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Legal independence vs. leaders' reputation: Exploring drivers of ethics commissions' conduct in new democracies

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1. INTRODUCTION

This article explores the rising debate over structural versus reputational sources of agency independence. In the last few decades, semi-autonomous agencies have proliferated worldwide, taking over regulatory tasks across various domains. Their arm's length distance from government has been supposed to enable expertise-driven (Vibert 2007), credible and time-consistent policy (Majone 1996), in contrast to politically opportunistic choices made by government departments. Yet, two diverging perspectives have developed in the literature over how the insulation from government, known as 'legal independence' shapes agency conduct in practice.

The structuralist perspective, inspired by the formal theory of bureaucratic control and the principal-agent contract paradigm (Moe 1984; McCubbins et al. 1987; Horn 1995), implies that legal independence is a crucial determinant of agency enforcement. Under lower degrees of legal independence, the logic goes, it is risky for agencies to contravene the principal's interest because they can be sanctioned, for instance through staff removal or budget cuts. Thus, the principal is seen as the key account-holder, and agencies' de facto independence is expected to correspond to their legal independence.

Yet, as transactional theory posits, agencies might extend their autonomy beyond the statutory confines through interactions with stakeholders (Carpenter and Krause 2014). By enhancing their own reputation among the watching audiences, agencies can increase the cost of a prospective principal's reprisal and thus potentially pre-empt it. Here, the watching audiences, rather than the principal, are highlighted as the key forum for agents' account-giving (Busuioac

and Lodge 2016). This implies that agencies' legal independence, which is determined by the principal's instruments of control, will not necessarily shape their de facto independence.

Extant research on the impact of legal independence on agency conduct has focused mainly on consolidated, Western democracies (e.g., Hayo and Voigt 2007; Maggetti 2007; Hanretty and Koop 2013; Guidi 2015; Koop and Hanretty 2018), but new democracies have received less attention (Teodoro and Pitcher 2017, p. 402). New democracies are interesting cases to analyse because open governmental action against an arm's-length agency, particularly an anticorruption watchdog, might be constrained by external conditionality. At the same time, in new (transition) democracies politicians can rely on strong informal networks (Volintiru 2015) as less visible, non-institutional, routes to undermine agencies' de facto independence. How, then, do these two countervailing forces typical of new democracies play out, in light of the structuralist and reputational theories of agency independence?

The article presents an analysis of the enforcement style of three ethics commissions from two Southeast European countries—Serbia and Macedonia. It contrasts the two theories, asking which factor better explains the commissions' de facto independence: their legal independence or their leaders' (lack of) reputational craft? To answer this question, a combination of qualitative and quantitative analysis is undertaken, based on cross-time comparisons within the commissions as well as cross-commission comparisons.

The contributions are as follows. First, the article develops an original concept of enforcement style for ethics commissions. Since it captures the nature of individual investigations, the concept produces a more reliable proxy of de facto independence than expert perceptions, assessments of policy impact, or counts of principals' 'reprisal actions' (e.g., removal of an agency chief). This concept might further be applied across other integrity regulators and anticorruption bodies. Second, to address the structuralist vs. reputational debate, the study utilizes original data from a transitional context. Third, the article finds deviations between legal and de facto independence, adding evidence to the 'sceptical' stream in delegation scholarship about the role of agency insulation in fostering de facto independence. Fourth, the analysis documents the mechanisms behind such deviations: (a) how some agency leaders exploit reputational forces to advance high de facto independence and (b) how high legal independence might just be an asset consciously underutilized by agency leaders.

2. LEGAL INDEPENDENCE, REPUTATION AND AGENCY ENFORCEMENT

Legal independence has been a central concept in the delegation literature. It can be defined as agencies' formal autonomy to conduct personnel, financial and administrative affairs free from governmental involvement (Verhoest et al. 2004; Busuioc et al. 2011). Legal independence is determined by a statute which sets out the role of government in the appointment and removal of agency staff, in budgeting, and in internal agency administration (Gilardi 2002).

De facto independence, on the other hand, refers to the day-to-day operations of agencies, unaffected by governmental preferences (Hanretty and Koop 2013, p. 196). Maggetti defines de facto independence as 'the self-determination of agencies' preferences, and their autonomy throughout the use of regulatory competencies' (2007, p. 272). One central question among delegation scholars and policy practitioners has been whether agencies' behaviour can be 'hardwired' through statutory design, that is, whether their legal independence will determine their de facto independence.

The structural school suggests that there is a link between statutory design and agency behaviour, implying that higher degrees of legal independence will lead to higher de facto independence; this also might translate into superior policy outcomes. Some studies have confirmed the link between legal and de facto independence, in the judiciary (Hayo and Voigt 2007), in competition policy (Hanretty and Koop 2013) or across multiple sectors (Egeberg and Trondal 2009; Verhoest et al. 2010). Similarly, authors have found a correlation between legal independence and improved policy outcomes, in central banking (Cukierman et al. 1992), competition policy (Koop and Hanretty 2018), and in cross-sectoral terms (Vining et al. 2015). However, there is also evidence that contests this link. Guidi (2015), for instance, found that competition authorities across the EU with greater legal independence do not necessarily produce better policy outcomes. Similarly, Maggetti (2007) reported non-trivial deviations in de facto independence from the legal independence across several sectors.

The structuralist argument can theoretically be challenged on three counts. First, as the reputational school highlights, the exercise of accountability is not necessarily oriented towards the principal but can be aimed at a wider set of audiences - the electorate, experts, and various interest and social groups (Carpenter 2001, 2014; Carpenter and Krause 2014; Busuioc and Lodge 2016, 2017). Increased legitimacy among these audiences might increase the cost of a principal's retaliation; sacking an agency head/board or cutting its budget is likely to politically backfire. Thus, even agencies with low legal independence could find a way, through crafty reputational management, to confront immediate political interests and sustain high de facto independence. In their study of the use of judicial review in post-communist

countries, Smithey and Ishiyama (2002) found that when public support has 'created a political context favourable to judicial power, judges ... seem to have taken advantage of it', exercising a proactive stance and assertiveness.

What would be good strategies for ethics commissions to advance their reputation among the audiences? We can assume that combative rhetoric will likely boost a commission's ratings. Observers of politics are generally more receptive to 'negative tones' (Soroka 2014), particularly in criminal and justice policies where assertiveness resonates with citizens (Yeung 2009, p. 275). Watchdogs pursuing harsh tones are therefore likely to increase legitimacy and thus boost *de facto* independence. Moving from the tone to the content of the message, we can also assume that anticorruption bodies will benefit in reputation if they go beyond the customary narrative of compliance and legality. Citizens deplore corruption not only because the law is violated, but also because of disregard of their and the public interest and, relatedly, because it adversely impacts their well-being. Therefore, besides the procedural dimension, there is a strong moral and performative dimension which watchdogs can exploit to enhance their reputation.

The second weakness in the structuralist argument relates to bureaucrats' intrinsic motivations. At the heart of the claim that legal independence steers agency action is the implicit assumption that leaders are policy driven. If the statute minimizes the principal's sanctioning power, the thinking goes, the agency leader will not worry whether its enforcement choice violates the principal's interests. Yet, bureaucrats might prefer personal utility over the policy. Whether because of outright capture (Bernstein 1955), career prospects in the public sector (Meyer-Sahling and Mikkelsen 2016, p. 1109), low relational distance towards regulated politicians (Black 1976), or because they are intimidated by informal pressure waged by politicians (Smith 2003, p. 291) — agents might opt for 'sub-optimal' policy choices.

Third, as Ennser-Jedenastik (2015) demonstrates, higher levels of legal independence may induce principals to make greater efforts to politicize agency appointments. When an agency's insulation from government is low, the principal might politicize its appointments less, expecting that the agency's high vulnerability to external statutory control will deter agency 'drift'. High legal independence might lead a principal to increase its *ex ante* efforts, formal and informal, to install allies to those positions over which it still commands some appointment powers.

These three objections to the structuralist argument imply that the assumed link between statutory design and policy action is problematic on two counts: agencies with low legal

independence might espouse high de facto independence, just as highly independent agencies in legal terms might not be highly independent in practice. Before this 'transmission belt' between legal and factual agency independence is empirically explored, the next section will set out the conceptual frameworks for de facto independence and reputational mechanisms.

3. CONCEPTUALIZING DE FACTO INDEPENDENCE

3.1 Enforcement style

Ethics policy is described as a symbolic or window-dressing policy (Mackenzie and Hafken 2002), often adopted in response to scandals (Rosenson 2005) or through a donor-induced diffusion like the one that took place in the 2000s across European post-communist countries (OECD 2013). Ethics policies are characterized by a constellation of 'intensive heat' (Busuioc and Lodge 2016), in which both the government and ethics commission have high incentives, but opposing interests, in their exercise of accountability: politicians seek to escape scandals, while ethics commissions seek to discover politicians' misconduct.

Since the actions of ethics commissions have redistributive reputational effects between the government and opposition, one good indicator of their de facto independence will be the level of political selectivity that they demonstrate in everyday practice. We can determine political selectivity by comparing whether ethics commissions undertake different enforcement styles when they are dealing with incumbents and with opposition members, respectively.

The concept of enforcement style has been used in the regulatory enforcement literature to capture how regulators deal with regulated entities. Originally, the concept had one central dimension, a degree of coercion, which captures whether regulators are accommodative or punitive towards non-complying regulatees (Bardach and Kagan 1982). The punitive enforcement style is characterized by the immediate sanctioning of an offender (upon discovery of a breach). The accommodative style features an advisory and educational approach, in which a regulator gives another chance to an offending regulatee to cease the uncovered non-compliance.

Over time, the unidimensional concept has been expanded to include other important dimensions of regulators' work, such as rigidity (Gormley 1998), formalism (May and Winter 2000), autonomy and capacity (McAllister 2010) and others. Such multidimensional concepts

capture more features of regulators' enforcement and have been applied to specific policy sectors. The concept of enforcement style which is developed here, for analysis of ethics commissions' work, builds on one classical dimension and integrates several other elements, which are central to the domain of anticorruption, into a second dimension. These two constituent dimensions are: zealotry and stringency.

Zealotry builds on the notion of punitiveness (coercion), and includes an added element of proactiveness. Punitiveness concerns whether a commission imposes the maximum fine against an official found to be in breach of the rules, or it opts for a 'discounted' sanction (including acquittal). Proactiveness, which some authors use as a separate dimension (e.g., McAllister 2010 calls it 'capacity'), relates to the pre-sanctioning stage and is about institutional effort to police and detect violations. High zealotry is demonstrated when a commission shows high proactiveness, whether by launching its own investigations or by quickly responding to others' reports of misconduct, and when in the sanctioning stage it demonstrates high punitiveness. Low zealotry, on the other hand, is observed when a commission frames a suspect's offence in terms of a lower fine,⁴ or it ignores, or belatedly opens an investigation following a third party's report of an official's alleged misconduct.

To contextualize ethics commissions' endeavours, we need to know their level of stringency, that is the severity of the sanction that the legislation sets out for a given misconduct. For instance, issuing a public warning and requesting a criminal prosecution are two different measures in terms of the consequences that a suspect will suffer, and as such they need to be treated as two different enforcement styles, even when pursued with similar zealotry.

High stringency involves harsh fines, and low stringency involves mild fines. Harsh fines include criminal sanctions and drastic forms of non-criminal fines such as a ban on holding public office or a ban on political engagement. Mild fines include warnings (public and non-public), financial penalties, recommendations for removal from office, and the like.

These two dimensions, zealotry and stringency, are combined into four possible enforcement styles:

1. *Retreatist style* (low zealotry, low stringency): inactive in detection, when the potential sanction is mild.
2. *Aloof style* (low zealotry, high stringency): the prescribed sanction for the discovered breach shall be severe, but the commission behaves inactively (in the detection stage or during evidence collection).

3. *Resolute style* (high zealotry, low stringency): the commission acts zealously, but the envisaged fine is mild.

4. *Aggressive style* (high zealotry, high stringency): the commission is zealous and pledges a harsh sanction.

In the operation of anticorruption bodies, the zealous approach can be regarded as normatively preferred. As the labels above indicate, the styles featuring high zealotry (resolute and aggressive) have positive connotations, and the styles featuring low levels of zealotry (retreatist and aloof) have negative connotations. In contrast to areas where 'flexible' or responsive regulation (Ayres and Braithwaite 1992) is considered most appropriate, in anticorruption low zealotry is usually seen as bolstering a culture of impunity and contradicting the rule of law. The forthcoming empirical analysis will therefore treat the occurrence of the two non-zealous enforcement styles as indicators of reduced de facto independence.

The analysis will focus on high-ranking politicians.⁶ Within ruling ranks, high-ranking politicians include: state presidents, members of government (including prime ministers), party leaders and their deputies and vice-presidents, presidents of parliamentary groups, prominent mayors (e.g., of capitals and regional centres), and politically appointed directors of major public enterprises (e.g., of state-owned oil companies). High-ranking politicians in opposition involve prominent party figures (presidents, vice-presidents, presidents of the party council, executive committee, and other major party bodies) and persons widely perceived as associated with the party (e.g., former high-ranking officials).

On an aggregate level, political selectivity occurs when a commission pursues zealous actions in a significantly greater proportion against the opposition than against ruling officials. For instance, if a commission undertakes the zealous style in all its actions against the opposition, while in some investigations of ruling officials it acts in a nonzealous manner, this will be a sign of political selectivity.

Investigations will be coded based on analysis of formal legislation, commission statutes, commissions' decisions, enforcement activities, press clippings, and interviews with senior officials and stakeholders. Analysis of these sources will provide a full picture of the observed cases, enabling the coding of levels of stringency and zealotry.

4. CONCEPTUALIZATION OF RHETORICAL PATTERNS

Alongside the commissions' enforcement styles, the article will also look into their reputational strategies, in search for the explanatory mechanisms. In doing so, the analysis focuses on the commissions' public statements, which are key vehicles for shaping organizational reputation (Yeung 2009).

The coding of the commissions' statements will draw on two central elements in text and sentiment analysis (Mohammad 2016): content and tone. Content refers to the symbols and values that ethics commissions refer to in their speech. A regulator's reputation can rest upon one or more of the following values: moral, performative, technical, or procedural (Carpenter 2014). Moral reputation is advanced by preaching ethical and widely approved values (e.g., honesty, non-corruptibility, transparency, accountability). Performative reputation is built through references to achieved results, for instance reduced corruption, or increasing investigations. Technical reputation rests on proven expertise (e.g., possession of legal, economic or forensic skills for investigations). At the heart of procedural reputation is the 'purity' in following the law and procedures, for instance compliance with standards on conflict of interest or with wider constitutional and legal principles.

The specificity of public sector regulators is that most of their work is not driven by proving their own, but by evaluating others', credentials in attaining the above four values. To establish its reputation, an ethics commission needs to communicate to the audience to what extent public officials have attained the given value. For instance, a watchdog might earn performative credentials urging a politician/institution to better fight corruption, or criticizing its lack of progress. To gain a procedural reputation, a commission might criticize violations of law. The coding of the ethics commissions' reputational strategies will therefore focus not on what values the commissions have achieved themselves, but what values they have stood for in their statements.

While what is said is one key element of public communication, how it is said is another important aspect, as it shapes the audiences' impressions about the actors involved. The tone of messages might antagonize the audiences against a regulatee, just as it can 'buffer' the blame against politicians. To capture this aspect, the article distinguishes between an 'insistent' and 'non-insistent' tone. Insistent statements feature a degree of assertiveness, an offensive or negative connotation, an accusatory tone (towards politicians or the political class), a demanding attitude (e.g., a request to act in a certain way), or an aspiration to change the status quo. Non-insistent statements feature neutral or positive messages.

To capture the reputational strategies of the three ethics commissions, the study counts how many commissions' statements referred to each of the four reputational values, and how many statements featured an insistent tone. The focus is on the absolute number of statements in each category (monthly average).

5. CASE SELECTION, METHODS AND DATA

5.1 Cases and context

The analysis includes three ethics commissions, two from Serbia and one from Macedonia (the period observed is 2002–12):

1. The Republican Committee for Resolution of Conflict of Interest (henceforth: the *Committee*), which was created in 2004 and abolished in 2009;
2. The Anticorruption Agency (henceforth: the *Agency*), which succeeded the Committee in late 2009;
3. The State Commission for Prevention of Corruption (henceforth: the *SCPC*), which was set up in 2002 and is still active.

The Committee and the SCPC were created in the early stage of the transitional reforms in Serbia and Macedonia. Their role was to enact regulations of conflict of interest, which were introduced under EU conditionality (both Serbia and Macedonia entered the 2000s with high levels of political and bureaucratic corruption; see Freedom House 2003, 2005). While the Macedonian SCPC has remained active until today, the Serbian Committee was abolished in 2009, when a newly created Agency took over its role as the ethics regulator, with a wider set of tasks and somewhat stronger powers.

5.2 Comparative strategy

Serbia and Macedonia are two similar countries whose ethics commissions exhibit variations across the two variables of interest—legal independence and leadership. This makes a suitable set-up to compare the impact of legal independence and leaders on the commissions' enforcement, while controlling for contextual factors.

Serbia and Macedonia are both systems of weak semi-presidentialism, in which the executive rests with the government, whereas directly elected presidents have mainly ceremonial roles.⁷ As former republics in the communist Yugoslavia (1945–91), they share similar administrative legacies, including a large public sector bureaucracy, widespread party patronage and high corruption (Trivunović et al. 2007, p. 4; Selami and Risteska 2009).

Alongside those historical and macro-institutional similarities, Serbia and Macedonia have been implementing similar reform agendas since the start of their EU accession process, in the early 2000s. (Despite obtaining the status of EU candidates, in 2005 (Macedonia) and in 2012 (Serbia), neither has joined the EU to date.) During the EU accession process the two countries have improved their legislation, but the rule of law and anticorruption efforts have remained plagued by low judiciary independence and poor law enforcement (see, for instance, the EU Progress Reports on Serbia and Macedonia from 2006 onwards; also Meyer-Sahling 2009).

Two commissions from the sample had, and one commission lacked, a high degree of legal independence. According to the widely used Gilardi's index of legal independence⁸ (scaled 0–1), the Serbian commissions—the Committee and the Agency—were highly independent (0.68 and 0.79, respectively), whereas the Macedonian SCPC was not (0.38).⁹ The appointment procedure for the Committee board included nominations by the Supreme Court (three commissioners) and Bar Association (one commissioner) and election of five commissioners by parliament, from a set of 10 candidates recommended by the Serbian Academy of Sciences and Arts (LPCIDPP 2004, Article 19). Regarding the Agency, candidates for its board are nominated to parliament by a mix of political bodies (the President, the government) and independent bodies (the Supreme Court of Cassation, State Auditor, Ombudsman and Information Commissioner, Socio-Economic Council, Bar Association, and the main journalist associations). The Agency Director is elected by its Board, and, likewise, can be sacked only by the Board, for specified forms of misconduct (LAA 2008, Articles 15–20). The Macedonian SCPC, on the other hand, enjoyed weaker institutional safeguards against political interference. Its commissioners are appointed by parliament, without external nominations, for a period of four years (LPC 2002, Articles 47–48); originally, the mandate of SCPC commissioners was non-renewable, but this was changed during its second term.¹⁰ Dismissal procedures for SCPC commissioners were not spelled out in the law, which left a formal possibility for parliament to sack them without justification.

To test the structuralist hypothesis, the analysis will question whether the commission which lacked high legal independence, the Macedonian SCPC, failed to exhibit high de facto independence, and whether the commissions with high legal independence, the Committee and Agency, demonstrated correspondingly high de facto independence. As another test of the structuralist hypothesis, it will be questioned whether the observed de facto independence of the Macedonian SCPC is lower than the de facto independence of the Committee and the Agency.

During the observed period, there were two major leadership changes. The first happened in the SCPC, in 2007, when after the expiry of the first mandate parliament appointed a new board of SCPC commissioners (Mangova 2013, p. 100). Later changes in the SCPC board were partial, since the abolition of the non-renewability clause allowed the re-election of some commissioners to the third board (2011–). The second major leadership change in the sample was that from late 2009, when, following the Committee termination, its successor Agency started work with a newly elected director as its decision-maker (RTS 2009). To test the ‘leadership hypothesis’, the study will question whether the commissions espoused different enforcement styles before and after these leadership changes.

Organizational resources, which are highlighted as an important factor among ethics commissions (Meagher 2005; Rauh 2015) and other regulators (Hutter 1989, pp. 164–65; McAllister 2010), are not expected to have shaped the commissions' de facto independence. The enforcement style analysed here does not concern the sheer quantity or length of investigations, but instead considers the manner in which commissions address arising cases of misconduct. The investigations of ethics commissions are performed from the office, based on public sources, tip-offs or self-initiated checks; instead of specialized teams and instruments, their methods include the exchange of data, hearings, and the referral of identified cases to other institutions. For these reasons, organizational resources are not a key variable in the research design.

6. ENFORCEMENT STYLE OF THE THREE COMMISSIONS

6.1 Republican Committee for Resolution of Conflict of Interest (the Committee, 2005-09)

During its lifetime, the Committee investigated hundreds of potential violations of ethical regulations (Committee Annual Reports 2005–09). Most of them involved ‘small-fish’, whereas the number of ‘big-fish’ cases amounted to less than 10 for its whole life.

Nevertheless, these big-fish cases were highly publicized. Examples include the Committee's actions when a Minister of Public Administration was holding another, duplicate, public post, as a member of a public university board (B92 2006); when a Vice-President of a ruling party was discovered to have a commercial arrangement with a state-owned pharmaceutical firm while serving as President of Parliament (Rov canin 2009); or when two State Secretaries pressed a court to hold up workers' lawsuits until the law on privatization changed (Beta 2009) (see online appendix B for the list of cases).

The Committee's reactions to these and other big-fish cases were uniformly zealous. After the press or political opponents raised a suspicion, the Committee would declare its jurisdiction and undertake a zealous investigation. The Committee would then complete the process by issuing a fine which, given the weak sanctioning powers, was predetermined to be mild (a public warning or a dismissal recommendation). Thus, all of the Committee actions were resolute, featuring high zealotry and low stringency (see Table 1).

The above pattern indicates high de facto independence. The Committee did not undertake non-zealous investigations, nor did it disproportionately target opposition members (though the overall lack of cases involving the opposition is unsurprising given that the regulation pertained exclusively to those in power). Its low stringency was the result of its narrow remit (the word corruption was not even mentioned in the law), and of the 'conservative legalism' among its commissioners (Interviewee S4); together, these two factors prevented engagement with cases of grand corruption.

TABLE 1. The enforcement styles in the Committee's investigations (2005-2009).

	Government				Opposition			
	Non-zealous		Zealous		Non-zealous		Zealous	
	Aloof	Retreatist	Resolute	Aggressive	Aloof	Retreatist	Resolute	Aggressive
2005			1 ■					
2006			1 ■					
2007			1 ■					
2008			2 ■■					
2009			4 ■■■■					

Overall, although its actions featured low stringency, the Committee acted as a highly independent commission. Its pattern of investigations is consistent with the structuralist hypothesis that high legal independence will be followed by high de facto independence. The 'leadership hypothesis' cannot be preliminarily assessed, as the Committee did not see a major leadership change.

6.2 Anticorruption Agency (the Agency, 2010)

In 2008, the new Law on the Anticorruption Agency (LAA 2008) spelled the end of the Committee, designating a novel Agency as its successor. The government touted this as a step forward in terms of anticorruption efforts (Danas 2009), as the Agency received a wider set of tasks and somewhat stronger powers, with immensely better resources. The outgoing Committee board, however, described this move as a retaliatory act of institutional fiddling (Committee Annual Report 2008, 2009). Later, however, most of the Committee staff moved to fill Agency's administrative and board positions (Agency Annual Report 2010, pp. 15–16), where they did not have enforcement and investigative powers. The executive authority of the Agency namely rested with its Director, (the Committee's Multiple Commissioner model was replaced with the General Director model of decision-making).

Between 2010 and 2012, most Agency investigations into conflict of interest involved 'small-fish', but the number of actions involving 'big-fish' significantly increased when compared to the Committee, from less than two actions per year (2005–09) to almost 10 per year (on average). Despite this increase in 'big-fish' investigations, however, the consistency of the enforcement style lessened.

Table 2 shows that, in contrast to the Committee's record of maximal zeal, there were many cases which the Agency investigated in a non-zealous manner. Most of the Agency's non-zealous investigations involved ruling officials, and where the potential sanction was criminal, it was predominantly opposition figures who were investigated with high zeal. As indicated in the right-hand column of the table, there were four aggressive actions against the opposition and zero aggressive actions against ruling officials. Some of those zealous investigations against the opposition leaders took place in an electoral campaign, which increased reputational costs.

Thus, despite the Agency's rise in legal independence, its director pursued a mixed pattern of enforcement styles in terms of zealotry, with signs of political selectivity. This indicates low de

facto independence. Such a deviation between legal and de facto independence is inconsistent with the structuralist hypothesis. On the other hand, the fact that the key change in the enforcement style came after the transition from the Committee to the Agency, which involved a major leadership change, might lend support to the leadership hypothesis.

6.3. State Commission for Prevention of Corruption (SCPC, 2002)

In its early days, the SCPC sought to position itself as an assertive anticorruption actor. It was not only enforcing the freshly introduced regulations of conflict of interest, but was also pressing the police and State Prosecutor to engage with potentially corrupt cases that were outside its statutory remit (SCPC Annual Reports 2003–06). Some of the SCPC's 'forays' into the wider anticorruption turf focused on past privatizations, and others included examples such as undeclared officials' accounts in foreign banks, officials' collusion in allegedly fraudulent inter-state projects and loans, and other schemes (see online appendix B for more details).

TABLE 2. The enforcement style in the Agency's investigations (2010-2012).

	Government				Opposition			
	Non-zealous		Zealous		Non-zealous		Zealous	
	Aloof	Retreatist	Resolute	Aggressive	Aloof	Retreatist	Resolute	Aggressive
2010	2 ■■		1 ■					
2011	3 ■■■	4 ■■■■					3 ■■■	3 ■■■
2012	5 ■■■■■■		3 ■■■			1 ■	1 ■	1 ■

The result of this approach by the SCPC during its first mandate was a high level of zealotry, featured by a mixture of resolute and aggressive enforcement style (see the 2003–07 section in Table 3). The resolute actions related to regulation of conflict of interest, while in the aggressive actions the SCPC dealt with potentially criminal cases. In the latter, the SCPC demonstrated initiative in investigating reports of corrupt schemes and passing the preliminary findings to the police and State Prosecutor.

The actions conducted during the first term showed no sign of political selectivity. Almost all the investigations that the SCPC undertook were zealous and targeted mainly ruling officials. The opposition 'big-fish' were also targeted in a zealous manner, but the number of those

cases, unsurprisingly, was lower (five cases against the opposition vs. 27 cases targeting ruling officials).

With the appointment of the second board (in 2007), however, the SCPC changed its enforcement style. It ‘retreated’ to the statutory remit, relinquishing cases from the Prosecutor’s jurisdiction. Within this statutory turf, focused on ethical regulations, the SCPC started undertaking an increasing number of non-zealous investigations. A disproportionate portion of those non-zealous actions concerned ruling officials (see the left two columns in the 2007–11 section in Table 3).

The SCPC’s third term (2011 and 2012) saw fewer investigations of high-ranking politicians. Opposition leaders were not the subject of major investigations, whereas the SCPC’s enforcement style against ruling officials remained predominantly non-zealous. In three out of the total of four actions against ruling officials that emerged in 2011, the SCPC acted either in a protracted manner or directed the investigation towards a potentially minimized sanction. Although its actions did not incur reputational costs to the opposition, the SCPC’s work indicates political selectivity nonetheless, because its enforcement style was accommodative towards ruling officials.

Overall, there is a stark contrast between the SCPC’s enforcement pattern in the first term (2003–07), on the one hand, and the second and third terms, on the other. The former involved high zeal and no political selectivity; the latter featured lower levels of zeal and political selectivity. This casts doubt on the structuralist hypothesis, because the observed shift in the enforcement pattern, and the corresponding decline in de facto independence, occurred under a continuous degree of legal independence. Also, the fact that this shift coincided with the leadership change in 2007 lends credence to the ‘leadership matters’ hypothesis.

TABLE 3. The enforcement style in the SCPC’s investigations (2003-2012).

	Government				Opposition			
	Non-zealous		Zealous		Non-zealous		Zealous	
	Aloof	Retreatist	Resolute	Aggressive	Aloof	Retreatist	Resolute	Aggressive
2003			2 ■■	1 ■				2 ■■
2004			3 ■■■	6 ■■■■■■				3 ■■■
2005			2 ■■	5 ■■■■■				

2006			3 ■■■■	5 ■■■■■■	1 ■			
2007	1 ■	5 ■■■■■■					1 ■	1 ■
2008		5 ■■■■■■	2 ■■	1 ■			3 ■■■■	
2009	5 ■■■■■	1 ■					1 ■	2 ■■
2010	1 ■		1 ■					2 ■■
2011	2 ■■	1 ■	1 ■					
2012								

6.4 Comparative analysis

Thus far, the empirical analysis has revealed variations in the commissions' de facto independence. Table 4 summarizes the observed enforcement patterns. Clearly, the evidence does not corroborate the structuralist, 'legal independence matters' hypothesis. Deviations from the predicted pattern of enforcement have been observed in both directions: (1) low legal independence which resulted in a zealous and non-selective enforcement pattern (e.g., the case of the SCPC from 2003 to 2007), as well as (2) high legal independence which failed to translate into a predominantly zealous and non-selective enforcement pattern (e.g., the Agency from 2010 to 2012). Thus, structural insulation from government does not turn out to be a good predictor of de facto independence.

On the other hand, the shifts which were observed in the commissions' enforcement patterns came after changes in their leadership. The cases in point are the 2007 board changes in the SCPC and the start of the Agency operation. In both instances, new commission leaders produced major shifts in the enforcement pattern.

This suggests that the role of leaders might have prevailed over the factor of structural insulation, crucially shaping the commissions' de facto independence. Yet, the question of mechanisms arises. How did the SCPC board manage to overcome its low statutory distance from the government in the first term, espousing high de facto independence, and why did some leaders, particularly the Agency director, fail to capitalize on the extremely protective statutory framework and to pursue high de facto independence? The next section approaches this question from a reputational perspective, unpacking the commissions' rhetorical patterns.

7 RHETORICAL PATTERNS

7.1 Exercise of reputation-oriented accountability

As introduced earlier, rhetorical patterns consist of two elements: (i) reputational values (moral, procedural, technical, performative), and (ii) tone (insistent vs. non-insistent). To gauge the commissions' rhetorical patterns, the study has coded all their public statements, drawing on press releases, interviews, and public comments made by commission members. Table 5 provides descriptive statistics of the monthly average number of statements across the categories of interest.

TABLE 4. Summary of the enforcement patterns of the three analysed commissions.

	Committee	Agency	SCPC
High legal independence?	Yes	Yes	No
Leadership change		2010	2007
Enforcement style	<u>2005-2009</u> Zealous, predominantly resolute	<u>2010-2012</u> Mixed, both zealous and occasionally non-zealous	<u>2002-2007</u> Zealous, mix of aggressive and resolute <u>2007-2012</u> Increasingly non-zealous
Pro-government bias / selectivity	<u>2005-2009</u> No	<u>2010-2012</u> Yes, occasional	<u>2002-2007</u> No <u>2007-2012</u> Yes, occasional

The greatest consistency across the commissions was in the procedural dimension, where they all demonstrated considerable focus on 'procedural purity', as well as in the technical dimension, which was almost absent in the commissions' speeches. The greatest variation was in the moral and performative dimension. While the Committee occupies the middle ground on each dimension, there were huge cross-time variations in the SCPC's references to moral and performative symbols before and after its leadership change (SCPC1 vs.

SCPC2), and also big variations in the Agency across its two entities (the Director and Board). The variations in tone reveal a similar pattern: the SCPC1 and the Agency Board were predominantly 'insistent', whereas the SCPC2 and Agency Director were not.

7.2 Rhetoric as reputation-enhancing device

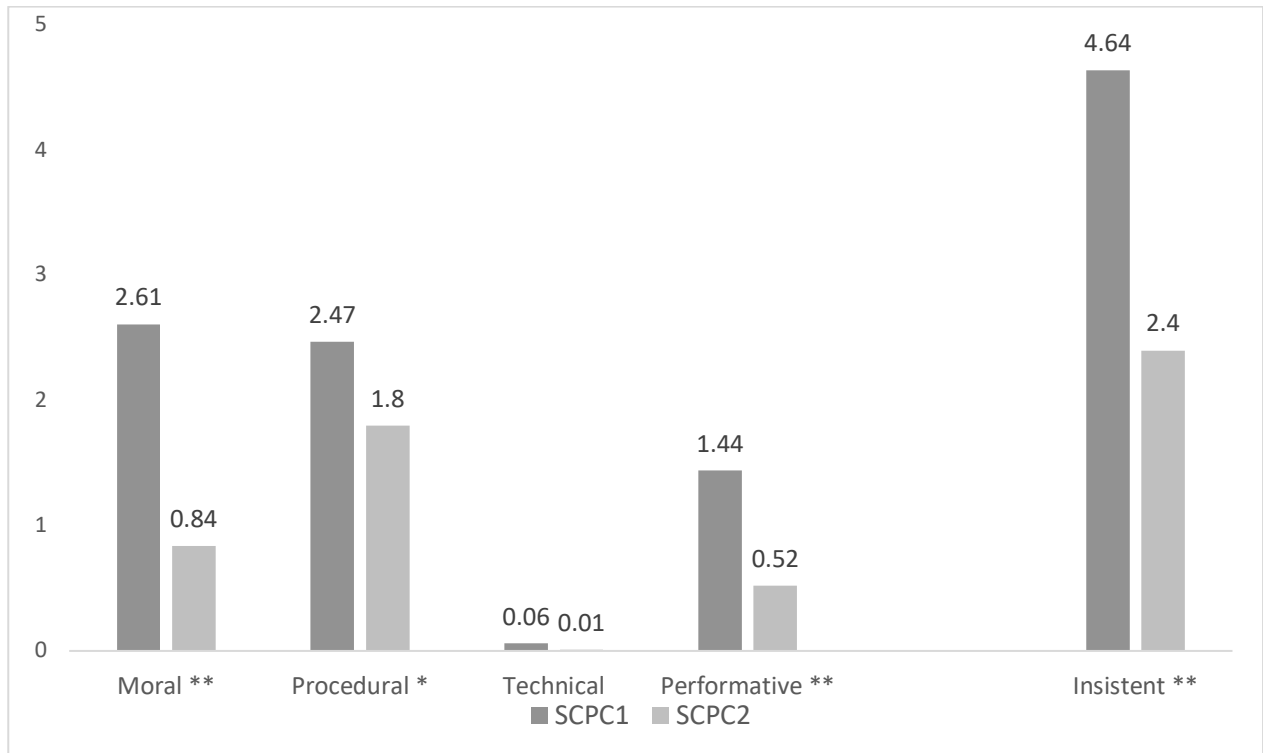
The first question posed above is how a commission with low legal independence, in our case the SCPC, carved out for itself high de facto independence. It is posited here that its leaders did so through reputational craft. Figure 1 illustrates the differences in reputational management that the leaders of the SCPC1 and SCPC2 advanced. While the SCPC1 established a strong rhetorical pattern, which featured a highly insistent tone, combined with strong moral, procedural and performative values, the SCPC2 had a 'weak' communicational strategy, with a low number of statements across all reputational categories except for the procedural.

As mentioned earlier, performative and moral symbols are effective in anticorruption, particularly when communicated with an insistent tone. It is therefore not surprising that audiences positively evaluated the SCPC1's work—it received positive comments from domestic experts (Mangova 2013, p. 42; Interviewee M2) and, similarly, international evaluators described the first few years of the SCPC operation as encouraging (Freedom House 2004; GRECO 2007). The SCPC saw this wider public support as a layer of protection against potential governmental backlash (Interviewee M1), which further boosted its resolve to persist in the zealous and non-selective enforcement style until the end of the first mandate. This meant in practice that, thanks to clever reputational management, the SCPC1 'displaced' its account-giving from the hierarchical relationship with the ruling majority towards its audiences.

The SCPC2 had a much 'milder' rhetorical style and as a result its legitimacy turned out to be weaker. Domestic experts described the second and third mandates of the SCPC as 'reactive' (Mangova 2013, pp. 42–43). After the first two years of the second SCPC term expired, the EU expressed concerns about its impartiality and independence (European Commission 2008), following up a few years later with the observation that the SCPC needs to be 'more proactive in both referring and monitoring the progress in corruption cases' (European Commission 2011). Similarly, an OECD SIGMA report advised in 2008 that the SCPC 'should implement a more proactive communication strategy' (SIGMA 2008). This weakened reputation of the SCPC2, both among domestic and international audiences,

further decreased its ability to pursue high de facto independence and handle potential political backlash. At the same time, it also reveals a lack of incentives of its leaders to act assertively.

Figure 1. The rhetorical patterns of the SCPC, during the first term (SCPC1) *versus* the later two observed terms (SCPC2).



Note: The graph displays the average number of statements per month, during the observed terms.

** $p \leq 0.01$ * $p \leq 0.05$

7.3 Rhetoric as indicator of a leader’s lack of interest in high de facto independence

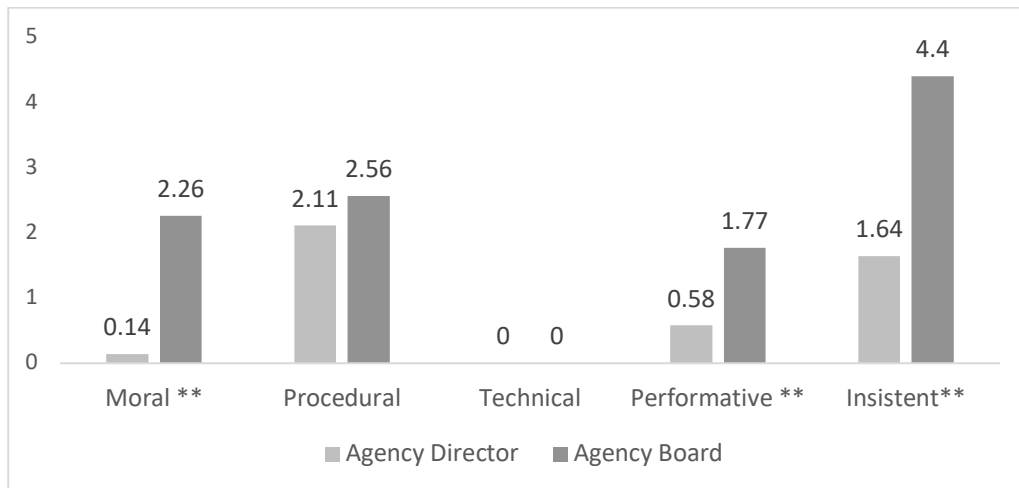
In the case of the Agency, high legal independence was not translated into high de facto independence. Despite its slight increase in legal independence compared to the Committee (which otherwise had been high), the Agency drastically reduced its de facto independence in practice. It is indicative that this ‘deterioration’ in de facto independence was accompanied by a weak rhetorical pattern of its Director (who was the person making enforcement decisions), whereas the Agency Board, which had high public presence but lacked enforcement and investigative powers, sustained a strong rhetorical pattern.

As can be seen in Figure 2, the Director lagged behind the Board's rhetoric in moral and performative values, and also in insistent tone. Moreover, the Agency director was not keen to sustain as strong a rhetorical 'picture' as that of the terminated Committee (0.14 vs. 0.83 monthly statements on average on the moral dimension; 0.58 vs. 1.07 on the performative, and 1.64 vs. 2.73 statements of insistent tone). This sort of 'weak' public appearance is likely linked to the Agency Director's lack of incentive to act assertively in its enforcement actions in the first place.

Towards the end of 2012, the Board sacked the Agency Director (RTS 2012) claiming, amongst the other things, that her 'style of running the Agency' was too lenient (Agency Annual Report 2012, pp. 8–9). It was said that, as a consequence, the Agency 'could not gain a sufficient reputation and visibility [*author's italics*], nor the reputation of an independent body which has the credibility and capacity to engage in the fight against corruption' (Agency Annual Report 2012, p. 9). While illustrating the linkage between the Director's presentational efforts and the accompanying Agency enforcement, it is also an example of how under the General Director model one person who is running an agency can be crucial for diminishing its *de facto* independence, despite a high degree of legal independence.

Whereas it is hard to find irrefutable evidence that direct governmental influence led the Agency Director to intentionally forego high *de facto* independence, it is clear from the empirical analysis that the Agency Director acted in practice as a government ally. This might seem surprising from the structuralist perspective, since the government was cut off from the formal appointment and removal procedures. However, even when formally independent, bureaucrats in postcommunist countries are nonetheless subject to extensive informal networks which feature dependencies on political parties, including potential perks and threats related to their careers in the public sector. Through these informal networks, parties can premeditate even the choices of formally independent, non-party, actors, such as for instance 'fourth branch' bodies and associations who make nominations for agency staff to parliament.

Figure 2. The rhetorical patterns of the Agency Director and Board.



Note: The graph displays the average number of statements per month, during the observed period (2010-2012).

** $p \leq 0.01$ * $p \leq 0.05$

A question can be raised why the Macedonian and Serbian governments did not ensure that the prior ethics commissioners, those from the first SCPC and the Committee board, were not appointed as allies; this would have prevented them from damaging the ruling coalition. While it is difficult to point to fully conclusive evidence, it is nevertheless likely that the ruling parties at first underestimated the harm that the ethics commissions could impose during the execution of their first mandate. It was found in a similar post-communist context from Southeast Europe that politicians adopted anticorruption policies that later hurt them because they ‘short-sightedly’ underestimated the possibility that these policies would be implemented assertively (Schnell 2017). It is possible that the elites who made the initial appointments to the SCPC and Committee overestimated their own power to contain zealous commissions’ conduct, failing to anticipate how effective and resistant can be the ‘reputational activism’ of those ethics commissions.

While being caught ‘asleep’ during the first round of appointments in 2002 and 2004, the Macedonian government in 2007 and the Serbian government in 2009 were later alerted by the highly independent conduct of the SCPC and Committee that greater efforts are needed to put in place like-minded commission leaders in future appointments. For the Macedonian government, its formal parliamentary majority sufficed to politicize the appointments to the second SCPC board, whereas the Serbian ruling majority would need to rely on informal networks due to its insulation from the Agency. Yet, in both cases, the result was the same —

the commissions' patterns of high de facto independence were broken, without the governments risking reputational losses. In Macedonia, due to a nonrenewability rule for the SCPC, the ruling majority did not have to justify why new commissioners were being installed. This spared the government potential conflicts with the public over whether the previous board deserved to stay in place. In Serbia, the termination of the Committee was 'covered' with an extensive campaign that the Agency creation means 'stronger anticorruption'. In summary, in both cases the governments managed to get likeminded leaders appointed without open confrontation with the audiences.

8. CONCLUSION

The analysis of the Serbian and Macedonian ethics commissions has found considerable deviations between their legal and de facto independence, which ran in both directions—from low legal to high factual, and from high legal to low de facto independence. The study has also found cross-time reversals in de facto independence of commissions, triggered by their leadership changes. These findings challenge the structuralist postulate that agencies' conduct is 'hardwired' by their statutory design, contradicting prior evidence from developed contexts that ethics commissions' legal independence does determine their de facto independence (Rauh 2015).

The analysis illustrates how agency leaders can advance strategic communication (Maor et al. 2012) to mobilize stakeholders and thus develop reputational 'safeguards' against the principal's statutory intervention. This corroborates the reputational thesis (Carpenter 2001, 2014; Busuic and Lodge 2016) that agency leaders might make the watching audiences their key forum of accountability, thus weakening the principal's control by statutory instruments.

The environment in the analysed region was conducive to exploiting reputational mechanisms, because anticorruption policies commanded high salience among domestic and international audiences. The commissions were early in their life-cycle, with the citizens' interest being far from a saturation point. The international overseers, who held sway over the domestic governments, were vigilant over the governments' treatment of independent anticorruption actors. These circumstances enhanced opportunities for ethics commissions to impose audience-based accountability and override the codified principal-oriented

accountability. Whereas such a constellation might not be as replicable in developed contexts, the findings are expected to have wider implications across new democracies.

The study has also illuminated how in new democracies it is not only agents, but also their principals, who can deploy non-statutory routes to shape policy implementation. While the political appointments literature has largely focused on formal principals' appointment/removal powers, this study has illustrated cases where there are signs of politicization of agency work taken through informal networks. Delegation scholarship should place greater emphasis on the question of principals' factual attention to politicize agency appointments, and whether it increases over time, if, as seen in the analysis, an agency leader persists in drifting from the principal's preference. Further research is also needed to understand how such changing principals' priorities affect the dynamic of agency enforcement. For instance, do enforcement shifts tend to occur within or between agency mandates (when agency leaders change), and, relatedly, are such shifts abrupt or gradual? Addressing these questions would advance our understanding of leaders' 'resistance' strategies to their principals' attempts at control

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