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The political independence of regulatory agencies: a critical appraisal of a “magic concept” and perspectives for its reconceptualization

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Abstract: The political independence of regulatory agencies has become the one criterion of good governance and the most studied feature of regulators. Yet, the concept of independence suffers from numerous tensions and ambiguities. It is not clear what the concept means in theory and academics have expressed scepticism over the capacity of the term to capture the condition of regulatory agencies and their interactions with other stakeholders. This dissertation seeks to tackle these two difficulties. It aims to identify the theoretical meaning of independence in a systematic way by performing a conceptual analysis over 78 academic articles. It then confronts the theory of independence to its practice in order to point out and explain the limitations of the concept. The lingering gap between the theory and practice of independence threatens the scholarship with stagnation or decline. I argue that reconceptualising independence is an opportunity to rejuvenate the field, provided that conventional assumptions and biases be abandoned. The field needs an embedded theory of independence, which would recognise and work with the numerous interactions and challenges that regulatory agencies maintain with other stakeholders, including political actors.

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1. Introduction and literature review

As of 1990s, the exhaustion of the “positive” welfare state and the quest for improved efficiency in public management has elicited a profound shift in governance. In an attempt to steer rather than rowing, governments in Europe privatised formerly state-owned activities, intensified their recourse to contractualisation and delegated extensive competencies to disaggregated and specialised bodies. While disaggregation and specialisation had been a long-standing evolution of public governance (Pollitt and Talbot 2004), the shift now involved a delegation of regulatory competences to independent or quasi-independent bodies, the so-called “independent regulatory agencies”, which gave rise to the “regulatory state” (Majone 1994, 1997). Though delegation of regulatory powers were initially limited to economic matters, regulatory agencies (RAs) quickly spread beyond these boundaries. Regulatory agencies are delegated extensive powers, including adjudication, rulemaking and prosecution, and their influence as experts in their field has allowed them to become a “third force” in the regulatory arena, along with elected officials and regulated industries (Thatcher 2005). The spread of RAs has thus been a cornerstone of the rise of the regulatory state and their independence is recognised as the ultimate criterion of good governance (OECD 2014; UK Government 2011). As Jackson (2014) puts it, “*international organizations recommend it, agencies seek it, governments support it and citizens expect it*”. To date, independence stands as one of the most studied topics in the regulation scholarship.

The scholarship has focused much on the “why” and the “how” of regulators’ independence. There are first both functional and contextual reasons for politicians to delegate extensive competences to independent bodies (Elgie 2006; Thatcher 2002a). Delegation was motivated by a widespread assumption that depoliticising regulatory issues by establishing non-majoritarian and expert bodies would solve time-inconsistencies and help to face heightened political complexity (Elgie and McMenamin 2005; Gilardi 2002; Levy and Spiller 1994). Elected officials also hope to transfer the political responsibility for the management of regulated sectors and thus shift the blame towards regulatory agencies (Thatcher and Stone Sweet 2004). Contextual reasons also shaped the establishment of regulatory agencies, including a process of diffusion and mutual learning (Jordana, Levi-Faur, and i Marín 2011; Levi-Faur 2005; Ruffing 2014), national traditions and cultures (Yesilkagit and Christensen 2010) and varieties of capitalism (Guardiancich and Guidi

2016). We also know much about how independence is granted to or gained by regulatory agencies. An extensive literature has focused on measuring the formal independence of regulatory agencies, i.e. the dispositions ensuring their independence that are contained in their statutes (Corrigan and Revesz 2017; Gilardi 2005; Hanretty and Koop 2012; Lewis and Selin 2015; Selin 2015). It is consensual in the literature that independence may have non-legal determinants so that “de facto independence” may depart from formal independence. The scholarship has identified a wealth of non-legal determinants of independence, including political salience and complexity, the number of veto players, the characteristics of the organisation (e.g., age, size, task, reputation), the participation of the agency in networks of regulators and the degree of politicisation and reach of political ties of the agency’s decision-makers (Fernández-i-Marín, Jordana, and Bianculli 2016; Hanretty and Koop 2013; Ingold, Varone, and Stokman 2013; Maggetti 2007; Ringquist, Worsham, and Eisner 2003; Rommel and Verhoest 2014; van Thiel and Yesilkagit 2014; Kutsal Yesilkagit 2011). Nevertheless, the connection between formal independence and de facto independence is not clear nor consensual. While some authors find formal provisions not very important (Carpenter 2001; Maggetti 2007), others argue that formal provisions are influential in determining the level of independence that a regulatory agency has in practice (Hanretty and Koop 2013; Verhoest et al. 2010). More recently, the recognition that regulatory agencies lack legitimacy (Majone 1999, 2001a) while potentially having the capacity to “clawback” power from their political masters (Coen and Héritier 2005) has led to a recognition of the need to have them under control, though not controlled (Moe 1985). The study of independence has thus been partially re-oriented towards the issue of balancing control and independence (Busuioac 2009; Casazza 2015; Christensen and Lægreid 2007; Lodge and Stirton 2010; Verhoest et al. 2010).

The scholarship on independence has thus been prolific and somehow enthusiastic. However, it remains far from clear what independence means exactly in theory. Very few authors provide a substantial definition of independence and as many would recognise, “*independence is a difficult construct to conceptualise and operationalise*” (Badran 2017). There are also lingering tensions in the literature around the concept of independence. Many scholars take distances with the term “independence”, referring to regulatory agencies as “so-called independent agencies” or “semi-independent agencies”. Others are openly critical and point that “*agency independence is an inexact, unstable and variegated concept*” (Seifter 2019) while others refute the term at once. Datla

and Revesz (2013), for example, argue that there is no defining feature to distinguish between independent and executive bodies, so that it would be preferable to drop the distinction and the term “independence” and rather refer to more or less autonomous institutions. Therefore, despite the considerable attention that the scholarship has paid to the issue of independence, there remains extensive tensions, ambiguities and occasionally contradictions that this dissertation seeks to address. I ask two questions. How has independence been conceptualised in the scholarship in the context of regulatory agencies? What are the tensions and limitations of this conceptualisation and how can they be addressed? I limit the scope of my research to economic regulators in developed countries which are generally those which should be most closely aligned with the ideal of an independent regulatory agency. To address the first question and identify how independence has been conceptualised in theory, I perform a conceptual analysis over 78 academic articles. This methodology allows me to focus on the definition of independence that is effectively used or endorsed in the literature. I then confront the theoretical conceptualisation of independence to the practice of independence, which I identify from research on the topic and 4 interviews with practitioners. The list of the interviews and the methodology and ethics principles I followed are exposed in Appendix 1. Confronting the theory of independence to the practice allows me to identify several shortcomings in the theory and reflect on a reconceptualization of independence.

My main finding is that the independence of regulatory agencies is not an exhausted theme of research. I have identified and discussed a gap between the theory and practice of independence which represents an opportunity to rejuvenate the field. The conceptual analysis revealed that there is a common conceptualisation of independence which crosses national and disciplinary boundaries. Independence is largely conceptualised as a purely institutional process through which regulatory agencies are granted or gain the capacity to determine their preferences and act according to them, without any external interference or constraint, especially of political nature. In the literature, the concept of independence has three pillars: a clear separation between regulators and political issues and actors, autonomy and self-reliance. Confronting this definition to the practice of independence has uncovered a gap regarding both the nature and definition of independence. I conclude that the theory of independence leads to a situation in which “all regulatory agencies are independent, but no regulatory agency is independent”. In other words, while regulatory agencies are generously called independent, when applying the theoretical

definition of independence to assess their existence, it is very unlikely to be able to confirm independence. The concept of independence thus fails to capture the reality of the condition of regulatory agencies. In reviewing critically the literature on independence, I find that, despite great intellectual and methodological richness, the scholarship has suffered from three shortcomings, namely excessive generalisation, a bias against politicians and a bias towards independence. Faced with the threat of decline or stagnation, I argue that reconceptualising independence provides an opportunity for rejuvenation. To be fruitful, such reconceptualisation must break with the above-mentioned assumptions and biases to define an embedded theory of independence, which recognises and work with the permeability and limitations of the boundaries between regulatory agencies and other stakeholders. I thus hope that, by identifying the concept of independence in the literature in a systematic way and identifying and explaining limitations, the dissertation will contribute to challenging and modernising our understanding of the independence of regulatory agencies. The dissertation is organised as follows. The second section is dedicated to the conceptual analysis of independence. The third section confronts the theory of independence to practice and uncovers the limitations of the theoretical concept. The fourth section reflects on the prospects of the scholarship on independence, between decline, stagnation or rejuvenation, and draws some perspectives to reconceptualise independence and err on the side of rejuvenation.

2. Independence in theory: a conceptual analysis

To investigate how independence has been defined and studied across social sciences disciplines, I rely on a novel conceptual analysis methodology developed by Koop and Lodge (Lodge and Koop 2015). This methodology allows me to focus on the actual use of independence in the literature. The assumption is that the way scholars refer to independence in their publications is representative of their conceptualisation of independence. I first identify areas of agreement and disagreement to define the conceptual dimensions I will investigate. I then perform a literature search and identify 78 academic articles on which to carry out the conceptual analysis.

2.1 Searching for common grounds

While independence is one of the most studied concept in regulation and most claimed characteristic of the regulatory state, it is far from clear what scholars mean with it, threatening independence to become a “magic concept” (Pollitt and Hupe 2011). Broadly speaking, the literature agrees that independence is about some kind of distancing between regulatory agencies and politics, though the forms this may take vary widely. Most of the literature sees independence as prevailing by degree, though the American literature has tended to rely on a binary conception of independence¹. There are, however, areas of disagreement which make the three dimensions that I will investigate. These dimensions concern 1) the nature of independence, 2) the account of independence and, 3) the distance of the relationship between regulators and politicians.

2.2.1 The natures of independence

Most traditionally, independence is seen as an institutional, top-down and exogenous process. According to this view, independence is an institutional process through which politicians unilaterally delegate tasks and powers to independent agencies who passively receive it. Delegation of independence may have five main dimensions: the status of the head of the agency and the board members, the dispositions concerning the relationship of regulators to the executive and parliament, the extent of financial and organisational autonomy and the regulatory competencies granted to the regulator (Gilardi 2005). This perspective is probably most widespread in the literature, perhaps partly for practical reasons as it is more easily operationalised (Hanretty and Koop 2012). However, many authors have pointed to the limitations of this perspective. Besides the absence of consensus on the dimensions of independence (Hanretty and Koop 2012), its exogenous and top-down character is questioned as regulators may actively build their independence, beyond what was intended by elected officials. Independence may also not be fixed in time and rather be highly dynamic according to the political and regulatory context.

¹ The American literature traditionally distinguishes between executive and independent agencies by the fact that the head of the agency has protection from removal, which creates a binary distinction between agencies which benefit from this disposition and those which do not.

In response to these limitations, scholars have argued that independence is in fact an endogenous, dynamic and bottom-up institutional process. This perspective still considers independence through institutional lenses but focuses on the effective relations and interactions within different institutions. Independence thus extends beyond formal processes and the regulator-ministry relationship. Independence is endogenous and bottom-up because it is “built from within” (Tan 2020); it rises from the external environment of regulators and the way they manage it. Regulators play an active role in defining the terms of their independence and relationship to politicians (Black 2008). Carpenter (2001; 2010) paved the way for this perspective by arguing that regulatory agencies can acquire more autonomy than intended or granted by their political principals by developing their reputation and building networks and coalitions. Yesilkagit (2004) also argued that the creation of a regulatory agency is followed by a process of habituation through which the relationships between regulators and politicians are redefined beyond the formal provisions of delegation. The new relationship may evolve in more or less autonomy than formally granted, depending on the preferences and strategies of elected officials and regulatory agencies. This perspective, mainly developed in the literature on bureaucratic autonomy, has elicited a continuous interest in the scholarship (Maggetti and Verhoest 2014).

Departing from the institutional nature of independence, some authors see independence as a cognitive process. Independence exists because of a collective, more or less conscious, understanding of what “being independent” means for a regulator and what tasks should be, by nature, carried out by independent bodies. A first mechanism of cognitive independence lies in the interactions of regulatory stakeholders through which they produce meaning beyond formal agreements. Regulatory conversations allow stakeholders to interact and build an inter-subjective understanding of the meaning of independence (Black 2002). A second mechanism was born in the literature on central banks and relies on conventions, defined as a regular pattern of behaviour that is seen as mandatory. Vermeule (2013) argues that agencies which may not be formally independent may still be independent in practice because of unwritten conventions which constrain political actors from attempting to interfere in the day-to-day activities of an agency. Political actors would refrain from using their oversight powers either because they have internalised that this is not appropriate, or because they expect a backlash from the public which considers in majority that regulatory agencies should be independent. Conversely, a formally independent

agency may not be independent in practice because it is widely understood or expected that this agency should be responsive to the political power. Independence may thus exist much beyond – or behind – formal provisions and institutions because of historic traditions, moral principles, or collective understandings and expectations.

2.1.2 The accounts of independence

Four major accounts of independence have thrived in the literature. I am focusing here on substantial definitions of independence rather than instrumental ones which define independence according to its practical consequences. The first account defines independence as a (strict) separation between regulatory agencies and political actors and issues. This account is derived from the credible commitment hypothesis and the will to depoliticise the management of certain activities. According to this view, the regulation of important activities should be delegated to non-majoritarian and expert institutions. This would increase the stability and efficiency of regulatory regimes by ensuring that decisions are based on expert considerations, rather than political ones. The separation of interests resonates with another separation, that of functions. Non-majoritarian institutions should focus on policy-implementation while political issues are left to elected officials (Majone 1997, 2001b; Wilson 1887). This account thus portrays regulatory agencies as largely apolitical institutions. Their ignorance and unresponsiveness to political issues and preferences constitute their *raison d'être* (Miller 2005). A second account conceptualises independence as autonomy or “the extent to which the agency can decide itself about matters it finds important” (Verhoest et al. 2004). It comprises the capacity for a regulatory agency to make its own decisions and act according to them without external constraint or influence, be they of legal, financial, structural or interventional nature. The third account argues that independence is a form of self-reliance. An independent agency is one that has control over the key aspects of its survival (e.g., protection from dismissal without cause, staff, resources) (Dworkin 1988). The last account moves away from these structural definitions and considers behavioural aspects. Independence is a behaviour which refers to moral qualities such as impartiality, integrity, fairness and trustworthiness. For example, an independent central bank is often defined as a conservative one (Rogoff 1985). With regulatory agencies, independence may be associated with expertise and evidence-based behaviour (Maor 2007; Ossege 2015; Schrefler 2010) as well as impartiality and

fairness. Independence is then more than a structural matter and includes values and commitment to these values. These definitions of independence overlap to some extent. It is hardly conceivable to attain autonomy without self-reliance as an agency that fears for its survival may adapt its decisions to align with those in control of its survival, namely elected officials. Similarly, autonomy overlaps with a separation of interest as being autonomous requires a certain distance from political interests. However, the overlap is not total. Autonomy only requires a regulatory agency not to be bound by political interests. A regulatory agency can be cognisant and even responsive to political preferences and issues and still be autonomous, provided the decision to be responsive was its own. In independence as a strict separation of interests, a regulatory agency is more than unbound by political issues and preferences, it is ignorant of them. Regulatory decisions should be solely based on expert opinion and not “polluted” by political considerations. Independence as a separation of interests thus goes further than independence as autonomy.

2.1.3 The distance of the relationship

Ultimately, conceptualising independence denotes a certain conception of the relationship between regulators and political actors. A widespread qualification of the relationship between regulators and political actors is political insulation. Again, it is unclear what “insulation” means. Most dictionaries define insulation as the quality of being protected from outside influence. Insulation also comes from the latin “*insulatus*” which means “to make an island”. Arguing that regulators are insulated from political actors may thus mean something from being protected from political actors to being completely separated, isolated from political actors. Both interpretations find support in the literature. Regulators benefit from a number of formal and informal protections from political influence (Barkow 2010; Pardow 2017), such as protection from removal, and the scholarship has theorised and commented on the strict separation of interests and functions that must exist between regulator and political actors (*supra*). Another frequent description of regulators’ relationship to political actors is “arm’s length relationship”. “Arm’s length” has been used to refer to the disaggregated character of agencies from governments (Hood 1991; Talbot 2004; van Thiel and Yesilkagit 2014) or to refer to a less distant relationship between regulators and politicians, acknowledging the existence of interactions and iterations and importantly, of

accountability and oversight mechanisms on regulatory agencies (Christensen and Lægreid 2007; Verhoest et al. 2010).

2.2 Data and method

I study the use of these conceptual dimensions on academic articles in the fields of political science, public administration, law, economics, management, business and sociology. I use the Web of Sciences Social Sciences Index and search for the terms (“independen*” or “autonomy”) and (“regulat*” or “non-majoritarian” or “agency”) in the title. These terms are voluntarily encompassing and seek to capture variations of conceptions of independence, from independence to autonomy, as well as varying terms used to refer to regulatory agencies. I focus on the articles written in English, in the above-mentioned academic fields, and published between 1990-2020. I choose to start the search in 1990 because it corresponds to the rise of agencification beyond the US. The practical impact of these boundaries is however relatively limited as the articles tend to rely on earlier publications to sustain their argument.

The search has identified 220 articles from which I remove articles engaging with board or auditor independence, state autonomy or regulatory autonomy, and articles focusing on government agencies rather than on independent regulatory agencies so as to focus my analysis (and statistics) exclusively on independent regulatory agencies. This selection took the number of articles down to 87. I do not perform further selection and rely on this data for my analysis. In these 87 articles, I assess how the author conceptualised independence along the three dimensions I have introduced above. To investigate each dimension, I have relied on a careful reading of the articles and a set of questions I have defined to assess whether the scholar has engaged with the conceptual dimensions. Table 1 presents the dimensions and the questions I used.

Table 1. Conceptual dimensions and questions

Dimensions	Questions
<i>A. Nature of independence</i>	<p>Is independence conceptualised as an exogenous and top-down institutional process?</p> <p>Is independence conceptualised as an endogenous and bottom-up institutional process?</p> <p>Is independence conceptualised as a cognitive process?</p>
<i>B. Account of independence</i>	<p>Is independence defined in terms of a separation of interests?</p> <p>Is independence defined in terms of autonomy?</p> <p>Is independence defined in terms of self-reliance?</p> <p>Is independence defined with behavioural qualities?</p>
<i>C. Distance of relationship</i>	<p>Is the relationship between political actors and regulators defined as insular?</p> <p>Is the relationship between political actors and regulators defined as arm's length?</p>

The methodology presents two major limitations. The boundaries of the research focus on articles and may thus miss influential books and book chapters. The impact is however limited as many articles were derived from books or relied on arguments found in influential books. Focusing on English-written articles may also introduce a bias towards the English-speaking literature. In the sample of 87 articles, about a half were written by scholars from universities located in non-English speaking countries (e.g., Scandinavia, Turkey, Latin America). The second limitation, perhaps the most important one, is that few authors define explicitly independence and how they conceptualise it, according to the dimensions I have identified. I have thus had to infer. A good practice would have been to have another researcher look through the articles and perform the analysis so as to compare the results and identify potential mistakes or biases. I, however, lack the resources to implement this. To strengthen consistency and accuracy, I have designed an index in which I

defined precisely the meaning of each dimension and how I would treat each situation and ambiguity. This index is presented in Appendix 2 with examples of choice of coding. I kept track, along the research, of the justifications of my coding choices to compare my decisions a posteriori and check their consistency. I also introduced a “missing” response category for situations in which I was unable to infer meaningfully from the words of the author. Overall, a conceptual analysis of this sort will not do justice to the subtleties and nuances of scholars’ thoughts and is not intended for it. The study will reveal broad trends in the literature and dimensions of independence so as to identify an overarching conceptualisation of independence. Nonetheless, I do supplement the conceptual analysis with an in-depth reading of academic articles in order to enrich the analysis of the theoretical conceptualisation of independence, which I expose in the discussion section.

2.3 Results and analysis

Assessing the 87 articles, it turned out that 9 articles did not engage sufficiently with the concept of independence to perform the analysis meaningfully. I excluded these articles from the analysis, reducing the sample to 78 articles. Table 2 describes the results per conceptual dimension. I have defined four different response categories: a) yes, when the author has engaged explicitly with the dimension, b) maybe, when the author did not engage explicitly with the dimensions but there are clues that this was part of their thinking – in other words, this category means “potentially yes”, c) no, when the author rejected it explicitly or when there are sufficient clues that it was not part of the thinking, and d) missing, when it is impossible to draw a meaningful conclusion on a particular item.

Table 2. Statistics per conceptual item

Dimensions and item	Yes (%)	Maybe (%)	No (%)	Missing (count)
<i>A. Nature</i>				
Institutional. Exogenous, top-down	100	0	0	1
Institutional. Endogenous, bottom-up	18	25	57	1
Cognitive	8	10	82	1
<i>B. Account</i>				
Strict separation	71	19	10	6
Autonomy	63	38	0	6
Self-reliance	53	40	7	6
Moral Behaviour	7	25	68	6
<i>C. Distance of relationship</i>				
Insulation	52	8	40	5
Arm's length	26	16	58	5

Starting with the nature of independence, there is unanimity among the 78 articles that independence is of institutional nature. The most common conception is that independence is a top-down process through which politicians grant independence to RAs who passively receive it. About half of the sample recognised that independence may also be an institutional bottom-up process through which RAs actively seek to manage their external environment and build independence, beyond what is intended or granted by elected officials. However, only 18% of the sample explicitly engaged with this perspective. The majority of the articles focused solely on the institutional nature of independence and disregarded its cognitive nature. There are variations in the references to the cognitive sources of independence among the articles which included it. Scholars may refer to it by highlighting that independence may be supported by a logic of

appropriateness, close to a moral principle which instils the feeling in politicians that it would be inappropriate to interfere with RAs' decision-making (Tan 2020; Trillas and Montoya 2008) or a pragmatic calculation through which politicians internalise that it is in their interest not to infringe on regulators' independence (Ennsner-Jedenastik 2015; Thatcher 2002b).

Turning to the account of independence, 90% of the sample defined independence as a separation of interests between politics and regulators and the majority did so explicitly. 10% of the sample did not include that account of independence. In this portion are articles which solely focus on independence as autonomy or articles which rejected explicitly defining independence as a strict separation of interests, by arguing that regulatory agencies are still very engaged with political issues and actors. All the articles also defined independence as autonomy. 63% of the articles did so explicitly and 38% did so implicitly by arguing that independence requires, for example, having large and exclusive powers or the incapacity for elected officials to overturn RAs' decisions. Independence is also referred to as self-reliance or having control over key aspects of survival. However, almost half of the articles which referred to self-reliance to define independence did so in an implicit or partial way, for example by highlighting that RAs should have protection from removal or control over their financial and human resources. Self-reliance is thus a widespread but less explicit account of independence, when compared to a separation of interests or autonomy. A minority of articles included behavioural features in their conceptualisation of independence. The main difficulty was that it is often unclear whether these behavioural traits are part of the definition of being independent, an input, or if they are a consequence of being independent, an output. When it was clearly an input, I coded "yes", when it was absent or clearly an output, I coded "no" and when it was present but unclear whether it was an input or output, I coded maybe. Only 7% of the articles included behavioural qualities to define independence. The qualities that come most often are expertise, impartiality and transparent behaviour.

Regarding the distance of the relationship between regulatory agencies and elected officials, more than half of the articles qualified the relationship as "insulated", though 40% of the sample did not use the term at all or rejected it explicitly. Through the readings, I find that insulation may refer both to a protection and a separation from political issues and actors. A smaller proportion of the

sample qualifies the relationship between regulatory agencies and elected officials as “arm’s length” and 58% did not use the term at all or rejected it explicitly.

In most cases, the literature is relatively homogeneous across nations and disciplines regarding the conceptualisation of independence, though certain differences are worth mentioning. Within fields, political science and public administration are precursors to define independence as a bottom-up institutional process or as a cognitive process. Other fields, including law, economics, business and management, would rely on a more traditional conceptualisation of independence, as a top-down institutional process. Whether independence is explicitly defined in terms of autonomy or a separation of interests also seems to depend on the field of the scholar. Public administration and sociology scholars would refer more easily to autonomy than others. Within nations, the most significant difference concerns the qualification of the relationship between RAs and elected officials. The American scholarship nearly systematically qualifies the relationship as “insulated” and ignores the term “arm’s length”. The concept of “arm’s length” relationship is European. The European literature uses both the terms “insulation” and “arm’s length” to qualify the relationship between RAs and elected officials. Some authors use both terms, indicating that they do not see a substantial difference between them.

2.4 Discussion

The results of the conceptual analysis tell us three things about the conceptualisation of independence in the literature: 1) despite independence becoming a “magic concept”, there exists a common understanding in the literature of what independence means, 2) independence is nearly exclusively seen as of institutional nature and, 3) the concept of independence has two pillars: a separation of interests and autonomy.

The scholarship is unanimous to consider independence to be of institutional nature more than of cognitive nature. All scholars have conceived of independence as an institutional process through which the regulators obtain a degree of independence from the political power (executive and legislative). The most basic conception is that independence is granted unilaterally by the political power through formal provisions. Many studies acknowledge the importance of the external

environment and institutional interactions. The granting of independence is seen as a multi-way institutional process in which multiple actors, including regulators, are influential in determining the formal and actual independence that regulators benefit from (Gehring and Krapohl 2007; Ingold, Varone, and Stokman 2013; Rommel and Verhoest 2014; K. Yesilkagit and Christensen 2010). By highlighting that independence can be built from within, independence becomes not only an exogenous and top-down institutional process but also an endogenous, relational, and bottom-up process. In focusing on the institutional nature of independence, the literature has largely overlooked the cognitive nature of independence. The fact that independence may lie in common understandings, expectations and traditions is scarcely acknowledged and studied in the literature and its study centres on central banks (Tan 2020; Vermeule 2013).

Furthermore, scholars exclusively define independence with structural features, neglecting behavioural ones. The vast majority of scholars refers to a separation of interests, autonomy and self-reliance to define independence. Thus, two themes stand out in the definition of independence in the literature: separation of interests and autonomy. To start with, separation of interests is perhaps the most traditional account of independence. *“The main aim of creating independent agencies is to insulate agencies from normal politics”* (Barkow 2010). Regulators should be immune to normal politics and may make their decisions only according to their expert opinion rather than short-term politics. Independence is *“the degree to which the decisions of regulatory agencies are formed without the interference of politicians and/or consideration of political preferences”* (Hanretty and Koop 2012, 2013). This is to ensure that *“enforcement officials can make decisions without destructive interventions by elected officials who head other government departments”* (Kovacic and Winerman 2015). Independence as a separation of interests has been studied and operationalised in the literature in two main forms: as an organisational separation, in which RAs are structurally separated from ministries and the ministerial hierarchy, or as a functional separation, in which RAs are responsible for expert issues, such as policy-implementation, while political issues and tasks (e.g., policy-design and policy-making) are left to elected officials, with the important precision that neither RAs nor elected officials should interfere in the missions of the other. Thus, a common definition of an RA is *“a body with its own powers and responsibility given under public law, which is organisationally separated from ministries and is neither elected nor directly managed by elected officials”* (Elgie 2006; Jordana, Levi-Faur, and

i Marín 2011; Levi-Faur 2005; Thatcher 2002b). Autonomy is the second pillar of independence. Through the readings, it turned out that independence as “self-reliance” considerably overlaps with independence as autonomy as it is hardly imaginable for a regulatory agency to take autonomous decisions and actions while fearing for its survival. Many scholars thus merged autonomy and self-reliance, which I also choose to do for the rest of the dissertation. To recall, autonomy is defined as the capacity to make one’s own decisions and to act according to them. Autonomy relates to individual freedom and self-determination. Maggetti argued that “*autonomy means, above all, to be able to translate one’s own preferences into authoritative actions, without external constraint*” and defined independence as: “*a) the self-determination of agencies’ preferences, and b) their autonomy throughout the use of regulatory competencies, that is, during the activity of regulation*” (Maggetti 2007; Nordlinger 1987). The use of autonomy to conceptualise independence is ambiguous in the literature. Autonomy may be a synonym for independence (Edwards and Waverman 2006; Ennsner-Jedenastik 2016; Wassum and De Francesco 2020) while other scholars make a distinction by defining autonomy as a form of de facto independence and highlight that independence is more than a structural separation of interests (Gehring and Krapohl 2007; Maggetti 2007). In this sense, independence as autonomy involves informal influences and relations so that autonomy offers an extended, more dynamic and relational, conceptualisation of independence. Ingold et al (2013), for example, define independence by combining an institutional and relational perspective on independence. They start with the premise that RAs are embedded in a network of actors who may influence or constrain them, though RAs may also have the resources (material or reputational) to resist influence or even exert itself influence on the actors of its network. A third perspective sees autonomy as a less demanding criterion of independence. As Rommel and Verhoest (2014) put it, “*although the notion of independence is often notion for regulatory agencies, we prefer to use ‘autonomy’, as one might argue that independence refers to an extreme case of decision-making autonomy, whereas autonomy refers more to a continuum and a more generic organisational feature*”.

Overall, the analysis tells us two things about the definition of independence. First, the study reveals that nearly all scholars conceptualise independence as both a separation of interests and autonomy even though these two accounts may have been presented as, if not rival, distinct conceptualisations of independence (Jackson 2013) and scholars have tended to emphasise more

one theme than the other, indicating different trends in the literature. Second, independence has very much been defined in opposition to political actors and issues. Independence is seen as the mirror image of the degree of protection and separation from politics – the more insulated from politics, the more independent. This supports the view that, in theory, the quality of independence is close to that of being apolitical. To be truly independent, RAs need to be insensitive to political issues and actors to define their own preferences and act upon them, which is made possible by the (assumed) absence of external influence. In the following section, I will confront the theoretical conceptualisation of independence to the practice of independence and point to a gap between theory and practice.

3. Confronting the theory and practice of independence

Having identified in a systematic way how independence has been conceptualised in theory, I confront it to the practice of independence to investigate whether or not theory and practice are aligned. The practice of independence is derived from academic research on the topic as well as four interviews conducted with practitioners in economic regulation. Confronting the theory and practice of independence reveals two major gaps, one concerning the nature of independence, the other the definition of independence.

3.1. Independence is more than an institutional process

Starting with the nature of independence, there is evidence that independence is more than an institutional process. Independence also exists through the demonstration of certain behaviours and qualities. A separation of interests and autonomy are not sufficient to define an independent regulator. Conducting field research, Jackson (2013, 2014) found that between 10 and 20% of the respondents - political actors, regulators and stakeholders alike - included behavioural qualities in their definition of independence. It would be difficult indeed for most of us to consider independent a regulatory body that fails to show fairness, integrity, impartiality and trustworthiness. There is also evidence that regulatory agencies have a developed sense of the behaviours they should show to demonstrate and maintain their independence. All interviewees reckon that independence is concomitant with moral behaviours. As interviewee 2 puts it, “*fairness, objectivity, integrity and*

impartiality are part of regulators' DNA". Research on voluntary accountability also suggests that regulators have identified and complied with a "logic appropriateness" which leads them to endorse values of openness and transparency, beyond institutional requirements (Koop 2014). Independence is also a cognitive process, as detailed in the above sections. Independence may exist because of a collective understanding or expectation that an activity should be regulated by an independent regulator. These expectations would make it inappropriate for political authorities to interfere in regulatory decision-making (Black 2002; Tan 2020; Vermeule 2013). The interviewees all recognised benefiting from this kind of collective expectation, which is particularly eminent in utilities regulation. The behavioural and cognitive nature of independence has thus been understudied and represents an opportunity to enrich our understanding of independence. Searching these areas could help us better understand how independence may rise or decline beyond formal requirements, and which behaviours or collective understandings may support or undermine independence.

3.2. Independence as an ambiguous reality

Turning to the definition of independence, it turns out that the theory of independence fails to capture the reality of the condition of regulatory agencies. The two pillars of the concept are unreliable: autonomy is an imperfectly robust criterion while the strict separation of interests is a totally unstable one. Starting with autonomy, the literature on delegation agrees that, as a rule, delegation is initiated and maintained by elected officials so long as they see it in their interest. As Huber and Shipan (2002) put it, "*when politicians have reason to suspect that bureaucrats will choose policy outcomes they dislike, these politicians will not delegate broad discretion through vague legislation, but rather will delegate narrow discretion through specific legislation*". In essence, a delegation of powers cannot be equated with an abandonment of power. There are natural and substantial limits to the discretion and autonomy that regulatory agencies have in the exercise of their powers. Among the widespread pressure points politicians have kept over regulatory agencies are appointment, funding and administrative procedures. There is evidence that political authorities appoint RAs' key decision-makers people whose preferences align with their own (Enns-Jedenastik 2015; Lewis and Devins 2008; Thatcher 2005). They also use the "power of the purse" (Feno 1966) to enforce their preferences by increasing or decreasing RAs'

resources or by earmarking some funds towards specific ends (Note 2012). Empirical research suggests that budget manipulation is the “most effective sanction” (Yandle 1988). More generally, political authorities may use the administrative procedures which regulatory agencies need to follow to reduce information asymmetries and facilitate control, but also to mirror the political environment of political authorities by disclosing information to the constituency and expose the agency to political feedback (McCubbins, Noll, and Weingast 1987). In particular, regulatory agencies are submitted to high transparency standards, including disclosing requirements or reporting obligations. Transparency requirements have self-disciplining and normalising effects as transparency facilitates external control but also self-assessment and reflection, comparison and exposure to external norms and expectations (Flyverbom, Christensen, and Hansen 2015). It is crucial for regulators to be attentive and potentially responsive to these external expectations to preserve their reputation, a key to their power and survival (Busuioc and Lodge 2017).

All these pressure points provide political authorities with powerful leverage on regulatory agencies. Though the literature has deemed these ex-ante and ongoing control mechanisms incompatible with independence (Busuioc 2009; Maggetti, Ingold, and Varone 2013), they are widespread and utilised in practice. The autonomy of regulatory agencies thus depends to some extent on the commitment of political authorities to the independence of regulatory bodies. As interviewee 2 puts it, “*the whole system that we have set is a creature of politics. It is the politicians who have set it up so it is as vulnerable to change on a political basis as any other creature or construct that politicians have set up*”. The existence and statutes of the vast majority of regulatory agencies are enshrined in ordinary laws, the amendment conditions of which are relatively low. Empirical research suggests that political authorities are able to overcome the constitutional requirements to terminate an agency so that a large number of them face that destiny (Lewis 2002). A threat of legislative change can in fact trigger a substantial change in an agency’s behaviour. For example, following the financial crisis in 2009, the Obama Administration vowed to establish an agency tasked with consumer protection, in fact transferring some of the Fed’s powers. Though the Fed had been largely inactive in consumers protection, it suddenly expressed a strong interest in the issue and raised itself as the best-placed agency to protect consumers. The move materialised in a shift in the Fed’s rhetoric and a sharp increase in enforcement actions (Carpenter 2010). We may then conclude that the autonomy of regulatory agencies is not only incomplete, but also

conditional. A regulatory agency may exist and exercise its powers so long as its actions are at least compatible with political preferences. To ensure survival, an agency must be attentive and potentially responsive to political preferences.

The limitations of autonomy already suggest that the separation between regulatory agencies and political actors and issues may not be as clear as theorised. To be true, the separation between RAs and politics finds some support in practice. All the interviewed practitioners highlighted the separation of interests and powers between regulators and politicians and limited their role to policy-implementation. In many cases, governments do perform policymaking and define policies and guidelines which regulators must take into account and implement. This was the case, for examples, with the deployment of the fibre by Office of Communications (Ofcom) or the coming reform of the railway, implemented by the Office of Rail and Road (ORR) in the UK. Recently, the UK National Infrastructure Commission (2020) went as far as publishing a report on the resilience of infrastructures in which it calls the Government to define its preferences on resilience standards for regulators to implement them. However, the interviewees also all recognised that the boundaries between regulation and politics, policymaking and policy-implementation, are quite blurred in practice. As interviewee 2 puts it, *“there should be a separation but pretending that each can operate without regard to the other is unrealistic and does not work. There are blurred boundaries, you do not find the purity of position on these issues”*. Similarly, a central conclusion of the OECD report on the practice of independence is that there are extensive blurred boundaries between political issues and missions and regulatory ones, despite attempts to separate them (OECD 2016). These blurred areas are systematic rather than exceptional, making the criterion of separation largely inoperant. In practice, politicians do regulation, and regulators do politics.

On the side of political actors, some issues are so politically sensitive, that it would be largely inappropriate for elected officials to avoid them. One example is the price of utilities, a cornerstone of the independent regulation of utilities. In France, energy prices are regulated by an independent regulatory, the Commission de Régulation de l’Energie, so that the Government has little power over it. Amid the “gilet jaunes” crisis, which was triggered by a rise in taxes on gas, the Commission de Régulation de l’Energie proposed a sharp increase, of 5.9%, in energy prices. The French Government quickly reacted and claimed to freeze energy prices, something which went

beyond the Government's powers and threatened the regulator's independence. The move sparked surprise and controversy. A compromise was found and the rise was delayed. The Government obtained what it wanted. Beyond politically hot issues, Verschuere (2009) found that elected officials substantially engage in policy-implementation on a more normal basis. In the UK in 2011, the Government also introduced the "Principles of Economic Regulation" which reasserted the dominance of governmental policy over policymaking and political issues and allowed it to issue substantive guidelines to regulatory agencies to carry out their missions. The intention was to give strategic and clear guidance without interfering with precise cases or the responsibilities of regulators but it is unclear how far government bodies may go in their guidelines and how much interference it has with the independence of regulatory agencies (Stern 2014). Independence has turned out to be an even more fragile construction in times of crisis. Crises are times when the public may expect or demand a political intervention to face the aftermath of the crisis, when a regulatory agency simply does not have the legal, political and material resources to take the appropriate actions or when the regulatory agency is itself in a crisis. In times of crisis, independence is hardly tenable. For example, Gadinis (2013) found that the financial crisis triggered a worldwide overhaul of financial regulation, with a shift away from political independence. Governments around the world have increased their capacity to intervene in the day-to-day regulatory management, when, before the crisis, their intervention capacity was usually limited to emergencies. He argues that the shift defined a new balance of power between financial regulators and politicians, in which regulatory agencies become experts whose role mainly consists in gathering information and providing advice while most of the decision power now lies in the hands of politicians. In times of crisis or in normal times, it is thus largely unreasonable to expect politicians to completely step out of regulation and policy-implementation.

Similarly, it has turned out infeasible to expect regulators to remain completely separated from political actors and issues. Regulators contribute to policymaking and thus *do politics*. In an empirical study, Maggetti (2009) found that regulatory agencies are the most central actors in policymaking, before politicians, committees and other advisory bodies. He sees it as a result of the unprofessionalisation of the legislature which needs the information and advice of regulators and of the need to enlist regulators early on in the political project so as to avoid resistance in the implementation phase. Regulatory agencies may thus "speak truth to power" and gain substantial

influence in policymaking. Regulatory agencies are also in a favourable place to influence and manipulate the framing and venues of policy issues as they can act as “first movers” and cover the political nature of their arguments with the look of neutral expertise (Littoz-Monnet 2014). What matters then, beyond participation in policymaking, is that regulatory agencies may do so with political motivations, rather than neutral and expert ones. Extensive research has shown that regulatory agencies may have their own preferences and use their role in policymaking to push their agenda. Carpenter, who defines autonomy as the capacity for an agency to impose its preferences and agenda to its political principals, notably argues that building reputation and coalition networks may allow an agency to effectively impose its preferences on Congress and carry out policy innovations (Carpenter 2001; 2010). Interviewee 4 also declared that when advising governments on specific policy issues, its organisation would push its preferences on politicians, most notably long-term and infrastructure investment related issues. Overall, as politicians could never fully step out of regulation and regulators extensively engage in policymaking with their own political interests, independence as a separation of interests and powers appears fragile. This theoretical flaw lies in the abstract character of the theory of independence which ignores that systems of social coordination are interdependent (Vibert 2014). Drawing a clear line between politics and regulation is neither practicable nor desirable. As Svara (1998, 2001) puts it, “*the politics-administration dichotomy, as standing alone, is an aberration*”.

In summary, there is a gap between the theory and practice of independence regarding both the nature and definition of independence. The concept of independence leads to a situation in which “all regulatory agencies are independent, but no regulatory agency is independent”. In other words, while we qualify all these agencies as independent, independence as conceptualised in the literature never allows us to conclude that a regulatory agency is independent. The concept of independence thus fails to capture the reality of the condition of regulatory agencies and their interactions with political actors and issues. From an academic point of view, this gap refrains us from gaining a better understanding of the boundaries between regulatory agencies and political authorities as well as the dynamics of these boundaries. From a practical point of view, the gap tends to hide the political character of regulatory agencies’ activities and the real involvement of political actors in regulatory issues, thus creating ambiguous boundaries and responsibilities. To be fair, there has been early awareness in the literature of the limitations of the concept of

independence. *“We should not overstate the degree of independence that exists in practice”* (Majone 1999). *“The idea of ‘independent regulators’ has either never really been embraced or has witness considerable neutering. This is not to suggest that regulatory agencies do not matter or play a meaningful role in the processes of modern European states, but rather that they neither represent “independence” or “autonomy””* (Lodge 2008). The literature on autonomy has also in part risen in a bid to refuse the term independence and some authors would rather refer to regulatory agencies as “so-called independent agencies” or “semi-autonomous” agencies. So why has this conceptualisation of independence remained dominant? I identify at least three reasons: a) because it accommodates the interest of regulators who can use theoretical works to argue for further independence, b) because it helps politicians shift blame and responsibility on regulators and benefit from credible commitment while maintaining in practice a potential for influencing regulators and, c) because the academia has not so far provided an alternative framework though an extensive amount of research remains dedicated to the issue of independence. The next section reflects on the gap between theory and practice of independence and its implications for the scholarship on independence.

4. Between decline, stagnation and rejuvenation, the theory of independence and its reconceptualisation

The previous section has identified a misalignment between the theory and practice of independence, highlighting the failure of the concept of independence to capture the reality of the condition of regulatory agencies. While this lingering gap threatens the scholarship with stagnation or decline, reconceptualising independence is an opportunity to rejuvenate the field. In the hope to pave the way for such reconceptualisation, I reflect in this section on the root cause of the gap. I identify misplaced assumptions and biases which, I argue, must be addressed to bring about an embedded theory of independence.

4.1. The successes and shortcomings of the scholarship on regulatory agencies' independence

There has been a considerable interest from the scholarship in the independence of regulatory agencies. A noticeable success of the scholarship has been its capacity to study “de facto independence” or “actual independence” and move beyond the formal institutions of independence and the vertical minister-agency relationship. Studying independence from informal processes and relations has extended and enriched the conceptualisation of independence as a bottom-up and relational process. This conceptual evolution has thrived together with a methodological evolution, with an increase in qualitative studies and case studies and attempts to operationalise de facto independence with variables such as political vulnerability (Hanretty and Koop 2013; Maggetti 2007; Trillas and Montoya 2008), judicial deference (Ram Mohan, Gopakumar, and Smith 2019), political communication (Puppis et al. 2014), and reputation and influence (Ingold, Varone, and Stokman 2013). The literature on regulatory agencies' independence has thus been both prolific and innovative over the years. There are, however, a number of shortcomings which have hindered a meaningful reconceptualization of independence.

The theory of independence contains three major shortcomings. The first one is excessive generalisation. The term “regulatory agencies” hides a wide diversity of bodies (Vibert 2007 for a classification) which leads scholars to make little difference between regulatory agencies. Nevertheless, independence varies greatly from one body to another. Economic regulators are notoriously more independent than social regulators (Gilardi 2005). We may thus want to distinguish between a central bank and a gambling commission. Independence also has a slightly different meaning across historical and political contexts. In the United-States, independence may refer more to a separation from partisan, normal politics rather than of politics at all. Regulatory agencies are usually independent of the President but not of Congress and remain highly politicised (Shapiro 1997). In contrast, some European countries, including the United-Kingdom and France, tend to focus on organisational separation and a somehow stricter separation of regulators from politics (Thatcher 2007). Using a generic term “independence” may thus be inappropriate to seize the diversity and subtlety of the relationships between regulatory agencies and politics. Building

workable distinctions according to tasks or nationality, as it exists today with “core” and “non-core” missions for example, will allow for a finer understanding of independence.

A second, fundamental, shortcoming is a bias against political issues and actors. Political independence has very much been conceptualised and operationalised in opposition with political actors, which has brought a certain level of abstraction to the concept of independence. The assumption, mostly derived from economics, is that political interference brings negative results and independence comes as a way to ensure that regulatory decisions are not disturbed by short-term political considerations. In the words of Cetin and colleagues (2016), “*regulatory agencies are established to purify the regulatory process. Regulatory agencies are seen as the guarantee for objective and unbiased administration of sensitive sectors*”. This view is the original sin of the conceptualisation of independence. As interviewee 1 argues, “*the economist view is that there are important technocratic decisions which can have a big influence on the way these sectors evolve so they want to kick politics out of it. I think there is some truth in this stylised economic view but an incredible degree of naivety too. It is just inappropriate to think they can operate not in a political context. This is the reality of the situation and I don’t think there is something necessarily wrong with it*”. We must recognise that political actors have a necessary and legitimate place in regulation, with regards to both the legitimacy and efficacy of regulation. On the one hand, the fact that the existence of regulatory agencies conflicts with all conventional democratic sources of legitimacy (Vibert 2007) and elected officials cannot transfer their legitimacy to regulatory agencies have created “the legitimacy problems” of the regulatory state (Majone 1999). While many authors point out regulatory agencies may benefit from other sources of legitimacy (Black 2008; Cashore 2002), I argue that this is not sufficient to palliate the difficulty to locate regulatory agencies within our existing constitutional arrangements and traditions. The involvement of elected officials in their activities is one way to palliate the tangent legitimacy of regulatory agencies and is nothing less than appropriate and healthy in a democracy. On the other hand, blurred lines between regulation and politics may also sustain regulatory efficacy. Most generally, highly sensitive sectors stand in the hands of regulatory agencies. Regulating them without consideration of political realities and preferences is a dangerous project. Regulatory agencies also need to develop their network and political relationships. An isolated agency – an agency that is *too* independent - would struggle to be influential in policymaking and to advocate for its

regulatory interests. Political actors may not consult an isolated agency in a timely manner, or even bypass an agency that is perceived as hostile to their preferences (Kovacic and Winerman 2015). Conceptualising independence as an isolation from politics and politicians may thus endanger the legitimacy, effectivity and ultimately survival of regulatory agencies and regimes. The fundamental flaw of the conceptualisation of independence lies in its opposition to politics.

The third and final shortcoming is a bias towards independence. Independence is one of the most studied topics in the scholarship on regulatory agencies. As Quintyn (2009) puts it, “*their independence is sometimes seen as a religion, or at least as a mystical power*”. In considering independence as the ultimate criterion of good regulatory governance and sometimes as an end in itself, too much attention has been granted to independence and too little to other, crucial, governance arrangements, such as transparency, accountability and regulatory appeals. By failing to consider a larger, balanced, governance with appropriate check and balances, a focus on independence may further insulate regulatory agencies from their external environment and fuel the democratic deficit. Fundamentally, these three shortcomings point to the fact that independence has tended to be conceptualised in an abstracted manner. Such a conceptualisation is inappropriate both in positive and normative terms and has prevented us to understand the reality of the boundaries between regulation and politics and puts the scholarship on independence at risk of stagnation or decline.

4.2. Towards an embedded theory of independence

To rejuvenate the field, the theory of independence must be *re-embedded* in its political and institutional context, which requires us to ask the right questions. Rather than asking why and whether regulatory agencies are independent, we should consider *how* independent a regulatory agency should be. The core issue is the amount of independence that is desirable for regulatory agencies to have as well as the ways in which independence should materialise and frame the relationships between regulatory agencies and other actors. On the one hand, we should abandon the strict separation between regulation and politics as the core of the definition of independence in order to acknowledge the existence of and study the extensive and legitimate connections and iterations between politics and regulation (Eriksen 2020). The study of independence should be

the one of the (moving) relationships and boundaries between regulatory agencies and political issues and actors. In this token, Vibert (2016) has recently argued that the relationship between elected officials and regulatory agencies is one of complementarity and mutual reliance. Both regulators and politicians work together to achieve wider public goals while respecting each other's political space and autonomy. While there are surely instances of complementarity, the term may not capture the whole story. Substitution and rivalry may also qualify the relationships between regulators and elected officials. The term complementarity also raises the important question of how far regulatory agencies and elected officials can work together until it endangers the independence or autonomy of the former.

Overall, what is needed is an embedded theory of independence which acknowledges and works with the multiple interactions that regulatory agencies maintain with regulatory stakeholders. Their independence is constituted and challenged through each of these interactions. In this view, independence does not rise from insulation but rather from the capacity to surpass one's environment and navigate it according to the requirements of one's own self-determination. Independence requires at most a distancing from politics, in which regulatory agencies are not bound by political preferences, rather than a strict separation. The preferences of regulatory agencies are constituted by their multiple interactions with regulatory stakeholders, which does not endanger their independence so long as there is no single actor that *determines* the preferences of regulatory agencies. As interviewee 2 argues, "*our whole purpose is to be independent in thought, to bring an independent perspective and take evidence-based decisions*". Regulatory agencies interact with all regulatory stakeholders, listen to their preferences and perspectives, including political ones, and make their own views. Furthermore, an embedded theory of independence relocates independence within broader governance arrangement and towards the ends that it is pursuing. Independence is a necessary but insufficient feature of good governance. As interviewee 3 puts it, "*independence is multi-dimensional. There are three criteria for creating an independent regulator: clarity of objectives and roles, autonomy, and accountability. Any successful regulatory regime will define these three items when creating a regulator*". Independence should thus be part of broader and more precise delegation arrangements which define the place and responsibilities of each institution and powers and balance the exercise of powers (Stern and Holder 1999; Tucker 2018). Independence should be both conceptualised and

operationalised in balance with other crucial (formal and informal) governance arrangements, including accountability, transparency and regulatory appeals. To be fair, these issues have not been totally absent in the literature and, since 2010, there has been a noticeable increase in attention on issues relating to accountability, transparency and participation, with a recognition that accountability and independence must and can go together. The amount of research on these issues, however, remains small compared to the work on independence and independence remains too often studied separately from these other governance arrangements.

5. Conclusion

The dissertation has exposed a critical review and analysis of the literature on regulatory agencies' independence. The aim of the research was to identify and define a gap between the theory and practice of independence and thus contribute to paving the way for reconceptualising independence. First, I have investigated the meaning of independence in the literature by performing a conceptual analysis over 78 academic articles. This allowed me to demonstrate in a systematic way that there is in the literature a common understanding of independence which crosses national and disciplinary boundaries. Independence has been defined as a purely institutional process which involves for regulatory agencies the capacity to be autonomous but also largely separated from political issues and actors. I confronted this conceptualisation to the practice of independence, which I derived from secondary research and interviews with practitioners. This comparison uncovered a gap between the theory and practice of independence on both the nature and meaning of independence. First, independence is not merely an institutional process but also a behavioural and cognitive one. Second, the concept of independence has turned out to be problematic as it leads to a situation in which "all regulatory agencies are independent, but no regulatory agency is independent". The key flaw of the theory of independence is to involve a clear separation of regulatory agencies from political issues and actors. In addition to bringing a certain degree of abstraction to independence, it conceptualises independence in opposition to politics – the more separated, the more independent. On the contrary, studying the practice of independence has revealed the existence of systematic interactions and iterations between regulation and politics. This gap has large implications. It hides the political nature of RAs' activities under the cover of neutral expertise, insulates them further and thus fuels the democratic deficit. It also prevents us

from understanding the reality of the relationships and boundaries between political actors and regulatory agencies. I argue that this lingering gap threatens the scholarship on independence with stagnation or decline. Reconceptualising independence thus comes as a welcomed opportunity to rejuvenate the field. I argue that to do so, the biases and shortcomings on which the gap between theory and practice lies must be addressed, namely excessive generalisation, a bias against politics and a bias towards independence. The scholarship must also ask the right questions by moving away from whether regulatory agencies are independent and why, and instead asking how independent they should be. The scholarship must also break with abstraction and bring about an embedded theory of independence which re-contextualises independence within its political and institutional environment. An embedded theory of independence recognises and work with the fact that independence does not mean abstraction or insulation from the political and social environment but rather the capacity to navigate and grow on that environment in such a way that it magnifies self-determination capacities. Embedded independence also means that independence is relocated within a broader governance architecture. Independence is not an end in itself, neither the one criterion of performance in regulatory governance, but only one of many essential governance mechanisms, such as accountability, transparency and regulatory appeals.

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Appendix 1. Interviews and Methodology

Interview 1: Chief Executive for an economic regulator in the UK.

Interview 2: General Counsel for an economic regulator in the UK.

Interview 3: Senior Advisor and Consultant in utilities regulation for the UK Government.

Interview 4: Senior Advisor for an economic regulator in the UK.

The interviews were semi-structured and conducted online. I followed the methodology detailed in: *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication*, Anne Galletta, New York University Press, New York.

Note regarding ethics:

- Informed consent for the interviews was collected in writing with an information sheet and consent form which detailed the purpose of the interview and the terms (anonymity, voluntary participation, withdrawal at any moment from the study, etc).
- All the data has been anonymised and stored according to the Data Management Plan I submitted to the LSE Library.

Appendix 2. Coding Index of the conceptual analysis of independence.

Conceptual dimensions	Response category	Criterion	Example
<i>Nature of independence</i>			
Institutional, exogenous and top-down process	Yes	Explicit conceptualisation of independence as a top-down, exogenous institutional process.	Thatcher 2002, Gilardi 2005, Elgie and McMenamin 2005
	Maybe	Implicit conceptualisation of independence as a top-down, exogenous institutional process.	No example available in the sample.
	No	There is no clue that independence is conceptualised as a top-down, exogenous institutional process. In other words, formal delegation does not matter at all.	No example available in the sample.
Institutional endogenous and bottom-up process	Yes	Explicit conceptualisation of independence as endogenous. External environment and actors matter. Regulators actively contribute to building their independence.	Rommel and Verhoest 2014: Study autonomy through a relational dynamic perspective. Autonomy is strategically constructed by regulators, notably by creating and maintaining networks.
	Maybe	Implicit conceptualisation of independence as an endogenous and bottom-up process.	Livermore 2014: Agencies have managed to take control over the cost-benefit analysis and review performed by OIRA. It suggests implicitly that independence may be a bottom-up process as regulators manage to free from certain mechanisms of control, though this is not clearly highlighted as part of the conceptualisation of independence.
	No	There is no clue that independence is conceptualised as an endogenous, bottom-up process.	Wassum 2020: this is a difficult case. Wassum considers that formal provisions are not sufficient to ensure independence and that what political actors do with their prerogatives afterwards matter (for de facto independence). However, he does not mention that regulators may be active in building their independence. Thus, there is no clue of a bottom-up conception of independence.

			See Ennsner-Jedenastik 2016 for a similar situation.
Cognitive process	Yes	Explicit conceptualisation of independence as a cognitive process.	Seifter 2019: there is not a strong collective norm enjoining political authorities to respect the independence of agencies.
	Maybe	There are clues that independence is conceptualised as a cognitive process.	Thatcher 2002: acknowledges that political actors may find it inappropriate to use their prerogatives of control over regulators, because it is not appropriate or not in their interests but no further mention of a cognitive process at the heart of independence.
	No	There is no clue that independence maybe a cognitive process.	Gilardi 2002: independence exclusively conceptualised as a formal institutional process.
<i>Account of independence</i>			
Separation of interests	Yes	Independence is explicitly defined as a separation of interests or powers between regulators and politicians (e.g., unelected members, structural separation with government, RAs only make expert-based decisions and do not take into account political preferences).	Tatcher 2002: defines RAs as structurally separated from elected officials, “neither elected nor directly managed by elected officials”. Koop and Hanretty 2012: independence is the capacity of regulators to make decisions “without consideration of political preferences”.
	Maybe	There are clues that a separation of interests is a part of the definition of independence.	Bianculli et al 2017: independence is not clearly defined as a separation of interests as the authors focus on autonomy but there are clues that separation of interests may be part of their conceptualisation (e.g. RAs are separated from ministries, emphasis on the fact that they make expert-based decisions).
	No	There is no clue that a separation of interests is part of the definition of independence.	Ingold et al 2013: independence defined in terms of autonomy, as the capacity to influence other actors and to resist the influence of other actors. Independence is clearly conceptualised in terms of autonomy and there is no indication that independence is conceptualised as a separation of interests.
Autonomy	Yes	Independence is explicitly defined as autonomy.	Rommel and Verhoest 2014: they explicitly prefer to use the term

			“autonomy” rather than “independence” as autonomy refers to a continuum.
	Maybe	There are clues that independence is defined as autonomy (e.g., having large powers, impossibility for politicians to overturn decisions, etc).	Gilardi 2002: he includes having “large powers” in his index of independence, suggesting that not being in competition without others contribute to building independence. This is a form of autonomy in decision-making.
	No	There is no clue that independence is conceptualised as autonomy.	No example available.
Self-reliance	Yes	Independence is explicitly conceptualised as self-reliance (i.e. having control over key aspects of survival such as protection from dismissal, staff, budget).	Kruly 2013: independence is guaranteed by protection from removal and financial resources independent from Congress.
	Maybe	There are clues that independence is conceptualised as self-reliance.	Hollibaugh 2019: independence as having protection from removal. This suggests that self-reliance is part of the definition of independence, but the author does not engage further with this account.
	No	There is no clue that independence is conceptualised as self-reliance.	Aulich et al 2017: control over key aspects of survival is not in their index of independence.
Moral Behaviour	Yes	Behavioural qualities are explicitly part of the definition of independence.	Lewis and Selin 2015: they include multi-partisan composition in the agency and absence of conflict of interest in their index of independence. It indicates that impartiality and integrity are part of the definition of independence.
	Maybe	There are clues that behavioural qualities are part of the definition of independence.	Mohan 2019: he assesses de facto independence with the level of judicial deference, which would denote the level of trust and expertise of the agency, as perceived by Courts. Independence is thus potentially defined by perceived trust and expertise of RAs.
	No	There is no clue that behavioural qualities are part of the definition of independence.	Van Thiel 2014: “Agency autonomy is expected to ensure that regulation is carried out in an independent, impartial and expert manner, on the one hand, and a transparent and efficient manner, on the other hand”. Behavioural qualities are clearly an output of independence

			rather than an input, a part of the definition.
<i>Distance of relationship</i>			
Insulation	Yes	The relationship between RAs and elected officials is described as “insulated”.	Hanretty and Koop 2018: “Such agencies operate under the authority of appointed rather than elected officials and are insulated from electoral pressure”; with no following qualification of the term “insulation”.
	Maybe	There are clues that the relationship between RAs and elected officials is conceptualised as “insulated”. In particular, if the scholar seems to think that independence requires RAs to be separated and/or protected from elected officials.	Edwards and Waverman 2006: the term “insulation” is not cited explicitly but there are clues that it is part of the thinking, as authors insist on preventing government from interfering in regulatory decision-making. There is no clue of a closer relationship to governments.
	No	There is no clue that the relationship between RAs and elected officials is conceptualised as “insulated”.	Ruffing 2020: the term “insulation” does not appear and the author engages with the interactions between elected officials and RAs.
Arm’s length	Yes	The relationship between RAs and elected officials is qualified as “arm’s length”.	Busuoic 2009: RAs “as benefiting from a substantial degree of real autonomy by virtue of operating at an arm’s length from the Commission and the Council”.
	Maybe	There are clues that the relationship between RAs and elected officials is conceptualised as “arm’s length”. In particular, if the scholar does not use the term “arms’ length” but refers to a closer relationship between politicians and regulators.	Aulich et al 2010: “arm’s length” is not used explicitly to qualify the relations between politicians and regulators but they engage with the balance between autonomy, control and accountability, suggesting an arm’s length relationship.
	No	There is no clue that the relationship between an RA and elected officials is qualified as “arm’s length”.	Gilardi 2002: never uses the term “arm’s length” and prefers “insulation”, and does not mention the possibility of closer relationships between political actors and RAs.