

**Guarding the Guardians of the Regulatory State:  
Understanding the Role of Judicial Accountability in the  
Governance of Regulatory Agencies**

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## Summary

This doctoral dissertation contributes to the debate on the accountability of the regulatory state by studying the role of judicial controls in the governance of regulatory agencies. The investigation consists of three individual research projects motivated by an overarching research question, which enquires how does judicial review of administrative decisions shapes the democratic accountability of the regulatory state. The research conducted here bridges frameworks and research methods from political science and administrative law to better understand how different governments have addressed the need for judicial controls to supervise regulatory agencies. The empirical evidence used for this research consists of unique information compiled by the author in three original and comprehensive datasets, which allowed to conduct diverse research methods for the examination of the evidence. The theoretical frameworks adapted for this study are designed to contribute with empirical knowledge about the varieties of judicial accountability adopted globally to supervise regulation authorities of two of the most representative industries operating under the ‘independent agency’ oversight governance paradigm: the energy and telecommunications public utilities, which are also supervised by competition regulators. The analysis starts with a global perspective of judicial accountability provisions implemented around the globe to supervise regulatory agencies. I conducted a comparative assessment of the intensity of judicial review that courts of appeal can exercise to supervise the legality of regulatory decisions of 100 authorities. The second investigation performs a closer examination of judicial supervision over regulatory agencies from two countries representative of opposite legal traditions: Spain and the United Kingdom. Finally, a third study enquires about the causes that prevent young regulatory agencies to comply with lawful administrative procedures throughout the enforcement of regulation. This last investigation studies the case of the Mexican Agency for Safety, Energy and Environment (ASEA). The overall outcomes of this study advance our understanding of the challenges to improve democratic mechanisms to hold regulatory agencies accountable, which is not only fundamental for a successful performance of regulatory institutions, but also a necessary condition to legitimize the activity of the state, enhance the trust on our governments and the consolidation of democratic values.

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## Chapter I: General Introduction and Overview

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### 1.1 Motivation: *Quis custodiet ipsos custodes?*

“But who will guard the guardians?”, asks the question that has been addressed throughout the last two millennia by sovereigns, politicians, philosophers and social scientists, concerning the ideal oversight and control mechanisms that should govern the activity of the rulers of a state (Courtney, 2013). The same question motivated the economist Leonid Hurwicz during his Nobel Prize Lecture in 2007<sup>1</sup>, where he enquired about the ideal type of “second-level guardians” that should supervise leaders and officials from political, economic, and social entities responsible for the enforcement of law in contemporary democratic societies. The Nobel laureate introduced the figure of *intervenors*, as those guardians who have “the ability (through power, financial assets, personal charisma, or status combined with the population’s respect), as well as the inclination, to discourage improper behavior of lower-level guardians” (Hurwicz, 2007, p. 276). These type of guardians, adds Hurwicz, in sympathy with the rules and operating under the ethical standards to rule out corrupt behavior, might be rare but not non-existent in well-functioning societies.

Twelve years have passed since Hurwicz’ Nobel Prize Lecture, and since then the world has witnessed a series of global catastrophic events with severe consequences for citizens and environment across the globe, which allegedly could have been prevented by the corresponding law enforcers –the first level “guardians”– (Lodge & Wegrich, 2011; Mills & Koliba, 2015; Moschella & Tsingou, 2013; Wang & Chen, 2012), and certainly were not anticipated by second-level supervisory institutions. In September 2008, just nine months after Hurwicz’ lecture, Lehman Brothers –the fourth-largest investment bank in the United States– filed for bankruptcy, sparking the deepest global economic recession caused by a financial crisis since the 1930’s, which resulted into a lost decade for most of the economies around the world and set the grounds for the rise of nationalist anti-establishment political movements across the world (Moschella & Tsingou, 2013) . On April 2010, the Deepwater Horizon oil rig experienced an explosion and sank 50 miles off the coast of Louisiana, causing the largest oil spill in the history of the United States, with more than 205 million gallons of oil discharged into the Gulf of Mexico and affecting more than 650 miles of coastline with devastating consequences for the environment (Mills & Koliba, 2015). Less than a year later, on March 2011, a 9.0 magnitude earthquake followed by an immense tsunami crippled the cooling systems at the Fukushima Daiichi nuclear power plant in Japan, which caused the worst nuclear accident since the Chernobyl incident in 1986 (Wang & Chen, 2012). Another environment related event occurred in 2015, known as the ‘Dieselgate’

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<sup>1</sup> Hurwicz was granted a Nobel Prize Award in Economic Sciences for having laid the foundations of mechanism design theory, jointly with Eric S. Maskin and Roger B. Myerson (Nobel Media AB, 2020).

emissions scandal, when the German car manufacturer Volkswagen was found to have installed a software ('cheating device') that artificially lowered emissions of nitrogen oxides when the vehicles were being tested, meaning that the output of the harmful pollutants was much higher in real-life conditions (Brand, 2016). In December 2019, the China office of the World Health Organization was informed of a pneumonia of unknown cause detected in the Chinese city of Wuhan, eventually known as the COVID-19 pandemic outbreak event (World Health Organization, 2020), which at the moment of writing these lines has costed the lives of more than 800,000 persons throughout the world (Johns Hopkins Corona Virus Resource Center, 2020) . The pandemic is expected to plunge most countries into recession, with an estimation of a 5.2 percent contraction in global GDP in 2020, and with highest per capita income contraction in the largest fraction of countries globally since 1870 (World Bank, 2020b).

Regulatory failure, industry capture and poor regulatory capacities are among the most common public outcries referring to the supervisory role of the state and its responsibility to enforce the corresponding laws to prevent such disastrous calamities (Floyd, 2008; Glicksman, 2010; Hubert, Dietmar, Traufetter, & Wüst, 2015; McCurry, 2017; Shear, Goodnough, Kaplan, Fink, & Thomas, 2020). Nevertheless, can we really say that all these events are a consequence of governments' regulatory failures, and in particular, caused by a poor responses from regulatory agencies to foresee, prevent, supervise and handle these crises? It is difficult to rule out additional extenuating circumstances that might have contributed to the magnitude of damage. For example, determining the safety improvement caused by regulations intended to prevent catastrophic incidents can be difficult because changes in the risk of 'low-frequency high-consequence events' are hardly discernible from incident data (and rare to occur), as well as relevant information on 'near misses' may be scarce or not available at all (Carrigan & Coglianese, 2012).

Whatever might have been the contributing factors that explain the occurrence of such events , it is now widely recognized that independent administrative government agencies with regulatory tasks –the 'first level guardians'– failed to comply with the responsibilities that these were originally designed for (Mills & Koliba, 2015; Moschella & Tsingou, 2013; Wang & Chen, 2012). The hunt for culprits and explanations to understand these events translated into public demands for the improvement of transparency and democratic accountability of regulatory agencies. This demands did not only targeted first-level guardians (regulatory agencies), but also led the public scrutiny to enquire about who were the second-level guardians or 'intervenor' (as referred by Hurwicz) responsible for the supervision of the activities of regulatory agencies, and how these actors could have anticipated the poor responses of regulation authorities.

### *1.1.1 The need for accountability and institutional challenges*

Ministries and audit offices from the executive power, legislative commissions, administrative appeals tribunals, judiciary courts, and supervisory boards integrated by public officers, citizens

and industry are generally among the list of second-level institutions established in most countries to supervise the activities of regulatory agencies. The growing demands from the public to improve democratic accountability of regulatory agencies after the series of events mentioned beforehand exposed the series of challenges that these second level oversight bodies usually face to increase the answerability of agencies and the scrutiny of their policy choices. These challenges are related to the institutional features and organizational structures that govern administrative agencies granted with independence from political control and discretionary powers to design regulatory policies, as well as managerial autonomy to function without the usual constraints that common bureaucracies face in their operations (Bianculli, Fernández-i-Marín, & Jordana, 2015). When this model of governance –also known as the regulatory state– meets the need for democratic accountability, a series of political implications and theoretical puzzles are raised, such as the lack of legitimacy of regulatory agencies’ policy choices, as well as the potential intrusion of political actors in the regulatory process, which is supposed to need isolation from political influence to guarantee successful policy outcomes (Jordana, Bianculli, & Fernández-i-Marín, 2015)

“But who guards the guardians and how to guard the guardians?” Ideally, in the world described by Hurwicz, a group of notable *intervenors* with solid reputation and committed to societal values of democracy would be the solution to discourage improper behavior from first-level guardians. Unfortunately, as one can observe from 12 years of repeated catastrophes, it is evident that the trust deposited in all possible type of second-level notable guardians was not enough to anticipate the problems with the fist-level guardians of the state.

### *1.1.2 Research question: the role of judicial accountability*

In order to design effective institutions and mechanisms of accountability to supervise the activities of regulatory agencies it is necessary to expand and deepen our understanding of the role that oversight institutions play in the governance these administrative bodies. Scholarly debate and academic research concerning the accountability of the regulatory state has been limited, and often there is no clear understanding of the particular problems that emerge when policies and institutions in the regulatory sector attempt to become increasingly accountable (Jordana et al., 2015). This doctoral dissertation contributes to the debate on accountability in regulatory governance by studying the role that one of the most notable types of accountability mechanisms in democratic societies plays in the governance of regulatory agencies: the judicial review of administrative decisions. In this research, I define the concept of ***judicial accountability of regulatory decisions*** as the independent legal controls exercised by judges in courts of appeal over agencies’ administrative decisions.

In almost every contemporary regulatory regime, courts of appeal are legally authorized to assess the legitimacy of agencies' policy choices to guarantee the protection of fundamental rights and

rule of law in administrative governance. For this reason, the study of judicial review of administrative decisions has been essential to complement our understanding of the accountability fora and the institutional mechanisms embedded in the governance structure of regulatory agencies (Lindseth, 2019; Rose-Ackerman, 2008; Whittington, Kelemen, & Caldeira, 2008). In this sense, judges are close to Hurwicz' description of an *intervenor*, as these have the faculties, statutory powers, resources and, in most cases, the trust from all the relevant actors involved in a democratic polity to deliberate about justice and fairness. With all of this in mind, this dissertation aims to answer the following research question:

*How do judicial controls contribute to the democratic accountability of the regulatory state?*

Addressing this question poses a multiplicity of theoretical and methodological challenges, related to the variety of analytical frameworks and research tools needed for the empirical study of judicial controls of administrative decisions, at the national level and in comparative perspective. In this regard, this doctoral dissertation bridges frameworks and research methods from political science and administrative law to address the study of judicial accountability in regulatory governance. The investigation aims to better understand, in comparative terms, how different governments have addressed the need for judicial accountability to supervise regulatory agencies, as well as the institutional and administrative design adapted for this purpose. Furthermore, it studies how different institutional arrangements of judicial controls lead to diverse supervisory roles for judges to adjudicate administrative disputes, and examines the information generated in courts of appeal as a distinctive source of evidence to assess the performance of an agency.

The empirical evidence used for this research consists of unique information compiled by the author in three original and comprehensive datasets, which allowed to conduct diverse research methods for the examination of the evidence, such as cross sectional analysis, comparative case studies, process tracing, and systematic content analysis of judicial texts. It is important to highlight that up to date there are very few empirical attempts within the literature of regulatory governance to collect, analyze and classify information related to the institutional features of the judicial controls adapted in different jurisdictions to supervise the activities of regulatory agencies, as well as a limited number of systematic examinations of the content of administrative appeals against regulatory decisions. This multidisciplinary and empirical approach aims to improve our understanding of the problems associated with accountability in regulatory governance, which is not only fundamental for successful performance of regulatory institutions, but also a necessary condition to legitimize the activity of the state, enhance the trust on our governments and the consolidation of democratic values.

### *1.1.3 Research problem: democratic legitimacy and accountability dilemmas*

Regulation is conceived as an “intentional intervention in the activities of a target population, where the intervention is typically direct – involving binding standard-setting, monitoring, and sanctioning – and exercised by public-sector actors on the economic activities of private-sector actors (Koop & Lodge, 2017, p. 105). Regulation is also considered as a form of governance designed to address complex social, environmental and economic problems that relies heavily on rules enforced against markets actors and administrative authorities (Bignami, 2016a, p. 3). Both definitions highlight the reliance of the state activities on established rules and standards to “steer” the economic or social activity of a population, rather than the state acting as a “rowing vessel” to provide economic and social welfare (Moran, 2002). As the realm of regulation has expanded worldwide, the proliferation of specialized administrative agencies that govern private markets and social activities has largely substituted the state ownership of industry, the taxing policies and welfare spending as the dominant models of state of action (Bignami & Zaring, 2018; Gilardi, 2005; Jordana & Levi-Faur, 2004; Levi-Faur, 2005). The literature has labeled this change of paradigm as the “rise of the regulatory state” which substituted the concept of “welfare state” (Majone, 1999; Moran, 2002; Yeung, 2010). The governance of regulatory administrative agencies, or regulatory governance, has at its core the institutional milestones of granting political independence and administrative discretion to expert bureaucratic bodies, as well as the delegation of relevant statutory capacities to make, supervise and enforce rules which were commonly exclusive faculties of elected officials, legislative bodies or judicial courts (Gilardi, 2002).

Political science, administrative law and public administration literature has long debated the democratic legitimacy of this model of governance, where the rule making, policy design and adjudication powers rest with bureaucrats in independent administrative agencies which are not subject to the usual democratic controls as would be the case of elected officials, legislative bodies or judicial courts (Bignami & Zaring, 2018; Black, 2008; Christensen & Læg Reid, 2006; Lindseth, 2019; Maggetti, 2010; Majone, 1999). Furthermore, the rapid expansion of the regulatory state across governments in the world and policy sectors has raised a puzzle concerning the dilemma of how to ensure the benefits of the technical discretion and independence granted to specialized bureaucrats, and at the same time, reducing the ‘agency costs’ that arise with the delegation model of regulatory governance. Such costs are defined by the literature as bureaucratic ‘policy drift’ and ‘regulatory capture’, which potentially cause that regulation is directed away from the public interest (Carpenter & Moss, 2013; Edley, 1992; Gailmard, 2014b; Gailmard & Patty, 2007, 2017; Magill, 2014; McCubbins, Noll, & Weingast, 1987; McCubbins & Schwartz, 1984; Mulgan, 2014; Posner, 2013; Stigler, 1971).

There is a consensus among scholars from political science and administrative law disciplines that highlights the relevant role of judicial mechanisms as a democratic tool to overcome the democratic dilemmas and political tensions arise with the regulatory state (Bell, 2019; Bignami, 2016b; Ginsburg & Wright, 2013; Lavrijssen & de Visser, 2006; Lindseth, 2019; McCubbins & Schwartz, 1984; Psygkas, 2017; Solanes Mullor, 2016; Sunstein, 2017; Turner, 2017). This literature has developed a series of theoretical approaches for the empirical study of judicial review of regulatory decisions, which can be identified as three functional explanations: (a) as a mechanism to enhance the legitimacy of agencies' policy choices; (b) as an institutional avenue to overcome democratic accountability gaps, and (c) as an instrument to assess the quality of implementation and regulatory performance.

## **1.2 State of research on regulatory governance and judicial accountability**

### *1.2.1 Judicial accountability as a legitimacy mechanism*

The regulatory state paradigm relies extensively on the delegation of powers to independent administrative bureaucratic bodies such as regulatory agencies (Jordana & Levi-Faur, 2004; Moran, 2002). As mentioned beforehand in this introduction, the delegation of important policy-making powers to non-majoritarian institutions raises problems for democratic legitimacy. Regulatory agencies often enjoy a significant degree of autonomy, and despite the need from governments to rely on independent technical experts to overcome policy challenges, these agencies lack the capacity to legitimize their output without maintaining the connection' to the more robustly legitimate *trias politica* of the state –i.e. the executive, legislative and judicial branches– (Lindseth 2019). These democratic anomalies have led scholars to enquire about how to reconcile two major aims of jurisdictional controls of regulatory agencies' discretion: “the successful exercise of regulatory power granted to the bureaucracy and the tethering of administrative agencies to the rule of law” (Rodriguez 2008, p. 341). The debate on how to supervise and control the activities of regulators has referred to the ideal degree of independence and political control that should be conferred to the agencies in order to guarantee a legitimate regulatory process (Gilardi, 2002). Scholars have also argued that such problems of legitimacy should be tackled not by limiting the independence of the regulators, but by strengthening their accountability structure (Majone, 1999).

Judicial review is one of the core accountability mechanisms available to enhance the legitimacy of regulatory agencies through their accountability structure, which avoids increased politicisation (Bell, 2019; Bignami, 2016a; Lindseth, 2019; Majone, 1999). It operates as an ongoing accountability check on agencies' discretion since courts of appeal are “presumed to provide a neutral forum to challenge the regulatory process” (Rose-Ackerman, 2008, p.577). Although the degree of scrutiny and control that judges and courts of appeal can exercise over regulatory agencies is limited, judicial review together with political oversight by legislative and

executive actors, serve as complementary mechanisms of mediated legitimacy (Lindseth, 2019). It is only by working together that these three complementary mechanisms provide the mediated legitimacy that administrative governance needs to sustain itself durably (Bell, 2019).

Despite the critical role of judicial controls as a mechanism of mediated legitimacy, very few empirical studies have attempted to assess how judicial review of regulatory agencies works together with alternative accountability provisions adapted by the legislative and executive branches, as well as other non-hierarchical forms of accountability. On the one hand, a great share of the comparative studies in political science and public administration that deal with the accountability of the regulatory state are focused on assessing formal accountability provisions (Bianculli et al., 2015; Hanretty & Koop, 2012; Jordana et al., 2018; Koop, 2015; Koop & Hanretty, 2018), but the evidence concerning judicial accountability is limited to information about the availability (or not) of judicial appeal mechanisms against administrative decisions. On the other hand, most of the knowledge concerning provisions of judicial accountability is based on a series of small-N comparative case studies from administrative law scholars (Bignami & Zaring, 2018; Craig, 2017; de Poorter, Hirsch Ballin, & Lavrijssen, 2019; Garoupa & Ginsburg, 2009; T. Ginsburg, 2003; T. Ginsburg & Moustafa, 2008; Hall & Wright, 2008; Jordao & Rose-Ackerman, 2014; Mejía, 2020; Perroud, 2017; Pierce & Weiss, 2011; Psygkas, 2017; Solanes Mullor, 2018; Zhu, 2019). In this sense, very little empirical research has been to understand the mediated legitimacy role of judicial controls in the context of the general accountability setting adapted to supervise of the regulatory state.

### *1.2.2 Judicial accountability to overcome information asymmetries*

A second functional explanation is based on the principal-agent theoretical framework from political science literature. This analytical lens highlights the relevance of judicial supervision as an ideal control mechanism to overcome the democratic accountability deficit that results from the delegation of regulatory powers from elected politicians to independent bureaucrats (Bovens, 2007; Ferejohn & Shipan, 1990; Gailmard, 2014b, 2014a; Gailmard & Patty, 2017; Geradin & Petit, 2012; Magill, 2014). Principal agent accounts of judicial supervision suggest that this mechanism allows overcoming the information and technical expertise asymmetries existing between political principals and specialized bureaucrats (Gailmard & Patty, 2017; Shipan, 1997; Sunstein, 2017). The new information available as a result of the litigation process against an agency represents a unique source of evidence that can be used to assess the legality of a regulator's performance. Furthermore, judicial courts act as a forum where regulatory agencies are exposed to reputational consequences of their actions, and this idea is central to understand what makes this type of information a relevant cue for political principals to assess the expertise of regulatory agencies (Shapira, 2020).

The scholarship that adapts the principal-agent approach for the study of judicial accountability focuses on certain basic incentives that operate in any system of power delegation with relevant information asymmetries (Gailmard, 2014a). This analytical framework represents a powerful and parsimonious approach to understand the complexities of the accountability relationships between regulatory agencies and political principals. However, we should not assume that rational-choice analytical models such as the principal-agent approach operate according to some decontextualized logic (Lindseth 2019). Principal agent approaches for the study of judicial controls of agencies assume that the information generated through judicial appeals will generate valuable evidence for political principals to assess the performance of agencies. Nevertheless, it is not clear what type of ‘informational cues’ would be necessary to obtain from judicial review procedures in order to make this accountability mechanism an effective instrument to overcome the information asymmetries. Moreover, it has been unexplored how the information-generating process through judicial appeals is affected by the institutional and organizational features of different legal systems and administrative traditions. This is of particular relevance for the study of judicial accountability of the regulatory state because “once we move from theoretical abstraction to comparative analysis several complications and complexities necessarily intrude on our understanding of how principal-agent relationships actually work in particular locations” (Lindseth 2019, p. 179).

### *1.2.3 Judicial accountability to assess effective policy implementation*

A third functional role of judicial accountability in the governance of regulatory agencies relates to the impact of judicial oversight on regulatory quality (D Geradin & Petit, 2012; Melnick, 2007; Sunstein, 1989; Turner, 2017). Judicial controls can be considered as “means of error correction”, aiming to amend flawed regulatory decisions which would have adverse effects on economic and social welfare (Geradin & Petit, 2012). According to this approach, the availability of judicial controls induces good regulatory governance. Fouled regulatory decisions can be potentially challenged in courts and struck down, with negative consequences for agencies reputation. However, there are scholars who argue a negative influence of judicial controls over the regulatory process, as judges lack the information and expertise required to review regulatory decisions (Bar Niv & Safra, 2006; Fox & Stephenson, 2009; Melnick, 2007). This lack of expertise could consequently damage the quality of the regulatory process due to the risk of “ossification” of agency action arising from systematic annulment from courts (Fox & Stephenson, 2009).

Notwithstanding the positive or negative effects of judicial oversight predicted by this body of literature, ‘judicial review should be evaluated in terms of its systemic consequences for the administrative process, which takes place in the shadow of review’ (Sunstein, 1989 p. 527, cited in Turner, 2017 p.70). According to Turner, scholars have focused their attention on the role of



judicial review to ensure the democratic legitimacy of agencies' policies; however, adds Turner, scholarship has overlooked the fact that delivering successful regulatory policies to provide efficient outcomes is not only dependent on the capacities of an agency to design sound policy choices, but is also reliant on the capacities to guarantee procedural lawfulness during the course of implementation. Failing to accomplish any of these two dimensions will generate similarly undesired consequences for the provision of expected regulatory outcomes. "Just as biasing the content of policy by agencies can lead to inefficient outcomes so too can poorly enforced policies *even when policy choices have been made perfectly faithfully*" (p. 70). In this sense judicial review is a key avenue to understand the administrative process and the effectiveness of agencies throughout the implementation of regulation, not only in terms of the policy outcomes, but according to the steps followed by an agency to achieve desired outcomes.

### **1.3 The approach and contribution of this dissertation**

This doctoral dissertation aims to present empirical evidence that clarifies our understanding of the accountability of the regulatory state through the study of judicial controls of regulatory decisions. The research aims to contribute to the existing scholarship by addressing three research gaps identified in the literature review described in the previous section. These gaps are summarized as follows:

- a. ***Mediated legitimacy:*** Despite the argument that judicial review, together with political oversight by legislative and executive actors, serves as complementary mechanisms of legitimacy, the empirical study of judicial review of regulatory decisions is isolated from the rest of the accountability provisions of administrative agencies. There is little empirical evidence to study the 'mediated legitimacy' role of judicial controls in regulatory governance.
- b. ***Type of informational cues:*** It is not clear what type of 'informational cues' are needed to overcome democratic accountability gaps through judicial appeals, neither it is empirically well defined how the information-generating process is affected by the features of different legal systems and administrative traditions.
- c. ***Effective implementation:*** scholarship has overlooked the contribution of judicial review in terms of its effects for the administrative process. There is little empirical evidence that shows how judicial procedures affect the implementation of regulation, not only in terms of the regulatory policy outcomes, but according to the procedures to achieve desired outcomes.

The next section elaborates on the rationale and steps followed in this research project to address the research gaps identified in the literature, as well as its contribution to the study of judicial accountability of the regulatory state.

### *1.3.1 Bridging, political science, administrative law and public administration*

To address the research gaps introduced above, this research project relies on three individual studies. These examinations correspondingly address each one of the identified research gaps, in order to answer the overarching question that motivates this research: *how do judicial controls contribute to the democratic accountability of the regulatory state?* The investigations follow a multidisciplinary approach for the study the role of judicial controls in the governance of regulatory agencies, based on political science, administrative law and public administration. The intersection of these academic literatures has recently raised the attention of scholars not only from political science, and public policy disciplines, but also from administrative law scholars who study jurisdictional controls of regulatory agencies using jurisprudence and case law investigations (Bignami, 2016a; Bignami & Zaring, 2018).

The first study builds on the literatures of the accountability of the regulatory state (Bianculli et al., 2015; Jordana, Fernández-i-Marín, & Bianculli, 2018; Koop, 2015) and comparative administrative law (Bignami & Zaring, 2018; Lindseth, 2019) to construct a theoretical framework for a comparative assessment of judicial accountability provisions adapted to supervise regulatory agencies. This framework is used to assess how judicial controls relate with existing conceptions of public accountability in the regulatory state. The study aims to present evidence to understand Bell's (2019) 'mediated legitimacy' role of judicial controls within the accountability platforms of regulatory agencies.

The second investigation builds again from the same literatures in political science and comparative administrative law, but for this case, it aims to illustrate the information-generating role of judicial accountability predicted by the principal agent approach, and how this process is affected by the governance structure of judicial institutions (Gailmard, 2014a; McCubbins & Schwartz, 1984; Psygkas, 2017; Solanes Mullor, 2016). For this examination I introduce a comparative framework that allows to analyze, classify and interpret the contents of judicial appeal judgments. The study aims to clarify and understand the 'informational cues' that arise in judicial procedures that translate into valuable information for political principals to assess the performance of regulatory agencies. Furthermore, the study shows how the institutional settings of the legal systems that rule the administrative jurisdictions of an agency are determinant for the type of information obtained from judicial disputes.

Finally, the third study zooms into the core administrative decision-making structure of a regulatory agency to demonstrate how judicial review of administrative decisions acts as instrumental mechanism to monitor and evaluate the procedural performance of a regulatory agency throughout the law enforcement. Framed under public administration and organizational accounts of agency performance (Bach & Wegrich, 2019; Lodge & Wegrich, 2014; Turner, 2017), the study shows how the information generated through judicial appeals as well as the

adjudication powers of courts are determinant to: (a) identify flawed administrative procedures throughout the enforcement of regulation; (b) to highlight problems in the organizational and institutional foundations of an agency that undermine the necessary administrative capacities for an adequate regulatory performance, and (c) show how the outcomes from judicial disputes can negatively impact the work of an agency.

### *1.3.2 From comparative examinations to practical case study analysis*

The research design strategy to address the study of judicial accountability of the regulatory state departs from a cross sectional comparative study (chapter two), which allows the reader to have a ‘birds eye’ on the global perspective of judicial accountability adapted by different states in diverse policy sectors. Although the study is not designed as a causal inference examination, the study does present a statistical correlational analysis that allowed generating a series of claims that potentially could explain the outcomes from the comparative investigation. A more detailed inspection into the core aspects of judicial accountability is presented in chapter three, where a most-different country case study is conducted, using Spain and The United Kingdom as representative of different legal systems and administrative traditions. The study presented in this chapter is comparative concerning the countries under study, however it also consists on a vast number of cross sectional observations. Finally, chapter four introduces an in-depth case study of the risk management regulator of the hydrocarbons industry in Mexico, the Agency for Safety, Energy and Environment (ASEA). The study performs a process tracing analysis (Beach & Pedersen, 2013) to study how the information collected from administrative appeals contributes with empirical evidence to identify flawed administrative procedures throughout the enforcement of regulation.

It is relevant to highlight that the theoretical frameworks adapted for this study are designed to contribute with empirical knowledge about the varieties of judicial accountability adopted globally to supervise regulation authorities of two of the most representative industries operating under the ‘independent agency’ governance paradigm: the energy and telecommunications public utilities (OECD, 2001), which are also supervised by competition regulators.

### *1.3.3 Data collection: coding, classifying and analyzing judicial texts and legal frameworks*

The empirical evidence used for this research consists of three original datasets compiled by the author. Data collected in chapter two is based on comparative analysis of legislation and procedural rules of judicial appeals against regulatory agencies, and the sample selection of regulatory agencies is based on the most comprehensive dataset with institutional features of regulatory agencies constructed to date (Jordana et al., 2018). The source of the information collected for chapters three and four was obtained directly from existing administrative appeal cases against regulatory decisions. The selection of cases, the procedures to extract, code and analyze data was conducted following a qualitative content analysis of the texts (Krippendorff,

2004), which was validated through secondary literature and the guidance of legal statutes that govern both, the activities of regulatory agencies and the attributions of courts of appeal to assess the validity of administrative decisions.

#### **1.4 Outline of the dissertation**

The next chapter aims to contribute with the comparative research that studies the accountability of the regulatory state, which so far has focused on assessing the varieties of formal and non-hierarchical provisions of accountability of regulatory agencies. Using a sample of 100 agencies, this chapter conducts a comparative assessment of the intensity of judicial accountability available for judges to supervise the legality of regulatory decisions in the electricity, gas and telecommunications sectors.

Chapter three addresses the lack of comparative empirical studies concerning the information-generating role of judicial accountability, and examines the content of 2,040 rulings against decisions issued by competition and telecommunications regulators in Spain and the United Kingdom. To understand the substance of the appeals, the study classifies cases according to the alleged administrative principles under breach and the regulatory capacities under challenge. Chapter four enquires about the causes that prevent young regulatory agencies to comply with lawful administrative procedures throughout the enforcement of regulation. It examines 71 enforcement decisions of the risk management regulator of the hydrocarbons industry in Mexico (ASEA), which were ruled as unlawful by appeal courts, to assess the procedural performance of the agency.

Finally, chapter five presents the most relevant findings, contributions and limitations of this doctoral dissertation, and suggests prospective avenues of research in the literatures of regulatory governance and accountability of the regulatory state. Support information of the three analytical chapters is provided in the Appendix of this dissertation.

## **Chapter II: Assessing judicial accountability of the regulatory state: a comparative study of 100 agencies from the oil & gas, electricity and telecommunications sectors.**

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### **2.1 Introduction**

It is well established that politicians and policy makers around the globe have advocated for state administrative reforms following the regulatory governance paradigm, which has at its core the delegation of relevant statutory powers and the granting political independence to expert bureaucratic bodies (Baldwin, Cave, & Lodge, 2010; Dubash & Morgan, 2012; Gilardi, Jordana, & Levi-Faur, 2006; Jordana & Levi-Faur, 2004; Jordana, Levi-Faur, & i Marín, 2011; Levi-Faur, 2011). In this sense, the rise of the ‘regulatory state’ has resulted in a constellation of agencies across countries and policy sectors that shows differentiated configurations of political independence, regulatory powers, public accountability, and institutional models of managerial autonomy within the hierarchical administrative structures of a state (Biela & Papadopoulos, 2014; Ennser-Jedenastik, 2015; Gilardi, 2002, 2005; Hanretty & Koop, 2012; Koop, 2015; Wassum & De Francesco, 2020). Political science and legal scholars have long debated the democratic legitimacy of this model of governance, where the decision making power rests neither with elected officials nor with legislative bodies or judicial courts, but with bureaucrats in independent administrative agencies which are not subject to the usual democratic controls (Bignami & Zaring, 2016; Black, 2008; Christensen & Lægreid, 2006; Lindseth, 2019; Maggetti, 2010; Majone, 1999). One of the most significant theoretical discussions in both academic fields is to enquire about the ideal control mechanisms to hold independent agencies accountable without interfering with the administrative discretion that these agencies need for a successful exercise of regulatory power (Edley, 1992; Gailmard & Patty, 2007, 2017; McCubbins et al., 1987; McCubbins & Schwartz, 1984; Rodriguez, 2008).

Amid the democratic means available to control regulatory agencies’ actions, judicial review of administrative decisions is considered as an ideal ex-post control mechanism to ensure ‘good governance’ (D Geradin & Petit, 2012), as well as an adequate ongoing check on agency discretion since courts are “presumed to provide a neutral forum to challenge the regulatory process” (Rose-Ackerman, 2008, p.577). Furthermore, it contributes to overcome the ‘democratic accountability deficit’ of agencies’ policy choices (Ferejohn & Shipan, 1990; Gailmard, 2014a; Gailmard & Patty, 2017; Magill, 2014; Mulgan, 2014; Turner, 2017), maintaining a legitimating connection to the classic *trias politica* of representation and power in democratic states –i.e. executive, legislative and judicial powers (Lindseth, 2019).

A great share of the comparative studies in political science and public administration which deals with the accountability of regulators is focused on assessing formal accountability provisions established by states, as well as non-hierarchical forms of accountability developed

by agencies (Bianculli et al., 2015; Hanretty & Koop, 2012; Jordana et al., 2018; Koop, 2015; Koop & Hanretty, 2018). These studies have demonstrated that there is no uniform pattern across sectors and countries concerning the institutional features of the accountability of regulatory agencies, and suggest considerable variations of the accountability provisions which regulators are subject to in different countries and policy domains. However, very few empirical studies have assessed the diversity of judicial controls configurations embedded in the governance systems of regulatory agencies. Most of the knowledge concerning the assessment of different constellations of judicial review to supervise agencies is based on a series of *small-N* comparative case studies from administrative law scholars (Bignami & Zaring, 2016; Craig, 2017; de Poorter, Hirsch Ballin, & Lavrijssen, 2019; Garoupa & Ginsburg, 2009; T. Ginsburg, 2003; T. Ginsburg & Moustafa, 2008; Hall & Wright, 2008; Jordao & Rose-Ackerman, 2014; Larouche & Taton, 2011; Lavrijssen & de Visser, 2006; Mejía, 2020; Perroud, 2017; Pierce & Weiss, 2011; Psygkas, 2017; Solanes Mullor, 2018; Zhu, 2019). Nevertheless, very little is known about whether these judicial controls vary across larger numbers of regulators in different countries and policy sectors, and even fewer empirical studies address how judicial controls are embedded within the existing formal and non-hierarchical provisions of accountability.

This paper provides an empirical contribution to the debate on accountability in regulatory governance (Bianculli et al., 2015; Koop, 2015) by assessing the *judicial accountability* of 100 independent agencies from the electricity, gas and telecommunications sectors. Building on the literature on accountability of regulatory agencies and comparative administrative law, I examine a distinctive feature of *judicial accountability*, related to the *intensity of judicial review* that courts of appeal can exercise to control the legality of agencies' enforcement decisions. This feature of *judicial accountability* is used to address two questions concerning the agencies under study:

1. What variations of *judicial intensity* do we observe across agencies, sectors, countries and legal systems?
2. How do these variations of *judicial intensity* relate with existing conceptions and measures of public accountability in the regulatory state?

To answer these questions, I first adapted an intensity scale to assess the attributions and powers that judges have to review and evaluate administrative decisions, which shows that there is no consensus of a model of judicial controls concerning the intensity of review available for judges to scrutinize enforcement decisions. Consequently, to explain this outcome, I introduce a correlation analysis between the measures of *judicial intensity* and the public accountability scores of regulatory agencies designed by Jordana et al (2019), which capture the activities that agencies need to perform to justify their decisions and judgments, as well as identifies the political actors that hold agencies accountable. Finally, I discuss the implications of these

findings guided by the theoretical conception of *judicial accountability* as a mechanism of *mediated legitimacy*, necessary for regulatory agencies to fulfil their tasks under a legitimate framework of action.

The relevance of this research can be explained as follows: first, it contributes empirically by studying an important democratic accountability instrument that has been relatively unexplored in literature of regulatory governance, offering a framework to measure the variations of judicial controls and providing empirical evidence to explore the logic of the existing differences. Second, it discusses how judicial accountability is embedded in the governance of regulatory agencies as a provision of democratic legitimization of regulatory policy choices. Third, it opens a multidisciplinary dialogue with legal scholarship from the comparative administrative law literature, which enhances our understanding of the regulatory state as part of the legal tradition that rules in a polity, where judiciary institutions are also subject to institutional arrangements that affect their own dynamics to hold administrative agencies accountable. Finally, it contributes by providing information about the varieties of judicial accountability adopted globally to supervise regulation authorities of two of the most representative industries operating under the ‘independent agency’ governance paradigm: the energy and telecommunications public utilities (OECD, 2001).

The paper proceeds as follows: the next section elaborates on political science and administrative law literature to discuss the advantages of *judicial accountability* as a mechanism of democratic control and legitimation of the administrative governance of regulatory agencies. Section three introduces an operational definition of *judicial accountability*, as well as a scale to measure the *intensity* of judicial controls available for national courts to exercise their review authority over regulatory agencies. Section four refers to the sample of agencies under study, describes the collected data and defines the procedures followed to classify cases according to the *intensity of judicial review* scale. Section five provides a comprehensive comparative analysis of the variations of *judicial intensity* across agencies, and presents a correlation analysis with public accountability scores. Finally, section six discusses the implications of these findings.

## **2.2 Judicial accountability in regulatory governance**

*Judicial accountability* of regulatory agencies refers to the independent legal controls exercised by judges over agencies’ administrative decisions. These controls are grounded on a set of institutional features that distinguish the various systems of judicial review. Such institutional features determine, for example, the type of judge that should be charged with the task of legal control of administrative governance; the types of questions and standards a judge may properly address to analyze the matters under appeal, and the intensity of review that judges can exercise (Lindseth, 2019). In almost every contemporary regulatory regime the courts are legally authorized to assess the legitimacy of agencies’ policy choices to guarantee the protection of

fundamental rights and rule of law in administrative governance. Therefore, the study of the judicial review of administrative decisions has been essential to complement our understanding of the accountability fora and institutional mechanisms embedded in the governance structure of regulatory agencies (Rose-Ackerman, 2008; Whittington et al., 2008). This section briefly discusses the debates within political science and administrative law literature concerning the role of *judicial accountability* as mechanism of democratic control and legitimation in the regulatory state.

### *2.2.1 Democratic tensions and agency costs*

The transformation of state structures into the regulatory governance paradigm is featured by the delegation of relevant statutory powers to independent administrative agencies with technical expertise (Jordana et al., 2011; Levi-Faur, 2005). One major theoretical issue that has dominated constitutional and administrative law scholarship is concerned with the underlying principle that regulatory governance operates in tension with the democratic and constitutional self-government represented in the classic *trias politica* (Lindseth, 2019). Regulatory governance has raised a “constitutional anomaly of policy making” (Bignami & Zaring, 2016, p. ix) in a system in which the legitimacy and source of decision making power rests with bureaucrats in independent administrative agencies which are not subject to the usual democratic checks and balances (Bignami & David Zaring, 2016; Black, 2008; Lindseth, 2019). The democratic anomalies and constitutional tensions of the regulatory state have led administrative law scholarship to enquire about how to reconcile two major aims of jurisdictional controls of regulatory agencies’ discretion: “the successful exercise of regulatory power granted to the bureaucracy and the tethering of administrative agencies to the rule of law” (Rodriguez 2008, p. 341).

A similar theoretical conundrum is present within political science literature that studies the accountability and performance of regulatory agencies. On the one hand, empirical evidence suggests that higher levels of political independence and technical discretion granted to regulatory agencies enhances the credibility of policy makers to commit into long-term policy goals detached from political manipulation, which is a necessary condition to achieve sound social and economic outputs (Alesina & Summers, 1993; Bertelli & Whitford, 2009; Braithwaite, 2008; Gilardi, 2002; Koop & Hanretty, 2018; Levy & Spiller, 1996; Pavón Mediano, 2020; Thatcher, 2002). However, on the other hand, the literature that studies bureaucratic behavior also highlights the ‘agency costs’ that arise with the delegation model of regulatory governance, as a consequence of the independence and the contrasting asymmetries of technical expertise that exist between politicians and specialized bureaucrats (Gailmard, 2014a; Gailmard & Patty, 2007; Mulgan, 2014). Bureaucratic ‘policy drift’ and ‘regulatory capture’ are typical manifestations of these ‘costs’, through which regulation is directed away from the public interest and toward the



particular interests of a regulated industry or other relevant stakeholders (Carpenter & Moss, 2013; Magill, 2014; Posner, 2013; Stigler, 1971). In this sense, a much debated theoretical puzzle for political science scholars concerns the dilemma of how to ensure the benefits of the technical discretion and independence granted to specialized bureaucrats, and at the same time, reducing the ‘agency costs’ to prevent bureaucratic policy drift and regulatory capture (Edley, 1992; Gailmard & Patty, 2007, 2017; McCubbins, Noll, & Weingast, 1987; McCubbins & Schwartz, 1984).

### 2.2.2 Rule of law and ‘fire alarms’

Legal and political science scholarship subscribe the argument that within the democratic mechanisms of oversight available for politicians to control the actions of independent regulatory agencies, judicial review of administrative decisions is considered an ideal mechanism that contributes to overcome the legitimacy and ‘agency costs’ problems that rise with the regulatory governance paradigm. For legal scholars, judicial review of administrative decisions is not only a mechanisms to guarantee the rule of law and secure the protection of citizens’ fundamental rights against state action, but is also considered as an ideal instrument to ensure transparency, participation rights and enforcing reason-giving obligations by administrative actors (Bell, 2019; Bignami, 2016b; Lindseth, 2019; Rose-Ackerman, 2017). Judicial accountability of administrative governance promotes sound policy-making and oversight through a ‘non-hierarchical, bottom-up form of administrative democracy’(Lindseth, 2019, p. 191), which compensates the weak legitimizing function of political control exercised by the legislative and executive branches of the state.

Meanwhile, political science literature relies on the *principal-agent* theoretical approach to understand the role of judicial accountability in the governance of regulatory agencies. Under this framework, judicial procedures represent a mechanism that allows overcoming the information and technical expertise asymmetries between political principals and specialized bureaucrats, which in consequence reduces potential ‘agency costs’ (Gailmard & Patty, 2017; Shipan, 1997; Sunstein, 2017; Turner, 2017). Judicial courts act as a neutral forum where regulatory agencies are exposed to legal consequences of their actions, and the new information available as a result of the litigation process against an agency represents a unique source of evidence to assess a regulator’s policy choices (Shapira, 2020). This conception of judicial controls of agency’s discretion depicts judicial procedures as ‘fire alarms’ (McCubbins & Schwartz, 1984) that enable individual citizens and organized interest groups to challenge administrative decisions before courts of appeal when an agency violates or exceeds its statutory mandate. In consequence, ‘fire alarms’ minimize the intervention of politicians into the policy making process, and rely on the power of courts to assess the policy choices of regulators.

### 2.2.3 Braided accountability and mediated legitimacy

Bell (2019) argues that “judicial review operates as one mechanism, among many, by which officials are asked to explain their decisions” (p.11). Accordingly, the role of judicial review as an accountability mechanism of administrative actions must be understood not as an isolated means of democratic control, but *braided* with a diversity of formal provisions and informal strategies established in a political system to hold agencies accountable. A distinctive feature of judicial review is that it operates as an ongoing accountability check on agencies’ discretion, which avoids the increased politicisation of executive and legislative controls, since courts of appeal are “presumed to provide a neutral forum to challenge the regulatory process” (Rose-Ackerman, 2008, p.577). In this sense, judicial review is one of the core democratic mechanisms available to guarantee the legitimacy of regulatory agencies through formal provisions of control embedded in their accountability structure (Bell, 2019; Bignami, 2016a; Lindseth, 2019; Majone, 1999).

Although the degree of scrutiny that courts of appeal can exercise over regulatory agencies decisions is limited, judicial review together with political oversight by legislative and executive actors, serves as a complementary mechanism of *mediated legitimacy* (Lindseth, 2019). Despite the need from governments to rely on independent technical agencies to address complex policy challenges, these agencies lack the capacity to legitimize their own output without the mediation of the executive, legislative and judicial powers of the state (Bell, 2019; Lindseth 2019). *Mediated legitimacy*, refers to the legitimization of agencies’ policy choices through accountability mechanisms that connect these with the *trias politica* of the democratic state. It is only by working together that these three branches of the state can provide the *mediated legitimacy* that regulatory governance needs to sustain itself durably (Bell, 2019). The degree of *mediated legitimacy* needed to guarantee an adequate link between administrative agencies and the *trias politica* shapes the type of oversight interactions between agencies and specific accountability forums. These oversight interactions are labeled by Bell as *accountability paradigms*<sup>2</sup>. In this sense, the specific features of *judicial accountability* needed in a polity to guarantee the legitimacy of regulatory decisions (e.g. the standards and intensity of review that

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<sup>2</sup> Bell (2019) identifies three accountability paradigms: the principal agent standard, the representative-electoral standard, and the trust standard. The principal-agent standard depicts a hierarchical authority model of accountability where agents must demonstrate that they did as mandated by their political principal. In a representative-electoral standard, agents must demonstrate that their policy choices are made in the best interest of society (not only limited to the will of the political principal or elector). Finally, the trust standard builds on the two previous paradigms, but under this model agents must also enable downwards accountability mechanisms to dialogue with the beneficiaries for whom the task has been entrusted. This last accountability paradigm represents the most complex and complete standard of oversight in a polity over administrative agencies actions.

judges exercise to control agencies' actions) will be shaped by the *accountability paradigms* that determine the type of oversight interactions between political principals and agencies.

### 2.3. A framework for the assessment of judicial accountability

#### 2.3.1 Defining judicial accountability

The definition of *judicial accountability* of regulatory decisions used for this study builds on the notion of accountability defined by Koop (2015): “actor A is obliged to offer or is committed to offer information on, and explanation of, his or her conduct to another actor B, and may be sanctioned for this conduct” (p. 82). In her study, Koop refers to this definition in order to analyze the different provisions of *mandatory accountability* that regulatory agencies must comply with, and judicial review falls into the *horizontal*<sup>3</sup> mandatory provisions through which agencies must offer explanations about the fairness of their actions. In this sense, this research paper considers *judicial accountability* as a subset of mandatory provisions of accountability for agencies to give explanations about the fairness and non-arbitrariness of their actions, which refers to the “independent legal control exercised by judges sitting on either ordinary judicial courts or venerable court-like administrative jurisdictions” (Lindseth 2019, p. 176) to review administrative decisions of regulatory agencies.

As mentioned beforehand, *judicial accountability* is grounded on a set of institutional features that distinguish a legal system, and such features shape judicial controls in the governance of regulatory agencies. Constitutional law scholarship that studies the jurisdictional control of administrative decisions has suggested that the features of judicial review of regulatory agencies will depend on how judges deal with three interlocking ideas: “the legal interpretation of judges concerning the nature and autonomy of independent regulatory bodies; the doctrine of separation of powers that prevails in a particular legal system; and finally, permeating the previous two ideas, the predominant *legal thought* of a polity (Solanes Mullor, 2018, p. 157)”<sup>4</sup>. Furthermore, comparative administrative law literature suggests that one necessary feature to grasp the institutional complexities and analytical complications of different systems of administrative controls is related to the scope and depth of legal control that judges may properly exercise over administrative decisions<sup>5</sup> (Lindseth, 2019). “‘Scope’ refers to the range of questions the judge

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<sup>3</sup> Koop (2015), and (Jordana et. al, 2015) refer to three directions of accountability of regulatory agencies: upward (directed to political principals), downwards (governmental bodies with similar status or auditing instances) and horizontal (directed to non-government stakeholders, citizens and society).

<sup>4</sup> *Legal thought* refers to “a particular way of thinking that characterizes the legal profession as a social group at a particular time in history. The main characteristic of this thought is that it contains a high number of norms, arguments, theories and information about the institutional functioning of the legal process and a constellation of ideals and living objectives of the profession at a given historical moment” (Kennedy, 2016, p. 27, cited in Solanes Mullor, 2018, p. 157)

<sup>5</sup> According to Lindseth (2019), the following elements of enquiry must be present to compare judicial review in administrative governance: (i) The judge/court charged with the task of legal control of

might examine –law, fact, policy discretion–whereas ‘depth’ refers to the extent to which the judge will undertake a de novo examination of these questions or defer in some measure to the determinations of the administrative actor” (p. 187). This definition of ‘scope’ and ‘depth’ expresses the intensity of judicial review in a way that courts’ judgements fluctuate between a highly deferential criteria to assess policy choices (restricted to the legality of the procedure followed by the administrative agent), and a very stringent analysis of policy decisions which consider the facts and merits that motivated an administrative decision (in this case, the court of appeal can be considered as a “second regulator”) (Lavrijssen & de Visser 2006). With this in mind, this research paper examines the *intensity of judicial review* available for courts of appeal to assess the legality of the decisions taken by regulatory agencies<sup>6</sup>.

### 2.3.2 *Intensity of judicial review*

In order to measure the *intensity of judicial review* exercised by the courts of appeal with authority to review administrative decisions of regulatory agencies, I build on Lavrijssen and de Visser (2006) "sliding scale" of judicial review, which consists of four different ‘phases’ of review, ranging from a very marginal, restrained test to a very intensive review of administrative decisions. I use this scale to assess the attributions and powers that judges have to review and evaluate administrative decisions related with the statutory capacities granted to agencies to *enforce the law and implement sanctions*<sup>7</sup>. It is important to highlight that this scale is adapted in this research as a representation of the intensity of review that a judge is allowed to exercise by statute, but this does not mean that judges apply the maximum level of intensity allowed by the law in every case (this would require an analysis of case by case jurisprudence). Lavrijssen and de Visser measure the intensity of review that judges exercise on a case by case basis, meaning

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administrative decisions. (ii) The intensity/depth of legal control and types of questions (fact/law/policy) may the judge properly address. (iii) Aspects/matters of an administrative decision which are categorically beyond the legal cognizance of a judge. (iv) Admissibility/timing for the judge to intervene in the administrative process in response to a litigant’s complaint. (v) Actors who may properly invoke the power of the judge to exercise legal control (standing). This framework goes beyond the simplified notion of the principal-agent relation and the common law versus civil law distinctions of judicial controls, and builds on the historical, genealogical and constructivist features that shape the administrative governance of a state.

<sup>6</sup> The reason for limiting this research to only one element of Lindseth’s framework is because expanding the enquiry to the remaining features would imply deepening into a case by case study of judicial resolutions of judges from each jurisdiction, which would imply a second level analysis on which the units of study would be judicial texts (analysis of jurisprudence), which falls out of the expertise of this research. Nevertheless, the element under study, allows to capture and compare the institutional setting of judicial controls (Tapia & Cordero, 2015) necessary to answer the questions framed for this research.

<sup>7</sup> The type of administrative decision considered for this study is related to challenges against resolutions or final decisions issued by the higher decision making body of each agency (e.g. the board of commissioners, the director or the president of a regulatory agency, etc.), excluding adjudications and other procedural actions of regulators, as these are not final binding decisions. This means that for every agency under analysis, the only effective means available for plaintiffs to challenge these types of decisions is through judicial litigation in the correspondent court of appeal.

that the scale was designed to analyze the intensity of review of individual judgements, and not to assess a general characterization of the intensity of review that a national court exercises. In turn, this research adapts this scale to reflect on the institutional setting established for the provision of *judicial accountability* of enforcement decisions of regulatory agencies (that is, the rule established in the law for judges to exercise their discretion over regulatory decisions). The categories are defined as follows:

- A. *Extremely marginal test*: the court can only intervene in the most outrageous of cases, and the judge thus limits its intervention to blatantly unreasonable decisions.
- B. *Marginal test*: the court can only review the legality of a challenged decision, limiting itself to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers. The legal test here is thus not so much whether the decision is unreasonable, but rather whether the decision is reasonable.
- C. *Intense review*: the court can fully review the merits of the case. It will assess whether all relevant facts were taken into account and whether the assessment of these facts and the application of the law to these facts has been done correctly. There is no longer any need for a manifest error on the part of the decision maker to warrant court intervention. Any error will suffice to have the decision annulled.
- D. *Extremely intense review*: where the court can substitute its own decision for that of the authority, simply because it believes its own decision would have been better or more suitable. In this case, the court functions as a de facto second regulator.

Although this scale could be used to assess administrative decisions related to most of the statutory capacities of agencies (e.g. *conflict resolution, rulemaking, licensing, market entries, pricing*), I only focus on the agencies' capacities to enforce and implement sanctions, for two reasons. First, it facilitates a coherent comparative analysis and allows assessing all the agencies in the sample<sup>8</sup>. This argument relies on the fact that some administrative systems may differentiate how every type of administrative decision should be assessed by courts of appeal, and it can result that, for example, the judicial procedures against the agencies' capacities to *make rules* are less intense than the procedures of review against agencies capacities to *enforce the law*. Second, administrative decisions related to the agencies' capacities to implement sanctions are the most representative activities of the regulatory state, which entail the abilities of regulators to guarantee the necessary techniques, expertise, knowledge, skills and resources to fulfil

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<sup>8</sup> As the same logic described in footnote 5, analyzing administrative decisions of other type of regulatory capacities derives into a scenario that requires a more complex case by case study of judicial resolutions, as there is no "clear cut" or standard definition of how different systems of courts define these administrative decisions, or perhaps not all the agencies have the capacities to issue decisions concerning all type of statutory capacities.

successfully their mandate (Lodge & Wegrich, 2014). Finally, it is important to note that the feature of *judicial intensity* measured in this research paper is representative of national courts of appeal of first instance. In most of the sample cases, final judgments from the courts of appeal consulted for this study can be further appealed to higher instance tribunals, such as Supreme Courts or Higher Courts of Appeal.

## 2.4 Methodology and data

### 2.4.1 Sample

The sample of cases under examination was drawn from Jordana et al. (2018) large scale study of 799 regulatory authorities in 17 policy sectors and 115 countries, which measured a set of institutional and organizational features of agencies. As a first step to select the cases, I identified the total number of regulatory agencies in the sample with jurisdiction to supervise the electricity, gas and telecommunications industries (n=170). Once these cases were identified, I extracted only those cases representative of agencies classified under the ‘independent agency model’ (n=100)<sup>9</sup>, which “prescribes a high level of managerial autonomy and high political independence, together with broad accountability mechanisms” (Jordana et. al p. 537). This institutional type refers to the model of political independence debated in the literature of regulatory agencies. Those agencies which did not fall into the ‘independent agency model’ (n=70) are left out of this enquiry as these do not represent cases that address the principal-agent and legitimacy dilemmas that motivate this research (table 1).

**Table 1. Universe and sample of regulatory agencies classified by institutional model of independence and regulated sector**

Institutional model	Regulated sectors <sup>†</sup>	n	% (universe=170*)	% (sample=100)
<b>Independent agency</b> n=100 (research sample)	Telecomm	45	26%	45%
	Gas & Electricity	32	19%	32%
	Electricity	14	8%	14%
	Gas, Electricity & Telecomm	3	2%	3%
	Electricity & Telecomm	3	2%	3%
	Gas	2	1%	2%
	Gas & Telecomm	1	1%	1%
<b>Non-politically independent</b> n=70 (not on sample)	Telecomm	36	21%	
	Gas & Electricity	15	9%	
	Electricity	11	6%	
	Gas	5	3%	
	Gas, Electricity & Telecomm	3	2%	
<b>Total universe of agencies</b>		<b>170</b>	<b>100%</b>	

Source: Jordana et. al (2018). Sample is representative of agencies operative as of 31 December 2010.

<sup>†</sup>Agencies in these sectors can also have authority to supervise multiple policy areas (e.g. competition, water, postal services), but for the simplicity of the explanation the table only depicts the sectors under study.

<sup>9</sup> The number of agencies in the sample are distributed in 70 countries. Europe: 25 (35%); the Americas: 16 (23%); Africa: 16 (23%); Asia: 13 (19%). For a complete reference of the agencies see Table A in the Appendix

From the sample under analysis, it is possible to observe seven different constellations of agencies according to the policy area under jurisdiction, which shows that 61% of the agencies are grouped as single sector regulators<sup>10</sup>; while 36% are responsible to supervise two sectors, and only 3% are entitled to regulate the three sectors under study. To facilitate the comparative analysis, I reclassified the sample of cases under analysis according to a mix of policy jurisdictions with three unique groups (table 1A): the *Gas & Electricity* jurisdiction, which comprises all the varieties of agencies that regulate any or both of these two sectors, and the *Overlapped jurisdiction*, which contains agencies that supervise any combination of gas and/or electricity markets plus the telecommunication sector. There is no change for the single sector agencies in the *Telecommunications* jurisdiction, which stays the same as the initial share of cases.

**Table 1A. Sample of regulatory agencies under analysis grouped by policy jurisdiction**

Policy jurisdictions <sup>†</sup>	n	%
<b>A. Telecommunications</b>	<b>45</b>	<b>45%</b>
<b>B. Gas &amp; Electricity</b>	<b>48</b>	<b>48%</b>
<i>Gas &amp; Electricity</i>	32	
<i>Electricity</i>	14	
<i>Gas</i>	2	
<b>C. Overlapped jurisdiction</b>	<b>7</b>	<b>7%</b>
<i>Gas, Electricity &amp; Telecomm</i>	3	
<i>Electricity &amp; Telecomm</i>	3	
<i>Gas &amp; Telecomm</i>	1	
<b>Total sample (A+B+C)</b>	<b>100</b>	<b>100%</b>

Source: own estimations based on Jordana et. al (2018)

<sup>†</sup>Policy jurisdiction refers to the set of regulated sectors under supervision by a regulatory agency.

#### 2.4.2 Data and operationalization

In order to assess the *intensity of judicial review* available for judges to exercise their legal control over regulatory agencies, I analyzed the content of four types of documents to extract information about the procedures followed by courts of appeal of every national context<sup>11</sup>: (I) legislation that decrees the creation, duties and statutory faculties of a regulatory agency; (II) legislation that establishes the review attributions of judicial courts over decisions issued by the administration (administrative law); (III) legislation that contains the rules, guidance and administrative

<sup>10</sup> Regulatory agencies in these sectors may also have authority to supervise multiple policy areas (e.g. competition, water, postal services), but for the simplicity of the explanation and the agency-sector comparative analysis, the table only depicts the sectors under study. For a complete reference of the agencies see Table A in the Appendix.

<sup>11</sup> It is important to highlight, that most of the official documents consulted for this research were already translated to English language by the official Government's websites. Those texts that did not count with a translation to English were translated by the author using the Google and DeepL translation platforms available online, and the information was validated through comparative administrative law scholarship and country specific legal case studies.

procedures that govern the activity of the appeal court with attributions to review decisions of a regulatory agency, and (IV) analysis from comparative administrative law scholarship and country specific legal case studies.

To accomplish valid inferences from texts contained in these documents, I performed a qualitative content analysis of the texts from documents type I, II and III considering the manifest information that was directly countable from the texts (Hayes & Krippendorff, 2007; Krippendorff, 2004). I preprocessed the texts to extract relevant information and code it under the categories defined by Lavrijssen and de Visser's (2006) scale, according to the following seven questions<sup>12</sup>:

- i. *Are the agency's enforcement decisions subject to judicial review?*
- ii. *Which system of jurisdiction is competent to verify the legality these decisions?*
- iii. *What are the extent and limits of the scope of the competence of the court of review?*
- iv. *Do judges have limited or thorough control? (i.e. are judges only allowed to assess the formal requirements, legal proceedings and/or reasons of enforcement decisions, or can judges reconsider the merits of the decision?)*
- v. *Is the court simply empowered to quash (declare null and void) an enforcement decision or to dismiss the legal demand?*
- vi. *Is it within the authority of the court to amend or modify the enforcement decision?*
- vii. *Can the court substitute an entirely new and different enforcement decision?*

Furthermore, to validate the classification of cases according to the scale of intensity of judicial review, I analyzed the information from documents type IV (administrative law literature) to confirm or modify the categorization of the information collected. In this sense, after validating the information from documents I, II and III, with the expertise and knowledge from documents type IV, I proceeded to readapt and operationalize Lavrijssen and de Visser's (2006) scale of accountability in order to have a more reliable measure that adapts to the characteristics of the data collected and the context of regulatory agencies. This modification consisted in merging two of the original categories from Lavrijssen & de Visser scale: *Extremely marginal test* (A) and *Marginal test* (B), into one category, named simply as *Marginal review*. The reason to do this transformation from the original scale is that there is no clear and reliable procedure to code the original categories A and B as mutually exclusive in the context of several administrative systems of comparison. In this sense, the adapted final classification is reliable enough to clearly

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<sup>12</sup> This criteria is based on a series of surveys conducted by the International Association of Supreme Administrative Jurisdictions (2010) and the European Association of Supreme Administrative Courts (2014).



distinguishing between three levels of intensity of the scale: *marginal review*, *intensive review* and *extreme review*.

## 2.5 Assessing judicial accountability of regulatory agencies

This section examines the *intensity of judicial review* available to judges to exercise their legal control over agencies' enforcement decisions, and enquires about the observed variations of judicial intensity across agencies, policy jurisdictions, countries, legal systems and *public accountability* measures. Preliminary findings from the comparative analysis are presented in table 2 and consequently explained according to each of the potential sources of variation.

**Table 2. Comparative analysis of the intensity of judicial review of regulatory decisions disaggregated by variables of interest**

Variables and categories	Intensity of review (share of agencies)						Total (N=100%)
	Marginal		Intensive		Extreme		
	%	n	%	n	%	n	
<b>A. Regulatory agencies (all)</b>	52%	52	23%	23	25%	25	<b>100</b>
<b>B. Institutional typologies</b>							
<i>Ideal</i>	54%	27	28%	14	18%	9	<b>50</b>
<i>Constrained</i>	44%	14	19%	6	37%	12	<b>32</b>
<i>Mimetic</i>	61%	11	17%	3	22%	4	<b>18</b>
	$\chi^2(4, n=100)=4.8889 p=0.299$						
<b>C. OECD membership</b>							
<i>Member</i>	19%	7	47%	18	34%	13	<b>38</b>
<i>Non member</i>	73%	45	8%	5	19%	12	<b>62</b>
	$\chi^2(2, n=100)=31.1938 p=0.000$						
<b>D. Region</b>							
<i>Europe</i>	14%	5	46%	16	40%	14	<b>35</b>
<i>Africa</i>	63%	15	12%	3	25%	6	<b>24</b>
<i>America</i>	83%	19	17%	4	-	-	<b>23</b>
<i>Asia-Pacific</i>	72%	13	-	-	28%	5	<b>18</b>
	$\chi^2(6, n=100)=38.0538 p=0.000$						
<b>E. Policy jurisdiction</b>							
<i>Electricity &amp; Gas</i>	54%	26	21%	10	25%	12	<b>48</b>
<i>Telecomm</i>	47%	21	24%	11	29%	13	<b>45</b>
<i>Overlapped jurisdiction</i>	71%	5	29%	2	-	-	<b>7</b>
	$\chi^2(4, n=100)=3.0531 p=0.539$						
<b>F. Legal tradition</b>							
<i>Civil Law</i>	51%	34	31%	21	18%	12	<b>67</b>
<i>Common Law</i>	55%	18	6%	2	39%	13	<b>33</b>
	$\chi^2(2, n=100)=10.2880 p=0.006$						
<b>G. Legal system</b>							
<i>European Culture</i>	26%	10	37%	15	37%	15	<b>40</b>
<i>Mixed System</i>	54%	14	8%	2	38%	10	<b>26</b>
<i>Weak Law in Transition</i>	88%	22	12%	3	-	-	<b>25</b>
<i>Rule by Law</i>	67%	6	33%	3	-	-	<b>9</b>
	$\chi^2(6, n=100)=33.1509 p=0.000$						
<b>H. Type of court<sup>†</sup></b>							
<i>Ordinary judicial court</i>	67%	47	25%	18	8%	6	<b>71</b>
<i>Court-like administrative</i>	45%	5	45%	5	10%	1	<b>11</b>
<i>Specialized tribunals</i>	-	-	-	-	100%	18	<b>18</b>
	$\chi^2(4, n=100)=68.3167 p=0.000$						

Source: own estimations with information from Jordana et. al (2018) (La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1997, 1998), (Siems, 2016), (OECD, 2020) and (World Bank, 2020a)

<sup>†</sup>Source: own estimations based in the manifest content analysis of documents referred in section 4.2 of this research paper (Data and operationalization).

### 2.5.1 Agencies, regions and policy jurisdictions

The findings in table 2.A show a clear variation of the intensity of judicial controls observed across the regulatory agencies under study. This information reveals a first preliminary finding to answer our first research question:

**Finding 1:** despite the greater share of restrained (*marginal*) judicial review observed within cases, evidence shows a cross sectional variation of *judicial accountability*. This suggests that there is no consensus on a model of judicial controls concerning the intensity of review available to judges to scrutinize regulatory decisions.

#### Typologies of regulatory agencies

It is now necessary to explore the potential sources of the variation of *judicial accountability* across cases. Table 2.B analyzes the distribution of regulatory agencies according to the institutional typologies of independent regulatory agencies defined by Jordana et. al (2018). This taxonomy of agencies is based on four analytical dimensions that feature agencies' complex and polymorphic nature, which capture differentiated configurations of political independence, regulatory powers, public accountability, and managerial autonomy. As mentioned in the sample description from section 4.1, this research considers only the 'political independent' model of agencies contained in Jordana et. al<sup>13</sup>, which are defined as follows:

- a. **Ideal:** agencies are the closest type to the theoretical *independent agency* model; separated from the executive and the legislative; granted with high political independence; low hierarchical managerial control, and good levels of accountability towards civil society.
- b. **Constrained:** agencies enjoy strong political independence but the executive and legislative branches retain significant control over agency organizational structure; enjoys looser regulatory powers and a less comprehensive provisions of accountability.
- c. **Mimetic:** this cluster emulates the *ideal* typology (high political independence and managerial autonomy), but enjoys looser regulatory powers and is featured by very low provisions of accountability (accountable only to the executive).

The evidence from this analysis suggest that there is a slight differentiation of the *intensity of judicial review* between typologies of agencies, which results in the following preliminary findings:

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<sup>13</sup> Jordana et al (2018) identify six institutional typologies of agencies, which are clustered into two main groups that distinguish between the 'political independent' agency model used in this research (*ideal*, *constrained* and *mimetic* typologies) and those agencies that lack the independence attribute, left out of this research (*dependent*, *autonomous* and *responsible* typologies).

**Finding 2:** independent agencies with strong regulatory powers, high provisions of accountability and high managerial autonomy (the *ideal* model) face higher *intensity of judicial accountability* than those observed for the *mimetic* model (i.e. agencies similar to the *ideal* model, but with looser regulatory powers and very low provisions of accountability).

**Finding 3:** independent but *constrained* agencies (i.e. loose regulatory powers, low managerial autonomy and intermediate provisions of public accountability) face higher *intensity of judicial accountability* than the rest of the agencies.

Interestingly, these findings suggest that the looser regulatory powers and the direct accountability to the executive branch observed by the *mimetic model* might be a plausible explanation to understand the lower intensity of judicial accountability of this group of agencies vis-à-vis the intensity observed for the *ideal* model. Concerning the *constrained* agency model, the higher control over an agency's organizational structure by the executive and legislative might reflect the concerns of the legislative to hold agencies accountable through tougher judicial controls than those observed by *ideal* agencies (as the latter group has higher provisions of accountability that might justify less need for judicial intensity). Although these trends seem to show a variation of *judicial accountability* between typologies of agencies, it must be noted that the *chi-squared* test of independence between categorical variables performed does not allow to infer statistical dependence between categories.

### **Regions and OECD membership**

Table 2.C reveals that judicial controls of regulatory enforcement decisions in OECD countries are clearly more intense than non-OECD countries. The variation is even more contrasting if we consider the difference in the share of agencies that face *marginal intensity* of review in both groups, where 73% of the agencies in non-OECD countries face a restrained review, while this is only the case in 19% of the cases from OECD countries. The information in table 2.D also shows a regional variation of judicial controls of regulatory agencies, and the findings confirm the trend of the OECD membership distinction presented before.

**Finding 4:** the *intensity of judicial accountability* of regulatory agencies in OECD countries is significantly higher than those agencies operating in non-OECD countries.

**Finding 5:** the *intensity of judicial accountability* of regulatory agencies in European countries is significantly higher than the intensity of judicial controls in any other region, while agencies in American countries face the lowest intensity of judicial review.

The most obvious finding to emerge from these results is the similar levels of judicial intensity observed for agencies for OECD and European countries. However, it results interesting to note that agencies in America (mostly agencies in Latin American countries) observe a lower *intensity*

of *judicial accountability*, which might be explained by a similar and systematic feature of agencies in this group (for example, see *Finding 8* concerning agencies in *weak law* countries).

### **Policy jurisdictions**

Concerning the policy jurisdictions supervised by agencies, evidence suggests that notwithstanding the clear variation of judicial accountability across regional types of countries and OECD membership, it is not possible to suggest a similar variation between regulated sectors. Evidence from the comparative analysis in table 2.E reveals that even though there is a slight difference between the intensity of judicial review observed for the *Electricity & Gas* and *Telecomm* policy jurisdictions, it does not represent a relevant discrepancy, and the group defined as *Overlapped jurisdictions* contains a very low number of cases which can't really distinguish a substantial difference between jurisdictions.

**Finding 6:** there is no clear evidence that suggests variations of the intensity of judicial accountability of regulatory agencies related to differentiated policy jurisdictions under supervision.

Although it is difficult to conclude any feasible explanation for these results, prior studies have noted that administrative reforms carried out worldwide to implement the regulatory governance paradigm targeted transformation to several public utilities at the same time, which might explain the adaptation of similar provisions of judicial accountability in every policy jurisdiction (Jordana & Levi-Faur, 2004; Levi-Faur, 2011).

#### *2.5.2 Legal systems and typologies of courts of appeal*

This section aims to understand the variations of the intensity of judicial controls observed across different configurations of legal systems. As mentioned beforehand, legal controls exercised by judges over regulatory decisions are grounded on a set of institutional features that configure a legal system (Lindseth, 2019). In this regard, I introduce two approaches to classify the legal systems or legal families across the world. On the one hand agencies are grouped according to the *Civil law* and the *Common law* distinction of legal traditions<sup>14</sup> (La Porta et al., 1997, 1998). On the other hand, I also considered the legal system taxonomy suggested by Siems (2016), which defines typologies of legal systems as a function of the Inglehart and Welzel's (2010) cultural map. This classification highlights how legal systems are associated to historical, social,

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<sup>14</sup> La Porta et al. (1997, 1998) group legal systems into five categories that relate to the legal origins of commercial codes. These categories are grouped into two major clusters of legal traditions: the Civil law legal tradition (which integrates the French, Germanic, Socialist and Scandinavian origins of commercial law), and the Common law tradition (based on English origins of commercial law). This distinction suggests legal systems as determinants of economic and institutional outcomes, such as external finances and the banking systems. The authors argue that legal rules protecting investors and the quality of their enforcement differ greatly and systematically across countries. A detailed description of the classification of agencies according to the five families of legal origins can be consulted in table B in the Appendix.

political, economic and cultural similarities and differences, and the clusters can be summarized as follows<sup>15</sup>:

- i. *European culture*: European countries from any legal tradition: Germanic, French and Nordic civil law but also common law countries, as well as some non-European countries that have been strongly influenced by European legal systems.
- ii. *Mixed legal systems*: countries that have at least some features of common law systems but are also mixed with civil law and/or religious legal traditions. The common law nature of some countries of this cluster matches their history as former English colonies, while for others this influence may be of more recent origins, possibly also through US law.
- iii. *Rule by law*: non-democratic countries, often with a socialist background as well as some countries of Islamic law.
- iv. *Weak law in transition*: cases in this cluster can be seen as countries in transition. Overall, these countries also have in common that they have decent but not perfectly working legal institutions.

### **Common law and Civil law distinctions**

Table 2.F displays the results of the comparative analysis for both classifications of legal systems. Concerning the *civil law-common law* distinction, even though both groups observe a similar share of agencies that fall into the *marginal* intensity category, there is a clear variation in the distribution of cases for the *intensive* and *extreme* categories of judicial intensity. The opposite holds true for the share of cases that belong to the *extreme* review category, where the percentage of cases in the *common law* group of agencies is twice as much larger than the share for the *civil law* group.

**Finding 7:** despite the similar share of *marginal* judicial review between *civil law* and *common law* traditions, it is more likely to observe *extreme* intensity of judicial accountability in *common law* systems than in *civil law* systems.

It is possible to understand this finding if we consider previous studies which suggest that the intensity of judicial review over regulatory decisions is not only dependent on the judiciary tradition of each country, but also dependent on how judicial systems interact with the generalist or specialist organizational setting of courts, where the latter enjoys stronger review faculties (Lavrijssen & de Visser, 2006; Mejía, 2020; Psygkas, 2017; Tapia & Cordero, 2015). This argument is consistent with evidence in this paper which shows that 61% of the agencies which operate in common law systems rely on specialized tribunals (see table C in the appendix).

### **Legal systems**

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<sup>15</sup> For a detailed reference of the countries that belong to these clusters, see table B in the Appendix.

Concerning the findings related to the legal system taxonomy suggested by Siems (2016), table 2.G shows that agencies in the *European culture* category face much more intense judicial controls than any other legal systems. Meanwhile, the administrative decisions of almost every regulatory authority in the *weak law in transition* category (mainly African and American countries) are subject to a *marginal* review. Furthermore, evidence reveals higher intensity of judicial controls for agencies in *mixed systems* (comprised by Asian and African countries) than in *weak* and *rule of law* systems.

**Finding 8:** the *intensity of judicial accountability* of regulatory agencies operating in *European culture* legal systems is significantly higher than in any other system, while agencies operating in *weak law* systems face the lowest intensity.

This result supports the regional trend of higher judicial intensity observed beforehand for European countries and OECD members. Moreover this finding also confirms the low *intensity of judicial accountability* observed for Latin American countries.

### **Courts of appeal**

This analysis refers to the system of jurisdiction to which the court of appeal with authority to review administrative decisions of regulatory agencies belongs. Administrative law literature has theorized how the degree of specialization of courts is linked to the intensity of review arguing that more specialized courts are endowed with greater attributions to assess the facts and technical discretion of regulatory decisions, rather than only the legality of the procedures (Baum, 2011; Bignami, 2012; Cane, 2011; Ginsburg & Wright, 2013; Psygkas, 2017). Furthermore, from this literature it is also possible to identify three types of courts of appeal with jurisdiction to review regulatory decisions: *ordinary judicial courts*, *court-like administrative jurisdictions* and *specialized tribunals*. *Ordinary judiciary courts* are appeal bodies embedded in and dependent on rules and procedures of the judicial power (usually operating as specialized branch of the judiciary dedicated to hearing administrative appeals against state actions). Meanwhile *court-like administrative jurisdictions* are review bodies connected to the executive branch, assigned with the jurisdictional control of administrative acts, which are separate from the ordinary judicial system of courts. A third category of courts of appeal relates to the *specialized tribunals*, which enjoy a greater degree of technical knowledge and policy expertise than *ordinary judicial courts* and *court-like administrative jurisdictions* due to the specialized professional background and expertise of judges. In most cases, *specialized tribunals* possess the same authority and faculties as *ordinary judicial courts* or *court-like administrative jurisdictions*, but the appointment mechanisms of the judges in this jurisdiction differ from the processes observed in the ordinary systems of courts of appeal, and judges do not necessarily have to fulfil the traditional legal career and experience required in ordinary courts. It is important to highlight that *judicial courts* and *court-like administrative jurisdictions* may also possess specialized knowledge of the substance

of regulatory decisions. However, this specialization is developed through the experience of dealing with appeals against administrative agencies over time (Baum, 2009, 2011), rather than through the professional background or technical skills that judges possess in specialized tribunals (Psytkas, 2017).

It is evident from the output presented in table 2.H that agencies facing *specialized appeal tribunals* are the group of cases with higher intensity judicial controls, and the second group with higher intensity of judicial controls refers to the *administrative jurisdictions* with half of the cases falling either into the *intensive* or *extreme* accountability. In turn, two thirds of the cases from the *ordinary judicial courts* face restrained (*marginal*) judicial review.

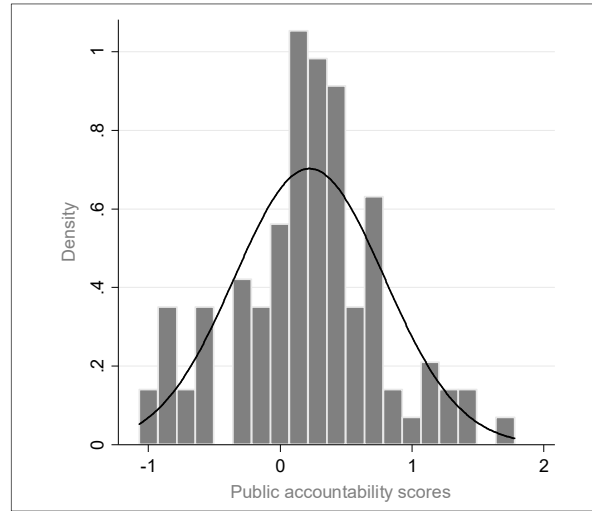
**Finding 9:** the highest intensity of judicial accountability is observed among agencies that face *specialized tribunals*, while *court like administrative jurisdictions* enjoy higher levels of intensity to assess regulatory decisions *vis a vis* ordinary judicial courts.

This last empirical finding can be explained if we consider the theoretical arguments of specialization and judicial intensity introduced previously, which confirms that specialized tribunals and courts closer to the administration (both with higher levels of expertise and policy knowledge than ordinary judicial courts) are entitled with higher intensity of judicial review faculties to assess administrative decisions.

### 2.5.3 Public accountability scores

So far it has been shown that the intensity of *judicial accountability* of independent regulatory agencies in the electricity, gas and telecommunications sectors varies across different types of countries and legal systems, which suggests that there is not one dominant model of judicial controls to supervise the administrative acts of these regulators. This final analysis shows how these variations of judicial intensity relate to existing measures and conceptions of *public accountability* of the regulatory state, in order to suggest a plausible explanation for the different intensity levels of judicial accountability. I use the *public accountability* score from Jordana et al (2018), which reflects the activities that agencies need to perform to justify their decisions and judgments. The score measures three different dimensions of accountability: (i) whether the agency is hierarchically accountable to the executive and/or the legislature; (ii) whether agencies are accountable to their stakeholders by means of different participatory mechanisms and, (iii) whether the agency is accountable to the public in general. The values of the score range in a scale of continuous values between -1 and 2, where negative scores reflect a prevailing basic hierarchical accountability to the executive, and positive scores show that the agency is also accountable to the legislative, diverse stakeholders, and the public. Figure 1 shows how the values of *the public accountability* score are distributed for the sample under study, and the data displayed in the histogram shows a normal trend distribution, with the mean value around 0.22 (see appendix for further details of the summary statistics of the scores).

**Figure 1. Histogram of the distribution of the public accountability scores of selected regulatory agencies in the sample under analysis (n=100)**

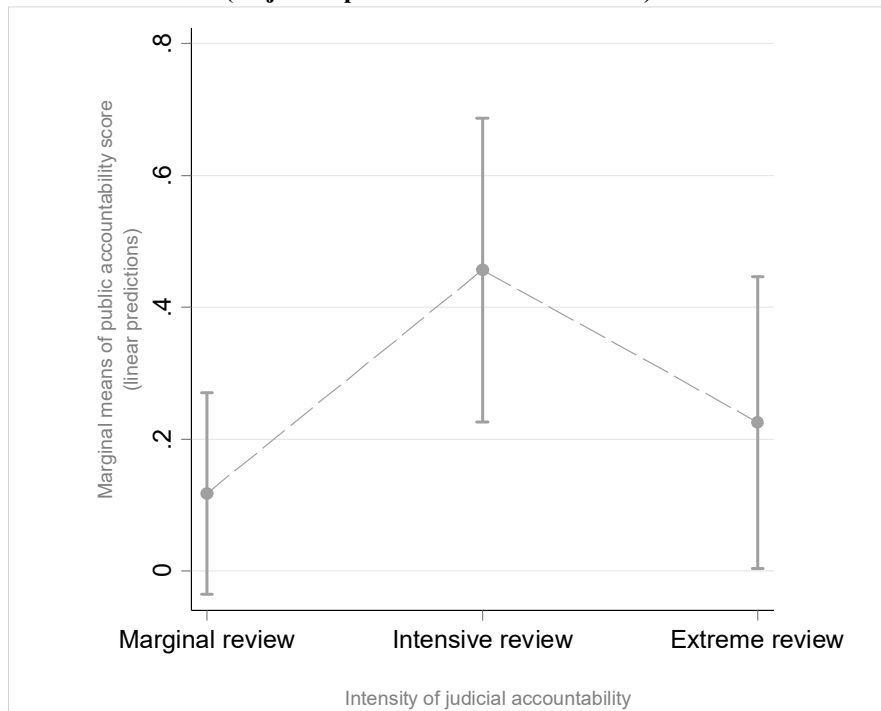


\*Source: own estimations with information from the public accountability score (Jordana et.al, 2018).

To represent the relationship between *public accountability* and the intensity of *judicial review*, figure 2 suggests that regulatory agencies with higher measures of public accountability are not necessarily associated to higher intensity of *judicial accountability*, and distinguishes a differentiated pattern between two main clusters of agencies: those that face *intensive* (intermediate) judicial controls and those who face either *marginal* or *extreme* controls. Agencies from the intermediate group of judicial intensity (*intensive review*) possess higher levels of public accountability than the rest of the cases.



**Figure 2. Marginal means of Public Accountability Scores by categories of intensity of judicial review (Adjusted predictions with 95% CI's) †**



†A one-way ANOVA analysis was conducted to determine if the score of public accountability of regulatory agencies was different for groups with different intensity of judicial accountability. Distribution of cases: *Marginal* (n=52), *Intensive* (n=23) and *Extreme* (n=25). There is a statistically significant difference between groups as determined by one-way ANOVA ( $[F 2,100] = 1.83, p = .05$ ). A Tukey post-hoc test revealed that public accountability was significantly higher in the *Intensive* group compared to the *Marginal* group ( $0.33 \pm 0.13$  units,  $p = .044$ ). However, there were no significant differences between the *Intensive* and *Extreme* groups ( $-.23 \pm .16$  units,  $p = .326$ ), or the *Extreme* and *Marginal* groups ( $.11 \pm .13$  units,  $p = .707$ ).

\*Source: own estimations with information from the public accountability score (Jordana et.al 2018).

**Finding 10:** evidence reveals that regulatory agencies that face an *intensive* (intermediate) judicial accountability are more likely to observe higher levels of *public accountability*, compared to agencies with restrained (*marginal*) or *extreme* intensity of review. However, there is no significant statistical evidence to suggest that the *intensive review* group has higher levels of public accountability than *extreme review* group.

To investigate the previous findings with more detail, table 4 introduces a cross tabulation of public accountability scores (simple means) between categories of *judicial intensity* and categories from the variables analyzed in the previous section. Interestingly, the empirical finding presented before (Finding 10) holds almost every category within each of the variables introduced for the comparative analysis, as shown in the output from table 4.

**Table 4. Public Accountability Scores (simple means) and Intensity of Judicial Review categories (share of cases).**  
*Cross tabulations with variables of interest*

Variables and categories	A. Public Accountability Scores				B. Intensity of review			
	(simple means)			Total (means)	% of agencies			Total (100%)
	Marginal	Intensive	Extreme		Marginal	Intensive	Extreme	
<b>Policy jurisdiction</b>								
<i>Electricity &amp; Gas</i>	-0.02	0.32	0.22	0.11	54%	21%	25%	48
<i>Telecomm</i>	0.32	0.55	0.23	0.3	47%	24%	29%	45
<i>Overlapped jurisdiction</i>	0.4	<b>0.61</b>	-	0.46	71%	<b>29%</b>	-	7
<b>Institutional typology</b>								
<i>Ideal</i>	0.45	<b>0.76</b>	0.61	0.57	54%	<b>28%</b>	18%	50
<i>Constrained</i>	0.09	0.28	0.22	0.17	44%	19%	37%	32
<i>Mimetic</i>	-0.67	-0.6	-0.63	-0.65	61%	17%	22%	18
<b>OECD membership</b>								
<i>Member</i>	0.61	<b>0.65</b>	0.41	0.55	19%	<b>47%</b>	34%	38
<i>Non member</i>	0.3	-0.1	0.02	0.02	73%	8%	19%	62
<b>Region</b>								
<i>Europe</i>	0.51	<b>0.64</b>	0.42	0.53	14%	<b>46%</b>	40%	35
<i>Africa</i>	-0.2	-0.48	-0.35	-0.27	63%	12%	25%	24
<i>America</i>	0.41	0.43	-	0.41	83%	17%	-	23
<i>Asia-Pacific</i>	-0.09	-	0.37	0.04	72%	-	28%	18
<b>Legal tradition</b>								
<i>Civil Law</i>	0.16	<b>0.46</b>	0.35	0.29	51%	<b>31%</b>	18%	67
<i>Common Law</i>	0.05	0.38	0.11	0.09	55%	6%	39%	33
<b>Legal system</b>								
<i>European Culture</i>	0.57	<b>0.72</b>	0.4	0.56	26%	<b>37%</b>	37%	40
<i>Mixed System</i>	-0.05	0.38	-0.04	-0.01	54%	8%	38%	26
<i>Weak Law in Transition</i>	0.25	0.14	-	0.23	88%	12%	-	25
<i>Rule by Law</i>	-0.71	-0.48	-	-0.63	67%	33%	-	9
<b>Type of court</b>								
<i>Ordinary judicial court</i>	0.11	0.45	0.16	0.2	67%	25%	8%	71
<i>Court-like administrative</i>	0.18	<b>0.49</b>	0.12	0.32	45%	<b>45%</b>	10%	11
<i>Specialized tribunals</i>	-	-	0.25	0.25	-	-	100%	18
Total (means)	0.12	0.46	0.23	0.22				

Source: own estimations with information from Jordana et. al (2018) (La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1998; La Porta, Lopez-De-Silanes, Shleifer, & Vishny, 1997), (Siems, 2016), (OECD, 2020)and (World Bank, 2020).

Table 4 shows that categories with the higher share of cases with intermediate (*intensive*) judicial accountability are constituted by regulatory agencies with the highest mean scores of public accountability. For example, the legal system with the greater share of cases falling into *intensive* judicial controls is the *European culture system* with 37% of its cases, which is also the group with the highest public accountability scores within legal systems and between categories of judicial accountability (a simple mean of 0.61).

In sum, these findings have shown that regulatory agencies adapted with higher provisions of *public accountability* tend to operate under scenarios where courts of appeal can exercise an

intermediate degree of scrutiny of regulatory decisions. This means that judges can fully review the merits, facts, motivation and substance of policy choices, but are not entitled to substitute their own decisions for that of the regulatory authority (i.e. courts are not *de facto* second regulators, but neither act as judges merely restrained to a basic assessment of the procedural validity of enforcement decisions).

## **2.6 Discussion: the ‘mediated legitimacy’ role of judicial accountability**

The empirical assessment of judicial accountability conducted in this research demonstrated that there is not one dominant model of judicial controls to supervise the administrative acts of independent regulatory agencies under study. Besides, the evidence revealed that regulatory agencies adapted with higher provisions of *public accountability* tend to operate under scenarios where courts of appeal are not merely restrained to a basic assessment of the procedural validity of enforcement decisions. Judges under this scenario can fully review the merits, facts, motivation and substance of policy choices; however, courts of appeal are not allowed to exercise their powers as *de facto* second regulators. How can we explain the empirical findings presented above and what is the relevance of these findings for the study of the accountability of regulatory agencies? In this last section, I discuss the implications of these research guided by the theoretical conception of *judicial accountability* as a mechanism of *mediated legitimacy* (Bell, 2019; Lindseth, 2019), necessary for regulatory agencies to fulfil their tasks under a legitimate framework of action.

### *2.6.1 Understanding the role of judicial accountability*

*Mediated legitimacy*, refers to the legitimization of administrative agencies’ policy choices through accountability mechanisms that connect these with the *trias politica* of the democratic state (Bell, 2019; Lindseth 2019). According to this theoretical approach, judicial review should be understood not as an isolated mean of democratic control, but *braided* with a diversity of formal provisions and informal strategies established in a political system to hold agencies accountable. Under this theoretical framework, the *intensity of judicial* accountability observed for the agencies under study can be conceived as a function of the overall *public accountability paradigm* that reflects the type of oversight interactions between agencies and statutory accountability forums. In this sense, it is possible to argue that lower values of the *public accountability* score will reflect a paradigm that depicts a hierarchical authority model of accountability where agencies must demonstrate that they did as mandated by their political principal, –labeled by Bell as the *principal agent paradigm*<sup>16</sup>. Meanwhile, higher values of the *public accountability* score suggest an *accountability paradigm* where an agency not only has

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<sup>16</sup> Not to confuse with the political science *principal-agent* theoretical analytical approach introduced in section 2.2

the task to report to political principals, but must also enable downwards and non-hierarchical accountability mechanisms to dialogue and receive feedback directly from beneficiaries and regulated actors for whom the task has been entrusted –labeled by Bell as the *trust paradigm*.

If we now assess *judicial accountability* of regulatory agencies according to the empirical findings and the framework introduced above, we can argue that regulatory governance systems with a *principal-agent accountability paradigm* demand a low degree of *mediated legitimacy* from judicial controls. The high provisions of hierarchical control from the executive or legislative powers under this paradigm suggest a low need for legitimacy of regulatory decisions mediated by courts of appeal. This explains the *marginal intensity* of *judicial accountability* observed for agencies with low scores of *public accountability* (recall figure 2).

Alternatively, regulatory governance systems operating under the *trust paradigm* of accountability demand a higher degree of *mediated legitimacy* from judicial controls than the *principal agent* accountability paradigm. A less hierarchical structure of accountability provisions from executive and legislative branches moves away agencies policy choices from the *legitimacy* provided by the executive and legislative, which demands a higher degree of *mediated legitimacy* from the judicial power. However, according to the empirical evidence of this research, the higher *mediated legitimacy* needed in this paradigm is not associated to an *extreme intensity of review*, but to an intermediate (*intense*) judicial control of regulatory decisions. The *intermediate role* of judicial accountability observed for agencies with high scores of public accountability (figure 2) can be explained as follows: on the one hand, the distant *mediated legitimacy* link from executive and legislative branches pushes for more judicial *mediation*. On the other hand, downwards and non-hierarchical accountability mechanisms developed under this paradigm will hold back the necessity for higher degree of judicial intensity.

Finally, how can we understand those cases in figure 2 that fall into an *extreme intensity of review*. For this group of cases, the values of the *public accountability* score range between the values observed for the *marginal review* and the *intense* categories of judicial intensity. According to Jordana et al (2018), the values of the scores in this segment of the accountability scale, reflect provisions clearly distanced from the hierarchical structures from executive and legislative branches (similar to the *trust paradigm*); however, there are no downwards *non-hierarchical* accountability provisions in this group as those observed for the trust paradigm. Theoretically, these intermediate score values reflect the type of oversight interactions between agencies and statutory accountability forums labeled by Bell (2019) as the *elector-representative paradigm*. Under this paradigm, agents must demonstrate that their policy choices are made in the ‘best interest of society’, and not only limited to the will of the political principal or elector that mediates the legitimacy of an agency. The empirical association between this paradigm and the *extreme intensity of review* observed from the data for this group can be understood as follows:

the need for strong judicial controls is motivated by the distant *mediated legitimacy* provided by the executive and legislative, as well as the lack of downward legitimacy mechanisms to act on behalf of the ‘best interest of society’. What would be the “best interest of society” for an independent regulatory agency? *Extreme* judicial controls may compensate the broad discretion of regulators to decide policies under such paradigm to guarantee the legitimacy of agencies’ decisions according to their statutory mandate.

### 2.6.2 Contribution to the literature

Altogether, the arguments made in this section discussed that the variations in the *intensity of judicial accountability* observed across the regulatory agencies under study can be understood as a result of the *mediating role* that judicial controls play to guarantee the legitimacy of regulatory decisions. A first important contribution of this research relates to addressing an existing gap in the literature of the accountability of regulatory agencies. Although *democratic accountability* of the regulatory state has been considered by the literature of regulatory governance as an ideal supervisory mechanism (Bignami & Zaring, 2016; Gailmard & Patty, 2017; Damien Geradin & Petit, 2010; McCubbins & Schwartz, 1984; Rose-Ackerman, 2008; Turner, 2017), very little is known about the existing typologies of judicial mechanisms to supervise regulatory agencies in different jurisdictions and policy sectors. This research paper addresses this research gap by empirically demonstrating not only with evidence that clarifies the role of judicial controls on the governance of regulatory agencies, but introducing theoretical and analytical approaches from political science and public law disciplines for the study of the governance of regulatory agencies. Furthermore, it sheds practical guidance to understand how is it that judicial controls contribute to overcome the democratic accountability dilemmas that raise with the expansion and diffusion of the regulatory state posed by political science and public administration scholarship (Gailmard, 2014b; Jordana et al., 2015; Maggetti, 2010; Majone, 1999), introducing the *mediated legitimacy* approach of judicial controls from administrative law scholarship (Bell, 2019; Bignami & Zaring, 2016; Lindseth, 2019; Rodriguez, 2008). Finally, the larger number of cases under study, and the multiple jurisdictions examined allowed to provide with a more detailed understanding of the relationship between judicial controls and the governance of regulatory agencies, considering that the claims and arguments introduced here follow a statistical examination of the concepts analyzed in this thesis, setting a precedent for the study of potential causal mechanisms and greater generalizations of the role that judicial review of administrative decisions plays in the regulatory policy process.

## 2.7 Conclusion

The purpose of this study was to assess the *judicial accountability* of a sample of 100 regulatory agencies from the electricity, gas and telecommunications sectors in different countries around the globe. The main goals of research were (a) to enquire about existing variations of the intensity

of judicial controls available for courts of appeal to control the discretion of agencies, and (b) to provide an explanation of how these variations relate with the *public accountability* setting that governs regulatory agencies.

Overall, the analysis undertaken here has extended our knowledge of the diverse avenues of democratic accountability of the regulatory state, and the empirical findings in this research have important implications for the study of accountability and regulatory governance. First, it confirms that just as every other mechanism of democratic accountability identified by the literature, the type of judicial review of regulatory decisions is also subject to variations across different agencies and countries. Second, the source of these variations goes beyond the differences of the legal tradition or court system of a country, and can be explained as a function of the specific needs of a political system to guarantee the legitimacy of regulatory decisions. Third, the intensity of judicial controls needed by a political system is ‘braided’ and dependent on the logic behind the legitimacy mechanisms enabled to supervise regulatory agencies (paradigms of accountability). Finally, accountability settings (paradigms) that promote answerability and feedback provisions closer to individuals directly affected by regulatory policies are more likely to observe a moderated intensity of judicial accountability.

Whilst this study did not confirm causality of the variations of judicial accountability, it did partially suggest some statistical trends that allow to infer the relationship existing between judicial accountability and public accountability from a considerable larger sample of agencies as the one introduced here. Besides, notwithstanding this study only addresses one of the several type of regulatory decisions that can be challenged in courts of appeal, it provides with an unprecedented analysis and compilations of frameworks from political science and comparative law scholarship to clarify the role of judicial controls in the governance of regulatory agencies. Further studies need to be carried out in order to validate the empirical claims offered here. This would require studies with larger scope, including agencies from other policy jurisdictions, as well as greater depth through case by case studies of judicial resolutions, not only from first instance court of appeal, but also from higher tribunals that may have a final say about the legality of regulatory policy choices.

## Chapter III: Judicial review of regulatory decisions: decoding the contents of appeals against agencies in Spain and the United Kingdom

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### 3.1 Introduction

The proliferation of government agencies with regulatory tasks across countries and different policy sectors has led scholars to enquire about the roles that institutional settings and administrative traditions play in the governance of regulatory authorities (Gilardi et al., 2006; Jordana et al., 2018, 2011; Levi-Faur, 2005). Additionally, a significant strand of the literature on regulatory governance deals with the study of the control mechanisms available for political principals to overcome the “democratic and accountability deficit” that results from the delegation of important regulatory powers of elected politicians to independent regulatory bureaucrats (Bovens, 2007; Christensen & Lægreid, 2004; Gailmard, 2014b; D Geradin & Petit, 2012; Koop, 2015; Maggetti, 2010; Majone, 2001; McCubbins et al., 1987; Mulgan, 2014). Within the strategies available for political principals to prevent agencies from policy drift, judicial review of administrative decisions is considered an ideal mechanism to create an ongoing check on agency discretion (Magill, 2014; Rose-Ackerman, 2008). In most of the contemporary regulatory regimes courts are legally authorized to assess the legality of agencies’ decisions when an affected party claims that an action or decision of an agency is presumably unlawful.

The political role of judicial controls in the process of policy making has become central for the empirical research in the field of law and politics (Stone Sweet, 2000; Whittington et al., 2008), which studies “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies” (Hirschl, 2008, p. 119). Furthermore, under a principal-agent framework, political science literature highlights the relevance of judicial procedures to overcome the information asymmetries existing between political principals and independent regulators (Gailmard & Patty, 2017; Shipan, 1997; Sunstein, 2017; Turner, 2017).

Despite the relevance of judicial review as a supervision mechanism to control agency discretion pointed out by political science and public management scholars (Jordana et al., 2015; Koop, 2015; Maggetti, 2010; Magill, 2014; Rose-Ackerman, 2008), and regardless of the proliferation and diffusion of regulatory agencies across European countries since the 1990s (Gilardi et al., 2006; Jordana et al., 2011; Levi-Faur, 2005; Majone, 2001), only few studies have performed empirical analysis of the contents of judicial appeals against regulatory decisions in European countries, and have mostly relied on scholarship from public law and comparative administrative law (Bajakić & Kos, 2016; Betancor Rodríguez, 2010; Cooper & Kovacic, 2012; Larouche & Taton, 2011; Lavrijssen & de Visser, 2006; Psygkas, 2017; Solanes Mullor, 2016). This lack of empirical research contrasts with the extensive amount of literature generated on the study of

judicial appeals against regulatory decisions in the United States courts system (Hall & Wright, 2008; Pierce & Weiss, 2011).

To contribute with the empirical study of judicial review of regulatory decisions, this paper performs a content analysis<sup>17</sup> of 2,040 judicial appeal rulings against decisions issued by eight regulators in the telecomm and competition jurisdictions in Spain and the United Kingdom between 2000 and 2016. The research goal is to process, analyze and interpret the information contained in legal disputes against regulators according to two main theoretical approaches: the *substantive principles of administrative decisions* (Bignami, 2012, 2016b) as a framework to examine the alleged violations to the lawfulness and legitimacy of regulatory decisions, and the *regulatory capacities* approach (Jordana et al., 2018; Lodge & Wegrich, 2014), to verify what are the substantive regulatory capacities under challenge. Both theoretical approaches consider the substantive features of agencies' administrative decisions to intervene in a specific policy area, which allows comparing cases across countries and policy sectors despite differences in the administrative traditions and judicial systems.

A country-sector analysis of the cases is conducted to verify if the differences between the Spanish and British legal systems and regulatory frameworks lead to dissimilar information contained in judicial appeals. The analysis is guided by two approaches that explain judicial controls of government's actions. On the one hand, it is guided by the comparative administrative law approach, which studies the legal doctrines that rule a judiciary system in order to distinguish institutions of administrative justice under the common law tradition from those rooted in the *French droit administratif* tradition (Baum, 2011; Betancor Rodríguez, 1994, 2010a; Bignami, 2012, 2016b; Cane, 2011; Ginsburg & Wright, 2012; Solanes Mullor, 2016). On the other hand, the comparative analysis is also guided by an institutional approach, which highlights how the given design of a court's system (e.g. the degree of specialization of a court or the scope of review applied by judges) determines the expected outcomes from judicial appeals (Canes-Wrone, 2003; Gailmard & Patty, 2017; Psygkas, 2017; Tapia & Cordero, 2015; Turner, 2017; Dyevre, 2010). Under these two approaches, findings in this paper suggest that judicial disputes against selected agencies in Spain allow a greater degree of deference to regulatory decisions concerning the technical discretion granted to regulators, and the scope of review of the courts is limited to

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<sup>17</sup> I would like to clarify that I use the concept of "content analysis" due to the research method I conducted to collect the information and perform valid classifications of the texts (explained in section 3.3). The method I use is a "deductive latent content analysis of texts" (Hayes & Krippendorff, 2007; Krippendorff, 2004), and this method derives a theoretical classification that leads to valid inferences about the content of texts. In order to follow the procedures of the method, I performed thorough investigation into the content matter of the texts, so that I could understand the substance of every appeal claim, conduct a validated classification and define comparable categories between countries. However, I am not analyzing the theses and doctrines of review of the judges, neither the behavioral attitudes of the judges. I am analyzing the outcomes to empirically understand what the rulings are about according to the theoretical classifications I propose.



analyze procedural aspects of an agency's decision. Meanwhile, judicial appeals against the sample of regulatory decisions in the United Kingdom are focused in reviewing the technical discretion granted to regulators.

As a roadmap for the reader, the next section presents a brief literature review and elaborates on the theoretical arguments used to construct the analytical framework for this paper, which is the base for the codebook and operationalization of variables used for the content analysis of the judgments. Section three describes the methodology followed to code and classify the appeal cases, as well as the criteria to select the observations under study. A country-case analysis and a discussion are provided in section four, and concluding remarks are presented in section five. Supporting evidence is available in the appendix.

### **3.2 Literature review and analytical framework**

Under the lenses of the principal-agent theoretical framework, judicial review is considered as one of the predominant ex-post control mechanisms to overcome the “democratic and accountability deficit” that results from the delegation of regulatory powers from elected politicians to independent bureaucrats (Ferejohn & Shipan, 1990; Gailmard, 2014b, 2014a; Gailmard & Patty, 2017; D Geradin & Petit, 2012; Koop, 2015; Magill, 2014; Mulgan, 2014). Moreover, the rise and diffusion of regulatory capitalism, which has at its core the milestones of independence and delegation of relevant governance functions to regulatory agencies (Gilardi et al., 2006; Jordana et al., 2011; Levi-Faur, 2005), has led administrative law scholars to enquire about how to reconcile two major aims of judicial controls: “the successful exercise of regulatory power granted to the bureaucracy and the tethering of administrative agencies to the rule of law” (Rodriguez, 2008, p. 341).

Furthermore, despite the potential bias of judges and courts theorized by the literature of judicial politics (Brouard & Hönnige, 2017; Canes-Wrone, 2003; Dyevre, 2010; Hönnige, 2011; Shapiro & Stone Sweet, 2002; Stone Sweet, 2000), which states that courts and judges might have an individual preference or institutional constraint to rule according to a preferred legal doctrine or a political inclination<sup>18</sup>, political scientists stress the importance of judicial review as a mechanism to ensure accountability of agencies' actions to bolster “good governance” (D Geradin & Petit, 2012), as well as an ideal ongoing check on agency discretion because courts

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<sup>18</sup> Dyevre (2010) identifies three models of judicial decision-making represented in the literature of American and European courts. On the one hand, (i) the attitudinal model, which refers to judges' brute individual policy preferences. On the other hand, two types institutional models are identified, which consider judges as “policy seekers” constrained by their institutional environment: (ii) the institutional internalist model which portrays judicial decision-making as a collegial game, and (iii) the institutional externalist model which emphasizes that judicial decision-making process is a function of the interactions between the court and its political environment.

are “presumed to provide a neutral forum to challenge the regulatory process” (Rose-Ackerman, 2008, p.577).

The relevance of the principal-agent framework to understand the role of judicial review through the policy making process is that judicial procedures help to overcome the information asymmetries existing between political principals and independent regulators (Gailmard & Patty, 2017; Shipan, 1997; Sunstein, 2017; Turner, 2017). The new information available as a result of the litigation process against the agency represents a unique source of evidence that can be used to assess the legality of a regulator’s performance. Shapira (2016) introduces this idea in his examinations of the reputation-shaping aspects of the law and litigation in courts, arguing that information generated in courts disputes affects the way external audiences evaluate the reputation of the parties involved in a legal dispute. According to the author, “law affects our behavior not only directly by imposing legal sanctions, but also indirectly, by providing information that shapes the reputations of individuals and organizations” (p.1193). Although the argument of Shapira refers to legal disputes between private entities in courts, it is possible to extrapolate this claim to the scenario where one of the actors implicated in the litigation is a public entity such as a regulatory agency under judicial review (Shapira, 2018). The contribution of Shapira allows a better understanding of judicial courts as a forum where regulatory agencies are exposed to reputational consequences of their actions. This idea is central to understand what makes this type of information relevant enough for political principals to assess agencies’ performance<sup>19</sup>.

As mentioned previously above, the existing body of research on judicial politics and agency behavior suggests that judicial procedures help to overcome the information asymmetries existing between political principals and independent regulators, and shows that the availability of judicial review affects how agencies make policy choices. Nevertheless, despite the explanatory and predictive advantages of the principal-agent approach for the study of judicial review as a formal accountability mechanism, it is still necessary to understand what exactly the information contained in judicial texts is about and how this information can be considered as a

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<sup>19</sup>Carpenter (2010) defines an organization's legal-procedural reputation as the ‘justness of the processes by which its behavior is generated’. The concept is related to the validity, fairness and legality of an agency’s actions, in line with the statutory responsibilities granted by the political principals. According to Carpenter, a central prediction of a reputation-based account of regulation argues that an agency’s decision will have an irreversibility cost attached to it, meaning that once the decision is taken it will be difficult for the regulator to go back on the decision without serious consequences for the agency's reputation, a situation that “can call the attention of different audiences to the agency's error” (p.68). This theoretical implication supports the argument that an unfavorable outcome from the courtroom might have a reputational implication on the organizational uniqueness of an agency, as administrative courts of appeal would emerge as alternative institutional forum to decide on regulatory tasks which corresponded uniquely to regulatory agencies. As a consequence the regulatory policymaking discretion power granted by political principals would be undermined, pushing regulation into the arena of judicial politics.

source of information that political principals use to overcome the information asymmetries. To address this concern, this paper introduces two theoretical concepts as informational heuristics to examine the information generated in judicial review, namely: the alleged *principles of administrative decisions* under breach and the substantive *regulatory capabilities* under challenge.

The introduction of these two approaches is relevant for the analysis conducted in this paper for two reasons: on the one hand, it makes the categories comparable across countries and policy sectors (Baldwin, Cave, & Lodge, 2011; Lodge & Wegrich, 2012), and on the other hand, categories respond to a “substantive rather than procedural” (Jordana et al. 2018) conception of agencies’ attributions granted to intervene in a specific policy area, which facilitates the comparisons between different administrative traditions and judicial systems.

### 3.2.1 *Principles of administrative decisions*

From the administrative law tradition, the right to contest administrative decisions in court proceedings is critical for the legitimacy of bureaucracies, and this premise represents a common characteristic of judicial review mechanisms in both civil law and common law systems (Bell, 2001; Bignami, 2012; Gordillo, 2013). According to Bignami, in both legal traditions (as well as within variations of each judicial tradition) the grounds of appeal or allegations of unlawful behavior that plaintiffs bring to courts for judicial review can be theoretically distinguished considering three types of violations to substantive principles of administrative decisions: violations to the principle of *rule of law*; to the principle of *individual rights*, and to principle of *policy rationality*. The arguments and classification of Bignami can be summarized as follows:

- i. Rule of law:* the task of judges is to enforce the limits of public administration and verify that bureaucracies respect the statutory attributions granted by legal acts, constitutions or executive decrees. In this sense a violation to the principle of rule of law is associated with a failure to comply with the purposes and limits set down in laws passed by political principals. Arguments of a breach against this principle in the text of judicial appeals usually indicate aspects like jurisdictional incompetence, purpose of the decision forbidden by law, violation of the law, error of law, inconsistency with applicable statutes, in excess of statutory jurisdiction, illegality, among other claims.
- ii. Fundamental rights:* this principle deals with the protection of basic liberties against government actions, and is related to acts or decisions issued by public administrators which violate fundamental rights established by constitutions. An example of this type of allegations has to be with the lack of proportionality and equality of an administrative act, unfairness and abuse of power, attempts against the freedom of expression and association, the right to privacy and human dignity, personal liberties and the right to engage in trades.

*iii. Policy rationality:* when the existing set of rules about the discretion and limits of public administration leaves decision making to bureaucratic discretion, the courts assess the legality of an administrative action based on criteria related to sound policymaking. As Bignami highlights, “rationality review picks up where legality review leaves off” (p. 14). Hence, violations to the principle of policy rationality occur when the allegations of an unlawful decision are attributed to the quality of agency reasoning or to the application of its bureaucratic discretion, usually associated with an arbitrary or capricious behavior or evidences of a manifest error of assessment.

### *3.2.2 Regulatory responsibilities under challenge*

Regulatory capacities relate to the tasks of control and oversight from the state, and relates to “debates about the way in which units tasked with ‘regulation’ are established” (Lodge & Wegrich, 2014 p.38). Furthermore, administrative capacities involve not only the structural organization and regulatory strategies followed by the state, but also relate to resources, expertise, performance and regulatory outcomes. The concept refers to “organization and strategies that enable the control of particular activities” (p.40). This approach allows labeling the regulatory decisions under appeal using the classification of regulatory responsibilities proposed by Jordana et al. (2018), defined as “the main capabilities required to make agency tasks effective, based on their legal characteristics” (p. 526), such as the responsibilities of agencies to *enforce sanctions*; perform *supervision activities*; *conflict resolution*, elaborating *rules and norms*, establishing *prices* and determine *market entries/exits* among other activities<sup>20</sup>.

## **3.3 Methodology and data**

### *3.3.1 Case selection*

This paper performs a content analysis of 2,040 judicial appeal cases that challenge administrative decisions issued by the telecom and competition regulators in Spain and the United Kingdom between 2000 and 2016 (Table 1). The sample of cases represents the total number of appeal cases that count with a final ruling, which were filed at the correspondent national court available to hear first instance appeals<sup>21</sup> against regulatory decisions: the

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<sup>20</sup> The categories from Jordana et.al (2018) used in this paper are six: enforce sanctions; perform supervision activities; conflict resolution, elaborating rules and norms, establishing prices and determine market entries/exits.

<sup>21</sup> For the purpose of this research, I use the term “appeals” as a generic term to refer to the sample of cases analyzed for both countries. For the case of Spanish cases, it refers to administrative appeals (*juicios contencioso-administrativos*) held at the administrative appeal chamber of the Spanish National High Court (*Audiencia Nacional*). However, for the sample of cases from the United Kingdom, an important distinction should be clarified to the reader, concerning the differences between the concepts of “judicial review” and “appeals”, as both types of procedures are conducted by the United Kingdom courts under study. According to Cane (2011) the United Kingdom legal system distinguishes the court’s ‘supervisory jurisdiction’ powers of judicial review (review proceedings) from ‘appellate

Administrative Chamber of the National High Court for the Spanish case, and the two courts available to hear appeals against regulatory decisions in the United Kingdom: the Competition Appeal Tribunal (CAT) and the England and Wales High Court (EWHC). Information was collected from the online databases from the Spanish National High Court (Poder Judicial de Espana, 2017), the CAT (Competition Appeal Tribunal, 2017), and the British and Irish Legal Information Institute (2017) for the EWHC appeal cases. The procedure followed to collect the information is explained in section 3.3 of this paper.

It is pertinent to make clear that the appeal judgements analyzed for this study are associated with challenges against resolutions or final decisions processed by the higher decision making body of each agency (e.g. the board of commissioners; the director or the president of a regulatory agency, etc.), excluding adjudications and other procedural actions of regulators, as these are not final binding decisions. This means that for both countries, the only effective mean available for plaintiffs to challenge these type of decisions is through judicial litigation in courts.

The criteria followed to select the countries under study responds to the logic of a *most-different* case selection (Seawright & Gerring, 2008) in order to perform a country-sector analysis that allows controlling for the differences between the judicial systems of each country - Common Law and Civil Law systems (Bignami, 2012)<sup>22</sup>. For the Spanish competition jurisdiction, the sample of observations analyzed represents the total number of rulings against decisions issued by three Spanish competition authorities. For a better reference, it is important to know that Spanish competition regulators are embodied by different agencies across the period of analysis: the Tribunal for the Competition Defense (TDC), which was eventually replaced by the National Commission on Competition (CNC) as a consequence of the economic reforms introduced in Spain in 2007<sup>23</sup>, whose regulatory functions were finally transferred to the Competition

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jurisdiction' powers (appeal proceedings). The main difference between these two legal proceedings is that appeal proceedings relate to the power of a court, where judges may substitute their decision "on the matters in issue for that of the body appealed from" (p. 29). Meanwhile "in review proceedings, the court's basic power is to 'quash' the challenged decision, that is, to hold it invalid" (p.30). A second distinction between appeal and review proceedings, relates to the subject matter of the court's jurisdiction. A court exercising an appeal proceeding has power "to decide whether the decision of appeal was 'right' or 'wrong', while a court exercising a review proceeding only has power to decide whether or not the decision under review was legal or 'lawful' (if the decision is illegal, it can be quashed, otherwise the court cannot intervene)" (pp.30-31) .

<sup>22</sup> For the purposes of this research I understand these differences as a result of two situations: whether a court of appeal is specialized or generalist, and the scope of the review that judges might apply to assess a judicial appeal (Tapia & Cordero, 2015).

<sup>23</sup> The reform to the Spanish competition authorities was introduced by the Defense of Competition Law 15/2007 (Ley 15/2007 de 3 de julio, de Defensa de la Competencia), aiming to strengthen the institutional mechanisms to enforce the law; to take into account the new European Union regulatory system, as well as to redefine the supervision role of the Spanish Autonomous Communities. The reform enabled important changes to strengthen the capacities of the CNC to execute three types of regulatory instruments: the applicable regulation to oversee and enforce penalties for restrictive competition practices; principles and rules of the regulation to control mergers, and the competences

Directorate (CD) of the National Commission on Markets and Competition (CNMC) in 2013 as a result of a second round of economic reforms<sup>24</sup>. Likewise, the sample of judicial appeals against regulators of the Spanish telecommunications sector under the period of study comprises legal disputes against the Commission on the Telecommunications Market (CMT) as well as the Telecommunications Directorate (TD) of the CNMC, which replaced the former regulator as result of the same package of economic reforms that affected the Spanish competition regulator in 2013<sup>25</sup>.

For the case of the United Kingdom, the sample of appeal judgements against competition authorities under the period of study is composed of the rulings against decisions issued by three regulatory agencies with powers to enforce competition law: the Office of Fair Trade (OFT) and the Competition Commission (CC), which eventually were replaced by the Competition & Markets Authority (CMA) as a result of the Enterprise and Regulatory Reform Act<sup>26</sup> in 2013.

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of the CNC to issue competition reports and addressing recommendations to the public authorities. Furthermore, according to the Law 15/2007 main objectives, the creation of the CNC is motivated by five principles: guarantee of the legal certainty of economic operators, independence of decision-making, transparency and responsibility to society of the administrative bodies responsible for the application of the Act, efficacy in the fight against conduct restrictive of competition and the search for consistency of the whole system and, in particular, for the adequate interdependence of the various institutional planes that interact in this field.

<sup>24</sup> The introduction of the Law 3/2013 established the creation of the National Commission of Markets and Competition (CNMC), entitled to group the regulatory functions of the Spanish Competition Commission and seven sector regulatory agencies: the National Energy Commission, the Telecommunications Market Commission, the Railway Regulation Committee, the National Commission of the Postal Sector, the Airport Economic Regulation Commission and the State Council of Audiovisual Media. The new authority merged the activities of the agencies into a hybrid system of regulatory functions: enforcing competition rules and regulating economic sectors. A Council of ten members operates as a decision making body, divided into two main chambers: the Competition Chamber entitled to enforce competition law, and the Regulatory Chamber responsible for the supervision and regulation of economic sectors. It is important to highlight that the regulatory functions and regulatory tasks concerning competition law supervision and enforcement of CNMC remain the same as those established in the Law 15/2007, which previously ruled the action of the former competition regulator in Spain (the CNC).

<sup>25</sup> With the creation of the CNMC, the supervision and regulatory functions previously executed by the CMT were inherited by the new agency. However a reorganization of tasks conducted previously by the CMT resulted in the reassignment of three administrative activities formerly executed by the CMT to the Spanish Ministry of Industry, Trade and Tourism: registration of telecommunication network operators; telecommunication networks naming, addressing and numbering policies, and management and collection of telecommunications fees (Ortiz, 2014).

<sup>26</sup> Among other policy objectives, according to the introductory paragraph of the legislation, the Enterprise and Regulatory Reform Act aimed to “establish and make provision about the Competition and Markets Authority and to abolish the Competition Commission and the Office of Fair Trading; to amend the Competition Act 1998 and the Enterprise Act 2002 [and] to make provision for the reduction of legislative burdens”. Furthermore, the relevant government’s goals that motivated merging the regulatory functions of the CC and the OFT into the CMA are the following: deliver effective enforcement of competition rules; extend competition frontiers; refocus consumer protection; develop integrated performance, and achieve professional excellence. An important enhanced task granted to the CMA is related to the concurrent powers of decision with existing sector regulators. The CMA will cooperate with the sector regulators, encouraging the regulators to be more proactive in their use of

Finally, judicial appeal cases against the United Kingdom telecommunications regulators are representative of appeals against the authority in charge to supervise the telecommunications markets, the Office of Communications (Ofcom). However, it is important to highlight that the study sample of Ofcom's appeal cases considers a short period of the legacy from the former telecommunications regulator, the Office of Telecommunications (OfTel)<sup>27</sup>, which was substituted by Ofcom in 2003. Evidence for very few appeal cases against OfTel in the period between 2000 and 2003 was found<sup>28</sup>, and these cases were solved and addressed after 2003, when Ofcom was fully operative. For the purpose of this study and for simplicity of the analysis, the few appeal cases against OfTel will be considered as part of the appeals against Ofcom.

*Table 1. Regulatory agencies under study*

<i>Sector</i>	<i>Country</i>	<i>Agency</i>	<i>Period of analysis</i>
<b>Competition</b>	Spain	Tribunal for the Competition Defense (TDC)	2000-2007
	Spain	National Commission on Competition (CNC)	2007-2013
	Spain	National Commission on Markets and Competition (CNMC-CD)	2013-2016
	United Kingdom	Office of Fair Trade (OFT)	2000-2013
	United Kingdom	The Competition Commission (CC)	2000-2013
	United Kingdom	Competition & Markets Authority (CMA)	2013-2016
<b>Telecomm</b>	Spain	Commission on the Telecommunications Market (CMT)	2000-2013
	Spain	National Commission on Markets and Competition (CNMC-TD)	2013-2016
	United Kingdom	Office of Communications (Ofcom-OfTel*)	2000-2016

(\*) Considers few cases for a short period of years (2000-2003) legacy from the former telecommunications regulator: the Office of Telecommunications (OfTel)

the concurrent competition powers. As part of its enhanced leadership role, the CMA will have the power to decide which body should lead on a case (Competition and Markets Authority, 2013)

<sup>27</sup> The telecommunications Act 1984 established the Office of Telecommunications (OfTel) as the regulator of the telecommunications industry in the United Kingdom. OfTel was abolished by the 2003 Communications Act, and its functions were transferred to the Office of Communications (Ofcom). Furthermore, appeals against the telecommunications regulator in the UK before 1 April 2003 were deemed to be made either to the England and Wales High Court or at the Competition Commission Appeal Tribunal (the predecessor of the Competition Appeal Tribunal).

<sup>28</sup> To consider the three years legacy of OfTel in my sample, I searched for existing appeal judgements (final rulings) against OfTel decisions from the England and Wales High Court or the Competition Commission Appeal Tribunal for the period between 2000 and April 2003. No public information indicates additional evidence of cases to consider in the sample under analysis. However, two cases from the sample under analysis refer to appeals against decisions issued by OfTel, which were originally filed at the Competition Commission Appeal Tribunal and eventually judged by the Competition Appeal Tribunal. Besides, during a transitional period between July and December 2003, the Director of OfTel was empowered to carry out telecommunications functions (Transitory Provisions of The Enterprise Act 2002). In this sense, three appeal cases in my sample refer to judgements of appeals against administrative acts issued by the Director of OfTel during the mentioned transition period. These cases can be consulted in the Competition Appeal Tribunal website (<https://www.catribunal.org.uk/cases>), under the file numbers: 1007/2/3/02; 1026/2/3/04; 1025/3/3/04; 1027/2/3/04; 1024/2/3/04.

The period of time under analysis chosen for this research (2000-2016), is adequate to benchmark and consider the introduction of the European Competition Rules in 2003, which empowered Member States' competition authorities and national courts to apply all aspects of the EU competition rules. The same logic applies for the telecommunications authorities, with the implementation in 2002 of the common regulatory framework directive for electronic communications networks and services in the European Union. Furthermore, the competition jurisdiction was selected under the logic of a stable platform for comparison, considering that the source of law for both countries depart from the same European legislative act, laid down in Articles 81, 82, 101 & 102 of the European Treaty. Additionally, the telecommunications sector was chosen under the basis of the similar patterns of implementation followed by both countries to reach the regulatory goals mandated in the *Directive 2002/21/EC* (Bulmer, Dolowitz, Humphreys, & Padgett, 2007)<sup>29</sup>.

Finally, it is important to note a limitation concerning the sample of cases used for this study which are representative only for the cases of appeals filed in courts of first instance. Final judgements from the courts of appeal consulted for this study (i.e. the Spanish National High Court, the United Kingdom CAT and the EWHC) can be further appealed to higher instance tribunals, such as the Supreme Tribunal for the case of Spain, or the Court of Appeal and Supreme Court for the case of the United Kingdom. This distinction is relevant to highlight, since the findings and conclusions obtained from this research only reflect a partial understanding of appeal cases considered for this study.

### 3.3.2 *Sample of observations*

The sample under study comprises 1,846 Spanish cases, and 194 cases for the United Kingdom (Table 2). For both countries, the sample contains a higher number of appeal judgements against regulatory agencies in the competition jurisdiction than the appeals against the telecomm authorities. However, it is important to clarify that these figures only reflect the absolute value of the cases from the cases under study. In this sense, Table 2 also depicts the sample cases as an estimation of the total share of administrative decisions issued by the regulators during the same period (i.e. the set of regulatory decisions that can be appealed in courts). As noted before in section 3.1, cases of administrative decisions are representative of final decisions issued by the agencies, related to the six categories of regulatory tasks presented in section 3.4 of this paper

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<sup>29</sup> Of course, one can argue that the financial services sector is even more similar between both countries, but this sector is not considered as this research aims to understand appeals against public utilities regulators. Besides, sectors like energy, transport and postal services could also fall into the criteria for selecting a sector, but those are less stable comparative platforms for the purpose of this research due to differences in the implementation processes conducted by each country to adapt the regulatory European Directives into their regulatory frameworks (Bartle & Vass, 2007).



(i.e. sanctions, supervision, conflict resolution, norms & rulemaking, price setting, and market entries), which excludes adjudications and other procedural actions of regulators.

Overall, from the sample analysed it is possible to observe a higher rate of appeal judgements against decisions of Spanish regulators (21%), in contrast to the rate observed for the agencies in the United Kingdom (9%). This differentiated trend in the sample is also observed if we only consider the appeal judgements in the competition sector, where the rate of appeal judgements against decisions issued by Spanish competition regulators (21%) is 14% higher than the rate observed for the competition authorities in the United Kingdom (7%). Nevertheless, despite the overall differences in the number of cases observed between countries and the competition sector, the sample of cases shows a marginal difference in the rate of appeal judgements as a percentage of the number of administrative decisions in the telecommunications sector between countries. The rate of appeal judgements observed for the Spanish telecommunications agencies (22%) is only 3% higher than the rate observed for the United Kingdom authorities in the same sector (19%).

Table 2. Distribution of cases by sector, country, agencies and regulatory decisions 2000-2016  
(N=2,040)

Country	Years	Agency	Appeal judgements <sup>†</sup>	%	Administrative decisions <sup>‡</sup>	Appeal judgements rate (%) <sup>§</sup>
<b>Competition Agencies</b>						
Spain	2000-2007	Tribunal for the Competition Defense (TDC)	413	29%	2,893	14%
Spain	2007-2013	National Commission on Competition (CNC)	1,000	69%	2,717	37%
Spain	2013-2016	National Commission on Markets and Competition (CD)	29	2%	1,259	2%
<b>Total Competition Spain</b>			<b>1,442</b>	<b>100%</b>	<b>6,869<sup>1</sup></b>	<b>21%</b>
UK	2000-2013	Office of Fair Trade (OFT)	87	74%	1,309	7%
UK	2000-2013	The Competition Commission (CC)	24	20%	166	14%
UK	2013-2016	Competition & Markets Authority (CMA)	8	6%	245	3%
<b>Total Competition UK</b>			<b>119</b>	<b>100%</b>	<b>1,720<sup>2</sup></b>	<b>7%</b>
<b>Telecommunication Agencies</b>						
Spain	2000-2013	Commission on the Telecommunications Market (CMT)	371	92%	1,447	26%
Spain	2013-2016	National Commission on Markets and Competition (TD)	33	8%	410	8%
<b>Total Telecomm Spain</b>			<b>404</b>	<b>100%</b>	<b>1,857<sup>3</sup></b>	<b>22%</b>
UK	2000-2016	Office of Communications (Ofcom-Ofjel*)	75	100%	405	19%
<b>Total Telecomm UK</b>			<b>75</b>	<b>100%</b>	<b>405<sup>4</sup></b>	<b>19%</b>

Overall cases by country	#	%	Administrative decisions	Appeal judgements rate (%)
<b>Total cases Spain</b>	1,846	90%	8,726	21%
<b>Total cases United Kingdom</b>	194	10%	2,125	9%
<b>Total sample of cases</b>	<b>2,040</b>	<b>100%</b>		

**Notes:**

<sup>†</sup>Source: Own estimation with available information from national courts of appeal online resources. Competition Appeal Tribunal (2017); British and Irish Legal Information Institute (2017); Poder Judicial Espana (2017)

<sup>‡</sup>Source: Own estimation with available information from regulatory agencies' online resources. (Competition and Markets Authority, 2019b, 2019a); (Comisión Nacional de los Mercados y la Competencia, 2019); (Office of Communications, 2019b, 2019a).

<sup>§</sup> Share of appeal judgements as a percentage of the total of administrative decisions.

<sup>1</sup>Administrative acts that can be appealed at the Spanish Courts under the following legal basis: Artículo 139 D.A. Cuarta, punto 3 de la Ley 29/1998 (TDC); Artículo 48. Ley 15/2007 (CNC); Artículo 36 de la Ley 3/2013 (CNMC-CD).

<sup>2</sup>Administrative acts that can be appealed at the United Kingdom Courts under the following legal basis: Section 46 & 47 Competition Act 1998; Section 114, 120 & 179 Enterprise Act 2002.

<sup>3</sup>Administrative acts that can be appealed at the Spanish Courts under the following legal basis: Artículo 48. Ley 15/2007; Artículo 36 de la Ley 3/2013

<sup>4</sup>Administrative acts that can be appealed at the United Kingdom Courts under the following legal basis: Section 46 & 47 Competition Act 1998; Section 179 Enterprise Act 2002; Section 192 & 316 Communication Act 2003.

\*Five appeal cases from this sample consider the legacy from the former telecommunications regulator (Ofjel), which were filed at the correspondent court of appeal between January 2000 and July 2003.

An important limitation of the data collected for this study, concerns the fact that it is not possible to benchmark the appeal judgement cases in this sample as a share of the total number of existing appeal cases against regulatory agencies (which would also include those cases that are still ongoing, with no final decision issued by courts), which would make a more precise reference of the number of cases in this study. Limited availability of additional information that contains the universe of appeal cases against selected agencies made it difficult for the research to compile necessary information for an adequate comparative analysis.

### 3.3.3 Variables

Considering the theoretical explanations introduced in section 2, the variables generated for this study are operationalized according to the following logic (see Table 3 for a detailed description):

- i. Violations to substantive principles:* refers to the allegations of unlawful behavior contained on the grounds of appeal of judicial review judgements, which can be classified according to the three substantive principles of administrative decisions: violations of the principle of *rule of law*; of the principle of *individual rights*, and the principle of *policy rationality* (Bignami, 2012; Pierce & Weiss, 2011). Allegations of unlawful behavior under each category are not mutually exclusive from each other; they can be present as an individual allegation, or as a combination with other categories.
- ii. Regulatory responsibility under challenge:* this variable classifies the specific administrative act under appeal according to six regulatory responsibilities conceptualized by Jordana et al. (2018): capacities of agencies to *enforce sanctions*, perform *supervision activities*, *conflict resolution*, *elaborating rules and norms*; establishing *prices* and, determine *market entries/exits*.
- iii. Ruling Outcome:* The variable “ruling outcome” refers to the final decision in the judicial review judgements issued by the appeal courts. It indicates a judge’s ruling to either set aside an agency’s decision (quashing orders); partially accept a plaintiff’s appeal, or to dismiss the appeal. The variable proposed to operationalize the judicial review ruling outcome is based on the literature of administrative law from the United Kingdom and Spain (Bell, 2001; Cane, 2011; Gordillo, 2013) as well as the administrative and civil procedures to appeal administrative decisions in courts of both policy jurisdictions

### 3.3.4 Content analysis design

In order to make valid inferences from texts contained in the sample of judicial review judgements I performed a manifest content analysis of the judicial cases considering the information that was physically present and directly countable from the texts (Hayes &

Krippendorff, 2007; Krippendorff, 2004). I pre-processed the texts to extract relevant information considering the following criteria:

- **Unit of analysis:** final judgements of judicial review of administrative decisions against selected regulatory agencies.
- **Sampling unit:** PDF documents downloaded from the sources (final judgements)<sup>30</sup>.
- **Coding units:** paragraphs with information containing: a) the administrative decision under challenge; b) the grounds of appeal and, c) final verdict of the judge.
- **Recording of the coding units:** conducted as separated entries in an excel file, representing each of three types of coding units, and linked to a unique case identification.

Once the relevant information of the coding units was registered under the three recording entries I conducted a deductive latent coding analysis (Krippendorff, 2004) to classify the appeal cases according to the theoretical framework presented in section 2. Table 3 displays the theoretical logic of classification for each of the possible categories in a corresponding variable.

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<sup>30</sup> Source Spanish cases: Poder Judicial España (2017). Criteria of search online: Jurisdiccion= Contencioso; Tipo Resolución=Sentencia; Tipo de órgano=Sala de lo contencioso; Texto libre: Comisión Nacional de la Competencia; Comisión Nacional; Comisión Y Nacional Y Competencia; Comisión del Mercado de las Telecomunicaciones; Comisión Y Mercado; Comisión Y Mercado Y Telecomunicaciones; Comisión Nacional de los Mercados y la Competencia; Comisión y Mercados y Competencia. Source UK cases: Competition Appeal Tribunal (2017) & British and Irish Legal Information Institute (2017). Period of time considered for the consultation: 1/Jan/00 to 22/Dec/16.

Table 3. Deductive latent coding analysis: criteria of classification for the coding units (codebook)

<b>Coding Unit (Variables)</b>	<b>Categories</b>	<b>Indicators (Evidence to find in the text)</b>
<b>Ruling outcome</b>	Agency's decision set aside	Resolves to make void, annul or set aside, an agency's administrative act or decision (quashing ruling).
	Appeal partially accepted	Resolves that some of the plaintiff's claims succeed, and judges might resolve to either quash part of an administrative act or instruct an agency to amend actions.
	Appeal dismissed	Resolves that all the grounds of appeal from the plaintiff's claim are thrown out.
<b>Decision under challenge</b>	Sanctions	Enforcement of legislation; bring criminal proceedings; impose civil financial penalties, etc.
	Supervision	Powers to investigate public interest issues, information gathering powers, interview powers, etc.
	Conflict resolution	Oral hearings, procedural complaints and settlement of disputes, etc.
	Norms & Rulemaking	Issue legally binding rules, norms, definitions, vocabularies, measurements, standards to comply with the regulation, etc.
	Price setting	References of price control matters, etc.
	Market entries	The remittances, concessions, grants, adjudications and licenses to provide public services; quotas and obligations for public services provision, etc.
<b>Grounds of appeal</b>	Rule of law	Unlawful decision attributed to a violation of the purposes and limits set down in laws passed by parliaments or executive decrees, e.g.: jurisdictional incompetence; purpose of the decision forbidden by law; violation of the law, error of law; inconsistency with applicable statutes; in excess of statutory jurisdiction; illegality
	Individual rights	Unlawful decision attributed to a violation of basic liberties and rights, e.g.: lack of proportionality & equality; unfairness and abuse of power; examples: against freedom of expression and association, the right to privacy and human dignity, personal liberty, the right to engage in trades, etc.
	Policy rationality	Unlawful decision attributed to the quality of agency reasoning and to the application of its bureaucratic discretion, e.g.: Arbitrary or capricious; manifest error of assessment.

*Source: own elaboration based on: Bell (2006); Cane (2004) Gordillo (2013); Bignami (2012); Tapia & Cordero (2015); Pierce Jr. (2010); Jordana, Fernández-i-Marín, & Bianculli (2018); Lodge & Wegrich (2014).*

### 3.3.5 Reliability Checks

Due to the differences in the language of the texts under analysis, the coding of the cases was conducted by the author and validated by two student assistants with an administrative law background (one with Spanish nationality and the other a British national), following the codebook introduced previously. The classification of Spanish cases was performed by the author and the Spanish student, and for United Kingdom cases the coding was conducted by the author and the British student. The inter-coder reliability agreement (Krippendorff's alpha) of the coded variables was substantially reasonable for the Spanish cases ( $0.72 < \alpha < 0.78$ ), and for the British cases, the agreement was higher ( $0.79 < \alpha < 0.88$ ). The Krippendorff's alpha was estimated using Mitnik, Cumberworth, & Grusky (2016) method, which computes points estimates and 95 percent confidence intervals for Krippendorff's reliability coefficient alpha, for nominal variables and two measurements. It also tests the null hypotheses that alpha is not larger than 0.67, 0.75 and 0.80, and reports the corresponding p-values. One could assume that the high rate of

agreement is due to the two rounds of feedback with coders, where the legal expertise of the student assistants helped to reshape the criteria used for the codebook. Besides, I argue that the higher values of the alphas for the British case are due to the lower sample of cases, which made the disagreement less probable to occur. The variable “ruling outcome” was the only variable classified according to the manifest content of the texts, which means that it did not follow the validity checks applied for the rest of the variables, assuming that there is no margin of interpretation for the coder (the text is explicit enough to classify cases).

### **3.4 Findings: country-sector analysis**

#### *3.4.1 Competition regulators under challenge*

**Regulatory responsibilities:** evidence shows that the sample of appeals against the competition regulators in Spain and the United Kingdom target three core responsibilities of these agencies: the capacity to enforce *sanctions* and *supervision* activities, as well as their statutory mandate to create *norms* (figure 1.a). A first important variation between cases of both countries is the high concentration of appeals against the sanctioning responsibilities of the Spanish authorities in comparison to a more differentiated outcome observed for the challenges against United Kingdom regulators. In this sense, the statutory capacity to impose and enforce *sanctions* is challenged in 80% of the cases against Spanish competition agencies, while the percentage of cases against the same task for United Kingdom competition authorities is 54% (supervision tasks of British agencies account for the 44% of the cases, and only 19% for Spanish appeals). It is also important to highlight that very few cases in both countries aim to challenge the *norms* creation capacities of competition authorities (2% in Spain and 3% in the United Kingdom).

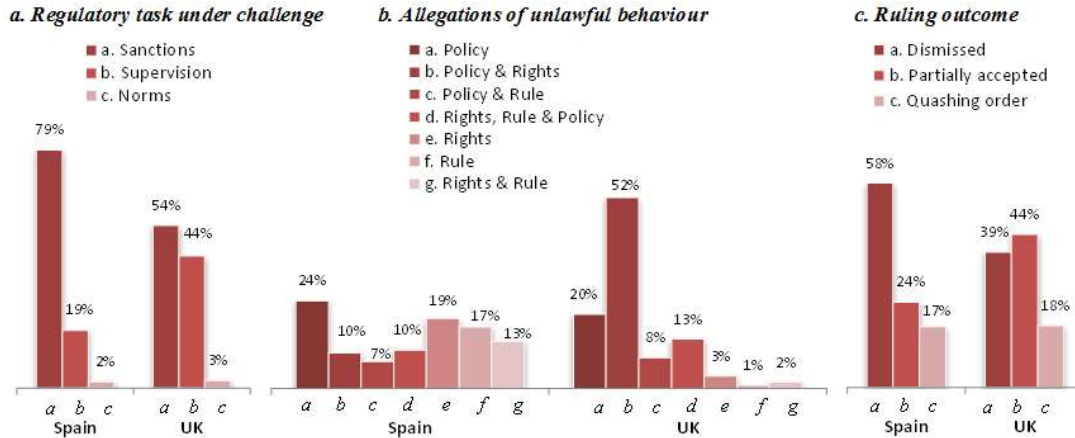
**Principles of administrative decisions:** a second relevant variance between the sample of cases for both countries comes from the allegations of unlawful behaviour against competition agencies. Almost the totality of cases against United Kingdom regulators encompass violations to the administrative principle of *policy rationality* (figure 1.b), while this principle is recalled in half of the cases against agencies in Spain. Furthermore, an additional highlight from this analysis is a country similarity in the second major component of the allegations of unlawful behaviour. Grounds of appeal of cases against Spanish and United Kingdom competition agencies are more likely to contain violations to the administrative principle of *fundamental rights*.

**Ruling outcomes:** A third country distinction relies on the ruling outcome of the appeal judgments. More than a half of appeals against Spanish competition authorities (58%) do not result in an adverse ruling for the regulators (figure 1.c). 17% of the cases Spanish regulators face a *quashing ruling*, and the rulings in 25% of the cases indicate that some of the plaintiff’s claims are *partially accepted* by the courts. In contrast to what happens in Spain, cases against United Kingdom regulators result in a greater number of appeals that were not dismissed by the

judges (62%), nevertheless the percentage of *quashing rulings* is similar to those in Spain (18%), which means that rulings against competition regulators in the United Kingdom mostly consist of the category of *appeals partially accepted* (44%).

Figure 1. Judicial review cases against competition agencies by country and variables of interest, 2000-2016

[Spain (n=1,442); United Kingdom (n= 119)]



**Note:** bars represent the percentage of cases with respect the total number of judicial review judgements against competition agencies in each country and sector.

**Source:** own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial España, 2017).

### 3.4.2 Telecomm regulators under challenge

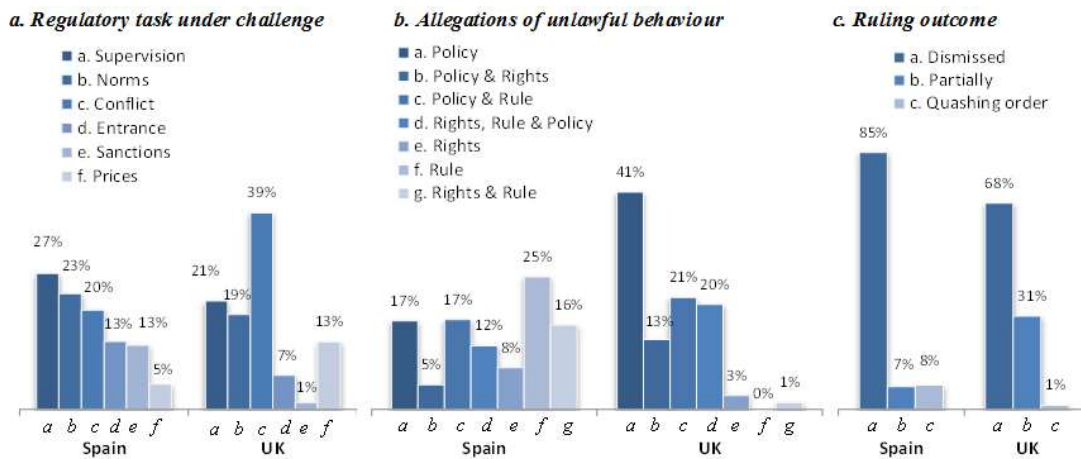
**Regulatory responsibilities:** Information collected for appeals against authorities of the telecommunications sector contains three additional regulatory tasks to those observed in the competition sector: *conflict resolution*, decisions on *market entries* and setting *prices* (figure 2.a). A first reading of the data suggests that in both countries, regulators are more likely to face challenges to their capacities to perform *supervision* activities; their statutory mandate to create *norms*, and *conflict resolution*. However, it is possible to distinguish two main country differences from the sample of cases: the high number of appeal concentrated against the *conflict resolution* capacity of the British telecomm regulator, and a less concentrated set of appeals against the capacities of Spanish regulators. It is also worth to note a variance in the number of cases that telecomm regulators face in the dimension of *sanctions*, as only a single case against the British regulator aims to challenge this task, compared with the 13% of the cases against the same task for Spanish regulators.

**Principles of administrative decisions:** as happened in the competition sector analysed previously, another relevant variance between countries comes from the allegations of unlawful behaviour contained in appeal cases of the telecommunications sector among countries. Most of

the cases against the Spanish regulators contain allegations against violations to the administrative principle of *rule of law*, while there is a dominant trend of allegations of violations against *policy rationality* in appeal cases against the British regulator (figure 2.b). Besides, different to what happens in the competition realm, grounds of appeal against Spanish competition agencies are more likely to contain violations to the administrative principles of *policy rationality* and *rule of law*, meanwhile United Kingdom authorities face more allegations related to breaches to the principles of *policy rationality* and *fundamental rights*.

**Ruling outcomes:** very few cases from the sample under study consist of adverse rulings against the telecommunications regulators in Spain in contrast to what happen in rulings of appeals against agencies in the competition sector in the same country, as 85% of the cases are dismissed by courts (figure 2.c). Same situation occurs for the appeals against the British telecommunications regulator, as only one in three cases results in an adverse ruling against the regulator, and only one single case reveals a quashing *ruling* against the agency’s actions.

Figure.2. Judicial review cases against telecommunications agencies by country and variables of interest, 2000-2016 [Spain (n=404); United Kingdom (n= 75)]



**Note:** bars represent the percentage of cases with respect the total number of judicial review judgements against telecommunications agencies in each country and sector.

**Source:** own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial España, 2017).

### 3.4.3 Agencies’ unlawful behavior

The analysis performed previously showed the distribution of judicial appeals against selected regulatory agencies according to the three variables under analysis. It is now necessary to portrait the appeal judgements according to a confirmed ‘unlawful behaviour’, that is, cases where regulatory agencies faced an adverse ruling from courts (either a *quashing ruling* or a plaintiff’s claim *partially accepted* by judges), leaving out those cases where a plaintiff’s claim was *dismissed* by courts. Table 4 depicts the total number of appeal cases against regulatory agencies, as well as the rate of appeals were the plaintiffs were unfavourable for the regulator. Furthermore,



the table shows the main features of unlawful behaviour contained in the appeals, pointing out which are the most affected regulatory tasks and principles of administrative behaviour (a detailed description of each regulatory agency can be found in the appendix attached to this paper).

Evidence confirms a clear distinction of unlawful behaviour between countries concerning the regulatory capacities under appeal (which is consistent with the findings of sections 4.1 and 4.2). Spanish competition agencies generally face adverse ruling outcomes against their capacities to enforce *sanctions*, meanwhile there is a differentiated pattern observed among United Kingdom competition regulators, as most of the cases of unlawful behaviour of the Office of Fair Trade are associated with its capacity to impose *sanctions*, while the unlawful cases against the Competition Commission and the Competition & Markets Authority are related to their *supervision* responsibilities. In the Spanish telecommunications sector, the greater share of unlawful cases is distributed among the dimensions of *conflict, norms & supervision*. For the case of the British telecomm regulator, the higher percentage of unlawful behaviour is concentrated on the *conflict resolution capacity*.

Table 4. Variable outcomes for cases of unlawful behaviour for selected regulatory agencies

Country	Years	Agency	Total cases	Lost cases						Most affected regulatory task	Most affected principle of administrative decisions
				Quashing†		Partially ‡		Total lost §			
				#	%	#	%	#	%		
<b>Competition cases</b>											
Spain	2000-2007	Tribunal for the Competition Defense (TDC)	413	21	5%	31	8%	52	13%	Sanctions	Policy rationality, Fundamental rights & Rule of Law
Spain	2007-2013	National Commission on Competition (CNC)	1,000	223	22%	314	31%	537	54%	Sanctions	Fundamental rights & Rule of Law
Spain	2013-2016	National Commission on Markets and Competition (DC)	29	7	24%	6	21%	13	45%	Sanctions	Fundamental rights
UK	2000-2013	Office of Fair Trade (OFT)	87	19	22%	42	48%	61	70%	Sanctions	Policy rationality & Fundamental rights
UK	2000-2013	The Competition Commission (CC)	24	1	4%	6	25%	7	29%	Supervision	Policy rationality
UK	2013-2016	Competition & Markets Authority (CMA)	8	1	13%	4	50%	5	63%	Supervision	Policy rationality & Fundamental rights
<b>Telecommunications cases</b>											
Spain	2000-2013	Commission on the Telecommunications Market (CMT)	371	30	8%	29	8%	59	16%	Conflict, Norms & Supervision	Rule of Law
Spain	2013-2016	National Commission on Markets and Competition (TD)	33	2	6%	1	3%	3	9%	(Not clear, few unlawful cases)	(Not clear, few unlawful cases)
UK	2000-2016	Office of Communications (Ofcom)	75	1	1%	23	31%	24	32%	Conflict	Policy rationality

**Notes:**

† Court of appeal resolves to make void, annul or set aside, an agency's administrative act or decision.

‡ Court of appeal resolves that some of the plaintiff's claims succeed, and judges might resolve to either quash part of an administrative act or instruct an agency to amend actions.

§ Sum of † and ‡

Source: own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial España, 2017).

The distinction between countries is even stronger if we consider the most affected principles of administrative decisions observed in the unlawful cases. On the one hand, there is a clear trend of violations against the *policy rationality* principle for the three United Kingdom competition regulators under study, meanwhile for Spanish regulators this same trend is observed only for the case of the Tribunal for the Competition Defense, and is highly concentrated on the violations against the *rule of law* and *fundamental rights*. On the other hand, in the telecomm jurisdiction, the unlawful behaviour of the United Kingdom Office of Communications is mainly attributed to violations to the *policy rationality* principle, in contrast to what happens with the unlawful behaviour of the Spanish Commission on the Telecommunications Market where the most affected principle of administrative decisions is related to violations to the *rule of law*.

### **3.5 Discussion: understanding country differences**

The motivation of this study is to contribute with a better understanding of how judicial procedures help to overcome the information asymmetries existing between political principals and independent regulatory agencies. In particular, this research aimed to process, analyse and interpret the information contained in legal disputes against regulatory decisions under a comparative perspective, in order to understand if different legal traditions lead to differences in the information generated through judicial challenges to regulators' actions. This section aims to discuss the two most relevant empirical findings of the research, concerning the country differences observed in the volume of cases and the scope of review applied by the corresponding appeal courts. Furthermore, the section argues how these findings contribute with the existing literature that studies the political role of judicial controls over regulatory agencies.

#### *3.5.1 Volume of cases*

Recalling the information given in section 3.2 (Table 2), the evidence collected for this research shows a higher number of appeal judgements against regulatory decisions of Spanish regulators in contrast to what happens with the United Kingdom's sample of cases. Even though it is not possible to confirm from the data available that a higher level of litigation against regulatory decisions happens in Spain vis a vis the United Kingdom (due to the sample limitations defined in section 3.2), it is still feasible to offer some explanations of why the evidence collected observes country differences in the number of cases. The first explanation offered is theoretical. Under the comparative administrative law approach, the information obtained from the share of cases is consistent with the premises that distinguish judiciary systems of administrative justice under the common law tradition from those rooted in the French *droit administratif* tradition (Bignami, 2012, 2016; Cane, 2011; Solanes Mullor, 2016). The latter type of judiciary system, such as the Spanish case where public administration is highly centralized by the state, is subject to tougher administrative control over bureaucrats, leading to a higher number of legal disputes and litigation over decisions of the government (Betancor Rodríguez, 2010a; Solanes Mullor, 2016), while the degree of judicial litigation in the common law system such as the United Kingdom is lower, associated to a more decentralized government administration style (Cane, 2011).

Secondly, as a complement of the argument presented beforehand, it is important to highlight those aspects related to the selected sample under study that could be affecting the difference between countries. As explained in section 3.1, the sample of cases represent appeal judgments that count with a final ruling, which for the case of the United Kingdom cases leaves out appeals where the CAT or the EWHC encouraged or facilitated the use of alternative dispute resolution procedures once an appeal has been notified (such as settlement offers between parties, which can lead to a withdrawal of a plaintiffs' claim). These types of procedures are not accounted as

final ruling outcomes for the purpose of this research, as it would be difficult to adapt in the comparative research design (these kind of judicial procedures are not common in Spanish courts).

Another example of court rules which might lead to a lower number of judgements in the United Kingdom is the CAT procedure where judges allow third parties who are sufficiently interested in the outcome of proceedings the right to be heard (intervene) and assist the Tribunal, which possibly would reduce the need for affected parties to start additional appeals against regulatory decisions (also not common in Spanish procedures). In this respect, within the sample of the United Kingdom appeal judgements filed at the CAT, 34% of the appeal cases against competition authorities and 82% of cases against telecomm agencies contain interventions from third parties (see Table 10 in the appendix for a better reference).

Related to the plaintiffs involved, an important feature from the cases in the sample that could also contribute to explain the higher number of Spanish cases is the distribution of cases that involve single or multiple plaintiff judgements. Single plaintiff cases are observed in 96% of the competition cases and 98% of the telecommunication cases from the Spanish sample (Table 11 in the appendix), meanwhile the share of single plaintiff cases are considerably lower for the United Kingdom cases (82% and 79% respectively for each sector). From the evidence collected it is not clear if the number of plaintiffs involved in the judgments is a result of the workload administration of courts (where judges might decide to group cases into a single judgement due to the affinity of the disputes), or an outcome that results from the motivation of plaintiffs to act as a group, however this aspect gives an additional clue of the country differences in the number of appeal judgments observed in the sample.

Despite the limitations of the sample under study, it is possible to argue that third party intervention procedures and the lower number of single plaintiffs observed for the United Kingdom cases could be associated to the low incentives that regulated entities have to appeal regulatory decisions. A public consultation to reform the United Kingdom's appeal regime, conducted by the government in 2013, concluded that some features of the appeals framework make it more difficult for smaller or less well-resourced parties to bring an appeal. According to the consultation, "across most [regulatory] sectors there is the scope for appeals to be wide-ranging, lengthy and costly" (Department for Business Innovation & Skills, 2013 p.23). This might push appeal courts to accept third parties intervention to avoid the significant time and costs that a judgement entails for all parties and open access to smaller plaintiffs, as well as encouraging the use of alternative dispute resolution procedures to secure the expeditious and economical conduct of the proceedings, –as suggested by the CAT Rules and Guidance.

### *3.5.2 Scope of review*

A second relevant empirical finding from the evidence collected for this study confirms the generalist vs. specialist assumption posed beforehand: litigation against agencies in Spanish generalist courts allow a greater degree of deference to regulatory decisions concerning the technical discretion granted to regulators, and the scope of review is commonly limited to scrutinize procedural aspects of an agency decision (coded in this research as rule of law and individual rights principles). Meanwhile the specialist characteristic of the Competition Appeal Tribunal in the United Kingdom, makes litigation against regulatory decisions substantially more concentrated in reviewing the technical discretion granted to regulators (i.e. an assessment of the policy rationality principle). Furthermore, appeals against United Kingdom regulators challenge a more differentiated set of regulatory tasks compared with cases against Spanish regulators.

These findings can be better understood as a result of two situations: whether the legal system of courts of appeal is specialized or generalist, and the scope of the review that judges might apply to assess a judicial appeal (Tapia & Cordero, 2015). As Tapia & Cordero argue, if the reviewer is a generalist court - as it happens in Spanish courts -, it will probably have an incentive to be deferential to a regulatory agency decision and the scope of review should only extend to questions of law - i.e. fundamental rights and rule of law- to avoid interfering with the discretion granted to regulators in terms of policy-making. If the court is a specialized one -as the Competition Appeal Tribunal in the United Kingdom- the incentives to be deferential to the regulator's decision will be scarce. In the latter case, "the scope of the review should not be restricted, in order to not reduce the benefits of specialization" (p.8), and this would promote the scrutiny of agencies decisions under a policy rationality principle.

This argument helps to understand the generalist approach of Spanish courts (Solanes Mullor, 2016), which allows less judicial challenges to the policy rationality principle, compared with the outcomes in the United Kingdom, where the challenges to regulators are substantially concentrated in such principle (Psydkas, 2017). Besides, the more generalist style of judges in a generalist setting like the Spanish legal system could possibly explain why we observe a higher rate of dismissed ruling outcomes cases in Spain in contrast to what is observed in the United Kingdom. Finally, country-differences observed between the regulatory tasks can also be understood as the degree of specialization of courts, which may allow assessing tasks that require a higher degree of technical knowledge, for example, the higher cases that challenge supervision tasks from the United Kingdom competition regulators, in contrast to authorities in Spain, who concentrate mainly in the legality of sanctioning tasks of the regulators.

These series of findings are aligned with the outcomes from other empirical studies that study judicial appeals against regulatory agencies. For example, for the United Kingdom context, Psydkas (2017) demonstrates the effects of the 'double helix' type of review, which allows the

United Kingdom CAT to decide within the same legislative framework as the regulators do, and exercise similar statutory capacities conferred to agencies, without losing the benefit of procedural review. Furthermore, (Lavrijssen & Visser, 2006) show in their analysis that judicial controls of the CAT concerning decisions issued by the OFT and Ofcom range from an intensive degree of review (where the matter is quashed but remitted back to the regulators), to extremely intense (where the CAT acts as a second regulator, with a final say on how a regulatory decision should be issued).

For the Spanish case, previous work from Solanes Mullor (2016, 2018) confirms the findings in this paper concerning the idea that unlawful behavior from Spanish agencies is most commonly associated with the violations against the principles of rule of law and fundamental rights rather to the policy rationality principle. Solanes Mullor argues that the emergence of independent regulatory bodies in Spain has not led to a rethinking of the traditional formalistic techniques of judicial control of public administration, and in consequence, Spanish courts have adopted a position of deference based on the technical nature of agencies' decisions, rejecting the techniques of formalistic judicial controls.

How does these findings contribute to the scholarship that studies the political role of judicial controls in the regulatory policy making process? Overall, if one considers judicial review as one of the predominant ex-post control mechanisms to overcome the potential "policy drift" from independent regulatory agencies, this research contributes with the literature that studies the role of courts under a principal-agent approach (Gailmard & Patty, 2017; Shipan, 1997; Sunstein, 2017; Turner, 2017). Considering this theoretical approach and the empirical results in this research paper, it is possible to show that the information generated through judicial appeals against regulatory decisions in the United Kingdom is closer to the theoretical idea that judicial review operates as a mechanism to overcome principal-agent information asymmetries that derive from the technical expertise from regulators, as the specialized courts allows to scrutinize violations to the policy rationality principle. On the other hand, this scenario is less likely to occur at the generalist type of Spanish courts, where agencies' technical statutory mandate is less scrutinized by courts, making it difficult to challenge regulators according to the policy rationality principle, hence less control over a regulator's discretion.

This contribution is of particular relevance because it helps to clarify what type of information about an agency's performance would be necessary to obtain from judicial review mechanisms, so that these procedures translate into an effective instrument to overcome the principal-agent information asymmetries predicted by this approach. Furthermore, these findings highlight an interesting issue that contravenes the conventional common law/French *droit administratif* distinction posed beforehand. Despite the tougher administrative control over bureaucrats observed by the Spanish judicial system, and the higher degree of litigation over administrative

decisions, the supervision controls of the judiciary over regulatory agencies analyzed in this study are not commonly employed as a mechanism to control the discretion of the regulators. Meanwhile, cases against administrative decisions of agencies in the United Kingdom –where a more decentralized government administration style allows a lower degree of litigation– are mostly employed as a device to control agencies technical discretion. From the evidence collected in this research, it is possible to argue that the country differences concerning the degree of scrutiny of the technical discretion of independent agencies are not only dependent on the judiciary tradition of each country, but also dependent on how the judicial system interacts with the specialist or generalist organizational setting of courts (Lavrijssen & Visser, 2006; Tapia & Cordero 2015), and the specific features of the sector under regulation. Further empirical research could usefully explore what are the characteristics of appeal cases that lead to a higher or lower degree of judicial scrutiny of technical discretion of independent agencies (e.g. policy sector, regulatory task under challenge, type of plaintiff) as well as how the interaction between the legal traditions and organizational setting of courts (specialists or generalists) in other countries determines the degree of deference that judges might have towards administrative decisions of regulators.

These findings also have implications for the understanding of the premises of judicial politics literature, where ruling outcomes of judges are theorized as function of individual preferences and institutional constraints, (Dyevre, 2010; Hönnige, 2011; Shapiro & Stone Sweet, 2002; Stone Sweet, 2000). It is possible to argue that the political role of Spanish judges within the regulatory policy making process is much more limited by the institutional constraints of the legal system (restricted to review the compliance with rule of law or individual rights principles). Meanwhile judges in the United Kingdom system of courts have less institutional barriers to scrutinize the policy rationality principle of administrative actions, which might generate incentives for judges to rule according to a preferred legal doctrine or political motivation.

Finally, these results add to the rapidly expanding literature of bureaucratic reputation (Boon, Salomonsen, Verhoest, & Pedersen, 2019; Busuioc & Rimkutė, 2019; Carpenter, 2010; Carpenter & Krause, 2012; Gilad, Maor, & Bloom, 2015; Shapira, 2020; Wæraas & Maor, 2014). A central premise of this approach contends that agencies have different reputational spheres that delimit its organizational image (i.e. *performance, technical competence, morality and procedural fairness*), and the regulatory power of an agency is related to how audiences perceive its organizational uniqueness as regulation policy-maker. In this sense, an agency's reputation will be under threat if administrative courts of appeal emerge as an alternative institutional forum to decide on regulatory tasks, which correspond uniquely to regulatory agencies. Under this approach, if we consider that judicial courts act as a forum where regulatory agencies are exposed to reputational consequences of their actions, then the *procedural fairness* dimension of an agency's reputation would be affected (i.e. the justness of the processes by which an agency's

behavior is generated). However, from the findings of this research, it would be also possible to argue that, due to the scope and intensity of review of United Kingdom courts, the *technical* reputation of agencies (i.e. scientific accuracy, methodological prowess, and analytic capacities) could also be exposed in a greater measure than Spanish agencies.

### **3.6 Conclusions**

This paper set out to analyze the content of judicial appeals filed against selected regulatory agencies in order to examine what the allegations of unlawful behavior against regulators are and what type of administrative decisions are generally under challenge, as well as to understand if different legal traditions lead to differences in the information generated through judicial challenges to regulators' actions. Findings suggest clear variations between the information contained in appeal judgements against regulatory agencies in Spain and the United Kingdom, as well as differences within regulated sectors of each country. Evidence collected shows that Spanish agencies faced a higher number of appeal judgements in comparison to the United Kingdom regulators under the period of study. Furthermore, data available confirms the differentiated patterns of review of the United Kingdom CAT vis a vis the Spanish National High Court, where the former pattern is associated with scrutinizing the substance and rationality of the regulatory decisions, and the latter is most commonly focused on the legality of the procedural standards followed by regulators.

Despite its exploratory nature, this study offers some insight into an explanation of the information about the behavior of regulatory agencies generated through judicial disputes, which arguably is highly dependent on the legal and administrative traditions that rule the system of courts of a polity, as well as the generalist or specialist features of courts and judges. Although the current study is based on a small sample of countries and regulated sectors, this research contributes with a better understanding of how judicial review translates into sensitive information useful for political principals to evaluate the legitimacy of regulatory agencies' policy choices under different institutional environments.

As a concluding remark, it is relevant to highlight that there are still many aspects to analyze regarding the content of judicial appeals which would offer a much better panorama of the information generated through judicial review appeals. As mentioned before in this paper, an important limitation of this study is the lack of information about decisions issued by higher instance courts of appeal, which could overrule a final judgement from first instance courts. Further research should be undertaken to analyze appeal cases from higher tribunals, as well as to explore the length of the tenure and decision record of judges; the characteristics of the plaintiffs, and the litigation capacities of agencies to face judicial appeals in courts.



## **Chapter IV: Apprentice blunders or undermined administrative capacities? Understanding unlawful enforcement procedures of the Mexican Agency for Safety, Energy and Environment.**

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### **4.1 Introduction**

In most of contemporary regulatory regimes, the quality of regulatory agencies' policy choices is usually subject to ex-post oversight controls from elected politicians in the legislative and executive branches of government. Furthermore, the lawfulness of the statutory procedures followed by the agencies to enforce the law are commonly subject to judicial review of administrative decisions. Judicial courts are legally authorized to assess the validity and legitimacy of administrative agencies' policy choices to guarantee the protection of fundamental rights and rule of law throughout the implementation of regulatory policies. For this reason, the study of judicial review of administrative decisions has attracted the attention of political scientists, public administration and administrative law scholars, as it represents an essential democratic mechanism to evaluate the performance and legitimacy of regulatory agencies' actions (Bignami, 2016b; Ferejohn & Shipan, 1990; Lindseth, 2019; Magill, 2014; McCubbins & Schwartz, 1984; Rodriguez, 2008; Rose-Ackerman, 2008; Shapira, 2020; Solanes Mullor, 2018; Turner, 2017; Whittington et al., 2008). In this sense, delivering successful regulatory policies to provide efficient social and economic outcomes will depend on two dimensions: the abilities of an agency to design and implement sound policy choices and the capacities to guarantee procedural lawfulness during the course of implementation. Failing to accomplish any of these two dimensions will generate similarly undesired consequences for the provision of expected regulatory outcomes (Turner, 2017). This study deals with the latter dimension, and enquires about the causes that prevent a regulatory agency to comply with procedural standards throughout the policy implementation process.

The research examines the case of the Mexican Agency for Safety, Energy and Environment (ASEA) to analyze those cases where the agency failed to observe legal standards in the process of enforcing the law during its first 36 months of operation. The relevance of the case under study lies on the critical role played by ASEA in the paradigmatic scenario of state reforms to the energy sector in Mexico<sup>31</sup>. Established in 2015 as a result of the state reforms that liberalized the Mexican energy and hydrocarbons markets, ASEA has the mammoth task to oversee the industrial safety and environmental protection of the entire hydrocarbons industry (ASEA, 2016, 2017; OECD, 2017b, 2017a). It has been argued that these inherited institutional features distinguish ASEA as the only regulator worldwide overseeing both, environmental protection and industrial safety throughout the whole hydrocarbons value chain of a country (Mejía &

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<sup>31</sup> For a better reference of state reforms in Mexico, see Wood (2018).

Elizondo, 2018; OECD, 2017a). In the period between March 2015 and December 2017, the agency faced a total number of 265 judicial appeals against the validity of diverse types of administrative resolutions issued by the agency (ASEA, 2018). Although the overall number of ASEA's administrative decisions that reached courts of appeals is low<sup>32</sup>, the ruling outcomes from the few enforcement cases where ASEA faced a court's reversal represent a unique source of information to assess the enforcement capacities of an agency operating under a new regulatory paradigm. Considering this scenario and building on the literature of administrative capacities of the state that studies the 'structural and procedural provisions that enable bureaucracies to perform particular functions' (Lodge & Wegrich, 2014), this paper addresses two research questions:

- (1) What type of unlawful procedures caused the invalidity of ASEA's enforcement decisions?
- (2) How did ASEA's organizational foundations and institutional goals affected its administrative capacities to prevent unlawful procedures?

I argue that ASEA's unlawful procedures were not solely attributed to the agency's inherent inability to enforce the law at the frontline of implementation (deficient *delivery capacities*), but were also caused by constraints related to the institutional and structural design of the agency, which undermined the agency's *analytical capacities* to ensure lawful procedures throughout the enforcement of regulations. Findings reveal that most of ASEA's cases of unlawful implementation are associated to the flawed analytical consistency of enforcement decisions, rather than to deficient operating procedures. Furthermore, evidence suggests that the *lack of statutory clarity* that governs the agency, and the *multiplicity of institutional short-term goals* triggered organizational constrains that undermined ASEA's *analytical capacities*, preventing the agency to comply with the necessary legal grounds to enforce the law.

The research design for this study follows a cross-sectional analysis of 71 judicial appeal judgements against sanctioning decisions issued by ASEA between March 2015 and December 2017. Data was collected under a content analysis of the texts from appeal judgements issued by the specialized chamber for regulation and environment affairs of the Mexican Federal Administrative Justice Court of Appeal (*Tribunal Federal de Justicia Administrativa*). Furthermore, a theory-testing variant of process tracing analysis is performed to explain how the evidence collected confirms the presence of *structural* and *institutional* organizational constrains that undermined ASEA's *analytical capacities* to enforce the law.

The case of ASEA and the findings presented here have several implications for the study of regulatory agencies, especially in regional jurisdictions that have been relatively unexplored,

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<sup>32</sup> ASEA issued 1,839 administrative acts related to supervision and enforcement activities, and more than 20,000 resolutions related to authorizations and licensing in the period of reference (ASEA, 2016, 2017, 2018).

such as the case of Latin American countries. Firstly, it introduces judicial review of regulatory decisions as a unique source of evidence to understand failures in the implementation of enforcement policies, as well as a measureable characterization of agency performance through the judgements of the courts of appeal. Secondly, the administrative capacities approach adapted in this research allows identifying and differentiating implementation failures related to an agency's inherent managerial deficiencies from those caused by the agency's institutional design and organizational structure originally fixed by political principals. Third, it contributes with empirical evidence to represent the unintended consequences of policy choices under complex and fragmented institutional settings, such as the regulatory systems in Latin America, where countries observed similar patterns concerning the restructuring of the state into a swift growth of regulatory agencies across different sectors (Levi-Faur & Jordana, 2006; Pavón Mediano, 2020). Finally, it opens a dialogue between public administration and administrative law scholarship, establishing an analytical framework that allows potential comparative assessments within policy sectors and between countries in the region.

The remaining part of the paper proceeds as follows: the next section provides a theoretical overview of the administrative capacities approach and its implications for the study of policymaking. Section three offers a brief overview of ASEA's organizational and institutional settings and explains the operationalization of concepts and working hypotheses. Section four describes the data collection and research design conducted, and section five presents the results. Section six briefly discusses the findings of this study and elaborates on two concrete unlawful implementation situations.

#### **4.2 Administrative capacities of the state**

The conception of administrative capacity of the state has been widely applied by political science and public management literature as a theoretical construct to analyze the resources and abilities that public bureaucracies should possess to accomplish their missions (Almond, 1965; Carpenter, 2001; Cingolani, 2013; Cingolani, Thomsson, & de Crombrughe, 2015; Geddes, 1994; Hood & Lodge, 2004; Levi-Faur, 2012; Lodge & Wegrich, 2014; Matthews, 2012). Notwithstanding the large number of studies that use this concept, there is a variety of approaches and overlapping definitions concerning the meaning and purpose of the capacities of a state, as well as a multiplicity of theoretical insights to measure and assess the performance of a state as a function of its capabilities.

A non-exhaustive list of the most common conceptions of state capacities are those that consider administrative capacities either as a mean for political development and state building; as an intervening factor in policy implementation; as device for measuring state performance and good governance or as a determinant of policy change (Addison, 2009). Moreover, recent attempts to classify the diversity of conceptions concerning the study of administrative capacities, suggest

that this literature can be identified according to three broad analytical families that converge into a problem-oriented perspective (Wegrich 2020): *output-oriented conceptions*, which study the role of government in relation to economic and social forces; *input-oriented conceptions*, related to the availability and structuring of human resources, and finally, those conceptions that focus on how *processes* and *structures* are turned into ‘governance readiness’ (Lodge & Wegrich, 2014). The latter conception of administrative capacities is of particular interest for this research, as it represents an ideal approach to trace the procedural aspects of decision-making processes that might potentially cause unlawful implementation of enforcement policies.

In an attempt to measure governance readiness and the preparedness of the state to solve the current challenges that society face nowadays, Lodge & Wegrich (2014) define administrative capacities as “the set of skills and competencies that are expected of public bureaucracies so that they can facilitate and contribute to problem-solving” (p.27). This functional definition considers the structural and procedural provisions to perform specific tasks, as well as the necessary skills from individuals within a bureaucracy to meet expectations from political principals and citizens. The authors identify four types of administrative capacities that highlight the varied expectations and demands regarding abilities that bureaucracies must have to fulfill their mandate. First, “the delivery capacity of ‘making things happen’, which relies on a structure that is sufficiently resourced to give life to policy objectives” (p.37). Second, the regulatory capacity of control and oversight, defined as “the coercive powers of the state used to constraint economic and social activities” (p.38). Third, the coordination capacities that include the “interdependence actions of different, often dispersed actors” responsible of a particular policy or task. Finally, a fourth typology of administrative capacity is related to the analytical abilities required by bureaucracies and technical knowledge of individuals to understand the problems and context of action of a public organization.

Another important analytical discussion concerning the study of the administrative capacities of the state is related to the intersection between the design of effective policy instruments and the necessary administrative capacities to implement these tools (Compton & ‘t Hart, 2019; Wegrich, 2020). Under this approach, administrative capacities and the way these capacities are institutionalized will shape how policy problems are perceived and addressed by key actors, having a direct impact on the design and effectiveness of policy instruments. According to Wegrich, linking the study of policy instrument design and administrative capacities allows exploring how state capacities can be built through policymaking, and provides with analytical insights to design policy instruments that enhance rather than undermine the necessary administrative capacities to make instruments work as intended.

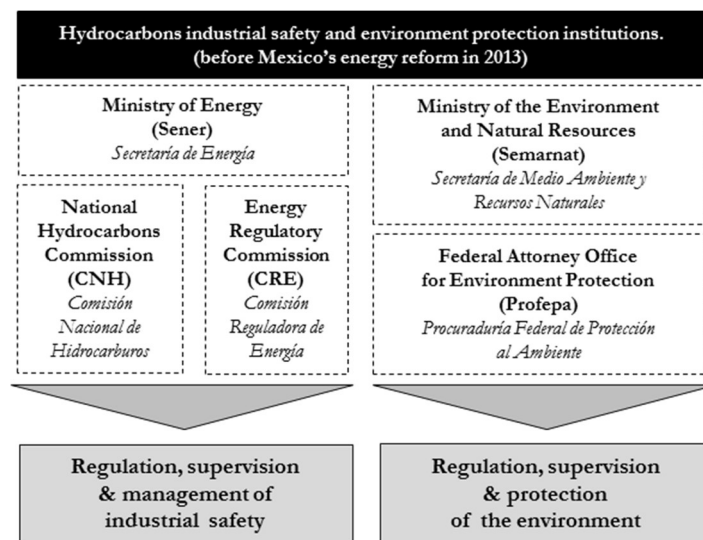
### 4.3 A framework to understand ASEA's unlawful implementation

This research is conducted using the administrative capacities of the state approach as a framework to explore and understand ASEA's failed attempts to enforce the law due to unlawful implementation procedures. In the next paragraphs, I will describe ASEA's organizational context and operationalize the concepts and hypotheses needed to verify the claim that ASEA's unlawful procedures were not solely attributed to the agency's inability to enforce the law at the frontline of implementation (deficient *delivery capacities*), but were also caused by constraints related to the institutional and structural design of the agency, which undermined the agency's *analytical capacities*.

#### 4.3.1 ASEA's organizational context

ASEA's mandate is the regulation of risk associated to hazardous activities in the hydrocarbons sector to guarantee the safety of citizens and industrial facilities, as well as the protection of the environment (ASEA, 2016; OECD, 2017a). Although ASEA is endowed with technical and managerial autonomy, it is attached to the administrative structure of the Mexican Ministry of Environment (Semarnat). Besides, ASEA concentrates several supervision and enforcement tasks that were distributed among different government agencies previous to the energy reform in Mexico. Figure 1 illustrates the multiplicity of institutions from which the agency inherited regulatory tasks.

Figure 1. Former institutional setting of regulatory tasks consolidated in ASEA's mandate



Source: 2016 Annual Report (ASEA, 2016) and (OECD 2017a, 2017b)

Furthermore, if one considers ASEA's double mandate (industry safety and environment protection), the wide scope of industrial activities under regulation, and the lack of autonomy

from the executive power<sup>33</sup>, it is possible to glimpse the complex legal setting under which the agency operates. The agency started to operate with a legal framework that comprised 11 federal laws and 12 subordinate regulations as well as ASEA's own legal framework (OECD, 2017a). This situation resulted in a complex governance landscape for the agency to carry out its regulatory tasks, which requires a high degree of coordination with other sectorial regulators like the National Hydrocarbons Commission (CNH), the Energy Regulatory Commission (CRE), and the Ministry of Energy (OECD, 2017b).

To illustrate the enforcement structure of ASEA, it is now necessary to map out how the enforcement capacities of the agency are subject to different laws and rules. Figure 2 allows tracking the enforcement decision making process established in ASEA's regulatory governance structure, according to the mandate of the agency. From this information, it is possible to observe that most of the sanctioned conducts and potential enforcement mechanisms which are competence of the agency to observe rely on a diversity of inherited laws, particularly for the mandate to guarantee the protection of the environment (Roldan Xopa, 2018).

Figure 2. Summary of illegal conducts and sanctions according to ASEA's mandate and jurisdiction

ASEA's mandate	Sanctioned conducts	Sanctions
A. Information and monitoring conditions for an effective regulation of risk	<ul style="list-style-type: none"> <li>a. Restrict access to agency's inspectors into industrial facilities.</li> <li>b. Breach of the obligations to inform any potential risk or contingency that can result in damages for persons, industry facilities and the environment.</li> <li>c. To provide false, altered or simulated information.</li> </ul>	<ul style="list-style-type: none"> <li>a. Fines between <b>75,000 - 225,000</b> times the amount of the MWS level*.</li> <li>b. Fines between <b>7,500 - 150,000</b> times the amount of the MWS level.</li> <li>c. Fines between 3,750,000 - 7,500,000 times the amount of the MWS level.</li> </ul>
B. Effective enforcement of the regulations for industrial safety	<ul style="list-style-type: none"> <li>a. Violations and breaches to ASEA's Law.</li> <li>b. Failure to comply with ASEA's administrative provisions and industry official standards.</li> <li>c. Violations to the Hydrocarbons Law.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Fines between <b>7,500 - 7,500,000</b> times the amount of the MWS level.</li> <li>▪ Withdrawal of authorization to operate in industrial activities</li> <li>▪ Adoption of mandatory preventive and corrective measures.</li> </ul>
C. Effective enforcement of the regulations for environment protection	<p><b>Violations to the following environmental Laws:</b></p> <ul style="list-style-type: none"> <li>▪ Ecological Equilibrium and Environmental Protection.</li> <li>▪ Handling and Processing of Waste.</li> <li>▪ General Law of Wildlife.</li> <li>▪ Sustainable Forestry Development.</li> <li>▪ Biosafety of Genetically Modified Organisms.</li> <li>▪ Environmental Liability</li> </ul>	<ul style="list-style-type: none"> <li>▪ Fines.</li> <li>▪ Withdrawal of authorization to operate in industrial activities.</li> <li>▪ Adoption of mandatory preventive and corrective measures.</li> <li>▪ Administrative detention or confiscation of assets.</li> </ul>

**Source:** adapted from Roldan Xopa (2018). \*Refers to the minimum wage salary valid for Mexico City at the time when the offense is committed. The reference value for the MWS as of 2018 is 102.68 MXP = 5.34 USD (2018 average exchange rate= 19.34 pesos per dollar). Comisión Nacional de los Salarios Mínimos (2019) & Banco de Mexico (Banco de México, 2019).

<sup>33</sup> This contrasts with the full autonomy granted to other sectorial regulators like the National Hydrocarbons Commission (CNH) and the Energy Regulatory Commission (CRE), as a result of the energy reform in Mexico (OECD 2017a, 2017b).

With the information presented in figures 1 and 2, it is possible to highlight two things about the institutional setting and organizational context of ASEA's capacities: the dispersed legal framework inherited from the previous regulatory regime, as well as the multiple goals and tasks that the agency inherited from previous institutions. I frame these two features as organizational constraints embedded in the structure of ASEA, which eventually undermined the agency's analytical capacities to enforce the law, causing implementation failures due to unlawful administrative decisions.

#### *4.3.2 Defining ASEA's unlawful enforcement*

Bovens & 't Hart (2016) defined the analysis of policy failures as “not a neutral endeavor, since policy fiascos are not neutral events. Moreover, they are often, usually implicitly, but sometimes explicitly, permeated with prosecutorial narratives, blame games and a search for culprits” (p. 653). The authors stress the importance to consider the implications of evaluating government interventions as “failed” or establishing normative assessment that could fall into political judgments. With this argument in mind, an important matter to cover in this section is to delimit what does the concept of “unlawful enforcement” means for the purpose of this research:

- ***Unlawful enforcement:*** *ASEA's failed attempts to enforce the law due to violations of the statutory provisions and legal standards that govern the agency's jurisdiction.*

To build on Bovens & t'Hart characterization of policy failure, this definition can be considered as a measureable characterization of “failure”, inherent to attributes of policy implementation rather to normative labels to assess an agency's performance. In this sense, judicial review of regulatory decisions represents a relevant source of evidence to understand failures in the implementation of enforcement policies, as courts have the formal authority to set aside an agency's choice issued under an unlawful process, as well as the faculty to instruct an agency to reformulate an erratic decision.

#### *4.3.3 Administrative capacities to implement lawful procedures*

Lodge & Wegrich (2014) administrative capacities framework introduced in section two has already been applied in previous investigations to assess the performance of ASEA (Casas, Dussauge, & Lodge, 2018; Elizondo & Dussauge, 2019; Heredia, Dussauge, & Lodge, 2018; Mejía & Elizondo, 2018). The studies revealed that despite ASEA's relative success to consolidate its administrative capacities in a short period of time, and regardless of the satisfactory results that the agency achieved during its first stage of operations (OECD, 2017), there is an imminent challenge to harmonize the technical characteristics of ASEA's regulations and the fundamental legal aspects of the regulatory framework to enforce the law (Heredia et al. 2018). These investigations suggest that the adequate balance and specialization of technical-legal skills of the staff is determinant for the capacities of the agency to avoid challenges in courts of appeal due to a flawed legal foundation of an administrative decision (regardless of the

accurate technical component of the decision). Considering these findings, this research paper focuses on the *delivery* and *analytical* capacities necessary for the agency to guarantee the implementation of lawful enforcement policies.

Heredia et al. (2018) point out the dual task of ASEA's *delivery* capacity to guarantee that regulatory objectives are fully achieved: on the one hand, the successful implementation of regulations to ensure regulatory compliance, on the other hand, to guarantee the legality of the enforcement activities that prevent judicial disputes in courts of appeal. In this sense, ASEA's *delivery capacities* can be understood as the ability to ensure that enforcement policies are implemented in a timely and effective manner, as well as to guarantee lawful activities throughout the implementation. Considering these arguments and recalling the research enquiry that motivates this study –the causes that prevented ASEA's compliance with lawful procedures–, the following definition is proposed:

- ***ASEA's delivery capacities***: ability to guarantee that the administrative procedures conducted to enforce the law at the frontline of implementation comply with the statutory provisions and legal standards that govern the agency's jurisdiction.

Note that the definition above refers to the legality of the routines, internal dynamics and work practices (*procedures*) conducted to enforce the law. In addition to ASEA's capacities to deliver in the frontline of regulatory enforcement, the lawfulness of ASEA's enforcement decisions is also dependent on the technical specialization and analytical expertise of the agency (*analytical capacities*) to prevent erratic assessments or a flawed rationality of an enforcement decision. This aspect leads to the definition of *analytical capacities*:

- ***ASEA's analytical capacities***: ability to guarantee that the legal grounds and technical assessment of an enforcement decision comply with the statutory provisions and legal standards that govern the agency's jurisdiction.

#### 4.3.4 *Unlawful enforcement as an unintended consequence*

Organizational studies refer to unintended consequences as a result of ambiguities, paradoxes, side effects and tensions embedded in public organization's institutional features (Merton, 1936, cited on Lodge 2019; Bach & Wegrich 2019). In consequence, policy failures, coordination problems and inefficient bureaucratic performance are consequential of rational behavior of bureaucrats constrained by organizational features. This conception implies that, even though bureaucrats follow the adequate or expected pathway and procedures of action to fulfill their tasks, an organizational bias can trigger unexpected outcomes consequently. Drawing upon this strand of research, I use the unintended consequences approach as a theoretical tool to understand how ASEA's complex institutional scenario constrained the administrative capacities of ASEA to enforce the law. Recalling two aspects of ASEA's organizational context (section 3.1), I

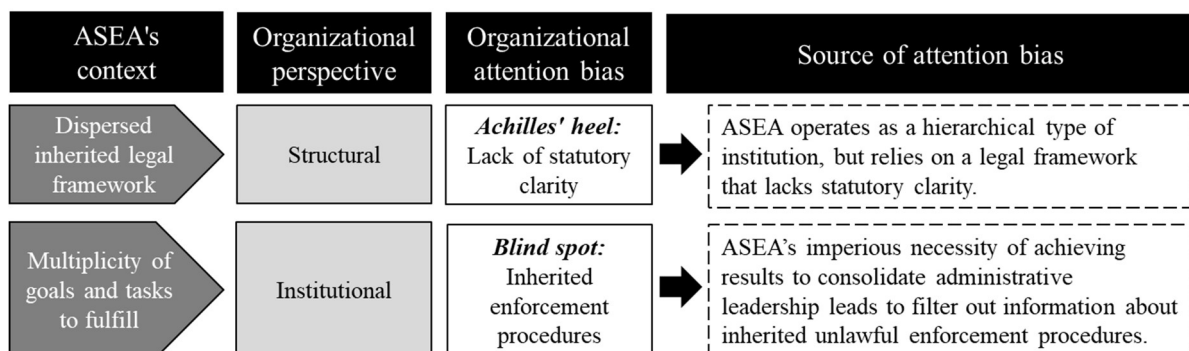


suggest that the dispersed legal framework inherited from the previous regulatory regime, as well as the multiple goals and tasks that the agency inherited from previous institutions, undermined ASEA’s *analytical* capacities to enforce the law under legal procedural standards.

Recent advances within the study of executive politics and public management identify how biases in organizational attention affect bureaucratic behavior (Bach & Wegrich, 2019; Lodge, 2019). This literature conceptualizes organizational constraints as attention biases, triggered by the structural design under which a public entity operates, as well as by the institutional goals that drive the performance of the organization. Organizational attention biases can be twofold. First, a perspective on *structure* emphasizes the “intentions of those in charge of designing formal structures of an organization (political principals) to achieve policy objectives” (Bach & Wegrich, 2019, p. 7). Meanwhile an *institutional* perspective focuses on “the gradual process of organizational emancipation from the original intentions of institutional design, which results in unique norms and values that guide decision making behavior” (p.8).

Moreover, Bach & Wegrich (2019) defined a non-exhaustive typology of organizational biases that lead to unintended consequences: structural *Achilles’ heels* and institutional *blind spots*. On the one hand, based on Hood’s (1998) cultural theory classification of organizational styles, Achilles’ heels refers to the idea that “any organizational form comes with particular strengths and weaknesses [...] and discusses how each organizational style comes with particular types of organizational failure and breakdown” (p.13). On the other hand, the notion of a ‘blind spot’ is defined as the “unknown inability to detect and process potentially critical information that might be fundamental to prevent poor policy implementation” (Lodge, 2019. p.31), generally caused by institutional arrangements of organizations. Building on these theoretical considerations, figure 3 summarizes how the particular context of ASEA is associated with the theoretical arguments proposed in this section.

Figure 3. ASEA’s organizational attention biases embedded in the enforcement decision-making process



Source: own elaboration based on Bach & Wegrich (2019), Lodge (2019), Hood (1998), Roldan Xopa (2018), ASEA (2016, 2017); OECD (2017).

From the information presented in figure 3 it is possible to visualize the mechanisms that explain unlawful implementation processes as a result of structural “Achilles’ heel” and institutional “blind spots” that undermined the agency’s *analytical* capacities to enforce the law.

#### **Achilles’ heel mechanism: lack of statutory clarity**

Following Hood’s (1998) cultural theory classification of organizational styles, ASEA’s organizational setting to enforce the law during its first 36 months of operation belongs to a “hierarchist-oversight” type of organization, which according with the information provided in section 3.1 of this paper “operates under explicit negotiated rules within specific limits, relies on technical expertise, demands compulsory reporting of regulated firms, and sanctions are based in a penalty catalogue” (Lodge, 2009, p. 402). An inherent weakness of a “hierarchist-oversight” institution predicted by the theory (the *Achilles’ heel*) concerns with the fact that it highly relies on rules, consistency and certainty, and is vulnerable to fragmented structures of governance. This conception points out how the lack of statutory clarity of the inherited framework under which ASEA operates is a weakness that undermines the enforcement strategies of the agency, leading to the following hypothesis:

- **H<sub>1</sub> Achilles’ heel hypothesis:** The lack of statutory clarity under which ASEA operates undermined the agency’s analytical capacities to comply with the legal provisions that govern the agency’s jurisdiction.

#### **Blind spots: inherited unlawful enforcement procedures**

Concerning the ‘blind spot’ source of bias, I consider the *imperious immediacy of interests* (Lodge, 2019) that mediated ASEA’s priorities during its first months of operation as an attention bias that led the agency to create an unconscious filtering out of relevant information to enforce the law. With this information provided, a second hypothesis is proposed:

- **H<sub>2</sub> Blind spots hypothesis:** ASEA’s unlawful inherited enforcement procedures undermined the agency’s analytical capacities to comply with the legal standards that govern the agency’s jurisdiction.

In addition to the hypotheses introduced, it is relevant to add null hypotheses that consider alternative explanations of ASEA’s unlawful implementation, which are not related to organizational attention biases. This set of explanations could be framed as inherent deficiencies in the legal and technical expertise of an enforcement decision (lack of *analytical capacities*), or lack of *delivery capacities* at the frontline of implementation (Heredia et. al, 2019).

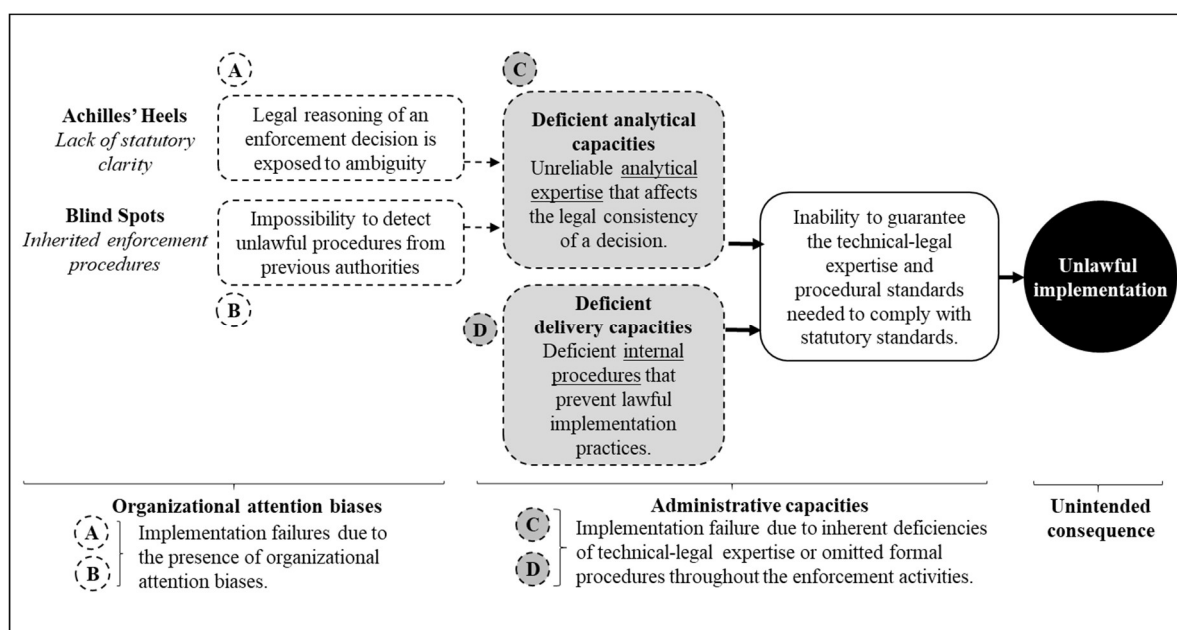
- **H<sub>0a</sub> Lack of analytical capacities** *unlawful implementation procedures are a consequence of ASEA’s deficiencies to guarantee that the legal grounds and technical*

assessment of an enforcement decision comply with the statutory provisions and legal standards.

- **H<sub>0p</sub> Lack of delivery capacities:** *unlawful implementation procedures are consequence of ASEA's deficiencies to guarantee that the enforcement procedures at the frontline of implementation comply with statutory provisions and legal standards.*

A graphic explanation of these hypothetical mechanisms to explain unlawful enforcement is depicted in figure 4, which shows the different starting points of the pathways that lead to unlawful implementation according to the administrative capacity affected. The pathways highlighted as A and B are representative of how the Achilles' heels and Blind spots (H<sub>1</sub> and H<sub>2</sub>) undermined ASEA's analytical capacities. Meanwhile pathways C and D (H<sub>0a</sub> and H<sub>0p</sub>) depict unlawful cases associated to the inherent inabilities of the agency to enforce the law at the frontline of implementation and poor analytical skills (deficient analytical and delivery capacities), which are not associated to the presence of organizational constraints.

Figure 4. Pathways of unlawful implementation procedures



Source: own elaboration based on Bach & Wegrich 2019, Lodge (2019), Lodge & Wegrich (2014), Roldan Xopa (2018), ASEA (2016; 2017); OECD (2017); Heredia et.al (2018).

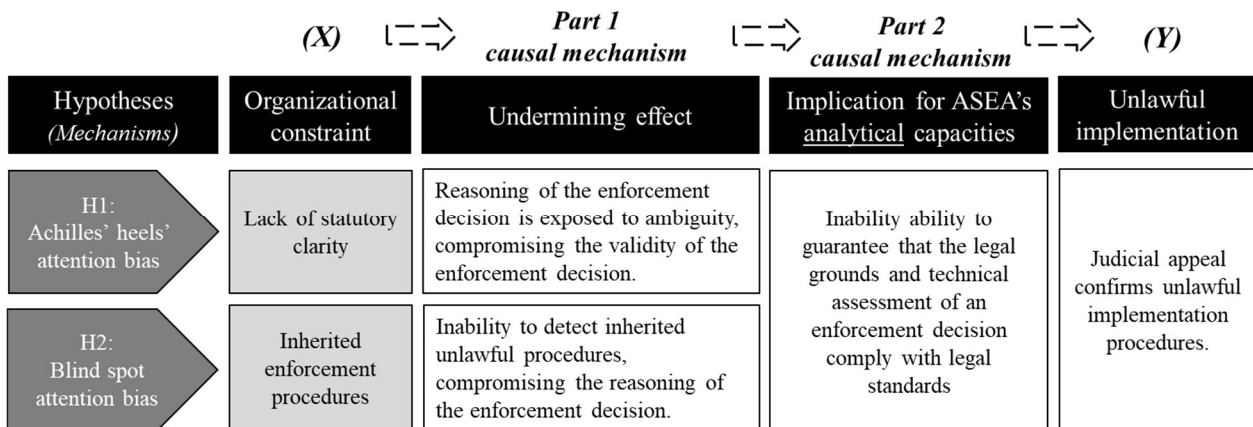
#### 4.4 Research design

I conducted a theory-testing variant of process tracing (Beach & Pedersen, 2013) as an approach that allows to investigate whether *structural* and *institutional* mechanisms are present in the content of 71 appeal judgements (*juicios de nulidad*) against sanctioning decisions issued by ASEA. I treat the sample of cases as causal process observations (Collier, Brady, & Seawright, 2010) and the goal is to evaluate if there is enough evidence in the text of the appeal cases to show that the hypothesized causal mechanisms linking organizational constraints and unlawful implementation are present, and that both works as theorized (Beach and Pedersen).

#### 4.4.1 Step 1: Conceptualization

According to Beach & Pedersen (2013) a causal mechanism can be defined as a theory of a system of interlocking parts that transmits causal forces from X to Y (Bunge, 1997; Glennan, 2002; Manicas & Bhaskar, 1981). With this arguments in mind, I propose a conceptualization of two causal mechanisms that reflect the theoretical relationship established in hypotheses H<sub>1</sub> (Achilles' Heels) and H<sub>2</sub> (Blind spots). For the case of H<sub>1</sub>, a *structural mechanism* is proposed to depict how actors react in predictable (rational) ways to their structural position due to exogenous constraints, and for the case of H<sub>2</sub>, I consider an *institutional mechanism*, which deals with how institutional arrangements channel actors unintentionally into a certain direction (Parsons, 2007). Figure 5 summarizes the conceptualization of the causal mechanisms.

Figure 5. Theory level conceptualization of causal mechanisms



**Source:** own elaboration based on Bach & Wegrich (2019), Lodge (2019), Lodge & Wegrich (2014), Roldan Xopa (2018), ASEA (2016; 2017); OECD (2017); Heredia et.al (2018); Beach & Pedersen (2013)

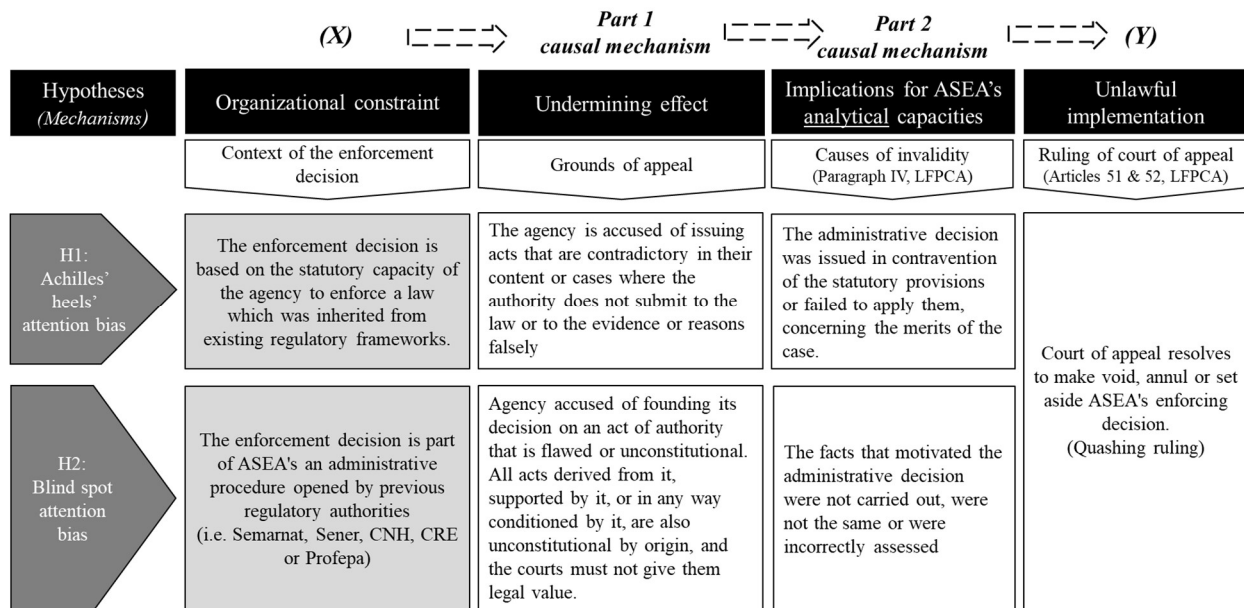
The information depicted in figure 5 highlights the causal logic in two levels. First, it captures the undermining effect that the organizational constraints have on the decision making process of the agency, and second, it reflects the consequences of this impact on the *analytical* capacities of the agency, which eventually translates into unlawful procedures.

#### 4.4.2 Step 2: Operationalization

In order to translate theoretical expectations into case-specific predictions I now introduce identifiable observable manifestations that the two mechanisms proposed beforehand should have if we expect them to be present in ASEA's unlawful implementation procedures. For this purpose, I recall the information provided in section 3.1, which describes the organizational context that the agency faced during the first 36 months of operations. Regarding the Achilles' Heel mechanism, the type of observable manifestations to be found must point out that the lack of statutory clarity under which the agency based its enforcement decision resulted in an overruling judgement by the appeal courts. The evidence must identify that ASEA's decision was based on a valid statutory rationality (expected behavior), although the dispersed set of laws

that comprise the agency’s legal framework opened the door to be challenged in courts, due to the possibility to argue an alternative legal rationality against the decision. For the case of blind spots, the empirical predictions should be aligned to a situation in which an enforcement decision would be overruled by courts due to the presence of invalid administrative acts issued by previous regulators. The operationalization of the mechanisms is summarized in figure 6, which refers to specific sections of the text of the appeal judgements, and links them to the theorized causal mechanism.

Figure 6. Operationalization of theoretical causal mechanisms



**Source:** own elaboration based on Bach & Wegrich (2019), Lodge (2019), Lodge & Wegrich (2014), Roldan Xopa (2018), ASEA (2016; 2017); OECD (2017); Heredia et.al (2018); Beach & Pedersen (2013)

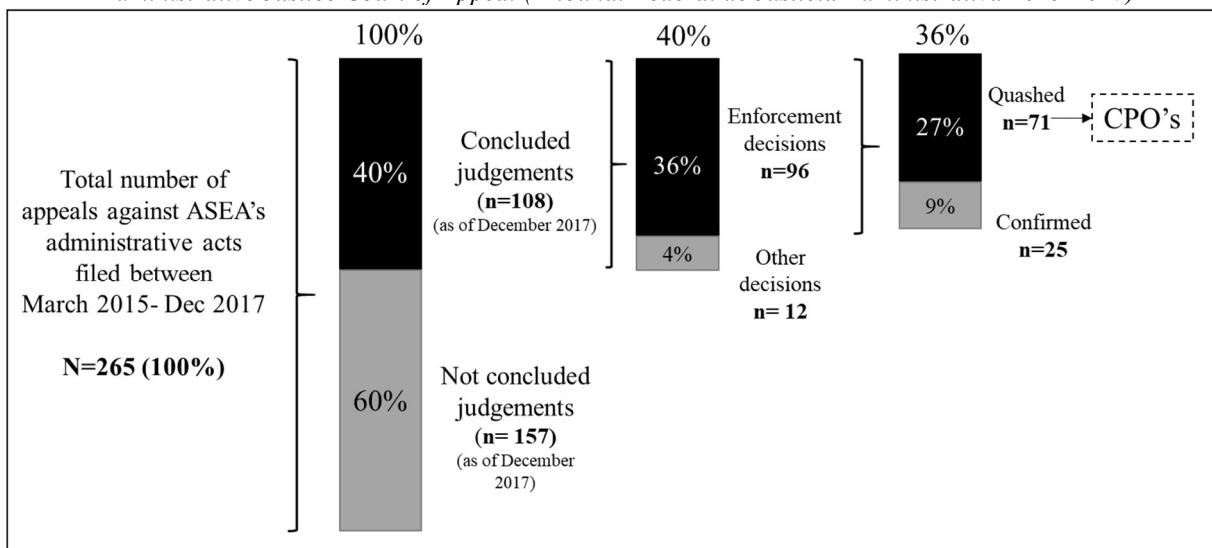
It is important to highlight two important aspects of the proposed operationalization. First, it guarantees the contextual specificity of the causal mechanism, delimiting “the relevant aspects of a setting where the initial conditions contribute to produce an outcome of a defined scope and meaning through the operation of a causal mechanism” (Beach & Pedersen 2013, pp. 54). Second, as this operationalization logic is designed to scrutinize information coming from legal texts issued by judges, it is possible to treat this information as a “trace” type of evidence “whose mere existence provides proof that a part of a hypothesized mechanism exists” (p. 100). This particular feature of the evidence found in appeal judgements frames the observations under study as “causal process observations” (Collier, Brady, and Seawright 2010), representative of pieces of data that provide information about the context and the contribution of mechanism to observe the expected outcome. Furthermore, it is of great importance to note that the mechanisms are mutually exclusive from each other. Even if both organizational biases were present in a case, the arguments of invalidity of judges would only point out to one cause as a determinant of an unlawful administrative act, as one causal of invalidity is enough to overrule an administrative decision.

#### 4.4.3 Step 3: Data collection

I conducted a content analysis of the texts from 71 judicial review judgements (*juicios de nulidad*<sup>34</sup>) against sanctioning decisions issued by ASEA between March 2015 and December 2017, which were solved by the specialized chamber for regulation and environment affairs of the Mexican Federal Administrative Justice Court of Appeal<sup>35</sup>. According to the information from the Court of Appeal (Tribunal Federal de Justicia Administrativa, 2019), the number of cases is representative of all the judicial review appeals against enforcing decisions that count with a final judgement. The study also considers information from those cases that escalated to higher instances of appeal (*Tribunales Colegiados de Circuito*) as well as cases attracted by the Mexican Supreme Court.

Figure 7 illustrates the representativeness of the sample of judicial cases used for this research as a percentage of the total number of judicial cases (n=265) against the agency between 2015 and 2017. As mentioned beforehand, I treat the sample of 71 judicial appeals as “causal process observations” (CPOs) (Collier, Brady, and Seawright, 2010), which I consider as representative evidence that provide information about the context and the contribution of the organizational constraints to observe the predicted implementation failures.

Figure 7. Sample selection of judicial appeals against ASEA’s enforcement decisions filed at the Federal Administrative Justice Court of Appeal (Tribunal Federal de Justicia Administrativa 2015-2017)



Source: OECD (2017a; 2017b), ASEA (2016; 2017; 2018) and own estimations with information from the online information from Tribunal Federal de Justicia Administrativa (2019) (information updated as of June, 2019).

<sup>34</sup> It is important to highlight that the Mexican justice system differentiates between two types of judicial appeals: *juicios de nulidad* (annulment judgements) and *juicios de amparo* (constitutional lawsuits). This research only considers the annulment judgements as this represent direct appeals to a final decision issued by the agency.

<sup>35</sup> The information was provided through the National Transparency Platform (INAI), as an information request of author to the *Tribunal Federal de Justicia Administrativa* (TFJA). The information provided consisted of a list of file numbers the resolutions requested. The author then downloaded the relevant information for each resolution number directly from the TFJA website. Finally, the author compiled and analyzed the information from the judgments whose final objective was the integration of a database that can be consulted.

In order to make valid inferences from texts contained in the sample of judicial review judgements I performed, as a first stage, a manifest content analysis of the judicial cases considering the information that was physically present and directly countable from the texts (Hayes & Krippendorff, 2007; Krippendorff, 2004). I pre-processed the texts to extract relevant information considering the following criteria:

- **Unit of analysis:** final judgements of judicial appeals against enforcement decisions issued by ASEA.
- **Sampling unit:** PDF documents downloaded from the Administrative Justice Court of Appeal online tool<sup>36</sup> (final judgements).
- **Coding units:** paragraphs with information containing: a) the administrative decision under challenge; b) the grounds of appeal; c) enforced law; d) final verdict of the judge, e) responsible authority; f) dates corresponding to the issue of the act, the start of the judgment, the end of the judgement; g) further challenges in higher instances of appeal; h) official file number.
- **Recording of the coding units:** conducted as separated entries in an excel file, representing each of the coding units, and linked to a unique case identification.

As a second stage, I developed a deductive latent content analysis (Krippendorff, 2004) of the information extracted from the manifest analysis, to classify the texts of the 71 appeal cases under study according to the codebook presented in Table A of the appendix. The coding of the cases was conducted by the author and a student assistant, following the same codebook introduced previously. In order to reach a 100% reliability agreement between coders, three rounds of coding were conducted following the same codebook. For the third round of coding, the codebook was readapted in order to reach a higher degree of clarity of the concepts.

## 4.5 Results

### 4.5.1 Types of unlawful implementation

The output presented in table 1 analyzes the information in two separate groups (A and B). Group A is related to those cases where the court of appeal ruled that the facts, motivation, assessment or the merits of the administrative decision issued by the regulator fell into an arbitrary or erratic analysis<sup>37</sup>. This group is of particular interest for the purpose of the study, as it represents the set of cases where the *Achilles' Heels* and *Blind spots* mechanisms are expected to be found. Recalling the operationalization of H1 and H2, a condition of both causal mechanisms (*structural* and *institutional*) is that unlawful implementation practices are a result of organizational

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<sup>36</sup> Source: Tribunal Federal de Justicia Administrativa (2019). Period of time considered for the consultation: 2-Mar-15 to 31-Dec-17. Criteria of search online: Consulta de Sentencias, Jurisdiccion= Sala especializada en materia de Regulación Ambiental y Competencia; Texto libre: Agencia Nacional de Seguridad Industrial y de protección al Medio Ambiente del Sector Hidrocarburos.

<sup>37</sup> See table A in the appendix for a better reference of the classification of cases.

constraints that undermined ASEA’s analytical capacities. In this regard, the subset of cases in group A represents situations where ASEA’s flawed analytical standards affected the legality of a decision (including the null hypothesis  $H_{0a}$ ). The remaining cases, classified under group B, illustrate those appeal judgements associated with unlawful enforcement practices that result from deficient operating procedures throughout the implementation. Conversely to what happens in group A, we would not expect observing the causal mechanisms within group B, as there are no causal connections to the analytical capacities of the agency (recall the null hypothesis  $H_{0d}$ ).

Table 1. Classification of appeal cases according to the theorized causes of unlawful behavior, and regulatory tasks under challenge

Grounds for invalidity of an enforcement decision	Causes of unlawful implementation	Total cases	Institutional mandate			Enforcement policy		
			Environmental protection	Industrial safety	Total 100%	Fines	Corrective measures	Total 100%
A. Flawed analytical criteria that affects the legal consistency of a decision.	H <sub>1</sub> : Achilles' heels	30% (21)	90% (19)	10% (2)	21	19% (4)	81% (17)	21
	H <sub>2</sub> : Blind spots	20% (14)	71% (10)	29% (4)	14	50% (7)	50% (7)	14
	H <sub>0a</sub> : inability to comply with analytical standards	17% (13)	54% (7)	46% (6)	13	92% (12)	8% (1)	13
	<b>Total group A (H<sub>1</sub>+H<sub>2</sub>+H<sub>0a</sub>)</b>	<b>67% (48)</b>	<b>75% (36)</b>	<b>25% (12)</b>	<b>48</b>	<b>48% (23)</b>	<b>25 (52%)</b>	<b>48</b>
B. Deficient operating procedures that prevent lawful implementation practices.	H <sub>0p</sub> : inability to comply with standard operational procedures	33% (23)	56% (13)	44% (10)	23	83% (19)	17% (4)	23
<b>Total Group A + Group B</b>		<b>71</b>	<b>70% (49)</b>	<b>30% (22)</b>	<b>71</b>	<b>60% (42)</b>	<b>40% (29)</b>	<b>71</b>

Source: own estimations with information from the online information from the Tribunal Federal de Justicia Administrativa (2019). Information updated as of June 2019. See appendix for details of classification.

(\*) Numbers in parentheses denote number of appeal cases.

#### 4.5.2 Testing hypotheses

The analysis presented in table 1 reveals that the *structural* causal mechanism theorized under H<sub>1</sub>: *Achilles' Heels* is present in 30% (21) of the sample of cases under study, and the institutional mechanism defined as H<sub>2</sub>: *Blind spots* in 20% (14). These results together mean that in half of the enforcement cases overruled by courts during the period between March 2015 and December 2017 the organizational attention biases embedded in ASEA’s decision making processes undermined the agency’s analytical capacities to prevent unlawful implementation procedures. Although, there is no evidence that confirms the presence of the mechanisms theorized by H<sub>1</sub> and H<sub>2</sub> in the remaining 50% of the cases, it results of great relevance to highlight the following: if we only consider the sample of cases from group A (48 cases), then the theorized mechanisms



are present in more than two thirds of the appeals (35 cases out of 48) in this group, leaving out only 13 cases where neither mechanisms can be observed. This represents a piece of evidence that confirms that the mechanisms are generally observed within group A (as expected), which allows to claim that most of the appeal rulings against the analytical criteria of ASEA's enforcement decisions under the period of study are caused by the presence of *Blind spots* or *Achilles' heels* constraints.

#### 4.5.3 Differentiated unlawful implementation

A couple of important distinctions should be noted about the cases of unlawful enforcement caused by these mechanisms (Table 1). The first distinction is concerning the differences that exist between the cases explained by the *Achilles' heels* and *Blind spots* mechanisms. The unlawful enforcement cases caused by the presence of the *Achilles' heel* mechanism are generally featured by arguments against the corrective measures imposed by the agency (81%) to enforce the environmental regulation (90%). Meanwhile this trend is less notorious within the cases explained by the *Blind spots* mechanism, where a lower share of cases is associated to arguments against the environmental protection mandate *vis a vis* the industrial safety supervision (71% vs. 29%), and a similar proportion of cases exists between the enforcement of fines and corrective measures. A second distinction is related to the differences that exist between the set of cases explained by the attention biases mechanisms and those that fall into the null hypotheses (see  $H_{0a}$  &  $H_{0p}$  in table 1). In the latter set of cases it is possible to observe a higher share of cases that argue against the enforcement of industrial safety regulations (although, still lower than the share of cases against environmental protection). Besides, a notorious difference is observed concerning the higher number of cases against the enforcement of fines *vis a vis* the implementation of corrective measures (83% vs. 17%), contrary to what happens in cases explained by the theoretical mechanisms.

## 4.6 Discussion

Throughout the preliminary findings of this research, it has been shown that the most of ASEA's cases of unlawful implementation are associated to the flawed analytical consistency of enforcement decisions, rather than to deficient operating procedures. It has also been demonstrated that unlawful enforcement decisions are not solely attributed to the agency's deficient delivery capacities, but were also caused by organizational constraints that undermined the agency's analytical capacities to ensure compliance throughout the enforcement of regulations. This final section discusses about the implications of this study for the assessment of ASEA's enforcement activities during its first stage of operations, and how does the empirical evidence presented in this investigation contributes to the literature of the administrative capacities of regulatory agencies. I will first discuss about how this study helps to clarify a relevant legal controversy concerning an enforcement decision issued by the agency in 2015

against the former Mexican state-run oil monopoly, *Pemex*, which eventually was overruled by courts due to an incorrect assessment of the facts and an erred application of the statutory framework. Secondly, I will assess how the basis of ASEA's strategy to deal with the high amount of administrative procedures inherited from previous regulatory authorities indirectly affected the lawfulness of ASEA's enforcement decisions. Finally, a brief discussion proposes how this research offers new theoretical and methodological pathways for to assess the administrative capacities and performance of regulatory agencies.

#### 4.6.1 *The Achilles' heels of the "Huachicoleros" case*

An example of an *Achilles' heels* attention bias that constrained the agency's capacities to enforce the law can be illustrated through an enforcement decision issued by the agency in 2015, which eventually was overruled by courts due to an incorrect assessment of the facts and an erred application of the statutory framework. In 2014, one year before ASEA started operations, an illegal perforation to a gasoline pipeline of *Pemex* (presumably attributed to the organized crime gangs in Mexico known as *Huachicoleros*<sup>38</sup>), caused a spillover of 120,000 liters of gasoline that affected 105,000 square meters of agricultural land located in the southeast region of Mexico. In consequence, the Federal Attorney Office for Environment Protection (*Profepa*, the former environmental authority) imposed a series of corrective measures to *Pemex* in order to remedy the situation and comply with the environmental regulation. The enforcement tasks of these corrective measures were transferred to the newly created ASEA. The new agency found that *Pemex* did not comply with the corrective measures previously decreed by *Profepa*, and issued a new set of remedial procedures to be executed by the oil company. Nevertheless, *Pemex* appealed ASEA's new set of corrective measures arguing that the spillover was a consequence of criminal activities and the firm should not had been accused liable for a damage caused by an incidental case<sup>39</sup>. The appeal did not succeed at the first instance administrative court, but the case escalated to the Supreme Court of Justice, whose final ruling determined that the sanctions imposed to *Pemex* should be invalidated, as the plaintiff was not found directly responsible for the damage occurred by the spillover.

In the aftermath of litigation, the ruling of the Supreme Court revealed that the success of ASEA's policy choices do not only depends on the agency's own capacities to enforce the law (Roldan Xopa 2018). Even though ASEA's decision to impose corrective measures to *Pemex* was seemingly conducted according to legal standards, the last word of the Supreme Court affirmed the contrary. Figure 8 depicts the main differences of the rationality followed by ASEA *vis a vis* the judgement of the Supreme Court.

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<sup>38</sup> For a better reference and context of the organized crime activities see (Sieff, 2019).

<sup>39</sup> See *Pemex v. ASEA*. 1621-16-EAR-01-8 (2018)

Figure 8. Summary of legal arguments from ASEA and the Supreme Court concerning the liability of Pemex in the 2014 gasoline spillover from the “Minatitlán-Villahermosa” pipeline (Tabasco, Mexico)

Event	Cause	Ruling	Legal rationality	Legal framework
Spillover of 120,000 liters of gasoline from a pipeline owned by Pemex.	Clandestine siphoning of oil by organized crime (Huachicoleros)	<b>ASEA:</b> Pemex is obliged to implement corrective measures to remediate the damages of the spillover	The owner of a property with contaminated soil has the legal duty to carry out the necessary remediation actions, even if the owner is not responsible for the contamination of the site.	Law on ecological equilibrium and environmental protection & Law for the handling and processing of waste
		<b>Supreme Court:</b> Pemex is not obliged to implement corrective measures; hence the sanctions imposed to Pemex should be invalidated.	The law foresees that an industrial operator should not be considered liable for environmental damage if the action that caused the damage is triggered by the action of criminal activities of a third party.	Environmental liability federal law

Source: adapted from Roldan Xopa (2018)

As mentioned before, according to the Supreme Court, Pemex was not found directly responsible for the damage occurred by the spillover, as it was caused by criminal activities from a third party, and there is an exclusion of liability clearly foreseen in the set of environmental laws that governed these matters under the previous regulatory regime. However ASEA’s decision to impose corrective measures to Pemex was based on foreseeable legal responsibilities from the same set of environmental laws, which operators must consider when conducting industrial activities. In summary, the *Achilles’ heels* bias can be spotted due to the different interpretation of the situation by the Supreme Court which assessed the unlawfulness of the sanctions to Pemex based on a ‘liability’ rationality, even though ASEA’s decision was based on a more ‘remedial/corrective’ approach to guarantee the effective enforcement of the regulations for environment protection.

#### 4.6.2 Blind spotted by the institutional design

One of the most relevant challenges faced by the agency during its first months of operation was the transfer of over 85,000 files from the different authorities in charge of supervising the industry previous to the state reforms, such as local authorities, regulatory agencies and administrative bodies (Semarnat, Sener, CNH, CRE and Profepa), which became the responsibility of ASEA (ASEA, 2016). In an attempt to position itself as a competent actor to carry out a multiplicity of regulatory tasks effectively, the agency concentrated most of its efforts to the analysis, organization and systematization of those files (ASEA 2016). After an intensive year of work conducted in 2015 and 2016 to unburden the high load of inherited files, the agency achieved to identify duplicated or inconsistent procedures, which allowed the initial load to be reduced to a universe of 6,534 files (5,803 related to inspections and 731 of ongoing administrative

procedures, such as licenses and authorizations). As of the end of 2016, 1,407 files had been resolved and 4,958 were under analysis legal analysis (ASEA, 2016).

The organizational context described before points out the necessary circumstances that led the agency to filter out relevant information concerning inherited unlawful procedures contained in enforcement investigations conducted by previous regulatory agencies and administrative bodies. In other words, the limitations of the ASEA's information processing capacity could have eventually blind spotted the agency to adapt inherited unlawful procedures into the implementation of enforcement policies. To this point, the reader might think that this situation could be simply interpreted as a lack of administrative capacities due to the overwhelming task of dealing and processing a disproportionate number of cases, but anything related to a blind spot. However, the blind spot mechanism relies on the premise that ASEA's imperious necessity of achieving results to consolidate administrative leadership led the agency to filter out information about unlawful enforcement procedures inherited from previous regulators. This "imperious necessity" gave result to ASEA's strategy to prioritize most of its efforts to the analysis, organization and systematization of the inherited files, but unconsciously filtered out specific information that potentially could reach courts of appeal.

#### *4.6.3 New analytical pathways*

As a final remark of this discussion, the empirical findings in this study provide a new understanding of the implementation challenges that a regulatory agency faces in its early days of life, which is a critical stage to demonstrate the effectiveness of its actions. This new understanding should help to improve predictions of how the institutional design and political 'zeitgeist' of regulatory reforms shapes the administrative capacities that an agency requires to deliver sound policies in a complex environment (Elizondo & Dussauge, 2019). In particular, the contribution of this investigation can be understood on the following basis. Firstly, the study offers an empirical representation of administrative capacities that shows how 'governance readiness' (Lodge & Wegrich 2014) is not only dependent on the abilities and resources that public bureaucracies should possess to accomplish their missions, but also on procedural aspects of decision-making processes that might be affected by non-evident organizational constraints. Secondly, this research contributes to the study of judicial review of regulatory decisions, which represent a unique source of evidence to assess the success of policy implementation. Courts of appeal act as a neutral forum where regulatory agencies are exposed to legal consequences of their actions (Shapira, 2020), and the information available as a result of the litigation process against a regulatory agencies reveals the deficiencies or the legal controversies that bureaucrats face throughout the implementation of policy choices (Bignami, 2018; Lindseth, 2019; Magill, 2014; McCubbins & Schwartz, 1984; Rodriguez, 2008; Rose-Ackerman, 2008; Turner, 2017; Whittington, Kelemen, & Caldeira, 2008). Finally, this research lays the groundwork for future

empirical research to assess the quality of the administrative decisions of regulatory agencies and the causes that may undermine their administrative capacities to implement comprehensive policy choices. The methodological insights introduced here allow a detailed scrutiny of the implementation process to understand how statutory and administrative procedures throughout the decision making processes affect the administrative capacities of an agency. The research methods to collect information and analyze judicial texts introduced in this paper, could be extrapolated to comparatively assess the enforcement capacities of regulatory agencies in other policy jurisdictions, as well as other Latin American countries that share similar complex institutional settings as a result of the same type of state structural reforms (Levi-Faur & Jordana, 2006; Pavón Mediano, 2020).

#### **4.7 Conclusions**

This study set out to examine the case of ASEA to understand those cases where the agency failed to observe legal standards in the process of enforcing the law during its first 36 months of operation. The main goal of the study was to explain what type of unlawful procedures caused the invalidity of ASEA's enforcement decisions, and how did the new institutional and organizational regulatory paradigm in Mexico affected ASEA's administrative capacities to prevent unlawful procedures throughout the enforcement activities. The evidence collected and the process tracing analysis confirmed that ASEA's fragmented governance system –dispersed into different laws and bylaws inherited from other jurisdictions–, translated into a lack of statutory clarity that undermined the decision-making capacities of the agency. Moreover, this study showed that ASEA's dual institutional mandate (environmental protection and industrial safety), as well as the multiplicity of activities under its supervision, undermined the agency's implementation quality.

Notwithstanding the relatively limited sample of cases and the limited period under study, this work offers valuable insights into the understanding of the challenges faced by agencies embedded in regulatory regimes from developing countries, concerning their institutional design and the ex-post oversight controls designed by political principals to supervise the quality of their actions. Further work that links administrative law scholarship with public administration and political science analytical techniques is needed to explore empirically the information contained on judicial appeals, and how this information could translate into valuable evidence to understand the performance of regulatory agencies.

## Chapter V. Concluding Remarks

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This doctoral dissertation aimed to contribute to the debate on accountability in regulatory governance by presenting empirical evidence that shows how does judicial review of administrative decisions shapes the democratic accountability of regulatory agencies. Based on a multidisciplinary approach, the three analytical chapters that comprise this investigation have demonstrated that judicial controls play a unique and essential role to overcome the legitimacy and democratic accountability dilemmas that arise from the regulatory governance paradigm. Chapter two highlighted the role of judicial accountability as a ‘mediated legitimacy’ contributor that links regulatory agencies’ actions to the democratic mandate of the *trias politica* of the state (i.e. executive, legislative and judicial powers). Chapter three examined the information-generating process feature of judicial accountability, and clarified what type of ‘informational cues’ are necessary to overcome the knowledge and expertise asymmetries between political principals and regulatory agencies. Finally, chapter four analysed the role of judicial controls as an approach to evaluate regulatory agencies performance, and how administrative appeals against regulatory decisions impact the decision-making process of agencies throughout policy implementation activities. The main results and findings from the investigations conducted for this dissertation are described and briefly discussed in the following paragraphs.

### 5.1 Main findings

Building on the literatures of regulatory governance and comparative administrative law, chapter two enquired about the typologies of judicial accountability established by different states to supervise the role of energy and telecommunications authorities around the world. The research aimed to understand the degree of scrutiny that judicial courts are allowed to exercise for the jurisdictional control of regulatory agencies. It examined how these varieties of judicial controls are conceived not in isolation from the rest of accountability mechanisms, but embedded in the accountability and legitimacy needs of political principals. Evidence suggests that there is no consensus of a model of judicial controls concerning the intensity of review available for judges to scrutinize regulatory decisions. The data collected for this chapter suggests that there are considerable variations of judicial accountability across regions, legal systems and institutional typologies of regulatory agencies, as well as across different types of courts of appeal. Findings revealed that regulatory agencies adapted with higher provisions of public accountability will generally operate under scenarios where courts of appeal can fully review the merits, facts, motivation and substance of policy choices, but these are not entitled to substitute their own decisions for that of the regulatory authority. In this scenario, courts are not *de facto* second regulators, but neither act as judges merely restrained to assess the procedural validity of regulatory enforcement decisions.

Chapter three built on the comparative administrative law scholarship and administrative capacities literature and enquired about the ‘informational content’ of judicial appeals against regulatory decisions, and how different legal and administrative traditions shape the characteristics of the information that results from disputes in courts of appeal. Findings are of particular relevance to understand the practical implications of analyzing judicial controls of regulatory decisions under a principal-agent approach. The evidence presented helped to clarify what specific type of information from judicial review mechanisms translates into an effective instrument to overcome the principal-agent information asymmetries predicted by this approach. For example, the chapter showed how the information generated through judicial appeals against regulatory decisions in the United Kingdom is closer to the theoretical idea that judicial review operates as a mechanism to overcome principal-agent information asymmetries, as the specialized courts are allowed to scrutinize the rationality and expertise of regulatory policy choices. Meanwhile, this scenario is less likely to occur at the generalist type of Spanish courts, as it is difficult to challenge regulators according to the policy rationality principle, hence less control over a regulator’s discretion.

Finally, chapter four enquired about the causes that prevent young regulatory agencies to comply with lawful administrative procedures throughout the enforcement of regulation, and showed that judicial review of administrative decisions is a unique tool to assess how the institutional foundations of an agency can trigger organizational constraints that affect its capacities to observe procedural standards. The research examined the case of the Mexican Agency for Safety, Energy and Environment (ASEA) to analyze those cases where the agency failed to observe legal standards in the process of enforcing the law during its first 36 months of operation. Findings of this chapter showed that most of ASEA’s cases of unlawful implementation are not solely attributed to the agency’s deficient delivery capacities, but were also caused by the organizational and institutional original design, which undermined the agency’s analytical capacities to ensure compliance throughout the enforcement of regulations. The chapter provided with a new understanding of the implementation challenges that a regulatory agency faces in its early days of life, which is a critical stage to demonstrate the effectiveness of its actions. This new understanding should help to improve both, the administrative capacities to prevent implementation failures, as well as the institutional design and set of rules under which an agency operates.

### *5.2 Overall contribution to the scholarship of regulatory governance*

The overall contribution of this doctoral dissertation consists of three main inputs for the study of regulatory governance. First, it represents a multidisciplinary attempt to “remove the artificial walls between the regulatory scholarly community and other social scientists, and promote more fruitful social science” (Levi-Faur, 2013, p. 29). It is also an attempt to expand the scope of study

that improves our understanding of the regulatory state, where administrative agencies “are pivotal, but not exclusive, institutions in the regulatory process and that regulatory output is fashioned also by other institutions, including legislatures, public prosecutors, courts and private bodies” (Bignami & Zaring, 2018, p. 3). Second, the comparative approach that features this research addresses the need for studies that elucidate the ‘odyssey’ of the regulatory state from a mere “American thin and monomorphic concept to a global, thick and polymorphic concept that captures some of the more important features of the capitalist–democratic state” (Levi-Faur, 2013, p. 29). Furthermore, the comparative research performed here captures the “institutional and legal building blocks of the many jurisdictions and less on the technical substance of particular policy areas” (Bignami & Zaring, 2018, p. 3), which facilitates scholars from different disciplines of social sciences to navigate through the regulatory state expanded across the world. Third, this research represents a methodological endeavor that adapted research tools from social sciences for the empirical and systematic analysis of legal texts and the legal provisions that govern regulatory agencies, which have been underexplored by political science and public administration scholars. Besides, the empirical findings of this research also improve the efforts from comparative administrative law scholars for the study of the administrative state beyond small-N case law examinations and limited samples of study.

### *5.3 Limitations and further avenues of research*

An important limitation of the three studies that comprise this research concerns to the lack of information about decisions issued by higher instance courts of appeal, which could overrule a final judgement from first instance courts. Further research should be undertaken to adapt resolutions issued by appeal cases from higher tribunals. Besides, although the overall research provides with an unprecedented empirical analysis and compilation of frameworks from political science and comparative law scholarship, the research only addresses few of the several type of regulatory decisions that can be challenged in courts of appeal.

Notwithstanding this work offers valuable insights into the understanding of the role of judicial accountability of the regulatory state, the relatively limited sample of administrative appeal cases under study makes it difficult to provide with causal explanations. Additional studies need to be carried out in order to validate the empirical claims offered here, especially concerning the study of agencies from other policy jurisdictions and to consider individual attributions of judges, such as length of their tenure decision and ruling records. Finally, supplementary work that links administrative law scholarship with public administration and political science analytical techniques is needed to explore empirically the information contained on judicial appeals, and how this information could translate into valuable evidence to understand the performance of regulatory agencies.



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## 8. Appendix

### 8.1 Appendix to Chapter II

Table A. Regulatory agencies under analysis, based on Jordana et.al. (2018)

	Regulatory Agency	Country	Policy jurisdiction
1	Institute for Electricity Regulation of Angola	Angola	Electricity & Gas
2	National Regulatory Authority for Gas	Argentina	Electricity & Gas
3	National Communications Commission	Argentina	Telecomm
4	Australian Energy Regulator	Australia	Electricity & Gas
5	Austrian Communications Authority	Austria	Telecomm
6	Bangladesh Telecommunication Regulatory Commission	Bangladesh	Telecomm
7	Commission for Regulation of Electricity and Gas	Belgium	Electricity & Gas
8	Belgian Institute for Postal Services and Telecommunications	Belgium	Telecomm
10	State Energy and Water Regulatory Commission	Bulgaria	Electricity & Gas
9	Communications Regulation Commission	Bulgaria	Telecomm
11	Regulatory Agency of Telecommunications	Cameroon	Telecomm
12	National Energy Board	Canada	Electricity & Gas
13	Canadian Radio-television and Telecommunications Commission	Canada	Telecomm
14	State Electricity Regulatory Commission	China	Electricity & Gas
15	Telecommunications Regulatory Commission	Colombia	Telecomm
16	Regulatory Authority of Public Services	Costa Rica	Electricity & Gas
17	Cyprus Energy Regulatory Authority	Cyprus	Electricity & Gas
18	Czech Telecommunications Office	Czech Republic	Telecomm
19	Danish Energy Regulatory Authority	Denmark	Electricity & Gas
20	National IT and Telecom Agency	Denmark	Telecomm
22	Superintendence of Electricity	Dominican Republic	Electricity & Gas
21	Dominican Institute of Telecommunications	Dominican Republic	Telecomm
23	National Electricity Council	Ecuador	Electricity & Gas
25	Egyptian Electric Utility & Consumer Protection Agency	Egypt	Electricity & Gas
24	National Telecommunications Regulatory Authority	Egypt	Telecomm
26	General Superintendency of Electricity and Telecommunications	El Salvador	Overlapped jurisdiction
27	Energy Market Authority	Finland	Electricity & Gas
28	Regulatory Commission of Energy	France	Electricity & Gas
29	Authority for Regulation of Electronic and Postal Communications	France	Telecomm
30	The Federal Network Agency	Germany	Overlapped jurisdiction
31	Public Utilities Regulatory Commission of Ghana	Ghana	Electricity & Gas
32	National Communications Authority	Ghana	Telecomm
34	Regulatory Authority for Energy	Greece	Electricity & Gas
33	Hellenic Telecommunications and Post Commission	Greece	Telecomm
35	National Electric Energy Commission	Guatemala	Electricity & Gas
36	National Telecommunications Commission	Honduras	Telecomm
37	Hungarian Energy Office	Hungary	Electricity & Gas
38	Central Electricity Regulatory Commission	India	Electricity & Gas
39	Telecom Regulatory Authority of India	India	Telecomm
40	Indonesian Telecommunications Regulatory Authority	Indonesia	Telecomm
41	National Communications and Media Commission	Iraq	Telecomm
42	Authority for Communications	Italy	Telecomm
43	Telecommunications Business Dispute Settlement Commission	Japan	Telecomm
44	Energy Regulatory Commission	Kenya	Electricity & Gas
45	Communications Commission of Kenya	Kenya	Telecomm
46	Public Utilities Commission	Latvia	Overlapped jurisdiction
47	Communications Regulatory Authority	Lithuania	Telecomm
48	Regulation Institute of Luxembourg	Luxembourg	Overlapped jurisdiction
49	Malawi Energy Regulatory Authority	Malawi	Electricity & Gas
50	Malawi Communications Regulatory Authority	Malawi	Telecomm
51	Energy Commission Malaysia	Malaysia	Electricity & Gas
52	Malaysian Communication and Multimedia Commission	Malaysia	Telecomm
53	Regulatory Committee of Telecommunications	Mali	Telecomm
54	Malta Resources Authority	Malta	Electricity & Gas
55	Malta Communications Authority	Malta	Telecomm
56	Energy Regulatory Commission	Mexico	Electricity & Gas
57	Federal Telecommunications Commission	Mexico	Telecomm
59	National Electricity Advisory Council	Mozambique	Electricity & Gas
58	National Institute of Telecommunications in Mozambique	Mozambique	Telecomm
61	Energiekamer (Nederlandse Mededingingsautoriteit)	Netherlands	Electricity & Gas
60	Independent Post and Telecommunications Authority	Netherlands	Telecomm
62	Commerce Commission	New Zealand	Overlapped jurisdiction
63	Nicaraguan Energy Institute	Nicaragua	Electricity & Gas
64	Multisectorial regulatory Authority	Niger	Overlapped jurisdiction
66	Norwegian Water Resources and Energy Directorate	Norway	Electricity & Gas

	Regulatory Agency	Country	Policy jurisdiction
65	Norwegian Post and Telecommunications Authority	Norway	Telecomm
67	National Electric Power Regulatory Authority	Pakistan	Electricity & Gas
68	Oil and Gas Regulatory Authority	Pakistan	Electricity & Gas
69	Pakistan Telecommunication Authority	Pakistan	Telecomm
70	National Authority for Public Services	Panama	Overlapped jurisdiction
71	National Telecommunications Commission	Paraguay	Telecomm
73	Energy and Mining Investment Supervisory Agency	Peru	Electricity & Gas
72	Supervisory Agency for Private Investment in Telecommunications	Peru	Telecomm
74	Energy Regulatory Commission	Philippines	Electricity & Gas
75	Romanian Energy Regulatory Authority	Romania	Electricity & Gas
77	Electricity Regulatory Commission	Senegal	Electricity & Gas
76	Regulatory Agency for Telecommunications and Postal Services	Senegal	Telecomm
78	Energy Market Authority	Singapore	Electricity & Gas
79	Energy Agency of the Republic of Slovenia	Slovenia	Electricity & Gas
80	National Energy Regulator of South Africa	South Africa	Electricity & Gas
81	Independent Communications Authority of South Africa	South Africa	Telecomm
82	Commission of the Telecommunications Market	Spain	Telecomm
83	Public Utilities Commission	Sri Lanka	Electricity & Gas
84	Swedish Energy Agency	Sweden	Electricity & Gas
85	Swedish Post and Telecom Agency	Sweden	Telecomm
86	Federal Communications Commission	Switzerland	Telecomm
88	Energy Regulatory Commission	Thailand	Electricity & Gas
87	National Broadcasting and Telecommunications Commission	Thailand	Telecomm
89	National Telecommunications Authority	Tunisia	Telecomm
90	Energy Market Regulatory Authority	Turkey	Electricity & Gas
91	Electricity Regulatory Authority	Uganda	Electricity & Gas
92	Uganda Communications Commission	Uganda	Telecomm
93	Office of Gas and Electricity Markets	United Kingdom	Electricity & Gas
94	Office of Communications	United Kingdom	Telecomm
96	Federal Energy Regulatory Commission	United States	Electricity & Gas
95	Federal Communications Commission	United States	Telecomm
97	Regulatory Unit of Energy and Water Services	Uruguay	Electricity & Gas
98	Communication Services Regulatory Agency	Uruguay	Telecomm
99	Energy Regulatory Board	Zambia	Electricity & Gas
100	Zimbabwe Electricity Regulatory Commission	Zimbabwe	Electricity & Gas

Source: own estimations with information from Jordana et.al (2018)

Table B. Classification of countries in the sample of analysis according to the legal taxonomies of La Porta et al. (1997, 1998), Siems (2016) (N=70)

Legal systems	Legal families				
	Common Law		Civil Law		
	English	French	Socialist	Germanic	Scandinavian
European culture	Australia, Canada, Cyprus, United Kingdom.	Belgium, France, Greece Italy, Luxembourg, Malta, Netherlands, Spain, Uruguay.	Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Slovenia, Romania.	Austria, Germany, Japan, Switzerland	Denmark, Finland, Norway, Sweden
Mixed system	Bangladesh, Ghana, India, Kenya, Malawi, Malaysia, New Zealand, Pakistan, Singapore, South Africa, Sri Lanka, Uganda, United States, Zambia, Zimbabwe.	Philippines.	n.a.	n.a.	n.a.
Weak law in transition	n.a.	Argentina, Cameroon, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Indonesia, Mali, Mexico, Nicaragua, Niger, Panama, Paraguay, Peru, Senegal, Tunisia, Turkey.	n.a.	n.a.	n.a.
Rule by law	Thailand	Angola, Egypt, Iraq, Mozambique.	China	n.a.	n.a.

Source: own estimations with information from Jordana et. al (2018) La Porta et al. (1997, 1998), Siems (2016),

Table C. Analysis of regulatory agencies clustered by legal families of the countries and typologies of courts of appeal

Intensity of review	Agencies		Legal families % of agencies <sup>†</sup>			
			Civil Law		Common Law	
	%	n	%	n	%	n
Ordinary judicial court	71%	71	75%	50	64%	21
Court-like administrative jurisdictions	11%	11	15%	10	3%	1
Specialized tribunals	18%	18	10%	7	33%	11
<b>Total</b>	<b>100%</b>	<b>100</b>	100%	67	100%	33

†  $\chi^2$  (2, n=100) 9.6535  $p = 0.008$

Source: own estimations with information from Jordana et.al (2018) La Porta et al. (1997, 1998), and based on the manifest content analysis of documents referred in section 4.2 of this research paper (Data and operationalization).

Table D. Analysis of regulatory agencies clustered by region and legal system

Intensity of review	Agencies		Region % of agencies							
			Europe		Africa		America		Asia-Pacific	
	%	n	%	n	%	n	%	n	%	n
European Culture	40%	40	97%	34			17%	4	11%	2
Mixed System	26%	26			50%	12	9%	2	67%	12
Rule by Law	9%	9			25%	6			17%	3
Weak law	25%	25	3%	1	25%	6	74%	17	5%	1
<b>Total</b>	<b>100%</b>	<b>100</b>	100%	35	100%	24	100%	23	100%	18

†  $\chi^2$  (9, n=100) 118.2008  $p = 0.000$

Source: own estimations with information from Jordana et. al (2018) La Porta et al. (1997, 1998), World Bank (2020)

Table E. Summary statistics of the public accountability scores (Jordana et al 2018) of regulatory agencies in the sample, and value of percentiles to assign the categories of paradigms of accountability.

Accountability score	Obs	Mean	Std. Dev.	Min	Max	Percentile 33.33	Percentile 66.66
All agencies	100	0.2224	0.5679	-1.07	1.78	0.066	0.463



## 8.2 Appendix to Chapter III

**Tables 1 to 9** depict the total number of judicial review appeals against agencies, classified in first place according to percentage of cases that fall in each of the categories of the ruling outcome from courts (i.e. *appeal dismissed*, *appeal partially accepted* and *quashing orders*). In second place, the information from each category of the ruling outcome variable is grouped according the share of cases that fall into the correspondent regulatory task under challenge. Finally, for each *ruling-task* dyad presented in the tables, three scores are introduced to depict the share of cases that fall into each of the types of allegations of unlawful behaviour, portrayed as P = violations against the *Policy rationality* principle; F= against the *Fundamental rights* principle, and R= against the *Rule of law* principle (let us remember here that these categories are operationalized as not mutually exclusive from each other, meaning that the sum of the three scores does not equals 1).

**Source tables 1-9:** own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial España, 2017).

### Tables 1 to 9. Summary information of judicial review appeals against selected agencies

#### 1. Spanish Tribunal for the Competition Defense (TDC)

Ruling	%	n	Sanctions			Supervision			Norms		
Dismissed	87%	361	P=0.51	F=0.37	R=0.31	P=0.76	F=0.14	R=0.14	P=1	F=1	R=1
Partial	8%	31	P=0.45	F=0.51	R=0.31	P=1	F=0.5	R=1		0%	
Quashed	5%	21	P=0.52	F=0.19	R=0.52			0%		0%	
<b>Total TDC</b>	<b>100%</b>	<b>413</b>									

#### 2. Spanish National Commission on Competition (CNC)

Ruling	%	n	Sanctions			Supervision			Norms		
Dismissed	46%	463	P=0.47	F=0.63	R=0.54	P=0.55	F=0.37	R=0.45	P=0.35	F=0.3	R=0.75
Partial	31%	314	P=0.54	F=0.71	R=0.56	P=0.62	F=0.5	R=0.66	P=0.66	F=0.33	R=0
Quashed	22%	223	P=0.46	F=0.62	R=0.56	P=0.57	F=0.28	R=0.43	P=0.5	F=0.5	R=0.5
<b>Total CNC</b>	<b>100%</b>	<b>1,000</b>									

### 3. Spanish National Commission on Markets and Competition (CNMC)

Ruling	%	n	Sanctions			Supervision			Norms		
Dismissed	55%	16	P=0.33	F=0.66	R=1	P=0.11	F=0.55	R=1	P=1	F=0	R=1
Partial	21%	6	P=0.66	F=0.83	R=0.33						
Quashed	24%	7	P=0	F=0.83	R=0.16				P=1	F=0	R=0
<b>Total CNMC</b>	<b>100%</b>	<b>29</b>									

### 4. United Kingdom Office of Fair Trade (OFT)

Ruling	%	n	Sanctions			Supervision			Norms		
Dismissed	29%	26	P=1	F=0.76	R=0.07	P=0.92	F=0.38	R=0.38			0%
Partial	48%	42	P=0.88	F=0.97	R=0.25	P=1	F=0.25	R=0.25	P=1	F=0	R=0
Quashed	22%	19	P=1	F=0.8	R=0.1	P=1	F=0.12	R=0.25	P=1	F=0	R=0
<b>Total OFT</b>	<b>100%</b>	<b>87</b>									

### 5. United Kingdom Competition Commission (CC)

Ruling	%	n	Sanctions			Supervision			Norms		
Dismissed	71%	17	P=1	F=1	R=0.66	P=0.93	F=0.85	R=0.14			82%
Partial	25%	6	P=1	F=1	R=1	P=1	F=0.4	R=0.4			83%
Quashed	4%	1				P=0	F=1	R=1			100%
<b>Total CC</b>	<b>100%</b>	<b>24</b>									

### 6. United Kingdom Competition & Markets Authority (CMA)

Ruling	%	n	Sanctions			Supervision			Norms		
Dismissed	37%	3	P=1	F=0	R=0	P=1	F=0	R=0			0%
Partial	50%	4				P=1	F=1	R=0.25			0%
Quashed	13%	1				P=1	F=1	R=1			0%
<b>Total CMA</b>	<b>100%</b>	<b>8</b>									

## 7. Spanish Commission on the Telecommunications Market (CMT)

Ruling	%	n	Conflict			Entrance			Norms			Prices			Sanctions			Supervision		
<b>Dismissed</b>	<b>84%</b>	<b>312</b>	<b>20%</b>			<b>14%</b>			<b>22%</b>			<b>5%</b>			<b>10%</b>			<b>28%</b>		
			P=0.42	F=0.26	R=0.77	P=0.4	F=0.31	R=0.6	P=0.48	F=0.3	R=0.74	P=0.68	F=0.31	R=0.81	P=0.75	F=0.78	R=0.56	P=0.44	F=0.46	R=0.75
<b>Partial</b>	<b>8%</b>	<b>29</b>	<b>38%</b>			<b>14%</b>			<b>10%</b>			<b>0%</b>			<b>17%</b>			<b>21%</b>		
			P=0.54	F=0.27	R=0.81	P=0.5	F=0.25	R=1	P=0.66	F=0.33	R=0.66				P=0.6	F=0.6	R=0.2	P=0.66	F=0.5	R=0.66
<b>Quashed</b>	<b>8%</b>	<b>30</b>	<b>7%</b>			<b>17%</b>			<b>30%</b>			<b>3%</b>			<b>17%</b>			<b>27%</b>		
			P=0	F=0	R=1	P=0.6	F=0.2	R=0.8	P=0.44	F=0.44	R=0.66	P=1	F=1	R=1	P=0.4	F=1	R=0.6	P=0.12	F=0.75	R=0.87
<b>Total CMT</b>	<b>100%</b>	<b>371</b>																		

## 8. Spanish National Commission on Markets and Competition (Telecomm directorate)

Ruling	%	n	Conflict			Entrance			Norms			Prices			Sanctions			Supervision		
<b>Dismissed</b>	<b>91%</b>	<b>30</b>	<b>13%</b>			<b>0%</b>			<b>37%</b>			<b>10%</b>			<b>20%</b>			<b>20%</b>		
			P=1	F=0.75	R=0.25				P=0.81	F=0.27	R=0.54	P=0.6	F=0.3	R=0.6	P=1	F=1	R=0.83	P=0.5	F=0.3	R=0.66
<b>Partial</b>	<b>3%</b>	<b>1</b>	<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>100%</b>			<b>0%</b>		
															P=1	F=1	R=1			
<b>Quashed</b>	<b>6%</b>	<b>2</b>	<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>100%</b>			<b>0%</b>		
															P=0.5	F=0.5	R=0			
<b>Total CNMC</b>	<b>100%</b>	<b>33</b>																		

## 9. United Kingdom Office of Communications (Ofcom)

Ruling	%	n	Conflict			Entrance			Norms			Prices			Sanctions			Supervision		
<b>Dismissed</b>	<b>68%</b>	<b>51</b>	<b>37%</b>			<b>8%</b>			<b>20%</b>			<b>14%</b>			<b>2%</b>			<b>20%</b>		
			P=1	F=0.16	R=0.58	P=0.75	F=0.25	R=0.25	P=0.9	F=0.4	R=0.3	P=1	F=0.14	R=0	P=1	F=1	R=0	P=0.9	F=0.4	R=0.6
<b>Partial</b>	<b>31%</b>	<b>23</b>	<b>43%</b>			<b>4%</b>			<b>17%</b>			<b>13%</b>			<b>0%</b>			<b>22%</b>		
			P=1	F=0.6	R=0.6	P=1	F=0	R=0	P=1	F=0.25	R=0.5	P=1	F=1	R=0				P=1	F=0.6	R=0.4
<b>Quashed</b>	<b>1%</b>	<b>1</b>	<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>0%</b>			<b>100%</b>		
																		P=1	F=1	R=1
<b>Total Ofcom</b>	<b>100%</b>	<b>75</b>																		

*Table 10. Distribution of the United Kingdom judgments according to the share of cases where a third party or parties are allowed to intervene in an appeal filed the Competition Appeal Tribunal (Section 4. CAT Guide to Proceedings)*

<b>Selected agencies</b>	<b>Cases with third party intervention*</b>	<b>Cases without third party intervention</b>	<b>Total cases<sup>1</sup></b>
Competition	34%	66%	116
Telecomm	82%	18%	67

Source: Competition Appeal Tribunal (2017). Own estimation with information from the United Kingdom judicial appeal judgements sample used for this study.

\*Notes: According to Section 4 of the Competition Appeal Tribunal's Guide to Proceedings, the statutory appeals and applications for review establish interventions as a procedure to give those parties who are sufficiently interested in the outcome of appeal proceedings the right to be heard and assist the Tribunal to consider the issues fully.

(1) Excludes cases from England and Wales High Court (EWHC)

*Table 11. Distribution of the sample of judgements according to the concurrent plaintiffs involved in a judicial appeal case (N=2,070)*

<b>Sector</b>	<b>Country</b>	<b>Single plaintiff cases</b>	<b>Multiple plaintiff cases*</b>	<b>Total cases</b>
<b>Competition</b>	Spain	96%	4%	1,114
	United Kingdom	82%	18%	119
<b>Telecomm</b>	Spain	98%	2%	404
	United Kingdom	79%	21%	75

Source: Competition Appeal Tribunal (2017); British and Irish Legal Information Institute (2017); Poder Judicial Espana (2017). Own estimation with information from judicial appeal judgements sample used for this study.

\*Notes: Multiple plaintiff cases refer to the judgements that were initiated by more than one party or cases where judges decided to group multiple cases into one single case to simplify workload and efficiency of the rulings.

## 8.3 Appendix to Chapter IV

Table A. Deductive latent coding analysis: criteria of classification for the coding units (codebook)

Theoretical concept	Categories	Operationalization and indicators (evidence to find in texts)	Source of evidence
<i>Enforcement decisions</i>	Safety measures	Safety measures imposed when an industrial activity or an installation represent a critical risk in terms of industrial safety, operational safety of the staff or endangers citizens or environment.	Statutory capacities to enforce the law according to (Article 22 & 25 of the ASEA Act)
	Fines	Financial sanctions as a result of violations and breaches to the ASEA's administrative provisions and industry official standards or the failure to comply with previously imposed safety measures.	
<i>Implementation failure</i>	Unintended consequence	Court of appeal resolves to make void, annul or set aside ASEA's enforcing decision (quashing ruling) according to articles 51 & 52 (LFPCA)	Articles 51 & 52 (LFPCA)
<i>Organizational constraints</i>	Achilles Heel (Lack of statutory clarity)	The enforcement decision is based on the statutory capacity of the agency to enforce a law which was inherited from existing regulatory frameworks.	Organizational context of decision making (judgment preliminaries)
	Blind spot (Inherited unlawful procedures)	The enforcement decision is part of ASEA's an administrative procedure opened by previous regulatory authorities (i.e. Semamat, Sener, CNH, CRE or Profepa)	
<i>Undermining effects</i>	Reasoning of the enforcement decision is exposed to ambiguity	<b>Consequence:</b> the agency is accused of issuing acts that are contradictory, disproportionate, absurd or illogical in their content or cases where the authority does not submit to the law or to the evidence or reasons falsely.	Plaintiff's grounds of appeal in the text of the judgment
	Impossibility to detect inherited unlawful procedures	<b>Consequence:</b> The agency is accused of founding its decision on an act or diligence of authority is flawed and unconstitutional, all acts derived from it, supported by it, or in any way conditioned by it, are also unconstitutional by origin, and the courts must not give them legal value.	
<i>Implications for ASEA's analytical capacities</i>	Arbitrary	<b>Consequence:</b> the facts that motivated the administrative decision were not carried out, were not the same or were incorrectly assessed (Paragraph IV, LFPCA)	Grounds for invalidity of an administrative act (Article 51, paragraph IV, LFPCA)
	Error of assesment	<b>Consequence:</b> the administrative decision was issued in contravention of the statutory provisions or failed to apply them, concerning the merits of the case (Paragraph IV, LFPCA)	
<i>Lack of administrative capacities</i>	<b>Analytical:</b> Unreliable technical expertise to guarantee the legal consistency of a decision	<b>Consequence:</b> the agency is accused of issuing acts that are contradictory, disproportionate, absurd or illogical in their content or cases where the authority does not submit to the law or to the evidence or reasons falsely.	Grounds for invalidity of an administrative act (Article 51, paragraph I-IV, LFPCA)
	<b>Delivery:</b> deficient routines and internal dynamics that prevent lawful implementation	<b>Consequence:</b> the agency is accused of omitting formal procedural statutory requirements, whenever it affects the defenses of the interested parties, or incompetence of the agent who issued, ordered or carried out a procedure.	

#### ***8.4 List of individual papers and pre-publications***

This cumulative dissertation consists of an envelope (chapters I and V) and three stand-alone research papers (chapters 2, 3 and 4). All three papers are single-authored.

**Chapter 2** has been submitted to the *Journal of Public Policy* (currently under review).

**Chapter 3** has been published as:

Mejía, L. E. (2020). Judicial review of regulatory decisions: Decoding the contents of appeals against agencies in Spain and the United Kingdom. *Regulation and Governance*.  
<https://doi.org/10.1111/rego.12302>

**Chapter 4** has been submitted to the *Journal of Comparative Political Studies* (currently under review).