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Institutional Choice and Bureaucratic Autonomy in Germany

MARIAN DÖHLER

A growing body of literature refers to a transformation of state structures in OECD nations that consists of an expansion of non-majoritarian institutions, particularly independent administrative agencies. Among others, this thesis is advocated by Majone, who argues that the transition from the positive to the regulatory state generates a functional need to adopt a US-like agency model.[1] Evidence can be detected at the EU level, but also at the national level. The argument is backed by current research about sectoral regulation whereby regulatory agencies are used as safeguards or initiators of competition in formerly state-supplied areas such as water, energy or telecommunication.[2] No less supportive for the 'agencification' thesis is the 'New Public Management' discourse in which the separation between policies and operations is strongly recommended as a tool to enhance government efficiency.[3]

A closer look at this phenomenon reveals three dimensions. First, agencies, defined as administrative units separated from federal or central government departments, appear to gain more political relevance, due mainly to their regulatory functions. Second, there is an increase in numbers of newly created agencies, measurable in a number of OECD nations, and most vigorously so in the UK where the policy/operations split is almost completely implemented by hiving off so-called executive agencies from ministerial departments.[4] Finally, either as a result of organisational decentralisation or their managerial functions, agencies are expected to become more independent from top-down political interference, thereby changing the command–control model of bureaucracy. Taken together, these dimensions lend political importance to the process of agencification.

The analytical framework to deal with this phenomenon has mainly been institutional convergence. But if agencification is explored within the German context, some striking differences occur. Within the system of government institutions agencies only play a subordinate role. In the official language they are usually referred to as 'non-ministerial federal administration'.[5] Furthermore, the idea of constructing administrative agencies as non-majoritarian institutions, protected from political

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interference into single decisions, has not gained ground. Rather, bureaucratic autonomy is still seen as contrary to the principle of democratic legitimacy that requires elected politicians to retain control. A final peculiarity is the resistance to using regulatory agencies as a standard response to the re-regulation of deregulated industries. Mostly policy makers try to find a solution within the existing framework, often via associational self-regulation. These observations are admittedly based on general indicators and the presumed deviation from the OECD mainstream may appear less pronounced if, for example, the cross-national equivalence of the dependent variable (that is, independent agencies) is defined differently. What sets the German case apart, however, is the combination of three factors that reduce the political role of administrative agencies. The first task of this discussion, then, is to explain their peculiar position in the German politico-administrative system and their lack of political independence.

A second more theoretical aim is derived from the principal–agent (P–A) perspective that dominates research about delegation. Even if the P–A approach could be used as a framework, open to different hypotheses, most applications exhibit a strong magnetism for rationalist behavioural assumptions. P–A analyses are usually built around the problem of political control and typically include the following assumptions.[6] Administrative agencies mainly emerge out of a 'clash of interests' – all actors in this game, that is, legislators, presidents, interest groups and bureaucrats, pursue their own, often contradictory preferences, thus justifying the assumption that the form of delegated functions is based on highly rational and instrumental considerations; because these contradictions are built into the structure of an agency, a constant 'fear of shirking' leads politicians to produce regulations, rules, reporting requirements, and other measures for bureaucratic control; and this in turn causes an enduring 'conflict over control' fuelled by the willingness of all actors to gain a competitive advantage whenever possible. These assumptions are not necessarily wrong or irrelevant, but they privilege an analytical perspective that is biased to exclude motives other than rational-instrumental. By taking up this problem, the second aim is to provide evidence for the argument that the instrumental rationality of institutional design and control decisions should not be overestimated.

This theoretical predisposition may appear somewhat outdated since modifications of some hard-core P–A assumptions have appeared over the past decade,[7] mainly through the integration of institutional factors, accepting non-utilitarian motives, and empirical arguments about a political process lacking a functional order, beset with goal ambiguities and *post-hoc* rationalisations. Despite such analytical extensions, P–A analysts still have problems escaping from the rational choice world of 'sophisticated

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economics and simple politics'.[8] Two of the persistent objections against the functionalism implicit in rationalist theories, recently summarised by Pierson,[9] also apply to mainstream P–A theories. First, actors are not necessarily instrumental in all their decisions, not only because they adhere to the logic of appropriateness, but also because the question of proper design is not raised. Second, policy makers often do not anticipate long or even medium term consequences of their choices. This is quite reasonable when considering the difficulties of assessing causal relations between policy goals and particular institutional arrangements.[10]

The explanatory concept applied here, therefore, emphasises the bounded rationality model and its derivates.[11] More specifically, it is assumed that institutional choices are often based on no or low preference decisions. Hence, even the term 'choice' may be misleading because of its preference-based image. This is not to say that interests or goal-oriented preferences are suspended or irrelevant; they do play a role in almost every political decision. However, this does not necessarily imply that policy makers are concerned with the problem of administrative design. The complexity of the political problems needing to be addressed is only one reason to concentrate on substantial aspects instead. Other reasons are the availability of reliable and undisputed administrative models or a lack of party competition, both of which would prevent actors from exploiting organisational questions.

Whether policy makers will act this way depends from the institutional setting within which they act, and this inevitably raises the question of how the institutional forces work. Among those scholars who have tried to elaborate the 'institutions matter' argument, Moe and Caldwell deserve special attention as their analysis is a rare example to link different modes of executive control with the structure of government in a systematic way. The initial assumption is that the institutional form of government, such as the separation of powers in the US or the parliamentary system in the UK, 'programs a whole array of system features'[12] by generating distinct sets of incentives. The position and performance of agencies is affected by the degree to which control is unified, the varying responsiveness of legislators to interest groups, the accruing need to formalise durable deals, and the degree of agency politicisation. Together this forms a 'genetic code' for bureaucratic structures and the way they are controlled.[13] The following analysis will consider these analytical perspectives.

OBSERVATIONS ON AN 'AGENCY LAGGARD'

German observers like to stress the multiplicity of the units of the federal administration as reflected in variations in their size, function, legal status,

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and political or economic relevance. Currently, there are no less than 639 different non-ministerial public authorities (*Behörden*) at the federal level, ranging from rather obscure, hardly noticed units to huge and well-known agencies such as the Federal Environment Office or the Federal Cartel Office (FCO).[14] According to a fine-grained legal framework, four basic types of federal authorities can be distinguished: Federal agencies (*Bundesoberbehörden*), self-governing bodies (*öffentlich-rechtliche Körperschaften* and *Anstalten*), public enterprises (*Bundesunternehmen*), and charged administrations (*Bundesverrichtungsverwaltung*). The first two types belong to the sphere of public law. The other two are private law organisations. Among these types, there is a clear hierarchy, allowing core government functions (*hoheitliche Aufgaben*) only to be delegated to federal agencies.[15] This type of agency enforces major administrative functions at the federal level such as banking, insurance or drug control, and cartel law. Although the legal rules are rather vague, a recurrent pattern has emerged to delegate functions with decreasing political relevance to the other types, that is, touchy political functions are likely to go hand in hand with closer ministerial control. Typically social security funds, public banks or government research institutes are organised as self-governing bodies, whereas public enterprises and charged administrations mainly have entrepreneurial functions that are thought to perform better outside the restrictions of the public sector. If the following analysis is confined to the roughly 40 federal agencies, the reason is that only this type of authority performs functions, including regulation, that have the chance to enter the sphere of politics, thereby rendering the question of design and control more interesting.

What all federal authorities have in common is their subordination, in varying degrees, to some sort of ministerial oversight. Due to their private law status, public enterprises and administrations charged with missions are only subject to a control at arm's length, mainly by ministerial bureaucrats acting as shareholders. In the case of self-governing bodies, oversight is restricted to legal aspects (*Rechtsaufsicht*). Federal agencies are additionally exposed to technical oversight (*Fachaufsicht*),[16] a remarkably indeterminate piece of public law that allows ministerial departments to issue instructions on virtually every substantial aspect of agency activities, including the reversal of single decisions.

There are a few exceptions to this rule, most notably the FCO and the Regulatory Agency for Telecommunication and Postal Services (RegTP), both of which are partly excluded from ministerial instructions. Cases like these have been dealt with in legal thinking as *ministerialfreie Räume* (areas free from ministerial oversight).[17] This legal doctrine, based on the idea of a continuous chain of democratic legitimacy and control, provides that an

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exemption from ministerial oversight should be limited to very special and well-founded cases. Although it is stressed that parliament is equally empowered to grant a fairly wide range of discretion to agencies, this is couched in a rule-exception scheme that clearly limits the appearance of autonomous authorities. This is well supported by general construction principles of public administration in Germany.

At the federal level, the so-called *Ressortprinzip* (departmental principle) is essential for executive organisation. Article 65 of the constitution stipulates that, within the policy guidelines set by the chancellor and cabinet decisions, 'each federal minister shall conduct the affairs of his department independently and in his own responsibility'. In practice, this rule creates a domain for each department that is often eagerly defended and not only applies to substantial policies but, almost to a greater extent, to the internal affairs of federal agencies. Ministers appoint agency heads, decide about their budgets and command a far-reaching power (*Organisationsgewalt*) to reorganise, downsize, merge, or abolish agencies within their competence *(Zuständigkeit*).[18] If this requires re-writing the enabling law, the majority factions in parliament usually follow suit. Without any explicit reference, the departmental principle has given birth to the equally heavyweight normative principle of ministerial responsibility. As in most parliamentary democracies, this doctrine requires individual ministers to appear before parliament and, if asked, to report, answer questions, and to take the blame for omissions or failures within their competence.[19] But, on top of this common obligation, ministerial responsibility has had quite unique repercussions on the role assigned to federal agencies. Even if important political functions are delegated to them, which is not unusual, they retain a subordinate status and are not given the chance to become 'non-majoritarian' in terms of escaping ministerial control.

The federalist structure of the German polity is another important factor for defining the role of agencies. In fact, a substantial number of federal laws are not implemented by the federal government but instead are enacted by the Länder. If devolving public functions to decentralised administrative units is an aim of creating agencies, then the federal allocation of functions has certainly reduced these kind of pressures. However, allocating functions across different levels of government (central/local) should not be confused with the devolution of functions at one level, as is the case if the Länder administration is regarded as the functional equivalent to British executive agencies.[20] In principle there are enough policies to be delegated to agencies at the federal level. What seems more important about the argument of federalism is the legislative veto right that the Länder can use to block the expansion of federal administrative bodies with regional or local field

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offices. However, this veto can be, and is, bypassed if a new agency is organised solely at the federal level. This has severely reduced the ability of the Länder to restrict the creation of new federal agencies, especially during the post-war reconstruction era. The Länder continue to be concerned about the growth of federal competencies and functions, and in energy or rail regulation they oppose new regulatory agencies at the federal level. But if federal policy makers agree to create, for example, a new agency for consumer protection, it is difficult for the Länder to avoid such a decision. Thus, on the one hand, federalism has reduced the need to think about decentralising federal functions but, on the other hand, is not a severe restriction for creating new agencies at the federal level either.

Aside from federalism, the frequent integration of interest groups into policy making is regarded as the trademark of German politics. Often this takes the shape of associational self-regulation replacing government interventions and therefore rendering new regulatory agencies superfluous. This argument is supported by examples such as health care, energy, or consumer protection. But two caveats need to be considered as well. The first is that self-regulation is embedded in a highly legalised political setting[21] that throughout makes self-regulation and government regulation more complementary than mutually exclusive. Typically, agreements are checked for their conformity with government policy goals and their enforcement is supervised by public authorities or even translated into binding law. Agencies, for example in banking or insurance regulation, strongly rely on associational agreements instead of replacing them. Second, functional equivalence may also work in the reverse, as is the case with associational agreements in energy policy whose function is to set rules for a more competitive electricity and gas market. Not only the contents, but also the implementation of these agreements are supervised by the federal Department of Economics and the introduction of a regulatory agency in the energy sector has been used as a threat to force associations to conform with federal government's policy goals.[22] Since the introduction of the RegTP, such a threat is no longer improbable and receives more support as deregulation shows perceptible price reductions.

This short overview leads to two conclusions. First, the legal-constitutional framework does not prescribe a single best way for administrative organisation. There are neither strong restrictions on the range of delegation nor constitutional doctrines that strictly prohibit autonomous agencies. There is considerable leeway for using agencies, including independent ones, as a tool for government policies. Second, although federalism and associational self-regulation reduce the functional need for regulatory institutions, they do not represent serious restrictions either.

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EX-ANTE DESIGN BETWEEN INSTITUTIONAL CHOICE AND INSTITUTIONAL DYNAMICS

In rationalist accounts institutions result from deliberate choices made to achieve substantial policy goals, to reduce transaction costs, or to overcome collective decision making problems. It is therefore hard to imagine that setting up a new agency is not accompanied by all those 'deck-stacking' elements[23] usually considered as the bread and butter of politics in P–A analyses. However, an alternative way to conceptualise the process of agency creation is to assume that institutional dynamics, or 'creeping institutional change',[24] prevail over conscious and goal-oriented institutional choices. Following this idea, result-based institutional reform could be expected to decrease if existing government institutions have the capacity to relieve policy makers from engaging in time-consuming and costly considerations about alternative structures, control problems and the consequences of agency design. Presumably, this will be the case if policy makers have no incentives to put these problems at the very centre of the legislative struggle, mainly because institutional or other factors provide reliable standard solutions to agency design and control. The argument, illustrated in the following cases, is that the German political system contains several attributes that allow institutional dynamics to prevail over institutional choice.

The 1950s were not only the decade of economic reconstruction, but also the heyday of agency creation. No less than 19 *Bundesoberbehörden* were set up during this period. Among them was the FCO, founded in 1957 after a long and bitterly fought legislative battle known as the 'seven years war'.[25] After initial hostility from German industry calmed down, the FCO became almost celebrated, not only due to its tough anti-trust enforcement, but also for its independent status. How can this be reconciled with the picture presented above? Part of the explanation is to be found in the vague rules establishing the agency's independence.[26] The law only mentions that general instructions must be published in the federal register (§ 49 GWB). One controversial interpretation, among others supported by FCO officials, is that this prohibits special instructions (*Einzelweisungen*). But this could be, and is, also understood the other way around, that is, there is no obligation to publish special instructions. In the overseeing Department of Economics the view is still held that the FCO's independence is only a customary right (*Gewohnheitsrecht*) without any formal guarantee.[27]

But even these concessions seem misplaced in the midst of an otherwise hierarchy-dominated administrative organisation. Due to pressures on German government by the American occupational forces to implement anti-trust legislation, the FCO's status was often regarded as conforming to

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the US tradition of independent agencies. However, a closer look reveals that American influence evaporated over the years. The exemption of the divisions from ministerial instructions was justified in parliament with reference to the Federal Patent Office and the Federal Insurance Oversight Agency,[28] both of which already embodied 'court-like'[29] decision making bodies. But these historical legacies are only part of the explanation. By looking at the broader context it seems more likely that the FCO as well as the Bundesbank, equipped with an even more pronounced degree of independence, emerged in a situation in which granting autonomy to federal agencies was still an open question. At this point, the constitutional doctrine of ministerial responsibility had not yet solidified in practice, nor had other delegation-hostile concepts become politically effective. With the gradual emergence of this doctrine and its derivates, both Bundesbank and *Bundeskartellamt* were perceived as exceptions.[30] This not only prevented a tradition of mimetic isomorphism among other federal agencies, the notion of singularity even made it redundant to justify why independence was not granted to other agencies. As German policy makers experienced their hands being tied whenever they were exposed to uncomfortable decisions by non-majoritarian institutions, including the Constitutional Court, a silent consensus emerged not to proliferate this type of *Nebenregierung* (supplementary government).[31] The irony of both the FCO and, to a greater degree, the Bundesbank is that they became widely recognised for being independent from political intrusions but at the same time contributed to an institutional dynamic in which subordinating agencies to ministerial oversight was perceived as a democracy enhancing constitutional standard.

This process did not surface as a series of conscious decisions. The 'rule' to subordinate federal agencies has remained more an implicit preference than a clear-cut regulation. Students of public administration have consistently observed low interest by politicians for administrative design and reform.[32] As is often the case if political preferences are diffuse or non-existent,[33] the ministerial bureaucracy becomes the main actor, and this frequently happens within the domain of the *Rechtsformenwahl* (choice of legal status). However, there is no indication that ministerial choices have gone beyond the application of routine legal models. In those few cases in which this process is mentioned at all, the focus is on privatisation, that is, the transition from public to private legal status.[34] Questions related to agency design or controls are largely neglected. Certainly, the enactment of enabling laws is by no means free from political disputes. But the focus is clearly on the range of functions delegated to an agency rather than on the range of discretion or administrative autonomy.

A more recent case to exhibit exactly this pattern is financial market regulation.[35] Since the 1980s, German banks, insurance companies, and

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large industrial firms felt the increasing need to move the cartelised and self-regulation based German model of capital market regulation closer towards US-like standards. Driven by anxieties over loss of attractiveness for foreign investors, especially in the stock and securities market, the financial community successfully lobbied for the introduction of the Bundesaufsichtsamt für den Wertpapierhandel (BAW) in 1994. Despite the US Securities and Exchange Commission, an independent commission by definition, figuring prominently in the debate preceding the enabling law, no thoughts were given to the question of political control. The BAW was almost automatically constructed as a federal agency subject to ministerial oversight. If there is a credible commitment to protecting a particular policy it is situated on the abstract level of having sectoral government regulation, leaving open the backdoor for the federal government to intervene in agency policies. The efficiency of the BAW to regulate stock exchange transactions, such as preventing insider trading, certainly depends more on the law enforcement capacity than on the degree of independence. But the straightforward attitude to adopt a particular legal form reflects a persistent pattern of relying on a tried and tested agency model. This underlines that the German way is not to have no delegation at all, but to restrict bureaucratic autonomy almost automatically by subordinating agencies to ministerial oversight.

Drug regulation is one of the few occasions on which controls on agency decisions have been thoroughly discussed during the legislative process.[36] The law, enacted in 1976, contained an unusually large number of measures to empower countervailing interests. A system of commissions, staffed with external experts including representatives from the pharmaceutical industry, plays an important role in the drug admission procedure. A reporting requirement to parliament was included for the first time, and post-market drug surveillance was arranged as a co-operative, somewhat ponderous procedure, again embracing a broad range of external experts. Certainly, this piece of legislation is no example for an ‘auto-pilot’ pattern of agency design. It shows that German policy makers may well consider frontloaded measures to temper agency activism, thus conforming to rational-instrumentalism. On the other hand, drug regulation also reflects interest accommodation through expert committees or co-operative arrangements as a typical pattern of the German administrative rule system.[37]

The most puzzling case in recent years was the introduction of the RegTP. Starting its operation in 1998, the agency was immediately received as a major innovation in at least three aspects. First, the agency adopted a highly visible, almost political role that triggered an unusual amount of attention and conflict. Second, it is regarded as the only ‘real’ regulatory agency, representing the arrival of the regulatory state in Germany.[38] Third,

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it is the first federal agency ever since the FCO back in 1957 to receive a limited exemption from ministerial oversight. These peculiarities reflect the whole field of telecom regulation being embedded in a deregulation–globalisation discourse and such large-scale political processes certainly have the power to overthrow national standard operating procedures. The creation of the RegTP has not swept away the model of a hierarchical administrative structure, but has demonstrated that pressures, primarily from the EU, to conform to a new regulatory regime exist and should be taken into account when considering the future of the German model.

During the legislative deliberation preceding the 1996 telecommunication act, the problem of agency monitoring and independence was discussed at some length.[39] The unusual willingness of policy makers to address this subject and to enact a limited exemption from ministerial instructions shows a clear deviation from institutional dynamics. This is underlined by the original plan to set up the RegTP as the highest federal authority (*oberste Bundesbehörde*), enjoying an independent status equal to the Bundesbank. But lawyers soon reminded policy makers about the logic of appropriateness,[40] thus redirecting attention towards imitating the FCO model rather than inventing a completely new kind of agency.[41] This indicates that the autopilot of German institutional dynamics was not completely disengaged.

The internal structure of the RegTP owes much to the FCO. Six collegial decision chambers were set up for some important agency functions such as licensing and price regulation. Analogous to the FCO divisions, these chambers are widely regarded as being free from ministerial instructions. But this is only inferred from their court-like image and nowhere guaranteed in the law. The Telecommunications Act (TKG) only stipulates that general instructions by the responsible Department of Economics have to be published in the federal register (§ 66 TKG). This has prompted a sophisticated and controversial legal debate, the result of which is that ministerial instructions should be issued very carefully. Thus, the RegTP's much proclaimed independence is shrouded in vagueness, as in the case of the FCO. It remains vulnerable to instructions as long the federal government remains a major shareholder of Deutsche Telekom AG, and the labour market problems of this and other former monopolists, caused by privatisation, are relevant for policy makers. In practice, the overseeing department has issued several general and special instructions.[42] Again, if agency design was meant to offer credible commitment, it went only half-way.

The conclusion to be derived from this section is not that conscious choices about agency design are non-existent, but that they are embedded in an institutional dynamic allowing policy makers a low preference stance

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with respect to monitoring and control measures. The underlying rationale could be described as 'design without grand decisions'.[43] As single policy-related cases will always show more or less pronounced deviations from this standard model, their importance should not be overestimated, as is the case with the RegTP. If we take a P–A point of view, yet another question occurs. German policy makers apparently reduce the transaction costs of agency creation by treating the problem of monitoring and control as already solved through ministerial oversight. The question, then, is whether there are any incentives to work on changing this? Answering this question requires an analysis of the incentives generated by the broader institutional setting of government.

THE INSTITUTIONAL ORDER OF GOVERNMENT

Following Moe and Caldwell, the identification of institutional genetics should start with the relationship between executive and legislative powers. In this respect, the two models of presidential and cabinet/parliamentary government represent the most basic institutional configurations.[44] In a presidential system of government, such as the US, the separation of power charges two equally legitimised institutions with controlling the executive. This 'parallel' system not only hampers a unified control but also triggers continuing conflicts between both constitutional powers.[45] Furthermore, legislators in Congress have strong incentives to react to group pressures as they depend on their support for re-election. As a result, agencies are exposed to a broad and sophisticated repertoire of political measures, all directed at maximising the gains or minimising the losses of politicians and clienteles. Making an agency independent is equally used either as a shield against competing congressional and presidential influence or to expose agencies to countervailing interests. To sum up, the American political system places federal agencies and commissions under a multiple-principal regime that generates strong incentives to make use of an extensive repertoire of supervisory measures.

No such running strategic battles exist in the German parliamentary system. As opposed to the US case, German government is based on a 'sequential' order of institutions, that is, parliament, cabinet, and the executive are arranged consecutively, thus allowing a unified and usually hierarchical administrative control. With the federal government being elected and supported by the majority parties in parliament, the likelihood of conflicting interests between majority factions and cabinet is extremely low. Furthermore, the responsiveness of legislators to demands of interest groups is boiled down through strong discipline of parliamentary factions. Since political parties command the decisive resources for re-election of

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individual MPs, they are less inclined to follow group pressures and more to subordinate to a fairly coherent party line. Administrative agencies are thereby situated in a clearly defined environment. Overseeing competencies rests with the responsible minister, thus reducing the incentives for legislators to be interested in such an 'executive-centred' administration. In contrast to the US system where executive and 'legislative-centred'[46] agencies exist at the same time, their German counterparts are only confronted with a single principal. Consequently, neither parliamentary sponsorship of agencies nor micromanagement aspirations have appeared. Certainly, parliamentary controls of executive action are regarded as an important constitutional function, just as in most other democracies. But by all measures, legislative controls over the executive in Germany are not designed to exercise a perceptible influence over the federal bureaucracy.[47]

This brings ministerial responsibility back in. Implicit to the concept is a transfer of agency monitoring from parliament to individual cabinet ministers. Parliamentary controls are seen as sufficient even if they remain 'sporadic' and 'coincidental'.[48] Their function is more to offer a threat than actual enforcement. Part of the German version of ministerial responsibility is its direct linkage to administrative organisation. Underlying is the idea that individual political responsibility can be invoked only as long and as far as ministers possess influence over their portfolios. The best guarantee to achieve this goal is the unlimited ministerial right to issue instructions. This, in turn, requires a hierarchical model of organisation and processes.[49] It is this very connection with democratic legitimacy that makes hierarchy an almost indispensable element of administrative structure. During day-to-day work it is not expressed in a rigid command-and-control fashion. The hierarchy principle, routinely referred to in law and administrative science textbooks, is even increasingly hidden under the language of a modernisation discourse that stresses co-operation and decentralised responsibility. But in case of conflicts or diverging opinions, hierarchy serves as a 'rule of last resort',[50] covering other forms of interaction. It is definitely among the elements constituting the genetic code of the German administrative landscape.

Ministerial responsibility, however, is not a sufficient explanation for low political conflict on agency operations. Since parliament is divided between majority and opposition parties, the latter might be expected to exercise a more vigorous control. Of course, the typical game is that majority parties practice solidarity with cabinet, whereas opposition parties critically assess government policies whenever possible. However, the focus of partisan disputes is more on individual ministers' ability to head a department and does not concern agency policies. It makes more sense for opposing parties to aim at cabinet and not to waste energy on agencies

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which, at any rate, are appropriately thought of as a ministerial appendage rather than as political actors in their own right.[51] This also makes interest group pressures for changes in agency policies more effective if they are directed at the incumbent minister who is equipped with oversight authority, and not at the parliamentary opposition that can, at best, try to mobilise the public. The most frequent technique used by groups or industries to influence an agency's operation is through administrative courts.[52] By doing so these actors contribute to the transformation of unsolved political conflicts into legal problems. Of course, judicial activism may backfire and force legislators to react. But, as is illustrated by the long-lasting atomic energy conflict, the legalisation strategy also keeps conflicts pending without forcing painful political decisions.[53]

Aside from incentives generated by the institutional order of government, an important reason for policy makers not to be concerned with agency design and control is the performance of bureaucracy. If it is based on 'neutral competence',[54] that is, agencies could be expected to serve the party in power as well as to enforce law in a neutral, public interest-oriented way, the likelihood increases that opposing parties agree to keep agencies out of politics because they want to benefit equally from an efficient bureaucracy if they assume power. This comes close to the situation in Germany, but is somewhat more complex due to the contradictions concerning the role of bureaucracy.

Even though the traditional separation between politics and administration is no longer explicitly advocated, there is still a tacit preference for a de-politicised administration, especially if connected with the implementation process. This is based on the following factors. First, a neutral civil service is fixed in several laws and it is taken for granted that no additional safeguards are needed on top of existing regulations to ensure that administrators will respect the political will of parliament. A second point is that party politics are expected to end if a law has passed parliament,[55] largely because administration is seen as law-enforcement and not as a continuation of policy making outside parliament. Third, there is a great lack of feedback from the implementation process to parliament,[56] allowing legislators to be satisfied with passing the law and not being forced into laborious evaluation activities. Even if a de-politicised administration and a neutral process of law implementation are fictitious, there are no pressures for policy makers to move away from these comfortable ideas.

Unsurprisingly, this system is not free from incoherence. Despite the fact that ministerial responsibility is recognised without reservations, public perceptions, including those of opposition parties, of course, are at odds with its implementation. If instructions are made public, which does not happen very often, negative responses prevail as ministers are suspected of

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serving partisan or clientelist purposes. Ministerial instructions are more generally thought of as a tool for correcting bureaucratic non-compliance rather than providing policy direction beyond what is already fixed in law.[57] This has forced incumbent ministers as well as ministerial officials to take an almost hypocritical stance. Whereas they have no problem in emphasising their hierarchical position vis-à-vis agencies in general, they dislike admitting that single agency decisions have been overturned or reversed by ministerial instructions. Facing the political costs of public punishment,[58] ministers and their bureaucrats are inclined to treat all agency matters, including instructions, as an internal administrative affair.[59] The underlying rationale is that the legitimacy of a hierarchical mode of governance requires that agency activities are administrative in nature, thus avoiding any suspicion that ministerial instructions may collide with, or even reverse, parliamentary decisions that have defined agency tasks in the first place.

EX-POST CONTROLS AND THE MALLEABLE MEANING OF BUREAUCRATIC AUTONOMY

Usually, P–A analyses start with the assumption that delegation almost by definition is creating a control problem.[60] As the previous sections have shown, to a considerable extent German politicians are released from conflicts over control and fear of shirking. Consequently, the problem of *ex-post* controls may appear less relevant. But reconsidering the argument that the advantage of independent agencies is the use of pure expertise for addressing complex problems and to generate credible policy commitments and continuity,[61] it might at least be asked how German policy makers cope with a system of agencies that apparently is not well equipped to harvest the fruit of independence.

To begin with, German politicians would probably disagree with the account that agencies are not independent. There are even typical statements, supposing that a certain agency is professionally independent (*fachlich unabhängig*) and the minister decides only questions of political relevance. But the arbitrary element in this distinction, which obviously serves the purpose of dispensing with the need for further outside scrutiny, is that it is within the supervising department's competence to decide whether a case is still professional in nature or already political. The resulting leeway for oversight is enormous. It even allows ministerial departments to impose their political rationality on scientific judgements. In such case, agency expertise is not challenged outright as being wrong; rather, 'scientists are expected to consider economic and political factors in the course of producing a reasoned, scientific judgment'.[62] Thus, in the

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German perception, expertise does not hinge on autonomy but can be achieved whilst taking account of political obligations.

The somewhat indeterminate meaning of agency independence is not limited to Germany. Already a modest comparative outlook reveals that bureaucratic autonomy is not as sacred as it may appear at first sight. A recent British survey has shown, for example, that general managers constantly struggle with 'political interference on operational management decisions'.[63] Swedish central agencies, which are typically described as being independent from their political principals, also display a different picture. Larsson describes the Swedish system 'as one in which ministers have as much influence over the bureaucracy as in other countries, but without the corresponding responsibility'.[64] Finally, it is well known that the independence of US agencies and commissions is not based on isolation from political influence, but is rather attained through a precarious balance between Congress, interest groups, and the president, all struggling for influence over agency policies. Political independence may be achieved if no single actor has more influence than his competitors,[65] but this is not necessarily the case.

On the one hand, these observations call for a more thorough determination of the concept of agency autonomy. The important point, however, is that independence is obviously framed in different mindsets in such a way that British, Swedish, and American politicians accept political independence as an instrument to achieve policy goals. In contrast, the idea that administrators should make policies is rejected in German normative thinking. One of the practical consequences is that overseeing departments try to suppress obvious policy ambitions from below. This is often done by denying that agency decisions are political and insisting that they are only technical or legal in character.

Majone has argued that there is a functional need to have more non-majoritarian institutions, because of pressures to conform to international regulatory regimes and the domestic problem of overcoming 'short-termism'.[66] The abstract solution to both problems is to delegate policies to institutions that are detached from electoral cycles and are trustworthy because they have nothing to gain if they give in to partisan or clientelist demands. As to the credibility problem, Majone probably overestimates the ensuing need for non-majoritarian institutions. The cases of the BAW and RegTP illustrated that the German style of handling pressures is to pretend that the institutionalisation of a public function is demonstrating sufficient honest effort to enforce a regulatory policy. Given their complexity, the credibility of this strategy is only damaged if ministerial micro-management reverses the overall goal to a significant extent. Credibility is probably a less ambitious aim of government policies and is accomplished on a lower level

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as well. Second, non-majoritarian institutions are not the only way to achieve policy continuity. In Germany, continuity already results from a system of dispersed government powers, complemented by a culture of negotiated policies. This allows the relevant economic and political interests to be considered in the political as well as in the administrative decision making process.[67] The persistence of this 'policy of the middle way'[68] is especially visible after partisan changes of government, which have not yet been accompanied by radical policy changes. With continuity being a general characteristic of German policy making, it is less urgent to protect agencies against the U-turn aspirations of subsequent governments.

In a way this is reflected in the patterns of ministerial oversight that show no signs of fixing policies for the long term. Administrative guidelines and other measures to cope with agency policies are dealt with in an almost secret fashion and therefore are not subject to public scrutiny or open political deliberations. Furthermore, ministerial oversight is not statutorily defined in terms of intensity, regularity, or instruments. Not least due to the departmental principle, it is up to each department to decide how to deal with an agency. Frequently used monitoring techniques are reporting requirements, pre-checking press releases or reserved agreements in relation to more important decisions. Agency officials in turn know which questions could bother the overseeing department and protect their position by providing first-hand information to the department. It must be added, however, that the day-to-day work of most agencies is not greatly subject to interference by ministerial instructions. Agencies may be left alone for long periods, either because there is no need for closer inspection, no interest, or no personal capacity. On balance, the oversight behaviour of German ministerial bureaucrats more closely resembles the 'fire alarm' than the 'police patrol'[69] approach. But instructions remain an option and agency officials anticipate this. A by-product is that strong agency activism has remained a rare exception.

Delegation is often referred to as an act of granting broad powers to administrative agents. A peculiarity of the German understanding is to think of delegation from the opposite direction. According to the German constitution, 'the content, purpose and scope' (Art. 80 para. 1 GG) of the range of delegated power must essentially be written into a parliamentary law. Pre-defining the 'essentials' of administrative action requires very detailed laws that tend to reduce administrative discretion. And, in fact, there is some evidence that German administration is equipped with less discretion than is found in France, Britain or the US.[70] At the same time, however, increasing complexity of legislative goals has caused parliamentary laws to include infinite law terms such as 'public safety', 'unreasonableness', or 'urgency'.[71] In cartel law even the central concept of

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'competition' is left open to definition.[72] More recently, the relevance of 'informal' or 'cooperative administrative action' was stressed as an emerging procedural standard that opens greater leeway to agencies. The impression of German administrators as lagging behind the discretionary powers in other countries may therefore be overdrawn. But this is not the problem. Regardless of deviations in practice, the constitutional doctrine of delegating only plainly circumscribed functions to administrative agents leads, if even implicitly, to a view of administrative agencies as non-political actors and restricted to applying the law. This also explains why German policy makers do not perceive administrative discretion as a severe problem. As compared to US legislators, who deliberately employ a wide range of constraint categories, including spending limits, legislative veto, rule making requirements or exemptions as instruments of political control,[73] most of these measures, in theory at the disposal of German legislators as well, are usually not considered in the law making process, because it is assumed that the average law contains sufficiently detailed guidance for administrators. A consequence of this somewhat circular argument is that legislators are not forced to behave like typical principals who are obsessed with the problem of misuse of administrative discretion.

PRESSURES FOR CHANGE

The recent debate on delegation and non-majoritarian institutions has largely been caused by the increasing importance of such institutions for the traditional model of representative democracy. As this process continues, it would be unrealistic to expect Germany to be left completely unaffected. Pressures for change indeed emerge from different sources. The process of European integration is a major source of pressure.

Majone puts forward the most explicit arguments in this respect.[74] They are based on the assumption that EU policies contribute to the transformation of the positive state, which was characterised by nationalised industries, redistributive policies, and taxing and spending as main instruments, into a regulatory state, which concentrates on rule making and generating competition. This new mode of governance is said to replace the old, rather centralised, command–control-based model of government administration by a more decentralised variety of commissions and agencies. Even if the overall story seems persuasive, at least from a German perspective, the assumed pressure for national adoption appears more diffuse and less powerful for institutional reform. Grande and Eberlein also put forward the argument of an emerging regulatory state, but are more cautious as to the ensuing administrative 'architecture'[75] that may take different shapes depending on the regulated sector. The often remarked

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strong sectoralisation of the German political economy, which is reflected in the views of actors who like to emphasise the peculiarities of their policy field, supports the conclusion that inter-sectoral spill-overs of the agency model (as seen in the case of the UK) are inhibited by divergent modes of governance.[76] The adaptive pressure of EU deregulation policies are therefore not only channelled and potentially absorbed through the genetics of national politico-administrative systems, but also meet policy sectors with variable adaptive rationalities. Quite a similar conclusion is drawn by Börzel and Risse, who argue that there must a perceptible 'misfit'[77] between European and national policies and institutions until adjustment pressures can succeed. This is not to say, however, that European policies still lack an impact. A less visible but nonetheless important change resulting from deregulation is related to the mandate of agencies. Since the early 1990s the traditional agency function of state oversight (*Staatsaufsicht*) with its hierarchical connotations and anti-competitive bias is slowly being replaced by a less industry-sponsoring but more consumer-oriented mandate, increasingly aimed at facilitating sectoral competition. So far Germany has resisted a visible agencification as a response to EU policies. But it is likely that EU liberalisation strengthens the public awareness and support for re-regulation and thereby makes the use of agencies more acceptable in policy domains such as energy or food safety.

A second source of change is the recent NPM discourse in which agencification of federal or central government executive structures is explicitly advocated as a tool to increase public sector performance.[78] Underlying this discourse is an entrepreneurial model of agency behaviour that advocates the splitting of operational functions from policy functions, the latter remaining in conventional ministerial departments. In the German version of NPM, the focus is on decentralising responsibility and contract management,[79] and its main success has so far been at the level of agenda setting and prompting activities for internal reorganisation, modernising civil service law and personal management, use of information technologies, improving team work and co-operation in federal authorities, and so on. This makes the federal government look like a radical moderniser, however, reform activities are still circumventing basic institutional features, especially the instrument of agency independence.

An assessment of the impact of NPM on the traditional hierarchical model has to consider that the mixture of organisational decentralisation, performance controls, contracts, and operational independence makes it is hard to measure non-compliance with the NPM prescription. It would be no problem either to follow the NPM agenda by decentralising or granting more operational autonomy to a number of agencies with unimportant service functions, such as civil and military procurement, foreign language

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translation or maritime affairs, while retaining hierarchical control over the political relevant ones. Aside from such an adoption *à la carte*, the question remains whether and to what extent a core area of federal administration possesses enough institutional inertia to resist an ongoing modernisation process. The pressure for change will presumably not be exercised through direct demands for institutional reform. Considering the opaque conditions under which federal agencies operate, NPM discourse could instead shed light on outdated modes of hierarchical control and activate a re-examination of the benefits of bureaucratic autonomy. Currently, however, neither incumbent politicians nor ministerial bureaucrats seem to be willing to accept changes.[80] Despite such reservations against the institution-transforming power of EU-driven deregulation and the modernisation discourse, it has to be acknowledged that the pressures for change, if only incremental, are nagging at the traditional administrative model. An outline of likely changes for the German case follows in the concluding section.

CONCLUSIONS

This discussion has used the notion of institutional genetics to explain the subordinated status of federal administrative agencies in Germany. Four elements shape the genetic code: (1) the conflict reducing executive centrism of agencies; (2) the unchallenged status of ministerial responsibility that makes (3) hierarchy an important construction principle for administrative organisation; and (4) the idea of a neutral, de-politicised civil service that allows policy makers to trust in uniform implementation standards. The extent to which this code determines *ex-ante* agency design and *ex-post* controls depends on whether institutional dynamics or institutional choice dominates. In the German case, an institutional dynamic, prevailing over long periods, has routinely 'auto-piloted' those parts of political decisions that involved the design and control of agencies. Typical P–A considerations such as fear of 'shirking' or conflict over control are thereby mostly absorbed and relax the necessity for policy makers to consider alternative options. The result is a low preference posture in relation to agency design and control. These questions are clearly more regarded in an instrumental and choice-based fashion in political systems such as the US or a polity in the making such as the EU, in which the separation of constitutional powers creates multiple P–A relationships. As opposed to the sequential structure of the German political system, such variability opens the window to pursue policy goals via agency design and control.

As we know from genetics, evolution is difficult to suppress in the long run – even stable institutional settings may be forced into evolutionary

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adjustment. With regard to the three characteristics of the German agency landscape, it is possible to make a ranking of expected persistence. The least protected attribute is the resistance to create new agencies with regulatory powers. Pressures either from the EU or domestic sources are likely to push forward this instrument more firmly in the immediate future. Somewhat more durability can be expected of the political role of agencies. Due to their executive-centred position, there are few incentives for political actors to giving them a greater political role, although the functions delegated to them might be important. Additionally, on the normative dimension, agency activism is still contrary to the preferred division of labour between politics and administration. Finally, bureaucratic autonomy is least likely to succeed over the traditional model of hierarchical governance for similar reasons. Neither pressures to make credible commitments nor efforts to secure policy continuity can be translated into a need for more non-majoritarian institutions. These characteristics of the German case are not evident at first sight since observers usually turn their attention to more obviously expressed interests of political actors. But previous findings suggest that non-instrumental, unreflected or low preference behaviours are equally relevant as goal-oriented and rationalist forms of action and therefore deserve a similar degree of analytic attention.

NOTES

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3. OECD, *The OECD Report on Regulatory Reform* (Paris: OECD 1997); Frieder Naschold, Werner Jann and Christoph Reichard, *Innovation, Effektivität, Nachhaltigkeit. Internationale Erfahrungen zentralstaatlicher Verwaltungsreform* (Berlin: edition sigma 1999); Christopher Pollitt and Geert Bouckert, *Public Management Reform. A Comparative Analysis* (Oxford: Oxford University Press 2000). More recently, the OECD has been actively promoting independent agencies through its PUMA initiative: 'Governance of State Agencies and Authorities', *Focus* 18 (2000), p.6.
4. In the British case, see Francesca Gains, 'Implementing Privatization Policies in "Next Steps" Agencies', *Public Administration* 77 (1999), pp.713–30; some comparative data are presented in Colin Talbot *et al*., 'The Idea of Agency. Researching the Agencification of the (Public Service) World', Paper for the American Political Studies Association Conference, Washington DC, August 2000.

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5. This is the title of an official compilation of federal administrative units. Cf. Bundesminister des Inneren, *Die nichtministerielle Bundesverwaltung* (loose-leaf edition, 2000).
6. This sketchy summary is based on: Mathew D. McCubbins, Roger G. Noll and Barry R. Weingast, 'Administrative Procedures as Instruments of Political Control', *Journal of Law, Economics and Organization* 3 (1987), pp.243–77; Terry M. Moe, 'The Politics of Structural Choice: Toward a Theory of Public Bureaucracy', in Oliver E. Williamson (ed.), *Organization Theory from Chester Barnard to the Present and Beyond* (New York: Oxford UP 1990); Murray J. Horn, *The Political Economy of Public Administration. Institutional Choice in the Public Sector* (Cambridge, MA: Cambridge University Press 1995); David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge: Cambridge University Press 1999).
7. Cf. Moe, 'The Politics of Structural Choice'; several contributions in Kristen Renwick Monroe (ed.), *The Economic Approach to Politics* (New York: HarperCollins 1991); David B. Spense, 'Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control', *Yale Journal on Regulation* 14 (1997), pp.407–50.
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13. Ibid., p.192.
14. Bundesministerium des Inneren, *Moderner Staat – Moderne Verwaltung. Zwischenbilanz – Chancen und Veränderungen* (Berlin 2000), p.16. Still the most comprehensive overview is Roman Loeser, *Die Bundesverwaltung in der Bundesrepublik Deutschland – Bestand, Rechtsformen und System der Aufbauorganisation. Vol. I* (Speyer: Speyerer Forschungsberichte 50, 1987).
15. Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland. Vol. II* (München: Beck Verlag 1980), p.817.
16. Roman Loeser, 'Neubestimmung der Steuerungsingrenzen der Ministerialinstanz gegenüber Bundesoberbehörden?', *Verwaltung und Fortbildung* 23 (1995), pp.275–91. Some empirical findings are summarised in Marian Döhler, 'Das Modell der unabhängigen Regulierungsbehörde im Kontext des deutschen Regierungs- und Verwaltungssystems', *Die Verwaltung* 34 (2001), p.74.
17. Carl-Peter Fichtmüller, 'Zulässigkeit ministerialfreien Raumes in der Bundesverwaltung', *Archiv des öffentlichen Rechts* 91 (1966), pp.297–355.
18. Cf. Janbernd Oebbecke, *Weisungs- und unterrichtungsfreie Räume in der Verwaltung* (Köln: Kohlhammer 1986), p.36; Dodo Traumann, *Die Organisationsgewalt im Bereich der bundeseigenen Verwaltung* (Baden-Baden: Nomos 1998).
19. Klaus Kröger, *Die Ministerverantwortlichkeit in der Verfassungsordnung der Bundesrepublik Deutschland* (Frankfurt/M.: Athenäum 1972).
20. Helmut Klages and Elke Löffler, 'New Public Management in Germany: The Implementation Process of the New Steering Model', *International Review of Administrative Sciences* 64 (1998), p.46.
21. Cf. Michael Kloepfer and Thomas Elsner, 'Selbstregulierung im Umwelt- und Technikrecht', *Deutsches Verwaltungsblatt* (1996), pp.964–75; Ian Bartle and Markus M. Müller, *The Administration of Regulation: Self Regulation State Agencies* (University of Exeter Discussion Paper No. 3, 2000), p.14.
22. Süddeutsche *Zeitung*, 1 Feb. 2001, p.25. On the background cf. Lars Kumkar, *Zur institutionellen Ausgestaltung der Strommarktregulierung: brauchen wir eine eigenständige*

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Regulierungsbehörde für den Stromtransport? (Kiel: Institut für Weltwirtschaft, Kieler Diskussionsbeiträge 371, 2000).

23. Cf. McCubbins *et al*., 'Administrative Procedures as Instruments of Political Control', p.261.
24. Roland Czada and Uwe Schimank, 'Institutionendynamiken und politische Institutionengestaltung: Die zwei Gesichter sozialer Ordnungsbildung', in Raymund Werle and Uwe Schimank (eds.), *Gesellschaftliche Komplexität und kollektive Handlungsfähigkeit* (Frankfurt/M.; New York: Campus 2000), p.30.
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28. Knut W. Nörr, *Die Leiden des Privatrechts: Kartelle in Deutschland von der Holzstoffkartellentscheidung zum Gesetz gegen Wettbewerbsbeschränkungen* (Tübingen: Mohr Siebeck 1994), p.216.
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30. Cf. Arnold Köttgen, 'Der Einfluß des Bundes auf die deutsche Verwaltung und die Organisation der bundeseigenen Verwaltung', *Jahrbuch für öffentliches Recht* 11 (1962), p.258; Oebbecke, *Weisungs- und unterrichtungsfreie Räume*, p.45.
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34. Roman Loeser, *System des Verwaltungsrechts. Vol. II: Verwaltungsorganisationsrecht* (Baden-Baden: Nomos 1994), p.90; Arthur Benz and Klaus H. Goetz, 'The German Public Sector: National Priorities and the International Reform Agenda', in idem (eds.), *A New German Public Sector? Reform, Adaptation and Stability* (Aldershot: Dartmouth 1996), p.21.
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39. Susanne K. Schmidt, 'Privatizing the Federal Postal and Telecommunications Services', in Benz and Goetz, *A New German Public Sector*?, p.62; Klaus Oertel, *Die Unabhängigkeit der*

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41. Böllhoff, *The New Regulatory Regime*, p.28.
42. Cf. *Tagesspiegel*, 9 July 1998, p.22; 'Über die Regulierung des Marktes neu nachdenken', *Blickpunkt Bundestag* 7 (2000), p.45; *Monopolkommission, Dreizehntes Hauptgutachten 1998/1999*. BT-Drs. 14/4002, p.61.
43. Johan P. Olsen, 'Institutional Design in Democratic Contexts', *Journal of Political Philosophy* 5 (1997), p.218.
44. Moe and Caldwell, 'The Institutional Foundations', p.173.
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60. McCubbins *et al*., *Administrative Procedures*, p.246; Horn, *The Political Economy*, p.40.

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