Chapter 7
The Set Up of Data Protection Authorities as a New Regulatory Approach

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7.1 Introduction

Embedded in a dissertation project that is dedicated to a comparative analysis of data protection authorities (DPAs; EU Directive 1995),[1] this chapter aims to shed light on the conception of DPAs as a new regulatory approach by the European Union (EU). Since there is little research on DPAs from a political science perspective, the theoretical foundations of and empirical findings about independent regulatory agencies (IRAs) can help to serve as a template model providing a framework for analysis of DPAs.[2]

IRAs represent a crucial instrument of the *regulatory state*, which is characterised by ongoing deregulation, increased delegation and reregulation processes (Majone 1994, 1996, 1997). They comprise a relatively new attempt to cope with societal challenges that elude traditional models of governance. The EU Data Protection Directive makes use of this instrument, stipulating mandatory supervisory authorities, which have to fulfil a variety of different functions. DPAs are not only expected to serve as ombudsmen, auditors, consultants, educators, policy advisers and negotiators, but they should also be able to enforce changes in behaviour, when private or public actors violate data protection legislation (Bennet and Raab 2006, p. 135).

Most importantly, contrary to most IRAs, DPAs are not only assigned to supervise private entities such as companies of various business sectors, but they are also expected to watch over public authorities, i.e. executive, legislative and judicial

[1] Data protection authority refers in the following text to the term of supervisory authority, stipulated in the Directive 95/46/EC.

[2] Since the dissertation project is in its theoretical conceptualisation phase, this work attempts to explore and discuss new theoretical and methodological approaches to the analysis of DPAs rather than to present substantial empirical results. This is also reflected in the structure of the chapter.

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institutions and bodies.[3] Despite the traditional checks and balances in a democratic and constitutional state, the monitoring of governmental bodies by an authority closely linked to the government is particularly new in the theoretical framework of the *regulatory state* and IRAs. Since "[w]e are not normally accustomed to think of government as 'regulating' itself" (Hood 1999, p. 3), the setting up of DPAs by the political actors in order to exercise control over the same presents an interesting and new aspect in the theory of regulation. Thus, the concept of independence in this context seems to require special attention. However, other essential and problematic features of IRAs and DPAs such as credibility, accountability, democratic deficit, legitimacy and effectiveness will be discussed as well.

As a final remark, the author wants to emphasise that this work displays the starting point of the above mentioned dissertation project. The text should therefore be considered as exploratory and tentative, reflecting new ideas to examine the role of DPAs in society.

7.2 The Development of the Regulatory State

One of the most controversial issues in political economy and public policy research has been the question of how deep the state should penetrate the market economy. Taking a closer look at dominant theories behind public policy-making processes of post-war countries in Western Europe, there seems to be a wavelike motion over time; a pendulum swinging back and forth between the poles of interventionist and free market approaches. While the strategies of stabilisation and consolidation—which included centralised administration, state ownership and planning—mainly shaped the political programmes of the 1950s and 1960s in most West European countries, the privatisation and deregulation dominated the policies in the 1970s and 1980s, strongly influenced by the American model (Majone 1994).

Today's *regulatory state* represents, in many ways, a mélange between the *dirigiste* and the *neoliberal state* of the preceding decades (Mayntz 2009).[4] On the one hand the state continued, throughout the 90s, to retreat from sectors which were once publicly owned, e.g. utilities such as traffic, gas, electricity, water, etc. In the new millennium the trend of privatisation seems to have manifested itself, since once considered core competences of the state such as education, welfare, pensions, police, military, and even whole policy-making processes, are subject to delegation (Kemp 2011). However, critics state that deregulation has not necessarily led to increased efficiency and a decrease in governmental rules and regulatory activities (Vogel

[3] Of course, there are additionally numerous data protection commissioners and officers in private companies and governmental organisations working together with DPAs on the international, national and federal level. However, they will not be part of the analysis in this work.

[4] Regulation refers in the following to "the development and application of rules (e.g. laws, directives, guidelines, standards, codes of conduct etc.) directed at specific target populations, and the—public as well as private—rule-makers involved." Moreover, this work mainly focuses on public regulation, i.e. regulation by the state, neglecting, for example, self-regulation approaches.

1996). On the contrary, privatisation frequently resulted in a massive increase of new state regulations, as happened in the British utilities sector in the 1980s and 1990s (Thatcher 1998).

On the other hand, the state "reregulates the now-liberalized markets [and sectors] with less intrusive instruments" (Gilardi 2002, p. 873). Rather than direct state intervention, reregulation ideally implies the idea of improving "the efficiency of the economy by correcting specific forms of market failure such as monopoly, imperfect information, and negative externalities" (Majone 1994, p. 79). Yet, imposing rules on highly dynamic and innovative sectors has turned out to be highly problematic and extremely difficult.

In fact, the information technology (IT) sector, for example, where the emergence of the personal computer, the Internet as well as mobile computing revolutionised the collection, storage, processing and exchange of information, has mostly evaded public regulation successfully. There are two main reasons for this: First of all the immense velocity of technological development has been constantly leaving state regulation to lag behind. Secondly, the transnational and globalised nature of the sector makes it extremely difficult for policy makers to pass effective regulatory legislation on a national level. Hence, the demand for reliable and trustworthy rules in these heavily under-regulated innovative sectors increases and the call for regulation has become more and more prevalent across national boundaries.

Furthermore, the evolution of the *regulatory state* in Europe was closely linked to the growing importance of the EU. Since the EU neither represents a federal state nor a confederation but rather made it necessary to redefine the term "union" as a new form of federation *sui generis*, based on the idea of a multilevel governance (Hooghe 2001), the EU legislation was designed to be regulatory rather than redistributive (Caporaso 1996, p. 39). Comprehensive empirical research on the *regulatory state* by Majone (1997, p. 139) suggests that "rule making is replacing taxing and spending". Traditionally, taxing and spending powers have always been the most powerful and prevalent instruments of national governments. Member States were therefore cautious in transferring these competences to EU institutions, although, at the same time, they had to provide a budget that ensured the Union's capacity to act.

Whether or not the EU can thus be considered a *regulatory state* remains a controversial subject; also because it is highly contested as to which political level is actually responsible for most of the regulations, as well as the most important ones. Whereas advocates of the Europeanisation thesis argue that EU-regulations and their influence on national legislation have grown exponentially in absolute as well as relative terms (Majone 1996, p. 144), adversaries emphasise the ongoing dominance of national regulatory institutions as well as the incapacity of European regulation.

Eberlein and Grande (2005, p. 98) introduce a third perspective, i.e. the differentiation thesis, which takes the constraints of harmonisation as well as the self-interest of the Member States into account. "Regulation in Europe, whether market creating or market correcting, thus includes both levels: it is national and European".

This governance model (Levi-Faur 1999, p. 201),[5] however, poses a serious dilemma for effective regulation. The two authors identify a so-called *supranational regulatory gap*, which, *inter alia*, originates from the latitude that is given to Member States when implementing EU law into national legislations (Eberlein and Grande 2005, p. 98). One of the key findings is that informal institutions and above all transnational networks serve as a back road to effective regulation in order to circumvent the regulatory lacunae (Eberlein and Grande 2005, p. 91).

In a nutshell, the concept of the *regulatory state* is characterized by an ongoing deregulation combined with (re-) regulation processes in either already liberalized markets or highly dynamic sectors that bring societal challenges. In Europe, public regulation is characterised by a complex, often state-centred, multi-level governance model that primarily comprises the local, regional, and particularly the national as well as European level.

7.3 Independent Regulatory Agencies

A distinguishing attribute of the *regulatory state* is reflected in the concept of delegation, which, contrary to privatisation, describes the transfer of authority and responsibility from the state to another private or public organisation without being completely exempted from accountability. Delegation of sector-specific regulation assignments to IRAs is an essential and prevalent tool of the *regulatory state*. Yet, the historical origins of IRAs in Europe date back to the early post-war years, when Britain and Germany introduced independent competition authorities (Wilks and Bartle 2002). Even prior to that, IRAs in the United States had become an integral part of the governmental agency landscape, typically operating outside the federal executive departments. Today, the model of independent central banks, which has been rapidly spreading throughout Europe and the rest of the world, is considered as one of the main archetypes of IRAs (Quintyn 2009, p. 267).

IRAs can be defined as "a body with its own powers and responsibilities given under public law, which is organisationally separated from ministries and is neither directly elected nor managed by elected officials" (Thatcher 2002, p. 956). As the name already suggests, independence from governmental influence plays an essential role in the conception of IRAs.[6]

Yet, it seems surprising that the state is willing to accept a loss or at least a reduction of control and power in certain regulatory sectors. Gilardi (2005, p. 102) identifies several reasons for this transfer of competencies to IRAs. One of the most important causes involves the objective of governments to reduce their decision-making costs

[5] In this context Levi-Faur coined the even more appropriate term "state-centred multi-level governance".

[6] This contribution solely deals with IRAs/DPAs on the national level, although the international, and particularly the EU level, would be interesting to look at as well.

by e.g. taking advantage of IRAs' specialised expertise in the relevant field of regulation. "Faith in the power of expertise as an engine of social improvement—technical expertise which neither legislators, courts nor bureaucratic generalists presumably possess—has always been an important source of legitimisation for regulators" (Majone 1997, p. 152).

Moreover, due to their independence, IRAs are not only more flexible in adjusting regulations to changing conditions, but they also work more effectively and efficiently, presenting better regulatory outputs than traditional bureaucracies. They tend additionally to organise their decision-making processes in a more open and transparent way and eventually policy makers are able to profit from shifting blame to IRAs when regulation fails to succeed.

However, the most convincing argument as to why governments delegate power to IRAs is offered by the *credibility hypothesis*. Since "politicians have few incentives to develop policies whose success, if at all, will come after the next election [. . .], it is difficult for political executives to credibly commit themselves to a long-term strategy" (Majone 1997, p. 153). Being exempt from elections and the associated political short-term thinking, IRAs are able to fill this credibility vacuum. They can provide a certain time consistency in their policies leading to a more "stable and predictable regulatory environment" (Gilardi 2005, p. 102). Fearing rapid changes in popular support, governments have, after all, an interest in preserving their policy achievements through IRAs, in order to prevent future parties in power from altering them too easily.

7.3.1 The Model of Regulatory Governance

Whereas the motivation for reducing decision-making costs does not necessarily rely on the agency's independence, most of the other reasons for the delegation of authority to IRAs are founded on this distinguishing attribute. The *credibility hypothesis* especially, is linked interdependently to the feature of independence.

Yet, other important characteristics of IRAs should not be left unconsidered. According to Quintyn (2009, p. 272), an International Monetary Fund (IMF) economist, who has extensively dealt with the concept of independent central banks,there has been too much focus laid upon independence. Being of the opinion that there is a permanent independence-bias, he suggests concentrating instead on the entire **governance model of IRAs** (Fig. 7.1), including, besides independence, accountability, transparency and integrity. In the case of central banks, the author argues that independence is a necessary, but not sufficient, condition for the main objective of price stability (Quintyn 2009, p. 274). He notes that independence, which only represents one pillar of his regulatory governance model comprises a principle that is not absolute and never has an end in itself. On the contrary, there is interdependence between the four pillars of the model.[7]

[7] However, due to the relative newness of the attempt to apply the theoretical concept of IRAs to the analysis of DPAs this work will mainly concentrate on the feature of independence and

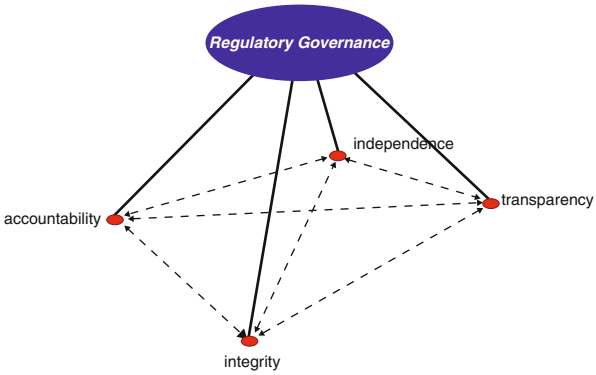

Fig. 7.1 Regulatory governance. (Source: Qintyn 2009, p. 282)

7.3.1.1 Independence of IRAs

Even though the concept of IRAs' independence seems to be rather straight forward, it is in fact highly complex, implying different nuances and dimensions. In order to exemplify the challenges in measuring the independence of IRAs, two empirical studies are briefly discussed.

Though being confronted with operationalisation and quantification problems, Gilardi has developed an independence index concentrating on formal, i.e. legally stipulated, independence. The comparative analysis embraces 33 IRAs from 5 different regulatory sectors in 7 European countries. Originally developed by Cukierman et al. (1992) in a comprehensive study focused on measuring the independence of central banks, the index involves five groups of indicators: The agency's head status, the management board members' status, the general frame of the relationships with the government and the parliament, financial and organisational autonomy, and the extent of delegated regulatory competencies (Gilardi 2002, p. 880). In order to avoid subjective valuation, he attributes the same weight to each of his 21 indicators.[8]

In a second step Gilardi (2002, p. 884) tries to explain why the independence of regulatory agencies varies from sector to sector and country to country. The results of his quantitative analysis, deploying multivariate regression models, reveal a significantly positive correlation between the country's degree of market openness and independence. Moreover, national veto players are negatively associated to agency independence, and eventually economic interdependence has no measurable impact on the formal independence of IRAs. He also finds an important difference between

accountability. Principles such as transparency and also integrity will mostly be neglected, although they comprise crucial elements of a good governance model, which will be subject to a more comprehensive assessment within the dissertation project.

[8] As an example, the indicator "term of office" can have six different parameters: "Over 8 years", "6–8 years", "5 years", "4 years", "fixed term under 4 years or at the discretion of the appointer", and eventually "no fixed term". Each parameter is assigned a value evenly spread between 1 (= complete independent) and 0 (= not independent). Since there are six parameters, the assigned values are accordingly: 1, 0.8, 0.6, 0.4, 0.2, 0.

economic and social regulation, namely that only the first is likely to be carried out by IRAs.

One of the main problems of Gilardi's quantitative analysis is that it only captures legally stipulated independence. Although pointing to that problem, he does not consider informal dependences, which are likely in an agency created by government. A combination of quantitative and qualitative research would have been interesting in that respect.

Thatcher (2002, p. 959), in contrast, includes informal aspects into his comparative analysis of 23 IRAs from 8 different sectors in 4 countries, using 5 groups of indicators: Party politicisation of regulators, departures of IRA members before the end of their term, official tenure of IRA members, financial and staffing resources as well as the use of powers by elected politicians to overturn the decisions of IRAs. The author not only integrates informal aspects of independence such as politicization of regulators into his models, but also expands his analysis to possible dependencies on regulatees, i.e. large companies, which is operationalised by the percentage of IRA members formerly or subsequently active in the private sector (*revolving doors*). Eventually, the influence of IRAs on decision-making processes is scrutinised.

Thatcher (2002, p. 966) concludes: "Having created IRAs, governments do not use their most visible formal powers to control them, with the exception of limiting IRA's resources (and the partial exception of politicization in Italy)". In addition, IRAs seem separated from business by and large, meaning that the *revolving door* phenomenon occurs rather seldom. Besides, sharp conflicts are frequently carried out between IRAs and the private sector, including legal action. Britain, however, represents an exception in both cases. In the end, he is of the opinion that IRAs have significantly contributed to making decision-making processes more open and transparent (Thatcher 2002, p. 969).

Both of these studies show the complexity of independence in the context of IRAs. Seemingly simple questions such as "Who is independent (the agency or single officials)?" and "Independence from whom (public or private actors)?" turn out to be difficult to answer. There is a formal (statutory) as well as informal dimension of independence and particularly the latter needs to be qualitatively examined, e.g. by conducting interviews with IRA officials.

In sum, it seems crucial that public as well as private sources of influence are separately identified in the analysis of IRAs, and accordingly, DPAs. Though stressing the importance of independence, private and public policy-makers are, in fact, confronted with a conflict of interests when an agency is enabled to escape their spheres of influence. Thus, it is most likely that IRAs are subject to attempts at severe manipulation. A comprehensive assessment and evaluation of independence should furthermore include a combination of quantitative and qualitative methods in order to grasp the informal dimension of potential dependencies.

7.3.1.2 The Importance of the Accountability Principle

Accountability is one of the most neglected, yet immensely important elements of IRAs, because, according to Bovens (2005, p. 192), it fulfils, above all, five key functions: Democratic control, legitimacy, enhanced integrity, improved performance and public catharsis.[9]

The first is clearly linked to the idea of *providing public oversight* in order to "give account" of IRAs' actions. In this context Majone (1997, p. 160) emphasises that "the simplest and most basic means of improving agency transparency and accountability is to require regulators to give reasons for their decisions". In this way IRAs are open to external checking mechanisms such as judicial review, public participation, peer review and policy analysis.

Secondly, one of the most important functions comprises *maintaining and enhancing legitimacy*. Since non-elected institutions such as IRAs face the problem of a democratic deficit inherent in their conceptual structure, the formerly supposed advantage of not being part of the electoral process turns out to be disadvantageous when it comes to legitimacy. Hence, the concept of accountability becomes even more relevant when considering that IRAs should avoid giving the impression of being a fourth branch of government (Meier and Bohte 2006).

Disagreeing with this view, Majone (1997, p. 159) argues that IRA's democratic deficit is mainly deduced from the assumption that "the only standard of democratic legitimacy is direct responsibility to the voters or to the government expressing the current parliamentary majority". Being an alternative to the common majoritarian archetype, the Madisonian democracy model primarily aims to share, disperse, delegate and limit power, in order to avoid Tocqueville's *tyranny of the majority* (Hamilton et al. 2008, p. 48; Tocqueville 2000). Consequently, the criticism that accuses IRAs of a serious democratic deficit is rather unfounded when following the Madisonian idea of democracy.

Thirdly, accountability helps to *enhance the integrity of regulatory governance*, since giving public account about one's actions reduces the risk of self-interest capture, i.e. individual staff pursuing their own self-interest by manipulating or subverting regulation (Quintyn 2009, p. 279).

Finally, there is a continuous *improvement of agency performance* mainly referring to individual as well as institutional learning processes. "Norms are (re)produced, internalized, and, where necessary, adjusted through accountability" (Bovens 2005, p. 193).

However, the principle of accountability remains problematic. Regarding the model of regulatory governance, one of the main difficulties lies in the interdependent relationship between accountability and independence, often presented as a trade-off. While doing research on the independence of central banks, Eijffinger et al. (2000) and Bibow (2004) objected to this view. The first has developed a model showing

[9] The fifth function refers to accountability in cases of tragedies or fiascos, which is less important in regards to the topic of this contribution and will therefore be neglected.

that independence and accountability complement each other in the case of monetary policy, while the latter emphasised the need to balance the two principles.

Even though both features do comprise counterparts, accountability should be seen as complementary to independence rather than antagonistic. "The concept of a 'trade-off' is flawed to the extent that it assumes that stronger accountability mechanisms must necessarily mean a less independent regulatory agency" (Quintyn and Taylor 2007, p. 18). Accountability and independence do not have to be mutually exclusive. In fact, it is even possible that they profit from each other, meaning that accountability underpins the autonomous status of IRAs by providing e.g. legitimacy. Yet, it should be noted that "the political principal can transfer his powers to the independent delegate, but not his legitimacy, [. . .] [which is why] IRAs must rely on other external sources of legitimacy [such as output-oriented legitimacy]" (Maggetti 2010, p. 3).

In order to reconcile IRAs' autonomy and the accountability claim of the political principal, Quintyn et al. (2005, p. 19) suggest a set of practical accountability arrangements: Ex ante and ex post accountability mechanisms refer to the obligation of reporting before or after actions are taken. Whereas these mechanisms follow an explanatory rationale, amendatory accountability implies the obligation to resolve deficiencies in policy or regulatory rule making. Furthermore, procedural accountability describes the legally binding procedures that must be followed when regulatory actions are taken and substantive accountability is supposed to ensure the alignment of supervisory actions with the IRA's official objectives. Though rarely applied, personal accountability corresponds to the sanctioning of individual top officials such as the head of an IRA. Financial accountability eventually creates the need to present proper financial statements, while performance accountability would emphasise the duty for IRAs to work effectively.

Despite these rather clearly structured arrangements, one major problem of accountability involves the confusion with control, causing profound problems for IRAs in exercising their tasks properly. Accountability should therefore only be enforced by a combination of monitoring arrangements and instruments (Quintyn 2009, p. 280), which should normally abstain from any governmental control mechanisms such as the exclusive right of appointment, dismissal, budgeting, etc. Therefore, while it remains tremendously important to keep an eye on the degree of influence from governmental and parliamentary actors, it should not be forgotten that accountability represents a vehicle for the construction of legitimacy as well as other important features.[10]

[10] As seen in the preceding paragraphs, the concepts of transparency as well as integrity permeate the accountability principle. Whereas the first is an important driver to enforce accountability, the latter serves as a guarantor of legitimacy and credibility. As mentioned before, however, transparency and integrity are mainly left out of the analysis due to the focus on independence and accountability.

7.4 The EU Data Protection Directive

Directive 95/46/EC represents the most comprehensive and influential legislative framework regarding the protection of personal data. From the start of the Directive's development it became clear that "data protection had ceased to be merely a human rights issue; it was also intrinsically linked to the operation of international trade" (Bennett and Raab 2006, p. 93).

Since the development of national data protection legislation in Europe had started almost 25 years prior to the Directive (Bennett 1992, p. 77), a patchwork of different data protection acts marked the European legal landscape. According to Mayer-Schönberger (1997, p. 221) national data protection legislation in Western Europe predominantly followed four patterns until the emergence of the EU Directive: The first laws in the 1970s were directed towards restrictions of huge centralised data banks and storage facilities run by governments and large companies; a second generation of legal provisions in the late 1970s aimed furthermore at the regulation of new emerging and rapidly spreading decentralised state and business sector databases. The third phase was dominated by the practical question of how the individual should actually exercise control over his/her information. In 1983, the seminal ruling of the German Constitutional Court, overturning the national census law and establishing the right to *informational self-determination*, provided a legal answer to this question. Thus, a fourth wave of legislations and amendments followed, incorporating the newly created norm and strengthening its status as an individual right.

Although the legal situation of citizens willing to defend their privacy rights in court had improved in many European states, the different data protection laws created a complicated patchwork of provisions associated with legal uncertainty, which caused, especially in the case of transferring personal data from one European country to another, enormous impediments for the private sector. That is why the most convincing argument in favour of approving the European Data Protection Directive was the objective of eliminating these impediments in order to harmonise the market (Gutwirth 2002, p. 91; Simitis 1994).

Aiming to create a more homogenous legal and economic sphere to guarantee the free flow of data across European borders, the Directive, which took over 5 years of tough negotiations from first draft to adoption, was therefore mainly developed in the Internal Market portfolio of the EU Commission (Bennett and Raab 2006, p. 93). Furthermore, the economic argument not only helped to persuade stakeholders of the Directive's benefits, but also provided a legal basis, namely Article 100a of the EC Treaty, which seeks, *inter alia*, "to ensure the establishment and functioning of the Internal Market".

Since then the Directive has not only facilitated the transborder flow of personal data within the EU, but has also contributed to higher minimum standards of data protection in quite a few Member States. Due to the fact that EU directives are supposed to be binding, each Member State has, at least formally, implemented comprehensive data protection provisions. Although these provisions have not been

able to keep pace with technological developments and new emerging threats to privacy, the Directive, which is currently under revision, still constitutes one of the most advanced legal frameworks in the field of data protection worldwide.

7.4.1 The Role of DPAs

The European Data Protection Directive also stipulates the mandatory set up of data protection authorities, the so-called supervisory authorities (EU Directive 1995, article 28). This has mainly been done to harmonise the responsibilities of DPAs, which were quite different in data protection provisions of the Member States developed prior to the EU Directive. Sweden, for example, relied on a licensing model, whereas the French government chose a more selective approach and Germany provided for subsequent monitoring as well as recommendations rather than binding decisions (Hustinx 2009, p. 134).

After the Directive had been implemented, functions of DPAs changed in the following ways: First of all, DPAs are expected to monitor the application of the Directive's provisions in their country (EU Directive 1995, article 28, para. 1). Second, they should serve as policy-advisors concerning administrative measures or regulations associated with the processing of personal data (EU Directive 1995, article 28, para. 2). Third, the Directive provides DPAs with investigative powers, effective powers of intervention and the power to engage in legal proceedings (EU Directive 1995, article 28, para. 3). Finally, they have to fulfil the role of ombudsmen, being obliged to hear claims lodged by any person (EU Directive 1995, article 28, para. 4).

The effective powers of intervention include the provision of "delivering opinions before [potentially privacy threatening] processing operations are carried out" (EU Directive 1995, article 28, para. 3, subparagraph 2), which results in a consultative function. DPAs are therefore supposed to advise not only public but also private actors when, for example, new policies or technologies are developed that might have privacy-invasive implications.[11] In addition, Bennett and Raab (2006, p. 139) have identified education as a rather informal but nonetheless important mission of DPAs, which relates to the objective of raising awareness and supporting data protection by the individual him or herself ("Selbstdatenschutz").

Considering all these assignments, it is not surprising that a comprehensive comparative study of the European Commission comes to the conclusion that DPAs are frequently overwhelmed by an enormous workload and sometimes incompatible functions. The authors note: "We feel that this is too much to ask of any single body"

[11] However, these formal provisions of the EU Data Protection Directive do not mean that national DPAs are actually endowed with the same powers and tasks. As already mentioned, Member States are granted some latitude in the transposition of EU law into national legislation, which often results in quite a different legal set up of DPAs.

(Korff and Brown 2010, p. 44), and in comparison to other IRAs, DPAs are in fact confronted with performing an incredible variety of different tasks.

One of the most distinctive features of DPAs is their assignment to watch over private as well as public actors. This is contrary to the work of most IRAs, monitoring (financial) markets or the utilities sector. Here, DPAs comprise an interesting aspect, namely the idea of an authority that was created by the state in order to control the same. Hood (1999, p. 223) deal with this new facet of regulation, identifying huge deficits in the actual transposition of the concept. Hence, the issue of independence especially from governmental influence requires extra attention.

7.4.2 Independence of DPAs

Although the majority of IRAs face similar conflicts concerning their continuous struggle for independence, DPAs are particularly under threat of being held in check by public authorities. Since the state not only delegates power to DPAs, but could additionally be subject to harsh criticism and potentially strict regulations itself, public actors have an increased interest in manipulating the output and outcome of DPAs' actions.[12] Maybe that is why the Directive has specifically stated that DPAs "shall act with **complete independence** in exercising the functions entrusted to them" (EU Directive (1995), article 28, para. 1).[13]

Nonetheless, the legal and political reality in EU countries shows that extremely different interpretations of the term "complete independence" are prevalent. Even though the goals stipulated in the Directive are supposed to be binding, the Member States are granted some latitude in working out the details of the finally implemented national legislation (Simitis 1994). That is why the legal set up and status of DPAs varies from country to country or in a federal state like Germany even from land to land. These legal details, however, can determine what kind of powers and tasks are delegated as well as whether or not DPAs are able to work independently and hence effectively.[14]

In the following section Germany has been chosen as an example to demonstrate how much room for interpretation of the term "complete independence" sometimes remains. At the same time, the German case serves as a starting point to conduct a more comprehensive analysis of DPAs in EU Member States.

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[12] Furthermore, DPAs are traditionally closely linked to certain ministries.

[13] Even though "complete independence" is the term used in the EU Directive, there is no institution, organisation or individual who can claim to be complete independent. However, the wording refers to the increased relevance the European Union put into the autonomous status of DPAs.

[14] As already pointed out in Sect. 3.1.1, it is important to consider the difference between the formal and informal dimension of independence. This work will only focus on legally stipulated independence features of DPAs.

7.4.2.1 The German Case

As we have shown, the concept of independence is hard to define and can be stretched at will. It also seems that the notion of independence varies over time. In Germany, where DPAs have a long tradition at the national (since 1978) as well as regional levels (in Hesse since 1970), independence was always an essential element of data protection institutions (Hessian Data Protection Act 1970). Supporting this point, German DPAs even served as a role model in the process of developing the EU Data Protection Directive.

Lately, however, the governmental interpretation of independence in Germany has come under closer scrutiny. Because Germany is a federal state, regulatory powers were given to the national DPA, i.e. the Federal Commissioner for Data Protection and Freedom of Information (FfDF),[15] as well as to his regional equivalents on the Länder level. Over the years, a differentiation process has been taking place between the two levels. Today, the FfDF is responsible for data protection issues concerning federal public institutions and their policies, whereas DPAs of the Länder monitor the public sector on the regional level as well as, most remarkably, non-public bodies, *inter alia* private enterprises, within their territory.

Consequently, some Länder governments launched specific governmental agencies, which were put in charge of supervising non-public corporations in regards to their compliance with data protection law. The close relationship between the government and the regulating agencies especially, caused the EU Commission as well as the European Data Protection Supervisor (EDPS) to file a suit against the Federal Republic of Germany for infringement of the "complete independence" principle.

In March 2010 the European Court of Justice (ECJ) ruled that Germany "failed to fulfil its obligations under the second subparagraph of Article 28(1) of Directive 95/46/EC", i.e. the assurance of "complete independence" (Judgment of the Court 2010). Indeed, the ECJ confirmed that some governments of the German Länder had appointed specific "authorities [to be] responsible for monitoring the processing of personal data by non-public bodies and undertakings governed by public law which compete on the market (öffentlich-rechtliche Wettbewerbsunternehmen)" (Judgment of the Court 2010, para. 56).

Furthermore, the court devoted much attention to the clarification of the meaning of "complete independence". The ECJ stated "that a supervising authority must be free from any influence, whether that influence is exercised by other authorities or outside the administration. The fact that these DPAs are subject to State scrutiny in Germany constitutes an infringement of that requirement" (Judgment of the Court 2010, para. 15). Apparently, some Länder governments had a narrower interpretation of "complete independence" in mind, proposing the concept of "functional

[15] The FfDF in Germany represents not only the head of the national DPA but also the institution itself. DPA officials are directly working for him.

independence" in the sense that DPAs must be primarily independent of regulatees from the private sector (Judgment of the Court 2010, para. 16).[16]

Despite the judicial decision of the ECJ, the independence of Germany's FfDF seems jeopardised since there are a significant number of gateways and possibilities of governmental influence. Most remarkably, the FfDF is organizationally attached to the Federal Ministry of the Interior, which has several problematic consequences. Even though the commissioner remains, in general, independent from any instructions or orders (functional supervision) by the government, which is specifically stipulated in the national data protection act (Federal Data Protection Act 2009 (1990), article 22, para. 4), he/she is exposed to administrative supervision by the ministry.

According to Dammann (2011, p. 1057), a legal scholar and former top official working for the FfDF, the administrative supervision could not only offer ways to seriously hamper the DPA's work, but also result in a so-called "anticipatory obedience" by the commissioner. Dammann (2011, p. 1058), furthermore, points to the fact that the national DPA is often only a way station for public servants of the Ministry of the Interior, where they will normally continue their career later on. This is highly problematic in terms of the staffs' commitment, orientation and willingness-to-comply.

In addition, the FfDF is not in a position to decide on his/her personnel policy independently (Federal Data Protection Act 2009 (2009) article 22, para. 5, cl. 5), since the ministry also has a say in it. In cases of a promotion or "voluntary" transfer of an employee, the authority even lies exclusively with the ministry (Dammann 2011, p. 1057). Finally, the commissioner is subject to statutory supervision by the government (Federal Data Protection Act 2009 (1990), article 22, para. 5.), which constitutes another potential source of governmental influence. All of this is particularly critical, since the Ministry of the Interior is traditionally in charge of often privacy-invasive national security policies.

All in all, the institution of Germany's FfDF does not seem to fulfil the "complete independence" requirements stated by the decision of the ECJ. Eventually, it should be noted that the "functional independence" approach, presented in the trial of the EU Commission against the Federal Republic of Germany, illustrates the common confusion of accountability with control.

7.4.3 Accountability and Legitimacy of DPAs

When talking about the accountability of DPAs, one would normally think of arguments in favour of more governmental control and against the far-reaching discretion of DPAs. However, this is clearly not the case, if accountability is seen as a complement to independence providing greater legitimacy for DPAs.

[16] Although specific DPAs of the Länder will be scrutinised more thoroughly within the dissertation project, this work will not deal with the regional level in more detail.

Regarding Quintyn et al.'s (2005) practical accountability arrangements, DPAs are already subject to quite a few accountability mechanisms. For example, whereas ex ante accountability is ensured by consultations with stakeholders before audits are undertaken, various publications alongside the mandatory annual report as well as large public relation and awareness raising campaigns represent classical ex post accountability instruments. These tools are rather of an explanatory character, fulfilling the task of shedding light on DPAs' actions. Procedural and substantive accountability mechanisms can be found as well. Since data protection commissioners cannot be sanctioned for regulatory failure, there is no such thing as personal accountability.[17] While financial accountability is reflected by the DPAs' obligation to regularly report on their expenses, performance does not appear as an accountability principle, at least not in the legal context.

However, the performance of DPAs plays a crucial role when it comes to output-oriented legitimacy. Although some data protection commissioners are elected by parliament,[18] the democratic legitimacy of DPAs remains scarce. Therefore, the other sources of legitimacy such as performance and effectiveness become crucial.

Yet, DPAs' performance is problematic, especially when it comes to the effectiveness of their work. This is supported by the results of several comprehensive studies. According to a comparative legal study by the Fundamental Rights Agency of the EU, the reasons for the often-poor effectiveness of DPAs lies predominantly in "the lack of independence, adequate resources and sufficient powers" (EU Report 2009, para. 8). Remarkably, Korff and Brown (2010, p. 44), who come to similar conclusions in their comparative survey on privacy challenges, point to the fact that "weak enforcement in many countries was already noted in a much earlier study [referring to an EC study on case-law on compliance from 1998 by Douwe Korff], and [it] does not appear to have improved much".

In general, DPAs seem to be overwhelmed by their workload, facing an incredible variety of different tasks and additionally being forced to operate on two regulatory fronts. On top of this, they have to deal with the complex functionalities of modern technologies as well as lacunae in data protection law, which makes their work even more complicated. Thus, DPAs can often not live up to the high expectations placed upon them.

In a nutshell, DPAs are confronted with several accountability arrangements. The emphasis lies on explanatory accountability, which is linked to the concept of transparency: DPAs provide public oversight over their actions on a regular basis and are therefore subject to a variety of external checking mechanisms. The lack of effectiveness, however, has in turn severe negative impacts on the legitimacy of DPAs in the long-term. In order to enhance effectiveness, public policy-makers could reduce the workload by defining fewer, and more specific, tasks, as well as increase DPAs' budgets and personnel resources significantly.

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[17] Yet, in cases of serious misdemeanours DPAs are, of course, subject to statutory supervision by the executive, legislative or judiciary.

[18] In order to obtain additional democratic legitimacy, the German Bundestag elects the FfDF at the suggestion of the Federal Government, following an amendment to the Federal Data Protection Act in 1990.

7.5 Conclusion

Marking the starting point of a dissertation project that deals with a comparative analysis of DPAs, this chapter presents an exploratory perspective on DPAs in the EU, drawing on theories of regulation such as the concept of the *regulatory state* and IRAs. Since there is no clear framework for a political science analysis of DPAs, theoretical and methodological approaches to IRAs could provide a template for the research on DPAs.

Central to the analysis of this work are features of IRAs such as their independence, credibility, accountability, democratic deficit, legitimacy and effectiveness. These aspects are also valid and relevant for the set up of DPAs. Therefore, the lessons learned from research about IRAs could represent a valuable asset in the assessment of DPAs. For example, Thatcher as well as Gilardi have demonstrated interesting ideas as to how to measure formal independence using quantitative methods. Furthermore, Quintyn has emphasized the relative value of independence pointing to principles such as accountability, transparency and integrity as equally important in his regulatory governance model. Although these authors mainly concentrate on IRAs in the financial and economic sector, their hypotheses and methods have been proven useful for the analysis of DPAs. That is why they will not only be applied, but also further developed within the dissertation project.

The most pressing topics for DPAs appear to be their lack of independence, adequate resources and sufficient powers, as several comprehensive studies concluded. Independence is particularly threatened, since DPAs face two fronts of regulatees, i.e. private and public actors, which both have a potentially strong interest in avoiding or manipulating regulatory actions.

Although the European Data Protection Directive stipulates "complete independence", DPAs need continuously to struggle for autonomy, recently exemplified by the ruling of the ECJ on the case of the European Commission against the Federal Republic of Germany in 2010. But also the administrative incorporation of the German FfDF into the Federal Ministry of the Interior poses serious problems for the independence of the DPA.

The "functional independence" approach, presented during the trial by German representatives, comprises a striking example of the common confusion between control and accountability. Hence, clearly defined accountability arrangements that involve a combination of monitoring instruments as well as accountability relationships towards multiple stakeholders are of the utmost importance. However, the traditionally close link between DPAs and the government (certain ministries in particular) has resulted in a rather one-dimensional accountability relationship, i.e. the often-exclusive right by the government to appoint and dismiss the commissioner (head of DPA) as well as to finance the agency.

Yet, accountability should not be seen as a trade-off in regards to independence. If appropriately structured and arranged, accountability actually serves as a complement to independence, providing not only transparency, but also greater legitimacy. Regarding the first, DPAs have clearly succeeded in making extensive information

about their actions available to the public. However, the latter suffers from the lack of effectiveness of DPAs' work. Facing a broad spectrum of activities as well as two regulatory fronts, DPAs appear to be overwhelmed by the enormous workload and the technological dimension of the tasks.

All in all, it seems tremendously important, not only to strengthen DPAs' independence, particularly from public policy-makers, but also to increase their financial and personnel resources significantly in order to enhance their effectiveness. The dissertation project will eventually try to answer the question as to how this can be achieved.

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