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The Accountability Regimes of Independent Agencies: A Comparative Study

Biela Jan

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Université de Lausanne

Faculté des sciences sociales et politiques (SSP)

Institut d'études politiques, historiques et internationales (IEPHI)

The Accountability Regimes of Independent Agencies: A Comparative Study

Thèse en vue de l'obtention du grade de docteur en science politique

de l'Université de Lausanne

Par

Jan Biela

Thèse présentée le 5 août 2016

Devant le jury constitué de

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Lausanne/Berlin

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Faculté des sciences
sociales et politiques

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autorise, sans se prononcer sur les opinions du candidat, l'impression de la thèse de Monsieur Jan BIELA, intitulée :

**« The Accountability Regimes of Regulatory Agencies:
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Le Doyen de la Faculté



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Abstract

In contemporary politics, a new type of actors, sometime called Non-Majoritarian Institutions (NMIs), are of raising importance - most often for efficiency rationales. One particular important species of that type are Independent Regulatory Agencies (IRAs), established mainly to regulate risks or (formerly monopolized) markets in an expertise- and long term-oriented manner. For this purpose, IRAs are often designed to act “at arm’s length” of government. In turn, it has been argued IRAs represent a challenge to democracy. Of particular concern is that IRAs, due to their independence, are not anymore subject to mechanisms of democratic accountability. The present thesis addresses the accountability of Independent Regulatory Agencies (IRAs) in a more inclusive way than existing approaches. That “regime approach” differentiates between formal accountability mechanisms “on paper”, and their de facto use. Empirically, the approach is used to analyze the accountability regimes of four case studies: The Swiss regulators for telecommunications and financial services, ComCom and FINMA, and their German counterparts, BNetzA and BaFin. The results yield, first, that each agency under scrutiny is formally subject to a powerful accountability regime. Moreover, there is no detectable trade-off between independence and formal accountability. The second part of the study reveals the power of additional factors such as trust, reputation-seeking, and transnational integration to completely juxtapose the character of the formal arrangement. The regime approach has hence proven useful to get a more fine-grained picture of accountability. It shows that accountability is not restricted mainly by resource scarcity or lack of credibility, which most fora are able to compensate for, but by informal dynamics among fora and between fora and agency.

Résumé

La politique contemporaine est marquée par l'apparition d'un nouveau type d'acteurs, parfois appelés institutions non majoritaires (INM) qui ont vu leur importance sensiblement s'accroître - le plus souvent pour des raisons d'efficacité. Parmi ces nouveaux acteurs, les organismes de réglementation autonome (IRA), ont pris une importance particulière dans le domaine de la réglementation des risques ou des marchés (anciennement monopolisés) dont l'expertise est orientée avant tout sur le long-terme. À cet effet, les IRA sont souvent conçus pour agir indépendamment du gouvernement. De ce fait, les IRA représentent pour certain un véritable défi démocratique. Il est notamment particulièrement préoccupant que les IRA, en raison de leur indépendance, ne soient pas soumises à des mécanismes de responsabilité démocratique. La présente thèse traite de la responsabilité des organismes de réglementation autonome (IRA) d'une manière plus inclusive que les approches existantes. Cette «approche de régime» établit une distinction entre les mécanismes officiels de responsabilisation «sur papier» et leur utilisation de facto. Empiriquement, l'approche est utilisée pour analyser les régimes de responsabilité de quatre organismes : Les régulateurs suisses pour les télécommunications et les services financiers, la ComCom et la FINMA, ainsi que leurs homologues allemands, BNetzA et BaFin. Les résultats de cette analyse démontrent, en premier lieu, que chaque organisme est formellement soumis à un régime de responsabilisation puissant. En outre, aucun compromis n'est apparu entre indépendance et responsabilité formelle. La deuxième partie de l'étude révèle également la puissance de facteurs supplémentaires tels que la confiance, la recherche de réputation et l'intégration transnationale afin de compléter les accords officiels. L'approche de régime s'est donc révélée utile pour obtenir une image plus fine de la responsabilité. Elle montre en particulier que la responsabilité ne se limite pas principalement à la rareté des ressources ou le manque de crédibilité, que la plupart des forums sont en mesure de compenser, mais se compose d'une dynamique informelle entre les instances ainsi qu'entre les instances et les organismes.

Preface

Similar to an accountability regime, what you learn writing a dissertation has a “on paper” and an “in practice” dimension. Asked for the topic of my PhD, I have been used to reply: “About the accountability of agencies”. But this is not the whole truth. De facto, you learn about many other things, at least some, maybe even most of them of even greater importance than the academic expertise gathered.

I learned from many other people, which I owe gratitude to: Foremost my supervisor, Yannis Papadopoulos, and my jury members, Martino Maggetti and Thomas Schillemans. Furthermore I would like to thank my Zurich officemates Karin Hasler, Thomas Schäubli, and Fabrizio De Francesco for the funny part, as well as Aurélien Buffat, Philipp Trein, and André Mach for making me feel comfortable in Lausanne (despite my poor French). Finally André Kaiser for arousing my fascination for political science.

I learned also to work under different conditions: Parts of this thesis were written in my spacious Zurich office, others in a one-room lakeside bungalow, formerly part of a socialist youth holiday camp, in rural Brandenburg. I worked in a basement office in Utrecht, in a 20 sqm glass cube together with 14 other people at LSE, in a charming concrete library building from the 1970s in Dortmund and in a hip Berlin co-working space with web designers and start-up employees enjoying a coffee flatrate and a minimum amount of six Club Mate a day.

During my work on that dissertation, I moved twice, and got two children. When I was writing my diploma thesis, and I got to my supervisor’s office with a new idea, he used to say: „Always remember: There is a life after the thesis.” To my family, Daniela, Lukan, and Robyn – many thanks for your patience, you survived. This is what I finally learnt: Get done with it, and care about the life thereafter. It is going to start now.

Berlin, August 2016

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Abbreviations

AS	Agency Strategy	
AFS	Financial Stability Commission, Germany	<i>Ausschuss für Finanzstabilität</i>
BaFin	Federal Financial Supervisory Authority, Germany	<i>Bundesanstalt für Finanzdienstleistungsaufsicht</i>
BAKred	Federal Banking Supervisory Authority, Germany (predecessor of BaFin, until 2002)	<i>Bundesaufsichtsamt für das Kreditwesen</i>
BCBS	Basel Committee on Banking Supervision	
BEREC	Body of European Regulators for Electronic Communications	<i>Gremium Europäischer Regulierungsstellen für elektronische Kommunikation</i>
BGBI	Federal Law Gazette, Germany	<i>Bundesgesetzblatt</i>
BGE	Federal Supreme Court, Switzerland	<i>Bundesgericht</i>
BIS	Bank for International Settlement	
BMF	Federal Finance Ministry, Germany	<i>Bundesministerium der Finanzen</i>
BMWi	Federal Ministry for Economic Affairs and Energy	<i>Bundesministerium für Wirtschaft und Energie</i>
BNetzA	Federal Network Agency, Germany	<i>Bundesnetzagentur</i>
BRH	Federal Audit Court, Germany	<i>Bundesrechnungshof</i>
BV	Federal Constitution of the Swiss Confederation	<i>Bundesverfassung der Schweizerischen Eidgenossenschaft</i>
BVerfG	Federal Constitutional Court, Germany	<i>Bundesverfassungsgericht</i>
BVGer	Federal Administrative Court, Switzerland	<i>Bundesverwaltungsgericht</i>
CEBS	Committee of European Banking Supervisors, EBA predecessor	
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors, EIOPA predecessor	
CEO	Chief Executive Officer	
CESR	Committee of European Securities Regulators, ESMA predecessor	
ComCo	Competition Commission, Switzerland	<i>Wettbewerbskommission</i>
ComCom	Communications Commission, Switzerland	<i>Kommunikationskommission</i>
DETEC	Federal Department of the Environment, Transport, Energy and Communications	<i>Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation</i>
DTAG	Deutsche Telekom AG, German incumbent of telecommunications markets	
EBA	European Banking Authority	
EC	European Commission	
ECB	European Central Bank	
ECJ	European Court of Justice	

EFK	Federal Audit Office, Switzerland	<i>Eidgenössische Finanzkontrolle</i>
EIOPA	European Insurance and Occupational Pensions Authority	
ENSI	Swiss Federal Nuclear Safety Inspectorate	<i>Eidgenössisches Nuklearsicherheitsinspektorat</i>
ESA	European Supervisory Authorities, summary term for EBA, ESMA, and EIOPA	
ESFS	European System of Financial Supervision	
ESM	European Stability Mechanism	
ESMA	European Securities and Markets Authority	
ESRB	European Systemic Risk Board	
EU	European Union	
FC	Federal Council, Swiss collective head of government	<i>Bundesrat</i>
FDF	Federal Department of Finance, Switzerland	<i>Eidgenössisches Finanzdepartement</i>
FINMA	Swiss Financial Market Supervisory Authority	<i>Eidgenössische Finanzmarktaufsicht</i>
FK	Finance Commission of the Swiss parliament	<i>Finanzkommission</i>
FLAG	German acronym for a New Public Management program in the federal sector („management by performance mandate and global budget“), Switzerland	<i>„Führen mit LeistungsAuftrag und Globalbudget“</i>
FMSA	Federal Agency for Financial Market Stabilisation	<i>Bundesanstalt für Finanzmarktstabilisierung</i>
FS	Forum Strategy	
FSB	Financial Stability Board	
GATT	General Agreement on Tariffs and Trade	
GDP	Gross Domestic Product	
GG	German Constitutional Law	<i>Grundgesetz</i>
GPK	Control Commission of the Swiss parliament	<i>Geschäftsprüfungskommission</i>
HKPA	Budget committee, BaFin	<i>Haushaltskontroll- und -prüfungsausschuss</i>
IAIS	International Association of Insurance Supervisors	
IMF	International Monetary Fund	
IRA	Independent Regulatory Agency	
IRG	Independent Regulators Group	
IOSCO	International Organization of Securities Commissions	

MoU	Memorandum of Understanding	
MP	Member of Parliament	
NGO	Non-Governmental Organization	
NMI	Non-Majoritarian Institution	
NMR	Non-Majoritarian Regulator	
NPM	New Public Management	
OECD	Organisation for Economic Cooperation and Development	
OFCOM	Office for Communications, Switzerland	<i>Bundesamt für Kommunikation</i>
PTT	Postal Telegraph and Telephone, former Swiss state monopolist for telecommunications and postal services	<i>Post-, Telefon- und Telegrafbetriebe</i>
PVK	Parliamentary Control of the Administration	<i>Parlamentarische Verwaltungskontrolle</i>
RegTP	Regulatory Agency for Telecommunications and Postal Services, predecessor of the BNetzA, Germany	<i>Regulierungsbehörde Telekommunikation und Post</i>
SBVg	Swiss Banking Association	<i>Schweizerische Bankiervereinigung</i>
SFBC	Swiss Federal Banking Commission; FINMA predecessor	
SIF	State Secretariat for International Financial Matters, Switzerland	<i>Staatssekretariat für internationale Finanzfragen</i>
SIFI	Systemically Important Financial Institution	
SNB	Swiss National Bank	<i>Schweizerische Nationalbank</i>
SoFFin	Special Financial Market Stabilisation Funds, Germany	<i>Sonderfonds Finanzmarktstabilisierung</i>
SR	Systematic Compilation of Federal Legislation, Switzerland	<i>Systematische Sammlung des Bundesrechts</i>
SSM	Single Supervisory Mechanism	
WIK	Consultancy firm for telecommunications services, owned by the BMWi	<i>Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste GmbH</i>
WTO	World Trade Organisation	
WHO	World Health Organisation	

1. Introduction

We live in an era sometimes called the “democratic age”. The number of democracies in the world has risen substantially in the last decades (Marshall and Cole, 2014). However, there are a number of facts raising concerns about the state of contemporary democracies, foremost low participation rates and the feeling of being misrepresented (Maggetti, 2010). That erosion is often associated with ongoing denationalization and, in turn, a power loss of national governments. Denationalization occurs economically (through worldwide capital flows and global companies) and politically, manifested in the raise of transnational bodies to coordinate policies (Papadopoulos, 2013; Zürn, 2005). In addition, some authors underline the widening gap between the extreme velocity of the economic world and financial transactions, and the limits of democratic processes in terms of decision-making and resources to keep pace with that (Rosa, 2005).

One aspect of that power loss is the growing importance of a new type of political actors:

“In several countries we can observe a growing phenomenon of reassignment of political power from democratic institutions (parliaments, governments, administration) to various non-elected bodies, which are not democratically accountable in the traditional sense of being politically responsive to citizens by means of a chain of political delegation ...” (Maggetti, 2010: 1).

For example, in most western countries, the supervision of financial markets had been and is executed by so called independent regulatory agencies. In other words, the supervisory tasks regarding financial institutions, but also in other policy areas, have been increasingly delegated to bodies which enjoy a certain degree of autonomy from government. This occurred primarily due to economic arguments, expecting economic growth due to impartial, and long-term stable market regulation autonomous from government turnovers or short-sighted interests. On these grounds, independent regulators have gained considerable importance for our economy.

It were the very same regulators that were publicly blamed in the aftermath of the crisis for not having foreseen and prevented it (Commission of Investigation into the Banking Sector in Ireland, 2011: vii-x; National Commission on the Causes of the Financial and Economic Crisis in the United States, 2011: xviii). The decisive fact is not, however, that these institutions had failed to prevent the financial crisis – they shared this blindness with many other relevant actors, including many banks. The concerns, from a democratic theory perspective, regard more the fact that these agencies do not react adequately to politicians' or citizens' concerns: How is it possible that institutions such as independent regulators are so important, but at the same time so distant from democratically elected institutions? Does the mere fact that independence is a desired characteristic of these regulators make democratic control over policies vanish into thin air? This leads to research question 1:

RQ 1: Can IRAs be formally independent yet accountable?

In fact, it is sometimes argued, that independence is at odds with democratic accountability. I argue in contrast, that accountability and independence do not interfere with each other, but suffer from incomplete differentiation.

Apart from that normative discussion, however, there are serious doubts that agents can be held to account for practical reasons. For instance, the lack of time and expertise would prevent e.g. parliaments from effective monitoring of agencies. Thus, in order to assess agency accountability, it is not useful to reduce the study to formal arrangements. In fact, it is plausible that the actual use of the instruments, and the general patterns of accountability in practice matter also. Research question 2 is thus:

RQ 2: How can we expect fora or agencies to act within a given accountability regime? And how does that affect overall accountability?

I address these two questions in the following way: Chapter 2 provides a fine-grained narrative of denationalization and the parallel raise of independent regulators. It then presents the challenges to democracy these developments represent, and the role of accountability as a potential remedy. Chapter 3 outlines the rationale of the empirical investigation. The aim of the study is to empirically test an expectation based on normative grounds (RQ 1) and to explore different accountability regimes and their work in practice.

To that ends, four agencies, namely the Swiss and German regulators of telecommunications and financial markets, respectively, have been chosen for in-depth case studies. Chapter 4 reviews existing understanding of accountability. It differentiates between a normative and a descriptive understanding of the term. It then develops a descriptive definition of the concept and the understanding of accountability as working together in an accountability regime. It suggests an integrated regime approach to accountability, which provides abstract criteria allowing for structured comparisons of accountability across agencies and countries, and even highly different institutional arrangements. Chapter 5 covers the operationalization of accountability. Chapter 6 contains the empirical investigation on research question 1. It yields that formal accountability regimes are present in cases under scrutiny. Moreover, there is no trade-off between accountability and independence detectable. However, as chapter 7 shows, accountability in practice is subject to various dynamics, that have the power to alter formal structures substantially. Factors such as reputation-seeking, trust, and policy salience shape actor behavior by inducing cooperation among fora and between fora and agencies. In the light of these insights, the findings from chapter 6 are revisited in chapter 8. Chapter 9 concludes.

2. Regulatory agencies as a challenge to democracy

This chapter outlines in more detail the starting point of the present work. It assesses the shifts in state tasks and state actors we can detect in the last decades, as well as the connected rise of regulatory agencies (section 2.1). It then presents the challenges to democracy and legitimacy these developments represent (section 2.2). Finally, it discusses the role of accountability in the context of independent regulators and the difficulties assigned to the coexistence of both concepts according to part of the literature (section 2.3).

2.1. The rise of the regulatory state

The last decades faced important changes in the organization of the state, which severely reduced the role of national governments and parliaments, while (international as well as domestic, public as well as private) non-elected actors have gained power. The origin of these changes is widely associated with the ongoing process of “globalization” or “social denationalization”. That “extension of social spaces, which are constituted by dense interactions, beyond national borders” (Zürn, 2000: 187) has put pressure on the traditional nation state:

“The territorially based, democratically legitimated state that took on the tasks of welfare provision and provision for macroeconomic stability sees its capabilities potentially eroded—crucial capabilities such as the one for resource extraction to finance the wide-ranging responsibilities which also contribute centrally to its legitimacy.” (Busch, 2009: 1).

In order to maintain its governing capabilities, nation states had to tackle at least two basic challenges: to improve (international) coordination in order to keep pace with the economic and societal “*Entgrenzung*” (Zürn, 2000), and to raise its own efficiency to keep pace with the intense competition they faced on world markets. In this context, the literature highlights two developments: first, the redistribution of tasks among actors of public or private character, and located at domestic, international, and subnational level; and second, the shift in the predominant task character away from a redistributive (or “positive”, or

“dirigiste”) state towards a “regulatory state” (Majone, 1997). Both developments are outlined in the following subsections.

2.1.1. Shifts in state actors

The redistribution of state tasks to new actors has been quite extensive: political power in the last decades has shifted away from parliaments, and partly also from governments, towards new actors, characterized as “non-majoritarian institutions” (NMIs, Majone, 2001a) or New Modes of Governance (Héritier and Lehmkuhl, 2011a). While the latter are most often detected at the level of the European Union,¹ the former class of institutions are characterized at a more general level as “unelected bodies ... that in a myriad of ways affect the quality of our daily life, our life chances and our life prospects” (Vibert, 2007: 7).

That “rise of the unelected” (Vibert, 2007) took place at international and supranational levels as well as at domestic level. The former, sometimes referred to as “upwards denationalization”, includes the transfer of power to, for example, the European Commission and other international and transnational organizations such as OECD, WHO, WTO or international networks. At the domestic level (titulated as “sideways” and “downwards denationalization”, respectively) there has been constituted a strengthening of independent central banks, expert and private bodies, regulatory authorities and agencies in general (Héritier and Lehmkuhl, 2011b: 51; Vibert, 2007).

Within that movement, I focus on the phenomenon sometimes called “agencification” - the increasing importance of agencies as a

“... structurally disaggregated body, formally separated from the ministry, which carries out public tasks at a national level on permanent basis, is staffed by public servants, is financed mainly by the state budget, and is subject to public legal procedures” (Christensen and Lægreid, 2006: 12).

Tasks of traditional bureaucracies in many Western countries have been transferred to agencies, in order to execute these in a more specialized and efficient manner (Christensen

¹ Héritier enumerates regulatory agencies and networks, comitology procedures, private self-regulation, the Open Method of Coordination, arbitration, and tripartite policy making.

and Lægreid, 2006: 12). One result of this development is that power now is more dispersed among actors than it used to be: hierarchical relations changed to a more network-like structure, and the multitude of structures made some traditional ways of governing pointless. This development is often called a shift “from government to governance” (Bellamy and Palumbo, 2010).²

2.1.2. Shifts in state tasks

Eising (2000: 34-5) explains this development with the upcoming neoliberal paradigm: instead of state provision, competitive markets of private actors, regulated by the state, should be responsible for the provision of a far wider range of goods. However, privatization does not mean that the state is completely out of the game:

“Privatisierungen höhlen die staatliche Verantwortung aber nicht gänzlich aus. ‚Der Staat‘ kann sich häufig nicht aus der Verantwortung für das Marktverhalten und die Performanz privatisierter Unternehmen lösen, insbesondere in Sektoren mit einer hohen Bedeutung für die Öffentlichkeit und großen Informationsasymmetrien (Medien, Finanzsektor), oder in Versorgungssektoren, die Charakteristiken natürlicher Monopole aufweisen (Starr 1990: 29). .. Die staatlichen Akteure sind vielmehr häufig dazu gezwungen, Märkte zu konstruieren und deren Funktionsfähigkeit sicherzustellen“ (Eising, 2000: 35).

Accordingly, some scholars have classified this development as a shift of state tasks from a primarily redistributive to a more regulative character (Levi-Faur, 2005; Majone, 1997):

“All in all, the increasing scope and depth of regulation suggest that it is a phenomenon to be reckoned with. The notion of regulatory capitalism that rests on a new division of labor between state and society, on the

² Governance provides a way to overcome classical delimitations of political science. In contrast to traditional views which highlighted the contrast to national hierarchies and international anarchy, governance approaches acknowledge the parallels of governing structures in the national and international context (Börzel 2006). In essence, it is associated with a less hierarchical and more network-like structure, characterized by the interplay of established democratic institutions with private and societal actors (Benz 2004; Wiesbaden et al. 2007; Benz et al. 2007).

proliferation of new regulatory agencies, on new technologies and instruments of regulation, and on the legalization of human interactions seems to open an agenda which may well become a major area of social, economic, and political research” (Levi-Faur, 2005: 22).

Regulatory policy, according to Busch (2009), provides certain advantages in comparison to redistribution:

“Regulatory policy produces few costs – compared to distributive policy and state-spending programmes – as the production of laws and rules is generally not very expensive. Similarly, monitoring compliance with these rules also requires little financial commitment, especially since these costs can often be imposed onto the regulated sector of the economy. As a result, regulatory policy will be largely unaffected by budgetary problems of a state, and if the latter vary across a group of states that are under investigation, the analysis will consequently not be distorted by this variation” (Busch, 2009: 13).

We can sum up that, at least partly, denationalization and privatization have induced the state to change its strategy. Instead of redistributing resources, governments increasingly focus on regulation of privatized economic sectors, in order to cope with the diminished role of national governments.

What is exactly meant now by “regulation”? The term “regulative policy” goes back to Lowi (1972), who differentiates between distributive, constituent, regulative, and redistributive policies. According to Baldwin et al. (2012), the term “regulation” in its narrowest meaning refers to

“a specific set of commands - where regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose” (Baldwin et al., 2012: 3).³

³Wider definitions also entail “economic incentives (e.g. taxes or subsidies); contractual powers; deployment of resources; franchises; the supply of information, or other techniques”. These techniques are implemented either exclusively by state institutions, or, in the widest definition, also by “a host of

In an economic sense, regulatory policies fulfil two purposes – a protective one and a competitive one (Ripley and Franklin, 1986). While the former one aims to regulate risks, the latter one focuses on the prevention of market failures:

“Regulierung wird erstens ... als politisches Instrument der Marktgestaltung, d.h. zur Herstellung und Sicherung von chancengleichem Wettbewerb begriffen. .. In diesen Befund mischt sich ... ein zweiter Bedeutungsgehalt von Regulierung, der das breite Feld zivilisatorischer Risiken umfasst ...“ (Döhler and Wegrich, 2010: 32).

The purpose of market regulation is hence mainly to correct market failures, such as monopoly rents, the under-provision of public goods, welfare-reducing effects of asymmetric information, or negative externalities (Majone, 1994: 81-2). Since privatization aims to establish competitive private good provision (instead of provision by state-owned monopolists), the increased importance of market regulation in several economic areas is quite straightforward: Döhler and Wegrich (2010: 32) enumerate telecommunications, energy, postal, and rail services as primary subjects for market regulation due to privatization efforts and the wide existence of (formerly) state-owned monopolists in these areas.

While market regulation thus aims for market efficiency, the regulation of risk is understood as “governmental interference with market or social processes to control potential adverse consequences to health” (Hood et al., 2001: 3). More generally, risk regulation occurs in all areas relevant to consumer, environmental and economic safety, such as production of food and pharmaceuticals, nuclear energy, or also financial markets (Döhler and Wegrich, 2010: 32).

The risk inherent to inadequate regulation of nuclear plants or pharmaceuticals is quite obvious. In the case of the financial sector, the risks in contrast have been overlooked for much time:

other bodies, including corporations, self-regulators, professional or trade bodies, and voluntary organisations” (Baldwin et al. 2012: 3).

“First of all, banks provide all other parts of an economy as well as the consumers on which all businesses ultimately depend with credit. An efficient and well-performing banking sector is therefore fundamental to the health of any economy. Secondly, the banking industry is one of the most vulnerable parts of the modern economic system. The collapse of a bank has a very different and often much deeper impact than the failure of firms belonging to other sectors of the economy” (Busch, 2009: 22-3).

In sum, mainly due to liberalization and denationalization, regulation has become an increasingly important state task. According to literature, rather than redistributing resources itself, the state nowadays rather focuses on the functioning of the markets and the management of risks.

2.1.3. Summary

In sum, recent decades have witnessed a substantive change in state tasks and how they are tackled. This is frequently associated with the challenges of denationalization. The shift of power away from the nation state is counteracted by more international *coordination*, efforts to increase the *efficiency* of state action, and in effect a change in the *type of predominant policy* (regulation instead of redistribution), and the *type of actors* executing these policies: Apparently, governments nowadays focus more on setting guidelines (regulations) in order to ensure market functions and to protect citizens’ and economy’s health, rather than intervening directly in the economy. This task is moreover done often by new kinds of actors, which are not always democratically elected.

The aim of the present work is to highlight the effects of these new arrangements on democracy, in particular on democratic accountability, which has remained underinvestigated in the debate is the impact of the new state structures on *democracy* (Christensen and Læg Reid, 2011: 140). The question is, if and how these unelected bodies are subject to democratic control. For this purpose, the work focuses on one of the most prominent realizations of that development: the rise of independent regulators.

2.2. The rise of independent regulatory agencies

The most visible effect of the above-mentioned phenomenon is the increasing number and importance of non-majoritarian regulators (NMRs) in the recent past. A NMR is defined as

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

Coen and Thatcher (2005: 330) differentiate between three types of NMRs: a) national independent regulatory agencies; b) supranational and international NMRs; and c) private NMRs. The focus of the present work is on the first type, independent regulatory agencies, or IRAs. In contrast to supranational bodies such as the European Commission, IRAs are mainly domestic actors and belong to the public sphere (Maggetti, 2010).

Regulatory powers have been increasingly delegated to IRAs since the 1980s (Coen and Thatcher, 2005; Gilardi, 2008; Levi-Faur, 2005; Maggetti, 2007; Thatcher and Stone Sweet, 2002). Figure 2.1 shows that the number of regulatory agencies in OECD countries rose substantially in the 1990s. While in 1986, less than 10% of OECD countries had an independent telecoms regulator, this number had risen up to more than 90% in 2001 – only 15 years later. Hood et al. detected for the British case, that while general government reduced direct employees by more than 25 per cent between 1976 and 1995, regulatory bodies' staff grew by 90 per cent (1999: 29-31). We are thus dealing with a highly relevant phenomenon in contemporary governance structures.

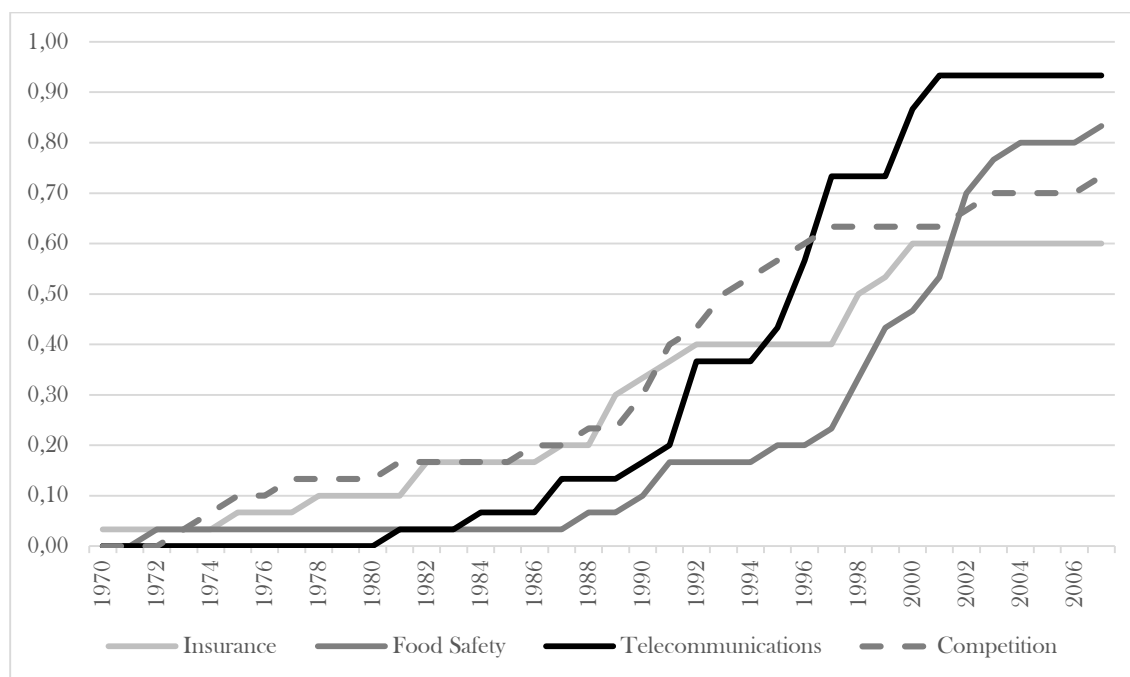


Figure 2.1: Share of OECD countries that have established IRAs in several economic sectors, 1970-2007

Source: Jordana et al. (2011), own calculations.

2.3. Independence as a challenge to democratic legitimacy

All NMIs in common have a shift away from the traditional democratic-representative governmental arena (Héritier and Lehmkuhl, 2011a: 50). This holds also for IRAs. This induces, first, a reduced level of control democratic institutions can exert:

“Critics have argued that the new public management may be detrimental to the representativeness of bureaucracies and democracy because it prioritizes performance over accountability to citizens [..] Privatization and delegation to ‚independent‘ regulatory agencies gives citizens fewer chances to control such agencies through voice and there is often insufficient compensation for these new exit options“ (Van Kersbergen and Van Waarden, 2004: 160).

Indeed, IRAs enjoy substantially more discretion (at least in principle) than ordinary bureaucracies (Gilardi, 2008) and operate “at arm’s length” of government. This “non-

majoritarian” character (Majone, 2001a) induced scholars to question the democratic legitimacy of those new actors. In the words of Bellamy et al. (2011: 136):

“This supposed superiority of new modes of governance, however, is a rather contested issue and one that poses difficult questions in terms of legitimacy, democratic representation and political accountability.”

They continue:

“New modes of governance may secure efficacious solutions in a speedier and less costly manner. Networks and private actors often have more expertise and may respond more speedily than when public actors seek to act alone. But, in the absence of transparency and oversight, citizens may have little reason to trust that this is in fact the case” (Bellamy et al., 2011: 143).

The same holds for public, but autonomous bodies, such as central banks or regulatory agencies. As an outstanding example, the European Central Bank (ECB) has been criticized for being overly autonomous and not effectively accountable to elected actors (Berman and McNamara, 1999; Elgie, 2002; Gormley and de Haan, 1996). Apart from strong institutional independence, it is also only weakly integrated in political spheres that might provide additional, more informal control (Berman and McNamara, 1999). In cases of strongly pronounced independence, the question of a “democratic deficit” of such institutions is most striking and has been raised frequently (Coen and Thatcher, 2005; Feldman and Khademian, 2002; Majone, 1994, 1999; Van Kersbergen and Van Waarden, 2004). Next, I present a concept of democratic legitimacy, which is consecutively used to enumerate the problems associated with IRA’s independence.

2.3.1. A concept of democratic legitimacy

Democratic legitimacy is a core value in democratic states. It is required by institutions to ensure the people’s willingness to comply with its decisions and thus a prerequisite for effective governance:

“Legitimationsargumente, die vom sozialen Umfeld des Handelnden anerkannt werden, verweisen auf Sachverhalte, welche die moralische Verpflichtung begründen, herrschaftliche Gebote und Verbote auch dann zu befolgen, wenn diese den eigenen Interessen oder Präferenzen zuwiderlaufen, selbst wenn der Eintritt formaler Sanktionen unwahrscheinlich ist. Fehlt diese auf Internalisierung und soziale Kontrolle gegründete Folgebereitschaft der Adressaten, so sinkt die Effektivität oder es steigen die Kontroll- und Erzwingungskosten des Regierens. Legitimität ist also die funktionale Voraussetzung der Möglichkeit von zugleich effizienter und liberaler Herrschaft” (Scharpf, 2005: 705-6).

The most prominent conceptualizations of legitimacy in the present context have been developed by Scharpf (1970, 1999), who differentiates between input- and output-oriented legitimacy. Input legitimacy is based on the responsiveness to citizens’ preferences (i.e., government “by the people”), whereas output legitimacy requires acting in the public interest (in other words, “for the people”). From an input perspective, “[p]olitical choices are legitimate if and because they ... can be derived from the authentic preferences of the member of a community.” In contrast, output legitimacy is given if and because choices “effectively promote the common welfare of the constituency in question” (Scharpf, 1999: 6).⁴

2.3.2. Non-majoritarian institutions and input legitimacy

First of all, as already mentioned above, IRAs operate “at arm’s length” of government. This means the absence of control and monitoring instruments usually present in the relationship between political sphere and administrative bodies. Second, the technical complexity of regulatory tasks make it doubtful that IRAs can be monitored effectively. While “information asymmetries” are omnipresent in delegation theory, Binderkrantz and Christensen (2009) find these asymmetries to be particularly extreme in the field of

⁴ Recently, Vivien Schmidt added to Scharpf’s concept a throughput dimension. According to her, throughput legitimacy is acquired through “the quality of the governance processes as established by their efficacy, accountability, transparency, inclusiveness and openness to interest intermediation” (Schmidt, 2013: 6).

regulation. Moreover, the multi-level character of contemporary governance systems (Curtin et al., 2010; Papadopoulos, 2003; Zürn, 2000) make it even more difficult for democratic institutions to keep pace with regulatory tasks. Finally, the so-called “hollowing out of the state” – i.e. the increased power of domestic bureaucracies and international networks (Rhodes, 1995) – induces scholars to raise serious doubts on the capability of parliaments and institutions of representative democracy in general effectively keep pace with their agents (Pierson, 2004; Rosa, 2005):

“Monitoring, overview, investigation, deliberation, decision-making is far beyond the capacity of a parliament (and its membership), no matter how large, how capable, how well organized, how specialized” (Andersen and Burns, 1996).

As a last point, IRAs are seen as likely to receive selective input. Powerful interest groups can, based on resources, influence regulatory decision-making, leaving other interests underrepresented (Papadopoulos, 2003). In turn, IRAs are suspected to be biased in favor of narrow and myopic interests (Føllesdal, 2011: 82):

“Looking at new modes of governance in the light of this discussion, their problem is not that functional representation cannot conform to requirements of public reasoning. It is rather that those who are not parties to the bargain find it difficult to have assurance that their legitimate interests and point of view are being sufficiently taken into account. The issue is not whether new modes of governance allow interested parties to bargain with one another to mutual advantage; it is whether this bargained advantage is bought at the expense of public interest” (Bellamy et al., 2011: 159).

In sum, democratic control of NMIs is possibly biased, and suffers from both lack of instruments and capability.

As a solution, it has been argued that enhanced citizen and stakeholder participation would provide a way out of that dilemma (Sosay, 2006; Zürn, 2000). Zürn (2005) deals above all

with negotiations in transnational contexts. He stresses the problem of reduced legitimacy of those negotiations, which he considers much more severe than eventual reduced abilities of the nation state to guarantee its citizens' welfare. He pleads for a strengthened role of parliaments and NGOs in the transnational arena.

While enhanced participation of "civil society" is often upheld as a panacea for the detected decline of representative democracy (Fung, 2015), there are unsolved problems in that regard: Risse (2006) highlights the difficulties in identifying relevant stakeholders, in deciding whom to in- and exclude, as well as in the trade-off between the transparency goals of participatory schemes and the fact that deliberation is more effective behind closed doors. In the EU context, participatory schemes are sometimes found to promote technocratic tendencies (Smismans, 2008). Representatives are also found to be only limitedly accountable to their organization members (Benz and Papadopoulos, 2006).

In different line of argumentation, input democracy has been declared as irrelevant in comparison with the performance gains (and hence increased output legitimacy) which had been theoretically associated with agencification and regulators' autonomy. From that perspective, efficient, expertise-based and unbiased decision making is believed to improve policy output and economic outcomes. In his earlier work, Majone (1996, 1998b) argues that the loss of input legitimacy can be entirely compensated by output legitimacy. In his view, regulation, as long as it does not entail redistributive effects, enhances general welfare and has even pareto-superior effects.⁵ In other words, there is no need for democratic election of institutions as long as their actions are beneficial for everyone. This view was challenged by other scholars, arguing that both input and output legitimacy are needed. In this perspective, output legitimacy has its limits as soon as decisions are not pareto-superior: i.e. they also generate losers (Scharpf, 2003). According to Scharpf, this is the case in most regulatory policies.

2.3.3. Non-majoritarian institutions and output legitimacy

In fact, it is not only unproven so far that independence of regulators produces pareto superior outcomes (i.e., it does not create any losers while enhancing general public

⁵ A situation A is pareto-superior compared to a situation B, if it makes at least one individual better off without having negative consequences for anyone else.

welfare), but there is neither clear evidence that independence has *any* positive effect on welfare, regardless its distribution. Further points mentioned with regard to output legitimacy of IRAs regard, first, the evaluation of their outcomes, and second, the lacking possibility for cross-sectoral policy deals.

Regarding the first point, the literature on central banks regularly underlines the fact that the bank has a single and measurable target: to keep inflation low. In contrast to central banks, IRAs regularly face multiple objectives (Goodhart, 2001; Quintyn et al., 2007) that are moreover quite difficult to measure (Maggetti, 2010). This makes it hard to assess the performance of agencies, which in turn gain leeway in their prioritization of goals.

Second, democratic decision-making normally shows several mechanisms to internalize general concerns and broader public interest, such as package deals. Agencification in contrast tends to lead to a large number of single-purpose actors. As a result, it is likely that externalities of their decisions are not taken into account by these agencies (Føllesdal, 2011: 82). Cross-sectoral coordination becomes more difficult, with probable negative implications for general welfare. In sum, the overall welfare benefit of NMIs is questionable, and moreover, difficult to evaluate.

2.3.4. Summary

Challenges to democracy regard both input and output legitimacy. Namely, the former is subject to limited democratic control induced both by restricted formal rights due to autonomy and non-majoritarian character, as well as by restricted capabilities of democratic institutions struggling with the high complexity of many policies. Moreover, the selective access of interest groups to decision-making processes reduces input legitimacy further. On the output side, it is argued that functional differentiation makes cross-sector coordination more difficult (this problem has recently been tackled by the literature on “wicked issues”) and that removing decision-making from the political sphere inhibits the consideration of externalities. Finally, the performance of many regulatory agencies and other New Modes of Governance is hard to measure, due to the complexity of the policy area, the multiple objectives pursued, and the lack of clear indicators.

2.4. Accountability as a remedy to legitimacy concerns?

In the light of lacking empirical evidence regarding the positive welfare effects of independence, Majone has more recently joined the position of other scholars dealing with democratic legitimacy, acknowledging the relevance of both input and output legitimacy in the case of regulatory agencies (Bellamy et al., 2011; Benz and Papadopoulos, 2006; Scharpf, 1999, 2003):

“Even if, ex hypothesis, new modes of governance were to make such policy and regulatory choices that secure Pareto improvements, this is not enough: citizens must also have reason to believe that new modes of governance regularly do so. As we have seen, the way to ensure this condition is to nest new modes of governance within democratically accountable structures that first provide transparency and the opportunities for public debate about the choices made by new modes of governance, and second that provide the possibility of sanctions.” (Bellamy et al., 2011: 145).

Concretely, IRAs gain their legitimacy from the fact that democratic institutions can override their decisions, but do not exercise that right as long as the decisions of the IRA are widely accepted by the public (Føllesdal and Hix, 2006; Sosay, 2006). From a normative perspective, adequate institutional design, administrative procedures and forms of accountability could remedy problems of legitimacy (Aucoin and Heintzman, 2000; Bovens, 2010; Epstein and O'Halloran, 1994; Flinders, 2001; Héritier and Lehmkuhl, 2011b; Horn and Shepsle, 1989; Majone, 1994, 2001a; McCubbins et al., 1989; Mulgan, 2003; Pollitt, 2003; Saalfeld, 2000).

In other words, the argument relates to increased democratic control by enhancing transparency of agency action, as well as by establishing instruments to possibly sanction the agency for wrongdoings - in short, it requires IRAs to be held effectively *accountable*:

“In spite of many ways in which new modes of governance contribute to more flexible, efficient and credible decision-making, they cannot generate their own democratic legitimacy. In order to function

legitimately, they need to operate under the ‘shadow’ of the more democratic accountability provided by and through other political institutions” (Bellamy et al., 2011: 161-2).

Accountability is a core mechanism within democracies in order to ensure agency legitimacy and to prevent a democratic deficit (Busuioc, 2009; Van Kersbergen and Van Waarden, 2004). The term, discussed at length in chapter 4, contains a normative and a descriptive meaning (Bovens, 2010). From the normative perspective,

„accountability is not primarily about instituting mechanisms, but about defining and preventing undesirable behavior“ (Bovens et al., 2014: 8).

Accountability is seen here to serve two basic purposes: a) to prevent the misuse of power (e.g. Thomas, 1998); and b) to ensure adequate performance (Peters, 2007). Both are directly linked to questions of democratic legitimacy:

“Institutions of power wielding can be legitimate in the eyes of citizens either because they ‘work’, ‘perform’, are able to ‘deliver the goods’ (output legitimacy); or because they result from decisions made according to procedures that include some minimal forms of accountability such as the rule of law, democracy, or political or economic competition (input legitimacy)” (Van Kersbergen and Van Waarden, 2004: 157).

Accountability is considered relevant for legitimacy particularly in the context of eroding public support (Dalton, 2006). Accountability, promoting transparency, responsiveness, and responsibility within governance structures, is seen as key factor to ensure public trust (Aucoin and Heintzman, 2000; Bovens, 2010: 954).

2.4.1. Prevent the misuse of power and ensure responsiveness

Misuse of power is mainly prevented by ensuring that agents behave according to the public will and in compliance with law. The first one is widely called responsiveness; the second

one is known as compliance, or as “responsibility” (Peters, 2007). Responsibility here means

“ensuring that the behavior of officials corresponds to (is responsible to) the law or a code of ethics in office” (Peters, 2007: 16).

Responsibility can be assured by a superordinate institution, such as a board or a parent ministry, or by courts. In contrast,

“the idea of responsiveness is that the good civil servant is one who is willing to take direction from above, to attempt to serve the public, and, insofar as possible, to provide the public with what it wants” (Peters, 2007: 16).

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

“An ‘accountability mechanism’ is thus a map from the outcomes of actions (including messages that explain these actions) of public officials to sanctions by citizens.” (Przeworski et al., 1999: 10).

To ensure responsibility and responsiveness of agents serves to enhance their *input legitimacy* (see section 2.3).

2.4.2. Ensure performance

The other basic purpose is to ensure performance. It is often argued that accountability is a necessary condition for good performance (Aucoin and Heintzman, 2000; Gasmi et al., 2009; Shah, 2007). This notion can be derived from two quite different arguments.

First, normative agency theory cares about efficiency, and in that respect it stresses the effect of sanctions: in anticipation of severe consequences *ex post*, agents show higher efforts than if this is not the case. The theory assumes that insufficient monitoring ends up in the agent pursuing his own goals. These goals are not necessarily policy-oriented (which has already been addressed by the discussion of responsiveness to the people's interests above), but can be characterized by the maximization of budget (Niskanen, 1971), the minimization of effort (Migué and Bélanger, 1974) or the maximization of "slack" (Wyckoff, 1990) in the sense of spare resources that can be used for anything in the agent's interest.

Second, other approaches see political decision making as an iterated process of learning and adaption under uncertainty. From that perspective, accountability is a mechanism that provides some feedback information on previous decisions and provides additional information for further improvement (cf. Sabel, 2004). Figure 2.2 depicts that feedback cycle. In effect, both arguments see accountability as a positive factor to performance and hence contributing to the agent's *output legitimacy*.

Another part of the literature doubts those positive effects: From that perspective, "accountability overloads" (Schillemans and Bovens, 2009) and "multiple accountability disorders" (Koppell, 2005) might lead to demotivation (Ossege, 2012) and symbolic action (Bovens, 2010: 957; Flinders, 2011). However, this remains an empirical question.

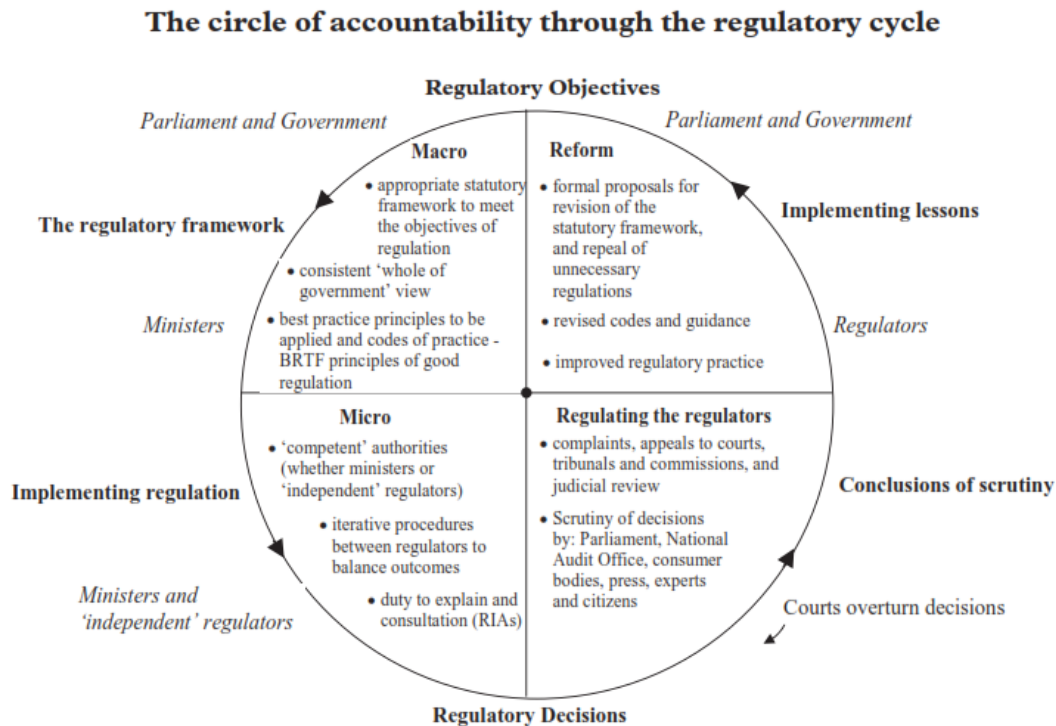


Figure 2.2 The circle of accountability through the regulatory cycle

Source: House of Lords (2004: 21).

2.4.3. Summary

Accountability serves four normatively desirable purposes:

- Prevent the misuse of power:
 - by ensuring responsiveness to the public will;
 - by checking compliance with rules/law (responsibility);
- Enhance performance:
 - by generating feedback loops that compare outcomes with initial goals and allows for improvement and learning;
 - by monitoring efficient resource use.

In other words, accountability is a prime instrument to guarantee (input and output) legitimacy. It is a core feature in contemporary political and administrative systems, and has gained more and more attention through the past decades (see chapter 4 for more on that).

However, and this is the very starting point of this work, a trade-off is claimed between accountability and the (from some theoretical viewpoints also desirable) agency independence. I present that argument in the following section.

2.5. The claimed accountability-independence trade-off

The problem with accountability in the context of independent agencies is the fact, that both terms are often seen as antagonistic:

“Debates over accountability have had to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to achieve their tasks, while at the same time ensuring an adequate degree of control” (Scott, 2000: 39).

From that perspective, accountability means control, control means less autonomy for the IRAs, which in turn endangers the associated positive economic effects. This is quite obvious in older contributions, using the term accountability merely as a different word for control (cf. e.g. Smith and Hague, 1971). As Romzek and Dubnick put in in their 1987 seminal article:

“[An] ingredient of any accountability system is the degree of control over agency choices and operations exercised by those sources of control. A high degree of control reflects the controller’s ability to determine both the range and depth of actions which a public agency and its members can take. A low degree of control, in contrast, provides for considerable discretion on the part of agency operatives” (Romzek and Dubnick, 1987: 228).

From this perspective, the mere fact that regulatory agencies are designed to be independent, implies that they cannot possibly be accountable to democratic institutions. As Busuioc writes for the European Union context:

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

Chapter 6 of this work argues that theoretically, there is in fact only a very limited trade-off between independence and accountability. This argument is reflected by empirical data: accountability of IRAs is widely unaffected from independence. Instead, it is subject to other factors affecting the practical use of formal accountability mechanisms. This is investigated in chapter 7. Before we get to the empirical part, however, I set out the research design of the study (chapter) and develop a conceptualization (chapter 4) and operationalization of accountability (chapter 5).

3. Research design

The study aims to investigate two research questions:

RQ 1: Can IRAs be formally independent yet accountable?

RQ 2: How can we expect fora or agencies to act within a given accountability regime? And how does that affect overall accountability?

To tackle these questions, a qualitative strategy seems suitable: A qualitative design makes sense since the theoretical arguments are manifold, existing empirical insights are scarce, and my way of assessing accountability is relatively resource-consuming. A comparative case-study design is able to test, but also to refine, causal relationships, as well as to allow for some generalization beyond specific cases. Gerring differentiates between (dis)confirmatory and exploratory research, whereby he assigns case studies “a natural advantage in research of an exploratory nature (Gerring, 2004: 349).

More specifically, my design resembles a hypothesis-centered comparative design. Comparative case-study designs can have different purposes, with implications for the focus of the analysis and the strategy for case selection. It is thus important to differentiate between the purposes of case studies in this context. Case-study designs can be “case-centered” or “hypothesis-centered”. Case-centered studies are “atheoretical”, interested in the case just for empirical reasons – i.e., aiming for a better understanding of a particular case without the ambition to generate knowledge that goes beyond that case. Hypothesis-centered case studies, in contrast, generally aim to either build, modify, or test hypotheses developed upon theoretical grounds.

The present work aims both to test and to build theory: Research question 1 has a rather theory-testing character. It asks, whether independence and accountability can coexist. In contrast to conventional theory, I argue that a differentiated view onto normative arguments leaves plenty of room for coexistence. It remains to be tested, however, if this argumentation is reflected in reality. This is going to be the subject of chapter 6.

The second question is more of an evaluative, theory-building type. There is plenty of theory regarding actor strategies within accountability relationships, but it gives only scarce hints on the conditions favoring more or less accountability. Moreover, I find interactions among fora to be a crucial factor to understand the functional dynamics of an accountability regime – a field that is completely unexplored so far. The analysis can thus be seen as a variant of “process tracing”. Process tracing can be useful for various purposes, among them to test, “Whether the observed processes among variables in a case match those predicted or implied by the theory” (George and Bennett, 2005: 217). In the analysis, it is thus important to look not only for facts corroborating the theory, but also for “causal processes not yet identified by theory. In this way, process-tracing contributes to the testing of the theory, but to its further development” (George and Bennett, 2005: 217). The analysis, to be found in chapter 7, in this sense aims to find patterns among accountability fora and to identify factors that contribute to a specific behavior.

3.1. Criteria for case selection

In order to get the most out of a small-N design, a sophisticated selection of cases is indispensable. For hypothesis-testing comparisons, it is useful to seek for variance on the hypothesized explanatory *or* dependent variables. Hypothesis building requires mostly variation among relevant scope conditions in order to get a multi-faceted picture. The selection moreover needs to make sense with regard to both research questions.

It is quite straightforward here to apply a “compound research design” (Levi-Faur, 2004). Such a design is useful to create variance in “medium-N” studies by making use of differences not only between countries, but also policy sectors, or different points in time. This makes sense since the analysis of formal accountability regimes is driven by hypotheses regarding the comparison between countries and sectors, and is thus of a “cross-case” character.

The second part focuses in contrast on “within-case” attributes i.e., on the comparison of accountability fora and their strategies within the case. The “unit of analysis” is thus rather the individual accountability forum than the regime as a whole.

The rationale for the selection of cases has to follow several criteria: For the analysis of formal accountability in chapter 6, it seems useful to check the co-variation of accountability with its presumed “antagonist”, i.e. formal independence. For the evaluation of the work of accountability regimes in practice (chapter 7), cases that are likely to show variation are needed, in order to learn as much as possible about viable actor strategies. As the literature review in section 7.1 reveals, most probable factors affecting actor constellations and accountability in practice are the degree of transnational integration, the characteristics of the political system, actor resources, and policy salience.

I chose hence four agencies from two countries and two policy areas for the in-depth analysis. I chose Switzerland and Germany, and their respective regulatory agencies for the telecommunications (ComCom and BNetzA) and financial sectors (FINMA and BaFin, respectively). The selection of Switzerland and Germany is based on the premises that both countries differ with regard to agency independence on the one hand, and scope conditions such as the degree of transnational integration, the characteristics of the political and administrative systems, and actor resources, on the other. Telecommunications and financial services regulation differ with regard to the purpose of regulation (ensure market functions and competition vs. protection from macroeconomic risks) and with regard to salience, which is expected to be higher in the field of financial regulation.

In the following sections, I elaborate on the characteristics of the selected countries with regard to the political system (section 3.1.1), resources (section 3.1.2), transnational integration (section 3.1.3), and scope conditions for agency autonomy (section 3.1.5). The policy areas under investigation are scrutinized for their political salience (section 3.1.4). Section 3.2 in addition gives a description of each agency analyzed, its creation, status within the regulatory regime, and autonomy. After all, the chapter gives in section 3.3 a detailed picture of the cases selected and their fit with the criteria outlined above.

3.1.1. Political system

Germany is a federal country with 16 constitutionally guaranteed *Land* governments. These have direct influence at federal level via the second chamber of the parliament, the *Bundesrat*. In the period between 2005 and 2009, 41.8 per cent of the bills required the

approval of the *Bundesrat*. The parliament (*Bundestag*) is elected using a mixed-member proportional system, which has produced fairly proportional representation.⁶ This results in a multi-party system and the virtual non-existence of single-party governments in the history of Germany since 1949. Apart from a short period 1960/61, all governments since then have been coalitions. Moreover, the governing coalitions have often had no majority of equally formed *Land* governments in the *Bundesrat*.⁷ In effect, this requires the coordination with at least one oppositional party, which has regularly led to an informal grand coalition of Christian Democrats and Social Democrats. German administration is characterized by “cooperative federalism” meaning that *Länder* administrations are in many cases responsible for the implementation of federal law. In sum, Germany is characterized by a parliamentary system with a single chain of delegation between the electorate, the parliament, government and federal administration. Moreover, federalism plays a role by adding veto players to the decision-making process as well as by being responsible for implementation of federal law in many areas.

The Swiss case is often seen as special case (“*Sonderfall Schweiz*”). Its non-EU membership, strong direct democracy, federal and strongly decentralized character, and a quite unique government structure contribute to that image. Perhaps the most prominent feature of the Swiss political system is its strong element of semi-direct democracy. Constitutional changes and membership in international associations are subject to the obligatory referendum, which has to acquire a majority of votes and cantons (*Doppelmehr*); other laws and ordinances are subject to a facultative referendum which can be initiated by 50,000 voters or eight cantons within 100 days after the law has been passed in parliament. Furthermore, political parties or interest groups can initiate constitutional initiatives which come to the ballot if the initiators collect 100,000 supporters within 18 months.

The Swiss system is strongly federalized and decentralized (Biela et al., 2012, 2013). The Swiss cantons play a central role in policy formulation as well as implementation: the *Doppelmehr* and the representation in the second parliamentary chamber ensure their

⁶ This might have changed due to recent shifts in the party system, resulting in a Gallagher (or least squares) index for proportional representation of 7.83 for the 2013 election (2009 election: 3.4); https://www.tcd.ie/Political_Science/staff/michael_gallagher/ElSystems/index.php, retrieved October 22, 2015.

⁷ Between 1990 and 2009, an equally formed majority in both chambers existed only between January and April 1991 and as of October 2009.

influence in the decision-making process. Many policy areas are moreover subject to cantonal legislation, or are implemented by the cantons under federal (framework) legislation (Vatter, 2005, 2008).

The bicameral parliament, the Federal Assembly, is formed by the National Council (200 members, elected by proportional representation) and the Council of States (46 members, two from each canton, one from each half-canton). All legislation proposals have to pass both chambers. The parliament is institutionally strong: the government is not dependent on its support (see below), which weakens party discipline and grants the parliament room for debate and maneuver; it is free to ignore government proposals and retains core political functions, such as the initiative right, legislation, budgeting, supervision of government and administration, and election of the Federal Council. With questions, interpellations, motions, and postulates, it has several instruments at hand for agenda setting and governmental control (Linder, 2009: 573-6). Like its German counterpart, it is a “working” parliament, dealing with legislation within specialized committees rather than focusing on debates. A Swiss particularity is the militia principle. MPs fulfil their office part-time and have a second job in the public or private sector. They execute their mandate during four meeting periods of three weeks per year.

The legislative process is characterized by an extensive pre-parliamentary process, whose main intention is to take that structure into account. Cantons, parties, and interest groups are strongly involved already in early stages of law formulation (Biela et al., 2013; Vatter, 2008):

“The Swiss political system is generally presented as particularly hostile to changes. A high number of veto-points, where policy proposals can be overturned or watered down by political opponents, prohibit rapid and wide-ranging policy changes. It suffices to mention the existence of a bicameral legislature with identical competencies for both chambers or the possibility for opponents to call for an optional referendum. These institutional veto-points usually lead to negotiations, which include not only political parties, but also interest groups and the cantons as early as in the highly institutionalized so-called ‘pre-parliamentary phase’ of the

policy process. It is thus no surprise that reforms are usually incremental (Kriesi 1995; Papadopoulos 1997)” (Mach et al., 2003: 302).

The government (Federal Council, FC) is formed by seven Federal Councilors, elected every four years by the Federal Assembly. The FC is a collegiate body and takes decisions by majority. The Federal Assembly annually elects a president from the councilors, who presides over the FC’s sessions but is otherwise a *primus inter pares* without directive powers. From the late nineteenth century on, the tradition developed to divide FC seats among the major parties, resulting in the “magic formula” (1959-2003) that granted two seats each to the Liberals (FDP), the Christian Democrats (CVP) and the Social Democrats (SP), and one seat to the Swiss People’s Party (SVP). In 2003, the SVP gained a second seat from the CVP. In 2007, internal conflicts regarding the FC election within the SVP led to a party split, resulting in both, later one of the SVP seats being obtained by the newly founded BDP. The consociational form of government is not prescribed by law but the result of institutional coercion by direct democratic instruments (Linder, 2009).

The Swiss system is a presidential one: the Federal Councilors are elected for a fixed period and cannot be dropped under normal circumstances. Accordingly, and despite the oversized coalition in office, the Swiss political arena shows not only competition among political parties, but also a checks and balances relationship between parliament and government.

Even though both countries are characterized by a relatively high number of veto players, federalism, and frequently required consensus of major parties, there are substantial differences in the functional logic of the political system as a whole. It is that contrast between parliamentary and presidential systems which arguably has a crucial influence on accountability relationships (Strøm, 2000, see also chapter 7).

3.1.2. Resources

Regarding resources, data exists primarily for national parliaments. Harfst and Schnapp (2003: 35) compare control rights and resources of parliaments. According to their index of parliamentary control capacity, Germany scores second with an index value of 7.3, while the Swiss parliament is at the bottom end with a value of 12.0 (min=5.3, max=12.4, mean=

10,07). The International Parliamentary Union calculated 4.5 members of staff per MP in Germany, while the Swiss National Council has a ratio of 1 (see Table 3.1). Also, a recent index developed by the Bertelsmann Foundation underlines that picture (depicted in Figure 3.1).

Country	Lower chamber		
	Staff	MPs	Staff/MP
Germany	2788	620	4.5
Switzerland	203	200	1

Table 3.1 Parliamentary staff, 2011

Source: Global Parliamentary Report, <http://www.ipu.org/gpr-e/downloads/dataset-full-e.xls>, retrieved October 30, 2015.

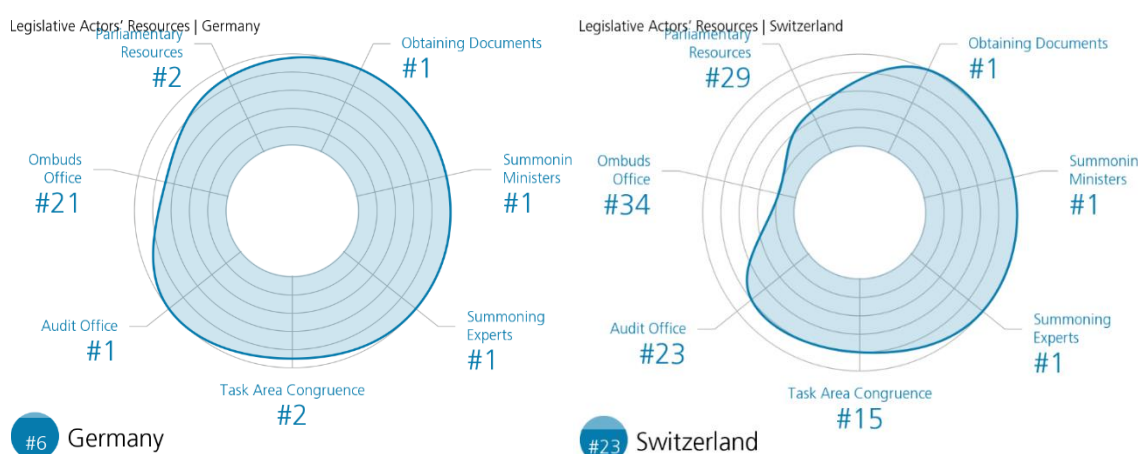


Figure 3.1 Legislative Actors' Resources

Source: Sustainable Governance Indicators, http://www.sgi-network.org/2015/Governance/Executive_Accountability/Legislative_Actors'_Resources, retrieved October 13, 2015.

For governments, only rough proxies are available: Eurostat reports central government’s expenses for “general public administration” as 4 per cent of the GDP for Germany, and 2.7 per cent for Switzerland.⁸ Despite these limitations, we can derive from the parliamentary data that Swiss political actors are clearly more limited with regard to resources, given that staff is necessarily much lower in absolute numbers given the difference in population size between both countries.

⁸ Eurostat, General government expenditure by function, data for 2013, retrieved July 24, 2015.

3.1.3. Transnational integration

Transnationalization applies primarily to sectors, but there are also general differences between both countries. I deal with both aspects consecutively.

Financial services are maybe the most internationalized economic sector in the world. Liberalization of capital transactions since the 1980s has made the circulation of capital more fluid. In turn, this has increased the need for international coordination in order to reduce regulatory arbitrage. Financial regulation is largely formulated at the supranational level. However, at least until the financial crisis of 2008 and onwards, “soft” coordination instruments clearly predominated over powerful transnational regulators. The main coordinating body since 1974 has been the Basel Committee on Banking Supervision (BCBS). Within that structure, national financial regulators and central banks from thirteen industrialized countries⁹ have negotiated common standards on banking supervision. In 2009, fourteen more countries became members of the BCBS.¹⁰ The most important standards are fixed in the Basel Accords, published by the BCBS in 1988 (Basel I), 2006 (Basel II), and 2010 (Basel III).

At European Union level, the Basel Accords have regularly been implemented via a number of directives and regulations.¹¹ A further coordination mechanism started the regulatory networks of securities, banking, and insurance supervisors, CESR (Committee of European Securities Regulators), CEIOPS (Committee of European Insurance and Occupational Pensions Supervisors), and CEBS (Committee of European Banking Supervisors). By the end of the 1990s, in the course of the Euro introduction, a common legal framework for financial services came to the forefront of the agenda within the European Community. The result was the so-called Lamfalussy reform of 2001, enabling a policy-making system strongly based on comitology and consultation, which was designed for the adoption of common framework legislation (level 1), the adoption of implementing

⁹ Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

¹⁰ Argentina, Australia, Brazil, China, Hong Kong, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, Singapore, South Africa, and Turkey.

¹¹ For instance, Basel II was implemented through the EU directive 2006/48/EC (Banking Directive) and 2006/49/EC (Capital Adequacy Directive). Basel III was adopted through the directive CRD IV (2013/36/EU) and the CRR regulation (no. 575/2013).

measures (level 2), to ensure consistent implementation (level 3), and to monitor enforcement measures (level 4) in financial services (de Visscher et al., 2008: 21-2).

The European Commission has the lead at levels 1 (drafting a proposal under consultation with market and consumer representatives), 2 (adoption of a directive or regulation, taking advice from member-states committees and regulatory networks), and 4 (monitoring consistent transposition and application of measures). At level 3, however, the European regulatory networks take the lead. Their task is to establish common standards and implementation recommendations to ensure convergent practices in the member states, even in areas not covered by EU legislation (de Visscher et al., 2008: 22-3; Ruffing, 2011). However, the European networks have neither law-making nor supervisory competencies (Amttenbrink, 2011).

The outbreak of the financial crisis, often seen as facilitated by regulatory shortcomings and the lack of a common approach (see e.g. Mayntz, 2012: 15), triggered a massive restructuring of EU regulatory structures. By January 2011, the Lamfalussy level-3 committees (CESR, CEIOPS, and CEBS) were replaced by three EU Supervisory Authorities (ESA): the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Banking Authority (EBA), respectively. While the agencies' main task remains the development of common standards, they gained intervention rights in conflicts between national regulators, and infringements by member states.

The agencies are part of the overarching European System of Financial Supervision (ESFS),¹² along with the European Systemic Risk Board (ESRB), and a joint committee of national regulators.¹³ The ESRB is hosted by the European Central Bank (ECB) and monitors the financial stability of the EU economic system. It is staffed by the ECB, the

¹² Not to be confused with the European Financial Stability Facility (EFSF), The stabilization fund responsible for Eurozone member states. The EFSF was replaced in September 2012 by the European Stability Mechanism (ESM).

¹³ http://ec.europa.eu/finance/general-policy/committees/index_en.htm, accessed May 5, 2015.

EU commission, the three supervisory agencies, and the governors of national central banks.¹⁴

By November 2014, the European Central Bank became in charge of the supervision of systemically relevant financial institutions (SIFIs) within the Single Supervisory Mechanism (SSM). The SSM is formed by four ECB representatives and national regulators. The reforms represent, after all, a significant strengthening of the European level and a systematic institutionalization of transnational coordination structures in financial regulation (Lehmann, 2011: 133-4). On the other hand, governance structures have become highly complex (cf. Figure 3.8) and imply an exponential rise of coordination needs given that the SSM has both to build up supervision expertise and coordination structures with domestic supervisors.

We see a highly transnationalized economic sector with high risks for national economies. However, for most of the time regulation was a national endeavor, while governments of Western industrialized countries tried to coordinate regulatory activities at international level. Real transnational integration took only place after the crisis of 2008, which triggered the establishment of powerful agencies at EU level and tremendous rights for the European Central Bank in terms of banking supervision.

Telecommunications, until the 1960s, were dominated by technology from the 19th century, with low levels of innovation and competition, prevented by the “natural monopoly” of state-owned monopolist providers (Thatcher, 2007: 124). From the 1970s on, pressures toward liberalization of telecommunications markets and transnationalization of regulation intensified: Technological innovations in context with early digitalization reduced prices for competitors while at the same time offering ways to circumvent state-owned monopolies. This induced monopolists to invest in their own networks, which reduced the advantages of public provision (Thatcher, 2007: 125-129).

Until the 1980s, telecommunications was only marginally transnationalized. The International Telecommunications Union (ITU), established on the basis of intergovernmental negotiations, was the only body in place, and only in charge of standards

¹⁴ <http://www.esrb.europa.eu/about/orga/board/html/index.en.html>, accessed May 5, 2015.

and interconnection fees. This changed when the European Commission put telecommunications liberalization on its agenda in 1987. By 1998, the EU insisted that competition on landline phones should be permitted in all member countries. At the same time, incumbents should be forced to let competitors access their networks for reasonable fees and thus facilitate market entrance. Mergers among providers were managed by the Commission under general EU competition law, and regulation should occur through national regulatory authorities:

“Hence although EU regulation was not entirely exogenous to policy makers in Britain, France, Germany, and Italy, it was not the product of any one nation nor within the control of policy makers in any one country” (Thatcher, 2007: 134).

EU law was legally binding and marked a clear step toward liberalization and transnationalisation of the policy area. According to Thatcher, it facilitated competition and cross-border entry of providers and represents a landmark regarding the influence of EU policies on domestic policy-making (2007: 136).

Comparing both sectors, the disparity between economic transnationalization and the adaption of governance structures is striking: In telecommunications, politics in Europe reacted quite early to market changes and adopted (mainly driven the EU Commission) a strongly transnationalized regulatory structure. In contrast, financial regulation remained relatively weak at transnational level until recently, whereas financial services have been described as traditionally quite denationalized.

Let us now get to country characteristics in that regard: Germany has been a founding member of the European Union, and as such bound by EU law. As outlined above, EU integration in both policy areas is substantial nowadays. However, for financial markets this is a recent development, since the sector had not been strongly regulated by EU-level institutions prior to 2008.

We have outlined above that political decision making in Switzerland is subject to multiple veto points and is criticized for producing “stability at cost of innovation” (Sager and

Zollinger, 2011: 33-4). In contrast to that general picture, particularly the late 1990s and early 2000s witnessed more or less dramatic institutional change, facilitated by partially circumventing the traditional decision-making procedures (Mach et al., 2003). In several areas, Switzerland liberalized its economy in a rather rapid way and has not hesitated to leave behind some traditional institutional features (Maggetti, 2014). Apparently, Switzerland has somewhat lost its “special” character and has started to resemble some characteristics of other European countries, which turned it into an “ordinary”, albeit rather extreme case (Vatter, 2008). Europeanization has been identified as a main driver of that development (Afonso et al., 2014; Linder, 2009; Mach et al., 2003; Maggetti et al., 2011; Sager and Zollinger, 2011; Sciarini et al., 2004). Both telecommunications (Fischer, 2005, 2008) and financial services are strongly affected by that development (Maggetti, 2014).

In sum, as an EU non-member, Swiss transnational integration is comparatively low in a political sense. In contrast, Switzerland is to a high extent subject to *economic* transnationalization. This has induced substantial, almost radical changes of policies and institutions, giving the stability-enhancing effects of the political system as such. Moreover, Switzerland is regularly affected by EU regulatory policies, which somewhat reduces its own room for maneuver. However, transnational integration differs substantially between both cases, as only Germany is subject to binding supranational legislation.

3.1.4. Saliency

As argued in chapter 7, the perceived relevance of the policy area, or saliency might of importance for the strategies of involved actors. I expect the saliency of financial services to be higher compared to telecommunications, due to its macroeconomic importance, and the recent financial crisis. I assess saliency by scrutinizing the relevance of the economic sector for the national GDP and domestic employment, and by the press coverage of agency issues over time.

In particular in Switzerland, the economic importance of the financial sector is striking. Germany resembles more or less an average case regarding the economic importance of financial services (see Figure 3.2). Figure 3.3 shows, that economic importance of telecommunications is similar in both cases under scrutiny and also in the EU-28.

Moreover, it resembles the role of the financial sector in Germany, which employs roughly 3% of inhabitants and generates 4% of GDP.

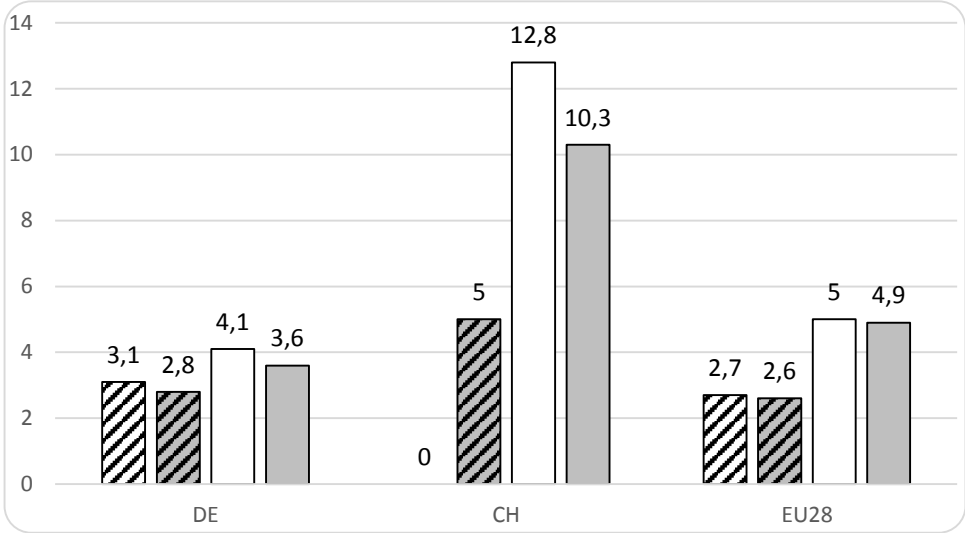


Figure 3.2 Economic importance of the financial sector in comparison

Note: dashed: Employees in financial sector as percentage of inhabitants; single-colored: Gross Added Value of financial sector as percentage of GDP; white: numbers for 2007; grey: numbers for 2013 (Switzerland)/2014 (Germany). Source: Eurostat.

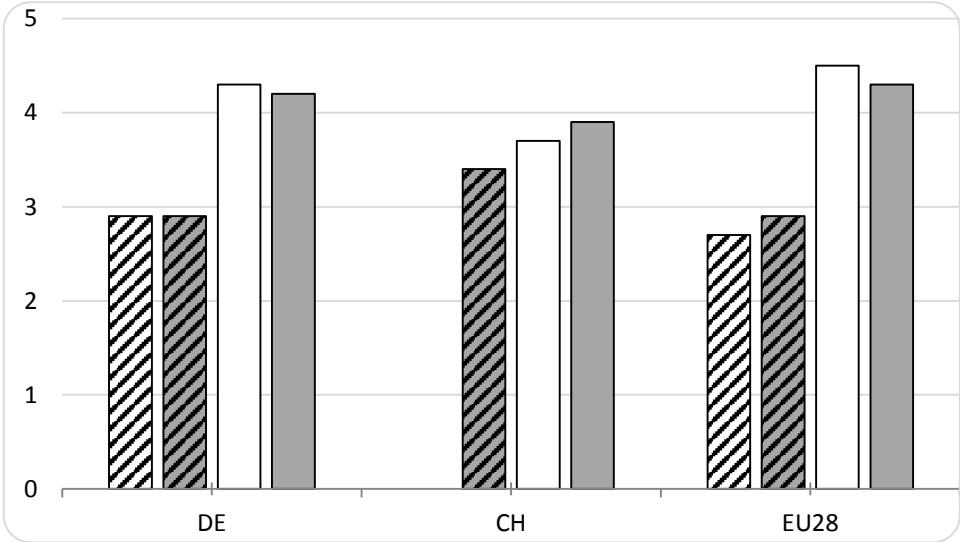


Figure 3.3 Economic importance of the telecommunications sector in comparison

Note: dashed: Employees in telecommunications sector as percentage of inhabitants; single-colored: Gross Added Value of telecommunications sector as percentage of GDP; white: numbers for 2007; grey: numbers for 2013 (Switzerland)/2014 (Germany). Source: Eurostat.

To assess press coverage, I selected three large newspapers per country and performed a full-text search on a series of keywords. By rule, I searched here for the full name of the agency, its common abbreviation, and the main task executed. If the agency changed its name within the scrutinized timeframe (2005-2015), I altered the search accordingly. This is the case for the *Bundesnetzagentur* (*Regulierungsbehörde für Telekommunikation und Post* or RegTP prior to 2006) and the FINMA (*Eidgenössische Bankenkommision* or EBK prior to 2009). Similarly, I added the French equivalents for the search in Switzerland, since I included one French-speaking newspaper. Finally, to address the fact that the Bundesnetzagentur is the only agency in the sample which covers more than one economic sector, I performed an additional search combining agency name and policy area (“Bundesnetzagentur AND Telekommunikation”) in order to get an additional hint on the salience of that specific agency task. In Figure 3.5, this is referred to by an asterisk (*).

The important role of financial markets for the Swiss economy is also reflected in the press coverage (Figure 3.4). At peak times of the financial crisis, FINMA outnumbered ComCom ten times in terms of press coverage. And even before the financial crisis emerged, the FINMA predecessor EBK was mentioned 2- to 3-times more often than ComCom. The German case points in the same direction, but due to the broad tasks of the Bundesnetzagentur it is strongly covered by the press as well (Figure 3.5). For example, the BNetzA covers also the energy sector, which became salient in 2011 and 2012 due to the Fukushima nuclear disaster and the following German policy shift toward renewable energy sources (*Energiewende*). The search for the agency combined with the sector yielded far less results and resemble the Swiss picture. In sum, the policy areas fulfil the prior expectation of financial services as more salient than telecommunications.

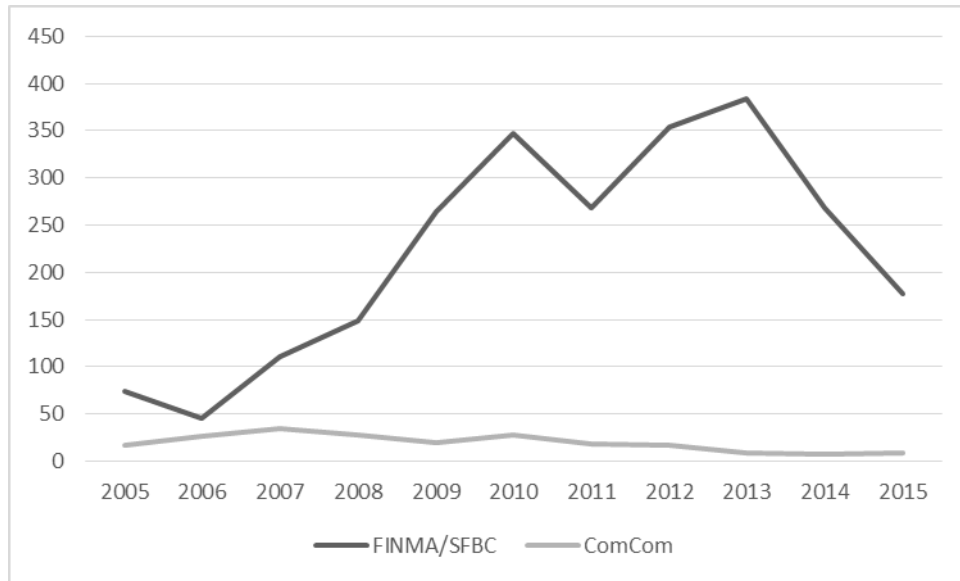


Figure 3.4 Press coverage of agency issues, Switzerland

Note: Newspapers searched: *Tages-Anzeiger*, *St.Galler Tagblatt*, *24 Heures*. Keywords: **FINMA/SFBC**: “Finanzmarktregulierung”; “supervision des marchés financiers”; “Eidgenössische Finanzmarktaufsicht”; “FINMA”; “Autorité fédérale de surveillance des marchés financiers”; “Eidgenössische Bankenkommission”; “EBK”; “Commission fédérale des banques”; “CFB”. **ComCom**: “Kommunikationskommission”; “ComCom”; “Commission fédérale de la communication”; “Telekommunikationsregulierung”; “Régulation du marché des télécommunications”. Source: LexisNexis.

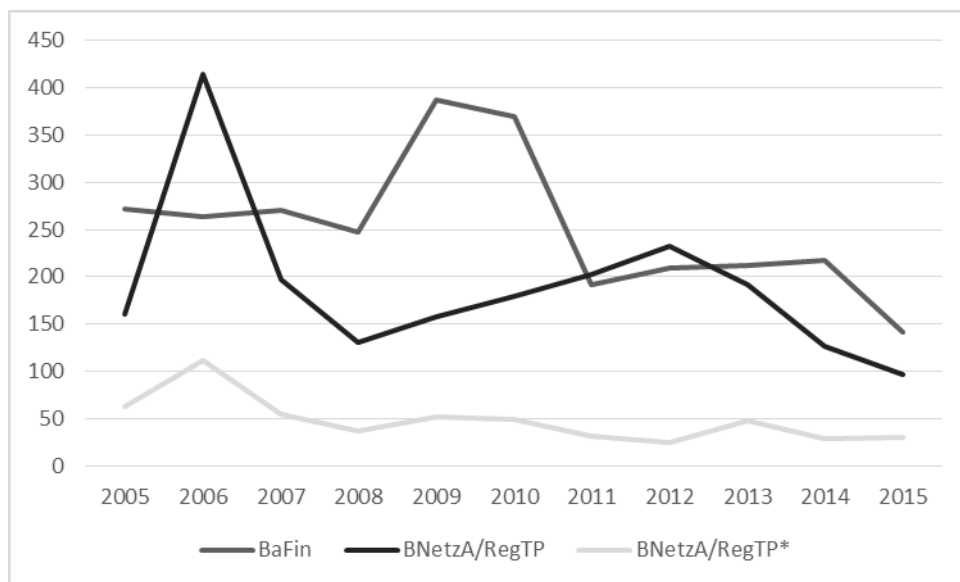


Figure 3.5 Press coverage of agency issues, Germany

Note: Newspapers searched: *Die Welt*, *Die ZEIT*, *Frankfurter Rundschau*. Keywords: **BaFin**: “Finanzmarktregulierung”; “Bundesanstalt für Finanzdienstleistungsaufsicht”; “BaFin”. **BNetzA**: “Bundesnetzagentur”; “BNetzA”; “Regulierungsbehörde für Telekommunikation und Post”; “RegTP”; “Telekommunikationsregulierung”. **BNetzA/RegTP***: “Telekommunikation AND Bundesnetzagentur”. Source: LexisNexis.

3.1.5. Agency independence

The previous sections have depicted a considerable amount of variation regarding the scope conditions for accountability in practice (chapter 7). In order to scrutinize the relationship between formal accountability on the one hand, and agency independence, on the other, I identified the latter as main criterion for case selection. In the present section, I thus elaborate on the Swiss and German administrative systems and the room they leave for agency autonomy. I expect Swiss agencies to be more autonomous than German ones, and telecommunications regulation to deliver more rationales for autonomy than financial services. This is counterchecked with quantitative data on agency autonomy. Expectations are by and large met, but however, variation in the quantitative data is less pronounced than expected. The following sections hence provide some detailed qualitative descriptions on the regulatory structures, the tasks of the regulators, and their autonomy, and reveal that variation is much larger than quantitative scores let us expect at a first glance. The selection of cases thus makes sense also with regard to the dimension of agency independence.

Let us turn first to the general characteristics of the respective administrative systems. The guiding principles of German federal government are the right to set guidelines (*Richtlinienkompetenz*) of the chancellor and ministerial responsibility. Ministerial responsibility for the subordinated administration, the so-called departmental principle, is a strong constitutional principle (*Ressortprinzip*, Art. 65 GG): For any administrative body, *Rechtsaufsicht* and *Fachaufsicht* have to be clarified (Art. 20 GG: *Demokratieprinzip*), which leaves only limited room for autonomous or independent design of governmental bodies (*ministerialfreie Räume*).

At the federal level, the administration is separated between ministerial bureaucracy, responsible for law formulation and ministerial support, and subordinate federal agencies (*nachgeordnete Bundesbehörden*) for law application and implementation (Döhler, 2002: 562; 2005: 218). Among these federal agencies, the German regulatory agency for telecommunications, the *Bundesnetzagentur*, is one of 71 higher federal authorities (*Obere Bundesbehörden*), the financial services regulator *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) is among the 38 federal institutions under public law

(*Anstalten öffentlichen Rechts*).¹⁵ Both agencies represent rather an exception within the German administrative system, which has no tradition of autonomous agencies, although sometimes an increased relevance of “non-ministerial federal administration” is detected (Döhler, 2005). However, German administration is characterized as “limitedly agencifiable” (Döhler, 2007: 13). As Döhler subsumes:

“Erstens dürfen Bundesbehörden dem herrschenden Verständnis zufolge keine eigenständige Rolle als Akteur im politischen Prozess wahrnehmen. Zweitens verfügen Bundesbehörden nur über begrenzte und zudem ministeriell kontrollierte Handlungsspielräume. Drittens schließlich bildet die indirekte Steuerung die Ausnahme. Eindeutig dominant ist nach wie vor die direkte, hierarchische Steuerung” (Döhler, 2007: 17).

Both agencies under scrutiny have been established by federal law, the *Telekommunikationsgesetz* (TKG 2002, the predecessor RegTP by TKG 1996) and the *Finanzmarktdienstleistungsaufsichtsgesetz* (FinDAG), respectively. While the latter can be altered by the Bundestag alone (*Einspruchsgesetz*), the former is subject to the Bundesrat’s approval (*Zustimmungsgesetz*), due to the shared competencies of federal and *Land* levels in telecommunications policy. In sum, strong rule of law and the constitutional principle of ministerial responsibility leave little room for agency autonomy. The two agencies under scrutiny are rather the exception than the rule.

The Swiss federal government is structured in seven departments headed by a Federal Councilor each and the Federal Chancellery as a coordinating staff office. Given the traditionally reduced size of government in Switzerland and the multitude of militia bodies, the role of federal administration is rather limited, which explains the low number of about 35,000 federal public servants (Linder, 2009: 591).

Most policy areas are subject to cantonal law or federal framework laws and cantonal implementation. Economic regulation, however, is both subject to federal legislation and implemented by federal administration. The constitution assigns economic policy making,

¹⁵ www.bund.de/Behörden, retrieved 8 April 2015.

in particular competition and consumer-protection policies, as well as regulation of the banking sector, to the federal level (Art. 94-8 BV, SR 101). Furthermore, the cantons are hampered from any additional regulations by the constitutional principle of economic freedom, which sets strict limits to government interventions (Art. 27 BV, SR 101).

Huber (2012) differentiates, first, between central (*Einheiten der Zentralverwaltung*) and decentralized federal administration (*rechtsfähige Träger der dezentralisierten Verwaltung*). In the strict sense, central federal administration is formed by the seven federal departments and their subordinated federal offices (*Bundesämter*) and State secretaries (*Staatssekretariate*). In the telecommunications and financial services areas, the OFCOM (Federal office for telecommunications) and the SIF (State Secretariat for International Financial Matters) are of importance. Within that structure, the departments have only small coordinative staff offices and rely mainly on the administrative capacities of the subordinated offices. Since the early 2000s, a number of federal offices, OFCOM among them, are subject to NPM-inspired elements such as performance targets and global budgets.¹⁶

A further area of central federal administration is formed by the so-called autonomous administrative units (*weisungsfreie Verwaltungseinheiten*, Huber, 2012: 20-1). Regarding regulation, the most important subgroup here are executive commissions (*Behördenkommissionen*). The telecommunications and competition regulators (ComCom and ComCo), as well as the former financial services regulator Swiss Federal Banking Commission (SFBC) are (or were) from that type. Executive commissions generally act on behalf of the Federal Council and decide on regulatory matters. They are formed by experts from the public and private sectors, which are appointed by the Federal Council and fulfil their duties in the commission following the militia principle - i.e. part-time in addition to their main position (Huber, 2012: 22-3).

Under the second major type, peripheral federal administration, Huber (2012) subsumes public law institutions (*öffentlich-rechtliche Anstalten*), non-profit organizations executing public tasks, and public companies. A number of Swiss regulators have been reorganized into a public law institution, most prominently in financial services (FINMA, in 2008),

¹⁶ <http://www.flag.admin.ch/e/themen/1-2strategie.php>, retrieved October 22, 2015.

therapeutic products (Swissmedic, in 2002), or nuclear energy (ENSI, in 2009). In contrast to the executive commissions that rely on other administrative bodies for implementation, public law institutions are fully-fledged bodies with their own administrative staff. The Federal report on corporate governance (Schweizerischer Bundesrat, 2006), in contrast to Huber, assigns the executive commissions to the peripheral administration.

Swiss public law differentiates two forms of the right to issue instructions to administrative units: the *Dienstrecht* and the *Verbandsrecht*. The former allows intervention of the superordinate into single decisions, even at the level of individual public servants; while the latter is restricted to the top-level officials of an administrative unit, which is internally autonomous (Huber, 2012: 36). Public law institutions underlie only the *Verbandsrecht*. Since there is no constitutional requirement of ministerial responsibility, special legislation matters for the determination of actual instruction rights, but de facto executive commissions, and also NPM-agencies (*FLAG-Ämter*) are excluded from *Dienstrecht* (Huber, 2012: 36).

In sum, Swiss administrative law leaves much more room for agency autonomy than its German counterpart: First, ministerial responsibility is not a universal principle, but subject to special law; second, Swiss federal departments themselves are organized in a cascade of offices of which some themselves own budgetary autonomy (the *FLAG-Ämter*); third, regulatory tasks are regularly executed by expert bodies or public law institutions which own at least some organizational autonomy.

The data collected by Hanretty and Koop (2013) indeed indicate Germany as an outlier in terms of average agency independence (see Figure 3.6). Switzerland, while not among the countries with extremely independent agencies, grants nevertheless reasonable autonomy to its agencies on average.

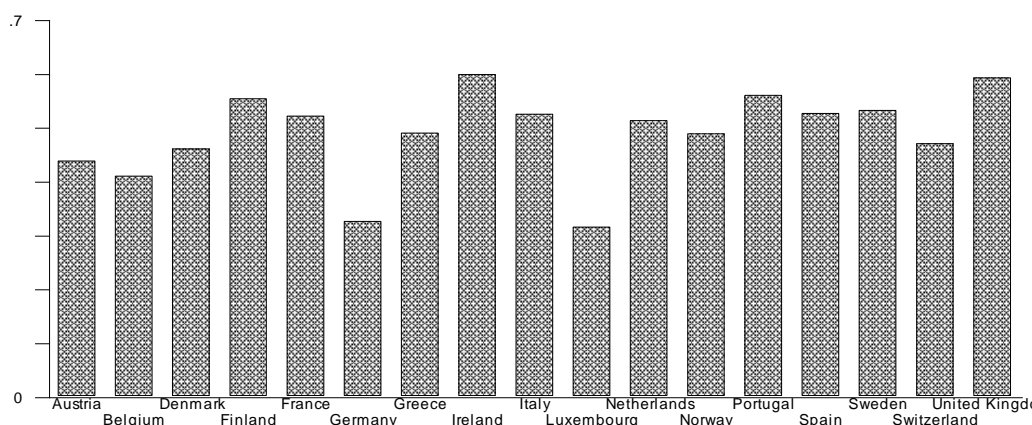


Figure 3.6 Average independence of Regulatory Agencies by country.

Source: (Hanretty and Koop, 2013), own calculations.

Both policy areas differ in the purpose associated with regulatory policies. This affects also expected agency independence. As outlined in section 2.1, scholars distinguish between market and risk regulation. While telecommunications is subject to the former, it is economic risks whose management is the primary purpose of financial regulation.

The goals of financial regulation are often differentiated into micro- and macro-prudential regulation (see Table 3.2). At the micro level, the regulatory goal is to protect shareholders and account holders by limiting the risk of bank failures. However, as recent years have clearly shown, the impact of bank failures is not necessarily restricted to customers and shareholders - interdependence between banks may induce massive macroeconomic effects under certain conditions. Hence, the ensuring of macroeconomic stability via macro-prudential regulation has become the rationale for substantial changes in international and domestic financial regulatory governance. The regulation of financial services is hence a clear example of risk governance.

Telecommunications regulation is a clear example of market regulation. The goal of market regulation is to enforce a well-working competition on the market and to prevent market failures. It became an issue after the liberalization of communications markets and the privatization of state-owned monopolists. To enter the telecommunications market, a competitor faces enormous investments, due to its lack of infrastructure, which is already possessed by the incumbent. Telecommunications regulation thus has been mostly about facilitating market access (e.g. by committing the incumbent to provide access to its

infrastructure, or parts of it, at market prices) and monitor consumer fees (to prevent the incumbent from taking advantage of its monopoly commission). Furthermore, since telecommunications are considered as a basic infrastructural need of the population, most regulators aim to ensure universal access to these services (also, for instance, in rural areas where a bad cost-benefit-ratio would have prevented private companies from service provision).

	Macro-prudential	Micro-prudential
Proximate objective	Limit financial system-wide distress	Limit distress of individual institutions
Ultimate objective	Avoid output (GDP) costs	Consumer (investor/depositor) protection
Characterization of risk	Seen as dependent on collective behavior (“endogenous”)	Seen as independent of individual agents’ behavior (“exogenous”)
Correlations and common exposures across institutions	Important	Irrelevant
Calibration of prudential controls	In terms of system-wide risk; top-down	In terms of risks of individual institutions; bottom-up

Table 3.2 Macro- and micro prudential regulation of financial markets

Source: Borio (2003).

In sum, one could expect that the task of facilitating competitors’ access to telecommunications markets needs the regulator to be more or less a neutral arbitrator, promoting for example its autonomy. This dynamic is weaker in the case of financial services. Indeed, the Hanretty/Koop data assigns highest independence score to the utilities regulators in telecommunications and energy sectors, while financial services stay somewhat below that on average (see Figure 3.7).

Under the operationalization used by Hanretty and Koop, however, the agencies under scrutiny reflect these general patterns only partly (see Figure 3.7): BaFin got a very low independence score of .34, while BNetzA (.48) joins the more independent FINMA (.48) and ComCom (.51) (Hanretty and Koop, 2013). Thus, while for German agencies as well as for Swiss and German financial regulators the expectations are met, after all three out of four agencies in the sample are independent to a very similar extent. However, the in-depth studies below show considerable variation among them (see section 3.2).

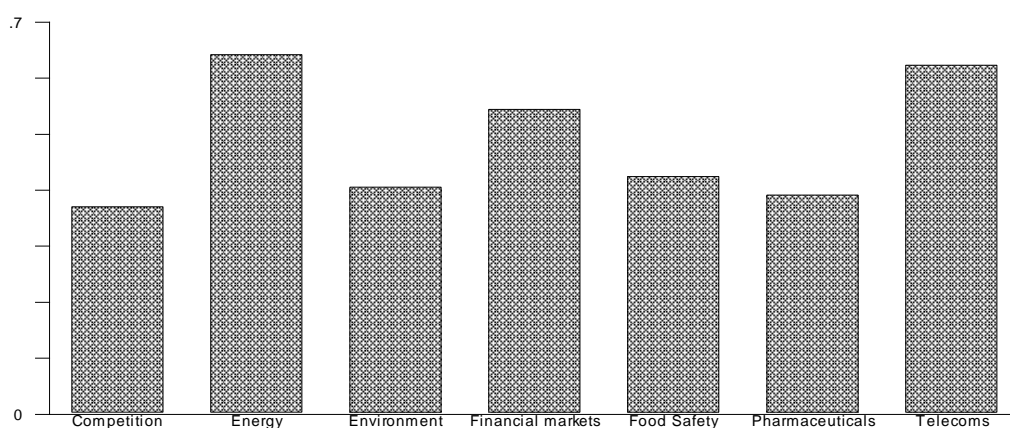


Figure 3.7 Average independence of Regulatory Agencies by sector

Source: (Hanretty and Koop, 2013), own calculations.

3.2. Agencies under scrutiny

After having checked the general scope conditions and quantitative data, I turn now to a more qualitative approach. In the present section, I scrutinized the agencies under scrutiny with regard to their tasks, their position within the respective regulatory regime, and their degree of autonomy. The aim is mainly to get a more detailed picture of the cases and their fit with the case selection criteria, mainly the one regarding agency independence. The section reveals a considerable amount of independence and suggests that cases are adequately selected.

3.2.1. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)

In 2002, the three formerly separated supervisory offices for banking (*Bundesaufsichtsamt für das Kreditwesen*, BAKred), securities (*Bundesaufsichtsamt für den Wertpapierhandel*, BAWe), and insurances (*Bundesaufsichtsamt für das Versicherungswesen*, BAV) were amalgamated to form the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority, BaFin). The BaFin's tasks are defined mainly by the *Finanzdienstleistungsaufsichtsgesetz* (Financial Services Supervision Act, FinDAG) and the *Kreditwesengesetz* (Banking Act, KWG):

“The primary objectives of banking supervision are summarised in section 6 (2) of the Banking Act. These are to work to prevent

irregularities in the banking system which endanger the safety of the assets entrusted to institutions; adversely affect the orderly execution of banking transactions; or may substantially prejudice the economy as a whole.”¹⁷

The BaFin is a public law institution (*Bundesanstalt öffentlichen Rechts*) and thus institutionally separated from the government. However, the Federal Finance Ministry (BMF) maintains supervisory powers, including the right to give binding instructions to the agency. Attempts to give financial supervision to the central bank were prevented; a main objective was the German constitutional principle of ministerial responsibility, which can be thrown apart (“*ministerialfreie Räume*”) only under certain circumstances. In particular, the principle demands ministerial (and hence also parliamentary) control of all bodies that have sanctioning powers.

3.2.1.1. The BaFin in the regulatory regime

The division of tasks between the BMF and the BaFin resembles the traditional one between German federal ministries and subordinated authorities: the BMF drafts legislation and exercises oversight, while the agency is responsible for implementation. In the BaFin case, implementation entails first, licensing issues, and second, ongoing oversight of the financial sector. Within the latter area, the BaFin can freely choose frequency, intensity, and severity of inspections and is entitled to give orders to the supervised institutions. A particularity is that during inspections, the BaFin depends on the Federal Bank (*Bundesbank*), while the BaFin is politically responsible, the Bundesbank helps in conducting inspections, analyzing reports and risk assessment. The cooperation between Bundesbank and BaFin are determined in great detail in the guidelines issued by BaFin (2013), which state:

“...the Deutsche Bundesbank shall, as part of the ongoing supervision process, analyse the reports and returns that institutions have to submit

¹⁷ http://www.bafin.de/EN/BaFin/FunctionsHistory/BankingSupervision/bankingsupervision_artikel.html, accessed April 21, 2015.

on a regular basis and assess whether their capital and their risk management procedures are adequate.”

As outlined above, the financial crisis has brought more attention to macro-prudential regulation and financial stability. For these purposes a Committee for Financial Stability (*Ausschuss für Finanzstabilität*, AFS) had been established by January 2013. Represented in this coordinating body are the BMF, the BaFin, the Bundesbank and (without voting rights) the Federal Agency for Financial Market Stabilization (*Bundesanstalt für Finanzmarktstabilisierung*, FMSA). Crucial in this regard is that the founding act of the AFS, the Financial Market Stabilization Act (*Finanzmarktstabilisierungsgesetz*, FinStabG), assigns the responsibility for macro prudential supervision to the Bundesbank, not the BaFin. The Bundesbank “analyses and identifies threat to financial stability” and “prepares an annual report to the Committee” (§1 FinStabG). Moreover, as stated previously, the supervision of SIFIs had been transferred to the SSM by November 2014. The governance structure of financial regulation is depicted in Figure 3.8.

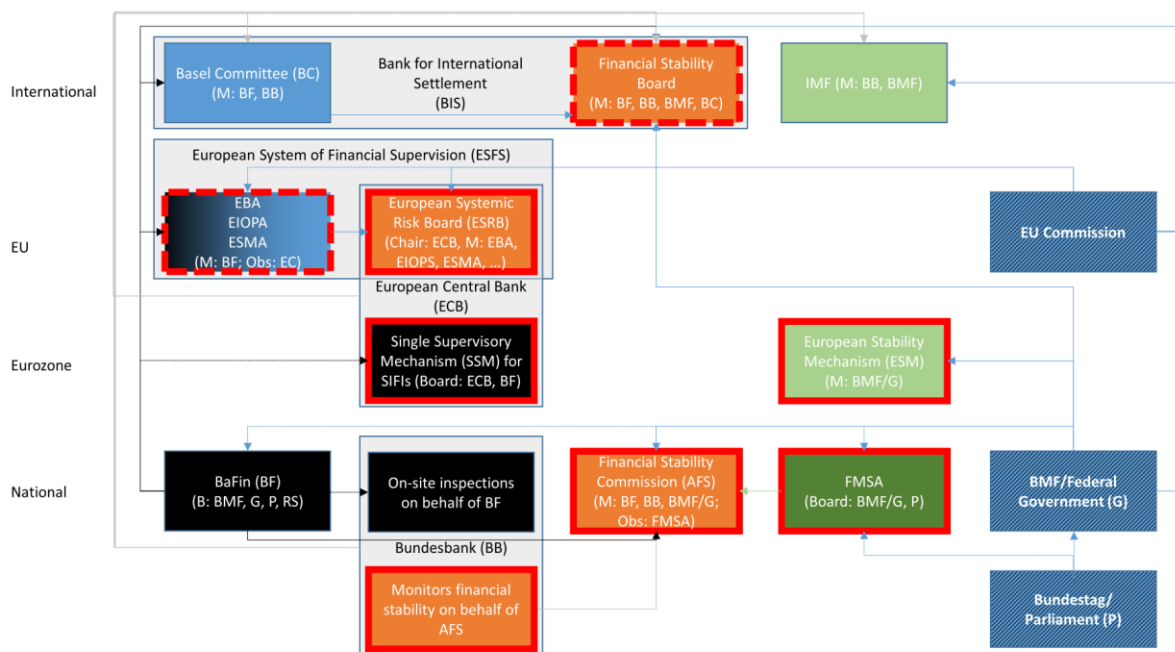


Figure 3.8 Governance structure of German financial regulation and supervision, as of 2015

Note: Blue: Setting of regulatory framework; Black: banking/micro prudential supervision; Orange: Financial stability/macro prudential supervision; Light Green: Country Stabilization Funds; Dark green: Bank stabilization and restructuring; hatched: Political actors; Red frame: newly established institution after the 2008 crisis, red dotted frame: reformed and/or upgraded after the 2008 crisis; SIFIs: Systemically Important Financial Institutions.

At the operational level¹⁸, the BaFin is in charge of licensing, inspections, and orders at micro-prudential level. While until 2012 the BaFin was almost a sole player on the field of financial supervision, a substantial share of this task has now been taken over by the Bundesbank and the SSM, even more since the Bundesbank is also in charge of on-site supervisions. These developments primarily concern the operational tasks of the BaFin. On the other hand, the BaFin represents Germany at the international level. Namely, it is member of all ESA, the Basel Committee, the Financial Stability Board, and the SSM. Since these institutions shape the rules, procedures and standards of financial supervision in great detail, we define these as the strategic tasks of the BaFin.

3.2.1.2. Organization and autonomy

The BaFin is under formal supervision of the Federal Ministry of Finance, although budget control lies with an administrative board comprising BMF and other ministerial representatives, MPs, and representatives of branch associations subject to regulation. The agency is funded through a levy on the regulated institutions (§§14-16q FinDAG) and to a small extent (in 2012 around 10%) by fees. Apart from the administrative board, there is an advisory board and (as of 2013) a consumer advisory board, both with a rather consultative role. The BaFin has grown to around 2,500 employees (BaFin, 2014: 244). It is led by a president, since 2008 accompanied by an executive board.

3.2.2. Eidgenössische Finanzmarktaufsicht (FINMA)

Financial regulation in Switzerland is strongly driven by a tradition of self-regulation. FINMA as an independent agency was created relatively late in international comparison, mainly due to gradually raising transnational pressure. Its creation and parallel policy changes, such as the weakening of banking secrecy, represent a significant path change.

Switzerland has always had a rather liberal approach to banking regulation. The first attempts to regulate the banking sector occurred not earlier than in the 1930s, ending up with the creation of the Swiss Federal Banking Commission (SFBC, Busch, 2009: 172-3). As an institution of self-regulation, the SFBC was staffed by the regulated entities and

¹⁸ In section 0, I distinguish between strategic, operational, and managerial tasks in order to develop a more fine-grained picture of accountability.

dependent on the banks' will to cooperate (Busch, 2009: 175). The Swiss model, built on liberal self-regulation and banking secrecy, was successful for many decades. This started to change when, from the 1970s on, the Swiss financial market regime was increasingly challenged by international political pressure and internationalization, and liberalization of financial markets.¹⁹

However, despite the fact that international pressure towards a hierarchical regulatory model with independent regulators substantially increased throughout the 1990s (Busch, 2009: 195-204; Lütz, 2002: 309; Steinlin and Trampusch, 2012: 145), Switzerland chose instead to change incrementally its regulatory model (Mach, 2007; Maggetti et al., 2011), keeping core characteristics of its regulatory model until 2009. Steinlin and Trampusch identify three main causes for this relative continuity: first, the coalition of center-right parties dominating Swiss politics; second, the banks' ability to hinder transformative change due to their strong influence on parties and strong corporatism in the legislative process; and third, the power of traditional self-regulation jointly with the constrained capacities of the Swiss central state (Steinlin and Trampusch, 2012: 148-53).

In the regulatory regime before 2009, the Swiss Banking Association (*Schweizerische Bankiervereinigung*, SBVg) was the key player in terms of regulation, while supervision was in the hands of the Swiss Federal Banking Commission. The SFBC, however, was an executive commission - a militia body with a rather small secretariat, and its supervisory practice was characterized by a strong dependence on external auditors (Busch, 2009), and a rather reactive role (Maggetti et al., 2011: 213).

It lasted until the late 2000s until substantial reforms of Swiss financial regulation were initiated. Some of these reforms were induced by the 2008 banking crisis (such as tighter regulation and an increased political will to cooperate internationally), others rather from the result of continuous international pressure: while the Swiss economy was much less affected by the crisis than that of other countries, the UBS liquidity crisis confronted Swiss politicians with a "too big to fail" problematic and left no other way than rescuing the bank with taxpayers' money. In turn, some institutional reforms within financial regulation took

¹⁹ An important trigger for increased pressure was the so-called "Chiasso scandal", which induced Swiss banks to agree to a self-commitment not to support tax evasion (Busch, 2009: 190-5).

place: the Federal Department of Finance (FDF) established a new State Secretariat for International Financial Matters (*Staatssekretariat für internationale Finanzfragen*, SIF), put stricter banking regulation in place (the so-called “Swiss finish”, going beyond the international Basel III rules), and made substantial concessions to its international opponents regarding banking secrecy (Steinlin and Trampusch, 2012: 158).

In 2009, moreover, the new Swiss Federal Banking Supervisory Authority (FINMA) was established. In contrast to the former measures, the creation of FINMA had already been in the pipeline before the crisis emerged. The step to create an independent regulatory body represents a substantial shift from the traditional policy, and has meant partly giving up the self-regulatory tradition. In fact, FINMA represents the first realization of the new corporate governance concept of the Swiss government (Schweizerischer Bundesrat, 2006). However, the literature also detects elements of continuity (such as the limited scope of regulation and the strong role of the banking industry), partly reinforced by strong revolving door effects between FINMA and the banking sector (Maggetti et al., 2011).

3.2.2.1. The FINMA in the regulatory regime

FINMA was established by the 2007 Financial Market Supervision Act (*Finanzmarktaufsichtsgesetz*, FINMAG, SR 956.1) and started operation on January 1, 2009. It is a public law institution (Art. 4 FINMAG) and its independence is guaranteed by law (Art. 21 FINMAG). It has the legal objectives of:

“...protecting creditors, investors, and insured persons as well as ensuring the proper functioning of the financial market” (Art. 5 FINMAG).

FINMA is entitled to supervise compliance with a series of laws regarding financial markets, enumerated in Art.1 FINMAG.²⁰ Apart from FINMA, the following actors play a central role in the governance of Swiss financial markets:

²⁰ Namely, the Mortgage Bond Act (SR 211.423.4), the Federal Act on Contracts of Insurance (SR 221.229.1), the Collective Investment Schemes Act (SR 951.31), the Banking Act (SR 952.0), the Stock Market Act (SR 954.1), the Anti-Money Laundering Act (SR 955.0), and the Insurance Supervision Act (SR 961.0).

- The Federal Department of Finance, in particular its State Secretariat for International Financial Matters (*Staatssekretariat für internationale Finanzfragen, SIF*). The SIF is responsible for the representation of Swiss interests at international level regarding financial market policies. It coordinates the responsible departments, maintains the relationships between the Federal government, Swiss National Bank, and FINMA, and develops strategies and drafts legislation on international financial, tax, and currency issues as well as financial regulation (Art. 7 organization ordinance of the Federal Department of Finance, OV-EFD, SR 172.215.1).
- The National Bank Act (*Nationalbankgesetz, NBG, SR 951.11*) assigns the Swiss National Bank (SNB), apart from its core task of monetary policy, several competencies regarding financial stability and macro-prudential supervision. It monitors the financial institutions' obligations to correctly and thoroughly fulfill its information obligations vis-à-vis the supervisory authorities and its duties to hold a minimum reserve (Art. 22 NBG), and oversees "systems for the clearing and settlement of payments and of transactions with financial instruments" (Art. 19 NBG). In turn, there are substantial overlaps of the SNB's and FINMA's responsibilities. These were attempted to be settled by a Memorandum of Understanding (MoU) between FINMA and the SNB (Eidgenössische Finanzmarktaufsicht FINMA and Schweizerische Nationalbank SNB, 2010). The MoU establishes two coordinating bodies at the top (Steering Committee) and working level (Standing Committee for Financial Stability), respectively. Moreover, the 2011 Banking Act revision (*Bankengesetz, BankG, SR 952.0*) assigns the SNB the authority to classify banks as Systemically Important Financial Institutions (SIFI). This is relevant since the SNB acts as "lender of last resort"; in other words, it grants liquidity to a financial institution unconditionally of its solvency only if the institution is classified as SIFI.
- The banking association SwissBanking (*Schweizerische Bankiervereinigung, SBVg*) remains an important actor in terms of self-regulation. In accordance with FINMA and its member institutions, it passes an agreement on the Swiss banks' code of conduct (*Vereinbarung über die Standesregeln zur Sorgfaltspflicht der Banken,*

VSB).²¹ It monitors compliance with the code of conduct, and can impose high fines in cases of code violation (Art. 64 VSB). Similarly, the Swiss stock exchange SIX is responsible for self-regulation at securities markets.

- At the international level, Switzerland takes part in the Financial Stability Board, the Basel Committee on Banking Supervision, and the international associations of supervisory authorities in the securities (IOSCO) and insurance (IAIS) sectors. The Eurozone- and EU-level institutions play only an indirect role in the Swiss case.

Figure 3.9 depicts the governance structure of Swiss financial regulation.

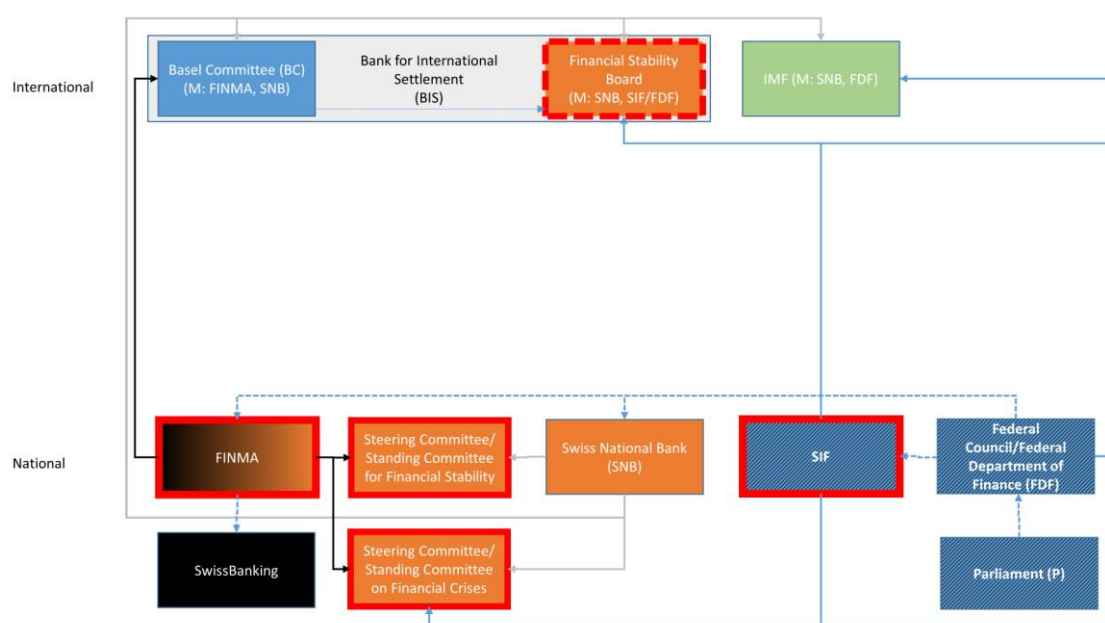


Figure 3.9 Governance structure of Swiss financial regulation and supervision

Note: Box colors: Blue: Setting of regulatory framework; Black: banking/micro prudential supervision; Orange: Financial stability/macro prudential supervision; Light Green: Country Stabilization Funds; Hatched: Political actors; **Box frames:** Solid red: newly established institution after the 2008 crisis, dashed red: reformed and/or upgraded after the 2008 crisis; **Arrows:** Solid: membership; dashed: influence via accountability relationship or appointment rights.

3.2.2.2. Organization and autonomy

Article 8 of the Financial Market Supervision Act (*Finanzmarktaufsichtsgesetz*, FINMAG, SR 956.1) enumerates the Board of Directors, the Management Board, and the Auditor as the management bodies of FINMA. It thus resembles the core characteristics of the Anglo-

²¹ http://www.swissbanking.org/VSB16_d_SBVg.pdf, retrieved July 8, 2015.

Saxon model.²² The Board of Directors is the “strategic management body”: it appoints the Management Board and the CEO, is responsible for internal audit by the Auditor, approves the budget, issues organizational regulations and is responsible for the annual report. Apart from these rather supervisory tasks, the Board of Directors sets the strategic goals of FINMA, formally issues its ordinances and circulars, and also has – as a peculiarity of the FINMA structure – a say on operational matters “of substantial importance” (Art. 9 b FINMAG). The FINMA Organizational Rules define these as:

“matters of considerable consequence for financial markets or of systemic importance as evidenced at one or more of the supervised institutions; matters of particular interest for the general public; matters that result in establishing rules of practice or a change thereto; matters involving a high liability risk for FINMA or having a long-term effect on FINMA’s reputation; matters that are designated as such by at least three members of the Board of Directors“ (Art. 2, No. 3 FINMA Organizational Rules, FINMA, 2015).

The Board of Directors is thus an integral part of FINMA, responsible partly also for operative issues.²³ This is a deviation from the “textbook-like” structure of the FINMA, and blurs the distinction between decision-makers and supervisory bodies (i.e., accountability fora). The Board has between seven and nine members, and is appointed by the Federal Council for a four-year term; each member can be re-elected twice. Only the president of the board holds a full-time position, while the other members are only paid a 25% position. The Board of Directors is hence a militia body, following Swiss administrative tradition. The Organizational Rules specify the board members as having “specialized knowledge” on financial matters and being “independent” – i.e. “they may not engage in activities for any supervised institution” (Art. 11 FINMA Organizational Rules). A violation of these rules is the only specified reason for a dismissal of a board member (Art. 9 No. 5 FINMAG).

²² Cf. for instance the corporate governance structures of the British Financial Conduct Authority (<http://www.fca.org.uk/about/operate/who>, retrieved October 21, 2015).

²³ This is also a substantial deviation from the above-mentioned Anglo-Saxon model (interview CH01).

Operational tasks of FINMA are executed by the Management Board, which is appointed by the Board of Directors and approved by the Federal Council. Subordinated to the Management Board is FINMA's staff of 483 full-time equivalents in 2014 (FINMA, 2014a). FINMA is entirely financed by fees levied from the regulated sector. Around 86 percent of the budget comes from supervisory charges, assigned to supervisory areas and individual institutions as defined in the Federal Council's Fees and Charges Ordinance (*FINMA-Gebühren- und Abgabenverordnung*, FINMA-GebV, SR 956.122).²⁴ The remaining 15 percent are fees based on rulings and supervisory proceedings.

3.2.3. Bundesnetzagentur (BNetzA)

In Germany, telecommunications (i.e. landline phones, at that time) and postal services had been traditionally provided by the *Deutsche Bundespost* (German Federal Post Office), a public authority, supervised by the Federal Ministry for Post Office and Telecommunications (*Bundesministerium für Post und Telekommunikation*). This started to change in the late 1980s. After a time of reluctance (due to resistance to liberalization by unions as well as business and political sectors), the German federal government started liberalization efforts in the telecommunications sector by the late 1980s: three *Postreformen* (1990, 1994, 1996) split up the public monopolists and liberalized the telecommunications market as of January 1, 1998. By that date, the new regulatory authority, *Regulierungsbehörde für Telekommunikation und Post* (RegTP) came into power (Werle, 1999). After it also took charge of the regulation of electricity, gas, and railway networks, the agency's name changed to *Bundesnetzagentur* (Federal Network Agency, from now on also BNetzA) by 2006.

3.2.3.1. The BNetzA in the regulatory regime

The governance structure of German telecommunications regulation is depicted in Figure 3.10. The main tasks of the BNetzA in the telecommunications area are, in brief: promoting competition in the telecommunications markets; ensuring a minimum level of telecommunications services, also in rural areas; protection of consumers; and allocation

²⁴ <https://www.finma.ch/en/finma/organisation/financing/>; retrieved July 14, 2015.

of radio frequencies. The most important regulatory instruments the agency has at hand entail:

- **Market access regulation:** the incumbent (or any “undertakings with significant market power”) can be required to grant the competitors access to its infrastructure and relevant information (§§16-26 *Telekommunikationsgesetz*, 2004, BGBl. I: 1190, hereafter TKG 2004);
- **Fee regulation:** the incumbent’s charges for these services to competitors can be capped, the same holds for consumer charges in monopolies (§§27-41 TKG 2004);
- **Market access and fee regulations** require a prior market definition and market analysis (§10-11 TKG 2004) in order to identify undertakings with significant market power that can be subject to these regulatory instruments; here, the European Commission owns a strong role;
- **Ensuring non-discriminatory access to the World Wide Web** (“net neutrality”, new in §§40-41 *Telekommunikationsgesetz*, 2012, BGBl. I: 958, hereafter TKG 2012);
- **Universal service obligation:** if in certain geographical areas a minimum level of telecommunications services provision is not ensured, the agency can require an undertaking for service provision, the undertaking receives a financial compensation by the competitors vis the BNetzA (§§78-87 TKG 2004). The TKG is quite restrictive on that point, enumerating only access to landline phone services; the DTAG is implicitly defined as a universal service provider. The BNetzA itself has only reporting duties on the state of universal service provision, but no decision-making rights (Kubicek, 2008);
- **Consumer protection:** the agency ensures minimal consumer contract conditions and data-protection rights;
- **Frequency allocation,** in cooperation with *Länder* authorities (§§52-65 TKG 2004)

In addition, the recent TKG 2012 defines the representation of Germany in international bodies (such as the BEREC) as a task of the agency on behalf of the BMWi. This entails wider information and instruction rights of the department (§140 TKG 2012).

In terms of our delimitation of levels of agency actions/aspects of agency conduct, we classify the processes of market definition and market analysis, as well as frequency allocations as strategic powers. These powers can most clearly be characterized as having wider impact for regulatory decisions and the functioning of the telecommunications markets. In contrast, instruments of market and fee regulation, consumer protection and universal service obligations are considered as clearly of an operational character.

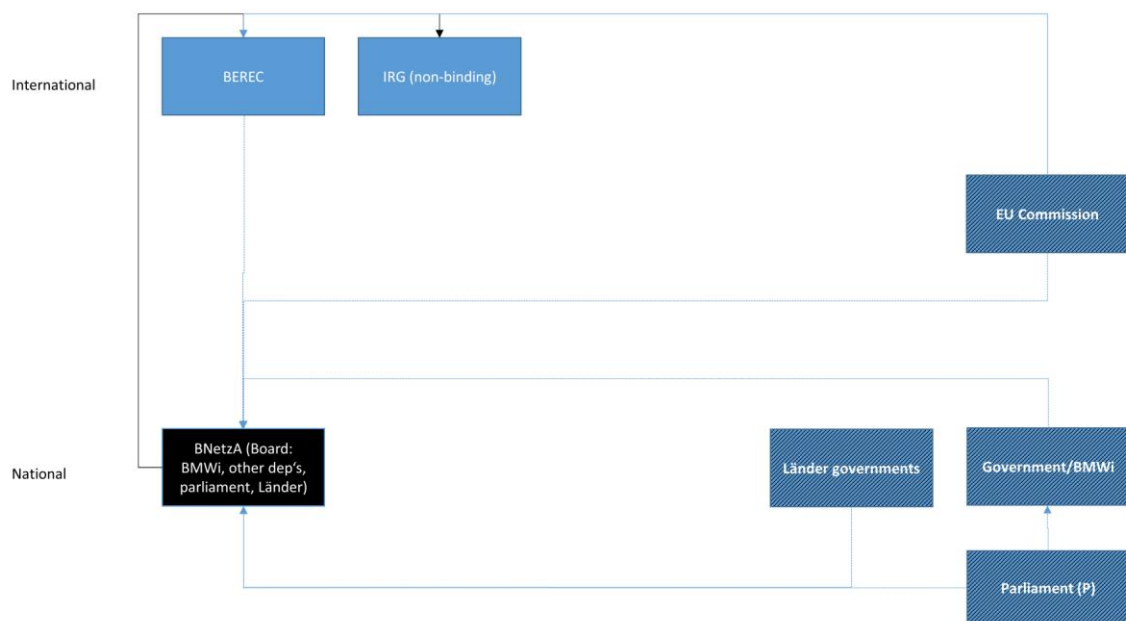


Figure 3.10 Governance structure of German telecommunications regulation

Note: blue: setting of regulatory framework; black: supervision; solid arrows: membership; dashed arrows: influence via accountability relationship or appointment rights.

3.2.3.2. Organization and autonomy

The BNetzA governance structure is rather an exception than the rule in the German administrative system. By law, it is a separate higher federal authority within the scope of business of the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*, BMWi),²⁵ which holds formal supervisory rights. The president of the BNetzA, upon suggestion by the advisory board, is appointed by the federal

²⁵ The ministry got its present name in 2013. Before, it was called the Federal Ministry for Economic Affairs and Technology (1998-2002, 2005-1013), and Federal Ministry for Economics and Labour (2002-2005).

government²⁶ for a fixed period of five years, and can be re-elected (Art. 3-4 TKG 2004). The agency is supported by an advisory board consisting of 32 members, half of them members of parliament (according to the seat share of the factions) and the rest representatives of the 16 *Länder* governments. It is funded mainly by government appropriations (59.2%) and spectrum fees (27.1%)²⁷ and employs about 2,900 people (Bundesnetzagentur, 2015: 162).

Regulatory decisions are for the most part made by nine court-like ruling chambers (§132 TKG 2012) – a unique structure among telecommunications regulators in Europe – and the government is restricted from interfering in these decisions. In this, the BNetzA resembles the structure of the Federal Cartel Office (*Bundeskartellamt*). These structures are elaborated more on below.

3.2.4. Eidgenössische Kommunikationskommission (ComCom)

As in most Western European countries, Switzerland started privatizing its monopolized communications sectors in the late 1980s. The monopolist was split up and regulatory bodies established. However, the governance structure shows some Swiss peculiarities: for instance, the regulator has fewer competencies than in neighboring countries and lacks its own administrative capacities.

In the first decades of the 20th century, PTT (Postal Telegraph and Telephone) emerged as Swiss public monopolist for post and telecommunications. Between 1928 and 1998, it was solely responsible for service provision and market regulation. First signs of liberalization are detectable as early as 1983, when an expert commission on liberalizing telecommunications was established. The commission's results came before parliament in 1987 (which is not extraordinarily long for Swiss conditions) and led in 1991 to a reform of telecommunications law (Ingold and Varone, 2014: 139-40). The 1991 telecommunications law reform (*Fernmeldegesetz*, FMG, AS 1992 581, SR 784.10) split service regulation and market provision. While the PTT monopoly for the former remained in place (Fischer, 2008), the latter was assigned to the newly founded federal

²⁶ Formally, the president is appointed by the Federal President upon suggestion of the Federal government.

²⁷ Numbers for 2013. Source: <http://www.itu.int/net4/itu-d/icteye/CountryProfile.aspx>; retrieved April 4, 2015).

Office for Communications (OFCOM), which dealt with concessions and technical standards (Mach et al., 2003: 305-6).

However, a complete separation of provision and regulation occurred only in 1997 (Fischer, 2008). By that law revision, ComCom was put in place. The 1997 liberalization was triggered mainly by the international environment (the GATT agreement, and European Union policies) and domestic pressure, particularly by PTT itself (Mach et al., 2003: 308). Swiss Telecom was eager to participate in the multinational Unisource project and to expand international business activities; this required the liberalization of the Swiss market since the European Union was willing to grant access of Swiss companies to the Common Market only on the basis of reciprocity (Ingold and Varone, 2014; Sciarini et al., 2004: 361). The EU, on the other hand, had enforced liberalization of infrastructures as of January 1998 (Thatcher, 2005), which put time pressure on Swiss politics. The law split PTT up into postal services (Swiss Post) and telecommunications (Swisscom), and created ComCom as a new regulator for the now entirely liberalized market. The telecommunications reform was a package deal, since most actors were pro-reform, including PTT, comprising export industries, economists, and right-wing parties. The more skeptical trade unions and Social Democrats were satisfied with a less intense liberalization of postal services (Mach et al., 2003: 306).

A last round of reforms took place in 2006, when the competitors were to be granted access to the “last mile”. At that point, Swisscom opposed further liberalization along with leftist and centrist parties, while right-wing parties as well as OFCOM and ComCom were in favor of liberalization. This resulted in lengthy negotiations, and finally in a further reform in 2006, requiring Swisscom to unbundle the “last mile”,²⁸ and at the same time clarifying ComCom’s competencies and independence (Maggetti, 2014: 287).

3.2.4.1. ComCom in the regulatory regime

ComCom is an executive commission (*Behördenkommission*), a traditional form of Swiss administration consisting of five to seven “independent specialists” (SR 784.10, Art. 56). Its

²⁸ The “last mile” in telecommunications is a colloquial term widely used for the technical components (e.g., cables, amplifiers, etc.) necessary to physically reach the consumer.

purpose is to make use of expertise external to the government via the militia principle. It is by law independent from the government and administrative authorities. ComCom's main tasks of concern the allocation of mobile phone frequencies (including frequency tenders), and the settlement of interconnection conflicts between the ex-monopolist Swisscom and the competitors (Sunrise and Salt²⁹). Moreover, it grants universal service concessions. ComCom delegated the powers to grant land line and private mobile radio concessions to OFCOM (Sager, 2014). ComCom itself lacks administrative capacities. Both in preparation and implementation of its decisions, it entirely relies on OFCOM's staff and expertise.

OFCOM as a federal office is a part of the Federal Department of the Environment, Transport, Energy and Communications (DETEC), headed by a Federal Councilor. Although OFCOM has some managerial autonomy,³⁰ it is understood to be an integral part of the Department. Further authorities in Swiss telecommunications governance are the Competition Commission (ComCo), Price Surveillance, and the Ombudsman for Telecommunications (Ombudscom). ComCo's task is the prevention of market failures; while the other two are in charge of consumer protection: Ombudscom is an arbitration board between consumers and telecommunications service providers; while Price Surveillance has a "fire alarm" function regarding non-market prices, e.g. in the health sector, but also in telecommunications.

In comparison to the other telecommunications regulators under scrutiny, ComCom lacks several core competencies: the FMG explicitly enumerates the technologies it applies to (Art. 11 FMG) rather than being technologically neutral as in other countries (Schweizerischer Bundesrat, 2012: 18). The Federal Council is in charge of market definition and analysis. Moreover, ComCom is restricted to *ex post* regulation: it can take regulatory decisions only *after* market participants have been unsuccessful in negotiating a solution, and have appealed to the Commission. This prevents ComCom from analyzing market power in advance, and accordingly facilitates competition. The restriction has been widely criticized as favoring the incumbent, since Swisscom is able to effectively hamper

²⁹ Until April 2015, the company was known as Orange.

³⁰ It is a so-called FLAG office, the Swiss implementation of an output-oriented, New Public Management-style body.

market access of its competitors (Bühler, 1999; Fischer, 2008: 88; Schweizerischer Bundesrat, 2010b: 178). Trends towards further liberalization or strengthening of ComCom are not in sight (Sager, 2014). In contrast, the 2007 reform explicitly discarded more active interventions by ComCom in the market, making it more dependent on the parent department and the competition regulator (Maggetti, 2014: 288). This has been widely associated with Swisscom influence (interview CH06) and a parliamentary majority reluctant to further liberalization (Fischer, 2008).

ComCom is characterized as a “primarily administrative body” responsible for implementation issues (interview CH03). In fact, its competencies and capabilities are severely restricted: since it lacks market definition or analysis powers, only frequency allocations remain as a strategic task. Settlement of interconnection conflicts is considered to be of an operative character. The governance structure is depicted in Figure 3.11.

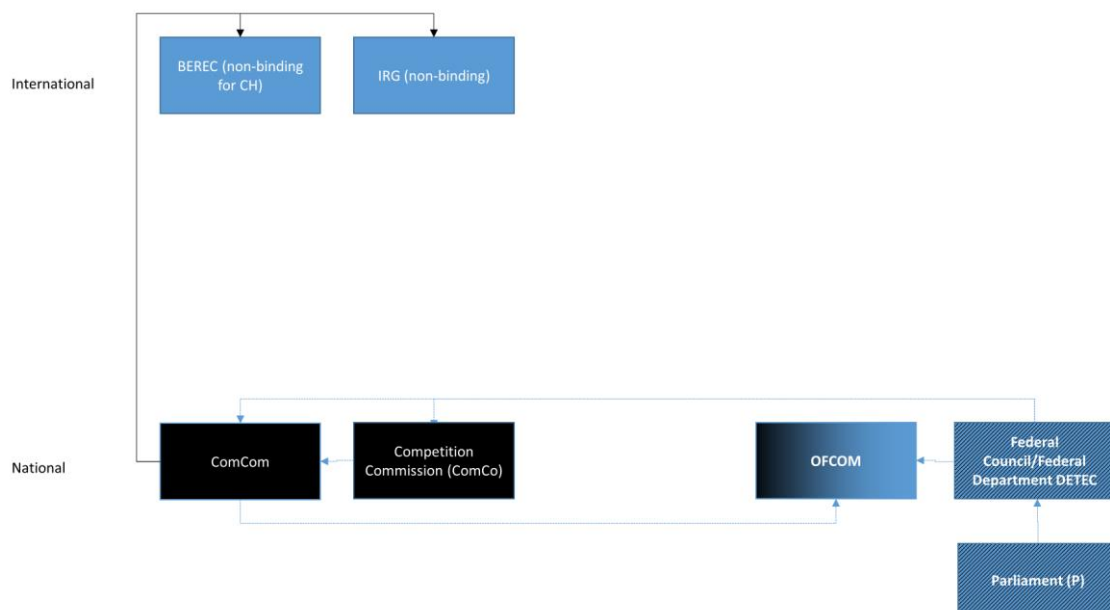


Figure 3.11 Governance structure of Swiss telecommunications regulation

Note: blue: setting of regulatory framework; black: supervision; solid arrows: membership; dashed arrows: influence via accountability relationship or appointment rights.

3.2.4.2. Organization and autonomy of ComCom

The members of the commission are appointed by the Federal Council (Art. 56 FMG, SR 784.10). Since 2009, the Administration Organization Ordinance (*Regierungs- und Verwaltungsorganisationsverordnung*, RVOV, SR 172.010.1) synchronizes the term of office of commission members to the parliamentary term and defines a maximum limit of 12 years in office (Art. 8g and 8i RVOV SR 172.010.1). Before, there was no formal limitation on office terms. The law requires Commission members to be “independent experts” (Art. 56 FMG, SR 784.10). The RVOV defines in detail the characteristics of potential interest conflicts. A failure to correctly inform on these conflicts or “important reasons” according to labor law (Art. 14 *Bundespersonalgesetz*, BPG, SR 172.220.1)³¹ are the only formally stated reason for a dismissal of Commission members (Art. 8f No. 4 RVOV, SR 172.010.1). There is no formal selection process, but rather a broad discussion of potential candidates, involving mainly the Federal Council, the DETEC, OFCOM, and even ComCom itself. The general goal is the representation of the three major language groups,³² of both university experts and the private sector, and having an engineer, an economist, and a lawyer in the commission (interview CH06, *Parlamentarische Verwaltungskontrolle*, 2015).

ComCom has only a very small secretariat with three employees and is highly dependent on OFCOM’s support in preparing and implementing its decisions (Ingold and Varone, 2014; Maggetti, 2014: 287-8; Varone and Ingold, 2011). By ordinance, ComCom has delegated to OFCOM the regulation of landlines and radio and TV frequencies, the technical implementation of frequency tenders and universal service obligations, and the participation in international networks at working level (interview CH03); and formally decides on interconnection issues upon OFCOM’s request (Art. 8 Reglement ComCom, SR 784.101.115). While ComCom’s restriction to ex post regulation is subject to political controversies (see above), the creation of substantial administrative capacities is not on the political agenda (interview CH03, Sager, 2014). While this fact is a peculiarity even among Swiss regulatory bodies, in general ComCom has been characterized as “an indigenous

³¹ As „important reasons“, Swiss jurisdiction subsumes violent threats, theft, corruption, and espionage.

³² As of 2010 required in Art. 8*c bis* RVOV, SR 172.010.1.

variety of regulator”, showing many features of traditional Swiss administrative organization (Maggetti, 2014: 287).

The activities of both ComCom and OFCOM are partly funded by licensing fees (Art. 40 and 56 No. 4 FMG). For 2014, a budget of 1.6 million CHF is projected.³³ In addition, OFCOM provides services to ComCom for 3.2 million CHF (Eidgenössische Kommunikationskommission, 2015). Until 2012, ComCom’s budget had been administered by OFCOM (Ingold and Varone, 2014: 143). Today, the DETEC’s general secretary provides these services to all infrastructure regulators (interview CH13).

In sum, ComCom’s peculiar structure raises doubts on its independence. As the recent report of the Parliamentary Control of the Administration points out:

“Durch die Übertragung der materiellen Entscheidvorbereitung sowie Teilen der Umsetzungsaufgaben an das BAKOM ist in der ComCom die Unabhängigkeit auf einen Kernbereich reduziert: die weisungsfreie Entscheidkompetenz der Kommission sowie das eigene weitgehend administrative Sekretariat. Mit dem weitgehend administrativen Sekretariat ist die ComCom in der Entscheidvorbereitung stark von der Zentralverwaltung abhängig und kann somit als Gesamtbehörde ... kaum mehr als unabhängig im engeren Sinne gelten – obgleich die Kommission selbstverständlich ihre Entscheide in aller Unabhängigkeit treffen kann” (Parlamentarische Verwaltungskontrolle, 2015: 60).

However, to judge ComCom as not being independent would mean to ignore a number of interesting features of the governance structure and its actual use, as shown in section 7.6 below.

³³ <http://www.efv.admin.ch/d/dokumentation/finanzberichterstattung/budget.php>, retrieved October 17, 2015.

3.3. Summary: Fit of cases

I have expected lots of variation with regard to political system, resources, transnational integration, and salience. These factors were identified as potentially important to understand accountability in practice (chapter 7). In fact, lots of variation has been fleshed out: As expected, Switzerland and Germany differ strongly with regard to the political system, resources, and transnational integration. Also, the selected policy areas differ with regard to the degree of transnationalization and salience. Thus, we can expect a broad range of ways to deal with accountability in everyday practice (chapter 7).

Moreover, we checked for agency independence as a suspected main driver for formal agency accountability. Administrative law and market structures led to the expectation that Swiss and telecommunications regulators should enjoy more independence than their German counterparts. While quantitative data was only able to corroborate that in part, a first qualitative assessment has yielded a more fine-grained picture: Despite similar independence scores, agency structures are quite different.

Only FINMA resembles the Anglo-Saxon governance model with a powerful, expert-staffed agency board, which is in the other cases either politicized (BaFin, BNetzA) or completely absent (ComCom). BaFin and ComCom are strongly intertwined with their parent departments, while the other two cases are rather separated. Finally, the European Union has got strong formal powers in the BNetzA case (and more recently also in the BaFin case), while Swiss agencies' autonomy is much less reduced by transnational arrangements. Table 3.3 summarizes these findings. In sum, the expectations are met for three out of the four cases: FINMA is more autonomous than the German cases in the sample, while comparing German agencies, the telecommunications regulator enjoys more autonomy. The ComCom is an outlier: On theoretical groundings, we would have expected it to be first of the class, but in fact it seems hardly independent at all. This is not reflected in the quantitative score, either. Nevertheless, there is sufficient variation to test the hypotheses regarding the relationship between independence and accountability (chapter 6).

In sum, the cases selected fit to the methodological rationale and promise insightful case studies for the empirical chapter 6 and 7. Before we get that, however, we need to define

and operationalize the core concept of the present study: accountability. Conceptualizations and methodological use of the term are discussed in the upcoming chapters 4 and 5. I develop there a new regime approach to tackle in particular the interactions among accountability fora in a more adequate manner than existing approaches.

Agency	BaFin	FINMA	BNetzA	ComCom
Responsibilities	In charge of supervision, support by national bank, recently additional structures: ECB supervises SIFs	In charge of supervision, competition with national bank	In charge of supervision, operational and strategic decision-making, supervision by EU Commission	Limited amount of tasks, no own administrative capacities
Role of board	Weak, politicized	Strong, expert body	Weak, politicized	none
Role of parent department	strong	weak	weak	strong
Role of transnational institutions	intermediate	intermediate	strong	weak
Overall agency independence	rather low	high	rather high	low

Table 3.3 Agency independence

4. Conceptualizing accountability³⁴

To tackle the research questions of this study, we need a useful conceptualization of accountability. This is by no means an easy task. Accountability is used in a wide variety of contexts, and with even more meanings. The chapter proceeds as follows: First, I distinguish descriptive from normative understandings of accountability (section 4.1). Next, I compare existing descriptive understandings of accountability (section 4.2) in order to develop my own approach (section 4.3): The central idea of that approach is, that accountability is often ensured by different fora for various aspects of agency conduct, but for one aspects by a multitude of fora as a whole.

As already argued, accountability is a core concept of contemporary governance research. The important changes in the organization of the state, shifting power away from parliaments and other classical democratic institutions, and particularly towards “non-majoritarian institutions” (Maggetti, 2010; Majone, 2001a; Vibert, 2007), have induced an increased interest in processes of accountability:

“...when decision-making power is transferred from a principal (e.g. the citizens) to an agent (e.g. government), there must be a mechanism in place for holding the agent accountable for their decisions and tools for sanction. ... In the last 10 to 15 years, the concept of accountability has become fashionable” (Lindberg, 2013: 203).

For quite some time, it was common sense for accountability to highlight the ongoing academic disputes regarding the content and limits of the concept (Curtin et al., 2010). As Lindberg continues:

“Unfortunately, this proliferation has resulted in a myriad of meanings and dimensions ascribed to the concept of ‘accountability’” (Lindberg, 2013: 203).

³⁴ Parts of this chapter have already been published in: Biela, Jan, 2015: Accountability, Measurement of. In: Melvin J. Dubnick and Domonic Bearfield (Hrsg.): Encyclopedia of Public Administration and Public Policy, 3rd ed. New York/London: Taylor and Francis.

It has been argued that, over time, more elements have been classified as part of accountability, turning it into an “ever-expanding concept” (Mulgan, 2000):

“Anyone studying accountability will soon discover that it can mean many different things to many different people (Behn 2001: 3-6; Dubnick 2005; Mulgan 2000: 555; Pollitt 2003: 89). ‘Accountability’ is used as a synonym for many loosely defined political desiderata, such as good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity (Behn 2001: 3-6; Dubnick 2007a; Mulgan 2000: 555).” (Bovens, 2010: 946).

Recently, this judgement has been increasingly challenged. While accountability research continues to be characterized as “highly fragmented and non-cumulative” (Bovens et al., 2014: 2), it has also been stated that “the level of conceptual confusion might sometimes be exaggerated” (Schillemans, 2013: 25) and that a “minimal conceptual consensus” has emerged (Bovens et al., 2014).

4.1. Normative vs. descriptive understandings of accountability

As a first step, normative and descriptive contents of the accountability concept have been distinguished: As depicted in the previous chapter, Bovens argues that in the understanding of some scholars, “being accountable” has become a kind of “virtue” of organizations. Accountability studies from that tradition hence often focuses the “actual and active behavior of public agents” (Bovens, 2010: 947-8) in order to assess the legitimacy of public officials and public organizations:

“Public accountability, in the sense of transparent, responsive, and responsible governance, is meant to assure public confidence in government and to bridge the gap between citizens and representatives and between the governed and government (Aucoin and Heintzman 2000: 49-52).” (Bovens, 2010: 954).

In this tradition, various normative purposes of accountability have been identified, such as to provide an effective link within a chain of delegation, to prevent the abuse of authority, to enable learning processes and hence contribute to good performance, to check for procedural correctness in the implementation of policies, to maintain professional, moral, legal and constitutional standards, or to ensure efficient and adequate resource use (Behn, 2001; Bovens et al., 2008; Schedler, 1999). In chapter 2, I have elaborated more on these argumentations.

In contrast, another strand of the literature treats accountability rather as a descriptive mechanism, and “employ a restricted definition of accountability that focuses on the mechanisms with which actors in public administration are held accountable” (Schillemans, 2011: 389). This descriptive understanding does not deal with the question “whether the agents have acted in an accountable way, but whether they are or can be held accountable *ex post facto* by accountability forums” (Bovens, 2010: 948).

4.2. Descriptive understandings of accountability

To follow the second understanding of accountability as a neutral and descriptive instrument means to carefully define the concept and its core elements in order to check its presence or absence empirically. In this section, I review existing concepts and conclude that there are mainly three aspects in which conceptualizations differ: At first, this is the constitutive elements of an accountability relationship and their relative importance. The other aspects represent the answers to the question by Bovens et al.: “Who is accountable to whom, for what, by which standards, and why?” (Bovens et al., 2014: 10). The “to whom” and “why” questions imply a decision if accountability is restricted to hierarchical relationships or can it come into effect also in horizontal, network-like structures? And, somewhat related: does it require a legal basis, i.e. a formal right to execute accountability, or is the mere power to pose sanctions, regardless of the formal right to do so, which characterizes an accountability relationship. Different understandings in these questions lead necessarily to a different empirical scope of accountability fora under scrutiny. The “for what” and “by which standards” questions, in contrast, suggest a differentiation of the

aspects of agency conduct scrutinized by fora. The next three sections deal with these dimensions consecutively.

4.2.1. Formative elements of accountability

Regarding the formative elements of accountability, there are three strands in the literature. First, there are those approaches that focus primarily on the delegative character of the relationship. In addition, Fearon highlights the right of the delegator to pose sanctions:

“We say that one person, **A**, is accountable to another, **B**, if two conditions are met. First, there is an understanding that **A** is obliged to act in some way on behalf of **B**. Second, **B** is empowered by some formal institutional or perhaps informal rules to sanction or reward **A** for her activities or performance in this capacity.”

In contrast, Romzek and Dubnick (1987) ignore the sanctioning part and combine delegation with the right to request information:

“[Accountability is a] relationship in which an individual or agency is held to answer for performance that involves some delegation of authority to act.”

Grant and Keohane (2005) do not demand a delegative relationship, but their definition is nonetheless similar to Fearon’s:

“[Accountability] implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”

Schedler (1999: 14) integrates both perspectives by dividing accountability into an “informational” and a “sanctioning” part:

“... [P]olitical accountability carries two basic connotations: answerability, the obligation of public officials to inform about and explain what they

are doing; and enforcement, the capacity of accounting agencies to impose sanctions on powerholders who have violated their public duties.”

In addition, some definitions define a form of “debate” or “justification” as a third constitutive element of accountability. The definition by Bovens (2007: 450) is a case in point:

“Accountability is a relationship 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.”

As Table 4.1 shows, the emphasis put on the different aspects varies amongst the definitions. Approaches informed by agency theory tend to emphasize the right to sanction as the decisive element of an accountability relationship. This has been reversed over time, as the recent conceptualizations of Philp (2009) and Lindberg (2013) put the request of information in the foreground while reducing the required sanctioning capacity:

“[Accountability entails] 1. An agent or institution who is to give an account (A for agent); 2. An area, responsibilities, or domain subject to accountability (D for domain); 3. An agent or institution to whom A is to give account (P for principal); 4. The right of P to require A to inform and explain/justify decisions with regard to D; and 5. The right of P to sanction A if A fails to inform and/or explain/justify decisions with regard to D” (Lindberg, 2013: 209).

“A is accountable with respect to M when some individual, body or institution, Y, can require A to inform and explain/justify his or her conduct with respect to M” (Philp, 2009: 32).

In sum, the various definitions refer to similar elements, but assign varying importance to them. While some approaches strongly build upon the presence of sanctioning possibilities,

others reduce or neglect the relevance of sanctions and highlight (enforceable) information as the core feature of accountability.

	Fora possess the right or power to request information/ justification	Relationship inhibits a deliberation/ justification/debate phase	Fora possess the right or power to sanction agents for misconduct
Romzek and Dubnick (1998)	●		
Fearon (1999)			●
Grant and Keohane (2005)			●
Schedler (1999)	●	●	●
Bovens (2007)	●	●	●
Philp (2009)	●	●	●a
Lindberg (2013)	●	●	●a

Table 4.1 Elements of accountability

Note: a: Philp and Lindberg restrict the right sanction only in case the agent fails to give adequate information to the forum; **Source:** Biela (2015).

In this sense, a majority of approaches (Schillemans, 2013) consents with regard to the understanding of accountability as, a), a social relationship between two actors – an actor and a forum (Bovens, 2007, 2010), an accountant and an accountee (Pollitt, 2003), or a principal and an agent (Lupia, 2003; Pratt and Zeckhauser, 1985) – that, b), “involves an obligation to explain and justify conduct” (Bovens, 2010: 951). That process of explanation and justification most often involves phases of information, debating, and sanctioning. As last point, c), most scholars highlight the ex post character of accountability – it is past agency actions that are primarily evaluated by accountability mechanisms.

4.2.2. Accountability to whom and why?

In addition to the constitutive elements of an accountability relationship and their relative importance, accountability concepts differ with regard to the degree of formalization required to speak of an accountability relationship. The answer to this question determines the accountability fora under scrutiny – the “accountability to whom?” question, so to say.

It turns out that existing conceptualizations differ with regard to the degree of formalization (of the forum and/or its relation to the agent) they require to classify a relationship as an accountability one. With respect to the degree of formalization, the most restrictive

approaches (first column of Table 4.2) require an act of delegation and the existence of a hierarchical relationship between actor and forum. These approaches, mainly from the strand of agency theory assume a linear, hierarchical relationship between politicians (principals) and bureaucrats (their agents) that is primarily characterized by mechanisms of monitoring, control, and sanctioning (see for overviews Bendor et al., 2001; Gilardi and Braun, 2002; Miller, 2005). Strøm (2000) speaks in this context of a “chain of delegation” from voters to members of parliament, a government head, government ministers, and bureaucrats:

“In democratic polities, [accountability] also appears intimately related to electoral representation, reflecting a looped relationship between authorisation of parties and their governments through ex-ante mandates, on the one hand, and, on the other, the evaluation of their performance in office through ex-post controls (Andeweg 2003), with the ultimate sanction being the capacity to ‘throw the rascals out’” (Curtin et al., 2010: 930).

In line with this, accountability has been used in political science for a long time primarily in two contexts: a) accountability of democratically elected politicians to their electorate, and b) accountability of bureaucrats to their administrative and political leaders. The former is generally labelled as political or electoral accountability, the latter one as administrative or bureaucratic accountability. However, this classical understanding of accountability makes increasingly less sense, and has been proven too narrow (Roberts, 2001), as the authors continue:

“In reality these links have become more complex. ... [T]he complexity of modern governance systems often makes the accountability of elected officials fictitious: they are considered responsible for events beyond their control and they can evade accountability for some of their undertakings (Papadopoulos 2003)” (Curtin et al., 2010: 930).

Considine states in a similar vein:

“Traditional measures of accountability that rely upon line or top-down measures do not necessarily provide a good guide to the accountability culture as a whole” (Considine, 2002: 37).

The widely acknowledged fact that accountability cannot be acquired anymore by democratic institutions (alone), has led to a conceptual widening of the accountability term: a court, for instance, is no one’s principal (it is not the court that has any powers to delegate) but nevertheless can hold other bodies to account. In fact, ombudsmen, accountors (Mainwaring and Welna, 2003; Moreno et al., 2003), judicial review, as well as professional peers (Papadopoulos, 2007) play an important role in holding political bodies to account.

These non-hierarchical relationships are regularly tagged with the notion “horizontal” or “diagonal accountability”³⁵ as opposed to “vertical accountability” (Bovens, 2007). While vertical accountability is characterized by a hierarchical principal-agent relationship, horizontal accountability is not:

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

This understanding refrains from a strictly hierarchical understanding of accountability as a mechanism of control following on a decision to delegate authority. These approaches hence include *non-hierarchical*, but nevertheless *formal*, relationships within their understanding of accountability:

“The accountee has the right to demand information, the duty to pass judgment and the opportunity to sanction dissatisfactory conduct. This formalized relationship distinguishes accountability from the many other

³⁵ Bovens labeled “diagonal accountability” the relationships in which a forum has direct access to information, but has to rely on a third party to implement sanctions (e.g. an audit office that reports to the parliament).

communicative relations of public agents with other parties”
(Schillemans, 2008: 177).

The least restrictive conceptualization of accountability touches Bovens question, *why* agents are expected to be accountable toward certain fora. It also includes non-institutionalized relations. From its point of view, the mere power to pose sanctions and/or force the agency to give information is decisive (third column in Table 4.2). Instead of analyzing the formal rights of accountability fora to demand information or pose sanctions, scholars rather focus on actors “simply having the power to make A do so” (Philp 2009: 33). In this vein, Grant and Keohane (2005) and Keohane and Nye (2003), inter alia, have developed what they call “reputational” or “market accountability”. The threat of losing reputation vis-à-vis influential spheres (e.g. the media or the market) in this view is a highly effective accountability mechanism. Smulovitz and Peruzzotti (2000) underline the importance of societal mechanisms of accountability, even though they do not own formal sanctioning rights:

“The notion of accountability is closely linked with the capacity to enforce decisions. Since societal forms of control expose wrongdoing but do not have mandatory effects, some authors have regarded them as window-dressing rather than as real checks on power. Yet since the social sanctions derived from the public exposure of wrongdoing can destroy the political capital and reputation of public officials, they are far from ‘toothless.’” (Smulovitz and Peruzzotti, 2000: 151)

Table 4.2 depicts the three conceptualizations and the definitions which (explicitly or implicitly) refer to them.

Table 4.3 shows that empirical approaches from the 1990s focus exclusively on parliamentary rights, whereas more recent approaches have begun to include governmental actors, courts, interest groups, audit offices, ombudsmen, or supra- and transnational actors. Thereby they reflect the widened understanding of the concept and the shift “from government to governance”. Apparently, there is no linear development towards more fora detectable; the selection of fora is, in contrast, mostly based on the research interest.

Forum type	I	II	III
	Institutionalized forum with formal rights to get informed by/sanction the agent, and which is in a hierarchical relationship to agent	Institutionalized forum, with formal rights to get informed by/sanction the agent	Institutionalized or non-institutionalized forum that lacks formal rights, but owns de facto capacity or informal power to get informed by/sanction the agent
Romzek and Dubnick (1998)	●		●
Fearon (1999)	●	●	●
Grant and Keohane (2005)		●	
Schedler (1999)		●	●
Bovens (2007)		●	
Philp (2009)		●	
Lindberg (2013)		●	

Table 4.2. Institutionalization as requirement for accountability

Forum type	Briault et al. (1995)	de Haan et al. (1998)	Masciandaro et al. (2008)	Verhoest et al. (2010)	Koop (2014)	Hanretty et al. (2012)	Biela/Papadopoulos (2014) ^a
I Parliament	●	●	●		●	●	●
Ministry/government			●	●	●	●	●
Board				●			●
EU commission						●	●
II Judiciary			●		●	●	●
Auditing institution			●	●			●
Ombudsman			●		●		●
Peers						●	●
Supervised industry			●			●	●
Public/consumers			●		●	●	●
III Media							
Public							

Table 4.3 Accountability fora explicitly enumerated

Note: a: Biela and Papadopoulos (2014) do not enumerate a list of fora, but use the existence of formal information rights as a criterion for including a forum.

4.2.3. Accountability for what and by which standards?

A last important differentiation is needed to answer Bovens et al.'s (2014: 10) question: "about what is an account to be rendered?" Bovens (2007) includes that dimension as "aspects of conduct" into its accountability framework, but so far empirical approaches have not included it into their operationalizations: accountability arrangements vary in many respects between countries as a result of variations of state structures, administrative traditions, and political-administrative relations (Pollitt and Bouckaert, 2011). Bovens and his colleagues refer here to the "nature of the conduct" under scrutiny: Is it about money? About decisions? About results?

Conventionally, public management literature often differentiates between managerial (or bureaucratic) and political (or public) 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 Lægreid, 2002: 271). More concretely, it includes fiscal and personnel management and the agency's internal structures. The latter is generally understood as political responsiveness to the principals' preferences, i.e. to "political forums, to voters, members of Parliament and other political representatives, ministers, or political parties" (Bovens et al., 2014: 11).

Apart from these two types, Bovens et al. (2014: 11) enumerate administrative accountability (to other administrative bodies, ombudsmen, or auditing courts), legal accountability (to courts), professional accountability (to peers and professional bodies of oversight), and social (or horizontal) accountability (to interest groups and stakeholders in general). Bovens et al. conclude here from the character of the forum on the nature of conduct under scrutiny: a department executes political accountability, while an auditing institution is in charge of administrative accountability.

In a different vein, e.g. Behn (2001) starts from the conduct of the agency rather than from the character of the forum. In a nutshell, he differentiates accountability for finance, for fairness, and for performance. The first one is quite straightforward, and related to the etymological roots of the term accountability: to account "how the books are kept and the money is spent" (Behn, 2001: 7). The second one relates to the procedural rules applied:

Are administrative decisions fair in the sense that procedures prescribe the same result under comparable circumstances? Behn argues, that procedural fairness has to be a basic ethical standard in democracies. Finally, he cares about the performance of the accountability holdees: “Are the policies, programs, and activities producing the results they were designed to produce?” (Behn, 2001: 10).

These three types, finance, fairness, and performance, are to some extent also reflected in the research on agency independence. In particular, scholars underline the substantial difference between the overall goal (or, the performance) and the sum of decisions contributing (or not) to the achievement of the former (the procedures): Literature differentiates between goal and instrument independence (DeBelle and Fischer, 1994), or between institutional, regulatory, supervisory and budgetary independence (Quintyn et al., 2007). Verhoest et al. (2004) provide an excellent synthesis of the different conceptualizations and differentiate autonomy in decision-making competencies (managerial and policy autonomy) from constraints in the actual use of these competencies (structural, financial, legal and interventional autonomy).

4.3. A regime approach to accountability

After the review of existing conceptualizations, I now turn to outline my own approach. It has become clear that, within the span of existing conceptualizations, each author has to find a way to maneuver. Each approach to accountability has - implicitly or explicitly - to take its position on the questions asked above, and the answers shape to a high extent the research results one gets: Which fora to include into the analysis? What aspects are under scrutiny? And even: Do we focus on accountability as whole, or rather on information, debate, or sanctioning aspects? In light of the complexity of the concept, this is quite frequent:

“Gauging all possible accountabilities for certain actors of forums therefore defies one’s best efforts. Researchers therefore usually investigate just one or only a few types of accountability relationship, depending on the nature of the most relevant actors or forums and the type of behavior for which account is rendered” (Brandsma, 2014: 147).

It is that complexity that has prevented researchers from developing a unified approach to accountability, and has contributed to the dominant impression of fragmentation and polyphony in the academic accountability realm. Studies regarding accountability show an amazing diversity, spreading over half a dozen disciplines, and even more research questions, foci, and methods:

“For instance, some authors focus attention on the accountability documents (annual reports) only where others look more specifically at institutions (such as inspections), formal mechanisms, specific reporting requirements, the availability of formal sanctions, or at incidents, frauds and failures. Furthermore, some authors adopt an explicit a priori and de iure perspective whereas others rather focus on de facto processes and outcomes and a posteriori evaluations. Finally, some authors look at results or outcomes, some look at the ability of organizations to provide accounts of their behaviour, some look at the content of accountability and some at the expectations or requirements.”
(Schillemans, 2013: 14).

This diversity results, on the one hand, in confusion regarding terms and meanings (Schillemans suggests a “hyphenation” of accountability to specify the aspect under scrutiny), while on the other hand urges the scholar to clarify his or her own understanding of the term.

Clearly, there is no “gold standard” of accountability, but the most adequate definition depends on the research interest. For my purposes, an adequate conceptualization of agency accountability should be grounded, first, on an empirically useful, i.e. narrow definition of accountability; second, it should consider complex, network-style arrangements of accountability; and third, it should be oriented towards the cross-sectoral (between agencies) and cross-national (between states) comparability of accountability regimes.

My approach, since it focuses on accountability to democratic institutions, leaves out non-institutionalized fora (the general public, the media) as accountability fora. It also sees

formal rights to be informed *and* to pose sanctions as a necessary prerequisite for executing accountability. This is partly due to analytical purposes, since non-institutionalized fora posing informal sanctions can neither be easily identified nor their influence adequately estimated. This does not mean, however, that only “classical”, hierarchical accountability fora are in the focus. In contrast, many actors (e.g. courts) have formal rights to obtain information and pose sanctions. Moreover, in analyzing accountability arrangements in practice, it is crucial to scrutinize also coordination between fora, and the effect of the accountability regime as a whole. Finally, the rather narrow definition is not intended to be exclusively restricted to information and sanctions provided by law. Rather, I see formal rights and institutionalization as prerequisites for accountability; or in other words, as necessary, but not sufficient conditions for accountability. While I adopt a rather narrow definition, *this does not mean that power is not of interest*. As in the case of agency independence (Gibaldi and Maggetti, 2011), it is plausible that a mixture of formal arrangements and their de facto use will determine agency accountability (Lægreid and Verhoest, 2010). Empirical evidence shows that despite a constant level of formal independence, behavioral independence of institutions can vary along with the composition of oversight bodies and hence the credibility of a sanctioning threat (Lohmann, 1998). Moreover, the mentioned non-institutionalized actors (media, public) can provide important “conveyor belts” or instruments to hold an agent to account, e.g. through publicly expressed dislike (“naming and shaming”) or information channel (“fire alarms”). In more general terms, informal factors, information sources and sanctioning options might turn out to be more effective than the formal analysis suggests. I will return to this in the theory chapter. Since our interest lies in the accountability of agencies to external, mainly political actors, it moreover makes sense to restrict our understanding of accountability to relationships between collective actors and to exclude internal responsibility and rectification (Mulgan 2003). Thus, I can sum up my definition of accountability as:

- **Definition 1: Accountability is a relationship between an actor and an external, institutionalized forum, which involves the formal rights of the forum to receive and/or request information by the agency *and* to impose consequences on the agent as a reaction to that information, or the agency’s failure to provide that information.**

I have stated that the idea of accountability as a hierarchical relationship has become less useful in complex contemporary governance structures (see above). We have seen, furthermore, that the understanding of accountability has been widened accordingly, integrating also, for example, non-hierarchical “horizontal” and “diagonal” accountability relationships. Albeit some scholars see horizontal accountability as a replacement of more traditional ones (Barberis, 1998), the majority of the research stresses the importance of interactions between traditional, hierarchical and new, more horizontal forms of accountability, understanding the latter as complementary (Héritier and Lehmkuhl, 2011b: 136; Mulgan, 2003; Papadopoulos, 2007; Schillemans, 2008, 2009). Schillemans (2008: 190) summarizes:

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

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

“The extended mechanisms of accountability in the regulatory state are not linear ... Rather, they are premised on the existence of complex networks of accountability” (Scott, 2000: 49-50).

For these networks, the term “accountability regime” has been proposed (Bovens et al., 2008; Schillemans, 2008: 179; Scott, 2000: 55). The term “regime” was first used in the

context of international relations (Krasner, 1983: 1). The regime concept has found entrance into the comparative analysis of political institutions (Kaiser, 2002) as well as into regulatory policy analysis (e.g. Vogel, 1996), in which regulatory regimes are identified “as the full set of actors, institutions, norms and rules that are of importance for the process and the outcome of public regulation in a given sector” (Eberlein and Grande, 2005: 91). Such an approach takes into account the multitude of institutional arrangements and the presence of formal and informal rules that structure interactions (Kaiser, 2002: 71). Taking into account the already mentioned empirical complexity of accountability mechanisms, it certainly makes sense to imagine accountability as a product of a variety of relationships – of a hierarchical as well non-hierarchical character. Some scholars already have tried to capture these accountability regimes in the case of IRAs (Harlow and Rawlings, 2007; Scott, 2000). Scott’s elaborations on accountability networks, distinguishing between an *interdependence* and a *redundancy* model, represented the starting point for approaches taking into account the accountability arrangements as a whole. Harlow and Rawlings investigated some aspects of these networks, focusing on networks of courts and ombudsmen across Europe. In contrast, I see the individual agency as the center of a network of accountability relationships that is formed by a wide variety of different actors. An accountability regime can thus be defined as follows

- **Definition 2: An accountability regime of an agent consists of all fora with an established accountability relationship to the very same agent.**

Of analytical relevance are here in particular the interactions between single accountability relationships. Chapter 7 elaborates more on that.

The definitions developed above set the frame for the empirical scrutiny: Scrutinized are all institutionalized accountability fora which maintain a formal relationship with an agent, entailing both information and sanctioning aspects. Albeit the particular fora of relevance have thus to be spotted in the course of the case study, we can already now determine a broader framework of forum types, based on the accountability holders included in the research reviewed in section 4.2.2. Table 4.3 enumerates in this regard parliaments, ministries and government in general, the agency board, the EU Commission, auditing institutions, ombudsmen, peers, the regulated sector, consumers, the wider public, and the

media. Obviously, the two latter actors we exclude due to lack of institutionalization. Boards are tricky since they are very close to agencies – in many contexts, however, they are main holder of accountability powers, and they are included in the analysis.

I group the possible accountability fora according to six forum types: first, boards; second, executive bodies in a narrow sense, i.e. parent departments or the government head. The third type is formed by the parliament(s), the fourth by judicial bodies (courts, and audit institutions). The fifth type is usually subsumed as “peer accountability” and consists of third party administrative bodies, academic experts, and interest groups. As a last type, I subsume all kinds of transnational actors.

It is important to note that there are some actors which feature an accountability aspect (and are thus part of the analysis), but accountability is not their main task but rather a by-product. An example is the role of national banks vis-à-vis financial regulators.

Apart from the “to whom” question, I obviously have to deal with the “for what” one as well: As outlined above, public administration literature as well as research on central banks and regulatory agencies have developed useful differentiations between the aspects of conduct of an agent.

Based upon the work by Behn (2001), I propose to distinguish between three levels of agency action: a strategic, an operational and a managerial level. The managerial and strategic levels of action – including budget use, internal organization and personnel management in the former, and policy, strategy or goals in the latter – are quite clear-cut and widely present in the literature. They resemble the accountability for finance and for performance in Behn’s typology.

Following the central banking literature (DeBelle and Fischer, 1994; Quintyn et al., 2007), I distinguish a third level of action, covered by the above-mentioned approaches as instrument independence, interventional autonomy, or regulatory and supervisory independence. I call it here “operational accountability”, and it includes single-case decisions and in general application of regulatory instruments by the agency. It is thus

related to Behn's "fairness" dimension of accountability, but is not restricted to the application of procedures, but to the decision-making of the agent in general.

This differentiation appears useful for two reasons. On the one hand, it is relevant for empirical research: as the empirical part will show, many accountability relationships focus on just one or two of these three levels. To differentiate them analytically in the empirical process hence generates a much more fine-grained picture of the accountability relationships an agency is subject to. The second reason is related to the normative argument on agency independence discussed in chapter 6.

5. Operationalizing Accountability³⁶

Conceptual discussions have dominated the academic debate for quite a long time, while “empirical research on accountability is fragmented, episodal, and scarce” (Brandsma and Schillemans, 2013: 1). Only recently, at least in the context of agencies, have accountability scholars switched to empirical questions. Nevertheless, these approaches vary greatly in their focus, approach, and indicators used. Obviously, there is no one “right” way to operationalize accountability. The optimal way to measure a concept always depends on the aspects of interest and the theoretical approach chosen (Adcock and Collier, 2001). Regardless, the measurement of accountability is far from being trivial and the various approaches’ options entail specific advantages and shortcomings. Section 5.1 reviews existing measurement strategies. Sections 5.2 and 5.3 then present my way to capture formal accountability, and accountability in practice, respectively.

5.1. A review of operationalizations

Most existing studies are qualitative in nature, being rather inductive, theory-generating, and focusing on small numbers of cases, detailed descriptions, and interpretations (Yang, 2014). However, there is also a number of efforts to generate accountability scores in order to enhance comparability (Brandsma, 2014). The most basic differentiation here is between indicators measuring information, debate, and sanctioning, respectively. Their relative importance of course depends on the conceptual understanding of accountability, as argued in chapter 4. The debate phase here is dealt with in the course of the information part.

Next, it is useful to distinguish indicators referring to the formal rights of fora from those assessing their de facto use or relevance (Brandsma, 2014; Brandsma and Schillemans, 2013). This partly reflects the difference between rights-based and power-based

³⁶ This chapter is partly based upon concepts first described in Biela, Jan and Yannis Papadopoulos, 2014: The Empirical Assessment of Agency Accountability: A Regime Approach and an Application to the German Bundesnetzagentur; *International Review of Administrative Sciences* 80(2): 361-382. The review of operationalizations is taken from Biela, Jan, 2015: Accountability, Measurement of. In: Melvin J. Dubnick and Domonic Bearfield (Hrsg.): *Encyclopedia of Public Administration and Public Policy*, 3rd ed. New York/London: Taylor and Francis.

accountability, outlined in section 4.2.2: A power-based approach relies exclusively on the de facto use of accountability mechanisms (since there are no formal requirements), while a rights-based approach can either focus exclusively on the formal rights (“accountability on paper”) or can also weight the de facto relevance of these rights by assessing their use or impact (“accountability in practice”).

5.1.1. Indicators of information

Information is usually measured a), by assessing the availability of information, such as reports b), by counting several types of reporting obligations, the frequency of reports (Brandsma, 2010), or c), scrutinizing the level or quality of information given. For an overview, see table Table 5.1 (and also Brandsma, 2014: 150).

I have objections using the availability of information as an indicator of accountability for two reasons: first, most definitions speak of the active right or the ability to request information rather than of the passive ability to access it. Accountability means thus something more than just public availability of information – it is about specific information to a distinguishable audience (Brandsma, 2014). Second, the relationship of general public and the agent is unlikely to be institutionalized. Institutionalization in turn is a prerequisite of accountability according to most conceptualizations. In conclusion, these indicators measure transparency rather than accountability.

Thus, we can distinguish between mainly two ways to assess information: First, to check out the formal structure in which fora are supposed to get informed. This means to control for the existence of formal forum rights to request information of a certain kind. Typically, information is covered by asking for the existence of a monitoring scheme, either vis-à-vis the principals (i.e. hierarchically superior fora); or, in more recent research, also with regard to “horizontal” accountability fora, such as audit offices or ombudsmen (see Table 5.1). Most approaches also include the public availability of reports, budget plans, public consultations or decision practices as an indicator of information.

As a second option, some approaches with an interest in de facto accountability have developed a focus on the quality of information (O’Loughlin, 1990) rather than on transparency features. In this vein, they ask for the frequency of communication

(Brandsma, 2010), the amount of expertise and resources available to the forum (Biela and Papadopoulos, 2014; Brandsma and Schillemans, 2013; Verhoest et al., 2010), or the contents of reports or press releases (Puppis et al., 2014). A final option is to ask in a survey for the perceived quality of information received, as done e.g. by Delreux (2011). An excellent summary of indicators is provided by Brandsma (2014).

	Briault et al. (1995)	de Haan et al. (1998)	Masciandaro et al. (2008)	Verhoest et al. (2010)	Brandsma (2010)	Koop (2009, 2014)	Hanretty et al. (2012)	Biela/Papadopoulos (2014)
<i>Public availability of information</i>								
Reports	•	•	•			•a	•	
Minutes	•	•				•a		
Regulatory decisions/practices			•			•a	•	
Mission or mandate			•				•	
Budget						•a		
<i>Existence of reporting schemes</i>								
Reporting/monitoring/evaluation scheme regarding policy/performance	•	•	•	•		•	•	•
Reporting/monitoring Scheme/evaluation regarding budget			•	•		•		•
Auditing scheme			•	•		•a		•b
Hearing/consultation scheme		•	•			•	•	•
Board				•				•b
Ombudsman			•			•a		•b
<i>Amount and quality of information</i>								
Frequency of reports				•				•
Frequency of formal and informal contacts				•	•			•
Level of resources (time, expertise, staff)					•c			•
Content and quality of information					•			•

Table 5.1 Indicators of information

Note: a: Only enumerated in Koop (2014); b: Biela and Papadopoulos (2014) use the rights to access documents and/or to request specific information as criteria for inclusion rather than a list of monitoring institutions; c: measured indirectly by asking senders and recipients of information for content of information.

5.1.2. Indicators of sanctions or consequences

Sanctioning rights are operationalized regularly as the right to override decisions, to dismiss the agency head, to cut salaries of staff or the budget for the entire agency (e.g. Koop, 2009; Masciandaro, 2007), to withdraw competencies, or to dissolve the agency (Hood, 1999: 47). Scholars using a broader conception of accountability also enumerate formal disapprovals (Busuioc, 2012), or negative publicity (Carpenter, 1996; Keohane and Nye, 2003). At a more general level, sanctioning options covered can regard the policies, the staff, or the internal organization of the agent as well as the range of competencies or the level of autonomy an agent possesses (Verhoest et al., 2004). Only a few approaches also take (internal or external) institution-related consequences into account (see Table 5.2). Instead, a policy- and personnel-related understanding is predominant. For instance, they check for ways to influence agency policies or decisions, as well as, for example, the conditions for staff dismissals. In this understanding, the approaches appear to presuppose certain institutional features not necessarily present under all circumstances: The German telecommunications regulator (*Bundesnetzagentur*), for example, has a court-like structure, and the roles of both agency head and board are significantly reduced (Biela and Papadopoulos, 2014) in comparison to agencies stemming from the Anglo-Saxon administrative tradition. Brandsma and Schillemans (2013), in contrast, develop highly context-specific indicators, but within a general, abstract framework that is adaptable to a multitude of contexts.

At the consequences stage additional factors also exist apart from formal rights, determining the actual use of an accountability arrangement. Not only the legal right to sanction matters, but the believed probability that the forum will make use of that right. There are some attempts to cover the likeliness or the credibility of sanctions (Brandsma, 2010).

Lastly, informal sanctioning powers are also assessed sometimes. One example is Romzek et al. (2012). Also Brandsma (2010) and Brandsma and Schillemans (2013), ask e.g. for sanctions such as “openly giving compliments or criticisms” or “organizing a drink or dinner” (Brandsma and Schillemans, 2013: 17).

	Briault et al. (1995)	de Haan et al. (1998)	Masciandaro et al. (2008)	Verhoest et al. (2010)	Brandsma (2010)	Koop (2009, 2014)	Hanretty et al. (2012)	Biela/Papadopoulos (2014)
<i>Policy-related</i>								
External influence on policy (override, instructions, approval)	•	•	• ^a	•		•	•	•
Judicial review			•	•		• ^b	•	•
<i>Institution-related</i>								
Internal (increase/decrease of budget; change of internal organization)			• ^a	•	• ^c			
External (change of agency tasks; change of level of autonomy)				•				•
<i>Personnel-related</i>								
Wage increase/decrease			• ^a	•	•			•
Staff dismissal		•	• ^a		•	•	•	•
Other (informal) disciplinary measures			•		•	•		•
<i>Likelihood of sanctions</i>								
Appointment rules/composition of fora			•	•				•
Decision-making rules of fora		•						•
Perceived or objective likelihood of sanctioning					•			

Table 5.2. Sanctioning indicators

Note: a: Used by authors as indicator of independence. b: Only enumerated in Koop (2014); c: In his survey, Brandsma asked in an open question for the character of sanctions.

5.2. Measuring formal accountability within an accountability regime

Due to lack of evidence and theory, the design of the present work shares main characteristics of qualitative work on accountability. Since, however, comparison is also important: Recent works highlight the relevance of causal explanations and more deductive approaches (Schillemans, 2013; Yang, 2014). I thus try to combine both worlds by doing in-depth case studies, while assigning scores to the individual accountability relationships in order to enhance comparability over agencies, fora, countries, and sectors.

The measurement of formal accountability is based on Biela and Papadopoulos (2014). I distinguish between extensive, moderate, and limited information rights, and several, moderate, and limited rights to pose consequences on the other. These rights are assessed for each forum, and with regard to every level of agency action separately: political, operational, and managerial accountability. To differentiate between the three different aspects of agency action means in turn to scrutinize the accountability regime for each aspect separately. This is not grounded solely on the theoretical difference between the aspects mentioned above, but also on the fact that empirically, relevant accountability fora differ to a great extent between levels.

Assigning scores to the level of rights allows the calculation of aggregate measures of accountability. This occurs first at the level of individual fora within one level of agency action. In a second step, aggregation of fora for each level of agency action is useful.

5.2.1. Indicators of information

The basis of the analysis of formal information rights is the analysis of legal documents. Existing indicators regularly focus on the existence of reporting duties for agencies (to a varying range of fora, mostly governmental and parliamentary) and transparency requirements (e.g. public availability of meeting minutes, or reports. Cf. Laurens et al., 2009; Masciandaro, 2007). In contrast to these indices, we also aim to capture the quality of information. Decisive here is the presence or absence of two conditions: can the forum directly access primary sources and internal documentation of the agency, or does it rely on the information provided by the agency; and can the forum actively ask for specific information or does it passively rely on the information granted by the agency? Table 5.3 summarizes the measurement strategy.

Information rights	Symbolized by	Forum has direct access to primary sources	Forum can request specific information	Examples
Extensive	■	yes	yes	direct access to internal documents, investigations within agency
Moderate	▣	no	yes	written or oral report with ability to ask for specific information (hearing, special report, questioning)
Limited	□	no	no	report by agency without ability to ask specific questions

Table 5.3 Measurement of information rights

5.2.2. Indicators of sanctions or consequences

Table 5.4 depicts my measurement of sanctioning rights. Sanctioning rights are commonly operationalized as the right to override decisions, to dismiss the agency head, to cut salaries of staff or the budget for the entire agency (e.g. Koop, 2009; Masciandaro, 2007), to withdraw competencies or to dissolve the agency (Hood, 1999: 47). These mechanisms all unfold an immediate impact; I call them thus “direct” sanctioning mechanisms.

Scholars using a broader conception of accountability also enumerate formal disapprovals (Busuioc, 2012), or negative publicity (Carpenter, 1996; Keohane and Nye, 2003). These more informal sanctions can very well have an impact, but most probably require additional efforts or other formal powers by the same or another accountability forum. I call these accountability powers to be “indirect”. Another form of an indirect sanctioning mechanism could be that a forum is part of a multi-party decision-making process on possible sanctions on which it has influence, but no unilateral decision-making power.

In section 5.1.2 reviewing the operationalization of sanctioning mechanisms, I distinguished moreover between policy-related, institution-related, and personnel-related sanctions. I include them in Table 5.4, but just for a more systematized overview- in the empirical part, I am going to neglect these difference, also since there is no way to determine differences between these aspects a priori.

	Strategic level	Operational level	Managerial level
■ Direct sanctioning mechanisms			
Policy-related	Right to override strategic decisions Right to issue general instructions	Right to override operative (regulatory) decisions, judicial review Decisions require forum's approval	
Institution-related	Right to alter agency tasks, to substantially reduce discretion or level of autonomy Right to decide on overall budget level		Right to alter internal organization, or internal distribution of staff or budget of the agency Changes of internal organization, redistribution of staff or budget require forum's approval
Personnel-related	Right to dismiss top-level staff due to staff's conflicts of interest, or poor performance	Right to dismiss top-level staff for any kind of reason	Right to dismiss or discipline working-level staff for any kind of reason Right to dismiss top-level staff for personal misbehavior (criminal convictions, etc.)
□ Indirect sanctioning mechanisms			
	Issue formal disapproval, public blaming Influence on more formal sanctioning, but no sanctioning power in its own right	Issue formal disapproval, public blaming Influence on more formal sanctioning, but no sanctioning power in its own right	Issue formal disapproval, public blaming Influence on more formal sanctioning, but no sanctioning power in its own right

Table 5.4 Measurement of sanctioning rights

5.2.3. An aggregate accountability score at forum level

These measures can now be aggregated at forum level, but for each level of agency action separately. It can be reasonably assumed that the rights (and maybe also de facto powers) of a forum differ between levels of action, and a weakness or deficit of accountability has a different theoretical meaning.

My definition of accountability specifies the existence of both the information and sanctioning aspects as necessary for accountability. Accordingly, in an attempt to aggregate

the two constitutive elements of accountability in a single score, we have to see them as individually necessary and jointly sufficient (Mahoney et al., 2009). In other words, accountability is given as soon as all elements – information rights I_r , and sanctioning rights S_r , – are present. Moreover, the overall level of accountability is determined by its weakest part.

Common operations to aggregate data are addition, multiplication, or computing the mean. None of these operations is particularly useful under these conditions: the addition of single scores do not take into account the absence e.g. of sanctioning powers. Addition or an average score thus cannot adequately reflect the strength of forum 1. Instead, I take the lower value of both information and sanctioning scores. In mathematical terms, the accountability A of a given forum f at a level of agency action l can thus be written as

$$A_f^l = \min\{I_r, S_r\}$$

The score generated through this procedure serves well to compare the strengths of several fora within one action level, or to compare the competencies of one forum regarding several levels of agency action.

5.2.4. An aggregate accountability score for a “level of agency action”

In contrast, for comparisons across agencies and/or countries, we aggregate the accountability scores further. Once scores for all relevant fora at all three levels of agency action are computed, these scores can be aggregated. To this purpose, Fora are ordered and eventually grouped within the following types: a) agency boards; b) government and parent department; c) parliament; d) courts and audits; e) expert and administrative bodies, e.g. central banks, other national regulators, scientific councils; and f) transnational bodies such as European Union institutions, international bodies, or peer networks.

We thus can aggregate accountability scores by level of agency action, or by forum types. I opted for the maximum as the operation of choice. This score is robust against the number of fora under scrutiny and takes into account the strength of individual fora. Expressed mathematically this equals: $A^l = \max(A_f^l | f = \{1, \dots, k\})$

Again, this aggregation level makes sense only if the research interest lies in the comparison of accountability across agencies. If the researcher is interested in comparing fora, or maybe types of fora (e.g. democratically elected vs other fora) the aggregation goes too far.

We are now able to generate a table that summarizes all relevant information on an agency’s accountability regime. Table 5.5 shows an example for such a table. In the columns we find: a) the forum under scrutiny; b) the forum scores for each level of agency action regarding information rights I_r , and sanctioning rights S_r , respectively; and d) the score for the individual forum at a certain level of agency action A_f^l . In the bottom row, the maximum accountability score at each level can be read out.

The table illustrates again the idea of the scoring strategy: First, a forum is treated separately at each level of agency action. Here, forum 1 has a role at political and operational levels, whereas forum 2 is relevant at political and managerial levels, and forum 4 only at the operational level. Moreover, despite its extensive information rights, the comparatively weak sanctioning power reduced the overall accountability score for forum 4. Second, an overall accountability score for each level of action is calculated by taking the maximum of all forum scores. In this case, there is a strong level of accountability at operational and managerial levels, but only at strategic level the accountability regime scores lower.

Forum	Strength of formal rights		Formal accountability level		
	Information SOM	Sanctioning SOM	Strategic	Operational	Managerial
Board	■ ■ ×	× × ×	×	×	×
Executive					
- Forum 1	■ ■ ×	■ ■ ×	■	■	×
Legislative					
- Forum 2	■ ■ ■	■ × ■	■	×	■
Courts/Audits					
- Forum 3	× ■ ■	× ■ ■	×	■	■
- Forum 4	× × ■	× × □	×	×	□
Administrative and expert bodies					
- Forum 5	× × ×	× × ×	×	×	×
Maximum score			■	■	■
Fora contributing to maximum score			Fora 1 and 2	Fora 1 and 3	Forum 3

Table 5.5 Generating the aggregated accountability scores

To compare more than one accountability regime, or to compare levels of agency action or forum types, I transfer the symbols used in the qualitative assessment into ordinal scores, as depicted in Table 5.6. The application of that can be found in chapter 6.

Symbol	Meaning	Score
■	high	3
▣	intermediate	2
□	low	1
×	none	0

Table 5.6 Formal accountability level: Transferring symbols into scores

With my operationalization, I aimed for wide applicability, allowing for systematic comparison. On the other hand, I wish to draw a fine-grained and differentiate picture. Of course, all operationalization decisions come with some costs also. I thus discuss some aspects of my approach as well as possible alternatives.

Following the conceptualization from chapter 4, fora are only considered if they possess formal information and formal sanctioning rights. This is a high threshold which might rule out fora which are relevant in practice. Moreover, indirect sanctioning mechanisms include items such as “public blaming”, which is not based on formal rights and might seem at odds with the definition used in the first place. First, I consider a high threshold useful since it prevents an overestimation of accountability strength. Second, the fact that informal sanctions are quite common in accountability relationships, but it is also widely stated, that these sanctions work primarily in the “shadow of hierarchy”, i.e. when the forum has also formal rights at hand.

The other major point regards aggregation: I refrained from using conventional operations to generate aggregate scores, such as computing means or sums. This is theoretically grounded: The accountability score of a single forum is calculated by taking the minimum score of information and sanctioning scores. The definition of accountability defines both as necessary conditions – thus, in the absence of one of them, accountability has to turn zero. A means would not make any sense here. An alternative would be to multiply both scores, but I cannot see a clear advantage in that technique.

Aggregating an accountability score for a level of agency action, I in contrast used the maximum score of all fora relevant at that level of action. This derives from my understanding, that one powerful accountability forum is enough to rule out an accountability deficit. Any alternative would imply a certain kind of interaction among fora. While this is exactly an argument I make, one might wonder why I want to rule this out aggregating scores. If we sum the scores of all relevant fora, than a high number of weak fora would gain an edge over one single, but powerful forum. If we weight the score sum with the number of fora (or in other words, compute the mean accountability score), it means that a number of weak fora do diminish the score of more powerful ones. I cannot see any advantage in this.

Why there is no single overall score? An accountability score does not mean much. I opted for a qualitative design, whose advantage is to differentiate rather to boil everything down to a single number. There are substantial theoretical empirical differences between these levels of agency action, and no reason to argue that a weakness at one level can be compensated by the other two being extraordinary strong - which would be the implicit meaning of an overall score from my perspective.

5.3. Measuring de facto accountability within an accountability regime

The formal accountability regimes scrutinized using the scoring scheme outlined above is re-analyzed in chapter 7 to assess the work of formal accountability mechanisms in practice. The rationale behind that is that we do not know much about the conditions that make accountability effective (Lægreid and Verhoest, 2010). The need for research in this area has been stressed by scholars, who have underlined the importance of the details, the “combinations and levels” (Føllesdal, 2011: 96) of institutional structures and procedural requirements that matter (Gailmard, 2009).

An empirical check on accountability in practice thus needs to evaluate the actual impact of the formal accountability mechanisms. In doing that, it would be naïve to just check the fora’s actual use of the formal instruments at hand. It is widely acknowledged that accountability unfolds its power “in advance”, due to the fact that agents try to anticipate the reaction of their accountability fora (Calvert et al., 1989; O’Loughlin, 1990; Romzek et

al., 2012) and consequently act under a “shadow of hierarchy” (e.g., H eritier and Lehmkuhl, 2011a). If the agent anticipates the reactions of its accountability fora correctly, it is highly probable that the existing sanctioning option is (almost) never used. In other words, the power of an accountability mechanism is maybe most clearly shown by the fact that it is rarely in use. Thus, I opted for a different way to evaluate de facto accountability. It aims to capture the practical relevance of formal accountability rights primarily in the light of restrictions to their application: Does the forum have a sufficient level of information to judge the agent’s performance? Is a forum free to take a sanction or is it hampered e.g. by internal conflicts? Are fora interested at all in the agency’s work?

The literature review in chapter 7 identifies as potentially relevant factors in this regard: actor resources, trust, coordination patterns among fora, and policy salience. The exact impact of each of this factors is, however, often disputed. For instance, does a higher number of accountability fora improves the chance for monitoring through cooperation and the use of mutual strength, or will it lead to competing attempts to influence agency policies?

In order to assess the impact of these factors on accountability, I conducted semi-structured interviews with forum representatives, checking on all the above-mentioned factors and the degree to which they actually shape forum behavior. Complementarily, government documents and secondary literature were used.

Regarding trust, I assess the following criteria:

- How is the relationship to the agency described?
- Is the agency and its expertise used for consulting?
- Do intense personal relationships between forum and agency exist?
- Do forum and agency put strong efforts in coordinating policy positions?

The resources of fora are checked by asking for:

- Time, expertise, and staff resources of the forum staff compared to the agency;
- Do resources affect the ability of monitoring the agency in practice?
- Does the forum feel well informed about the agency’s actions?

- Would the forum representative prefer to have more resources for agency monitoring?

Next, I am interested in whether formal sanctioning options can be considered effective in practice:

- How is the forum composed? Which appointment rules are in place and what is the internal decision rule?
- Do sanctioning decisions induce relevant side costs, such as negative publicity or pressure from other actors?
- Is lack of credibility perceived as a problem by forum representatives?

To correctly assess the practical use of formal arrangements, coordination of accountability fora has been identified as crucial, too:

- Are there common interests and cooperation among fora? Do we find, for instance, memoranda of understanding or other documents assigning tasks in order to improve coordination among fora?
- Is there any evidence of coordination problems, such as conflicts between fora, in particular regarding overlapping monitoring tasks or agency strategy?
- Do fora strategically make use of third party actors or other accountability fora to compensate their own weaknesses - e.g. do departments seek advice from expert bodies?

Finally, I am interested in whether salience is considered a relevant factor for fora in choosing their accountability strategy:

- Do fora care about public opinion?
- Do they use informal strategies such as “naming and shaming” with regard to the agency?

From the agency perspective, I identified trust, the perceived strength of accountability, and the dependence on support by other actors or the wider public as main factors driving their everyday behavior. Accordingly, I checked empirical data for the following questions:

- Trust:

- How does the agency perceive the relationship with the accountability fora?
- Are there conflicts with certain fora or do aligned interests predominate?
- Perceived accountability:
 - Does the agency representative feel accountable to certain actors?
 - Are certain actors perceived as particularly relevant in terms of accountability?
 - Does the agency actively manage the relationship to one or several fora, attempting to manage its expectations and to anticipate forum reactions?
 - Does the agency actively seek cooperation with one or several fora?
- Dependence on support:
 - Is the agency able to implement its decisions itself or is it dependent on other actors in the course of the administrative process?
 - Is the agency dependent on diffuse public support, maybe due to high public salience of the policy area?
 - Are there signs of non-transparent behavior - e.g. do fora complain about lack of information?

A sample questionnaire can be found in Appendix A.

5.4. Summary

In the present chapter, I have reviewed existing operationalizations of accountability, identified a series of shortcomings, and developed my own approach for assessing accountability empirically. This regime approach to accountability shows the following crucial characteristics: first, it can be applied regardless of the institutional structure under scrutiny, since it is highly abstract and thus adaptable to different conditions; and second, it differentiates between three levels of agency action, for which accountability arrangements often differ, and for which different theoretical implications apply. It provides hence a fine-grained picture of agency accountability and a systematic framework allowing for comparison over agencies, fora, sectors, and countries. This framework is used in chapter 6 to analyze the four cases selected in chapter 3.

Moreover, I outlined my approach to accountability in practice. To assess the effect of all accountability fora combined, I analyze restrictions fora face in their use of their formal rights. These restrictions can be e.g., other fora, own resources, or simply a lack of interest. This part of the study is explorative in character. Chapter 7 checks for relevance the factors derived from literature and aims to identify patterns across fora and cases.

6. The formal accountability of Regulatory Agencies

In chapter 2, I presented a line of argumentation from the literature, stating that: a) the independence of regulators is economically desirable; but b) there is a trade-off between independence and accountability, making it impossible to acquire one without weakening the other. This means, c), that the most important instrument to remedy weaknesses of contemporary democracy – accountability – is not an option in the case of IRAs, or at least that there is a trade-off between accountability and independence. As Busuioc (2009: 601) states:

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

However, the trade-off between independence and accountability is not as clear-cut as conventionally thought. Busuioc (2009: 614) concludes:

“[T]he dilemma of accountable independence is a myth owing its existence to lack of conceptual clarity. Independence and accountability can and actually should co-exist.”

In fact, the understanding of both terms often suffers from a narrow understanding of the purposes of accountability, and an overly wide interpretation of agency independence. Section 6.1 clarifies the relationship between accountability and independence in conceptual and normative terms. It concludes that the overlap of both concepts is marginal and that we can expect accountability to remain largely unaffected by agency independence. This is tested empirically by means outlined in section 6.2. and executed in sections 6.3 to 6.6. The analysis reveals that indeed, there is neither an accountability deficit of the IRAs in the sample, nor a trade-off between independence and accountability detectable.

6.1. Accountability and independence of IRAs³⁷

Scholars continue seeing accountability and independence as strongly antagonistic:

“The empirical distinction between the procedures for implementing independence and accountability is far from trivial and unproblematic. The two properties might occasionally overlap and thus conflict in practice.” (Maggetti et al., 2013: 4).

While Maggetti et al. are right in principle, I would stress the word “occasionally” much more than other scholars. In the present section, I argue that the idea that independence and accountability were antagonistic is based on an insufficient differentiation of aspects and purposes of accountability on the one hand, and an overly generous understanding of the term “independence” on the other.

6.1.1. A conceptual perspective

Conceptually, accountability does not equal control: “Whereas control and independence might be contradictory, accountability and independence are not” (Busuioc, 2009: 605). In their review of autonomy concepts, Verhoest et al. (2004) differentiate between six understandings of autonomy, divided in two kinds of autonomy:

“1) autonomy as the level of decision-making competencies of the agency (concerning management on the one hand and concerning agency policy on the other hand) and; (2) autonomy as the exemption of constraints on the actual use of decision-making competencies of the agency (referring to structural, financial, legal and interventional constraints on the agency’s decision-making competencies)” (Verhoest et al., 2004: 104).

In Verhoest et al.’s terms, agency autonomy is equivalent to the absence of government controls: control inevitably reduces autonomy. Accountability (they call it ‘interventional

³⁷ The main line of argumentation was developed in Biela, Jan, 2014: What deficit? Legitimacy and Accountability of Regulatory Agencies. 42nd ECPR Joint Sessions of Workshops, Salamanca, April 10-15.

autonomy', however, is included in just one of the six understandings of control they distinguish. By a lack of interventional autonomy they mean:

“Control by influencing the agencies’ decisions by the means of reporting requirements, evaluation and auditing provisions against externally set goals and norms and by (the threat of) sanctions or direct interventions” (Verhoest et al., 2004: 109).

Thus, accountability as a descriptive mechanism is only one small aspect of agency autonomy. Busuioc (2009) shares that point and develops upon it a differentiation of ex ante, “ex ongoing”, and ex post controls. She defines “ex ongoing” controls as informal measures to reduce discretion which was granted originally (ex ante) to the agent and associates the absence of such controls with agency independence. This is contrasted with accountability, understood as of ex post character, which “precludes direct intervention which would amount to reintroducing control into the picture” (Busuioc, 2009: 608).

On that last point, I cannot agree with Busuioc: In light of the fact that accountability exerts its impact mainly through anticipation (see chapter 4), it is hardly imaginable to preclude a control character of accountability a priori. Moreover, the separation of ex ante, ex ongoing, and ex post seems artificial and processes are difficult to assign to any of them in the iterative accountability circles agencies find themselves in.

Instead of distinguishing several phases to separate independence and accountability, I rather look at the normative grounds which led to independent regulators. If we compare the claimed normative purposes of accountability with those of independence, only a minimal overlap shows up.

6.1.2. A normative perspective

Answers to the question of why delegation occurs in general and why in particular in the context of regulation have been delivered by three major institutionalist approaches: rational choice, sociological, and historical institutionalism (Giaraldi, 2004).

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. In times of stability, administrative traditions are expected to predominate (Painter and Peters, 2010), while policy or institutional path change is a direct or indirect consequence of political and/or economic pressures. As outlined in chapter 2, it would be plausible to see the origin threat pressure in the international realm. The pressure's origin can be, first, political in character and stem from international organizations, such as the IMF or the European Union (Börzel and Risse, 2003; cf. Radaelli, 2007; Simmons et al., 2006). Second, it can be grounded in more general economic pressures that induce political actors to strive for more efficient policy-making structures. The rise of IRAs have frequently been associated with Europeanization (Coen and Thatcher, 2005; Gilardi, 2008; Levi-Faur, 2005; Maggetti, 2007; Thatcher and Stone Sweet, 2002).

Second, sociological approaches highlight mechanisms such as learning, interdependence, “emulation”, common norms, “taken-for-grantedness”, or “symbolic imitation” (Braun and Gilardi, 2006: 313) as driving factors for policy diffusion. A development such as the rise of IRAs is thus rather explained by role models, best practice experiences, or simply the believe that it is best to do something the way all others do it as well.³⁸

Third, 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) refer to the efficiency gains from delegation: Due to increasing complexity of policies, cognitive factors like lack of expertise and time have induced governmental actors to delegate a larger share of their tasks to actors who are expected to have a higher level of expertise (Maggetti et al., 2013; Majone, 1999; McGowan and Wallace, 1996: 352). Particularly public choice-inspired approaches, such as transaction cost or agency theories, associate hierarchical or market forms of coordination with higher efficiency than democratic negotiations (Alesina and Tabellini, 2007, 2008; Majone, 1999, 2001a; Radaelli, 1999; Williamson, 1999). From that point of view, agencies are staffed with professionals, who are able to take decisions quickly and impartially.

³⁸ See Gilardi (2005) for a summary of approaches to policy diffusion.

Scholars in that line of research suggest:

“... that the establishment of IRAs can be a solution to problems of choice over time, and in particular credible commitments and political uncertainty” (Gilardi, 2004: 69).

The first perspective claims independence from politics to be a necessary precondition for long-term commitment, an argument borrowed from the literature on independent central banks (Barro and Gordon, 1983; Franzese, 2002; Keefer and Stasavage, 2003; Kydland and Prescott, 1977). The argument treats monetary policy as a subject to time-inconsistent preferences. Time inconsistency means that an actor interested mainly in short-term advantages takes decisions, which entail negative effects in the long run. In the central bank context, independence serves to generate trust of potential investors: investors are interested in a low inflation rate, which is the classical task of a central bank. However, a present or future government might have the intention to lower unemployment in order to increase its chances of re-election. In the case of a dependent bank, it is a viable option to allow for a higher inflation rate. According to economic theory, this will lower unemployment in the short run, while in the long run investors lose trust in the monetary policy of the country.³⁹ In this view, IRAs help to generate a credible commitment to regulatory policies, unaffected by short-term political interests. This in turn should prevent regulatory capture (Laffont and Tirole, 1991) and serves the interests of the business sector by reducing investment risks and promoting growth (Alt, 2002; Kydland and Prescott, 1977; Majone, 1999). In other words, politicians might favor lower interest rates that in the short run reduce unemployment (and improve their chance of being reelected), while in the long run that interest rate means a (welfare-decreasing) rise of inflation rates.

From the second perspective, governments uncertain about their re-election have an incentive to delegate authority to independent actors in order to reduce the effects of an eventual government turnover (Moe, 1990a), or “legislative drift” (Horn and Shepsle,

³⁹ In abstract terms, the government faces a problem of time inconsistency. While there is a long-term gain from not influencing monetary policy, it is a short term advantage.

1989). This “deck-stacking” (McCubbins et al., 1989) paves the way for a policy to persist beyond the end of office of the initiating politicians.

Besides these “policy-oriented” (Strøm, 1990) rationales, it has also been argued that delegation decisions are taken, thirdly, to avoid blame for decisions that are unpopular or perceived as unlikely to generate rewards (Barberis, 1998; Fiorina, 1982; Hood, 2002; Weaver, 1986; Wilks, 2007) or to prevent rent-seeking of narrow interest groups (Miller, 2000).

In sum, the raise of IRAs is associated by social interactions, by external shocks inducing path change, and by rational decisions for efficient organization and credible commitment. It is solely the last one having a somewhat normative content: It postulates, that the credible auto-limitation of governments is rational for them due to positive economic effects.

In a next step, I put that argument in the context of the normative purposes of accountability, outlined in chapter 2, namely:

- to prevent the misuse of power:
 - by ensuring responsiveness to the public will;
 - by checking compliance with rules/law;
- and to enhance performance:
 - by generating feedback loops that compare outcomes with initial goals;
 - by monitoring efficient resource use.

In light of these purposes of accountability, the commitment argument exclusively relates to short-term responsiveness (Lohmann, 1998). This applies foremost to every-day decision-making of agencies and banks. In this regard, much of the central bank literature refer to Debelle and Fischer’s (1994) differentiation between goal and instrument independence, mentioned above. Quintyn et al. (2007) use the term “operational independence” in order to widen the term from the mere choice of instruments to all kinds of day-to-day decisions. It can be derived from the literature that, while instrument or operational independence is economically useful in the case of central banks, goal independence is not (Briault et al., 1995). In other words, in order to fulfil their tasks, central banks or IRAs should be isolated from shortsighted political influence.

In contrast, the other purposes of accountability remain unaffected: independent regulators also have to be held to account for their resource use (i.e. staff policies, or spending habits). Moreover, they have to obey the rule of law – and can be sanctioned by courts if they violate it (Majone, 1998a, 1999; Van Kersbergen and Van Waarden, 2004). Finally, they are subject to more or less formal evaluations if the policy goals associated with their creation have been reached (Majone, 2001a) – e.g. efficient competition on the telecommunications market. If the agency does not fulfil its purpose, we can expect it to be subject to altered political strategies, changing the agency’s tasks, approach, organization, or even dissolving the agency totally.

These insights can now be brought together with the analytical differentiation in section 0, where I identified a strategic, operational, and managerial level of agency action. The normative goals of accountability can now be associated with the different levels of agency action, and expectations formulated regarding accountability and independence from a normative perspective. Following the credible commitment argument (Barro and Gordon, 1983), agencies are free to make decisions that are neutral, expertise-oriented and separated from political interests. They are thus explicitly designed *not* to be *responsive* to democratic principals in the short term. However, this does not mean that they are completely independent. In fact, statutory goals are regularly set and monitored by the legislature (the strategic level) and the agency’s resource use has to be justified either in front of a parliamentary committee, a board, or public or private auditing (the managerial level). Therefore, the autonomy suggested by the credible commitment argument refers to the regulatory decisions the agency takes in order to reach its statutory goals. At this level, short-term political and long-term economic interests are most likely to collide (e.g. the government is interested in gains of state-owned, ex-monopolist enterprise, while this reinforces the monopoly of that enterprise with negative economic effects). On the other hand, even these decisions cannot be taken undisputedly. There remains an undisputed need for judicial review of the agency’s decisions, apart from control by other mechanisms – e.g. horizontal ones such as peer pressure, or transnational accountability fora. Moreover, also accountability for performance remains in place: while direct interference in the actual instrument use is theoretically undesirable, democratic accountability fora are still able to

check the effectiveness of these instruments, being in turn able to alter the legal basis for agency action.

6.1.3. Summary

In other words, credible commitment argues in favor of *operational* independence from *democratic principals*. All other functions of accountability – long-term responsiveness, effectiveness, efficiency, and responsibility to non-political fora – remain in place. The functions of accountability thus ought to be only partly restricted in the context of IRAs. Transferred to my typology of action levels, this leads to theorem 1:

- *Theorem 1a: From a normative perspective, we expect a reduced role of political fora at the level of operational accountability.*

However, the other levels of accountability ought to be unaffected by agency “independence”. Moreover, the operational level should also be subject to monitoring and accountability, albeit not to political fora:

- *Theorem 1b: In contrast, accountability to non-political fora in general and to political fora at other levels of agency action should remain unaffected.*

To sum up, I have qualified the normative argument regarding the relationship between independence and accountability. These can coexist, and there are only minor restrictions related to the role of political fora at the operational level. Regarding all other kinds of fora, and all other levels of agency action, the theoretical functions of accountability remain unaltered. We thus should expect agencies to be independent, yet accountable. However, it is crucial to stress that this section dealt with the relationship between independence and accountability from a normative perspective. The relevant argument in favor of independence here rests upon the credible commitment literature.

6.2. Data sources for formal accountability

I check theorems 1a and 1b doing in-depth case studies of the four agencies selected in chapter 3, using the operationalization developed in chapter 5. For the analysis of formal

accountability, the main data source of course is legal documents – i.e. founding acts, ordinances, and internal guidelines that define competencies, accountability structures, and sanctioning rights. In addition, scientific literature and, in some cases, direct communication with the respective authorities have been used.

6.3. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)

As a first case study, the German financial services regulator, the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) is scrutinized. The chapter then deals with the information rights (6.3.1) and sanctioning rights (6.3.2) of the BaFin’s accountability fora in order to outline the formal accountability regime of the agency (6.3.3).

6.3.1. Information rights

Formal information rights stay with the administrative board, the BMF, the parliament, administrative courts, the Federal Audit Court, the Bundesbank, the EC, the ESA and fellow national regulators. For quite some time, the BMF had been undisputedly the strongest accountability forum; the establishment of EU-level financial regulators has however recently altered the regulatory landscape significantly.

6.3.1.1. Board

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 board, which has to be “informed regularly” by the executive board about agency conduct (§7 FinDAG). The members of the executive board are required to attend the sessions of the administrative board (§6 of the BaFin regulations, Bundesministerium der Finanzen, 2013) and have to report upon request by and answer to questions from members of the board (§4 BaFin regulations). The administrative board has access to the annual financial statement and additional audits executed by an external auditing firm and the Federal Audit Court (*Bundesrechnungshof*, BRH, §10 BaFin regulations). However, the right to request information does not entail an access to internal documents (Frach 2010: 83). Formally, the main area of the administrative board is internal organization and budgeting of the

BaFin. As the then BMF junior minister, Mirow, stated in front of the parliamentary inquiry committee, this implies information on supervision strategies and “systematic questions of banking supervision, but no single issues” (Deutscher Bundestag, 2009b: 8). I thus assign moderate information rights at strategic and managerial levels to the BMF.

The executive board members are also required to attend the sessions of the advisory council (§8 BaFin regulations) and have to report annually both to the advisory and (since 2013) the consumer advisory council (§§8 and 8a BaFin regulations). They are thus restricted to information rights at strategic level (advisory council), and limited information rights at strategic level (consumer advisory council), respectively.

6.3.1.2. Government

The BaFin is subject to legal and professional supervision by the Federal Finance Department (*Bundesministerium der Finanzen*, BMF, §2 FinDAG). These rights have been further specified by detailed supervisory guidelines rules published by the BMF (Bundesministerium der Finanzen, 2013). The BaFin is obliged to pass the BMF annual financial statements, audit reports, agendas, and minutes of sessions of the administrative board, relevant internal affairs, important events, and regulatory responses in supervision, international contacts, and negotiations, and planned audits by the BRH. Additionally, the BMF is entitled to request internal documents, and additional information in form of reports, or expert workshops (Bundesministerium der Finanzen, 2013). Decrees, regulations, and changes of procedural rules of the BaFin have to be passed to, and can be vetoed by, the BMF (see sanctioning rights). This holds even for press releases, interviews, and parliamentary information. In sum, the BaFin is subject to more detailed controls than comparable public law institutions (Fekonja, 2014: 39; Handke, 2012c) (*Substantial information rights at strategic, operational, and managerial levels*).

6.3.1.3. Parliament

The Parliament has a quite weak role. It receives written information mainly via the BMF, which receives and forwards parliamentary requests and also answers queries regarding general policy issues. BaFin itself answers specific queries on the application and interpretation of supervisory rules, submitting a copy of the answer to the ministry

(Bundesministerium der Finanzen, 2013). There are two exceptions regarding parliamentary committees. The finance committee can invite agency representatives in the course of a legislative procedure (interview DE03). Moreover, if there is an inquiry committee (as was the case after the financial crisis and the Hypo Real Estate banking scandal), this committee can require any information, even internal documents for investigative purposes. Apparently, during the inquiry process, there were some frictions between committee and BMF regarding confidential information, which were solved by a constitutional court decision in favor of the parliament (Deutscher Bundestag, 2009a: 46-7) (*moderate information rights at strategic level, inquiry committee also at operational level*).

6.3.1.4. Courts and Audits

All BaFin decisions are subject to judicial review by administrative courts (Frach, 2008: 84), which can require the submission also of confidential files. The president can give agency employees permission to give evidence; the BMF gives the respective permission to the executive directors. The agency is entitled to withhold confidential files or deny permission to give evidence, but this decision can be overridden by higher courts. The court trials entail not only regulatory decisions, but also procedural questions, e.g. payment orders (*extensive information rights at operational and managerial levels*).

The Federal Audit Court (*Bundesrechnungshof, BRH*) holds formal accounting rights, which entail access to internal accounting records. Moreover, the BRH counterchecks the report of the mandatory external accountancy service (§10 BaFin regulations) (*extensive formal information rights at managerial level*).

6.3.1.5. Expert and administrative bodies

Due to the overlap of competencies, the BaFin has various close connections with the German Central Bank (*Bundesbank*). We can broadly differentiate between two areas of regulation: first, micro-prudential supervision of individual banks – according to §7 of the *Kreditwesengesetz (KWG)*, the Bundesbank acts here on behalf of the BaFin; second, the new area of macro-prudential supervision of systemic risks, executed primarily by the Bundesbank, with the BaFin collaterally involved.

In the area of micro-prudential regulation, the BaFin is in charge. The Bundesbank executes on-site investigations on behalf of the BaFin, the BaFin keeps the right to decide on subject and content of the investigations and to draw consequences from them (Frach, 2008: 75). §7 KWG and §9 of the MoU between BaFin and Bundesbank⁴⁰ stress the bilateral exchange of information. The main reason for this share of tasks is that the Bundesbank has regional branches (*Hauptverwaltungen*), which is prohibited to the BaFin as a federal authority (Frach, 2008: 105).

The financial crisis has triggered several institutional changes, mainly in the area of macro-prudential regulation. In Germany, a new committee on financial stability (*Ausschuss für Finanzstabilität*, AFS) was established in January 2013. In this committee, the BMF, the BaFin, and the Bundesbank possess voting rights. On behalf of the AFS, the Bundesbank has become in charge of monitoring macro-prudential financial stability, and in turn gained additional information rights, also vis-à-vis the BaFin (cf. §5 FinStabG).

Furthermore, the Bundesbank may attend the sessions of the administrative board (without voting rights, §7 FinDAG), and is represented in the advisory council (§8 FinDAG). Since 2013, there has been an additional working group within BaFin dealing with financial stability: the MoU between BaFin and Bundesbank grants the Bundesbank participation (but no voting rights) in the working group (§8 MoU BaFin-Bundesbank 2013). Finally, the Bundesbank is represented in the bodies of the European Central Bank (ECB) and the European Systemic Risk Board. Thus, it is indirectly involved in macro- as well as micro-prudential supervision. In sum, the Bundesbank has *detailed information rights regarding strategic and operational decisions of the agency*.

6.3.1.6. Transnational bodies

There is a substantial difference regarding reporting rights to the international level before and after the financial crisis of 2008: legal revisions at EU and national levels established several new institutions and competencies (see Figure 3.8): At EU level, the European System for Financial Supervision (ESFS) has been established by 2011. Within the ESFS

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http://www.bafin.de/SharedDocs/Aufsichtsrecht/DE/Richtlinie/rl_130521_aufsichtsrichtlinie.html?nn=3136360, accessed 28 April 2015.

framework, the former regulatory networks (now transformed into European agencies) and the European Central Bank gained new tasks. The agencies and the ECB together form the European Systemic Risk Board (ESRB). The BaFin quarterly reports to ESRB technical key figures regarding liquidity and anti-cyclical capital buffers according to §10 KWG (§7d KWG).

The European commission now has to be informed on the officially approved financial institutions and regulatory measures that have been taken (§7a KWG). The regulatory networks - CESR for securities, CEBS for banking, and CEIOPS for insurances supervision - were transformed into European agencies in 2011. The new agencies (ESMA, EBA, and EIOPA) have access to “all the necessary information to carry out the duties assigned” to them (Art. 35 of EU regulations 1093/2010, 1094/2010 and 1095/2010). The BaFin reports a wide variety of facts to the European counterparts. Apart from the information also provided to the EC (approval of and some regulatory measures taken against financial institutions), they are kept posted about a wider range of measures taken by the BaFin, results of stress tests, and further details (§7b KWG). Moreover, the ESFS institutions have special rights if a national regulator is suspected of not fulfilling its duties formulated in the EU regulations. Under certain conditions, the EU agency is entitled first, to start an investigation and request all relevant information from the national regulator; and second, to take all measures necessary instead of the national regulator (Art. 17 1095/2010). Furthermore, the respective EU agency can request information and monitor national regulatory enforcement in order to ensure uniform application (Art. 21 and 30 1095/2010). In sum, the EU commission has *limited information rights on selected operational issues*. The ESFS institutions have *extensive rights at strategic and operational levels*.

Much information transferred to the EU agencies, in particular on liquidity risks and reliability of the respective management, can be provided to national regulators of EU member states, except in cases when the BaFin refrains from doing so for important reasons. It is the BaFin that is responsible for a financial institution with subsidiaries in other member states: it has the right to forward to the responsible national regulator information considered relevant (§8 KWG).

Also the Eurozone has faced important changes regarding financial regulatory governance. By November 2014, the supervision of systemically important financial institutions (SIFIs) had been transferred to the European Central Bank within the framework of the Single Supervisory Mechanism (SSM). EU and ECB regulations (1024/2013 and ECB/2014/17) assign *extensive information rights* to the ECB *at strategic and operational levels*.

At transnational level, furthermore the Financial Stability Board (until 2009 called the Financial Stability Forum) and the Basel Committee on Banking Supervision (BCBS) play key roles. They are mainly platforms for monitoring and coordination, and take decisions by consensus. They thus build on cooperation, but do not have “hard” rights at their disposal.

In addition, the International Monetary Fund (IMF) executes regular supervisions of member states’ regulatory framework and financial stability (Financial Stability Assessment Program, FSAP). The IMF reports build upon personal talks with market and regulatory authority representatives, as well as on legal documents, and thus imply *moderate information rights at strategic level*.

6.3.2. Sanctioning rights

We now turn to the formal sanctioning rights of the various accountability fora. Also here, the BMF remains the most powerful forum.

6.3.2.1. Board

The administrative board is entitled to approve the annual report and financial statements and has to exempt the executive board from liability (§12 FinDAG). This decision can be taken by simple majority. To refuse the exemption is the legal prerequisite to compensation claims. Since it approves the budget in advance, it can sanction the agency by formal budget disapproval or budget cuts, which is a *strategic* power according to our classification. For decisions to disapprove the budget or to deny the executive’s board’s exemption, the BMF’s consent is required. Moreover, the board and the BMF can jointly decide on amendments to the BaFin regulations (§5 No. 3 FinDAG). Apart from that, the administrative board does not hold further sanctioning rights (interview DE03). In sum, it can be assigned *direct sanctioning powers at strategic and managerial levels*.

6.3.2.2. Government

In terms of sanctioning, the formal supervision of the BMF (*Rechts- und Fachaufsicht*) involves also disciplinary measures: the department passes and amends the BaFin regulations (*Satzung*) and rules of procedure (*Geschäftsordnung*), appoints the members of the administrative board, the advisory and consumer advisory councils, and has to approve the discharging of the executive board (§§5-9, 12, 14 FinDAG, BMF supervisory guidelines).⁴¹ The BMF is informed about all regulations (*Verordnungen*), newsletters, and rules of procedure for supervision; and in the latter two cases, it retains a veto right (IV.1.b and c of the BMF supervisory guidelines). Formally, the supervision rights also include the right to give direct instructions, and thus represent:

“a remarkably indeterminate piece of public law that allows ministerial departments to issue instructions on virtually every substantial aspect of agency activities, including the reversal of single decisions” (Döhler, 2002: 104).

Recent law changes granted two more powers to the BMF. First, since 2011, the BMF owns a formal right to dismiss executive board members “for important reasons” (§9 No. 2 FinDAG 2011). The BaFin statutes precise that rule by referring to the Federal Civil Servant Act (*Bundesbeamten-gesetz*, BBG) and the Federal Disciplinary Code (*Bundesdisziplinar-gesetz*, BDG), which stipulate dismissals - e.g. for corruption, the disclosure of state secrets, and criminal conviction. Second, since 2013, the BMF can solve disputes between the BaFin and the Bundesbank by intervention (§4a FinDAG). In sum, the BMF has *direct formal sanctioning rights at all levels* thanks to its power over the BaFin regulations.

The federal government as a whole appoints the members of the executive board (§ 9 Abs. 2 FinDAG).⁴² However, it is not involved in dismissal decisions and is thus without sanctioning rights according to our operationalization.

⁴¹ http://www.bafin.de/SharedDocs/Aufsichtsrecht/DE/Satzung/aufsicht_bmf_bafin.html?nn=2696090, accessed 27 April 2015.

⁴² Formally, they are appointed by the Federal President on the federal government’s proposal.

6.3.2.3. Parliament

The most important formal sanctioning option available to the parliament is law revisions – e.g. altering agency competencies or structure. Another important tool, budgeting, is not at hand to the parliament, due to the BaFin’s funding through fees. The role of the budget committee is taken by the administrative board instead – in which MPs are represented, but a minority. Finally, parliamentary inquiries can draw public attention and put pressure on the government. In sum, the *sanctioning rights* of the parliament are direct at *strategic*, and *indirect at operational and managerial levels*.

6.3.2.4. Courts and Audits

Decisions of the agency regarding both supervision and payment orders can be revoked by administrative courts (*direct sanctioning rights at operational and managerial levels*).

The Auditing Court lacks formal sanctioning rights. It reports to the BMF and the administrative board and can opt for mentioning mismanagement in its annual public report (*indirect formal sanctioning rights at managerial level*).

6.3.2.5. Expert and administrative bodies

The Bundesbank has no formal powers to sanction the BaFin. Within micro-prudential regulation, it acts on the agency’s behalf, and the rules of procedure fixed in the MoU are set by the BaFin with the BMF’s consent. However, there is a qualification since the 2011 revision of the FinDAG: §4a states that “disagreements of substantial relevance ... in the course of on-going supervision” shall be solved “by mutual agreement” – a common phrase in German law to indicate mutual veto power. If there is no agreement, the BMF is entitled to decide “in consultation with” the Bundesbank. Given an agreement between BMF and Bundesbank, this can be classified as a conditional veto power regarding operative decisions of the BaFin (*indirect sanctioning at operational level*). At strategic level, the Bundesbank’s influence is even more indirect and can unfold only via the institutions at EU or Eurozone levels. Since the Bundesbank cannot unilaterally decide on consequences at these levels, it has also only *indirect sanctioning power at strategic level*.

By January 2013, in analogy to the European Systemic Risk Board (ESRB), a committee on financial stability (*Ausschuss für Finanzstabilität*, AFS) had been established. It can give “warnings“, either confidentially or publicly, to “certain addressees” (§3 FinStabG). These addressees include e.g. also the BaFin, if it fails to follow the AFS’s suggestions. Nevertheless the BaFin is represented in the AFS, and sanctions are thus rather unlikely. Moreover, the AFS was established only in 2013 and if thus beyond the period scrutinized here.

6.3.2.6. Transnational bodies

As of January 2011, the ESFS institutions have moreover special rights if a national regulator is suspected of not fulfilling its duties formulated in the EU regulations. In these cases, a three-stage sanctioning process can be started. In a first step, the responsible EU agency (EBA, EIOPA, or ESMA) starts an investigation, usually resulting in a recommendation to the national regulator. If the latter refuses to comply with the recommendation, the EU commission in a second step issues a formal opinion. If the national regulator still refuses to comply, the EU agency is, thirdly, entitled to either oblige the national regulator to act in accordance with the EC’s opinion or to issue orders directly to the financial institutions (Art. 17 1095/2010). Similar rights with even lower intervention thresholds exist in crisis situations (Art. 18 1095/2010). If national regulators are unable to solve conflicts regarding the supervisory strategy, the EU agency has the final decision (Art. 19 1095/2010). In particular the final step of directly intervening in national jurisdiction is seen as a substantial strengthening of the EU agencies (Fekonja, 2014: 42-3).

The EU commission’s main power lies in giving a formal opinion in the second step of the sanctioning process (see above). It thus can formally disapprove agency decisions. Moreover, even though the decision on formal sanctions rests with the respective EU agency, rules require some consent between the agency and the EC: the EC is free to opt for or against issuing a formal opinion. If it does, the agency’s eventual intervening measures have to take the commission’s opinion into account. On the other hand, if the EC does not issue a formal statement, the agency cannot go on to measures belonging to the third stage (Art. 17 1095/2010). Thus, the EC has indirect formal rights since its consent is necessary

for the *operational consequences* enforced by the EU agencies (see above) and for standard setting procedures (which is a *strategic* task).

By November 2014, according to the regulations regarding the Single Supervisory Mechanism (EU directive 1024/2013 and regulation ECB/2014/17), the European Central Bank has gained substantial sanctioning rights at operational level. This is beyond the period of analysis, but has induced a significant strengthening of the ECB. It can, first, assume responsibility for financial institutions on a relatively broad legal basis, and give direct instructions to financial institutions under its responsibility. Second, it can give instructions to national regulators to take certain measures or give instructions to financial institutions remaining under the national regulators' responsibility. As depicted in Figure 6.1, decisions are drafted by the supervisory board, in which the national regulators, BaFin among them, are represented. The ECB council (in which the Bundesbank is a member) then adopts or objects to these decisions. The ECB council has thus veto power on all decisions. Due to the fact that the SSM is the Eurozone-level banking supervisor, it takes mostly *operative decisions* on licensing issues and capital buffers. Since it is only very recent, it has not been included in the summary of this section.

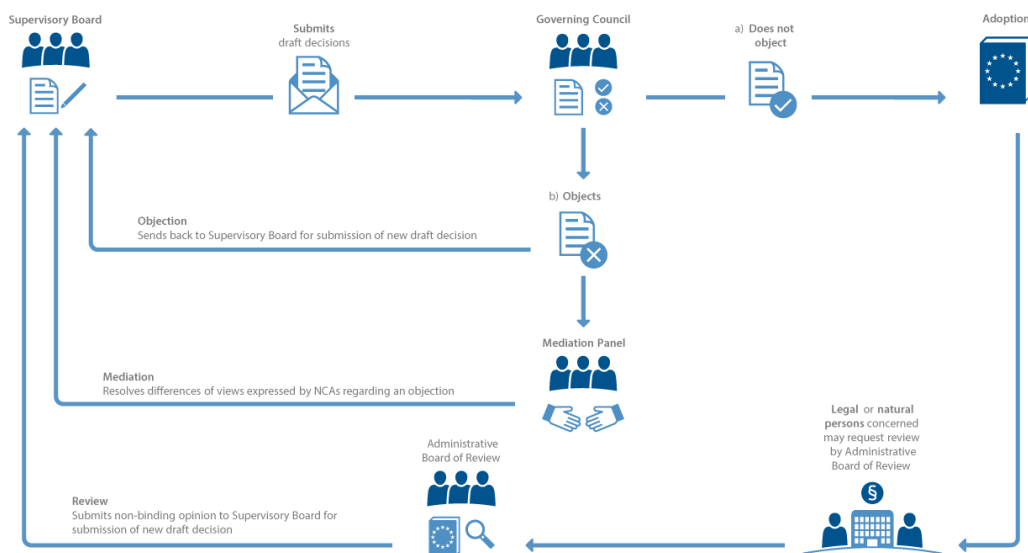


Figure 6.1 The decision-making process of the Single Supervisory Mechanism (SSM)

Source: <https://www.bankingsupervision.europa.eu/organisation/governance/html/index.en.html>, accessed 28 April 2015.

Neither the IMF,⁴³ nor the FSB or the BCBS have formal sanctioning rights in the case of non-compliance. However, the extreme awareness of financial markets makes even a formal disapproval a highly relevant sanctioning option. I thus assign all three institutions *indirect sanctioning powers at strategic level*.

6.3.3. The formal accountability regime of the BaFin

The findings are summarized in Table 6.1. The method of scoring has been described in section 5.3. In the left column, all accountability fora are enumerated according to the type of actor. The next two columns depict the formal information and sanctioning rights for strategic (S), operational (O), and managerial (M) levels, respectively. “■” means extensive information rights, “◻” indicates moderate, and “□” weak information powers, respectively. With regard to sanctioning rights, I differentiate between formal powers (indicated by “■”) and some influence on sanctioning decision (indicated by “□”), either through public pressure or involvement in multilateral decision making. A “×” indicates a lack of formal powers at the respective level. The coding “◻×■” for the administrative board’s information rights thus reads “moderate information rights at strategic level and extensive rights at the managerial level, but no information rights at operational level”.

The formal rights are then translated into an overall score. Since according to our definition, accountability requires both information and sanctioning rights, the overall score for a given forum and level is the minimum of both the respective information and sanctioning scores. To give an example: the Bundestag scores “■□□” on the sanctioning-rights dimension. Matching that with the information rights (“◻■×”) it turns out that only at the strategic and operational levels does Parliament have both information and sanctioning rights. We opt for the lower value in all three cases, such that the final score for the Parliament will be “◻□×”.

Finally, the bottom rows of the table summarize the highest accountability scores for each level and the fora that got that score. We can testify that the Federal Finance Ministry is the most powerful accountability forum of the BaFin. This regards all three levels of action and both information and sanctioning aspects. Due to the fact that ministerial responsibility

⁴³ At least as long as the country has not taken up a loan with the IMF.

remains in place and the BMF is in charge of supervision, the accountability of the BaFin resembles by and large that of any subordinate federal authority. The Parliament's position is also comparable to that in relation to other administrative bodies, although only at strategic and operational levels. Its budgeting function, in contrast, was taken over by the administrative board. The board decides on issues of internal organization, but also on the overall budget. Thus it possesses managerial, but also strategic accountability powers. Both Government and Parliament are represented in the board.

Forum	Strength of formal rights		Formal accountability level		
	Information SOM	Sanctioning SOM	Strategic	Operational	Managerial
Board					
- Administrative board	■×■	■×■	■	×	■
- Advisory council	■××	×××	×	×	×
- Consumer adv. council*	□××	×××	×	×	×
Executive					
- Department (BMF)	■■■	■■■	■	■	■
Legislative					
- Bundestag	■■×	■□□	■	□	×
Courts/Audits					
- Administrative courts	×■■	×■■	×	■	■
- Federal audit office	××■	××□	×	×	□
Expert bodies					
- Bundesbank	■■×	□□×	□	□	×
Transnational bodies					
- EU commission ^a	■□×	□□×	□	□	×
- ESA (EBA/ESMA/EIOPA) ^b	■■×	□■×	□	■	×
- European Central Bank ^c	×××	×××	×	×	×
- IMF/FSB/Basel Committee	■××	□××	□	×	×
Maximum score			■	■	■
Fora contributing to maximum score			BMF	BMF, courts, ESA	BMF, board, courts

Table 6.1: Formal powers of fora vis-à-vis the BaFin

Note: SOM: Strategic/Operational/Managerial level. Information rights: ■: Extensive, ■: moderate, □: limited, ×: none; Sanctioning rights: ■: direct, □: indirect, ×: none; Formal accountability level: ■: high, ■: intermediate, □: low, ×: none; a: as of 2011; b: as of 2011, predecessors: CEBR/CESR/CEIOPS; c: as of November 2014 (introduction of SSM); Information ■■×/Sanctioning ×■×/Formal accountability level ×■×.

The judicial review by administrative courts and external controlling by the Federal Audit Court have also remained in place. A peculiarity is the role of the Bundesbank. On the one hand, it is in charge of micro-prudential supervision on behalf of the BaFin. On the other hand, it has gained considerable power by the changes in domestic and European governance structures. Since our analysis focuses on the period up to 2011, however, these changes are not depicted in the table.

Transnationalization of financial regulation had been comparatively weak in the pre-crisis period. This has changed dramatically. EU-level networks have been strengthened and formalized. Governance structures are now far more complex than before (Figure 3.8 shows a high number of bodies established or strengthened after 2008 – in fact, more than half of them). At national and transnational level, new macro-prudential supervisory bodies have been established. This has mainly strengthened the central banks (Bundesbank and ECB), but the BaFin keeps its say within the Eurozone SSM structures. However, we cannot determine yet if these changes are going to strengthen accountability (because there are additional accountability fora) or weaken it (since they shift power away from the parent department). The considerable power gain is likely to alter accountability structures significantly, as can be detected in the BNetzA's case.

6.4. Eidgenössische Finanzmarktaufsicht (FINMA)

FINMA was established in 2009. It is thus the youngest agency in the sample, and also the most autonomous. This is reflected in the analysis both of the formal and the de facto accountability arrangements. However, political and public pressure is not harmless to FINMA, which faces powerful opponents in the Swiss political sphere.

6.4.1. Information rights

Let us now turn to formal information rights with regard to FINMA. The section reveals that FINMA is the only case upon which Parliament and the parent department are seriously restricted in terms of information access. Moreover, as FINMA is quite unique in its organizational structure within Switzerland, there is a considerable degree of uncertainty regarding the accountability relationships and corresponding rights.

6.4.1.1. Board

As the Board of Directors is both a supervisory as well as an operational body, it is thoroughly informed on all relevant FINMA business: Article 10b FINMAG specifies the Management Board's duties as preparing "the files and materials on which the Board of Directors bases its decisions and reports to it regularly, and in the case of special events

immediately.” It takes far-reaching and strategic decisions by itself, formally issues most operational decisions, and can request any kind of information. Furthermore, the Board of Directors has access to the reports both of the internal audit (a division of FINMA directly subordinated to the Board, Art. 20 FINMA Organizational Rules) and the external audit, executed by the Federal Audit Office (*Eidgenössische Finanzkontrolle*, EFK, Art. 12 FINMAG). The internal audit is entitled “to receive all information available and be allowed access to all documents and any other records” (Art. 22 No. 4 FINMA Organizational Rules). The Board of Directors is clearly an integrated part of the agency structure, and is thus *extensively* informed at *all levels* of agency action.

6.4.1.2. Government

Within the Federal Government, two bodies are in direct interaction with FINMA: first, the Federal Council itself; and second, the Federal Department of Finance (*Eidgenössisches Finanzdepartement*, EFD), or more precisely, the State Secretariat for International Financial Matters (*Staatssekretariat für internationale Finanzfragen*, SIF). FINMAG defines the Federal Council as the agency’s main supervisor. Regarding information, the Council meets once a year with FINMA to “review the strategy for its supervisory activity and current issues of financial centre policy” (Art. 21 No. 2 FINMAG). Furthermore, the Federal Council has to approve, and thus has prior knowledge of, FINMA’s strategic goals, the annual report, the annual budget (Art. 9 FINMAG), and the personnel ordinance (Art. 13 FINMAG); and it has access to the external audit executed by the Federal Audit Office (Art. 12 FINMAG). It is, however, not entitled to investigate directly within the Agency.

Second, FINMA “deals with the Federal Council via the Federal Department of Finance” (Art. 21 No. 3 FINMAG). Article 7 No. 5 FINMAG requires FINMA to issue guidelines for its regulation to coordinate with the FDF beforehand. Apart from that, the law does not specify particular rights or processes of information exchange by the FDF. The organization ordinance of the FDF (*Organisationsverordnung für das Eidgenössische Finanzdepartement*, OV-EFD, SR 172.215.1) specifies the SIF as responsible unit for the relationship with FINMA. Its tasks include maintaining cooperation of FINMA and the FDF regarding financial market policy, international financial market regulation, and international finance, taxes, and currency issues (Art. 7 OV-EFD).

In sum, the Federal Council is assigned the main supervisory power, while the SIF has more of a coordinating role. Since the former lacks the power to investigate within the Agency, and the latter, regardless of its a bit unspecific role, is able to interact directly with FINMA, both fora's information rights are characterized as being *moderate*. The Council's tasks regard mainly the *strategic* and *managerial* levels, while under normal circumstances the SIF is more involved at working level and hence the counterpart for *operational* issues. However, the Council is not formally restricted and can in principle request information on operational issues as well.

6.4.1.3. Parliament

By constitution, the Parliament is in charge of oversight (*Oberaufsicht*) over government and administration (Art. 169 BV, SR 101). The Parliament focuses on legality, regularity, expediency, effectiveness, and economic efficiency (Art. 26 No. 3 *Parlamentsgesetz*, ParlG, SR 171.10) of governmental actions. There are some ambiguities regarding parliamentary supervision of decentralized units, which are outlined below. In general, the quasi-presidential Swiss system induces a more distant relationship between parliament and government than in parliamentary democracies, such as Germany. The Federal Councilors are elected for a fixed term and do not depend directly on support of a parliamentary majority.⁴⁴ In contrast, the supervisory function of the Parliament is comparatively strong. The parliamentary chambers have a set of instruments to request answers from, or even law proposals by, the executive (see section 7.2).

A more sophisticated monitoring system is provided by the supervisory committees. The Parliament has two chambers, and each chamber sends a number of delegates to legislative and supervisory committees. At the moment, there are nine legislative committees in each chamber, resembling by and large the departmental structure of the Federal Council.⁴⁵ Their job is primarily the preparation of legislation. More interesting for our purposes are the supervisory committees, which exist as finance committees (*Finanzkommissionen*, FK),

⁴⁴ Due to the strong plebiscitarian component in Swiss democracy, political parties in general seek a consensus among all major parties and societal groups (see section 7.2).

⁴⁵ <http://www.parlament.ch/D/ORGANE-MITGLIEDER/KOMMISSIONEN/LEGISLATIVKOMMISSIONEN/Seiten/default.aspx>; retrieved June 9 2015.

control committees (*Geschäftsprüfungskommissionen*, GPK), and parliamentary investigation committees (*Parlamentarische Untersuchungskommissionen*, PUK). PUKs exist only by majority vote of both parliamentary chambers.

FKs and GPKs are in charge of ongoing supervision of the government. FKs are responsible for financial management, and a preliminary examination of the draft budget (Art. 50 No. 11 ParlG, SR 171.10). For these purposes, the FKs constitute a number of subcommittees (four at the moment, each covering the tasks of one or two departments), and in addition a finance delegation (*Finanzdelegation*, FinDel) to scrutinize the federal budget more in detail. The control committees (GPK) are also divided in subcommittees (five per chamber at the moment). Their task is “to exercise supervisory control over the conduct of business, ... [focusing] on the criteria of legality, expediency and effectiveness” (Art. 52 ParlG, SR 171.10). The GPK elects a control delegation (GPDel), in charge of questions of national security.

Information rights within the parliament are distributed in cascades. There are four stages of information access, where the upper stages possess all the rights of the lower stages plus specific additional rights.⁴⁶ The first stage is formed by the information rights of all MPs: Article 7 of the Parliamentary Act (ParlG, SR 171.10) grants the Assembly members:

“...the right to be provided with information by the Federal Council and the Federal Administration and to inspect documents on any matter of relevance to the Confederation, provided this is required for the exercise of their parliamentary mandates.”

The legislative committees possess information rights of the second stage according to Art. 150 ParlG, which allows information to be requested from the Federal Council and interrogates federal public servants with the agreement of the Federal Council.

At the third stage, finance and control committees have the additional right to directly interact with administrative units (without the Federal Council’s agreement) and can interrogate public servants and assess documents unrestrictedly (Art. 153 ParlG). The only

⁴⁶ Parliamentarian initiative „Präzisierung der Informationsrechte der Aufsichtskommissionen“, BBI 2011 1817.

restrictions are questions of national security, the protocols of Federal Council meetings, and the *Mitberichte* – i.e. the accompanying reports of the various departments serving for opinion formation within the Federal Council. Moreover, in case of dissent over the extent of information rights, the GPK has the final decision right (Mäder, 2011: 11-2). This extent of information rights was subject to a revision of the ParlG in 2011, after the Federal Council had refused document access on various occasions, claiming to be protecting the “immediate decision-making process of the Federal Council’s collegiate” (Art. 153 No. 4 ParlG, before 2011).

The highest (fourth) stage of information rights is occupied by the control delegations (FinDel and GPDel, Art. 154 ParlG) and the parliamentary investigation committees (Art. 166 ParlG): They have access to all information and no secrecy obligation can be upheld in front of them (Art 169 No. 2 BV). This means that they can assess issues of national security as well as accompanying reports.

In sum, formal information rights regarding governmental and administrative actions are extensive. However, the mandate of the Parliament is debated when it comes to oversight of decentralized federal administration, due to the fact that the law is mostly unspecific on that issue, and the practice of oversight over decentralized units not mentioned (Biaggini, 2013: 27). The federal government has argued that autonomous units are not subjects to parliamentary oversight. Instead, it is rather the way the Federal Council pursues its “ownership interests” that is subject to parliamentary scrutiny (Eidgenössische Finanzverwaltung, 2006: 69):

“Wenn das Gesetz eine Organisationseinheit nicht der Aufsicht des Bundesrates unterstelle oder ihr Autonomie gewähre, bestehe keine Oberaufsicht. Der Bundesrat habe vor allem die Aufgabe, die *Eignerinteressen des Bundes* gegenüber den verselbständigten Einheiten wahrzunehmen. Dementsprechend sei es Aufgabe der parlamentarischen Oberaufsicht, die Art und Weise der Wahrnehmung dieser Eignerinteressen zu überwachen. Sie befasse sich nicht in erster Linie mit den operative Tätigkeiten der Verwaltungseinheiten (*direkte Oberaufsicht*), sondern konzentriere sich auf die Weise, wie der

Bundesrat sowie die Vertreterinnen und Vertreter des Bundes diese Einheiten verwalteten und überwachten (*indirekte Oberaufsicht*)” (Müller and Vogel, 2010: 653, emphasis in original).

“Im Rahmen der parlamentarischen Oberaufsicht über die verselbständigten Einheiten überwacht das Parlament den Bundesrat bei der Wahrnehmung der Interessen des Bundes. ... Die bundesrätliche Kontrolle und demnach auch die parlamentarische Oberaufsicht finden ihre Grenzen dort, wo die Autonomie und die Verantwortung der verselbständigten Einheiten beginnen” (Schweizerischer Bundesrat, 2006: 8281).

The GPKs have subsequently obtained several expert reports on the question of whether autonomous administrative units are themselves subject to parliamentary oversight, or if the Parliament is restricted to the task of monitoring the supervisory practice of the Federal Council (“indirect oversight”); and if this oversight is limited by the autonomy of the administrative unit vis-à-vis the Federal Council. Biaggini (2013), Uhlmann (2013: 37) and Müller and Vogel (2010: 649) agree that: a) parliamentary oversight of autonomous administrative units should be cautious, reluctant, and ex post in order not to compete with Federal Council’s oversight; b) decentralized units themselves are in general subject to parliamentary oversight, not only the supervisory practice of the Federal Council; and that c) not only strategic questions, but also operative interactions between Federal Council and administrative units are subject to parliamentary scrutiny.

Scholarly opinion differs as to whether the Parliament is restricted by the administrative unit’s autonomy from the Federal Council. Uhlmann (2013) underlines the decisive role of special legislation for the extent of parliamentary oversight. For the FINMA case, he agrees with the EFV’s position that Parliament is restricted by the boundaries applying to the FC, while stating that there is as yet no answer to the general question. Biaggini (2013: 40, 60-1) in contrast argues that the parliament maintains the power to supervise the compliance with procedural rules (“*der äussere Geschäftsgang*”), regardless of the fact that the object of scrutiny is legally exempted from oversight by Federal Council or Parliament. Finally, Müller and Vogel (2010: 665-6) see no reason why parliamentary information rights

vis-à-vis autonomous units should be less extensive than with regard to federal administration. However, they underline the responsibility of the parliament to apply the instrument cautiously, taking account of the wider impact of its actions on the unit's independence and the Federal Council's authority.

It is thus complex to classify parliamentary information rights. In the discussion of the issue for the ComCom case, I classify parliamentary rights as formally extensive. However, in the FINMA case, the situation is slightly different: FINMA has a different legal status, increasing its autonomy, and special legislation is very clear on the Federal Council's monitoring competencies, whereas in the ComCom case, special legislation is silent on that issue. Moreover, FINMA is funded by fees from the regulated sector, and its resource use is supervised by the Federal Audit Office and the Federal Council. Since no money from the federal budget is affected, Parliament's say is comparatively smaller than in the ComCom case. In sum, I assign the Parliament *moderate information rights at strategic and operational levels* of agency action.

6.4.1.4. Courts and Audits

FINMA is subject to legal revision by the Federal Administrative Court (FAC) and the Federal Supreme Court (Art. 53 and 54 FINMAG). This regards the agency's operative decisions, and entails rights specified by the *Verwaltungsverfahrensgesetz* (VwVG, SR 172.021). The courts may call in witnesses (Art 14c *Verwaltungsverfahrensgesetz*, VwVG, SR 172.021) and use documents, information, and external expertise (Art 12 VwVG, SR 172.021). Thereby, it can rely on the legal obligation to cooperate (Art. 13 VwVG). Accordingly, I assign the courts *extensive information rights at operational level*.

The Federal Audit Office is the external auditor of FINMA. Beyond pure auditing, it also executes "the supervision of finance according to the criteria of regularity, legality and economic efficiency" (Art. 5 FKG, SR 614.0). Thus, it goes beyond mere controlling and evaluates administrative decisions under a wider set of criteria, applying a risk-based approach. According to the Federal Audit Office Act (FKG, SR 614.0), the office owns *extensive rights at managerial level*.

6.4.1.5. Expert and administrative bodies

Regarding administrative and expert bodies, the most important actor is clearly the Swiss National Bank (*Schweizerische Nationalbank*, SNB). As mentioned at the outset of this chapter, it monitors financial institutions' obligations regarding information and minimum reserves, among others (Art. 19 and 22 NBG). The cooperation between FINMA and the SNB is fixed in a Memorandum of Understanding (*Eidgenössische Finanzmarktaufsicht FINMA and Schweizerische Nationalbank SNB*, 2010). The MoU entitles both institutions to exchange confidential information on banks (Art. 6 MoU FINMA-SNB, Art. 23 No. 3bis BankG, Art. 50 NBG) and to coordinate on eventual counteractions. However, the MoU does not say too much on information duties, despite:

“Die FINMA informiert die SNB über wesentliche Ergebnisse ihrer Überwachung der systemrelevanten Banken und des Bankensektors insgesamt” (Art. 6 No. 5 MoU FINMA-SNB).

In the aftermath of the crisis, a discussion on that matter started, since the parliamentary inquiry focused on insufficient information flows between governmental bodies as its main critique. While attempts to improve that flow were made, mutual information apparently continued to be an issue. For formal information rights, we can conclude that the SNB strongly depends on FINMA's cooperation, due to the lack of a detailed legal basis. Moreover, the SNB is restricted since it is not entitled to request qualitative information from the market players (Fáykiss and Szombati, 2013: 14). The SNB thus *has information rights of limited character at strategic and operational levels*, since it lacks a legal basis to request specific information, but is dependent on FINMA's willingness to do so.

The Swiss Banking Association has a strong role in the revision of laws, ordinances, and circulations, and is informed at an early stage of the process. However, it has no formal right to be informed on any agency issues.

6.4.1.6. Transnational bodies

Switzerland is represented within the Financial Stability Board (FSB) and the Basel Committee on Banking Supervision (BCBS). Neither of these bodies possesses formal rights in any way, albeit peer pressure *de facto* requires cooperative behavior.

6.4.2. Sanctioning rights

There are strong sanctioning powers by some fora, but restricted by the limited sanctioning rights. This affects accountability negatively.

6.4.2.1. Board

The board elects the managing director, approves the budget planning and determines the strategic goals, which in turn have to be approved by the Federal Council. It decides on all issues of “major importance” and formally passes all FINMA publications (circulations, ordinances, etc.). Finally, it decides on the internal organization of the agency. Hence, it is authorized to pose *direct sanctions at all levels* upon the agency.

6.4.2.2. Government

In line with the government’s Corporate Governance report, the Federal Council is entitled to approve FINMA’s strategic goals and the annual report (Art. 9 FINMAG). Moreover, it can veto the appointment of a managing director, and appoints and dismisses the board members – although the latter only “if the requirements for holding office are no longer fulfilled” (Art. 9 No. 5 FINMAG, SR 956.1), i.e. if they start to “carry out any other economic activity” or “hold any federal or cantonal office” (Art. 9 No. 4 FINMAG).

Moreover, an important instrument for the Federal Council is its power over FINMA’s personnel and fee ordinances (SR 956.121 and 956.122, Art. 13 No. 3 and Art. 15 No. 3 FINMAG). Accordingly, Uhlmann assigns the Federal Council a crucial role and strong influence on managerial issues:

“Die Einflussnahme des Bundesrates ist nicht auf die Genehmigung und Überprüfung strategischer Ziele beschränkt. Sie reicht offensichtlich viel weiter als beispielsweise die Einflussnahme auf die Schweizerische Nationalbank SNB. .. Der Bundesrat hat insbesondere einen wesentlichen personalpolitischen und finanzrechtlichen Einfluss auf die FINMA, dessen Handhabung einen erheblichen Interpretationsspielraum lässt” (Uhlmann, 2013: 29-31).

This judgement is shared by Kilgus, who doubts FINMA's independence at the strategic level:

“Obwohl die FINMA als unabhängige Behörde geschaffen wurde, ist die materielle Einflussnahme des Bundesrates, auch über die Funktion als Wahlbehörde hinaus, gross. Mit der Genehmigung der Regulierungsleitlinien und der für die jeweilige Amtsperiode des Verwaltungsrates verabschiedeten Strategiezielen nimmt der Bundesrat (zu) grossen Einfluss auf die FINMA wahr. Insbesondere im Vergleich zur ebenfalls unabhängigen SNB ist die FINMA viel stärker in die Bundesverwaltung eingebunden” (Kilgus, 2014: 62).

In sum, the Federal Council has several options for posing consequences on the agency by formal disapproval, and by influencing budget and personnel decisions. The sanctions are direct at strategic and managerial levels.

The FDF and the SIF do not have formal sanctioning rights, since FINMA is not subordinated to the FDF.

6.4.2.3. Parliament

In contrast to its strong information rights, the GPK itself can give recommendations to administrative bodies (Art. 158 ParlG), but has no power to enforce its implementation:

“Die Umsetzung der Empfehlungen liegt in der Kompetenz der Empfehlungsadressaten. Die GPK müssen diese mit Argumenten überzeugen, ihren Empfehlungen zu folgen. ... Das eigentlich wirksamste Mittel der GPK für die Erfüllung ihrer Funktion ist aber die Schaffung von Transparenz - insb. bezüglich Informationen, die bisher der Geheimhaltung unterliegen. So kann die GPK auch bis zu einem gewissen Grad darauf setzen, dass die öffentlich formulierte Kritik bei den verantwortlichen Behörden genügend (politischen) Handlungsdruck bewirkt, so dass ihre Empfehlungen nicht ins Leere laufen” (Mäder, 2011: 14).

Apart from the instrument of recommendation, and the power to make certain issues transparent to the public, the **GPK** can report to the plenary and recommend actions from the parliamentary arsenal of motions, postulates, proposals, and initiatives in order to change the law or request a report by the Federal Council.

Parliamentary power lies hence generally in its power to change law, and its power over funding. However, funding of **FINMA** is not under parliamentary control. Moreover, in the ongoing discussion on parliamentary oversight over decentralized federal administration (see section 6.3.1.3), it has partly been argued that only the Federal Council's practice of oversight might be subject to parliamentary supervision. In contrast, a wider understanding of parliamentary rights includes the option to address recommendations to the decentralized bodies themselves (Uhlmann, 2013: 23).

Furthermore, Parliament owns an instrument to reduce agency discretion: according to the Federal Constitution, Parliament retains the power to decide on "significant provisions that establish binding legal rules" (Art. 164 BV, SR 101). Kilgus infers from that:

"Je strenger das Parlament den Bereich der ‚wichtigen rechtssetzenden‘ Erlasse definiert, desto mehr Gebiete müssen in einem Gesetz im formellen Sinn geregelt werden. Im Ergebnis ist dann sowohl die Kompetenz des Bundesrates als auch diejenige der **FINMA** zum Erlass von rechtssetzenden Verordnungen eingeschränkt, was zu erheblichen Umsetzungsproblemen führen und die **FINMA** auch im Bereich des Vollzugs erheblich hindern kann. Dies kann so weit gehen, dass trotz der Vorgaben von Art. 21 **FINMAG** gar die Unabhängigkeit der **FINMA** gefährdet ist" (Kilgus, 2014: 24).

In sum, law reforms are the only "hard" sanctioning instrument - a powerful one, but only in the long run. Apart from that, parliamentary sanctioning powers rest on the power to reduce discretion and on informal recommendations, and unfold power mainly through public pressure. In the present case, it seems most adequate to differentiate between sanctioning rights at the several levels of action: at the *strategic level*, law change represent

a powerful direct sanctioning option; whereas at *operational and managerial levels*, only *indirect* consequences are at hand for the Parliament.

6.4.2.4. Courts and Audits

FINMA decisions have, in general, the legal form of a *Verfügung* (ruling), which can be appealed against at the Federal Administrative and Federal Supreme Courts. The courts can revoke FINMA's rulings, and thus have *direct sanctioning powers at operational level*.

The Federal Audit Office (EFK) informs the administrative units on the results of its revision. If the administrative unit refuses an objection regarding economic efficiency, the Audit Office may inform the unit's parent department. In the FINMA case, the Federal Audit Office provides its report to the Board of Directors and the Federal Council (Art. 12 FINMAG). The EFK can appeal against the department's decision in front of the Federal Council. If the administrative unit refuses an objection on legality or regularity of the unit's behavior, the Audit Office may formally state the administrative offence or issue an instruction to the unit. The unit can appeal against the EFK's decision in front of the Federal Council (Art. 12 FKG, SR 614.0). Furthermore, the EFK reports to the Federal Council, the responsible department, and the financial delegation (FinDel) of the Parliament. The financial delegation, as well as the EFK itself, is entitled to publish the results of the EFK's revision (Art. 14 FKG). The EFK hence has *indirect operational and managerial sanctioning rights*.

6.4.2.5. Expert and administrative bodies

The SNB and FINMA can agree to cooperate on several issues, mainly of an operational character. This regards the analysis of systemically relevant banks, and issues related to crisis prevention and financial stability (Art. 3 MoU FINMA-SNB). In any case, however, the final decision can be taken unilaterally by the legally responsible institution, so long as the other institution was consulted beforehand (Art. 8 MoU FINMA-SNB). In other words, there are no formal sanctioning rights of the SNB vis-à-vis FINMA.

6.4.2.6. Transnational bodies

Neither the FSB nor BCBS own formal sanctioning rights.

6.4.3. The formal accountability regime of the FINMA

The accountability of the FINMA to the Federal Council (and, since both rights are connected according to legal interpretation, also to the Parliament) is significantly reduced compared to direct federal administration, but also in comparison to other decentralized authorities, such as ComCom or similar bodies. The maximum level of accountability reaches only an intermediate score at strategic and managerial levels of action.

The Federal Council is restricted in information access, and has no sanctioning power at operational level. In this, the case corroborates our theoretical expectations. The Parliament's role suffers from ambiguities in law, which are subject to scholarly discussions. As in the BaFin case, since the Agency is not funded through the federal budget, the Parliament lacks managerial powers.

Also, other domestic and transnational actors are not highly powerful - although an exception is the judicial review at operational level, which remains unaltered. Also, the Audit Office scrutinizes FINMA's behavior, but the consequences in case of misbehavior are not completely clear. The low international involvement of Switzerland compared to EU member states induces that accountability to transnational bodies is a matter of peer pressure (which might be considerable), but no "hard" sanctioning mechanisms are in place. The accountability regime is summarized in Table 6.2.

Forum	Strength of formal rights		Formal accountability level		
	Information	Sanctioning	Strategic	Operational	Managerial
Board of Directors*	■ ■ ■	■ ■ ■	■	■	■
Executive					
- Federal Council	□ □ □	■ × ■	□	×	□
- SIF	× □ ×	× × ×	×	×	×
Legislative					
- Parliament	□ □ ×	■ □ □	□	□	×
Courts/Audits					
- Federal Administrative Court and Federal Supreme Court	× ■ ×	× ■ ×	×	■	×
- Federal Audit office	× ■ ■	× □ □	×	□	□
Expert and administrative bodies					
- SNB	× □ ×	× × ×	×	×	×
International actors					
- FSB, BCBS	□ × ×	□ × ×	□	×	×
Maximum score			■	■	■
Fora contributing to maximum score			Board	Board, courts	Board

Table 6.2: Formal powers of fora vis-à-vis the FINMA

Note: Information rights: ■: Extensive, □: moderate, □: limited, ×: none; Sanctioning rights: ■: direct, □: indirect, ×: none; Formal accountability level: ■: high, □: intermediate, □: low, ×: none; *: The board of directors is an integral part of the agency. While formally a monitoring body, it takes certain operational decisions and partly represents the FINMA in public. It is included in the analysis, but nevertheless thus problematic in terms of our definition of accountability.

In fact, accountability is mainly executed by the board. In this, FINMA resembles private corporate governance structures. However, there is a major exception: the Board of Directors is not primarily a supervisory body, but does take operative decisions itself. This has been criticized in the literature, and is in fact a significant strengthening of FINMA's position. In a strict sense, the partly operative character of the FINMA board is at odds with the definition of accountability applied, demanding accountability fora to be external to the agency. Since the board is by far the strongest forum, it is included in the analysis, but in the interpretation of the findings it is important to bear the somewhat ambiguous character of that forum in mind.

Moreover, in terms of competencies, FINMA is the only Swiss agency that possesses the right to give ordinances (Parlamentarische Verwaltungskontrolle, 2015). A restraining factor might be, however, the somewhat ambiguous legal situation. FINMA has been the first of its kind, and the limits of its discretionary powers as well as parliamentary scrutiny are subject to controversies.

6.5. Bundesnetzagentur (BNetzA)

Let us now turn to the second policy area under scrutiny, the regulation of telecommunications. In the German case the *Bundesnetzagentur* (Federal Network Agency), or BNetzA, is in charge of that task. The analysis follows the same framework as before.

6.5.1. Information rights

The accountability structures of the BNetzA differ in some details dependent on the regulatory area. What I present here is the accountability regime for telecommunications regulation. Formal information rights are assigned by law to the Federal Ministry of Economic Affairs (BMWi), the advisory board (Beirat), plenary and committees of the German Parliament (Bundestag), the European Commission (EC) and the Body of European Regulators for Electronic Communications (BEREC, TKG 2012).

6.5.1.1. Board

The advisory board has the right to demand information and to pose questions to the BNetzA during hearings (§120 TKG 2012). These hearings include mainly strategic (policy) questions. Moreover, it has consultation rights in decision making on frequency allocation and universal service obligations. The intent of this is to maintain the *Länder* influence on those decisions. The board has no accounting responsibilities (*Strength of information rights: moderate at strategic and operational levels*).

6.5.1.2. Government

The BMWi has access to an annual report and a bi-annual action report accompanied by a detailed market analysis done by the monopoly commission (see below). It exerts legal and professional supervision (*Rechts- und Fachaufsicht*) over the BNetzA according to German administrative law, which requires ministerial oversight for any kind of authoritative body. That supervision includes direct access to internal documents, accounting and staff documentation. Moreover, the recent TKG 2012 introduces information duties of the agency regarding its role in international bodies, as soon as issues

beyond the agency's task are treated (§140 TKG 2012). This refers to tasks the agency carries out on behalf of the department and is thus beyond our core research interest. *(Strength of information rights: extensive at strategic, operational, and managerial levels).*

6.5.1.3. Parliament

The parliamentary committees have the right to invite members of the BNetzA for hearings. This entails the committee on economic affairs as well as the budgetary commission (more precisely, in the sub-commission for controlling). Temporary parliamentary investigation committees have moreover the right to summon BNetzA representatives as witnesses *(Strength of information rights: moderate at all three levels).*

6.5.1.4. Courts and Audits

BNetzA decisions are subject to scrutiny by administrative courts. In the course of administrative trials, the BNetzA is required to disclose its files. It is allowed, however, to restrict the court's file access to protect business secrets of the regulated. These restrictions can be overridden only by decision of a higher administrative court *(Strength of information rights: extensive at operational level).*

The Federal Auditing Court (*Bundesrechnungshof*) monitors the resource use of all federal bodies and can monitor accounting unrestrictedly *(Strength of information rights: extensive at managerial level).*

6.5.1.5. Expert and administrative bodies

The Federal Cartel Office (*Bundeskartellamt*) is in direct exchange with the BNetzA to coordinate and harmonize the policy approaches of both authorities (Berliner, 2012: 26). In several relevant procedures (market definition, market analysis, and split of undertakings, since 2012), the BNetzA and the cartel office are required to find a consensus (§123 TKG 2004). In most other regulatory decisions (market access and fee regulation, etc.) the cartel office retains the right to give a statement *(Strength of information rights: extensive at strategic and operational levels).*

The monopoly commission, an advisory expert body to the government, has by law the duty to publish a biennial report on the state of the telecommunications market and the regulatory decisions of the BNetzA. To this end in 2007 the TKG was revised (BGBl. I: 106) and from then on entitled the commission to access all files at the BNetzA, including secret ones. This is a reaction to intensive protest by the commission itself (Monopolkommission, 2012). According to legal scholars, this function of the monopoly commission is seen as a main monitoring device for the government:

“Die Monopolkommission hat zwar selbst keine Eingriffsmöglichkeiten. Die Begutachtung dient aber der Kontrolle der Verwaltungspraxis der Bundesnetzagentur gerade auch durch die Bundesregierung ... und ist insofern auch eine Ausprägung des Aufsichtsrechts” (Berliner, 2012: 28).

(Strength of information rights: extensive at strategic and operational levels).

6.5.1.6. Transnational bodies

The agency is required to deliver information on market definition and market analysis to the EC (articles 15 and 16 of directive 2002/21/EC and articles 10 through 14 of the TKG 2004). The TKG 2012 additionally requires the BNetzA to provide to the EC “after a reasoned request, the information necessary for it to carry out its tasks” (Art. 123b TKG 2012; Interview DE09). This entails secret information from regulated undertakings. Moreover, the EC needs to approve decisions regarding the split of powerful “vertically integrated” market participants - the BNetzA needs to give extensive reasoning for such decisions (§40 TKG 2012) *(Strength of information rights: extensive at strategic and operational levels).*

In the TKG 2004, the national regulators of EU countries have information rights within the market definition and analysis processes. The TKG 2012 replaces the national regulators by the European network of telecommunications regulators (BEREC) and adds wider information rights, similar to those of the EC (§123b TKG 2012). However, the BNetzA is entitled to withhold secret information from fellow regulators and require the

commission not to share secret information among the other national regulators. (*Strength of information rights: extensive at strategic and moderate at operational level*).

6.5.2. Sanctioning rights

After having assessed the formal information rights of all accountability fora, we next scrutinize their formal sanctioning powers.

6.5.2.1. Board

The advisory board possesses mainly information rights. In frequency allocation and universal service issues, the board “is involved”. Involvement (“*Mitwirkung*”) implies the right to be consulted, and the agency should strive for a consensus. However, it can deviate from the board’s opinion for justified reasons. The board thus has no real sanctioning power.

6.5.2.2. Government

The parent department of the BNetzA, the BMWi, holds strong sanctioning rights: it can delegate tasks to the BNetzA by decree, drafts changes in legislation and is in charge of the legal and technical supervision (*Rechts- und Fachaufsicht*). Within legal supervision it monitors the agency’s actions on compliance with law. In the areas in which the BNetzA acts on behalf of the department – i.e., international negotiations (§140 and 141 TKG 2012) – the BMWi has a veto right over the agency’s decisions (*Genehmigungsvorbehalt*) and is entitled to override them (*Ersatzvornahme*). By technical supervision, it monitors the appropriateness of agency action and can give general and individual instructions (*allgemeine Weisungen* and *Einzelweisungen*). The former give detailed instructions on legal interpretation, while the latter can easily serve to influence operative decisions and are considered as the most powerful instrument at the department’s disposal (Böllhoff, 2005: 89). Before 2004, the law requested the publication of general instructions, and was quiet on individual ones. The department interpreted the law in the way that it could give individual instructions without publishing it. The TKG amendment of 2004 made clear that the department can give individual instructions, even to the ruling chambers, so long as it publishes the order in the official government bulletin. This is a strong formal right, but de facto, the publication requirement is a strong threshold.

Moreover, the BMWi can request the dismissal of the agency president for important reasons, which is then decided on by the federal government. Finally, the BMWi holds the *Dienstaufsicht* and *Finanzaufsicht* powers (staff and financial supervision) and is assigned to set the fees the BNetzA is allowed to charge (Art 142 TKG). The BMWi supervises the agency's budgeting and "may utilize negotiations on the budget to influence general and even detailed policy-making" (Böllhoff, 2005: 158). According to its supervisory rights, the department moreover has to approve changes in internal structure and procedural rules, and is in charge of staff policy and recruitment for higher positions (Böllhoff, 2005: 157-158, 173). Finally, a formal way to influence regulatory policy is, of course, to change the law. To draft bills is a core task of federal ministries, and policies disliked by the department are addressed in the following TKG amendment (interview DE08) (*Direct sanctioning rights at all levels*).

6.5.2.3. Parliament

The chambers of parliament (*Bundestag* and *Bundesrat*) can jointly change national regulatory law. The Bundestag has also budgetary control over the BNetzA. There is no way to influence operative decisions apart from public pressure (*Strength of sanctioning rights: direct at strategic and managerial levels, indirect at operational level*).

6.5.2.4. Courts and Audits

Administrative courts can decide both on the substance and the procedures of agency decisions (Böllhoff, 2005: 198) and can revoke them (*strength of sanctioning rights: direct at operational and managerial levels*).

The auditing court itself regularly publishes detailed reports, which can trigger reactions by other accountability fora. It is the audit's choice if it publishes its critique or not. This formal disapproval is thus an *indirect sanctioning option at managerial level*.

6.5.2.5. Expert and administrative bodies

The same holds for the monopoly commission. It relies on its biennial reports, which include a critical appraisal of the BNetzA's practices (see e.g. Monopolkommission, 2011) (*Strength of sanctioning rights: indirect at strategic and operational level*).

In contrast, the federal cartel office has to agree (*“im Einvernehmen”*) on decisions regarding market definition and analysis, frequency allocation, and since 2012 also to the split of undertakings, which de jure assigns it a veto power (Böllhoff, 2005: 193) over strategic decisions (*Strength of sanctioning rights: direct at strategic level*).

6.5.2.6. Transnational bodies

The European Commission is a highly influential player: It can initiate new directives at EU level in order to implement effective competition in a common market (art. 86 of the EC Treaty) or veto BNetzA's decisions by formulating its disagreement with the ways the agency defines its relevant markets (§12 TKG 2012 and articles 15 and 16 of the telecommunications directive). When the veto right was established by the directive 2002/21/EC, the RegTP (the predecessor of the BNetzA) opposed this (Böllhoff, 2005: 212). Moreover, since 2012, the EC can veto agency decisions on the split of powerful market participants (§40 TKG 2012). 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) (*Strength of sanctioning rights: direct at strategic and operational levels*).

The BEREC members lack formal sanctioning powers, but since the TKG 2012 they can make statements that have to be “widely considered” within the market definition and market analysis processes (art. 12 TKG 2012) (*Strength of sanctioning rights: none*).

6.5.3. The formal accountability regime of the Bundesnetzagentur

In sum, only a limited number of fora remain formally powerful (see Table 6.3): Interestingly, there is no reduced role of Government and Parliament at a formal level. Both retain the rights they usually have vis-à-vis administrative bodies. The parent department BMWi has strong powers at all levels. The Parliament (strategic and managerial levels) possesses powerful sanctioning rights, but is somewhat limited regarding

information. Since MPs are represented on the board, it will be interesting to see if they can benefit from that role, despite the fact that the board has no sanctioning powers.

The judicial review aspect and auditing remain strong, as in the BaFin case and in general in the German public administration system. The BNetzA needs to coordinate with the cartel office due to the latter’s veto power on certain issues. Interesting, in addition, is the formal role of the Monopoly Commission – this is a pure expert body, which is quite rare in Germany, where they even less frequently possess significant powers.

At the transnational level, both the European Commission and the BEREC network have gained a formal role in the TKG. In particular the EC is a powerful competitor to the BMWi in terms of formal accountability rights. Thus, it will be enlightening how coordination among the different accountability fora works in practice.

Forum	Strength of formal rights		Formal accountability level		
	Information SOM	Sanctioning SOM	Strategic	Operational	Managerial
Board	■□×	×××	×	×	×
Executive					
- Department (BMW _i)	■■■	■■■	■	■	■
Legislative					
- Bundestag	□□□	■□■	□	□	□
Courts/Audits					
- Administrative courts	×■■	×■■	×	■	■
- Federal audit office	××■	××□	×	×	□
Administrative and expert bodies					
- Monopoly commission	■■×	□□×	□	□	×
- Federal Cartel office	■■×	■××	■	×	×
International actors					
- EU commission	■■×	■■×	■	■	×
- BEREC	■□×	×××	×	×	×
Maximum score			■	■	■
Fora contributing to maximum score			BMW _i , cartel office, EC	BMW _i , courts, EC	BMW _i , courts

Table 6.3: Formal powers of fora vis-à-vis Bundesnetzagentur

Note: SOM: Strategic/Operational/Managerial level. Information rights: ■: Extensive, □: moderate, □: limited, ×: none; Sanctioning rights: ■: direct, □: indirect, ×: none; Formal accountability level: ■: high, □: intermediate, □: low, ×: none.

6.6. Eidgenössische Kommunikationskommission (ComCom)

The last case study deals with the accountability regime of the Swiss telecommunications regulator, the Communications Commission (*Eidgenössische Kommunikationskommission*, ComCom). According to its formal characteristics, it hardly seems independent, and is provided with few competencies. Interestingly, the analysis of the de facto situation yields in contrast that inter-institutional trust and mutual respect widens the agency's discretion, while leaving the governmental actors sufficient instruments to keep themselves informed.

6.6.1. Information rights

ComCom's governance structure clearly affects the informational dimension of accountability. Due to OFCOM's role, the "information advantage" claimed by classical agency theory is hardly an issue.

6.6.1.1. Board

There is no board.

6.6.1.2. Government

OFCOM has virtually all information ComCom has, and prepares and implements ComCom's decisions. It plans and prepares frequency tenders, prepares decisions on interconnection issues (including consultations of the Competition Commission), and can apply for decisions at ComCom. Moreover, ComCom has delegated some tasks – such as licensing of landlines – to OFCOM, which also executes monitoring and enforcement on behalf of the commission (Art. 8 Reglement ComCom, SR 784.101.115). If OFCOM detects non-compliance with a decision taken by ComCom, it *applies* for the Commission's reaction (Art 58 No. 4 FMG, SR 784.10). At international level, OFCOM "accompanies" the ComCom president to meetings of the Independent Regulators Group (IRG) and BEREK.⁴⁷ Finally, it is formally granted access to ComCom's meetings and reports to the Commission (Art. 14 and 15 Reglement ComCom, SR 784.101.115). The only exception

⁴⁷ <http://www.bakom.admin.ch/org/international/01027/index.html?lang=en>, retrieved June 8, 2015.

is the position of ComCom on political issues, when ComCom members discuss their joint position without OFCOM's presence. OFCOM hence not only has "access to internal documents", it actually drafts them itself. Its information rights are, accordingly, *extensive* at strategic and operational levels.

DETEC and the Federal Council receive an annual report (Art. 57 FMG, SR 784.10), which has to cover the Commission's past decisions, as well as its goals and policy. But the Commission is free to choose the extent of reporting:

"Der Jahresbericht ... befasst sich insbesondere mit den im Berichtsjahr behandelten wichtigen Fragen, der Politik der Kommission und ihren Zielen. Die Kommission bestimmt über Form und Umfang der Veröffentlichung" (Art. 9 Reglement ComCom, SR 784.101.115).

DETEC's general secretary manages procurement, human resources, and accounting for all regulatory authorities under its supervision (Eidgenössische Kommunikationskommission, 2015: 25). It thus possesses all possible information on managerial issues.

Furthermore, the governance structure raises a question on DETEC's right to require sensitive information from OFCOM, when the latter deals with ComCom issues. The confidentiality of business data is a core concern in market regulation and one argument in favor of independence of regulators. Unlike other countries, Swiss administrative law does not have an overarching principle of ministerial responsibility and administrative supervision. Although the Administration Organization Act (*Regierungs- und Verwaltungsorganisationsgesetz*, RVOG, SR 172.010) assigns to the Federal Council the "continuous and systematic supervision" of the Federal administration, the Council monitors peripheral administration only "in accordance with special regulations" (Art. 8 RVOG, SR 172.010). In other words, special law determines the oversight role of the Federal Council (Müller and Vogel, 2010: 654). Given OFCOM's role as the back office of ComCom and part of DETEC, it underlies ordinary reporting duties to the DETEC. DETEC's right to request ComCom-related information is thus only limited by the FMG, stating:

“The Commission and the Office shall provide to other Swiss authorities data *which these authorities need in order to fulfill their legal duties*” (Art. 13b FMG, emphasis added).

The emphasized passage prevents the transmission of sensitive business data to the Federal Council (interview CH13). In light of the partly vague law regarding decentralized administrative bodies, however, it is not completely improbable that actors disagree on what data DETEC or the FC may need “to fulfill its legal duties”. Nevertheless, as long as we treat OFCOM as an integral part of DETEC, both actors’ information rights are *extensive at strategic and operational levels*. Moreover, DETEC’s assistance in accounting provides access to the Commission’s budget and personnel policies and thus grants *extensive* information rights at managerial level.

6.6.1.3. Parliament

Information rights of the Swiss Parliament are discussed extensively in the chapter on the FINMA (section 6.3.1.3). The Parliament, in particular its finance and control committees, has far-reaching information rights. However, legal scholars differ in their viewpoint regarding parliamentary oversight of autonomous units. Some scholars see only minor differences between those units and direct federal administration (Biaggini, 2013; Müller and Vogel, 2010). Nevertheless, restrictions apply since the Parliament is only entitled to monitor the correctness of procedural rules (Biaggini, 2013); and in practice the Parliament should be reluctant to compete with the Federal Council (Müller and Vogel, 2010). In contrast, Uhlmann (2013) emphasizes the role of special legislation.

Legal scholars agree that Parliament has access not only to strategic and budgeting issues, but also to operational decision making. Thus formally, we can assign to the Parliament *extensive information rights at all three levels* of agency action. We have to keep in mind, however, the restrictions highlighted by Müller and Vogel, and the overall legal dispute on parliamentary rights.

6.6.1.4. Courts and Audits

ComCom’s decisions are – as with all Swiss administrative decision-making bodies – subject to judicial review by the Federal Administrative Court (FAC, Art. 33f

Verwaltungsgerichtsgesetz, VGG, SR 173.32), prior to its creation in 2007 by the Swiss Federal Supreme Court. While in general decisions of the Federal Administrative Court can be appealed against in front of the Supreme Court, the Federal Supreme Court Act (art. 83p *Bundesgerichtsgesetz, BGG, SR 173.110*) rules out appeals against licensing decisions and decisions regarding interconnection conflicts according to Art. 11a FMG. As of 2007, the Supreme Court is thus irrelevant for ComCom issues. The FAC's information rights regard the *operational* and *strategic* levels. In these regards, its information rights are *extensive*.

ComCom – as with all Swiss administrative units – is subject to auditing by the Swiss Federal Audit Office (Eidgenössische Finanzkontrolle, EFK), according to Art. 8 of the Federal Audit Office Act (Finanzkontrollgesetz, FKG, SR 614.0). The EFK possesses extensive information rights with regard to managerial, but partly also with operational issues.

6.6.1.5. Expert and administrative bodies

The Ombudscom foundation has been established as an arbitration body between providers and consumers of telecommunication services. It is supervised by OFCOM, while ComCom supervises and relieves the obligation of professional secrecy. The Ombudscom has no formal rights vis-à-vis ComCom.

Price Surveillance monitors markets and can give orders to reduce prices. It has to be consulted by OFCOM in the preparation of ComCom decisions (Art. 14 *Preisüberwachungsgesetz, PÜG, SR 942.20*). ComCom has to inform Price Surveillance of its price assessment (Art. 15 *2bis PÜG*) and can be required to cooperate with, and forward relevant documents to, Price Surveillance (Art. 18 *PÜG*). Furthermore, Price Surveillance has access to relevant documents from the Competition Commission (Art. 25 *Kartellgesetz, SR 251*) and attends its meetings in an advisory role (Art. 5 No.2 *PÜG*; Art. 11 *Reglement ComCo, SR 251.1*). Its information rights are thus *extensive at operational level*.

The Competition Commission (ComCo) is charged with preventing market failures by “combating harmful cartels, monitoring dominant companies for signs of anti-competitive conduct, enforcing merger control legislation and preventing the imposition of restraints of

competition.”⁴⁸ By order of OFCOM, ComCo assesses the market dominance of actors according to Art. 11a FMG in cases of interconnection issues. In all other questions of competition, as well as within telecommunications markets, ComCo is in charge. Private as well as public actors are required to cooperate with ComCo and to provide all necessary documents and information (Art. 40 and 41 *Kartellgesetz*, KG, SR 251). Moreover, it can summon witnesses and order house searches (Art. 42 KG) and use external expertise (Art. 19 Reglement ComCo, SR 251.1). Its information rights are without doubt *extensive*. With regard to ComCom, ComCo’s role is restricted to the analysis of market dominance. Since we defined market analysis as a *strategic* task, we have to classify ComCo’s role accordingly.

6.6.1.6. Transnational bodies

ComCom is a member of the Independent Regulators Group (IRG) and has observer status within the Body of European Regulators for Electronic Communications (BEREC). Regulators of EU member states are required to provide a wide range of information on markets and their own activities to BEREC and its members. These provisions do not apply to Switzerland as a non-member. BEREC thus lacks any formal information rights with regard to ComCom. The same holds for the IRG, which is a voluntary bottom-up organization of national regulators for support and exchange without formal powers.

6.6.2. Sanctioning rights

The first part of the analysis has yielded a number of fora with information rights. The present section will conclude that primarily government and parliament remain powerful accountability fora in the formal sense.

6.6.2.1. Board

There is no board.

6.6.2.2. Government

The Federal Council’s Corporate Governance report enumerates several measures at hand to “counteract skewed developments within the Autonomous Bodies” (Eidgenössische

⁴⁸ <http://www.weko.admin.ch/index.html?lang=en>, retrieved June 11, 2015.

Finanzverwaltung, 2006: 8279), among them amendment and change of the objectives, the refusal of the management or financial reports, dismissal of board members or to propose a law change to the Parliament in order to change the body's organization and/or reduce its autonomy. The report claims to "apply by analogy" to executive commissions (Eidgenössische Finanzverwaltung, 2006: 8242). By law, the Federal Council owns supervisory rights vis-à-vis the decentralized federal administration "according to special provisions" (Art. 8 No. 4 RVOG, SR 172.010). ComCom is part of the decentralized federal administration according to Article 6 of the Government and Administration Organisation Ordinance (*Regierungs- und Verwaltungsorganisationsverordnung*, RVOV, SR 172.010.1) and hence subject to the Federal Personnel Act (Art. 2 No. 1.e *Bundespersonalgesetz*, BPG, SR 172.220.1). The BPG declares "important reasons" necessary to dismiss members of elected bodies. A further reason for dismissal is incorrect declaration of conflicts of interest (Art. 8f No. 4 RVOV). The elected Commission members are automatically re-elected, except where the Federal Council has "reasonable causes" to desist from re-election, presenting these at least six months before the term of office ends (Art. 14 BPG).

A further core task of the executive is to adopt ordinances: the Federal Council has to approve changes in ComCom's statutes (Art. 56 No. 3 FMG, SR 784.10). Furthermore, it is responsible for the ordinance defining the markets, setting the procedural rules for the Commission's decisions, and also the principles of cost calculation (Ordinance on Telecommunications Services, *Fernmeldedienstverordnung*, FDV, SR 784.101.1). Moreover, the fees ComCom receives for its services (covering only a part of the Commission's budget) are fixed by the Federal Council (Art. 41 FMG) in an ordinance (*Fernmeldegebührenverordnung*, GebV-FMG, SR 784.106). These ordinances can be changed by a majority decision of the Federal Council, but the Parliament can demand to be informed (Art. 22 and 151 ParlG, SR 171.10). The Federal Council has neither the right to accept or refuse the annual report; nor to set, amend or change the strategic goals and objectives of ComCom. Nor is it entitled to override agency decisions.

To sum up, the Federal Council can change ordinances or propose a change of law to the Parliament. Via ordinances, it can directly affect the agency's discretion (e.g. by market

definition), and the internal organization and the budget of ComCom. Thus, sanctions address primarily strategic and managerial issues. Altogether, the Federal Council's formal powers have the potential to reduce the agency's autonomy to a minimum, but these instruments are rarely in use.

In a different vein, the particular structure of OFCOM, serving both DETEC and ComCom, induces an additional chance to indirectly influence the Commission's operative decisions (Parlamentarische Verwaltungskontrolle, 2015: 134). At a formal level, OFCOM, partly subordinated to ComCom, has no formal sanctioning powers of its own.

6.6.2.3. Parliament

Parliamentary powers lie primarily in the budgeting function. It passes the budget and approves the State Account (Art. 142-3, 145 ParlG, SR 172.10; Art. 167 BV, SR 101). Moreover it passes the legislature plan of the Federal Council (Art. 146 ParlG), and approves the Federal Council's annual report (Art. 145 ParlG). A further option, of course, is to pursue a law change. This can also be done by a GPK (see the respective FINMA section). After all, the Parliament is formally able to draw *direct consequences at strategic level and can put indirect pressure at the other two levels*.

6.6.2.4. Courts and Audits

The Federal Administrative Court has the formal right to revoke all regulatory decisions, due to factual or formal errors such as insufficient legal grounds. Its powers regarding consequences are hence *direct at managerial level*.

The Audit Office in sum possesses rights to issue instructions and to publish objections, and hence to draw *indirect consequences at managerial level*.

6.6.2.5. Expert and administrative bodies

Price Surveillance has the right to be heard and can apply for lowering prices at ComCom. If ComCom refuses to follow the application, it has to justify that decision (Art. 15 *Preisüberwachungsgesetz*, PÜG, SR 942.20). Thus, Price Surveillance has no formal sanctioning rights.

The Competition Commission has to be heard on interconnection issues and provides reports on market power (Art. 11a FMG). However, ComCo's statement is not binding and can be disregarded by ComCom (interview CH12). It thus has no sanctioning powers.

6.6.2.6. Transnational bodies

Neither the IRG nor BEREK possess formal rights regarding ComCom.

6.6.3. The formal accountability regime of the ComCom

As with the BaFin and BNetzA, the overall accountability of ComCom is fine. In Table 6.4, we find weak accountability to the government at operational and managerial levels. While the former is what I theoretically expect, the latter is somewhat surprising. However, this can be easily explained. First, the table depicts the situation prior to 2012, when OFCOM had been in charge of administering budgetary and personnel issues of ComCom. Since OFCOM lacks sanctioning powers, managerial accountability is absent. We can, however, expect that there would have been some coordination on that between OFCOM and DETEC, which is not depicted in the analysis of formal mechanisms. Second, the responsibilities were changed in 2012, and now the DETEC itself administers ComCom's managerial issues. While we can only speculate if that was intended, information and sanctioning powers at managerial level are now in the same hands, which results in a raised accountability score for the DETEC (see note a of Table 6.4).

A further peculiarity not depicted in the table is the double-hatted character of OFCOM. ComCom's lack of its own secretary is also unique in the Swiss context. Since it is in fact the back office of both DETEC and ComCom, OFCOM has access to virtually all necessary information on ComCom's business. Moreover, it prepares ComCom's decisions and thus has a chance to informally influence these. I therefore decided to assign OFCOM indirect influence in operational decision making. The Federal Administrative Court and the Audit Office remain in their traditional role. Besides them, there are neither domestic nor transnational bodies with formal accountability powers.

The next chapter will show how this arrangement works in practice. ComCom's design is quite far away from being a "textbook solution" – it is very limited with regard to

competencies and resources and does not have much in common with most contemporary IRAs. To scrutinize that arrangement in detail thus is particularly interesting.

Forum	Strength of formal rights		Formal accountability level		
	Information	Sanctioning	Strategic	Operational	Managerial
Executive					
- Federal Council/DETEC ^a	■□×	■□■	■	□	×
- OFCOM ^a	■■■	×□×	×	□	×
Legislative					
- Parliament	■■■	■□□	■	□	□
Courts/Audits					
- Federal Administrative Court	■■×	×■×	×	■	×
- Federal Audit Office	×■■	××■	×	×	■
Expert and administrative bodies					
- ComCo	■××	×××	×	×	×
- Price Surveillance	×■×	×××	×	×	×
International actors					
- IRG	×××	×××	×	×	×
- BEREC	×××	×××	×	×	×
Maximum score			■	■	■
Fora contributing to maximum score			FC, Parliament	Court	Audit Office

Table 6.4: Formal powers of fora vis-à-vis the ComCom

Note: SOM: Strategic/Operational/Managerial level. Information rights: ■: Extensive, □: moderate, □: limited, ×: none; Sanctioning rights: ■: direct, □: indirect, ×: none; Formal accountability level: ■: high, □: intermediate, □: low, ×: none; a: Until 2012, when the administration of the budget shifted from OFCOM to DETEC. This results in the following changes: DETEC: Information ■□■/Sanctioning ■□■/Formal accountability level: ■□■; OFCOM: Information ■■×/Sanctioning ×□×/Formal accountability level: ×□×

6.7. Patterns of formal accountability regimes: ‘independent, yet accountable’?

What can we now learn regarding the relationship between independence and accountability from the in-depth analysis of the formal accountability regimes? In order to enhance comparability of the different accountability regimes, I have transferred the symbols attributed to the accountability fora into scores according to the scheme depicted in Table 5.6 (p. 111). The first question to answer is: is there an overall accountability deficit? In other words, does the fact that regulatory agencies are designed to be independent mean that they all lack formal accountability relationships? The answer is, obviously, no: as shown in Table 6.5, all agencies face high-level accountability forums at all levels of agency action. The only exception is FINMA - but only under the condition

that the Board of Directors is not considered as a fully-fledged forum.⁴⁹ Apart from that, however, we can derive that regulators in fact are formally accountable.

Level of action	BaFin	FINMA	BNetzA	ComCom	Average
Strategic	3	3	3	3	3
Operational	3	3	3	3	3
Managerial	3	3	3	3	3

Table 6.5 Maximum accountability scores by agency and level

Note: *: Lower scores since we defined the Board of Directors not to be an accountability forum according to our definition.

The next question to answer is: to whom? According to Hypotheses 1.1 and 1.2, operational accountability to government and parliament should be reduced, while all other fora should remain in power. The same should hold for government and parliament at strategic and managerial levels, respectively. In order to check these hypotheses, I have calculated an average accountability score for each forum type: boards, government, parliament, courts and audits, administrative and expert bodies, and transnational bodies. The average is calculated separately for each level of agency action. If there are several accountability fora in one category, I opted for the highest value. The result is depicted in Table 6.6.

The table represents the most condensed summary of the findings on formal accountability. It allows a comparison of agencies in a highly detailed way. For the moment, however, we are interested in the average score of forum types. Table 6.7 shows the right column of the previous table again in a more convenient manner for comparisons.

⁴⁹ The reasons to exclude the Board of Directors would be a), that it is an integral part of the Agency; and b) the Board owns operative decision-making competencies. This clearly undermines the Board's supervisory character.

Forum type	BaFin	FINMA	BNetzA	ComCom	Average
Strategic level					
Board	2	3	0	0	1.25
Government	3	2	3	3	2.75
Parliament	2	2	2	3	2.25
Courts and Audits	0	0	0	0	0.00
Administrative/expert bodies	1	0	3	0	1.00
Transnational bodies	1	1	3	0	1.20
Operational level					
Board	0	3	0	0	0.75
Government	3	0	3	1	1.75
Parliament	1	1	1	1	1.00
Courts and Audits	3	3	3	3	3.00
Administrative/expert bodies	1	0	1	0	0.50
Transnational bodies	3	0	3	0	1.50
Managerial level					
Board	3	3	0	0	1.50
Government	3	2	3	0	2.00
Parliament	0	0	2	1	0.75
Courts and Audits	3	1	3	3	2.50
Administrative/expert bodies	0	0	0	0	0.00
Transnational bodies	0	0	0	0	0.00

Table 6.6 Accountability strength by forum type and level

Forum type	Strategic	Operational	Managerial
Board	1.25	0.75	1.50
Government	2.75	1.75	2.00
Parliament	2.25	1.00	0.75
Courts and audits	0.00	3.00	2.50
Adm./expert bodies	1.00	0.50	0.00
Transnational bodies	1.20	1.50	0.00

Table 6.7 Average scores by forum type and level

The table shows that, indeed, accountability to the government is weakest at operational level. Similarly, accountability to parliaments is much weaker at operational than at strategic level (the low value for managerial accountability corresponds to the parliament's general functions and the fact that I defined budget cuts as a strategic competence). Furthermore,

courts and audits are among the most powerful fora at operational and managerial levels, respectively. Regarding theorems 1a and 1b we can already state that political bodies are restricted mainly at operational level, while other accountability relationships remain intact.

If the conventional expectation is true, that there is a trade-off between independence and accountability, this should be reflected in the empirical findings: The qualitative assessment of independence in chapter 3 has yielded, that FINMA appears to be the most, and ComCom the least independent agency, while the two German ones stay in between. Quantitative scores, in contrast, see BaFin as the least independent agency, while the others are all at a similar level. Of course, we can reasonably expect a trade-off only at operational level, and with regard to governments and parliaments. In the presence of a trade-off, we thus should be able to find some co-variation of independence and accountability in the way that high independence should go along with low accountability scores.

In fact, Table 6.8 shows some tendencies, but none of the two assessments of independence fits with the accountability pattern found: With regard to governments, German agencies score high (and hence low on independence), and Swiss agencies rather low. ComCom is thus completely at odds with the theoretical expectation. On the other hand, BNetzA scores quantitatively as high as both Swiss agencies, and that difference is not reflected in the accountability score either. With regard to parliaments, the pattern at strategic level meets with the expectations, while at operational level, there no variation at all.

		FINMA	BNetzA	BaFin	ComCom
Agency independence	Hanretty/Koop score	.48	.48	.34	.51
	Qualitative assessment	++	+	-	--
Formal accountability to government	Strategic level	2	3	3	3
	Operational level	0	3	3	1
	Managerial level	2	3	3	0
Formal accountability to parliament	Strategic level	2	2	2	3
	Operational level	1	1	1	1
	Managerial level	0	2	0	1

Table 6.8 Comparing independence and accountability

We can sum up, that there no clear pattern detectable that indicates a trade-off between independence and accountability. Not even taking into account strategic and managerial levels, there is the slightest sign of weakened accountability due to higher or lower autonomy. This is a finding with a potential for generalization, and it would be interesting to countercheck it in a larger sample.

There is a huge amount of variation found in the analysis of accountability regimes with regard to countries and sectors. Table 6.9 compares the accountability strength of forum types over countries. Obviously, accountability structures in Germany are more powerful: governmental accountability is stronger at all three levels, administrative and transnational bodies at strategic and operational bodies, courts and audits, and the parliament at managerial level. Only Swiss boards are stronger than their German counterparts.

Another remark regards the formal powers of transnational institutions. In the BNetzA case, and more recently also in the German financial sector, EU institutions have gained formal sanctioning rights. Their powers in particular at operational level are striking. In other words, accountability has been shifted rather than reduced, and is now held by the EU Commission (telecommunications) and the European Supervisory Authorities (ESA), respectively. Depending on the perspective, one might criticize both arrangements as either repoliticization (due to the influence of the Commission) or technocratization (since the ESA are formed by representatives of national regulators).

Forum type	Level of agency action					
	Strategic		Operational		Managerial	
	DE	CH	DE	CH	DE	CH
Board	1	1.5	0	1.5	1.5	1.5
Government	3	2.5	3	.5	3	1
Parliament	2	2.5	1	1	1	.5
Courts and audits	0	0	3	3	3	2
Adm./expert bodies	2	0	1	0	0	0
Transnational bodies	2	.5	3	0	0	0

Table 6.9 German and Swiss agencies compared by forum type

Note: Higher values indicated in bold; DE: Germany, CH: Switzerland.

Comparing sectors, it turns out that the differences between financial and telecommunications regulators are much less pronounced than those between Swiss and German agencies. Table 6.10 provides average scores for the financial and telecommunications sectors. There are some differences, but rather marginal ones, and there is no predominant pattern. Agencies in the financial sector have more powerful boards and governments regarding managerial issues. In particular the difference in boards' strength is striking: highly powerful boards in the financial sector contrast with formally powerless (BNetzA) or non-existent (ComCom) ones. Telecom regulators, on the other hand, are more prone to strategic accountability by government, parliament, administrative and expert bodies, and transnational bodies.

Forum type	Level of agency action					
	Strategic		Operational		Managerial	
	Fin	Tel	Fin	Tel	Fin	Tel
Board	2.5	0	1.5	0	3	0
Government	2.5	3	1.5	2	2.5	1.5
Parliament	2	2.5	1	1	0	1.5
Courts and audits	0	0	3	3	2	3
Adm./expert bodies	.5	1.5	.5	.5	0	0
Transnational bodies	1	1.5	1.5	1.5	0	0

Table 6.10 Financial and telecommunications regulators compared by forum type

Moreover, it is quite obvious that German agencies face a significantly higher number of accountability fora forming their accountability regime, than their Swiss counterparts. Figure 6.2 depicts the number of fora and their respective strength across agencies and levels of action. Fora without formal accountability powers have been left out. There are at least two possible explanations for that. First, Germany as an EU member state is more strongly involved in transnational structures, which, as already outlined, have gained formal powers over time. In fact, three strategic and two operational accountability fora of BaFin are transnational bodies, compared with two for the BNetzA, one for FINMA and none in the ComCom case. This explains part of the picture, and also indicates that new accountability structures are regularly put on top of existing ones, rather than replacing them. At least at the formal level, independence through transnational pressure does not

mean less accountability, but rather more – but to different and more diverse accountability fora. However, also subtracting transnational bodies, the difference in forum numbers does not blur completely.

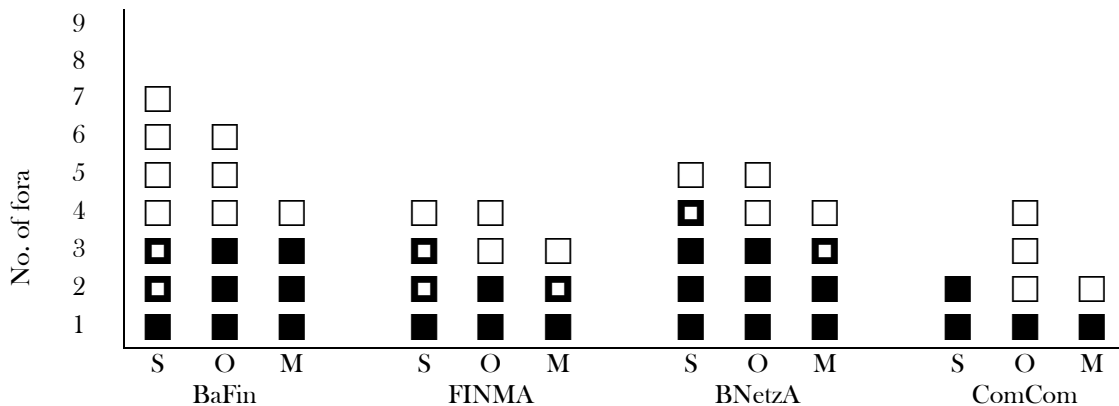


Figure 6.2 The number of accountability fora in the regime

Note: S/O/M: Strategic/Operational/Managerial level; Formal accountability level of fora: ■: high, ◻: intermediate, □: low.

After all, there is no accountability deficit in the present sample: all levels of agency action are formally monitored. Second, there indeed signs that operational influence of parent departments is reduced in the case of IRAs – which meets with the normative argument made at the outset of the chapter. Theorems 1a and 1b are corroborated. Eventually, theoretical consideration indeed play a role in agency design. Third, there is no co-variation between independence and accountability in the sample. Thus, in a nutshell, at least for the agencies under scrutiny, we can attest that there is no accountability deficit, and no trade-off with independence. In a formal sense, all agencies are thus “independent, yet accountable”.

Differences in the structure of the accountability regimes, moreover, let us expect interesting insights from analysis of accountability in practice. First, there is a strong dynamic of transnationalization in German agencies, which has an impact on the number and power of accountability fora. This might be a challenge for coordination among fora. Second, accountability appears to be generally higher in Germany than in Switzerland. The latter’s fora thus face stronger pressures to compensate own weaknesses. The analysis of accountability in practice (chapter 7) deals with these points.

7. Accountability of Regulatory Agencies in practice

Chapter 6 has revealed that there is no detectable trade-off between independence and formal accountability arrangements. Nevertheless, formal accountability can be more or less effective, depending e.g. on the amount of resources and interest available or specific dynamics within the accountability regime. It is thus not only the institutional structure, but also actor behavior within that structure that matters:

“The accountability deficit is located in institutions and actors who are assumed to call others to account and assess and sanction accounts but lack motivation, time and energy, knowledge or capabilities for so doing and for improving the accountability system at large (Busuioc 2010: 220 – 23; Considine 2002; Shapiro 2005)” (Olsen, 2013: 454).

The chapter thus aims to depict a system of actor strategies to utilize strengths and/or overcome shortcomings of the accountability regime. It thus follows a rather evaluative research question:

RQ 2: How can we expect fora or agencies to act within a given accountability regime? And how does that affect overall accountability?

The aim of the chapter is twofold: First, the findings on formal accountability and eventual deficits can be modified by learning more about accountability in practice. Are the formal structures working well or are there reasons to believe that formal accountability is de facto not effective? Building upon the regime approach outlined in chapters 4 and 5, I focus here in particular on dynamics among fora, and between agency and fora. In effect, we can modify our normative assessment of IRAs' accountability.

The second purpose of the chapter is, to identify patterns of actor strategies: Different strands of theory in delegation differ with regard to their expectations on actor behavior. Agency theory highlights control, others cooperative behavior. Empirical research has found mixed evidence for both approaches and is developing more fine-grained hypotheses. The present analysis maybe can contribute here some additional insights. In

this sense, the unit of analysis is not the agency anymore, but the individual forum: Formal analysis has detected 36 fora relevant in our four cases.⁵⁰

The theoretical part in section 7.1 focuses hence on arguments regarding actor behavior and strategies, associates these arguments with institutional features and develops expectations on the empirical findings. Section 7.2 enumerates the data sources of the study. Sections 7.3 to 7.6 present the four cases in detail. Section 7.7 concludes.

7.1. Accountability in practical use

In the present section, I compare different approaches to the question of delegation and accountability. Besides the most influential agency theory, that includes stewardship theory and recent efforts to explain actor behavior as reputation-driven. From these approaches, a number of mechanisms affecting accountability in practice is derived. The regime approach applied serves here in particular to underline the importance of interaction processes among accountability fora. I associate the likeliness of these mechanisms with a number of scope conditions already used in chapter 3 to justify the selection of cases: Resources of fora, governance structures (domestic administrative, domestic political, and transnational ones), and policy salience.

The most influential approach with regard to delegation issues is doubtlessly agency theory. Agency theory understands delegation decisions as driven by resource scarcity, and the search for efficiency gains. Due to lack of time and expertise, delegation is a necessary principle of representative political systems (Lupia and McCubbins, 1994). “Principals” delegate tasks to “agents” since they are better informed and can do a better job. In other words, delegation occurs because of a presumed higher efficiency in terms of output (Føllesdal, 2011; Majone, 1999). According to normative agency theory, however, this occurs at the cost of agency loss – i.e. the risk that the agent acts contrary to the principal’s interests.

In this light, the principal faces a dilemma, since she depends on the resources and expertise of the agent, but cannot always be sure of its intentions and/or actions, since she

⁵⁰ BaFin: 12 fora, FINMA: 8, BNetzA: 9, ComCom: 7.

lacks complete information (Gilardi and Braun, 2002). This is irrelevant as long as agent and principal pursue the same goals. As soon as this is unsure from the principal's perspective, two problems can occur: if the principal is unsure about the agent's preferences (known as *hidden intention*), she might select an agent who will pursue other than the principal's interests (*adverse selection*); and incomplete information on the agent's actions (*hidden action*) or the results from these actions (*hidden information*). In these cases, the agent can make use of his informational advantage to his own merit (moral hazard, Arrow, 1985). As a consequence, according to classical agency theory, the principal has to effectively monitor the agent in order to prevent undesired behavior. Accountability from this perspective is mainly about the reduction of information asymmetries and the containment of "bureaucratic drift", i.e. the pursue of own interests by the bureaucracy (Hammond and Knott, 1996; McCubbins et al., 1987, 1989). From agency theory, we can derive the following hypothetical mechanisms:

1. **Distrust and diverging interests between forum and agent.**
2. **The forum is expected to have own interests at stake, and to execute monitoring at an efficient level.**
3. **The forum uses sanctions at its disposal to align agency behavior with own interests. This might result in reduced agency autonomy.**
4. **The agent, in turn, is expected to avoid accountability whenever possible in order to pursue its own goals.**

The restricting factor in this arrangement is the limited resources of the principal: Resources (in terms of time, personnel, and expertise) affect the capabilities of an overseeing body to gather and process sufficient information. These resources can be time (Schedler and Santiso, 1998), personal expertise or qualified staff of individual members of overseeing bodies, like boards or parliamentary committees. Delegation in turn occurs primarily in areas of high complexity, requiring technical expertise politicians do not have and cannot acquire at reasonable costs (Majone, 2001a; Radaelli, 1999). While monitoring is desirable from the theory's viewpoint, at a certain point it weighs out the initial efficiency gains from delegation.

Literature now gives reasons why the information asymmetry is particularly pronounced in the case of IRAs (Binderkrantz and Christensen, 2009): First, agency output is harder to measure – there are often multiple statutory goals of an agency, the performance of the agency in reaching these is hard to measure, and regulatory policies are often highly technical and complex issues (Maggetti, 2010). On the other hand, it has been argued that 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 relevance of resources is underlined even more in light of the doubts expressed with regard to the capacities of parliament and also government as traditional holders of accountability to execute effective control (Andersen and Burns, 1996; Wood and Waterman, 1991). Also more optimistic scholars highlight the relevance of resources for accountability:

“There are politicians who are able to specialize, and in parliamentary systems in which committee structures are strong, this specialization can be honed to strengthen accountability” (Weale, 2011: 67).

It may be provided by good information sources from the media or the regulated sector. These factors determine the degree to which accountability fora are capable of performing their task seriously. Time for preparation, assisting staff, and level of expertise obviously influence the chance of monitoring people to judge correctly on an agency’s report:

“Under multiple accountability, responsibility to different groups depends not on the relative power to impose or threaten sanction (or withdraw cooperation), but on the capacity to make accountability ‘meaningful,’ i.e., to institute the ability to ask the right question and assess the adequacy of the answers” (Choudhury and Ahmed, 2002: 583).

In addition, the cases of European agencies (Busuioc, 2012), and of corporate governance (e.g. Cornforth, 2005) suggest a crucial role of resources for accountability. Bawn (1997) finds that actors with more resources tend to rely more on ex post monitoring (hence, accountability) rather than on detailed statutory controls.

Resources are to some extent also the formal rights assigned to a forum and how easy it is to implement them.

5. **Forum owns an insufficient level of formal rights.**
6. **Forum faces restrictions applying these rights (e.g., information is not forwarded etc.).**
7. **Due to unclear division of tasks, accountability is dispersed (“problem of many hands”).**

A forum with scarce resources has in sum less capabilities to process information and hence to be less able to hold the agency to account. One could thus hypothesize:

8. **Forum does not make use of their formal rights due to insufficient resources.**

Instead of non-monitoring, there are of course several strategies imaginable to compensate resource scarcity. The most obvious one is to seek cooperation with other fora, or even the agency:

9. **Forum makes use of additional information sources to reduce asymmetry and to improve monitoring.**
10. **Cooperation among fora occurs to use the respective strengths while compensating weaknesses.**

Cooperation among fora is already a deviation from classical agency theory, which assumes the existence of several fora to end up in competition (see below).

A perspective on the relationship between principals and agents completely different from agency theory is taken by stewardship theory. Agency theory assumes the rational choice paradigm of utility-maximizing, rational, and interest-oriented actors (Ross, 1973). Accordingly, scholars stress the importance of the agent’s intentions (Niskanen, 1971; Wyckoff, 1990). Stewardship theory claims, in contrast, that conflicts between principals and agents are not the rule, but the exception, and that agents are likely to act as defendants of the policy they are in charge of. Stewardship theory assumes hence interests to be aligned and agents to be intrinsically motivated.

“Die Mitglieder der Unternehmensverwaltung stellen demnach keine opportunistisch handelnden Akteure, sondern stets ‘gute Verwalter’ dar. Durch die Ausrichtung des Managementhandelns an den Interessen der Eigentümer treten keine Zielkonflikte zwischen den Kontraktpartnern auf. Ferner wird auch die Existenz von Informationsasymmetrien als Hauptcharakteristikum der Principal-Agent-Theorie aufgegeben. Da der gemeinsamen Zielsetzung im Kollektiv (‘pro-soziales Verhalten’) höhere Bedeutung beigemessen wird als einer individualistischen Nutzenerhöhung, besteht in Abgrenzung zur Agency-Theorie auch keine Notwendigkeit zur Implementierung spezifischer Überwachungsmaßnahmen (‘Monitoring’) oder finanzieller (extrinsischer) Anreizsysteme (‘Incentives’)” (Velte, 2010).

Similar to that, Majone aims to solve the problem of agency legitimacy. He describes the relationship to agencies’ democratic principles as “fiduciary”, building mainly on trust and peer control (Maggetti, 2010). He thereby neglects the dissent between principal and agent assumed in classical agency theory. Agents act as “fiduciaries” on behalf of their principals, and principals have no reason to distrust them (Majone, 2001b, 2005).

From that perspective, mutual trust makes close monitoring unnecessary, and accountability serves primarily for learning purposes. High trust between forum and agency let the forum rely on agency information, and use accountability structures for learning and policy improvement. If the forum distrusts the agent, in contrast, it is quite straightforward that it uses the formal accountability mechanisms at hand to the maximum extent. In the latter case, the resource problems and information asymmetries mentioned above come into play.

11. **There is a high level of trust between forum and agent.**
12. **Forum does not use formal rights.**
13. **Forum uses agency as sole or main information source.**
14. **Agency voluntarily informs forum thoroughly on all relevant issues.**

The last mechanism is also plausible in a context which gives incentives to the agent to seek cooperation. We can for instance imagine an agency that is formally independent but needs

some consent with other actors in the course of the research process. Examples could be the National Bank in the case of financial regulators, or competition regulators in the case of utilities regulators. Also, in some cases regulators lack their own implementation power, since their decisions are enforced by “regular” public administration. In all these cases, the agency depends on third party support in order to get its decisions implemented. In these cases I expect it to actively seek support for its strategy. This argument was made first by Black (2008). She argues that communication contributes to accountability and agencies might use the strategy of offering justifications for their actions in order to enhance legitimacy (Puppis et al., 2014).

With regard to national high courts, it has been argued that they depend on diffuse support, given that they are – similar to regulatory agencies – appointed, not elected (Gibson and Caldeira, 1995; Vanberg, 1998). Nevertheless, they own (at least in the successful cases) a substantial amount of legitimacy. This legitimacy is clearly identifiable as being of the output type. However, it is not the functionalist meaning of output: what matters is not the highest quantity but modesty, it is about the acceptance of the contents of the decision. This modesty scholars link to a complex process of auto-limitation: judges anticipate the acceptance of their decisions and therefore will not regularly take unpopular decisions. This way they gain legitimacy just because they are limiting themselves to their perceived public will. However, courts are able to take unpopular decisions as well without losing reputation – but not too many. Thus,

- 15. Agency cooperates with forum to gain its political support/support for implementation.**
- 16. Agency needs support of forum to enhance legitimacy and/or reputation vis-à-vis fora or third actors.**

In a similar vein, recent literature has found (contrary to agency theory’s expectations) fora often highly uninterested in accountability and agency behavior in general. In contrast, it is agents that care about their tasks and want to perform properly. The problem is thus rather forum drift than agency drift (Schillemans and Busuioc, 2014). In turn, the basic assumption of agency theory (namely, that agents are self-interested and principals pursue the general interest) are possibly incorrect (Olsen, 2013).

This apparent lack of interest has theoretically been rooted to a couple of factors. They agree that a forum does not care about agency action because the costs associated with it are not high enough, either because the forum itself is indifferent on the agency's action or because no one else cares about if the forum is doing its job properly to hold the agent to account.

17. Forum is apparently disinterested in making use of its formal rights.

One reason in this regard is policy salience. In areas considered as highly relevant, politicians are expected to leave less discretion to bureaucratic agencies (Bawn, 1997; Calvert et al., 1989), and make stronger efforts to influence bureaucracy (Epstein and O'Halloran, 1994; Spence, 1999). These arguments have also been corroborated empirically (Ringquist et al., 2003; Worsham et al., 1997). In contrast, low levels of salience encourage political-bureaucratic cooperation (Ripley and Franklin, 1986). Koop (2014) finds that there is more "voluntary accountability" of agencies in highly salient policy areas. This is already covered by mechanisms 15 and 16 above.

Similarly, taking action may be associated with costs. For instance, the forum fears a sanctioning decision to have negative impacts on the markets, e.g. since it is interpreted as a breach of the commitment to agency independence. Another reason might be some kind of second-level accountability, in a way the forum is the agent of another forum, which is opposed to sanctioning decisions. Of course, this works also the other way round (the forum does not want to take action, but the meta-forum wants).

A last strand of literature compares expected gains for politicians from keeping the task themselves, compared to the political or financial costs of the task. A policy area without much redistributive potential, but with unpopular decisions to be taken, is more likely to be delegated. Politicians this way try to shift blame for unpopular policies (Barberis, 1998; Fiorina, 1982; Hood, 2002; Weaver, 1986; Wilks, 2007). While this argument regard more the decision to delegate, we can derive two mechanisms from it. The argument is, that a forum is blamed for policies if it cannot credibly claim that it had nothing to do with it. Thus, in order to shift blame effectively, it might not make to full extent use of its formal accountability rights:

18. Forum does not make use of formal rights in order to shift blame to agency.

As a further crucial motivation for forum's engagement, reputation has been recently identified (Busuioc and Lodge, 2016; Schillemans and Busuioc, 2014). Reputation thus is of relevance not only for the agents, but also for fora. All these arguments yield that the

19. Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-reelection, etc.) coming with that.

On the other hand, blame shifting is not credible as soon as an actor has sufficient opportunity to monitor and supervise the agent it shifted its blame to. Also, the reputation argument can be interpreted in a different way. Instead of distant itself from the agency, it may support it in order to ensure policy success:

20. Forum aims to hold agent to account for not being blamed itself.

21. Forum forms alliance with agency to ensure policy success (e.g., shields agency from third parties).

The arguments related to mechanism 18 above have in common, that fora are externally restricted from taking the action they might wish. Another factor pointing in the same direction is the logic of the governance structure, and in particular the number of actors.

Veto player theory associates high policy stability with a higher number of actors whose consent is formally required. A higher heterogeneity of fora is, moreover, theoretically associated with a reduced level of decision-making capacity (Tsebelis, 1995, 2002). For a unitary actor, for instance, it is quite easy to take a decision. In contrast, fora such as boards or parliamentary commissions, which are regularly collective actors, decide on reactions or sanctions by a certain decision rule. The rule and the composition of the forum makes a reaction more or less likely (cf. Tsebelis, 2002). Hence, a forum with strong formal sanctioning power may remain a toothless tiger if it is heterogeneously composed and a sanctioning decision requires unanimity.

22. Forum internally or fora among each other differ in their interests and cannot agree on decisions to be taken.

Since it is not only the legal right to sanction but the believed probability that the forum will make use of its right that matters (Halfteck, 2008), a high level of heterogeneity is by the agent perceived as low probability of formal rights being used. This is likely to be anticipated in the agency's actions (Friedrich, 1937).

From the literature, it is moreover plausible to argue that the agent's discretion increases with the number of actors ("problem of many eyes"): the presence of a multitude of fora can result in lack of coordination (Bovens, 2007), where each forum is hoping for a reaction from another (cf. Tiegen and Brun, 2011). Similarly, agencies in European Union member states have been described as "double-hatted" (Egeberg and Trondal, 2009) and with dual loyalties. Agency scholars have argued that multiple monitoring actors widen the room for maneuver an agency possesses (Gailmard, 2009):

23. Agency strategically uses conflicts among or within fora to widen its own discretionary leeway.

Thus, most of the literature concludes that more actors make sanctioning less credible and hence lower accountability in practice.

24. A higher number of fora makes coordination more sophisticated and results in less accountability.

Also, Strøm (2000) argues that conflicting demands of more than one forum might have an effect. However, he rather argues that presidentialism, which he associates with a higher number of fora and more competition and conflicts than parliamentary systems, is better able to hold agents to account due to the combined information of various fora:

25. A higher number of fora improves information and hence accountability.

While it is thus unclear if the absolute number of fora matters, it is highly plausible that coordination among fora does: According to literature on accountability networks, increased coordination among fora can strengthen formal accountability relationships.

As I have outlined in section 0, those who have studied “new” forms of accountability have often underlined the complementary character of horizontal accountability mechanisms, and the interactions between actors (Héritier and Lehmkuhl, 2011b: 136; Mulgan, 2003; Papadopoulos, 2007; Schillemans, 2008, 2009; Thomas, 1998: 349). Harlow and Rawlings (2007: 542) state:

“...‘accountability networks’ may be emerging, composed of agencies specialising in a specific mode of accountability, which come together or coalesce in a relationship of support, fortified by shared professional expertise and ethos. At present fragmentary and imperfect, these might ultimately be capable of providing effective machinery for accountability in network governance systems.”

Scott (2000: 50) distinguishes between two forms of “extended” accountability. In “interdependent” accountability regimes:

“actors are dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition to action.”

In contrast, “redundancy” models include “overlapping (and ostensibly superfluous) accountability mechanisms [which] reduce the centrality of any one of them” (Scott, 2000: 52). As a last example, Bovens (2007: 460) defines “diagonal accountability” as accountability towards administrative bodies, which “ultimately report to the minister or to parliament and thus derive the requisite informal power from this.” Also empirically, Cornforth (2001) finds that cooperation within the agency board and between board and agency is decisive for board effectiveness.

In all these arguments, the weaknesses of some accountability fora are compensated by others. This implies a more or less cooperative behavior among accountability fora. From that perspective, to analyze just the bilateral relationships between agencies and single

accountability fora is likely to miss the extent and also the quality of the accountability regime, which relies strongly on cooperation and mutual control.

26. Under the condition that fora cooperate, a higher number of fora yields stronger accountability.

Interestingly, to make use of the qualities of different accountability fora is implicit already in the early literature on agency theory. It has been argued, for instance, that public attention enables politicians to use third actors (e.g., the media) to reveal wrongdoing (so called ‘fire alarms’, Hopenhayn and Lohmann, 1996; McCubbins and Schwartz, 1984):

“... fire-alarm oversight is less centralized and ... a system of rules, procedures and informal practices that enable individual citizens and organized interest groups to examine administrative decisions ... and to seek remedies from agencies, courts, and Congress itself” (McCubbins and Schwartz, 1984: 166).

27. Under the condition that the policy salience is high, media and public attention can be used by fora to improve own information.

The literature review has yielded a complex array of hypotheses, which arise mostly from the following scope conditions: Resources, trust, governance structures and political system, transnational integration, and salience. For the evaluation of agency accountability in practice, I formulated a series of mechanisms which could be plausibly found in the evaluation (see Table 7.1). The table enumerates all mechanisms, assigning them, a) a strengthen or weakening potential regarding accountability in practice, derived from the argumentation above; and b), associates the mechanisms with the factors used for the case selection chapter 3.

The table gives a hint what we can expect in the evaluation of accountability in practice. The list of mechanisms cannot be exhaustive, due to the explorative character of the study. In the course of the empirical investigation, it is likely that additional mechanisms are going to be added.

No.	Mechanism	Effect on accoun- -tability	Related to				
			Trust	Res.	Pol. Sys.	Transp.	Salience
1	Distrust and diverging interests between forum and agent.		●				
2	The forum is expected to have own interests at stake, and to execute monitoring at an efficient level.	+	●				
3	The forum uses sanctions at its disposal to align agency behavior with own interests. This might result in reduced agency autonomy.	+	●				
4	The agent, in turn, is expected to avoid accountability whenever possible in order to pursue its own goals.	-	●				
5	Forum owns an insufficient level of formal rights.	-		●			
6	Forum faces restrictions applying these rights (e.g., information is not forwarded etc.).	-		●			
7	Due to unclear division of tasks, accountability is dispersed ("problem of many hands").	-		●			
8	Forum does not make use of their formal rights due to insufficient resources.	-		●			
9	Forum makes use of additional information sources to reduce asymmetry and to improve monitoring.	+		●			
10	Cooperation among fora occurs to use the respective strengths while compensating weaknesses.	+		●			
11	There is a high level of trust between forum and agent.		●				
12	Forum does not use formal rights.	-	●				
13	Forum uses agency as sole or main information source.	-	●				
14	Agency voluntarily informs forum thoroughly on all relevant issues.	+	●				●
15	Agency cooperates with forum to gain its political support/support for implementation.	+			●		●
16	Agency needs support of forum to enhance legitimacy and/or reputation vis-à-vis fora or third actors.	+			●		●
17	Forum is apparently disinterested in making use of its formal rights.	-			●	●	●
18	Forum does not make use of formal rights in order to shift blame to agency.	-			●	●	●
19	Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-re-election, etc.) coming with that.	-			●	●	●
20	Forum aims to hold agent to account for not being blamed itself.	+					●
21	Forum forms alliance with agency to ensure policy success (e.g., shields agency from third parties).				●	●	●
22	Forum internally or fora among each other differ in their interests and cannot agree on decisions to be taken.	-			●	●	
23	Agency strategically uses conflicts among or within fora to widen its own discretionary leeway.	-			●	●	
24	A higher number of fora makes coordination more sophisticated and results in less accountability.	-			●	●	
25	A higher number of fora improves information and hence accountability.	+		●	●	●	
26	Under the condition that fora cooperate, a higher number of fora yields stronger accountability.	+			●	●	
27	Under the condition that the policy salience is high, media and public attention can be used by fora to improve own information.	+		●			●

Table 7.1 Hypothetical mechanisms strengthening/weakening accountability in practice

In the next section, I outline the process of data generation. In section 7.3 to 7.6, the four cases are scrutinized with regard to the mechanisms developed above. The aim is to evaluate the relevance of these mechanisms and their impact on accountability in practice. Moreover, the empirical relevance of the various mechanisms also has implications for the theories underlying them. All this is discussed in section 7.7.

7.2. Data sources for accountability in practice

The analysis of actor strategies rests on interview data, as well as on existing case studies on the agencies under scrutiny. Interviews have been conducted foremost with representatives of accountability fora and agencies. These interviews were semi-structured, asking for the frequency of interactions between accountability fora and of fora with third actors, as the most probable compensatory strategy of these actors to prevent conflicts between fora and compensate individual weaknesses in capacities and competencies. It was also asked if the agency voluntarily cooperates with one or several fora, which can be seen as a strategy to enhance legitimacy of agencies. In Appendix A, a sample questionnaire can be found.

A total of 25 interviews with 29 interviewees have been conducted between October 2011 and July 2015. The interviews have taken place face-to-face at various locations in Germany and Switzerland, by phone, and in some cases based on written communication. To all interviewees, confidentiality was guaranteed in order to build trust and to motivate them to participate and speak more openly. An anonymized list of interviewees can be found in the reference section (10.1).

As the period of analysis, I concentrate on the years 2009 throughout 2011. This allows the level of public attention to be held constant, and hence political salience, which rose in the banking sector after the financial crisis of 2008.

7.3. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)

After having scrutinized the formal accountability rights, I now shed light on the everyday interactions and strategies of the BaFin and its relevant accountability fora. The idea is, as

outlined in the theory and design chapters, to trace the ways in which actors use the existing formal structures and in particular interactions between actors. In the theoretical section, various ways have been indicated that actors might choose to circumvent restrictions, or that restrict fora from effectively making use of their formal rights.

7.3.1. Board

As outlined above, the administrative board deals exclusively with organizational issues, namely staff, infrastructure, and internal organization (interview DE03). Until 2013, the administrative board consisted of ten representatives of the regulated sector, five MPs and six delegates from different departments. As of the 2013 reform, the number of members from the regulated sector is reduced to six. Members of the board are elected for a fixed term of five years and can be dismissed by the BMF only for reasons that would cause a civil servant to be suspended or dismissed (§3 No. 3 BaFin regulations). The administrative board meets twice a year; and its subcommittee for budget control and audit (*Haushaltskontroll- und -prüfungsausschuss, HKPA*) meets four times per year (interview DE01). The BMF has a strong role as it sets the agenda and formally appoints all member except the MPs, which are selected by the Parliament (§7 FinDAG, §3 BaFin regulations). Moreover, in the event of a tie, the (BMF) chairman has the casting vote.

In contrast, the access to information for the MP board members is much more restricted, albeit the board structure represents a particularity in the German administrative system, insofar as board members are informed by the BaFin itself. In contrast, if the parliamentary committee on financial issues deals with a policy issue, the BMF is interposed (interview DE02). The difference is pointed out clearly by one interviewee:

“...ich könnte in meiner Funktion als Verwaltungsrat der BaFin die BaFin anschreiben und dann würde ich auch von der BaFin eine Antwort kriegen. Aber wenn ich jetzt nicht Mitglied des Verwaltungsrates der BaFin wäre, sondern normaler Abgeordneter, dann würde ich immer eine Antwort der Bundesregierung kriegen und nicht von Herr Sanio, weil er halt nachgeordnete Behörde ist. Und es muss im Zweifel immer erst mal über den Tisch des Ministeriums. ... wenn das als

Abgeordneter ist, ist das natürlich immer selektiv, weil das immer durch die Hand des Finanzministeriums geht. Und klar, je nachdem, ob ich Opposition oder Regierung bin, kriege ich halt da, naja, das werden die wohl nie laut sagen, aber unterschiedliche Informationen. Das ist halt so zwischen Regierung und Opposition. Als Mitglied des BaFin-Verwaltungsrates kriege ich glaube ich schon objektive Informationen...“ (interview DE04).

MPs largely depend on information provided by the agency, by the regulated sector, and by external experts. In general, we have to differentiate between two basic tasks of the administrative board: First, it has to approve past agency actions and budget use. Second, it has to set up future budgets and personnel plans. Regarding the first task, the board receives abundant information by the agency:

„Wir bekommen etwa die Prüfungsgutachten, die gemacht werden. Wir bekommen die internen Berichte über Personalentwicklung, Personalstrukturen. Also es ist immer ein ziemlicher Stapel an Papier, was da auf dem Tisch liegt“ (interview DE03).

Board members also have external expertise available in the form of reports by the external auditing firm and the Federal Audit Court (interview DE02). Auditing thus seems to occur on quite solid grounds.

In contrast, budgeting and staffing decisions for the future are more difficult to take (interview DE02). Budget negotiations regularly take place in the budget control subcommittee (*Haushaltskontroll- und -prüfungsausschuss*, HKPA), mainly due to the fact that the board is too large and too diverse for effective negotiations:

“Das Problem mit diesem Verwaltungsrat insgesamt ... würde ich darin sehen, dass es natürlich ein sehr großes Gremium ist, das sich überwiegend dahingehend erschöpft, das zur Kenntnis zu nehmen, was der Haushaltskontrollausschuss ihm empfiehlt und das wird dann im Regelfall auch übernommen” (interview DE03).

In any case, MPs have difficulties to assess the real requirements:

„Aber man ist als einzelner Abgeordneter natürlich ein Stück weit, wie soll man sagen, erschlagen, weil die Materie natürlich auch sehr komplex ist und man das auch als Abgeordneter schwierig beurteilen kann, ob jetzt Stellen in diesem oder jenen Bereich, ob das sinnvoll ist oder nicht sinnvoll ist. Das kann ja einem auch immer auf die Füße fallen, wenn man da irgendwann mal sagt: nein, das wollen wir nicht diese Stellen. Dann heißt es hinterher: ja die Politik hat die Stellenbewilligung verhindert, deshalb konnten wir nicht ordentlich hinsehen, deshalb ist die Krise da entstanden“ (interview DE04).

MPs state that regarding staff requirements, they strongly depend on information provided by the agency itself, or by branch associations (interview DE04). Additional sources are contacts within the agency (interview DE02). Despite these efforts, conflicts are regularly solved in advance by “horse trades” within the HKPA or in the corridors (interviews DE04, DE10):

“...die BaFin sagt: wir brauchen so und so viel Stellen für diese Aufgaben. Und die Branche sagt: nein, das ist völlig unnütz, das geht gar nicht. Und dann findet noch eine zweite Sitzung statt und dann konnten sie sich zwischendurch in den Fluren irgendwie auf einen Kompromiss einigen und der wird dann in der Regel akzeptiert“ (interview DE04).

In sum, budget control seems to be rather effective, while future budget setting is difficult to assess for MP board members. This holds even more for questions aside budgeting, where the level of information is quite general (interview DE02). The former junior minister in the BMF said on sessions of the administrative board,

“... [dass sie] nicht von Einzelfragen der Institutsaufsicht handeln, sondern von Haushaltsfragen und systematischen Fragen der Finanzaufsicht und der Arbeitsweise der BaFin, nicht aber eben von der

Diskussion einzelner aufsichtsrechtlicher oder aufsichtsinhaltlicher Themen” (Deutscher Bundestag, 2009a: 160).

However, MPs can gather additional information on operational or policy questions dependent on their role in Parliament. There is an interaction in the way that cross-membership (parliament and administrative board) pays off in terms of information. On the one hand, party membership is described as a crucial factor for the amount of information MPs receive (see also interview DE04 above):

“Da gibt es schon erhebliche Unterschiede natürlich zwischen Regierung und Opposition. Die Regierungsfraktion wird natürlich ganz anders informiert als die Oppositionsfraktion” (interview DE03).

On the other hand, while as board members MPs are restricted to internal organization issues, they can act more freely as part of an inquiry committee:

“Mein Vorteil ist eben, dass ich wirklich in diesem HRE Untersuchungsausschuss gesessen habe und da eben auch unter Ausschluss von Öffentlichkeit eben vieles mitgekriegt habe, so dass man sich ein Bild machen kann, was können Bundesbank und BaFin und was können sie eben auch nicht” (interview DE02).

Apart from the question of information access, capability to process information is highly relevant in the MPs’ case: after all, the time for preparation that MPs have is limited. Interviewees spend between several hours and two days for board-meeting preparation (interview DE02, DE03, and DE04). Although their preparation and their level of expertise is considered sufficient (interviews DE01, DE02, DE04, and DE10), MPs are well aware of their limitations:

“Wir Abgeordneten sind nun ja auch nicht in der Lage, rundum uns nur mit BaFin und Finanzministerium zu beschäftigen. ... insofern ist es natürlich schon auch aus dem Verwaltungsrat nur eine Aufsicht *light*. Das ist so. ... Vielmehr ist nicht leistbar” (interview DE02).

In sum, MPs within the board are limited with regard to information access and processing. In budget negotiations, solutions are frequently found in informal talks, bypassing the institutional structure.

The board needs a simple majority to take decisions. Given the membership structure, two “factions” out of the executive, legislative, and regulated sector are always needed for decisions. Before the reform, a “political” majority of government representatives and MPs was very slight, and is now strengthened at the cost of the regulated sector. After the reform, at present there are six government representatives and four MPs of government factions, which constitute an absolute majority of the government in a sense.⁵¹ Further points that strengthen the BMF are its agenda-setting role, in particular within the HKPA (the de facto decisive body), and its veto power over sanctions – a budget disapproval by the board, for instance, has to be confirmed by the BMF. After all, a board decision against the BMF’s interest is described as “hardly imaginable” (interview DE10). However, the atmosphere within the board is described as constructive, with often diverse interests at the start, but regularly consensual decision making in the end (interviews DE01, DE02, DE03). Party politics occasionally plays a role, but is not predominant (interviews DE02, DE10).

As mentioned above, the question of the overall budget has the most potential for controversy, since the agency is funded by the regulated sector. Here, the representatives of the sector tend to favor more parsimonious solutions than political representatives. However, the regulated sector is also interested in effective and reliable regulation (interviews DE01, DE03, DE10). Agenda setting of the BMF is seen as of great importance: it prepares draft resolutions (often formulated by the BaFin) and it is hard to imagine that the board decides against the BMF’s interests (interview DE10). Regarding strategic issues, the administrative board meetings’ main function is exchange of information on the general political climate between the BMF and the other members (interview DE01).

In sum, the administrative board is an extraordinary organizational form in the German administrative context and grants some additional ways for MPs to gather information from the administrative sphere. Moreover, policy questions are dealt with only rarely, and

⁵¹ This can be justified by an interviewee’s statement: „Die Regierungsfraktion unterstützt ... das Ministerium“ (interview DE03).

depend on the BMF due to its strong agenda-setting role. Frach (2008: 96) is hence skeptical on the practical relevance of the administrative board:

“In der Praxis sind diese Gremien jedoch eher ‘artig als neuartig’” While it is true that the board is rather a vehicle for government interests and an arena to bargain with the regulated sector on budgeting issues, its role as additional information channel for MPs has not to be underestimated.

Advisory and consumer advisory boards have weak formal competencies and are treated here only briefly. The advisory board has 24 members, appointed by the BMF. By law, public finance experts, the regulated sector, the Bundesbank, and consumer groups have to be “adequately” represented (§8 FinDAG 2015). The advisory board has few formal competencies and its size and composition make it hardly effective. Frach (2008: 97) summarizes the debates within the advisory board as:

“weder sehr offen noch kontrovers. Das Gremium ist zu groß und zu breit besetzt, um Vertraulichkeit zu gewährleisten und so auch Problemfälle zu diskutieren.”

Recently, a consumer advisory board has been established. It is formed of three academic consumer protection experts, four representatives of consumer groups, one representative of the Federal Ministry responsible for consumer protection, and one trade union representative. Its impact is hard to judge yet, but given its rather “soft” character, it will hardly change the overall accountability structure.

7.3.2. Government

Since 1972, the Federal Department of Finance (*Bundesministerium der Finanzen*, BMF) has been responsible for banking regulation, which was executed by the *Bundesamt für das Kreditwesen* (BAKred) between 1962 and 2002, and the BaFin afterwards. In that setting, the BMF is responsible for legislation and general economic policy, but not for direct oversight, which is implemented by the respective agency (Busch, 2009: 97-9). This division was underlined also by the BMF’s junior minister Mirow in front of the financial crisis inquiry committee:

“Die BaFin hat die Einzelaufsicht über das konkrete Institut. Das Bundesfinanzministerium ist nicht der Oberaufseher, bezogen auf das Einzelinstitut, sondern das Bundesfinanzministerium ist dazu da, dafür Sorge zu tragen, dass die BaFin ihre Aufgaben wahrnimmt und entsprechend ausgestattet ist, ihre Aufgaben wahrzunehmen, die entsprechenden Strukturen hat, um ihre Aufgaben wahrzunehmen. Das heißt, der Gesetzgeber hat sehr sorgfältig darauf geachtet, dass das BMF insofern nicht in eine Oberaufseherfunktion kommt” (Deutscher Bundestag, 2009b: 16).

The division of tasks resembled German administrative tradition, and in this sense has been described as traditionally uncontroversial and efficient (Busch, 2009: 97-9). Apparently, this changed in recent years due to, first, increased politicization of financial issues after 2004; and second, institutional changes and transnationalization of banking supervision in the aftermath of the financial crisis. These changes have altered the interaction mode and raised the conflict level between the BMF and the BaFin (Handke, 2010: 112-3) – we elaborate more on that point below.

Frach describes the BMF as very modest during the first two years of the BaFin’s existence. In the years 2004-2005, however, oversight became tighter: the BMF established a subdivision responsible for BaFin oversight (subdivision VII B I), and published detailed instructions on the information the BaFin is obliged to provide to the BMF (Bundesministerium der Finanzen, 2013; Frach, 2008: 113-7). The relationship is described as generally trustful, albeit sometimes top level officials rival on competencies (Frach, 2008: 118). Also, Handke (2012c: 245) delineates personal conflicts between the BaFin president, Sanio, and top-level officials within the BMF and the Bundesbank:

“The personal relation of BaFin’s president Jochen Sanio with the state secretary at the Ministry of Finance, Jörg Asmussen, and the head of the Bundesbank, Axel Weber, was more a “non-relationship” (Interview 17) than a good co-operation of leading actors in financial market policy ... On one reading, he behaved as the head of a fully independent agency – that is, according to his own self-image – and sent signals of ambition and

waywardness towards the BMF (Heise & Herden, 2009). From the ministry's point of view this was seen as an inappropriate way of leading a subordinate government body, despite the acknowledgement of Sanio's professional expertise and the correctness of his statements (Interview 19)."

These conflicts are mainly organizational issues and competencies, but did not affect close collaboration regarding policy advice and representation at the international level (Handke, 2012c: 243). That last point is also highlighted by the interviewees:

“Es ist gar kein so großer Unterschied ob die BaFin verhandelt oder ob irgendein Mitarbeiter des Ministeriums verhandelt, denn am Ende brauchen beide einen gewissen Verhandlungsspielraum und beide müssen letztendlich die Chance haben abzuweichen von irgendwelchen Vorgaben, die dann möglicherweise rückgekoppelt werden müssen mit dem BMF. Auch sowohl der Mitarbeiter des BMF mit seinem Vorgesetzten als auch die BaFin mit uns. Also insofern ist es kein so großer Unterschied in den internationalen Verhandlungen, ob da die BaFin sitzt oder jemand aus dem BMF” (interview DE01).

The BMF and BaFin are in frequent contact by various means and at top and working levels. The agency sends quarterly reports to the department, which are amended by special ad hoc reports on single issues considered too important to be withheld until the next quarterly reporting (BaFin president Sanio in Deutscher Bundestag, 2009a: 28-9; BMF representative Conert in Deutscher Bundestag, 2009c: 161). Meetings at the working level occur every two months within the administrative board or its budget-control subcommittee, four times a year with each executive director, monthly at subdivision head level plus additional meetings if required. Moreover, the agency and the department mirror units communicate on a daily “almost hourly” basis (interviews DE01, DE10). For the top level, BMF junior minister Mirow stated:

“Normalerweise war es so, dass ich Herrn Sanio im Schnitt alle vier, sechs Wochen persönlich gesehen habe, sei es aus Anlass von Verwaltungsratssitzungen, sei es aus Anlass von internationalen Sitzungen, die wir gemeinsam wahrgenommen haben, etwa dem FSF,

sei es aus anderen Gründen. Im Übrigen haben wir häufig miteinander telefoniert; „häufig“ heißt auch unterschiedlich, aber ich schätze mal im Schnitt alle zehn Tage, jede zweite Woche, manchmal auch öfter. Diese Telefonate handelten natürlich davon, dass man sich darüber ausgetauscht hat, wo jeweils gerade die größten Risiken gesehen werden und gesehen wurden” (Deutscher Bundestag, 2009b: 10). Agency president Sanio acknowledged the agency’s responsibility to report all politically relevant issues to the BMF (Deutscher Bundestag, 2009c: 21). This holds even more regarding strategic issues, such as international as well as domestic law and standard setting, where the BaFin is highly involved.

Relevant issues at international stage are coordinated with the BMF, the BaFin aims to integrate the department in decision-making procedures and a cooperative relationship is described as important for both actors (interview DE10):

“Man kann sagen, dass] eine sehr ... vertrauensvolle, und ... auf ständiger Kommunikation basierender Austausch hier zwischen BMF und BaFin stattfindet ... Also, größere Probleme gibt es eigentlich nicht” (interview DE01).

Interviewees also underlined the BMF’s unlimited access to information:

“Die BaFin ist eine nachgeordnete Behörde im Bereich des BMF. ... Wenn wir bestimmte Daten, zum Beispiel zu irgendeinem bestimmten Kreditinstitut von der BaFin haben möchten oder zu einer Gruppe von Instituten, dann macht die BaFin eine Erhebung bei diesen Instituten, wenn sie die Daten nicht schon vorher hat, und dann liefert sie uns die” (interview DE01).

At national level, the BaFin frequently assists the BMF in law formulation (Frach, 2008: 114-6; Handke, 2012c: 240-1) and strategy development (interview DE10). Handke (2012c: 240) associates that with a severe lack of staff and expertise within the BMF:

“In the end, BaFin has to fulfil tasks in policy-making ‘that the colleagues in the BMF should actually deal with’ with the result that ‘the vast majority of draft laws is prepared by BaFin’ (Interview 2).”

Also Frach (2008: 114) concludes that the BMF’s staff is not capable of dealing with all legislative projects coming up. However, it is not so clear if this holds also for monitoring and supervision of the agency. Handke (2012c: 240-5) strongly argues that way, detecting an agency problem with regard to agency supervision and underlines the comparative strength of the BaFin in matters of supervision, but also law formulation and policy making in the transnational sphere:

“Inquiries made after the financial market crisis revealed that BaFin met all requirements in regard to reporting obligations in cases like HRE, but the BMF was not able to process them adequately (Bulletin of the German Parliament 16/14000)” (Handke, 2012c: 243).

Indeed, the HRE report criticizes information flaws between the BaFin and the BMF (Deutscher Bundestag, 2009a: 365). However, the report firstly refers to information flows and procedural issues rather than to ministerial capabilities; and second, the cited passage stems from the minority report of the parliamentary opposition, whose interest clearly was to blame the BMF for supervision failures. The report also provides evidence for close and trustful cooperation between BMF and agency:

“Wir sind aber nicht so aufgestellt und verstehen uns selber auch nicht so, dass wir die einzelnen Sachaussagen verifizieren, sondern wir nehmen sie entgegen in dem Vertrauen, dass hier vonseiten der Aufsicht richtig recherchiert wurde. Dass es in sich schlüssig sein muss, dass es in sich plausibel sein muss, ist klar. Wenn es Anzeichen gibt, dass dem nicht so ist, besteht Anlass für Rückfragen.’ (Aussage Jens Conert, Protokoll Nr. 10, S. 51)” (Deutscher Bundestag, 2009a: 161).

“Aber das war der Weg, sodass es ein - aus meiner Sicht - völlig eindeutiges Einverständnis gab, wenn dem Präsidenten der BaFin etwas auf der Seele lag, wenn er irgendwo ein besonderes Risiko sah, von dem

er meinte, dass ich es kennen sollte, dann würde er mich entweder schriftlich oder fernmündlich darüber unterrichten” (BMF junior minister Mirow in Deutscher Bundestag, 2009b: 10).

Both the BMF and the BaFin interviewees consider information flows and capabilities as sufficient. MPs, particularly from the parliamentary opposition, are more critical, but even they concede that the relationship is no more critical than the ones between other federal authorities and their parent ministry:

“Ich bin der festen Überzeugung, dass es da Lücken gibt. Dass also auch die Fachaufsicht des Ministeriums nicht in der Lage ist, im Detail nachzuvollziehen, was in allen Verästelungen der BaFin gemacht wird. Davon gehe ich fest aus. Aber ich vermute, dass ist in anderen Behörden auch nicht anders. Dass die Fachaufsicht letztlich dann schon darauf vertrauen muss, dass das Haus selbst und seine Leitung eine vernünftige Politik macht” (interview DE02).

In sum, while there is an informational advantage of the BaFin in technical expertise, the informational gap is not at all wider than between any other federal authority and its parent ministry. On the contrary, due to the high salience and the political risks associated with financial regulation, the BMF insists on extensive and detailed monitoring, despite its trust in the agency’s work.

By law, the BMF possesses extensive rights to give orders to the BaFin and/or to override agency decisions. These rights, however, are utilized to a varying extent over time and regarding the different tasks of the BaFin. The most cooperative area is international negotiations. Here, important issues are coordinated and discussed in advance between BaFin and BMF (Frach, 2008: 120). No one is interested in escalating conflicts, and the agency communicates in advance with the BMF, not least to avoid direct orders (interview DE10):

“...so dass man eigentlich schon auch immer hier ungefähr weiss, was wird verhandelt, in welche Richtung geht es. Und die BaFin kommt

natürlich auch wenn sie der Auffassung ist, ... aus der Verhandlungssituation, ergibt sich jetzt etwas was vielleicht politisch von Bedeutung sein könnte, oder ich kann mich nicht durchsetzen mit bestimmten Dingen, die von besonderer Relevanz sind, dann meldet sie das auch automatisch zurück, so dass das ein ständiger Austausch letzten Endes ist” (interview DE01).

A more critical point of view is taken by Handke (2012c: 243), who characterizes the influence of the BMF on international negotiations as limited, mainly due to limited capabilities and the complexity of regulatory standard development.

At national level, the situation is more multi-faceted. The BaFin predecessor BAKred had scarcely been subject to direct ministerial orders (Busch, 2009: 97). After the creation of the BaFin, especially after 2004, we have already seen that the relationship between agency and department has not always been consensual, in particular regarding regulatory policies (Frach, 2008: 120). Apparently, however, political interventions have been limited for the most part to new regulations and law interpretation. Ongoing supervision (i.e. operational issues), in contrast, have only rarely been subject to ministerial intervention (interview DE10, Frach, 2008: 117). Only for single exceptional cases is there some evidence (Handke, 2012c: 243).⁵² This general trend is reflected in the BMF’s junior minister Asmussen’s intriguing statement, as he rules out single case instructions, but not instructions in general:

“Die operative Bankenaufsicht wird durch BaFin und Bundesbank durchgeführt. Dabei sind sie nach international geltenden Grundsätzen des Baseler Ausschusses operativ unabhängig. Das heißt, es gibt von uns keine *Einzelfallweisungen* an die BaFin” (BMF junior minister Asmussen in Deutscher Bundestag, 2009a: 159, emphasis added).

The BMF in general avoids the impression it would use its powers to directly intervene in agency business:

⁵² Handke mentions the IKB case. The IKB bank, part of the state-owned development bank KfW, which came in trouble in August 2007 and was bailed out by the KfW and other banks for €3.5 billion.

Question: Haben Sie dann das Gefühl, dass diese letztendliche Möglichkeit der Weisung im Hinterkopf irgendwo mitschwebt? Ich nehme mal an, dass ja auch die Akteure auf der Seite der BaFin wissen, dass Sie das letztendlich könnten und es dementsprechend nicht darauf ankommen lassen.

Answer: “Ja, aber ich meine, alle ziehen doch... Es gibt ein gemeinsames Ziel an dem man sich orientiert, Finanzmarktstabilität. Und das Ziel ist schon, dass man sich da verständigt, und dass man vertrauensvoll zusammenarbeitet und eben die Handlungen und Massnahmen dann auch einvernehmlich ergreift. Nachdem man das halt besprochen, diskutiert hat ... So das wir mal richtig Ärger gehabt hätten oder Meinungsverschiedenheiten, im höchsten Ausmaß, kam mir jetzt nicht in den Sinn” (interview DE01). In that sense, a BMF representative stressed the operational independence of the BaFin:

“In diesem Zusammenhang ist wichtig, zu betonen: Es gilt der feste Grundsatz der Unabhängigkeit der operativen Bankenaufsicht. ... Es spiegelt einen festen internationalen Grundsatz wider: Es gibt vom Basler Ausschuss für Bankenaufsicht sogenannte Kernprinzipien für eine effektive Bankenaufsicht ... Sie muss ... unabhängig von direkter Einflussnahme aus der Politik oder anderen Kreisen agieren können. Wir verstehen uns nicht als Superaufsichtsbehörde. Die Aufsichtsbehörde übt ihre Aufgaben nach dem Gesetz unabhängig aus” (Deutscher Bundestag, 2009a: 161).

In turn, even in strategic issues, the BMF refrains from giving formal instructions and favors more subtle ways of intervention, in the character of “suggestions”:

“Weisungen werden in der Regel informell ausgedrückt, indem das BMF seine Präferenzen zu Auslegungsmöglichkeiten äußert und schriftlich an BaFin-Präsident Sanio übermittelt” (Frach, 2008: 117).

“In daily routine interactions, technical oversight over policy-making and supervision activities appears in the form of request than formal instruction” (Handke, 2012c: 244).

Handke (2012c: 244) interprets that as a proof for the BMF’s weak position, as “this is the only adequate way of interaction between a quite weak principal and a rather powerful agent”. I tend to disagree with his interpretation: regardless of its limited information capabilities, the BMF has highly powerful formal instruments at hand, and does not face severe restrictions regarding their use. It is thus plausible to interpret the BMF’s requests as an attempt to signal good-will and cooperative behavior, while the BaFin’s obedience is virtually guaranteed due to an effective “shadow of hierarchy”.

A reason for the rather subtle interventions can be found in the BCBS’ principles of independent supervision Germany agreed upon. The rather subtle style of intervention in this interpretation represents the attempt to officially follow international rules (and thus to preempt side costs associated with formal interventions). In contrast to BNetzA case, where international rules effectively hamper ministerial interventions (EU can start infringements procedures), BCBS rules are “softer” - while the BMF does not wish to openly break the rule, it nevertheless takes the risk. This interpretation is backed by the fact that the BMF apparently reduces its “non-intervention” policy to operative issues - BMF representatives spoke of “single-issue instructions” or “ongoing supervision” - while in all other areas, the BMF’s reluctance is rather less pronounced. In any case, the sanctioning option is hence effective without much doubt.

Apart from direct orders, the BMF can pose sanctions upon the BaFin by internal reorganization or a redistribution of tasks. For both strategies, however, it needs parliamentary support. A successful example is the FinDAG reform of 2008. As already mentioned, the personal relationship of responsible government and Bundesbank representatives with agency president Sanio was disrupted. In turn, a reform of the FinDAG weakened the president’s role to the benefit of a collegiate board of directors. Handke (2012c: 243-245) interprets this as a sanctioning measure to Sanio. In 2009, however, attempts to restructure the whole governance structure of banking supervision failed since governing parties Christian Democrats and Liberals, as well as the Bundesbank, pursued

different strategies and could not agree on a common reform (Handke and Zimmermann, 2012). Effective consequences for the BMF beyond giving orders, and hence intervening on operations and interpretatory issues, requires parliamentary support, which is not always easy to acquire.

On the other hand, the cooperation with other accountability fora is substantial. First, the administrative board provides an arena to discuss supervisory and regulatory issues:

“Wir stehen ... mit den Abgeordneten, ... die im Verwaltungsrat der BaFin sitzen, im permanenten Austausch. Das sind ja die Abgeordneten, die sich sonst mit Themen der Finanzmarktregulierung beschäftigen, ... da gibt es einen permanenten Austausch von Informationen und dasselbe gilt natürlich für die Verbände oder im Verwaltungsrat sitzen noch andere Ressorts, Innenministerium, Wirtschaftsministerium. Mit denen hat man immer Kontakt. Also, es ist nicht so, dass man jetzt auf dieser Verwaltungsratssitzung warten müsste, um ein bestimmtes Thema anzusprechen, oder auf die Tagesordnung zu heben, ... das ist sehr fokussiert auf das Innere der BaFin. Aber zu diesen Personen hat man natürlich jede Menge Kontakt” (interview DE01).

Through these contacts, the BMF is able to evaluate the broader political climate:

“Die diskutieren mit, aber ohne, sagen wir mal, einen sachlichen Input. Das ist eher umgekehrt, dass wir die Informationen den Parlamentariern weitergeben. Andererseits haben die natürlich eine bestimmte politischen Vorstellung, wie Dinge zu funktionieren haben, und ... wenn wir also, wie jetzt, in einem Gesetzgebungsprozess sind, um die Finanzmarktaufsicht auf neue Füße zu stellen, dann kommen in der Tat auch individuelle Gespräche zustande mit Parlamentariern, in denen wir uns austauschen und letztlich von der politischen Seite das Gefühl mitkriegen, was gewollt ist und was nicht gewollt ist” (interview DE01).

The relationship to the administrative board is close, also since the BMF chairs the board and has substantial powers regarding agenda setting and appointments. The division of competencies is quite straightforward (interview DE01).

The BMF received more detailed policy advice from associations, external experts and contacts to international partners (interview DE01), as well as from the BaFin itself:

“Die Grundlage der Rechts- und Fachaufsicht, im Bezug auf die BaFin, [ist] ein sehr ausgeprägtes Berichtswesen ... so dass wir einen grossen Teil der Informationen im Zusammenhang mit der Finanzmarktaufsicht aus der BaFin beziehen” (interview DE01).

In addition from advice from the BaFin, the BMF frequently asks the Bundesbank for a second opinion:

“Die Bundesbank wird fast immer zusätzlich zur BaFin vom BMF zu einer Stellungnahme zu einschlägigen Gesetzgebungsprojekten gebeten und auch bei Anhörungen im Bundestag ist die Bundesbank oft als eigenständiger Akteur present” (Frach 2008: 110).

In the relationship to other fora, the BMF generally acts as the BaFin’s protection force. This holds particularly in the relationship to other ministries, but also to the Parliament: parliamentary questions to the BaFin are answered by the BMF, since it is politically responsible for subordinated authorities under its supervision (interview DE10). On the one hand, this arrangement reduces the agency’s room for maneuver: the BaFin is hardly able to publicly take positions different from the ministry’s. On the other hand, it effectively prevents the BMF from shifting blame to the BaFin:

“The BMF as the superior authority of BaFin was accountable to parliament but could not blame BaFin for failures, since this would have implied the failure of ministerial oversight” (Handke, 2012c: 244).

“Eine öffentliche und so weitgehende Kritik der deutschen Regierung an der administrativen Aufsicht, wie sie in Großbritannien gewagt wurde, ist

aber nicht wahrscheinlich: Als politische Aufsicht über die BaFin würden sich das BMF und die Regierung selbst schaden" (Frach, 2008: 124).

In sum, the BMF's position is not only formally strong, but also de facto effective. While it faces some limitations mainly regarding capabilities in policy formulation, oversight and accountability is as strong as between ministerial departments and "ordinary" federal authorities. However, the BMF acts more subtly than normal regarding direct interventions: it does not intervene in operative supervision apart from exceptional circumstances, and prefers to make "suggestions" rather than direct orders in issues of law interpretation and supervisory strategy, probably showing consideration to international agreements. Apart from that, the BMF perceives the BaFin mainly as subordinate body and maintains detailed "police patrols". The BMF is thus clearly in the driving seat. This holds even for international negotiations, where the BaFin coordinates the main strategic issues with the BMF in advance.

7.3.3. Parliament

Traditionally, the Parliament itself has only scarce contact with subordinated administration (Döhler, 2002: 112). There are four formal ways of interaction between the Parliament and the BaFin. First, in legislative processes, the responsible committee – in this case, the finance committee – can invite experts from the administration to discuss issues regarding the planned law. At least for the period prior to the financial crisis, here Busch's (2009: 98) statement holds:

"In the context of bank regulation, the role of parliament is primarily that of a ratifying body rather than a space in which detailed discussion over policy alternatives takes place." The frequency has changed in recent years, but the finance committee remains responsible for legislation rather than for accountability:

"Der Finanzausschuss beschäftigt sich regelmässig mit Finanzmarktfragen und da spielt halt die Bafin immer irgendwie eine Rolle ... als Betroffene oder als Einschätzer. Also nach dem Motto: Wie schätzt ihr das ein? Es sind auch viele europäische Regulierungsfragen oder weltweite Regulierungsfragen. Basel II, Basel III, Solvency II, die

Versicherungsrichtlinie. Ja, da spielt das immer eine Rolle” (interview DE04).

Regarding international negotiations, albeit relevant for legislation, the parliament is regularly not involved:

Question: Und waren Sie im Laufe der Entwicklung der Basel III Richtlinien da als Bundestag involviert oder im Rahmen des Verwaltungsrates?

Answer: “Nein. Waren wir nicht. Das war sehr schwierig für uns, da an Informationen zu kommen. Wir haben die Informationen bekommen, indem wir einzelne Leute, die in diesem Gremium saßen oder sitzen, in dem wir mit denen zusammengesessen haben. Und darüber haben wir Informationen bekommen. Wir haben auch einen Besuch in der Schweiz gemacht und haben da auch führende Leute erlebt. Aber das ist ein grosses Problem. Dieses Gremium ist extrem intransparent und für einen Abgeordneten ist die Arbeitsweise kaum zu durchschauen und wir haben keine Möglichkeit Einfluss auf Details zu nehmen. ... Ansonsten sind wir sehr stark darauf angewiesen, was so in der Fachpresse kolportiert wird” (interview DE03).

This is a substantial difference compared to the informal contacts between the MPs and the *Bundesnetzagentur*:

Answer: Es war [bei der BNetzA] meistens konkret im Zusammenhang mit Verordnungen oder Gesetzen, die umgesetzt werden sollten. Und die dann Auswirkungen entfaltet haben. Das ist ja bei der BaFin was völlig anderes. Die haben ja eine ganz normale Kontrolltätigkeit, die sie immer ausüben. Und wenn wir als Parlamentarier zum Beispiel irgendwelche Detaillierungen von Sanio als Präsidenten der Bafin haben wollten, für unsere Arbeit, dann würden wir den in den Finanzausschuss einladen und befragen oder wir machen eine Anhörung. Das ist ja auch sehr häufig zu Gesetzentwürfen. Und da sind

dann natürlich Vertreter der Bafin, die wir dann befragen im Hinblick auf einen solchen Gesetzesentwurf.

Question: Das geschieht dann aber offiziell, formal im Rahmen einer Anhörung des Finanzausschusses.

Answer: Genau, formal im Rahmen einer Anhörung des Finanzausschusses.

Question: Im Gegensatz zur BNetzA, wo Sie dann zum Telefonhörer gegriffen hätten?

Answer: Richtig, das war sehr viel informeller. (interview DE03)

The remaining instruments (the parliamentary question, the inquiry committee and, as a BaFin particularity, the administrative board) are more of a supervisory character. Regarding parliamentary questions, the parliament is in contact mainly with the responsible ministry. The instrument is used quite regularly and is considered a powerful tool to generate public attention (Siefken, 2010): up to 2015, the parliamentary database enumerates 275 parliamentary questions mentioning the BaFin. While until 2005, only 22 parliamentary questions had been posed, the following parliamentary terms saw 108 (2005-2009) and 109 (2009-2013) questions, respectively.⁵³ However, the instrument does not necessarily grant direct access to the BaFin, since political questions to the agency are mostly answered by the parent department. The BMF, in turn, refuses to answer questions regarding the BaFin's supervisory practice (Hagen, 2014).

In comparison, the administrative board provides more detailed information and direct access to agency representatives, also for accountability matters. However, it is limited to internal organization and budget issues. In these regards, membership in the administrative board provides informational gains to the MPs:

“Zumindest kriegt man dort mehr mit, wie das Haus aufgestellt ist. Was sie vorhaben, wie die Schwerpunkte eingehen. Und das machen sie halt

⁵³ <http://pdok.bundestag.de/>, results for parliamentary questions containing „BaFin“, accessed May 10, 2015.

am Haushalt- und am Stellenplan fest. Und das spielt da halt eine Rolle. Das spielt im Finanzausschuss keine Rolle. Weil die BaFin ist ja eine obere Bundesbehörde, d.h. sie ist eine nachgeordnete Behörde des Finanzministers. Insofern ist das ein Geschäft, in Anführungszeichen, der laufenden Verwaltung und hat nichts mehr mit Gesetzgebung an sich zu tun. ... Also ich könnte mal in meiner Funktion als Verwaltungsrat der BaFin die BaFin anschreiben und dann würde ich auch von der BaFin eine Antwort kriegen. Aber wenn ich jetzt nicht Mitglied des Verwaltungsrates der BaFin wäre, sondern normaler Abgeordneter, dann würde ich immer eine Antwort der Bundesregierung kriegen und nicht von Herr Sanio, weil er halt nachgeordnete Behörde ist. Und es muss im Zweifel immer erst mal über den Tisch des Ministeriums” (interview DE04).

Nevertheless, the MP board members perceived the agency and the BMF as less open than, for example, in the *Bundesnetzagentur* case:

Answer: Und es hat natürlich auch etwas ... mit dem Stellenwert des Gremiums [zu tun]. Das war bei der BNetzA in der Tat anders, ja.

Question: Das heisst, da spielte Informationsvermittlung eine grössere Rolle?

Answer: Ja, da hatte man natürlich ganz andere Drähte und ganz andere Möglichkeiten über bestimmte Themen zu reden, weil sozusagen der enge Draht zum Chef der BNetzA, und wenn es da mal ein Problem gab, da haben wir ihn einfach angerufen und mal gefragt, wie ist da der Sachstand und dann wurde man informiert.

Question: Also es war mehr Transparenz im Verhältnis zur Behörde

Answer: Ja zu uns, ja. (interview DE03)

The access to information varies with party membership: members of governing factions get more information than of oppositional ones. Moreover, board membership provides additional channels for information (interviews DE03, DE04).

The most powerful instrument of the parliament is the inquiry committee. An inquiry committee is formed upon formal request by a quarter of all MPs and is equipped proportionally by all parliamentary factions. So far, 41 inquiry committees have been created since 1949, mainly in the aftermath of major crises, corruption scandals, and similar issues.⁵⁴ The inquiry committee on the Hypo Real Estate bail out and the financial crisis is so far the only one dealing with financial regulation. The instrument is thus only rarely used.

An important external source of information is the Federal Audit Court (*Bundesrechnungshof*, BRH). It is by law obliged to audit the BaFin and regularly checks additional aspects. However, it depends on the BRH in how far it makes its audits accessible to the public and the parliament. In the course of a corruption scandal within the BaFin's procurement department 2006, a BRH report led to media attention (e.g., Afhüppe, 2006), parliamentary questions (e.g., Deutscher Bundestag, 2006) and, finally, the conviction of a corrupt staff member of the BaFin (Der Spiegel, 2007). Moreover, the organizational change of 2008 toward a collegiate Board of Directors is widely associated with the preceding corruption scandals (Süddeutsche Zeitung, 2010).

Apart from information access, the capability to process is crucial for effective accountability. While the parliament of course cannot compete with the expertise in federal administration, it is less restricted than with regard to information access: in the Harfst and Schnapp (2003) dataset, the Bundestag holds the second rank, after the US. MPs are relatively specialized and have personal staff, the same holds for committees. Moreover, there is a powerful research and documentation division.

Sanctioning options rest on the ability to change legislation and alter the agency structure and/or competencies. However, the legislation process requires unanimity of a relevant

⁵⁴ Datenhandbuch des Deutschen Bundestages, chapter 8.9, p. 13, accessed May 11, 2015.

https://www.bundestag.de/blob/196178/02b367c6d8c3acf02d777e0698064fcb/kapitel_08_09_untersuchungsaussch_sse-data.pdf.

number of actors. In the BaFin context, Handke and Zimmermann (2012) provide a detailed case study why a BaFin reform failed due to different preferences within the governing coalition. They conclude:

“Although BaFin had no strong institutional support, it survived. Dissent among the coalition parties and in the industry was enough to kill any proposal” (Handke and Zimmermann, 2012: 134).

In sum, both information access and sanctioning credibility are difficult for the parliament. For information access, the membership in the administrative board is a substantial advantage, but is much more restricted than in the BNetzA case. On the other hand, MPs have even less access to the internal organization of “ordinary” agencies without a board. The parliamentary question is an important parliamentary instrument, often used to generate public attention – it is mostly answered, however, by the responsible parent department, and hence is only an indirect access to the agency. Inquiry committees are powerful, but are only rarely established. Sanctions in terms of legislation changes are difficult to manage. In contrast, information capability, albeit limited, is a less relevant problem.

7.3.4. Courts and Audits

BaFin decisions can be fought in front of the Frankfurt administrative court. Similarly to the BNetzA case, there is a specialized chamber⁵⁵ dealing with BaFin cases. However, judicial review is much less frequent than in the BNetzA case: the website of the Hessian court system⁵⁶ enumerates 155 decisions regarding the BaFin, compared to 725 decisions regarding the Bundesnetzagentur in roughly the same period. This can, however, be explained by the market-regulatory character of the BNetzA’s tasks – in comparison, the

⁵⁵ The 7th chamber of the administrative court. See the allocation plan of the court (Geschäftsverteilungsplan): https://vg-frankfurt-justiz.hessen.de/irj/VG_Frankfurt_am_Main_Internet?uid=92229bac-cbd9-521f-012f-31e2389e4818, accessed May 11, 2015.

⁵⁶ Results for „BaFin“ at <http://www.lareda.hessenrecht.hessen.de/jportal/portal/page/bslaredaprod.psml?Openform>, accessed May 11, 2015.

BaFin has more supervisory tasks and direct market interventions is far less frequent. Accordingly, interviewees did not mention courts as relevant accountability fora.

In contrast to the administrative courts, the Federal Audit Court (*Bundesrechnungshof*, BRH) has a crucial role. It is formally obliged both to check the report of the external auditor and to audit the BaFin by itself. The BRH audits are considered more thorough, examining the BaFin's behavior "virtually all the time" and "under different aspects" (interview DE10). The BRH submits the report to the government and the administrative board:

"Das Direktorium legt dem Bundesrechnungshof die Jahresrechnung sowie den Bericht des Abschlussprüfers vor. Der Bundesrechnungshof informiert den Verwaltungsrat über Erkenntnisse, die für die Entscheidung über die Entlastung des Direktoriums relevant sind" (§10 BaFin regulations).

This is considered to be a highly valuable source of information by the board members, in particular regarding personnel planning:

"Die Frage ist ja sofort, wenn solche beantragten zusätzlichen Stellen nicht genehmigt werden, werden dann die Aufgaben, die da beantragt sind, nicht wahrgenommen. Das kann gar nicht sein, weil das Aufgaben sind, die eindeutig die Bafin zu erfüllen hat. Und dann muss sie es ja irgendwie anders machen. Und das eben genau kriegen sie von außen quasi gar nicht mit. Und da können sie dann nur vertrauen, auf das was der Bundesrechnungshof, der nun ja regelmässig seine Berichte vorlegt und an allen Sitzungen teilnimmt und die Innenrevision, die dann eben auch ihre Berichte vorlegt und an allen Sitzungen teilnimmt, dass die solche Schwächen entsprechend auch aufdecken" (interview DE02).

The BRH can also choose to publish its critique; it has opted to do so four times so far, highlighting deficits in procurement and risk management of BaFin's financial assets.⁵⁷ In terms of information access and capability, the BRH is virtually unrestricted. After all, auditing can be considered as effective; its reports provide a valuable information source for BMF, Parliament, and administrative board. However, the BRH - in contrast to the Swiss EFK - deals exclusively with managerial issues - i.e. the efficiency of resource use, while the EFK evaluates also the effectiveness of decisions and the impact of decisions on the budget.

7.3.5. Expert and administrative bodies

The most relevant expert body regarding financial regulation outside BaFin is the Bundesbank. The BaFin and the Bundesbank have several areas of overlapping competencies, which requires extensive cooperation and exchange of information. While prior to 2002 the division of competencies was considered as efficient and without relevant tensions (Busch, 2009), the founding of the BaFin resulted in intensive turf wars, which are by now at least partly settled in everyday life, but flare up again whenever tasks are reorganized.

The cooperation in micro- and macro-prudential supervision is fixed in the respective laws (KWG, FinStabG) and a supervisory guideline originally issued by the BaFin in 2003.⁵⁸ Basically, §7 No. 1a KWG and Art. 8 of the supervisory guidelines demand the exchange of all information "needed for the fulfilment of their tasks", including of their communication with the ECB. A very similar formulation can be found in the financial stabilization act (§5 FinStabG), which assigns the Bundesbank the main responsibility for macro-prudential supervision. There is a joint database on supervisory issues and several bodies facilitating a coordinated approach to banking supervision: there is a joint committee on ongoing supervision issues (Art. 8, No. 3 supervisory guidelines), with quarterly meetings of the banking supervision top officials from both sides (Frach, 2008: 108). The Bundesbank is also represented in the BaFin advisory board and (without voting rights) in

⁵⁷ https://www.bundesrechnungshof.de/de/veroeffentlichungen/datenbank-veroeffentlichungen#b_start=0&c6=finanzdienstleistungsaufsicht, accessed May 11, 2015.

⁵⁸ https://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Richtlinie/rl_130521_aufsichtsrichtlinie_en_ba.html, retrieved October 14, 2015.

the administrative board and the BaFin risk committee. Furthermore, both actors are equally represented in the Committee on Financial Stability (AFS).

At the international level, the Bundesbank is a member of most relevant bodies: this holds for the Basel Committee as well as for the Financial Stability Board. In the former Committee on Banking Supervision, both BaFin and Bundesbank held a seat, albeit only the BaFin had a vote (Frach, 2008). In the SSM structures, the Bundesbank holds only a secondary role, which induced some political debates (see below).

At the working level, as well as regarding international negotiations, both actors collaborate closely with, and take a joint and coherent position vis-à-vis, market actors and international partners (Frach, 2008: 110). However, there is a long history of personal conflicts and turf wars on competencies.

The Bundesbank has tried several times to take on supervisory tasks, the first time prior to the BaFin creation in 2002. A second attempt occurred in 2009, as the financial crisis opened up a window of opportunity. Bundesbank president Weber then presented an “integration model” that would have turned the BaFin into a mere appendix to the Bank (Handke, 2012b: 50). On both occasions, the BMF refused the plan: first, banking supervision by the Bundesbank would have meant substantial loss of control over financial services regulation, due to the fact that the Bundesbank is not subject to ministerial supervision (Handke, 2012a: 38).; and second, this exemption would have caused legal problems, as ministerial control is a legal prerequisite for an agency to execute sovereign tasks (such as giving orders or imposing fines). The option to make a supervisory branch of the Bundesbank subject to ministerial and/or parliamentary oversight was refused by the former (interview DE04, Handke, 2012a).

After 2008, the structures of banking supervision have undergone dramatic changes. The BaFin has lost a substantial part of its responsibilities, as macro-prudential supervision is now executed by the Bundesbank, and SIFIs are now under SSM scrutiny. On the other hand, the Bundesbank is not very happy with the new arrangement, since its role in European supervision is now only a secondary one. Within the SSM, only the BaFin is officially responsible, the Bundesbank has lost its voting right. Arguments that the

Bundesbank is represented in the ECB council, which has to adopt the important decisions of the SSM, were dismissed by the Bundesbank, stating that the ECB council is expected to decide only very rarely on these issues (Die Welt, 2014; Manager Magazin, 2014).

Apart from these general conflicts regarding the institutional setting, there is evidence for ongoing turf wars within the existing arrangement of micro-prudential supervision. Already in 2002, there was an intense conflict on the interpretation of §44 KWG which assigns ongoing supervision to the Bundesbank, while the BaFin insisted on its discretionary leeway, allowing it also to execute its own audits. The conflict was preliminarily settled when BaFin and Bundesbank agreed on the supervisory guidelines, which assigned, as a rule, ongoing banking supervision to the Bundesbank, but reserving BaFin's right for its own supervisory action in important cases (Frach, 2008: 106-8):

“Unsere Aufgabe ist es, die Sachverhalte zu klären, zu analysieren, zu bewerten und entsprechend gegebenenfalls Handlungsvorschläge der BaFin zu unterbreiten, und Aufgabe der BaFin ist es, gegebenenfalls Maßnahmen zu ergreifen gegen das Institut, das heißt Verwaltungsakte anzuordnen. Faktisch ist es aber auch so, dass bei systemrelevanten Instituten auch die BaFin sich in die Sachverhaltsklärung einschaltet” (witness Klaus-Peter Jakob in Deutscher Bundestag, 2009a: 156-7).

In front of the financial crisis inquiry committee, both Bundesbank and BaFin underlined their good cooperation:

“Die Beweisaufnahme hat ergeben, dass die Kommunikation zwischen der Deutschen Bundesbank und der BaFin funktionierte und beide Säulen der Bankenaufsicht kooperativ zusammengearbeitet haben” (Deutscher Bundestag, 2009a: 156). However, there is evidence for ongoing turf wars on competencies, which continued to influence the relationship between both actors both prior to (Frach, 2008: 110) as well as during (Handke, 2012c: 245) the financial crisis:

“Das Verhältnis beider Behörden ist in der Bankenaufsicht seit 2002 durch eine horizontale Trennung der Aufsichtskompetenz gekennzeichnet, die zu einer Konkurrenzsituation führte, in der

»Grabenkämpfe, Konflikte um Politikmaßnahmen oder Versuche, Schuldzuweisungen abzuwehren«, die Regel sind” (Handke, 2012a: 38-9).

Despite the settlement attempts, the division of competencies in banking supervision had been far from clear-cut (Frach, 2008: 75):

“Es gibt auch den Konflikt zwischen Bafin und Bundesbank. Die Bafin will stärker in die Einzelfallaufsicht hinein, weil sie halt den Blick in die Unternehmen haben wollen. Aber die Bundesbank sagt: nein, das ist unser Aufgabenbereich, wir informieren euch dann darüber. Da gibt es unterschiedliche Interessen auch zwischen Bundesbank und Bafin und Politik, dann wiederum” (interview DE04).

This conflict resembles the turf wars between SNB and Finma in the Swiss case, albeit with reversed directions. Accordingly, the supervisory guidelines were reformulated in 2013 in order to “clearly delimit competencies and ensure informational exchange”.⁵⁹ In addition, the 2011 amendment of the FinDAG appoints the BMF as arbitrator in case of continuous conflicts between BaFin and Bundesbank regarding issues of ongoing supervision (§4a FinDAG 2011). After all, both BaFin and Bundesbank are eager to avoid negative publicity and are interested in smoothly managed supervision processes without overlaps (interview DE10).

At a personal level, Handke (2012c: 245) depicts conflicts between BaFin head Sanio on the one hand, and Bundesbank president Weber, BMF junior minister Asmussen, and the head economic adviser in the chancellery, Weidmann, on the other. In contrast to these quarrels, BaFin and Bundesbank cooperate from time to time in terms of policy advice. The Bundesbank is a strong political actor. On many occasions, the BMF asks both BaFin and Bundesbank for their opinion and policy advice. Although we again find here some indications for differences in terms of policy preferences (Frach, 2008: 110), the Bundesbank as a constitutional body with its exceptional political independence (Quaglia,

⁵⁹ https://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Richtlinie/rl_130521_aufsichtsrichtlinie_en_ba.html, retrieved October 14, 2015.

2005) has much more political impact than the BaFin as a subordinated federal authority. This can be used strategically by the BaFin, as we can detect in the protocols of the financial crisis inquiry committee, where the BaFin head, Sanio, states:

“Wir haben dann nach Frankfurt einberufen, also den Gesamtvorstand mit allen maßgeblichen Leuten, Holding, Hypo Real Estate Holding, Bundesbank dabei. Es ist eine - ich bin fast geneigt zu sagen - Tradition in der Krise, dass wir hier immer zu zweit in die Schlacht ziehen” (BaFin president Sanio in Deutscher Bundestag, 2009c: 11).

On the negotiations regarding an eventual bail out of the Hypo Real Estate bank, he moves on:

Zeuge Jochen Sanio: ... Herr Weber hatte telefonisch den Kontakt nach Berlin. ...

...

Dr. Gerhard Schick (BÜNDNIS 90/DIEGRÜNEN): Warum haben Sie das nicht getan als Chef der Finanzaufsichtsbehörde?

Zeuge Jochen Sanio: Aus dem einfachen Grunde: Ich musste nachher die Schließung - wenn es denn so weit gekommen wäre - vornehmen. Für mich war das, wenn ich das mal so formulieren - - war meine vorgesetzte Dienstbehörde, das BMF, nachher Verhandler am Tisch. ... Außerdem war Herr Weber nun der beste Kanal nach Berlin, zu wem auch immer, wer gerade erforderlich war. Einen besseren konnte es nicht geben.” (Deutscher Bundestag, 2009c: 35-43).

In sum, there are top-level tensions between BaFin and Bundesbank, while cooperation at the working level is rather unproblematic. Cooperation is on some occasions (international negotiations, seeking for political impact) of mutual benefit. The involvement of the Bundesbank in processes of supervision and regulatory law-making, both at national and international level, a strong economic department, and the fulfilment of tasks in the course

of ongoing supervision, mean access to and the capability to process information provided by the BaFin, and in turn a high level of expertise.

The Bundesbank retains informal powers to influence banking supervision: it has to agree if further competencies are delegated to the BaFin (Frach, 2008: 107) and has a say in the selection process for the BaFin president (Busch, 2009: 96-7). Furthermore, it can veto BaFin's changes of the supervisory guidelines (§7 No. 2 KWG, Frach, 2008: 106). The same holds if the Bundesbank disagrees with the BaFin on issues of ongoing supervision. Here, the BMF has the right to a final decision (§4a FinDAG 2011).

In sum, the Bundesbank is not just an assistant in implementation, but a strong actor in itself. It is politically influential and possesses a high level of expertise. There are strong indications of rivalries between both institutions, although they only rarely hamper effective supervision. Apparently, the attempts of the Bundesbank to gain additional competencies were refused by the BMF in order to retain control over banking supervision. In other words, the BMF backs the BaFin vis-à-vis the Bundesbank, while at the same time it is interested in strong control. The BaFin in turn can make use of the Bundesbank's political weight if their interests are allied against the BMF.

Most of these points, however, regard political influence, rather than accountability. Here, we have to conclude that the Bundesbank is the one actor with abundant expertise and information access, but has nevertheless failed in its attempts to change the governance structures or the supervisory approach more toward its own interests. In terms of accountability, the Bundesbank thus apparently is rather a part of a complex checks-and-balances system that is designed to provide early warnings to the government, in particular the BMF.

While the study of the Bundesbank has not revealed a pronounced strategy to hold BaFin to account, their struggle on tasks and policy influence shows resemblances of an effective accountability mechanism: The BMF has the option to sanction insubordination by BaFin with an exclusion from legislative processes or other ways to reduce the latter's impact on policies.

7.3.6. Transnational bodies

Already before the 2008 crisis, Busch judged German financial regulation as being the product of European guidelines, with the most important initiatives coming from the European Union and the Basel Committee (Busch, 2009: 113). The most powerful pre-reform bodies are considered the networks at level 3 of the Lamfalussy procedure (Handke, 2010: 127-8). Döhler (2007: 35) interprets the detailed information duties of the BaFin vis-à-vis the BMF as a product of that Europeanization. Europeanization, however, mainly affects the parliamentary powers:

“Da wird die parlamentarische Beteiligung sukzessive ausgehöhlt. ... die ganzen Richtlinien im Finanzmarktbereich und vor allem dann die Umsetzung auf Verordnungswege, ... da werden ja die eigentlichen Gesetze oder die eigentlichen Regelungen getroffen, da hat die Politik dazu gar nichts mehr zu sagen. ... Nicht nur BaFin, sondern auch Finanzministerium, die sagen: Ja, haben wir leider nicht durchgesetzt gekriegt. Und dann kann man es nie nachprüfen, ob sie es überhaupt versucht haben. Und dann entscheiden nicht irgendwelche Abgeordnete, sondern irgendwelche Referatsleiter oder Abteilungsleiter im Finanzministerium und da wird Politik gemacht, so indirekt” (interview DE04).

The reforms at EU level strengthened the powers of the three new ESA even more (Handke, 2012a: 37), while the effects of these new structures could not be evaluated in the present work. As we can detect in the BNetzA case, a strengthening of the EU-level bodies with relevant enforcement powers vis-à-vis the national governments and regulators can alter the relationship between the domestic agency and its parent department significantly. A parallel development in the financial sector has yet to be seen.

Within the international bodies - namely the BCBS and the FSB - the rivalry between national regulators, central banks, and finance departments is omnipresent:

“Dann gibt es Länder die sich einfach gut koordinieren. ... Und in anderen Ländern spürt man dann eher die Spannungen. Es wird

vielleicht auch durch die interne Kommunikation überall etwas abgefedert. Aber trotzdem, wenn man genau hinhört und hinschaut, spürt man also diese nationalen Spannungen, die vielleicht überall bestehen, aber dann in manchen Ländern ist es dann noch deutlicher. Es bleibt es dann trotzdem noch deutlich. Und das sind vor allen Dingen die größeren Länder, [mit] komplexeren Systemen” (interview CH09).

The national governance structure clearly matters in these negotiations:

“... manche sind unabhängiger als andere. Und dann sind insbesondere da, wo die Aufsichtsbehörde dann Teil von der Notenbank ist, England, Frankreich, die sind weniger abhängig von ihrem Finanzministerium als jetzt Deutschland, beispielsweise” (interview CH09).

For the German case, the BaFin is seen as being very close to the BMF’s position:

“... [In] Deutschland [sind] Aufsichtsbehörde und Finanzministerium sehr eng, und da sieht man dann, die Positionen sind praktisch identisch” (interview CH09).

It is expected, however, that this situation is going to change in the future, given that national governments have agreed to delegate more powers to supranational and regulatory bodies:

“Jetzt finden ja die Verhandlungen zu den verschiedenen Richtlinien statt, und ... viele Verhandler kommen ja vom Finanzministerium. Das heisst, sie haben noch nicht ihre Kompetenzen abgetreten, und man ist eben noch daran” (interview CH09).

In sum, recent changes make it hard to assess the exact powers at the supranational level; however, a power gain of transnational bodies and national regulators is expected.

7.3.7. Agency strategy

Most importantly, the BaFin always maintains its close relationship to the BMF. There is a close connection, and abundant cooperation between BMF and BaFin. The relationship

between BMF and BaFin is characterized by close personal contacts (Frach, 2008: 117-8). Political responsibility is with the BMF, and the BaFin opts to report much (sometimes even more than required) to the BMF. In fact, BaFin sometimes acts “with a kind of anticipatory obedience towards the BMF” (Handke, 2012c: 242). Moreover, it sometimes even requests a detailed instruction from the BMF in avoidance of political responsibility (Frach, 2008: 116). The BaFin stays close to the BMF and would rarely express open disagreement with the BMF (at least publicly), it can in turn expect the BMF’s public support, since the closeness makes attempts at blame shifting implausible (Frach, 2008: 124). This close connection does not let the BaFin refrain from pursuing its own interests: for instance, it makes use of its role in the legislative process to acquire a maximum of tasks and staff (Frach, 2008: 117-8; Handke, 2012a: 38; 2012c: 244).

While the BMF’s close control can be interpreted as a fear of losing control over politically sensitive issues (Handke, 2012a: 36), it can be understood from the agency’s perspective as a strategy to avoid liability. Quoting a slang expression from the German army, one interviewee described that strategy as “reporting frees [from responsibility, J.B.]” (interview DE10). The BaFin thus clearly applies a cooperative strategy towards the BMF. This holds also for the international level (interview DE10).

Conflicts, if any, occur mainly at a personal level: Jochen Sanio, BaFin president between 2002 and 2012, had a difficult relationship both towards the BMF and the Bundesbank. While its expertise was uncontested, he battled with the BMF on organizational issues and task divisions:

“He behaved as the head of a fully independent agency - that is, according to his own self-image - and sent signals of ambition and waywardness towards the BMF (Heise&Herden, 2009). From the ministry’s point of view this was seen as an inappropriate way of leading a subordinate government body ...” (Handke, 2012c: 245).

That finding, stemming also from interview data, again clearly reveals the BMF’s perspective on the BaFin as enjoying some autonomy on selected issues (i.e. ongoing supervision), while its main character as a subordinate body remains untouched.

To the parliament, the BaFin has no frequent relationship, and less so a strategy. In fact, the BaFin is only occasionally in direct contact with the parliament, the BMF forming a “barrier” for parliamentary requests. Since the BaFin is not funded from the federal budget, the budget committee of the parliament has no role either. After all, direct interaction between MPs and the BaFin occurs in three ways: first, when the parliamentary finance committee calls in a BaFin representative as expert, mostly in the course of a legislative process; second, as witnesses in front of parliamentary inquiry committees, which has occurred so far only in the aftermath of the financial crisis; and third, in their function as members of the administrative board. The board, however, is an additional source of information for the MPs, but rather due to informal networking rather than by official reporting in front of the board.

There is only scarce use of the public: the BaFin stated in interviews that they do not seek public debate but rely on confidentiality. Accordingly, the BaFin issued only eleven press releases in 2011 and 2012, compared to the 233 of the British Financial Services Agency, or 125 of the BNetzA in the same period (Puppis et al., 2014).

In fact, the only relevant player at domestic level besides the BMF is the Bundesbank. At the working level, the collaboration between both institutions functions quite well: in ongoing supervision, the BaFin depends on Bundesbank staff, but due to detailed laws not so much on the Bundesbank’s will to cooperate.

Up the ladder, there is much evidence of turf wars. As outlined above, between the former Bundesbank president Weber and its former students, then BMF junior minister Asmussen and Chancellery coordinator (and present Bundesbank president) Weidmann on the one hand, and BaFin’s Sanio on the other, existed a kind of “non-relationship” (Handke, 2012c: 245). Also, a series of newspaper articles indicate conflicts on the division of tasks between Bundesbank and BaFin. I interpreted that to be a kind of power triangle between BMF, Bundesbank, and BaFin, in which either actor tries to push through its own position.⁶⁰ The “triangle” picture holds even more, bearing in mind that the BaFin

⁶⁰ The interest conflicts between central banks and financial regulators are partly induced by their main objectives, since for example the central bank’s decisions on interest rates directly affect the stability of banks (interview CH09).

sometimes manages to benefit from the Bundesbank's strong position in order to push the BMF in a certain direction. The fear of a reputation loss (and hence less policy influence) might be anticipated by the agency and result in behavioral adaptations in line with the department's positions.

7.3.8. Summary of actor strategies

Scrutinizing accountability in practice, it is clear that the parent BMF in fact uses its strong formal position: it maintains strong control, both directly and via control of the Administrative Board. This is not due to a lack of trust, but the Department's understanding of taking political responsibility for all decisions. It limits itself at the operational level and refrains from direct interference in ongoing supervision; but in general it understands the BaFin as a subordinate body. This has gone as far as the BMF changing BaFin's internal structure when its President behaved in a way perceived as inadequate for the director of a subordinate administrative body.

BaFin reinforces the BMF's police-patrol strategy by informing the BMF on all politically delicate issues, regardless of its formal duty to do so. The BMF and BaFin thus stand in the tradition of German administration, which has a strict division between political decision making and responsibility, and administrative implementation. Political responsibility stays with the BMF, which is then taken by the Department as an argument for maximizing control, and restricting itself only where international standards require regulatory independence.

As a result, the BMF is thoroughly informed and the BaFin in general shares the Department's position on most issues. Moreover, the Department makes use of external advice from the Audit Court and the Bundesbank. The latter, as a constitutionally strong actor within financial policy, has a twin role: it is regularly asked for its opinion and provides additional external expertise to the BMF, which results in ongoing competition between BaFin and Bundesbank on policy issues and political influence; this increases the pressure on the Agency to act in a pro-department way in order to maintain its influence on policies and legislative projects. In sum, the BMF is thus closely involved in BaFin businesses and relies on a wide variety of additional sources of information. There is evidence of mechanisms no. 9, 11, 13 to 16, 18, and 20.

The German Parliament is traditionally weak with regard to administrative accountability, and has scarce options for direct access to administrative bodies. In the BaFin case, it lacks the authority over the budget, which lies with the Administrative Board. On the other hand, the Board provides an access channel into the Agency, which is used for additional, informal information that otherwise could not be gathered by (opposition) MPs. In general, MPs see more of a problem in getting access to information, rather than in processing it due to limited resources. This holds in particular with transnational standard-setting procedures, where Parliament is only scarcely involved, if at all.

Parliamentary questions are not as useful with regard to subordinate administrative bodies, and mainly allow pressure to be put on the supervising BMF. Regarding all policy-related issues, the BMF effectively protects BaFin from parliamentary pressure. In general, the Parliament thus relies on coordination through cross-membership (administrative board) and external information sources (audit). Its options to request information via formal channels are filtered by the BMF and depend on their status as government or opposition MPs. In exceptional cases, an inquiry committee or hearings of the financial committee are additional information sources. Mechanisms no. 6 and 9 have been detected.

The Board hardly has an independent role: its function is mainly to involve the regulated sector in budgeting decisions, which are then taken informally “in the corridors”. It serves also as a way for MP members to have more direct contact with Agency staff. However, the BMF’s position in the Board is so strong it generally follows the former’s agenda (mechanism 19).

Courts are not very relevant in the BaFin case.

A further strong actor is the Bundesbank, which implements on-site inspections on behalf of BaFin and is in charge of macro-prudential issues. Task division and policy issues have regularly been a source of conflict between Bundesbank and BaFin. At first glance, this is about political power and influence rather than accountability. However, the evidence suggests that the competition between BaFin and Bundesbank is at least partly intended: it provides another source of expert information to the Department and puts pressure on BaFin. Given the existence of a powerful competitor (which would like to gain a substantial

part of BaFin's tasks), the Agency is more prone to maintain a good relationship to the BMF, and hence might refrain from deciding against the Department's will (mechanisms 19 and 26).

The role of Eurozone, EU, and transnational institutions has recently undergone quite dramatic changes and is hard to judge. On the one hand, BaFin lost some powers (macro-prudential supervision, supervision of SIFIs); but also got more involved at transnational levels (ESA) at the cost of both BMF and Bundesbank. Since with the ESA a structure similar to the telecommunications sector is now in place, parallel developments - i.e. a greater distance of BaFin from the BMF - are not improbable. What can almost certainly be said is that there has been an ongoing power loss of the Parliament, due to the stronger standard-setting powers at the transnational level. Furthermore, it is striking that the new governance structure did not replace, but was rather established in addition to existing ones (with the exception of the formalized ESA instead of the informal networks CEBR, CESR, and CEIOPS). European governance structures are highly complex. This makes it even more questionable that national accountability fora maintain oversight over transnational activities of both BaFin and Bundesbank. In terms of mechanisms, however, this field is so far hard to assess. Table 7.2 thus just reports mechanisms with regard to board, government, and parliament.

#	Mechanism	B	G	P	C	E	T
1	Agency theory predicts a considerable level of distrust and diverging interests between forum and agent.						
2	The forum is expected to have own interests at stake, and to execute monitoring at an efficient level.						
3	The forum uses sanctions at its disposal to align agency behavior with own interests. This might result in reduced agency autonomy.						
4	The agent, in turn, is expected to avoid accountability whenever possible in order to pursue its own goals.						
5	Forum owns an insufficient level of formal rights.						
6	Forum faces restrictions applying these rights (e.g., information is not forwarded etc.).					•	
7	Due to unclear division of tasks, accountability is dispersed ("problem of many hands").						
8	Forum does not make use of their formal rights due to insufficient resources.						
9	Forum makes use of additional information sources to reduce asymmetry and to improve monitoring.			•	•		
10	Cooperation among fora occurs to use the respective strengths while compensating weaknesses.						
11	There is a high level of trust between forum and agent.			•			
12	Forum does not use formal rights.						
13	Forum uses agency as sole or main information source.			•			
14	Agency voluntarily informs forum thoroughly on all relevant issues.			•			
15	Agency cooperates with forum to gain its political support/support for implementation.			•			
16	Agency needs support of forum to enhance legitimacy and/or reputation vis-à-vis fora or third actors.			•			
17	Forum is apparently disinterested in making use of its formal rights.						
18	Forum does not make use of formal rights in order to shift blame to agency.			•			
19	Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-re-election, etc.) coming with that.	•					•
20	Forum aims to hold agent to account for not being blamed itself.			•			
21	Forum forms alliance with agency to ensure policy success (e.g., shields agency from third parties).			•			
22	Forum internally or fora among each other differ in their interests and cannot agree on decisions to be taken.						
23	Agency strategically uses conflicts among or within fora to widen its own discretionary leeway.						
24	A higher number of fora makes coordination more sophisticated and results in less accountability.						
25	A higher number of fora improves information and hence accountability.						•
26	Under the condition that fora cooperate, a higher number of fora yields stronger accountability.						
27	Under the condition that the policy salience is high, media and public attention can be used by fora to improve own information.						

Table 7.2 Patterns of accountability in practice: BaFin

Note: B: Board; G: Government; P: Parliament; C: Courts and Audits; E: Expert and Administrative bodies; T: Transnational bodies.

7.4. Eidgenössische Finanzmarktaufsicht (FINMA)

The financial crisis substantially raised public attention to regulatory questions, in particular since it coincided with an institutional path change (the creation of FINMA) and a substantial policy change regarding banking secrecy due to international pressure. In turn, it provides an excellent example for investigating Swiss accountability practice “in action”: FINMA, the Federal Council, and the Parliament authored a series of reports during which a number of external experts were engaged. Most of these reports were initiated by the Parliament, but executed by the federal administration and external experts on behalf of the Federal Council. Thus, before analyzing the behavior of the various political actors separately, Table 7.3 gives an overview over the political debate over time.

Parliamentary initiatives		Resulting report	Contributing expert reports
Postulate 09.3209.	Graber	“Strategic directions for Switzerland’s financial market policy”, Federal Council, December 2009.	
Initiative David 08.4039, National Council’s Committee on Economic Affairs and Taxation (WAK-N) 09.3010.		“Das Verhalten der Finanzmarktaufsicht in der Finanzmarktkrise - Lehren für die Zukunft”, Federal Council, May 2010.	<ul style="list-style-type: none"> • “Financial market crisis and financial market supervision”, FINMA, September 2009. • “Expertengutachten über das Verhalten der Finanzmarktaufsicht in der Finanzkrise”, Hans Geiger, December 2009. • “The Conduct of Financial Market Supervision during the Financial Crisis”, David Green, January 2010.
Decision of the Control Committee (GPK), March 2009.		“Die Behörden unter dem Druck der Finanzkrise und der Herausgabe von UBS-Kundendaten an die USA”, 10.054, Control committee of the Swiss Parliament, May 2010.	<ul style="list-style-type: none"> • “La Suisse face à la crise: une comparaison internationale”, Cédric Tille and Charles Wyplosz, February 2010.
Parliamentary report 10.054, postulates 10.3389 and 10.3628.		“Weiterentwicklung der Aufsichtsinstrumente und der Organisation der Eidgenössischen Finanzmarktaufsicht FINMA”, Federal Council, May 2012.	<ul style="list-style-type: none"> • “Supervisory Instruments and the Organisation of FINMA”, Peter Hayward, November 2011.
Postulates 12.4095, 12.4121, 12.4122, 13.3282.	Graber de Courten, Schneeberger de Buman	“Die FINMA und ihre Regulierungs- und Aufsichtstätigkeit”, Federal Council, December 2014.	<ul style="list-style-type: none"> • “Expertengutachten betreffend die Regulierungs- und Kommunikationstätigkeit der FINMA”, Sabine Kilgus, August 2014.

Table 7.3 Swiss parliamentary initiatives and reports with regard to the governance of the financial sector after 2008

The table depicts only the debate regarding accountability and governance of FINMA. Of course, several consequences in terms of regulatory policies have been drawn as well. The

most prominent example is the adaption of Swiss law to the Basel III regulations, plus the so-called “Swiss finish”, additional requirements for Swiss banks. These adaptations are implemented mainly through the Capital Adequacy Ordinance (*Eigenmittelverordnung*, SR 952.03) of the Federal Council and corresponding implementing provisions, issued by FINMA.

7.4.1. Board

The executive and the Board of Directors are in very close contact. At least every two months, there is a formal meeting; and at every other meeting, the CEO provides a written report to the Board members (interview CH01). Apart from the Board president, all Board members are employed part-time. This means that for time reasons, Board members are restricted to strategic issues and are not involved in day-to-day business (interview CH08). On the other hand, in particular the president of the Board fulfills representative functions: she presents the annual report, and takes part in meetings with the Federal Council (interview CH08). Moreover, the Board is included when there is much at stake in order to share responsibility (interview CH01).

The ambiguous role of the Board between monitoring and operative tasks is seen as critical (interview CH01). However, it has been expressed that a pure monitoring function would lead to an increased politicization of the board:

“Concern has been expressed that if decision-making in individual cases were removed from the Board, pressure would build for the Board to include membership representing wider interests, so that the perceived current potential risk of excessive influence by the financial services industry could be replaced by the risk of undue representation of other, perhaps political, interests” (Green, 2010: 14).

Interviewees assign the board a non-politicized, expertise-oriented character (interview CH05). In sum, the Board of Directors’ character is clearly mixed; while it fulfills in part a monitoring function, it is clearly an integral part of the agency.

7.4.2. Government

FINMA cooperates closely with the government on legislative issues, but differences both in policy positions and regulatory issues have been revealed. With the government, namely the SIF and the FDF, there is a formal meeting every six months, where a wide range of strategic issues are discussed (interviews CH02, CH08). Apart from that, meetings occur at the working level, according to need, and with changing participants. This holds also for the top-level, i.e. meetings with the Federal Council:

“Nach Bedarf gibt es Sitzungen auf oberster Stufe mit dem Bundespräsidenten, bzw. den Bundesräten. In der Regel ist es der Direktor der Finma, der sich dann mit der Bundesrätin bzw. Bundespräsidentin trifft. Es gibt auch mal Treffen zwischen der Verwaltungsratspräsidentin und der Bundespräsidentin. Der häufigere Fall ist aber, dass der zwischen Direktor und Bundesrätin stattfindet” (interview CH08).

FINMA is the only administrative body with a legally fixed annual meeting with the whole Federal Council. This is associated with its extraordinary importance for the Swiss economy:

“[Die FINMA] verlangt, dass sie zweimal im Jahr Treffen mit dem Gesamtbundesrat hat, weil sie die wichtigste Behörde im Lande ist, um es etwas zynisch zu sagen” (interview CH04).

Apart from that, the relationship between the government, the SNB, and FINMA has been characterized as informal, and not very intense (Green, 2010; Schweizer Parlament. Geschäftsprüfungskommissionen des Nationalrates und des Ständerates, 2010):

“...it may be appropriate for a review to be undertaken to see whether the relationship between the FDF and the other two parties should be more formal, as is the case elsewhere” (Green, 2010: 8).

An interviewee agrees:

“Ich glaube, das ist auch etwas, was wir in Zukunft noch mehr versuchen sollten, ... diesen Informationsfluss zu verbessern und uns gegenseitig zu informieren. ... Aber wie gesagt, es ist auch etwas eine Vertrauenssache, es hat in den vergangenen Jahren immer relativ gut funktioniert” (interview CH02).

As a consequence, the Federal Council aimed to strengthen coordination mechanisms. In 2010, FINMA passed in accordance with the FDF its guidelines for financial regulation. Regarding information and cooperation, it states:

“Die FINMA bezieht das EFD und, im Rahmen der zwischen ihr und der SNB abgesprochenen gemeinsamen Interessengebiete, die SNB in ihre regulatorischen Überlegungen ein. Führen die Beobachtungen und Abklärungen die FINMA zum Schluss, dass eine Regulierung auf Stufe Gesetz oder eine Verordnung des Bundesrates notwendig wäre, informiert sie das EFD entsprechend. Die FINMA unterstützt das EFD bei den Regulierungsarbeiten und unterbreitet ihm geeignete Vorschläge” (FINMA, 2013: 4-5).

However, the problem is not only access to, but also processing of information. Apparently, the Federal Council reached its limits at the apex of the financial crisis:

“Wir hatten doch letztlich keine Ahnung, ob das stimmt, was man uns erzählt hat – weil wir es gar nicht verstanden haben” (anonymous Federal Councillor, quoted in Teuwsen, 2013).

Nevertheless, and in particular in legislative processes and international negotiations, cooperation works quite well: the political process is described as in principle consensual. The regulation of SIFIs after the crisis (“Too Big to Fail” bill) is an example:

“Im Falle von Too Big to Fail ... hat man im Fachkreis ... einen Kompromiss erarbeitet, einen Konsens. Aber auch da waren die Interessen unterschiedlich. Die Aufsicht, die Nationalbank hätte vielleicht noch höhere Anforderungen gehabt ... Aber man hat irgendwie

einen Konsens gefunden und das war die ideale Voraussetzung, auch dass man dann im politischen Prozess am Ende auch eine Vorlage fand, die eine Mehrheit unterstützt hat. Und das war bei dieser Vorlage der Fall” (interview CH02).

Thus, if there is no consensus within reach, this can result in a failure of the project:

“Das kann in einem Projekt so sein, ... dass Differenzen da sind, die wirklich auch zum Scheitern eines Projekts führen” (interview CH02).

In other words, FINMA has a strong influence on processes, which under certain conditions equal a de facto veto power. Its expertise is of tremendous importance to the FDF (interview CH08). Compared to FINMA’s 400 employees, the number of staff dealing with regulatory affairs within the SIF (ten) and FDF (six) is vanishingly small (interviews CH02, CH08). As a result, government bodies have to rely on trust, e.g. in international negotiations:

“Die Zusammenarbeit beinhaltet nicht natürlich nur Dialoge, sondern dass man sich auch gegenseitig informiert ... über das internationale Engagement... Wir sollten wissen, was läuft in diesen wichtigen standard setting-Gremien, weil wir ansonsten gewisse Entwicklungen erst viel zu spät erkennen... es gibt Gefässe, wo diese Informationen dann auch fließen... Aber es ist natürlich schon so in diesen Fachgremien, die FINMA ... macht das natürlich in ihrer Art und in ihrer Betrachtung... aber ... sie wird nicht irgendetwas verfolgen... das ist auch eine Vertrauensfrage schlussendlich bis zu einem gewissen Grad” (interview CH02).

Although this is rather unlikely and would be an exceptional issue, the formal instruments at hand can effectively be used in case FINMA exceeds its competencies from the government’s perspective:

“...es gibt da verschiedene Eskalationsstufen. Also was [die Regierung, JB] sicher machen kann, ist zu sagen, ... wir finden, ihr macht da etwas

und da fehlt die Gesetzesgrundlage dafür. Sollte dann sich die FINMA nicht bewegen, kann man das natürlich eskalieren lassen und dann finden auch Gespräche auf höchstem Niveau statt zwischen den Behörden und der Departementsleitung. Die dann wirklich nicht stattfinden sollten. ... theoretisch kann man sich dann überlegen: ... es wäre in diesem Fall denkbar, dass man halt eine Gesetzesvorlage macht ... oder was auch möglich ist, ... man sagt, der Bundesrat sollte das regeln, die FINMA soll das nicht in ihrer Kompetenz entscheiden können. Sondern es soll in einer Verordnung geregelt werden, die ja der Bundesrat verabschieden kann. Und die FINMA muss sich ja an dem ausrichten und das ist dann für sie die Grundlage” (interview CH02).

Although cooperation is the rule, it is quite clear that different interests prevail between the SIF and FDF on the one hand, and FINMA and the SNB on the other (interviews CH01, CH02, CH08). This regards mainly the balance between regulatory and economic interests:

“Eine FINMA hat eine andere Perspektive als vielleicht wir haben. Das können Sie auch ganz grundsätzlich anschauen. Die FINMA möchte vielleicht tendenziell regulieren, mehr eine klare Regulierung haben ... dieses Ziel kann vielleicht in einem gewissen Konflikt stehen zu einer wettbewerbsfähigen Gestaltung der Rahmenbedingungen” (interview CH02).

In particular in comparison with the other agencies under scrutiny, it is striking that FINMA and the FDF act independently, even with regard to the public. As a reaction to the crisis, the Federal Council aims to negotiate a tripartite Memorandum of Understanding with the SNB and FINMA. In 2010, it referred to potential problems due to these actors' independence:

“Zur Früherkennung von Gefahren für den Finanzplatz Schweiz, zur Wahrung der Finanzstabilität, zur Abstimmung der Regulierung und der Positionen im Hinblick auf die internationale Tätigkeit sowie zur Förderung des Austauschs und der Optimierung des Know-how ist es

unentbehrlich, dass auch auf tripartiter Ebene zwischen EFD, SNB und FINMA zusammengearbeitet wird und ein regelmässiger Informationsaustausch stattfindet. Es wird zu prüfen sein, ob sich dafür ein MoU als notwendig erweist. Dabei ist zu berücksichtigen, dass die FINMA und die SNB unabhängige Behörden sind, was den Abschluss eines MoU mit der Regierung erschweren könnte” (Schweizerischer Bundesrat, 2010a).

The tripartite MoU was passed in 2011 and established the Financial Stability Committee (Eidgenössisches Finanzdepartement. Financial Stability Working Group, 2012) in order to improve the information flow. In the committee, FDF, SIF, FINMA, and SNB are represented. Interestingly, it also states:

“The FDF, FINMA and the SNB shall coordinate their communications on their cooperation ... although as a rule each body shall issue separate communiqués” (Eidgenössisches Finanzdepartement EFD et al., 2011).

From FINMA’s perspective, it is not backed by the FDF, but liable itself in case of critique (interview CH01). We can attest the relationship thus a certain distance. That felt separation between department and regulator has on some occasions led to attempts at blame avoidance. An example is the UBS affair in 2008/2009.⁶¹ On instruction by FINMA, UBS released the data shortly before the set deadline. This was seen in Switzerland as substantial weakening of banking secrecy. FINMA was publicly blamed for that, and its right to take that far-reaching decision that affected a core principle of Swiss economic policy was doubted. The Federal Council declared FINMA to be in charge since the decision regarded a supervisory issue:

“Wir wollten den Entscheid nicht selbst treffen, das sollte die FINMA machen, schließlich handelte es sich um eine Aufsichtsfrage” (then Federal Councillor Merz, quoted in Teuwsen, 2013).

⁶¹ The Swiss UBS was accused by US prosecutors of lending support in thousands of tax fraud cases, and requested Swiss authorities to forward personal data of US customers involved.

In 2011, the Federal Supreme Court endorsed FINMA's actions (BGer 137 II 431). From a different perspective, however, the political character of the decision would have meant the Federal Council taking that decision within emergency law:

“Wir haben das auch kritisiert und gesagt, das ist eigentlich nicht normal, dass man der FINMA diesen Entscheid überlässt. Aber da hat sich der Bundesrat Merz einfach die Finger nicht verbrennen wollen. Es ist ein bisschen einfach. Ich finde das ist staatspolitisch sehr problematisch, natürlich. Jetzt weiss ich nicht, ob wir wieder vor so etwas stehen. Ob das dann wieder so passiert. Ich hoffe es nicht. Die Strukturen haben sich nicht gross geändert” (interview CH05).

As a rule, however, the actors avoid criticizing each other in public (interview CH02). The Federal Council even defended FINMA's management of the financial crisis vis-à-vis the Parliament:

“Allfällige im Verlauf der Finanzmarktkrise zu Tage getretene Mängel in der Aufsichtstätigkeit der EBK, welche auf Mängel in den Strukturen dieser Behörde zurückzuführen sind, wurden daher mit dem Inkrafttreten des FINMA bereits behoben. Aus diesem Grund ist darauf zu achten, das Verhalten der EBK von demjenigen der FINMA zu unterscheiden. ... Im Ergebnis kann festgehalten werden, dass die Finanzmarktkrise durch die Aufsichtsbehörden – insbesondere im Vergleich zum Ausland – gut gemeistert wurde” (Schweizerischer Bundesrat, 2010a: 12-3).

7.4.3. Parliament

Direct interactions between Parliament and FINMA are largely problem-focused. The Control Committee (GPK) has an annual meeting with FINMA's director and Board president to discuss the annual report and current issues (interview CH04). Regarding supervision of FINMA, the GPK restricts itself to organizational issues. Its aim is mainly to identify weaknesses in the FC's supervision of FINMA, and proposes changes to the Council:

“Wir versuchen auch im Gespräch mit den verschiedenen Amtsstellen, sei das jetzt FINMA, aber auch Nationalbank oder Finanzverwaltung, allfällige Zusammenarbeitsprobleme zu eruieren und versuchen dann, solche Erkenntnisse in den Bundesrat hineinzugeben. Aber es ist nicht so, dass wir dann den Bundesrat kontrollieren, wie er seine Aufsicht wahrnimmt. ... wenn wir jetzt gestützt auf ein solches Gespräch oder die Prüfung des Geschäftsberichtes, Anliegen betreffend der FINMA haben, die im Bereich der Aufsicht durch den Bundesrat liegen, dann machen wir dem Bundesrat eine entsprechende Empfehlung oder einen Vorstoss und dann kontrollieren wir, ob der Bundesrat unsere Empfehlung umgesetzt hat und wie. Das ist das Verfahren. Wir kontrollieren nicht, wie er das direkt umsetzt, sondern wir kontrollieren, ob er und was er von unseren Empfehlungen umgesetzt hat” (interview CH04).

The direct relationship is rather wary: MPs criticize FINMA’s independence as hampering the information flow between government bodies (interview CH04) and resulting in agency capture by banks:

“Die von der FINMA durchgeführte Krisenanalyse zeigt deutlich, dass die Aufsichtsbehörde die Schlussfolgerungen der Bank nicht genügend hinterfragt hat und dass die EBK sich zu bereitwillig mit den Versicherungen der Bank zufrieden gab” (Schweizer Parlament, Geschäftsprüfungskommissionen des Nationalrates und des Ständerates, 2010: 3163, with regard to FINMA’s predecessor, EBK).

FINMA, on the other hand, sees the Parliament mainly as a vehicle of lobbyists, and would prefer not to have direct contacts with it (interview CH01). Normally, the GPK meets 16 times a year, plus additional meetings of subcommittees (interview CH04).

As also described in the ComCom case study, the Swiss parliament faces serious restrictions in terms of resources:

“Wir sind alle nicht rund um die Uhr Parlamentsmitglieder, sondern wir haben unsere Berufe daneben und da kann man nicht alles rein zwängen. Das heisst, man ist gezwungen Prioritäten zu setzen” (interview CH04).

Support by assistants is scarce – the whole SP faction, second largest in the National Council, has six assistants (interview CH05). Additional resources are provided to the GPK by the Parliamentary Control of the Administration (*Parlamentarische Verwaltungskontrolle*, PVK):

“Bei der Finanzkrise hat die PVK auch sehr viele Unterstützung geleistet und wurde in die ganzen Arbeiten auch mit einbezogen. ... Da wird zuerst einmal eine Studie durch die PVK erstellt. Und dann werden Experten einbezogen und konkret befragt durch die PVK. Das wird dann gesammelt und das bekommen wir dann in der parlamentarischen Arbeit von der PVK präsentiert. Weil man einfach unmöglich alles selber machen kann” (interview CH04).

The expertise within the GPK is largely bound to the subcommission presidents (interview CH07):

“Ich war noch erstaunt bei dieser Diskussion, wie kompetent auch die Fragen von den Parlamentariern gestellt wurden” (interview CH05).

As a rule, GPK membership is not particularly attractive for MPs:

“Wir haben teilweise zum Teil Mühe Leute zu finden für die Politik, die zum Beispiel gerade grosse Finanzspezialisten, die verdienen natürlich in einer Privatbank viel mehr. Und wenn sie in einer Privatbank an der obersten Spitze sind, haben sie keine Zeit für Politik. ... In der GPK wechseln die Leute effektiv oft. Weil man oft in der ersten Legislatur dazu verknurrt wird, in die GPK zu gehen. Weil das ist eine Kommission, wo man relativ wenig gegen aussen auftreten kann” (interview CH05).

Apart from resources, to increase the autonomy of units clearly affects the availability of intervention instruments for the parliament:

“Das können wir nur dem Bundesrat mitteilen. Aber der Bundesrat muss nachher handeln. Und der kann auch sagen, ich finde, da muss ich nicht handeln, weil für mich läuft das gut. Und da können wir nichts machen. Wenn es in der Bundesverwaltung ist, in der Zentralverwaltung, dann können wir direkter eingreifen und sagen, das verändern wir da. Da muss der Bundesrat etwas verändern, aber wenn es die ausgelagerten Institution, wo es nur einen Leistungsauftrag gibt oder Globale Budgets, kann man einfach wenig direkt eingreifen” (interview CH05).

All these facts are not really favorable for effective accountability by the Parliament. However, there is one exception: although formally weak, the Parliament nevertheless can have influence if there is exceptional public pressure:

“Also Einfluss haben wir keinen. Also das ist wirklich die Aufgabe des Bundesrates. Ausser ... wenn es natürlich einen politisch öffentlichen Druck gibt. Dann könnte etwas geändert werden. Wenn jetzt jemand vom Verwaltungsrat völlig ins Schussfeld geraten würde wegen irgendetwas. Aber das ist dann eine politische Druckfrage. Vom Gesetz her oder von unserem Handeln her können wir da nicht gross Einfluss nehmen. Und wie der Bundesrat diese Leute wählt, da haben sie eine grosse Freiheit” (interview CH05).

Furthermore, sometimes key actors seem to stick to their habitual action and thus do not adapt to changes in the organization:

“Also dem Parlament ist die Eigenständigkeit, wenn man so will, der FINMA relativ egal. Er betrachtet den BR einfach als zuständig auch für Finanzmarktthemen. Und das Parlament hat ja letztlich auch nicht die Möglichkeit, parlamentarische Vorstösse an die FINMA zu richten. Also es ist dann auch irgendwie logisch, dass sie sie an den BR richtet.

...

Wenn sie die parlamentarische Obergrenze betrachten, die entsprechenden Vorstösse, [müssen sie] auch feststellen ... das letztlich sich die Verselbstständigung im Handeln des Parlaments und im Verständnis des Parlaments nicht oder kaum niedergeschlagen hat. Also das heisst, das Parlament hat nach der Verselbstständigung gleich agiert wie vorher, obwohl man rein formal hätte sagen müssen, meldet euch bitte an den Verwaltungsratspräsidenten. Aber das findet eben so nicht statt" (interview CH08).

In fact, parliamentary requests and in particular GPK recommendations can have a substantial impact. There are no minority reports, and recommendations within a GPK report always require broad political support (interview CH04). Furthermore, the power-sharing characteristics of the Swiss political system provoke a clear separation between Federal Council and Parliament. This leads to a pronounced self-understanding of the Parliament as a monitoring body. This results in a sometimes openly critical attitude vis-à-vis the Federal Council, as for instance the report on the financial crisis shows:

“dem Bundesrat scheint es im Krisenfall an den elementarsten Mitteln der Teamarbeit zu mangeln” (Schweizer Parlament. Geschäftsprüfungskommissionen des Nationalrates und des Ständerates, 2010: 3238).

In sum, despite its resource weakness, the Parliament is an effective counterpart to the Federal Council. With regard to bodies separated from direct federal administration, such as FINMA, it is formally less powerful. Under normal circumstances, it thus monitors mostly decision-making and supervisory processes, and directs its requests and recommendations to the Federal Council rather than to the autonomous body itself. However, political scandals, or personal misbehavior of agency officials, can raise public pressure to a level that helps the Parliament to prevail with its interests. Compared to parliamentary systems, the primary role of the Parliament as a monitoring body rather than one of government support, as in most parliamentarian systems, contributes further to a

role of the Parliament that is more influential than its limited resources leads one to predict. On the other hand, however, its impact is restricted as soon as it deals with FLAG offices are decentralized administration, since it is only entitled to issue non-binding recommendations.

7.4.4. Courts and Audits

In their respective online databases, there are 257 decisions⁶² by the Federal Administrative Court and 19 decisions⁶³ by the Federal Supreme Court regarding FINMA. Given that FINMA has only existed since 2009, this number is considerable. The great majority of the cases concerns appeals against single regulatory decisions. Thus they apparently fulfill their function. Moreover, the courts play a role in interinstitutional conflicts over competencies.

7.4.5. Expert and administrative bodies

The relationship between FINMA and the Swiss National Bank (SNB) is characterized by: a) a substantial overlap of tasks that results in high coordination needs; and b) a conflict between both institutions, driven by partly diverging policy positions, a dissent regarding respective information needs, and lastly a personal conflict between both presidents in the past.

FINMA is responsible for micro-prudential supervision and monitors banks, with the help of external auditors. The SNB is in charge of macro-prudential supervision and financial stability. Both actors have coordinated their activities in a Memorandum of Understanding in 2007, amended in 2010 (Eidgenössische Finanzmarktaufsicht FINMA and Schweizerische Nationalbank SNB, 2010). However, some issues have remained unsolved. The main problem from the SNB's perspective is the lack of direct access to the supervised institutions in order to gather qualitative data, e.g. on risk assessments (Fáykiss and Szombati, 2013: 67). Furthermore, it requested to be involved in the regulatory process already at an early stage, and the right to decide on a bank's SIFI status. This is justified with the SNB's role in macro-prudential regulation (Jordan, 2010). The issue had been

⁶² <http://www.bvger.ch/publiws/pub/search.jsf>, search result for „FINMA“, retrieved October 21, 2015.

⁶³ <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht-leitentscheide1954.htm>, search result for „FINMA“, retrieved October 21, 2015.

debated within the “*AG Finanzstabilität*” between FDF, SNB, and FINMA. Its report reads:

“The SNB has no direct, legally enforceable access to information of a non-statistical nature vis-à-vis financial market participants. The recent crisis showed, however, that this information can be important for the identification of systemic risks. ... Under existing law, the SNB can obtain such information only if it is forwarded by FINMA or voluntarily submitted by the financial market participants themselves. This setup may have functioned well in practice so far, but it has its limitations: As FINMA and the SNB pursue different supervisory goals, the information requirements of these two institutions can differ from one another. It could therefore come to pass that FINMA does not obtain information relevant to the SNB and is therefore not in a position to forward such information...” (Eidgenössisches Finanzdepartement. Financial Stability Working Group, 2012: 13).

The division of tasks is suboptimal also from FINMA’s perspective. It nevertheless wants to avoid duplications of effort, fears blurred responsibilities and is thus reluctant to grant the SNB access to data it considers not highly relevant for the latter’s tasks (interview CH01):

“... FINMA considers the existing legal basis and the Memorandum of Understanding to be sufficient for the SNB to acquire the information it requires to fulfil its macroprudential mandate. ... However, the majority of the working group believes the SNB should be given direct access to information of a non-statistical nature through an amendment to the NBA. This access would however be restricted to information which is not already obtained by other authorities - i.e. FINMA - and which clearly serves to fulfil the macroprudential mandate” (Eidgenössisches Finanzdepartement. Financial Stability Working Group, 2012: 13).

In other words, the SNB won the fight. This, however, was apparently only one round in a turf war. A newspaper article from 2012 elaborates on the conflict and frames it as a fight about the primary role in the banking sector:

“Seit den Tagen der Finanzkrise piesackte die Nationalbank die Finma und nahm das Zepter in Sachen Finanzplatzregulierung immer stärker in die Hand. Da die Finma die Krise nicht hatte kommen sehen, war ihre Autorität nach den hektischen Monaten des Jahres 2008 angeschlagen - in dieses Vakuum preschte mit dem damaligen SNB-Chef Philipp Hildebrand ein Mann mit grossem Ego und Machtanspruch. Die Finma-Oberen mussten sich zähneknirschend fügen. Doch dann kam Anfang Jahr die Affäre um die Devisengeschäfte des obersten SNB-Mannes - Hildebrand musste das Feld räumen. Zurück blieb eine SNB, die ihre unantastbare Autorität eingebüsst hatte. Das war für die Finma die Chance zum Gegenschlag” (Nolmans, 2012).

The author then portrays the dispute as a personal conflict between the FINMA director, Raaflaub, and SNB president Jordan:

“Kein Wunder, stimmt auch die persönliche Chemie zwischen den beiden nicht. Jordan und Raaflaub könnten einander nicht riechen, heisst es aus dem Umfeld beider Chefs” (Nolmans, 2012).

In the end, Raaflaub resigned in 2014, probably reacting to continuous political pressure from the SNB, SwissBanking, and several political parties (Kneubühler, 2013).

In sum, the FINMA director has proven to be subject to political pressure and reliant on external support. The SNB has an important role here. The problems between SNB and FINMA extended to the personal level, which is of particular importance in the Swiss governance mode, which is built to a relatively high extent upon personal, rather than informal exchange. Interestingly, the German case study also showed conflicts between Bundesbank and BaFin. Eventually, the FINMA CEO resigned since he had lost political support and hence policy influence.

The Federal Audit Office (EFK) has recently had some problems in accessing information hosted by FINMA: due to its independence, FINMA denied the EFK's right to access internal documents. The EFK decided to take an unusual reaction: it published the incident in its annual program:

“Als weiteren Ort und Themenbereich hätten wir die FINMA und ihre Aufsicht über die Zusatzkrankenversicherung prüfen wollen. So sah es unser Programm letztes Jahr vor. Die Zusammenarbeit mit dem Regulator der Banken und Versicherungen hat sich allerdings als anspruchsvoller als gedacht erwiesen. Wir sind zuversichtlich, dass es dieses Jahr klappen wird. Eine «Mission Impossible» gibt es ja wie gesagt nicht” (Eidgenössische Finanzkontrolle, 2015).

This is another indicator that the exact role of FINMA within Swiss government is not entirely clear yet, and subject to struggles among several actors.

7.4.6. Transnational bodies

Transnational bodies do not play any formal role in the accountability of FINMA.

7.4.7. Agency strategy

The agency's perspective has in part already been discussed. It sees itself as highly independent, also de facto. It characterizes its relationship to the FDF as non-hierarchical, and considers itself much more autonomous in organizational and personnel issues than a federal office or an executive commission (interview CH01). In enforcement issues, it partly relies on the FDF (Art. 50 FINMAG), but this does not affect its policy position, which has often been antagonistic to those of the Federal Council or SNB.

The scarce resources of governmental bodies also partly hampers cooperation from FINMA's perspective. As a former employee states:

“... da gab es Phasen wo wir sehr gut ... zusammengearbeitet haben. Und dann gab es eben strukturelle, personelle Veränderungen. Dann war es weniger, weil einfach eben nicht genügend Expertise dort vorhanden ist.

Und das erschwert natürlich dann auch die Zusammenarbeit, ... dann haben sie dann weniger Leute, die sich mit Regulierung und solchen Fragen beschäftigen" (interview CH09).

The Agency pursues an active public relations strategy: FINMA publishes quite frequently. Besides circulars with its regulatory decisions, and the annual report, this also entails strategy papers and press releases (FINMA, 2014b; Kilgus, 2014). These publications are partly used to make political statements. At least from the parliamentarians' perspective, this is intended and approved:

"Das zeigt, dass sie ja unabhängig ist von der Politik. Das finde ich richtig. Wenn sie das aus der Expertensicht sagt, so kann man nicht weitermachen, so geht unser Finanzmarkt auf mittelfristige oder längere Zeit kaputt. Das finde ich richtig, dass sie das sagt. Aus Expertensicht" (interview CH05).

As the resignation of FINMA director Raaflaub in 2014 showed, however, this independence is not absolute. FINMA is subject to political pressure and can overdraw the level of conflict:

"wenn sich plötzlich diese Klagen häufen würden, wie das jetzt zum Beispiel bei der FINMA ja der Fall ist, das müsste mir dann schon zu denken geben. Gerade die FINMA wird jetzt ziemlich kritisiert, im Sinne Überregulierung und so weiter" (interview CH06).

Since it is not shielded by its parent department, it has to stand up for itself (interview CH01). This can be critical in a traditionally liberal environment with banking sector interests. Apparently, after a relatively short pro-regulation alliance after the financial crisis, the wind had already changed again, bringing suspicions about overregulation and negative economic effects:

"Vor der Finanzkrise war im Wesentlichen der Trend sicherzustellen, dass die Finma nicht zu stark ist. Man hätte das als Bedrohung für die gedeihliche Entwicklung der Finanzindustrie sehen können. Dann kam

die Finanzkrise, dann hat der Wind schlagartig gedreht... das politische Gedächtnis in diesem Bereich ist relativ, ist relativ kurz und wir fallen eigentlich eher wieder in dieses ehemalige Muster zurück, ... wo die Finma als eher zu stark, als zu interventionistisch wahrgenommen wird. Das heißt, die Finma muss auch mit diesen wechselnden politischen Strömungen umgehen können" (interview CH08).

7.4.8. Summary of actor strategies

The Board of Directors also in practice behaves more as a part of the Agency rather than as a supervisory body. Thus given the non-transparent appointment rules, not too much can be said about its expertise and policy positions. However, it is appointed by the multi-party Federal Council, and its non-politicized, expertise-oriented character has been proven. I see evidence for mechanisms 13, 14, 16, and 21; 11 and 20 are probable.

The relationship between the Government (i.e. Federal Council, FDF, and SIF) and FINMA is multi-faceted. On the one hand, there is a strong involvement of the Agency in legislative procedures within the highly formalized pre-parliamentary process. Here, FINMA is almost assigned a de facto veto power. Both the SIF and FDF rely on FINMA's expertise, and use it frequently. On the other hand, the relationship is quite pragmatic: interviewees evoked the impression of FINMA's rather distant behavior, underlining its own independence quite frequently. Conflicts are apparently not uncommon, although this was stated only indirectly in the interviews. FINMA has a special role due to the extraordinary importance of the banking sector for the Swiss economy, which for instance grants it the legal right to meet with the Federal Council as a whole twice a year. On the other hand, this highly politicized policy area makes things more complicated in several ways: for example, in an attempt of blame shifting, the Federal Council left the decision to transfer data to US authorities to FINMA. Although open conflicts in public are generally avoided, FINMA cannot count on political support, but often finds itself caught in the crossfire of government, political parties, regulated sector, and the Swiss National Bank.

According to newspaper reports, it was that lack of political support that eventually led to the resignation of FINMA CEO Raaflaub in 2014. Apart from personal antagonisms that

may have played a role here, the resignation might also be an indicator that FINMA faces powerful opponents in the political sphere. Interviewees confirmed that the general political climate favors less intense regulation, which was only altered for a relatively short period in the aftermath of the financial crisis. The interpretation that external political pressure has the power to kick agency heads out of office is further underlined by the cases of the former SNB Director, Hildebrand, in 2012⁶⁴ and the ENSI President, Hufschmied, in 2011,⁶⁵ who were both forced to resign due to personal conflicts of interest. If this holds true, then lack of political support also has an impact in highly independent bodies such as FINMA. Mechanisms 13, 15, 18 and 27 are definitely active.

The Parliament, suffering from severe resource restrictions and an ambiguous legal role, focuses on the Federal Council and its communication and supervisory processes vis-à-vis FINMA. Because of the autonomous character of FINMA, the Parliament is restricted to giving recommendations to the Federal Council - compared to direct federal administration, it thus has only reduced powers. Nor does it deal with operative decisions or governmental oversight in practice. Apart from an annual meeting, personal contacts are rare. From the FINMA perspective, even that is too much: the strategic goals are considered as “not political”, and the Parliament is seen as an instrument of lobbyists. In turn, FINMA would prefer a concentration of accountability tasks within the Board and Federal Council. One MP, in contrast, criticized FINMA’s institutional design, calling it too remote both from Parliament and Government. The relationship is thus characterized by mutual distrust. Nevertheless, as outlined above, the Parliament can exert some power through political pressure. However, this pressure is mainly related to personnel issues in the light of misbehavior. A last interesting fact is that MPs continue to direct their requests to the Federal Council instead of to FINMA directly - this might be a question of habit, or driven by political considerations, but shows that the change of formal structures does not necessarily alter everyday behavior to the same extent. Parliament faces mechanisms 1, 4, 5, 7, and 27. All mechanisms are summarized in Table 7.4.

⁶⁴ http://www.snb.ch/de/nmr/reference/pre_20120109_1/source/pre_20120109_1.de.pdf, retrieved October 28, 2015.

⁶⁵ <http://www.ensi.ch/de/2011/06/24/ensi-ratspraesident-tritt-per-sofort-zurueck/>, retrieved October 28, 2015.

#	Mechanism	B	G	P	C	E	T
1	Agency theory predicts a considerable level of distrust and diverging interests between forum and agent.			•			
2	The forum is expected to have own interests at stake, and to execute monitoring at an efficient level.						
3	The forum uses sanctions at its disposal to align agency behavior with own interests. This might result in reduced agency autonomy.						
4	The agent, in turn, is expected to avoid accountability whenever possible in order to pursue its own goals.			•			
5	Forum owns an insufficient level of formal rights.			•			
6	Forum faces restrictions applying these rights (e.g., information is not forwarded etc.).						
7	Due to unclear division of tasks, accountability is dispersed ("problem of many hands").			•			
8	Forum does not make use of their formal rights due to insufficient resources.						
9	Forum makes use of additional information sources to reduce asymmetry and to improve monitoring.						
10	Cooperation among fora occurs to use the respective strengths while compensating weaknesses.						
11	There is a high level of trust between forum and agent.	•					
12	Forum does not use formal rights.						
13	Forum uses agency as sole or main information source.	•	•				
14	Agency voluntarily informs forum thoroughly on all relevant issues.	•					
15	Agency cooperates with forum to gain its political support/support for implementation.		•				
16	Agency needs support of forum to enhance legitimacy and/or reputation vis-à-vis fora or third actors.	•					
17	Forum is apparently disinterested in making use of its formal rights.						
18	Forum does not make use of formal rights in order to shift blame to agency.		•				
19	Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-re-election, etc.) coming with that.						
20	Forum aims to hold agent to account for not being blamed itself.	•					
21	Forum forms alliance with agency to ensure policy success (e.g., shields agency from third parties).	•					
22	Forum internally or fora among each other differ in their interests and cannot agree on decisions to be taken.						
23	Agency strategically uses conflicts among or within fora to widen its own discretionary leeway.						
24	A higher number of fora makes coordination more sophisticated and results in less accountability.						
25	A higher number of fora improves information and hence accountability.						
26	Under the condition that fora cooperate, a higher number of fora yields stronger accountability.						
27	Under the condition that the policy salience is high, media and public attention can be used by fora to improve own information.		•	•			

Table 7.4 Patterns of accountability in practice: FINMA

Note: B: Board; G: Government; P: Parliament; C: Courts and Audits; E: Expert and Administrative bodies; T: Transnational bodies.

7.5. Bundesnetzagentur (BNetzA)

I now turn to the analysis of BNetzA's fora's strategies. In light of the multitude of actors and the duality of strong national and supranational principals (the BMWi, and the European Commission), it is particularly interesting to check for coordination efforts among fora.

7.5.1. Board

The relationship between the BNetzA and the advisory board is described as transparent, and constructive:

“Wenn ich eine konkrete Sachfrage habe, auch eine Frage auf rechtliche Einordnung, auf zusätzliche Informationen, da kann ich einen Brief schreiben an den Präsidenten der BNetzA oder an die entsprechende Fachebene. Da kriege ich auch immer eine profunde Auskunft, also der Austausch ist sehr gut” (interview DE06).

The agency itself cares about a good relationship and consults the board with regard to action plans and activity reports (interview DE09). However, this does not mean that discussions are always consensual:

“...es gibt sicherlich Meinungsunterschiede, weil ja ein großes Spektrum von Meinungen da auch vertreten ist. Die Bundesländer, die Vertreter der Parteien, aber es wird sich an der Sache orientiert” (interview DE05).

Apparently, the most conflictive issue is the allocation of radio frequencies, where the *Länder* representatives within the board and the agency have different interests (interview DE09). Nevertheless, party politics play a strong role within the Beirat (interviews DE05, DE09):

Q: “Gibt es denn sehr unterschiedliche politische Ansichten, jetzt parteipolitisch motiviert, im Beirat?”

A: “Klar, logisch. Die Linke sitzt da auch drin.”

Q: “Und die hat eine andere Vorstellung von Telekommunikationsregulierung?”

A: “Selbstverständlich, das ist eine linksradikale Partei. Die wollen alles verstaatlichen” (interview DE07).

However, as often in German politics, the board is alternately chaired by an MP or a *Land* representative, a Christian or a Social Democrat (interview DE07).

The board meets six to eight times a year and is a crucial instrument for informing MPs (interview DE08). The agency uses this chance extensively (interview DE09). Apparently, the information flows primarily from the agency to the MPs (interview DE08):

Q: “Also Sie würden sagen, der Informationsfluss ist eigentlich sehr einseitig aus ihrer Sicht?”

A: “Absolut.”

Q: “Das Parlament wird informiert durch die BNetzA, aber nicht andersrum?”

A: “Nein, überhaupt nicht” (interview DE07).

The MPs are comparatively well equipped. However, the amount of tasks naturally implies a discrepancy between agency representatives and board members, which perform oversight from an enormous “crossing altitude” (interview DE09):

“...wirklich nachvollziehen im Detail können wir das kaum. Das heißt, nicht nur die rechtliche Unabhängigkeit der BNetzA sorgt dafür, dass

der Einfluss der Politik auf Entscheidungen relativ begrenzt ist”
(interview DE06).

The board has 32 members, half them MPs, and has to cover the wide spectrum of the BNetzA, which regulates railroad, gas, and electricity networks besides telecommunications. Profound knowledge on telecommunications regulation is thus scarce:

“das ist ein relativ großer Aufwand, um überhaupt in dem Thema drin sein zu können ... Das heißt, da haben Sie schon mal eine natürliche Auslese, wie viele Mitglieder des Beirates kennen sich an der Stelle mit Telekommunikationsregulierung aus. Das ist schon mal eine reduzierte Anzahl und dann kommt noch hinzu, dass sicher auch zwischen den Einzelperson Unterschiede sind: wie stark sind die eingearbeitet, sind die neu drin, sind die schon seit vielen Jahren drin” (interview DE06).

In contrast, the *Länder* representatives, often their economic ministers or junior ministers, have in general less personal expertise, but more assisting staff (interviews DE06, DE07, DE09).

The interviews corroborated the lack of influence on agency actions (interview DE06, DE07, DE08), with the exception of frequency allocation, where the board has to be consulted. In turn, political lobbying of market participants is quite frequent (interview DE09). Apart from that, its most important role is seen, first, in its right to propose the agency’s president (interview DE08); and second, in its function as an additional information channel for board members. An MP sums up the purpose of the board as:

“...dass man bei Entscheidungen, die vielleicht am Anfang nicht ganz nachvollziehbar sind, Nachfragen stellen kann oder bei aktuellen Themen vielleicht auch seine eigene Meinung natürlich einbringen kann” (interview DE06).

In effect, *Länder* governments and MPs are more closely involved in agency decisions and are apparently better informed on the BNetzA’s activities than they would be on those of

other federal authorities. Although the board lacks formal sanctioning mechanisms, both *Länder* and parliament have other options to maintain political influence. The board is thus a way to ensure their participation in the political process, and strengthens accountability in a rather indirect, and informal way. The heterogeneity of the board does not hamper that function.

7.5.2. Government

There is a close and cooperative relationship between the department and the BNetzA. Both have a parallel structure of divisions in the agency and the department that enhances the expertise of the department. The BNetzA reports regularly to the department. Moreover, there are plenty of personal relationships between employees; nevertheless department staff distinguishes naturally between “us” and “them” (interview DE08).

There is a clear division of tasks, assigning law making to the department and operative decision making to the BNetzA (interview DE08). Vis-à-vis other fora, the agency usually stays close to the department’s position (interview DE09), while the BMWi shields the BNetzA against other departments (interview DE08), in particular the Federal Finance Ministry (*Bundesministerium der Finanzen*, BMF), which, as a main shareholder of Deutsche Telekom, is interested in the company’s market performance.

The BMWi exerts its supervision via a unit (VI A 1) with two to three full-time employees, assisted by several other units within the same sub-department (VI A, interview DE08); the division head and the agency’s vice president meet monthly. Compared to the agency’s staff of over 2,500 (Bundesnetzagentur, 2015), “several hundred” (interview DE08) of them within telecommunications, this is a fairly small number for effective supervision. However, the BMWi extensively uses scientific advice from the monopoly commission, an affiliated research bureau (WIK), and benchmark comparisons with other European member states to assess the agency’s work (interviews DE08, DE09). However, resources delimit effectively the department’s capability for monitoring (interviews DE08, DE09).

The formal position of the BMWi is very strong. Besides its right to give instructions, it has to agree on internal organization and procedures, and decides on agency funding. Regardless of its formal competencies, however, the use of formal instructions is the

exception rather than the rule. There is only one general instruction published in agency history, referring to the postal sector. Nevertheless, there is a development over time: in the early 2000s, there were strong indications for regular individual instructions by the department (Böllhoff 2005). According to Böllhoff, the ministry made use of an ambiguity in the 1996 law, which had explicitly mentioned the duty to publish general instructions given (and was quiet on specific ones). Though debated among legal scholars, the department defined specific instructions to be allowed, but not to be published. The 2004 revision changed that, explicitly allowing for direct political interference with the agency's decisions, but at the same time requiring their publication. The fact that instructions given have to be published in the *Bundesgesetzblatt* (BGBl, German Federal Law Gazette), is considered a high threshold in a traditionally non-transparent administrative system (Döhler, 2005: 143) and is a first landmark in a process reducing ministerial influence (Böllhoff 2005: 175):

“Das Wirtschaftsministerium könnte ja theoretisch auch Einzelentscheide der BNetzA sozusagen zurückrufen... Gegebenenfalls müsste das dann aber auch im Bundesgesetzblatt veröffentlicht werden und mir ist jetzt kein Fall bekannt, dass das mal gemacht wurde, weil einfach die Hürde auch sehr, sehr hoch ist und sich natürlich auch das Ministerium und damit die Politik indirekt den Vorwurf aufgesetzt fühlt: Hier habt ihr eigentlich die unabhängige Regulierungsbehörde überstimmt und was ist eigentlich der Hintergrund? Und das würde sicher sofort thematisiert, um nicht zu sagen skandalisiert. Und auch vor dem Hintergrund ist die Unabhängigkeit der Regulierungsbehörde gegenüber der nationalen Politik doch relativ groß” (interview DE11).

Moreover, the limits of ministerial interference have been set quite narrowly by European institutions. In 2009, the European Court of Justice decided a paragraph of the TKG to be against the EU directive. Article 9a TKG 1996 exempted new markets from regulation and was sometimes referred to as “Lex Telekom” or “regulatory vacations” for the incumbent. That decision resulted in more reluctant behavior of the department, suspecting that formal instructions might be considered an infringement as well (interview

DE09). This threat became even more real when the EC directive 2009/140/EC modified the 2002 directive by explicitly precluding direct instructions:

“... national regulatory authorities responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings ... shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law” (2009/140/EC Art. 1 No. 3b).

The aim of the directive is seen as limiting review of regulatory decisions to courts. The department’s role is accordingly reduced to set the “general political framework” without reference to “ongoing implementation” (Ludwigs 2011: 45). The department now faces a dilemma: instructions are illegal according to EU law, but a necessary requirement of the German constitution. The behavior of the BMWi has to be understood accordingly as the attempt to avoid infringement procedures and a “major conflict” between EU law and national constitutional norms. I return to that conflict below.

As a last point, German law requires the consistency of administrative decisions with previous practices and court decisions. The formulation of such “legally robust” decisions exceeds the capacities of the department, which just by that means has little possibility of overruling agency decisions (interview DE08). In sum, the department is severely restricted from making use of its formal powers (interviews DE07, DE09), mainly due to the publication requirement, the demands of the legal system, and the EU institutions.

Another major issue is the role of the agency’s president: he has a special role since he is the main contact for ministry representatives (Böllhoff, 2005: 185, interview DE11), in contrast to other German agencies that cooperate basically at working level. Often, the subordinate divisions of the department are bypassed by direct contacts between the agency president and the minister, or her junior ministers (Böllhoff, 2005: 186, interview DE09). This is a clear departure from administrative traditions, in which the relationship to a subordinate body is largely maintained by the subdivision responsible for direct

supervision, rather than by the department's top level. The agency president's position in the ministry's hierarchy is thus almost that of a junior minister.

The internal role of the president is also strong: "The view of reality showed that the agency head defines the direction of general regulatory decision-making" (Böllhoff, 2005: 156). He has the power to set up the agency's rules of procedure (given the agreement of the BMWi), which for example assigns the tasks to the decision-making chambers. Due to the fact that these rules of procedure are not accessible to the public (Böllhoff, 2005: 157, footnote 328), there is some disagreement in the literature on the internal power of the president. Apparently, he has the formal power to give direct instructions to the ruling chambers (Ludwigs, 2011: 50), but is somewhat restricted by the fact that he has to respect the division of competencies among the chambers. He would not be allowed, for instance, to directly override a chamber's decisions (Ruthig and Storr, 2011: 103). However, he remains highly influential via informal talks and "subtle interference" to ensure decision coherence (Böllhoff, 2005: 157). Moreover, the president is head of the presidential ruling chamber, being in charge of frequency allocations, universal service obligations (§132 TKG), market analysis, and market definitions. In other words, he decides on all decisions of wider impact that have been accordingly defined above as strategic. However, the statistics of agency activity show that the presidential chamber has not taken any decisions later than 2004 (see Table 7.5). This is in line with concerns of a largely different regulatory approach raised in the context of the change from the founding president of the BNetzA to his successor (Böllhoff, 2005: 156), which highlight the crucial role market participants assigned to the president. Agency representatives themselves consider the way the president addresses the public as highly relevant for the success of regulatory policy.

Chamber no.	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
1 (pres.)	2	6	3	2	1		1											15
2	2	6	15	21	29	27	24	9		1	6	2	6	1	1		1	151
3	2	7	5	9	5	3	10	8	14	26	39	45	131	38	21	36	1	400

Table 7.5 Number of decisions by ruling chamber

Note: The presidential chamber (no. 1) is responsible for market definitions and analyses, conditions for frequency allocation, and universal service obligations; chamber no. 2 is in charge of decisions regarding consumer charges, chamber no. 3 for access and presale regulation. The remaining chambers regulate postal, electricity, and railroad network markets; **Source:** <http://beschlussdatenbank.bundesnetzagentur.de>, accessed 17 April 2015.

The president is proposed by the advisory board, and (de facto) appointed by the government (Böllhoff, 2005: 150) for a fixed term of five years. He can be dismissed only for important reasons, presented at the advisory council and after being heard. However, there is no definition of “important reasons” in the law. Lawyers suggest that “it is not justifiable to dismiss the president because of a shattered relationship with the government; it is only justifiable if he acts against common interests” (Böllhoff, 2005: 154).

Accordingly, the appointment of the president is a highly political issue (Böllhoff, 2005). The department has no exclusive right to select him but needs to negotiate with the advisory board and the party factions within it (Handelsblatt, 2011). This results in doubts on the president’s independence:

“...der Präsident der Bundesnetzagentur ist weniger unabhängig, sage ich jetzt mal, von der Politik als der Präsident des Bundeskartellamtes zum Beispiel. Na das liegt daran, dass er eine bestimmte Vertragskonstruktion hat, nicht sozusagen Beamter auf Lebenszeit ist, dass er aus wichtigen Gründen abberufen werden kann, usw. Das macht ihn weniger unabhängig ... Und aus dieser Geringe von Unabhängigkeit gibt sich natürlich eine größere Möglichkeit der politischen Einflussnahme auf Regulierungsentscheide” (interview DE11).

This has been underlined also by some Swiss interviewees:

“Ich muss Ihnen ganz klar sagen, der Chef der Bundesnetzagentur ist politisch mitnichten unabhängig. Der Kurth war SPD. Der neue ist CSU oder CDU, Homann. Ich meine das ist ganz klar, dann sind sie nicht unabhängig” (interview CH06).

“...wenn Sie das Beispiel nehmen Präsidium BNetzA zum Präsidium ComCom? Da sind natürlich Welten dazwischen, wie die neueste Besetzung in der BNetzA stattgefunden hat, das ist nicht so in der Schweiz.” (Interview CH03).

In sum, the BNetzA has much more autonomy from the parent department than any other German federal agency apart from the Federal Cartel Agency. It is thus empowered to effectively negotiate with the BMWi. The relationship is characterized as cooperative: both actors describe each other as communicative and flexible; a confrontation is seen as a lose-lose situation (interviews DE08, DE09). The strength of the agency relies in part on the department's reluctance to use its instruction powers (see below). Furthermore, of importance is the strong role of the president. The appointment procedure is highly politicized: he has a strong internal role and is the main link between the agency and the department. Initial doubts on the agency's autonomy due the political role of its president have become less relevant in recent years, since the presidential chamber has not taken any more decisions since 2004.

In terms of information access and coordination with other fora, the BMWi relies strongly on the reports of the auditing court (Interview DE02) and the monopoly commission. The latter is in charge of regulatory impact assessments and goes beyond formal legal supervision in monitoring the BNetzA's actions (interview DE08). By formal arrangements, the awareness of the BMWi to these reports is further risen:

“...es muss eine Stellungnahme der Bundesregierung zum Hauptgutachten oder zum Sondergutachten der Monopolkommission veröffentlicht werden. ... Das heißt also, es gibt eine gewisse Vorabstimmung auch über diese Stellungnahme, die wird vorformuliert vom Bundeswirtschaftsministerium, da muss die abgestimmt werden, usw. Und dann wird die veröffentlicht. Das heißt also, weil es diese Stellungnahme gibt, gibt es auch eine Befassung zumindest im ministeriellen Bereich mit den Gutachten der Monopolkommission. Und die müssen also im Detail auch wahrgenommen werden, um da irgendwas aus der Sicht der Regierung sagen zu können” (interview DE11).

The relationship between the BMWi and the European commission is of a more conflictive character. In contrast to the commission (and, as of 2012, the BEREC), the department is not formally involved in regulatory decision-making processes, neither at national, nor at

European level. The department considers its chances to influence EU decision making as very low. Lack of expertise and resources hamper the department's access to the political arena further. According to the department, telecommunications policies are determined by a small group of people within the EC with detailed provisions that have to be implemented without much discretion (interview DE08).

In sum, the BMWi, thanks to a good relationship to the agency and further external information sources, can be considered as pretty well informed on regulatory issues. Formally, accountability is tremendously strong through instructional and supervisory rights, and a strong role in appointing the president. On the other hand, strong rule of law prevents both the department and the agency president from interfering with the ruling chambers' decisions. The requirement to publish direct instructions and the threat of being infringed by the EU commission, however, effectively restrains the department from using those formal powers. In effect, BMWi and BNetzA negotiate at eye level, but avoid conflicts and seek coordinated solutions.

7.5.3. Parliament

The role of the parliament is hard to separate completely from the one of the advisory board. MPs in the relevant parliamentary committee and advisory board members are largely identical. The agency is generally described as open and provides information to MPs and their staff:

“Es gibt das Geschäftsbüro, ich kenn natürlich auch die Leute dort. Ich rufe die dann persönlich an und frage sie zum Beispiel über Hintergründen nach dem Motto: Was geht denn hier und da vor? Dadurch, dass ich sie kenne und daher komme, kann ich dann auch direkt anrufen. Und in der Regel sind die Leute dann auch auskunftsfreudig ... Betriebs- und Geschäftsgeheimnisse, die werden nicht herausgegeben. Alles andere ist in der Regel Information ... die auch öffentlich bekannt ist, wo man nur wissen muss, wo man sie herbekommt. ... Das steht allen offen” (interview DE07).

“[Die BNetzA] ist in der Regel informations- oder auskunftsbereit. Man würde ja merken, wenn man die Informationen nicht so umfassend kriegt, wie man sie braucht. Ich ... würde das merken und würde dann nachfragen. Und dann werden die Informationen hergestellt... ich kriege die schon. Und wenn sich sie von der BNetzA nicht kriege, dann kriege ich sie von wo anders, aber das weiß Herr Kurth [the president of the BNetzA at that time, JB] auch” (interview DE05).

From the parliament’s perspective, the agency is trustworthy even in cases of disagreement:

Q: Gibt es da irgendwelche inhaltliche Konflikte?

...

A: Sicherlich kommt das mal vor. Das ist gar keine Frage.

Q: Das bezieht sich auf Einzelentscheidung oder auf die Ausrichtung?

A: Das bezieht sich auf Einzelentscheidungen. Aber in der Regel vertraut man dem Sachverstand der BNetzA. Also in den weit überwiegenden Fällen ist das so, dass man dem Sachverstand der BNetzA vertraut, damit sehr gute Erfahrungen gemacht hat - muss ich ganz ausdrücklich hier sagen, sehr gute Erfahrungen gemacht hat. Und man weiß, dass es in der BNetzA in guten Händen ist (interview DE07).

MPs of the Bundestag are comparatively well equipped: they have 2 to 3 staff members (Harfst and Schnapp, 2003); and parliamentary committees and factions have additional staff (interview DE07). In part, these assisting staff themselves have an expert background:

“Ich war selber neun Jahre in der BNetzA gewesen, in allen möglichen Positionen, sowohl als Referent in der Grundsatzabteilung, als auch als persönlicher Referent des Präsidenten, als auch als Beisitzender in Beschlusskammern. Also ich kenne den Laden rauf und runter” (interview DE07).

The size of the parliament and the number of staff allows for certain expertise, albeit only for a handful MPs:

“...im Bundestag, da gibt es bestimmte Leute, die sich damit beschäftigen, mit TK [Telekommunikation, JB]. Das sind vielleicht zwei, drei Leute pro Fraktion, und davon einer federführend, und der kümmert sich darum. Und der ist sozusagen in den Ausschüssen dafür verantwortlich; der formuliert die Anfragen, die da passieren. Der ist bei der Diskussion über die Gesetzesformulierung mit dabei. ... das sind eine Hand voll Leute aus den verschiedenen Fraktionen, die da die Spezialkenntnisse haben” (interview DE11).

“...im Telekommunikationsbereich gibt es zwei, drei Leute, ... die das auch schon seit zehn Jahren machen, oder seit acht Jahren machen. ... [Die sind] da auch drin in der Geschichte, ganz klar” (interview DE11)

“...die Bretter sind sehr dick, die da gebohrt werden. Es geht sehr ins Detail ... Das heißt aber nicht, dass er sich nicht von seinen Leuten hier und da gezielt bei bestimmten Problemen durchaus auch mal vorbereitet. Es gibt ja auch durchaus auch Fachabgeordnete, die sich zum Beispiel nur mit dem Thema Energie beschäftigen oder nur Berichterstatter für Energie, Berichterstatter für Telekommunikation, Berichterstatter für Post. Die kennen sich dann in dem Bereich ein bisschen mehr aus, weil die sich auch inhaltlich mit dem Themen auch tagtäglich bei der Arbeit auseinandersetzen müssen. ...Jede Fraktion hat ihre Berichterstatter für die verschiedenen Themenbereiche” (interview DE07).

Still, however, MPs are quite restricted due to limited time and staff resources:

Q: Wenn Sie eine Beiratssitzung der BNetzA vorbereiten, wie viel Zeit wenden Sie und Ihre Mitarbeiter dafür auf?

A: Drei Stunden.

Q: Sie alle zusammen?

A: Ja, alle zusammen, ja (interview DE05).

Moreover, party factions have very few members with expertise in telecommunications policy:

“...ich sehe bei der Frage TK-Regulierung und Politik ein grundsätzliches Problem, dass es sehr, sehr wenige Politiker gibt, die sich wirklich in Materie auch von Regulierung an der Stelle eingearbeitet haben. Also die meisten sind doch eher an der Oberfläche” (interview DE06).

The sources of information MPs use are the agency itself and hearings of the president in the parliamentary committee (interview DE06). The most important factor for MPs to get informed is, however, cross-membership in the advisory board, which allows for direct access to agency structures and better information than the one provided by the department (interview DE09):

“...die Entscheidungswege waren [im Beirat der BNetzA, JB] durch Kontakte sehr viel enger. Also es ist dann nicht so sehr über den Beirat gelaufen, das muss man auch sehr klar sagen, sondern mehr über informelle Kontakte zu den wesentlichen Leuten” (interview DE03).

Moreover, MPs get informed through the reports of the monopoly commission (interview DE11). Due to the extensive rights of the monopoly commission, this is a valuable source of information:

“... gerade durch die Rolle der Monopolkommission ... sind wir da eigentlich relativ gut aufgestellt. Dadurch, dass wir als Monopolkommission uns regelmäßig dazu äußern, dass wir Akteneinsichtsrechte haben, dass zumindest die Möglichkeit für die demokratisch gewählten Vertreter besteht, sich zu informieren - und dies im Zweifel, wenn es mal eine Diskussion gibt, auch tun würden, wenn sie's nicht ohnehin tun - sind wir eigentlich in einer Position, die

vergleichbar gut ist. Nicht übertrieben, aber ausreichend” (interview DE11).

In sum, MPs have more expertise at hand than their Swiss counterparts, but also compared to the BaFin board members. The cross-membership with the advisory board plays a crucial role for information flow. Via the formal information channels (i.e. formal requests to the parent department) oppositional MPs in particular have only limited information access.

7.5.4. Courts and Audits

The court system is free to establish specialized courts, and litigations have to be brought to the court to whose territorial jurisdiction the agency seat belongs. In effect, at the administrative court in Cologne, the higher administrative court in Münster, and the Federal administrative court in Berlin, specialized chambers take decisions on all cases regarding telecommunications regulation (Böllhoff, 2005: 198). The courts have widely unrestricted access to internal documents and regularly use external expertise. A restriction is sometimes the limited number of “neutral” experts, given that the WIK consultancy acts on behalf of the BNetzA and other experts for the petitioner (often the incumbent, the DTAG; interview DE09). Moreover, the mere number of appeals has brought the responsible court in Cologne to its limits, resulting in long delays, often favoring the incumbent (Böllhoff, 2005). The complexity of regulation continues to be a major challenge:

“Diese ganzen Berechnungen sind so komplex, dass sie, glaube ich, nicht mal am Ende wirklich, wenn sie vor Gericht landen - und sie landen hier öfter vor Gericht -, vom Gericht objektiv zu bewerten sind. Vieles hängt ja auch von Prämissen ab. Das heißt, das ist ein Bereich, der eigentlich für den Markt von der Größenordnung des Geldes relativ wichtig ist, der aber selbst von Gerichten kaum noch zu kontrollieren ist, weil sie sagen, da hat einfach die BNetzA einen gewissen Ermessensspielraum” (interview DE06).

Regarding the agency's discretion, there are some dynamics. Traditionally, the legal requirements on consistency of administrative decisions are high; in turn, virtually every decision the BNetzA takes has been subject to judicial review (interview DE08, Sturm et al., 2002). The respective database counts 725 decisions containing the term "*Bundesnetzagentur*".⁶⁶ Traditionally, judicial review does not leave much discretion with the agency: courts are entitled to review content and procedure in much greater detail than, for example, in the UK (interview DE08). However, a decision by the federal constitutional court in 2008 (BVerfG 1 BvR 1932/08) limited appeals against regulatory decisions and in turn enhanced the discretionary leeway of the BNetzA to some degree. This is considered as a landmark in German administrative tradition (interview DE09). However, in comparison, the requirement of legally robust ("*gerichtsfest*") agency decisions in accordance with case law continue to effectively restrict the BNetzA and keep judicial accountability via courts effective.

The Federal Audit Office (*Bundesrechnungshof*) has a formally strong position. It has constitutional rank (Art. 114 GG) and is thus at the same level as the constitutional court, the chancellery, federal ministries, and other higher federal authorities (*Oberste Bundesbehörden*). It is free to choose the objects of its financial supervision as long as they receive federal funding or are owned by the federal government (§§88, 91, 92 *Bundeshaushaltsordnung*, BHO). Its formal information rights are virtually unrestricted (§95 BHO).

The audit office has about 600 employees and thus a high level of expertise available. Its analyses can therefore be expected to be widely unrestricted by resource scarcity or external influence. As of April 2015, the *Bundesnetzagentur* has been subject to its reports on eight occasions.⁶⁷ However, only 25% of its investigations are published or otherwise accessible by the Parliament (Drange, 2007). The BRH reports have been proven valuable to MPs and the government; as the BNetzA does not have its own budget but is funded mainly via the BMWi's budget, this makes audit less relevant than in the BaFin case.

⁶⁶ <http://www.justiz.nrw.de/Bibliothek/nrwe2/index.php>, accessed May 11, 2015.

⁶⁷ https://www.bundesrechnungshof.de/de/veroeffentlichungen/datenbank-veroeffentlichungen#b_start=0&c6=bundesnetzagentur, accessed at 18 April, 2015.

7.5.5. Expert and administrative bodies

The monopoly commission is formed by five experts (two academics, an economist, and a lawyer, as well as three practitioners) and an office. The office employs ten analysts, one of them mainly responsible for telecommunications. That analyst drafts the report and is in close contact with relevant associations and undertakings (interview DE11). The commission has virtually unlimited access to internal documents, even to secret ones:

“Das heißt also wir können in die Akten reingucken, und zwar in die komplette Akte können wir reinschauen. Das machen wir auch in konkreten Fällen. ... Und das ist dann völlig unproblematisch. Das wird dann auch gemacht” (interview DE11).

Moreover, commission analysts can meet agency representatives at the working level to get more detailed explanations for regulatory decisions. When a report is due, the commission meets with the agency presidency and discusses a list of questions regarding the agency’s regulatory strategy.

The commission’s own resources are complemented by external expertise by the WIK, the EC, or external academic experts. Furthermore, the commission coordinates with the federal cartel office once or twice a year. Problematic is the raise of econometric modeling, which occupies large amounts of staff both at the federal cartel office and the BNetzA:

“Die sammeln Daten in Mengen, die wir so gar nicht mehr so nachvollziehen können. Und da muss man aufpassen, dass man nicht von der 'man power', die wir haben, abgehängt wird, und da muss man auch aufpassen, dass wir so von unserer informationstechnischen und EDV-technischen Ausstattung nicht abgehängt werden” (interview DE11).

The commission lacks formal sanctioning rights, but its reports are widely perceived and unfold substantial impact. The primary addressee of all reports is the BMWi. Moreover, reports are sent to the chancellor, the parliament, and are published in print and online. The government has to issue a statement on the report:

“es gibt eine gewisse Vorabstimmung auch über diese Stellungnahme, die wird vorformuliert vom Bundeswirtschaftsministerium, da muss die abgestimmt werden, usw. Und dann wird die veröffentlicht. Das heißt also, weil es diese Stellungnahme gibt, gibt es auch eine Befassung zumindest im ministeriellen Bereich mit den Gutachten der Monopolkommission. Und die müssen also im Detail auch wahrgenommen werden, um da irgendwas aus der Sicht der Regierung sagen zu können” (interview DE11).

Also, the monopoly commission is regularly heard in parliamentary committees, particularly in the draft of legislative proposals:

“...dann wird der Vorsitzende eingeladen, werden dann immer so fünf, sechs Experten - in Anführungszeichen - eingeladen zu diesen Bundestagsanhörungen. Da sind wir in aller Regel dabei, und das so auch mal die Möglichkeit, wie wir unsere Auffassung transportieren und das ist auch dann letztlich die Form, in der wir Einfluss nehmen auf die Politik” (interview DE11).

There is no regular contact with the advisory board, but many personal relationships to MPs and other relevant actors. The monopoly commission often takes an ordoliberal position, defending regulators’ independence from interest group influence through government or parliament (Döhler, 2007: 37).

After all, the monopoly commission is considered both by the BMWi and the BNetzA as extremely relevant (interviews DE08, DE09) and as “quality control of regulation” (interview DE08). It is seen as independent from political influence (interview DE11)

7.5.6. Transnational bodies

The impression of the EC’s resources is mixed. On the one hand, staff and expertise are limited, although the respective division of the EC is larger than the BMWi’s.⁶⁸ However,

⁶⁸ The Directorate B (Electronic Communications Networks and Services) within the Directorate General CNECT (Communications Networks, Content and Technology) has 98 staff members

high personnel fluctuation and limited expertise are reported – interventions in agency decisions are often outrageous and poorly justified (interview DE09). In the legislative process, national regulators are sometimes asked for policy solutions. This is associated a lack of expertise within the EC (interview DE09).

On the other hand, the Commission has extensive access to information and powerful instruments to enforce them even beyond its formal rights. After a dispute over the information duties of the BNetzA vis-à-vis the Commission, the latter started an infringement proceeding against Germany. As a reaction, the BNetzA changed its procedures and proceeded in fee decisions according to the consultation process as described in §12 TKG (Monopolkommission, 2011). In anticipation of a harsh reaction, the agency provides more information than legally required. By law, the EC needs to receive only the market analyses done by the BNetzA; however, it nowadays tends to send “everything” in order to prevent infringements (interview DE09).

This already shows that the threat of an infringement process is a very real one: the EC blatantly uses this threat regularly, and has used it extensively in the past (Schmidt, 1998). It then signalizes its “serious doubts” on the conformity of agency decisions with EU legislation, inducing the agency to give way – infringements are thus a “very real scenario” (interview DE09).

A powerful instrument in this context is that EU law entitles the EC to ensure consistent implementation of directives. This right has been strengthened over time (cf. TKG 2012):

“Dann gibt es natürlich die Möglichkeit der Europäischen Kommission, und das ist gestärkt worden ..., in Regulierungsentscheidungen der nationalen Regulierungsbehörde einzugreifen ... die Rechtfertigung die dahinter steht ist ja, wir müssen drauf achten, dass nicht Staat A mit Problem X so umgeht und Staat B geht mit dem gleichen Problem völlig

(<http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeID=386405>, retrieved October 1, 2015).

anders um. Wir müssen eher für eine Einheitlichkeit innerhalb der Gemeinschaft sozusagen sorgen” (interview DE11).

Several interviewees were critical of this “harmonization mania” (interview DE08):

“...das heißt natürlich ganz konkret, dass ... nationale Eigenheiten, die zur Folge haben, dass man eine Regulierung in einer ganz bestimmten Form eben halt macht, weniger ausschlaggebend sind, was in Richtung der sachlichen Regulierung natürlich nicht positiv ist, sondern eher negativ ist. So will ich's mal ausdrücken” (interview DE11).

From the national perspective, the EC aims to make IRAs independent from national governments, and coordinates them via European networks or a European agency (interview DE08): the directive 2009/140/EC establishes an explicit prohibition of ministerial instructions (Ludwigs, 2011: 45). Moreover, the EC has aimed to establish a European agency in telecommunications regulation; this has been prevented so far by the member states, but is still on the table (interview DE09). In turn, several interviewees have concerns regarding the BNetzA’s discretion:

“Wir haben eigentlich eine Verschiebung der Kompetenzen, was den TK-Regulierungsrahmen angeht, der immer mehr einerseits vom Parlament Richtung BNetzA und von da aus auch Richtung Europa geht. Weil zum Beispiel mit GEREK versucht natürlich die EU Kommission jetzt mit den neuen Richtlinien auch mehr Einfluss zu gewinnen auf Entscheidungen der nationalen Regulierungsbehörden und da sehe ich grundsätzlich Probleme” (interview DE06).⁶⁹

It is said that directives often leave almost no discretion for the national actors and are enforced strictly – in other words, by threatening with infringement procedures (interview DE08):

⁶⁹ GEREK, *Gremium Europäischer Regulierungsstellen für elektronische Kommunikation*, is the German acronym of the Body of European Regulators for Electronic Communications (BEREC).

“... dann ist man schon im Handlungsspielraum bei der nationalen Regulierungsbehörde so weit eingeschränkt, dass man eigentlich sachlich kaum noch irgendwie eine Möglichkeit hat, sagen wir, eine Entscheidung so oder so zu treffen. Das ist ganz konkret so. Das ist im Bereich TK-Regulierung schon ein gewisses Problem” (interview DE11).

The decision-making processes at EU level help the EC to promote its assumed goals: initiative right lies with the Commission. It consults national regulators at an early stage of the drafting process of new directives (interview DE09). When the proposal gets to the European Council, changes are hard to acquire, due to the limited resources of many member states (interview DE08). At that point, the room for changing the directive often is already very limited (interview DE09). In the end, directives are rarely discussed, and regulation is de facto determined by a small group of people within the General Directorate (interview DE08):

“...vor dem Hintergrund ist halt die Unabhängigkeit der Regulierungsbehörde gegenüber der nationalen Politik doch relativ groß. Sie ist vielleicht eben grösser als zum Beispiel gegenüber der EU-Kommission, weil immer auch zu befürchten ist, dass bei bestimmten ... Entscheidungen die EU-Kommission umgekehrt auch wieder Einfluss ausübt, also was Marktdefinitionen und ähnliches angeht” (interview DE06).

The EC thus has a crucial role both in legislation and implementation of telecommunications regulation. It is not hesitant to use its formal rights to put pressure on both national governments and regulators. This results in a polarization between EC on the one hand, and BNetzA and BMWi on the other. National actors are quite critical toward the EC. However, in the legislative process, national regulators are consulted quite early in the process, which results in a real challenge for both department and agency to feed their interests into the EU legislation procedure. That means for the BNetzA that it has to “throw itself into the commission’s arms” (interview DE09) while coordinating with the BMWi at the very same time.

The regulators of the other EU member states, organized within BEREC, have quite strong information rights, in most areas comparable with those of the European Commission. However, the complexity of the consultation procedure and tight time restrictions limit their influence (interview DE09). Their main de facto influence on the political process is via the policy-making process at EU level. In the early phase of Commission decisions and new directives, many strategies are first discussed among national regulators within BEREC structures (interview DE09). In these processes, neither ministerial nor parliamentary representatives are involved:

“Es ist kein Abgeordneter dabei, es ist kein Abgeordnetenmitarbeiter dabei, es ist keine der Regierungen jeweils dabei, sondern es sitzen nur ... die Referenten, die dort hingeschickt werden von Seiten der Regulierungsbehörden” (interview DE07).

In sum, European networks play a strong role in the legislative process, but rather less so in accountability.

7.5.7. Agency strategy

The *Bundesnetzagentur* has to balance its loyalty between the department and the European Commission. This has not always been the case. In the agency's early years, political influence was more powerful: Böllhoff (2005: 151) describes the first president as “rigid” and with “clear basic principles” in order to promote competition. He was “kicked upstairs when the opportunity was there as an elegant way to get rid of a president immune to political influence”. His successor, Kurth, was seen partly as too close to politics and dependent upon party politics, mainly because he was not a civil servant but a politician that needed a job afterwards (Böllhoff, 2005: 152-3). The strong role of the president is elaborated on above. His/her election continues to be a political issue. This is sometimes criticized as reducing the independence of the president. On the other hand, the conflicts about regulatory strategies have apparently become less intense in the past decade.

Conflicts between agency and department occurred in the past when the BMWi used its instruction right to influence decisions (Böllhoff, 2005: 94), which was quite common until

the early 2000s. The developments traced above somewhat weakened the department's powers and have led to a more cooperative relationship:

“Die BNetzA hat ja ein Argument, mit dem sie immer wuchern kann und das heißt: Ich habe hier ein Gesetz. ... Daran muss ich mich halten. Aber das Gesetz gibt in diesem und jenem Bereich auch Ermessensspielräume. Diese Ermessensspielräume nutze ich aus für mich und diese Ermessensspielräume stehen mir zu nach europäischem Recht und wenn ich diese Ermessensspielräume nicht hätte, dann würde meine Unabhängigkeit auch sehr stark beeinträchtigt sein” (interview DE07).

In the interviews, the BMWi is now characterized as an ally. Common interests predominate in many issues, and conflicts are considered as producing “only losers” (interviews DE08, DE09). This is also reflected in the fact that the agency position vis-à-vis the advisory board is always coordinated with the department (interview DE09).

The rule of law and “legally robust” decision making continue to be a strong determinant of regulatory decision making. That strong role of judicial review sometimes reduces discretion and regulatory flexibility. On the other hand, the agency considers litigations as instruments for improving the quality of its own decisions (a learning effect), and enforces independence from politics by eventually annulling politically favorable, but legally problematic decisions (Böllhoff, 2005: 207-8).

Toward the monopoly commission, the agency acts cooperatively and helpfully. Despite its formally weak role, its reports are eagerly anticipated (interview DE09), apparently because of their substantial political impact.

The most important forum in recent years has become the EU Commission. I have delineated the strong conflicts between the Commission and various national accountability fora, which results in a challenge for the agency, which has to “throw itself into the Commission's arms” while keeping the BMWi's support (interview DE09). In other words,

influence on EU processes requires close collaboration with the EC, but the BNetzA aims to act jointly with the BMWi. This is described as sometimes “tricky” (interview DE09).

The literature describes the German administrative system as traditionally non-transparent. In this environment, the threat of making certain issues public can be used effectively by “political” agencies such as the Federal Cartel Office or the BNetzA (Döhler, 2005: 234). This manifests in the publication requirement for ministerial instructions, which reduced ministerial influence effectively. A president who knows to generate media attention is moreover characterized as a strong determinant of the agency’s political strength (interviews DE08, DE09). On the other hand, public attention and strength of undertaking result in regular public debates, which can be initiated by market participants to put pressure on the regulator (interview DE08).

In sum, the EC’s role has further contributed to a special role of the BNetzA in the German regulatory regime. Jointly with other factors, this helped the BNetzA to acquire more autonomy than any other administrative body at national level. Even the role model, the Federal Cartel Office, can be overridden by ministerial approval. As a result, the BNetzA is treated as a partner by the BMWi, rather than as a subordinate body (as, for instance, the BaFin by the BMF). Second, the BNetzA is far more transparent to the parliament and the public than comparable bodies. The parliament is represented on the advisory board, and the agency president participates regularly in public debates. In a “traditionally non-transparent” administrative system, this has to be seen as major change in behavior.

7.5.8. Summary of actor strategies

In the BNetzA’s case, the analysis de facto accountability has yielded quite a number of insights. Interactions between accountability fora strongly affect their de facto impact. The Board is formally weak, but provides a valuable information channel for the represented MPs and *Länder* governments. German MPs’ resources are comparatively generous, but administrative bodies are normally shielded by their parent departments, and MPs have a hard time accessing them. Via the board, MPs have also established many informal contacts with Agency staff that keeps them updated on the Agency’s policies. Compared to other bodies of federal administration, parliamentary access to Agency issues is excellent.

The Board is moreover the main channel used by MPs, since nearly all telecommunications specialists of the Parliament are Board members. They express a profound level of trust to the Agency's decisions, even if they disagree with them from time to time. In sum, mechanism 5, 10, 11, 13, and 14 have been found.

The parent economic department and the BNetzA have a good and trustful relationship. They cooperate closely and the BMWi shields the BNetzA from other departments. The BNetzA has a special status and the Agency president interacts directly with the minister and junior ministers. Besides information from the Agency itself, the BMWi has a number of external advisors at hand: the government-owned consultancy WIK, the Audit Court and, maybe most important, the Monopoly Commission.

On the other hand, the BMWi's formally strong supervisory role is effectively reduced, mainly at operational level, by a number of factors. First, while the Department is entitled to give instructions to the BNetzA, it is legally required to publicize them in the Federal Law Gazette. This is highly uncommon and led virtually to the absence of instructions since the law was rendered more precisely in 2004. Second, BNetzA's decisions have to be "legally robust" (*gerichtsfest*), in other words, since nearly every Agency decision is appealed against, it has to be in line with case law. Due to the complexity of the latter, the department declares itself as not capable of formulating decisions itself. Third, the European Commission is an effective watchdog: since EU law requires telecommunications regulators to be independent in order to promote the EU single market, ministerial interference always faces the credible threat of an infringement procedure.

After all, the distribution of accountability powers has succeeded in generating a cooperative relationship between the BMWi and BNetzA at eye level. There is, however, one ambiguous point: the President's appointment procedure. The President is highly politicized and has some strategic influence on the Agency's basic orientation. In the early years of the BNetzA's existence, this had caused a number of conflicts. In the meantime, however, the most fundamental decisions already are taken, and the politicization of the post has been reduced.

Both Government and Parliament benefit from the expertise of the Federal Audit Court and the Monopoly Commission. The latter's reports are feared by the Agency and used as a major source of information by MPs and Government. The Commission has a strong inclination toward Agency independence. There is hence no major resource problem at the domestic level. Mechanisms relevant to the BMWi are nos 3, 9 to 11, 19, and 22; to the parliament nos 9 and 10, all depicted in Table 7.6.

The main determinant of Agency behavior at domestic level, however, is judicial review. The rule of law and the detailed review of decisions and procedures substantially reduce Agency discretion, but also ministerial influence. Virtually every Agency decision is reviewed, which has caused long delay in the past, since there is only one court dealing with all cases. However, judicial review is powerful and rests upon external expertise. The Audit Office is well equipped both with information rights and resources; however, since the BNetzA has no budget of its own, it is less relevant here than in the BaFin case.

The EU Commission is a crucial actor whose importance has grown over recent years. While its resources are more limited and it relies on expertise from domestic regulators, it is not at all hesitant in threatening regulators and governments with their formal sanctioning powers. The relationship between national and European levels are characterized as often conflictive, and the "double-hatted" BNetzA regularly faces the challenge to deal with both its hatters. The infringement threat is so intimidating, that it has altered the power balance between Agency and BMWi quite a lot, bringing the BNetzA more or less to eye level and having induced strong cooperative efforts. We find thus mechanisms 2, 3, and 13 to 16 to be in place.

#	Mechanism	B	G	P	C	E	T
1	Agency theory predicts a considerable level of distrust and diverging interests between forum and agent.						
2	The forum is expected to have own interests at stake, and to execute monitoring at an efficient level.						•
3	The forum uses sanctions at its disposal to align agency behavior with own interests. This might result in reduced agency autonomy.		•				•
4	The agent, in turn, is expected to avoid accountability whenever possible in order to pursue its own goals.						
5	Forum owns an insufficient level of formal rights.	•					
6	Forum faces restrictions applying these rights (e.g., information is not forwarded etc.).						
7	Due to unclear division of tasks, accountability is dispersed ("problem of many hands").						
8	Forum does not make use of their formal rights due to insufficient resources.						
9	Forum makes use of additional information sources to reduce asymmetry and to improve monitoring.		•	•			
10	Cooperation among fora occurs to use the respective strengths while compensating weaknesses.	•	•	•			
11	There is a high level of trust between forum and agent.	•	•				
12	Forum does not use formal rights.						
13	Forum uses agency as sole or main information source.	•					•
14	Agency voluntarily informs forum thoroughly on all relevant issues.	•					•
15	Agency cooperates with forum to gain its political support/support for implementation.						•
16	Agency needs support of forum to enhance legitimacy and/or reputation vis-à-vis fora or third actors.						•
17	Forum is apparently disinterested in making use of its formal rights.						
18	Forum does not make use of formal rights in order to shift blame to agency.						
19	Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-re-election, etc.) coming with that.		•				
20	Forum aims to hold agent to account for not being blamed itself.						
21	Forum forms alliance with agency to ensure policy success (e.g., shields agency from third parties).						
22	Forum internally or fora among each other differ in their interests and cannot agree on decisions to be taken.		•				
23	Agency strategically uses conflicts among or within fora to widen its own discretionary leeway.						
24	A higher number of fora makes coordination more sophisticated and results in less accountability.						
25	A higher number of fora improves information and hence accountability.						
26	Under the condition that fora cooperate, a higher number of fora yields stronger accountability.						
27	Under the condition that the policy salience is high, media and public attention can be used by fora to improve own information.						

Table 7.6 Patterns of accountability in practice: BNetza

Note: B: Board; G: Government; P: Parliament; C: Courts and Audits; E: Expert and Administrative bodies; T: Transnational bodies.

7.6. Eidgenössische Kommunikationskommission (ComCom)

In the ComCom case, the implementation of formal rules is exceptionally important. The peculiar governance structure makes it difficult to assess the accountability of the Commission by legal documents alone. Furthermore, the law is partly ambiguous, e.g. regarding parliamentary rights.

7.6.1. Board

There is no board.

7.6.2. Government

Ingold and Varone (2014: 149-51) assign OFCOM and DETEC wide-ranging influence on the Commission's appointments and regulatory decisions. In particular OFCOM is characterized as a highly reputable and central actor (Ingold and Varone, 2014: 158). Also, from my document analysis I could determine OFCOM as being a crucial actor, with close formal connections both to the Federal Council and DETEC on the one hand, and to ComCom on the other. Direct contacts occur frequently at working and top levels between all three actors. At the administrative level, ComCom's secretariat is in touch with OFCOM; while OFCOM manages the relationship with DETEC since it is the joint back office of both ComCom and the Federal Council. As a part of DETEC, OFCOM is in daily contact with the responsible specialist within DETEC, and OFCOM directors meet every two weeks with the Federal Councilor heading DETEC (interview CH03). ComCom itself is also in close contact with OFCOM: the OFCOM directorate and ComCom presidency prepare meetings 10 to 14 days in advance; and ComCom receives extensive expertise and advice from OFCOM. The OFCOM director and deputy director regularly attend ComCom meetings and are accompanied by expert staff that is consulted by ComCom during meetings (interview CH03).

Apart from these formalized structures, it turned out that the short official channels between the ComCom presidency and the DETEC head are formative for ComCom's role in the political process. There is no formal reporting requirement or an institutionalized form of contact, but meetings occur whenever considered necessary:

“Aber wenn ich irgendein Thema habe, vom dem ich finde, das hat politische Dimensionen ... dann mache ich eine Sitzung mit der Bundesrätin” (interview CH06).

Under normal conditions, ComCom’s presidency meets the Federal Councilor two or three times a year, and the Councilor attends one ComCom meeting. Partly, OFCOM attends or is informed of the meetings of ComCom and DETEC. The contacts with the Federal Council occur exclusively via DETEC; there are virtually no meetings with the Federal Council as a whole (interview CH06).

Apparently, the people in charge play a key role for the functioning of the inter-institutional relationships. The informal and personalized relationship is considered as very positive (interview CH06). It seems to rest strongly upon informal or tacit agreement not to interfere with the respective responsibilities:

“...an sich lässt man sich gegenseitig in Ruhe. ... Diese Grundsätze, die sind nirgends aufgeschrieben. Aber man hält sich daran” (interview CH06).

That tacit agreement is the key to understand ComCom’s role, which is difficult to grasp on formal premises alone. While ComCom’s organization does not fit the “textbook model”, actors are satisfied with the arrangements. However, the functioning of the structure depends on the individuals in charge (Parlamentarische Verwaltungskontrolle, 2015).

OFCOM is the only body with substantial administrative expertise in telecommunications policy, which is neither present at ComCom nor at DETEC (interview CH06).⁷⁰ The reason for this particular structure is seen in enhanced resource efficiency and lean administration (interview CH03). In particular OFCOM underlines the advantages of the present structure, but also other actors affirmed that the establishment of its own administrative secretariat is not on the agenda: ComCom is satisfied with how OFCOM does its job and

⁷⁰ At DETEC, two people dedicate each “ten to forty per cent” of their workload to telecommunications issues (interview CH13).

is not strongly interested in a larger administrative body. In terms of resource management, however, the twin role of OFCOM can be a challenge (interview CH03).

The preparation of regulatory decisions is done entirely by OFCOM. Within an instructional procedure (*Instruktionsverfahren*), it requires documents and cost calculations from market participants, reports by administrative bodies, and organizes consultations. In the end, it applies for a decision by ComCom:

“Das ganze Fachwissen ist bei uns und selbstverständlich ist es dann an uns die Details und die operativen Sachen vorzubereiten und der ComCom im Sinne eines Antrages - formell sind das Anträge, die wir stellen als so genannte Instruktionsbehörde - unterbreiten” (interview CH03).

During the whole process, however, OFCOM and ComCom stay in close contact:

“Wir sind letztlich frei, wie wir das Verfahren machen wollen bis wir zum Antrag kommen zur ComCom. Aber es macht keinen Sinn für uns in eine Richtung zu laufen, wo die ComCom nach einem Jahr sagt, wir machen etwas ganz anderes” (interview CH03).

This coordination works excellently:

“Die ComCom entscheidet eigentlich immer in unserem Sinne, weil wir eben einen intensiven Austausch pflegen in der Vorphase.” (interview CH03).

“Sehr oft stellt das BAKOM auch einen Antrag und sagt: ‚Wir finden das und das richtig.‘ Und je nachdem wird dann entschieden. Wir entscheiden nicht immer gemäss BAKOM, aber manchmal schon. Meistens eigentlich schon” (interview CH06).

OFCOM is not only formally but also practically involved in all stages of the decision-making process. The OFCOM head and deputy head prepare ComCom meetings jointly with the ComCom presidency. Top-level officials from OFCOM attend the ComCom

meetings to provide expertise on law, economics, or engineering (CH03). In terms of resources to process information, the relation between “agent” ComCom and “principal” DETEC is reverse to all other cases, since administrative capacity lays exclusively with OFCOM: OFCOM has 271 employees,⁷¹ of which around 60 work in the telecommunications section (interview CH03). ComCom in contrast is a militia commission with a secretariat of three (Ingold and Varone, 2014: 157-9).

OFCOM and ComCom maintain a close and trustful relationship. There is mutual consultation both in regulatory and in legislative issues. In the former, ComCom determines the direction, while OFCOM is in charge of the details (and can of course to a certain extent fill ComCom’s directives to their taste).

Within government, there is no other body with substantial expertise in telecommunications besides OFCOM and ComCom. Albeit legally entitled to give instructions to OFCOM, the Federal Council apparently refrains from influencing single decisions OFCOM or ComCom prepare. Even more, only the more general *Verbandsrecht* (see above) to give orders to OFCOM is considered relevant, due to the status of OFCOM as FLAG office (Huber, 2012):

“Die Weisungsgebundenheit ergibt sich aus den gesetzlichen Grundlagen und die bezieht sich immer formell nur aufs Amt als solches. Nie auf einzelne Abteilungen” (interview CH03).

DETEC considers the division of tasks to be clear, and is careful not to interfere in ComCom’s business (interview CH13, Parlamentarische Verwaltungskontrolle, 2015). This is striking, since at a formal level, there are serious doubts on ComCom’s independence. While ComCom still lacks capacities and core competencies, one has to acknowledge its substantial degree of autonomy, based on mutual trust and the respect regarding the respective roles of OFCOM, ComCom, and the Federal Council. Given the influence ComCom has on the appointment procedure, one might even consider the

⁷¹ OFCOM Annual report 2013, <http://www.bakom.admin.ch/org/jahresberichte/04673/04682/04716/index.html?lang=de>, retrieved June 25, 2015.

autonomy as overrated, in light of the non-use of accountability instruments. However, the pivotal function of OFCOM, which is in close contact with both ComCom and DETEC, apparently provides a trustworthy safeguard to the lead executive.

7.6.3. Parliament

ComCom is invited to participate in hearings when the Parliament discusses legislation projects. However, the relationship between ComCom and the Parliament is characterized as “very loose”:

“Ich sage immer... den Parlamentskommissionspräsidenten, wenn Bedarf ist nach einer Information, dann kommen wir sehr gerne, ... wir sind nicht verpflichtet dazu, aber wir machen das sehr gerne. Aber auch hier ist es sehr lose” (interview CH06).

In its almost 20 years of existence since 1997, ComCom had never been subject to scrutiny by the GPK, until the first time in 2015 (Parlamentarische Verwaltungskontrolle, 2015).

The Swiss Parliament is weak in oversight due to limited resources: Lüthi (2014: 181) finds signs of increased capability to maintain oversight, but summarizes with regard to the GPK:

“[W]as ihr aber fehlt, sind die personellen Ressourcen, um die Tätigkeit von Regierung und Verwaltung konstanter und tiefgehender zu verfolgen.”

MPs are encouraged to remain a member of the same commissions in order to gain expertise. In particular the GPK, however, is not a particularly attractive commission since it does not provide many opportunities for public attention (interview CH07). Contacts between the Parliament and ComCom are hence mainly restricted to the presidents of the relevant commissions; expertise within the parliament is generally considered quite scarce by the interviewees. The GPK has an investigative unit (*Parlamentarische Verwaltungskontrolle*, PVK) in charge of in-depth analyses of administrative behavior. The PVK is entitled to evaluate governmental policies and can hire external experts. It has all information rights granted to the GPK (Art. 63 and 157 ParlG, SR 171.10, Mäder, 2011:

9). To start an evaluation, the PVK needs a mandate by the GPK. Its resources allow it to deal intensively with four to five topics a year (Janett, 2008: 126-7).

Recent legal expertise agrees that parliamentary oversight includes peripheral administration and autonomous units. However, Müller and Vogel (2010: 656-7) stress that direct correspondence of the Parliament with the autonomous bodies tends to attract public attention, and in turn strengthens the Parliament's role in oversight at the cost of the Federal Council. Consequently, they argue, Parliament should in general ask the Federal Council for information and interact with the autonomous body directly only on a random basis:

“Art und Ausmass des Direktverkehrs sind so festzulegen, dass die Verantwortung der Regierung gegenüber den verselbständigten Einheiten nicht untergraben wird” (Müller and Vogel, 2010: 657).

Accordingly, oversight over autonomous bodies is less intense than over central federal administration (Mäder 2011: 6). The GPK's role is to increase transparency of governmental action and the accountability of the Federal Council within a checks and balances system (Mäder 2011).

Moreover, Parliament does not seem to be very preoccupied with telecommunications. Parliamentary procedural requests (*Vorstösse*) are quite frequent (Interview CH03), but public attention to telecommunication issues is described as highly selective, and mainly reduced to cost issues:

“Es ist sehr komplex, es ist technisch und ... ich glaube nicht, dass das politisch gleich sensitiv ist wie ein Präsidium einer Nationalbank oder ein Präsidium einer Finma zu bestellen” (interview CH03).

Moreover, the policy approach and ComCom's design have been subject to a political compromise. Proposals to further liberalize the telecommunications markets, or to assign additional competencies to ComCom, have repeatedly failed (Fischer, 2005, 2008; Sager, 2014). The Parliament's sanctioning threat is thus not excessively high, having in mind that the recent (and first ever) evaluation by PVK was highly positive on the ComCom.

7.6.4. Courts and Audits

Practically all ComCom decisions are appealed against in front of the Federal Administrative Court (*Bundesverwaltungsgericht*, BVGer, interviews CH03, CH06). That trend has increased in recent years (Schweizerischer Bundesrat, 2012). Until July 2015, the BVGer has been appealed to 46 times. According to government representatives, ComCom has won 80 to 90 percent of the cases completely, and had to adjust minor aspects in the remaining ones. Not a single case has been lost completely (interviews CH03, CH06, CH10). The Court itself counts four successful appeals, and twelve more where the court required limited changes (interview CH11). In any case, it is quite rare that the court takes back a ComCom decision entirely.

Only in the early years of ComCom's existence, the then responsible Federal Supreme Court repealed a ComCom decision on unbundling, judging that ComCom had over-interpreted the then quite unspecific law to its own advantage. In a series of decisions, it made clear that unbundling decisions need to be law-based and prevented both the Federal Council and ComCom from decreeing unbundling on a vague legal basis (Fischer, 2005, interview CH03). Furthermore, it characterized ComCom as an administrative and regulatory body rather than quasi-judicial, which exempted the Court from taken ComCom's decisions for granted. In turn, the Court delimited the amount of discretion for ComCom and the Federal Council to the benefit of the Parliament. However, it had already then acknowledged the special role of ComCom as an independent regulator:

“Die Kommunikationskommission ist keine gewöhnliche Vollzugsbehörde, sondern eine verwaltungsunabhängige Kollegialbehörde mit besonderen Kompetenzen. Als Fachorgan ist sie sowohl autonome Konzessionsbehörde als auch Regulierungsinstanz mit besonderer Verantwortung. Dies rechtfertigt an sich eine gewisse Zurückhaltung des Bundesgerichts wenigstens insoweit, als die Kommunikationskommission unbestimmte Gesetzesbegriffe auszulegen und anzuwenden hat. Es befreit das Bundesgericht aber nicht davon, die Rechtsanwendung unter Beachtung dieser Zurückhaltung auf ihre Vereinbarkeit mit Bundesrecht zu überprüfen” (BGer 2A.503/2000).

The BVGer, which became the responsible court for ComCom decisions in 2007, declared in a decision:

“Vorliegend kommt der Vorinstanz bzw. dem mit der Instruktion des Verfahrens betrauten BAKOM ein ausgeprägtes Fachwissen in fernmeldetechnischen Fragen sowie bei der Beurteilung der ökonomischen Gegebenheiten im Telekommunikationsmarkt zu. Das Bundesverwaltungsgericht kann auf kein gleichwertiges Fachwissen zurückgreifen [...]. Es hat sich [...] dort eine gewisse Zurückhaltung aufzuerlegen, wo der Vorinstanz [ComCom] angesichts der sich stellenden Fachfragen ein erheblicher Handlungsspielraum belassen wurde. Dabei variiert der Grad der Zurückhaltung im Einzelfall je nach der Natur der sich stellenden Fragen und dem erforderlichen Fachwissen der Vorinstanz” (BVGer A-7162/2008).

It is remarkable that the court stresses its own limited capabilities while underlining the expertise of both OFCOM and ComCom. In fact, the resources available to the court are restricted: Division 1 of the BVGer is responsible for telecommunications, among a wide range of other issues.⁷² For that wide range of issues, the court employs nine judges and 18 assistants (interview CH11). It is not restricted in accessing information or calling in external experts, including that of administrative bodies such as ComCo or Price Surveillance (interview CH11).

Apparently, the BVGer interprets its restraints more rigorously, and grants the administration more interpretative power. The room for discretion is regularly larger on interconnection issues, while in granting concessions ComCom’s leeway is more reduced (interview CH11). Fischer’s (2005, 2008) judgment of the Federal Supreme Court as an

⁷² The BVGer website enumerates „state liability and recourse, federal employment and data protection ... Switzerland’s two federal institutes of technology, fitness and sports, the armed forces, civil protection and war materials ... customs duties, taxation, alcohol, preservation of nature and habitats, footpaths and hiking trails, spatial planning and expropriation ... infrastructure projects, water rights, national roads, energy, traffic and transport, protection of the environment and water resources, post and telecommunications, radio and television, forests and hunting.“
(<http://www.bvger.ch/gericht/organisation/00552/00568/index.html?lang=en>, retrieved October 19, 2015).

important actor, having “the final word” on many issues, has to be at least partly altered in light of the Administrative Court’s detention. Together with the high percentage of cases won by ComCom in the past, this allows the conclusion that ComCom has relatively wide discretion in law interpretation.

The Swiss Federal Audit Office (*Eidgenössische Finanzkontrolle*, EFK) has a comprehensive role:

“It extends from compliance with regulations and legality – that also includes compliance with environmental legislation if the latter one has a financial impact – to economic viability in the broader sense. By this we mean ... the correctness of accounting in accordance with the books and the review of the internal audit system. ... [T]he SFAO ascertains whether disbursements ... conform with the law and ordinance. ... [T]he SFAO may not only audit whether funds are being used thriftily and a favorable ratio is achieved between costs and benefits, but whether the state expenditure also achieves the expected effect.” (*Eidgenössische Finanzkontrolle*, 2010: 10-1).

It applies a risk-based, selective approach: while it in general supervises internal controlling of the audited bodies, it can decide on more thorough checks if it detects high risks for the state budget. In these audits, the EFK is also entitled to evaluate cost-benefit-ratios and the effectiveness of laws and audited bodies. It coordinates its long-term agenda with the parliamentary investigation unit, PVK (interview CH14).

During its years of existence, ComCom has not ever been subject to EFK’s scrutiny. In sum, the EFK’s rights are extensive, and in case of major irregularities the threat of an audit is quite real. On the other hand, it is an open question under which conditions the Audit Office may choose to check a commission with a rather small budget, which is moreover administered by the parent department.

7.6.5. Expert and administrative bodies

Price Surveillance has only a minor role, which does not restrict ComCom decisions in any way (interview CH06). It regularly coordinates joint initiatives with ComCom and ComCo:

for instance in 2010, when the three bodies requested the possibility of ex ante regulation for ComCom (Varone and Ingold, 2011: 50).

ComCo is consulted on market power to coordinate law application (Art. 11a FMG, SR 784.10; interview CH06). So far, ComCo's expertise has been requested 21 times by OFCOM or ComCom (interview CH12). The consultations are not formally binding. However, ComCom has to take that decision into account to some degree:

“...die Frage der Marktdominanz, das ist bei allen Regulierungsbehörden so, dass die WEKO schlussendlich entscheidet, ist Marktdominanz vorhanden oder nicht. Aber sonst sind wir unabhängig” (interview CH06).

The cooperation between ComCo and ComCom depends on personal relationships and the issue under discussion; there is evidence both for joint initiatives and different positions on certain issues (interviews CH03, CH06). Deviating policy positions are in general settled within the office-consultation procedure, not via the public (interview CH12). Irrespective of ComCom's position, ComCo is free to start antitrust proceedings against telecommunications companies. The difference is its “case-wise” perspective, in contrast to ComCom's “sector-wise” analysis (interview CH12).

In general, ComCo has more of its own expertise than ComCom due to its secretariat. It is entitled to access all information relevant for its decisions. On the other hand, its composition has been subject to critique, since it is staffed partly by independent experts,⁷³ partly by interest groups. Further points are the size of the commission, the incomplete separation of the decision-making commission, and the applying secretariat. In an evaluation, the Federal Department of Economic Affairs (FDEA) pleaded for a professionalization of the body (Eidgenössisches Volkswirtschaftsdepartement, 2009), which was dropped in the administrative consultation procedure afterwards. In sum, although there are differing opinions on some issues, there is no strong accountability role of ComCo with regard to ComCom.

⁷³ <http://www.weko.admin.ch/org/index.html?lang=de>, retrieved July 1, 2015.

7.6.6. Transnational bodies

Transnational bodies, in particular the European Commission and the European network BEREC, which play a crucial role in the other countries under scrutiny, have almost no impact in terms of accountability in the Swiss case. ComCom has observer status within BEREC and is a member of IRG. Neither network has formal competencies regarding Swiss national regulation. However, interviews state that formal powers are not of great importance within these networks, which are rather an arena to share experiences and approaches. The main difference to regulators of EU member countries is that information exchange with fellow regulators occurs on an informal basis, and that the European Commission, of course, lacks a veto right with regard to ComCom's decisions:

“Was die BEREC für Meinungen abgibt, hat direkten Einfluss auf die Verfahren, die sie führen, die sie unter Umständen national führen, unter Umständen gegenüber der Kommission. Und da ist es für uns insofern komfortabel, als wir vom Know-how zehren können, wir können auch mitdiskutieren, aber wir sind letztlich nicht verpflichtet, irgendetwas anzuwenden, was in der BEREC bzw. durch die Kommission beschlossen wird” (interview CH03).

An interesting point, already mentioned above, is that the OFCOM deputy director stands in for the ComCom president in BEREC and IRG meetings, and that OFCOM representatives attend all meetings at working level in accordance with the division of tasks between ComCom and OFCOM.

7.6.7. Agency strategy

Although formal independence is questionable, ComCom's actions in the political agenda are driven by “mutual respect of the respective roles”. The relationship to the department head is strongly informal and shaped by a tacit consensus on the division of tasks. The ComCom president can even influence the appointment procedure for new board members. The appointment follows some unwritten rules, requiring a representation of the three language groups (as always at Swiss federal level) and expertise in economics, law, and engineering. It is claimed that party affiliation does not play any role. Apart from these

informal rules, there is no formal appointment procedure, and all involved bodies (ComCom, OFCOM, and DETEC) can propose “appropriate” candidates.

ComCom is strongly dependent on OFCOM’s support during both preparation and implementation of its decisions. During the decision-making process, coordination between both bodies is good and intense. In the course of the process, OFCOM makes suggestions and reacts to the expectations ComCom formulates:

“Die [ComCom] hat zwar Mitglieder, die Experten sind, aber das sind Milizmitglieder, und von daher gesehen ist es auch dort ein sehr interaktiver Prozess, wo auch wir immer wieder Anträge stellen und sagen: Man soll das so machen, wir würden es so vorschlagen. Aber die ComCom hat dort natürlich sehr viel Gestaltungsfreiheit” (interview CH03).

ComCom tends to follow “most of the time” OFCOM’s proposals (interview CH06). It also depends on OFCOM when it comes to monitoring and enforcement of ComCom decisions. When it detects a violation, OFCOM asks ComCom for a decision (Art. 58, No. 4 FMG, SR 784.10). Within these coordination proceedings, substantial discussions between OFCOM and ComCom also take place. Different is the situation within the office-consultation procedure (*Ämterkonsultation*), when third administrative bodies can formally give statements on legislation proposals. When OFCOM drafts a law, ComCom discusses its position without OFCOM representatives present:

“Wenn wir unsere Haltung gegenüber einer Gesetzesvorlage fassen, dann ist das BAKOM nicht mehr am Tisch, sondern dann diskutieren wir das untereinander ohne BAKOM. Weil das BAKOM ja selbst an der ministeriellen Arbeit beteiligt war oder sogar die Federführung gehabt hat” (interview CH06).

In sum, ComCom is to a high extent dependent on other bodies within federal administration to execute its tasks (Maggetti, 2014; Varone and Ingold, 2011: 49).

Its de facto autonomy stems from mutual respect, inter-institutional trust, and the sophisticated relationship management of the ComCom president. On the other hand, this does not mean that ComCom is reluctant to publicly formulate policy positions different from those of the government. It openly communicates with the public, and also disseminates its own political opinion. On several occasions, ComCom differed in these releases from the Federal Council's position or even openly criticized it:

“Wir äussern uns bei einem Gesetzgebungsprojekt wie jetzt die Fermeldegeseztrevision, ob man das machen soll. Dann äussern wir uns dazu in aller Deutlichkeit. ... Das hat nicht so Freude bereitet” (interview CH06).

For instance in 2008, ComCom, ComCo, and Price Surveillance published a joint letter requiring ex ante regulation in the telecommunications market.⁷⁴ In 2010, ComCom tackled the Federal Council's decision not to revise the telecommunications law, given that the government's own evaluation of the telecommunications market (Schweizerischer Bundesrat, 2010b), had detected various flaws in the existing law.⁷⁵ ComCom can disseminate its opinion on policy matters both within the office-consultation procedures and directly to the public, mostly in the form of media releases or interviews.

Apparently, ComCom understands itself as completely independent, even from the Parliament, and only subject to public scrutiny:

“Das Parlament [muss] eben verdammt aufpassen ... , weil wir eine unabhängige Behörde sind. Wir sind eigentlich auch unabhängig vom Parlament” (interview CH06).

“Also wenn wir irgendeinen Quatsch bauen, dann kann ich Ihnen garantieren, da werden sowohl die Marktteilnehmer wie auch die

⁷⁴ <http://www.comcom.admin.ch/aktuell/00429/00636/00712/index.html?lang=de&msg-id=20908>, retrieved July 2, 2015.

⁷⁵ <http://www.comcom.admin.ch/aktuell/00429/00636/00712/index.html?lang=de&msg-id=36109>, retrieved July 2, 2015.

Öffentlichkeit werden dann schon reagieren. Das ist eigentlich das beste Sensorium” (interview CH06).

These impressions seem to almost reverse the formal situation: ComCom is not threatened by the “shadow of hierarchy”, but in fact acts independently and even opposed to the government; it even has influence on its own composition by making appointment proposals. Thus, while it remains restricted by its few competencies, it can act quite freely within legal boundaries, and enjoys quite some discretion. This is due to a high degree of mutual trust, but of course also enabled by the fact that OFCOM is always well informed on agency issues and thus has a certain type of a “police patrol” function. The governance structure and the accountability regime are thus peculiar, but apparently work well.

7.6.8. Summary of actor strategies

In sum, ComCom’s governance structures deviate in many aspects from the “textbook solution”. The organization as an executive commission (*Behördenkommission*) has a long-standing tradition in Switzerland. However, its lack of its own administrative capacities is also unique in the Swiss context. After all, it resembles more a court than an agency. The reason for that is mainly to keep structures lean and to avoid duplications of effort.

In fact, due to its limited competencies, its dependence on third actors, the non-transparent appointment procedure, and the power over relevant ordinances, the Government is hardly restricted from impinging on Agency decisions. ComCom is highly dependent on OFCOM, which prepares and enforces the Agency’s decisions. Since the latter is a government department, doubts have been expressed on the de facto independence of ComCom.

However, the independence of the Agency apparently is de facto maintained, mainly since ComCom’s accountability regime rests to a high extent upon personal relationships and trust between ComCom, OFCOM, and DETEC. In fact, decisions are apparently a cooperative process, with a steering input by ComCom, but in everyday practice driven by OFCOM’s expertise. Moreover, that arrangement provides the Government with detailed information on ComCom’s activities. Some issues are discussed directly between the

ComCom President and the Federal Councilor heading DETEC. Government relations are after all shaped by mechanisms 11 to 15, and 17.

The recent PVK report accordingly concludes that, due to the mutual trust and the respect regarding the respective roles, the system works quite well, and all actors are satisfied with it (Parlamentarische Verwaltungskontrolle, 2015: 134), despite a striking lack of interest and effort by the parliament to effectively use its monitoring rights (mechanisms 8, 11, 12, and 17). A summary of all mechanisms is given by Table 7.7.

In general, there is an astonishing lack of interest in ComCom's business by almost all accountability fora: the Federal Council leaves the appointment of Commission members to OFCOM and ComCom itself. The monitoring tools of both Parliament and the EFK have recently scrutinized ComCom for the first time since it came into existence in 1997 (Parlamentarische Verwaltungskontrolle, 2015). Also, judicial review seems to be less effective than in other sectors: the Administrative Court admitted its own lack of expertise and granted ComCom substantial discretion in its decisions.

In fact, while some accountability instruments exist with regard to other autonomous bodies (e.g. approval of strategic goals or annual budgets, such as in the FINMA case) are missing and others are not in use, one might even consider accountability as being in deficit. On the other hand, many actors in the Swiss governance system rely on some kind of "fire alarm" strategy - they rely on public attention and deal with ComCom only if there are problems detected.

Governmental safeguards are thus mainly based on trust, detailed information from OFCOM, and of course the highly limited competencies of ComCom. As is concluded by the PVK report, the system works well and satisfies the participants, but is at the same time dependent on the persons in charge and their respect to their respective roles.

#	Mechanism	B	G	P	C	E	T
1	Agency theory predicts a considerable level of distrust and diverging interests between forum and agent.						
2	The forum is expected to have own interests at stake, and to execute monitoring at an efficient level.						
3	The forum uses sanctions at its disposal to align agency behavior with own interests. This might result in reduced agency autonomy.						
4	The agent, in turn, is expected to avoid accountability whenever possible in order to pursue its own goals.						
5	Forum owns an insufficient level of formal rights.						
6	Forum faces restrictions applying these rights (e.g., information is not forwarded etc.).						
7	Due to unclear division of tasks, accountability is dispersed (“problem of many hands”).						
8	Forum does not make use of their formal rights due to insufficient resources.						•
9	Forum makes use of additional information sources to reduce asymmetry and to improve monitoring.						
10	Cooperation among fora occurs to use the respective strengths while compensating weaknesses.						
11	There is a high level of trust between forum and agent.						• •
12	Forum does not use formal rights.						• •
13	Forum uses agency as sole or main information source.						•
14	Agency voluntarily informs forum thoroughly on all relevant issues.						•
15	Agency cooperates with forum to gain its political support/support for implementation.						•
16	Agency needs support of forum to enhance legitimacy and/or reputation vis-à-vis fora or third actors.						
17	Forum is apparently disinterested in making use of its formal rights.						• •
18	Forum does not make use of formal rights in order to shift blame to agency.						
19	Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-re-election, etc.) coming with that.						
20	Forum aims to hold agent to account for not being blamed itself.						
21	Forum forms alliance with agency to ensure policy success (e.g., shields agency from third parties).						
22	Forum internally or fora among each other differ in their interests and cannot agree on decisions to be taken.						
23	Agency strategically uses conflicts among or within fora to widen its own discretionary leeway.						
24	A higher number of fora makes coordination more sophisticated and results in less accountability.						
25	A higher number of fora improves information and hence accountability.						
26	Under the condition that fora cooperate, a higher number of fora yields stronger accountability.						
27	Under the condition that the policy salience is high, media and public attention can be used by fora to improve own information.						

Table 7.7 Patterns of accountability in practice: ComCom

Note: B: Board; G: Government; P: Parliament; C: Courts and Audits; E: Expert and Administrative bodies; T: Transnational bodies.

7.7. Patterns of actor strategies

The aim of the chapter was to identify patterns to check how agency accountability works in practice. Trust, resources, governance structures, transnationalization and salience had been identified as potentially relevant for accountability in practice. In section 7.1, a number of mechanisms has been formulated whose empirical relevance has been checked afterwards.

Regarding trust there are some general insights. All governments trust information delivered by agencies; in general a cooperative relationship predominates. Personal relationships between top-level agency representatives are not unimportant in this, and is a key factor in the ComCom case. The relationship between ComCom and governmental bodies relies almost exclusively on informal, tacit agreements of task division. It is, however, strongly dependent on the persons in charge and hence potentially vulnerable.

In turn, if information gathering is significantly hampered, as in the relationship between Swiss and German financial regulators and their respective parliaments, trust is distorted – lack of transparency here induces a lack of trust. It is also pretty clear that in this context of predominating cooperation, the EU Commission's behavior in the BNetzA case stands out: the rather confrontational approach and the blatant threatening of the EC irritates both the agency and its parent department. A certain degree of cooperation and transparency is thus a shared value.

Administrative organization differs. While ministerial responsibility is the overarching constitutional principle that ultimately requires strong ministerial control over all decisions taken by subordinate bodies, Swiss government is organized more flexibly. Administrative units and monitoring structures are, in comparison, more output-oriented, and supervising institutions apparently request detailed information mainly if something has gone wrong. On the other hand, however, the Swiss cases under scrutiny lack a thorough impact evaluation – which again underlines the crucial role of trust for the system as a whole. These differences in administrative traditions strongly affect the design of accountability regimes, but they are maybe more an outgrowth of the constitutional norms than one of distrust.

One has to mention the different behavior of the parent department in the relationship to third actors. In the German case, the department effectively shields the agency from other departments, or parliamentary questions. The majority of the latter is answered by the department instead of the agency; and in political conflicts, the agency can always build upon the department's backing. On the other hand, they are substantially restricted from taking their own policy positions and always take care to stay close to the department's position. In the Swiss case, on the contrary, agencies obtain for themselves a role in the public debate, and sometimes openly take a position different from the department's one. However, this does not hamper the collaboration in legislative processes, where for instance the FDF relies strongly on FINMA's expertise. A possible explanation for this rather independent role of Swiss agencies in the policy process is the formalized pre-parliamentary process: namely the office-consultation procedure. Here, all affected administrative units are free to issue a statement that is then included in the government's law proposal. In other words, Swiss agencies have a guaranteed say in the legislative process. German departments have more discretion in obtaining external expertise - and it is presumably a question of reputation and trust who is asked. I get back to this in the sanctioning paragraphs.

A counterweight to that process is agency influence on international legislation and standard-setting, which is a factor in particular in the BNetzA case: de facto, the highest chance to have an impact in EU legislation exists in the very early stages of the policy process. Here, national regulators are involved, but governments are not.

I now turn to the question of resources. A basic concern of the present work is that political institutions, due to the high complexity of regulatory policies and their limited resources, have a hard time effectively holding regulatory agencies to account. I have to conclude here, with some exceptions, accountability fora mostly have a means at hand to keep themselves adequately informed. German departments rely on external expert bodies and active networking: the Bundesbank is an important information source for the BMF, while the Monopoly Commission and a government-owned consultancy, BMWi, is well equipped with regard to telecommunications regulation. German MPs have, compared to their access to "ordinary" administrative bodies, additional information due to their representation on agency boards. However, the access to information varies between sectors: BNetzA is

considered much more transparent and willing to inform, than is BaFin. In the Swiss case, parliamentarians are more restricted, but parliamentary requests and government information, also on internal processes and different decision-making options, is more thorough than in the German case.

In all four cases, there is a powerful source of expertise besides the agency: in financial regulation, both Swiss and German governments make use of the central banks' knowledge. The BMWi, as already mentioned, has the Monopoly Commission at hand; and due to its governance structure and OFCOM's dual role, OFCOM/DETEC are always informed on any of ComCom's business. In two cases - namely ComCom and OFCOM, and BaFin and Bundesbank - these bodies are even in charge of implementing the agency's tasks.

There are two lines of interpretation for this finding. First, it can be considered as intended to have an additional information source and to benefit from a variety of different opinions and approaches. In the ComCom case, OFCOM's role allows the non-use of existing accountability instruments, since the Agency's work is closely monitored. A second line of interpretation is more tentative, but not improbable - in our sample, however, it applies only to the financial regulators. It is reported that both FINMA and BaFin have been in continuous struggles with the respective central banks on task division, information exchange, and policy influence. The conflicting interests can (whether intentionally or not) be strategically used to effectively strengthen the agency's accountability. I elaborate more on this in the following paragraphs, which brings us to the sanctioning options.

As anticipated in the theoretical section, there are some occasions where formal sanctioning rights lack credibility. This can be due to strong pressure by third actors - the diminished role of the BMWi vis-à-vis the BNetzA in light of the EU Commission's infringement threat is a case in point. The BMWi is furthermore restricted by abundant case law that reduces the Agency's discretion, but also prevents the Government from interfering. Also the BMF, despite its formal powers, does not interfere with ongoing supervisory issues due to international agreements and market expectations. This shows that the formal (EC) or informal character of sanctions (market expectations) is not always decisive in its impact.

Of course, this refers not only to situations in which one forum interferes in the accountability mechanism related to another - as depicted above - but of course also in

simple, bilateral accountability relationships. Informal sanctions can prove highly effective. The Monopoly Commission's reports are feared by the BNetzA, for instance. The same can hold for audit reports, parliamentary investigations, or public opinion. Again, I want to highlight two interesting mechanisms: first, the use of third parties to exert pressure, as noted above; and second, a form of public pressure that might remain intact also in the case of highly autonomous, even unaccountable agencies.

The first mechanism, as already described, can be found in both BaFin and FINMA cases: the regulators and central banks found themselves in enduring turf wars on competencies, information, and policies. The government is then in the comfortable situation of deciding which position to back. In effect, even tasks can be reallocated; but at least, the influence of the agency's ongoing legislative processes can vary. Since the agency suspects that it has better chances of influencing policies and future legislation if it maintains a good relationship with the department, it might be reluctant to openly take a position different from the department and might even anticipate the latter's opinion in its regulatory decisions. The literature regularly, albeit often implicitly, takes this "currency" of policy influence into account. This is in fact what Keohane called "reputational accountability". Vice versa, the instrument can also be used if the agency has more influence on legislative processes than the government. The BNetzA's influence on EU legislation is a case in point (see above).

The second mechanism is closely connected to public attention and salience of the policy area, and is related to personnel issues. Apparently the heads of independent agencies also have to take care about public opinion and/or their political allies. This is not at all surprising in the case of the politically appointed president of the BNetzA. The governmental intervention in the BaFin case was already more subtle: since the BMF considered the then president too recalcitrant, it changed the agency's internal organization and installed a collective executive board. In Switzerland, there are even a few recent cases in that regard. The two earlier ones regarded conflicts of interest: both the head of the Swiss Federal Nuclear Safety Inspectorate (ENSI), Hufschmied, and the SNB President Hildebrand resigned after questionable behavior regarding personal interests. This was exclusively due to political and public pressure, since both bodies are highly independent

and there was no legal option to get them out of office. But also in the absence of personal misbehavior, political allies are important: in 2014, the FINMA head Raaflaub resigned apparently due to loss of political influence, facing a high number of political opponents from SNB, political parties, and the Swiss banking sector. Public opinion and pressure from parliament hence played a crucial role in all cases, and prove informal public pressure to be effective under certain conditions.

I compared mechanisms promoting or hampering accountability in practice also at a higher level of abstraction, in order to push forward theory-building. Mechanisms have been fleshed out from different strands of literature and had frequently a rival character. Table 7.8 shows that the mechanisms detected most frequently are (frequency in parentheses):

- 11. There is a high level of trust between forum and agent (6).
- 13. Forum uses agency as sole or main information source (6).
- 14. Agency voluntarily informs forum thoroughly on all relevant issues (5).
- 9. Forum makes use of additional information sources to reduce asymmetry and to improve monitoring (4).
- 15. Agency cooperates with forum to gain its political support/support for implementation (4).
- 10. Cooperation among fora occurs to use the respective strengths while compensating weaknesses (3).
- 19. Forum is either eager or reluctant to take decisions/pose sanctions due to external costs (such as reputational loss, high salience, public blame, non-reelection, etc.) coming with that (3).

The three most frequently detected mechanisms, and four out of six, all relate to high trust between agency and forum. Fora use agencies for information, and agencies provide it, voluntarily and thoroughly. The remaining mechanisms (9, 15, and 19) regard to interactions among fora. Two of them imply cooperation by sharing information, or compensating specific institutional weaknesses, e.g. the use of additional expertise by governments or parliaments. Mechanism 19 points toward the fact, that fora are subject to accountability themselves and thereby sometimes restricted in their options.

In theoretical terms, the prominence of these mechanisms is at odds with the premises of agency theory. This is underlined even more by a look at the remainder of mechanisms (see Table 7.8): Mechanisms 1 to 4 containing expectations derived from agency theory, are far less frequent than those inspired by stewardship theory (5 and 19, respectively). After all, trust seems to be a driving factor.

Another point is that the mechanisms listed above highlight the character of accountability as a social relationship. All frequent mechanisms are about interactions. This is less surprising in the case of mechanisms 11, 13, 14, and 15, which are about the agency-forum relationship. However, three out of seven most frequent mechanisms (9, 10, and 19) are about coordination among fora. This is a strong indicator that the interactions assessed by the regime approach are of tremendous importance.

I next compare the frequency of mechanisms by the scope conditions they are theoretically linked to. Table 7.9 depicts the number of mechanisms associated with each scope condition, as well as the absolute number the mechanism showed out in the empirical analysis. The last column weighs the frequency by the number of mechanisms to get a comparable score. It turns out, that mechanisms related to trust and salience are relatively most frequent, and thus apparently more important than those associated with the political system, transnationalization, and resources.

Differentiated by Agency, we can yield moreover, that mechanisms related to salience matter more in financial services, while telecommunications are more prone to mechanisms regarding trust (see Figure 7.1). Indeed, the case studies revealed a substantial amount of conflict between actors in financial services. Between countries, in Germany a higher number of coordination mechanisms is in place. This is plausible in light of the higher number of accountability fora detected already in chapter 6.

Finally, we can state that mechanisms associated with a positive effect on accountability are relatively more frequent (see Table 7.10). Eleven mechanisms associated with a strengthening impact turned up 27 times, while the thirteen mechanisms negative to accountability have been counted only 22 times.

#	Related to					Theoretical effect on accountability	Frequency of occurrence in sample	
	Trust	Resources	Political Sys.	Transnat.	Saliency			
1	●						■	1
2	●					+	■	1
3	●					+	■ ■	2
4	●					-	■	1
5		●				-	■ ■	2
6		●				-	■	1
7		●				-	■	1
8		●				-	■	1
9		●				+	■ ■ ■ ■	4
10		●				+	■ ■ ■	3
11	●						■ ■ ■ ■ ■ ■	6
12	●					-	■ ■	2
13	●					-	■ ■ ■ ■ ■ ■	6
14	●				●	+	■ ■ ■ ■ ■	5
15			●		●	+	■ ■ ■ ■	4
16			●		●	+	■ ■ ■	3
17			●	●	●	-	■ ■	2
18			●	●	●	-	■ ■	2
19			●	●	●	-	■ ■ ■	3
20					●	+	■ ■	2
21			●	●	●		■ ■	2
22			●	●		-	■	1
23			●	●		-		0
24			●	●		-		0
25		●	●	●		+	■	1
26			●	●		+		0
27		●			●	+	■ ■	2

Table 7.8 Patterns of accountability in practice: Occurrence of mechanisms

Scope condition	No. of mechanisms associated with scope condition	Frequency of mechanisms associated with scope condition in sample	Frequency by no. of mechanisms
Trust	8	24	3.00
Resources	8	15	1.87
Political System	11	22	2.00
Transnationalization	9	11	1.22
Salience	9	23	2.56

Table 7.9 Frequency of mechanisms by scope conditions

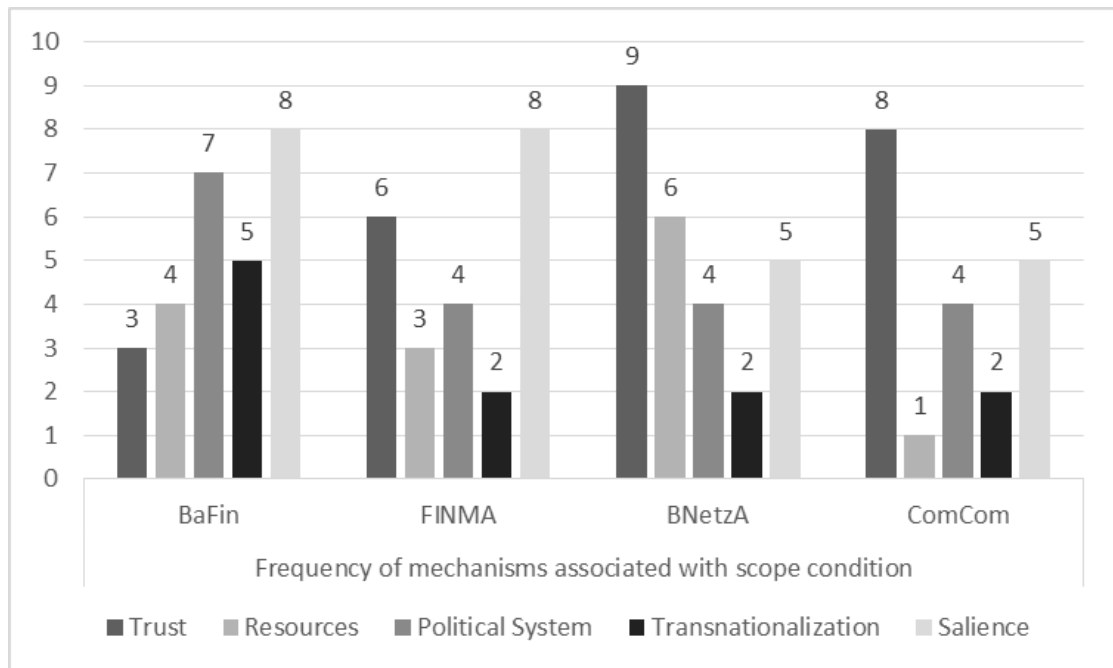


Figure 7.1 Frequency of mechanisms associated with scope conditions, by Agency

Theoretical effect on accountability	No. of mechanisms associated with effect	Frequency of mechanisms associated with effect in sample	Frequency by no. of effects
Positive	11	27	2.45
Negative	13	22	1.69
Neutral/Ambiguous	3	9	3.00

Table 7.10 Frequency of mechanisms by associated effect on accountability

8. Formal accountability revisited

As a last step before I conclude, I revisit the formal analysis by using the additional information gathered in chapter 7. It modifies the insights from the formal analysis and highlights the differences between both assessments and makes a final assessment of the accountability regimes.

8.1. Accountability of the BaFin

Bringing together the insights generated by both approaches, I can draw some conclusions. First, the BMF does not make use of its supervisory power with regard to ongoing supervision. It thus limits itself, probably due to market pressures and international agreements that require independent supervisors. Beyond that, however, BaFin is not treated very differently from an ordinary subordinate administrative body. Second, the BMF's influence is even stronger in part, since it de facto controls the Administrative Board. The Board has no own strategy or policy position, but is strongly ruled by the BMF as the agenda setter, which de facto holds a veto power. That means that the Board's sanctioning powers are in fact under the control of the BMF. Its role is mainly to involve the regulated sector and the Parliament in budgetary issues – the latter because of its lost budgetary function due to BaFin's funding scheme.

This means in turn that, third, the Parliament has additional information sources through cross-membership. It was stated that information access is quite restricted and the Board membership is highly valuable to get direct personal access to Agency staff. Apart from that, fourth, the relationship between Parliament and Agency is quite distant, with the BMF shielding the Agency from direct interactions with MPs: this is the German interpretation of ministerial responsibility, which remains completely unaltered in the BaFin case.

Fifth, both Parliament and Government makes use of external expertise, namely by the Audit Court and the Central Bank. In particular the latter's role in the "power triangle" BMF-BaFin-Bundesbank is of relevance: it not only raises the BMF's information level, but is also used to exert sanctioning pressure at the strategic level. BaFin is thus further under

pressure to back the BMF's position in order not to lose influence on relevant policy issues. Sixth, and finally, the recent changes at the transnational level contain the potential to alter domestic structures to a high extent. Veto powers at operational level, as are now possessed by the ESA, have had the power to effectively cut back the Department's role in the telecommunications sector. However, this has to be left to future investigations.

Table 8.1 provides a summary of the findings. It can be concluded that accountability to the BMF is formally strong and effective in practice. In various ways, the BMF as crucial actor reduced BaFin's discretionary leeway. In fact, BaFin's autonomy rests upon the BMF's commitment not to interfere with operational supervisory tasks. BaFin restricts itself moreover in order not to lose reputation via-à-vis the BMF. Albeit high on the agenda, for the Parliament it is difficult to access information: it relies here on the BMF, and also on the MPs on the administrative board. Members of governing factions have fewer problems in getting information from the BMF. Judicial review and audits are effective. Up to 2010, financial regulation was rather weakly transnationalized. This has changed and might alter domestic accountability relationships, as can be seen in the BNetzA case. We can conclude that in practice, the parent department is even more dominant than indicated by the formal analysis. The autonomy of the BaFin rests purely upon auto-limitation of the BMF, which in turn does not interfere with BaFin foremost in areas where market actors or international treaties expect agency autonomy. Apart from that, BaFin is treated as a (special, and prestigious) subordinate body.

Forum	Formal accountability level			Strategies
	S	O	M	
Board				
- Administrative board	■	×	■	Under BMF control, no own strategy, information source for MPs
- Advisory council	×	×	×	
- Consumer adv. council	×	×	×	
Executive				
- Department (BMF)	■	■	■	Highly effective control, informed in great detail
Legislative				
- Bundestag	■	□	×	Difficulties to access information, in particular at transnational level, uses cross-membership in board as additional information source
Courts/Audits				
- Administrative courts	×	■	■	Effective review, less relevant in terms of number of decisions than in BNetzA case
- Federal audit office	×	×	□	Valuable information source to BMF, parliament, and board
Expert bodies				
- Bundesbank	□	□	×	Role in implementation of supervision and at transnational level, tremendously important information source to BMF, strong political actor, frequent conflicts with BaFin raises political pressure and reduced BaFin's discretion
Transnational bodies				
- EU commission	□	□	×	
- ESA (EBA/ESMA/EIOPA)	□	■	×	Recently risen importance, cannot be evaluated yet, potential to alter domestic accountability powers (in telecommunications, department's role significantly reduced)
- IMF/FSB/Basel Committee	□	×	×	

Table 8.1 Formal and effective accountability of the BaFin

8.2. Accountability of the FINMA

Taking both formal and de facto accountability together, there is only a limited amount of instruments that effectively hold FINMA to account (see Table 8.2). The Board has by far the strongest formal powers, expertise, and time devoted to Agency business.

There are coordination instruments in place to keep the Federal Council (less frequent) and SIF/DETEC (more frequent) updated on FINMA's businesses. However, compared at least to the BaFin case, that information is necessarily far less detailed. The Swiss National Bank has a powerful position in the Swiss governance structure, similar to the

Bundesbank. It can help in exerting political pressure, and advises the Government. The Parliament, in turn, restricts itself to scrutinizing these coordination instruments, not the contents of coordination themselves. Furthermore, judicial review and the managerial powers of the Audit Office remain intact – at operational level, however, FINMA has disputed the EFK’s right to access its data.

After all, besides the Board, the most powerful accountability forum appears to be political pressure. Similarly to the BaFin case, it seems that the real “currency” within the political process is reputation and influence on policies. However, the formalized office-consultation procedure guarantees the participants being heard – in contrast to the German case, where external advice can be sought at the request of the BMF. Nevertheless, FINMA’s position can be effectively weakened that way. FINMA appears to be the least accountable agency in the sample, but this is partly because the strength of such political pressure is hard to assess. Apparently, FINMA faces powerful opponents in political and administrative realm and is thus effectively restricted from politically undesired behavior.

Forum	Formal accountability level			Strategies
	S	O	M	
Board of Directors*	■	■	■	Very close to agency, and owns operational competencies, questionable “non-textbook” role regarding accountability
Executive				
- Federal Council	■	×	■	Is informed on businesses, but only on broad basis, no resources for detailed information
- SIF	×	×	×	Effective coordination with FINMA on legislative and international issues, FINMA has strong position
Legislative				
- Parliament	■	□	×	Addresses rather FC and processes, only limitedly involved in strategic and not at all in operative issues
Courts/Audits				
- Federal Administrative Court and Federal Supreme Court	×	■	×	
- Federal Audit Office	×	□	□	Information right at operational level disputed by FINMA
Expert and administrative bodies				
- SNB	×	×	×	Powerful opponent, exerts political pressure, but no accountability powers
International actors				
- FSB, BCBS	□	×	×	

Table 8.2 Formal and effective accountability of the FINMA

8.3. Accountability of the BNetzA

The formal accountability structure of the BNetzA is substantially altered, taking the interactions between accountability fora into account. The most important path change is due to the formal sanctioning powers of the EU Commission against the Government. In practice, it effectively entirely prevents government influence on operational decisions. In turn, the traditionally dominating role of the parent department is substantially weakened and replaced by the Commission as principal political accountability forum. Apart from that, administrative courts are highly effective in the BNetzA case. Table 8.3 depicts these dynamics.

Forum	Formal accountability level			Strategies
	S	O	M	
Board	×	×	×	Valuable information source for MPs and <i>Länder</i> governments
Executive				
- Department (BMWi)	■	■	■	Formal powers strongly reduced through case law, publication of issued instructions, and EC watchdog
Legislative				
- Bundestag	□	□	□	MPs gain information via board and have exceptionally good contacts to agency
Courts/Audits				
- Administrative courts	×	■	■	Strong role in reviewing agency decisions, effective
- Federal audit office	×	×	□	Effective, but not so crucial, since BNetzA is budgeted by BMWi
Administrative and expert bodies				
- Monopoly commission	□	□	×	Highly influential, defends agency independence and is information source of major importance
- Federal Cartel office	■	×	×	
International actors				
- EU commission	■	■	×	Police patrol with highly credible sanctioning threat, rather confrontational style
- BEREC	×	×	×	

Table 8.3 Formal and effective accountability of the BNetzA

The BNetzA's design represents a significant path change from German administrative traditions. In no other German agency has the departmental influence been cut back that effectively. Furthermore, the Board provides MPs with an exceptional degree of information about Agency business. In the BaFin case, for instance, information access and the protective shield of the parent BMF effectively hampers parliamentary information

access. Finally, the role of the Monopoly Commission is a key to understanding the governance structure. It is an effective watchdog that even possesses substantial formal information rights. It thus contributes to the good level of information of both Government and Parliament.

In sum, operational accountability is de facto ensured by courts and the EU Commission, while the BMWi retains its powers at managerial level, and mostly also at strategic level. The Bundestag is de facto strengthened: its information rights are restricted de jure, but its additional information sources more than compensate for that. After all, accountability is shifted rather than reduced. The EU legislation has had the power to completely alter German traditional administrative structures, and the de facto dynamics reinforce that further.

8.4. Accountability of the ComCom

ComCom's accountability regime is peculiar. The Agency has fewer competencies than fellow regulators, and the Government lacks the regular presence of a number of instruments for ensuring accountability. A government department acts as the Agency's back office. This of course enables the Government to interfere with Agency decisions. De facto, however, the existing instruments to restrict Agency discretion are not in use, and the relevant actors respect their mutual tasks regardless of the presence or absence of formal accountability mechanisms. Apparently, this system works, and has generated a system in which the Agency can act independently, both in its operative decisions and in taking policy positions in public. These insights are summed up in Table 8.4.

The crucial factors determining the good functioning of the system are mutual trust, respect for the respective roles, and good personal relationships. There is a high level of transparency since all decisions are prepared and implemented by OFCOM, which facilitates trust. On the other hand, the regime is in principle vulnerable since it rests on informal arrangements and personal relationships.

Forum	Formal accountability level			Strategies
	S	O	M	
Executive				
- Federal Council/DETEC	■	□	×	Trust in ComCom and information by OFCOM Close relationship and thorough information on ComCom's activities due to twin role
- OFCOM	×	□	×	
Legislative				
- Parliament	■	□	□	Interested in compliance with law, not highly interested, recently positive evaluation by PVK
Courts/Audits				
- Federal Administrative Court	×	■	×	Granted substantial discretion to ComCom, admitted its greater expertise Applies risk-based approach, ComCom has not been subject to its scrutiny
- Federal Audit Office	×	×	■	
Expert and administrative bodies				
- ComCo	×	×	×	Cooperates with ComCom on certain policy issues, no accountability powers
- Price Surveillance	×	×	×	
International actors				
- IRG	×	×	×	
- BEREC	×	×	×	

Table 8.4 Formal and effective accountability of the ComCom

8.5. Summary

In sum, in this work four very different agencies have been under scrutiny. First, there are two cases, in which the trade-off “autonomy or control”, which is partly claimed in the literature, can be characterized as more or less “balanced”: ComCom and the BNetzA. From a formal perspective, ComCom can hardly be called independent, and in theory, politics can interfere quite a lot. Through trust and mutual respect, however, ComCom gains discretion and is in fact a fairly autonomous body with whose design everyone is satisfied. The BNetzA is also under strong formal accountability mechanisms by its parent department, but this is undermined by the powers of the EU Commission. The transnational level is here able to alter the complete accountability architecture and to promote a real “path change” away from national traditions. Anyway, this development means greater independence from the national government – but at the same time, being held to account by a transnational body.

On the other hand, there are two more “unbalanced” cases: the financial regulators BaFin and FINMA. In their organizational form they are most distant from government; but strangely enough, if we look at accountability, BaFin is the most strongly controlled agency in the sample. While here accountability is highly effective, FINMA is the most autonomous agency under scrutiny. Its strongest formal accountability forum, the Board, is also an operative body and not a textbook monitoring device. In fact, FINMA is mostly controlled via high public attention and powerful opponents within the Swiss banking sector.

The “unbalanced” cases have regimes that work more or less as intended by design. Apparently they are either “independent, but not so accountable” (FINMA), or “effectively accountable, but (if at all) only partly independent” (BaFin). In contrast, in both the BNetzA and ComCom cases, the de facto use of the accountability regime deviates quite substantially from what the formal analysis would let us expect. In the end, they gain their autonomy due to the fact that existing formal accountability mechanisms are de facto scarcely used.

9. Conclusion and outlook

The leading research interest of the present work has been to scrutinize the accountability of regulatory agencies. These are a relatively recent phenomenon, but of rising importance in terms of numbers and competencies. Seen as one form of a wider trend towards non-majoritarian institutions, doubts have been raised on the legitimacy of these agencies: since they are designed to regulate markets at arm's length from government, it remained unclear what this meant for their democratic accountability. Moreover, given regulatory complexity and limited resources of democratic principals compared to more generously equipped agencies, it remained an open question how political actors effectively hold these regulators to account.

The study has yielded that accountability of regulatory agencies is formally still in place. All agencies under scrutiny are subject to powerful accountability structures. In particular, governments (or, more specifically, parent departments) have in most cases retained strong formal powers to hold IRAs to account. Only when it comes to single regulatory decisions, accountability powers of departments are reduced and taken over by courts. EU membership and strong transnationalization of a policy area, however, can empower additional actors even at operational level.

The analysis of formal accountability has moreover proven that there is no general trade-off between accountability and independence. According to the theoretical argumentation, the term independence refers mainly to regulatory decision-making unbiased by political actors. Accountability that effectively reduces independence can thus be found mainly in the above-mentioned transnationalization cases: In fact, these agencies can hardly be called independent. Apart from that, it can be concluded that formally, there is neither an accountability deficit nor a trade-off between accountability and independence – „independent, yet accountable“ agencies are both very well possible and an empirical reality.

Interestingly, how accountability regimes work in practice deviates quite a lot from the formal governance structure. The second part of the study reveals the power of additional factors such as trust, reputation-seeking, and transnational integration to completely

juxtapose the character of the formal arrangement. The dynamics of the four regimes are highly different in terms of the extent accountability is de facto executed: Strong EU role in the BNetzA's case has shifted powers away from domestic actors, which are severely restricted in the use of their formal powers, while in the case of ComCom, fora leave more room to the agency than it formally possesses. BaFin actively seeks for political support and acts almost like an "ordinary" public authority, while FINMA has frequently underlined its independence, but also suffers from the lack of political allies.

Interactions and dynamics among the various actors of the accountability regime induced thus very different results: Some fora hold agencies on the long leash, making hardly any use of accountability powers, others want to be informed in detail or even aim to influence agency decisions. The study aimed to evaluate these dynamics by scrutinizing cases for the existence of a series of mechanisms.

The most striking fact derived from the analysis of those mechanisms is the amount of cooperation present within the accountability regime. Some agencies even actively seek the political support of strong fora, e.g. voluntarily forwarding unrequested information. There are two rationales plausible for that: First, agencies seek the good-will of policy-formulating fora (mostly departments and the European Commission, which are in charge of drafting bills) in order to ensure their own access to the policy-making process. In case a relevant bill is under way, they want to be consulted and have a say on it. Ideally they are asked to draft the bill themselves. This of course prevents them from openly opposing the forum and facilitates cooperative behavior from the agency's side. Such cooperative behavior is apparently more pronounced as soon as a second source of expertise is available - as the respective national bank in the area of financial services. Interestingly, and supporting this hypothesis in some sense, this dynamic turns upside down in the BNetzA case: Telecommunications policies are delineated mostly at EU level, and the European Commission regularly consults the domestic regulators, if not even asking them for drafting directives and regulations. The most promising way for the department to influence policies in the national interest is to brief the agency accordingly in an early stage of the policy process. This way, it is the department which is in need of the agency's support.

A second rationale for support-seeking of agencies is the need of a political ally: As can be seen contrasting the BaFin and FINMA cases, even a highly independent agency loses options when it lacks political support. This dynamic is apparently driven by the salience of the policy area: It is plausible that lack of political support matters more in an area perceived as highly important, with everyone having something to say on it.

From the forum's perspective, it turned out that trust between agencies and fora is generally quite strong. This holds especially for fora with a larger say, in particular departments, which show a high level of trust in the agencies' information, and often seek their expertise and advice. Trust of governments and ally-seeking by agencies are arguably both sides of the same medal. The feeling to be thoroughly informed is apparently decisive on the level of trust. Also among fora, coordination is widely present. Fora share information to overcome resource weaknesses and thus in most cases manage to get additional sources of information (e.g. central banks in addition to financial regulators).

In sum, the scrutiny of accountability in practice finds coordination a highly important feature in accountability regimes, both among fora and between fora and agency. These findings have important theoretical implications, since they are at odds with most predictions that can be derived from agency theory – still the most influential approach to delegation. Agency theory expects diverging interests between agent and forum, and in turn predicts that the agency attempts to circumvent monitoring structures in favor of own interests, while fora have strong reasons to distrust the agency and to reinforce monitoring. Monitoring is costly, however, and raises the question of fora's capabilities to put it into practice. At least in the studies sample, trust and reputation-seeking have induced cooperative behavior of fora and agencies, while resource problems are compensated by inter-forum cooperation.

The revelation of that is a benefit from the applied regime approach, which has hence proven useful to get a more fine-grained picture of accountability. First, it allows for a differentiated assessment of formal agency accountability: it separates three levels of agency action, which can be theoretically distinguished and in fact show diverging empirical patterns. Moreover, in its assessment of accountability in practice, it was able to shed light onto the various interactions and dynamics within the formal regimes, and has proven to

be valuable to carve out the dynamics supplementing and sometimes superseding formal structures.

What have we learned for know about Regulatory Agencies' accountability? As stated above, there is no accountability deficit detected checking formal accountability powers. In practice, formal structures can be subject to very different dynamics, which can substantially alter the de facto powers of the formal structure. In the cases under scrutiny, these dynamics managed to further strengthen formally strong fora, but also to restrict them in the application of their powers. In particular, the level of trust, the need for reputation, and the salience of the policy area turned out to be influential in that regard. After all, none of the agencies is unrestricted in their actions, and all have for sure await consequences if they exceed their powers or act unlawfully.

While accountability apparently works in practice in the cases under scrutiny, the latter's insights can used to imagine counterfactual conditions, but most of them put rather independence at stake than accountability: The ComCom system relies very much on personal relationships and informal arrangements, which are likely to alter. The system is thus vulnerable, but mainly in the sense to make the agency less autonomous as soon as formal rights are effectively used. The deal between BaFin and finance department to get political support in change of thorough information works also well and seems stable. However, the BNetzA case gives a contradictory example: Formal powers at transnational level may alter the dynamics and make the deal obsolete. Again, this does not cause an accountability deficit but rather a shift of powers away from the national sphere. The democratic legitimacy of the EC is another topic and not subject to this work.

Nevertheless, there are conditions imaginable which might be critical to agency accountability: If we take e.g. a FINMA-like agency, confronted with less public interest and not counterweighted by a second powerful actor such as the national bank, the agency would probably face only limited accountability. Thus, while there is strong support to the claim that there is no need to fear an accountability deficit of Independent Regulators, some slight doubts remain.

Anyways, regarding the study of regulators in particular as well as of accountability in general, there remains much to be done. Apparently, the dynamics of accountability in

practice are an area worth for further research. For example, when and why agencies seek for political allies? How does the competition on political influence works in detail? Can we corroborate that to reduce the agency's policy influence is used by fora as a sanctioning mechanism? Scholars may well focus on the reasons for the different patterns, or check their empirical validity in larger samples. This would mean, however, to find a more comprehensible way to measure them.

Second, my approach covers only "first order" accountability, i.e. interactions of fora of a single agency. It turned out, that fora themselves are subject to restrictions: Some face costs if they take a decision in one or the other way. Others are staffed by third parties. In other words, fora are themselves agents of second-order fora – or maybe call them "meta-fora". A study of this kind of networks is a truly complex task, but may yield interesting insights on complex governance structures, probably using techniques from network analysis or similar approaches.

Third, in particular the study of the BaFin case has revealed the increasing complexity of accountability over time: It can be easily seen that the number of actors active within transnational financial regulation has sharply increased in recent years. At the same time, accountability relationships have become much more complex: Some of these structures include even mutual accountability – an agency is a forum of its own forum. Since new structures – including new accountability mechanisms – are regularly put on top of existing ones, rather than replacing them, it is an open question how these systems work, and what effects they are going to have.

10. References

10.1. Interviews

25 interviews with 29 interviewees have been conducted face-to-face, by phone or in written form between October 2011 and July 2015. Confidentiality was guaranteed throughout the interviews. One or several interviews have been conducted with representatives of the following institutions:

- Communications Commission (Kommunikationskommission, ComCom), Bern, Switzerland;
- Competition Commission (Wettbewerbskommission, ComCo), Bern, Switzerland;
- Federal Administrative Court (Eidgenössisches Bundesverwaltungsgericht, BVGer), St. Gallen, Switzerland;
- Federal Department of Finance (Eidgenössisches Finanzdepartement, FDF), Bern, Switzerland;
- Federal Department of the Environment, Transport, Energy and Communications (DETEC), Bern, Switzerland;
- Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin), Bonn, Germany; staff and members of the administrative board;
- Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie, BMWi), Bonn, Germany;
- Federal Ministry of Finance (Bundesministerium der Finanzen, BMF), Berlin, Germany;
- Federal Network Agency (Bundesnetzagentur, BNetzA), Bonn, Germany; staff and members of the advisory council;
- Financial Stability Board, Basel, Switzerland;
- German Parliament (Bundestag), Berlin; Members of Parliament;
- German Parliament (Bundestag), Berlin; parliamentary staff;
- Monopoly Commission (Monopolkommission), Bonn, Germany;

- Office for Communications (Bundesamt für Kommunikation, OFCOM), Biel/Bienne, Switzerland;
- State Secretary for International Financial Matters (Staatssekretariat für internationale Finanzfragen, SIF), Bern, Switzerland;
- Swiss Federal Audit Office (Eidgenössische Finanzkontrolle, EFK), Bern, Switzerland;
- Swiss Financial Market Supervisory Authority (Eidgenössische Finanzmarktaufsicht, FINMA), Bern, Switzerland;
- Swiss Parliament, Bern, Switzerland; Members of Parliament and of the Control Committee;
- Swiss Parliament, Bern, Switzerland; Parliamentary Control of the Administration.

10.2. Legal documents

10.2.1. German law

Bundesbeamtenengesetz, BBG

Bundesdisziplinargesetz, BDG

Bundeshaushaltsordnung, BHO

Finanzmarktdienstleistungsaufsichtsgesetz, FinDAG

Finanzmarktstabilisierungsgesetz, FinStabG

Kreditwesengesetz, KWG

Telekommunikationsgesetz, TKG 2004, BGBl. I: 1190

Telekommunikationsgesetz, TKG 2012, BGBl. I: 958

Federal Constitutional Court, decision BVerfG 1 BvR 1932/08

10.2.2. Swiss law

Bankengesetz, BankG, SR 952.0

Bundesgerichtsgesetz, BGG, SR 173.110

Bundespersonalgesetz, BPG, SR 172.220.1

Bundesverfassung, BV, SR 101

Fernmeldedienstverordnung, FDV, SR 784.101.1

Fernmeldegebührenverordnung, GebV-FMG, SR 784.106

Fernmeldegesetz, FMG, SR 784.10

Finanzkontrollgesetz, FKG, SR 614.0

Finanzmarktaufsichtsgesetz, FINMAG, SR 956.1

FINMA-Personalverordnung, SR 956.121

FINMA-Gebühren- und Abgabenverordnung, FINMA-GebV, SR 956.122

Kartellgesetz, SR 251

Nationalbankgesetz, NBG, SR 951.11

Organisationsverordnung für das Eidgenössische Finanzdepartement, OV-EFD, SR 172.215.1

Parlamentsgesetz, ParlG, SR 171.10

Preisüberwachungsgesetz, PÜG, SR 942.20

Regierungs- und Verwaltungsorganisationsgesetz, RVOG, SR 172.010

Regierungs- und Verwaltungsorganisationsverordnung, RVOV, SR 172.010.1

Reglement ComCo, SR 251.1

Reglement ComCom, SR 784.101.115

Verwaltungsverfahrensgesetz, VwVG, SR 172.021

Swiss Federal Supreme Court, decisions BGer 137 II 431 and BGer 2A.503/2000

Swiss Federal Administrative Court, decision BVGer A-7162/2008

10.2.3. European law

ECB regulation ECB/2014/17

EU directives 2002/21/EC, 2009/140/EC

EU regulations 1094/2010, 1095/2010, 1096/2010, 1024/2013

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Appendix A: Sample questionnaire

Research project of the Universities of Lausanne and Zurich, Switzerland, funded within the framework of the National Centre for Competence in Research (NCCR), Democracy in the 21st century

Internationalization, mediatization, and the accountability of regulatory agencies

Questionnaire forum Y

Dear Mr _____

below, you will find a series of questions we care about in the above-mentioned research project at the Universities of Lausanne and Zurich. We thank you very much for your interest and for supporting our research by answering this questionnaire.

The project in brief: Regulatory authorities have spread out over Europe in the last decades and occupy a crucial role in today's politics. Many of them are highly autonomous from the government, which poses some challenges for democratic accountability. Our research focuses on the chances and ways of democratically elected institutions to monitor these authorities and to hold them politically accountable.

Of particular interest for us is agency X and its accountability towards government, parliament, and general public. More concretely, our main interest regards the formal and informal exchange of information between forum Y and agency X as well as between forum Y and other relevant actors, such as....

We would appreciate if you took some time to do so, since we are highly dependent on information from insiders of the political process. Please note that all information will be used in an anonymized way and is purely confidential. We will keep you informed on results and forthcoming publications. Below, you find the questions that are of interest to us.

Accountability relations between forum Y and agency X

- 1.1. How is the co-operation between forum Y and agency X structured? How frequent (daily, weekly, monthly, irregular) and of what kind (phone, inofficial meeting, official hearing) are these contacts? On which level (minister/chairman, unit directors, etc.) these contacts occur?
- 1.2. What kind of written information do you get from agency X, apart from the annual report?
- 1.3. Does forum Y receive detailed minutes of the board's decisions?
- 1.4. Is there a corresponding internal structure of forum Y and agency X? Concretely, is there a unit responsible for relations to agency X? And is there a clear counterpart within forum Y you are mainly in contact with?
- 1.5. How many people deal with financial regulatory policy in forum Y? Who is politically responsible for regulatory policy?
- 1.6. Is the amount of staff monitoring agency X sufficient? Has it always been?
- 1.7. Do forum Y and agency X in general pursue the same goals? Do you have a case in mind, when there was disagree between them? How do you tell agency X that you disagree with its decisions?
- 1.8. Do you use agency X's expertise on regulation issues for your political business? How?
- 1.9. How do you manage to evaluate agency X's performance (e.g. Regulatory Impact Assessment, evaluations, benchmarking)? Do you use information by third parties (e.g. stakeholders, science) for that?
- 1.10. The agency X is in some sense both accountable to the forum Y, and to the forum Z. Are the responsibilities clearly divided between the two institutions? Are there areas where there are tensions regarding responsibilities?
- 1.11. The competencies of both institutions also differ (e.g. the forum Y can dismiss board members, forum Z cannot). Do forum Y and forum Z cooperate on accountability issues regarding agency X? How does that work in practice?
- 1.12. What role does the general public play in holding the agency X to account? Is there a difference regarding public attention pre/post-crisis? Has that changed the work of the forum Y (e.g. increased amount of information, increased public pressure)? Has the agency X reacted in its public relations strategy to this increased public attention? How?
- 1.13. In case you are not satisfied with agency X's performance, which possibilities you have to react? What is the most probable form of reaction?
- 1.14. Had there been pre-crisis tensions regarding the regulatory strategy taken by agency X between agency X and forum Y?
- 1.15. There are some areas with potential for tensions between agency X and forum Y. How is dealt with these goals conflicts between agency X and forum Y?
- 1.16. Are there formal rules for agency board appointments (regarding expertise, affiliations etc.)? How the candidates are selected? Can the parliament intervene? Can the agency X propose candidates?

- 1.17. Can the forum Y dismiss board members? Has that happened? For what reasons?
- 1.18. Has ever an agency board member stepped back from office? For what reasons?
- 1.19. In case the agency X is criticized in public, or by the parliament, does it react by itself or is that done by the department? Does the department usually back the agency X's position vis-a-vis the public, the parliament, or other departments?
- 1.20. Who in the end is the politically responsible for the decisions of agency X (the board, the CEO, the Secretary of State)? Does that depend on the nature of the decision?

2. *European regulation*

- 2.1. Financial regulatory policy occurs to a high extent at the international level. Does the agency X coordinate its position in the negotiations with the forum Y or the parliament?
- 2.2. How frequently the forum Y is in contact with the EC/ESMA/EBA?
- 2.3. How frequently the agency X is in contact with the EC/ESMA/EBA?
- 2.4. Does the EC have sufficient staff/time/interest for dealing with FR issues adequately?
- 2.5. How do you consider the level of expertise within the EC?

3. *General assessment*

- 3.1. Has agency X been sufficiently equipped (staff, budget, competencies, discretionary leeway) to effectively fulfil its statutory objectives?
- 3.2. Are accountability holders interested in the performance of the agency or do they pursue their own political agenda?
- 3.3. Do you consider agency X (as it was structured in the past) as fully accountable to the forum Z, to the forum Y, or to the general public? Do you consider the monitoring instruments at hand for the forum Y as adequate, exaggerated, or insufficient? In what regard?
- 3.4. Do you think a different accountability scheme of the agency X could have prevented the banking crisis or at least could have reduced its impact?
- 3.5. Has accountability been a major reason for institutional reform?
- 3.6. Do you think institutional reform raises the effectiveness of the accountability structures of the financial regulators towards government and/or parliament? Are there further changes you would have thought of as favourable?
- 3.7. Do they have increased the power of the government and/or the parliament to set the regulators' statutory goals and the strategies to attain them?