Chapter 6
Delegated Authority: Legitimising the Regulatory State

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1. Introduction

Over the past two decades, a general trend has been observed in Western countries towards the reassignment of political power from representative institutions such as parliaments and governments to non-elected bodies (Gilardi 2002, 2005, 2008; Levi-Faur and Jordana 2005; Majone 1994, 1996; Thatcher 2002a, b) which are not democratically responsive to citizens by means of a chain of political delegation (Strom et al. 2003). This tendency corresponds, above all, to the decision of governments to delegate competencies to domestic independent regulatory agencies (hereafter IRAs) in order to increase the legitimacy and acceptance of policy outputs which have been undermined by the unprecedented level of societal complexity compromising the steering capacity of political decision-makers, whilst the citizens' demands for political action are continuously rising. Several types of independent regulatory agencies have, therefore, been established for enhancing sector-specific regulatory governance: competition authorities, communication agencies, financial markets commissions, and so forth.

From an organizational viewpoint, IRAs are governmental bodies which command some degree of specialised public authority, separate from that of other institutions, but which are not directly elected by the democratic sovereign and not directly managed by elected officials (Thatcher and Stone Sweet 2002). The formal independence of regulatory agencies is imposed in a set of statutory prescriptions that are supposed to insulate them from political pressures, ensuring credibility towards external actors (especially firms and shareholders) and guaranteeing that decisions and expertises are not politically biased. In a less formalised way, agencies are also presumed to be insulated from the potential influence of the representatives of the target sector, i.e. the 'regulatees'.

This chapter is devoted to discussing the extent to which delegating authority to independent regulatory agencies is a viable strategy for legitimising regulatory policies. The point is that IRAs are by definition non-majoritarian and non-democratic bodies, hence depoliticised, whilst legitimacy is widely believed to emerge, first and foremost, from democratic participation and procedures (see Chapter 1 in this volume). Hence, the central research questions are: How can institutions that are non-democratic be expected to increase the legitimacy of policies? Can such institutions really deliver what is expected of them?

As I will elaborate in detail below, the legitimacy of regulatory governance by independent agencies is supposed to derive from: (1) the expected high efficiency of IRAs, based on the assumption that they are faster and more proficient in producing qualitatively better policy output than democratic institutions; (2) the expected high procedural accountability of IRAs, i.e. the assumption that they operate in a transparent, open and fair way, more so than democratic institutions; (3) the expected high factual independence of IRAs from politics and organized interests, which should give them a higher level of credibility and policy time-consistency than democratic/political institutions normally have.

This chapter presents the argument that IRAs cannot really deliver in these three dimensions – at least not simultaneously – and that therefore delegating authority to IRAs is hardly a suitable strategy for regenerating the political legitimacy that has been undermined by the challenges of societal complexity. The chapter suggests that the politics of depoliticisation and the factual reliance by governments on IRAs which cannot really deliver what they are expected and supposed to do may be interpreted – based on Blühdorn's model of *simulative politics* (Blühdorn 2004, 2007a, b, c) – as part of a tendency towards a *simulative regeneration* of political legitimacy (see also the first chapter of this volume), i.e. as the performance of legitimacy in a context where legitimacy generation becomes increasingly difficult.

In the following section I will first of all present the logic of delegation to IRAs and the related phenomenon of depoliticisation. Section three will be devoted to outlining the expectations invested in IRAs as regards promoting legitimised regulatory governance. Then I will discuss the limits of legitimising IRA policies by output-oriented legitimacy, by procedural accountability and by reference to their effective independence (section four). In the concluding section I will interpret practices of delegation within the model of *simulative politics* and point towards some new perspectives for legitimising regulatory governance.

2. Delegation to independent regulatory agencies (IRAs)

Since the 1980s, a concomitant process of delegation and re-regulation has emerged in Western Europe. This development has been described as the rise of the *regulatory state* (Majone 1994) or, more generally, as *regulatory capitalism* (Levi-Faur 2005) by researchers who argue that the style of modern governance has considerably transformed. Indeed, the post-war settlements of 'welfare capitalism' have been severely challenged (Coen and Thatcher 2005), but in an unexpected way. While several studies emphasise how the spread of liberalisation and privatisation is reducing the power of the state by restraining the room for political manoeuvre, and other scholars point out the increase of deregulation, this approach underlines the expansion and intensification of increasingly strict regulatory arrangements (Levi-Faur 2005; Vogel 1996), whereby executive competencies are delegated to authorities that are formally independent from direct political control, i.e. IRAs. The reorientation of public priorities towards a more pro-market agenda indeed implied a new regulatory approach aiming to increase the allocative efficiency of markets and correcting market failures (Majone 1996).

Therefore, the institutional model of independent regulators has been extensively adopted in almost all OECD countries, and where older agencies had already been in place, their competencies and formal independence have been extended (Gilardi 2002). The diffusion of IRAs follows a similar trend in almost all regulatory domains. It reflects a mix of factors including cross-national policy learning, top-down initiatives – for instance EU policies and regulations – and pressures for improving credibility of national policies, and the need to cope with political uncertainty (Gilardi 2005, 2008). The shift of power towards these bodies is qualitatively and quantitatively impressive (Levi-Faur 2005). IRAs benefit from, and often accumulate, special powers: rulemaking and promulgation of rules, monitoring, control, supervision and prosecution of violations, adjudication of those violations, and sanctioning. According to a recent study covering 16 sectors and 49 countries over 39 years (1964–2002), more than 20 agencies were created per year from the 1990s to 2002, and by the end of 2002, autonomous regulatory agencies were in place in about 60 per cent of the possible cases (Jordana et al. 2007).

The logic of delegating authority to IRAs as a policymaking strategy to deal with conditions of unprecedented societal pluralism and complexity is consistent with other more general socio-political developments also elucidated in this book, such as the decline of parliaments (see Chapter by Kelso), the rise of informal government (Jun in this volume) or governance by committees (e.g. Heard-Lauréote or Kuitunen and Lähteenmäki-Smith in this volume). In particular, the proliferation of IRAs can be interpreted in the light of the functional and symbolic pressures for steering complex societies. Decision-makers have to cope with an environment perceived as increasingly uncertain, contingent and fluid, whilst external imperatives deriving from an internationalised economy and conditions of the *risk society* require quick adaptation, certainty and informed policy responses.

As noted in the first two chapters of in this volume, these developments are integrated in a structural transformation towards a Post-Fordist society in which the public/private and national boundaries become indistinct, political and economic power is fragmented and disseminated, and levels of decision-making become more and more entangled. On the one hand, the declining sovereignty of nation states in favour of less representative institutions such as international organizations (Dahl 1999; Held 2000) and supranational bodies (Follesdal and Hix 2006) seems to hollow out the substance of national policymaking setting up a structure of multilevel governance. On the other, the rising importance of international norms and standards is profoundly redefining the patterns of political authority and blurring the boundaries between states and markets. As a result, the provision and distribution of public goods is greatly affected by a transnational context that is increasingly shaped by private and quasi-state global actors (Drahos 2004; Graz et al. 2007). In this context, IRAs are the instruments of a technocratic approach, advocated in particular by the proponents of New Public Management who aspire to enhance the effectiveness of policy-making and the management of social complexity.

Above all, the rise of formally independent bodies is said to provide the specialised tools for improving the *efficiency* of the decision-making process, understood as the capacity to achieve a predetermined goal with the lowest costs possible, while also solving the time-inconsistency problem related to the political cycle. Indeed, as I will discuss in detail below, the contended legitimacy of IRA policies is normally based on a large array of 'non-representative' justifications, and principally in terms of the need to improve efficiency by means of technical expertise and credibility through insulation from day-to-day short-term politics (Thatcher and Stone Sweet 2002).

Finally, the decisions to delegate public authority to IRAs are in line with the broader phenomenon of *depoliticisation* as described by Blühdorn (2007c). Depoliticisation – and delegation to non-majoritarian regulators as one of its main strategies – is a means for managing complex systems by artificially reducing the conflicting nature of issues. It implies the elimination of alternatives and the circumvention of democratic veto players by claiming that certain matters are technical rather than political problems and are most suitably dealt with by technocratic approaches.

3. Depoliticisation and policy legitimacy

When regulatory practices are *depoliticised,* they are no longer considered to be objects of political struggle; IRAs are located outside the political arena because their activity is perceived as merely technical. In this context, IRAs' policies are uncontested by citizens, taken-for-granted by the political decision-makers, and usually accepted by those being regulated. Furthermore, political

parties, associations, or social movements have hardly ever contested the existence of domestic IRAs. Indeed, they are normally regarded in a positive way, under the assumption that they are protecting the public interest from market failures and from unfair behaviour of economic actors (Cohen 2001).

Yet delegating power to IRAs was a deliberate political and hence reversible decision and can be considered as a governing strategy shaped by international factors and domestic conditions. This strategy has been described as a process of placing at one remove the political character of decision-making (Burnham 2001) that leads to the fragmentation of authority in response to public pressure 'to do something' about problems in society (Buller and Flinders 2005; Grant 2000). As a result, independent regulatory agencies can, in line with the Weberian/Schumperterian tradition, be considered as organizations exercising a specific – and advanced – form of rational legal authority in the context of a democratic order where the individual is – in contrast to participatory models of democracy – increasingly disconnected from the political process.

Moreover, the regulatory policies are themselves potentially highly controversial, as they may involve the redistribution of resources both between the public and private sectors and within the private sector. IRA policies could thus be challenged if their practice of regulation came to be perceived as adverse by the political decision-makers or regulatees. Indeed, regulatory action may affect the vital interests of the target sector, implying new costs and obligations for the regulated firms. Unsatisfied regulatees may decide to oppose the regulatory order. Also, the longer a particular IRA exists the more likely is it compromised by the inconsistent preferences of changing political elites which are exchanged in the political cycle, especially if the democratic deficit turns into a source of populist discontent (Mény and Surel 2000). If the technocratic sovereignty of experts tends to prevail over popular, parliamentary and governmental power, the argument concerning the impoverishment of democracy within the political system is likely to be taken up by political entrepreneurs and become politically salient (Papadopoulos 2003).

However, the politics of depoliticisation and the related delegation of regulatory competencies to IRAs appear at present to be a widely accepted solution to the challenges of an increasingly complex political system. IRAs and their policies are believed to derive their legitimacy from three different sources stemming from public interest theories about, and New Public Management approaches to, the superiority of regulatory governance by independent bodies for steering complex and increasingly internationalized societies. Speaking in Weberian terms, delegation to IRAs is conceived as a process through which legitimacy – the social acceptance of the existing order – is produced (Lagroye et al. 2002).

First, it is believed that specialized experts can ensure a more *efficient* regulatory process than democratic institutions. Politicians are believed to have neither the expertise to design technical policies nor the capacity to adapt them in case unexpected conditions or systemic crises emerge. Specialised agencies, in contrast, staffed by supposedly politically neutral experts, are said to possess the skills to improve the efficiency of the decision-making process and are viewed as having the capacity to achieve predetermined goals at the lowest possible costs (Majone 1999). This illustrates the shift from public management towards public governance, whereby the state is leaving its function as provider of services in favour of playing the role of their guarantor and coordinator.

Second, delegation to a specialized body is believed to imply enhanced procedural *accountability* of regulatory policies. This is a consequence of the improved transparency of rules, a legally specified assignment of functions, and the assumed high responsiveness to the stakeholders, through, for instance, regular consultations and appeals opportunities for producers and consumers. In addition, accountability refers not only to the legal basis upon which the regulator operates, but also to the shared understanding of the customs and practices of regulation that sustains a legitimate regulatory governance by means of an open regulatory process, the involvement of relevant parties, and the justification of the regulator's decisions and procedures (Stern 1997).

Third, governments decide to tie their own hands in order to create *credible* commitments, providing protection from erratic public moods and societal short-term interests, and ensuring isolation from the anticipated time inconsistency of policies due to the political cycle, so as to protect the common good and long-term public interest. This rationale for delegation stems from the theoretical framework that supports the independence of central banks. In this particular case, independence is seen as a necessary condition for price stability and low inflation rates, as it denies governments the discretionary use of monetary policy, so as to avoid a time inconsistency between monetary goals and actual results (Alesina and Summers 1993; Barro and Gordon 1983; Campbell and Peters 1988; Cukierman et al. 1992; Kydland and Prescott 1977). Otherwise, in collective negotiations private actors would anticipate expansive monetary policies adopted by governments, and incorporate ex-ante those anticipations into their strategies, thus triggering higher inflation rates.

4. Can regulatory agencies deliver on the expectation of improved legitimacy?

First of all, I will discuss the most important assumed source of legitimacy, i.e. the *efficiency* of delegating regulatory competencies from political decision-makers to independent agencies. In this regard, democratic systems can be conceptualised as chains of delegation from voters to parliament, to government, to ministers, to administration (Strom et al. 2003). Delegation to IRAs constitutes an additional step, which is, however, qualitatively different, as IRAs are not directly accountable to voters nor to elected officials.

The point is that IRAs are outside the chain of democratic delegation. In fact, delegation to IRAs should not be understood in terms of a principal/agent relationship, structured in order to minimize any possibility of an agent's shirking. Instead, the need for credibility requires that the agency be independent, according to a fiduciary mode of delegation (Majone 2001a). In this case, the principal's powers and competencies are factually delegated to the agency. In other words, regulatory agencies are intrinsically and irremediably insulated from democratic responsiveness because independence is seen as the precondition for high-quality regulatory outcomes. The role of elected representatives is becoming less relevant, in favour of influence connected to specialized experts (Papadopoulos 2003). As a consequence, it is generally accepted that the regulatory state dramatically suffers from a deficit of democratic legitimacy (Majone 1999; Scott 2000).

In response to the criticism of this democratic deficit it has been argued that the lack of input-oriented legitimacy might be compensated by a positive evaluation of the policy outputs and results by citizens (Scharpf 2000). The legitimisation of IRA policies relies on the capacity of IRAs to produce regulatory outcomes which are highly satisfactory: this is the substantive component of IRA legitimacy (Majone 2001a). After all, regulatory agencies are cut off from the chain of democratic delegation precisely with the purpose of obtaining *better* results from the regulatory action, because a certain amount of autonomy is supposed to be necessary to perform certain tasks in a complex society (Majone 2001a/b). The expected higher quality of regulatory results *necessitates* the absence of input legitimacy.

Yet, two major drawbacks are challenging this form of legitimacy pertaining to IRAs. Firstly, there is still no clear-cut empirical evidence for the superior efficiency of the regulatory action performed by IRAs. This is because: (a) it is difficult to assess the impact of IRAs because their constitutional goals are varied, mixed, broad, and sometimes ambiguous or at least blurred, and in most cases much less clearly defined than those of central banks (e.g. market competition authorities are uneasy about deciding whether the task of promoting the public interest can be narrowly defined as the reduction of market prices in the sector under investigation, or whether they should encompass broader public concerns); (b) the assessment of regulatory *quality* is always relative to the subjective understandings of the different actors involved, such as political-decision makers, civil servants, experts, producers, consumers, and citizens (Radaelli and De Francesco 2007), which implies fundamental difficulties in attempting to reach a general agreement on the measurement of regulatory quality (e.g. a process of market concentration can be interpreted as indicating oligopolistic, reduced competition in the investigated sector or, alternatively, as normal adjustment where lower-performing firms are evicted from the market); and (c) even if we could confidently assess the implementation of regulatory policies, it would still be arduous to persuasively verify the causal relationship linking the regulatory action of IRAs with the broad outcomes for society and societal well-being at large. As a matter of fact, the vague notion of 'x-efficiency' is occasionally used in order to denote this somewhat undefined type of outcome (Button and Weyman-Jones 1993; Stennek 2000).

Secondly, there is a more fundamental critique of reliance on IRAs that concerns a theoretical problem. It is not certain that a deficit of input legitimacy indeed can be compensated by the 'better' quality of the outcomes. In fact, ex-post legitimacy cannot be conceptually separated from input legitimacy, notably because the positive evaluation of results depends firstly on the political consensus about the existence of a specific problem (see Blühdorn 2007d). Furthermore, such a form of legitimisation requires that the regulatory process is perceived as a win-win game (Papadopoulos 2003). However, the relevant actors tend to conceive of this process differently. They normally understand the game as competitive, and they fight to obtain the most favourable compromise, as the regulatory action often also has significant redistributive effects.

The literature on governance arrangements that deals with these problems proposes a way to resolve the legitimisation dilemma: it emphasises the relevance of *procedural* legitimacy, i.e. an enhanced *accountability* of the political process (Papadopoulos 2003). The basic idea is that political actors, even if they disagree with a particular decision, may be able to accept it as legitimate if it has been taken in a way considered fair, namely if it originates from an open and inclusive political process, ideally based on openness, transparency, equal access, and deliberation. Similarly, one can make good the democratic deficit if the regulatory agencies in charge engender the belief among the relevant actors that procedures are appropriate. Indeed, according to some scholars – and most IRA professionals – it is possible to legitimise regulation by independent agencies on the basis of the throughputs, whatever costs the decisions may entail (Stern 1997). This is the procedural component of IRA legitimacy (Majone 2001a).

Yet, once again a twofold criticism of IRA legitimacy by throughputs has to be considered: Accountability and efficiency may be in conflict, undermining the underlying assumption that justifies the delegation to IRAs. Indeed, it has been argued that a participative and deliberative process would weaken the efficiency of the regulatory action (Majone 1994), as it would significantly increase the political transaction costs of the process. A minimal version of accountability, however, probably cannot secure the legitimacy of the IRA towards the relevant political actors. In fact, when participation is reduced, and legitimacy is only based on Schumpeterian procedural correctness, the regulatory order will risk being considered barely legitimized and at best weakly democratic (Barber 2004).

This puzzle is inherent to all scenarios in terms of procedural accountability, as stated by Sosay (2006). In the participatory scenario, the diffusion of power is emphasized and public involvement is improved. The management of social complexity is accomplished by decentralizing power and opening channels of access to decision-making. This scenario is in line with the Habermasian ideal of communicative and collective deliberation. Yet, apart from the criticism of its overly idealistic assumptions – the prospect that only certain powerful interest groups are actually able to influence the process, excluding ordinary citizens and less well organised groups such as consumer associations (Olson 1971) – it is plausible that the participation of an increasing number of actors does undermine the decision-making capacity of the agency, reducing its efficiency (Majone 1999), i.e. its *raison d'être*. Conversely, the technocratic scenario represents the merely procedural way to legitimise IRAs. The instrument is the implementation of a strict, rule-based system providing expertise in order to maximise the efficiency of regulatory action. It corresponds to the Weberian process of rationalisation and bureaucratization that follows the development of a complex and differentiated society. This scenario implies the minimization of the involvement of political representatives and public participation, generating the supremacy of technocratic rule over democracy.

Given the aforementioned substantial inconsistencies, the criteria of efficiency and accountability appear to be unsatisfactory for securing legitimacy for of regulatory policies. Another way commonly adopted by scholars and professionals refers to the value of the agencies' *independence* itself (Spence 1997). This point is crucial in the theory of delegation to IRAs (Majone 1996). The argument is that administrative bureaucracies in general, and regulatory agencies in particular, have often been described as the fourth branch of government. In this context, the legitimacy of the regulatory order does not derive only from the quest for efficiency or enhanced accountability, but, above all, from another more fundamental aspect: the intrinsic value of the separation of powers, a concept that enjoys a long history and characterises the modern constitutional state. Separation of powers refers to the conception of the rule of law and reliance on checks and balances in order to help prevent the abuse of power (Persson et al. 1997).

This view of legitimacy is consistent with the Madisonian model of democracy, prescribing the fragmentation and limitation of political power in order to avoid a tyranny of majority: IRAs are believed to protect some pre-established *basic principles* from the populist component of democracy and from the potentially arbitrary use of power by political decision-makers (Riker 1982). Therefore, the claim of effective independence of agencies from political decision-makers is a crucial feature of legitimising regulatory governance by independent agencies, especially because it could supplement the other – and defective – avenues of legitimacy generation discussed above. Once again, however, two shortcomings may undermine this form of legitimisation:

First, in theory, regulation by factually independent agencies can reduce the efficiency of the political process again. In fact, according to the literature on delegation, the pursuit of efficiency and the need for independence imply two utterly different relational structures that come between the political decision-makers and the agency. Following the principal/agent model, policy efficiency requires a close alignment between principal and agent preferences and/or behaviour, because the principal should minimize any possibility of an agent's shirking (Braun 2003; Braun and Guston 2003). Yet, following Majone (2001b), factual independence in the long term requires a substantial differentiation between the principal and the trustee, implying that the agency benefits from a fiduciary mode of delegation, i.e. the possibility of self-determining its preferences and implementing a factually autonomous activity of regulation (Maggetti 2007).

Nonetheless, one may argue that, particularly in sensitive, unpredictable and globalized economic sectors such as financial markets (Baker et al. 2005), the need for credible regulation derived from the expected enhanced time-consistency of independent regulatory policies is so crucial for the functioning of the system that the choice of an independent regulator could be considered as per se legitimate. However, even in this extreme case – this is the second point – the legitimacy of the regulatory order cannot be simply deduced from the existence of a formally independent regulator (Maggetti 2007). When discussing the reliability of this form of legitimacy, it first and foremost needs to be investigated whether agencies in fact really are as independent from political decision-makers as prescribed in their statutes.

In this regard, the level of formal independence should only partially explain the variations in effective independence from politicians (Stern 1997; Thatcher 2002a; Wilks and Bartle 2002; Yesilkagit 2004). Given that any institutional framework allows a certain amount of discretion (Friedberg 1997; March and Simon 1958), *de facto* independence from politicians will not necessarily be consistent with statutory prescriptions. Empirical evidence, based on a survey inquiry of 16 West-European agencies (Maggetti 2007), suggests that formal independence alone is insufficient for explaining variations in the *de facto* independence of IRAs. In other words, prescriptions of formal independence cannot guarantee a factually autonomous regulatory action.

This means that formal independence may not always be effective; hence, legitimising the regulatory order in this way may not work. Indeed, especially if the relevant stakeholders perceive the outcomes of regulatory policies as adverse (Landry et al. 1996), a lack of *de facto* independence from the elected politicians is likely to be criticised by those being regulated. This reduces the sustainability of regulatory governance and in the long run criticism from the public at large will build up, too, because the regulator's independence is supposed to justify the democratic deficit. If, however, the opposite is the case, i.e. if there is a very high level of factual independence, uncontrolled agencies may develop their own strategies, thereby rerouting the strategic aims of delegation (Braun 2002) and hardly providing any additional legitimacy beyond what political decision-makers could claim. Furthermore, a lack of political support could facilitate a capture process by the regulated industries (Bernstein 1977), which would in turn seriously challenge the efficiency of the regulatory action.

The consequences of this puzzle are critical for the study of the consequences of delegating authority to agencies, as a lack of effective independence will render the formal separation from the representative institutions and hence the democratic deficit problematic. At the same time, the capacity to deliver 'better' regulatory outputs might be compromised because independence is seen as the precondition for high-quality regulation.

5. On the simulative (re)generation of legitimacy

So it has been argued that the delegation of public authority to independent regulatory agencies is a currently favoured solution for governments confronted with contradictory demands deriving from a situation of unprecedented societal complexity, in order to regenerate the legitimacy of the political process. The solution both presupposes and engenders the belief that regulatory policies can be enhanced if they are delegated to specialised bodies which are insulated from democratic institutions. IRAs are in fact by definition depoliticised, non-majoritarian, and non-democratic bodies. Yet legitimacy is widely believed to emerge, first and foremost, from democratic participation and procedures. How can institutions that are non-democratic be expected to increase the legitimacy of policies? As discussed above, the legitimacy of regulatory governance by independent agencies is expected to derive from a supposedly superior capability of IRAs in comparison to democratic institutions related to: the higher efficiency of IRAs, based on expertise; their higher procedural accountability, based on transparency, openness and fairness; the higher independence of IRAs from politics, organised interests, and the democratic masses, which provides a higher level of credibility.

But can such institutions really deliver what is expected of them so as to legitimise regulatory policies? The argument developed in this chapter is that delegating to IRAs is hardly a suitable strategy for regenerating the legitimacy that has been undermined by the challenge of societal complexity because: the expected superiority of independent agencies is difficult to assess – if it exists at all; there are serious trade-offs concerning the delivery in any of the three dimensions of legitimacy; and the reliance on one single dimension is hardly sufficient to legitimise the political process. Indeed, agreement on a positive evaluation of results is hard to achieve, and in any case it cannot substitute for input-oriented legitimacy. Moreover, the procedural legitimacy, in terms of accountability, may be in conflict with the IRAs' *raison d'être*, that is their assumed efficiency. Furthermore, it has been demonstrated that legitimisation in terms of effective independence does not work either. It appears that formal independence is neither a necessary nor a sufficient condition for explaining variations in the *de facto* independence of agencies from political decision-makers (Maggetti 2007). But any lack of *de facto* independence would render the democratic deficit unjustified and may lead to the contestation of the regulatory order.

As a consequence, the delegation of public authority to independent regulatory agencies appears as a rather unreliable and unsatisfactory means of policy legitimisation. Delegation emerges as a way of dealing with the contradictions of complexity that relies on depoliticisation as an end in itself rather than a means. In this sense, delegation can be interpreted as a way to reduce social complexity by eliminating some demands from the political system. So, the reliance by governments on institutions (IRAs) that cannot really deliver what they are expected and supposed to, may be interpreted – based on the model of *simulative politics* – as a process of simulative regeneration of political legitimacy, i.e. as the performance of legitimacy in a context where legitimacy becomes increasingly difficult to generate (Blühdorn 2007c; also see Chapter 1 in this volume).

In this context, simulation is a way of managing systemic contingency, by attempting to reconcile, or at least to permit the coexistence of, two contradictory needs. On the one hand, delegation relies on the *metaphysics of efficiency* (Blühdorn 2007d: 75-82) in a context presented as complex, differentiated, flexible and competitive, in order to answer dramatic social demands for public action and intervention, whereby the assessment of actual improvements to the quality of regulatory governance remains an uncertain and intricate process. On the other hand, following many structural transnational developments – particularly the liberalisation and internationalisation of the markets – delegation to independent regulators is crucial to secure

credibility in the eyes of global actors such as foreign firms, international investors, and consumers. Accordingly, the simulative nature of the politics of delegation is particularly significant if there is a discrepancy between formal and factual independence. Other modes of regulation are likely to continue operating to a certain extent, in order to avoid an abrupt and perilous transition to the new regulatory order.

At present, this reconciliation of conflicting goals seems successful. Regulatory issues are depoliticised, and delegation to agencies is widely adopted as the taken-for-granted solution to the challenges of complexity. However, regulatory governance by independent agencies, although momentarily uncontested, can hardly secure legitimacy for the policy process. Depoliticisation is thus a fragile political strategy, and the new regulatory order is likely to be challenged, especially in cases of a systemic crisis or paradigm shift.

Some recent trends, however, open up new perspectives on legitimising regulatory governance by independent agencies. The emergence and ongoing consolidation of transnational networks of regulators might configure a new potential source of legitimacy for regulatory policies, if these institutional arrangements prove to be effective. For instance, European networks (Coen and Thatcher 2008) – where domestic independent regulatory agencies, scientific committees, member states, the Commission, and the European parliament are involved – could provide agencies with incentives and means for the development of an independent and efficient regulatory process (Majone 2001c) because of the lasting cooperation among agencies and the requirement of international reputation, ideally also making the agencies reciprocally (horizontally) accountable (Moe 1985). Further research will have to look carefully at the consequences of these new institutional developments, especially from the point of view of the potential improvements of regulatory governance.

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Chapter 7
Delegation to the EU: Participation *versus* Efficiency in German EU-Policy

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1. Introduction

In the political space of the European Union we can distinguish between the levels of national and EU politics. From the perspective of nation-state governments, domestic preferences or interests need to be first delegated to and then negotiated at the EU level. This process itself represents a considerable challenge of cross-linking several different arenas within the European political system. In some member states, notably in Germany, a federal structure of the nation state adds a further dimension of political action. Against the background of this multi-level-system, the process of delegating domestic demands to the EU level is a particularly complex exercise of steering politics. An enquiry into the ways in which the involved delegation networks respond to societal needs and expectations is therefore able to produce valuable insights into the overall question of this volume, namely how governments seek to generate legitimacy for their policies and for themselves. In this chapter, German EU delegation will be analysed as a case study for legitimacy generation in the EU context. It will be demonstrated that two dominant strategies have evolved to secure legitimacy: actor inclusion and policy effectiveness/efficiency. Yet, contrary to what Dahl's famous dilemma of participation and effectiveness may suggest (Dahl 1994), the two strategies are not mutually exclusive but even seem to imply each other.

In the EU, the character of democracy is peculiar. Nowadays, minimum standards of democracy are firmly established almost all over Europe, and most certainly throughout the EU. Several years ago, when the formula of the 'ever closer Union' dominated not only the preamble of the Maastricht Treaty but also many expectations about the future dynamics of European integration, nation-state democracies seemed to be very close to a conversion. Dahl (1989) speculated about a 'third transformation' of democracy beyond the nation state. With some blend of idealism, authors like David Held or Ernst-Otto Czempiel proposed models in which national sovereignty was given up in favour of a 'world domestic policy' (Czempiel 1998) or transferred into a 'cosmopolitan model' of democracy (Held 1995). The capacity