

# Does formal independence of regulators change? Evidence from Portuguese agencies

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The rise of the regulatory state has led to the global diffusion of independent regulatory agencies (IRAs). IRAs are the result of the tension between the functional demands of regulatory capitalism and the need of politicians to control policies. Their life cycles have not been linear. Their legal statuses have changed over time, affecting their degrees of independence. This article revisits Gilardi's formal independence index, makes an in-depth diachronic and cross-sectorial analysis of 11 regulatory bodies in Portugal, and searches for explanations for the observed variations. It concludes that the formal independence of IRAs tends to increase due to external pressure and the need of governments to project credible commitment, but principals only grant as much independence as they see fit to satisfy those (external) demands (for change).

## 1 | INTRODUCTION

The rise of the regulatory state (Levi-Faur, 2005) has led to the global diffusion of independent regulatory agencies (IRAs) (Jordana, Fernández-i-Marín, & Bianculli, 2018) that are expected to operate at arm's length from politicians, who risk considerable agency losses by granting them (Majone, 1997; Thatcher, 2002). The legal independence granted to these bodies is thus a balance between the demands of economic agents for regulated capitalism and the desire for control on the part of elective or political principals. Therefore, autonomy changes significantly across sectors (Gilardi, 2002, 2005a, 2008) and countries with different administrative traditions (Bianculli, Fernández-i-Marín, & Jordana, June 15, 2013; Thatcher, 2005) and varieties of capitalism (Guardianich & Guidi, 2015). But can variations of formal independence be observed over time? If so, in which direction, and which factors explain the changes?

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Studies on the life cycles of institutions suggest diverging paths, some toward more autonomy due to the reputations they build (Carpenter, 2001) and others toward capture by stakeholders (Martimort, 1999). Most studies restricted the measurement of formal independence to the foundation of agencies (Badran & James, 2012; Gilardi, 2002, 2005a; Hanretty & Koop, 2012) and thus have not accounted for subsequent reforms that could have aimed at influencing independence through legislative means. When analyzing the influence politicians have over agencies, other studies have focused on how politicians intervene in the daily activities of regulators according to or in spite of legal restrictions (Ennsner-Jedenastik, 2015; Fernández-i-Marín, Jordana, & Bianculli, 2016; Hanretty & Koop, 2013; Maggetti, 2007; Thatcher, 2005). However, institutional reform regarding formal independence has not been sufficiently revisited. If lawmakers reform the laws governing agencies, this suggests that *de jure* independence still plays a relevant role as an instrument of control, in addition to politicization or other factors. Although principals may or may not make use of control mechanisms, it is the law that defines that possibility and preestablishes what politicians are allowed to do. This article adds to the existing work on institutional change (Di Mascio, Maggetti, & Natalini, 2018; Maggetti, 2014) and the diachronic evolution of formal independence of competition authorities (Guidi, 2015) not only by increasing the number of observations and sectors compared in the research, but also by testing the pertinence of previously tested hypotheses.

Using a within-case study approach, this article assesses the diachronic evolution of formal independence of 11 Portuguese IRAs. In this context, Portugal emerges as a relevant case for how party governments have established IRAs while managing to retain some political control over the process. The Portuguese case contributes to explaining why countries that are considered mixed-market economies and Napoleonic in their administrations have more independent agencies and how party governments, which are traditionally more controlling in these contexts, have reconciled demands for credibility with their inclinations to retain influence over IRAs.

The article is divided into three parts. First, it looks at the variation of formal independence, applying Gilardi's index (Gilardi, 2002, 2005a, 2007). Second, it conducts a content analysis of the preambles of laws, complemented by secondary sources, to understand how reforms of the statutes have been justified. Third, it conducts another content analysis of bills in parliament and maps the different positions of parties when they were in office and in opposition. Opening a dialogue between the two bodies of literature—regulation and party politics—this article argues that the tension and subsequent balance between the pressure to delegate and politicians' motivations to control agency losses is not limited to the foundation of IRAs, but rather persists over time. In addition, while the analysis of *de facto* independence signals principals' attempts to minimize agency losses, they may also continue doing so through formal means, exercising their law-making powers to grant varying degrees of independence to agencies. As delegation is “a process rather than one-off event” (Thatcher, 2002), commitment needs periodic renewal, and principals, despite projecting an image of support for delegation, retain as much legal control as possible over agencies in a bargain with obligations to their commitments.

## 2 | THEORETICAL FRAMEWORK

The state has been reducing its role as a service provider in some sectors, promoting competitive markets through privatization and liberalization, in which public companies no longer exist or operate on a level playing field with private stakeholders. This retreat gave rise to the regulatory state

(Majone, 1994), in which the regulation of private stakeholders would be carried out through IRAs instead of traditional bureaucratic oversight, as the former was expected to enjoy more autonomy from elected officials than the latter (Gilardi & Maggetti, 2011). This institutional arrangement was expected to protect markets from inconsistent preferences of politicians over time, thus ensuring more regulatory and economic stability. However, it has also been regarded as one of the main challenges to effective party governments (Mair, 2008), because it makes it more difficult for politicians to influence the behavior of organizations (Carpenter, 2001). The history of IRAs is one of tension between the demands of the regulatory state for less government interference in markets and the need for politicians to control public administration in order to implement their policies and electoral promises (Blondel & Cotta, 1996, 2000; Katz, 1986; Mair, 2008; Rose, 1969, 1974; Thomassen, 1994). The degree of formal independence is the outcome and the balance of that tension.

As empirical studies have shown, this legal autonomy varies across sectors and countries. Numerous theoretical arguments have attempted to explain this variation, but mostly at the foundation of agencies. However, institutions change over time, some becoming better shielded from influences (Carpenter, 2001) and other less so, as they are often captured by stakeholders (Martimort, 1999). This is particularly pertinent, given the several regulatory crises that erupted in western countries over the past two decades (Lodge & Wegrich, 2012, p. 5), including the 2010 financial crisis, which called into question the relevance of autonomous banking supervisors (Jordana & Rosas, 2014). Given that politicians' preferences are inconsistent over time and that, despite delegation, they retain the ultimate control over the continuation, termination, and the design of agencies, it is expectable that independence changes over time, not only at the *de facto* level (Maggetti, 2007) but also at the statutory level. This article investigates institutional reform of legal independence, tests whether the explanatory variables commonly proposed to be behind the delegation of power at the foundation of agencies still play a role in explaining changes in rules and looks at how those variables interact with politicians' preferences.

Three of the most prominent explanations of the formal independence of IRAs emanate without major consideration for party systems and politicians' preferences: emulation, coercive isomorphism, and credible commitment. The two other arguments that have advanced to explain variation in legal independence are more related to the preferences of political actors, namely governments and law-makers, who have power over agencies.

## 2.1 | Coercive isomorphism

The first argument accounting for the level of formal independence of IRAs is *coercive isomorphism*, conceived as a top-down input through which formal and informal pressures are placed on an organization (Dimaggio & Powell, 1983, p. 150) or, as is the case with the creation of IRAs, national policymakers respond to exogenous (and often common) pressures from various international sources on national political communities (Levi-Faur, 2005, p. 25). Processes such as Europeanization have been identified as major sources of top-down pressure and subsequently as an explanation for the creation of IRAs (Gilardi, 2005b), as several of EU directives impose independent regulators.<sup>1</sup>

## 2.2 | Credible commitment

A second argument is related to the deficits in credibility of governments, due to their inconsistent preferences over time. For instance, politicians may change public policies if they perceive that it translates into electoral gains or feel pressure due to public opinion (Gilardi, 2002). In order to

increase investor confidence and attract investment, governments have incentives to make credible commitments and insulate policies from their direct control through autonomous bodies.

The formal independence of regulators operates as a commitment instrument that provides credibility to a policy choice. Sectors that are undergoing liberalization or privatization processes demand stronger commitments, and the establishment of IRAs is more likely when those processes occur, as is the case with utilities or with other economic regulatory bodies (competition and financial markets—Gilardi, 2002, 2005b, 2007; Jordana, Levi-Faur, & Fernandez-i-Marín, 2011; Levi-Faur, 2003). Therefore, more formal independence is expected in contexts that demand more credible commitment from governments.

## 2.3 | Emulation

Emulation is a horizontal diffusion process through which governments conduct some sort of benchmarking of best practices and replicate a model that has been used in other contexts and enjoys a good reputation. In the context of European regulators, Gilardi adds that it is mostly based on two diffusion mechanisms: *taken-for-grantedness*, that is, “some policies or organizational forms may progressively become taken for granted as the normal solution to a given problem, regardless of their actual effectiveness”, and *symbolic imitation* “intended to legitimize the actions of the adopters” (Gilardi, 2005b, p. 90). This takes place in environments marked by uncertainty, in which imitation is encouraged (Dimaggio & Powell, 1983, p. 151). Diffusion of models may occur across countries that share the same context, such as membership in the same international organizations or economic processes, or within the same country across different sectors. The same thing happens among EU member states that face similar policy challenges and, by the stimulus of European institutions, become models for each other (Radaelli, 2000). Empirical studies have shown that when more IRAs are in place, there are higher numbers of changes in new ones being created across countries (Gilardi, 2005b).

## 2.4 | Political uncertainty

Political uncertainty results from characteristics of the democratic process itself, as elections may cause policies to change when a new party or coalition gains power (Gilardi, 2005b). This argument is in line with the theory of judicial independence as insurance for political leaders in order to protect themselves in case they lose office (Finkel, 2005, 2008). Politicians hold authority over policy and have the right to change it without compensations for the losers (Moe, 1985). Uncertainty, that is, the perception or possibility of being replaced in power, may motivate politicians to transfer policy decisions to independent regulators to tie the hands of their opponents, but the propensity to do so depends not only on the chance of immediate re-election of the incumbent government but also on its longer-term prospects, that is, whether or not there is a perception that the party will stay in office (Figueiredo, 2002). In the particular case of IRAs, the likelihood of establishing an independent agency increases when there is a chance that a government will be replaced (Gilardi, 2005b).

## 2.5 | Management of political control

Although there may be incentives for politicians to promote the insulation of regulatory bodies from traditional administrations, politicians may still have reasons for aiming for some amount of control of IRAs. This is why, despite delegating powers, they have preserved instruments through which

they can manage delegated authority (Balla, 2011). These instruments can be, as previously mentioned, the nomination of board members, budget allocation, or the redesign of the laws that govern agencies.

If the above variables play significant roles in the degree of autonomy granted to IRAs at their foundation, it is expectable that they arise again over time, particularly given the inconsistent preferences of politicians over time and their ultimate power to design agencies. The objective of the present article is to examine the causes of variation over time and test if those explanations remain valid. If so, it would be expected that:

**Hypothesis 1.** When external pressures are exerted, it is more likely for agencies to be reformed to increase their formal independence in a process of coercive isomorphism. For instance, if new EU directives need to be transposed to national legislation, it is more likely that a reform with an increase in formal independence will take place.

**Hypothesis 2.** Changes in the structure of the market—envisioned or implemented—require a renewal of the initial credible commitment to potential investors that governments will not interfere in the market as they previously did. Therefore, if the creation of an independent agency signaled that commitment, then the reinforcement of its formal independence through a statute reform is expected each time there is a launch of a new phase of privatization or liberalization of the market.

**Hypothesis 3.** Within countries, recent agencies tend to follow the design and pattern of reform of the ones that were successfully established before in a process of domestic emulation. If the pioneer agencies tend to increase independence, other regulatory bodies will follow. Therefore, when older IRAs witness an increase in their formal independence, this is expected to promote waves of reform across similar entities in the same country.

Concerning politically based explanations, the following two opposing hypotheses were tested:

**Hypothesis 4.** On the one hand, political uncertainty may lead to increased independence. Thus, despite the chances of limiting their own actions, political parties in power may tend to boost the legal independence of agencies to tie the hands of future governments led by the opposition party in cases where they are uncertain about being able keep office in the future.

**Hypothesis 5.** On the other hand, politicians may manage their power over agencies so that they do not lose control over them entirely. Thus, in the face of the demands of regulatory capitalism, politicians will let go of some control over agencies by granting them independence, but only to a certain extent.

### 3 | RESEARCH DESIGN

The present article uses a diachronic within-case study design. This methodological option allowed for the identification of relevant factors and interactions between different inputs, such as internal

factors (political decisions), external pressures (EU directives or others), and policy choices (privatization and liberalizations) and their impacts on the formal independence of agencies. The expectations outlined earlier were tested on the evolution of the 11 IRAs in Portugal, a country that emerges as a relevant case due to its apparent internal contradictions vis-à-vis independent regulators. Its administrative, political, and legal traditions suggest a heavy control of bureaucracy by executives. Portugal displays a “Napoleonic” administrative tradition based on a centralized state and a strong reliance on the law as a means of controlling bureaucracy. Concurrently, Portugal has been considered a big privatizer (Clifton, Díaz-Fuentes, & Comín, 2006, p. 743; Rodrigues & Silva, 2012) and an early adopter of the IRA model (Jordana, Levi-Faur, & Puig, 2006). Some authors, based on the literature on the varieties of capitalism, have considered the country a mixed-market economy, because both unions and trade associations show levels of coordination that are higher than in liberalized economies but lower than in coordinated ones (Hall, 2014; Hall & Gingerich, 2009; Hall & Soskice, 2001). As such, it is expected that its agencies display high degrees of formal independence in comparison to other European countries (Guidi, 2014), which has been confirmed by other authors (Gilardi, 2005b; Hanretty & Koop, 2012).

On the other hand, Portugal is far from being regarded as a success story for regulatory capitalism. In 2010, an IMF Report stated that “non-tradable sectors also suffer from a lack of competition” (International Monetary Fund, 2010, p. 5). The financial assistance program confirmed these problems (Ministry of Finance, 2011) and later, the European Commission (2017, p. 11) stressed that “despite ... reforms, policy gaps persist regarding product and services markets.” Thus, it is expectable that Portugal is a case that illustrates the challenges of accommodating the IRA model, despite its apparent enthusiastic adoption and success in terms of its global diffusion (Jordana, Fernández-i-Marín, & Bianculli, 2018).

Despite the prior existence of semi-autonomous administrative entities, particularly in the financial sector, IRAs were first created the late 1980s and early 1990s. Conversely, 1997 marked the turning point of the diffusion of IRAs: the electricity regulator was finally operating (after having been legally established 2 years before), a constitutional amendment opened the door for the creation of autonomous bodies in public administration and several agencies were established or reformed immediately after. With the exception of the Central Bank and the media regulator, both of which are enshrined in the Constitution, regulatory agencies were considered special administrative entities within the more general category of public institutions or simply had no particular categories (Moreira & Maçãs, 2003, p. 203). All IRAs, as stated by the dedicated framework law, are public entities that are subject to public law, have administrative and financial autonomy and hold their own assets. However, they have not always enjoyed this status. The second turning point was the implementation of the framework law for IRAs in 2013. As a consequence of the requirements of the Memorandum of Understanding signed with the Troika,<sup>2</sup> Portugal had to ensure greater independence of regulators (Ministry of Finance, 2011). Some agencies were upgraded to independent bodies and all IRAs saw their statutes amended.

The statutes of IRAs display a significant lack of consistency. In 2000, the Portuguese government set up a working group for the study of autonomous and indirect public administration. At the time, one of the main conclusions in the report was the dispersion and heterogeneity of public entities concerning independence, tutelage, and responsibilities (Moreira, 2001). The conclusions were later reinforced by Moreira and Maçãs (2003, p. 260), who stated that (a) there was a lack of homogeneity in the institutional solutions with regards to regulation and that (b) there was a tendency for the establishment of IRAs, but (c) there were considerable differences between IRAs, even within the same sector, as was the case with financial regulators. A decade later, the framework law decreased the inconsistency among IRAs, but it did not homogenize agencies entirely. Besides, the Central Bank

and the media regulator were not included in the framework law because they had constitutional statutes and dedicated laws governing them.

4 | DATA AND ANALYSIS

4.1 | Variation of formal independence

Within the case study, 11 IRAs and the 33 statutes that operated changes in the formal independence of IRAs were examined, as listed in Table 1. For each IRA, besides the foundational law, only amendments that changed the indicators under analysis were taken into account. Thus, the number of statutes measured for each IRA varies: The energy regulator has four measurements, whereas the competition regulator has two. In addition, for comparability reasons, we measured the framework law on regulators approved in 2013.

For the measurement of formal independence, an adapted version of Gilardi's index was applied (Gilardi, 2002). The formal independence index was divided into five dimensions: (a) the status of the agency head, (b) the status of the members of the management board (with both dimensions using the same indicators, namely, term of office, appointment, and dismissal procedure), (c) the relationship between the executive and the legislative, (d) financial and organizational autonomy, and (e) regulatory competencies. The index ranges from 0 (no independence) to 1 (full independence) and was obtained by taking the average of the five dimensions.<sup>3</sup>

When applying the index to the case study, it was concluded that some adaptations were required (i.e., the inclusion and exclusion of some indicators and the renaming of the dimensions) for two

TABLE 1 Portuguese independent regulatory agencies

| Sector                                 | IRA    | Year of creation | Creating political party | Year of statutes amendments              |
|--|--------|------------------|--------------------------|--|
| Competition                            | AdC    | 2003             | Centre-right             | 2014                                     |
| Energy                                 | ERSE   | 1995             | Centre-right             | 1997, 2002, 2012, 2013                   |
| Telecommunications and postal services | ANACOM | 2001             | Centre-left              | 2014                                     |
| Securities                             | CMVM   | 1991             | Centre-right             | 1999, 2000, 2003, 2008, 2015             |
| Insurance and pension funds            | ASF    | 1997             | Centre-left              | 2001, 2015                               |
| Media                                  | ERC    | 2005             | Centre-left              |  |
| Health                                 | ERS    | 2003             | Centre-right             | 2009, 2014                               |
| Water and sewage                       | ERSAR  | 1997             | Centre-left              | 2009, 2014                               |
| Banking                                | BdP    | 1990             | Centre-right             | 1998, 2001, 2004, 2007, 2012, 2013, 2015 |
| Aviation                               | ANAC   | 1998             | Centre-left              | 2007, 2015                               |
| Transport                              | AMT    | 2007             | Centre-left              | 2014, 2015                               |

Abbreviation: AdC, Autoridade da Concorrência; AMT, Autoridade da Mobilidade e dos Transportes; ANAC, Autoridade Nacional de Aviação Civi; ANACOM, Autoridade Nacional de Comunicações; ASF, Autoridade de Supervisão de Seguros e Fundos de Pensões; BdP, Banco de Portugal; CMVM, Comissão do Mercado de Valores Mobiliários; ERC, Entidade Reguladora da Comunicação Social; ERS, Entidade Reguladora da Saúde; ERSAR, Entidade Reguladora dos Serviços de Águas e Resíduos; ERSE, Entidade Reguladora dos Serviços Energéticos; IRA, independent regulatory agency.

Source: Portuguese Official Gazette.



main reasons. The first relates to the fact that some dimensions and indicators were redundant or not useful, namely the differentiation between the status of the head of the agency and the other members of the board. In Portuguese IRAs, all members of the board enjoy the same status regardless of their positions. Therefore, maintaining both dimensions separately would result in redundancy. We opted to merge both dimensions into a single one.

The second reason refers to the need to include more indicators to deepen and refine the analysis, as well as update it with new elements brought up by the literature and the economic context. Gilardi's index was built in the beginning of the 2000s. Since then, particularly in the aftermath of the 2008 financial crisis, new elements related to the independence of regulators emerged, particularly relating to regulated firms. The revolving doors phenomenon is one of the most relevant of those elements, because it might jeopardize integrity and public trust, and it may offer unfair advantages to certain groups (Lucca, Seru, & Trebbi, 2014; Miller & Dinan, 2009). Thus, new indicators were added to included mechanisms that prevent revolving doors and undue influence, namely the existence of cooling-off periods and the nonexistence of financial interests in regulated companies. Table 2 summarizes the indicators.

Figures 1 and 2 show the longitudinal variation among regulators, from which the following conclusions can be drawn:

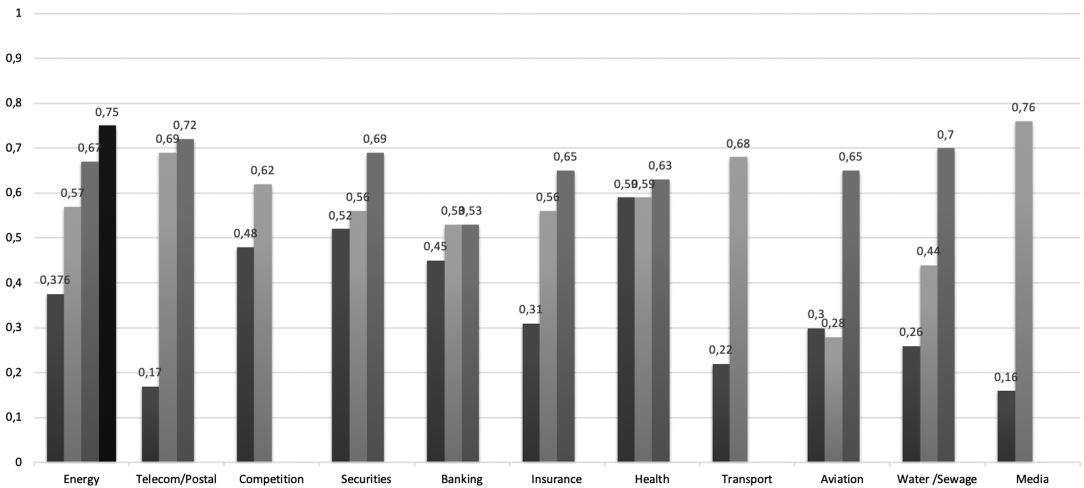
Most regulatory agencies were created with relatively low degrees of formal independence. There was also a clear and sometimes dramatic change in the degree of formal independence of all IRAs over time. With the exceptions of competition, securities, and health, all other agencies began with a formal degree of independence below 0.5 points. The lowest value at the time of creation was 0.17 for the communications agency created in 1989 and the highest was the competition regulator created in 2003, with a value of 0.48. The reason for this difference relies on the statutes of the agency at the time of their creation: Bodies that were created to be autonomous regulators were more independent than those that were created as part of the public administration and later converted into independent regulators. This is also related to the variation of degrees of independence: Former administrative

**TABLE 2** Adapted Gilardi's formal independence index

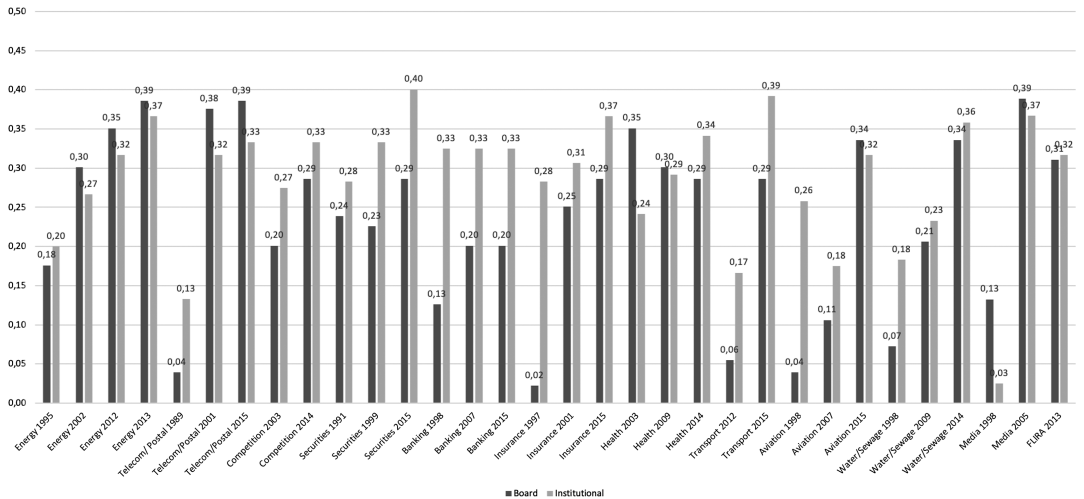
| Dimensions    | Political principals   | Regulatees  |
|---------------|--|---|
| Board         | <ul style="list-style-type: none"> <li>• Term in office</li> <li>• Who appoints?</li> <li>• Dismissal</li> <li>• Other offices in government</li> <li>• Renewal</li> <li>• Ex ante cooling-off period for political office</li> <li>• Ex post cooling-off period for political office</li> <li>• Independence requirement</li> </ul>   | <ul style="list-style-type: none"> <li>• Ex ante cooling-off period for regulated companies</li> <li>• Ex post for regulated companies</li> <li>• Financial interests in regulated companies</li> <li>• Independence requirement</li> </ul> |
| Institutional | <ul style="list-style-type: none"> <li>• Independence formally stated</li> <li>• Formal obligations to government</li> <li>• Formal obligations to parliament</li> <li>• Overturn of decisions</li> <li>• Budget source</li> <li>• Budget control</li> <li>• Who decides internal organization?</li> <li>• Personnel policy</li> </ul> | <ul style="list-style-type: none"> <li>• Incompatibility of staff</li> </ul>  |

Source: Adapted from Gilardi, F. (2002). Policy credibility and delegation to independent regulatory agencies: A comparative empirical analysis, *Journal of European Public Policy*, 9(6), 873–893.





**FIGURE 1** Diachronic evolution of formal independence per independent regulatory agency



**FIGURE 2** Diachronic evolution of independent regulatory agencies' formal independence by dimension

bodies show more dramatic variations of independence. This is particularly evident in the water and sewage regulator and the transport agency.

The framework law on regulatory agencies approved in 2013 had an impact on all statutes approved in the following years and led to convergence across agencies. All IRAs witnessed an increase in their autonomy levels, and that is particularly noticeable in those agencies that were still under full tutelage of ministries, namely in the transportation, aviation, and water/sewage sectors. The less dramatic increases were felt by the energy and the telecommunications/postal agencies, as they were already the most formally independent ones. However, even among agencies covered by the framework law, statutes were not completely harmonized, because—as previously noted—the framework law was not statutory, as it offered room for sector adaptation.

There is an overall evolution of statutes in the direction of granting more independence to agencies, that is, there is no retraction of formal independence for most IRAs. To a greater or lesser

extent, agencies saw their overall formal independence increase over time, with one exception: the aviation agency. The retraction of formal independence took place in the 2007 statute amendment, due to changes in the obligations to the government. While the 1998 statutes determined that annual reports had to be approved by the minister, the 2007 statutes lacked any provisions on those obligations. Yet, parallel legislation on public institutes clarified that ministers are requested to approve several other documents or management acts and are entitled to guide the regulators' activities.

However, when considering the dimensions separately, more subtle retractions are identifiable. Despite the explicit tendency for an increase in overall independence, some regulators experienced retractions in specific indicators, as was the case of the health regulator. Its overall independence between the first and the second statutes was maintained, but there was a retraction in two indicators. The *ex ante* cooling-off period for board members was decreased in every amendment, only to be fully eliminated in the last reform. There was no apparent reason for this choice. However, during parliamentary discussion of the framework law, regulators were invited to present opinions and contributions. The health regulator underlined the importance of its *ex ante* cooling-off rule as an example of best practice and proposed its inclusion in the framework law. Former regulators were not able to explain these changes,<sup>4</sup> which suggests that the redrawing of the mechanism was a strict political choice and not one that emanated from the regulator or that was coordinated with it. In addition, the requirement for "independence of the board members" was also deleted in the 2014 statutes, whereas it had been present in the two previous statutes. It is also worth noting that, paired with the energy and communications regulators, the health agency was the most independent body since its creation. However, contrary to those other two agencies, it was not established or reformed due to obligations toward the EU. Following 2013, the independence requirement for board members was also erased from the reviewed statutes of the securities and the insurance regulators, even though it existed in their previous governing laws.

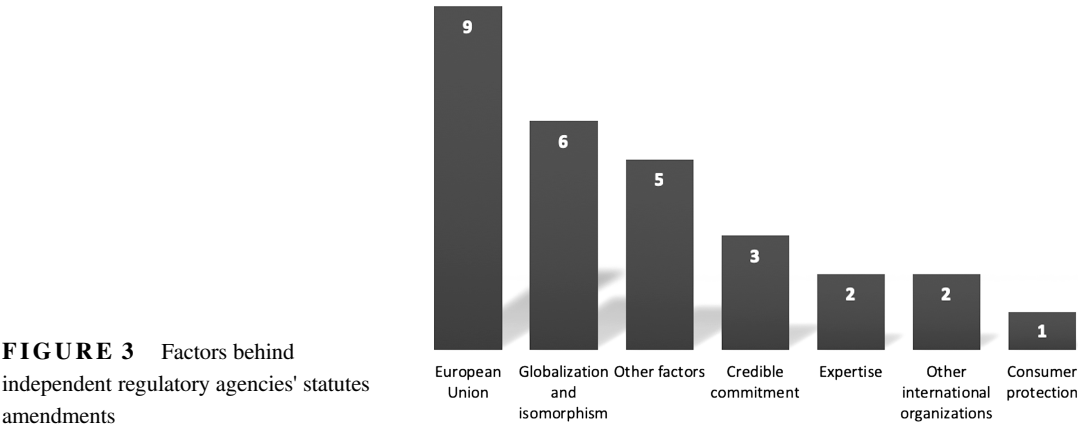
The financial sector is arguably an exception. Historically, financial regulators were the first IRAs and were granted more autonomy than the remaining public administration bodies. The Central Bank and the insurance and pension funds regulators' origins date back to the nineteenth century, but they were only granted special independent statuses in 1998 and 1997, respectively. When comparing independence scores at the time of creation, the securities and the insurance bodies display higher degrees of independence than the energy agency, which was also established in the 1990s. However, the relatively higher autonomy was blurred, particularly following the framework law, which was expected to harmonize the statutes of all regulators. By 2015, when all regulators had their new statutes approved, the financial regulators were, in comparison, the least independent ones. Indicators that keep autonomy lower are *ex ante* cooling-off periods and the lack of an independence requirement for board members. The question emerges as to why this is so. Even before the passing of the framework law by parliament, both the securities and the insurance and pension funds agencies showed strong disagreement on several issues of the bill. From the start, both regulators were against the fact that they were not being treated the same way as their partner financial regulator, the Central Bank (ISP, 2012; Tavares, 2012). In addition, both claimed the *ex post* cooling-off periods were not adequate for their profiles and that the Central Bank was not subject to similar restrictions. Despite having failed in their common goal of avoiding *ex post* quarantines, those regulators are not, as utilities agencies are, subject to *ex ante* cooling-off periods and their board members are not required to be "independent" individuals. There seems to be a lobbying capacity for financial agencies to ensure that they maintain a revolving door, that is, they have a voluntary lower level of independence vis-à-vis the regulated sector.

4.2 | Coercive isomorphism, emulation, or commitment?

It is now clear that Portuguese agencies have gone through several reforms, which in general led to an increase—although not always a consistent one—of formal independence. We now proceed to the official justifications behind those reforms by conducting a content analysis of the preambles of laws and decree-laws related to IRAs. Preambles provide relevant clues for understanding the context, motivations, and stakeholders involved in the design of a law. When deemed necessary, secondary sources, such as media or sectorial literature was consulted. Each hypothesis was linked to one or more expressions that could be found in the preambles of the law, as listed in Table 3. Then, we manually counted the presence of these expressions in the statutes.

In addition, to understand the political dynamics surrounding the formal independence of agencies and to test hypotheses 4 and 5 related to the role of political parties, a content analysis of bills proposed by both government and opposition was conducted. The analysis aimed at mapping the positions regarding the independence of each political party and how it changed depending on whether the parties were in office or in opposition (Figure 3).

Analyzing the context in which IRAs were established and reformed in reference to EU legislation, recommendations and practices appear in the preamble of most laws related to the creation or change of statutes of Portuguese IRAs. Mentions are, for example, “driven by the EU law” or “within the European Union”.<sup>5</sup> It is not by chance that the two most independent regulators are specifically those that are under stronger influence of EU law: the energy and communications regulators. The EU directives in electricity and telecommunications impose such authorities on member states, regardless of countries' administrative organization or tradition. In addition, the legislative changes of 2013–2015,



**FIGURE 3** Factors behind independent regulatory agencies' statutes amendments

**TABLE 3** Summary of hypotheses

| Hypothesis                         | Operationalization   |
|------------------------------------|--|
| Hypothesis 1: Emulation            | Globalization<br>Other countries' experiences<br>International organizations |
| Hypothesis 2: Coercive isomorphism | Transposition of EU directives<br>International creditors                    |
| Hypothesis 3: Credible commitment  | Commitment<br>Privatization<br>Liberalization                                |

which followed the international financial assistance program, contribute to the argument for coercive isomorphism and confirm the crucial role of external pressures. The Memorandum of Understanding demanded “the implementation of best practices in terms of independence of national regulators” (Ministry of Finance, 2011, p. 30) and the Portuguese government agreed to “provide an independent report (by internationally recognized specialists) on the responsibilities, resources and characteristics determining the level of independence of the main [National Regulatory Agencies]” and “present a proposal to implement the best international practices identified to reinforce the independence of regulators where necessary” by the end of 2011 (Ministry of Finance, 2011, p. 91). Therefore, Hypothesis 1 is confirmed: The reform of legal status and the increase in independence is mostly driven by coercive isomorphism.

Privatizations and liberalizations (undergoing or planned) surfaces as the second most common explanation, suggesting that governments need to project credible commitment in order to ensure the success of those economic policy choices. This was the case for the establishment of the securities, energy, and health regulators and for the increase of independence of land transportation, civil aviation, water and sewage agencies (in the case of the latter, it was not privatization but a possible concession of public companies to private investors). Although not as intensely as 1, Hypothesis 2 is also confirmed: Credible commitment on the part of politicians toward stakeholders is key in the deepening of *de jure* independence. However, it also shows that, in addition to delegation, credibility is a process that requires periodic renewal and is not a one-off event. Moreover, there is a correlation between 1 and 2. Both EU directives and the Memorandum of Understanding that followed the 2011 financial bailout demanded simultaneous market liberalization and/or the completion of privatizations and the creation or reinforcement of the independence of agencies.

Emulation shows up in third place, but it plays a stronger role at the domestic level. The 1997 constitutional review that enshrined the possibility of autonomous administrative bodies and the large-scale administrative reform launched in 2006 both had strong impacts on agencies that enjoyed a certain degree of autonomy but could not be fully considered to be independent regulators. This was the case of the creation of the aviation, the insurance and pension funds, and the water and sewage agencies and the statute amendments of those same agencies along with the health regulator between 2007 and 2009. The creation of those three agencies, the restructuring of the communications agency in 2001 following the establishment of the energy regulator and the 1997 constitutional review also suggests a wave of mimetic institutional isomorphism. The energy agency served as a model that was to a certain extent replicated in other sectors.

### 4.3 | Political uncertainty and managed political control

In spite of the above, there are political partisan dynamics that need to be taken into consideration, as they may signal that governments use delegation as an insurance mechanism vis-à-vis political uncertainty or a way to manage control over time. The repeated increases in autonomy suggest that from the start, lawmakers do not opt for mechanisms that grant agencies full independence and retain enough control over agencies that allow for further improvement in the future. For instance, at first, the appointment of board members was made by one minister and later by the government as a whole, but a competitive call was never considered. The absence of change or occasional decreases in independence should not be overlooked, as they also provide guidance for the evaluation of institutional change. A lack of amendments, particularly when there are calls for greater independence from opposition parties or international organizations, may signal that principals want to retain control over IRAs.

The different bills presented in parliament over the years show that the positions of parties regarding independence differ when they hold power and when they do not.<sup>6</sup> Parties are more willing to grant independence when they are in opposition and tend to forgo their own previous proposals once in office. Since the early 2000s, parties have proposed bills that address the issue of the independence of regulators. More specifically, in 2000, the Socialist government set up a working group for the study of autonomous administrative bodies and the drafting of a dedicated framework law. At the time, from a functional perspective, the only IRAs were the energy agency, the “special case” of the Central Bank and “to a certain extent” the securities regulator (Oliveira & Moreira, 2001, pp. 19–20). A project for a framework law focusing exclusively on “independent administrative entities” (Moreira & Maças, 2003) was drafted, but it was only presented by the Socialists when they were no longer in office. The center-right coalition, which was in government and had a parliamentary majority, rejected the bill. However, when in office again between 2005 and 2011, the Socialist Party did not resume its previous bills. Moreover, the 2002 and 2003 bills presented by the Socialists covered the aviation agency, whose formal independence actually witnessed a retraction in the following years when the party was in power. In 2007 and 2009, both center-right parties presented bills that dictated that the President of the Republic should nominate board members, following a proposal from the executive and a parliamentary hearing. In addition, in 2009 and 2010, other center-right bills proposed *ex ante* restrictions for individuals who had taken political offices. Both bills were rejected by the Socialists in office. However, when they were in power in 2013, the center-right coalition dismissed their previous proposals when drafting the framework law.

In 2013, when the government proposal for the framework law was being discussed in parliament, the Socialists suggested that the nomination of board members by the council of ministers should be dependent on the positive opinion of the parliament. However, when the same law was reviewed in 2016 and the Socialists were back in power, the nomination process was amended so that parliament would have to issue an unbinding written opinion about potential board members. The last word on board members remains a prerogative of the government.

## 5 | CONCLUSIONS

The present article posits that influence over IRAs after their establishment is exercised not only by *de facto* instruments, but also by legal ones. The literature on regulation has examined the degree of formal independence at the foundation of agencies and proceeded to study how IRAs function in practice. Nevertheless, statutes are also reformed over time, as this research confirmed, and this should be revisited. Despite having been created to escape policy instability due to principals' inconsistent preferences over time, IRAs are still subject to lawmakers' choices. The position of political parties varies depending on whether they are in office or in opposition, with parties being more likely to favor more independence when they are not in power. Incentives to tie the hands of the following government do not seem to be a driver for granting more independence to IRAs. Political uncertainty as an explanatory factor for reforms and independence (4) has not been confirmed. On the contrary, governments manage the authority they delegate (5) by legally dismissing policies that grant more autonomy and retaining as much control as they can until they are forced to let go of it by external pressures (1) and the need to project commitment (2).

The top-down factors—credible commitment and coercive isomorphism—emerge as the main explanatory variables in the creation of IRAs in Portugal, but these also played a key role in various reforms and the increase in the degree of formal independence. While the literature on the diffusion of IRAs had already confirmed this, the findings of this article suggest that those were not one-off events.

Commitment needs to be renewed occasionally (or frequently), as the original power delegation does not seem to be enough. External actors also seem to press for more independence from time to time.

A second finding is that the variation on formal independence is a progressive one, but this also shows that, in each amendment, principals try to retain some degree of control over IRAs and this is the reason why there is always room for more autonomy over time. Moreover, amendments are more a projection of credible commitment for stakeholders and external institutions than concrete willingness to delegate powers to autonomous bodies. As they are the results of external factors over political and administrative systems, IRAs may not be fully accepted and internalized by politicians. Thus, at their own initiative, politicians do not show proactiveness in increasing the formal independence of regulators, and when led to do so by external pressures, they only grant enough autonomy to respond to those pressures and provide an appearance of independence. Otherwise, principals would opt for mechanisms that grant most of an agency's independence from the beginning. A third finding is that, despite the diffusion of the regulatory state and its institutions, party politics still play a significant role. The technical nature of IRAs does not prevent them from being the objects of political dispute.

This article has only focused on the evolution of formal independence and the factors that explained change, namely external pressure of the EU and foreign creditors. More investigation should be conducted on the reasons behind those pressures. While the literature has studied the impact that statutes have on de facto independence, new perspectives are yet to be explored, namely the influence practices vis-à-vis IRAs have on the reform of legal independence. Finally, as a case study, this research has limitations, as it is not possible to conclude whether Portugal is an outlier among the countries that have adopted the IRA model. Therefore, formal independence should be revisited, and more case studies followed by comparative research could be developed.

## ENDNOTES

<sup>1</sup> For further explanation, please refer to Gilardi (2008), who lists a number of EU directives on electricity and telecommunications.

<sup>2</sup> The Troika was composed of the European Commission, the European Central Bank, and the International Monetary Fund.

<sup>3</sup> The full description of the index and the values of each indicator can be found in Appendix S1.

<sup>4</sup> Given the absence of written sources, two former board members of the health regulator were interviewed regarding the elimination of the ex ante cooling-off period, but they were not able to provide any clarification or reveal any rationale for this choice.

<sup>5</sup> Decree-law no 309/2001 and Decree-law no 212/2012.

<sup>6</sup> Bill 346/IX (2002); Bill 178/IX (2003); Bill 344/X (2007); Bill 49/XI (2009); Bill 55/XI/1.<sup>a</sup> (2009); Bill 382/XI/1.<sup>a</sup> (2010); Bill 595/XIII/2<sup>a</sup> (2017); Proposal for changes in FLIRA (2013).

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