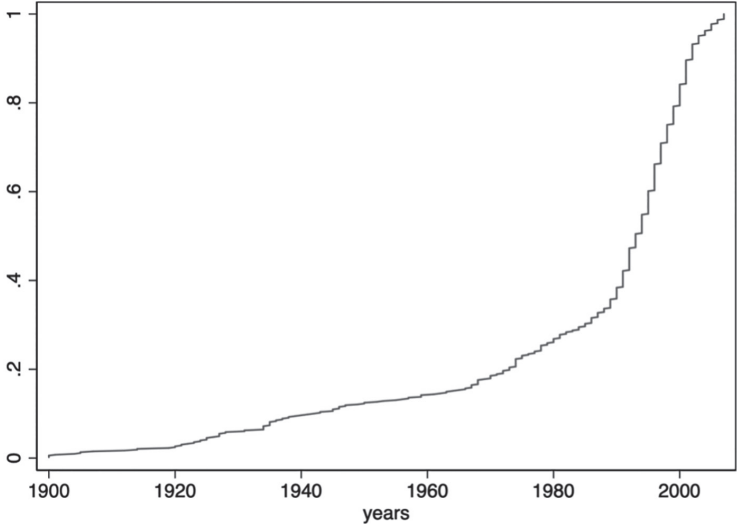

1. Introduction to the *Handbook of Regulatory Authorities*

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THE SPREAD OF REGULATORS

Regulatory authorities – that is, independent regulatory agencies – are structurally disaggregated public sector organizations entrusted with specialized regulatory tasks. Their organizational model has risen to prominence and diffused worldwide in the last decades (see Figure 1.1). Examples are the Food and Drug Administration (FDA) in the U.S., the French *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP), the Italian *Autorità Nazionale Anticorruzione* (ANAC), the Telecom Regulatory Authority of India (TRAI), or the *Agência Nacional de Energia Elétrica* in Brazil. Besides sector-specific regulators, economy-wide competition authorities and central banks are included in this definition, as they also possess the key traits of independent regulatory agencies insofar as they exert regulatory authority while being insulated from direct political control (Thatcher 2002; Gilardi 2007).



Source: Own calculations based on the dataset compiled by Jordana, Levi-Faur and i Marín (2011), covering 15 sectors in 45 countries (19 Latin American countries and all 30 OECD countries).

Figure 1.1 The diffusion of independent regulators (cumulative percentages)

Governments have delegated fundamental regulatory powers to regulators in countless areas, ranging from utilities and finance to food safety, therapeutic products and environmental protection. They are in charge of a wide range of regulatory tasks, such as conformity assessments, licensing, rule refinement, standard setting, monitoring, and eventually sanctioning those being regulated in case of non-compliance. They thereby cumulate executive, legislative, and judicial functions. At the same time, they typically enjoy a certain degree of formal independence from elected politicians, which materializes in statutory prescriptions and organizational features such as those granting policy, managerial, and financial autonomy to these agencies (Maggetti and Verhoest 2014). As such, independent regulatory agencies constitute the institutional cornerstone of the regulatory state (Gilardi 2008), an expression that epitomizes the shift towards increasing reliance on regulation as a mode of governance (Jordana and Levi-Faur 2004). Whilst being considered essential for granting impartial and nonpartisan regulation that is expected to be consistent over the long run, and for providing expert advice to policymakers (Majone 1996), they are not without criticism. In particular, they have been criticized for exerting considerable public authority whereas lacking of direct democratic responsiveness and control, creating thus a democratic deficit in the regulatory state (Vibert 2007).

Research on independent regulatory agencies is entering into a mature stage. Therefore, it is time to take stock and discuss the ways forward. These are the primary goals of this volume, whose content is briefly presented later on in this introductory piece. Each chapter is structured along two parts: foundations and foresight. The first part lays out the fundamental concepts and theoretical and empirical achievements on the topic covered by the chapter, while the second considers the main issues, challenges, and questions that are emerging in each area of research. We approach the study of regulatory governance by following the way paved by previous contributions – namely those collected in the *Oxford Handbook of Regulation* edited by Baldwin, Cave and Lodge (2010) and in the Edward Elgar *Handbook on the Politics of Regulation* edited by Levi-Faur (2011a); however, we do so from a quite different angle. We put regulators themselves at the forefront, as organizations that evolve in relation with their organizational environment, and, at the same time, as institutions that lie at the center of regulatory regimes, shaping regulatory policies and being in turn reshaped by them. Before moving forward, in the next section we outline four main developments pointing to how the reach and the scope of independent regulatory agencies expanded and transformed over time.

THE EVOLUTION OF REGULATORS

The first development concerns the geographical spread of regulators, as anticipated with Figure 1.1. The earliest public sector organization recognized as a regulatory agency has been the U.S. Interstate Commerce Commission (ICC) established by the Congress in 1887 to regulate railroads, and later also in charge of motor carriers, inland waterways, and oil companies (Best, Teske and Mintrom 1997). At the outset, regulatory agencies were considered as a peculiar feature characterizing the U.S. policy system (Moran 2002) – with the partial exception of banking, financial, and competition regulators that were relatively common elsewhere as well. Then, the rise of the regulatory state in Europe since the 1980s has been associated with privatization and liberalization reforms that implied a considerable widening of the scope of regulators to promote competition at the national and European levels (Majone 1994, 1997).

The number of regulatory agencies started to grow considerably in other regions with a small delay, especially in Latin America since the mid-1990s (Jordana and Levi-Faur 2005) and in South and East Asia from the early 2000s (Dubash and Morgan 2012; Ohnesorge 2016). It is also worth noting that, especially after the 2000s, regulatory agencies are also mushrooming at the supranational level, namely in the European Union, where they configure multilevel regulatory regimes (Mathieu et al. 2020). As a result, agencification can be seen as a global macro-trend towards the increasing institutionalization of regulatory governance, which is however displaying considerable cross-country and cross-sectoral variation (Braithwaite 2008; Levi-Faur 2011b).

Second, regulatory agencies extended their reach by colonizing more and more sectors. The first wave of regulatory expansion has been oriented towards market and economic regulation, mainly focusing on re-regulation after the privatization and liberalization of former public utilities, on the enforcement of antitrust and competition law, and on the prudential and systemic risk regulation of the financial and banking sector (Carpenter 2001). The second wave, which started in the U.S. from the 1960s onwards and has been subsequently mainly led by the European Union, was more geared towards social regulation and risk regulation, including in particular environmental protection, public health, and safety at work (Moran 2002). Nowadays, we are in the middle of a third wave, which is characterized by the need for developing a regulatory response to emerging digital technologies and new threats associated with them. This wave started with regulatory efforts for dealing with electronic data protection (Newman 2008) and it is currently deployed to fill in the regulatory void in critical issues for society and democracy such as the use of big data, algorithms in the public sector and in the private sector, cryptocurrencies, blockchains, and artificial intelligence applications (Yeung and Lodge 2019).

Third, and related to the previous point, the rationale for relying on regulatory governance evolved over time. The delegation of public authority to formally independent regulators has been firstly motivated by the functional need of increasing the credibility in the time-consistency of regulatory policies in front of market actors (Gilardi 2002). However, credible commitments became less relevant for regulators whose regulatory activity does not have a primarily economic goal. Social and risk regulation has a wider scope, combining market, technical, societal, and public service aims, producing an entanglement which can result in trade-offs between these competences. Balancing these different goals requires a great deal of sector-specific expertise and the use of knowledge in regulatory policy. In turn, knowledge is a crucial resource that is expected to percolate from regulators into the policy process, whereby policymakers are confronted with increasingly complex policy problems (Bawn 1995; Ossege 2016). Figure 1.2 summarizes these developments, which will be tackled in detail in the chapters of this volume.

Fourth, following a logic of bureaucratic expansion and mission creep, regulatory agencies acquired competences over time that trespass and extend beyond their regulatory tasks in a strict sense. As noted by Carpenter, instead of remaining mere “agents” in charge of implementing rules and regulations, regulatory agencies became players in the “game” of policy creation (Carpenter 2001:116). Evidence from European countries has supported this point by showing that regulatory agencies actively participated in agenda setting and policy formulation in legislative processes that fall into their areas of expertise (Bach 2012; Maggetti 2009). Their unique technical expertise allows them to become a central actor in the regulatory regime and an inescapable participant to policymaking (Litzo-Monnet 2014).

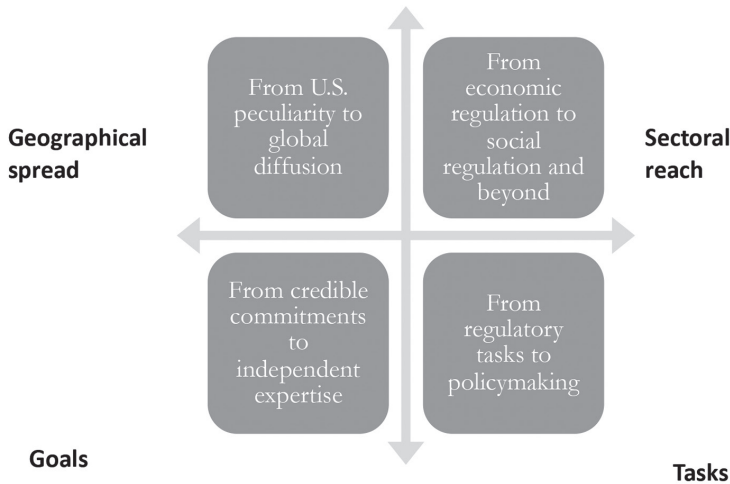


Figure 1.2 *The evolution of regulators*

THE CONTRIBUTIONS TO THIS VOLUME

The first part of this volume focuses on the development of independent regulators in different regions across the world. Carrigan and Febrizio’s contribution (Chapter 2) traces the historical establishment of U.S. independent regulators until the current state of affairs characterized by political polarization. Chapter 3, written by Coen and Tarrant, focuses on regulators in Europe, centering on their multilevelness and on the progressive emergence of new organizational forms. Independent regulators in Latin America are investigated in the fourth chapter by Pavón Mediano and González Becerra, with a particular attention to the regional political context. The case of the Middle-East is dealt with in Badran’s chapter, the fifth of this volume, pointing to the issues related to the transplantation of a foreign organizational model into another type of political system. Lastly, Fernández-i-Marín, Jordana and Levi-Faur offer a systematic comparative outlook to regulatory agencies’ differences and similarities over countries and sectors in Chapter 6. All in all, it appears that regulators flourish and thrive in a wide range of varieties, some of which configure truly innovative governance arrangements.

Part II comprises contributions on different types of regulators in various sectors. The seventh chapter, written by Fontan and de Cabanes, deals with the specificities of central banks. Competition authorities as economy-wide regulators are treated in Chapter 8 by Guidi. The growing importance and peculiar nature of data protection authorities is outlined in Schütz’s contribution in Chapter 9. The tenth contribution by Finger relates to agencies regulating network services, that is, utility regulators. Agencies regulating risks are considered by Allio and Rangone in Chapter 11, while anticorruption regulators are examined by Di Mascio, Maggetti and Natalini in Chapter 12. The main lesson from this section is that regulators differ crucially from sector to sector, and yet a powerful tendency is observed, towards the attribution of more regulatory powers in new areas to regulators, especially those concerned with social regulation.

Part III offers a discussion of three key conceptual issues. The first corresponds to the patterns of agencies' politicization and it is discussed by Selin in Chapter 13. Koop and Jordana investigate regulatory independence and the quality of regulation in Chapter 14. Chapter 15, written by Maggetti, examines the role of agencies in the post-delegation stage. This conceptual overview points to the persisting challenges associated with the *raison d'être* of independent regulators, that is, their independence. Balancing expertise, political responsiveness, accountability, and insulation from politics requires constant work and reflexivity, like the weaving of Penelope's shroud.

In Part IV, our contributors investigate reputation, performance and control as the key attributes of regulators shaping their relations with other actors. The sixteenth chapter, written by Lodge and Wegrich, outlines what a reputation-based perspective adds to our understanding of regulatory agencies. Overman, Schillemans and van der Heijden present the debates surrounding the accountability of agencies in Chapter 17, with a special focus on relational and perceptual accountability. Maor's chapter, the eighteenth of this volume, considers the issues related to strategic communication by regulatory agencies. A discussion about managing the performance of regulatory agencies is put forward by Coglianesi in Chapter 19. Regulatory impact assessment in the European Union and in the United States is described by Dunlop and Radaelli, and, respectively by Dudley and Ellig in their two chapters. Similarly, the judicial review of agency action in Europe is examined by Popelier, De Somer and Lettanie in Chapter 22, while it is analyzed by Murphy in the following chapter as regards the United States. As a result, it appears that multiple factors interact in co-determining the reputation, performance, and control of regulators, creating a complex system which may eventually raise the uncertainty and indeterminacy of the governance arrangement.

Part V presents the most up-to-date academic debates on the role of independent regulators beyond their activity of regulation. Chapter 24 by Rex deals with agency capture. The role of regulators in agenda setting is outlined by Guaschino in Chapter 25. Scholten tackles the issue of enforcement in Chapter 26 with a special focus on the European level. EU agencies and their dynamics are described by Mathieu in Chapter 27, and regulatory networks are presented by van der Heijden and Yesilkagit in Chapter 28. The twenty-ninth chapter by Ford deals with innovation as a priority and at the same time as a challenge for regulators. Behavioral insights are outlined in the thirtieth chapter co-authored by Wegrich and Lodge by focusing on nudges in the field of economic regulation. Busuioc, in Chapter 31, presents algorithmic oversight as the new frontier of regulatory accountability. The question of expertise with reference to regulatory agencies is investigated by Rimkutė in the last chapter of this volume, by connecting it to the reputational approach. To sum up, it can be observed that regulators do not evolve in a void, but they unfold within crowded regulatory spaces, by developing cooperative and conflicting relationships with various types of actors, whereby reputation stands out again as a crucial issue.

WAYS FORWARD

The emerging picture is that we still live in what has been called "the golden age of regulation" (Levi-Faur and Jordana 2005), albeit with some crucial twists. Regulation is the increasingly dominant mode of political governance, embodied by the ubiquitousness of regulatory agencies. In turn, these expert-based public sector organizations entrusted with regulatory tasks

and enjoying some degree of formal independence from elected politicians still represent the take-for-granted model for ensuring the implementation of regulatory governance. As a consequence, regulators at different levels of governance are deepening their grip on the regulated sectors and, at the same time, they are extending their regulatory reach towards new directions, such as emerging societal risks and new technologies. In doing so, regulators are generally considered apt in ensuring their day-to-day regulatory activities, namely through regulation by information and regulatory oversight. Nonetheless, while achieving even more central positions in regulatory regimes, regulators also experience growing pressures. The contributions to this volume point to several of the challenges regulatory agencies are facing. Three of them stand out as particularly relevant.

First, regulators appear as particularly sensitive to reputational concerns, and, thereby, potentially vulnerable to reputational threats. Agencies live by their reputation, which is actively cultivated and managed by regulators. Reputation, in turn, is a key attribute that shapes their regulatory power and their independence in practice. However, against the background of mega crises such as the 2007–8 financial crisis, the COVID-19 pandemic, or the climate emergency, regulators are under strain as politico-administrative relations become more politicized and potentially more conflictual, among different public sector organizations and with respect to their political principal. In this context, blame shifting is a risky strategy for policymakers as repeated blame deflection towards regulators may damage their reputation and ultimately imperil their organizational survival. What is more, their reputation is potentially undermined by quick, large-scale technological changes that are also driven and exploited by large corporations. The case of the (non)regulation of Big Tech companies illustrates the difficulty of formulating and applying an appropriate regulatory framework to these areas, because of their highly technical nature, quick evolution, global character, and the asymmetry of information on the data that are collected and the algorithms that are used by these companies.

Second, the independence of regulators is still bearing open questions. Not only formal independence evolves over time, and it may diverge from their independence in practice. It also appears that their statutory insulation from political pressures might not work when it is mostly needed, that is, when a hostile government strives to curtail their regulatory action. In particular, strong populist pressures can be directed towards regulators as expert-based bodies that exert an intermediation function. When compared to other targets of populist pressures such as parliaments or courts, regulators are more at risk as they rely on a limited stock of democratic legitimacy. Being unelected, they cannot benefit from input legitimacy as parliaments do. Respectively, their regulatory powers cover a wider array of features – from advice, rule refinement, monitoring, certification, enforcement, and adjudication – than those attributed to courts, which are clearly delineated and neatly demarcated from other manifestations of public authority. This state of affairs exposes regulators to even more populist criticisms.

Third – and this is an even more transversal issue – regulators appear as ill-equipped when dealing with emerging multilevel issues. Independent regulatory agencies are born in nation states. As a response to the processes of internationalization and supranational (mainly EU) integration, they moved upwards and increased their transnational interactions specifically through regulatory networks. However, regulation is still largely rooted in domestic institutions, whereas those more in need for regulatory responses correspond to global corporations such as large digital platforms. Technological innovation, data protection, and artificial intelligence constitute the big pending issues as they change both the object of regulation (the criteria, the modalities, and the responsibilities of the choices made by those being regulated)

and, at the same time, the regulatory style, the information required by regulators, the ways of monitoring behavior, the procedures for risk assessment, and so on.

As a reaction to these challenges, regulators may be able to react and evolve again in unforeseen directions. They could recenter their functioning around their independence as their purpose and mainspring, by withdrawing in the ivory tower at the domestic level. In that way, they would take care of offering expert-based advice and ensuring the technical application of rules, while refraining from taking part in agenda-setting, policy formulation, and direct sanctioning. If they do so, however, they could be at risk of irrelevance and of being sidelined by other actors. Alternatively, they could step into the arena and play the political game more explicitly, for instance with respect to the need for taking action against pressing problems such as the climate emergency. They could also strengthen their international regulatory cooperation and be more proactive in their strategies towards the news media. In this case, however, politicization could backfire, and further undermine their legitimacy. At the end of the day, rather than choosing a strict alternative, it is probably again a question of finding a context-sensitive strategy for balancing the existing trade-offs, so as to provisionally achieve an equilibrium that is necessarily dynamic.

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