The literature of the first strand, interprets institutional solutions often as equilibriums that are adjusted when external (e.g. economic) pressures arise. This is plausibly the case in the field
of regulation (Majone 1994). We derived three scope conditions that apparently have an impact on bureaucratic design: In more detail, it is the number of veto players, the political interest in a regulated policy area and the resources of involved actors that are supposed to affect the (de jure) design and the (de facto) effectiveness of the agency’s accountability regime.

A high number of veto players in a political system can be expected to lead either to a higher number of accountability fora or to a higher degree of heterogeneity within fora. This is because veto players are more likely to approve the delegation of tasks to an autonomous agency if they retain a certain amount of influence. From the literature, it is plausible to argue that a higher number of fora may, in turn, lead to a reduced level of control: the agent’s discretion increases with the number of actors (“too many eyes”) and can eventually play out the expectations of various fora against each other (Bovens 2007; Egeberg and Trondal 2009; Gailmard 2009). A higher heterogeneity of fora is, moreover, theoretically associated with a reduced level of decision-making capacity (Tsebelis 1995; Tsebelis 2002). In sum, a higher number of veto players in the political system might affect the institutional structures and the everyday work of political actors in a way that reduces the credibility and, hence, the effectiveness of accountability arrangements.

<table>
<thead>
<tr>
<th>Number of veto players</th>
<th>De jure accountability</th>
<th>De facto accountability</th>
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<tr>
<td></td>
<td>More accountability mechanisms, more numerous, and/or more heterogeneous fora</td>
<td>More conflicts between fora, more need of coordination, problem of many eyes, more room for manoeuvre for agency</td>
</tr>
<tr>
<td>Political interest in policy area</td>
<td>More/less care about institutional design</td>
<td>More/less instruments to hold agency to account, less use of existing instruments</td>
</tr>
<tr>
<td>Resources of political actors</td>
<td>Less autonomy for agency, more ex ante control by administrative procedures</td>
<td>Only limited use of ex post accountability mechanisms</td>
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**Table 1:** Hypothesized causal relations

A second scope condition affecting agency design is presumably the public interest in a policy area: first, the threat of being hold to account is higher in the case of high public interest. Politicians are more attentive to problems and it is more probable that third actors (e.g., the media) reveal wrongdoing (so called ‘fire alarms’, Hopenhayn and Lohmann 1996; McCubbins and Schwartz 1984).
The hypothesized third scope condition is the resources of political actors. From an agency theory perspective, delegation entails efficiency gains but also control needs and the potential for agency misbehaviour due to informational advantages of the agent, often subsumed as agency costs. The problem of informational asymmetry is particularly pronounced in the case of regulatory agencies. First, agency output is harder to measure – there are often multiple statutory goals of an agency, the performance of the agency in reaching this goals is hard to measure, and regulatory policies are often highly technical and complex issues (Maggetti 2010). On the other hand, it has been argued political institutions are hardly capable of keeping pace with the acceleration of time in economic markets (Pierson 2004; Rosa 2005), which raises doubts about their capacities to effectively control agencies. The restricted resources of political actors theoretically affect their decisions to delegate and their control strategy: Bawn (1997) finds that actors with more resources tend to rely more on ex post monitoring (hence, accountability) rather than on detailed statutory controls. In other words, we expect a forum with scarce resources to have less capabilities to process information and hence to be less able to hold the agency to account.

**Research design and operationalization**

We test the expectations derived from the analytical model in a small-n study of eight agencies from four countries (Germany, Switzerland, Ireland, and the United Kingdom) and two policy areas (finance and telecommunications). However, for space limitations only four of them are presented in this paper. The aim of the investigation is to see how actors deal with the institutional restrictions they face. The cases were selected in a way that encompasses all possible combinations of the presumably relevant scope conditions: information capabilities, number of veto players, and level of public attention. This way, we can both systematically test the predictive power of the model and explore compensating actor strategies in a wide range of institutional settings.

The selection of cases, thus, maximizes variance with regard to the scope conditions and includes every possible combination of them. Based on the analytical model above, expectations for the individual cases can be derived and tested (table 2). We then use the individual causal links to derive a tendency towards stronger (weaker) accountability regimes and accordingly ranked the cases in the table. Given that all theoretical expectations hold, the FSA has the lowest probability of an accountability deficit, while the contrary is the case for Swiss ComCom. However, in between there are several “mixed” which can serve to identify the scope conditions with the highest explanatory potential.
To test these hypotheses empirically, we use a regime approach to agency accountability (Biela and Papadopoulos forthcoming). The approach takes into account that an agency is regularly subject to several of these mechanisms, connecting it to several fora. Rather than looking at individual fora, the approach focuses on the joint effect of all accountability fora with which an agency is engaged in accountability relations. Accountability fora are frequently interdependent and agencies thus face rather ‘complex networks of accountability’ (Scott 2000: 49-50), for which the concept ‘accountability regime’ (Bovens et al. 2008; Schillemans 2008: 179; Scott 2000: 55) has been proposed. The approach moreover proposes to distinguish between three levels of agency action: a political, an operational and a managerial level. Commonly, literature differentiates between managerial and political accountability (Day and Klein 1987). The former form is a ‘neutral, technical exercise involving bookkeeping and arguments about whether what is being done is being done efficiently and effectively’ (Christensen and Laegreid 2002: 271). Political accountability, in contrast, is generally understood as political responsiveness to the principals’ preferences. Justified by the theoretical underpinnings of delegation to regulatory agencies, we add a third level of action, which includes single-case decisions, and in general application of regulatory instruments by the agency. Furthermore, the approach focuses not only on the formal rights of accountability fora to gather information or pose sanctions, but also their de facto ability to use these rights, determined by their capability to process information and the credibility to use their sanctioning rights. These points are consecutively elaborated below.

Regarding formal information rights, we aim to capture the quality of information. The approach hence judges information rights as extensive, if a) the forum has direct access to

<table>
<thead>
<tr>
<th>Agency</th>
<th>FSA</th>
<th>BaFin</th>
<th>CBI/FSD</th>
<th>Ofcom</th>
<th>Finma</th>
<th>BNetzA</th>
<th>ComReg</th>
<th>ComCom</th>
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<tbody>
<tr>
<td>Veto players: high</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
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<tr>
<td>Salience: high</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
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<tr>
<td>Resources: high</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
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<tr>
<td>Power and credibility of accountability mechanisms</td>
<td>+ (+) (+) (+) (-) (-) (-) -</td>
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Table 2: Expected level of accountability according to the analytical model

Note: The table covers all cases, which form part of the overall project. The present paper only features the bold cases. If a negative relationship between scope condition and institutional setting is expected, the presence (+)/absence (-) of a scope condition leads to, e.g., a decreased (-) or increased (+) degree of credibility. The last column depicts the potential level of accountability that can be derived from the hypothesized causal effects. Abbreviations: FSA: Financial Services Agency, UK; BaFin: Bundesanstalt für Finanzdienstleistungsaufsicht, Germany; CBI/FSD: Central Bank of Ireland, Financial Services Division; Ofcom: Office of Communications, UK; Finma: Eidgenössische Finanzmarktaufsicht, Switzerland; BNetzA: Bundesnetzagentur, Germany; ComReg: Communications Regulator, Ireland; ComCom: Eidgenössische Kommunikationskommission, Switzerland.
primary documents and b) the forum can demand specific information. If only the latter is present, but the forum is dependent on information collected and distributed by the agency, we code information rights as moderate. If both conditions are absent (and the forum depends on agency reports without being allowed to ask for additional information), information rights are understood as limited.

In order to systematize formal sanctioning rights, we differentiate them along two dimensions: a) whether a consequence applies to a particular situation (e.g. a single-case decision or a particular behaviour of an agency employee) or generates a persistent structural change (such as a removal of competencies); and b) whether it is imposed on individuals (including the agency head) or on the agency as a whole. Structural consequences at agency level, because they affect the whole body and are durable, are interpreted as severe measures, while individual and situational consequences are rather limited in their impact. The two remaining categories are interpreted as moderate consequences.

<table>
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<tr>
<th>Fora</th>
<th>Aspects of agency conduct</th>
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<tbody>
<tr>
<td>All political or societal actors in a accountability relation with</td>
<td>Political accountability: achievement of statutory goals, outcome</td>
</tr>
<tr>
<td>the agency, i.e., with relevant information and/or sanctioning rights</td>
<td>Operational accountability: adequacy and legality of single regulatory decisions, output</td>
</tr>
<tr>
<td></td>
<td>Managerial accountability: Efficient use of resources (staff, funding), throughput</td>
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<table>
<thead>
<tr>
<th>Formal information rights</th>
<th>Information capability</th>
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<tbody>
<tr>
<td>Extensive (+): forum has direct access to primary documents</td>
<td>Resources: time, staff, expertise</td>
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<tr>
<td>and forum can demand specific information</td>
<td>Cooperation: cross-memberships, information exchange with third for a or expert bodies</td>
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<tr>
<td>Moderate (o): forum has no direct access to primary documents</td>
<td>Political interest</td>
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<td>but can demand specific information</td>
<td></td>
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<tr>
<td>Limited (-): forum has neither direct access to primary</td>
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<td>documents nor can demand specific information</td>
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<tr>
<th>Formal sanctioning rights</th>
<th>Sanctioning credibility</th>
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<tr>
<td>Severe (+): persistent effect at organizational level (e.g.,</td>
<td>Internal structure of forum: composition, appointment rule, decision rule, heterogeneity</td>
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<td>competence withdrawal)</td>
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<tr>
<td>Moderate (o): Situational effect at organizational level (e.g.,</td>
<td>Coordination between fora: division of competencies, probability of deadlock and blame</td>
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<td>decision overrun) or persistent effect at individual level (e.g.</td>
<td></td>
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<td>dismissal of staff)</td>
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<tr>
<td>Limited (-): situational effect at individual level (e.g.,</td>
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<td>disciplinary measures to staff)</td>
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Table 3: The assessment of agency accountability (Biela and Papadopoulos forthcoming).

After having outlined the operationalization of formal information and sanctioning rights, we now turn to their de facto use. In our approach, we evaluate a forum’s capacity to gain information and to appraise agency action adequately, and the believed probability that the forum actually imposes consequences based on that information. On the information side, the effectiveness of a regime depends foremost on its resources: time (Schedler and Santiso 1998), and the level of expertise (Weale 2011: 67). If a forum lacks these resources, it may pursue strategies to overcome its structural weakness, e.g. cross-memberships, joined committees, cooperation with other fora, consulting of expert bodies, or other forms to add
external expertise. On the other hand, credibility of sanctioning instruments rests on the perceived likeliness that the forum imposes consequences on an agency. We expect at least three factors to reduce that chance. First, the internal structure of an overseeing body; second, the side costs of sanctions (for example because the dismissal of the agency head would probably result in a loss of market confidence); and third, the coordination among fora. The rationale here is that in the presence of a multitude of fora, a ‘problem of many eyes’ (Bovens 2007) may occur, where each forum is hoping for a reaction from another (cf. Tiegen and Brun 2011). Table 3 summarizes the elements of the approach and the detailed operationalization.

Empirical results

The empirical results based upon the theoretical considerations and the analytical approach utilized are presented in the next section. It is based on 20 semi-structured interviews with members of national parliaments, public servants and external experts, conducted between September 2011 and November 2012. The complexity of and enormous variance between accountability regimes turns the condensed presentation of the findings in a challenge. For the moment, we decided to restrict the description to only four cases from Germany and Switzerland. First, we describe the cases individually. In the next step follows the analytical comparison.

The Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)

The German financial regulator BaFin is characterized by a strong role of its parent department, the Federal Department of Finance (Bundesministerium der Finanzen, BMF). It falls under its supervision and the department owns extensive rights to request information from the agency, both on strategical and operational issues. The parliament has a minor role and can pose questions only to the BMF. In contrast to ordinary government agencies, the internal structure and the funding of the BaFin are not managed by the parent department, but by an administrative council. At managerial level, moreover, the Federal Audit Office (Bundesrechnungshof) and the parliament via its budget committee have oversight roles.

In terms of sanctioning, the formal supervision of the BMF (Rechts- und Fachaufsicht) involves also disciplinary measures; the parliament of course can change the legal basis for the agency’s operations, decisions of the BaFin can be repealed by administrative courts. Budgetary and staff questions are covered by the administrative council. European bodies for
financial regulation are authorized to pose sanctions to national regulators only where a breach of EU treaties is obvious.

The information capability of the fora are as follows: BaFin is in frequent contact with the BMF: It reports quarterly to the department and communicates daily with the departments’ mirror units. According to the interviews, the agency actively seeks the BMF’s support and coordinates its position. Nevertheless, the resource difference between the supervising departmental sub-unit and the 2,000 employees of BaFin is striking and led to an intermediate score for the BMF’s information capability. Next to the BMF, there is the administrative council, which meets twice a year and the subcommittee Haushaltskontroll- und -prüfungsausschuss, which meets four times per year. The parliament, in contrast, is only scarcely informed. MPs are however represented in the administrative council and thus have some direct access to BaFin staff. This cross-membership and the information by the audit office improves the otherwise weak information capability of the parliament at least at the managerial level. While thus the MPs depend largely on information provided by BaFin and BMF, their own resources are not too bad in international comparison: In the Harfst and Schnapp (2003) dataset, it holds the second rank, after the US. MPs are relatively specialized, MPs and committees have staff at hand, and describe the time they have for preparation as adequate. On average, BaFin board members spend one to two days of their staff preparing board meetings, personally they invest approximately four hours. Under certain circumstances, the parliament can appoint special investigation committees, which have more resources to scrutinize a topic in depth.

The threat of being sanctioned by the department is quite real for the agency: The department is internally not restricted, has no other strong forum to face and rules the administrative council: This consists of ten representatives of the regulated sector, five MPs and six delegates from different departments. The BMF has the presidency and four delegates and can set the agenda of the meetings quite unilaterally. That means on the other hand, that the sanctioning threat of the board is only credible as long as it coincides with the BMF’s position.

The Swiss Financial Market Supervisory Authority (FINMA)

In the FINMA case, formal supervision lies with the Federal Council (FC), while the parliament only monitors the supervision quality of the FC. Apart from this single chain of delegation, there is an internal (Revisionsstelle) and external revision (Eidgenössische
Finanzkontrolle), reporting to the board and the Federal Council, respectively. The board both a monitoring body (and can thus be classified as an accountability forum), but it decides on “important” operational decisions and is as such a part of the agency itself. The board as well explains the FINMA’s policy to the politics and the public – in that sense, the board is part of the agency.

Regarding formal information rights, the CEO has the duty to answer any question to the board. The board, in turn is obliged to discuss its strategy with the Federal Council. Law requires giving federal authorities access to their files, but with several important restrictions. The Federal Council has no direct link to the CEO – the board is thus both a monitoring forum to the CEO, takes operational decisions and is representative of the agency vis-à-vis the political sphere. The parliament has extensive rights; however, there have been disputes if this right extents to independent agencies and the Federal Council itself. The audit institutions have to seek the agreement of the respective department, before authorized to reclaim any kind of documentation.

On the sanctioning side, the Federal Council may dismiss board members, but only under limited conditions. Moreover, it can decide not to accept the FINMA’s strategic goals and it can set the level of fees regulates pay to FINMA. The board can dismiss the CEO and the executive officers. The parliament cannot sanction FINMA directly, since its competencies include only monitoring of the Council’s supervision duties. However, it can change the legal basis for financial supervision, which did happen in the aftermath of the financial crisis. Despite heterogeneous interests and the importance of the financial sector in Switzerland, it was hence able to agree on a substantial reform.

However, information capabilities of most actors are quite restricted. The board consists of seven members, of which only the board director is paid on a full-time basis. The board meets monthly, and every second meeting there is a briefing by the CEO. The Federal Counsellors have very broad portfolios and scarce administrative assistance: There is a General Secretary with one person in charge of financial regulation. Moreover, there is a secretariat for international finance (SIF) with a total of ten people dealing with regulatory matters. The parliament has a committee for supervision of administrative units; its subunit responsible for financial issues consists of 12 members. Swiss MPs work on a part-time basis and do not have assisting staff. The audit office has about 100 public servants at hand. Federal Council and parliament have an annual hearing with FINMA representatives. Moreover, the Council is
briefed by the SIF, which is in exchange with FINMA at least twice a year and in various working groups. The parliamentary committee, in contrast, has no resources for extra meetings, and its information is provided either by the FINMA and the department, or by the Parlamentarische Verwaltungskontrolle (PVK), an auxiliary body supporting the parliament with expertise. On selected issues, the PVK (which itself is very small) can order external expertise. In sum, the resources of the Swiss parliament are quite scarce in international comparison (Harfst and Schnapp 2003).

The Federal Council is not very credible; it can use its sanctioning rights only at rare occasions (reappointment of board, discussion of strategic goals) and under certain conditions, and it is heterogeneously composed. The board’s ability to sanction the executive is better.

After all, accountability is executed mainly through the public. Since the parliament and the government are weak in both formal rights, information capability, and sanctioning credibility, they depend on the public for getting ‘fire-alarmed’ and for putting pressure on the agency.

The Bundesnetzagentur (BNetzA)

The BNetzA is a separate higher federal authority within the scope of business of the Federal Ministry of Economics and Technology (Bundesministerium für Wirtschaft und Technologie, BMWi), which holds formal supervisory rights. The federal government appoints the president of the BNetzA, but nine court-like ruling chambers take the regulatory decisions – a unique structure among telecommunications regulators in Europe – and the government has no right to interfere in these decisions. Other relevant fora at the national level are the parliament, the advisory board (Beirat), the federal audit office, and the monopoly commission (Monopolkommission), an expert body monitoring the state of market competition. Additionally, the European Commission (EC) and the fellow regulators, organized in the BEREC network, play a decisive role.

Formal information rights: The supervision by the BMWi includes the direct access to internal documents and hence extensive rights for information. The same holds for the monopoly commission. The advisory board and parliamentary committees have the right to demand information and to pose questions to the BNetzA during hearings. The board focuses on strategic, political questions, while the budget committee of the parliament is more into budgetary issues. The EC (and the other national regulators) have extensive information rights
due to article 123b TKG and article 5.2 of the directive 2002/21/EC, particularly at the political and operational level. BNetzA decisions are subject to scrutiny by administrative courts.

Regarding information capabilities, the BMWi hosts a sub-unit with two to three full-time employees, assisted by several other units within the same sub-department (VI A). Compared to the agency’s staff of over 2,500 (Bundesnetzagentur 2012), this is a fairly small number for effective supervision. However, the BMWi uses much external expertise by the monopoly commission, comparative evaluations done jointly with other EU member countries, scientific advice by an affiliated research bureau (WIK), and the audit office. The advisory board and the Bundestag are more severely restricted in terms of resources. The board meets six to eight times a year and consists half of Länder top-level public servants and ministers, and half of MPs. The Länder ministers with a broad spectrum of responsibilities and hence mostly lack specific expertise, but have staff at hand. The members of the Bundestag have on average three scientific assistants (Harfst and Schnapp 2003). Since the BNetzA covers several policy areas, only four to five people in Beirat and Bundestag are specialists in each of them, which restricts the expertise available. However, it has been stated that the cross-membership of MPs in the board provides additional information sources and is decisive for parliamentary expertise level. The relation between the agency and the ministry and the advisory board is described as close and trustful. Both administrative courts, the monopoly commission, the audit office and the fellow national regulators have a good expertise level. The respective unit of the EC is larger than the BMWi’s one. The EC builds in part on expertise from national agencies to develop an opinion in certain regulatory matters and in general occupies a strong position in the policy-formulation stage.

The BMWi, the parliament and the EC retain formal sanctioning rights. The BMWi’s exerts influence by appointing the agency head and by drafting legislation. At the operational level, the BMWi can give detailed instructions to the agency and it can pose disciplinary measures and personal dismissals. The chambers of parliament (Bundestag and Bundesrat) can jointly change national regulatory law. The Bundestag has also budgetary control over the BNetzA. The advisory board has no sanctioning power. The EC can initiate new directives at EU level formulate its disagreement with the ways the BNetzA defines its relevant markets. It is also entitled to check all agency decisions for compatibility with EU law and may launch infringement proceedings at the European Court of Justice (ECJ).
Regardless of its formal competency and the fact that it is internally quite unrestricted, the BMWi has given a direct instruction that overruled the BNetzA only once in its history. In fact, the BMWi’s attitude is one of self-restraint, mainly due to the mutually beneficial cooperative attitude of the agency and the threat of an infringement procedure by the EC. The BMWi’s credibility is rather low, while the EC’s powers prove to be highly effective vis-à-vis both the agency and the ministry. The sanctioning credibility by the administrative courts is also high – almost every decision of the BNetzA has been brought to court.

The Federal Communications Commission (ComCom)

The ComCom is unique in the sense that it lacks its own staff for implementation and enforcement of its decisions. It is an expert board with seven members, appointed by the Federal Council, the collective head of state while. It has only a small administrative secretariat, while its decisions are implemented by the Federal Office of Communications (OFCOM), a federal authority directly subordinated to the Federal Department of the Environment, Transport, Energy and Communications (DETEC).

Apart from being appointed by the Federal Council, the members of the ComCom face few restrictions within the framework of their legal mandate. Relations to the Federal Council and to the parliament are described as highly informal: Once a year, the parent department head attends a meeting, which however is not obligatory and depends, as well as contacts between the commission head and the minister (approx. twice a year), on personal relations and the minister’s interest in the topic. The Federal Council has a second line of information via the Ofcom, which is subordinated to both ComCom and the federal department DETEC – it is informed in more detail about the decisions of ComCom and hosts 60 people representing the holders of government’s expertise in telecommunications regulation. The DETEC itself has only one officer in charge of regulatory matters.

The only ways to sanction the ComCom for disliked behavior is to change their statutory rights via law (by parliament), to cut the budget, or not to reappoint a member of the commission (by the Federal Council). No ways, however, are highly credible, since both fora are highly heterogeneous and such drastical ways are considered as uncommon in the Swiss administrative culture. Instead, the ComCom is restricted by the public opinion, and by the
fact that it would risk the trustful relationship to the department and the Federal Council. As a last point, both ComCom and DETEC are formally entitled to give instructions to Ofcom. Hence, the DETEC could (theoretically) give concurrent advice to the subordinated authority in order not to implement a certain decision.
<table>
<thead>
<tr>
<th>Agency</th>
<th>BaFin</th>
<th>Finma</th>
<th>BNetzA</th>
<th>ComCom</th>
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<tr>
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<td>Sanctioning Rights</td>
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<td>B D G</td>
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<td>Managerial acc.</td>
<td>D P</td>
<td>B</td>
<td>B</td>
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Table 4: The accountability regimes in comparison

Abbreviations: *Agency*: BaFin: Bundesanstalt für Finanzdienstleistungsaufsicht, Germany; Finma: Eidgenössische Finanzmarktaufsicht, Switzerland; BNetzA: Bundesnetzagentur, Germany; ComCom: Eidgenössische Kommunikationskommission, Switzerland. *Country*: CH: Switzerland, DE: Germany. *Sector*: Fin: Financial Regulations; Tel: Telecommunications regulation. **Accountability fora**: A: Audit institution; B: Board; C: Courts; D: parent department; E: EU Commission, EU body (fin.: EBA, ESMA); G: Government head; I: Intergovernmental bodies (Fin: Financial Stability Board, Basel Committee etc.); N: European network of regulators; P: National Parliament; X: Expert commission. **Meaning of symbols**: Information rights: extensive(+)/moderate(o)/limited(-); Information capability: high(+)/intermediate(o)/low(-); Sanctioning rights: severe(+)/moderate(o)/limited(-); Sanctioning credibility: highly likely (+)/ambiguous (o)/ highly unlikely (-); **Overall assessment of accountability effectiveness**: high (+)/ intermediate (o)/ low (-); Upper cases: main forum, lower cases: auxiliary forum, e.g. providing additional information or expertise, Bold cases: parliaments and governments as “classical” holders of democratic legitimacy in parliamentary democracies.
Table 4 provides detailed information on the rights and capabilities of a multitude of fora. It shows the degree of institutional variation found already in this small sample. For an overall assessment of the accountability level of an agency, the cooperations between fora and the minimum level of a forum in one of the four dimensions are taken into account. The rationale behind this is the assumption that an accountability mechanism is only as powerful as its weakest link – if for instance, a forum has extensive information and sanctioning rights, but the credibility of sanctioning is very low, the accountability to that forum is considered very weak. Under these assumptions, the overall assessment is depicted in table 5. De jure and de facto accountability varies only in the case of the Finma, which accountability regime is \textit{strong(+)} at all levels, considering only the de jure arrangements.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Bafin</th>
<th>Finma</th>
<th>BNetzA</th>
<th>ComCom</th>
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<tbody>
<tr>
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<td>o</td>
<td>o</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Operational acc.</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Managerial acc.</td>
<td>+</td>
<td>o</td>
<td>o</td>
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\textbf{Table 5:} Overall assessment of accountability regimes

If we take out actors that are not itself democratically legitimised, the accountability relations of the agencies in the sample change to the ones in table 6.

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

\textbf{Table 6:} Accountability vis-à-vis governments and parliaments

We see, first, Swiss agencies in both sectors to be less accountable than their German counterparts: Bafin and BNetzA have more elaborated accountability regimes – this can be assigned both to administrative tradition and to the scarce resources Swiss political institutions have at hand. A further reason is apparently the less common cooperation between institutions in the Swiss system. However, the weak and partly only informal linkages between politics and agencies are not seen as a problem (at least from within public administration) since there is a high level of mutual trust prevailing. Nevertheless, some MPs have a problem with the role of Finma and its high degree of independence. The German cases show, in contrast, that formally very tight connections must not be that powerful in the real life: EU influence widely disables the (formally strong) parent department of the BNetzA to interfere with its decisions.
From the interviews, it appears that agencies react to accountability pressure: Swiss agencies (which are more independent) communicate more with the public, while German agencies tend to seek the support of their parent department. This means public ‘fire alarms’ represent a possible compensation for Swiss institutions’ structural weaknesses. Somewhat differently than expected, the financial regulators act less transparently than their telecom counterparts: It was stated that information is more complicated to gather in the financial sector – it is thus not only public interest or salience, but most probably also the willingness of the agency which determines the level of information political institutions possess.

Regarding the overall accountability regimes, we can state that the cases fit the pattern predicted by the theoretical argumentation, but only for the operational and managerial levels. At political level, in contrast, no clear pattern can be detected: BNetzA is highly accountable here, while ComCom is not and Bafin and Finma are both in between. From present data, the reasons for that pattern are not clear. Further research is therefore definitely needed.

**Conclusion**

In analyzing the accountability regimes of two Swiss and two German regulatory agencies, we found substantial differences in institutional design and capabilities. The approach chosen has thus proved to be useful in order to identify the real strengths and weaknesses of accountability in the context of agencies. Apparently, Swiss agencies are formally less accountable than their German counterparts are. We however cannot quantify how much the factors mentioned by Swiss interviewees (mutual trust, public fire alarms) are able to compensate these weaknesses. Here, need a more detailed assessment.

The factors theoretically fleshed out to be influential onto accountability of agencies are corroborated at two levels of agency action (operational and managerial accountability). It thus seems that we were successful in identifying factors contributing to the strengths and weaknesses of accountability regimes. However, at the political level, the pattern found was different. We foresee to include the other four cases of the study (Irish and British agencies) in order to broaden the database and to seek for reasons for that different pattern.

This holds also for the analysis of agency legitimacy: From the viewpoint of the time inconsistency argument (Kydland and Prescott 1977), delegation to independent actors occurs to strengthen the long-term orientation of policy to reduce uncertainty for the markets. Since systems with many veto players are ceteris paribus characterized by a higher degree of policy stability (Tsebelis 2002), their need to use such an instrument is less pronounced. It is thus
plausible to expect that the degree of independence of regulators in such systems is lower and that agencies in general get less competencies. Also, the level of political interest probably affects the other aspects of the institutional setting under investigation, namely the decision of what to delegate and how much control to retain (Alesina and Tabellini 2007). In further analyses, we thus plan to include these dimensions to scrutinize the legitimacy of regulatory agencies more in depth.

References


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