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# Judicial review of regulatory decisions: Decoding the contents of appeals against agencies in Spain and the United Kingdom

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## Abstract

Despite the important role that courts play to supervise the legality of regulatory agencies' actions, only few comparative studies analyze the contents of judicial appeals against regulatory decisions within European countries. This paper builds on the comparative administrative law scholarship and administrative capacities literature to analyze the content of 2,040 rulings against decisions issued by competition and telecommunications regulators in Spain and the United Kingdom. To understand the substance of the appeals, the study classifies cases according to the alleged administrative principles under breach and the regulatory capacities under challenge. Findings show a clear country-sector variation regarding the information contained in judicial disputes for both dimensions of analysis, which can be explained as a result of existing differences between the institutional settings of courts. These results offer a more in depth understanding of the political role of judicial oversight over regulatory agencies embedded in different institutional arrangements and policy sectors.

**Keywords:** administrative law, competition, judicial review, regulatory agencies, telecommunications.

## 1. Introduction

The proliferation of government agencies with regulatory tasks across countries and different policy sectors has led scholars to enquire about the roles that institutional settings and administrative traditions play in the governance of regulatory authorities (Levi-Faur 2005; Gilardi et al. 2006; Jordana et al. 2011; Jordana et al. 2018). Additionally, a significant strand of the literature on regulatory governance deals with the study of the control mechanisms available for political principals to overcome the “democratic and accountability deficit” that results from the delegation of important regulatory powers of elected politicians to independent regulatory bureaucrats (McCubbins et al. 1987; Christensen & Lægreid 2004; Geradin & Petit 2012; Bovens 2007; Majone 2007; Maggetti 2010; Bovens et al. 2014; Gailmard 2014b; Koop 2015). Within the strategies available for political principals to prevent agencies from policy drift, judicial review of administrative decisions is considered an ideal mechanism to create an ongoing check on agency discretion (Rose-Ackerman 2008; Magill 2014). In most of the contemporary regulatory regimes courts are legally authorized to assess the legality of agencies' decisions when an affected party claims that an action or decision of an agency is presumably unlawful.

The political role of judicial controls in the process of policymaking has become central for the empirical research in the field of law and politics (Stone Sweet 2000; Whittington et al. 2008), which studies “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies” (Hirschl 2008, p. 119). Furthermore, under a principal-agent framework, political science literature highlights the relevance of judicial procedures to overcome the information asymmetries existing between political principals and independent regulators (Shipan 1997; Gailmard & Patty 2017; Sunstein 2017; Turner 2017).

Despite the relevance of judicial review as a supervision mechanism to control agency discretion pointed out by political science and public management scholars (Rose-Ackerman 2008; Maggetti 2010; Magill 2014; Jordana et al. 2015; Koop 2015), and regardless of the proliferation and diffusion of regulatory agencies across European

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countries since the 1990s (Majone 2001; Levi-Faur 2005; Gilardi et al. 2006; Jordana et al. 2011), only few studies have performed empirical analysis of the contents of judicial appeals against regulatory decisions in European countries, and have mostly relied on scholarship from public law and comparative administrative law (Lavrijssen & Visser 2006; Betancor Rodríguez 2010; Larouche & Taton 2011; Cooper & Kovacic 2012; Bajakić & Kos 2016; Solanes Mullor 2016; Psygkas 2017). This lack of empirical research contrasts with the extensive amount of literature generated on the study of judicial appeals against regulatory decisions in the United States courts system (Hall & Wright 2008; Pierce & Weiss 2011).

To contribute with the empirical study of judicial review of regulatory decisions, this paper performs a content analysis<sup>1</sup> of 2,040 judicial appeal rulings against decisions issued by eight regulators in the telecomm and competition jurisdictions in Spain and the United Kingdom between 2000 and 2016. The research goal is to process, analyze, and interpret the information contained in legal disputes against regulators according to two main theoretical approaches: the *substantive principles of administrative decisions* (Bignami 2012, 2016) as a framework to examine the alleged violations to the lawfulness and legitimacy of regulatory decisions, and the *regulatory capacities* approach (Lodge & Wegrich 2014; Jordana et al. 2018), to verify what are the substantive regulatory capacities under challenge. Both theoretical approaches consider the substantive features of agencies' administrative decisions to intervene in a specific policy area, which allows comparing cases across countries and policy sectors despite differences in the administrative traditions and judicial systems.

A country-sector analysis of the cases is conducted to verify if the differences between the Spanish and British legal systems and regulatory frameworks lead to dissimilar information contained in judicial appeals. The analysis is guided by two approaches that explain judicial controls of government's actions. On the one hand, it is guided by the comparative administrative law approach, which studies the legal doctrines that rule a judiciary system in order to distinguish institutions of administrative justice under the common law tradition from those rooted in the *French droit administratif* tradition (Baum, 2011; Betancor Rodríguez, 1994, 2010a; Bignami 2012, 2016; Cane 2011; Ginsburg & Wright, 2012; Solanes Mullor 2016). On the other hand, the comparative analysis is also guided by an institutional approach, which highlights how the given design of a court's system (e.g. the degree of specialization of a court or the scope of review applied by judges) determines the expected outcomes from judicial appeals (Canes-Wrone 2003; Dyevre 2010; Tapia & Cordero 2015; Gailmard & Patty 2017; Psygkas 2017; Turner 2017). Under these two approaches, findings in this paper suggest that judicial disputes against selected agencies in Spain allow a greater degree of deference to regulatory decisions concerning the technical discretion granted to regulators, and the scope of review of the courts is limited to analyze procedural aspects of an agency's decision. Meanwhile, judicial appeals against the sample of regulatory decisions in the United Kingdom are focused in reviewing the technical discretion granted to regulators.

As a roadmap for the reader, the next section presents a brief literature review and elaborates on the theoretical arguments used to construct the analytical framework for this paper, which is the base for the codebook and operationalization of variables used for the content analysis of the judgments. Section 3 describes the methodology followed to code and classify the appeal cases, as well as the criteria to select the observations under study. A country-case analysis and a discussion are provided in Section 4, and concluding remarks are presented in Section 5. Supporting evidence is available in the Appendix.

## 2. Literature review and analytical framework

Under the lenses of the principal-agent theoretical framework, judicial review is considered as one of the predominant *ex post* control mechanisms to overcome the “democratic and accountability deficit” that results from the delegation of regulatory powers from elected politicians to independent bureaucrats (Ferejohn & Shipan 1990; Geradin & Petit 2012; Bovens et al. 2014; Magill 2014; Gailmard 2014a, 2014b; Koop 2015; Gailmard & Patty 2017). Moreover, the rise and diffusion of regulatory capitalism, which has at its core the milestones of independence and delegation of relevant governance functions to regulatory agencies (Levi-Faur 2005; Gilardi et al. 2006; Jordana et al. 2011), has led administrative law scholars to enquire about how to reconcile two major aims of judicial controls: “the successful exercise of regulatory power granted to the bureaucracy and the tethering of administrative agencies to the rule of law” (Rodríguez 2008, p. 341).

Furthermore, despite the potential bias of judges and courts theorized by the literature of judicial politics (Stone Sweet 2000; Shapiro & Stone Sweet 2002; Canes-Wrone 2003; Dyevre 2010; Hönnige 2011; Brouard & Hönnige 2017), which states that courts and judges might have an individual preference or institutional constraint to rule according to a preferred legal doctrine or a political inclination,<sup>2</sup> political scientists stress the importance of judicial review as a mechanism to ensure accountability of agencies' actions to bolster "good governance" (Geradin & Petit 2012), as well as an ideal ongoing check on agency discretion because courts are "presumed to provide a neutral forum to challenge the regulatory process" (Rose-Ackerman 2008, p. 577).

The relevance of the principal-agent framework to understand the role of judicial review through the policymaking process is that judicial procedures help to overcome the information asymmetries existing between political principals and independent regulators (Shipan 1997; Gailmard & Patty 2017; Sunstein 2017; Turner 2017). The new information available as a result of the litigation process against the agency represents a unique source of evidence that can be used to assess the legality of a regulator's performance. Shapira (2016) introduces this idea in his examinations of the reputation-shaping aspects of the law and litigation in courts, arguing that information generated in courts disputes affects the way external audiences evaluate the reputation of the parties involved in a legal dispute. According to the author, "law affects our behavior not only directly by imposing legal sanctions, but also indirectly, by providing information that shapes the reputations of individuals and organizations" (p. 1193). Although the argument of Shapira refers to legal disputes between private entities in courts, it is possible to extrapolate this claim to the scenario where one of the actors implicated in the litigation is a public entity such as a regulatory agency under judicial review (Shapira, 2018). The contribution of Shapira allows a better understanding of judicial courts as a forum where regulatory agencies are exposed to reputational consequences of their actions. This idea is central to understand what makes this type of information relevant enough for political principals to assess agencies' performance.<sup>3</sup>

As mentioned previously above, the existing body of research on judicial politics and agency behavior suggests that judicial procedures help to overcome the information asymmetries existing between political principals and independent regulators, and shows that the availability of judicial review affects how agencies make policy choices. Nevertheless, despite the explanatory and predictive advantages of the principal-agent approach for the study of judicial review as a formal accountability mechanism, it is still necessary to understand what exactly the information contained in judicial texts is about and how this information can be considered as a source of information that political principals use to overcome the information asymmetries. To address this concern, this paper introduces two theoretical concepts as informational heuristics to examine the information generated in judicial review, namely: the alleged *principles of administrative decisions* under breach and the substantive *regulatory capabilities* under challenge.

The introduction of this two approaches is relevant for the analysis conducted in this paper for two reasons: on the one hand, it makes the categories comparable across countries and policy sectors (Baldwin et al. 2011; Lodge & Wegrich 2012), and on the other hand, categories respond to a "substantive rather than procedural" (Jordana et al. 2018) conception of agencies' attributions granted to intervene in a specific policy area, which facilitates the comparisons between different administrative traditions and judicial systems.

## 2.1. Principles of administrative decisions

From the administrative law tradition, the right to contest administrative decisions in court proceedings is critical for the legitimacy of bureaucracies, and this premise represents a common characteristic of judicial review mechanisms in both civil law and common law systems (Bell 2006; Bignami 2012; Gordillo 2013). According to Bignami, in both legal traditions (as well as within variations of each judicial tradition) the grounds of appeal or allegations of unlawful behavior that plaintiffs bring to courts for judicial review can be theoretically distinguished considering three types of violations to substantive principles of administrative decisions: violations to the principle of *rule of law*; to the principle of *individual rights*, and to principle of *policy rationality*. The arguments and classification of Bignami can be summarized as follows:

- 1 *Rule of law*: the task of judges is to enforce the limits of public administration and verify that bureaucracies respect the statutory attributions granted by legal acts, constitutions, or executive decrees. In this sense a violation to the principle of rule of law is associated with a failure to comply with the purposes and limits

set down in laws passed by political principals. Arguments of a breach against this principle in the text of judicial appeals usually indicate aspects like jurisdictional incompetence, purpose of the decision forbidden by law, violation of the law, error of law, inconsistency with applicable statutes, in excess of statutory jurisdiction, illegality, among other claims.

- 2 *Fundamental rights*: this principle deals with the protection of basic liberties against government actions, and is related to acts or decisions issued by public administrators which violate fundamental rights established by constitutions. An example of this type of allegations has to be with the lack of proportionality and equality of an administrative act, unfairness and abuse of power, attempts against the freedom of expression and association, the right to privacy and human dignity, personal liberties, and the right to engage in trades.
- 3 *Policy rationality*: when the existing set of rules about the discretion and limits of public administration leaves decisionmaking to bureaucratic discretion, the courts assess the legality of an administrative action based on criteria related to sound policymaking. As Bignami highlights, “rationality review picks up where legality review leaves off” (p. 14). Hence, violations to the principle of policy rationality occur when the allegations of an unlawful decision are attributed to the quality of agency reasoning or to the application of its bureaucratic discretion, usually associated with an arbitrary or capricious behavior or evidences of a manifest error of assessment.

## 2.2. Regulatory responsibilities under challenge

Regulatory capacities relate to the tasks of control and oversight from the state, and relates to “debates about the way in which units tasked with ‘regulation’ are established” (Lodge & Wegrich 2014 p. 38). Furthermore, administrative capacities involve not only the structural organization and regulatory strategies followed by the state, but also relate to resources, expertise, performance, and regulatory outcomes. The concept refers to “organization and strategies that enable the control of particular activities” (p. 40). This approach allows labeling the regulatory decisions under appeal using the classification of regulatory responsibilities proposed by Jordana et al. (2018), defined as “the main capabilities required to make agency tasks effective, based on their legal characteristics” (p. 526), such as the responsibilities of agencies to *enforce sanctions*; perform *supervision activities*; *conflict resolution*, elaborating *rules and norms*, establishing *prices*, and determine *market entries/exits*, among other activities.<sup>4</sup>

## 3. Methodology and data

### 3.1. Case selection

This paper performs a content analysis of 2,040 judicial appeal cases that challenge administrative decisions issued by the telecomm and competition regulators in Spain and the United Kingdom between 2000 and 2016 (Table 1). The sample of cases represents the total number of appeal cases that count with a final ruling, which were filed at the correspondent national court available to hear first instance appeals<sup>5</sup> against regulatory decisions:

**Table 1** Regulatory agencies under study

Sector	Country	Agency	Period of analysis
Competition	Spain	Tribunal for the Competition Defense (TDC)	2000–2007
	Spain	National Commission on Competition (CNC)	2007–2013
	Spain	National Commission on Markets and Competition (CNMC-CD)	2013–2016
	United Kingdom	Office of Fair Trade (OFT)	2000–2013
	United Kingdom	The Competition Commission (CC)	2000–2013
	United Kingdom	Competition and Markets Authority (CMA)	2013–2016
Telecomm	Spain	Commission on the Telecommunications Market (CMT)	2000–2013
	Spain	National Commission on Markets and Competition (CNMC-TD)	2013–2016
	United Kingdom	Office of Communications (Ofcom-Ofel*)	2000–2016

(\*) Considers few cases for a short period of years (2000–2003) legacy from the former telecommunications regulator: the Office of Telecommunications (Ofel).

the Administrative Chamber of the National High Court for the Spanish case, and the two courts available to hear appeals against regulatory decisions in the United Kingdom: the Competition Appeal Tribunal (CAT) and the England and Wales High Court (EWHC). Information was collected from the online databases from the Spanish National High Court (Poder Judicial de España 2017), the CAT (CAT 2017), and the British and Irish Legal Information Institute (2017) for the EWHC appeal cases. The procedure followed to collect the information is explained in Section 3.3 of this paper.

It is pertinent to make clear that the appeal judgments analyzed for this study are associated with challenges against resolutions or final decisions processed by the higher decisionmaking body of each agency (e.g. the board of commissioners, the director or the president of a regulatory agency, etc.), excluding adjudications and other procedural actions of regulators, as these are not final binding decisions. This means that for both countries, the only effective mean available for plaintiffs to challenge these types of decisions is through judicial litigation in courts.

The criteria followed to select the countries under study responds to the logic of a *most-different* case selection (Seawright & Gerring 2008) in order to perform a country-sector analysis that allows controlling for the differences between the judicial systems of each country – Common Law and Civil Law systems (Bignami 2012).<sup>6</sup> For the Spanish competition jurisdiction, the sample of observations analyzed represents the total number of rulings against decisions issued by three Spanish competition authorities. For a better reference, it is important to know that Spanish competition regulators are embodied by different agencies across the period of analysis: the Tribunal for the Competition Defense (TDC), which was eventually replaced by the National Commission on Competition as a consequence of the economic reforms introduced in Spain in 2007,<sup>7</sup> whose regulatory functions were finally transferred to the Competition Directorate of the National Commission on Markets and Competition (CNMC) in 2013 as a result of a second round of economic reforms.<sup>8</sup> Likewise, the sample of judicial appeals against regulators of the Spanish telecommunications sector under the period of study comprises legal disputes against the Commission on the Telecommunications Market (CMT) as well as the Telecommunications Directorate of the CNMC, which replaced the former regulator as a result of the same package of economic reforms that affected the Spanish competition regulator in 2013.<sup>9</sup>

For the case of the United Kingdom, the sample of appeal judgments against competition authorities under the period of study is composed of the rulings against decisions issued by three regulatory agencies with powers to enforce competition law: the Office of Fair Trade (OFT) and the Competition Commission (CC), which were eventually replaced by the Competition and Markets Authority (CMA) as a result of the Enterprise and Regulatory Reform Act<sup>10</sup> in 2013. Finally, judicial appeal cases against the United Kingdom telecommunications regulators are representative of appeals against the authority in charge to supervise the telecommunications markets, the Office of Communications (Ofcom). However, it is important to highlight that the study sample of Ofcom's appeal cases considers a short period of the legacy from the former telecommunications regulator, the Office of Telecommunications (OfTel),<sup>11</sup> which was substituted by Ofcom in 2003. Evidence for very few appeal cases against OfTel in the period between 2000 and 2003 was found,<sup>12</sup> and these cases were solved and addressed after 2003, when Ofcom was fully operative. For the purpose of this study and for simplicity of the analysis, the few appeal cases against OfTel will be considered as part of the appeals against Ofcom.

The period of time under analysis chosen for this research (2000–2016), is adequate to benchmark and consider the introduction of the European Competition Rules in 2003, which empowered Member States' competition authorities and national courts to apply all aspects of the EU competition rules. The same logic applies for the telecommunications authorities, with the implementation in 2002 of the common regulatory framework directive for electronic communications networks and services in the European Union. Furthermore, the competition jurisdiction was selected under the logic of a stable platform for comparison, considering that the source of law for both countries depart from the same European legislative act, laid down in Articles 81, 82, 101, and 102 of the European Treaty. Additionally, the telecommunications sector was chosen under the basis of the similar patterns of implementation followed by both countries to reach the regulatory goals mandated in the *Directive 2002/21/EC* (Bulmer et al. 2007).<sup>13</sup>

Finally, it is important to note a limitation concerning the sample of cases used for this study which are representative only for the cases of appeals filed in courts of first instance. Final judgments from the courts of appeal

consulted for this study (i.e. the Spanish National High Court, the United Kingdom CAT, and the EWHC) can be further appealed to higher instance tribunals, such as the Supreme Tribunal for the case of Spain, or the Court of Appeal and Supreme Court for the case of the United Kingdom. This distinction is relevant to highlight, since the findings and conclusions obtained from this research only reflect a partial understanding of appeal cases considered for this study.

### 3.2. Sample of observations

The sample under study comprises 1,846 Spanish cases, and 194 cases for the United Kingdom (Table 2). For both countries, the sample contains a higher number of appeal judgments against regulatory agencies in the competition jurisdiction than the appeals against the telecomm authorities. However, it is important to clarify that these figures only reflect the absolute value of the cases from the cases under study. In this sense, Table 2 also depicts the sample cases as an estimation of the total share of administrative decisions issued by the regulators during the same period (i.e. the set of regulatory decisions that can be appealed in courts). As noted before in Section 3.1, cases of administrative decisions are representative of final decisions issued by the agencies, related to the six categories of regulatory tasks presented in section 3.4 of this paper (i.e. sanctions, supervision, conflict resolution, norms and rulemaking, price setting, and market entries), which excludes adjudications and other procedural actions of regulators.

Overall, from the sample analyzed it is possible to observe a higher rate of appeal judgments against decisions of Spanish regulators (21%), in contrast to the rate observed for the agencies in the United Kingdom (9%). This differentiated trend in the sample is also observed if we only consider the appeal judgments in the competition sector, where the rate of appeal judgments against decisions issued by Spanish competition regulators (21%) is 14% higher than the rate observed for the competition authorities in the United Kingdom (7%). Nevertheless, despite the overall differences in the number of cases observed between countries and the competition sector, the sample of cases shows a marginal difference in the rate of appeal judgments as a percentage of the number of administrative decisions in the telecommunications sector between countries. The rate of appeal judgments observed for the Spanish telecommunications agencies (22%) is only 3% higher than the rate observed for the United Kingdom authorities in the same sector (19%).

An important limitation of the data collected for this study, concerns the fact that it is not possible to benchmark the appeal judgment cases in this sample as a share of the total number of existing appeal cases against regulatory agencies (which would also include those cases that are still ongoing, with no final decision issued by courts), which would make a more precise reference of the number of cases in this study. Limited availability of additional information that contains the universe of appeal cases against selected agencies made it difficult for the research to compile necessary information for an adequate comparative analysis.

### 3.3. Variables

Considering the theoretical explanations introduced in Section 2, the variables generated for this study are operationalized according to the following logic (see Table 3 for a detailed description):

- 1 Violations to substantive principles:** refers to the allegations of unlawful behavior contained on the grounds of appeal of judicial review judgments, which can be classified according to the three substantive principles of administrative decisions: violations of the principle of *rule of law*; of the principle of *individual rights*, and the principle of *policy rationality* (Pierce & Weiss 2011; Bignami 2012). Allegations of unlawful behavior under each category are not mutually exclusive from each other; they can be present as an individual allegation, or as a combination with other categories.
- 2 Regulatory responsibility under challenge:** this variable classifies the specific administrative act under appeal according to six regulatory responsibilities conceptualized by Jordana et al. (2018): capacities of agencies to *enforce sanctions*, perform *supervision activities*, *conflict resolution*, elaborating *rules and norms*, establishing *prices*, and determine *market entries/exits*.
- 3 Ruling Outcome:** The variable “ruling outcome” refers to the final decision in the judicial review judgments issued by the appeal courts. It indicates a judge’s ruling to either set aside an agency’s decision (quashing orders); partially accept a plaintiff’s appeal, or to dismiss the appeal. The variable proposed to

**Table 2** Distribution of cases by sector, country, agencies, and regulatory decisions 2000–2016 (N = 2,040)

Country	Years	Agency	Appeal judgments <sup>†</sup>	%	Administrative decisions <sup>‡</sup>	Appeal judgments rate (%) <sup>§</sup>
Competition Agencies						
Spain	2000–2007	Tribunal for the Competition Defense (TDC)	413	29%	2,893	14%
Spain	2007–2013	National Commission on Competition (CNC)	1,000	69%	2,717	37%
Spain	2013–2016	National Commission on Markets and Competition (CD)	29	2%	1,259	2%
		Total Competition Spain	1,442	100%	6,869 <sup>1</sup>	21%
UK	2000–2013	Office of Fair Trade (OFT)	87	74%	1,309	7%
UK	2000–2013	The Competition Commission (CC)	24	20%	166	14%
UK	2013–2016	Competition and Markets Authority (CMA)	8	6%	245	3%
		Total Competition UK	119	100%	1,720 <sup>2</sup>	7%
Telecommunication Agencies						
Spain	2000–2013	Commission on the Telecommunications Market (CMT)	371	92%	1,447	26%
Spain	2013–2016	National Commission on Markets and Competition (TD)	33	8%	410	8%
		Total Telecomm Spain	404	100%	1,857 <sup>3</sup>	22%
UK	2000–2016	Office of Communications (Ofcom-Ofel*)	75	100%	405	19%
		Total Telecomm UK	75	100%	405 <sup>4</sup>	19%
Overall cases by country			#	%	Administrative decisions	Appeal judgments rate (%)
Total cases Spain			1,846	90%	8,726	21%
Total cases United Kingdom			194	10%	2,125	9%
Total sample of cases			2,040	100%		

<sup>†</sup>Source: Own estimation with available information from national courts of appeal online resources. Competition Appeal Tribunal (2017); British and Irish Legal Information Institute (2017); Poder Judicial de España (2017). <sup>‡</sup>Source: Own estimation with available information from regulatory agencies' online resources. (Competition and Markets Authority 2019a,b); (Comisión Nacional de los Mercados y la Competencia 2019); (Office of Communications 2019a,b). <sup>§</sup>Share of appeal judgments as a percentage of the total of administrative decisions. <sup>1</sup>Administrative acts that can be appealed at the Spanish Courts under the following legal basis: Artículo 139 D.A. Cuarta, punto 3 de la Ley 29/1998 (TDC); Artículo 48. Ley 15/2007 (CNC); Artículo 36 de la Ley 3/2013 (CNMC-CD). Ley 29/1998; Ley Orgánica 6/1985; Real Decreto de Ley 1/1977. <sup>2</sup>Administrative acts that can be appealed at the United Kingdom Courts under the following legal basis: Section 46 & 47 Competition Act 1998; Section 114, 120 & 179 Enterprise Act 2002; Competition Appeal Tribunal Guides to Proceedings 2015; Competition Appeal Tribunal Rules 2015. <sup>3</sup>Administrative acts that can be appealed at the Spanish Courts under the following legal basis: Artículo 48. Ley 15/2007; Artículo 36 de la Ley 3/2013. Ley 29/1998; Ley Orgánica 6/1985; Real Decreto de Ley 1/1977. <sup>4</sup>Administrative acts that can be appealed at the United Kingdom Courts under the following legal basis: Section 46 & 47 Competition Act 1998; Section 179 Enterprise Act 2002; Section 192 and 316 Communication Act 2003; Competition Appeal Tribunal Guides to Proceedings 2015; Competition Appeal Tribunal Rules 2015. \*Five appeal cases from this sample consider the legacy from the former telecommunications regulator (Ofel), which were filed at the correspondent court of appeal between January 2000 and July 2003.

operationalize the judicial review ruling outcome is based on the literature of administrative law from the United Kingdom and Spain (Bell 2006; Cane 2011; Gordillo 2013) as well as the administrative and civil procedures to appeal administrative decisions in courts of both policy jurisdictions



**Table 3** Deductive latent coding analysis: criteria of classification for the coding units (codebook)

Coding unit (variables)	Categories	Indicators (Evidence to find in the text)
Ruling outcome	Agency's decision set aside	Resolves to make void, annul or set aside, an agency's administrative act or decision (quashing ruling).
	Appeal partially accepted	Resolves that some of the plaintiff's claims succeed, and judges might resolve to either quash part of an administrative act or instruct an agency to amend actions.
	Appeal dismissed	Resolves that all the grounds of appeal from the plaintiff's claim are thrown out.
Decision under challenge	Sanctions	Enforcement of legislation; bring criminal proceedings; impose civil financial penalties, etc.
	Supervision	Powers to investigate public interest issues, information gathering powers, interview powers, etc.
	Conflict resolution	Oral hearings, procedural complaints, settlement of disputes, etc.
	Norms & Rulemaking	Issue legally binding rules, norms, definitions, vocabularies, measurements, standards to comply with the regulation, etc.
	Price setting	References of price control matters, etc.
	Market entries	The remittances, concessions, grants, adjudications and licenses to provide public services; quotas and obligations for public services provision, etc.
Grounds of appeal	Rule of law	Unlawful decision attributed to a violation of the purposes and limits set down in laws passed by parliaments or executive decrees, for example jurisdictional incompetence; purpose of the decision forbidden by law; violation of the law, error of law; inconsistency with applicable statutes; in excess of statutory jurisdiction; illegality
	Individual rights	Unlawful decision attributed to a violation of basic liberties and rights, for example lack of proportionality and equality; unfairness and abuse of power; examples: against freedom of expression and association, the right to privacy and human dignity, personal liberty, the right to engage in trades, etc.
	Policy rationality	Unlawful decision attributed to the quality of agency reasoning and to the application of its bureaucratic discretion, for example arbitrary or capricious; manifest error of assessment.

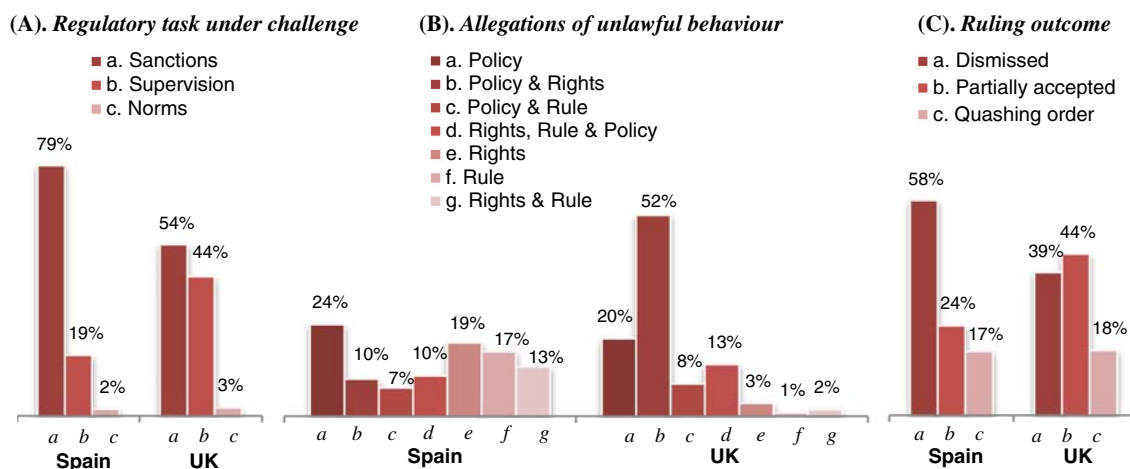
Source: own elaboration based on: Bell (2006); Cane (2004) Gordillo (2013); Bignami (2012); Tapia and Cordero (2015); Pierce Jr. (2010); Jordana et al. (2018); Lodge and Wegrich (2014).

### 3.4. Content analysis design

In order to make valid inferences from texts contained in the sample of judicial review judgments I performed a manifest content analysis of the judicial cases considering the information that was physically present and directly countable from the texts (Krippendorff 2004; Hayes & Krippendorff 2007). I preprocessed the texts to extract relevant information considering the following criteria:

- **Unit of analysis:** final judgments of judicial review of administrative decisions against selected regulatory agencies.
- **Sampling unit:** PDF documents downloaded from the sources (final judgments).<sup>14</sup>
- **Coding units:** paragraphs with information containing: a) the administrative decision under challenge; b) the grounds of appeal; and c) final verdict of the judge.
- **Recording of the coding units:** conducted as separated entries in an excel file, representing each of three types of coding units, and linked to a unique case identification.

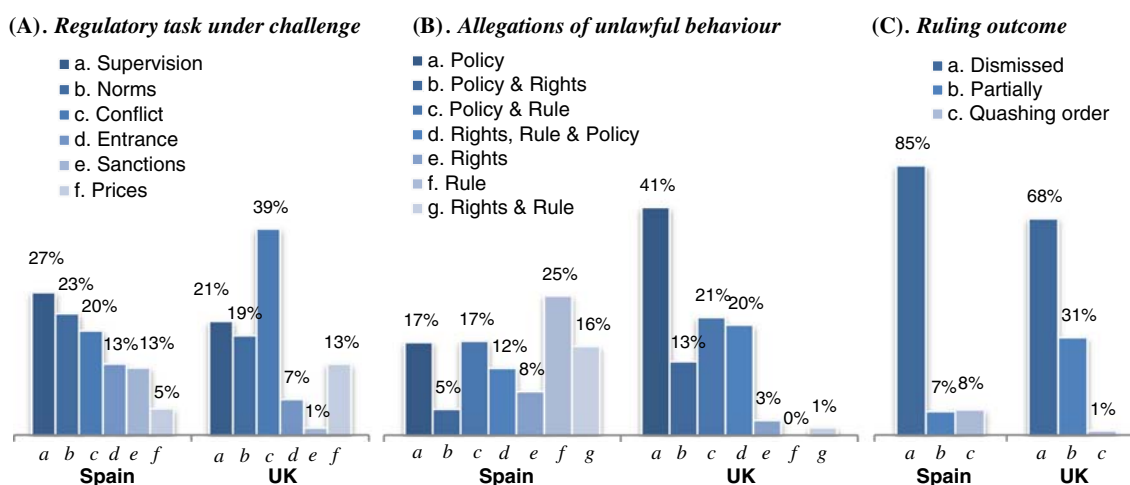
Once the relevant information of the coding units was registered under the three recording entries I conducted a deductive latent coding analysis (Krippendorff 2004) to classify the appeal cases according to the theoretical framework presented in Section 2. Table 3 displays the theoretical logic of classification for each of the possible categories in a corresponding variable.



**Figure 1** Judicial review cases against competition agencies by country and variables of interest, 2000–2016. (Spain [ $n = 1,442$ ]; United Kingdom [ $n = 119$ ]). Note: Bars represent the percentage of cases with respect the total number of judicial review judgments against competition agencies in each country and sector. Source: Own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial de España 2017).

### 3.5. Reliability checks

Due to the differences in the language of the texts under analysis, the coding of the cases was conducted by the author and validated by two student assistants with an administrative law background (one with Spanish nationality and the other a British national), following the codebook introduced previously. The classification of Spanish cases was performed by the author and the Spanish student, and for United Kingdom cases the coding was conducted by the author and the British student. The intercoder reliability agreement (Krippendorff's alpha) of the coded variables was substantially reasonable for the Spanish cases ( $0.72 < \alpha < 0.78$ ), and for the British cases, the agreement was higher ( $0.79 < \alpha < 0.88$ ). The Krippendorff's alpha was estimated using Mitnik et al. (2016) method, which computes points estimates and 95 percent confidence intervals for Krippendorff's reliability coefficient alpha, for nominal variables and two measurements. It also tests the null hypotheses that alpha is not larger than 0.67, 0.75, and 0.80, and reports the corresponding  $P$ -values. One could assume that the high rate of



**Figure 2** Judicial review cases against telecommunications agencies by country and variables of interest, 2000–2016 (Spain [ $n = 404$ ]; United Kingdom [ $n = 75$ ]). Note: Bars represent the percentage of cases with respect the total number of judicial review judgments against telecommunications agencies in each country and sector. Source: Own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial de España 2017).

agreement is due to the two rounds of feedback with coders, where the legal expertise of the student assistants helped to reshape the criteria used for the codebook. Besides, I argue that the higher values of the alphas for the British case are due to the lower sample of cases, which made the disagreement less probable to occur. The variable “ruling outcome” was the only variable classified according to the manifest content of the texts, which means that it did not follow the validity checks applied for the rest of the variables, assuming that there is no margin of interpretation for the coder (the text is explicit enough to classify cases).

## 4. Findings: Country-sector analysis

### 4.1. Competition regulators under challenge

#### 4.1.1. Regulatory responsibilities

Evidence shows that the sample of appeals against the competition regulators in Spain and the United Kingdom target three core responsibilities of these agencies: the capacity to enforce sanctions and supervision activities, as well as their statutory mandate to create norms (Fig. 1a). A first important variation between cases of both countries is the high concentration of appeals against the sanctioning responsibilities of the Spanish authorities in comparison to a more differentiated outcome observed for the challenges against United Kingdom regulators. In this sense, the statutory capacity to impose and enforce sanctions is challenged in 80% of the cases against Spanish competition agencies, while the percentage of cases against the same task for United Kingdom competition authorities is 54 percent (supervision tasks of British agencies account for the 44 percent of the cases, and only 19 percent for Spanish appeals). It is also important to highlight that very few cases in both countries aim to challenge the norms creation capacities of competition authorities (2 percent in Spain and 3 percent in the United Kingdom).

#### 4.1.2. Principles of administrative decisions

A second relevant variance between the sample of cases for both countries comes from the allegations of unlawful behavior against competition agencies. Almost the totality of cases against United Kingdom regulators encompasses violations to the administrative principle of *policy rationality* (Fig. 1b), while this principle is recalled in half of the cases against agencies in Spain. Furthermore, an additional highlight from this analysis is a country similarity in the second major component of the allegations of unlawful behavior. Grounds of appeal of cases against Spanish and United Kingdom competition agencies are more likely to contain violations to the administrative principle of *fundamental rights*.

#### 4.1.3. Ruling outcomes

A third country distinction relies on the ruling outcome of the appeal judgments. More than a half of appeals against Spanish competition authorities (58 percent) do not result in an adverse ruling for the regulators (Fig. 1c). A total of 17 percent of the cases against Spanish regulators face a *quashing ruling*, and the rulings in 25 percent of the cases indicate that some of the plaintiff's claims are *partially accepted* by the courts. In contrast to what happens in Spain, cases against United Kingdom regulators result in a greater number of appeals that were not dismissed by the judges (62 percent), nevertheless the percentage of *quashing rulings* is similar to those in Spain (18 percent), which means that rulings against competition regulators in the United Kingdom mostly consist of the category of *appeals partially accepted* (44 percent).

### 4.2. Telecomm regulators under challenge

#### 4.2.1. Regulatory responsibilities

Information collected for appeals against authorities of the telecommunications sector contains three additional regulatory tasks to those observed in the competition sector: *conflict resolution*, decisions on *market entries*, and setting *prices* (Fig. 2a). A first reading of the data suggests that in both countries, regulators are more likely to face challenges to their capacities to perform *supervision* activities; their statutory mandate to create *norms*, and *conflict resolution*. However, it is possible to distinguish two main country differences from the sample of cases: the high number of appeal concentrated against the *conflict resolution* capacity of the British telecomm regulator, and a less concentrated set of appeals against the capacities of Spanish regulators. It is also worth to note a variance in the number of cases that telecomm regulators face in the dimension of *sanctions*, as only a single case against

**Table 4** Variable outcomes for cases of unlawful behavior for selected regulatory agencies

Country	Years	Agency	Total cases	Lost cases		Partially‡		Total lost§		Most affected regulatory task	Most affected principle of administrative decisions
				Quashing†							
				#	%	#	%	#	%		
Competition cases											
Spain	2000–2007	Tribunal for the Competition Defense (TDC)	413	21	5%	31	8%	52	13%	Sanctions	Policy rationality, Fundamental rights, and Rule of Law
Spain	2007–2013	National Commission on Competition (CNC)	1,000	223	22%	314	31%	537	54%	Sanctions	Fundamental rights and Rule of Law
Spain	2013–2016	National Commission on Markets and Competition (DC)	29	7	24%	6	21%	13	45%	Sanctions	Fundamental rights
UK	2000–2013	Office of Fair Trade (OFT)	87	19	22%	42	48%	61	70%	Sanctions	Policy rationality and Fundamental rights
UK	2000–2013	The Competition Commission (CC)	24	1	4%	6	25%	7	29%	Supervision	Policy rationality
UK	2013–2016	Competition and Markets Authority (CMA)	8	1	13%	4	50%	5	63%	Supervision	Policy rationality and Fundamental rights
Telecommunications cases											
Spain	2000–2013	Commission on the Telecommunications Market (CMT)	371	30	8%	29	8%	59	16%	Conflict, Norms & Supervision	Rule of Law
Spain	2013–2016	National Commission on Markets and Competition (TD)	33	2	6%	1	3%	3	9%	(Not clear, few unlawful cases)	(Not clear, few unlawful cases)
UK	2000–2016	Office of Communications (Ofcom)	75	1	1%	23	31%	24	32%	Conflict	Policy rationality

<sup>†</sup>Court of appeal resolves to make void, annul or set aside, an agency's administrative act or decision. <sup>‡</sup>Court of appeal resolves that some of the plaintiff's claims succeed, and judges might resolve to either quash part of an administrative act or instruct an agency to amend actions. <sup>§</sup>Sum of <sup>†</sup> and <sup>‡</sup>. *Source:* own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial de España 2017).

the British regulator aims to challenge this task, compared with the 13 percent of the cases against the same task for Spanish regulators.

#### 4.2.2. Principles of administrative decisions

As happened in the competition sector analyzed previously, another relevant variance between countries comes from the allegations of unlawful behavior contained in appeal cases of the telecommunications sector among countries. Most of the cases against the Spanish regulators contain allegations against violations to the administrative principle of *rule of law*, while there is a dominant trend of allegations of violations against *policy rationality* in appeal cases against the British regulator (Fig. 2b). Besides, different to what happens in the competition realm, grounds of appeal against Spanish competition agencies are more likely to contain violations to the administrative principles of *policy rationality* and *rule of law*, meanwhile United Kingdom authorities face more allegations related to breaches to the principles of *policy rationality* and *fundamental rights*.

#### 4.2.3. Ruling outcomes

Very few cases from the sample under study consist of adverse rulings against the telecommunications regulators in Spain in contrast to what happen in rulings of appeals against agencies in the competition sector in the same country, as 85 percent of the cases are dismissed by courts (Fig. 2c). Same situation occurs for the appeals against the British telecommunications regulator, as only one in three cases results in an adverse ruling against the regulator, and only one single case reveals a quashing *ruling* against the agency's actions.

### 4.3. Agencies' unlawful behavior

The analysis performed previously showed the distribution of judicial appeals against selected regulatory agencies according to the three variables under analysis. It is now necessary to portrait the appeal judgments according to a confirmed "unlawful behavior," that is, cases where regulatory agencies faced an adverse ruling from courts (either a *quashing ruling* or a plaintiff's claim *partially accepted* by judges), leaving out those cases where a plaintiff's claim was *dismissed* by courts. Table 4 depicts the total number of appeal cases against regulatory agencies, as well as the rate of appeals where the plaintiffs were unfavorable for the regulator. Furthermore, the table shows the main features of unlawful behavior contained in the appeals, pointing out which are the most affected regulatory tasks and principles of administrative behavior (a detailed description of each regulatory agency can be found in the Appendix attached to this paper).

Evidence confirms a clear distinction of unlawful behavior between countries concerning the regulatory capacities under appeal (which is consistent with the findings of Sections 4.1 and 4.2). Spanish competition agencies generally face adverse ruling outcomes against their capacities to enforce *sanctions*, meanwhile there is a differentiated pattern observed among United Kingdom competition regulators, as most of the cases of unlawful behavior of the OFT are associated with its capacity to impose *sanctions*, while the unlawful cases against the CC and the CMA are related to their *supervision* responsibilities. In the Spanish telecommunications sector, the greater share of unlawful cases is distributed among the dimensions of *conflict*, *norms*, and *supervision*. For the case of the British telecomm regulator, the higher percentage of unlawful behavior is concentrated on the *conflict resolution capacity*.

The distinction between countries is even stronger if we consider the most affected principles of administrative decisions observed in the unlawful cases. On the one hand, there is a clear trend of violations against the *policy rationality* principle for the three United Kingdom competition regulators under study, meanwhile for Spanish regulators this same trend is observed only for the case of the TDC, and is highly concentrated on the violations against the *rule of law* and *fundamental rights*. On the other hand, in the telecomm jurisdiction, the unlawful behavior of the United Kingdom Ofcom is mainly attributed to violations to the *policy rationality* principle, in contrast to what happens with the unlawful behavior of the Spanish CMT where the most affected principle of administrative decisions is related to violations to the *rule of law*.

## 5. Discussion: Understanding country differences

The motivation of this study is to contribute with a better understanding of how judicial procedures help to overcome the information asymmetries existing between political principals and independent regulatory agencies. In particular, this research aimed to process, analyze, and interpret the information contained in legal disputes against regulatory decisions under a comparative perspective, in order to understand if different legal traditions lead to differences in the information generated through judicial challenges to regulators' actions. This section aims to discuss the two most relevant empirical findings of the research, concerning the country differences observed in the volume of cases and the scope of review applied by the corresponding appeal courts. Furthermore, the section argues how these findings contribute with the existing literature that studies the political role of judicial controls over regulatory agencies.

### 5.1. Volume of cases

Recalling the information given in Section 3.2 (Table 2), the evidence collected for this research shows a higher number of appeal judgments against regulatory decisions of Spanish regulators in contrast to what happens with the United Kingdom's sample of cases. Even though it is not possible to confirm from the data available that a higher level of litigation against regulatory decisions happens in Spain vis-à-vis the United Kingdom (due to the sample limitations defined in Section 3.2), it is still feasible to offer some explanations of why the evidence collected observes country differences in the number of cases. The first explanation offered is theoretical. Under the comparative administrative law approach, the information obtained from the share of cases is consistent with the premises that distinguish judiciary systems of administrative justice under the common law tradition from those rooted in the French *droit administratif* tradition (Cane 2011; Bignami 2012, 2016; Solanes Mullor 2016). The latter type of judiciary system, such as the Spanish case where public administration is highly centralized by the state, is subject to tougher administrative control over bureaucrats, leading to a higher number of legal disputes and litigation over decisions of the government (Betancor Rodríguez, 2010a; Solanes Mullor 2016), while the degree of judicial litigation in the common law system such as the United Kingdom is lower, associated to a more decentralized government administration style (Cane 2011).

Second, as a complement of the argument presented beforehand, it is important to highlight those aspects related to the selected sample under study that could be affecting the difference between countries. As explained in Section 3.1, the sample of cases represent appeal judgments that count with a final ruling, which for the case of the United Kingdom cases leaves out appeals where the CAT or the EWHC encouraged or facilitated the use of alternative dispute resolution procedures once an appeal has been notified (such as settlement offers between parties, which can lead to a withdrawal of a plaintiffs' claim). These types of procedures are not accounted as final ruling outcomes for the purpose of this research, as it would be difficult to adapt in the comparative research design (these kind of judicial procedures are not common in Spanish courts).

Another example of court rules which might lead to a lower number of judgments in the United Kingdom is the CAT procedure where judges allow third parties who are sufficiently interested in the outcome of proceedings the right to be heard (intervene) and assist the Tribunal, which possibly would reduce the need for affected parties to start additional appeals against regulatory decisions (also not common in Spanish procedures). In this respect, within the sample of the United Kingdom appeal judgments filed at the CAT, 34 percent of the appeal cases against competition authorities and 82 percent of cases against telecomm agencies contain interventions from third parties (see Table A10 in the Appendix for a better reference).

Related to the plaintiffs involved, an important feature from the cases in the sample that could also contribute to explain the higher number of Spanish cases is the distribution of cases that involve single or multiple plaintiff judgments. Single plaintiff cases are observed in 96 percent of the competition cases and 98 percent of the telecommunication cases from the Spanish sample (Table A11 in the Appendix), meanwhile the share of single plaintiff cases are considerably lower for the United Kingdom cases (82 and 79 percent, respectively, for each sector). From the evidence collected it is not clear if the number of plaintiffs involved in the judgments is a result of the workload administration of courts (where judges might decide to group cases into a single judgment due to the affinity of the disputes), or an outcome that results from the motivation of plaintiffs to act as a group; however,

this aspect gives an additional clue of the country differences in the number of appeal judgments observed in the sample.

Despite the limitations of the sample under study, it is possible to argue that third-party intervention procedures and the lower number of single plaintiffs observed for the United Kingdom cases could be associated to the low incentives that regulated entities have to appeal regulatory decisions. A public consultation to reform the United Kingdom's appeal regime, conducted by the government in 2013, concluded that some features of the appeals framework make it more difficult for smaller or less well-resourced parties to bring an appeal. According to the consultation, "across most [regulatory] sectors there is the scope for appeals to be wide-ranging, lengthy and costly" (Department for Business Innovation & Skills 2013 p. 23). This might push appeal courts to accept third-parties intervention to avoid the significant time and costs that a judgment entails for all parties and open access to smaller plaintiffs, as well as encouraging the use of alternative dispute resolution procedures to secure the expeditious and economical conduct of the proceedings, as suggested by the CAT Rules and Guidance.

## 5.2. Scope of review

A second relevant empirical finding from the evidence collected for this study confirms the generalist vs. specialist assumption posed beforehand: litigation against agencies in Spanish generalist courts allow a greater degree of deference to regulatory decisions concerning the technical discretion granted to regulators, and the scope of review is commonly limited to scrutinize procedural aspects of an agency decision (coded in this research as rule of law and individual rights principles). Meanwhile the specialist characteristic of the CAT in the United Kingdom, makes litigation against regulatory decisions substantially more concentrated in reviewing the technical discretion granted to regulators (i.e. an assessment of the policy rationality principle). Furthermore, appeals against United Kingdom regulators challenge a more differentiated set of regulatory tasks compared with cases against Spanish regulators.

These findings can be better understood as a result of two situations: whether the legal system of courts of appeal is specialized or generalist, and the scope of the review that judges might apply to assess a judicial appeal (Tapia & Cordero 2015). As Tapia and Cordero argue, if the reviewer is a generalist court – as it happens in Spanish courts – it will probably have an incentive to be deferential to a regulatory agency decision and the scope of review should only extend to questions of law – that is, fundamental rights and rule of law – to avoid interfering with the discretion granted to regulators in terms of policymaking. If the court is a specialized one – as the CAT in the United Kingdom – the incentives to be deferential to the regulator's decision will be scarce. In the latter case, "the scope of the review should not be restricted, in order to not reduce the benefits of specialization" (p. 8), and this would promote the scrutiny of agencies decisions under a policy rationality principle.

This argument helps to understand the generalist approach of Spanish courts (Solanes Mullor 2016), which allows less judicial challenges to the policy rationality principle, compared with the outcomes in the United Kingdom, where the challenges to regulators are substantially concentrated in such principle (Psygkas 2017). Besides, the more generalist style of judges in a generalist setting like the Spanish legal system could possibly explain why we observe a higher rate of dismissed ruling outcomes cases in Spain in contrast to what is observed in the United Kingdom. Finally, country-differences observed between the regulatory tasks can also be understood as the degree of specialization of courts, which may allow assessing tasks that require a higher degree of technical knowledge, for example, the higher cases that challenge supervision tasks from the United Kingdom competition regulators, in contrast to authorities in Spain, who concentrate mainly in the legality of sanctioning tasks of the regulators.

These series of findings are aligned with the outcomes from other empirical studies that study judicial appeals against regulatory agencies. For example, for the United Kingdom context, Psygkas (2017) demonstrates the effects of the "double helix" type of review, which allows the United Kingdom CAT to decide within the same legislative framework as the regulators do, and exercise similar statutory capacities conferred to agencies, without losing the benefit of procedural review. Furthermore, (Lavrijssen & Visser 2006) show in their analysis that judicial controls of the CAT concerning decisions issued by the OFT and Ofcom range from an intensive degree of review (where the matter is quashed but remitted back to the regulators), to extremely intense (where the CAT acts as a second regulator, with a final say on how a regulatory decision should be issued).

For the Spanish case, previous work from Solanes Mullor (2016, 2018) confirms the findings in this paper concerning the idea that unlawful behavior from Spanish agencies is most commonly associated with the violations against the principles of rule of law and fundamental rights rather to the policy rationality principle. Solanes Mullor argues that the emergence of independent regulatory bodies in Spain has not led to a rethinking of the traditional formalistic techniques of judicial control of public administration, and in consequence, Spanish courts have adopted a position of deference based on the technical nature of agencies' decisions, rejecting the techniques of formalistic judicial controls.

How does these findings contribute to the scholarship that studies the political role of judicial controls in the regulatory policymaking process? Overall, if one considers judicial review as one of the predominant *ex post* control mechanisms to overcome the potential "policy drift" from independent regulatory agencies, this research contributes with the literature that studies the role of courts under a principal-agent approach (Shipan 1997; Gailmard & Patty 2017; Sunstein 2017; Turner 2017). Considering this theoretical approach and the empirical results in this research paper, it is possible to show that the information generated through judicial appeals against regulatory decisions in the United Kingdom is closer to the theoretical idea that judicial review operates as a mechanism to overcome principal-agent information asymmetries that derive from the technical expertise from regulators, as the specialized courts allows to scrutinize violations to the policy rationality principle. On the other hand, this scenario is less likely to occur at the generalist type of Spanish courts, where agencies' technical statutory mandate is less scrutinized by courts, making it difficult to challenge regulators according to the policy rationality principle, hence less control over a regulator's discretion.

This contribution is of particular relevance because it helps to clarify what type of information about an agency's performance would be necessary to obtain from judicial review mechanisms, so that these procedures translate into an effective instrument to overcome the principal-agent information asymmetries predicted by this approach. Furthermore, these findings highlight an interesting issue that contravenes the conventional common law/French *droit administratif* distinction posed beforehand. Despite the tougher administrative control over bureaucrats observed by the Spanish judicial system, and the higher degree of litigation over administrative decisions, the supervision controls of the judiciary over regulatory agencies analyzed in this study are not commonly employed as a mechanism to control the discretion of the regulators. Meanwhile, cases against administrative decisions of agencies in the United Kingdom – where a more decentralized government administration style allows a lower degree of litigation – are mostly employed as a device to control agencies technical discretion. From the evidence collected in this research, it is possible to argue that the country differences concerning the degree of scrutiny of the technical discretion of independent agencies are not only dependent on the judiciary tradition of each country, but also dependent on how the judicial system interacts with the specialist or generalist organizational setting of courts (Lavrijssen & Visser 2006; Tapia & Cordero 2015), and the specific features of the sector under regulation. Further empirical research could usefully explore what are the characteristics of appeal cases that lead to a higher or lower degree of judicial scrutiny of technical discretion of independent agencies (e.g. policy sector, regulatory task under challenge, type of plaintiff) as well as how the interaction between the legal traditions and organizational setting of courts (specialists or generalists) in other countries determines the degree of deference that judges might have toward administrative decisions of regulators.

These findings also have implications for the understanding of the premises of judicial politics literature, where ruling outcomes of judges are theorized as function of individual preferences and institutional constraints (Stone Sweet 2000; Shapiro & Stone Sweet 2002; Dyevre 2010; Hönnige 2011). It is possible to argue that the political role of Spanish judges within the regulatory policymaking process is much more limited by the institutional constraints of the legal system (restricted to review the compliance with rule of law or individual rights principles). Meanwhile judges in the United Kingdom system of courts have less institutional barriers to scrutinize the policy rationality principle of administrative actions, which might generate incentives for judges to rule according to a preferred legal doctrine or political motivation.

Finally, these results add to the rapidly expanding literature of bureaucratic reputation (Carpenter 2010; Carpenter & Krause 2012; Wæraas & Maor 2014; Gilad et al. 2015; Shapira 2016; Boon et al. 2019; Busuioc & Rimkutė 2019). A central premise of this approach contends that agencies have different reputational spheres that delimit its organizational image (i.e. *performance*, *technical competence*, *morality*, and *procedural fairness*), and the regulatory power of an agency is related to how audiences perceive its organizational uniqueness as regulation



policymaker. In this sense, an agency's reputation will be under threat if administrative courts of appeal emerge as an alternative institutional forum to decide on regulatory tasks, which correspond uniquely to regulatory agencies. Under this approach, if we consider that judicial courts act as a forum where regulatory agencies are exposed to reputational consequences of their actions, then the *procedural fairness* dimension of an agency's reputation would be affected (i.e. the justness of the processes by which an agency's behavior is generated). However, from the findings of this research, it would be also possible to argue that, due to the scope and intensity of review of United Kingdom courts, the *technical* reputation of agencies (i.e. scientific accuracy, methodological prowess, and analytic capacities) could also be exposed in a greater measure than Spanish agencies.

## 6. Concluding remarks

This paper set out to analyze the content of judicial appeals filed against selected regulatory agencies in order to examine what the allegations of unlawful behavior against regulators are and what type of administrative decisions are generally under challenge, as well as to understand if different legal traditions lead to differences in the information generated through judicial challenges to regulators' actions. Findings suggest clear variations between the information contained in appeal judgments against regulatory agencies in Spain and the United Kingdom, as well as differences within regulated sectors of each country. Evidence collected shows that Spanish agencies faced a higher number of appeal judgments in comparison to the United Kingdom regulators under the period of study. Furthermore, data available confirms the differentiated patterns of review of the United Kingdom CAT vis-à-vis the Spanish National High Court, where the former pattern is associated with scrutinizing the substance and rationality of the regulatory decisions, and the latter is most commonly focused on the legality of the procedural standards followed by regulators.

Despite its exploratory nature, this study offers some insight into an explanation of the information about the behavior of regulatory agencies generated through judicial disputes, which arguably is highly dependent on the legal and administrative traditions that rule the system of courts of a polity, as well as the generalist or specialist features of courts and judges. Although the current study is based on a small sample of countries and regulated sectors, this research contributes with a better understanding of how judicial review translates into sensitive information useful for political principals to evaluate the legitimacy of regulatory agencies' policy choices under different institutional environments.

As a concluding remark, it is relevant to highlight that there are still many aspects to analyze regarding the content of judicial appeals which would offer a much better panorama of the information generated through judicial review appeals. As mentioned before in this paper, an important limitation of this study is the lack of information about decisions issued by higher instance courts of appeal, which could overrule a final judgment from first instance courts. Further research should be undertaken to analyze appeal cases from higher tribunals, as well as to explore the length of the tenure and decision record of judges; the characteristics of the plaintiffs, and the litigation capacities of agencies to face judicial appeals in courts.

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## Endnotes

- 1 I would like to clarify that I use the concept of “content analysis” due to the research method I conducted to collect the information and perform valid classifications of the texts (explained in Section 3.3). The method I use is a “deductive latent content analysis of texts” (Krippendorff 2004; Hayes & Krippendorff 2007), and this method derives a theoretical classification that leads to valid inferences about the content of texts. In order to follow the procedures of the method, I performed thorough investigation into the content matter of the texts, so that I could understand the substance of every appeal claim, conduct a validated classification and define comparable categories between countries. However, I am not analyzing the theses and doctrines of review of the judges, neither the behavioral attitudes of the judges. I am analyzing the outcomes to empirically understand what the rulings are about according to the theoretical classifications I propose.
- 2 Dyeve (2010) identifies three models of judicial decision-making represented in the literature of American and European courts. On the one hand, (i) the attitudinal model, which refers to judges’ brute individual policy preferences. On the other hand, two types institutional models are identified, which consider judges as “policy seekers” constrained by their institutional environment; (ii) the institutional internalist model which portrays judicial decisionmaking as a collegial game; and (iii) the institutional externalist model which emphasizes that judicial decisionmaking process is a function of the interactions between the court and its political environment.
- 3 Carpenter (2010) defines an organization’s legal-procedural reputation as the “justness of the processes by which its behavior is generated.” The concept is related to the validity, fairness, and legality of an agency’s actions, in line with the statutory responsibilities granted by the political principals. According to Carpenter, a central prediction of a reputation-based account of regulation argues that an agency’s decision will have an irreversibility cost attached to it, meaning that once the decision is taken it will be difficult for the regulator to go back on the decision without serious consequences for the agency’s reputation, a situation that “can call the attention of different audiences to the agency’s error” (p. 68). This theoretical implication supports the argument that an unfavorable outcome from the courtroom might have a reputational implication on the organizational uniqueness of an agency, as administrative courts of appeal would emerge as alternative institutional forum to decide on regulatory tasks which corresponded uniquely to regulatory agencies. As a consequence the regulatory policymaking discretion power granted by political principals would be undermined, pushing regulation into the arena of judicial politics.
- 4 The categories from Jordana et al. (2018) used in this paper are six: enforce sanctions; perform supervision activities; conflict resolution, elaborating rules and norms, establishing prices, and determine market entries/exits.
- 5 For the purpose of this research, I use the term “appeals” as a generic term to refer to the sample of cases analyzed for both countries. For the case of Spanish cases, it refers to administrative appeals (*juicios contencioso-administrativos*) held at the administrative appeal chamber of the Spanish National High Court (*Audiencia Nacional*). However, for the sample of cases from the United Kingdom, an important distinction should be clarified to the reader, concerning the differences between the concepts of “judicial review” and “appeals,” as both types of procedures are conducted by the United Kingdom courts under study. According to Cane (2011), the United Kingdom legal system distinguishes the court’s “supervisory jurisdiction” powers of judicial review (review proceedings) from “appellate jurisdiction” powers (appeal proceedings). The main difference between these two legal proceedings is that appeal proceedings relate to the power of a court, where judges may substitute their decision “on the matters in issue for that of the body appealed from” (p. 29). Meanwhile “in review proceedings, the court’s basic power is to ‘quash’ the challenged decision, that is, to hold it invalid” (p. 30). A second distinction between appeal and review proceedings, relates to the subject matter of the court’s jurisdiction. A court exercising an appeal proceeding has power “to decide whether the decision of appeal was ‘right’ or ‘wrong’, while a court exercising a review proceeding only has power to decide whether or not the decision under review was legal or ‘lawful’ (if the decision is illegal, it can be quashed, otherwise the court cannot intervene)” (pp. 30–31).
- 6 For the purposes of this research I understand these differences as a result of two situations: whether a court of appeal is specialized or generalist, and the scope of the review that judges might apply to assess a judicial appeal (Tapia & Cordero 2015).
- 7 The reform to the Spanish competition authorities was introduced by the Defense of Competition Law 15/2007 (Ley 15/2007 de 3 de julio, de Defensa de la Competencia), aiming to strengthen the institutional mechanisms to enforce the law; to take into account the new European Union regulatory system, as well as to redefine the supervision role of the Spanish Autonomous Communities. The reform enabled important changes to strengthen the capacities of the CNC to execute three types of regulatory instruments: the applicable regulation to oversee and enforce penalties for restrictive competition practices; principles and rules of the regulation to control mergers; and the competences of the CNC to issue competition reports and addressing recommendations to the public authorities. Furthermore, according to the Law 15/2007 main objectives, the creation of the CNC is motivated by five principles: guarantee of the legal certainty of

economic operators, independence of decisionmaking, transparency and responsibility to society of the administrative bodies responsible for the application of the Act, efficacy in the fight against conduct restrictive of competition, and the search for consistency of the whole system and, in particular, for the adequate interdependence of the various institutional planes that interact in this field.

- 8 The introduction of the Law 3/2013 established the creation of the National Commission of Markets and Competition (Ley 3/2013, por la que se crea la Comisión Nacional de los Mercados y la Competencia), entitled to group the regulatory functions of the Spanish Competition Commission and seven sector regulatory agencies: the National Energy Commission, the Telecommunications Market Commission, the Railway Regulation Committee, the National Commission of the Postal Sector, the Airport Economic Regulation Commission, and the State Council of Audiovisual Media. The new authority merged the activities of the agencies into a hybrid system of regulatory functions: enforcing competition rules and regulating economic sectors according to the unity of the markets mandate established in the Law 20/2013 (Ley 20/2013, de garantía de la unidad de mercado). A Council of 10 members operates as a decision making body, divided into two main chambers: the Competition Chamber entitled to enforce competition law, and the Regulatory Chamber responsible for the supervision and regulation of economic sectors. It is important to highlight that the regulatory functions and regulatory tasks concerning competition law supervision and enforcement of CNMC remain the same as those established in the Law 15/2007, which previously ruled the action of the former competition regulator in Spain (the CNC).
- 9 With the creation of the CNMC, the supervision and regulatory functions previously executed by the CMT were inherited by the new agency. However, according to the Telecommunications Law 9/2014 (Ley 9/2014, General de Telecomunicaciones) a reorganization of tasks conducted previously by the CMT resulted in the reassignment of three administrative activities formerly executed by the CMT to the Spanish Ministry of Industry, Trade, and Tourism: registration of telecommunication network operators; telecommunication networks naming, addressing, and numbering policies; and management and collection of telecommunications fees (Ortiz 2014).
- 10 Among other policy objectives, according to the introductory paragraph of the legislation, the Enterprise and Regulatory Reform Act aimed to “establish and make provision about the Competition and Markets Authority and to abolish the Competition Commission and the Office of Fair Trading; to amend the Competition Act 1998 and the Enterprise Act 2002 [and] to make provision for the reduction of legislative burdens.” Furthermore, the relevant government’s goals that motivated merging the regulatory functions of the CC and the OFT into the CMA are the following: deliver effective enforcement of competition rules; extend competition frontiers; refocus consumer protection; develop integrated performance; and achieve professional excellence. An important enhanced task granted to the CMA is related to the concurrent powers of decision with existing sector regulators. The CMA will cooperate with the sector regulators, encouraging the regulators to be more proactive in their use of the concurrent competition powers. As part of its enhanced leadership role, the CMA will have the power to decide which body should lead on a case (Competition and Markets Authority 2013).
- 11 The telecommunications Act 1984 established the Office of Telecommunications (Ofotel) as the regulator of the telecommunications industry in the United Kingdom. Ofotel was abolished by the 2003 Communications Act, and its functions were transferred to the Office of Communications (Ofcom). Furthermore, appeals against the telecommunications regulator in the United Kingdom before 1 April 2003 were deemed to be made either to the England and Wales High Court or at the Competition Commission Appeal Tribunal (the predecessor of the Competition Appeal Tribunal).
- 12 To consider the 3 years legacy of Ofotel in my sample, I searched for existing appeal judgments (final rulings) against Ofotel decisions from the England and Wales High Court or the Competition Commission Appeal Tribunal for the period between 2000 and April 2003. No public information indicates additional evidence of cases to consider in the sample under analysis. However, two cases from the sample under analysis refer to appeals against decisions issued by Ofotel, which were originally filed at the filed at the Competition Commission Appeal Tribunal and eventually judged by the Competition Appeal Tribunal. Besides, during a transitional period between July and December 2003, the Director of Ofotel was empowered to carry out telecommunications functions (Transitory Provisions of The Enterprise Act 2002). In this sense, three appeal cases in my sample refer to judgments of appeals against administrative acts issued by the Director of Ofotel during the mentioned transition period. These cases can be consulted in the Competition Appeal Tribunal website (<https://www.catribunal.org.uk/cases>), under the file numbers: 1007/2/3/02; 1026/2/3/04; 1025/3/3/04; 1027/2/3/04; 1024/2/3/04.
- 13 Of course, one can argue that the financial services sector is even more similar between both countries, but this sector is not considered as this research aims to understand appeals against public utilities regulators. Besides, sectors like energy, transport, and postal services could also fall into the criteria for selecting a sector, but those are less stable comparative platforms for the purpose of this research due to differences in the implementation processes conducted by each country to adapt the regulatory European Directives into their regulatory frameworks (Bartle & Vass 2007).
- 14 Source Spanish cases: Poder Judicial de España (2017). Criteria of search online: Jurisdicción = Contencioso; Tipo Resolución = Sentencia; Tipo de órgano = Sala de lo contencioso; Texto libre: Comisión Nacional de la Competencia;

Comisión Nacional; Comisión Y Nacional Y Competencia; Comisión del Mercado de las Telecomunicaciones; Comisión Y Mercado; Comisión Y Mercado Y Telecomunicaciones; Comisión Nacional de los Mercados y la Competencia; Comisión y Mercados y Competencia. Source United Kingdom cases: Competition Appeal Tribunal (2017) & British and Irish Legal Information Institute (2017). Period of time considered for the consultation: 1 January 2000 to 22 December 2016.

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## APPENDIX

Tables depict the total number of judicial review appeals against agencies, classified in first place according to percentage of cases that fall in each of the categories of the ruling outcome from courts (i.e. *appeal dismissed*, *appeal partially accepted*, and *quashing orders*). In second place, the information from each category of the ruling outcome variable is grouped according the share of cases that fall into the correspondent regulatory task under challenge. Finally, for each *ruling-task* dyad presented in the tables, three scores are introduced to depict the share of cases that fall into each of the types of allegations of unlawful behavior, portrayed as P = violations against the *Policy rationality* principle; F = against the *Fundamental rights* principle, and R = against the *Rule of law* principle (let us remember here that these categories are operationalized as not mutually exclusive from each other, meaning that the sum of the three scores does not equals 1).

**Source** Tables : own estimations with information from the online information of United Kingdom Competition Appeal Tribunal (2017), the British and Irish Legal Information Institute (2017), and the Spanish Administrative Appeal Chamber of the National Audience (Poder Judicial de España 2017).

Table A1 Spanish Tribunal for the Competition Defense (TDC)

Ruling	%	n	Sanctions	Supervision	Norms
Dismissed	87%	361	82% P = 0.51 F = 0.37 R = 0.31	17% P = 0.76 F = 0.14 R = 0.14	1% P = 1 F = 1 R = 1
Partial	8%	31	93% P = 0.45 F = 0.51 R = 0.31	7% P = 1 F = 0.5 R = 1	0%
Quashed	5%	21	100% P = 0.52 F = 0.19 R = 0.52	0%	0%
Total TDC	100%	413			

Table A2 Spanish National Commission on Competition (CNC)

Ruling	%	n	Sanctions	Supervision	Norms
Dismissed	46%	463	59% P = 0.47 F = 0.63 R = 0.54	37% P = 0.55 F = 0.37 R = 0.45	4% P = 0.35 F = 0.3 R = 0.75
Partial	31%	314	91% P = 0.54 F = 0.71 R = 0.56	8% P = 0.62 F = 0.5 R = 0.66	1% P = 0.66 F = 0.33 R = 0
Quashed	22%	223	96% P = 0.46 F = 0.62 R = 0.56	3% P = 0.57 F = 0.28 R = 0.43	1% P = 0.5 F = 0.5 R = 0.5
Total CNC	100%	1,000			

Table A3 Spanish National Commission on Markets and Competition (CNMC)

Ruling	%	n	Sanctions	Supervision	Norms
Dismissed	55%	16	18% P = 0.33 F = 0.66 R = 1	56% P = 0.11 F = 0.55 R = 1	25% P = 1 F = 0 R = 1
Partial	21%	6	100% P = 0.66 F = 0.83 R = 0.33	0%	0%
Quashed	24%	7	86% P = 0 F = 0.83 R = 0.16		14% P = 1 F = 0 R = 0
Total CNMC	100%	29			

**Table A4** United Kingdom Office of Fair Trade (OFT)

<b>Ruling</b>	<b>%</b>	<b>n</b>	<b>Sanctions</b>	<b>Supervision</b>			<b>Norms</b>		
Dismissed	29%	26	50%	P = 1	F = 0.76	R = 0.07	50%		
			P = 1				0%		
Partial	48%	42	86%	P = 0.88	F = 0.97	R = 0.25	9%		
			P = 0.88				5%		
Quashed	22%	19	52%	P = 1	F = 0.8	R = 0.1	42%		
			P = 1				5%		
Total OFT	100%	87					P = 1	F = 0	R = 0

**Table A5** United Kingdom Competition Commission (CC)

<b>Ruling</b>	<b>%</b>	<b>n</b>	<b>Sanctions</b>	<b>Supervision</b>			<b>Norms</b>		
Dismissed	71%	17	18%	P = 1	F = 1	R = 0.66	82%		
			P = 1				R = 0.14		
Partial	25%	6	17%	P = 1	F = 1	R = 1	83%		
			P = 1				R = 0.4		
Quashed	4%	1	0%	P = 0	F = 1	R = 1	100%		
							R = 1		
Total CC	100%	24							

**Table A6** United Kingdom Competition and Markets Authority (CMA)

<b>Ruling</b>	<b>%</b>	<b>n</b>	<b>Sanctions</b>	<b>Supervision</b>			<b>Norms</b>		
Dismissed	37%	3	33%	P = 1	F = 0	R = 0	66%		
			P = 1				0%		
Partial	50%	4	0%	P = 1	F = 1	R = 0.25	100%		
							0%		
Quashed	13%	1	0%	P = 1	F = 1	R = 1	100%		
							0%		
Total CMA	100%	8							



**Table A7** Spanish Commission on the Telecommunications Market (CMT)

Ruling	%	n	Conflict	Entrance	Norms	Prices	Sanctions	Supervision
Dismissed	84%	312	20%	14%	22%	5%	10%	28%
			P = 0.42 F = 0.26 R = 0.77	P = 0.4 F = 0.31 R = 0.6	P = 0.48 F = 0.3 R = 0.74	P = 0.68 F = 0.31 R = 0.81	P = 0.75 F = 0.78 R = 0.56	P = 0.44 F = 0.46 R = 0.75
Partial	8%	29	38%	14%	10%	0%	17%	21%
			P = 0.54 F = 0.27 R = 0.81	P = 0.5 F = 0.25 R = 1	P = 0.66 F = 0.33 R = 0.66		P = 0.6 F = 0.6 R = 0.2	P = 0.66 F = 0.5 R = 0.66
Quashed	8%	30	7%	17%	30%	3%	17%	27%
			P = 0 F = 0 R = 1	P = 0.6 F = 0.2 R = 0.8	P = 0.44 F = 0.44 R = 0.66	P = 1 F = 1 R = 1	P = 0.4 F = 1 R = 0.6	P = 0.12 F = 0.75 R = 0.87
Total CMT	100%	371						

**Table A8** Spanish National Commission on Markets and Competition (Telecomm Directorate)

Ruling	%	n	Conflict	Entrance	Norms	Prices	Sanctions	Supervision
Dismissed	91%	30	13%	0%	37%	10%	20%	20%
			P = 1 F = 0.75 R = 0.25		P = 0.81 F = 0.27 R = 0.54	P = 0.6 F = 0.3 R = 0.6	P = 1 F = 1 R = 0.83	P = 0.5 F = 0.3 R = 0.66
Partial	3%	1	0%	0%	0%	0%	100%	0%
							P = 1 F = 1 R = 1	
Quashed	6%	2	0%	0%	0%	0%	100%	0%
							P = 0.5 F = 0.5 R = 0	
Total CNMC	100%	33						

**Table A9** United Kingdom Office of Communications (Ofcom)

Ruling	%	n	Conflict	Entrance	Norms	Prices	Sanctions	Supervision
Dismissed	68%	51	37%	8%	20%	14%	2%	20%
			P = 1 F = 0.16 R = 0.58	P = 0.75 F = 0.25 R = 0.25	P = 0.9 F = 0.4 R = 0.3	P = 1 F = 0.14 R = 0	P = 1 F = 1 R = 0	P = 0.9 F = 0.4 R = 0.6
Partial	31%	23	43%	4%	17%	13%	0%	22%
			P = 1 F = 0.6 R = 0.6	P = 1 F = 0 R = 0	P = 1 F = 0.25 R = 0.5	P = 1 F = 1 R = 0		P = 1 F = 0.6 R = 0.4
Quashed	1%	1	0%	0%	0%	0%	0%	100%
								P = 1 F = 1 R = 1
Total Ofcom	100%	75						

**Table A10** Distribution of the United Kingdom judgments according to the share of cases where a third party or parties are allowed to intervene in an appeal filed the Competition Appeal Tribunal (Section 4. CAT Guide to Proceedings)

Selected agencies	Cases with third-party intervention*	Cases without third-party intervention	Total cases <sup>1</sup>
Competition	34%	66%	116
Telecomm	82%	18%	67

(1) Excludes cases from England and Wales High Court (EWHC). \*Notes: According to Section 4 of the Competition Appeal Tribunal's Guide to Proceedings, the statutory appeals and applications for review establish interventions as a procedure to give those parties who are sufficiently interested in the outcome of appeal proceedings the right to be heard and assist the Tribunal to consider the issues fully. *Source:* Competition Appeal Tribunal (2017). Own estimation with information from the United Kingdom judicial appeal judgments sample used for this study.

**Table A11** Distribution of the sample of judgments according to the concurrent plaintiffs involved in a judicial appeal case (N = 2,070)

Sector	Country	Single plaintiff cases	Multiple plaintiff cases*	Total cases
Competition	Spain	96%	4%	1,114
	United Kingdom	82%	18%	119
Telecomm	Spain	98%	2%	404
	United Kingdom	79%	21%	75

*Source:* Competition Appeal Tribunal (2017); British and Irish Legal Information Institute (2017); Poder Judicial de Espana (2017). Own estimation with information from judicial appeal judgments sample used for this study. \*Notes: Multiple plaintiff cases refer to the judgments that were initiated by more than one party or cases where judges decided to group multiple cases into one single case to simplify workload and efficiency of the rulings.