Networks, Committees or Agencies?

Coordination and Expertise in the Implementation of EU Regulatory Policies

Emmanuelle Mathieu

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

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European University Institute
Department of Political and Social Sciences

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To Marisa and Martí

Contents

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'If you are a poet, you will see clearly that there is a cloud floating in this sheet of paper. Without a cloud, there will be no rain; without rain, the trees cannot grow: and without trees, we cannot make paper'

Thich Nhat Hanh

A thesis is not the achievement of its author only. Its coming into being is the result of a myriad of ideas, emotions, values and beliefs that grow out of a fertile soil constituted by the author's academic, institutional, material and social environment.[1] Luckily, my world has been populated by encouraging, friendly, stimulating, inspiring, considerate and helpful people. I am happy to have the opportunity to express my gratefulness to all of them.

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1 I am now flirting with constructivism… In fact, after writing a thesis grounded into rational-choice institutionalism, it feels good allowing oneself some theoretical holidays ☺

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Abstract

In order to fill the 'EU regulatory gap' caused by the mismatch between the single market programme and the lack of EU regulatory capacity, a number of regulatory agents were created. Committees, networks, and EU agencies mushroomed in order to fulfil different regulatory functions. This thesis aims at explaining the sectoral variation, and evolution over time, in the type of agent chosen and the kind of regulatory function delegated.

Articulating the concept of institutional complementarity with power-distributional factors, the thesis first argues that, in the early stages of an EU regulatory policy, the delegation pattern is determined by the distribution of implementation competences between the member states and the Commission. While the need for coordination typical of nationally based policy implementation would be addressed by EU regulatory networks (coordination pattern), the Commission's lack of expertise and resources in the face of delegated implementing competences would lead of the creation of expert committees (expertise pattern).

The transformation of the regulatory pattern over time is then explained with a dynamic relationship between functional and distributional forces unfolding over time through feedback loops. Keen on keeping their power, policy-maker set up weak agent before expanding their power at a later stage after realizing they lacked the means to achieve the policy objectives. This takes the form of a process of gradual reinforcement of the regulatory agent, which may, under certain conditions, culminate with the 'agencification' of the agent.

The empirical analysis is based on three sectors: food safety, electricity and telecommunications. While providing a good support to the conjectures, the cases also point at additional factors such as the distribution of implementing competences among national actors, the technicality of the sector and sociological pressure.

In addition to providing a wealth of new insights on the phenomenon of regulatory delegation in the EU, the thesis offers a sophisticated adaptation of the principal-agent (P-A) framework in multiple principals configurations and makes a strong case for refining the conceptualization of functional pressure and colouring the study of institutional choice, otherwise dominated by distributional and institutional factors, with a revamped functional approach.

List of tables

List of figures

List of abbreviations

ACER	Agency for the Cooperation of Energy Regulators
ACF	Advisory Committee on Foodstuffs
BEREC	Body of European Regulators for Electronic Communications
BERT	Body of European Regulators in Telecommunications
BERT	Body of European Regulators in Telecommunications
BEUC	The European Consumer Organisation
BSE	Bovine spongiform encephalopathy
CEER	Council of European Energy Regulators
CEPT	Conference of Post and Telecommunications Administrations
CJEU	Court of Justice of the European Union
Cocom	Communications Committee
Coor	Coordination
DG	Directorate General
DG III	Directorate General for Industry
DG VI	Directorate General for Agriculture
DG XXIV	Directorate General for Consumer Policy and Consumer Health Protection
DSO	Distribution system operators
EC	European Community
EEA	European Economic Area
EEC	European Economic Communities
EECMA	European Electronic Communications Market Authority
EFA	European Food Authority
EFPHA	European Food and Public Health Authority
EFSA	European Food Safety Authority
ENISA	European Union Agency for Network and Information Security
ENTSO-E	European Network of Transmission System Operators for Electricity
EP	European Parliament
ERG	European Regulators Group
ERGEG	European Regulators Group for Electricity and Gas
ETNO	European Telecommunications Network Operators
ETSI	European Telecommunications Standards institute

ETSO	European Transmission Systems Operators
EU	European Union
Exp	Expertise
FDA	Food and Drug Administration
FLEP	Food Law Enforcement Practitioners
FVO	Food and Veterinary Office
GERT	Group of European Regulators in Telecommunications
GDP	Gross Domestic Product
GGP	Guidelines of Good Practices
GMO	Genetically modified organisms
GSM	Global System for Mobile Communications
HLCG	High Level Communications Group
IRA	Independent regulatory agency
IRG	Independent Regulators Group
ITU	International Telecommunications Union
MEP	Members of the European Parliament
NRA	National regulatory agency
ONP	Open network provisions
OVPIC	Office of Veterinary and Phytosanitary Inspection and Control
P-A	Principal-Agent
PB	Problem
RSC	Radio Spectrum Committee
DG SANCO	Directorate-General for Health and Consumers
SCF	Scientific Committee for Food
SEA	Single European Act
SMP	Significant market power
SPS	Sanitary and Phytosanitary Measures
SSC	Scientific Steering Committee
StCF	Standing Committee for Foodstuffs
StVC	Standing Veterinary Committee
SVC	Scientific Veterinary Committee
T1	Period 1
T2	Period 2
T3	Period 3
T4	Period 4
TSE	Transmissible spongiform encephalopathy (TSE),

TSO	Transmission System Operator
TTE	Transport, Telecommunications and Energy
TV	Television
UMTS	Universal Mobile Telecommunications System
UNICE	Union of Industries of the European Community
UK	United Kingdom
WTO	World Trade Organization

Introduction

In the mid-1980s, with the adoption of the European Single Act, the realization of the single market became a priority for the European Economic Communities (EEC).[2] The traditional Community method, consisting in harmonising legislations while leaving discretion to the member states for implementation, began to reveal its limitations. The development of cross-border exchanges was prevented by important problems at the implementation stage, in particular the divergences among member states in the way EEC legislation was implemented (Dehousse 1997). Comitology soon began to flourish. The ad hoc delegation of executive competences to the Commission was a good way of increasing regulatory convergence at the implementation stage, without overloading the Council. But still, the challenge was big, the Commission was small, and member states did not want to give away the bulk of their regulatory authority to the Commission, let alone multiply its budget to the vertiginous proportions that the task would have required (Dehousse 1997). While Comitology was convenient, it was largely insufficient on its own to palliate what is now commonly referred to as the EU regulatory gap. The EEC was facing a huge regulatory challenge and it crucially lacked the regulatory capacity to address it.

Thus, to fill this gap, several kinds of actors have been created (Dehousse 2002) to form what is now sometimes called the 'EU regulatory space' (Levi-Faur 2011): committees (Peters 2007), regulatory networks,[3] and EU agencies (Dehousse 1997). The increasing array of these numerous informal actors, thereafter referred to as regulatory agents, has spurred considerable interest among scholars of EU governance and EU regulation. Compared to EU institutional actors such as the Council or the Commission, these regulatory agents are less formal. They are not mentioned in the Treaties and, in many cases, they are not even referred to in the regulatory framework that they contribute to implement. There is also a wide discrepancy in their degree of formalisation. While, in some cases, their existence and role may be recognized in secondary legislation, they can also be created by a simple decision of the Commission, or even set up in a bottom-up and informal fashion, without anchorage in the EU legal order. These regulatory agents, as the literature has abundantly commented upon, tend to combine national and EU

2 Depending on the period discussed, it will either be referred to the European Economic Community (EEC), the European Community (EC) or the European Union (EU). Where no specific historical reference is involved, the term EU will be used.

3 Dehousse 1997, Eberlein and Grande 2005, Eberlein and Newman 2008

features. They generally consist of a pooling at the EU level of national resources, expertise, or competences, in order to carry out specific regulatory tasks.

The overall picture of this EU regulatory space is dauntingly complex. Examining this phenomenon across sectors, we find significant variations in its concrete manifestations. Some sectors, such as utilities, traditionally rely on regulatory networks in order to improve regulatory coordination. Other sectors make a more extensive use of committees that provide other types of input in the regulatory process, in risk regulation for example. What is more, variation is not only found between sectors but also over time: the type of agent in a given sector and its regulatory function may undergo transformations. While various regulatory networks have been 'agencified' (Levi-Faur 2011), European agencies have also replaced scientific and expert committees in risk regulation sectors (Krapohl 2008). The change in the type of agent may even be accompanied by a significant reshaping of the function performed by the agent in the European regulatory process. European regulatory networks initially created to foster coordination between national administrations are increasingly solicited to serve as advisory bodies to the Commission.

The literature on EU governance and EU regulation has tended to address this phenomenon laterally, paving the way for a body of literature that is fragmented into various sub-branches: on regulatory networks,[4] on committees and comitology,[5] and on European agencies.[6] While we can find a few pieces of work that bridge two types of regulatory agents, either by looking at regulatory networks and agencies,[7] or committees and agencies (Krapohl 2008), to date, no research has addressed the EU regulatory space frontally in order to explain the range of its manifestations across different sectors and its transformation over time.[8]

Thus the aim of this thesis is to take a first step towards filling this gap. Two *explananda* are investigated: the type of regulatory agent empowered or created, and the kind of regulatory function it is assigned. Not only do the type of regulatory agent and the type of regulatory function vary across sectors; moreover, they often change over time. Hence, the central question that guides this research is: how can we explain the variation across sectors and the change over time in the type of regulatory agent and its regulatory function?

4 Dehousse 1997, Eberlein and Grande 2005, Eberlein and Newman 2008, Thatcher and Coen 2008, Coen and Thatcher 2008.
5 Joerges and Vos 1999, Christiansen and Kirchner 2000, Dehousse 2003, Bergström 2005, Gornitzka and Sverdrup 2008, Héritier and Moury 2011.
6 Dehousse 1997, 2008, Majone 1997, Everson et al 1999, Kelemen 2002, 2005, Krapohl 2008, Egeberg et al 2009, Trondal et al 2012.
7 Dehousse 1997, Majone 1997, Kelemen and Tarrant 2011, Schout 2011.
8 Schout's (2011) evaluation of the added value of an EU agency, by comparison to other forms of EU governance, should however be mentioned as an innovative approach consisting in holding EU agencies as functional equivalent to both networks and comitology committees.

Drawing into new institutionalism, the thesis first conjectures that in the initial stages of an EU regulatory policy, the distribution of competences, between the Commission and the member states, for the implementation of EU legislation determines the type of problem faced by policy-makers, which determines the range of functionally relevant institutional options among which policy-makers can choose. Reluctant to give away much regulatory power, policy-makers opt for the option that is least costly in terms of power. This corresponds to the distinction between two patterns: the coordination pattern and the expertise pattern.

In cases where the implementation remains at the national level, a collective action problem due to member states' divergent regulatory practices sparks the need for regulatory coordination. In order to keep control on the regulatory process, the member states opt for delegating coordination tasks to a regulatory network. Gathering the national authorities responsible for implementing EU regulation, the network is then expected to foster mutual influence and gradual regulatory convergence (coordination pattern).

Alternatively, when regulatory authority is delegated to the Commission in order to solve the problem of divergent national practices, the lack of human resources and technical expertise within the Commission triggers the need for additional resources and expertise. Eager to keep control on the use of expertise in regulatory policies, the Commission would refrain from proposing the creation of a strong body such as an EU agency. Rather, the Commission would meet the need for assistance in the preparation and drafting of implementing regulation through the establishment of expert committees that provide them with important informal resources (expertise pattern).

Both the coordination and expertise patterns change over time, which may culminate in the creation of an EU agency. Two processes of institutional change can be distinguished: the agencification of the network (coordination path) and the agencification of the committee (expertise path). Both processes are explained by a dynamic operating between functional pressure and policy-makers' power distribution concerns, unfolding over time through a series of feedback loops. Under problem pressure, in order to preserve their power, policy-makers tend to opt for institutional solutions that are not necessarily optimal in terms of effectiveness, i.e. creating a weak and easily controllable agent. However, the very weakness of the regulatory agent carries with it the seeds of its future reinforcement. In the face of strong and persistent problem pressure, as is the case with the single market programme, the weak regulatory agent will most likely lack effectiveness, leading to calls for its reinforcement. Over time, this dynamic takes the form of an endogenous process of gradual reinforcement of the regulatory agents,

which may culminate, where functional pressure is strong enough, into the transformation of the agent into an EU agency.

Given the gradual nature of the agent's reinforcement, it is also conjectured that EU agencies do not appear in the first stages of the process of institutional change of a public policy, but rather after a series of reforms has been made and previous regulatory agents have shown their lack of effectiveness. Finally, given that the Commission's distributional stakes are higher in the expertise path, where the potential EU agency would inherit powers that would otherwise belong to the Commission, the latter is unlikely to advocate the creation of an EU agency in such sectors, unless in case of very strong problem pressure. As a consequence, it is also conjectured that the agencification of networks is more likely than the agencification of committees.

These conjectures are evaluated on the basis of three in depth case studies, corresponding to three sectors: food safety, electricity, and telecommunications. For each sector and for each period, the institutional framework is systematically mapped and explained in great detail, covering the lack of effectiveness of the previous agent, the distribution of implementing competences between the member states and the Commission, the presence of needs for expertise and for coordination, the regulatory agents created and the regulatory functions delegated. The empirical chapters are structured in a way that allows assessing of the plausibility of the coordination and expertise patterns, as well as tracing the processes of institutional change to evaluate their consistency with the coordination and expertise paths. The bulk of the empirical material stems from official documents of the EU institutions, semi-structured interviews with policy-makers, and secondary literature.

The data show a significant degree of consistency with the conjectures. The first set of conjectures, related to the impact of the distribution of competences on the type of agent and the type of function delegated, have had a significant echo in the cases examined. Moreover, the data has also revealed the importance of three additional factors: the distribution of competences, at the national level, between national implementation actors; the degree of technicality involved in the implementation of the sector; and the extent to which policy-makers decide to use the legislative procedure to adopt technical measures. The second set of conjectures, related to the progressive reinforcement of the regulatory agents and the conditions under which we may expect its agencification, are all validated by the data which nonetheless also reveals the importance of sociological pressure next to the functional explanation.

The thesis is composed of five chapters. Chapter 1 exposes the framework of the research. It includes a review of the literature, a theoretical framework, and a methodological section. It is followed by three empirical chapters dealing with food safety (Chapter 2), electricity (Chapter

3), and telecommunications (Chapter 4). Finally, Chapter 5 offers a summary of the data and discusses how this relates to the conjectures. The concluding chapter summarizes the thesis and highlights the contributions made in the field of the EU regulatory space, to the P-A literature and to the theories of institutional design and institutional change.

Chapter 1:
Research framework

The adoption of the Single European Act (SEA) in the mid-1980s has constituted a huge challenge for the EU. Achieving the single market implied multiplying its regulatory output, with a regulatory capacity that remained limited. Many types of regulatory agents have appeared to fill this gap, performing various types of contributions to the EU regulatory process. But the different sectors vary significantly regarding the type of regulatory agents they rely on and the type of functions these are delegated. Besides, even within one sector, the type of regulatory agent and its regulatory mandate will often change over time. How, then, can we explain the variation between sectors, and the change over time, in the types of regulatory agents created and the type of regulatory functions delegated?

This first chapter presents the framework of the research. It starts with a review of the literature on delegation and regulatory agents in the EU. The mapping of the knowledge already created on the EU regulatory space has allowed the creation of the analytical categories used in the research as well as a more detailed articulation of the research question. The second section presents the analytical and theoretical frameworks within which two sets of conjectures are presented. A short section on methodology closes the chapter.

1 Review of the literature

The literature review is divided in three parts. The first part analyses the extent to which the P-A literature speaks to the research questions and concludes that the P-A framework needs being adapted and extended in order to deal with the complexities characterising EU regulatory delegations. The second and third parts of the literature review aim at gathering the building blocks that are subsequently used in the analytical framework. The second part covers the different delegation rationales and discusses them in the light of the specificities of the EU polity in order to identify the delegation rationales that are most likely to be found in the EU. It finds that the two most important reasons why EU policy-makers may want to delegate power to a regulatory agent are: to increase coordination among national regulatory authorities, and to provide assistance in terms of resources and expertise to the Commission. In the third part, the

literature review summarizes the academic knowledge produced on expert committees, regulatory networks, and EU agencies, in particular regarding the kind of functions these agents are typically delegated. It reveals that, while expert committees are created to provide the Commission with expertise and technical information, regulatory networks are set up to foster coordination among national regulatory authorities, and EU agencies have boomed to cover various kinds of needs, in particular the two needs also addressed by committees and regulatory networks.

Piecing the various elements of the literature review together unveils a broader picture indicating the presence of three delegation patterns, i.e. three combinations of regulatory agents and regulatory functions. First, regulatory networks would be in charge of fostering coordination among national authorities (coordination pattern). Second, expert committees would be in charge of providing expertise and information to the Commission (expertise pattern). Third, EU agencies could be in charge of both coordination and expertise (EU agency pattern). The literature review further shows that both regulatory networks and committees are susceptible to being transformed into an EU agency that would take over their regulatory functions. This indicates that both the coordination and expertise patterns may be transformed into the EU agencies pattern.

Eventually, the classification resulting from the literature review allows us to reformulate the research question and to split it in two sub-questions. First, under what conditions does a sector fall under the coordination patterns versus the expertise pattern? Second, why and under what conditions do the coordination and expertise patterns develop into the EU agency pattern?

1.1 Gaps in the P-A literature

The principal-agent (P-A) literature provides a wealth of insights and inspiration on delegation. P-A analysis has been applied to explain both the delegation from legislators to bureaucratic actors and from nation states to supranational organizations, including to EU institutions. The early applications of P-A framework on the EU were embedded in the debate regarding the course of the EU integration process. While some authors considered that member states remained in control of their supranational agents (Moravscik 1993, Garrett 1992, Garrett and Weingast 1993), Pierson (1996) argued that delegations to the EU came with unintended consequences in the form of agency loss aggravated by the member states' inability to properly correct the delegation contract afterwards. Taking as a point of departure the varying autonomy of supranational agent between issues or institutions, subsequent works provided refined perspectives on the delegation in the EU by offering explanations for both the varying amount of

power delegated to the EU (Franchino 2005, 2007) and the varying ability of member states to control their supranational agents (Pollack 1997, 2003).

In the wake of the 'governance approach of European integration' (Jachtenfuchs 2001) and the 'public administration turn in integration research' (Trondal 2007), P-A analyses were employed to study delegations taking place within the EU, the EU being then considered as a political system rather than a set of supranational organisations. In the field of regulatory governance characterised by the rise of regulatory agents such as committees, networks and EU agencies, delegation was conceived as a multidimensional process. The analytical relationship between the principal and the agent would not only cover the decision of the member states – through the Council - to delegate regulatory power to an EU-level agent, but also the decision of the EU policy-maker – composed of the Council, the EP and the Commission – to set up an administrative agent (Dehousse 2008). EU regulatory agents would have several principals and the inter-institutional politics and between as well as their vested interests them would explain both the emergence of these particular types of regulatory agents instead of more ambitious options (Dehousse 1997, Kelemen 2002) and the little amount of power delegated to them (Dehousse 2008, Coen and Thatcher 2008, Thatcher 2011).

The P-A literature provides relevant elements regarding the research question. First the variation in regulatory function delegated can be explained by the variation in the delegation rationale. Indeed, different needs leads principals to delegate different functions to supranational institutions (Martin 1992). Having identified four reasons for member states to delegate powers to the EU, Pollack found that the four corresponding functions were indeed delegated (Pollack 1997). I thus assume that, the function delegated to the agent follows the functional purpose of the delegation. But what conditions principals to search delegation for one reason and not another? The P-A literature does not explain the variation in delegation needs across situations.

The synthesis of the contributions of the P-A literature regarding the choice of the regulatory agent is more complex. P-A analyses that focus on the design of delegation tend not to investigate so much the question of the choice of the agent. Rather, they focus on the power delegated to the agent, its autonomy, and the control mechanisms set up by the principal. The choice of the agent partly overlaps with the dimension of power, autonomy and control. Indeed, part of the distinctions between the regulatory agents relate to their power and autonomy. Some agents can receive more powers than others. For example, while EU agencies may be formally involved in EU regulatory decision-making procedures spelt out in EU secondary legislation, networks cannot. Besides control mechanisms differ depending on the type of agent. Whereas, expert committees are exclusively controlled by the Commission, EU regulatory agencies are

also connected to the member states and may have to report to the EP. Hence, the P-A literature that addresses the variation in the power and autonomy of the agent provides elements relevant to the study of variation in the type of regulatory agent.

Which factors affect the amount of power and autonomy given to the agent? First, the delegation rationale was found to play a role. Among the many objectives that may motivate policymakers to delegate powers, some require a greater level independence for the agent. In some cases, such as when policy-makers benefit from not having to spend resources on a given task or from not bearing the political costs of unpopular regulatory decisions, there is no specific added value in ensuring that the regulatory agent is operating independently. In other cases, for example when delegation serves credible commitment purposes or is meant to palliate political uncertainty, the very function of delegation is not simply freeing the policy-maker from unwanted responsibilities or tasks, it is preventing the policy-maker to intervene in regulatory decisions in the future. There, it is crucial to guarantee the independence of the agent (Majone 2001, Gilardi 2008).

Whereas far-reaching delegation shall depend on the benefit anticipated from insulating the agent, Kelemen and Tarrant underlined the role played by the costs of delegation in terms of power (2011). Facing the choice to set up a regulatory network versus an EU regulatory agency, the member states would only allow the creation of EU agencies when the distributional stakes are low. In sectors where they retain important economic interests like network industries characterised by a high level of public ownership, member states would oppose the delegation of significant powers to the EU to prevent the implementation of far-reaching liberalization programmes. There, as a result, networks would be preferred to EU agencies.

Then, the literature highlighted the crucial effect of the multiplicity of principals on the extent of powers delegated to the agent and its autonomy. While some authors emphasize that the multiplicity of principals explains that EU regulatory networks and agencies have remained weak bodies (Dehousse 2008, Coen and Thatcher 2008, Thatcher 2011), a wider review of the literature beyond its application to EU regulatory agents provides a richer and more complex picture.

The decision-making process among the principals was often shown to be significant in explaining the discretion given to the agent. On the one hand, Pollack found that unanimity would increase the discretion of the agent by limiting the principals' ability to agree on sanctions in case of agency drift (Pollack 1997). However, it was also found that the higher the number of veto players, the less discretion the agent would be given in the delegation act (Kelemen 2004, Gilardi 2008, Franchino 2007). At first sight, both findings appear contradictory: whereas, for

Pollack, veto-players would increase the discretion of the agent, it would reduce it for the other authors. The contradiction is however only apparent and both findings can be articulated in a very complementary way. Where the decision-making process involves many veto-players, decisions are very difficult to overturn or modify at a later stage (Tsebelis 2002). Kelemen (2004) thus convincingly argues that in fragmented political systems involving many veto players, policy-makers leave agents with as little discretion as possible because, in case of agency drift, it would then be very difficult to agree again on the re-orientation of the mandate of the agent. This argument parallels Pollack's point that the difficulty met by multiple principals to agree among themselves reduces the likelihood of sanctioning the agent. As the principals know they shall have difficulties in agreeing on how to react to agency drift, they anticipate by limiting the powers and autonomy of the principal *ex ante.* Hence, as regards the design of regulation (as opposed to the sanctions applied), a high number of veto players involved the principal's decision-making process shall be reflected in a limited amount of power and discretion for the agent.

The extent of leeway left to agents shall also depend on the constellation of preferences among principals. Here, complex and seemingly contradictory findings make it harder to draw firm conclusions. Does the conflict of preferences among principals favour of impede agent's discretion? Studies of congressional delegation in the United States showed that in periods of divided government, bureaucratic agents were given less discretion than under unified governments (Epstein and O'Halloran 1999: Chapter 6). Nevertheless, in the EU, it was demonstrated that the scope of discretion given to the Commission for implementing EU regulation broadens in situations of conflict within the Council (Franchino 2007). The reason for this difference of finding probably in the distinction between a conflict *within* an institutional actor (the Council) and a conflict *between* institutional actors (between the Council, the Commission and the EP). While conflict between the Council and the Commission would limit the powers of the agent, conflict within the Council can be exploited by the Commission to get a more extensive mandate.

It thus seems that the direction of the impact of preference conflict among principals on the extent of discretion given to the agent would depend on the institutional context of the legislative decision-making process (Franchino 2007: 301-304). Given that the institutional context relevant in the thesis is the EU, in particular the co-decision procedure, one can rely on Franchino's analysis that aims at explaining the varying amount of power and discretion delegated to the Commission for the implementation of EU policies and is, therefore, the closest to the research question of the thesis.

On the basis of Franchino's analysis, one could expect that higher preference conflict between the Council and the Commission would lead to weaker supranational agents and that a conflict within the Council would lead to a stronger agent. Franchino further qualifies these hypotheses by introducing the preferences of the EP. In short, where the EP's preference would be closer to those of the Council, the Commission would be given less power than when the EP's preferences are aligned with the Commission.

However, the applying Franchino's finding to the choice of EU regulatory agents would reveal problematic. In his work, the Commission is both principal (because it takes part into the legislative decision-making process) and agent. In this context, the preferences of the Commission are clear; they want to be delegated as much power as possible and this preference will weigh in the negotiation process. In the thesis, the agents are third bodies that are not involved in the legislative decision-making process, and the Commission's preferences regarding their empowerment is more ambiguous. While setting up a powerful agent is a form of European integration – which the Commission, *as supranational actor*, shall favour – it also involves empowering a rival to the Commission *as administrative actor*. It is therefore necessary to clarify the distributional implications of empowering regulatory agents for the Commission in order to be able conjecture about the outcome of the aggregation of the preferences of the Commission with those of the Council and the EP.

It should also be noted that the causal relationship between the decision-making procedures and the scope of powers delegated to agents is mediated by the default position relative to the negotiation. Franchino explains that his findings, while corresponding to similar bargaining environments, are opposite to those of Huber and Shipan (2002) because both situations were backed by opposite status quo (Franchino 2007: 303). Pollack also refers to the consequences of the absence of agreement as a factor influencing the preferences of the principals (Pollack 1997). If the status quo favours one principal over the others, the outcome of the negotiation shall be biased in his favour because, having less incentives for negotiating than the other principals, he can afford making less concessions.

Finally, as this thesis investigates delegations processes unfolding over times, learning should be considered as a potential factor affecting the amount of power delegated to the agent. While often studied as a one-shot phenomenon, the act of delegating is nonetheless often followed up by subsequent adaptations in the agent's mandate. Between negotiations, principals can learn by observing how the agent implements the delegation mandate in practice and adjust the mandate at a later stage to reorient the behaviour of the agent. The literature suggests that the learning effect on principals regarding the actual consequences of the agency discretion can unfold in both directions. On the one hand, learning can allow the member states to limit the discretion

left to the supranational agents in case of agency drift (Tallberg 2002: 38-39, Kassim and Menon 2003: 134) – although this ability may be discussed (Pierson 2004). On the other hand, the member states may decide to extend the powers of the supranational institutions in case their initial status revealed too weak to achieve the desired outcome (Tallberg 2002: 39).

Let me now sum up the ways in which the existing P-A literature can help answering the research question of this thesis. First, the variation in the type of regulatory function delegated is not much discussed in the P-A literature, but it also appears relatively unproblematic. Backed by Martin (1992) and Pollack (1997), I take as a point of departure that the type of functions delegated to the agent follow the delegation rationale. This argument is however incomplete for it does not account for the factors determining the variation in the delegation rationale involved. If the regulatory functions delegated depend on the governance problem at stake, what conditions the variation in the type of governance problems met by policy-makers?

The variation in the type of regulatory agent is a more complex issue. One axis along which types of agents vary is the power dimension. The literature suggests that the amount of power and discretion entrusted to an agent depends on the delegation rationale, the distributional stakes for the member states, the decision-making procedure framing the negotiation between the principals, the configuration of preferences among the principals, the nature of the status quo, and learning effects.

First, the delegation rationales that lead to more independent agents are all delegations that aim at securing the credible commitment of the principal or protecting their policies from the risk of overhaul after political alternation. Second, the decision-making process among principals is an important factor but it does not vary in this study where the legislative decisions are made under the co-decision making procedure. Third, the configuration of preferences among the principals should then be taken into account but the literature does not provide clear assumptions about the preferences of the Commission regarding the empowerment of regulatory agents. Fourth, the status quo, by favouring some actors over others, shall affect the situational preferences of the principals. However, here again, drawing clear conjectures out of this factor would require a clearer picture about the distributional stakes involved by the status quo compared to the empowerment of regulatory agents for the Commission. Finally, learning seems to matter as well, but as it can influence the agent's empowerment in both directions, no clear conclusion can be drawn.

In sum, the extant P-A literature does not allow making clear conjectures to address the research questions. This endeavour would first require a clarification of the distributional stakes for the Commission regarding the empowerment of regulatory agents. This would allow to take into

account not only the vertical delegation from the member states to supranational agents, but also the delegation from EU policy-makers and the EU executive (in particular the Commission) to EU bureaucratic actors. On the one hand, works that take these various dimensions of delegation into account find that the interlocking of these various dimensions leads to the establishment of weak agents (Dehousse 2008, Coen and Thatcher 2008, Thatcher 2011). But these works do not address the variations of power within this category of agents. On the other hand, more fine-grained studies that address the varying discretion left to the agents are limited to the vertical dimension of delegation. Hence, so far, we lack the analytical tools to explain variations in the design of EU regulatory agents that take into account the various dimensions of power shifts involved in the delegation process. A second requirement to address the thesis' research question is the need to clarify theoretically the effect of learning in order to come up with precise conjectures. Finally, unlike the majority of P-A works seem to suggest, the variation in the type of agent is not limited to the difference in terms of power. Networks and committees differ, above all, in terms of functional profile and composition, not in terms of power. For those variations that cannot be reduced to the issue of power, the P-A literature has remained very silent.

1.2 Rationales for regulatory delegation in the EU: the need for coordination and expertise

The literature has made clear that the lack of regulatory capacity is the functional pressure that explains regulatory delegations. It has, however, remained ambiguous with respect to what regulatory capacity actually means. Some refer to the fact that, in policy implementation, the bulk of decision-making competences having remained at the national level, regulation was not harmonised enough. Here, regulatory capacity would refer to the lack of decision-making competences at the EU level. Others understand it as a lack of expertise. For them, regulatory agents are created because the staff of the Commission is not specialised enough to regulate increasingly complex and technical areas of the economy. A final meaning that has been given to the lack of regulatory capacity lies in the limited size of the Commission compared to its increasing regulatory responsibilities. To complete this picture, it should also be noted that the creation of EU agencies is sometimes portrayed as a haphazard phenomenon that results from many different sector specific ad hoc motivations.

In order to flesh out and clarify the concept of regulatory capacity, without falling into a ad hoc type of explanation, I reviewed the theories of delegation to identify the delegation rationales intervening in the creation of various types of agents, e.g. independent regulatory authorities (IRAs) or international organizations. I then discussed this list of delegation rationales in the

light of the specificities of the EU policy, which has allowed me to discard some of the delegation rationales for being irrelevant in the EU context and to identify the two rationales that are likely to play an important role in EU regulatory delegation. The first is the need to improve the coordination between national regulatory authorities. The second is the provision of expertise and information to the Commission.

1.2.1 Delegation rationales in the theories of delegation

Two branches of the political science literature have addressed the issue of delegation. While international relations scholars have sought to explain the creation of international organizations, students of comparative politics have investigated the development of independent regulatory authorities (IRAs). Joining these two research strands, six delegation rationales have been identified: committing to international cooperation, enhancing policy credibility, avoiding political uncertainty, blame shifting, acceding to expertise and increasing efficiency.

1.2.1.1 Commitment to cooperation

To start with, the international relations literature has identified and conceptualized the movement by which a group of states delegate power to an international organization. Here, delegation steps in as a solution to a collective action problem. The states may have an interest in cooperating with other states (Keohane 1984). However, international agreements are not self-enforcing and countries may have reasons not to trust the credibility of their cooperation partners' commitment. First, countries often have divergent preferences. In case of agreement adopted with a majority decision-making rule, a country that has been outvoted may be tempted not to comply with the agreement (Franchino 2007: 293). Second, international agreements may present the problem of defection (Keohane 1984: 67-69). While states are interested in benefiting from other states fulfilling their engagements, they may also gain from not fulfilling their own. This may generate free-riding behaviours, when some states do not comply with the rules, undermining the overall effectiveness of the cooperation arrangement. Delegating to an international organization some tasks related to the implementation of cooperation rules is one way to prevent such a shift (Hawkins et al 2006). It means that member states voluntarily tie their hands as a way to make a credible commitment to cooperation.

1.2.1.2 Policy credibility

Within states, the need for policy-makers to make a credible commitment towards a specific policy stems from the multiplicity of potentially conflicting objectives governments have to deal with. Research on legislative-executive relationships in national political systems has shown

how policy-makers' conflicts of interests lead them to choose delegation as a mechanism to credibly commit to one of their various objectives. For example, politicians may be squeezed between, on the one hand, their willingness to adopt what they consider as a good policy and, on the other hand, their ambition to be re-elected, which generally requires relaxing policy pressure on constituents. This tension is particularly strong in economic policies, where businesses may anticipate that a given policy may be subject to subsequent modifications. Fearing policy instability, businesses tend to be reluctant to invest when the regulatory ground seems unsteady. As a consequence, a policy lacking credibility can undermine its own effectiveness (Levy and Spiller 1996). Policy-makers may thus want to strengthen their policy commitment with more stability and credibility, which may be achieved by resorting to delegation. Both in international relations and in internal politics, where delegation serves as a credible commitment, the mechanism provided by delegation consists in solving time-consistency issues, and protecting long-term policy choices against short-term electoral interests (Majone 1996, Gilardi 2008: 30-31).

1.2.1.3 Political uncertainty

The regulatory stability owed to delegation does not only sustain policy effectiveness, but also its durability over time, beyond the electoral mandate of the policy-maker that is at the origin of the delegation. By freezing the policy orientation through delegation, politicians guarantee the permanence of their policy choice even if the opposition reaches the majority at the following elections. Here, delegation is a mechanism that allows governments to preserve their policies from the threat of political alternation. This reason for delegating competences to agencies is commonly referred to as political uncertainty (Moe 1990: 227-228).

1.2.1.4 Blame shifting

In addition to fostering policy effectiveness and durability, politicians may decide to delegate competences to independent agencies as a strategy towards their ambition to be re-elected. Policy-makers may be in favour of a constraining policy that might not please their constituency, while having to flatter them to maximize their electoral interests. Delegating to an independent agency the tasks of adopting the unpopular policy measures can solve this tension. Commonly called 'blame-shifting', this type of delegation consists, for politicians, in shifting to a third party, not submitted to electoral pressure, the responsibility for the potentially electorally embarrassing aspects of policy (Thatcher and Stone Sweet 2002). They are likely, however, to keep for themselves the valuable function of undoing the agency's wrong decisions when these occur (Fiorina 1977: 179-180). Policy-makers can thus use delegation to shape an electorate-

friendly role for themselves that will allow them to reap all the possible credit extractable from a given policy while avoiding culpability.

1.2.1.5 Expertise

'It is by now a truism that public policy is increasingly dependent on relevant, timely and, especially, credible information' (Majone 1997: 264). In sectors such as food safety, environment, or pharmaceuticals, the production of ever more technically sophisticated products present new risks that the regulator is expected to manage. Doing so requires dealing with an impressive amount of highly scientific and technical information. In addition to this, utility sectors, which represent an important part of the economy, previously performed as a public monopoly, have been privatized and liberalized. This move has contributed to the rise of the regulatory state: newly liberalized sectors need to be regulated. So the public sector needs to develop their own technical resources to be able to regulate technical sectors such as telecommunications and energy (Thatcher 2002: 131). However, politicians and administrators working in ministries, as generalists, do not necessarily have the appropriate technical or scientific knowledge. In this context, the delegation of regulatory tasks to sectoral and specialised agencies staffed with experts can constitute an efficient solution (Baldwin and McCrudden 1987: 4-5).

1.2.1.6 Efficiency

Finally, delegation to an independent agency also means getting rid of the laborious task of dealing with the technical or administrative details related to the elaboration and implementation of regulation. This may be particularly interesting for policy-makers since it allows them to free up resources, time and energy to focus on their core functions related to more general policy-making (McCubbins and Page 1987, Epstein and O'Halloran 1999).

1.2.2 Delegation rationales relevant to the EU

The six delegation rationales listed above were identified, above all, through studies on the creation of international organizations and on the relationship between politicians and the bureaucracy in the United States. In order to evaluate their applicability to the EU context, each of them is discussed in the light of the specificities of the EU polity.

1.2.2.1 Commitment to cooperation

With regards to the single market objective, member states came to realise that legislative harmonization was not enough; harmonisation was also needed at the implementation level to effectively remove internal barriers to trade (Dehousse 1997: 13). Yet the bulk of formal

decision-making power related to the implementation of regulatory policies has remained in the hands of national authorities. This explanation, which is behind the creation of EU regulatory networks and EU regulatory agencies, fits the delegation rationale associated with the situation where a group of states meet a collective action problem due to their divergent preferences. For the sake of cooperation effectiveness, they credibly commit themselves by delegating competences to an international organization.

1.2.2.2 Policy credibility

In the Principal-Agent literature, delegation for policy credibility is meant to serve the protection of long-term policy goals against short-term electoral concerns. A given majority may have conflicting objectives: improving policy effectiveness and being re-elected. This rationale for delegating assumes that policy decisions have an effect on the outcome of elections. It is however largely acknowledged that EU citizens show very little interest for EU regulatory policies. Instead, EU elections are embedded into national politics and determined by them. Parties use them to test their domestic political agenda with the public and the policies proposed by the candidates 'rarely have much European content' (Franklin 2006: 228). Since EU policies thus have little (if no) effect on EU elections, EU elections have 'no readily discernible effect on the conduct of European affairs' (Franklin 2006: 228). It is thus highly unlikely that the EU ruling majority is tempted towards the end of its mandate to flatter the electorate with generous decisions. The conflict of interests, characteristic of political majorities in national systems, does not exist at the EU level. EU policy-makers are therefore unlikely to delegate in order to guarantee policy credibility.

1.2.2.3 Political uncertainty

Delegation may also be a way of protecting policy choices from changes of majority. Wonka and Rittberger thus claim that EU policy-makers are willing to 'send strong signals of regulatory stability to firms and consumers that a change in political majorities in the EU legislative institutions, i.e. the Commission, European Parliament and Council, should not directly lead to an overhaul of regulatory decisions taken previously' (Wonka and Rittberger 2010: 734).

This delegation rationale assumes that the change of ruling majority is likely to lead to the reform of regulations adopted by previous majorities. This risk, linked to political alternation, although not insignificant, should however be put in perspective. Three factors specific to the EU polity downplay the risk of policy overhaul: the limited impact of partisan conflicts on policy outcomes, the high number of institutional veto players, and the need to co-opt a large number of interest groups for the elaboration of EU policies.

First, the coalition and conflict dynamics behind the adoption of EU legislation is complex and involves several dimensions (Egeberg 2006). While partisan conflicts are not absent from EU regulatory policy making, their impact on policy outcomes are limited due to the importance played by other lines of conflict. Political partisanship is only one among several lines along which negotiations patterns are structured. The opposition between partisans and opponents of EU integration also plays a decisive role in EU legislative negotiations, particularly in the opposition between the Council on the one hand (as intergovernmental institution), and the Parliament and the Commission on the other hand (as supranational institutions). Finally, EU coalition building is also affected by nationality membership, as national models compete to influence the design of EU regulation (Héritier 1996).

EU legislation is thus the outcome of negotiations between several institutions that intertwine three lines of coalitions building. The position of the political majority in EU institutions on the left-right political spectrum is thus only one of three determinant factors of policy outcomes. Given this complexity, political leaders rarely manage to keep the policy flow entirely under control and the outcome of legislative negotiations is difficult to predict from the outset (Wallace 2005: 489). The risk of overhaul of regulation adopted by a previous majority should thus be put in perspective as it is not as straightforward as in the national arena. Although the risk exists, it is mediated at the EU level by the involvement of other dimensions of the political debate such as EU integration or competition between national models.

Second, the particularly high number of institutional veto players in the EU policy process is an important obstacle to radical change. This mechanism has been explored and confirmed in several types of situations. At a general level, it has first been shown that, in a given political system, a high number of institutional veto players is a factor of policy stability (Tsebelis 2002). Hence, the more veto players intervene in the elaboration of legislation, the more difficult it is to revise the legislation once adopted (Kelemen 2004). This takes a particular signification in regulatory policies subject to the delegation to IRAs. Since the delegation to IRAs is a way to increase policy credibility, institutional veto players and IRAs are functional equivalents: both configurations provide private actors with guarantees that the regulatory environment shall remain stable (Spiller 1993, Levy and Spiller 1994). It has subsequently been shown that in Western Europe, the presence of veto players is negatively correlated with the independence of IRAs (Gilardi 2002, 2005).

This mechanism is particularly true for the European Union, which is characterised by a very high number of institutional veto players. The EU policy process thus 'displays a deep gradualism and incrementalism. It is not possible for the Commission, the Council Presidency, a national government, or anyone else, to initiate a clear and comprehensive policy proposal,

incorporating bold new plans and significant departures from the status quo, and expect it to be accepted without being modified significantly – which usually means being watered down.' (Nugent 2006: 422) Although this does not mean that change is not possible, policy innovation and bold initiatives 'are always likely to be weakened/checked/delayed' (Nugent 2006: 423).

Finally, since lacking input legitimacy, the EU relies on output legitimacy. In order to legitimize the policy outcome, EU 'collective governance moves slowly, co-opting as broad a coalition of interested groups as possible in the consultative committees and hierarchy of working groups through which it operates' (Wallace 2005: 494). The EU thus has a 'far more diverse group of interests to persuade or to override than any of its component state systems' (Wallace 2005: 492). Due to the same mechanism as with institutional veto players, the necessity to co-opt a large coalition of interest groups for the production of EU policies limits the possibility to depart significantly from the established Community acquis.

In sum, the risk of policy overhaul after a change of political majority, although not being inexistent, is significantly less probable than in national political systems which tend to be less complex, less dependent on interest groups and, importantly, involve fewer veto players. As a consequence, regulatory delegation to tackle political uncertainty is less likely in the EU than suggested by the theories of delegation to IRAs that were developed through the analysis of national political systems.

1.2.2.4 Blame shifting

If EU agencies were created by EU policy makers with the view of shifting the blame of unpopular decisions, it would assume that EU policy makers fear electoral reactions to the adoption of EU policies. As mentioned above, EU elections are determined to a great extent by national politics. As a consequence, the European legislator is unlikely to be blamed by the European electorate for its decisions. This makes blame shifting a somewhat useless mechanism in the context of EU politics. It can be concluded that EU regulatory agents are not created for blame shifting.

1.2.2.5 Expertise

The lack of EU regulatory capacity is sometimes associated with the lack of EU-level scientific and technical expertise required for regulating complex sectors. Regulating an increasingly complex society requires more technical and scientific knowledge. The Commission is essentially an institution of general competence, so it lacks the specialised staff able to deal with the highly technical dimension of regulation. It can thus be expected that the lack of expertise at EU level is a motive for delegation.

1.2.2.6 Efficiency

The lack of regulatory capacity is also used to refer to the lack of staff within the Commission to face the increased demand for regulatory activity (Tallberg 2006: 207). The objective of realising a single market has involved an increase in the workload of the Commission in several respects. Realising a single market first requires an increase of the production of EU regulatory legislation, which depends on more activism from the Commission, in charge of initiating legislative proposals and developing and adopting technical implementing regulations under the control of comitology committees. In addition, more regulation also means that the Commission, as a guardian of the Treaties, has more work when it comes to monitoring member states' compliance with EU legislation. Given that the size of the Commission has not grown in proportion with the increase in its regulatory responsibilities, it needs to increase its internal efficiency. 'Faced with an increasing agenda overload, one strategy available to the Commission is to import a large number of external specialists and experts in preparing initiatives and drafting new legislation' (Trondal 2007: 964). Indeed, the Commission is said to have engaged into a decentralisation of its administrative tasks to increase flexibility, efficiency, technicality and reduce its workload (Vos 2000a: 1119). The literature has indeed also highlighted, for example, the role that EU agencies are expected to play in the Commission's plans for internal reform. In order to re-centre on its core tasks and policy priorities, the Commission's strategy consisted in delegating some of its activities (Vos 2000a: 1116). Consequently, the need to increase the Commission's efficiency is likely to play a role in the delegation to regulatory agents.

1.2.3 Delegation rationales in the EU: coordination and expertise

The review of the literature indicates that there are three major reasons behind the delegations to EU regulatory agents: the need to develop cooperation mechanisms in order to coordinate the activities of national regulatory administrations, the need for expertise to feed into the EU regulatory process, and the need to improve the Commission's efficiency so it can face the increase in workload (see table 1.1).

Next to these three reasons, it should also be acknowledged that delegation to EU regulatory agents could theoretically take place to guarantee policy stability beyond electoral terms. This argument should, however, be interpreted with caution since there are counter forces, specific to the EU polity, that significantly lower the likelihood of this happening in practice: the multiple lines of coalition and conflict that shape policy outcomes, the high number of institutional veto players, and the need to co-opt interest groups for the elaboration of EU policies. Finally, two delegation rationales, policy credibility and blame shifting, are inapplicable to the creation of EU

agencies because they rest on the assumption that EU policies affect the results of EU elections, a link that is largely denied by the literature. As a consequence, this chapter focuses on the three major explanations: commitment to cooperation, expertise, and efficiency. Each of the three delegation rationales can be found in the literature on EU regulatory governance, often associated with the more general concept of regulatory capacity. But they are often presented separately. Thus, while the literature on EU regulatory governance has made reference to the different delegation rationales, it has tended to do so in a fragmented way. A systematic and encompassing picture is thus still lacking.

	Delegation rationales	**Applicability to EU regulation**	**Explanation**
1	Commitment to cooperation	+++	Collective action problem
2	Policy credibility	-	No link between EU policies and EU vote
3	Political uncertainty	+	Possible but difficult policy overhaul
4	Blame shifting	-	No link between EU policies and EU vote
5	Expertise	+++	Commission has a general profile
6	Efficiency	+++	Commission is overburdened

Table 1.1: Different delegation rationales and their applicability to delegation for the implementation of EU regulation

A first step towards constructing the broader picture consists in breaking down the concept of regulatory capacity into various types of regulatory functions, deducted from the list of delegation rationales. For member states, the commitment to cooperation can be made by delegating coordination functions to a regulatory agent. For the Commission, the need for expertise can be achieved by delegating, to a regulatory agent, the function of providing expert-based advice and information. And its need to increase efficiency can be met by creating a regulatory agent responsible for the administrative and technical dimensions of policy implementation.

The latter two delegation rationales, expertise and efficiency, correspond to in the increase of staff at the EU level to help the Commission deal with its executive responsibilities. This makes it difficult to distinguish between them analytically and empirically. Furthermore, they are often presented together in the literature (e.g. Trondal 2007: 964, Vos 2000a: 1119). Both delegation rationales will thus be merged into a single one: the completion of the Commission's working capacity which covers its extension both in quantitative terms, to palliate the lack of resources, and in qualitative terms, to palliate the lack of specific expertise.

Reviewing the different delegation rationales has clarified the first element of the *explanandum*: the different types of regulatory function. The first type is coordination and the second one will be referred to as expertise. For this thesis, 'coordination', as a regulatory function delegated to an agent, means that the tasks of the regulatory agent serve as a way to foster convergence, or at least, to reduce divergence, in the way the member states implement a given regulatory framework. While a strong coordination mechanism would involve the possibility of adopting binding decisions for the member states, a weak coordination mechanism could consist, for example, in the exchange of information and the development of common interpretations. So, coordination tasks encompass all types of coordination mechanisms, independently from their strength, as long as these mechanisms are meant to increase regulatory consistency among the member states.

In the framework of this research, an agent given an 'expertise' regulatory function is expected to assist the Commission by serving as a pool of experts and working force into which the Commission can tap in order to carry out its regulatory responsibilities. Expertise functions can take different forms, such as providing information, issuing an opinion on a draft of the Commission, or even drafting a regulation that should then be endorsed and adopted by the Commission. A function is thus considered to fall into this category whenever the agent provides the Commission with any form of scientific or technical informational input in order to feed the regulatory process.

1.3 Three types of regulatory agents in the EU: committees, networks and agencies

In the literature on EU regulation and EU governance, the three regulatory agents typically associated with the two regulatory functions identified - coordination and expertise - are: expert committees, regulatory networks, and EU agencies.

1.3.1 Expert committees

Within EU studies, the term 'committee' covers several quite distinct institutional realities (Gehring 1999: 196, Egeberg et al 2003). While comitology committees have attracted the widest coverage in the literature, other types of committees play an important role in the EU regulatory process: the Council's working groups, the committees of the European Parliament (EP) and the expert groups advising the Commission (Christiansen and Larsson 2007: 1).

The thesis deals with the latter type: expert committees that are advising and assisting the Commission, also referred to as scientific committees or expert groups (Guéguen and Rosberg

2004). Compared to the other types of committees, expert committees are less formalized. The Commission can set them up and abolish them freely; it can also consult them whenever it feels the need to do so. Expert committees are thus mobilized in all stages of the EU regulatory process, which includes policy implementation (Larsson and Murk 2007: 87-89). The number of such committees today amount to over one thousand.[9] Contrary to other types of committees, the members of expert committees are not representatives of their member states. The members may be civil servants, but also independent experts, interest groups representatives and other stakeholders, all of which enjoy an equal status (Larsson and Murk 2007: 90).

With the increase of complexity in society, science and expertise have become increasingly necessary and relevant in public policies (Gornitzka and Sverdrup 2010: 3-4). This is particularly true of the European Union where the focus on regulation and problem solving involves a high degree of technicality (Majone 1996). The EU thus exhibits high levels of 'information, expertise and reason-giving' within expert groups (Gornitzka and Sverdrup 2010: 1) which have proliferated over time and across sectors (Gornitzka and Sverdrup 2008).

The Commission, in particular, makes a wide use of external expertise (Cini 1997: 121) due to the increasing gap between its regulatory responsibilities and its limited size and resources (Cini 1997: 105-106, Robert 2003: 58). Indeed, the Commission has a genuine need for information (Christiansen and Larsson 2003: 4). The system of committees is the main channel that is used to gather the necessary expertise.[10] Creating expert committees is a way to increase the Commission's technical knowledge and reinforce its capacity to produce norms,[11] although they may also be used for other reasons such as legitimizing actions or when looking for support.[12] The Court of Justice of the European Union (CJEU) has even reinforced this tendency by making it mandatory for the Commission to consult scientific committees whenever it prepares an act with views to regulate a product that may have an impact on public health.[13] Committees have thus provided an 'ad hoc institutional evolution meeting the, at times unexpected, functional demands of an ever-expanding European Community for technical information and expertise' (Vos 1999: 19).

Research on expert committees, while less proliferous than on comitology committees, has nonetheless attracted growing interest among political scientists in the past few years.[14] The

9 Gornitzka and Sverdrup 2008: 745, Larsson and Murk 2007: 68.
10 Schaefer 1996: 6-9, Van Schendelen and Pedler 1998: 290, Christiansen and Kirchner 2000, Abels 2002: 13.
11 Douillet and de Maillard 2010: 80, Robert 2010: Hrabanski 2011.
12 Robert 2003, Douillet and de Maillard 2010: 77-78.
13 CJEU Judgement C-212/91. *Angelopharm v. Hamburg.* Paragraph 38.
14 Gornitzka and Sverdrup 2008, Douillet and de Maillard 2010, Robert 2010, Hrabanski 2011, Schot and Schipper 2011.

questions typically addressed revolve around the influence and power of experts committees in the regulatory process;[15] the strategic use of expertise by the Commission;[16] the socialisation processes at work within expert committees (Hrabanski 2011); their accountability, legitimacy and opacity;[17] or their deliberative character (Larsson and Murk 2007: 89-91).

More relevant to this thesis is the approach adopted by Gornitzka and Sverdrup (2008) consisting in mapping and explaining the differences of the expert committee system across sectors. While expert committees have proliferated over time and across sectors, their distribution across policy domains is remarkably uneven. While some Directorate Generals (DGs) of the Commission are clearly involved in this mode of governance, others are not. Several factors are put forward. External pressures play a significant role: the quantity of interest groups is significantly correlated with the number of expert groups created by the corresponding DG. Part of the sectoral variation is due to the type of policy: distributive policies involve fewer expert groups than regulatory policies. The development of routines specific to the different DGs also has some explanatory power. Finally, the number of expert groups is also positively correlated with the size of the corresponding DG. The latter finding is interesting because it contradicts the explanation of the creation of expert groups based on the limited size and capacity of the Commission. However, Gornitzka and Sverdrup do not control this correlation with the amount of executive competences held by the Commission in the sector, which may reveal a spurious relationship between the two variables. They conclude their article by emphasising 'the need to give due attention to the heterogeneity of European multi-level governance (…) and to specify the institutional conditions and constellations of actors involved in governing Europe' (Gornitzka and Sverdrup 2008: 746).

1.3.2 Regulatory networks

In his seminal article, Dehousse (1997) explains the functional pressure that led to the creation of EU networks. The Community method traditionally used for market integration, relying on legislative harmonisation and decentralized implementation, allowed not only wrongful or incomplete transpositions, but also, most problematically, significant divergences in administrative practices. 'The approximation of substantive law is far from sufficient to ensure uniform behaviour by national administrations' (Dehousse 1997: 251).

Yet, more uniform administrative practices were needed to make the internal market a reality. Dehousse mentions two alternatives that could have been envisaged to solve the regulatory gap

15 Van Schendelen 1998, Schot and Schipper 2011.
16 Robert 2003, Douillet and de Maillard 2010, Rimkutė and Haverland 2014.
17 Radaelli 1999, Larsson and Murk 2007: 92-95.

and explains why they were impracticable. First, the adoption of more detailed legislation in order to reduce the discretion at the implementation stage would have been too rigid and intrusive to be accepted by the member states. Second, the reinforcement of implementation powers of the Commission would face limited human resources and expertise. A considerable increase of bureaucratic resources would have been required, which, on top of meeting member states' scepticism, would not have been desirable in terms of efficiency.

How, then, can the uniformity of implementation be increased in a system based on decentralised implementation? European regulatory networks have been created to meet this challenge (Dehousse 1997, Eberlein and Grande 2005). For this thesis, regulatory networks are understood as a network gathering together the national authorities in charge of implementing a given regulatory framework. While these networks answer a clear functional pressure in the form of a need for coordination of national practices,[18] the choice of this particular institutional solution is also presented as a result of political considerations. Regulatory networks would have been adopted as a second (or third) best option, after the member states refused to empower the Commission or to create an EU agency.[19]

Without denying the importance of political factors, one must not forget the functional advantages of regulatory networks as an institutional option. Regulatory networks gather civil servants from national administrations and therefore draw from their knowledge and workforce.[20] Networks also provide a platform for the European socialisation of national civil servants and for the cross-fertilization of ideas, which is expected to contribute, over time, to the convergence of administrative practice.[21] The harmonisation effect of regulatory networks will be even stronger if it gathers independent regulatory agencies (IRAs). As IRAs have been found to be less sensitive to political signals than ministries (Egeberg and Trondal 2009), an EU network of national IRAs could allow the EU level to leverage the regulatory authority delegated at the national level to national IRAs. Coalitions between the national IRAs, the Commission and other sectoral stakeholder could emerge and facilitate supranational coordination. The effectiveness of such a configuration would however depend on the extent of authority delegated to the IRAs by their governments (Egeberg, 2006: 14, Eberlein and Newman 2008).

On the functional dimension, regulatory networks are, however, not without flaws. They are loose structures with little concrete power, and they are only able to adopt non-binding guidelines. This contrasts with the importance and vastness of their mission: ensuring coordination of national regulatory practices. The mismatch between their tasks and their

18 Dehousse 1997, Coen and Thatcher 2008.
19 Kelemen 2002, Coen and Thatcher 2008, Kelemen and Tarrant 2011.
20 Dehousse 1997, Blauberger and Rittberger 2014.
21 Dehousse 1997, Majone 2000: 295-298.

means leads, unsurprisingly, to a lack of effectiveness (Coen and Thatcher 2008, Kelemen and Tarrant 2011).[22]

Coen and Thatcher's account of the poor performance of regulatory network counter-balances the synergetic perspectives on the relationship between IRAs and regulatory networks (Egenerg 2006, Eberlein and Newman 2008). Resulting from the delegation from both the national IRAs and the Commission, regulatory networks would have only emerged as weak agent engaged in a relationship with strong principals (Coen and Thatcher 2008). Whereas Egeberg (2006) and Eberlein and Newman (2008) implicitly assumed the convergence of preferences between IRAs among themselves and with the Commission, Coen and Thatcher antagonizes them by holding IRAs as principal and the network as agent. The truth is probably in between; while some situations or sectors might benefit from a convergence of preferences and complementary relationship between the delegation of authority to IRAs and their coordination activities at the EU level, one cannot assume such a convergence to be the rule.

Independently from the question about the convergence versus divergence of preferences between networks and their members, one must acknowledged that regulatory networks enjoy only very little formal powers. Being 'designed to fail' (Kelemen and Tarrant 2011: 926) in spite of significant pressure to increase coordination, regulatory networks carry with them 'endogenous forces for change' (Thatcher and Coen 2008: 830). The Commission does, in fact, regularly attempt to reform regulatory networks to increase their effectiveness. But once created, national regulatory agencies (NRAs) and their European network develop institutional interests of their own as well as influence and lobbying capacity which can significantly limit the scope of modifications policy-makers are been able to impose on them.[23] This shall explain why EU regulatory networks remain at the centre of the EU institutional setting for coordination, while becoming, over time, increasingly institutionalised and centralised (Thatcher and Coen 2008).

1.3.3 EU agencies

Over the last 10 years, many European agencies have been created. They are involved in many different sectors, such as health, food safety, environment, energy or aviation and endorse very different tasks, for example harmonising national technical standards, providing expertise to EU decision-makers, developing information-sharing platforms, etc. Authors frequently refer to the definition of EU agencies given by the European Commission. Accordingly, an EU agency is an EU

22 See, however, Maggetti and Gilardi 2011 for a positive account of the effectiveness of the regulatory network in the financial sector.

23 Thatcher and Coen 2008, Boeger and Corkin 2012, 2013.

level public authority with a legal personality and a certain degree of organizational and financial autonomy, created to perform clearly defined tasks.[24] Although they are not recognized by the EC Treaty as a European institution, they are part of the broader EU legal Framework, since they are created by a secondary legislative act (Kelemen 2005 : 175, Groenleer 2006 : 157-160). EU agencies are thus more formal than committees and networks.

Notwithstanding these few common features, EU agencies display significant variation in terms of internal structure, relations with other institutions, tasks delegated, and powers.[25] One of the most determinant distinctions within agency type is between 'executive' and 'regulatory agencies'.[26] Elaborated by the Commission, this distinction has been widely integrated by scholars in their work on EU agencies. Executive agencies perform managerial tasks on behalf of the Commission. They are established to implement community programmes, and are delegated only managerial, technical and administrative tasks that do not involve 'discretionary powers in translating political choices into actions'.[27] They are created as a direct delegation of the Commission to the agency, without the intervention of any other actor.[28] Consequently, executive agencies are controlled exclusively by the Commission (Curtin 2009: 143). Today, there are six executive agencies.[29]

The other category of agencies, referred to as 'regulatory agencies'[30], is more heterogeneous. 'Regulatory agencies are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector'.[31] Their contribution to the executive function can take various forms. They can support the preparation of regulatory decisions by collecting and analysing information, or by issuing scientific opinions. They may be a platform allowing national regulatory authorities to pool information and coordinate their actions. In certain cases the agency is even entrusted with decision-making competences. To date, however, this direct regulatory power has been limited to individual decisions and does not involve rule

24 Commission Communication. *The operating framework for the European Regulatory Agencies.* COM(2002) 718 final, p.3.

25 Commission Communication. *The operating framework for the European Regulatory Agencies.* COM(2002) 718 final, p.3.

26 Commission Communication. *The operating framework for the European Regulatory Agencies.* COM(2002) 718 final, p.3.

27 Council regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community Programmes, Recital 13.

28 The creation of an executive agency has, however, been framed by a Council regulation (No 58/2003 of 19 December 2002), laying down the conditions under which such a delegation can take place, and limiting its scope.

29 A list of the executive agencies can be found at: http://europa.eu/agencies/executive_agencies/index_en.htm (consulted on 22/01/12).

30 Commission Communication. *The operating framework for the European Regulatory Agencies.* COM(2002)718 final. Brussels 11/12/2002.

31 Commission Communication. *The operating framework for the European Regulatory Agencies.* COM(2002)718 final. Brussels 11/12/2002. p.4.

making. The agencies studied in the thesis correspond to this latter type: EU regulatory agencies, hereafter referred to as EU agencies or simply agencies.

A first wave of the creation of EU agencies, going back to the mid-1970s, brought agencies with limited powers into clearly delimited policy fields.[32] Scholars of EU governance however started to look at EU agencies with the second wave of creation of EU agencies, starting in the early 1990s. These first studies on EU agencies[33] have provided a detailed account of the numerous reasons justifying their creation. The regulatory gap is here prominent. In the face of the single market programme, the EU was crucially lacking regulatory capacity. This explains the second wave of agencies. Following the Single European Act, President Delors launched the creation of no less than six agencies between 1990 and 1994.

With respect to the regulatory gap, while some authors present the problem as lying essentially in the decentralized policy implementation spurring divergent administrative practices (Dehousse 1997, Kreher 1997), others primarily emphasise the lack of resources and expertise at the Commission's disposal (Vos 2000a). In the formers' perspective, EU agencies in the form of networks are expected to sustain the creation of a 'community of views' among national civil servants and experts, which, eventually, will allow a progressive convergence of administrative behaviours (Dehousse 1997). This perspective is based on the assumption that policy implementation is done at the national level.

The alternative view of the regulatory gap takes, as a point of departure, the Commission's insufficient resources compared to its increasing responsibilities in policy implementation (Vos 2000a: 1113-1114). This focus on the Commission's problems as the trigger for the creation of EU agencies has been fuelled by other significant political events that took place in the 1990s. First, Treaty changes have made the Commission more dependent on the Parliament. This politicisation of the Commission would call for the creation of independent regulatory agencies to insulate regulatory decisions from the discretionary political power endowed to the Commission as well as to distinguish, within the EU executive, policy-making from technical and administrative tasks (Vos 2000a: 1118, Everson et al 1999). Second, deep crises in the end of the 1990s have shattered the credibility of the EU executive: the BSE crisis and the corruption scandal of the Santer Commission. All in all, at the turn of the decade, the need to transform EU governance in general, and the Commission in particular, had become obvious. This context provided a fertile ground for EU agencies. President Prodi has indeed launched what the literature calls the third wave of agencification in the early 2000s. The creation of EU agencies is thus related to several distinct, but often intertwined, delegation rationales. It is therefore

32 Geradin and Petit 2004, Curtin 2009
33 Dehousse 1997, Everson et al 1999, Majone 1997, Vos 2000a

unsurprising that the range of tasks and functions delegated to EU agencies is so vast and heterogeneous.

The institutional design of EU agencies is often put down to a mix of institutional and political factors. First of all, EU agencies, in the form of networks, are presented as a political compromise between the need to upload administrative capacity to the EU level and member states' reluctance to empower the Commission and willingness to safeguard their own regulatory authorities (Dehousse 1997, Kelemen 2002).[34] Distributional concerns are also in the foreground when it comes to explaining variation among sectors. The choice of policy-makers for agencies versus looser regulatory networks would be driven by considerations related to power-distribution conflicts (Kelemen and Tarrant 2011).

Secondly, EU agencies are often characterised as relatively weak bodies, deprived of real decision-making power. Here, the interest of pre-existing actors in preserving their share of regulatory power, in particular the member states with their NRAs and the Commission, has largely prevented the creation of powerful agencies.[35] This explanation may, in turn, be presented as a political one – when the emphasis is placed on actors' desire to retain power (Kelemen 2002); an institutional one – for those authors who point at the pre-existing institutional setting which granted the other actors the regulatory power they do not want to lose (Egeberg et al 2009, Thatcher 2011); or as an endogenous one – when the causal relationships between pre-existing institutions, pre-existing actors' interest not to lose power, and resulting institutional outcome takes the form of a path dependency type of process.[36]

The latter historical institutionalist type of reasoning can be approached by an argument made by a few other scholars: EU agencies recycle pre-existing institutional structures (Krapohl 2004, 2008, Martens 2009). Martens (2009) explains that this process may take the form of institutional bricolage (Djelic and Quack 2003: 30), conversion (Thelen 2003: 226), layering or succession (Quack and Djelic 2005: 275). Indeed, EU agencies are not created *ex nihilo*. But if EU agencies are the product of a process of institutional change, from which actors and institutions do they emerge? There are various paths of institutional change that lead to EU agencification (Busuioc et al 2012: 4).

EU agencies are sometimes presented as a substitute for committees. 'The true functional alternative to agency action […] [is] decision-making in the framework of comitology

34 Although this explanation is centred on actors' interests in maximizing their power, it can be framed in an institutionalist approach, pointing at institutions as part of the explanation because they mediate the negotiation between policy-makers (e.g. Egeberg et al 2009).

35 Kelemen 2002, Coen and Thatcher 2008, Thatcher and Coen 2008, Dehousse 2008, Egeberg et al 2009, Thatcher 2011, Boeger and Corkin 2012, 2013.

36 Thatcher and Coen 2008, Boeger and Corkin 2012, 2013.

committees' and the power given to EU agencies would originally stem from committees (Dehousse 1997: 258). Agencies are, indeed said to be, 'often based on existing committees' (Vos 2000a: 1117), from which they evolve, while taking over their structure (Krapohl 2004). Regulatory networks scholars, on the other hand, point at the progressive transformation of regulatory networks into EU agencies,[37] in a process of 'agencification of networks' (Levi-Faur 2011).

The variety of paths leading to EU agencification would explain the variation in the form and functions of the different agencies (Busuioc et al 2012: 4), which could be related to the variety of rationales intervening in the creation of EU agencies (see above). EU agencies inherit the functions of their predecessors. Thus, they may be agents of coordination, like regulatory networks (Levi-Faur 2011: 814), or providers of expertise, like committees. Hence, unlike regulatory networks and committees which are clearly associated with one specific function (networks are created to improve coordination and committees are meant to assist the Commission by providing expertise) EU agencies can be created for purposes of both coordination and expertise: they are multifunctional bodies.

1.4 Three delegation patterns and two paths of institutional change

The overarching research question of the thesis is: how can we explain the variation among sectors and the change over time, in the type of regulatory agent (committee, network or EU agency) and regulatory functions (coordination, expertise)? Before addressing this vast question directly, the configuration of the *explanandum* within the EU regulatory space has been mapped in order to clear the way.

The review of the literature first indicates that each type of regulatory agent seems to be associated with a specific regulatory function: networks are endowed with the coordination of national authorities, committees with the provision of expertise to the Commission, and EU agencies with both. It also reveals that the chronological dimension plays a role. EU agencies are not set up in the first stages of the Europeanization of a public policy. Rather, they replace pre-existing regulatory agents – committees or networks, in a public policy that has reached a certain degree of maturity.

As a result, the EU regulatory space, as complex and nebulous as it may appear, seems to lend itself to a typology composed of three distinct regulatory patterns. The coordination pattern would be characterised by regulatory networks, in charge of coordinating national regulatory

37 Thatcher and Coen 2008, Levi-Faur 2011, Ottow 2012, Boeger and Corkin 2012, 2013.

practices. The expertise pattern would partly correspond to what is often referred to as the committee system, where expert committees would assist the Commission by providing information and expertise. The agency pattern would be centred on an EU agency that could produce either coordination with views to harmonise national regulation, expertise in order to assist the Commission, or both. The agency pattern would result from a process of institutional change where it would either replace the coordination pattern (coordination path) or the expertise pattern (expertise path).

This typology of regulatory patterns and paths of institutional change will help to address the overarching research question by decomposing it in two sub-questions. First, what makes a sector fall into the coordination pattern versus the expertise pattern in the first place? Second, why and under which conditions do the coordination and expertise patterns develop into the agency pattern?

2 Theoretical framework

For the sake of analytical clarity and simplicity, the general research question is split in two. Instead of investigating the variation in the regulatory agents created and the regulatory functions delegated across sectors and over time, I first address the sectoral variation in the type of delegation pattern produced (coordination pattern versus expertise pattern) before investigation the process of agencification of regulatory agents over time. This structure is replicated in the theoretical framework which provides two sets of conjectures, one per research question. Both sets of conjectures share a common theoretical approach which is located at the crossroads between historical institutionalism and rational choice institutionalism. It shares with historical institutionalism the consideration that a given institutional choice can be best understood by unveiling its relationship with other - previous or interrelated - institutional choices. The familiarity with rational choice institutionalism lies in the conception of the preferences and behaviour of actors who are assumed to be driven by the desire to maximise both policy effectiveness and institutional power. This section starts with the first set of conjectures related to the sectoral variation in the type of delegation pattern. It continues with the second set of conjectures addressing the agencification process of networks and committees. Both sets of conjectures are then integrated into a more general theoretical proposition about institutional design and institutional change. Finally, in order to prepare the empirical analysis, a schematic overview of the processes expected to be found in the cases is presented.

2.1 Variation among sectors: competence distribution and delegation pattern

When deciding about which institutional answer to apply to a given problem, policy-makers are bounded by a limited range of relevant institutional options. The range of relevant institutional options is highly dependent on the type of problem at stake: one effective institutional solution to a given problem may be irrelevant to another problem (Martin 1992).[38] Hence, a given problem can be addressed by only a few institutional options that may be considered as functionally equivalents - although their effectiveness may vary. This shall account for why we see networks in some sectors and committees in others. In fact, EU policy-makers do not choose between a network and a committee, because both types of agents answer different types of problems. As explained above, while networks tend to answer a need for coordination, committees are created to palliate for the lack of expertise and resources within the Commission. So networks and committees tend not to be alongside each other in a given range of institutional alternatives in a specific situation. Hence, to understand why a sector is characterised by a coordination pattern versus an expertise pattern, two things must be clarified. First, what explains the emergence of a given type of problem in one sector and another problem in another sector? Second, what conditions networks and committees, in their respective situations, to be preferred over other functionally equivalent regulatory agents?

This section deals more extensively with the first question, i.e. the variation in the type of governance problem. Based on the review of how the delegation literature applies to EU regulatory governance (see above) and an adaptation of the P-A framework (see below), I propose that the type of problem depends on the distribution of implementing competences between the Commission and the Member States. On the one hand, in situations where most of the responsibilities for the implementation of regulation lie at the national level, a collective action problem is more likely to emerge than a need for expertise at the EU level. This would require the establishment of coordination mechanisms, paving the way for setting up a coordination pattern based on a network. On the other hand, in sectors where most regulatory responsibilities have been placed in the hands of the Commission, the need for expertise and efficiency will be more acute than the need to coordinate national administrations. In such a situation, there would be no need to coordinate national authorities because decision-making authority is already centralised. The Commission is thus unlikely to delegate for coordination reasons. Rather, it shall delegate the task to gather information and draft regulations because,

38 Who would think of using a hammer to open a bottle of wine?

given its limited resources, it cannot cope with the technicality of regulation and with the workload.

The second question on the choice of network and committees over other possible institutional solution is explained by a trade-off between actors' search for effectiveness and willingness to maximise their institutional power. This question is strongly related to the issue of the agencification process and change of regulatory agents over time. It is therefore presented only briefly here because it will be more extensively developed in the second part of the theoretical framework which deals, precisely, with the choice between several relevant institutional alternatives.

2.1.1 Competence distribution and delegation patterns

The first argument of the thesis is that the variation in the delegation pattern depends on the variation in the type of governance problem met in the public policy which is shaped by the distribution of implementing competences between the Commission and the Member States. Before turning to the link between the problem type and the delegation pattern, let us first consider the effect of the distribution of competences on the type of problem.

Analytically, whether the member states or the Commission is in charge of policy implementation corresponds to who the principal of the delegation is, the principal being understood as the competence owner (Thatcher and Stone Sweet 2002). The creation of a regulatory agent can be the outcome of the delegation, by the member states, of part of their regulatory competences that would otherwise be exerted by national authorities. Alternatively, it can result from a delegation of regulatory competences by the Commission who would otherwise be responsible for them. In the first case, the situation of reference, or starting point, is one of decentralised regulatory authority. Here, member states are the principal. In the second case, the situation of reference is characterised by a centralised regulatory authority, where the principal is the Commission. In sum, the institutional setting, in the form of competence distribution, determines who the principal is. While the implementation of EU regulatory policies is, by default, a national competence, in practice, the member states delegate a significant amount of regulatory authority to the Commission which the latter exerts under the comitology process. The amount of delegated implementing authority enjoyed by the Commission is not constant: it varies between sectors, issues and over time.[39]

The identification of the principal is particularly important because it is intimately linked to the delegation rationale which derives from the type of problem. Policy-makers decide to delegate

39 See Franchino 2007 for an account of the variation in the scope of implementing power delegated to the Commission.

powers in order to solve a specific problem. Since the delegation is a mechanism that, basically, transfers powers from one actor to another, the fundamental problem necessarily stems from the actor who initially holds the power. More precisely, the problem lies in the association of a specific task with a specific actor, the principal. Hence, the identity of the original competence holder is crucially linked with the rationale at stake in the delegation process. This is why it is crucial to identify the principal, as the original competence owner, to understand whether delegation comes as a solution to a problem of coordination or one of expertise and resources which, eventually, shall explain why a given sector falls into the coordination or in the expertise pattern.

It may be argued that, in such complex delegation configurations, it is not possible to identify a principal clearly, particularly when the decision to delegate is made by the EU legislator, which comprises the Commission, the EP and the Council, acting as a collective principal (Dehousse 2008). Dehousse warns against the analytical temptation to distinguish between a horizontal delegation, from the legislature to the bureaucracy, as studied in comparative politics, and a vertical delegation, from the member states to a supranational organisation, as studied in international relations. Such a separation would overlook the fact that the decision to delegate is the result of a negotiation between the Commission, the EP, and the Council, which is fundamental in explaining why EU regulatory agents – EU agencies in Dehousse's article - are endowed with so little power.

If, as argued by Dehousse, splitting the analysis into a horizontal type of delegation – where the Commission would delegate the task to provide expertise-based information, and a vertical one – characterised by an upload of national competences to the EU level, overlooks the inter-institutional politics at work in the decision-making process, then considering the principal of such regulatory delegations as being a collective one – composed of the Commission, the EP, and the Council, overlooks the competence shifts involved in the delegations. While inter-institutional politics explains some aspects of the institutional outcome – like the small amount of power delegated, the emphasis on competence shift can help us to understand variations in the type of delegation rationale, the types of function delegated, and the type of regulatory agent, which together make up the type of delegation pattern. So, how can we solve this dilemma?

The solution lies in introducing some distinctions in the definition of the principal. The concept of principal, in the P-A literature, conflates three roles or attributes. The principal is, in the first place, the actor who owns the competence that is delegated (Thatcher and Stone Sweet 2002). Second, the principal is the actor who formally makes the decision to delegate responsibilities to the agent. Thirdly, the principal is the actor who controls the agent. Hence, the concept of principal covers the actor whose competences are delegated, the actor who makes the decision

to delegate, and the actor who controls the agent. Each of the three attributes can lead to different definitions of the principal. It is thus possible to choose the definition of the principal that best suits the research question at hand.

In most instances of delegation, such an analytical distinction is not necessary because the three attributes are concentrated within a single actor. But in the EU, characterised by the dispersion of power, complex chains of delegation, and multiple principals configurations (Dehousse 2008), it can be of help to clarify and refine the definition of the principal in order to avoid confusion. For example, when several actors are considered as principals, the three attributes – competence ownership, delegation decision, and control – may be unevenly distributed among them. This is the case in situations where the three EU institutional actors co-decide about the delegation of responsibilities owned by only one of them. The creation of EU agencies provides a clear example of a collective decision to delegate regulatory authority that may have belonged to the member states only. In the absence of an effort to clarify the concept of principal, confusion arises and may lead to the assumption that EU agencies are delegated competences that would otherwise be exercised by the EU legislator.

When delegations are co-decided by the Commission, the EP, and the Council, considering the three institutional actors as a collective principal implies a very specific, although implicit, definition of the principal. Accordingly, the principal is the actor who makes the decision about delegation. Such a definition may be convenient when one is willing to investigate the amount of power delegated to the agent, its independence, or who is involved in its control, which can then be done in an approach based on inter-institutional politics (Dehousse 2008). On the other hand, defining the principal as the competence owner invites other analytical and theoretical perspectives. It allows the institutional setting, i.e. the competence distribution, to be held as determinant in the delegation rationale and the functional profile of the delegation pattern. This is the approach adopted here.

The review of the P-A literature and its application to the EU revealed that regulatory delegation in the EU may happen to palliate essentially two problems: the need for coordination of national authorities and the need to provide the Commission with expertise to palliate its lack of resources and technical specialisation. Both delegation rationales can be now clearly associated with the distribution of implementing competences. A situation where member states dominate the implementation of EU regulatory policies is likely to produce an uneven implementation, undermining market integration. The regulatory divergence resulting from decentralised implementation can only be solved through coordination, in the form of mutual adjustment or hierarchy (or a mix of both). Some implementation tasks may thus be usefully delegated to another body which shall ensure a coordinated implementation. Alternatively, where the

Commission is delegated the bulk implementing regulatory authority, its limited capacity and specialisation is likely to limit the Commission's capacity to make a full use of its competences, unless the Commission's resources are significantly reinforced or part of the workload involved is delegated to a another body.

In case of essentially national implementation, the main alternatives for fostering a coordinated regulatory output are: setting up a regulatory network, an EU regulatory agency or delegating implementation decision-making competences to the Commission. Creating a network gathering the national regulatory authorities that are in charge of implementing EU legislation can foster mutual adjustment. Delegating implementing decision-making competences to the Commission can provide a hierarchical type of solution to the need for coordination. And setting up an EU regulatory agency that would involve national authorities can address the need for coordination by mixing mutual adjustment and hierarchical mechanisms. When the extensive decision-making competences entrusted to the Commission triggers a need for expertise and resources, the main alternatives are: creating expert committees, establishing an EU regulatory agency or increasing the Commission's budget.

Given that policy-makers combine the willingness to solve functional problems with that of maximizing their institutional power, they are expected to opt for the option that is the least threatening for their own prerogatives, even if it is not supposed to be the most efficient one. Given their bounded rationality, policy-makers do not know in advance which exact institutional solution would provide the best trade-off between gain in effectiveness and maximisation of power. As a consequence, they proceed by trial and errors, adjusting institutional arrangements gradually (North 1990). Given the high number of veto players in the EU, it is almost impossible for policy-makers to significantly depart from previously adopted policy decisions (Tsebelis 2002), in particular to remove competences that were previously delegated to the EU (Pierson 1996). So policy-makers may not want to risk delegating more power than strictly necessary to bring some improvements to their governance problem because they know they shall be unable to go backwards. On the other hand, they know it is always possible to delegate more power in the future in case the first agent reveals unable to solve the problem. For this reason, in the first stages of development of an EU public policy, policy-makers tend to opt for the institutional alternative that is least damaging for their own power.

When needing to develop coordination, while the Commission and the EP would be in favour of stronger coordination mechanisms such as an EU agency or the empowerment of the Commission, the Member States shall prefer a lighter coordination mechanism such as a network. This situation is one where the member states hold most implementing competences so the distributional stakes of delegation are particularly high for them. Even if agreeing to the

necessity to foster coordination, member states are expected to limit the delegation process to the creation of a relatively weak network composed of their own national authorities in order to keep some control on the process of EU coordination. Given the importance of Member States in the EU decision-making process, their preference for a network shall be reflected in the outcome. Hence, in the first stages of a public policy where most implementing competence have remained at the national level, a need for coordination is expected to emerge and the most likely outcome is the delegation of coordination functions to an EU regulatory network.

When it comes to palliate the Commission's need for resources and expertise, the Member States' reluctance to empower the Commission shall first eliminate this option from the realm of possible outcomes, although this would have constituted the preferred option for the Commission. The alternatives consist in delegating the task to provide expertise and information to the Commission through the creation of either expert committees or an EU regulatory agency. The agency option might be the preferred one for the EP who favours transparency over opaque processes that are characteristic of committee governance. But both the member states and the Commission shall prefer committees over an EU agency, although for different reasons. For the member states, the creation of an EU agency involves a significant budget and it can be a first step towards further integration in the future as, once created, an agency can hardly be undone. For the Commission, the delegation goes with high distributional stakes because it involves giving away some of its own responsibilities. The Commission shall therefore favour committees because they would be a weaker agent and easier to control than an EU agency that would enjoy more resources, a higher formal status and more independence from the Commission. As a consequence, in the first stages of a public policy where the bulk of implementing authority has been delegated to the Commission, I expect the latter to lack the required expertise and resources to make use of these competences which shall, most likely, lead to the creation of expert committees to provide the necessary expertise-based input into the regulatory process.

2.1.2 Conjectures

While the thesis makes a distinction between coordination and expertise, it happens that, in practice, both dimensions overlap. In particular, regulatory networks are often called to provide expertise on top of their coordination mandate. Committees, however, are not portrayed by the literature as bodies providing coordination of national regulatory practices; their functional profile seems more clear-cut. The fact that both coordination and expertise function are sometimes found in the activities of networks may be one of the reason why the literature has tended to conflate both problems, the lack of decision-making competences and the lack of resources, into the concept of regulatory gap. Whereas the distinction between coordination and

expertise may not be relevant for some research questions, I think that it has important benefits. First, by clarifying the functional nature of the regulatory gap, the distinction allows the construction of a parsimonious explanation of the varying reliance on networks versus committees between sectors. Second, it enables us to trace the competence shift involved in the delegation. This helps the clarification of the distributional stakes of delegation for the various institutional actors, which is crucial in understanding why EU agencies are more likely to emerge in the coordination path than in the expertise path (see below).

Such situations of double delegations, i.e. where both coordination and expertise tasks are delegated to a single agent, are not analytically problematic as long as it is possible to identify empirically which was the main problem behind the creation of the regulatory agent and what is its main function. We may however imagine situations where both delegation rationales are equally important for the creation of an agent who is in charge of both coordination and expertise tasks in equal proportions. There, I expect a network to be created instead of committees. While it is easy to use a network as a source of expertise, using a committee to foster coordination is more complicated. Indeed, where there is no centralization of competences, the coordination of national administrative behaviour can only be fostered by having the competent administrative actors exchanging with each other. This condition would not be met with a committee composed of independent experts who do not necessarily belong to national administrations.

Accordingly, one can formulate the following hypotheses:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*
    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*

- *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
- *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
- *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.*

- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:*
  - *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
  - *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
  - *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

2.2 Transformation over time: functional-distributional dynamic with feedback loops

Why and under which conditions do coordination and expertise patterns develop into the agency one? The delegation pattern is the combination of the type of regulatory functions delegated and the type of regulatory agent. As regards the change of regulatory functions, the first argument presented above applies. Unless the process of institutional change involves a significant change in the distribution of competences, the type of function delegated is likely to show a fair level of continuity over time. If, however, the policy-makers decide at some point to delegate more executive responsibilities to the Commission, one may expect a concomitant

increase of expertise functions in the mandate of the regulatory agent. Facts show that, if any change occurs in the distribution of regulatory competences between the member states and the Commission, it will be to the benefit of the Commission. EU public policies tend, indeed, to become increasingly europeanized over time rather than the other way round. Hence, while we may expect the mandate of regulatory agents who were initially delegated coordination tasks to gradually involve more expertise tasks, the reverse trend – an initial expertise mandate expanding to coordination tasks – seems unlikely.

What makes the change towards the agency based regulatory regime particularly intriguing is that it implies a change of regulatory agent in the form of a process of agencification. Whereas this trend encompasses two empirical realities, the agencification of networks and the agencification of committees, it is approached from a single theoretical perspective, expected to be equally valid for both the coordination and expertise paths. The agencification regulatory agents are, I think, best explained by a combination of functional and power-distributional factors unfolding in a feedback loop type of process. This is based on the assumption that, if power distributional considerations influence the shape of institutional outcomes, functional pressure represents the drive to reform the institutional structures in the first place.

2.2.1 Agencification of newtorks

Many accounts of EU agencies and regulatory networks insist on their 'lack of teeth' due to the interest of pre-existing actors in preserving their own powers (Thatcher and Coen 2008, Boeger and Corkin 2012, 2013). This is also the case with analyses related to the transformation and progressive institutionalisation of networks. Once created, NRAs and regulatory networks develop institutional interests of their own as well as lobbying capacity, which has significantly limited the scope of modifications that policy makers have been able to impose on them. As a result, in spite of problem pressure, once created, EU regulatory networks have remained at the centre of the EU institutional setting for coordination, and have only progressively become institutionalised rather than be replaced, in a process of radical change, by a more effective institutional structure such as an EU regulator (Thatcher and Coen 2008, Boeger and Corkin 2012, 2013).

Yet, interestingly, being 'designed to fail' (Kelemen and Tarrant 2011: 926) in spite of important pressure to increase coordination, regulatory networks carry with them 'endogenous forces for change' (Thatcher and Coen 2008: 830). And the very, politically driven, weakness of regulatory agents is precisely why functionalism strikes back. As long as policy-makers resist from engaging in significant institutional change, the problem is still lurking in the background. Reluctant to give up their power, policy-makers opt for an unambitious institutional solution.

But they also quickly have to face the lack of effectiveness of their institutional choice. In the face of a strong problem pressure, unambitious institutional solutions are questioned, revised, and ultimately reinforced, even if this takes time. For as weak as the literature portrays them, EU agencies are nonetheless stronger than the networks that they replace. And given the direction of EU integration, as well as the high number of veto points in the EU policy-making system, once an institutional move to increase EU regulatory capacity is made it is practically impossible to undo. As a consequence, policy-makers, and member states in particular, make progressive moves, slowly, yes, but surely too, towards the reinforcement of regulatory agents.

Focussing on snapshot decisions about the creation of EU regulatory agents overlooks this dynamic between political and functional forces which unfolds over time, through feedback loops. The approach adopted here is very close to Thatcher and Coen's (2008) account of the evolutionary analysis of the European regulatory space. However, while they emphasise the absence of significant changes, in spite of significant pressure, due to pre-existing actors' interest, the opposite is done here: emphasising the persisting functional pressure to explain why there is change, in spite of the interest of pre-existing actors in holding onto power.

The change of agent, in the form of the agencification of networks, is thus driven by a functional imperative: improving the effectiveness of the delegation pattern. The extent to which the regulatory agent is reinforced through this process, as well as the likelihood of the network to be agencified, thus depends on the amount of functional pressure. While high problem pressure would lead to a significant reinforcement of the regulatory agent, this will not be the case where functional pressure is low.

The change in the distribution of competences is not neutral in this respect. While the divergence of national regulatory practices may be tackled through the reinforcement of the regulatory agent in charge of the coordination of national regulatory authorities – as outlined above, another route for solving the collective action problem always remains possible: delegating more executive competences to the Commission. The centralization of implementing authority would *de facto* solve the problem of divergent implementation practices, reducing the problem pressure felt. However, as has been explained above, while a change in the competence distribution to the benefit of the Commission would decrease the pressure related to the coordination problem, at the same time, it is likely to increase the pressure related to the problem of the Commission's lack of expertise and resources, leading to the delegation of expertise tasks.

2.2.2 Agencification of committees

Why are committees transformed into EU agencies? While they are said to be effective and efficient with respect to the production of technical and scientific opinions that help regulatory decision-makers to reach agreements, expert committees exhibit some problems: a lack of transparency, accountability, and legitimacy. The system of expert committees makes it very difficult to know who did what, who said what, and who decided what. Besides being very opaque structures (Larsson and Murk 2007: 94), they are also very numerous and several expert committees may even co-exist in the same area. This makes it particularly difficult to identify who is responsible for specific pieces of advice or decisions. This, added to the technical character of committees, nourishes the image of an opaque technocracy, which also undermines its legitimacy (Christiansen and Larsson 2007:8). Furthermore, the loyalties of the participants to the committee are particularly obscure; committees are indeed said to be permeable to national or economic interests. In spite of this, they have a considerable influence on EU regulation, which creates a problem of accountability (Christiansen et al 2007). Finally, their working capacities are limited and, in case of increased need for expertise and advice from the Commission, a more permanent structure might be necessary.

Theoretically, the agencification of committees can be approached in a similar way as the agencification of networks. The integration of the committees into an agency structure is functionally driven: it aims at solving the governance problems of the committees. Here as well, vested interests of pre-existing actors may resist significant change. The system of expert committees is very fragmented and informal, and the Commission decides on the creation of a committee and how the output of that committee is used. This provides the Commission with very important leeway as to how it handles expert opinions. Consequently, 'expert groups are an administrative tool that the Commission can use in order to try and influence and even control the decision-making process of the EU.' (Larsson and Murk 2007: 73). Having the capacity to set up committees at will and organize their work, by deciding who would be the chair and the committee members, etc. provides the Commission with 'unlimited possibilities to use this to his/her advantage to influence the outcome of the committee' (Larsson and Murk 2007:73). And even if the Committee's output is not in line with the preferences of the Commission, the latter can always decide to close it down or not to act on its conclusions (Larsson and Murk 2007:73). The literature has indeed shown that the Commission is using expert committees strategically, with a view to gather support or legitimacy for its actions (Robert 2003, Douillet and de Maillard 2010: 77-78).

The Commission is thus expected to be reluctant to switch from a committees system to one based on an independent EU agency, which would be more constraining due to the increased visibility, transparency, and formality characteristic of EU agencies. As regards the member states, they are also expected to be reluctant to the replacement of committees by agencies because the latter option requires a much bigger budget. The Parliament, on the contrary, will prefer EU agencies, precisely because the higher transparency associated with these more formal structure allows a fire-alarm type of control (McCubbins and Schwartz 1984), convenient for the Parliament, which is not possible with the opaque, fragmented and complex system of expert committees. Under the expertise pattern, given that both the Commission and member states would prefer committees to agencies, EU agencies are rather unlikely to be created to replace committees – unless there is exceptionally high problem pressure.

Here as well, the time dimension, with feedback loops, should be taken into account. EU regulatory institutions develop over time, reform after reform. If, in order to preserve their powers, policy-makers opt for a committee system *a minima* in spite of strong problem pressure, the outcome is unlikely to match the extent of the problem, setting the stage for later reform. Hence, in a sector with important executive powers delegated to the Commission, an EU agency will only be created after the committee system has proved to be lacking effectiveness in a context of very high problem pressure.

2.2.3 Conjectures

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means.*
- *The higher the problem pressure, the more likely it is that the regulatory agent – network or committee – is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees.*

2.3 Actors' preferences

2.3.1 Meta-preferences

The actors that are involved in the design of institutions for the implementation of EU regulatory policies are the Commission, the Council, and the European Parliament. Most of the institutional choice about the delegation pattern is made at the legislative stage under the codecision procedure. EU legislation is necessary to enlarge the Commission's decision-making powers and

budget as well as to create an EU regulatory agency. The creation of regulatory networks and expert committees can be realized by a decision of the Commission only. The decisions made about the delegation pattern in one and the other venue (by the collective EU policy-maker and by the Commission) are interrelated in a way that allows, analytically, treating the decisions of the Commission as one of the collective EU policy-maker (more details about this below).

In a rational-choice institutional approach, I assume actors to be driven by the need to maximise their interests. I consider two types of relevant interests: actors are interested in increasing policy effectiveness and maximising their institutional power. Besides, I assume actors' rationality to be bounded in the sense that they are unable to predict all the consequences of their institutional choices and what precise decision is required for them to reach their objectives (North 1990).

The range of relevant institutional options differ in the coordination path and in the expertise path. In the coordination path, at the level of the legislative decision by the three EU institutions, the alternatives are: keeping the status quo, creating an EU regulatory agency or empowering the Commission. In case the legislator opts for maintaining the status quo, the Commission may still decide to set up a network on its own. I assume the legislator to know about this possibility and to know about the Commission's preference for working with a network over the status quo. Hence, I assume that the legislator's preference for the status quo accommodates the option of creating a network and that it can be analytically treated as a preference for setting up a network. As a consequence, in the coordination path, the choice about the delegation pattern is seen as determined by a legislative decision-making process between three alternatives: setting up a regulatory network, setting up an EU regulatory agency, or delegating regulatory authority to the Commission.

In the expertise path, the relevant options at the legislative stage are: keeping the status quo, creating an EU regulatory agency or increasing the budget of the Commission. Similarly as with networks in the coordination path, the Commission may decide to set up expert committees on its own. Assuming the legislator's knowledge about this possibility as well as the Commission's preference for working with committees over the status quo, I assume that the legislator's preference for the status quo can be analytically treated as a preference for setting up expert committees. In sum, in the expertise path, the choice about the delegation pattern is seen as determined by a legislative decision-making process between three alternatives: setting up expert committees, setting up an EU regulatory agency, or increasing the budget of the Commission.

The ranking between the different options differs depending on which assumption about actor's motivation is considered (see table 1.2). Under the assumption that actors' preferences follow an effectiveness rationale, decision-makers shall chose the institutional option that appears to be the best one to solve their governance problem. Governance problems are common to the three EU institutional actors because they are defined in relation to their commonly established policy objectives. Hence, under this functionalist assumption, the preferences of all three institutional actors shall converge towards the more effective institutional solution. In the coordination path, the problem is that EU legislation is implemented unevenly among the member states. The most effective solution to harmonise policy implementation is to delegate authoritative implementing competences to the EU level. While EU regulatory agencies can legally absorb more competences and powers than EU regulatory networks, they cannot be delegated the capacity to adopt binding implementing regulations with general application.[40] Such implementing power can only be delegated to the Commission. So the need to harmonise the implementation of regulatory legislation would be best served by the delegation of decision-making competences to the Commission. The second best option is the creation of an EU agency in charge of coordinating national authorities and, finally, the least effective option is the delegation of coordination tasks to an EU regulatory network.

In the expertise path, the problem consists in the lack of resources and expertise at the EU level. The most effective option here is the creation of an EU regulatory agency. On the one hand, because of their permanent status, EU agencies outperform committees. The EU's need for expertise is best served with a strong corpus of full-time employees working in a dedicated institution or department rather than a group of international experts mainly engaged in another professional activity and meeting from time to time in Brussels. A dedicated group of EU staff would not only significantly increase the working capacity, but also ensure the continuity of the work, which shall guarantee the quality of the opinions delivered and as well as the overall efficiency of the workflow by reducing transaction costs. On the other hand, an EU regulatory agency would be much more efficient than the Commission for the provision of expertise. Whereas the Commission would have to duplicate the expertise already present in the member states, the institutional structure of EU regulatory agencies allows setting up relatively flexible working arrangements involving and pooling the resources and the expertise of national administrations. Finally, a solution where the Commission would be working with committees gathering international experts appears more efficient than a situation where the Commission's budget would be dramatically increased in order to duplicate the expertise that can be mobilized in a more flexible and cheaper way.

40 CJEU Judgement C-9/56. *Meroni v. High Authority.*

	Assumption	Ranking	COMMISSION	COUNCIL	EP
Coordination path	Policy effectiveness	1	Increase of Commission's power		
		2	EU agency		
		3	EU network		
	Institutional power	1	Commission	EU network	EU agency
		2	EU agency	EU agency	Commission
		3	EU network	Commission	EU network
Expertise path	Policy effectiveness	1	EU agency		
		2	Increase of Commission's budget		
		3	EU committees		
	Institutional power	1	Commission	Committees	EU agency
		2	Committees	EU agency	Commission
		3	EU agency	Commission	Committees

Table 1.2: Actors' preferences

On the other hand, the assumption that actors are driven by the interest to maximise institutional power leads to divergent preferences among the institutional actors. Institutions have distributional effects on actors; they favour some actors over others. Under this power-based assumption, actors shall thus prefer the institutional option that promises the best distributional outcome for them (Knight 1995). Two dimensions of power distribution are relevant here. There is first the divide between the national and the EU level. Whereas the Council, being composed of the member states, shall prefer keeping the power at the national level, the EP and the Commission, being supranational actors, shall prefer the delegation of power to the EU. The second dimension of power distribution relates to the inter-institutional political dynamics taking place at the EU level between the Council, the EP and the Commission. The three institutional actors are also rival on the EU scene and each of them will tend to maximise its relative power in this context, which often means willing to minimise the power given to their rivals.

In the coordination path, the alternatives are: empowering the Commission, creating an EU regulatory agency or creating an EU regulatory network. The Commission's would prefer being directly empowered. If this were not possible, the Commission would favour creating an EU agency over a network. Indeed, an EU agency would involve a more substantial shift of power from the member states to the EU level, which can be seen by the Commission as an indirect way to maximise its power by gaining influence over the agency's activities. For the Council, it is the other way around. Member states are reluctant to delegate power to the EU level and even more

to the Commission than to an agent that has accumulated less power and could be more easily controlled. I thus assume their preferred outcome to be the creation of an EU regulatory network before the establishment of an EU regulatory agency. Their least favoured option would be the delegation of competences to the Commission. For the EP, the important criteria are the delegation of competences to the EU level, their own relative institutional power within the overall EU institutional framework and the degree of transparency offered by the institutional set-up which can allow the EP to gain some control over the regulatory process through 'fire-alarm' mechanisms (McCubbins and Schwartz 1984). This shall lead the EP to prefer the creation of an EU agency which would combine transparency with important shifts of power to the EU level, while avoiding empowering the Commission too much. The EP's interest in power uploading would then favour the delegation of competences to the Commission. Finally, the least preferred option for the EP would be the creation of a network because this solution would not be seen as supranational enough.

In the expertise path, the alternatives are: increasing the Commission's budget to allow them to recruiting experts, setting up an EU regulatory agency or creating expert committees. The Commission's preferred option would be enjoying a bigger budget. Its second best option would be to work with committees and, finally, it would be to create an agency. he Commission would prefer working with committees because this situation provides them with a higher informal power. The Commission has a large influence on expert committees are uses them strategically which is, amongst others, allowed by the opacity of the committee system. EU agencies are more transparent than and not as malleable as committees are. This is why I assume the Commission to prefer committees over EU agencies. For the Council and the EP, the ranking follows the same logic as within the coordination pattern. The Council's preferred agent would be committees because they do not represent an important step in the process of transferring power to the EU. EU agencies are more significant institutions which do also require a bigger budget. Finally, the worst option for the member states would be to empower the Commission by increasing its budget. For the member states, an agency would be largely preferable to empowering the Commission because, being generally in the board of EU agencies, they have some control over the agency. Besides, the empowerment of the Commission would diminish their relative power in the inter-institutional political game and the budget of the Commission would have to increase in very high proportions. For the EP, creating an EU agency is the best solution because this is an important step in transferring power to the EU level without empowering much the Commission and because the transparency associated would allow them to keep some control over the regulatory process through fire-alarm mechanisms. Empowering the Commission would come next, because of the supranational shift involved. Finally, the worst option for the

EP is the committee system because of its opacity and the informal power it provides to the Commission.

2.3.2 Situational preferences

Actors' meta-preferences are then shaped into situational preferences. We shall first consider that situations determine how actors' drives for increasing their power and solving collective problems interact. In some cases, the functional and distributional interests converge towards the same situational preference. This is often the case for the Commission whose empowerment can contribute to a more effective integration of markets in the EU. The situation is generally the opposite for the member states who have to delegate their own power to the EU level in order to solve the collective action problem that is impeding market integration. Hence, in many situations, actors' situational preferences result from a trade-off between policy effectiveness and power. Whether this trade-off favours functionalist or distributional interests depends on their relative strength in a given situation. The more acute the problem pressure, the more actors are influenced by their willingness to solve problems. Similarly, as distributional stakes increase, so does the influence of actors' quest for power on the determination of situational preferences.

The trade-off between functional and power-distributional interests first depends on the level of distributional stakes for the actors. Nelson and Silberberg (1987) found that legislators were more likely to orientate their choices on ideology rather than on the interest of their constituents when the political cost of doing so was lower. Building on this finding, North makes the assumption that the trade-off made by actors between wealth maximisation and ideology is 'a negatively sloped function' (North 1990: 22). The extent to which ideology determines actors' preferences and behaviour depends on the cost of doing so. When the price is high, ideology would weigh less than when the price of an ideologically driven behaviour is low. Replacing ideology by policy effectiveness and wealth by institutional power, North's reasoning can be applied to policy-making actors that are assumed to be driven by the desire to maximise both effectiveness and power. The significant role played by functional pressure in shaping actors' preferences would be conditioned upon low distributional stakes.

For the member states, distributional stakes may vary between sectors. For example, they are higher in public utilities sectors hosting national economic champions that may be partly owned by the states themselves (Kelemen and Tarrant 2011). Also, distributional stakes are higher for the member states in sectors where the implementation has still remained under the national authority (coordination path) because the reinforcement of regulatory agents, in particular their agencification, would involve giving away part of their power. When they would not imply the

transfer of national powers to the EU level, e.g. because it would entail the transfer of the powers stemming from the Commission instead (expertise path), the Member States are expected to be less reluctant about agencification – although they may oppose agencification there for other reasons such as the amount of budget needed.

For the Commission, distributional stakes may vary between sectors depending on the executive competences it holds. For example, a sector like competition policy where the Treaties endowed significant powers to the Commission would represent very high distributional stakes. Thus, in the expertise path, the Commission is unlikely to be in favour of a reinforcement of the agent, and even less in favour of its agencification. But where the Commission's power would remain unaffected – or barely affected (coordination path), the Commission is expected to be in favour of the creation of an EU agency because this would involve the transfer of national competences to the EU level, which is, as such, a desirable outcome for the Commission. And even if this power upload would not contribute to directly empower the Commission, the creation of an EU agency still represents an opportunity for the Commission to indirectly increase its influence on the regulatory process, through the influence it could gain in the future on the new EU agency. For the Parliament, the distributional stakes are not expected to vary as they do for the member states and the Commission because, in principle, regulatory agents are never delegated tasks that would otherwise belong to the legislative power.

While holding this assumption made by North about the interaction between functionalist/ideological and distributional considerations for relevant, I think that it is incomplete. While North assumes that the distributional stakes vary depending on the situation, the ideological (or functional in our case) relevance is implicitly supposed to remain constant. Yet history provides plenty of examples where individuals were ready to pay a very high price, including sacrificing their lives, in ideologically and ethically extreme situations. Similarly, institutional actors have given examples of preferring ideology and policy effectiveness over the search for power when policy choices implied making unpopular decisions. It should therefore be acknowledged that the variation in the strength of the functional pressure (or the ideological relevance) does also affect the trade-off between functionalist and distributional interests in the definition of actors' preferences. Functional pressure is present in all sectors subject to EU regulation and the internal market programme. The pressure is not necessarily constant and may change from one sector to another, depending on elements such as the nature of the barriers for cross-border trade, the economic benefits expected from market integration or whether a crisis has intervened in the sector.

Finally, for strategic reasons, the preferences pursued by actors in the negotiation may differ from the situational preferences as resulting from this trade-off. First, I assume uncertainty to

affect the preferences pursued by actors in the negotiation process. Uncertainty is not only affecting actors' capabilities to make the right choice. Knowing about their inability to predict exactly the effect of their institutional choices, where functionalist and distributional interests contradict each other, I assume that policy-makers include this uncertainty into their choice by limiting the risk of going through unnecessary losses of power. Policy-makers are expected to search the most power-efficient solution to their problem, i.e. the solution that, while being able to solve the problem, is the least costly in terms of power. In a context of uncertainty, actors do not know beforehand which solution is the least power-costly. Hence, they shall avoid risking losing more power than strictly necessary to solve the problem because they may be unable to recover the power initially given away. On the other hand, an unambitious solution on the dimension of effectiveness is easier to adjust by giving more power away at a later stage. Power is more easily delegated than recovered once given away. Given that policy-makers know this, I assume that the relative weigh of distributional concern in the definition of preferences is higher in actors' negotiation preferences than in their situational preferences.

Second, the strategic setting plays a crucial role in shaping the preferences pursued by actors in the negotiations. While they do not share the same preferences, the Commission, the Council, and the Parliament know that they must reach an agreement in order to be able to change the governance of regulatory policy implementation. Anticipating the negotiation process, actors may therefore renounce their ideal institutional outcome in case it would be incompatible with the preferences of the other actors. Instead, they may decide to target, for example, the next best institutional outcome in order to reach an agreement in case of the absence of agreement – the status quo – would be worse for them.

2.4 Institutional design and institutional change

The theoretical framework of the conjectures allies rational choice institutionalism and historical institutionalism. It is close to rational choice institutionalism because of its assumptions on actors' rationality and the emphasis on functional and power distributional factors. The familiarity with historical institutionalism lies in the focus on the interconnectedness between distinct institutional choices and on policy feedbacks.

The thesis establishes first an analytical distinction between the emergence of governance problems and the limitation of relevant alternatives to tackle them on the one hand, and the political choice among those alternatives on the other hand. Turning first to the emergence of problems and the relevant institutional alternatives, the thesis' approach is similar to Kingdon's endeavour to explain policy choices by emphasizing what happens before the political decision-

making as such. Policy decisions are conditioned by the emergence of specific problems and the pre-selection of a limited number of alternatives to solve these problems (Kingdon 2003).

While Kingdon explains the selection of policy alternatives with political, social and economic factors, such as ideas, policy communities, technical feasibility, value acceptability and costs (Kingdon 2003: Chapter 6), I focus on the functional reasons why 'there are only a limited number of ways of acting in most contexts and only so many different rules to structure most social interactions' (Knight 1995: 116). North underlines the force of the 'interdependent web of an institutional matrix' in shaping institutional and organizational development (1990: 95): there is a 'symbiotic relationship between institutions and the organizations that have evolved as a consequence of the incentive structure provided by those institutions' (1990: 7). Along that same line, Hall and Soskice (2001) developed the concept of institutional complementarity. Two institutions can be said to be complementary if the presence (or efficiency) of one increases the returns from (or efficiency of) the other' (Hall and Soskice 2001: 17). This mechanism would help understanding how different patterns of institutional practices come to form different varieties of capitalism. 'Nations with a particular type of coordination in one sphere of the economy should tend to develop complementary practices in other spheres as well.' (Hall and Soskice 2001: 18).

In a logic close to the concepts of institutional matrix (North 1990) and institutional complementarity (Hall and Soskice 2001), I explain the limited number of institutional alternatives with their functional relevance within the institutional framework at hand. Asking national regulatory authorities to coordinate their activities can only be useful when these authorities are competent to implement EU legislation. If most decision-making competence was delegated to the EU Commission, coordinating the activities of NRAs shall not bring any relevant benefit. Similarly, it would not make much sense to set up expert committees to help the Commission in drafting regulations if the latter is not competent to initiate or adopt such regulations. But where the Commission is delegated implementation competences, the functional value of expert committees is obvious; and the presence of expert committees is also reinforcing the effectiveness of the Commission in making use of its delegated competences.

Drawing into the institutional complementarity concept, the argument presented in this thesis goes also beyond this mechanism in three ways. First, it considers that the interconnectedness between the distribution of implementing competences and the delegation pattern does not limit the possible delegation pattern to one regulatory agent. Several functionally equivalent delegation patterns can serve the same functional requirement for institutional complementarity (Hancké et al 2007: 11). Both an EU regulatory network and an EU regulatory agency can produce some coordination. Although they may not have the same degree of

effectiveness, they can be given the same functional profile, i.e. they can address the same type of problem. Hence, I accompany the functional logic of the institutional complementarity argument with the possibility of choice between several institutional alternatives.

Second, unlike classical functionalist theories and the original version of the *Varieties of Capitalism* argument (Hall and Soskice 2001), this thesis includes the dimension of power. Indeed, the *Varieties of Capitalism* argument as well as functionalism in general have been criticised for ignoring that institutions have distributive implications, which is crucial in understanding institutional choice (Snidal 1996: 132-133). Existing institutions benefit some actors and disadvantage others. According to the theory of bargaining and distribution, when negotiating, policy-makers anticipate these distributive effects and determine their institutional preferences accordingly. Consequently, actors' preferences diverge and the final institutional outcome reflects the preferences of the most powerful actors (Knight 1995: 107-108).

To account for the institutional choice on the delegation pattern, the thesis integrates the power distributional factor, without however limiting the explanation of institutional choice to the sole effect of power distribution. As exposed above, actors are also interested in achieving policy effectiveness and their preferences are conceived as a trade-off between their functional value and their distributional impact. The trade-off depends on the degree of functional pressure and the level of the distributional stakes. Actors' preferences that result from this trade-off are then strategically adapted so they can be credibly defended in the negotiation process without antagonizing other negotiating actors. Furthermore, given actors' uncertainty about which precise institutional solution would be the least 'power-costly' while still solving their problem, they tend to defend options that are less power-costly for them, although less effective, than the preference resulting from their trade-off evaluation. They do so in order to avoid giving away more power than strictly necessary to solve their problem because such a move would be difficult to correct afterwards, in particular in political systems with a high number of veto-players (Tsebelis 2002). In sum, among the institutional alternatives, I expect the outcome to reflect the preferences of the most powerful actors and I expect these preferences to be less ambitious on the functional dimension and more conservative on the power dimension than the ideal trade-off between effectiveness and power made by the same actors.

The third way in which the thesis expands the concept of institutional complementarity consists in connecting it to a broader argument about institutional change, which allows overcoming the static dimension that has been reproached to Hall and Soskice's *Varieties of Capitalism*. Given that actors tend to choose sub-optimal institutional solutions, I expect these solutions to be unable to properly solve their problems. This lack of effectiveness creates feedback effects triggering actors' willingness to adjust the institutional solution. Institutional change follows in

order to improve institutional effectiveness. Here again, wherever the gains in effectiveness run against the maximisation of power of actors with significant bargaining power, I expect the scope of institutional change to be limited. This dynamic interaction between functional and distributional forces unfolds over time through feedback loops making a process of gradual improvement of the institutions.

This conjecture about the gradual reinforcement of the regulatory agent is backed by earlier work on policy feedbacks. The literature on policy feedback has identified various feedback mechanisms. Policies may redistribute resources and incentives and they can change identities and interests (Skocpol 1992). Besides, policy implementation can sustain a process of policy learning by providing policy-makers – subjects to problems of bounded rationality in a context of complexity and uncertainty - with additional information (Heclo 1974, North 1990). Often used to explain lock-in effects and path dependency by launching dynamics of increasing returns (Krasner 1988, Pierson 2000, Pierson 2004: Chapter 1), policy feedbacks may also be a trigger for institutional change by providing policy-makers with information allowing them to better understand their problems and learn from past mistakes. By allowing policy learning, policy feedback give policy-makers the tools to adapt and improve institutional structures, although such adaptation is generally imperfect, marginal and incremental due to its containment within pre-established paths or bounded cognitive and cultural frameworks (Heclo, 1974, North 1990). The thesis' conjecture about the gradual reinforcement of regulatory agents makes a specific application of this argument about the learning effect of policy feedback by centring it on the dynamic interaction between functional and distributional factors.

2.5 Three delegation patterns and two paths of institutional change

In order to facilitate the evaluation of the conjecture in the empirical chapters, the presentation of the empirical material will be structured along the patterns and processes involved in the conjectures. In order to clarify this structure before moving on, this last section of this chapter provides a summary of the conjectures accompanied with flowcharts. Note that the processes outlined below are likely to unfold more progressively and EU agencies are expected to appear at later stages of reform. They have been presented in two steps for the sake of simplicity.

2.5.1 The coordination pattern and the coordination path

At T1, the coordination pattern is found where regulatory competences have remained at the national level. This creates a need for coordination which, given actors' preferences not to lose power, shall be met by the creation of an EU regulatory network. The network, being a weak and

loose structure, would be unable to achieve the necessary degree of regulatory coordination. This would spark a reform process with views to solve the remaining problem of coordination. At T2, two institutional options are then available: reinforcing the network, or delegating implementing competences to the Commission.[41]

At T2, in the absence of a significant shift of regulatory authority to the Commission, the situation would remain one of nationally based implementation, with a problem of coordination that could not be solved earlier because of the networks' lack of effectiveness. The likely institutional outcome, then, is a reinforcement of the network. The extent of this reinforcement would depend on the amount of problem pressure. In case it is high, the network is likely to be agencified.

If, at T2, a significant amount of implementation competences are delegated to the Commission, the situation would be one combining a pre-existing coordination problem – unsolved at T1 by the weak network, and a new expertise problem – due to the Commission's lack of resources and expertise. The likely institutional outcome, then, is a reinforcement of the network, as well as an expansion of the mandate of the network towards the provision of expertise to the Commission. The extent of this reinforcement would depend on the amount of problem pressure. In case it is high, the network is likely to be agencified.

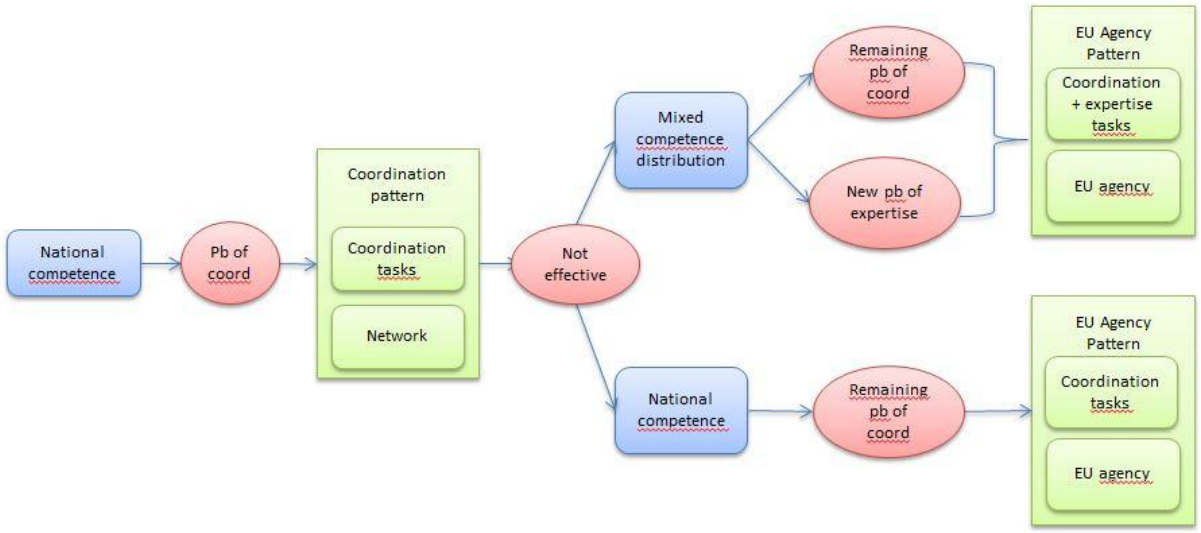

Figure 1.1: the coordination path

41 These two options do not exclude each other, they may be combined.

2.5.2 The expertise pattern and the expertise path

At T1, the expertise pattern is found where most implementing competences have been delegated to the Commission. In order to palliate the lack of resources and expertise of the latter and given actors' interest not to lose power, an expert or scientific committee, gathering independent experts, would be set up and given the mandate to provide the Commission with expertise in order to prepare implementing regulation. In case of high pressure, the committee system would be problematic in terms of accountability and transparency, or lack the capacity to cope with the amount of work required. This would trigger a reform process meant to solve this problem of expertise. If problem pressure is very high, this could lead, at T2, to an agencification of the committee.

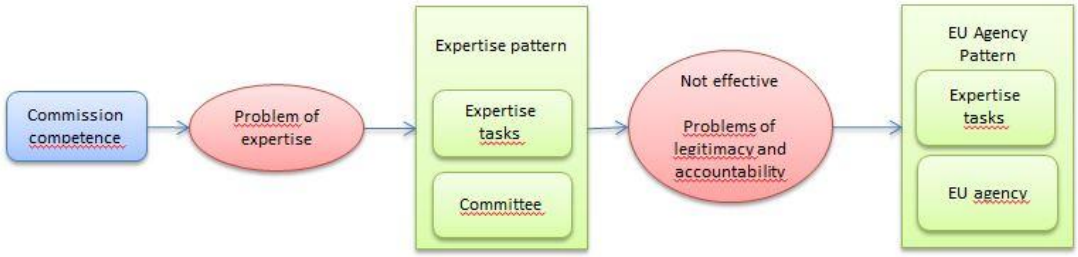

Figure 1.2: the expertise path

3 Disclaimer

Before turning to the research design and the methods used in the research, it is useful to write a few words on what has been consciously discarded from this research. To start with, there are institutional phenomena that may be close to those investigated here but which are not part of the *explanandum*. First of all, the thesis looks at the distribution of competences and delegation patterns that were set up for the implementation of EU regulatory policies, related to the creation of the internal market. This means that other kinds of policies, such as redistributive policies, are not covered. The research question addressed here is anchored in the adoption of the Single European Act with the objective to achieve the internal market, and the institutional implications of this political goal. Any policy that would not be related to this objective would therefore be *a priori* irrelevant to the research question. Then, as has been explained very well in the literature, the major obstacle to the realisation of the internal market is the difficulty to bring about a harmonised implementation of regulatory policies in a system based on decentralized implementation (Dehousse 1997). The key challenge, here, is regulatory harmonisation or, at least, regulatory convergence. The variation of regulatory rules across countries is, indeed, what

makes it difficult for companies to offer their services and products beyond their national boundaries. Yet, the adoption of implementing rules and decisions do not exhaust what is commonly referred to as policy implementation, which may also involve other types of tasks such as enforcement. The need for harmonisation and consistency, which constitutes the starting point of the research question, may not apply equally to these other tasks. As a consequence, the research framework only applies to those elements of policy implementation that consist in adopting implementing regulations and decisions. The empirical chapters may nonetheless punctually discuss these additional tasks. This is for the sake of providing a good picture of how EU regulatory policies are implemented in practice. But the institutional developments on such additional tasks are not expected to fit the conjectures.

It might be surprising that the range of regulatory agents forming the *explanandum* do not include comitology committees, which are very important regulatory agents in the implementation of EU regulatory policies. The creation of comitology committees is intimately related to the delegation of executive competences to the Commission. Their very function is to control the Commission when the latter is delegated executive competences. Hence, comitology committees are created or involved almost every time such competences are entrusted to the Commission. Yet the delegation of executive competences to the Commission is the main explanatory factor of, amongst others, the type of regulatory agent created. Considering comitology committees as a part of the *explanandum* would therefore create a problem of endogeneity between the *explanandum* and its *explanans*. Instead, it is assumed that comitology committees are created or involved whenever the Commission is delegated executive competences and the involvement of these comitology committees in the regulatory process will be consequently referred to in the empirical chapters.

While the central explanatory factor for the variation in the type of regulatory agent and of regulatory functions is the distribution of implementation competences between the Commission and the member states, one may be tempted to ask what accounts for this distribution of competences in the first place. Why is it that, in some sectors, the centralisation of implementing regulation is chosen and resisted in others? As important as this question may be, it is beyond the scope of this thesis, which, instead, investigates the consequences of this institutional choice.[42]

By focussing on the distribution of competences as an explanatory factor, it has been chosen to discard other possible factors that could have played a role in the determination of the types of regulatory agents and functions. Interest groups, for example, could be playing a role in the EU

42 For an investigation on the determinants of the delegation of executive competences to the Commission, see Franchino 2007.

policy-making process. While their influence is not denied, it is assumed that it is aggregated, at a lower level of analysis, within the preferences of the policy-makers. For example, the former monopolists, who now constitute dominant industries in the utilities sector, tend to oppose the delegation of powers to the EU because the EU is in favour of liberalization, which implies a reduction of their market shares. These groups do lobby EU institutions, but their influence is the greatest on the member states. Indeed, member states have tended to resist far-reaching Europeanization in these areas, amongst others to protect their national champions. This national reluctance has been reflected in the institutional outcomes, providing important room for the implementation by the member states. Taking for granted the resistance of member states to significant shifts of power in these sectors involves the implicit integration of the influence of interest groups in their preferences.

Finally, the type of sector is not considered as relevant factor for explaining the choice for the type of regulatory agent and function. Sectoral specificities may play a role in explaining institutional designs because they bring different types of economic problems or different power constellations (in particular regarding interest groups and sub-national actors). Sectoral differences in terms of policy problems is evacuated through the relative homogeneity in the type of policies investigated. Limiting this study to EU regulatory policies related to the creation of the internal market allows rallying all sectors around a common central objective, promoting market integration through regulatory harmonisation, and the regulatory gap as a common major obstacle. Sectoral differences with regards to power constellations shall certainly affect whether the bulk of implementing authority is delegated to the Commission or to the member states. This is however considered as exogenous to the study as it affects the status of the explanatory factor of the explanation. In other words, as explained above regarding the role of interest groups, sectoral differences in terms of power constellations do certainly play a role and they are indirectly taken into account by holding the distribution of implementing competence as explanatory factor.

4 Research design and method

Two conjectures should be evaluated: the link between competence distribution and delegation patterns on the one hand, and the effectiveness driven transformation of delegation patterns towards a model based on an EU agency, replacing committees and networks, on the other hand.

The first research question is: how can we explain why some sectors fall into the coordination regulatory regime while others fall into the expertise one? I conjecture that the sectoral variation in the type of delegation pattern is best explained by the distribution of decision-

making competences for the implementation of the regulatory framework. Where the implementation is mostly done at the national level, we shall find a need for coordination, which, given actors' reluctance to lose power, is likely to trigger the creation of a network in charge of coordinating the activities of national regulatory authorities. In sectors where, on the contrary, the Commission has been delegated many executive responsibilities, the problem most likely to emerge is one related to the Commission's lack of resource and specialised experts among its staff. There, given actors' reluctance to lose power, the likely outcome is the creation of an expert or scientific committee tasked with assisting the Commission in drafting and preparing its implementing regulations.

The second research question is: how can we explain that the coordination and expertise patterns change towards the agency pattern? First, the change in the type of regulatory functions is explained, as presented above, by the change in the distribution of competences. Second, it is conjectured that the change of the regulatory agent, with the eventual agencification of networks and committees, is best explained, in a functional type of argument, by their lack of effectiveness or other problems they might exhibit. While networks would be too loose and weak to bring about the necessary harmonisation, committees would be problematic for their lack of transparency and accountability, and their limited working capacity.

4.1 Research design

I use the term conjecture, and not hypothesis, because this research does not perform a strict hypothesis testing, for which more cases would be required. Instead, the research design will allow the assessment of the plausibility of the conjectures. This will be done on the basis of three cases: food safety, electricity, and telecommunications. Food safety and electricity, as diverse cases (Seawright and Gerring 2008), will constitute the core of this comparison. The third case, telecommunications, has been added in order to offer additional insights on the two research questions. For each sector, I systematically trace and explain in detail the transformations of the delegation pattern, from the very beginning of the related EU public policy.

Electricity and food safety have been chosen to maximize the variation with respect to the consideration of the first question: the distribution of competences. The Europeanization of the electricity sector has arrived rather late, and the member states have long resisted the delegation of important executive powers to the European level. Electricity should thus allow us to evaluate the plausibility of the coordination delegation pattern and path. Food safety, on the other hand, is a public policy with a long history at the EU level and which has involved, since very early on, important delegations of executive powers to the Commission with views to

accelerate the approximation of legislation and market integration. Hence, food safety will serve the evaluation of the expertise delegation pattern and path.

With respect to the first question, the telecommunications sector constitutes a relative middle ground between electricity and food safety, due to an interesting mix of competence distribution from the adoption of the second regulatory framework. Although, like electricity, it is a public utility sector which the member states have been particularly reluctant to europeanize, it has been subject to very strong exogenous pressures, mostly since the 1980s, due to technological innovations which provided an opportunity for the Commission get into the sector. As a consequence, relatively early on in the development of this policy, the Commission has been delegated important executive powers, alongside NRAs who had nonetheless retained the most important share of the regulatory authority for the implementation of the regulatory framework.

The evaluation of the first set of conjectures will be done in two ways. First, the comparison between sectors should reveal the great lines and tendencies in the relationship between competence distribution and regulatory regime. This understanding of this relationship will then be refined with the intra-sector comparison of the different stages in the process of policy change. Doing so will allow us to examine how the changes, over time, in the distribution of competences affect the transformation of the delegation pattern.

The second set of conjectures will be evaluated by looking at the reasons behind the transformation of the regulatory regimes in the three sectors. While food safety will serve as a typical case for the expertise path, the coordination path will be evaluated on the basis of electricity and telecommunications. The evaluation of the second conjecture will thus be reinforced by a comparison between electricity and telecommunications, which will be particularly helpful to examine the influence of problem pressure on the agencification process. In telecommunications, important regulatory competences had been uploaded much earlier than in electricity. Besides, energy is commonly considered as a strategic sector, much more politicised than telecommunications. One can thus assume that the distributional stakes are higher in electricity than in telecommunications. The Commission advanced proposals to agencify the respective networks in both sectors at the same time, in 2007. Yet, surprisingly, while a powerful EU agency has been created in the energy sector, the Commission's plan failed in telecommunications, leading to the creation of a weak body, assisted by a tiny EU agency. The comparison of the transformation of both utilities sectors will shed new light on the process of network agencification and allow examining the extent to which functional pressure can explain the varying outcome in both sectors.

4.2 Data collection

As regards data collection, the telecommunications and electricity chapters are the result of a combination of official documents, semi-structured interviews, and secondary sources. The official documents considered were mostly EU legislation, documents stemming from the policy-makers during negotiation processes, as well as diverse types of Commission papers – such as White and Green Papers, implementation reports or press releases and, to a lesser extent, printed press sources. Secondary sources have been particularly useful regarding the first stages of both policies, but not for the last stage – the creation of EU agencies, which was too recent to be well covered by the academic literature. Finally, a significant part of the empirical data stems from semi-structured interviews. While the majority of interviewees were civil servants of the Commission, I also interviewed civil servants from EU agencies, the Council, national regulatory authorities, national ministries, as well as key individuals involved in regulatory networks, regulated firms and independent experts. In total, twenty-one interviews were conducted for electricity and twenty-seven for telecommunications. I proceeded slightly differently for food safety. The EU agency in that sector was created in 2002 and the agencification process has been widely covered in the academic literature, both in political sciences and in law. Hence, secondary literature has constituted the main source of information and it has been complemented with official documents as well as with five semi-structured interviews with civil servants of the Commission and of the European Food Safety Authority.

4.3 Specification of the *explanandum* and *explanans*

The different elements to be identified within the cases in order to proceed to the assessment of the conjectures are: the distribution of implementing competences, a problem of coordination, a problem of expertise, the creation of a regulatory network, the creation of scientific or expert committees, the creation of an EU regulatory agency, the delegation of coordination tasks, the delegation of expertise tasks, the lack of effectiveness related to the problem of coordination, and the lack of effectiveness related to the problem of expertise, the reinforcement of the agent related to the problem of coordination and the reinforcement of the agent related to the problem of expertise. This last section defines and specifies each of these elements to facilitate their identification within the empirical material (see table 1.3).

Competence distribution	National	The legislative framework delegates few and/or relatively unimportant implementing decision-making competences to the Commission compared to those delegated to the member states.
	Commission	The legislative framework delegates to the Commission most of the implementing decision-making competences or the most important ones. The member states only decide on few issues or relatively unimportant ones compared to the Commission.
	Mixed	The legislative framework shares in similar proportion the implementing number and/or importance of decision-making competences between the Commission and the member states.
Type of problem	Coordination	The divergence in the implementation of EU legislation constitutes an obstacle to the integration of markets.
	Expertise	The Commission lacks the resources or the specialised knowledge necessary to fulfil its delegated implementing competences.
Type of agent	Network	Body gathering the national authorities responsible for implementing the EU legislative framework.
	Committee	Body created by the Commission as an advisory group and composed of independent experts.
	EU agency	Community body, i.e. EU body with legal personality.
Type of task	Coordination	Fostering regulatory consistency, reducing regulatory divergence among the member states.
	Expertise	Providing scientific and/or technical informational input to the Commission to feed into the EU regulatory process.
Lack of effectiveness of the agent	Coordination	The output of the agent does not allow enough convergence for market integration: • The agent lacks authority on the national implementing bodies (e.g. lack of binding decision-making power or unanimity rule for decision-making) • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver)
	Expertise	• Provision of scientifically/technically unsound information or analyses. • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver).
Reinforcement of the agent	Coordination	The agent' capacity to influence national implementing bodies is increased (e.g. through a switch from unanimity to qualify majority voting rule, through the monitoring of compliance of national implementing bodies or through the acquisition of binding decision-making power).
	Expertise	More staff/budget is allocated to the agent or the number of committees is increased.

Table 1.3: Specification of the various elements of the analytical framework

The distribution of implementing competences refers to whether the legislative framework has delegated to the Commission a significant share of the decision-making power involved for the implementation of legislative framework. The competences for the implementation of EU regulatory policies are defined in the EU legislative framework, i.e. a set of directives and regulations. EU legislation, to be implemented, generally involves an important amount of decision-making competences that are referred to in the legislative act itself. These are, in general, to be exercised by the member states, and may be introduced as something like "Member states ensure that…" or "Member states may decide on…", etc. EU legislation may also delegate implementing competences to the Commission. Generally under the comitology procedure, these measures are introduced as "The Commission may adopt guidelines on…". It can also refer to the Commission's possibility to make individual or general decisions that would be constraining for national regulators or for regulatees or to veto a national decision.

The importance of the competences delegated to the Commission may be appreciated both quantitatively and qualitatively. While the proportion of such measures empowering the Commission compared to those empowering the member states provides a first quantitative indication of the amount of power delegated, this proportion is balanced by the political weight of the corresponding decisions that are delegated. Not all implementing measures are equally important or determinant in shaping the sector's regulation. The importance and centrality of the delegated measures in the regulatory framework are also integrated into the evaluation of the distribution of implementing competences.

The assessment of the type of distribution of implementing competences can be carried out in two major ways. In cases where the legislative framework of a public policy is clearly identifiable and contained, all legislative provisions can be screened in order to evaluate the proportion of implementing competences that are endorsed by the member states versus the Commission. In cases where the legislative framework is itself complex, fragmented and composed of many pieces of legislation, a shortcut for the evaluation of the distribution of competences consists in counting the number of implementing regulations actually adopted by the Commission, assuming that the adoption of many implementing regulations corresponds to the delegation of many implementing competences. In both cases, this evaluation of the distribution of competences is checked with the interviewees. The interviews, as well as document analysis, also provide important clues regarding which implementing measures are particularly central for the implementation of the framework.

For the specification of the functional problem, it is necessary to distinguish between a problem of coordination and a problem of expertise. A problem of coordination can be found where the divergence of national implementation prevents the integration of markets. A problem of

expertise corresponds to a situation where the Commission lacks the specialised knowledge or the administrative or financial capacities that are necessary to endorse fully an implementing competence that it would have been delegated. In both cases, the presence of the functional problem is qualified if the majority of stakeholders or sources converge towards the acknowledgement of such a problem.

Three types of agents can be created: regulatory networks, scientific and expert committees, and EU regulatory agencies. The latter is very easily identified as it corresponds to the legally defined category of 'Community body', which means a body enjoying a legal personality. Scientific and expert committees are committees that are created by the Commission as advisory groups and composed of independent experts (as opposed to other types of committees that may be composed by representatives of the member states). Finally, regulatory networks are bodies that gather the national authorities in charge of implementing the regulation; these are generally NRAs.

Two types of tasks can be delegated to the regulatory agents: coordination and expertise. Coordination tasks encompass all types of interactions that aim at increasing consistency between the decisions of the interacting actors. Coordination may thus be seen in the exchange of information, the development of common interpretations, the adoption of common guidelines and, even, the adoption of decisions that would be binding for the coordinating actors. As soon as these types of interactions serve regulatory consistency, they can be interpreted as a coordination task. The difference between them is the strength of the coordination instrument. While the exchange of information and development of common interpretations are a loose form of coordination, the adoption of binding decisions constitutes a very strong coordination mechanism.

The category of expertise tasks covers any task consisting in giving input to the Commission in the form of technical information and/or opinions. This technical input can take different forms. It can involve providing information, for example on national markets or on technical obstacles to the pan-european provision of a given service, in order to allow the Commission to evaluate how to orientate future regulatory action. The input can consist in issuing an expert and technical opinion on a regulatory project of the Commission. Finally, it can also involve the drafting of regulations to be later endorsed and adopted by the Commission.

Once a regulatory agent is created to deal with the functional problem, this agent may lack effectiveness. The specification of the lack of effectiveness of the agent requires, here again, distinguishing between the situations where the agent was created to solve a problem of coordination from those based on a problem of expertise. The lack of effectiveness of an agent

towards a problem of coordination is found when the agent's output has not been sufficient to bring about the regulatory convergence required for market integration. This lack of effectiveness can take two forms. First, the agent may lack the authority and power to actually bend the behaviours of national implementing authorities in favour of convergence. Second, the action of the agent may be limited by a lack of administrative and financial resources. The presence of one of these problems is recognized when the majority of stakeholders or sources acknowledge it.

The lack of effectiveness of an agent towards the problem of expertise also has two possible manifestations. It can first be the failure to produce a sound scientific and/or technical basis for EU regulation. Alternatively, it can also emerge from the mismatch between the administrative and financial capacities of the agent and the amount of work it is delegated. Here as well, the lack of effectiveness is qualified when the majority of stakeholders or sources converge towards its acknowledgement.

Chapter 2: Food safety

The first set of conjectures describes how the distribution of competences shapes the governance problem met by policy-makers and, therefore, the type of tasks delegated and the type of regulatory agent chosen:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*
    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*
    - *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
    - *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
    - *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.*
- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:*

- *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
- *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
- *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

The second set of conjectures addresses, within each sector, the progressive reinforcement of the agent over time and the conditions under which it may be agencified:

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means. This is due to the dynamic between functional pressure and actors' interest in maximizing power, unfolding through feedback loops.*
- *The higher the problem pressure, the more likely it is that the regulatory agent is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms, than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees.*

Competence distribution	National	The legislative framework delegates few and/or relatively unimportant implementing decision-making competences to the Commission compared to those delegated to the member states.
	Commission	The legislative framework delegates to the Commission most of the implementing decision-making competences or the most important ones. The member states only decide on few issues or relatively unimportant ones compared to the Commission.
	Mixed	The legislative framework shares in similar proportion the implementing number and/or importance of decision-making competences between the Commission and the member states.
Type of problem	Coordination	The divergence in the implementation of EU legislation constitutes an obstacle to the integration of markets.
	Expertise	The Commission lacks the resources or the specialised knowledge necessary to fulfil its delegated implementing competences.
Type of agent	Network	Body gathering the national authorities responsible for implementing the EU legislative framework.
	Committee	Body created by the Commission as an advisory group and composed of independent experts.
	EU agency	Community body, i.e. EU body with legal personality.
Type of task	Coordination	Fostering regulatory consistency, reducing regulatory divergence among the member states.
	Expertise	Providing scientific and/or technical informational input to the Commission to feed into the EU regulatory process.
Lack of effectiveness of the agent	Coordination	The output of the agent does not allow enough convergence for market integration: • The agent lacks authority on the national implementing bodies (e.g. lack of binding decision-making power or unanimity rule for decision-making) • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver)
	Expertise	• Provision of scientifically/technically unsound information or analyses. • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver).
Reinforcement of the agent	Coordination	The agent' capacity to influence national implementing bodies is increased (e.g. through a switch from unanimity to qualify majority voting rule, through the monitoring of compliance of national implementing bodies or through the acquisition of binding decision-making power).
	Expertise	More staff/budget is allocated to the agent or the number of committees is increased.

Table 2.1: Specification of the various elements of the analytical framework

This chapter presents the first case of my thesis, the regulation of food safety. The function of this case is to evaluate the conjectures on the side of the expertise pattern and the expertise path. The expertise pattern is expected to be found where most implementing regulatory competences are delegated to the Commission, which has been the case in food safety since the 1980s. The delegated competences are expected to create a need for assistance in the form of the provision of information and expertise, which is likely to lead to the creation of a scientific committee to fulfil this function. The transformation over time of this delegation pattern, i.e. the expertise path, is expected to be functionally driven, i.e. it is expected to be guided by the need to solve the specific problems of the model of scientific committees, such as their lack of transparency and accountability, or their limited working capacity. The optimisation of the expertise pattern may lead to the creation of an EU agency. The EU agency model, indeed, offers several functional advantages. In particular, it can be directly funded by the EU budget and therefore hire permanent staff to meet the demand for support to the EU regulatory process and it performs much better than committees in terms of transparency and accountability. The Commission may, however, be reluctant to revise the committees extensively and, in particular, to transform them into an EU agency, because this may imply a loss of power. This dynamic between functional pressure and distributional interests is expected to unfold through a series of feedback loops, with the consequence that the reforms are undertaken gradually.

The evolution of food policy is structured in four periods. The first period (T1) covers the period stretching from the early 1960s to 1985. It is characterised by the traditional Community method, based on extensive legislative harmonisation, which proved a failure. The second phase (T2) starts in 1985 with the Commission's new strategy for the internal market, consisting of a combination of the mutual recognition principles with a minimal harmonisation approach, relying on extensive delegation of executive competences to the Commission and on a system of scientific committees for the provision of expertise. The third phase (T3), starting in 1996, takes stock of the huge problems of regulatory expertise and governance revealed by the BSE crisis. It modifies the committee systems and the Commission's internal structure. Finally, the fourth phase (T4), starting in 1999 with the acknowledgement that the reforms of the committee system introduced two years earlier were not enough and that the rising concerns of the public required a significant change, culminates with the creation of the European Food Safety Authority (EFSA). The outcome of this data gathering and analysis is therefore quite consistent with the conjectures, to the exception that, next to the functional pressure, the EU's need to restore its legitimacy played an important role in the establishment of the agency.

The implementation of food safety legislation implies two major functions. There is first the regulatory function, consisting in the adoption of technical implementing regulation. We then

find the enforcement level, consisting in inspections and controls to make sure the regulation is actually implemented. The central issue of this dissertation is the regulatory part of policy implementation, i.e. it looks at rule- and decision-making. The enforcement dimension is therefore not included in the research. This chapter will however provide some insights into the kinds of problems met at the enforcement level and the institutional solutions that have been developed to address these.

1 T1: Legislative approximation (1962-1985)

Figure 2.1: T1 in the food safety sector

The regulation of foodstuffs has a long history. Measures ensuring the control of the composition of principal food products, such as bread or beer, have existed for centuries in European countries. Although each state developed its own style of controls depending on national specificities, a similar pattern of development can be traced. Compositional controls initially aimed at ensuring fair competition. With the advent of scientific techniques, legislation started to limit the substances introduced in food and controls were directed towards the safety of foodstuffs. A common set of objectives could thus be extracted from the various national legislations: safety of the food for the consumer, consumer protection and giving the food purchaser the possibility to make an informed choice and fair competition (Fallows 1990: 14-16).

The development of EC food legislation had one clear objective: guaranteeing the free movement of foodstuffs on the common market (O'Rourke 2005: 3). Because of the variation of national provisions, it appeared necessary to proceed with the harmonisation of the legislation applying to foodstuffs (Alemanno 2006: 239). Building on the policy objectives that national food legislations had in common, the EC thus tried to establish a unified community-wide set of measures that would equally apply to all food producers of the EC (Fallows 1990: 16). This endeavour was based on the Article 100 of the Treaty of Rome[43] allowing the Council to issue directives for the approximation of national provisions.

The harmonisation of foodstuff legislation was divided in two types of action. Horizontal directives were measures that applied to a wide range of foodstuffs. These include, for example,

43 Which became Article 94 of the EC Treaty.

the regulation of food additives, labelling, and use of materials that could come in contact with foods. Vertical directives, also referred to as 'breakfast directives',[44] aimed at regulating in great details certain specific and narrowly defined food categories such as cacao, chocolate, sugar, or honey.

This method of harmonisation relied almost exclusively on the adoption of Council directives and led to an important accumulation of legislative acts. For example, colouring matters were subject to nine Council directives between 1962 and 1984 – most of them being modifications of the basic directives (Deboyser 1989: 423, Gérard 1987: 37). Yet colouring matters were only one type of food additive, and food additives were only one subsection of horizontal legislation. Deboyser's book (1989) includes a lengthy list (26 pages) of the different acts that have been adopted for the regulation of foodstuffs between 1962 and 1989. Up to mid-1980s, the turning point between this period of legislative harmonisation and the new approach (see below), the vast majority of these acts were Council directives (Deboyser 1989: 421-446).[45]

The massive use of Council directives in this first period can be understood from the historical context. Except in the field of agriculture where it was possible to use other procedures, the approximation of legislations had to be based on Article 100 of the Treaty of Rome, which only allowed the adoption of directives. Furthermore, back in the 1960s and 1970s, directives were a particularly appropriate tool to guarantee the practical applicability of EEC legislation in the member states. During this period, the Internet did not exist and hardly anyone consulted the Official Journal. The adoption of directives implies a transposition into national legislation. This very mechanism allowed EEC legislation to be visible to national actors whose exclusive point of reference had been national law.[46]

Historically, EU food policy has been divided into three sectors: food of animal origin, food stemming from plants, and what is called foodstuffs, i.e. all the rest – food additives, materials in contact with food, production processes, labelling, etc. This distinction has long been relevant because it underpinned the fragmentation of food policy within the Commission. Each sector was developed on the basis of different political approaches, regulated by different legislations, and managed by different Directorates within the Commission. While veterinary and plant health dimensions were in the hands of DG VI - Agriculture, foodstuffs, i.e. anything that was not related to animals or plants, was endorsed by DG III – Industry.

44 Interview with an official of the Commission, November 2013.
45 As an exception to this, Council regulations and Commission regulations could be found in the field of fruits and vegetables.
46 Interview with an official of the Commission, November 2013.

1.1 Competence distribution

Figure 2.2: T1 in the food sector - competence distribution

The directives adopted by the Council were very detailed (Alemanno 2006: 240) and, in substance, they were much more similar to regulations than to directives.[47] As these acts take the form of directives that should be transposed into national legislation, they involve delegations to the member states, typically introduced as 'Member states shall (not)...'. But instead of formulating objectives, as directives are supposed to, these delegations refer to very narrowly defined tasks, leaving the Member states little room for the implementation stage. For example, the first directive on colouring matters[48] prohibits member states from using colouring foodstuffs other than those listed in the annex. Another article allows the member states to authorise the use of specific substances, by derogation to the general prohibition, only for colouring cheese-rinds.

Even if these directives may have been very narrow, not all of them shared the same degree of detail, nor were all of their dispositions equally precise. Hence, member states were left some room (albeit not a great deal) for implementation, which has led to some divergence in national implementations.[49] These divergences were not significant, however, because in most cases the member states 'copy-pasted' the directives.[50]

In this first phase of EC food law, the Commission also had little delegated power from the Council, this practice having remained exceptional.[51] It is only towards the end of the 1970s that the first measures directly taken by the Commission[52] appeared to take over part of the work of the Council. The proportion of such acts stemming from the Commission rose in number throughout the 1980s (Deboyser 1989: 421-446, Gérard 1987: 36-42).

Within this system, the enforcement, consisting in controlling industrial and farming practices, was a national competence.

47 Interview with an official of the European Food Safety Authority (EFSA), May 2013.
48 Council Directive 2645/62 on the approximation of the rules of the Member States concerning the colouring matters authorised for use in foodstuffs intended for human consumption. 11/11/62.
49 Interview with an official of the EFSA, May 2013.
50 Interview with an official of the Commission, November 2013.
51 Interview with an official of the EFSA, May 2013.
52 At the time, these measures were referred to as "Directive of the Commission".

1.2 Problem of expertise and the creation of committees

Figure 2.3: T1 in the food sector - problem and delegation pattern

Until the early 1980s, the bulk of the regulatory activity was carried out by the legislator who produced a significant collection of directives. Very little power was delegated to either the member states or the Commission. The conjectures would consequently suggest the relative absence of both coordination and expertise problems.

1.2.1 Regulation: problem of expertise and the committees

In this first period, the Commission already had an important need for expertise, despite not having been delegated executive powers. This can easily be explained by the fact that comitology was not yet well developed. Harmonisation was done by the legislator, even when it came to very precise and technical matters. Therefore, much of what would, functionally, belong to the realm of executive and regulatory action, was pursued at the legislative level. Legislation thus involved an unusual degree of technicality, which required scientific input.[53]

Various committees were created to meet the need for expertise.[54] In the foodstuff sector, the first was the Standing Committee for Foodstuffs (StCF), which was created in 1969 with a decision of the Council.[55] It was a comitology committee, composed of representatives of the member states, created to ensure 'close cooperation between the Member States and the Commission' in the cases where the latter would be delegated powers by the Council.[56] It is interesting to note that, beyond the traditional controlling function of this committee, the recitals added that the StCF should also enable the Commission to 'consult experts'.

Within a few years the need for expertise had become even more explicit when the Commission created the Scientific Committee for Food (SCF). It was then considered that the regulation of foodstuffs required an examination of health and safety issues, which needed the 'participation

53 This pattern is also found in the first phase of the EU electricity regulatory policy where the Commission, without having been delegated executive powers, needed the expertise of the regulators to propose the adoption of highly technical legislative measures.
54 Interview with an official of the EFSA, May 2013.
55 Council Decision of 13 November 1969 setting up a Standing Committee for Foodstuffs (69/414/EEC).
56 Recitals of the Council Decision of 13 November 1969 setting up a Standing Committee for Foodstuffs (69/414/EEC).

of highly qualified scientific personnel'. This explains the creation of the SCF as a consultative body of the Commission[57] and its composition of 'highly qualified scientific persons'.[58] Finally, in 1975, the Commission created the Advisory Committee on Foodstuffs (ACF)[59] in order to allow the stakeholders to bring their views to the debate and to offer opinions to the Commission.

Similar institutional developments took place in the other two sectors. With regards to veterinary issues, the Council created the Standing Veterinary Committee (StVC) in 1968,[60] a comitology type of committee, and the Commission created, first, a Scientific Veterinary Committee (SVC) in 1981,[61] and an Advisory Veterinary Committee in 1987.[62] The plant health sector had also had its dedicated Standing Committee on Plant Health since 1976[63] – a comitology type committee, and a Scientific Committee for Pesticides since 1978.[64]

1.2.2 Enforcement: problem of coordination

The controls ensuring that EEC law was implemented in practice by economic actors was the responsibility of national enforcement authorities. However, no clear need for coordination was found in the literature or in the documents analysed in this first period. This might have been due to the fact that, back then, legislative harmonisation was at the core of the EEC endeavour and strategy to integrate markets and administrative coordination did not raise much concern among EEC policy-makers. As a consequence, EEC law did not provide for a general coordination mechanism. Two elements could, however, be found in the areas of fruits and vegetables, and viticulture. These coordination mechanisms consisted in regular exchanges and interactions between the relevant administrations. In addition, a few ad hoc and informal mechanisms also appeared, such as the establishment, in the 1970s, of a network of contact points within national administrations, in the form of well identified civil servants who could be reached immediately through a direct telephone line. It was a system of rapid alert that was activated in case of danger resulting from the commercialisation of a product, aiming at allowing national administrations to take immediate action (Castang 1987: 162). These coordination mechanisms

57 Recitals of the Commission Decision of 16 April 1974 relating to the institution of a Scientific Committee for Food (74/234/EEC).
58 Article 4 of the Commission Decision of 16 April 1974 relating to the institution of a Scientific Committee for Food (74/234/EEC).
59 Commission Decision of 26 June 1975 setting up an Advisory Committee on Foodstuffs (75/420/EEC).
60 Council Decision of 15 October 1968 setting up a Standing Veterinary Committee (68/361/EEC).
61 Commission Decision of 30 July 1981 establishing a Scientific Veterinary Committee (81/651/EEC).
62 Commission Decision of 7 January 1987 on the setting-up of an Advisory Veterinary Committee (87/89/EEC).
63 Council Decision of 23 November 1976 establishing a Standing Committee on Plant Health (76/894/EEC).
64 Commission Decision of 21 April 1978 establishing a Scientific Committee for Pesticides (78/436/EEC).

remained extremely limited and, in no case took the form of a structured network of actors that could be analytically assimilated as an actor or a regulatory agent.

2 T2: The New Approach (1985-1997)

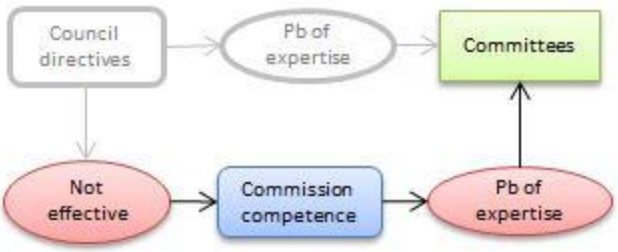

Figure 2.4: T2 in the food sector

2.1 Feedback of T1: Lack of effectiveness

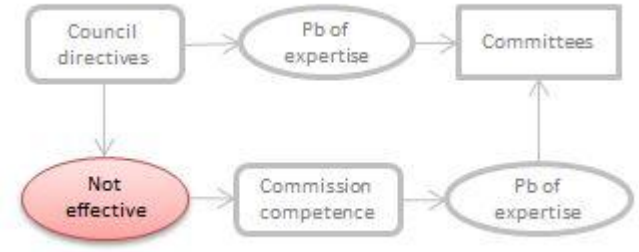

Figure 2.5: T2 in the food sector - feedback from T1

In 1985, the Commission adopted a White Paper on completing the internal market[65] in which it recognises that the traditional method of harmonisation was not enough to create a genuine common market. The strategy adopted in phase 1, relying on legislative approximation, had proved a failure. Progress towards full harmonisation was extremely slow and the member states kept postponing the deadline for the completion of their harmonisation programmes (Krapohl 2008: 123).

First of all, Article 94 of the EC Treaty,[66] which served as a legal basis for the adoption of the directives, required unanimity within the Council. This enabled member states to block initiatives of the Commission in case they disagreed with the proposal. Second, the food sector

65 Commission Communication. *Completing the Internal Market.* COM(85) 310 final. Brussels, 14 June 1985.

66 Previously Article 100 of the Treaty of Rome.

was a sensitive one for member states in that it touches on culinary cultures and traditions (Alemanno 2006: 241). For several years, Belgium blocked the adoption of a directive on chocolate, Germany prevented the harmonisation of beer standards, and Italy made it impossible to agree a legal definition of the composition of margarine.[67] The sensitivity of the issue thus aggravated the procedural hurdle due to the need to reach unanimity. Third, given the number and variety of existing food types, the vertical approach, consisting in the adoption of harmonised directives per type of food, was inadequate (Krapohl 2007: 38).

2.2 The New Approach: mutual recognition, minimal harmonisation and delegation to the Commission

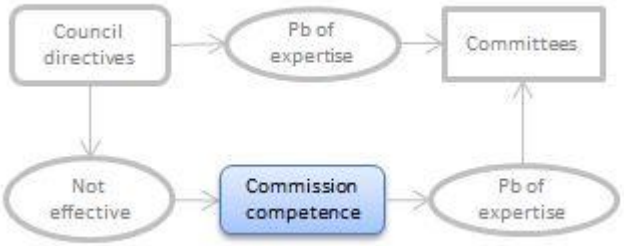

Figure 2.6: T2 in the food sector - competence distribution

This problem was not specific to the food sector. In its horizontal 1985 White Paper on completing the internal market,[68] the Commission recognizes that the traditional method of harmonisation was not enough to create a genuine common market. Backed by the famous 1979 Cassis-de-Dijon decision,[69] the Commission presented a new strategy in the 1985 White Paper consisting of a combination of the principles of mutual recognition together with a more efficient harmonisation mechanism. The Commission considered that this strategy would be particularly appropriate in the food sector and issued, a few months later, a Communication called 'Completion of the Internal Market: Community Legislation on Foodstuffs'.[70] The strategy, as applied to the food sector, became commonly referred to as the 'New Approach', consisting in

67 Interview with an official of the Commission, November 2013.
68 Commission Communication. *Completing the internal market.* COM(85) 310 final. Brussels, 14 June 1985.
69 CJEU Judgement C- 120/78. *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon).*
70 Commission Communication. *Completion of the internal market: Community Legislation on Foodstuffs.* COM(85) 603 final. Brussels, 8 November 1985.

the combination of the mutual recognition principle with minimum harmonisation, boosted with a more effective procedural approach.[71]

2.2.1 Mutual recognition

The principle of mutual recognition, the first pillar of the New Approach, was consecrated by the CJEU in 1979 in the Cassis de Dijon decision. The affair began when Germany prohibited the import of a French liquor, called Cassis de Dijon, on the grounds that its level of alcohol was below the minimum necessary for a drink to qualify as a liquor according to German Law. The Court saw the prohibition of the import as a restriction on the free movement of goods that was not justified by the general interest. Except in cases where the product may affect a non-economic general interest, such as public health, a product that is in conformity with the standards in one member state should be allowed on the market of other member states (O'Rourke 2005: 3). This is based on the concept that the various national regulations are mutually recognized as offering an equivalent level of protection.

While Cassis-de-Dijon is, by far, the most famous case of the CJEU in the food sector, many other food cases were brought before the Court during the first period of food regulation. The CJEU has consistently ruled that restrictive regulations are contrary to the principle of the free movement of goods and only accepted exceptions to this principle in the name of public health, animal and plant health and consumer protection (Fallows 1990: 24).[72]

When it comes to completing the single market, the use of the principle of mutual recognition represents an enormous advantage. It will move things much more effectively towards the realisation of the single market, without having to multiply vertical directives,[73] while preserving the diversity of national culinary traditions (Alemanno 2006: 242).

2.2.2 Streamlined harmonisation method with new powers for the Commission

The second pillar of the New Approach can be defined as a streamlined use of harmonisation, which entails two aspects. First, harmonisation must be minimal. The Commission distinguishes between those areas that need to be regulated and the others. The CJEU jurisprudence and the Treaty allow member states to prohibit the import of certain food products if they represent a

71 Commission Communication. *Completion of the internal market: Community Legislation on Foodstuffs.* COM(85) 603 final. Brussels, 8 November 1985, p.1.

72 For an in-depth legal analysis of CJEU case law on the mutual recognition principle, see Holland and Pope 2004: 6-14 and O'Rourke 2005: 33-54.

73 Commission Communication. *Completion of the Internal Market: Community Legislation on Foodstuffs.* COM(85) 603 final. Brussels, 8 November 1985. p.12.

threat for public health and other general interests. These areas involving public health, because they offered the possibility for member states to restrict intra-community trade, would be subject to legal uncertainty. The Commission thus identified them as the ones that would need harmonisation. Consequently, further harmonisation would only apply to public health, consumer protection, fair competition, and controls. Everything beyond these issues would be subject to the mutual recognition principle. Obviously, this also implied the abandoning of vertical directives, which required the member states to agree on detailed recipes for different kinds of food (Krapohl 2008: 124). In those areas subject to mutual recognition, reinforced labelling was expected to enable the consumer to make better-informed choices (Alemanno 2006: 242). This approach involved distinguishing food safety regulation from food quality regulation, while both used to be mixed in the past. EEC harmonisation would apply to food safety, and food quality would be subject to the principle of mutual recognition.

Second, harmonisation shall be subject to a more effective type of procedure that would accelerate the regulatory process. Aiming at a new distribution of competences between the Council and itself (Krapohl 2008: 125), the Commission introduces a distinction between major measures, requiring the attention of the Council, and more technical ones that could be delegated to the Commission (Fallows 1990: 39). Accordingly, a framework directive, establishing the policy, shall be followed by one or more implementing technical directives that could be delegated to the Commission (Fallows 1990: 20).

The Commission's strategy of limiting the number of legislative acts and increasing the delegation of executive powers to itself was not confined to the food sector. As part of a horizontal approach sketched in the 1985 White Paper on the completion of the internal market, this regulatory technique was enshrined in the 1987 Single European Act (SEA) with the insertion of a new provision in the Treaty. Accordingly, the Council shall 'confer on the Commission in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down'.[74] Soon after the adoption of the SEA, the Council issued the Comitology Decision of 13 July 1987 to systematise the control of the Commission through comitology committees. In the face of the objective to complete the internal market in 1992, these changes announced a massive use of delegation of executive powers to the Commission through the comitology system.

In the food sector, which fit rather well along the lines of the Single Market Programme, policy-makers' energies were monopolized by the 1992 single market programme run-up (O'Rourke

74 The SEA also inserted a new Article 100A which allows the Council to adopt directives on the approximation of legislation on the basis of qualified majority voting instead of unanimity and makes for an increased participation of the EP through the cooperation procedure.

2005: 3, Alemanno 2006: 243). The goal was ambitious, and the time given to achieve it was scarce. Hence, 'no wonder that comitology flourished' (Joerges and Neyer 1997: 614) and, with it, the executive powers of the Commission. Many powers were indeed delegated to the Commission (Krapohl 2007: 39) and, ten years after, the StCF was referred to in about thirty-five directives (Joerges and Neyer 1997: 615) and regulations and was expected to cope with 117 different groups of tasks (Falke 1996: 127, quoted in Joerges and Neyer 1997: 615).

2.3 The problem of expertise and the committee system

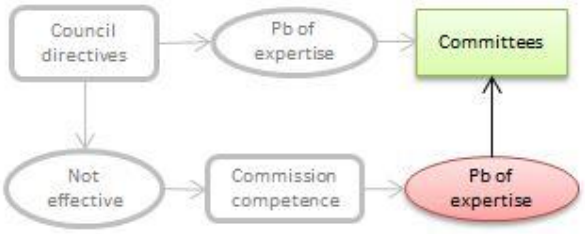

Figure 2.7: T2 in the food sector – problem and delegation pattern

In the face of the monumental task of realising the single market with its delegated powers, the Commission may appear resourceless. 'It has neither the in-house staff nor expertise necessary to take decisions in all of the highly technical areas of the internal market' (Chambers 1999: 100). And the food sector involves particular difficulties due to considerations of product safety and public health. This requires carrying out risk assessment, which is a highly scientific form of activity (Vos 2000b: 229). The Commission explained to the CJEU that it was 'not in a position to carry out assessments of this kind'.[75] But the Commission is 'not left alone to deal with this task' (Krapohl 2008: 39). In the food sector, to face problems of resources and expertise, the Commission has traditionally relied on committees of experts (Vos 2000b: 229). So the 'New Approach', by inducing massive delegations to the Commission, has led the latter to draw heavily on the expertise of the scientific committees (Fallows 1990: 26).

According to the procedure generally followed, the Commission consulted the SCF to obtain scientific advice. This advice was then discussed with member states representatives within the StCF, and sometimes, with stakeholders within the ACF. Given the sensitivity of many food issues, member states frequently delegated powers to the Commission under the regulatory procedure, so the StCF almost always intervened as a regulatory committee (Joerges and Neyer 1997: 616). The StCF was highly pressured by the Commission who tended to overload the agenda. As a

75 CJEU Judgement C-212/91. *Angelopharm v. Hamburg.* Paragraph 32.

result, the delegations experienced a recurrent difficulty in terms of resources and technical expertise (Joerges and Neyer 1997: 617).

The Commission generally consulted the SCF to obtain advice and the CJEU even made it an obligation to do so whenever issues of public health are involved[76] (Joerges and Neyer 1997: 622). The SCF was responsive to the Commission only and it represented a powerful tool for negotiations further down in the decision-making process. In comitology, scientific evidence carries much weight in the discussions. Thus, the Commission heavily exploited scientific arguments whenever they could help in promoting harmonisation (Joerges and Neyer 1997: 617).

Given the many competences delegated to the Commission with views to realise the single market in 1992, the workload increased. This led the Commission to reinforce the scientific committee for foodstuffs by increasing the maximum number of committee members in 1995.[77]

Finally, the ACF, designed to represent economic and social interests and increase the social acceptability of EC food regulation, lost importance over time and, in the second half of the 1990s, was simply not convened any more by the Commission (Joerges and Neyer 1997: 615).

It should also be noted that the Commission could also rely on the assistance of the member states as regards scientific tasks. Indeed, a directive adopted in 1993[78] sets up arrangements for scientific cooperation in the scientific examination of food issues.

In spite of a few criticisms, such as the lack of transparency of the StCF, this committee system established with the New Approach seemed to work well and it was met with approval. The SCF progressively gained an excellent reputation and its work was highly regarded (Vos 2000b: 231). Both the Commission and national representatives were satisfied with the functioning of the StCF (Vos 2000b: 231).

2.4 The need for coordination in controls endorsed by the Commission

The empirical material did not indicate the presence of a significant problem of coordination at the level of enforcement and controls. Two institutional developments are nonetheless worth presenting.

76 CJEU Judgement C-212/91. *Angelopharm v. Hamburg.* Paragraph 32.
77 Commission Decision of 6 July 1995 relating to the institution of a Scientific Committee for Food (95/273/EC).
78 Council Directive of 25 February 1993 on assistance to the Commission and cooperation by the Member States in the scientific examination of questions relating to food (93/5/EEC).

First, the absence of a significant problem of coordination did not mean that the decentralized enforcement was not without problems. Some countries had been somewhat lax in the way they implemented EEC security and hygiene rules and the Commission realised it could not fully trust national enforcement authorities. Thus, over time, the Commission understood that harmonising legislation was not enough; it had to make sure that legislation was implemented correctly.[79]

Therefore, in order to monitor member states' enforcement of EEC law, the Commission set up a unit dedicated to inspection within DG VI - Agriculture. In 1991, this inspectorate was merged with the unit responsible for secondary legislation and became the Office of Veterinary and Phytosanitary Inspection and Control (OVPIC). The rationale behind this merger was to increase the coordination between inspections and the production of legislation. Legislation could take into account information stemming from the inspections and the inspections could be oriented by legislation (Chambers 1999: 103).

In 1993, the Council decided, obviously as part of a wider bargain, to move the OVPIC to Ireland. The Commission, although reluctant about the relocation, finally made a proposal in May 1996 with views to implement the Council's decision. However, it coupled it with a proposition to transform OVPIC into an independent European agency.[80] By 1995, OVPIC was facing a crucial lack of staff and, as part of the DG VI - Agriculture, it had to compete with other DGs for resources. This was very difficult because DG VI was already the biggest and richest of the Commission (Chambers 1999: 104). The Commission came to the conclusion that, in order to strengthen OVPIC, it would be necessary to transform it into a European agency that would enjoy independent funding (Kelemen 2002: 106). The proposal, made in May 1996, had been issued at the very beginning of the eruption of the BSE crisis. As will be seen below, the events triggered deep thinking about the institutional structure of EC food policy, providing the Commission with new opportunities. As a consequence, the proposal did not survive 1997, a crucial year in terms of institutional reforms (Kelemen 2002: 106-107).

Second, while the DG VI developed this system of EEC level monitoring of national controls, another type of development took place in the area of foodstuffs, the area connected to DG III - Industry. 'The EC-Symposium on 'Food Control' in Rome in 1989 identified the need to create a forum which would allow representatives of European food control authorities to meet, exchange information, address inconsistencies and explore practical enforcement difficulties'.[81] In 1990, the Dutch inspectorate for Health Protection thus invited its colleagues from other member states to discuss this and the national delegates decided to create an informal European

79 Interviews with officials of the Commission, October 2013.
80 Commission Proposal for a Council Regulation (EC) establishing a European Agency for Veterinary and Phytosanitary Inspection. COM(96) 223 final.
81 See www.Flep.org/what.html, consulted on 04/01/2014.

Forum for Food Law Enforcement Practitioners (FLEP). The aims of the FLEP are thus mutual learning, information sharing, and building up knowledge of good practice.[82]

3 T3: The 1997 reforms after the BSE Crisis (1997-1999)

Figure 2.8: T3 in the food sector

3.1 Feedback of T2: The BSE crisis and the problem of expertise

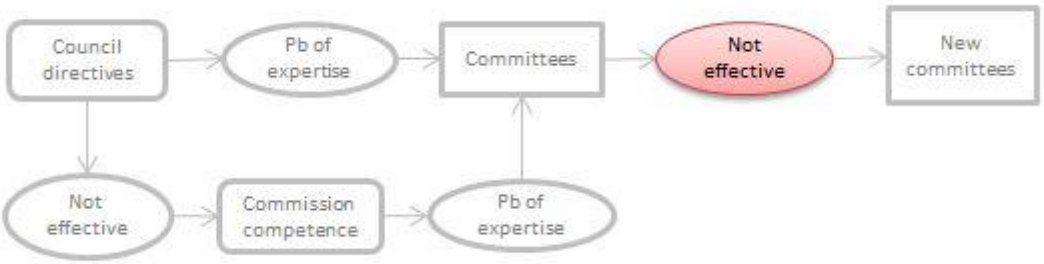

Figure 2.9: T3 in the food sector – feedback from T2

3.1.1 BSE as a veterinary issue

The Commission and the committees' cosy arrangement was deeply shaken by the BSE crisis of the 1990s (Vos 2000b: 231). To understand the BSE crisis it is necessary to go back to 1985, in the United Kingdom (UK), when the first cow died of an unknown disease. Other cases followed, leading to the identification of a disease that is very similar to the 'scrapie' disease that had been affecting sheep for centuries. The sheep scrapie belongs to a group of diseases known as transmissible spongiform encephalopathy (TSE), which also includes the Creutzfeldt Jacob Disease that affects humans. The new disease affecting cows, clearly belonging to the same

82 See www.Flep.org/what.html, consulted on 04/01/2014.

group, was thus named bovine spongiform encephalopathy (BSE). The origins of BSE remain uncertain but it is commonly believed to be caused by feeding bovines (which are ruminating mammals) meat and bone meal.

Since the scrapie affecting ovines (sheep) was not transmissible to humans, it was hoped that BSE would behave in the same way (Krapohl 2008: 127). This corresponded with the conclusion reached by the British Southwood Working Party, an expert group mandated by the British Government to investigate the BSE issue. Although the scientific basis for their conclusion was ambiguous, and disputed, the Working Party only recommended measures aiming at preventing the spread of BSE amongst cattle; no precautionary measures were deemed necessary to protect humans (Krapohl and Zurek 2006: 7-8).

Interpreting BSE as a veterinary issue was certainly in the interest of the UK, which was seeking to continue beef exports in the internal market. Provided that no issue of human public health was involved, the mutual recognition principle could continue to apply for the trade of meat and no restriction could be justified. Restrictions could only be applied to the trade of cattle in order to prevent the transmission of the disease to continental cattle.

This interpretation also prevailed in Europe for the first ten years of the BSE epidemic. Because the disease was considered a danger to the health of animals – but not to humans – the BSE crisis was handled by the EC through secondary veterinary legislation (Krapohl 2008: 127). At the time, the DG VI - Agriculture (the service in charge of the dossier) was being advised by the Scientific Veterinary Committee (SVC). As has since been revealed by the European Parliament (see below), the SVC was not only chaired by a British expert, but was also numerically dominated by British experts (St Clair Bradley 1999: 87). While these experts were seen as amongst the most knowledgeable on the disease, they were not free from political influence, with the consequence that the SVC, subject to political pressure (Vos 2000b: 232), tended to reflect the thinking of the British Ministry of Agriculture, Fisheries and Food.[83] The central position of the British SVC in the management of the BSE crisis explains the heavy influence of British thinking on the Commission (Vos 2002b: 232).

Given this British orientation in the management of the BSE crisis at the EC level, the European reaction to the BSE was late and largely insufficient (Krapohl and Zurek 2006: 8). Two measures were adopted in 1989 to ban the export of cattle and one in 1990 to restrict the export of bovine offal. In 1990, the issue took a more political turn when France and Germany called for a ban on the import of British beef. The UK and the Commission took the opposite stance, in favour of the internal market. The Commission even threatened them with a claim before the CJEU. Because it

83 European Parliament – Temporary committee of inquiry into BSE. *Report on alleged contraventions or maladministration in the implementation of Community law in relation to BSE.* A4-0020/97/A. 7 February 1997.

was believed that BSE did not pose a risk to humans, there was no legitimate justification for restricting imports from Britain. A compromise was, however, reached: France and Germany relinquished their call to prohibit the import of British beef when the UK committed to set up an identification system for cattle (Krapohl 2008: 128), with compulsory registration for BSE, and exportations were limited to beef that had previously been certified by the British authorities as stemming from BSE-free herds (Neyer 2000: 4).

This episode was followed by four years of inactivity and silence. Between 1990 and 1994, crucial years in which the epidemic peaked in the UK, no inspections of the Community were pursued to monitor the UK's compliance to the recently adopted regulation. Keith Meldrum, the head of the competent British Veterinary Office denied the authority of the Commission's inspectors to make these investigations, arguing the BSE had become too political. Two witnesses to the meeting later qualified his reaction to the Commission's inspectors as 'furious', 'arrogant', and 'aggressive'. Such controls would, however, have revealed a number of failings: the identification scheme did not work as it was supposed to, and the meat and bone meal suspected to be at the origin of the problem was still being produced and exported to the rest of Europe, and was contaminating ruminant feed in the UK (Chambers 1999: 99).

The EP later revealed that the Commission had 'allowed itself to be blackmailed by Britain and had failed to exercise due diligence' (Neyer 2000: 4). The Commission then adopted a 'true policy of disinformation' (Vos 2000b: 232) in order to avoid public concern and a destabilization of the European beef market, as shown by a Commission memo suggesting that it would be wise 'to keep the BSE affair as low-key as possible'.[84] This went as far as the Director General for Agriculture approaching the German Health Minister and asking him to ensure one of his officials would 'shut up' while expressing his views in scientific forums, because they did not coincide with those of the SVC. The German official in question, a toxicologist, had previously participated in the SVC with an observer status and, after disagreeing with the conclusion reached by the Committee, had insisted on his views being recorded as a minority opinion (Chambers 1999: 101, St Clair Bradley 1999: 87). Last but not least, this cover-up strategy also affected the EC regulatory activity. During those four years, between 1990 and 1994, there was no regulatory activity on BSE, nor any debates on BSE in the Council (Krapohl 2008: 128, Vos 2000b: 232).

Germany ended this period of inactivity in 1994 by raising concerns about the potential danger for humans in 1994. This led to the adoption of a few additional measures to prohibit the feeding of ruminants with meat and bone meal, to regulate the processing of this type of feed – still

84 Commission memo of 12/10/1990, quoted by the German journal Die Zeit (12/07/1996), quoted by Neyer 2000: 4.

allowed for other animals (Krapohl 2008: 128), and to strengthen the existing regulations on the export of bovine cattle and offal.

3.1.2 BSE as an issue of public health

The panorama changed in March 1996 when the British Government admitted that the link between BSE and a new variant of the Creutzfeldt Jacob Disease could no longer be ruled out. Although the direct connection between the disease affecting cows and that affecting humans was not scientifically backed up, within a few days the StVC had adopted the Commission's proposal to impose a ban on British beef for an indefinite period.[85] In the face of the lack of scientific evidence, the UK protested against this 'political' decision. The Turin European Council meeting, convened in early April, saw a clash between the UK and the Community regarding the British proposals for a programme to destroy the cattle. While the other member states requested from the UK the total eradication of the BSE disease, the UK insisted on the necessity to make progress towards lifting the ban. No agreement could be reached in Turin and Britain threatened to veto all legislative Community acts. During the following months, these positions progressively became closer and the parties reached a compromise on 14 June, at the Florence European Council. The other member states stepped down from requiring the total eradication of the cattle and acceded to consider a gradual lifting of the ban. In turn, Britain committed to implement the measures agreed upon and to put an end to its policy of non-cooperation (Neyer 2000: 5-6).

In July, the EP established the 'Temporary committee of inquiry into BSE' in order to investigate the governance issues related to the BSE crisis. The Committee submitted its report in February 1997, which made decisive and damning revelations about how the BSE crisis had been handled between 1986 and 1996. The British government was criticised for having concealed elements in order to downplay the seriousness of the issue. Several accusations were levelled at the Commission: because it had given priority to trade over health, it had ignored numerous scientific uncertainties, neglected the principle of preventive action, downplayed the problem (O'Rourke 1998: 178) and failed to publish dissident opinions within the SVC (St Clair Bradley 1999: 87). On the organisational dimension, the competence over veterinary issues lay with the DG VI – Agriculture and 'the responsibility for health protection was divided amongst many DGs of the Commission, in none of which it was a true priority' (Chambers 1999: 98). Moreover, the over-specialisation of scientific committees had allowed the problem to be entrusted to a group of overly like-minded people, in this case British veterinaries (Chambers 1999: 102). The SVC received its share of the blame for lacking transparency and for being overly swayed by national

85 Commission Decision of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy (96/239/EC).

interests. As for the StVC, it was charged with having only recorded brief summaries of the meetings – instead of proper minutes – and with having refused to transmit them to the EP inquiry committee (St Clair Bradley 1999: 87). As a whole, this governance system lacked transparency and clarity in terms of who did what, which contributed to the diluting of responsibilities (Krapohl 2008: 131).

The EP came to the conclusion that the Commission needed to undertake a serious reform of its approach to food policy and made a series of recommendations, including that the rules governing the work of scientific committees be reformed. This includes, in particular, the appointment of their members, the publication of their reports, and the transparency of their working methods. Their roles should remain purely advisory and in no case involve political considerations. The EP also advised that public health should be given a much more important role in the EC and in food policy. The Treaty should thus be modified to reinforce the EC's role on matters of public health, the responsibilities of the various DGs associated with public health and food should be rationalised, and the Commission should draw up a framework directive on EC food law (O'Rourke 1998: 179) to deal with the deficiencies of its fragmented and *ad-hoc* legislative approach (Vos 2000b: 233). Finally, the EC's means for monitoring and inspection should be reinforced and the Commission should pursue the objective of creating a European agency for veterinary and phytosanitary inspections, which was outlined in its 1993 proposal.

3.2 The Commission announces forthcoming reforms

The report of the inquiry committee was debated at the February Plenary together with the possibility of adopting a Motion of censure against the College of Commissioners (O'Rourke 1998: 178). Given the seriousness of the threat, Jacques Santer, then President of the Commission, presented at the plenary a list of changes the Commission intended to make that was almost identical to the list of recommendations of the EP.[86] The EP then set up a new temporary committee on BSE to follow closely the actions the Commission would carry out in order to implement the promised reforms. Given the pressure represented by the motion of Censure on the Commission, the EP managed to obtain a huge influence, extending to the very detailed decisions made by the Commission with views to implement the promised reforms (Chambers 1999: 106).

86 Speech by Jacques Santer, President of the European Commission. Debate on the report by the Committee of Inquiry into BSE. (Speech 97/39). European Parliament. Strasbourg, 18 February 1997.

Jacques Santer also raised the possibility of creating an independent agency, modelled on the American Food and drug Administration (FDA) (Chambers 1999: 105, Alemanno 2007: 162).[87] However, after visiting the American FDA in April 1997, Emma Bonino – then Commissioner for Consumer Affairs – declared that the American model was not appropriate for the European Union for a number of reasons: it was less independent than initially imagined, it did not cover the entire food chain, and its 9,000 staff structure was much too big (O'Rourke 1998: 145). The issue of the agency was then left on the back burner for the following months, as the Commission focussed on the reforms mandated by the EP.

In May 1997, the Commission presented a renewed approach to consumer health, food safety and food law by issuing two important documents: a Green Paper on the General Principles of Food Law[88] in the EC and a Communication on Consumer Health and Food Safety.[89] The Communication placed the issues of food safety and consumer protection at the centre of its new approach to food policy. This Approach is based on three principles. First the legislative activities should be separated from that of providing scientific advice. Second, legislation should also be separated from inspection activities. Third, the decision-making process and inspections should become more transparent.

To achieve the new major policy objective, consumer health, three major instruments are highlighted: scientific advice, risk analysis, and controls and inspections (Vos 2000b: 234). The first element, scientific advice, should meet standards of excellence, independence, and transparency. The second element, risk analysis, is defined by the Commission as a systematic procedure including risk assessment, risk management, and risk communication.[90] Risk assessment, the core of the scientific advice, consists in evaluating hazards and their probability of occurring, while risk management refers to the political decision which is based on the risk assessment. Finally, risk communication involves the transparent exchange of information with the stakeholders (Vos 2000b: 239). The third instrument, controls and inspections, essential for the actual enforcement of EC regulation, should, according to the Commission, lie with the industry and the member states. The role of the EC in this field would be limited to monitoring the way national actors enforce EC law (Vos 2000b: 239).

87 The creation of such a European Agency had already been proposed by the EP environmental Committee some years earlier (Chambers 1999: 105).

88 Commission Green Paper. *The general principles of food law in the European Union.* COM(97) 176 final. Brussels, 30/04/1997.

89 Commission Communication. *Consumer health and food safety.* COM(97) 183 final. Brussels, 30/04/1997.

90 Commission Communication. Consumer health and food safety. COM(97) 183 final. Brussels, 30/04/1997. p.19.

These principles and tools presented in the Communication are encompassed into the six major goals set forth in the Green Paper. These goals are: ensuring a high level of protection of public health, safety and the consumer, ensuring the free movement of goods on the internal market, ensuring that regulation is backed by scientific evidence and risk assessment, ensuring the competitiveness of the European food industry to support exportation, giving the major responsibility for food safety to the industry which must be framed by an effective system of control and enforcement, and ensuring the coherency and rationality of the legislation (Holland and Pope 2004: 15). The Heads of governments endorsed these objectives by agreeing, one month later, in June 1997, on the Amsterdam Treaty which makes the protection of the health, safety and economic interests of consumers some of the objectives of the European Community[91] and inserts the obligation, for the Commission, to take particular account of 'any new development based on scientific facts'[92] (Vos 2000b: 235-236).

3.3 Reforms undertaken by the Commission

The Commission quickly took action to implement the new approach. The three major changes regarded: first, an internal reshuffling of competences and resources to the benefit of DG XXIV – Consumer Policy and Consumer Health Protection, subsequently renamed DG SANCO – Health and consumer protection, second, a reform of the committee system and, third, a reinforcement of veterinary and foodstuffs control (Krapohl 2008: 132).

The internal redistribution of competences was aimed at reinforcing the impact of health and consumer protection considerations within the Commission and the EC. Prior to the BSE crisis, responsibilities in this area were divided among many DGs (Agriculture, internal market, Enterprise and Consumer Policy) (Krapohl 2008: 132). Responsibilities for food inspection and controls have thus been concentrated in the revamped DG XXIV – Consumer Policy and Consumer Health Protection which was reinforced by important transfers of staff from other DGs. The size of the DG XXIV more than doubled in the process (O'Rourke 2005: 14). The new scientific committees relevant to food matters (see below) were accordingly attached to the DG XXIV, instead of DG VI – Agriculture, as was previously the case (Vos 2000b: 234).

The system of scientific committees relevant for food policy was also fully renewed. First, in June 1997, the Commission created the Scientific Steering Committee (SSC).[93] At the centre of the mandate of the SSC is the coordination of the work of the scientific committees set up by the

91 Article 153 of the Treaty establishing the European Community - which became Article 169 of the Treaty on the functioning of the European Union since the Lisbon Treaty.
92 Article 95 (3) EC of the Treaty establishing the European Community - which became Article 114 of the Treaty on the functioning of the European Union since the Lisbon Treaty.
93 Commission Decision of 10 June 1997 setting up a Scientific Steering Committee (97/404/EC).

Commission to address matters of consumer health. This function is divided in three tasks. First, the SSC evaluates and monitors the working procedures used by the scientific committees and may, if necessary, harmonise them. Second, for matters that necessitate consulting two or more committees, the SSC identifies which committees should be involved. Third, when there are evaluations stemming from national organisations on which Community measures are based, the SSC aids the Commission in evaluating whether EC scientific committees should be involved, and if so, which ones. In addition to its coordination function, the SSC is delegated further tasks in the area of consumer health. These are: delivering scientific advice on matters that are not covered by the other scientific committees and on multidisciplinary aspects of TSE diseases, reviewing the risk assessment procedures and, where appropriate, proposing new ones, and drawing the attention of the Commission to any specific or emerging consumer health problems.

Not only did the Commission create the SSC but it also set up eight new scientific committees, to replace the six scientific committees that existed prior to the Decision (O'Rourke 2005: 16), in areas related to consumer health and food safety.[94] These committees are asked to examine critically the risk assessments made by scientists belonging to member states' organizations; developing new risk assessment procedures; drafting scientific opinions to enable the Commission to evaluate the scientific basis of the recommendations, standards, and guidelines prepared in international forums, as well as evaluating the scientific principles on which Community health standards are based. Finally, they may also draw the Commission's attention to any aspect or emerging problem within in their area of competence.

The committees are composed of a maximum of 19 members, carefully selected in order to honour the principle of excellence. The members are also remunerated for their services, in addition to the reimbursement of travel and subsistence allowances. This should allow the EC to attract high-level scientists. The other two principles applying to scientific advice put forward by the Communication on Consumer Health and Food Safety are also declined in the Decision. Accordingly, the members, shall act independently of all external influence and inform the Commission of any interests that could compromise their independence. Finally, to satisfy the need for transparency, the committees shall publicize their rules of procedures, agendas, minutes, and opinions – including minority opinions.

94 Commission Decision of 23 July 1997 setting up Scientific Committees in the field of consumer health and food safety (97/579/EC). The new scientific committees are: Scientific Committee on Food, Scientific Committee on Animal Nutrition, Scientific Committee on Animal Health and Animal Welfare, Scientific Committee on Veterinary Measures relating to Public Health, Scientific Committee on Plants, Scientific Committee on Cosmetic Products and Non-Food Products intended for Consumers, Scientific Committee on Medicinal Products and Medical Devices, Scientific Committee on Toxicity, Ecotoxicity and the Environment.

It should also be noted that the Commission shall also rely on the assistance of the member states as regards scientific tasks on the basis of the directive adopted in 1993 (see previous section).[95] The Commission is very much in favour of these kinds of cooperation arrangements, which allow the pooling of information and resources, as they are particularly cost-effective. Its intention is to increase its use of this kind of resource in the future to complement the work of the SSC and of the other scientific committees (O'Rourke 2005: 18).

Effective controls and inspections constitute the third instrument of the new food safety policy. In this respect, in light of the new principle of separation between legislative activities and inspections activities promoted in its Communication, the Commission decided to split the OVPIC accordingly. While the legislative part of OVPIC remained within DG VI, the inspection section, renamed the Food and Veterinary Office (FVO), was reinforced (Krapohl 2008: 132) and transferred to DG XXIV – Consumer Policy and Consumer Health Protection (Chambers 1999: 104).

In the meantime, the project to create a European agency in the food sector vanished. In January 1998, the Commission published a Communication on Food, Veterinary, and Plant Health inspections[96] stating that the project to transform the FVO into an agency was definitely abandoned. This about-face was justified by the opposition of the EP. The EP, at that point involved only under the consultation procedure, had indeed suggested resorting to use its budgetary power to express its discontent (Chambers 1999: 104). Besides, the Commission also argued that the FVO would be more independent from member states authorities if it was kept within the Commission than if it was transformed into a European agency whose Board would be dominated by national representatives. But it may be that, behind these justifications, the Commission was in fact seeking to maximise its power. The initial plan for the agency had indeed been motivated by the Commission's difficulty in reinforcing EC inspection capacities without delegating them to a body with independent funding. It can therefore be argued that the BSE crisis presented a formidable opportunity for the Commission to strengthen significantly the inspection office while keeping it within the Commission (Kelemen 2002: 107-108). The decision not to opt for a European agency would thus have been driven by the Commission's interest in maximizing enforcement power.

95 Council Directive of 25 February 1993 on assistance to the Commission and cooperation by the Member States in the scientific examination of questions relating to food (93/5/EEC).

96 Commission communication on food, veterinary and plant health control and inspection. COM(1998) 32 final. Brussels, 28 January 1998.

4 T4: The creation of the EFSA (2002-)

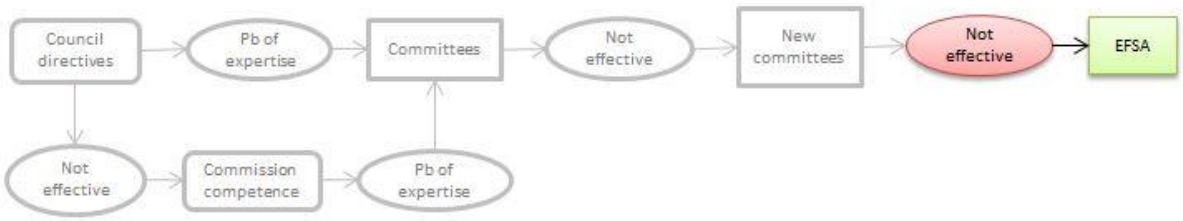

Figure 2.10: T4 in the food sector

4.1 Feedback of T3: A remaining problem of expertise

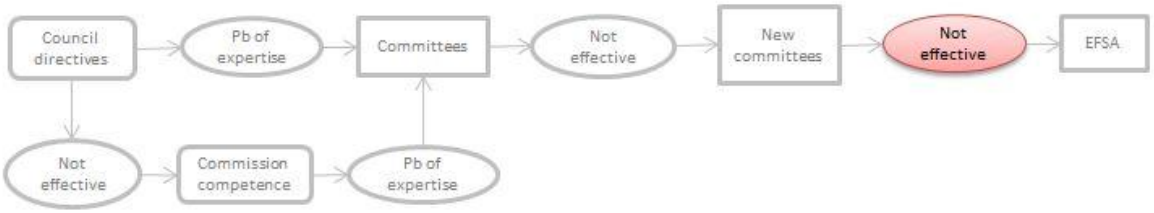

Figure 2.11: T4 in the food sector – feedback from T3

4.1.1 A lack of capacity

The system for providing scientific advice to the Commission, based on the scientific committees had been completely reformed in 1997. However, it was not long before the implementation of this new system revealed important weaknesses. Handicapped by a lack of capacity, it has been struggling to cope with increasing demands.[97] As a consequence, the committees are overburdened. The Belgian Dioxin Affair showed that the system was not strong enough to cope with the demands placed on it. In May 1999, Belgian authorities informed the Commission that feedstocks were contaminated with dioxins. The Commission activated its Rapid Alert System allowing the exchange of information with the member states regarding potential threats to food safety. It also took appropriate regulatory measures to remove the products possibly affected from the market across Europe, and worked hard to reassure consumers (O'Rourke 2005: 6). The EC's response to the dioxin crisis, however, could only be addressed at the EC level by delaying work in other areas. It thus became obvious that the system needed to be reinforced to be able to respond more rapidly and flexibly.[98]

97 Commission White Paper on food safety. COM(1999) 719 final. Brussels, 12/01/2000. p.12-13.
98 Commission White Paper on food safety. COM(1999) 719 final. Brussels, 12/01/2000, p.11-13.

The members of the committees were under great pressure. In a Conference in 1998, exhausted experts explained that this unsustainable pace simply could not continue. They urged for the creation of an agency type of structure that would have a permanent status and could release the experts from the background work (Vos 2000b: 244).

4.1.2 A lack of confidence

The effect of the dioxin crisis on the public's trust, highly fragile since the BSE crisis, was doubled with rising concerns about genetically modified food at the end of the 1990s. If, in the BSE case, the food production, although guaranteed by scientific experts to be safe, turned out to have long term negative effects on public health, consumers were likely to be doubtful about genetically modified food, based on new and as yet unproven production technology (Vogel 2001: 13). In 1999, the EC food safety policy had thus not managed to regain the trust of European consumers (O'Rourke 2005: 6, Alemanno 2006: 246, Buonanno 2006: 263, Vos 2000b: 242).

The confidence of international partners in the EC's use of science in foodstuffs regulation was also at stake following the BSE crisis and the more recent Beef Hormone Dispute. In 1985, the EC adopted a Directive prohibiting the use of hormones in livestock farming. This ban was attacked by the United States and Canada before the World Trade Organization (WTO) in 1996, on the grounds that it did not comply with the recently adopted WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement, which entered into force in 1995, requires that standards for food safety and animal and plant health set by Member Countries should be based on science. While Member Countries are encouraged to use international standards, they may also set higher standards (and therefore restrict importations on this ground) only if these are based on a scientific risk assessment (Joerges 2001: 10-11).[99] Yet, according to the risk assessment, the hormones concerned by the European ban would not endanger public health. The EC justified its ban by citing former food incidents related to hormones and the consequent need to restore consumer confidence in the market (Joerges 2001: 11). The WTO panel and Appellate Body ruled against the EC.

In this affair, the EC's position, while owing much to consumer pressure, invoked the precautionary principle that was gaining importance in Europe throughout the 1990s. This principle applies to situations where 'potentially dangerous effects deriving from a phenomenon, product or process have been identified, and … scientific evaluation does not allow

99 See also the WTO website: http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm, consulted on 28/05/13

the risk to be determined with sufficient certainty'.[100] The precautionary principle has a complex relationship with science, making it both necessary while introducing some distance to it. On the one hand, it is firmly embedded in an approach to regulation based on scientific risk assessment. On the other hand, it acknowledges that science must not be the only factor that is taken into account when making regulatory decisions. In Europe, in line with the Amsterdam Treaty, which places a new emphasis on consumer protection and interests, the precautionary principle has opened the regulatory process to greater civic participation and allows for public acceptability to be taken into account in the decision (Vogel 2001: 16).

Yet it has been argued that the EC's stance in the beef hormone affair was at odds with the clear distinction, made by the SPS Agreement, between risk assessment and risk management. While risk assessment, which falls into the responsibility of the scientists, aims at evaluating the possible effects of a product or practice on human health, risk management, performed by politicians, consists in adopting measures to realise the level of protection required based on the identification of the risks previously undertaken by scientists. For the United States negotiators and the WTO Panel, the distinction between risk assessment and risk management was meant to ensure that 'the objectivity of science would counter the subjectivity (…) of culturally based food safety measures. Consumers were to have influence only at the secondary stage when the nature of the measure was decided, not initially at the stage of determining whether there is a food safety risk' (Echols 1998: 541). Hence, at the international level, the BSE and beef hormone crises undermined the credibility of the EC, casting a shadow on its ability to make appropriate use of science for regulating food safety, in particular to proceed to a proper distinction between risk assessment and risk management.

4.1.3 A lack of legislative framework

Finally, although this is not related to the research question on delegation patterns, one should also note that the substantive reforms announced in the 1997 Green Paper remained to be implemented. The need for a piece of general legislation that would provide a consistent framework of food safety regulation by means of clarifying structuring principles had not been met (Vincent 2004: 512-513). From 1997 to 1999, the member states pursued their ad hoc and fragmented approach to regulation, coupled with a reluctance to engage in EC-wide regulatory measures, as shown in the subsequent regulatory development around the BSE crisis. This approach, however, quickly proved flawed. The member States, considering BSE as a problem affecting the UK (and Portugal) only, limited their regulatory action to the ban on beef products originating in these countries. They did not adopt the proposals put forward by the Commission

100 Commission Communication on the precautionary principle. COM(2000) 1 final. Brussels, 02/02/2000. p.3.

to regulate the feeding of farm animals on their own territories. It was only in 2000, when cases of BSE spread to a majority of countries, that they realised the ban was not enough and progressed to EC-wide measures to eliminate the epidemic on EU territory as a whole (Krapohl 2003). A new legislative thrust was thus needed to remedy to such a fragmented regulatory approach.

In sum, the system for providing scientific advice to assist the Commission in making regulatory decisions was, even after the 1997 reform, far from meeting the demands. Increased output was necessary, and maintaining the confidence of the consumer and of the international community needed stronger guarantees. In these respects, the mere adaptation of the committee system proved largely insufficient. The circumstances required a more radical institutional change.

4.2 The creation of the EFSA

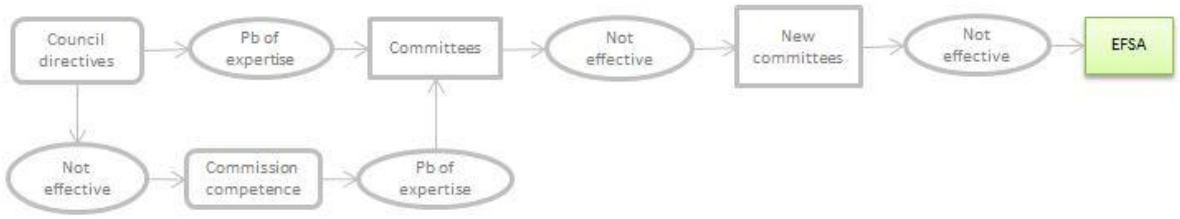

Figure 2.12: T4 in the food sector – delegation pattern

4.2.1 The report of the experts

In May 1999, the Commission appointed three scientists to devise the most effective system for providing independent, transparent, and excellent scientific advice and, in particular, to evaluate whether an agency type of structure could improve the quality of scientific advice in the EC (James et al 1999). At the same time, following the corruptions scandals, the Santer Commission resigned. Romano Prodi, due to take office to preside over the new Commission in September 1999, announced in his first speech to the EP in July that the reform of food safety regulation was going to be a top priority and that he wanted to create a 'European FDA' (O'Rourke 2005: 6-7, Testori and Deboyser 2014: 194) in order to restore consumer confidence. The Commission, previously reluctant about the creation of an agency, changed their views – as the member states did, in the wake of the dioxin contamination crisis (O'Rourke 2005: 7).

The scientists' report on the 'future of scientific advice in the EU', which came out in December 1999, proposed the creation of a European Food and Public Health Authority (EFPHA). They considered, as a starting point, that an improved system within DG SANCO did not match the immensity of the public concern that rose in the aftermath of the food scares of the 1990s

(Alemanno 2008: 4). Given the importance of the stakes, they made an ambitious proposal. The EFPHA would be even more powerful than the American FDA as it would also include the competences of the US Center for Disease Control (Buonanno 2006: 265). The EFPHA would also be more independent of political and industrial interests than the FDA (Alemanno 2008: 4). Since the BSE crisis had severely damaged public confidence in the neutrality of government-led regulation, independence from them was critical (Buonanno 2006: 266). Finally, instead of separating the tasks of risk assessment and risk management by distributing them to the EFPHA and the Commission together with comitology committees respectively, the report recommended the delegation of both tasks to the EFPHA, advocating the need for coordination between them. In short, the new authority would reap all the authority and power in the food sector, leaving other EU institutions with nothing (Alemanno 2008: 4).

4.2.2 The 2000 White Paper on food safety

Soon after the Prodi Commission took office, in January 2000, under the direction of Commissioner David Byrne, DG SANCO produced the White Paper on Food Safety.[101] The central part of the White Paper is the establishment of a European Food Authority (EFA). This major change would allow the Commission to gather the best scientific advice available to underpin EC regulation and solve the problem of capacity of the scientific committees (Vos 2000b: 245-246). The Commission, however, diverges from the experts' project in some respects. Most importantly, the EFA would be responsible for risk assessment (scientific advice) and risk communication. Risk management, i.e. the power to make regulatory decisions, would remain in the hands of the Commission and the member states via their comitology committees. The member states, reluctant to lose their grip on risk management, would have pressured the Commission not to integrate this transfer of competences to the agency (Alemanno 2008: 4), the Commission also being interested in keeping these competences for itself (O'Rourke 2005: 195). Three justifications are provided in the White Paper. First, such devolution of power would represent problems in terms of democratic accountability. Second, 'the control function must be at the heart of the Commission's risk management process if it is to act effectively on behalf of the consumer'. And third, it would not be compatible with the EC Treaty.[102]

As regards the other tasks of the regulatory process, the White Paper first gives the task of risk communication, considered as crucial to foster consumer confidence, to the EFA. The new Authority should thus become 'the automatic first port of call when scientific information on

101 Commission White Paper on food safety. COM(1999) 719 final. Brussels, 12/01/2000.

102 Commission 2000 White Paper on food safety. COM(1999) 719 final. Brussels, 12/01/2000. p.15. This argument refers to the Meroni doctrine of the CJEU.

food safety and nutritional issues is sought or problems have been identified'.[103] Also, contrary to the experts' proposal, the competence for control would remain with the Commission. Finally, the Agency would operate the Rapid Alert System, allowing the identification and quick notification of urgent food safety problems.

Next to the creation of the EFA, the White Paper puts forwards further lines of reform. First, the legislation shall be revised, with the creation of an overall framework for EC food law. This comprehensive and integrated approached would encompass the entire food chain, all food sectors, the member states and international levels. This approach should foster the coherence, effectiveness, and dynamism of food policy. In this view, the White Paper presents a list of 84 regulatory measures that would allow EC food law to upgrade to this ambitious objective (Alemanno 2006: 247-248). This integrated approach is based on three pillars: Risk assessment, risk management and risk communication. Also, in order to improve stakeholder involvement across the sector, the Commission plans the creation of a new Advisory Committee on Food Safety. The precautionary principles and transparency also feature in the structuring principles presented by the White paper (Vos 2000b: 244-245).

4.2.3 The legislative proposal and its adoption

The Commission presented its proposal in November 2000, along exactly the same lines sketched in its White Paper on food safety, released just two months earlier. All EC institutions agreed with the Commission that risk management should remain in the hands of the Commission and that risk assessment should be delegated to the Agency. The EP, however, opposed the delegation of the management of the Rapid Alert System (RAS) to the Agency and wanted it handed back to the Commission. It was concerned about 'whether the new authority could be held accountable for future failures in the RAS' (Buonanno 2006: 269). The Commission revised the proposal and presented its new version in August 2001. The only noteworthy amendment introduced by the legislator to this second proposal was the change of the title of the Agency made by the EP; the new body was to be called the 'European Food Safety Authority' (EFSA) (Buonanno 2006: 270). The regulation was adopted in January 2002. Kelemen also highlights those features of the Agency that reflect the preferences of the EP, and therefore their influence in the legislative process: the EP would have gained an unusual involvement in the appointment of the members of the management board; the management board should also involve a minimum of members who have backgrounds in consumer organisations, the Executive Director selected by the board should be heard by the EP before being appointed. Finally, a series of transparency measures shall apply to the Agency (Kelemen 2002: 108).

103 Commission 2000 White Paper on food safety. COM(1999) 719 final. Brussels, 12/01/2000. p. 15 and 19.

Consistent with the White Paper, the framework set up by the 2002 regulation is articulated around food safety, the overarching policy objective. Food safety policy is structured on three pillars: risk assessment, risk management, and risk communication. Risk assessment and risk communication are given to the EFSA, while risk management, consisting of legislation and control was kept out of the mandate of the Agency. Implementing legislation is still adopted by the Commission in comitology and control is primarily a national competence, monitored by the FVO (part of DG SANCO), which ensures that member states enforce EU law properly (O'Rourke 2005: 194).

4.3 The EFSA: Functions and organisation

The EFSA's primary function is to provide independent scientific advice on all issues that may affect food safety.[104] This mandate is broad and covers the whole food chain (O'Rourke 2005: 195) identifies six main functions of the EFSA. The first one, as already mentioned, is the provision of independent scientific advice to evaluate risks for food safety. Such advice may be requested not only by the Commission, but is also available to member states, national food bodies, or the EP. Second, the EFSA shall monitor food safety in the EU by collecting and analysing scientific data on nutrition and dietary patterns, for example. Third, some processes or substances need to be approved at the EU level, such as food additives or genetically modified organisms (GMOs). The EFSA receives the corresponding dossiers from the industry and evaluates their safety. Fourth, the EFSA is responsible for the identification of emerging food safety risks. Fifth, it should act as a support to the Commission in cases of crises. Sixth, as already mentioned, the EFSA is responsible for the communication of its risk assessment to the wider public (O'Rourke 2005: 195).

Importantly, the EFSA occupies a central place within a network of national food agencies set up to exchange scientific opinions and information. This arrangement is 'typical' of the relationships between an EU agency and national agencies. EU agencies have in common 'a mandate to establish and maintain policy networks among national authorities, interests, and experts.' (Buonanno 2006: 272).

The EFSA is composed of the Management Board, the Executive Director, the Advisory Forum, a Scientific Committee, and the Scientific Panels. The Management Board is composed of 14 members. They are appointed, for four years, by the Council and the EP (the latter in consultation) plus one representative of the Commission. Meeting at least three times a year, the Management Board's competences include the adoption of the budget and of the work

104 See Alemanno 2006 and 2008 for a legal analysis of the extent to which the EFSA's opinions will be constraining for the Commission.

programme for the year. The Executive Director is appointed for five years by the Management Board who chooses her from a list of candidates set up by the Commission following an open competition. The Director is in charge of the day-to-day management of the Agency. She ensures that the scientific Committees and the Panels enjoy appropriate support for their work. Finally, she drafts the work programme of the Agency in consultation with the Commission. The Advisory Forum gathers representatives from the national food authorities of the member states. Its role is to foster cooperation between the national agencies and the EFSA, which includes the exchange and pooling of information. The Scientific Committee and the Scientific Panels bear the core task of the Agency, that of providing scientific opinions. Similarly to the previous Scientific Steering Committee (within the Commission), the Scientific Committee is in charge of the general coordination of the whole advisory process. It is composed of the Chairmen of the Panels plus six independent experts. The Panels' members are independent scientific experts appointed by the Management Board after a call for expression of interest. The six Scientific Panels replace the eight Scientific Committees created in 1997.[105] Both the Scientific Committee and the Panels adopt their opinion by majority, and minority opinions are recorded (O'Rourke 2005: 198).

5 Food safety: conclusion

5.1 Conjectures

The first set of conjectures describes how the distribution of competences shapes the governance problem met by policy-makers and, therefore, the type of tasks delegated and the type of regulatory agent chosen:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*

105 The corresponding areas are: food additives, flavouring, processing aids and materials in contact with food; additives and products or substances used in animal feed; plant health, plant protection products and their residues; GMOs; dietetic products, nutrition and allergies; biological hazards (which includes BSE); contaminants in the food chain; and animal health and welfare.

    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*
    - *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
    - *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
    - *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.*
- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:*
    - *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
    - *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
    - *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

The second set of conjectures addresses, within each sector, the progressive reinforcement of the agent over time and the conditions under which it may be agencified:

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means. This is due to the dynamic*

between functional pressure and actors' interest in maximizing power, unfolding through feedback loops.

- *The higher the problem pressure, the more likely it is that the regulatory agent is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms, than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees.*

5.2 Analysis

At T1, the distribution of competences gives the primary role to the legislator. Member states had very little room to implement EC law, except for its enforcement – which is not covered by the conjectures. There were no executive competences delegated to the Commission because this was not possible under the Treaties at the time. The Commission, nonetheless, had important needs for scientific support and various scientific committees were created. Given the impossibility to delegate the adoption of technical regulation to the Commission, the adoption of these technical rules was channelled through the legislative procedure, which starts with a proposal of the Commission. The Commission thus needed expertise and assistance to draft these proposals. Regarding the nationally based enforcement, the little need for coordination that was found was addressed by a few limited and ad hoc coordination initiatives. Due to the fact that no delegation to the Commission was legally possible at T1, this case shall be considered as of little relevance for the evaluation of the conjectures.

T2 provides a very good fit with the conjectures. The arrangement put in place at T1 revealed to be crucially ineffective. This has been revised through the single market turn in the mid-1980s, relying on mutual recognition and the delegation of numerous executive competences to the Commission. Lacking resources and expertise, it draws heavily from the various pre-existing scientific committees. The increase in the Commission's workload leads to a slight reinforcement of the committees through the increase in the maximum number of committee participants. Regarding enforcement, the Commission created OVPIC, an inspectorate within DG VI – Agriculture, in order to monitor member states to make sure they were actually enforcing EEC regulation in a satisfactory way.

T3 is also highly consistent with the conjectures. The BSE crisis, having shed crude light on the weaknesses of the EC committee system as managed by the Commission, led to subsequent reforms. The 6 pre-existing scientific committees were replaced by 8 new committees, subject to the coordination of another new committee, supervising the work of all scientific committees

related to matters of consumer health. The rules framing the functioning of the committees were also modified in order to guarantee the independence of committee member, increased transparency, and the improved scientific quality of the opinions. The Commission's internal organization was also profoundly revised, with all aspects related to food gathered into an empowered DG XXIV – then SANCO, instead of being fragmented, as it used to be, between DG VI – Agriculture and DG III – Industry. The lack of effectiveness of the previously established delegation system led to its re-organization, involving, amongst others, a reinforcement of the committees by increasing their number from 6 to 9.

Finally, the conjectures are partially confirmed by T4. The first years of implementing the new committee system quickly revealed that the revisions were insufficient and that a more radical institutional change was needed. The need to significantly upgrade the delegation pattern was however not the only factor contributing to the creation of the EFSA. After the food scares, the public as well as the EU's trade partners needed being reassured about the EU's capacity to produce sound scientific evaluations. Hence, besides answering a pressing functional concern, the EFSA's creation was also largely conceived as a symbolic act meant to improve the EU's legitimacy.

Overall, the transformation over time of the institutional framework of the food sector provides an good illustration of the expertise path. The discussion of the conjectures reveals two elements that were not integrated in the conjectures. First, at T3, while the revision of the committee system involves a reinforcement of the committees, it is its reorganization, and not its reinforcement, that constituted the core of the reform aiming at improving the effectiveness of the system. Second, the creation of the agency at T4 was not driven by functional considerations only, but also, and importantly, by the EU's need to restore its legitimacy.

Chapter 3: Electricity

The first set of conjectures describes how the distribution of competences shapes the governance problem met by policy-makers and, therefore, the type of tasks delegated and the type of regulatory agent chosen:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*
    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*
    - *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
    - *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
    - *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.*
- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:*

- *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
- *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
- *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

The second set of conjectures addresses, within each sector, the progressive reinforcement of the agent over time and the conditions under which it may be agencified:

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means. This is due to the dynamic between functional pressure and actors' interest in maximizing power, unfolding through feedback loops.*
- *The higher the problem pressure, the more likely it is that the regulatory agent is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms, than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees.*

Competence distribution	National	The legislative framework delegates few and/or relatively unimportant implementing decision-making competences to the Commission compared to those delegated to the member states.
	Commission	The legislative framework delegates to the Commission most of the implementing decision-making competences or the most important ones. The member states only decide on few issues or relatively unimportant ones compared to the Commission.
	Mixed	The legislative framework shares in similar proportion the implementing number and/or importance of decision-making competences between the Commission and the member states.
Type of problem	Coordination	The divergence in the implementation of EU legislation constitutes an obstacle to the integration of markets.
	Expertise	The Commission lacks the resources or the specialised knowledge necessary to fulfil its delegated implementing competences.
Type of agent	Network	Body gathering the national authorities responsible for implementing the EU legislative framework.
	Committee	Body created by the Commission as an advisory group and composed of independent experts.
	EU agency	Community body, i.e. EU body with legal personality.
Type of task	Coordination	Fostering regulatory consistency, reducing regulatory divergence among the member states.
	Expertise	Providing scientific and/or technical informational input to the Commission to feed into the EU regulatory process.
Lack of effectiveness of the agent	Coordination	The output of the agent does not allow enough convergence for market integration: • The agent lacks authority on the national implementing bodies (e.g. lack of binding decision-making power or unanimity rule for decision-making) • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver)
	Expertise	• Provision of scientifically/technically unsound information or analyses. • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver).
Reinforcement of the agent	Coordination	The agent' capacity to influence national implementing bodies is increased (e.g. through a switch from unanimity to qualify majority voting rule, through the monitoring of compliance of national implementing bodies or through the acquisition of binding decision-making power).
	Expertise	More staff/budget is allocated to the agent or the number of committees is increased.

Table 3.1: Specification of the various elements of the analytical framework

The electricity sector is the second case of the dissertation. It has been chosen in order to evaluate the conjectures related to the coordination pattern and the coordination path. The coordination path is expected to be found where most implementing regulatory competences have remained at the national level, which has been the case with the electricity sector for a long time, at least until the recent reform in 2009. This nationally based implementation is expected to lead to divergent administrative practices making more difficult the integration of markets. This would call for the creation of a regulatory network in charge of coordinating national regulatory practices. Due to the reluctance of member states to give away implementing power, the network would initially be delegated only little power and would therefore lack effectiveness. The network would however be reinforced over time due to the persisting functional pressure that suboptimal previous arrangements would not have been able to manage (coordination path). Eventually, in case of very strong problem pressure, member states might even agree to transform the network into an EU agency, after previous looser networks models have proven insufficient. Given this dynamic between functional pressure and distributional interests, the reinforcement of the network is expected to be gradual and to unfold through a series of feedback loops.

The change over time of the electricity policy is clearly structured in three periods, corresponding to three regulatory packages. The first period (T1) corresponds to the first regulatory package which was applied in the 1990s until 2002. The situation spurred an acute need for both coordination and expertise. To address this, while the Commission created the Florence forum, the regulators created their network and transmission system operators (TSOs) set up their federation. In the second period (T2), stretching from 2002 to 2009, the lack of effectiveness of the Florence Forum led the Commission to create an official regulatory network for coordination and expertise. Finally, in the reform introduced in 2009 (T3), taking stock of the lack of effectiveness of the network model in a context of increased pressure, massive shifts of competence were made in favour of the Commission, the regulatory network was transformed into an EU agency endorsing, above all, an expertise mandate, and the group of TSOs was formalised and integrated as an expertise body to feed into the regulatory process. The electricity case thus confirms most of the elements of the coordination pattern and coordination path.

1 T1: The first regulatory framework (1990-2002)

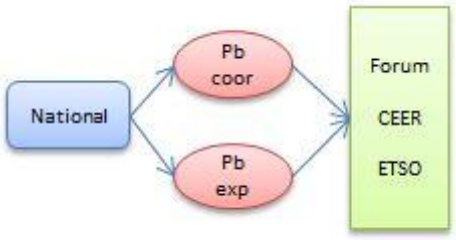

Figure 3.1: T1 in the electricity sector

In the western world, the economic model that was applied for a long time was characterised by state-owned monopolistic companies. In the 1980s, the emergence of the liberal paradigm in economic policies paved the way for far-reaching reforms of the energy sector. Starting in the United States and in the United Kingdom, these changes emphasised the privatisation and liberalization of national energy markets. At the same time, the EEC was launching the ambitious internal market programme (Andersen and Sitter 2007: 8). While the Commission did not integrate the energy and other utilities sectors into its 1985 White Book on the single market, it caught up in 1988 with a report on the internal energy market.[106] Highlighting the cost of non-Europe in the energy sector, evaluated at 0.5% of the Gross Domestic Product (GDP), the Commission advocated the creation of an internal energy market. The major obstacles to market integration would be the structures and practices of national energy markets, which protected the industry from the competition.

A first Directive on cross-border transmission of electricity was adopted in 1990,[107] but had a limited impact on electricity trade between member states (Vasconcelos 2005: 90). The real move was initiated in 1991 with the Commission's proposal for a Directive on common rules in electricity. The debate centred on third party access to networks and managerial unbundling within vertically integrated industries aimed at separating the network management from commercial services and interests of the company. Divergences of preferences in the Council were profound. Through the negotiations, monopolies, deeply opposed to the proposed reforms (Eising 2002: 93), managed to have the regulated third party access replaced by a negotiated one and change managerial unbundling for an accountancy unbundling (Andersen and Sitter

106 Commission Working Document. *The Internal Energy Market*. COM (88) 238, final. Brussels, 02/05/1988. P.6.

107 Council Directive of 9 October 1990 on the transit of electricity through transmission grids (90/547/EEC).

2007: 8). The scepticism of the Council regarding the Commission's plan was magnified by the strong criticism of the EP. As a consequence, the Commission revised and watered down its proposal in 1993 (Schmidt 1998: 177).

Throughout 1994, the question of network access continued to block negotiations, France and Germany being the major antagonists (Eising 2002: 94). In early 1995, the French Presidency of the Council proposed the single buyer model. Initially opposed by the Competition Commissioner Karel Van Miert, this model was finally accepted by the Commission, under certain conditions. Intense negotiations in the Council followed, with the question of reciprocal market opening featuring as central (Schmidt 1998: 178). While, progressively, several member states became ready to compromise, the Franco-German antagonism was still blocking the agreement (Eising 2002: 94-95). Finally, in Spring 1996, France and Germany initiated bilateral talks at the highest level and reached a compromise which paved the way for an agreement in the Council in June 1996 (Eising and Jabko 2001: 755) and the final adoption of the Directive on December 19th, 1996,[108] i.e. five years after the original proposal of the Commission.

Given the deep divisions within the Council, the liberalization could only be realised as a slow and partial transition. The resulting Directive, which allows the member states wide discretion for the implementation,[109] rests on three pillars. First, vertically integrated undertakings should proceed to accounting unbundling. Second, network owners should guarantee third party access. Here, the Directive allowed member states to choose, from a pre-established menu, their preferred model for third party access (Eising and Jabko 2001, Schmidt 1998: 178, Vasconcelos 2005: 82,). Third, national markets would be opened gradually – in three stages – and partially, to reach 33% of the consumers in 2003. No target date was set for full liberalization (Eberlein 2003: 140).

108 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

109 Interview with officials of an NRA, February 2013; Eberlein 2003: 139, Eising and Jabko 2001: 745, Glachant and Finon 2003.

1.1 Competence distribution: nationally based implementation

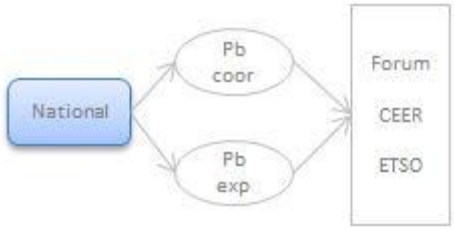

Figure 3.2: T1 in the electricity sector – competence distribution

The Directive 96/92/EC does not only give member states a large discretion. It also gives member states a quasi-monopoly of regulatory authority for its implementation. This 1996 Directive does not yet require that the member states create NRAs. As regards the Commission, it is hardly given any role in the implementation of the Directive. Only three articles give the Commission the possibility to make decisions and these are far from being central to the framework. Article 19(5b) states that, in case a transaction between an electricity supplier and an eligible customer of another member state is refused, the Commission may oblige the electricity supplier to execute the requested electricity supply. The other two articles belong to the final provisions. Article 23 relates to exceptional crisis circumstances that may justify the member states to adopt temporary safeguard measures. In case these would disturb the functioning of the internal market, under certain conditions, the Commission may decide that the member state concerned amends or abolishes them. Finally, Article 24 addresses the particular circumstances under which member states may apply for an exemption from the implementation of some provisions of the Directive, which may be granted by the Commission.

1.2 Problem of coordination

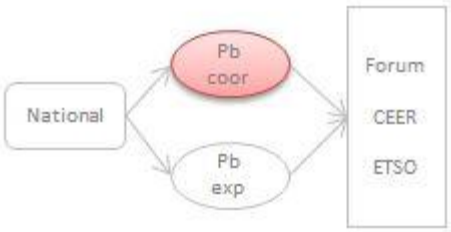

Figure 3.3: T1 in the electricity sector – problem of coordination

According to the conjecture, such a nationally based implementation of EC legislation would result in a need for coordinating national regulatory activities, which is verified here. While the

1996 Directive addressed the objective of liberalising national energy markets, it fell short with regards to setting the conditions for integrating them into a European market (Eberlein 2005: 140). Very little could be found on cross-border energy trade, the development of regional markets, the development of inter-connectors and supranational market integration. Yet the simultaneous liberalization of national markets 'did not ensure the compatibility – and even less convergence or integration – of these markets' (Vasconcelos 2005: 90). This resulted in the emergence of a regulatory gap between the national and the internal markets. The first example that clearly showed the existence of this regulatory gap was the issue of cross-border electricity trade (Vasconcelos 2005: 82-92).

In order to facilitate cross-border flows of electricity, it was necessary to coordinate the national transmission systems. It was therefore not only a coordination of regulatory authorities that was a stake, but also a coordination of TSOs. There are technical and operational requirements to the development of cross-border trade that are entirely dependent on the TSOs' will and capacity to coordinate their activities. Such coordination would be necessary on two issues: the transmission pricing of cross-border electricity flows and the access to and management of limited interconnection capacity between national networks (Eberlein 2003: 142).

Furthermore the national authorities in charge of implementing the framework felt a need to cooperate so as to develop a common understanding of their tasks. Although the Directive did not require member states to create NRAs, several member states established independent regulators. For the newly created NRAs, everything was new[110] and it quickly became obvious that they needed to exchange with each other in order understand what they could do, and how their tasks could be defined and performed.[111] Hence, the need for coordination takes three forms. One is the need to create a cross-border regulatory regime to allow cross-border trade. The second relates to the need for exchange among NRAs in order to establish a common understanding of their functions. The third one, operational, requires the cooperation of the TSOs in order to establish the technical conditions for the interconnection of the networks.

110 Interview with officials of an NRA, February 2013.
111 Interview with an independent expert, February 2013.

1.3 Problem of expertise

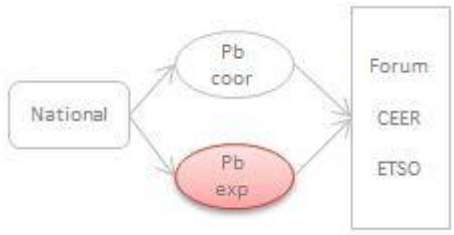

Figure 3.4: T1 in the electricity sector – problem of expertise

According to the conjecture, since the implementation of the framework is largely national, no specific problem of expertise is expected. However, the Commission experiences a need for expertise in the absence of delegated executive competences. Indeed, Eberlein, explains the need to gather information, data, and expertise at the European level. Particularly crucial at the beginning of the liberalization process, technical expertise was required for the identification of relevant policy options to address the regulatory problems faced and for the elaboration of proposals (Eberlein 2003: 145 and 2008: 77). But why was it that the Commission needed expertise in the absence of delegated regulatory authority? The answer lies in the legislative role of the Commission. The Commission is willing to develop legislative initiatives in order to close the regulatory gap, but is far from having the necessary information, expertise, and resources to do so.

1.4 Regulatory delegation

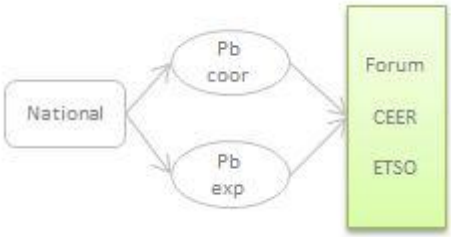

Figure 3.5: T1 in the electricity sector – delegation pattern

Given the combination of a need for coordination and a need for expertise, we would expect the creation of a regulatory network that would be given a double mandate, composed of both coordination and expertise tasks. This is not exactly what happened. Instead, the Commission created the Florence Forum, a wide platform gathering all relevant actors of the sector. The forum was delegated both coordination and expertise tasks. Moreover, a network of regulators was created, the Council of European Energy Regulators (CEER), which also assumed

coordination and expertise tasks. However the CEER was the NRAs' creature, as they built it from scratch; it cannot, therefore, be seen as a regulatory agent of the Commission. Finally, the TSOs joined together in a federation called the European Transmission Systems Operators (ETSO), which also aimed at fostering coordination and providing expertise.

1.4.1 The Florence Forum

1.4.1.1 Creation

In 1997, the Commission developed the plan of creating a Forum on European Electricity Regulation, the so-called Florence Forum, in order to palliate the gaps of the Directive and facilitate the integration of national electricity markets. The Florence Forum was launched at the end of 1997 and its first meeting took place in February 1998, at the European University Institute in Florence (Vasconcelos 2005: 93). Given that the 1996 electricity Directive entailed nothing about regulation on cross-border trade, the main purpose of the Florence forum was to try to solve the issue of cross-border electricity trade on a voluntary basis[112] in order to move towards the integration of national markets.

1.4.1.2 Composition

The forum gathers twice a year and its members are the Commission, the member states' representatives, NRAs, private actors, and other stakeholders. One innovation of the Florence Forum has been to include third parties, along with European and national authorities. This included the industry, consumers, network users, and other technical experts. 'In the uncharted area of electricity liberalization and market integration, it was vital to extensively consult and involve industry stakeholders and to mobilize much-needed expertise' (Eberlein 2003: 143). In this respect, it was particularly important to involve TSOs because of the technical barriers to cross-border exchanges. 'Technical coordination between TSOs is therefore the very minimum necessary to promote and enhance transit and transmission across national borders' (Hancher 2000: 132). The informal character of the Forum has made it possible to gather these heterogeneous actors around a single discussion table (Eberlein 2003: 143).

As regards the participation of national authorities in the forum, 'the initial intention of the European Commission was to convene regulators only, since member states energy representatives meet regularly within the Council framework' (Vasconcelos 2005: 91). And the Commission was interested in establishing a direct and privileged relationship with regulatory agencies. This was a deliberate strategy to sidestep the dissident attitudes of ministers. Because they were new bodies, the Commission expected the regulators to be more in line with their

112 Interview with an independent expert, February 2013.

ideas.[113] However, back in 1998, not all member states had established NRAs, as the 1998 Directive had not made this mandatory. In order to have all member states represented in the forum, the Commission finally invited both regulators and government representatives (Vasconcelos 2005: 91). Even with this composition, the forum constituted a great institutional innovation because it established an institutional channel of communication whereby national agencies communicated with the Commission alongside the ministries, instead of having the ministries in a gatekeeper position between the Commission and their agencies.[114]

1.4.1.3 Functions

In terms of regulatory functions, the Florence Forum has a very mixed profile and served various purposes. At the beginning of the liberalization process, the Commission needed insights into the possible approaches of regulating liberalised energy markets. The forum was a way to gather, generate, and assess information or data relevant to the regulatory issues at stake. The Florence Forum did so by structuring dialogue between regulators and market players, which also constituted a parallel objective of the Forum, next to the gathering of expertise. The Florence Forum nonetheless goes beyond merely gathering information. The dialogue among regulators and stakeholders was expected to lead, through voluntary consensus, to the delivery of agreements, which could then be endorsed later by the Council (Eberlein 2003).

Looking at the Florence Forum as a body gathering stakeholders in order to produce draft agreements to be formally codified later through the formal EC decision-making process would encourage the interpretation of its tasks as falling into the expertise category. The Commission lacks the expertise and knowledge to produce drafts of regulation on the regulatory issues at stake and gathers stakeholders to do so for them. However, the work of the Forum also has an important coordination dimension. Not all agreements within the Forum are sent into the pipeline of formal European decision-making processes. One of the important functions of the forum is also to foster discussions and voluntary agreements, which plays the role of social or professional pressure on the members of the forum. The forum is thus also a platform allowing a soft and informal type of coordination.[115]

1.4.1.4 Functioning and performance

In the first days of the forum, while discussing the possibility of setting up of a mechanism for cross-border electricity trade, the industry was arguing that cross-border electricity trade was

113 Interview with an independent expert, February 2013.
114 Interview with an independent expert, February 2013.
115 Interviews with independent experts, February 2013 and November 2013.

technically and economically almost impossible.[116] This was not the opinion of the three chairmen of the group of Mediterranean regulators who, at the second Florence Forum meeting, in October 1998, presented a joint paper detailing how things should be organised. They explained to the Commission and the stakeholders that there were other possible approaches than that defended by the industry.[117] The Commission, regulators, and network users allied and, in Spring 2000, finally managed to convince TSOs to accept a mechanism for the tarification of cross-border electricity trade, which constituted the Forum's first important achievement (Vasconcelos 2005: 91). The implementation of this mechanism was scheduled for October 2000, but some reluctant TSOs caused it to suffer significant delay – until 2003. Germany was then seen as the country making the most obstacles to the progresses of the Forum (Eberlein 2003: 152, Vasconcelos 2005: 91).

The mechanism was based on the principle of non-transaction-based tarification with a 'postage stamp tariff granting access to the entire European grid' (Eberlein 2003: 148). Those TSOs that would bear the costs of the transactions would be compensated by a fund. The member states could choose freely how to distribute their contribution of the fund among national users. Belgium and Germany wanted those users that caused the cross-border flows to bear the costs – which equated the creation of an export tariff. In addition to re-introducing a transaction based factor into the agreed tarification system, this would create a serious distortion of competition at the European level. It would lead to differences regarding the costs for exporting, depending on the member states. The Commission therefore refused to approve the scheme (Eberlein 2003: 148). The situation remained blocked at the Forum for a considerable amount of time. The Forum was then seen as a body that was not able to deliver, or to respect deadlines. It was only in March 2002 that the Forum could reach an agreement on the entry into force of a provisional cross-border tarification system and on principles for a more cost-reflective, long term, mechanism, to enter into force in January 2003 (Eberlein 2003: 148-149).

1.4.2 The CEER

Most NRAs were newly created bodies, entrusted with responsibilities that did not exist prior to their creation. For them, everything needed to be defined[118] and they had to go through a very complex learning process.[119] Furthermore, the NRAs had been created by EU directives and were facing common challenges.[120] Facing the need to exchange their views and experiences, the NRAs

116 Interview with an independent expert, February 2013.
117 Interview with an independent expert, February 2013.
118 Interview with officials of an NRA, February 2013 and with an independent expert, February 2013.
119 Interview with an official of the Council of the EU, February 2013.
120 Interview with an official of an NRA, February 2013 and with a member of the network of regulators, February 2013.

started establishing contacts with each other. The initiative came from the newly established authorities in the Mediterranean area in March 1997.[121] A first meeting was organised between the Spanish, Portuguese, and Italian regulators, followed by subsequent regular meetings, seminars, and the establishment of working groups (Vasconcelos 2005: 93).

There was some difference between the regulators, as some countries had begun liberalization earlier.[122] So the group of Mediterranean regulators established contact with the Northern EU regulators who already had a tradition of and some experience in the liberalization process. They asked to meet the Northern regulators to see what they could learn from their experiences and to compare their mandate, i.e. seeing if their functions had been similarly defined. They saw that there was an overlapping area in their tasks which, although not 100%, was large enough to allow them to take advantage of each other's experiences.[123] So there was both the need and the possibility to learn from each other, and to exchange best practices and information. And beyond the learning dimension, for the regulators, this cooperation was also meant as a way to develop a common perspective on regulation. In particular this took the form of developing a common interpretation of their tasks.[124]

Over time, other NRAs joined the group established by the Mediterranean regulators – which progressively turned into a significant network of NRAs. In March 2000, the NRAs gave their network the status of association under Belgian private law and named it the Council of European Energy Regulators (CEER).

There is an additional factor that motivated the development of the network of regulators. The experience of discussions within the Forum on the tarification mechanism for cross-border transmissions of electricity made it obvious to the regulators that they needed to be organised, elaborate common positions and speak with one voice.[125] Thus, organising themselves into a network was also, for the regulators, a way of strengthening the regulatory voice within the Forum. This initiative has been widely encouraged and promoted by the Commission who mandated them to develop a system for cross-border trade (Eberlein 2003: 146). As a result, the CEER was a platform allowing cooperation between regulators and the Commission (Vasconcelos 2005: 90), designed in particular to participate actively in the Florence Forum (Eberlein 2003: 146). In practice, the interactions between the regulators and the Commission spilled over and led to the cooperation between the CEER and the Commission for the

121 Interview with an independent expert, February 2013.
122 Interview with officials of an NRA, February 2013 and with a member of the network of regulators, February 2013.
123 Interview with an independent expert, February 2013.
124 Interview with an independent expert, February 2013.
125 Interview with an independent expert, February 2013 and with an official of ACER, February 2013.

preparation of the new energy regulatory package where the CEER provided support to the Commission (Vasconcelos 2005: 92).[126]

In sum, the CEER did also have a mixed functional profile, combining expertise and coordination. For the coordination dimension, the first reason for the creation of the CEER was the regulators' willingness to cooperate in order to develop a coordinated interpretation of the framework and to foster mutual learning. For the expertise dimension, in creating this network regulators also aimed at bringing their views and arguments into the discussions and, ultimately, fed into the agreements made within the Florence Forum in order to contribute to the development of EU electricity regulation. While this thrust emerged in a bottom-up fashion, it was nonetheless very much encouraged by the Commission.

1.4.3 The ETSO

To palliate the fragmentation of the management of European grids into several TSOs, in 1998, the Commission started to encourage TSOs to set up a federation of all TSOs in order to develop coordination. This was expected to bring about three positive outcomes. First, it would enhance the independence of TSOs from the company in which they would be vertically integrated. Second, it would facilitate communication and cooperation between TSOs to ease market integration, which qualifies as a coordination type of task. Third, it would ease the dialogue between TSOs and the Commission by constituting a single interlocutor, provided with the necessary resources and expertise, which can be interpreted as an expertise function. On July 1, 1999, the TSOs thus created their network: the European Transmission Systems Operators (ETSO) association (Eberlein 2003: 146). Hence, as with the Florence Forum and CEER, ETSO also combined coordination and expertise functions.

2 T2: The second regulatory framework (2003-2008)

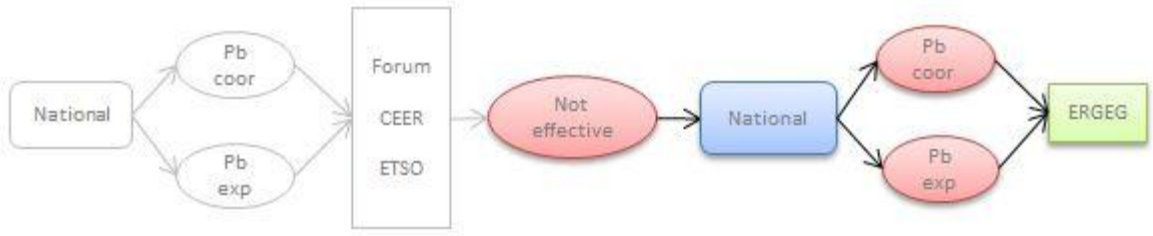

Figure 3.6: T2 in the electricity sector

126 Interview with an independent expert, February 2013.

2.1 Feedback of T1

Figure 3.7: T2 in the electricity sector – feedback from T1

Although the Florence Forum made some contributions with regards to the development of common approaches to facilitate cross-border transactions, it was still seen as insufficient.[127] Within the forum, some transmission system operators were reluctant to implement the mechanism for facilitating cross-border electricity trade. German companies, in particular, wanted to block the progress of the Forum. At the time, no NRA had been created in Germany; the country was therefore represented by its Ministry for Economic Affairs in the Forum, which was seen by the participants of the Forum as being captured by the largest national industries. As a result of these resistances, the implementation of the mechanism for facilitating cross-border electricity trade, expected to have been implemented by October 2000, was delayed until 2003 (Vasconcelos 2005: 91). So, in spite of many efforts, the Forum did not reveal itself to be the most efficient venue for closing the regulatory gap.

As a consequence, in the early 2000s, cross-border trade in electricity remained underdeveloped compared with other sectors of the economy.[128] At its meeting in Lisbon on 23 and 24 March 2000, the European Council called for the respective actors to take rapid action towards the completion of the internal market in both the electricity and gas sectors, as well as to hasten liberalization in these sectors with a view to achieving a fully operational internal market.[129] Meanwhile, difficulties were increasing within the Florence Forum and reached their peak in 2001, a year marked by serious deadlocks in the discussions (Eberlein 2003: 148). So while the political level was calling for accelerating market integration, the Forum did not seem to be sufficiently effective to palliate the shortcomings of the Directive. Hence, in order to allow the development of a cross-border regulatory regime, the Commission proposed a new regulatory package in March 2001 (Eberlein 2003: 140).

127 Recital 5 of Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/796/EC).
128 Recital 3 of the Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.
129 Recital 3 of the Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

2.2 The second regulatory framework

The package consisted in the amendment of Directive 96/92/EC on common rules for the internal markets in electricity – and its equivalent for the gas sector – augmented by a proposal for a regulation on conditions of access to the network for cross-border exchanges in electricity. After the first discussions between the EP and the Council, the Commission presented amended proposals in June 2002, which led to the adoption of the second regulatory package in 2002 (Eberlein 2008: 89). As regards the electricity sector, this second package consists of a Directive[130] and a Regulation.[131] It is completed by a decision of the Commission to establish the European Regulators Group for Electricity and Gas (ERGEG).[132]

The new framework required full market opening in July 2004 for non-household consumers and in July 2007 for all consumers. It also strengthened the access regime to national networks and unbundling requirements for vertically integrated companies. As for the institutional aspect, it makes it compulsory for member states to create regulatory authorities and delegate to them a minimum set of responsibilities (Cameron 2005: 19-22, 82). Significant leeway is left to the member states for the implementation of the Directive. National implementations are expected to be coordinated through the cooperation of NRAs within the newly created European Regulators Group for Electricity and Gas (ERGEG), in collaboration with the Commission.

2.2.1 Competence distribution: still nationally based implementation

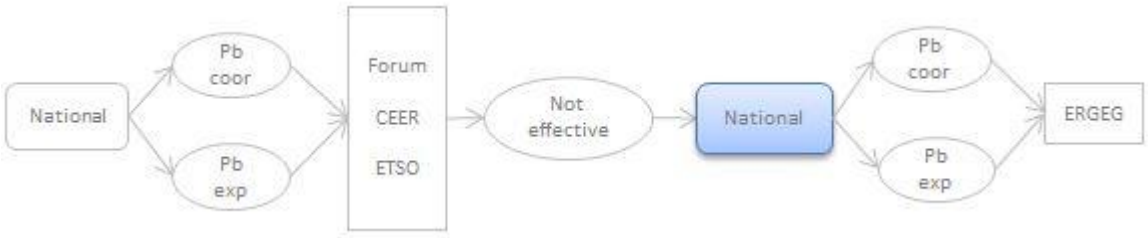

Figure 3.8: T2 in the electricity sector – competence distribution

As regards the distribution of competences in the second regulatory package, the bulk of the regulatory activity has remained at the national level (Eberlein 2008: 82, Eberlein & Newman 2008: 41-42). The member states retain regulatory authority on a wide array of topics: public services, consumer protection, environmental protections, security of supply, maintenance and

130 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

131 Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.

132 Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/796/EC).

construction of network infrastructure, technical regulation (including safety criteria), authorisations for building new generating capacities, tendering procedure for building new capacities, framing TSOs' dispatching activities, framing TSOs' development of the transmission system, framing distribution system operators' (DSO) dispatching activities, implementation of the system of third party access (to transmission and distribution systems), *ex ante* approval of tariffs for third party access, authorisation for construction of direct lines, regulation of the management and allocation of interconnection capacity, *ex ante* approval of conditions of connection and access to national networks (both transmission and distribution networks), *ex ante* approval of conditions of provision of balancing services, power to require TSOs and DSOs to modify their conditions for interconnections, and dispute settlement regarding interconnections to TSOs or DSOs, including cross-border disputes.

As regards the details on how the member states should implement the legislation, the EU requires member states to create NRAs. In a few instances, the EU legislation explicitly requires that a task is undertaken by NRAs. This is, for example, the case with the setting or approval of network tariffs (or their underlying methodologies) (Cameron 2005: 19-22). Except in these cases, national regulatory functions may be shared between the NRA and sub-national, regional authorities, or between NRA and ministries or competition authorities. Governments should provide NRAs with enough resources to be able to carry out their duties 'in and efficient and expeditious manner'.[133]

The Commission is given regulatory competences regarding four issues: inter-TSOs compensation mechanisms for cross-border transmission services,[134] transmission tariffs,[135] congestion management,[136] and locational signals.[137] In order to control the Commission in the exercise of these new delegated competences, a comitology committee is created: the 'Committee on the implementation of legislation on conditions of access to the network for border exchanges in electricity'.[138] The implementation of electricity regulation therefore clearly remains nationally based, the powers delegated to the Commission are few compared to the amount of issues regulated independently at the national level.

133 Article 23(7) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity.
134 Article 8(2) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity.
135 Article 8(3) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity.
136 Article 8(1) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity.
137 Article 8(3) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity.
138 The Committee is based on the Regulation (EC) No 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity.

2.2.2 Remaining problem of coordination

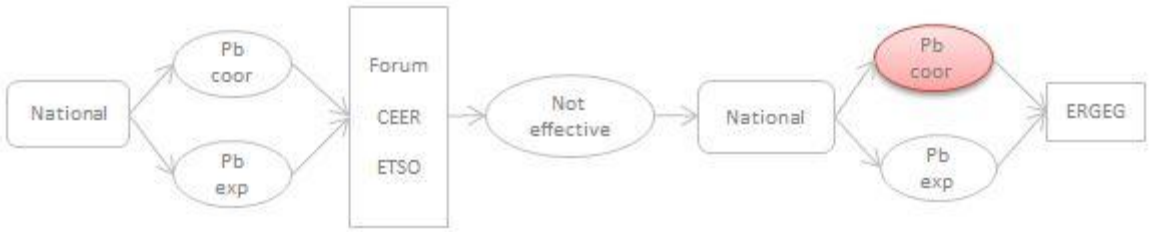

Figure 3.9: T2 in the electricity sector – problem of coordination

Given the competence distribution adopted at T2, in particular the wide powers remaining at the national level, the coordination problem of T1 is expected to remain at T2. This is verified. The implementation of the first regulatory package left the problem of coordination unsolved. A small part of this problem has been addressed by the delegation of regulatory competences to the Commission. But these are few compared to the amount of remaining national regulatory competences. And national regulatory competences are defined in a way that allows a considerable scope for diversity in the implementations by the member states (Eberlein 2008: 82). Therefore, the formal competence distribution of the new framework is not suited to the objective of creating a genuine EU regulatory regime (Eberlein 2003: 141) and the need for improving coordination among national authorities remains.

2.2.3 Remaining problem of expertise

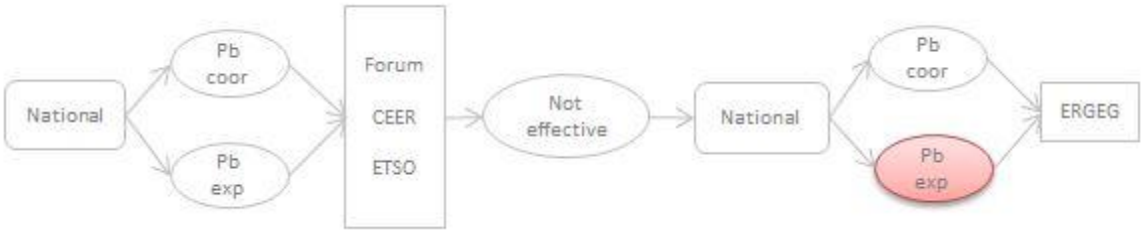

Figure 3.10: T2 in the electricity sector – problem of expertise

Given the competence distribution adopted at T2 and, in particular, the new powers delegated to the Commission, according to the conjectures the Commission is expected to have a new need for expertise. The interviewees said that, since the Commission was lacking resources, it had a crucial need for the information and expertise of the regulators.[139] It needed to understand how the market was developing at the time and had only very incomplete information on that

139 Interview with an official of ACER, February 2013 and with a former official of the Commission, February 2013.

aspect.[140] This was already the case under the first regulatory framework and it was even truer under the second one, given the new competences delegated. The Commission lacked the ability, resources, and expertise to make use of its new powers on inter-TSO compensation mechanisms, transmission tariffs, congestion management, and locational signals.[141]

2.2.4 The ERGEG

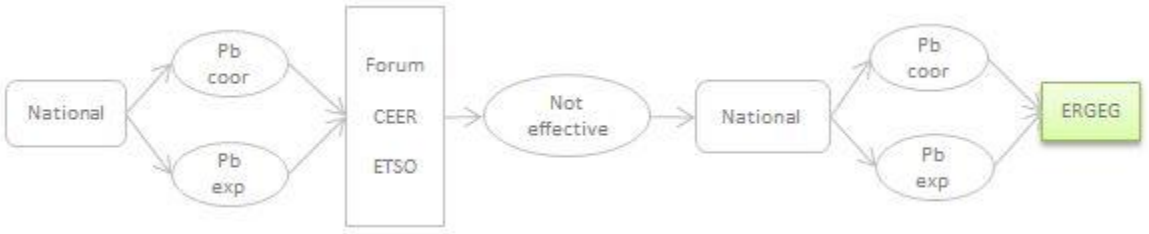

Figure 3.11: T2 in the electricity sector – delegation pattern

According to the conjecture related to the process of institutional change in the coordination path, the first agent, lacking effectiveness, is replaced by another agent. This conjecture is verified as the Commission created the European Regulators Group for Electricity and Gas (ERGEG) with views to foster coordination more effectively than with the Forum. Indeed, in spite of many efforts, the Forum proved to be too weak to close the regulatory gap. It appeared necessary to proceed to an institutional reform and, in particular, to 'give regulatory cooperation and coordination a more formal status in order to facilitate the completion of the internal energy market'.[142] This is what has justified the creation of the ERGEG. It should be noted that the Forum does not disappear, so we see a phenomenon of institutional layering. The problem of expertise is also directed to the ERGEG, which is also responsible for providing advice and support to the Commission to palliate its lack of staff.

2.2.4.1 The ERGEG as a formalisation of the network of NRAs

The creation of the ERGEG results from the willingness of both the NRAs and the Commission to formalize the network of regulators. The NRAs wanted to gain a more formal role in the EU regulatory process and, in particular, to be given the power to regulate collectively the cross-border trade of electricity. They argued that the establishment of a cross-border regulatory regime entailed a natural extension of their national competences. Furthermore, giving this

140 Interview with a former official of the Commission, February 2013.
141 Interview with an official of the Council of the EU, February 2013.
142 Recital 5 of Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/796/EC).

competence to the network of NRAs would guarantee the application of the principle of independent regulation at the EU level (Vasconcelos 2005: 96).

The Commission, who appreciated the collective work done by the regulators through CEER, wanted to support and strengthen them. Furthermore, seeing the good results of the regulators' cooperation, the Commission wanted to get involved in this structure, collaborate more directly with the NRAs (Hancher 2007: 99), and take advantage of the experience and expertise of the NRAs to palliate its lack of resources.[143] Yet the CEER, as an association created under private law, did not allow the Commission to be involved in the network. Formalising and integrating the regulators' network would allow the Commission to consult them and receive opinions from them.[144] So both the NRAs and the Commission found a common interest in formalising the network of NRAs. While the regulators wanted to gain more influence in the EU regulatory process, the Commission, given its lack of resources and expertise, was interested in gaining their input and deepening their involvement.

It should be mentioned that the CEER continued to operate after the creation of the ERGEG and remained very active. In fact, both networks were complementary and the ERGEG was rather like a hat that the regulators could put on when convenient.

2.2.4.2 Why a regulatory network and not an EU Agency

The idea of creating an EU regulator already existed in the early 2000s.[145] But there was political factor behind the choice for a regulatory network. When the second package was negotiated, a difficult issue was the unbundling of the provision of electricity service into different segments. It appeared to the Commission that it would have been too ambitious to target an agreement with the member states and EP on both unbundling issues and on the creation of an EU regulatory authority. Alternatively, the use of intermediary steps based on these groups of regulators, without much power, would have the effect of familiarising actors with the collective work of the regulators within an EU framework – rather than in a mere association, thereby preparing the next step towards an EU regulator.[146] As a result, the Commission opted for the creation of a lighter structure, in the form of a regulatory network, which became the ERGEG. Although lacking effective power, it still represented an institutional recognition for the NRAs. For them, having the ERGEG's stamp on their opinions would give them more weight. Furthermore, while the regulators and the DG Energy and Transport, who drafted a first version

143 Interview with an official of ACER, February 2013.
144 Interview with an official of the Commission, February 2013.
145 Interview with an official of the Commission, February 2013.
146 Interview with an official of the Commission, February 2013.

of the proposal together, were in favour of creating a strong body, the Commission's legal service denied this on the grounds that it was not legally possible.[147]

2.2.4.3 Functions

ERGEG was given two tasks. It was first expected to assist the Commission, in particular in the preparation of draft implementing measures. The regulation 1228/2003 specifies that, where appropriate, the new regulatory powers delegated to the Commission should involve the NRAs through their European association because the regulators have an important contribution to make towards the functioning of the internal electricity market.[148] Second, ERGEG was supposed to facilitate consultation, coordination, and cooperation among NRAs for the consistent application of the framework.

Both tasks represent a continuation of the two functions performed by the CEER. One of the reasons why the CEER was created was that regulators needed a forum to elaborate common positions with views to influence the EU regulatory process, which, in practice, means influencing the Commission. Yet, at T1, with CEER and the Florence forum, the NRAs were just one out of the many stakeholders consulted by the Commission; they did not have any specific status. The creation of ERGEG as an official advisory body of the Commission gave the voice of the NRAs a specific status in the consultations made by the Commission. The second task of ERGEG, cooperation and coordination among NRAs, corresponds to what the NRAs were already doing through CEER with their exchanges of best practices.

2.2.4.4 ERGEG's contribution to regulatory coordination

In terms of the coordination work undertaken by the ERGEG, the stakeholders do not speak about regulatory *harmonisation*, which is seen as too strong a word, but about regulatory *convergence*.[149] The central and most visible way in which NRAs pursued regulatory convergence was by producing guidelines of good practices (GGPs). The guidelines produced by the regulators were not binding. If an NRA did not respect the GGPs, there was no legal enforcement. But there was a moral commitment to follow them.[150] Their coordination took other forms, such as, for example, the development of a common interpretation of the provisions of the regulatory framework. Very often, the regulators discussed how to interpret a particular

147 Interview with an independent expert, February 2013.
148 Recital 18 of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.
149 Interview with an official of ACER, February 2013 and with a member of the network of regulators, February 2013.
150 Interview with an official of ACER, February 2013.

provision, for example of a rule on unbundling.[151] Also, with regard to their obligation to produce a national yearly report, the regulators agreed beforehand on which indicators they would take into account to proceed to the monitoring.[152]

The dynamism of ERGEG is related to both the pro-activity of the NRAs[153] and the Commission which stimulated regulatory convergence by mandating the NRAs to work on various issues.[154] While the attitude of the Commission in this respect is largely unsurprising, given its preference for regulatory harmonisation, the pro-activity of the NRAs is interesting and worth considering. One might have expected some reluctance from the NRAs vis-à-vis the development of a European dimension of their work, as they may have felt threatened in their own prerogatives. Rather, there was a strong willingness among the NRAs to make the internal market a reality and many GGPs were developed on the regulators' own initiatives.[155] In fact, the regulators saw the development of their network as a way to become stronger; it provided them with support and backup. And they did not feel their prerogatives threatened because they remained at the centre of the network and its institutional development.[156]

There were some very pro-European NRAs within ERGEG that served as motors in the network. The first period, roughly until the creation of ERGEG in 2003, was clearly marked by the formidable impetus of the three Mediterranean regulators. In 2003, John Mogg, former Director General of the DG Internal market at the Commission, became the chairman of Ofgem, the UK regulator. Very pro-European, he also became the chairman of ERGEG in the same year. Walter Boltz, chairman of the Austrian regulator should also be mentioned among the driving motors of the network. Both John Mogg and Walter Boltz were men who 'saw the need for a better cooperation between the regulators. They were fitting along the same lines as the Commission'.[157]

2.2.4.5 ERGEG's advisory role towards the Commission

ERGEG's advisory function has been exploited well by the Commission who gave a lot of work to the regulators: to produce guidelines, best practices, etc.[158] The Commission which was sitting in ERGEG's meetings, was able to influence ERGEG's work programme. So there was a dialogue on

151 Interview with an official of ACER, February 2013.
152 Interview with an official of ACER, February 2013.
153 Interview with an official of ACER, February 2013 and with a member of the network of regulators, February 2013.
154 Interview with a former official of the Commission, February 2013.
155 Interview with an official of ACER, February 2013 and with a member of the network of regulators, February 2013.
156 Interview with a member of the network of regulators, February 2013.
157 Interview with a former official of the Commission, February 2013.
158 Interview with an official of the Commission, February 2013.

the priorities and the Commission was able to ask regulators to work on topics it was interested in.[159] Part of the output of the network was codified by the Commission or the policy-makers at a later stage.[160] This is the case of the regulation on cross-border trade in electricity, which had been developed, first by CEER, and then by ERGEG in the context of the Florence forum (Eberlein and Newman 2008: 43). Another example is provided by the draft guidelines for fundamental data transparency, produced by ERGEG and now adopted under the third regulatory package in comitology. There are other examples where ERGEG has directly drafted texts.[161] The Commission was taking the expertise of the regulators, putting a formal rubber stamp on their advice and guidelines were developed in these areas.[162]

The NRAs have also been a huge source of information for the Commission, in particular with the benchmarking report, which allowed the Commission to monitor what was happening. The benchmarking report was written yearly by ERGEG. On the basis of national reports of all NRAs, ERGEG carried out a benchmarking assessment to chart the evolution of electricity markets on several aspects: functioning, prices, tariffs, etc. It showed where things were working and where they were failing and in which member states certain problems remained. This constituted a very important source of information for the Commission.[163]

3 T3: The third regulatory framework (2009-)

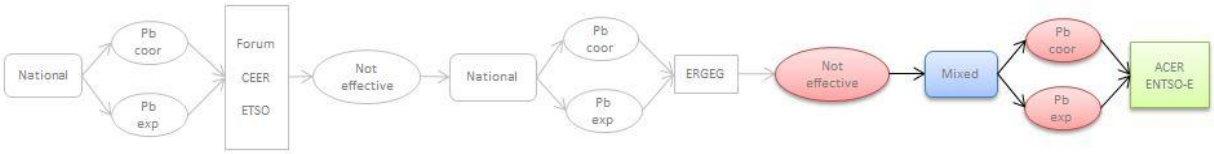

Figure 3.12: T3 in the electricity sector

3.1 Feedback of T2

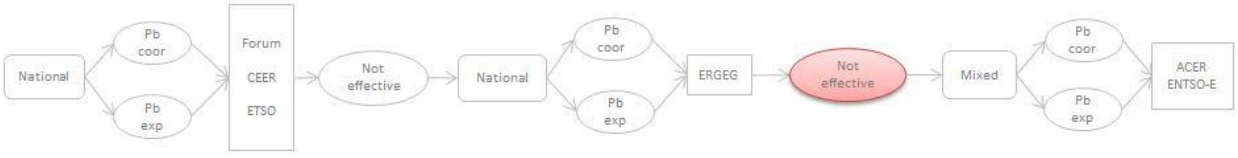

Figure 3.13: T3 in the electricity sector – feedback from T2

159 Interview with an official of the Commission, February 2013.
160 Interview with an official of an NRA, February 2013.
161 Interview with an official of the Commission, February 2013.
162 Interview with an official of ACER, February 2013.
163 Interview with officials of an NRA, February 2013.

3.1.1 National and non-competitive markets

Around 2005, there was a consensus in the sector – except among the incumbents – that the European reform in energy had stalled half-way and that a new thrust and instruments were needed to reach the policy objectives.[164] Liberalization was far from being fully effective: former monopolists remained very powerful and new entrants were facing serious difficulties.[165] A lack of transparency, for example regarding the available transport capacity, represented obstacles for all market parties, except the incumbents. This affected trust in the pricing mechanisms and therefore acted as a barrier for investment in alternative energy sources.[166] TSOs, especially when vertically integrated, have often failed to create the right conditions to foster competitive and liquid markets.[167]

Things did not look any better for the dimension of market integration as the internal energy market remained far from a reality.[168] A significant indicator of market integration is the variation of prices among countries. Yet energy prices for commercial users vary significantly between member states.[169] EU consumers had been given the legal right to choose their electricity and gas supplier freely between any EU company. While this right was legal and existed on paper, it was hardly effective or exercised in practice. As for EU companies, they were not guaranteed the right to sell electricity and gas in any member states on equal terms with national companies without suffering discrimination or disadvantages. Hence, there was no cross-border integration and no cross-border competition. Incumbents tended to stick to their national markets and rarely entered other national markets as competitors. TSOs had some responsibility for this as they did not take much action towards the increase of cross-border capacity, which was often the result of inadequate regulatory incentives.[170]

Around 2005, while the realisation of the internal energy market was lagging behind, a consensus was created around the Commission's ambition to push market integration in the energy sector to the next level. Jose Manuel Barroso, appointed as President of the Commission

164 Neelie Kroes, European Commissioner for Competition Policy. Speech/07/4. *Introductory remarks on Final Report of Energy Sector Competition Inquiry.* Press Conference, Brussels, 10th January 2007; Interview with an independent expert, February 2013.
165 Interview with an independent expert, February 2013.
166 Neelie Kroes, European Commissioner for Competition Policy. Speech/07/4. *Introductory remarks on Final Report of Energy Sector Competition Inquiry.* Press Conference, Brussels, 10th January 2007.
167 Commission Communication. *Prospects for the internal gas and electricity market.* COM(2006) 841 final. Brussels, 10/01/2007. p.7.
168 Commission Communication. *Prospects for the internal gas and electricity market.* COM(2006) 841 final. Brussels, 10/01/2007. p.7.
169 Neelie Kroes, European Commissioner for Competition Policy. Speech/07/4. *Introductory remarks on Final Report of Energy Sector Competition Inquiry.* Press Conference, Brussels, 10th January 2007.
170 Commission Communication. *Prospects for the internal gas and electricity market.* COM(2006) 841 final. Brussels, 10/01/2007. p.7.

in 2005, was committed to pursuing the completion of the internal market with a proactive use of competition policy. As the Commission planned to launch a series of sector inquiries to identify barriers to competition,[171] the internal energy market was chosen as a pilot case. The sector's inquiry, realised jointly by DG Competition and DG Energy and Transport, convinced the two Commissioners – Neelie Kroes for competition and Andris Pielbalgs for energy – of the need for adopting a third liberalization package. The vertically integrated energy producers, responsible for discrimination in the use of infrastructures, were identified as one of the biggest obstacles to competition and market integration (Eikeland 2011: 250-51).

The lack of competition on the internal energy market was particularly problematic as it interfered negatively with other policy goals, raising particular concerns regarding climate change and security of supply (Eikeland 2011: 251). The issue of security of supply was one that the member states were sensitive to. The international context, indeed, was one of increasing EU dependency on energy importation, of international competition for access to energy sources, and of growing uncertainty stemming from the Middle East. In 2005, at the Hampton Court Summit, the heads of states had indeed acknowledged the need to articulate the three primary objectives – a competitive energy market, security of supply, and climate change – into a more coherent EU energy policy. The Commission therefore proposed a new strategic energy policy for Europe[172] that emphasises and articulates three objectives: sustainable energy, competitive energy, and security of supply. In this context, the internal energy market is defined as 'the cornerstone and most important means' to meet these three strategic energy challenges.[173] [174] Energy market integration is broken down into five components: the development of a European Grid via, amongst others, the elaboration of a European grid code; improved interconnections; a regulatory framework that stimulates new investments; effective unbundling; and increased competitiveness – to be achieved in particular through better coordination between regulators, competition authorities and the Commission.[175]

171 Commission Communication. *Working together for growth and jobs. A new start for the Lisbon Strategy.* COM(2005) 24 final. Brussels, 02/02/2005, P. 8, 18.

172 Commission Green Paper. *A European Strategy for Sustainable, Competitive and Secure Energy.* COM(2006) 105 final. Brussels, 08/04/2006; Commission Communication. *An Energy Policy for Europe.* COM(2007) 1 final. Brussels, 10/01/2007.

173 Heinz Hilbrecht, Former Director of the European Commission. Speech. T*argets without governance? The pursuit of the strategic energy objectives of the European Union*. Florence, 10 May 2012. p.1.

174 Indeed, a competitive and integrated market is expected to: cut costs and stimulate energy efficiency and investments; allow for better application of climate friendly economic instruments, such as emission trading mechanisms; encourage TSOs to promote connections to climate friendly sources of energy; provide the interconnection and new generation capacity that are necessary to avoid black-outs and price surges (Commission Communications. *An energy policy for Europe.* COM(2007) 1 final. p.6).

175 Commission Green Paper. *A European Strategy for Sustainable, Competitive and Secure Energy.* COM(2006) 105 final. Brussels, 08/04/2006. p.18.

3.1.2 A remaining problem of coordination

The sector inquiry identified several problems that have hampered progress towards the creation of a competitive and integrated market. Among them, the unbundling of vertically integrated companies features as a central. The second regulatory package required from the member states the legal and functional separation of the network operations from the supply, generation, and production activities. While some member states created a completely independent company for network operations, others created a legal entity within an integrated company. In the latter cases, the Commission observed three kinds of problems. First the TSO may treat its affiliated companies better than competitors. Second, the non-discriminatory access to information was not respected because it proved impossible to prevent the TSOs from releasing sensitive information to other branches of the integrated company. Third, vertically integrated TSOs had less incentive to invest in new networks, which might benefit the market in general and, therefore, the competitors of the integrated company.

The unbundling regulatory regime belongs to the substance of the regulatory policy. Given that this research looks at the transformation over time of governance mechanisms for the internal market, among those obstacles to market integration identified by the Commission, I will only look at those related to governance and therefore leave the unbundling issue aside. As regards the governance-related obstacles to market integration, the Commission points at three outstanding issues: the coordination of regulators at the EU level, the independence and powers of NRAs, and the EU level coordination between TSOs. The first and third issues are directly related to a problem of coordination between national entities (NRAs or TSOs). As will be explained, the second issue regarding the statutes of the NRAs, although not a coordination issue as such, does have an impact on the coordination between NRAs.

3.1.2.1 Insufficient coordination among regulators at the EU level

Although the second regulatory package introduced for the first time the possibility to regulate cross-border trade, a regulatory gap emerged due to a lack of institutional means.[176] In the absence of a central regulatory authority, the regulatory framework, lacking a set of uniform technical rules, was limited to laying down 'general principles likely to lead to various implementations that are neither equivalent nor mutually compatible.' (Glachant and Levêque 2009: 25). Policy makers were aware of that divergence. As they were reflecting on the third package, they realised there was a growing gap between the objective of integrating electricity markets and the way regulators were performing the tasks they had been delegated. For reasons partly due to their lack of NRA independence – in Germany for example, or due to different

176 Interview with an official of ACER, February 2013.

market structures among member states, there were different regulatory practices among member states. These divergences of regulatory practices were such that leaving the regulators to work in an independent fashion could not solve them.[177]

Policy-makers came to the conclusion that in order to facilitate cross-border trade the divergences between regulators should be addressed. They needed to build something at the EU level to make sure that these regulators, although operating in their national framework with their own specificities, did so in a way that is consistent across the various member states.[178] This was meant to take place through the development of EU rules, in particular as regards technical standards.[179] Yet the forums and ERGEG have not led to the real push towards development of common standards and approaches that would have been necessary to make cross-border trade and the integration of markets a reality. These efforts towards gradual convergence led to a number of non-binding codes. But progress remained limited because they needed all regulators to have the necessary powers and to agree over each other's.[180] Furthermore, the ERGEG's guidelines were only voluntary so the network's effectiveness was also affected by its lack of binding decision-making power.[181] The Commission concluded that the progress towards market integration required more effective coordination, with increased resources.[182] This diagnosis was largely shared in the sector[183] as all stakeholders had an interest in establishing a system in which the codes are obligatory for each network operator.[184]

3.1.2.2 The lack of independence and powers of the NRAs

Several characteristics of the NRAs were seen as blocking progress towards market integration: their mandate, their powers, and their independence. Their powers, in particular, were considered as a key condition for effective EU-level coordination among regulators.

3.1.2.2.1 National mandate

Under the second package, most regulators could only take the national viewpoint into account for making decisions. This was problematic when it came to making decisions that affected cross-border trade. For example, the regulatory framework allowed regulators to exempt new interconnectors from the obligations to give market access under certain conditions. The benefit

177 Interview with an official of the Council of the EU, February 2013.
178 Interview with an official of the Council of the EU, February 2013.
179 Interviews with officials of the Commission, February 2013; Commission Communication. *An Energy Policy for Europe.* COM(2007) 1 final. Brussels, 10/01/2007.
180 Commission staff working document accompanying the legislative package on the internal market for electricity and gas. *Impact assessment.* SEC (2007) 1179, Brussels, 19/09/.2007. p. 48.
181 Interview with an member of the network of regulators, February 2013.
182 Commission staff working document accompanying the legislative package on the internal market for electricity and gas. *Impact assessment summary*. SEC (2007) 1180. Brussels, 19/09/2007. p.14.
183 Interview with an official of the Commission, February 2013.
184 Interview with a former official of the Commission, February 2013.

provided by the new inter-connector was one of the factors that may justify the decision to exempt the new inter-connector from complying with the rules of the framework on market access. There are cases where the added value of a new interconnector was located at the European level. An example of this from the gas sector was the building of the Nabucco pipeline, which connected several European countries. But in several cases, national legislations did not allow their regulator to take the European perspective into account to evaluate the benefit brought by the inter-connector. Limited to a national perspective on the evaluation of the benefit of the inter-connectors, it happened that NRAs could not exempt inter-connectors, which would be of great value at the level of the internal market. So it was necessary to broaden regulators' mandate with a European dimension, to make sure they could take the European interest into consideration in their national decisions.[185]

3.1.2.2.2 Lack of independence and powers

While the second package required that the member states established NRAs, there were few requirements regarding their independence and competences. As a consequence, many regulators were weak, not really independent, and largely influenced by their Ministries.[186] Spain and Germany were particularly affected by the lack of an independent regulator.[187] Also, the new member states that entered the Union in 2004 had different administrative traditions and lacked the culture of independent regulation.[188] On many issues, certain regulators, lacking the appropriate powers and independence, were constrained in their relations with the industry. This was particularly true for subjects that were not explicitly defined by the directives as the responsibility of the NRAs, such as functional unbundling, non-tariff access conditions, and provision of information to network users.[189] For example, while tariff setting is one of the most important competences of the regulators, the Spanish regulator never set a tariff because the ministry set them. The regulator was merely proposing the tariff, and the ministry could change it without giving much explanation.[190] Yet regulatory independence from politicians is seen as important, in particular for policy stability. The states are not neutral towards energy markets; they have conflicts of interest. They are not only driven by the creation of competitive energy markets. They may still own part of the industry, be willing to promote national champions or to bring prices down for the consumers before elections.[191] This conflict of interests can oppose

185 Interview with a former official of the Commission, February 2013.
186 Interviews with officials of the Commission, February 2013.
187 Interview with an independent expert, February 2013, with an official of the Council of the EU, February 2013, and with officials of an NRA, February 2013.
188 Interview with an independent expert, February 2013.
189 Commission Communication. *Prospects for the internal gas and electricity market*. COM(2006) 841 final. Brussels, 10/01/.200. p. 8.
190 Interview with an official of ACER, February 2013.
191 Interview with an official of the Commission, February 2013.

national versus European interests: in fact, it happened that regulators were pressured by their governments to make decisions that were clearly going against market integration.[192]

3.1.2.2.3 Heterogeneity of independence and powers

Independently from the level of powers and independence of NRAs, the Commission also mentioned the divergence in the levels of independence and powers among regulators as a problem.[193] Heterogeneity in the competence of regulators is first an obstacle to the EU-level cooperation among regulators. To create cooperation at the EU level, national actors need to have the same competences.[194] It is important to create a sense of community[195] and to allow discussion.[196] On some issues, depending on the country, the national interlocutor could be the NRAs or the ministry. Equalizing the powers of the regulators allows regulators to speak to the regulators of other member states, instead of interacting with ministries. For some very technical decisions, ministries do not have the appropriate perspective or expertise. There, it is more appropriate to have regulators exchanging among themselves and this helps market integration.[197]

Competence heterogeneity is in particular problematic when it comes to setting cross-border rules[198] or developing cross-border infrastructure. Let us assume, for example, that one regulator wants to oblige its TSO to build a wider pipeline to its neighbouring country because there is a need for increasing cross-border transmission capacity but that the regulator of the neighbouring country does not have the capacity to impose the same on its own TSO. It would not be sensible to build a wider pipeline in the first country if there is only a narrow one on the other side of the border.[199] Finally, levelling the competences of the NRAs is important for the implementation of the agreements reached between NRAs, to make sure they can implement them. On occasion, regulators have discussed but not been able to implement the agreements because the corresponding issue was a competence of their ministry.[200]

192 Communication from the Commission to the Council and the European Parliament, Prospects for the internal gas and electricity market, Brussels, 10.1.2007, COM(2006) 841 final, p. 8.
193 Commission staff working document accompanying the legislative package on the internal market for electricity and gas. *Impact assessment.* SEC (2007) 1179. Brussels, 19/09/2007. p.45.
194 Interview with an official of the Commission, February 2013.
195 Interview with an official of the Commission, February 2013.
196 Interview with an official of the Commission, February 2013.
197 Interview with an official of the Commission, February 2013.
198 Interview with an official of ACER, February 2013.
199 Interview with officials of an NRA, February 2013.
200 Interview with an official of ACER, February 2013.

3.1.2.3 Insufficient coordination between TSOs

At the technical level, i.e. at the level of TSOs, a series of aspects needed to be improved to facilitate cross-border exchanges. First, cross-border transmission capacity needed to be increased. For this to happen, network investments must be made with a pan-European perspective, which requires TSOs to engage in the joint planning of system development. Besides the construction of new infrastructures, additional improvements to the network and cross-border capacity could be provided with a more regular information exchange between the TSOs. Finally, to make sure that the increase of transmission capacity would function effectively and in a secure way, it was necessary that TSOs reached agreements on detailed operational standards. Yet this required a high level of technical cooperation that, according to the Commission, was unlikely to be achieved under the second framework where TSOs were 'inclined or even obliged to follow a national focus'.[201]

3.1.3 A remaining problem of expertise

Under the second regulatory package, on the basis of its delegated executive powers, the Commission took two initiatives and adopted texts under comitology: the congestion management guidelines in 2006 and the inter TSO compensation guidelines in 2009. However, the Commission would have been willing to take more action on the basis of these powers but did not due to its lack of ability, resources, and expertise. Asking the NRAs, through ERGEG, to generate advice was however a limited solution. Dealing with these very complex questions requires a substantial allocation of resources, as well as a clear decision-making structure, which the ERGEG was lacking.[202]

3.1.4 Comitology

Although this aspect was not related to the problem of coordination, it is interesting to mention some possible weaknesses of the comitology system in the energy sector. The comitology system has also been subject to criticisms throughout the implementation of the second package and the preparation of the third. The weaknesses of the comitology system were mostly highlighted by the regulators[203] and, to a smaller extent, by academics (Glachant and Levêque 2009). It should be noted that no document of the Commission itself suggests changes should be made to the comitology system or to its role in energy regulation.

201 Commission Communication. *Prospects for the internal gas and electricity market.* COM(2006) 841 final. Brussels, 10/01/2007.p.17.
202 Interview with an official of the Commission, February 2013.
203 Interview with an independent expert, February 2013.

As already mentioned, the Commission had been delegated a few executive powers by the second package, which were associated to the comitology system. The regulators considered it inappropriate to entrust the responsibility of adopting common rules to comitology committees (Vasconcelos 2005: 96). One particular concern was that the involvement of the committees in the adoption of cross-border regulation would contradict the principle of independent regulation. Regulatory decisions had been entrusted to independent regulatory authorities at the national level and this principle should also apply for regulatory decisions taking place at the EU level. Accordingly, it would be more appropriate to have NRAs cooperatively adopting EU rules on cross-border electricity trade instead of member states representatives.

Vasconcelos advanced a second reason why cross-border regulatory regime should not be in the hands of comitology committees. The areas that were delegated to the Commission are inter-TSOs compensation mechanisms, tariffs of transmission networks, and management of transfer capacity of interconnection. Yet the Directive 2003/54 gave NRAs the responsibility for fixing or approving transmission tariffs and balancing service tariffs at the national level. These EU and national competences are closely inter-related. When establishing national codes, NRAs should reflect on the rules agreed at the EU level governing interactions between TSOs. This inter-dependency would have justified that the set of rules governing interactions between TSOs should be agreed, at the EU level, by the Commission and the regulators, in close cooperation with TSOs and network users (Vasconcelos 2005: 101). Finally, the academic literature also mentioned the risk that comitology committees may 'allow a "unified" block of "national interests" to veto convergence on some issues it deems vital and adverse to its interests.' (Glachant & Levêque 2009: 25).

3.2 The third regulatory framework

As regards the electricity sector, the regulatory package is composed of three pieces of legislation: a new Directive on common rules for the internal market in electricity repealing the former Directive,[204] a new Regulation on cross-border exchanges repealing the former Regulation,[205] and a completely new Regulation establishing the Agency for the Cooperation of Energy Regulators (ACER).[206]

204 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

205 Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009, on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003.

206 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

3.2.1 Massive new competences for the Commission

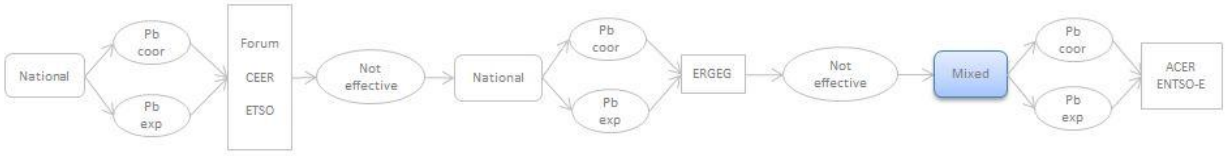

Figure 3.14: T3 in the electricity sector – competence distribution

The proposal of the Commission significantly alters the distribution of competences between the member states and the Commission to the benefit of the latter. The competence distribution is, therefore, from 2009 onwards, a mixed one.

3.2.1.1 Decisions

The Commission was given the possibility to veto some individual decisions of the NRAs in cases where these would not comply with the criteria set down in EU legislation. This may occur regarding the NRAs' decisions to grant exemptions from complying with EU legislation to new cross-border interconnectors.[207] Besides, while on most decisions related to the certification of TSOs, the Commission only has the possibility to issue an opinion – of which NRAs must take the utmost account, in a few certification decisions, the Commission itself makes the decision and the NRAs must comply with it.[208] More generally, the Commission may require that an NRA withdraws any decision that would not comply with the guidelines attached to the regulatory framework.[209] Finally, the Commission may also decide on the geographical areas in which regional cooperation between TSOs should take place.[210]

3.2.1.2 Guidelines

Under the 2002 regulatory package, the Commission had the possibility to adopt guidelines regarding inter-TSOs compensation mechanisms for cross-border transmission services, transmission tariffs, congestion management, and locational signals. The 2009 framework adds further competences for the Commission to adopt guidelines.

The most important delegation operated in 2009 is the capacity, for the Commission, to adopt and make binding the so-called network codes, which are central to the new regulatory package. A specific section is dedicated to the network codes (see below).

207 Article 17 of the Regulation (EC) No 714/2009.
208 Articles 9 and 10 of the Directive 2008/72/EC, Article 3 of the Regulation (EC) No 714/2009.
209 Article 39 of the Directive 2008/72/EC.
210 Article 12 of the Regulation (EC) No 714/2009.

Second, the Commission may adopt guidelines in new areas: to ensure full and effective compliance of TSOs and DSOs with the unbundling provisions,[211] to modify the extent of the duties of the NRAs to cooperate with each other and with the Agency,[212] and to set the conditions under which inter-connectors can be exempted from certain provisions of the framework.[213]

Third, the Commission may adopt guidelines for establishing a minimum degree of harmonisation on the following issues:[214] the details on the provision of information by TSOs on interconnection capacities, the details on rules for the trading of electricity, the details on areas subject to the development of network codes, and on the details of investment incentive rules for interconnector capacity.

3.2.1.3 Network codes

Network codes are sets of rules that operationalize regulatory provisions by translating them into technical terms so as to allow their implementation by the technical branches of network operators. Traditionally elaborated at the national level, the need for EU-level network codes was identified during the elaboration of the third package, in order to create the operational and technical conditions for cross-border exchanges of electricity, while pursuing the other policy goals (security of supply, competitive and low carbon energy sector).[215] The range of issues on which network codes may be developed is wide and may be classified into three categories: grid connection related codes, system operation related codes (for example on operational network security), and market related codes (for example on capacity allocation and congestion management).

In the complex procedure that applies to the network codes, the Commission intervenes twice: first, to establish the annual priority list identifying the areas where network codes should be adopted and then, after the codes are drafted by the group of TSOs under the supervision of the new EU agency, the Commission formally adopts them in comitology under the regulatory procedure with scrutiny.

3.2.1.3.1 Negotiations within the Commission

The initial plan of DG Energy and Transport was to give the decision-making power related to the adoption of the network codes to a new EU agency that would have replaced the network of regulators. But this was not to happen in this way. While the idea of DG energy and transport

211 Article 14(3) of the Directive 2008/72/EC.
212 Article 38(5) of the Directive 2008/72/EC.
213 Article 17(9) of the Regulation (EC) No 714/2009.
214 Article 18 of the Regulation (EC) No 714/2009.
215 See ENTSO-E website: https://www.entsoe.eu/major-projects/network-code-development (consulted on 15/05/2013)

was to create a powerful agency with binding decision-making powers, the Commission proposed the creation of the Agency for the Cooperation of Energy Regulators (ACER) mostly as an advisory body. While ACER is certainly largely involved in the network codes through their supervision of the TSOs, they lack the authority to formally adopt them.

It appeared, throughout the internal negotiation of the Commission between the DG Energy and Transport on the one hand and the Secretariat General and the Legal Service on the other hand, that the only possibility to have the network codes codified into binding EU-level regulation was to use the executive powers of the Commission under the comitology system.[216] This negotiation revolved around the Meroni doctrine,[217] a judgement of the CJEU dating back from the 1950s.[218] Based on the principle of the institutional balance of power, this judgement limits the possibility, for the Commission, to delegate the powers it received from the Treaties. It has been invoked by the Legal Service and Secretariat General to block the delegation of regulatory decision-making competences to ACER.

The interpretation of the Meroni judgement is subject to discussion[219] and its applicability to today's cases of EU regulatory agencies creation is questioned by several stakeholders.[220] The judgement is older than the creation of the European Community and it could be argued that political will might have allowed the Commission to overcome this legal barrier.[221] This raises the question of the extent to which the Meroni doctrine would constitute a genuine legal obstacle versus being instrumentalized by the horizontal services of the Commission whose preference would be to keep regulatory power within the Commission.

The Secretariat General and the Legal Service have another perspective on the question. One of the roles of the Legal service is to make sure that the Commission's acts are not cancelled by the CJEU. Yet, here, we are in a grey zone.[222] The Meroni case, although old, has never been overruled or nuanced by the CJEU.[223] On the other hand, it is true that when the Commission has a strong preference, they may proceed and assume the risk of being cancelled. Yet there is a political will, within the Legal Service and the Secretariat General, to maintain the Meroni

216 Interviews with an official of the Commission, February 2013 and with a member of the network of regulators, February 2013.
217 Interview with an official of the Commission, February 2013 and with a former official of the Commission, February 2013.
218 CJEU Judgement C-9/56. *Meroni v. High Authority.*
219 Interviews with former officials of the Commission, February 2013, and with officials of the Commission, February 2013.
220 Interviews with officials of the Commission, February 2013
221 Interview with a former official of the Commission, February 2013 and with an official of the Commission, February 2013.
222 Interview with an official of the Commission, February 2013.
223 Interview with an official of the Commission, February 2013.

jurisprudence and not to change the situation.[224] This relates to the responsibility of both the Secretariat General and Legal Service to maintain the institutional balance and to protect the powers of the Commission. Allowing the delegation of regulatory competences in one sector would create a precedent, making it difficult to prevent its transposition to other sectors,[225] and therefore, possibly leading to very important changes in the EU institutional balance. The Commission, as a matter of principle, did not want to give decision-making powers to a secondary agency. At the top, the Commission was afraid that a system would develop where a second layer of institutions would have legal powers that are now reserved to the Commission.[226]

This could be related to a possible willingness of the Commission to keep its regulatory powers instead of evolving towards a sort of Government. If the Commission is a regulatory power, it may not be interested in creating regulatory agencies. But another possibility would be that the Commission is a governmental body that needs to outsource. There, it would make sense to create regulatory agencies. But this would question the role of DG Competition, which may then have to outsource its work.[227]

In sum, there is a mix of genuine legal constraint, as the judicial risks run by delegating regulatory competences to the Agency cannot be ignored, and of political preferences of the horizontal services that share the interpretation of the Treaty made by the CJEU in the Meroni judgement.[228] And the DG energy and transport could not advance on a proposal without the agreement of the Legal Service and the Secretariat General, which are, both, directly linked to the Presidency of the Commission. So they are located at a higher level than the services and the green light of Catherine Day, The Secretariat General of the Commission, was necessary for transferring the proposal to the College of Commissioners for formal adoption.[229] This explains why the Commission did not propose the delegation of formal decision-making powers on the network codes to ACER.

Hence, the only way to make the codes binding was through comitology. But the DG Energy and transport was not in favour of using the comitology procedure. They saw comitology as a cumbersome, lengthy, and difficult process. Yet, they saw there would be a need to adapt and revise the codes often, which would imply a continuous process of comitology procedures.[230] As

224 Interview with an official of the Commission, February 2013.
225 Interview with an official of the Commission, February 2013 and with an official of ACER, February 2013.
226 Interview with an official of the Commission, February 2013.
227 Interview with an official of the Commission, February 2013.
228 Interview with an official of the Commission, February 2013.
229 Interview with an official of the Commission, February 2013.
230 Interview with an official of the Commission, February 2013.

a result, the Commission finally decided to keep the network codes voluntary in the proposal, reserving the intervention of the Commission and the comitology committee in case the TSOs would not act according to their mandate regarding the elaboration and implementation of the network codes.

3.2.1.3.2 Negotiations in co-decision

In the EP, the third package was dealt with by the Committee on Industry, research and Energy and its components were distributed to three Rapporteurs. The Plenary adopted an amended version of the proposal on the whole package on the 18th of June 2008. The EP introduced significant amendments with respect to the distribution of competences for the network codes. Taking as a point of departure a distinction between technical codes and those related to the operation of markets, the EP argues that ACER should be in charge of deciding on technical codes while decisions on market related codes could be left to the Commission, which is competent on competition policy.

The EP justified its position by the specificity of the energy sector, which was calling for a careful re-evaluation of the Meroni doctrine. Such a revision of the Meroni case should take the context into account instead of applying the doctrine in a 'simplistic, overly conservative manner'.[231] Firstly, while the EP acknowledged that the delegation of binding decision-making powers to other EU agencies has not gone beyond individual decisions, an ad hoc approach based on the specific needs of the sector was advocated in order to justify the distinctiveness of the new energy Agency in terms of decision-making powers. Secondly, the Meroni principles would not, according to the Rapporteur, be affected by the proposed amendments. The CJEU judgement would have, in substance, prohibited the delegation of powers to an Agency involving a wide margin of discretion between many different objectives. In the Meroni case, the authority had been delegated decision-making powers, which involved the possibility of balancing eight different aims. But the EP argued that such a wide margin of discretionary power would not actually be given to the energy Agency. Instead, it would take decisions requiring highly technical evaluations rather than balancing many different and conflicting public interests goals.

Hence, the EP was willing to give the Agency binding decision-making power only for the network codes that relate to the technical operation of the network. Those codes that related to competition and market rules would follow a distinct procedure where the Commission, which is competent on competition policy, would have the authority to make them binding. This also departs from the proposal of the Commission in which the network codes would only be

231 European Parliament – Committee on Industry, Research and Energy. *Report on the Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators.* A6-0226/2208. 04/06/2008. p.47.

voluntary rather than binding, in order to avoid the comitology procedure. In this respect, the Rapporteur argued that harmonisation, which should be one of the core objectives of the package, was not at the forefront of the proposal. The situation was indeed that market integration was prevented by the diversity of national regulatory frameworks. The Rapporteur therefore questioned the voluntary nature of the codes and the extent to which it would represent any added value to the previous system. He was therefore of the opinion that some of the codes should be compulsory, in order to ensure harmonisation.

The Council, in its common position of December 12, 2008, while agreeing with the EP that the network codes should be binding, rejected the delegation of this power to ACER. According to the Council which refers to the Meroni doctrine, network codes should be made binding by the Commission and comitology committees, through the comitology process. The Commission aligned with the Council and the EP finally agreed with this procedure in second reading.

3.2.2 New problem of expertise

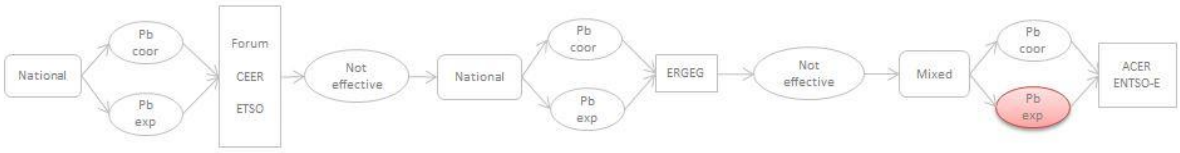

Figure 3.15: T3 in the electricity sector – problem of expertise

Much of the Commission's new competences require very technical knowledge. Drafting regulations and guidelines about the harmonisation of grid codes is not a task that typically falls within the Commission's sphere of activities. It represents a great deal of work and the Commission does not have the resources, technical expertise, or knowledge to deal with it on its own. This is particularly true of the drafting of network codes, which are highly technical rules. The NRAs and the TSOs are the actors that hold the necessary knowledge.[232]

3.2.3 Remaining problem of coordination

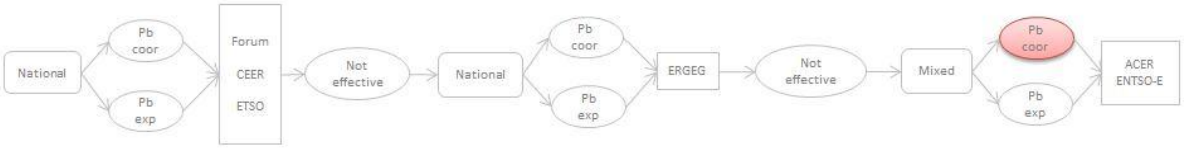

Figure 3.16: T3 in the electricity sector – problem of coordination

232 Interview with an official of the Commission 2013, and with a former official of the Commission, February 2013; Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007. P. 10.

On the one hand, the new powers that were delegated to the Commission, in particular on the network codes, should guarantee a fair improvement with regards to regulatory harmonisation. On the other hand, a significant amount of regulatory decisions remained nationally based and some cross-border issues were not covered by the network codes procedure. These areas also needed to be coordinated among the NRAs. Furthermore, the coordination problems of the second package were not only linked to the coordination device among NRAs. Coordination among TSOs and the weakness and heterogeneity of NRAs needed to be addressed as well. These remaining issues are thus expected to lead to policy-makers introducing some institutional changes. As regards TSOs, we can apply by analogy the theoretical argument about the coordination among NRAs. Accordingly, we can expect the creation of an agent in the form of a network of TSOs. The same analogy does not apply, however, to the change of the statuses of the NRAs because these regard the shape of the individual NRAs rather than the way they coordinate.

3.2.4 Change of agents

These problems of expertise and coordination are addressed by the creation of ACER, of the European Network of Transmission System Operators for Electricity (ENTSO-E), and by the empowerment of NRAs.

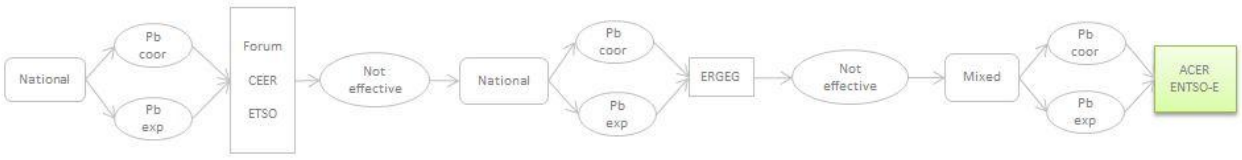

Figure 3.17: T3 in the electricity sector – delegation pattern

3.2.4.1 ACER

3.2.4.1.1 Agencification of the regulatory network

The evaluation of the second regulatory package highlighted the need for EU level binding decisions, which the ERGEG was unable to provide given its lack of formality. Hence, the Commission wanted to transform the legal status of the regulators' network so as to enable them to make binding decisions. At the EU level, the only type of regulatory agent that could make such decisions should be an agency. It was the need to have this body making decisions that triggered the choice for an EU agency as an institutional model.[233] Besides, there is a second reason why the EU agency model was needed. It was necessary to give NRAs support in their work: a permanent staff, informatics resources, etc. The CEER had a few employees but it was an

233 Interview with an official of the Commission, February 2013.

association under private law that could not be given any decision-making power.[234] On the other hand, the ERGEG had no employee, it was just a hat used to formally articulate common positions and providing advice.[235] Yet providing regulators with such support has budgetary implications that required a framework. ERGEG could not constitute a legal basis for receiving Community funding and therefore have a staff and resources.[236] Given the outcome the DG energy and transport was seeking, i.e. an instrument with as much legal power as possible, it became clear from the beginning that the only legal possibility was to have an agency.[237]

Both the EP and the member states immediately agreed on the necessity to transform the network of NRAs into an EU agency. The EP, usually sceptical about EU agencies,[238] was very enthusiast about ACER from the outset. As for the member states, they agreed even in November 2007 on the importance of setting up a mechanism to improve the coordination of NRAs at the EU level and to provide it with the capacity to 'carry out well defined tasks where it can provide added-value'.[239] While, at that stage, they were still divided with regards to the legal nature of the mechanism, i.e. whether it should be an Agency or another type of body, the Council also mentioned that this coordination mechanism should be independent, both from the member states and from the Commission, while highlighting the need that it should represent the views of the NRAs and ensure 'an effective and balanced representation of member states'.[240] Later, in its common position of December 2008, the Council agreed with the principle of creating a regulatory agency that would be independent of the member states and the Commission and whose tasks should be well circumscribed.

One could have expected more resistance from the member states and from the EP – who are usually sceptical about EU agencies.[241] With regards to the EP, several interviewees explain its enthusiasm for ACER by the successful and intense lobbying of the Members of the European Parliament (MEPs) by the NRAs.[242] In the energy sector, the EP is indeed a big ally of the NRAs as MEPs see the regulators as being fair, objective, and reliable.[243] The Rapporteurs may also have played a role: those that dealt with the package saw the need to improve the institutional

234 Interview with an official of the Commission, February 2013.
235 Interview with an official of the Commission, February 2013.
236 Interview with an official of the Council of the EU, February 2013.
237 Interview with a former official of the Commission, February 2013.
238 Interviews with officials of the Commission, February 2013.
239 Council of the European Union. *Preparation of the TTE (energy) Council on 3 December 2007.* 15193/1/07 REV1. Brussels, 28 November 2007. p. 10.
240 Council of the European Union. *Preparation of the TTE (energy) Council on 3 December 2007.* 15193/1/07 REV1. Brussels, 28 November 2007. p. 10.
241 Interviews with officials of the Commission, February 2013.
242 Interviews with officials of the Commission, February 2013.
243 Interview with an official of ACER, February 2013.

structure and to create a common market.[244] As for the member states, the fact that the European Council mandated the Commission to make proposals towards the establishment of an 'independent mechanism for national regulators to cooperate and take decisions on important cross-border issues'[245] undoubtedly paved the way for the acceptance of the ACER concept. This development has also probably been further facilitated by the early cooperation between Heinz Hilbrecht (Director in the Commission in charge of the third package), John Mogg (President of the network of regulators) and the TSOs, which allowed the Commission to present a common front with the regulators so as to make it more difficult for the EP and Council to unravel the proposal. Finally, another possible factor can be found in the combination of issues that constituted the third package. It was a big package with several sensitive topics, in particular unbundling and the third country clause. ACER was further down in the ranking of sensitive negotiation issues.[246] Member states have limited resources for the negotiations, and these were mostly channelled by the more difficult topics like unbundling.[247]

3.2.4.1.2 Functions: mostly expertise tasks with some coordination

ACER is a multifunctional body, in charge of both expertise and coordination functions. In the proposal of the Commission, ACER's tasks are divided in four categories, each one corresponding to a type of act that the Agency can issue:[248] opinions addressed to TSOs, opinions addressed to NRAs, opinions and recommendations addressed to the Commission, and individual decisions in specific and well-delimited cases.

These tasks can be distributed in the coordination and expertise categories relevant to this research. Among the coordination tasks, we would find, above all, the tasks that are related to the NRAs. These include the adoption of non-binding guidelines for the diffusion of good practices, the adoption of individual decisions on technical issues where indicated in the guidelines attached to the framework, and, when requested by an NRA or the Commission, giving an opinion about NRAs' compliance with the guidelines attached to the framework.[249] Also qualifying as coordination tasks, ACER is responsible for the supervision of the cooperation of

244 Interview with a former official of the Commission, February 2013.
245 Brussels European Council. *Brussels European Council 8/9 March 2007 – Presidency conclusions*. 7224/1/07 REV 1. Brussels, 2 May 2007. p. 17.
246 Interview with an official of the Commission, February 2013.
247 Interview with an official of the Commission and with a former official of the Commission, February 2013.
248 Article 4 of Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007.
249 Article 4 of Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007.

TSOs.[250] This role was given to ACER because the NRAs are the ones that have the expertise to do so; they are the ones regulating TSOs at the national level, so the EU-level monitoring of TSOs' cooperation is a natural replication of their national competences at the EU level.[251]

Under the expertise tasks, we would first find ACER's role in the network codes as an advisor of the Commission for defining the areas that require network codes to be drafted. The network codes process also involves, for ACER, reporting to the Commission whenever ENTSO-E does not behave according to its mandate.[252] ACER would also have, as a general task, the role of providing opinions to the Commission on all issues related to the purpose for which it was created – either upon the request of the latter or on its own initiative.[253]

The EP, willing to give ACER a binding decision-making power on the adoption of the network codes, significantly shifted the functional profile of ACER towards coordination. But the Council and the Commission did not agree. Since, in their views, the binding decision-making authority should be given to the Commission and comitology committees, the contribution of ACER on network codes automatically took an expertise profile, because the agency would be acting as an advisory body to the Commission. The EP further expanded the coordination tasks of ACER, in particular regarding the supervision of TSO's cooperation and the cooperation of NRAs.

While the Commission agreed with this increase in coordination tasks – as long as they were not related to the network codes, the Council reduced the scope of ACER's coordination tasks. The coordination tasks affected regard, in particular, the proposed capacity of the Agency to decide on the interconnection regime for cross-border infrastructures which was reduced to a last-resort type of intervention, i.e. a possibility to act only where the relevant NRAs decide to transfer the issue to the Agency.[254] On the other hand, the Council was in favour of reinforcing ACER's advisory role, i.e. increase its expertise tasks. As a consequence, ACER has been created as a multifunctional body, in charge of both coordination and expertise tasks, although its expertise functions have become predominant in its mandate.

250 Article 6 of Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007.

251 Interview with an official of ACER, February 2013

252 Article 6 of Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007.

253 Article 5 of Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007.

254 Council of the European Union. TTE (Energy) Council on 6 June 2008 – Internal Energy Market. 10513/08. P. 7 ; Article 8 of the Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

Finally, it should be mentioned that there is one task of ACER that does not fall into the coordination nor the expertise categories. This relates to the role of assistance ACER is expected to give to individual NRAs when these have difficulties with the implementation of the framework. In such situations, the NRA may ask ACER for an opinion. This would correspond to an advisory role, but towards the NRAs and not the Commission. Yet the categories of coordination and expertise correspond to an interaction with NRAs and with the Commission respectively.

3.2.4.1.3 Governance

Regarding the structure and governance of the Agency, a few changes to the Commission's proposal were introduced in the negotiations, but overall, the final outcome is very close to the Commission's proposal. In particular, the EP has introduced provisions in favour of accountability and transparency. The Council has reinforced the role of the Board of Regulators. And, unsurprisingly, the three institutions have negotiated on the distribution of seats within the Administrative Board.

The Agency is composed of four organs: the Administrative Board, the Board of Regulators, the Director, and the Board of Appeal. The Administrative Board is composed of nine members – two appointed by the Commission, two appointed by the EP, and five appointed by the Council. Decisions of the Administrative Board are adopted on the basis of a two-thirds majority, each member having one vote. The Administrative Board appoints the Director (after a positive opinion of the Board of Regulators), the members of the Board of Regulators and the members of the Board of Appeal. It adopts the work programme of the Agency (after consulting the Commission and receiving the approval of the Board of Regulators). It exercises budgetary powers and disciplinary authority over the Director (in consultation with the Board of Regulators). It draws up the Agency's staff policy and it adopts the annual report of the Agency (one section of the report, on the regulatory activities of the Agency, should be approved by the Board of Regulators).

The Board of Regulators is composed of one representative per member state, which shall come from the NRAs, plus one non-voting representative of the Commission. The Board of Regulators acts by a majority of two thirds of its members, where each member has one vote. It acts independently and does not take instructions from any public or private authority. The functions of the Board of Regulators are the following: For any act the Agency adopts, the Board of Regulators delivers an opinion to the Director (who is formally in charge of adopting the acts for the Agency). It delivers to the Administrative Board an opinion on the candidate to be appointed as Director. It approves the work programme of the Agency and presents it for adoption by the

Administrative Board. It approves the section on regulatory activities of the annual report of the Agency. The EP may invite the chairman of the Board of Regulators to make a statement and answer questions.

The Director is appointed by the Administrative Board, following a favourable opinion of the Board of Regulators, from a list of at least three candidates proposed by the Commission, established after a call for expression of interest. He is appointed for five years, which may, in specific circumstances, and after evaluation, be extended for a further three years. He may be removed from office upon a decision of the Administrative Board, after consultation with the Board of Regulators; and, he may be called by the European Parliament and the Council to submit a report on the performance of his duties. His tasks are the following: he represents the Agency and is in charge of its management, he prepares the work of the Administrative Board (in which he can participate, albeit without voting rights), he adopts the acts of the Agency, subject to the assent of the Board of Regulators, he implements the annual work programme, he makes sure the functioning of the Agency complies with the regulation, he prepares the draft work programme which he submits to the Board of Regulators, the EP and Commission, he implements the budget of the Agency, he prepares the draft annual report, and he manages the staff of the Agency.

The Board of Appeal is composed of six members selected from current or former senior staff of the NRAs, competition authorities, or other national or Community institutions with relevant experience. The members are appointed by the Administrative Board on a proposal from the Commission. The term of office is five years, renewable. The members shall be independent in making their decisions and may not take part in any appeal proceeding in which they would have a personal interest or would have been previously involved in one way or another. The role of the Board of Appeal is to decide about the appeals made against the decisions of the Agency. Its decisions may be contested before the Court of First Instance of the CJEU.

In the landscape of EU agencies, ACER's peculiarity is its Board of Regulators. In other agencies there is only an Administrative Board and no equivalent to the Board of regulators.[255] It was the first time that an Agency with two distinct boards was created. While the Administrative Board deals with administrative questions such as budget and staff, the regulatory board is responsible for regulatory matters. This dual structure was new and it has been difficult for the DG Energy and transport to convince the Secretariat General of the Commission, which was reluctant because they thought the structure would be too complicated.[256]

255 Interview with an official of the Commission, an official of ACER and a former official of the Commission, February 2013.
256 Interview with a former official of the Commission, February 2013.

This structure is the result of the willingness of the NRAs and the Commission to give a central role to the NRAs within the Agency. It also explains the enthusiasm of the NRAs for ACER. They would keep the control through the Board of Regulators.[257] The NRAs and the Commission coordinated a lot for the preparation of the new regulatory package. Throughout this process, the NRAs' major interest was to keep as much power as possible for the Board of Regulators and to reduce the influence of the Director.[258] This was a crucial lobbying issue for the NRAs who wanted to make sure the Agency would not become too independent from them. The NRAs did not want a Director; they wanted this organ of the Agency to be called a Secretary General instead. This reflected the fact that the regulators, although in favour of the creation of a strong agency, saw the Agency rather as a secretariat to support their network rather than a body that is separated from them and makes independent decisions.[259]

3.2.4.2 ENTSO-E

The drafting of the network codes is a highly technical and specialised activity. While the regulators thought they should develop the rules that the TSOs would have to comply with, the DG Energy and transport was of the opinion that it was impossible to have the network codes developed without giving TSOs a decisive role in it. The TSOs were the only actors with the expertise necessary to elaborate these codes. So, when the Commission was preparing the proposal, there was a lot of discussion on the respective roles of the TSOs and of the regulators in the development of the network codes. This point was among the most difficult regarding the discussion between the NRAs and the Commission on the elaboration of the proposal.[260] The Commission held on to its idea and introduced a significant amount of self-regulation into the elaboration of the network codes. In this context, the role of the Agency was supposed to be supervising and monitoring the work of the TSOs. Although the EP wanted to have some of the network codes drafted by ACER only, this amendment has not been accepted and the Commission's proposal is what constitutes the final outcome. So, in this third package, for the network codes, the ENTSO-E appears as a fundamental regulatory agent, expected to prepare the adoption of implementing decisions based on their expertise and experience.

The details of the network codes procedure go as follows. (1) The Commission requests that the Agency submit (within six months) a non-binding framework guideline, setting out clear and objective principles for the development of network codes relating to the areas identified in the priority list. Each framework guideline shall contribute to non-discrimination, effective

257 Interview with an official of the Commission, February 2013.
258 Interview with officials of the Commission, with an official of ACER and with an official of an NRA, February 2013.
259 Interview with a former official of the Commission, February 2013.
260 Interview with a former official of the Commission, February 2013.

competition, and the efficient functioning of the market. The Agency shall consult ENTSO-E for Electricity and the other relevant stakeholders in regard to the framework guidelines. (2) ENTSO-E then drafts the codes. (3) Once the Agency is satisfied that the network code drafted by ENTSO-E is in line with the relevant non-binding framework guidelines, the Agency submits the network code to the Commission and may recommend that is adopted within a reasonable timeframe. If the Commission does not adopt the code, it must state the reasons why. (4) ENTSO-E for Electricity shall monitor and analyse the implementation of the network codes and the guidelines adopted by the Commission in accordance with the Regulation, and their effect on the harmonisation of applicable rules aimed at facilitating market integration. ENTSO-E shall report its findings to the Agency and include the results of the analysis in its annual report. (5) The Agency monitors the work of the TSOs: where ENTSO-E has failed to implement any network code, the Agency requests ENTSO-E to provide a duly reasoned explanation as to why it has failed to do so. The Agency shall inform the Commission of this explanation and provide its opinion thereon.

To meet the need for coordination among TSOs, the third package formally mandates the ENTSO-E with a series of issues.[261] First, with respect to research and innovation, TSOS should cooperate to 'identify, finance and manage research and innovation activities necessary driving the sound technical development and evolution of the European electricity and gas networks'.[262] Second, with views to facilitate cross-border grid operation, TSOs shall proceed to a common operation of networks according to the agreed network codes, which involves the exchange of network operational information. Third, on the level of investments, TSOs will be required to coordinate their long-term planning of system development with a view to developing sufficient transmission capacity to integrate national markets.

3.2.4.3 Empowerment of the NRAs

The problem identified by the Commission was the lack of uniformity of NRAs' powers and, in many cases, the weaknesses of the regulatory authority. Also problematic was the fact that NRAs were limited to a national mandate inducing them to ignore the European dimension in their decisions, including those relating to cross-border trade. The Commission's proposal, which was very ambitious in terms of empowering the NRAs, both expands their competences and significantly reinforces their independence. The EP supported this and wanted to broaden even more the responsibilities of the NRAs. While the Council welcomed the Commission's proposal

261 Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007. P. 13-15.

262 Commission Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators. COM(2007) 530 final. Brussels, 19/09/2007, p. 14

to empower NRAs and reinforce their independence, they did not agree with the EP that it was necessary to go beyond the Commission's proposal.

The outcome is a formidable extension in the regulatory authority of the NRAs and a considerable reinforcement of their independence. In the 2003 Directive on common rules, NRAs were addressed by Article 23, which belonged to Chapter VII entitled 'organisation of access to the system'. In the new version of the common rules Directive, Article 23 is deleted and replaced by a new chapter IX – entirely dedicated to NRAs – composed of six long articles.

The 2003 Directive required that member states 'designate one or more competent bodies with the function of regulatory authorities [which] shall be wholly independent from the interests of the electricity industry'. With this formulation, the second package did not require the NRAs to be separated from the Ministries. The proposal represents a clear evolution in this respect. Accordingly, the independence of NRAs does not relate only to the industry, as it covers Governments and ministries as well. Indeed, when carrying out its tasks, the regulatory authority should be 'legally distinct and functionally independent from any other public or private entity […], act independently from any market interest and do not seek or take instructions from any government or other public or private entity'.[263]

The commission gives further details as to how this independence should be guaranteed. NRAs should be able to 'take autonomous decisions, independently from any political body, and [have] separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties'.[264] Appointment and demission of NRAs' management are also addressed: it is appointed for a fixed term of at least five years, renewable once. It may be relieved from office during its term only if it no longer fulfils the conditions set out in the Article or if it has been found guilty of serious misconduct.[265]

Second, NRAs are then given a European mandate.[266] This is done through the extension of the policy objectives NRAs are expected to contribute to, so as to include the European dimension of electricity regulation. The pursuit of policy objectives that are associated with electricity regulation (competition, security of supply, environment) should therefore take place at the Community level, in cooperation with the Agency, the other NRAs and the Commission.

263 Article 35(4) of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

264 Article 35(5) of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

265 Article 35(5) of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

266 Article 36 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

Furthermore, NRAs should aim at the development of 'properly functioning regional markets within the Community', and at 'eliminating restrictions to electricity trade between member states, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the Community'.

Third, the Commission proposes to extend the list of areas in which NRAs are competent[267] so as to include, among others: monitoring the compliance of TSO and DSO with the various obligations of the framework, reviewing the investment plans of the TSO and evaluating their consistency with the European-wide 10-year network development plan, monitoring and reviewing network security and reliability rules, monitoring and ensuring compliance with transparency obligations, monitoring the level of market opening and competition and promoting effective competition in cooperation with competition authorities and ensuring the effectiveness of consumer protection measures.

Fourth, to make sure NRAs have the power to exercise their tasks, the 2003 Directive used to oblige member states to 'take measures to ensure that regulatory authorities are able to carry out their duties […] in an efficient and expeditious manner'.[268] The 2009 reform take this provision a step further by listing a series of powers that should be granted to the NRAs to guarantee the efficient and expeditious exercise of regulatory duties. Accordingly, they should have the possibility to issue binding decisions on electricity undertakings, to carry out investigations on the functioning of electricity markets in cooperation with the national competition authority, to request any relevant information from the electricity undertakings and to impose sanctions on companies in case of non-compliance.[269]

Finally, the new chapter on NRAs also entails two articles related to the interaction between the NRAs and ACER and with the Commission, regarding the compliance with the guidelines. The first requires that NRAs cooperate with other NRAs and with ACER and exchange the information necessary to the regulation of cross-border issues. Coordination should aim, amongst others, at fostering the creation of operational arrangements enabling optimal network management, at promoting the allocation of cross-border capacity and at enabling an adequate

267 For the full list of competences, see Article 37 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

268 Article 23(7) of the Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity.

269 Article 37(4) of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

level of interconnection capacity.[270] The following article gives the Commission the possibility to veto any decision of the NRAs for which the Commission has 'serious doubts as to its compatibility with guidelines' referred to in the regulatory package or in the Cross-border Regulation.[271]

4 Electricity: conclusion

4.1 Conjectures

The first set of conjectures describes how the distribution of competences shapes the governance problem met by policy-makers and, therefore, the type of tasks delegated and the type of regulatory agent chosen:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*
    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*
    - *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
    - *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
    - *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing*

270 Article 38 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

271 Article 39 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.

- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:*
    - *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
    - *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
    - *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

The second set of conjectures addresses, within each sector, the progressive reinforcement of the agent over time and the conditions under which it may be agencified:

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means. This is due to the dynamic between functional pressure and actors' interest in maximizing power, unfolding through feedback loops.*
- *The higher the problem pressure, the more likely it is that the regulatory agent is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms, than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees*

4.2 Analysis

T1 challenges the conjectures in several ways. While, as conjectured, the nationally based implementation created a huge regulatory gap in the form of a need for coordination, a significant need for expertise was also felt in the absence of delegated competences to the

Commission. This was due to the fact that the Commission was willing to close the regulatory gap with the adoption of technical measures via the legislative procedure. Being in charge of drafting legislative proposals, the Commission needed assistance because the issues at stake were extremely complex. Then, the regulatory agent created by the Commission to address both needs was not a regulatory network but a Forum based on a much more open membership. It gathered NRAs, but also ministries, TSOs, and other stakeholders. At T1, NRAs were still not set up in all member states, so it was necessary to invite ministries as well to have all member states represented. And TSOs and other stakeholders were also necessary because of the degree of technicality involved and the necessity to gather a wide spectrum of expertise. The NRAs nonetheless created a network on their own, the CEER, to pursue both expertise and coordination tasks. TSOs did the same by setting up a federation of operators called ETSO.

T2 provides an excellent fit with the conjectures. The 2002 reform was engaged because the regulatory gap was exerting pressure and the Forum was obviously unable to lessen it. The Commission, who had been delegated a few competences, created the ERGEG, a regulatory network, endowed with both coordination and expertise functions, expected to push through harmonisation more effectively than the Forum. The Commission chose the network form instead of an agency because it was necessary to move only gradually on the institutional aspect in order to gather the agreement of the member states. The only deviation from the conjectures lies, here again, in the importance of expertise in a situation characterised by few competences delegated to the Commission. This is explained here, as in T1, by the use of the legislative procedures to adopt technical measures, as well as by the very high degree of technicality involved by the few competences delegated to the Commission.

T3 is also very consistent with the conjectures. The 2002 framework was still far from providing the tools to close the regulatory gap. In particular, the ERGEG clearly appeared too limited in terms of legal tools, resources, and structure. The 2009 reform thus involves the massive delegation of executive competences to the Commission – which both reduces the need for coordination and significantly increase the need for expertise. The ERGEG was transformed into ACER, a relatively powerful EU agency, provided with much more resources and power than ERGEG in order to address the challenge of market integration under the new competence distribution. In the process, the federation of TSOs was also reinforced and formalized into ENTSO-E, which was necessary due to the need to formally involve TSOs in the regulatory process by having them drafting, under the guidance of ACER, many of the new rules to be later adopted by the Commission.

Overall, the electricity sector provides good support to the conjectures. It features a nationally based implementation creating a problem of coordination that led to the creation of various

regulatory agents, including a regulatory network that has recently been reinforced and transformed into an EU agency. Only three aspects deviate from the conjectures: the creation, by the Commission, of a Forum instead of a network at T1; the need for expertise at T1, in the absence of competences delegated to the Commission, due to the use of the legislative procedure for the adoption of technical measures; and the institutional development around the network of TSOs, due to the high level of technicality of the sector.

Chapter 4: Telecommunications

The first set of conjectures describes how the distribution of competences shapes the governance problem met by policy-makers and, therefore, the type of tasks delegated and the type of regulatory agent chosen:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*
    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*
    - *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
    - *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
    - *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.*
- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in*

charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:

- *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
- *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
- *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

The second set of conjectures addresses, within each sector, the progressive reinforcement of the agent over time and the conditions under which it may be agencified:

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means. This is due to the dynamic between functional pressure and actors' interest in maximizing power, unfolding through feedback loops.*
- *The higher the problem pressure, the more likely it is that the regulatory agent is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms, than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees.*

Competence distribution	National	The legislative framework delegates few and/or relatively unimportant implementing decision-making competences to the Commission compared to those delegated to the member states.
	Commission	The legislative framework delegates to the Commission most of the implementing decision-making competences or the most important ones. The member states only decide on few issues or relatively unimportant ones compared to the Commission.
	Mixed	The legislative framework shares in similar proportion the implementing number and/or importance of decision-making competences between the Commission and the member states.
Type of problem	Coordination	The divergence in the implementation of EU legislation constitutes an obstacle to the integration of markets.
	Expertise	The Commission lacks the resources or the specialised knowledge necessary to fulfil its delegated implementing competences.
Type of agent	Network	Body gathering the national authorities responsible for implementing the EU legislative framework.
	Committee	Body created by the Commission as an advisory group and composed of independent experts.
	EU agency	Community body, i.e. EU body with legal personality.
Type of task	Coordination	Fostering regulatory consistency, reducing regulatory divergence among the member states.
	Expertise	Providing scientific and/or technical informational input to the Commission to feed into the EU regulatory process.
Lack of effectiveness of the agent	Coordination	The output of the agent does not allow enough convergence for market integration: • The agent lacks authority on the national implementing bodies (e.g. lack of binding decision-making power or unanimity rule for decision-making) • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver)
	Expertise	• Provision of scientifically/technically unsound information or analyses. • The agent lacks resources to meet the demand (the agent is overburdened or does not deliver).
Reinforcement of the agent	Coordination	The agent' capacity to influence national implementing bodies is increased (e.g. through a switch from unanimity to qualify majority voting rule, through the monitoring of compliance of national implementing bodies or through the acquisition of binding decision-making power).
	Expertise	More staff/budget is allocated to the agent or the number of committees is increased.

Table 4.1: Specification of the various elements of the analytical framework

The telecommunications sector is the third case of the dissertation. It has been chosen for two reasons. With respect to the first set of conjectures, it provides a sort of middle ground between electricity and food safety. Although belonging to the coordination path, the telecoms sector features the delegation of significant implementation powers to the Commission from T2, which made the sector qualify as a mixed type of competence distribution. Regarding the second set of conjectures, seen from the coordination path angle, the telecommunications sector provides an interesting comparison with electricity with respect to the final shape of the regulatory agent at T3. While a powerful agency was created in electricity, a hybrid solution consisting in the combination of a network and a tiny agency was chosen in telecommunications.

Because of its massive reliance on member states for the implementation in the first regulatory framework, the telecommunications sector has engaged in the coordination path. However, even in the second framework, the Commission was delegated very important executive powers, so the distribution of competences was a mixed one. Such a situation is thus expected to lead to the co-existence of both types of needs, coordination and expertise, and to lead to the creation of a regulatory network to which both coordination and expertise tasks would be delegated. Because of policy-makers' reluctance to delegate much power, the network would initially be fairly weak, lacking the powers and resources required to perform its tasks. Lacking effectiveness, it would fail to reach the objectives assigned, and both coordination and expertise problems would still be felt. This would lead policy-makers to accept the network's reinforcement, giving it more power and resources. Depending on the degree of the problem pressure, this may culminate in the creation of an EU agency. Given this dynamic between functional pressure and distributional interests, the reinforcement of the network is expected to be gradual and to unfold through a series of feedback loops.

The change over time of EU telecoms policy is composed of three stages, one per regulatory package. The first package (T1) stretches from 1988 to 2002. It is characterised by a nationally based implementation, a need for coordination that was met through a comitology committee where the Commission was diffusing its perspective on the interpretation of the framework, and the spontaneous creation of a regulatory network by the regulators themselves. The second regulatory package, adopted in 2002, was in force until 2009 (T2). Partly motivated by the need to ensure regulatory consistency, it features a significant shift of regulatory authority in favour of the Commission as well as the creation of the European Regulators Group (ERG), a regulatory network in charge of ensuring coordination among NRAs. Finally, the third package introduced in 2009 (T3), aiming at tackling the remaining coordination problem unsolved by the delegation pattern at T2, led to the transformation of the regulatory network into the Body of European Regulators for Electronic Communications (BEREC), a reinforced network assisted by the Office,

a small EU agency, for administrative and logistic tasks. The telecommunications sector thus provides good support to the conjectures.

Before delving into the presentation of the data, an analytical clarification needs to be made. The telecommunications sector covers, in fact, two different sub-cases: the regulation of the radio spectrum, and the regulation of telecommunications, i.e. the use of the public telephone network. The reasons for this are twofold. First, historically, these are two different sectors, because the underlying technology and network served different purposes. While the public telephone network was used for telephonic communications, radio spectrum technologies were applied to, amongst others, analogue television, broadcasting, the military, or radar.

Second, for the member states, the distributional impact of the Europeanisation of radio spectrum and telecommunications regulations differed significantly. Their readiness to shift competences to the European level in one and the other sector was thus very unequal. While they could see important advantages in the liberalization of the telecommunications market, they have always been extremely reluctant to abandon their prerogative to perceive the sometimes very high fees paid by companies for having the right to use certain bands of the radio spectrum. As a consequence, in spite of the technological convergence, the institutional arrangement of the radio spectrum has always operated very differently than that of telecommunications regulation. Hence, analytically, telecommunications and radio spectrum regulation should be treated as two different cases. Telecommunications being the case that is relevant for the research design of the dissertation, it is the one that is fully developed in the empirical study. However, complementary insights on radio spectrum management will also be provided.

1 T1: The first regulatory framework (1988-2002)

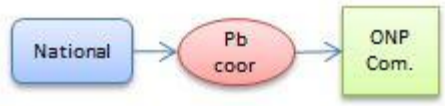

Figure 4.1: T1 in the telecommunications sector

The first regulatory framework was built up incrementally, in a piecemeal approach. It consists of a very high number of pieces of legislation that have been adopted and revised over about 10 years – between 1988 and 1998. It started with a Green Paper, issued by the Commission, in 1987, on the Development of the Common Market for Telecommunications Services and

Equipment.[272] At that time, while all activities related to the telecommunications sector were integrated in a ministerial black box, the Green Paper sketches a scenario for the development of the sector based on a separation between the regulatory and commercial and operational dimensions. Technological innovation in the sector was rapidly progressing, pushing costs down, and pushing demand up. This tendency constituted the major trigger for the liberalisation process of the sector.[273] Backed by these favourable circumstances, the Commission also worked on building political support for its project, which was received positively by the monopolistic companies. The latter, seeing the growing demand, understood that total liberalisation would allow them to access a much bigger market that would boost their benefits, even in a situation of reduced market shares.[274] Also, the managers of these public enterprises, remunerated as civil servants, saw how they could personally gain from a privatization process in terms of level of remuneration.[275]

One year later, in 1988, the Commission made an ambitious move. Relying on Article 90 of the EC Treaty, the Commission adopted a Commission Directive for the liberalisation of terminal equipment.[276] Article 90 of the EC Treaty, anchored in EEC competition law, specifies the condition under which member states may grant special rights to a public undertaking. Its third paragraph provides the Commission with the possibility to adopt directives or decisions, addressed to the member states, to ensure the application of the article. Before using it in the field of telecommunications, the Commission had used Article 90(3) only once, in 1980 (Schmidt 1998: 172). With respect to the liberalisation of terminal equipment, before acting, the Commission had previously made sure the member states agreed, substantially, with this evolution. However, France, as well as other countries, contested the procedure, arguing that the adoption of directives was reserved to the Council (Schmidt 1998: 173).

The Commission did persist with this strategy and prepared a further directive to be adopted on the basis of the same Article 90 of the EC Treaty to expand liberalisation to telecommunications services other than voice telephony. This issue, being more contentious than terminal equipment (Schmidt 1998: 173), gave rise to intense negotiations between the Council and the Commission. The member states were worried about market opening on the basis of the mutual recognition principle as laid down in the Single European Act. They wanted to accompany

272 Commission. *Green Paper on the development of the common market for telecommunications services and equipment.* COM(87) 290 final. Brussels, 20 June 1987.
273 Interviews with various officials of the Commission, May 2012.
274 Interview with an official of the Commission, May 2012.
275 Interview with an official of the Commission, May 2012.
276 Commission Directive of 16 May 1988 on competition in the markets in telecommunications terminal equipment (88/301/EEC).

liberalisation with a system of authorisations that would allow them to keep some control on market entries.[277]

The discussions led to the adoption, in 1990, of two directives: one for liberalisation, and one for re-regulation. There is, first, the Services Directives, issued by the Commission, on the introduction of competition on telecoms services other than voice telephony[278] which allowed member states to maintain the monopolistic regime as far as voice telephony was concerned, while monopolies were banned in other non-reserved services such as e-mail, fax services, data transmission and processing services (Thatcher 2001: 564). The services opened to competition could, however, be subject to a national licensing regime. At the same time, there was the ONP Directive, emanating from the Council, which aimed at harmonising the conditions of open access to public telecommunications networks, the so-called open network provisions (ONP).[279] A few member states challenged the 1990 Commission Directive before the Court. But the CJEU backed the Commission's capacity to use Article 90(3) of the EC Treaty for both the Service Directive and the Directive on the liberalisation of terminal equipment (Schmidt 1998: 173).

While the Commission liberalisation Directive could be interpreted as liberalizing all telecoms services other than voice telephony, in practice, member states did maintain exclusive rights for some of these services (Kiessling and Blondeel 1998 : 575). So, after this fundamental 1990 milestone, the Commission continued to use Article 90 of the EC Treaty to progressively extend liberalisation to further areas, such as satellite services and equipment in 1994,[280] cable TV networks in 1995[281] and mobile and personal communications in 1996.[282] Thanks to the Court's support, this progressive extension could be carried out through a series of Commission Decisions amending the 1990 Services Directive.

This piecemeal approach was expected to lead eventually to a full liberalisation, including all telecommunications services and networks, and in particular voice telephony. The member states, reluctant, decided in 1993 that full liberalisation should only be planned for 1998 onwards. The Commission thus waited until 1996 to adopt a directive aimed at implementing

277 Interview with an official of the Commission, May 2012.
278 Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (90/388/EEC).
279 Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (90/387/EEC).
280 Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications.
281 Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services.
282 Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications.

full competition in the telecommunications market, which also took the form of amendments to the 1990 Services Directive (Kiessling and Blondeel 1998: 575-76).[283]

While the Commission pursued the liberalisation process on the basis of Article 90 of the EC Treaty, the Council, acting first on its own and later together with the EP, adopted a series of directives with views to re-regulate the sector, notably with respect to universal service, interconnection and licensing, and numbering (Thatcher 2001: 568). Licensing was, for the Commission, a central issue because national licensing regimes could act as a barrier to competition[284] (Thatcher 2001: 569) and there were situations where licensing conditions for a given service varied widely among countries (Kiessling and Blondeel 1998: 585). The 1997 Licensing Directive[285] thus distinguishes between the services subject to a principle of general authorisation and those where individual licensing was still possible. The latter category included voice telephony, public telecommunications networks and networks involving the use of radio frequencies or numbering resources (Kiessling and Blondeel 1998: 586).

As a result of this piecemeal legislative approach, the first regulatory package counts no less than 20 legislative acts. Two directives are central in this construction: the ONP Directive adopted in 1990 and amended in 1997, and the Services Directive adopted in 1990 and later extended to various sub-sectors in 1994, 1995, 1996 and 1999. Additional pieces of legislation were progressively added to complete the framework in order to address the issues of licensing and authorisations, access and interconnection, universal service and data protection.

1.1 Nationally based implementation

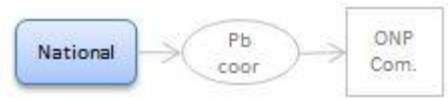

Figure 4.2: T1 in the telecommunications sector – competence distribution

For the implementation of this regulatory framework, the overwhelming majority of the regulatory authority lies at the national level. EC legislation may specify that some of the national implementing competences are exercised by national regulatory agencies (NRAs). The 1998 step towards full liberalisation has indeed given many new tasks to the newly created

283 Commission Directive of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets.
284 Interview with an official of the Commission (May 2012).
285 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licenses in the field of telecommunications services.

NRAs.[286] The member states retained considerable power within the framework, and with a wide discretion left to NRAs, including on crucial matters such as licensing, interconnection and universal service (Thatcher 2001: 572-3).

It should however be noted that, in the telecommunications sector, the concept of national regulatory agency was however still in the process of being clarified throughout the 1990s. EC legislation mentioned regulatory agencies for the first time in 1990, in the ONP Directive, before defining them, in 1995, as 'the body or bodies in each member state, legally distinct and functionally independent of the telecommunications organizations, entrusted by that member state, *inter alia*, with the regulatory functions addressed in this Directive'.[287] Further precisions came in 1997 when it was ruled that NRAs should not only be legally distinct and functionally independent of all organizations providing telecommunications networks, equipment or services.[288] In addition, where member states retained significant ownership of telecommunications operators, the ministerial regulatory function could not be given to the minister that was also in charge of managing the ownership of the operator. This definition left a considerable discretion to the member states regarding the institutional features and procedures of NRAs (Thatcher 2001: 172-173). Under the 1990s framework, 'the concept of an NRA is not the same as an independent regulator. In most member states both the independent regulator and the Government Ministry are NRAs for the purposes of EU telecommunications legislation'.[289]

While constructing this regulatory framework, the major concern, for the Commission, was not to gain regulatory power but to introduce competition in the telecommunications sector, which remained very monopolistic until the late 1990s. And this was, above all, seen as a task for the national regulators. As a consequence, the various legislative acts did not rely, for their implementation, on massive delegations of executive powers to the Commission.[290] A few executive powers were nonetheless delegated to the Commission. These concerned, for example, the possibility to determine the rules for uniform application of the conditions under which the access to public telecommunications network could be limited.[291] Another example, also found in the ONP Directive, is the possibility, for the Commission, to request standards to be drawn up by

286 Interview with an official of the Commission, May 2012.
287 Article 2 of the Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony.
288 Article 1(6) of the Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications.
289 Commission staff working document. *Europe's Liberalised Telecommunications Market – A Guide to the Rules of the Game.* P. 39.
290 Interview with an official of an NRA, June 2012.
291 Article 3(5) of the Informal Consolidated Text of the ONP Framework Directive (Directive 90/387/EC – revised). Brussels, 10 June 1997.

European standardization bodies with views to harmonise technical interfaces and/or service features for network.[292]

These functions should be exercised under the control of two comitology committees, the ONP (Open Network Provision) Committee and the Licensing Committee. The ONP Committee was originally established in 1990 under the ONP Directive package.[293] It also deals with all issues that arose with the progressive expansion of liberalisation to various sub-sectors, e.g. on leased lines, voice telephony and interconnection. The ONP Committee meetings are attended by representatives of the member states and the EEA countries as well as the candidate countries, including the independent NRAs. The Committee exercises both advisory and regulatory functions.[294]

The Licensing Committee was established in 1997, under the Licensing Directive.[295] The Committee meetings are attended by representatives of the member states and of the countries of the European Economic Area (EEA), including the independent NRAs. The Licensing Committee exercises both advisory and regulatory functions. The Committee is involved principally in the harmonisation of conditions for licensing and in the establishment of a one-stop shopping procedure as well as in discussions about the need for harmonising the spectrum.[296]

1.2 Problem of coordination

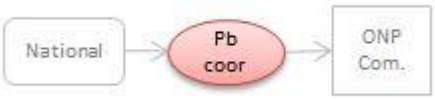

Figure 4.3: T1 in the telecommunications sector – problem of coordination

The 1990s are also characterised by the raising awareness that the broad discretion left by European directives to NRAs led to uneven implementation of EC legislation at the expense of the development of the single market. The Commission reports the 'disparity of interpretation

292 Article 5 of the Informal Consolidated Text of the ONP Framework Directive (Directive 90/387/EC – revised). Brussels, 10 June 1997.
293 Article 9 of the Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (90/387/EEC).
294 See http://ec.europa.eu/information_society/topics/telecoms/implementation/onp/index_en.htm (consulted on 09/03/12)
295 Article 14 of the Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licenses in the field of telecommunications services.
296 http://ec.europa.eu/information_society/topics/telecoms/implementation/onp/index_en.htm (consulted on 09/03/12)

and application of Community legislation'[297] and laments the remaining fragmentation of the European telecommunications market.[298]

In this respect, licensing has represented a major issue in the 1990s as the member states fiercely held on their national licensing schemes. The Council rejected a proposition made by the Commission in 1992 to europeanize licensing through the application of the mutual recognition principle and the creation of a 'Community Telecommunications Committee'.[299] As a consequence, before the entry into force, in 1998, of the Licensing Directive,[300] the conditions under which license for the provision of a given service could be granted varied widely between member states (Kiessling and Blondeel 1998: 585). The Licensing Directive did not solve all problems because, even after 1998, the Commission still mentioned difficulties in pan-European services due to 'current licensing differences between Member States and the problem of coordinated assignment of spectrum in multiple Member States'.[301]

Licensing is not the only sub-field concerned by the lack of market integration. Interconnection rules and rates, as set by the 1996 Interconnection Directive,[302] are expected to lead to divergences in the interconnection rights and conditions among member states and increase market fragmentation (Kiessling and Blondeel 1998: 580-582). Finally, member states diverge considerably with respect to their approach to the funding of universal service. This variation shall, according to Kiessling and Blondeel, 'act to some extent as entry barrier for cross-border operators and will increase market fragmentation' (1999: 589-590).

1.3 Problem of expertise

The tasks delegated to the Commission under the first regulatory package involved both tasks for which the Commission had the required expertise and tasks for which it did not. Here we can usefully distinguish between the commercial and technical conditions for market opening and

297 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review.* COM (1999) 539 (unofficial version), p. 9-10.

298 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM (1999) 539 (unofficial version), p. iii.

299 Commission Proposal for a Council Directive on the mutual recognition of licenses and other national authorizations to operate telecommunications services, including the establishment of a single Community telecommunications license and the setting up of a Community Telecommunications Committee (CTC). (92/C 248/05). COM(92) 254 final – SYN 438.

300 Directive 97/13/EC.

301 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM (1999) 539 (unofficial version), p. 9-10.

302 Directive 97/33/EC.

integration.[303] On the one hand, everything involving radio frequencies, numbering and standardisation are highly technical matters which the Commission was far from being able to address. On the other hand, for the elaboration of commercial principles and rules regarding market opening and interconnections, the Commission did not require external support.[304] First, technically, these issues were not very complicated.[305] And second, in a context where liberalisation of public utilities was new for all actors of the sector in nearly all member states, the Commission has rather been able to position itself as an intellectual leader. The Commission also used to internalize member states' experts by having seconded national experts working for the Commission in detachment.[306]

1.4 Regulatory agent for coordination

Figure 4.4: T1 in the telecommunications sector – delegation pattern

Under the first regulatory package, no network of national regulatory authorities has been created by the Commission in order to deal with coordination issues. The Commission made various attempts to create an EU body composed of national regulators to address the issue of licensing. In 1992, it proposed the creation of a Community Telecommunications Committee,[307] and, in 1996, the establishment of a European Union Telecommunications Committee in the form of an advisory committee.[308] Both attempts were rejected by the member states.

1.4.1 The ONP Committee

In fact, it is the ONP Committee, i.e. a comitology type of committee that has been used as a platform for exchange between the Commission and the national administrations, with views to foster coordination and the consistent implementation of the framework. The ONP Committee,

303 Interview with an official of the Commission, May 2012.
304 Interview with an official of the Commission, May 2012.
305 Interview with an independent expert, May 2012.
306 Interview with an official of the Commission, May 2012.
307 Commission Proposal for a Council Directive on the mutual recognition of licenses and other national authorizations to operate telecommunications services, including the establishment of a single Community telecommunications license and the setting up of a Community Telecommunications Committee (CTC). (92/C 248/05). COM(92) 254 final – SYN 438.
308 Commission Proposal for a European Parliament and Council Directive on a common framework for general authorizations and individual licenses in the field of telecommunications services. (96/C 90/05). COM(95) 545 final – 95/082(COD).

being a comitology committee, was created for the member states to control the Commission in the exercise of the delegated executive competences mentioned above. In practice, however, the ONP Committee served other purposes. It was, in particular, a way for the Commission to assist the member states in the implementation of the framework.[309] This could take the form, for example, of discussions around 'guidance papers'[310] or 'committee papers'[311] which were independent from the adoption of a regulation or recommendation as specified in the legislative texts.[312] Such papers would, for example, explain concepts of the framework, such as the separation between commercial activities and regulatory functions, or cost orientation as a method for calculating interconnection rates.[313]

1.4.2 The IRG

Although not having been created to deal with coordination strictly speaking, the Independent Regulators Group (IRG) is worth mentioning here. The IRG was created in 1997, following the initiative taken by Michel Hubert, the President of the French regulatory agency, to invite his counterparts to Paris. The NRAs were new bodies in a new context, facing new issues that were common to all of them. They wanted to learn from each other, and to share their experiences. So they discussed how to interpret and apply the framework.[314] Although their exchanges did not target a consistent application of the framework among member states, they did discuss how to interpret and apply the framework, looking at how the other was doing, and taking inspiration from each other.[315] So, to some extent, this network may have contributed to foster some regulatory convergence among NRAs.

1.5 Regulatory agent for expertise

1.5.1 The CEPT and the ETSI

The lack of expertise of the Commission in the highly technical matters – radio frequencies, numbering and standardisation, used to be palliated by mandates given to the European Conference of Post and Telecommunications Administrations (CEPT) and the European Telecommunications Standards institute (ETSI).

309 Interview with an official of the Commission, May 2012.
310 Interview with an official of the Commission, May 2012.
311 Interview with an official of the Commission, May 2012.
312 Interview with an official of the Commission, May 2012.
313 Interview with an official of the Commission, May 2012.
314 Interview with an independent expert and, May 2012 ; Interview with a member of the IRG, May 2012.
315 Interview with a member of the IRG, May 2012.

The CEPT was created in 1959, independently from the European Communities, as a network of European telecommunications monopolists who, back then, used to endorse both the commercial and auto-regulatory functions of the sector. Radio frequencies do not stop at the boundaries between states, so it was necessary to coordinate the use of the radio spectrum with neighbouring countries. Coordination was also needed in order to provide cross-border telecommunications service, such as international calls. These were the major incentives that led European countries to create the CEPT and to work together. And the CEPT also served as a platform for preparing European positions for the conferences at the International Telecommunications Union (ITU) which is the United Nations' specialised agency for information and communications technologies. The membership of CEPT is much wider than that of the European Union, since it involves states like Georgia, Turkey, and the Russian Federation. It now counts 48 members.

The CEPT has changed a lot over time, due to the considerable developments in the sector. Under the monopolistic regime, the ministries performed all the different functions related to the sector. Therefore, the CEPT, as a network of national ministries, was a coordination arena for dealing with all those functions. But as the different functions were progressively taken away from the ministries at the national level, in particular the regulatory and economic functions, the scope of issues coordinated at the CEPT diminished accordingly.

In 1988, the CEPT created the European Telecommunications Standards Institute (ETSI) and transferred to it all the activities related to standardisation. The members of ETSI are enterprises. It involves historic operators such as British Telecom or Telefónica, but also players such as Motorola, Ericsson, Nokia, etc. Enterprises form the core of ETSI because they are the actors that are doing the research on which standardisation is based. Given the rise of liberalisation and, with it, the disconnection between regulatory and commercial activities, it was politically important to have a new standardisation body, separated from the monopolies and administrations for a fresh and more open start.[316] Then, the separation between regulatory and commercial activities had also led to the creation of a new body, the European Telecommunications Network Operators (ETNO), which is the voice of European historical operators in Brussels. Finally, with the progressive detachment of regulatory agencies from national ministries and the related creation of European networks of regulators (see below), the CEPT became a federation of ministries.

Nowadays, the CEPT is mostly active on the field of radio frequencies, a competence that has generally not been delegated to NRAs and remains in the hands of ministerial administrations.

316 Interview with an official of the Commission, May 2012.

The management of the radio spectrum is a field the member states hold on to tightly and have systematically refused to europeanize.[317] The radio spectrum is considered as falling into the public domain and its use by enterprises is conditioned upon paying considerable licensing fees which represent a source of income member states are not ready to give away.[318] Member states have thus consistently argued the CEPT is the appropriate venue for international coordination in the field of radio frequencies, thereby favouring an intergovernmental body, with non-binding recommendations, to the detriment of the European Union.[319]

While the bulk of radio spectrum management has remained a national competence, a very small sub-set of radio frequencies bands is harmonised at the EU level, such as the Global System for Mobile Telecommunications (GSM) and Universal Mobile Telecommunications System (UMTS) bands.[320] This comes with some delegated competences to the Commission in terms of radio spectrum harmonisation. There, the drafting of technical requirements for the harmonisation of spectrum use required the involvement of technicians and engineers that can only be found in national administrations or in the industry. Yet some work on technical harmonisation had already been done by the CEPT. So, between 1990 and 1992, in four instances, European legislation made pre-existing CEPT recommendations binding.[321] The GSM[322] norm constitutes the most successful example of this practice. The GSM norm is the result of a technical harmonisation done by the CEPT, which was later made binding by EC legislation, before becoming the global norm for mobile telecommunications.[323] Then, particularly in the package of Directives and Decisions adopted in 1997 and 1998 by the Council and the European Parliament, the Commission was given executive competences for which a mandate should be given to the CEPT and/or ETSI for the preparation of technical aspects.[324]

The reason the Commission delegated this work to CEPT instead of any other body, such as the ONP Committee or the Licensing Committee for example, was one of expertise. The existing

317 Interview with an official of the Commission, May 2012.
318 Interview with an official of the Commission, May 2012.
319 Interview with an official of the Commission, May 2012.
320 Interview with an official of the Commission, May 2012.
321 Council Directive of 9 October 1990 (90/544/EEC), Council Directive of 3 June 1991 (91/287/EEC), Council Decision of 29 July 1991 (91/396/EEC), Council Decision of 11 May 1992 (92/264/EEC).
322 Initially, "GSM" was a French abbreviation for "groupe spécial mobile" which was a group within the CEPT. As the norm became international, the acronym was kept and translated into "Global System for Mobile Communications" (Interview with an official of the Commission, May 2012).
323 Interview with an official of the Commission, May 2012.
324 Council Directive of 28 June 1990 (90/387/EEC), Council Directive of 5 June 1992 (92/44/EEC), Directive 87/33/EC of the European Parliament and of the Council of 30 June 1997, Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995, Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997, Decision No 710/97/EC of the European Parliament and of the Council of 24 March 1997, Directive 98/19/EC of the European Parliament and of the Council of 26 February 1998, Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998.

committees would not have been able to address issues of such a degree of technicality.[325] Among the bodies that existed at the time, the CEPT was the only appropriate option for such a mandate. One could however argue that the Commission could have created a new advisory committee, composed of those national experts who otherwise meet within CEPT. But the CEPT had the advantage of being already existing and was recognized as an area of expertise. Besides, the member states have invested a lot in this platform since then, and have defended its role vis-à-vis the attempts of the Commission to transfer the coordination of radio spectrum management to the EC (Goodman 2006: 5).[326]

1.5.2 The ONP Committee

Besides the need for technical capacity for harmonising the uses of the spectrum and numbers, the Commission also, although only to some extent, relied on the ONP Committee to gather information. This was not however due to a lack of expertise. Instead, it came from the need to understand what was happening on the ground, at the national level. National administrations were particularly solicited by the Commission with views to draft the yearly recommendation on the interconnection rates benchmark. In the early days of liberalisation, no one had regulated interconnection between an incumbent and an alternative operator before, so no one knew which rate should be applied to the interconnection. The Commission used to gather the rates in the member states that had already liberalized and recommended the regulators to locate their interconnection rates between the cheapest and the third cheapest rates.[327] For this exercise, the Commission needed information from national regulatory authorities regarding the interconnection rates practiced in their country.

1.5.3 The IRG

Finally, it may be worth mentioning that, under the first regulatory framework, the Commission never consulted the IRG or asked them to provide any information. The IRG was not yet an official representation of the NRAs but a very informal network. We can, however, note that the first position paper issued by the IRG came in 1999, following the proposal of the Commission to reform the regulatory package.[328]

But in fact, at that time, the Commission was still sustaining a traditional style of interaction with the member states through the ONP Committee which did, interestingly, host some exchanges between the Commission and the regulators. Many of the discussions in the ONP Committee

325 Interviews with officials of the Commission, May 2012.
326 Interview with an official of the Commission, May 2012.
327 Interview with an independent expert, May 2012.
328 Interview with an official of an NRA, June 2012.

were related to the operational work of the NRAs. So a number of member states ministries brought their experts from the NRAs with them for the ONP Committee meetings. The NRAs who were present in the ONP Committee meetings were however not allowed to say anything and had no right to vote. So, the NRAs were unofficially included in the discussions in the ONP Committee but only to assist the national ministries – not to relay the views of the IRG.[329]

2 T2: The second regulatory framework (2002-2009)

Figure 4.5: T2 in the telecommunications sector

T2, the second regulatory package, covers the period from 2002 to 2009. The adoption of this second package has been motivated by several factors. A first problem was that the 1997 complete market opening did not have enough impact on the liberalisation of the markets. Some operators continued to maintain a dominant position that allowed them to control the market. A second reason to revise the framework was to adapt the regulation to the process of technological convergence that had been brought about by technological innovation. From the late 1990s, a single service could be delivered through different networks.[330] Under the first framework, regulatory constraints used to vary according to the technology used. In order to prevent competition distortion between providers of similar services, the 2002 framework sets the principle of technological neutrality: regulation is approached by services, independently from their technological support. Such services are for example call origination from a fixed telephone, call termination on a mobile telephone, or wholesale broadband access. Finally, the third problem in the telecommunications sector was the remaining fragmentation into national markets. Regulatory divergence was pointed at as an obstacle to the provision of European level communications services. The market needed regulatory convergence.[331]

329 Interview with an official of an NRA, June 2012.

330 For example making a call to a fixed telephone can be done from a fixed telephone network, from a mobile telephone network, or from a cable network. Listening to the radio no longer relies exclusively on broadcasting networks; it can be done via the internet, through a fixed telephone or cable network.

331 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM(1999) 539 (unofficial version). p. v.

2.1 Feedback of T1

Figure 4.6: T2 in the telecommunications sector – feedback from T1

2.1.1 Remaining problem of coordination

The Commission outlined that the telecommunications markets had remained fragmented and that the provision of pan-European services was encumbered by the considerable divergence in how the regulatory framework was interpreted and applied in the member states. It was particularly important that similar operators would be treated in similar ways, wherever they operate in the EC. Coordination thus needed to be enhanced.[332] Yet, neither the ONP Committee, nor the licensing Committee or the IRG were suited for this.

For reasons of membership, comitology committes were not the appropriate venue to foster a convergent interpretation and application of the framework. Comitology committees gathered representatives of the member states, stemming from national ministries. However, the newly created NRAs were, increasingly, the most relevant actors when it came to interpreting and applying the regulatory framework. *De facto*, this delegation process within the member states undermined the relevance of comitology committees as a platform to provide coordination for the implementation of the framework at the EU level. While ministries were still relevant actors for many issues, depending on the topic, coordination might be better addressed by a network of NRAs.[333]

While the IRG was a network of NRAs, it had been created by the regulators themselves, and the latter were not particularly interested in developing a common regulatory approach. This was criticised by the Commission who also felt that the IRG was a way for the regulators to act as a counter-power to the Commission, trying to find arguments against the Commission's ideas and propositions. It was, in particular, seen to be defending the national interest, instead of promoting a European view. Furthermore, the European Commission wanted to be involved in the network of NRAs, but the regulators rejected such an evolution. For all these reasons, the

332 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM(1999) 539 (unofficial version). p. 9.
333 Interview with an official of the Commission, May 2012.

Commission did not perceive the IRG positively and wanted to replace it with another network of regulators in which it would be involved.[334]

2.1.2 Remaining problem of expertise

The CEPT was the main actor providing technical expertise to the Commission for the preparation of implementing measures. However, the Commission lamented that the cooperation with CEPT had not worked satisfactorily. 'Almost without exception, the deliverables supposed to result from this cooperation have not materialised'.[335] Some consider that the CEPT is working defensively, and is a place of resistance against Europeanisation and liberalisation processes.[336] The Commission was thus willing to set up new institutional arrangements.[337]

2.2 The second regulatory framework

To deal with the technological convergence, the EU based the new regulatory framework on the concept of technological neutrality. The objective was to avoid technologically specific regulations from constituting obstacles to the development of competition between different technologies for the provision of the same service, as was the case in the first framework. As a consequence, the new regulatory framework is technologically neutral and regulation is approached by service, independently from the technology used to provide it.

The lack of competition on the telecommunications market led the Commission to elaborate a new regulatory approach inspired by competition law. Telecoms regulation would be subject to market analyses, which are based on the concept of powerful operator and were downloaded from competition law. The market analysis process is divided into three steps. The first one is the market definition, i.e. the identification and delineation of the market that is going to be analysed. The second one is the market analysis as such; it consists of scrutinizing the market to assess whether it is competitive enough or whether there is an operator with significant market power (SMP). The third step is the choice of remedies, i.e. the choice of obligations that will be imposed on the SMP operator, such as transparency, network access, or tariffs. Generally, these obligations aim at preventing the SMP operator from abusing its dominant position to prevent the development of competition.

334 Interview with an official of the Commission, May 2012.
335 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM(1999) 539 (unofficial version). p. 51.
336 Interview with an independent expert, May 2012.
337 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM(1999) 539 (unofficial version). p. 51.

Finally, with respect to the need to increase regulatory convergence, this regulatory package introduced a major and ambitious institutional innovation. The Commission was delegated a veto power on the first two steps of the market analyses performed by the NRAs: market definition and identification of SMP operator. In practice, this covers a huge amount of decisions and a very big share of the regulatory authority in the sector, although NRAs remain the central actors of the implementation of the framework. Therefore, with the 2002 regulatory package, the distribution of competences for implementation became mixed as both the member states and the Commission held significant implementing powers. To deal with the remaining need for coordination, as well as to provide some expert based input to the Commission, a network of regulators is created, the European Regulators Group (ERG).

2.2.1 Mixed distribution of competences

Figure 4.7: T2 in the telecommunications sector – competence distribution

In the process of preparing the second regulatory framework, the Commission commissioned various studies to gather the opinion of interested parties on the existing regulatory arrangement and on the possible ways to improve it, including the option to create a European regulatory agency. While the studies reported significant support for greater EC involvement in various areas, such as competition, development of a pan-European market, interconnection and significant market power, and enforcement, there was little support for the creation of an independent European regulatory agency. Instead, the majority of stakeholders were of the opinion that, while some regulatory functions would best be executed at the European level, it was more appropriate to improve existing structures rather than establish a new European agency.[338]

The NRAs would thus remain the central actors of the implementation of the framework. The new package reasserts that the regulatory and commercial functions should be structurally

338 Commission Communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review*. COM(1999) 539 (unofficial version). p. 8-9.

separated and that the 'Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions'.[339]

In this second package, NRAs would, however, enjoy a much larger discretion than before regarding market regulation. A significant part of what was established at the legislative level in the first framework would be left to the discretion of the NRAs in the second. First, the concept of significant market power created in 1998 was very rigid. If an operator had 25% of the market shares or more, it was automatically designated as having a significant market power (SMP). This automatic and simple 25% threshold disappeared. Instead, from 2002, the principles of competition law would apply, which meant that several factors needed to be weighed to evaluate the dominant position: the evolution of markets, the evolution of prices, the evolution of market shares, etc. It is a much more complex exercise. Second, under the first framework, once an operator was designated as dominant, a series of obligations that were listed in the Directive, the so-called 'remedies', were imposed on them automatically. With the second framework, once the regulators identify SMP operators, they would have to choose which remedies should apply to them, instead of having a list of obligations that would be applied automatically.[340]

Given the new powers and discretion given to the NRAs, there was a strong risk that, without coordination, the different member states would develop into very different regulatory environments. There was thus a clear need for stronger coordination.[341] The Commission thus proposed to compensate the wide discretion of the NRAs with a veto power of the Commission on the market analysis done by the regulators. According to the proposal, the Commission would have a veto power on the three elements of the market analysis process: market definition, identification of SMP operators, and choice of remedies.

2.2.1.1 Negotiations

In first reading, the parliament showed strong agreement with the Commission's proposal to establish a veto power on the market analyses performed by the NRAs in order to guarantee a harmonised implementation of the regulatory framework.[342] The member states who, on all reform negotiations, attempted 'to ensure that the maximum room for discretion is retained at national level' (Tarrant and Kelemen 2007:15), disagreed with the Commission. The *a priori*

339 Recital 11 of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).
340 Interview with an official of the Commission, May 2012.
341 Interview with an official of the Commission, May 2012.
342 European Parliament – Committee on Industry, External Trade, Research and Energy. Report on a proposal for a directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. FINAL A5-0053/2001. p. 29.

intervention of the Commission, consisting in preventing NRAs from taking certain measures, would run counter the institutional balance established in the Treaty. However, taking note of the European Parliament's support for the Commission, the Council sought a compromise and proposed that the Commission would be able to delay the implementation of an NRA measure whilst issuing a detailed opinion. The NRAs could choose not to follow the opinion of the Commission's but they would need to explain their reasoning. The Council's proposed amendments thus aimed at restoring NRA's final authority on the whole market analysis procedure.[343]

The EP's amendments in second reading insisted that the large discretion given to NRAs by the Directive represented a 'risk of divergences between member states which could endanger the development of a real European single market in communications'. Taking into account the Council's strong opposition to the Commission's supervision power, the EP thus proposes another type of compromise: keeping the Commission's veto power on 'those areas most critical for achieving the single market objectives of the Directive'.[344] The EP recommendation thus maintains the Commission's veto for market definition and identification of SMP operators, but not for the choice of remedies, which would only be subject to non-binding recommendations from the Commission. This solution, welcomed by the Commission[345] and accepted by the Council, became the core of the new market regulation system.

The proposal of the Commission also entailed increased executive power for the Commission with respect to the regulation of radio frequencies which, in spite of being supported by the EP, were rejected by the member states.

The delegation of the veto power to the Commission on market analyses is a considerable leap forward in terms of shifts of power to the EU level. A combination of three reasons has made this possible.[346] First, the period in which this package was negotiated was following the 2000 Lisbon summit, which was marked by a general enthusiasm for information and communication technologies. In a context of economic difficulties, this sector was seen as promising and benefited from a favourable opinion. Second, a certain misunderstanding on the implications of the new regulatory package helped to gain the support of the historical operators. The introduction of a competition policy concept into telecommunications regulation was presented

343 Council of the European Union. *Common position.* 10420/01 ADD 1. Brussels, 20 July 2001. P. 5.
344 European Parliament – Committee on Industry, External Trade, Research and Energy. Recommendation for second reading. FINAL A5-0435/2001. 4 December 2001, p.20-21.
345 Commission opinion on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. COM(2002) 78 final. Brussels, 07/02/2002. P. 3.
346 Interview with an independent expert, June 2012.

as a way to quickly move towards a regulatory regime that would be subject to competition policy only. Telecoms regulation aimed at introducing competition on the market. But once competition was established, sectoral *ex ante* regulation would no longer be necessary and the sector could switch to the general *ex post* regulatory regime of competition policy. And while the Commission kept repeating to the historical operators that *ex ante* regulation would disappear once competition was present, they thought that the transition would be quick. Having misinterpreted the consequences of such a far-reaching reform, the incumbent did not oppose it, which allowed a favourable political climate. Third, the negotiation has been facilitated by the fact that the three negotiators of the package were competent in the field. Commissioner Liikanen for the Commission, Mr Dams, the Belgian competent Minister for the Council, and Mr Harbour for the Parliament, were all able to discuss the details of the regulatory package directly among themselves and solve many aspects of the negotiation.

2.2.1.2 Outcome

The Commission was thus delegated important executive powers that should be exercised under the control of the Communications Committee (Cocom), a newly created comitology committee. First, the Commission would supervise NRAs' individual decisions about market analysis, with a veto power on market definition and identification of SMP operators. In addition, the Commission was also given the responsibility to adopt a recommendation on the relevant markets to be regulated[347] as well as recommendations with views to harmonise the application of the framework by the member states.[348] Also, the Commission would be able to adopt technical implementing measures to support the harmonisation of the use of numbering resources.[349] Finally, the framework encompasses a decision on the radio spectrum, delegating new powers to the Commission for the harmonisation of the use of certain frequency bands.[350]

To accompany and control the Commission's newly delegated executive functions, two comitology committees were created: the Communications Committee (Cocom) and the Radio Spectrum committee (RSC). The Cocom, created in 2002 by the Framework Directive,[351] replaces the ONP Committee and the Licensing Committee. Composed of senior officials from the member state authorities responsible for telecoms, the Cocom assists the Commission in carrying out its executive powers under the regulatory framework, according to the Council's decision on comitology. The committee exercises its function through advisory and regulatory procedures in

347 Article 15(1) of the Framework Directive (2002/21/EC).
348 Article 19(1) of the Framework Directive (2002/21/EC).
349 Article 10 and 19(2) of the Framework Directive (2002/21/EC).
350 Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision).
351 Article 22 of the Framework Directive (2002/21/EC).

accordance with the Council Comitology Decision.[352] In addition, the Cocom provides a platform for the exchange of information on market developments and regulatory activities (see below).[353]

The Radio Spectrum Committee (RSC) was established in 2002 under the Radio Spectrum Decision[354] as part of the new regulatory framework. The RSC assists the Commission in the development and adoption of technical implementing measures aimed at ensuring harmonised conditions for the availability and efficient use of radio spectrum, as well as the availability of information related to the use of radio spectrum. The committee exercises its function through advisory and regulatory procedures in accordance with the Council Comitology Decision.

2.2.2 Problem of coordination

Figure 4.8: T2 in the telecommunications sector – problem of coordination

The new framework implies increased room for decision-making at the level of the NRAs.[355] While part of this discretion is balanced by the veto power of the Commission on market definition and the identification of SMP operators, the choice of remedies remains without binding coordination mechanism. It is therefore necessary to develop regulatory coordination for the choice of remedies.

2.2.3 Problem of expertise

352 Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC).

353 http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/comm_committee/index_en.htm, consulted on 09/03/12.

354 Article 3 of the Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision).

355 Commission communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review.* COM(1999) 539 (unofficial version), p. 51.

Figure 4.9: T2 in the telecommunications sector – problem of expertise

As regards the expertise dimension, in spite of the new powers conferred to the Commission on market definition and the identification of SMP operators, the Commission barely needed external assistance. Indeed, the new veto powers were closely related to EC competition law, an area in which the Commission has a lot of expertise. To face the huge workload coming with the supervision of the market analyses of all regulators, the Commission created a task force for market analyses, joining staff from the DG Competition and the DG Information Society.

Besides the specific case of market analyses, there are indications that the Commission would welcome some input from the regulators for its implementing powers. The Commission's 1999 review indeed mentions that a new body, composed of NRAs and the Commission, could help the Commission in drafting the Recommendation on market definition and provide ideas for the adoption of implementing measures.[356]

2.2.4 Regulatory agents

Figure 4.10: T2 in the telecommunications sector – delegation pattern

2.2.4.1 The ERG

2.2.4.1.1 Creation

Given that most regulatory competences remained in the hands of the NRAs, the Commission was convinced of the necessity to have the NRAs cooperating and developing a common approach.[357] As part of the second regulatory package, the Commission thus wanted to replace the IRG by a new regulatory network that would be anchored in the regulatory framework and in which it could participate. The NRAs had become the key regulatory actors of the sector and the Commission wanted to interact with them directly, without the intermediation of the ministries, as it is the case in comitology committees.[358]

356 Commission communication. *Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review.* COM(1999) 539 (unofficial version), p. 52-53.
357 Interview with an independent expert, June 2012.
358 Interview with an independent expert, May 2012.

Initially, the Commission proposed the creation of a High Level Communications Group (HLCG). The tasks envisaged by the Commission for the HLCG covered both the need for coordination and that for technical advice. For the coordination dimension, NRAs would have adopted common positions and codes of practice, related to the application of the legislation, with views to promote its uniform application, facilitate pan-European services and resolve cross-border disputes between consumers and operators. As regards their advisory role, they would 'use their expertise to assist in the drawing up of EU guidelines on market definition', gather and publicize information on the activities of all NRAs, and suggest the need for Commission measures, e.g. recommendations or decisions, to address specific issues. It would also inform the Commission of any difficulties encountered in the implementation of the framework and of any divergences between the practices of the member states that would be likely to affect the internal market.[359]

However, the Council deleted from the proposal the article about the High-Level Communications Group. After having consulted its legal service, it explains that 'it was not considered necessary or appropriate to establish such a group, which falls outside of the types of committees envisaged by the new Comitology decision, in a Community act.'[360] The member states wanted to retain their gate-keeping role between national implementation and the Commission through comitology committees.[361] The Council indeed considered that such a body would 'be a potential competitor for the comitology body on which ministries sit' (Tarrant and Kelemen 2007: 14-17). The Commission accepted the change requested by the Council, and said they would examine the possibility of setting up such a group at its own initiative.[362] The ERG was then created by a Decision of the Commission, on the margins of the regulatory package.[363]

2.2.4.1.2 Functions

The main reason behind the creation of the ERG was to encourage their cooperation with views to the development of a common doctrine.[364] Coordination tasks are thus central in the mandate of the ERG. First, they were expected to develop common positions in order to make a harmonised use of their regulatory discretion.[365] The regulators thus started to develop common positions on, for instance, how to regulate wholesale broadband, wholesale access market, or

359 Article 21 of Commission Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. COM(2000) 393 final. Brussels, 12/07/2000.
360 Council of the European Union. Common position. 10420/01 ADD1. Brussels, 20 July 2001. p. 6.
361 Interview with an independent expert, May 2012.
362 Commission communication to the European Parliament concerning the common position of the Council. SEC/2001/1411 final - COD 2000/0188.
363 Commission Decision of 29 July 2992 establishing the European Regulators Group for Electronic Communications Networks and Services (2002/627/EC).
364 Interview of an independent expert, June 2012.
365 Interviews with officials of the Commission, May 2012.

local loop unbundling.[366] The IRG/ERG Guide explains that NRAs are, in particular, required to agree between themselves on the appropriate regulatory instruments and remedies. One way to do so is to share experiences of applying the framework within the relevant working groups. Following a discussion of experiences, the NRAs' combined position on a particular subject may be published as a Common Position. Common positions are not binding for NRAs, but the group monitors NRAs' compliance with them and reports the results by publishing a document on its website. 'However, given the consensual decision-making practices, [the common positions] are typically drafted in a very general way and members do not regard them as morally binding' (Tarrant and Kelemen 2007).[367]

Second, in order to sustain peer pressure, the regulators were expected to comment on each other's draft decisions related to market analysis. The regulatory framework did indeed require individual NRAs to send their draft decisions to all other NRAs for consultation. The Commission considered this practice as essential for building a European regulatory culture in the sector.[368] Initially, the regulators abstained from engaging in this exercise. The cooperation style of the ERG was such that NRAs, collectively, are not willing to tell individual NRAs how they should regulate their national market. First, they considered that individual NRAs are in a better place to know what should be done because they know their national market best. And second, they did not want to be told what to do when they are the ones submitting a decision project.[369] However, in 2006-2007, as the Commission started to work on preparing the transformation of the ERG, the regulators started to take up a position on those market analyses which the Commission was considering vetoing, in order to show that they are able to do their job.[370] They did so in a defensive way, though, willing to defend their fellow NRAs against the Commission.[371] The first case was a complicated one, involving the Dutch NRA who was submitted to strong political pressures. In order to get support, the Dutch NRA asked the other NRAs to take a position. However, against their intentions, the NRAs had to agree with the Commission and take a position against the Dutch NRA. From there onwards they developed this practice, which has been welcomed by the Commission.[372]

366 Interview with an official of the Commission, May 2012.
367 Corroborated in an interview with a senior staff member of an operator, June 2007.
368 Commission Amended proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. COM(2001) 380 final. 2000/0184 (COD), p. 2.
369 Interview with an official of an NRA, January 2010.
370 Interview with an independent expert, June 2012.
371 Interviews with independent experts, May 2012, June 2012.
372 Interview with an independent expert, June 2012.

Finally, the Commission wanted to have the views of the regulators on issues related to market analysis because they were the actors who were on the ground.[373] The ERG was meant to provide the Commission with input on the technical issues, i.e. the choice of remedies. While the Commission had no decision-making power on the choice of remedies, it could make recommendations, for which the expertise of the NRAs was necessary. The Commission also needed to consult the ERG for drafting the recommendation on the relevant markets and on a number of other occasions, such as for the recommendations on termination rates or on next-generation networks.[374] In the market analysis procedure, in case of strong disagreement between the NRAs and the Commission, the latter always consulted the ERG.[375] Over time, the advisory role of the ERG has gained importance.[376]

2.2.4.2 The IRG

The Commission aimed at replacing the IRG by the ERG. But NRAs did not want the IRG to disappear because they wanted to safeguard their independence from the Commission. As a consequence, the ERG has been created on top of the already existing IRG. One of the main differences between the IRG and the ERG is the involvement of the Commission in the ERG, while the IRG is totally independent from the Commission. The Commission may attend every meeting and activity of the ERG and it also holds the Group's secretary. So the shift from the IRG to the ERG, for NRAs, represents an issue in terms of independence from the Commission. This is why the NRAs decided to maintain the IRG and keep it independent from the ERG so as to keep a forum where they could cooperate without the presence of the Commission. In practice the IRG and ERG have become very close and adopted a joint agenda as of 2005. In their day-to-day functioning, the existence of the IRG next to the ERG actually means that, before gathering together with the Commission, under the ERG hat, NRAs first meet together without the Commission, under the IRG hat. But there is absolutely no difference as to which topic is dealt with in one or the other forum. Relevant issues are dealt with in all cases; the IRG hat is just used by the NRAs to keep the Commission out of the meeting room when they want to be on their own. So, although the IRG and the ERG overlap on the paper, with regard to both their membership and their functions, they have found a way to articulate their activities in practice by dividing them into horizontal cooperation (NRAs among themselves) and horizontal–vertical cooperation (NRAs among themselves, together with the Commission).

373 Interview with an official of the Commission, May 2012.
374 Interviews with officials of the Commission, May 2012.
375 Interview with an official of the Commission, May 2012.
376 Interview with officials of the Commission, May 2012.

2.2.4.3 The Communications Committee (Cocom)

The new regulatory framework also revised the system of comitology committees with the creation of the Communications Committee (Cocom), replacing both the former ONP and Licensing Committees, and the new Radio Spectrum Committee (RSC) (see above). Like the ONP Committee, the Cocom served not only as a pure comitology committee, but also as a platform for exchanging information between the Commission and the member states, so it performed some kind of expertise function.

Unlike under the first framework, however, from 2002 onwards the comitology committee was not the only venue for the Commission to deliberate with national authorities. Both the ERG and the Cocom now serve as forums for discussion. The two are however not exactly interchangeable, in particular due to their different membership. In Cocom, the members are the representatives of the member states, in general ministries. One factor that influences the choice of the Commission to turn to the Cocom versus the ERG for discussion is the issue to be discussed. Market regulation is clearly a competence of the regulators and, therefore, is much better handled by the ERG. The Cocom is not the most appropriate venue to discuss market regulation, because not all NRAs are there and the discussions are therefore less detailed and technical. On the other hand, some issues are not systematically a competence of either the ministries or of the NRAs, they may be the NRAs' responsibility in some member states and in the ministry's one in others. In such cases, Cocom might provide a more appropriate forum, although some topics are also discussed with both the Cocom and the ERG.[377]

The NRAs may accompany their member states to the Cocom, but this varies depending on the member states. Since, under the comitology process, the Cocom had the role to control the Commission in its use of the veto against NRAs' market analyses, the Cocom had to take positions on market analysis, which was the competence of the NRAs. Depending on the member states, what may have happened in these situations was that the representative of the member states took their voting instructions from the NRAs. In these cases, given that the NRAs would never vote against another NRA, the instructions from the NRAs was always to abstain from voting.[378] Additionally, the presence of some NRAs accompanying their member states in the Cocom would take advantage of this to convey the views of the ERG.[379]

377 Interview with an official of the Commission, May 2012.
378 Interview with a member of a national permanent representation to the EU, May 2012.
379 Interview with an official of the Commission, May 2012, Interview with a member of an NRA, June 2012.

2.2.4.4 The Radio Spectrum Committee (RSC) and the CEPT

As part of the regulatory package, the Commission was delegated new competences related to the harmonisation of certain bands of radio frequencies. These new competences were exercised with the Radio Spectrum Committee (RSC). There was a rather high output in this field; many frequencies harmonisations measures are adopted per year.[380] The technical preparatory work for these decisions is undertaken by the CEPT.

3 T3: The third regulatory framework (2009-)

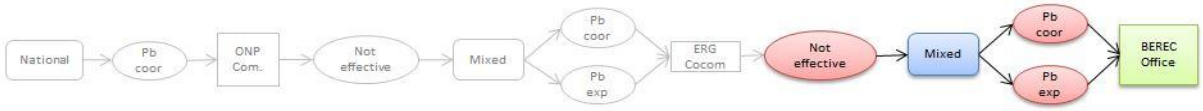

Figure 4.11: T3 in the telecommunications sector

Three years after the entry into force of the second regulatory package, the Commission started to discuss how it might be reformed.[381] The Commission was particularly keen on improving the institutional setting for enhancing the coordination among NRAs and to reach new powers regarding the choice of remedies in market analyses and in the field of radio spectrum management. While the member states did not agree with the Commission on the need to make these reforms, the Commission, led by the Commissioner Reding, brought a very ambitious proposal to the table, which included everything the member states had previously made clear they did not want.[382] Negotiations have thus been very conflictive. The member states remained cohesive in the face of Commissioner Reding so, in the end, very little of the Commission's proposal was accepted and the third regulatory package has not brought significant changes compared to the second one.[383]

The major novelty was the replacement of the ERG by the creation of the Body of European Regulators for Electronic Communications (BEREC) and the Office. BEREC is a body composed of a unique organ, the Board of Regulators. The Office is, legally, an EU agency that was created to provide administrative assistance to BEREC. The member states were very opposed to the Commission's plan to transform the networks of NRAs into an EU agency. The EU agency structure was however unavoidable as soon as they wanted to have a structure assisting the network of regulators that would be funded by the EU budget. This is why the new body has

380 Interview with an official of the Commission, May 2012.
381 Interview with a member of a national permanent representation to the EU, May 2012.
382 Interview with a member of a national permanent representation to the EU, May 2012.
383 Interview with a member of a national permanent representation to the EU, May 2012.

been split in two distinct entities: BEREC with the Board of Regulators, which is not an EU agency, and the Office, which is.

The reason why the ERG was transformed into BEREC was twofold.[384] First and foremost, it was necessary to improve coordination among NRAs, which the BEREC structure was expected to allow, at least to some extent. Second, the Commission had been given a new role in the choice of remedies. Although this did not take the form of binding decision-making power, as the Commission initially wanted, the Commission still needed the assistance of the regulators in the exercise of this new competence, because the choice of remedies requires technical knowledge. In addition, the BEREC is given an advisory function in other instances, both towards the Commission, but also, and this is a novelty, towards the European Parliament and the Council. In sum, although the initial drive for formalizing the network of NRAs into BEREC was mostly the need to improve coordination, this change is accompanied by a reinforced and formalised advisory role of the regulators' network vis-à-vis other EU institutions.[385]

3.1 Feedback of T2

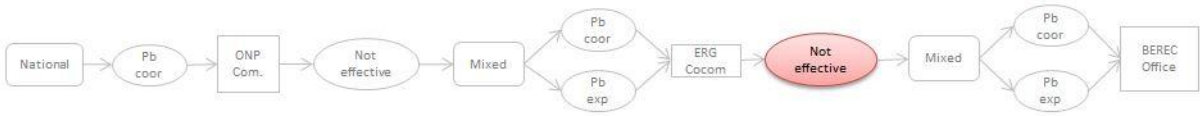

Figure 4.12: T3 in the telecommunications sector – feedback from T2

3.1.1 Remaining problem of coordination

When initiating the reform, the Commission explained that the single market of electronic communications was still far from a reality and, supported by public consultations, pointed at NRAs' inconsistent regulatory approaches as the major obstacle. 'In general, respondents to the public consultations, from industry (UNICE) to consumer organisation (BEUC), from new market entrants to telecom incumbents with international and cross-border business and Internet Service and Voice over IP providers, argued that having different regulatory approaches in different countries adds substantially to the costs of firms operating across multiple countries'.[386] NRAs have been delegated considerable discretion in implementing the regulatory

384 Interview with an official of the Commission, June 2012.
385 Interview with an official of the Commission, May 2012.
386 Commission Working Document. *Impact assessment*. SEC(2007) 1472. Brussels, 13/11/2007. P.79.

framework, and the efforts of the ERG to improve coordination had proved insufficient to bring regulatory consistency.[387]

There are two ways in which the ERG may foster convergence among its members. One is adopting common positions or guidelines. The other is by engaging in peer review on each other's market analyses. As regards the adoption of common positions, the ERG was known for adopting positions that were general enough to accommodate the diversity of the 27 national approaches.[388] This may have been partly due to the internal decision-making procedure of the ERG. To be adopted, any position within the ERG had to meet the unanimity of its members. This made the ERG a very weak structure that provided hardly any input in the EU regulatory debate,[389] at least until 2006-2007. This turning point corresponds to the moment when the Commissioner Reding presented her project to transform the ERG into an EU agency.[390] The regulators understood then that, in order to defend their autonomy, they should show more proactivity in the construction of the internal market and they started to produce more complete work and come up with clearer positions.[391]

In spite of the efforts made by the regulators under the pressure put by the Commission's proposal, the Commission remained convinced it was necessary to improve coordination among the regulators. The veto power of the Commission had created a high degree of consistency on market definition and the designation of SMP operators, but the Commission concluded that there was a wide discrepancy with the remedies that still needed to be addressed.[392]

3.1.2 Remaining problem of expertise

With respect to the regulation of electronic communications, for the Commission, there was first the problem that the ERG did not offer, as was expected from them, clear and insightful positions.[393] Second, when giving an opinion on market analyses, while the Commission was requesting ERG opinion, the regulators systematically presented IRG opinions. And more generally, regulators also used to discuss many things among themselves, under the IRG hat, excluding the Commission.[394] This did not please the Commission, and it criticised the IRG as 'a parallel body which operationally overlaps with the ERG'. The IRG has some influence on the

387 Commission Working Document. *Impact assessment*. SEC(2007) 1472. Brussels, 13/11/2007. p. 66-67 ; Commission communication. *Report on the outcome of the review of the EU regulatory framework for electronic communications networks and services*. COM(2007) 696 final. Brussels, 13/11/2007. p.3.
388 Interview with a senior staff member of an operator, June 2007.
389 Interview with an official of the Commission, June 2012.
390 Interview with an official of the Commission, June 2012.
391 Interview with an independent expert, June 2012.
392 Interview with an official of the Commission, May 2012.
393 Interview with an official of the Commission, June 2012.
394 Interviews with officials of the Commission, May 2012.

implementation of the framework, while avoiding any obligation to implement Community Law or a duty to report to the Commission. So, the Commission denounced that, in addition to being unable to deliver efficient results in terms of harmonisation, it was problematic in terms of accountability and transparency.[395]

As regards the management of the radio spectrum, the usual problem of the CEPT, its slowness, continued under the second package.[396]

3.2 The third regulatory framework

3.2.1 Distribution of competences

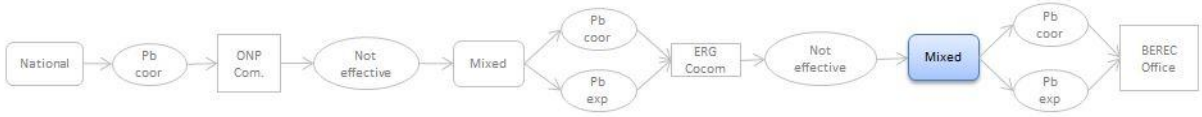

Figure 4.13: T3 in the telecommunications sector – competence distribution

3.2.1.1 Commission's competences

The 2009 reform did not bring any significant change in the distribution of competences between the member states and the Commission. The Commission wanted to be delegated veto power on the choice of remedies and important powers in the radio spectrum management. While the European Parliament was in favour of giving the veto power to the Commission for remedies, the member states were very opposed to it and managed to show enough cohesion within the Council to withdraw this measure from the text. Instead, the Council proposed that the Commission only issues opinions about NRA's draft remedies. If an NRA does not comply with the Commission's opinion, it would then have to justify its position.[397] The outcome of the negotiations is a very complex and convoluted procedure that increases the moral pressure on the NRAs, while only giving to the Commission and BEREC the power to issue recommendations.[398]

While the Commission did not manage to get the veto power on the remedies, the reform has slightly expanded its capacity to adopt executive implementing measures. First, the

395 Commission, *Proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority*. COM(2007) 699 final. Brussels, 13/11/2007. p. 5.
396 Interview with an independent expert, May 2012.
397 Council of the European Union. Press Release. 2907th Council meeting – Transport, Telecommunications and Energy. Brussels, 27 November 2008. 16326/1/08 REV 1 (Presse 345). p. 7.
398 Article 1(7) of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending the Framework Directive (2002/21/EC), the Access Directive (2002/19/EC) and the authorisation Directive (2002/20/EC).

Commission's faculty to adopt harmonisation measures, introduced in 2002,[399] has been specified and broadened. Before 2009, when the Commission found divergences in the way NRAs implement the framework, it could adopt a recommendation proposing a harmonised implementation of the measures concerned. The 2009 reform introduces the possibility, for the Commission, to adopt a decision on the same issue, two years after having adopted a recommendation. While previously the Commission could only make recommendations, it can now adopt decisions, although this can only been done two years after having first adopted a recommendation on the same issue. Second, the Commission has been delegated the possibility to adopt recommendations and/or guidelines in relation to a few modalities of application of the related market analyses.[400] These may regard the form, content and level of detail to be given by NRAs when notifying the Commission of their projected measures. The recommendations and/or guidelines may also apply to the circumstances in which notifications would not be required, and in the calculation of the time limits.

3.2.1.2 The NRAs

NRAs remain the central actors of the implementation of the regulatory framework, responsible for carrying out market analyses, under the supervision of the Commission for market definition and market analysis, and enjoying discretion regarding the choice of remedies. The new framework also gives the NRAs new competences on consumer protection. While some member states had already delegated this issue to their regulators, EU legislation used to be neutral regarding which national regulatory actor should implement consumer protection measures.

It should be noted that the 2009 reform has significantly empowered the NRAs' in their national arena and considerably reinforced their independence. The NRA should be 'protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it'.[401] The new provision also introduced the concept of political independence. While in the first two regulatory frameworks, the distance to be created between regulators and their governments was justified by the possible public ownership of the historical operator. Under the third package, NRAs shall exercise their competences autonomously from policy-makers, independently from the eventuality of public ownership of the incumbent. This is justified by the idea that governmental interferences in regulation distorts competition.[402]

399 See Article 19 of the Framework Directive (2002/21/EC).
400 Article 1(7) of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending the Framework Directive (2002/21/EC), the Access Directive (2002/19/EC) and the authorisation Directive (2002/20/EC).
401 Recital 13 of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, amending Directives 2002/21/EC, 2002/19/EC, and 2002/20/EC.
402 Interviews with officials of the Commission, May 2012.

Furthermore, the reform makes it harder to dismiss the heads of NRAs by requiring that 'rules should be laid down at the outset regarding the grounds for the dismissal of the head of the NRA in order to remove any reasonable doubt as to the neutrality of that body'.[403] Finally, the new framework entails a provision aimed at guaranteeing that regulators are given a separate budget so that they can, in particular, hire enough qualified staff.[404]

3.2.2 Problem of coordination

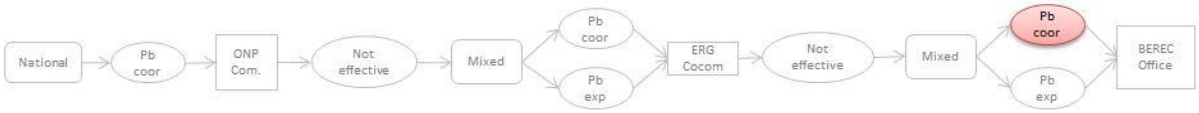

Figure 4.14: T3 in the telecommunications sector – problem of coordination

Since the distribution of competences has not fundamentally changed, in particular because the NRAs still have the last word on the choice of remedies, the coordination problem remains. Furthermore, NRAs' low motivation to work towards market integration was still to be addressed. According to the Commission, this was mainly due to the ERG being a very weak and loose structure. It was fundamental, for the Commission, to formalize the network in a way that would force the regulators into more cooperative behaviour.[405]

3.2.3 Problem of expertise

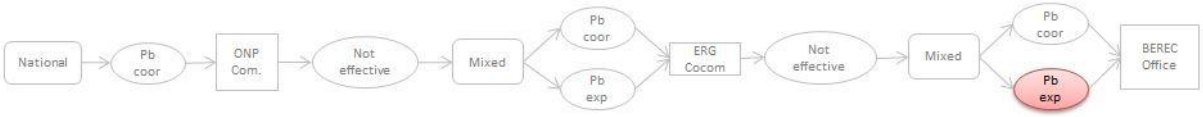

Figure 4.15: T3 in the telecommunications sector – problem of expertise

Although the Commission did not get the veto power on the choice of remedies, the new decision-making procedure allows a deeper involvement of the Commission who is expected to make detailed recommendations to the NRAs. Unlike for market definition and identification of SMP operators, the choice of remedies does not only require legal and economic expertise, but also deep technical knowledge which the Commission is lacking. It was therefore necessary, for the Commission, to have the support of the NRAs for the exercise of this new role.[406]

403 Recital 13 of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, amending Directives 2002/21/EC, 2002/19/EC, and 2002/20/EC.
404 Recital 13 of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, amending Directives 2002/21/EC, 2002/19/EC, and 2002/20/EC.
405 Interview with an official of the Commission, May 2012.
406 Interviews with officials of the Commission, May 2012, June 2012.

3.2.4 Regulatory agents

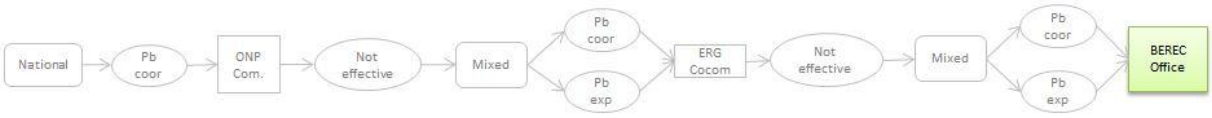

Figure 4.16: T3 in the telecommunications sector – delegation pattern

3.2.4.1 BEREC

3.2.4.1.1 Commission's proposal to create the EECMA

When preparing the transformation of the ERG system, the DG Information Society came to the conclusion that the best solution would be to create a large secretariat, with about 30 to 40 qualified staff, to assist the work of the network of regulators and give it continuity and consistency. Given the legal and budgetary constraints of the EU, the only way to fund such a body is to create an agency. This is how the DG Information Society conceived the idea of creating an EU agency as part of the third package. The Commissioner Reding then seized this idea and started to present the future body as a European regulator. The entire DG even received an email from the Commissioner's cabinet, telling them they should not discourage journalists from using the term 'European regulator' because this was the term that Commissioner Reding was using herself.[407] Also, while the DG was considering the creation of a secretariat, i.e. a body with a low public profile, Commissioner Reding had very ambitious views and finally proposed the creation of a very large EU agency that would cumulate other functions and competences than those initially outlined by the DG Information Society. Several interviewees said that Commissioner Reding was pursuing political prestige. She wanted to appear as a courageous Commissioner, proposing a radical measure to eradicate problems.[408]

Two options were discarded in the impact assessment. The first option was a single European Regulatory Authority with discretionary decision-making powers in market reviews and responsibility for managing EU aspects of the radio spectrum. While this structure would have been very efficient in terms of harmonisation, it would represent a problem of subsidiarity because most markets in telecommunications are still national and not transnational. Furthermore, the Meroni doctrine[409] would make it impossible to delegate such strong decision-making competences to an EU regulatory authority. The second option, very close to the status quo, would consist in formalizing the way through which the network issues an opinion on

407 Interview with an independent expert, June 2012.
408 Interview from an independent expert, June 2012, Interviews with senior staff from national permanent representations to the EU, May 2012.
409 CJEU Judgement C-9/56. *Meroni v. High Authority.*

NRAs' draft market analysis decisions that the Commission is considering vetoing. In this configuration, harmonisation would still rely on NRAs' voluntary coordination efforts which proved to be insufficient under the ERG institutional structure. The ERG institutional setting did not provide NRAs with enough incentives to actually take harmonisation into account as a determining criterion when it came to choosing remedies. This last option was thus rejected for its lack of effectiveness.

To address the need for increased coordination among NRAs and the Commission's need to draw from NRAs' expertise, the Commission proposes the creation of the European Electronic Communications Market Authority (EECMA), an EU agency that would be constructed on the basis of the NRAs' network. The new body would, above all, have an expertise functional profile. The EECMA was part of a broader proposal that aimed at significantly reinforcing the Commission's executive powers, in particular on the choice of remedies. In this configuration, the Commission would feature as the EU regulatory actor with the most decision-making power and the EECMA would be the regulatory agent providing support to the Commission with these new competences. The proposal did also involve the delegation of a few coordination tasks to the EECMA, in particular, the new authority should be 'able to take decisions in relation to the issuance of rights of use for numbers (...and) shall be responsible for the administration and development of the European telephone numbering space (...).[410] The EECMA was also supposed to endorse the definition of transnational markets and to provide the framework allowing the cooperation of NRAs. The EECMA would be a Community body, i.e. an EU regulatory agency, with legal personality,[411] and therefore would be subject to EU regulation on such bodies, which would involve amongst others reporting to the Commission and representation of the Commission in the governing board of the agency.

A further noteworthy element of the Commission' proposal was to merge the European Union Agency for Network and Information Security (ENISA), an existing EU agency working on cyber security, with the EECMA. This answered tactical purposes. When the third regulatory package was discussed, there was an increasing scepticism from the Parliament and the Member states regarding EU agencies and they was no willingness to create a new one. Merging EECMA with ENISA would transform the ERG into an EU agency without increasing the number of EU Agencies. ENISA was seen as having little efficiency and, furthermore, it was located on the

410 Article 8 of the Commission Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority. COM(2007) 699 final. Brussels, 13/11/2007.

411 Article 48 of the Commission Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority. COM(2007) 699 final. Brussels, 13/11/2007.

Island of Crete, in Greece, which meant it was very difficult to recruit staff.[412] And given that ENISA dealt with cyber security, it seemed justified to bring this field closer to that of the regulation of electronic communications.

3.2.4.1.2 Negotiations and the creation of BEREC

The European Parliament, while renaming the EECMA the Body of European Regulators in Telecommunications (BERT), generally agreed with the proposal of the Commission, except for merging with ENISA.[413] The Council, on the other hand, showed very strong opposition to almost all the elements of the Commission's proposal.[414]

The Commission thus withdrew its proposal and presented an amended one in November 2008. The Council then agreed on the need to formalize the status of the group of regulators and to improve the coordination among them. They recognized the need to shift from unanimity to a two-thirds majority rule for decision-making and were in favour of the establishment of a more precise definition of network's tasks, functioning and relations with the other EU institutions.

But there was one thing that the Council rejected with force: giving the group of regulators the status of an Agency. The member states were strictly opposed to the creation of an agency and they wanted the network, which they renamed the Group of European Regulators in Telecommunications (GERT), to remain a network without legal personality. Furthermore, the approach of the member states consisted in postponing the discussion on the legal status of GERT to the end of the negotiation. They wanted to negotiate the different competences one after the other and reach an agreement on the new body's aims and tasks before making a decision on the institutional aspect.[415] And the member states considered that the Agency status was neither necessary nor proportionate to the tasks they wanted to assign to GERT.

However, to their surprise, they finally discovered that, from a legal point of view, the body they wanted to create could not be anything other than an EU agency. Indeed, they wanted to create an administrative and technical support to assist the work of the group of regulators. Yet the only type of structure at the EU level that can be funded under the EU budget to do such things is an agency. Since they did not want the group of regulators to become an agency, they opted for a double structure with, on the one hand, the Body of European Regulators for Electronic Communications (BEREC) which consisted in the group of regulators, and on the other hand, the

412 Interview with an official of the Commission, June 2012.

413 European Parliament – Committee on Industry, Research and Energy. *Report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Commuincations Market Authority.* A6-0316/2008.

414 European Parliament. Summary of the Debate in Council of 12 June 2008. http://www.europarl.europa.eu/oeil/popups/summary.do?id=1040109&l=en&t=E

415 Interview with an official of the Commission, May 2012.

Office, a small EU agency in charge of assisting BEREC. The compromise was reached with the EP in April 2009 on the basis of this two-layer structure.

During the negotiation, the member states always thought that BEREC would be located in Brussels because it would be an informal body. As soon as the question about the legal nature of the new body started to be discussed, Latvia presented its application to host the future Agency. From this point onwards, it was not possible to go back. The member states were engaged in the procedure established by a Gentlemen's agreement between the heads of states regarding the distribution of the seats of EU agencies according to which new agencies should go, in priority, to those member states that do not have any agency. It was inconceivable to create a precedent by placing the Office in Brussels. Thus, this is how the choice of Riga as a seat for the Office was made.[416]

3.2.4.1.3 Legal status of BEREC

'BEREC should neither be a Community agency nor have legal personality. BEREC should replace the ERG and act as an exclusive forum for cooperation among NRAs, and between NRAs and the Commission, in the exercise of the full range of their responsibilities under the EU regulatory framework'.[417] However, BEREC has been likened to an agency in the press. While this apparent contradiction is probably due to a lack of semantic precision on the part of the journalist, the article nonetheless points at an important dimension of BEREC's organizational status. It underlines the uncertainty regarding the future functioning of BEREC: Will it 'be paralyzed by political self-interest or emerge as a forceful, independent voice that brings into being a harmonised telecommunications market'?[418]

BEREC is composed of a unique organ called the Board of Regulators, itself composed of one member per member state who should be a high-level representative of the NRA.[419] For carrying out the tasks it is conferred by the regulation, BEREC shall act independently, i.e. the Members of the Board of Regulators shall neither seek nor accept any instructions from any government, from the Commission, or from any other public of private entity. The Commission shall attend BEREC meetings as observer and shall be represented at an appropriate level. As for its internal

416 Interview with a staff member from a national permanent representation to the EU, May 2012.
417 Recital 6 of the Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.
418 The New York Times. *Fortified European Telecommunications Regulator Has Potential to Wield Real Power*. July 3, 2011.
419 Article 4 of the Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

decision-making process, the Board of Regulators shall act by a two-thirds majority of all its members.

3.2.4.1.4 The Office

The regulation establishes the Office, a Community body with legal personality, i.e. an agency, in charge of providing administrative support to BEREC by, amongst others, managing the flow of information between the NRAs and BEREC, assisting BEREC in setting up expert groups and preparing the work of the Board of Regulators. The Office is composed of a Management Committee and an Administrative Manager, the latter being responsible for the management of the Office. The Management Committee is composed of one member per member state – who will be a high level representative of the NRA – and one member representing the Commission. Each member will have one vote. The Management Committee appoints the Administrative Manager, guides her in the execution of her tasks, is responsible for the appointment of staff, and assists the work of the expert working groups. The Administrative Manager is accountable to the Management Committee and should perform her duties independently from any member states, any NRA, the Commission, or any third party. She is designated for three years, renewable once. In addition to being in charge of the management of the Office, she shall provide administrative and organizational assistance to the Board of Regulators, the Management Committee and the Expert Working Groups.

3.2.4.1.5 Functions of BEREC

3.2.4.1.5.1 Coordination tasks

The introductory part of the regulation establishing BEREC justifies the new body by the need, for a consistent application of the EU regulatory framework in all member states. This need is referred to very often in the establishing regulation of BEREC, as well as on BEREC's website. The argument that is unfolded in the recitals of BEREC regulation goes as follows: The EU regulatory framework provides a set of objectives and a framework for regulatory action by the NRAs. In certain areas, NRAs are granted discretionary power to apply the rules in light of national conditions. However, in order to create an internal market for electronic communications networks and services, EU regulation needs to be applied in a consistent way in all member states. Some institutional device fostering the harmonisation of NRAs' practices is thus required. In this perspective, the Commission created the ERG in 2002 and BEREC has been created to continue the work of the ERG. The recitals thus make clear that BEREC is created to improve the harmonisation of how NRAs make use of their discretion when implementing the regulatory framework. In practice, this relates above all to the choice of remedies.

BEREC is expected to do so through a series of coordination tasks. The first task of BEREC that is

mentioned in the Directive is the promotion of cooperation and coordination among NRAs and the assistance to NRAs on regulatory issues.[420] To foster cooperation among NRAs, BEREC should develop and disseminate among them best practices, common approaches and methodologies, guidelines, etc.

One of the most important changes brought by the third package is the modification of the market analysis procedure which allows BEREC to comment on NRAs' decision projects, in particular on the choice of remedies. Under the second package, the regulators were able to comment on each other's draft decisions. While initially they did not make use of this provision, they started to do so whenever one of them was threatened by a possible veto of the Commission. This procedure, which was informal under the second package, has been institutionalised with the 2009 reform. It involves the obligation, for BEREC, to comment on the NRAs' projected choice of remedies in case the Commission has doubts about the compatibility of the national decision project with community law. This responsibility will guarantee that BEREC is more active than the ERG in the coordination of remedies.

Finally, the new framework gives BEREC a new role in situations of cross-border dispute.[421] Prior to the reform, the NRAs concerned were expected to cooperate to find a solution. Now, they still have to do so, but they may consult BEREC. If BEREC is consulted, NRAs should take utmost account of its opinion and cannot act as long as BEREC has not issued its opinion. This task can be subsumed under BEREC's function as coordination platform for NRAs.

3.2.4.1.5.2 Mutual assistance among NRAs

Over time, the Commission realised that one of the problems of the regulatory framework was the huge amount of work it implied for the regulators. Furthermore, the amount of work was relatively independent from the market size of the member states, which was problematic for small regulators working from small member states that had difficulties coping with the workload. The idea was that the network of regulators could constitute a pool of expertise and resources to help small regulators.[422]

The reform thus introduces a new measure regarding the relationship between BEREC and NRAs in the context of the market analysis. Where a national regulatory authority has not completed its analysis of a relevant market identified in the Recommendation within the required time limits, BEREC shall, upon request, provide assistance to the NRA concerned in

420 Articles 1 and 2 of the Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

421 Article 1(23) of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/21/EC, Directive 2002/19/EC and Directive 2002/20/EC.

422 Interview with an independent expert, June 2012.

completing the analysis of that market. This is a new role for BEREC in comparison to ERG. Here, BEREC is given the role of assisting individual NRAs when they need help.[423]

This new task is very interesting because, strictly speaking, it does not fit in the coordination category, or in the expertise pattern, but rather combines traits of both. It is about providing assistance and expertise to actors that are lacking resources, but interestingly, the recipients of this assistance would be the NRAs themselves – most probably small NRAs – and not the Commission. On the one hand, this type of interaction among NRAs is not strictly a coordination task – it can even be better described as an advisory or expertise task. On the other hand, the objective of the Commission behind the introduction of this task is to raise the level and output of the NRAs to allow them to keep up with the expectations of the Commission in terms of internal market development. Besides, it should be noted that such a mechanism could also, indirectly, contribute to increase regulatory consistency because it involves elements of policy transfer.

3.2.4.1.5.3 Expertise tasks

The list of functions attributed to BEREC entails three types of advisory tasks. First, BEREC should issue an *ex ante* opinion every time the Commission makes use of its delegated competences. This regards the elaboration of decisions, recommendations, and guidelines issued by the Commission. This function is specified in a number of circumstances. In most of these circumstances, BEREC is now involved as an advisory power, while the ERG was not. And in some instances, BEREC has even replaced Cocom.

First of all, BEREC intervenes in market analysis where the ERG did not. For market definition and market analysis, the Commission must now consult BEREC before making use of its veto power. This constitutes a clear shift of competences between Cocom and BEREC. Cocom used to be consulted under the advisory procedure for such decisions of the Commission; the Committee is now kept out of the decisions entirely. On the other hand, ERG did not have any role here, so BEREC's involvement is a net increase of advisory competences for the regulators.

Second, BEREC is also given an important responsibility as regards the adoption of recommendations. The reformed Framework Directive requires that BEREC is always consulted before the Commission adopts a recommendation. This is also found as a procedural requirement in each article dealing with specific recommendations. Hence it applies to the

423 Article 1(18c) of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/21/EC, Directive 2002/19/EC and Directive 2002/20/EC.

adoption of harmonisation measures,[424] to the adoption of guidelines regarding the modalities of application of market analysis procedure,[425] and to the adoption of the recommendation that define relevant markets as well as to the identification of transnational markets.[426]

The second and third advisory tasks of BEREC relate to the EU institutions in general. BEREC should indeed become the advisory body not only for the Commission but also for the EP and the Council. This shall first take the form of BEREC issuing reports and providing advice, both on request and on its own initiative. In addition, BEREC will also assist them in their interaction with third parties.

Many interviewees justified the shift of advisory functions from Cocom to BEREC by referring to BEREC's expertise. This was particularly true when it came to explaining why the Commission must now consult BEREC instead of Cocom before making use of its veto against the draft market analysis decisions of the NRAs. The NRAs are the competent actors of the market analysis thus it was felt that it would be inconsistent to keep the Cocom, with member states representatives, offering opinions within the market analysis procedure.

3.2.4.2 The IRG

The Commission expected that the third regulatory package would lead to the dissolution of the IRG because BEREC shall be, according to the legislation, the 'exclusive forum for cooperation among NRAs'.[427] The IRG nonetheless continues to exist, but it has engaged in a process of reflection regarding its role. Under the second package, it used to serve as a support to the cooperation among NRAs, in particular administratively and logistically. This administrative support is now taken over by the Office. So the IRG needs to redefine its purpose.[428]

424 Article 1(21) of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending the Framework Directive (2002/21/EC), the Access Directive (2002/19/EC) and the authorisation Directive (2002/20/EC).
425 Article 1(7) of the Directive 2009/140/EC.
426 Article 1(17) of the Directive 2009/140/EC.
427 Recital 6 of the Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.
428 Interview with a member of the IRG, May 2012.

4 Telecommunications: conclusion

4.1 Conjectures

The first set of conjectures describes how the distribution of competences shapes the governance problem met by policy-makers and, therefore, the type of tasks delegated and the type of regulatory agent chosen:

- *When most regulatory authority remains at the national level, policy-makers are expected to set up a coordination pattern, e.g. delegate coordination tasks to an EU regulatory network. Indeed:*
    - *When most regulatory authority remains at the national level, market integration shall require a coordination of national regulatory practices;*
    - *The relevant institutional solutions to such a need for coordination are: delegating coordination tasks to an EU regulatory network, to an EU regulatory agency, or delegating implementing authority to the Commission;*
    - *Given member states' reluctance to lose much of their implementing power, the outcome shall be limited to the delegation of coordination tasks to an EU regulatory network.*
- *When the biggest share of regulatory authority is delegated to the Commission, policy-makers are expected to set up an expertise pattern, e.g. create expert committees and entrust them with the task to provide expert-based input to the Commission. Indeed:*
    - *When the biggest share of regulatory authority is delegated to the Commission, an effective use of these competences shall require additional resources and expertise;*
    - *The relevant institutional solutions to such a need are: entrusting the task of providing the Commission with expert-based input to expert committees, to an EU regulatory agency, or increasing the budget of the Commission;*
    - *Given member states' reluctance towards empowering the Commission and the Commission's reluctance towards loosing much control over implementing regulation, the outcome shall take the form of expert committees responsible for providing expertise to the Commission.*
- *When the regulatory authority is shared between the member states and the Commission in similar proportions, policy-makers are expected to create an EU regulatory network in charge of both coordinating national regulatory practices and providing the Commission with expertise. Indeed:*

- *When the regulatory authority is shared between the member states and the Commission in similar proportions, the effective implementation of the policy shall require both the coordination of national regulatory practices and additional expertise and resources for the Commission;*
- *The relevant institutional solutions to the combination of both needs are: entrusting both tasks to an EU regulatory network, to an EU regulatory agency, or empowering the Commission (both in terms of resources and decision-making power);*
- *Given member states reluctance to empower the Commission, to lose much implementing power and the Commission's own reluctance towards losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

The second set of conjectures addresses, within each sector, the progressive reinforcement of the agent over time and the conditions under which it may be agencified:

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means. This is due to the dynamic between functional pressure and actors' interest in maximizing power, unfolding through feedback loops.*
- *The higher the problem pressure, the more likely it is that the regulatory agent is transformed into an EU agency.*
- *EU agencies are more likely to be created when the public policy has already undergone several reforms, than during the first and second stages of policy change.*
- *The agencification of networks is more likely than the agencification of committees.*

4.2 Analysis

T1 is quite challenging for the conjectures. While, as conjectured, the nationally based implementation led to a need for coordination, this need was not addressed through the delegation of coordination tasks to a regulatory network. Instead, the Commission diffused its own doctrine regarding how the framework should be implemented within the ONP Committee – a comitology committee. The choice of the ONP Committee as a coordination venue rather than a regulatory network that could have been created by the Commission can be explained by the fact that, back in T1, the NRAs had not yet emerged as central national actors for the implementation; the ministries remained very important for many years. The coordination of national administrative practices was therefore best addressed by a body composed of

representatives of national ministries which, depending on the member states, NRAs were still able to attend. The use of the ONP Committee for coordination purposes is also due to the fact that possible alternatives had been discarded by the member states, who twice refused to create a specific body for the coordination of licensing.

Another deviation from the conjectures is the fact that the ONP Committee was not delegated coordination tasks, but rather served as an audience for the Commission to diffuse its implementation doctrine. This can be explained by the very legal character of telecommunications implementation at the time, which allowed the Commission to dominate the sector and devise its own harmonised interpretations. The setting up of the IRG, a regulatory network, provides some slight support to the conjectures regarding the need for the creation of a network of NRAs, despite the fact that it was not created by the Commission and was not exactly engaged in coordination *stricto sensu*.

T2 provides a good fit with the conjectures. In the 2002 reform, the need to improve coordination led to two important institutional developments. First the Commission was delegated a significant share of the regulatory authority, which led to a mixed distribution of competences, where both the Commission and the member states were important implementation actors. However, unexpectedly, these new powers did not really lead the Commission to require external expertise assistance. The type of expertise required for the liberalization and regulation of telecommunications was of a legal nature, in particular in competition law. The Commission does not fall short of legal resources, as lawyers constitute a significant part of its staff. This is particularly true for the specific area of competition law where the Commission enjoys large resources. The Commission could thus rely on its own expertise for develop the regulation of telecommunications and barely needed external input. The second major institutional development was the creation, by the Commission, of the ERG, an official regulatory network in charge of fostering regulatory convergence in those areas that had not been covered by the new competences of the Commission. The ERG was also asked to provide expertise and information to the Commission for those few new competences of the Commission which were not related to competition law and included a fair level of technicality. The ERG was chosen as an option after the Council had refused a more ambitious institutional move proposed by Commission with the High Level Communication Group, in order to maintain its power to implement regulation through comitology. Finally the Cocom, the new comitology committee anchored in the second framework, was also regularly asked to provide the Commission with information or opinions. The expertise role played by the Cocom is due to the fact that, some issues having remained in the hands of the ministries at the national level (depending on the topic), the Commission needed to consult one or the other body.

Finally, the conjectures are confirmed well by T3. At T2, the ERG had showed a clear lack of effectiveness. The need to coordinate national regulatory practices thus remained. In order to improve coordination, the ERG was reinforced. The network of regulators has been replaced by BEREC, a new body enjoying a reinforced and formalized coordination and expertise mandate, subject to the two third majority rule to facilitate internal decision-making. A small EU agency, the Office, has been created on the side in order to provide BEREC with the required administrative and logistical support.

Overall, the telecommunications sector provides a good support to the conjectures by validating most of its elements. Two deviations should, however, be noted. First, the need for coordination at T1 did not lead to the delegation of coordination tasks to a regulatory network but to the Commission diffusing its doctrine within a comitology committee. The use of the comitology committee can be explained by the distribution of competences, at the national level, between the NRAs and the ministries. And the coordination method used is related to the absence of technicality involved in the implementation of the framework. Second, at T2, most of the competences delegated to the Commission did not raise a need for expertise. Here again, this is due to the legal character and the absence of technicality of the implementation tasks delegated.

Chapter 5: Analysis

1 Conjectures

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- *The agencification of networks is more likely than the agencification of committees*

This last chapter is composed of two sections. In the first one, the data is summarised and confronted to the conjectures for each sector separately. The second section discusses the conjectures on the basis of a comparison between the three sectors.

2 In-depth analyses of the three sectors

2.1 Food safety

2.1.1 T1: Legislative approximation (1962-1985)

2.1.1.1 Summary of the data

The EEC started to get into the food sector in the early 1960s. Community action consisted in the approximation of legislations related to food quality and safety, in order to allow the free movement of foodstuffs in the EEC. The food regulation was then divided into three sectors: veterinary, plant health, and foodstuffs, i.e. everything else. Two types of acts could be distinguished: horizontal directives – which applied to a whole range of food products, and vertical directives – which regulated the composition of specific food products. During this period, comitology was not yet established as a practice and every harmonisation measure had to be decided by the Council, even the most technical ones. The member states were responsible for transposing the directives and their enforcement, i.e. performing inspections and controls. The configuration was thus characterised by the absence of implementing regulation combined with a nationally based enforcement.

The need for expertise was very important. The Commission needed scientific input to draft the directives to be adopted by the Council because these were very technical. Various committees were thus created during the 1960s and, above all, in the 1970s. We found a combination of comitology types of committees – also used as a source of expertise by the Commission; scientific committees – composed of independent experts; and advisory committees – to consult stakeholders. This institutional development was similar in the three sectors – veterinary, plant health, and foodstuffs. For the enforcement, coordination did not appear to be particularly problematic. While a few very specific, informal, or ad hoc coordination initiatives were made, in particular in the form of establishing regular contact between civil servants from the different enforcement authorities, no genuine coordination body or network emerged.

2.1.1.2 Analysis

The picture of the food safety sector at T1 falls largely outside the conjectures. The relationship between the distribution of competences and the delegation patterns is not verified here. First, there is an important need for expertise, leading to an expertise delegation, in the form of various committees providing expertise to the Commission, in the absence of delegation of executive competences to the Commission. This is explained by the fact that measures that

would normally be implementing regulatory measures were channelled by the legislator. In this period, indeed, it was not yet legally possible for the legislator to proceed to the delegation of implementing regulatory implementing power to the executive. As a consequence, legislative acts were extremely technical and the Commission required expertise to draft them in the same way it would have needed expertise to draft implementing regulation. In fact, the type of approach followed by the EEC at T1 fails to comply with an assumption upon which the conjectures were developed: the possibility, for policy-makers, to delegate implementing regulatory powers to the Commission under comitology.

Second, although the enforcement arrangement is not expected to fit the conjectures because these were tailored to the arrangements related to the adoption of regulatory decision-making, it can also be discussed. In spite of being nationally based, the policy enforcement has not led to an important need for coordination; hence no coordination delegation pattern emerged. Policy-makers were more focussed on achieving legislative harmonisation than the coordination of enforcement. And legislative harmonisation was challenging enough in this period, where unanimity prevailed as a mode of decision-making in the Council.

2.1.2 T2: The New Approach (1985-1997)

2.1.2.1 Summary of the data

The strategy adopted at T1, based on the traditional Community method of legislation approximation, was revealed as a failure. The pace of harmonisation progress remained far too slow. These difficulties were not specific to the food sector. Two fundamental institutional developments had made possible the adoption of a new approach. First, the Court of Justice of the European Union (CJEU) Cassis de Dijon judgement in 1979 consecrated the principle of mutual recognition, which made it possible to trade a wide range of products between member states in the absence of legislative harmonisation.

The second event was the launching of the single market programme by Jacques Delors on the basis of renewed procedural and decision-making tools. The Single European Act opened the possibility to adopt measures for harmonising legislation on the basis of qualified majority voting in the Council and co-decision with the EP, and to delegate to the Commission implementing powers under the control of comitology committees.

Combining the opportunities provided by these two developments, the Commission announced its new strategy in the field of foodstuff regulation. First, consistently with the CJEU ruling, EEC harmonisation would only address the regulation of food safety. Everything else, i.e. food quality regulations, would be subject to the principle of mutual recognition. Second, the massive use of

delegation of executive powers to the Commission would offload the legislator for the most technical decisions and accelerate the realisation of a harmonised body of legislation on food safety.

In sum, at T2, food safety regulation lay mostly in the hands of the Commission and comitology committees, food quality was mostly regulated at the national level while being subject to the mutual recognition principle, and enforcement was still performed by national authorities. As regards the considerable need for expertise, the Commission could rely on the committees already created at T1. As for the enforcement, the main concern that appeared in this period was not the coordination of national enforcement, but the compliance of national enforcement authorities with EC legislation. The Commission thus set up, within DG VI - Agriculture, an inspectorate unit to monitor how member states were enforcing EC legislation in the veterinary and plant health areas which became the Office of Veterinary and Phytosanitary Inspection and Control (OVPIC). In the foodstuffs area, an informal and bottom-up network of national enforcement authorities was created to exchange best practices.

2.1.2.2 Analysis

T2 provides a partial fit to the conjectures. First, consistent with the conjectures on the relationship between the distribution of competences and the delegation pattern, we clearly find that the numerous competences delegated to the Commission are reflected by a large need for expertise, which is principally channelled by scientific committees.

As regards enforcement in the field of veterinary and plant health, given that monitoring national enforcement of EEC Law is a task of the Commission as a guardian of the Treaty, by applying the conjectures in analogy, we would have expected the regulatory agent to be created outside the Commission as was the case with OVPIC, given the Commission's limited capacities. However, the OVPIC later revealed itself to be suffering from a massive shortage of staff. Regarding foodstuffs, the creation of a network of national enforcement authorities to exchange best practices provides, by analogy, support to the functional institutionalist argument according to which national implementation creates a need for coordination, leading to the creation of regulatory networks. Here, the only aspect that would not be in line with the conjectures is that the network is not an agent of the EC or of the Commission as it was created by the national civil servants themselves.

Finally, the change of approach, between T1 and T2 was clearly due to an enormous lack of effectiveness. However, the lack of effectiveness did not take the form of a reinforcement of the regulatory agent but as a complete change of strategy regarding how the EEC proceeded with legislation. The scientific committee was nonetheless slightly reinforced in 1995 with an

increase in the maximum number of participants, in order to face the increased workload of the Commission. The scope of this latter revision is, however, relatively limited.

2.1.3 T3: The 1997 reforms after the BSE crisis (1997-1999)

2.1.3.1 Summary of the data

T3 corresponds to the outbreak of the BSE crisis and the reforms that immediately followed. BSE is a disease that affects cows that originated in the United Kingdom in 1986. British veterinary authorities interpreted it as merely a veterinary issue, in the sense that it could not be transmitted to humans. The same interpretation prevailed at the EC level. The BSE outbreak was therefore dealt with by the DG VI - Agriculture, with the Veterinary Standing Committee and the Scientific Veterinary Committee. Since public health was not involved, the mutual recognition principle applied and it was not possible to ban the export of British bovine meat. The measures adopted aimed at, instead, limiting the circulation of cows to avoid the spread of the disease, guaranteeing that beef exportations from the United Kingdom stemmed from BSE-free cattle and prohibiting the use of meat and bone meal, which was considered to be to blame for the disease. At the same time, the Commission was trying to downplay the importance of the affair to avoid public concern and failed to proceed to the necessary inspections to make sure the United Kingdom was complying with EC measures.

This all changed in 1996 when it appeared that BSE might be responsible for a new variant of the Creutzfeldt Jacob Disease. The EC immediately decided to ban the export of British beef. The EP decided to investigate the affair and delivered a damning report. The Commission was accused of having failed to proceed to the necessary inspections to monitor the compliance of the United Kingdom with EC measures, of having downplayed the seriousness of the issue, of having given priority to trade over health – by ignoring numerous scientific uncertainties, and, finally, of having neglected to publish dissident opinions of the Scientific Veterinary Committee. Also, the EP disclosed that the internal organization of the Commission regarding the food sector, in particular its fragmentation between various DGs, had prevented public health from being treated as a priority of food policy. The committees were also accused of being too specialised and permeable to national interests, as well as lacking transparency. The EP concluded that a deep reform of the Commission and of the committee system was required and made a series of recommendations in this direction, threatening the Commission to adopt a motion of censure against the college of commissioners.

In order to place public health and consumer protections at the forefront of EC food policy, the Commission first proceeded to an internal reshuffling of competences and resources to the

benefit of the DG XXIV, subsequently renamed DG SANCO. Second, after having considered the option of creating a European agency, the Commission, seeing an opportunity to increase its powers in the field, decided, instead, to keep and reform the system of scientific committees for food. The Commission thus created the Scientific Steering Committee (SSC) whose role was to coordinate the work of all scientific committees of the Commission related to matters of consumer health. Additionally, all scientific committees relevant for food policy were attached to the new DG XXIV. The six pre-existing scientific committees were replaced by eight new scientific committees. Furthermore, the rules related to the inner functioning of the committees as well as the recruitment of scientists were revised in order to guarantee independence, sound scientific evaluations, and transparency. Third, in order to strengthen controls and inspections, the inspection section of OVPIC was reinforced and transferred to DG XXIV.

2.1.3.2 Analysis

The developments of T3 are very much in line with the conjectures, in particular with respect to the functionally-driven change in the delegation pattern. The relationship between the distribution of competences and the corresponding delegation patterns are also confirmed. The distribution of competences has not changed since T2. The Commission is still in charge of adopting a huge amount of implementing regulations, and the member states remain competent for controls and inspections. The delegation pattern has not changed fundamentally; we still have a system of committees in charge of providing expertise to the Commission.

Regarding the reforms, the BSE crisis revealed that the system of committees put in place to provide the Commission with expertise was deeply flawed: with a lack of transparency, lack of independence, and fragmentation of the different committees relevant to food between several DGs. These weaknesses of the committee system significantly undermined the quality of the scientific opinions because they did not allow the objective of public health to be taken into account, as would have been required. Second, by diluting the responsibilities, the flaws of the committees undermined the accountability of the whole system. Yet accountability is particularly crucial in situations of crises like this one. The reforms undertaken by the Commission in 1997 aimed at reinforcing the committee system in the food sector so as to prevent the occurrence of future crises. Committees were replaced, reorganized, coordinated by the SSC and their rules for transparency and independence strengthened. So the transformation of the committee system provides a very good illustration of the conjectured functionally-driven reinforcement of a regulatory agent.

Although far reaching, these reforms may appear rather unambitious compared to the option of creating a European agency – which would have been justified in view of the depth of the

governance problems affecting the committee system. But in this reform, with the power of the Commission in the management of expertise at stake, the latter decided not to opt for the creation of a European agency which would have implied a loss of actual power and of an opportunity to increase its resources and competences in the field. This supports the argument that, in the expertise path, the Commission is likely to prefer European agencies *not* to be created in order to maximize its own power and that the functionally-driven reforms tend to be more gradual than radical.

2.1.4 T4: The creation of the EFSA (2002-)

2.1.4.1 Summary of the data

In 1999, i.e. only two years after the post-BSE reforms, the dioxin crisis broke out. It first highlighted an important extant failure of the committee system: its insufficient capacity to deal with the increasing workload. It thus appeared that a more permanent type of structure was necessary to cope with the amount of work. Second, it deepened the lack of confidence among consumers which, after the BSE crisis and the arrival of GMO technologies, was clearly on the rise. The late 1990s also witnessed a rising distrust at the international level in the EC's use of science and expertise in food regulation. In the beef hormone affair at the WTO, under consumer pressure, the EC adopted a confused position that was mixing risk evaluation and risk management. Yet a clear distinction between the two was not only made mandatory by international agreements, but was also seen as a fundamental pillar of a sound use of science in food regulation. In 1999, it thus became fundamental for the EC to take action to restore the confidence of both consumers and international partners. Added to the lack of capacity of the committees, the confidence crisis thus paved the way for the creation of a European agency.

In 1999, Romano Prodi took office with the new Commission and immediately announced that the creation of a European agency in the food sector was one of its first priorities. Soon the Commission issued the White Paper on Food Safety, followed by a proposal to create the European Food Safety Authority (EFSA), which was adopted very quickly by the EP and the Council. The EFSA's central function would be the provision of solid and independent expertise to be subsequently adopted by the Commission in comitology.

2.1.4.2 Analysis

The creation of the EFSA makes a partial confirmation of the conjectures. The previous regulatory agent, in the form of a system of scientific committees, had proved too weak to meet the high demand for scientific opinions. Furthermore, besides undermining the EC's international credibility, the unfortunate WTO affair on beef hormones also highlighted

weaknesses in the EC's approach to the use of science in food regulation. Finally, the reform undertaken in 1997 proved largely unable to restore the confidence of consumers. These fundamental weaknesses have driven a radical change of regulatory agent, replacing the system of the scientific committees with a European agency.

This institutional development first confirms that EU agencies may only replace regulatory agents after previous reforms have already been adopted and proven ineffective. It also confirms that EU agencies are particularly unlikely to appear as a result of the process of institutional transformation in the expertise path. It was conjectured that, given the Commission's reluctance to create agencies in the expertise pattern, EU agencies might only be created in circumstances of extreme pressure. The food safety sector illustrates this very well although the pressure was not only of functional nature; sociological pressure in the form of a deep crisis of confidence revealed crucial in explaining the agencification process. Even after the BSE crisis, the Commission preferred to opt for a reform of the committee system, without questioning the system as such. It was only when the crisis of confidence and the lack of capacity of the committees had clearly reached unsustainable levels that the Commission, under the leadership of Prodi, was able to accept renouncing its power on the organisation and management of the scientific committees in order to create a European agency.

2.2 Electricity

2.2.1 T1: The first regulatory package (1990-2002)

2.2.1.1 Summary of the data

At T1, the bulk of regulatory authority is at the national level. This configuration led to a need to coordinate regulators and TSOs to facilitate cross-border flows of electricity. Coordination was particularly needed on two issues: the transmission pricing of cross-border electricity flows and the access to and the management of scarce interconnection capacity between national networks. Moreover, a problem of expertise also emerged. At the beginning of the liberalisation process, in order to identify the relevant policy options to move forward, the Commission needed to gather information, data, and expertise. The expertise and information were not needed for the use of delegated executive powers – at T1 the Commission had hardly any, but for preparing legislative proposals.

Three bodies were created at T1 in order to address the needs for expertise and information. The Florence Forum, which gathers regulators, ministries, TSOs, and other stakeholders, serves both purposes. Created by the Commission as a platform to foster the dialogue between

regulators and TSOs, it is expected to produce voluntary agreements and soft peer pressure, which qualifies as a coordination function. Besides, the output of the Florence Forum may also be used by the Commission as draft legislative proposals to be submitted to the Council, which then also makes the Florence Forum an agent providing expertise to fuel the EC regulatory process. The forum thus combines coordination and expertise functions. As regards its format, given its wide membership, it does not qualify as a regulatory network – which is defined, in this research, as a network gathering the national authorities responsible for implementing EC legislation.

If the Florence Forum cannot be seen as a regulatory network, this is not the case of the Council of European Energy Regulators (CEER), which is, precisely, a network of NRAs. It should be noted, however, that it has not been created as an agent of EC policymakers, but is the result of a bottom-up initiative of the NRAs themselves. But although not created by delegation, the CEER's activities contribute to fill the regulatory gap which sparked the creation of the Florence Forum as a regulatory agent by the Commission. The CEER also combines coordination and expertise tasks. With respect to the coordination function, it contributes to mutual learning among NRAs with views to create a common interpretation of the regulatory framework. The expertise function is also met by the CEER activism within the Florence Forum to bring forward ideas allowing the realisation of cross-border flows of electricity.

Finally, the third body is the European Transmission System Operators (ETSO), the federation of TSOs. Being a group of TSOs and not NRAs, ETSO does not qualify as a regulatory network. And neither is it an agent of the Commission: as with the CEER, it was created in a bottom-up fashion. ETSO nonetheless constitutes a first step towards the coordination of TSOs – necessary to allow cross-border trade – and is involved, through the Florence Forum, in the generation of ideas meant to serve as a basis for future legislative proposals. ETSO, without formally being an agent of the Commission, and without being a regulatory network, is nonetheless engaged, alongside the CEER, and within the Florence Forum, in the efforts to close the regulatory gap by producing both coordination and expertise.

2.2.1.2 Analysis

The electricity case at T1 confirms the conjecture on the following elements: a nationally based implementation of EC legislation creating a need for coordination, and the need for coordination pushing the Commission to set up a body to endorse coordination tasks.

However, while it was expected that the regulatory agent would be a regulatory network, the Commission decided to create a Forum, involving the TSOs as well. This can certainly be explained by the fact that the deployment of cross-border electricity flows did not require

regulatory coordination alone, but also, technical and operational coordination, which takes place at the level of the TSOs. It was therefore essential to involve the TSOs in the endeavour to make cross-border trade possible.

Interestingly, next to the Forum as the main regulatory agent, two bodies have emerged: a network of regulators and a federation of TSOs. A first explanation for this was the necessity, for both the NRAs and for the TSOs, to structure their positions in order to be more influential within the Florence Forum. So it can be seen as a further manifestation of the particularity of the electricity sector already mentioned: the fact that it was indispensable to have TSOs involved in the discussions, alongside the NRAs.

As regards the creation of the regulatory network in particular, although it was not created by EC policy-makers as specified in the conjectures, it nonetheless reinforces the functional institutionalist argument according to which a nationally based implementation leads to the creation of a regulatory network type of body in order to address the need for coordination among regulators. The bottom-up creation of the regulatory network did, indeed, address an institutional vacuum that was not filled by the Forum: the coordination among NRAs with respect to the interpretation of the regulatory framework. While the Commission had not created a network of regulators in order to organise coordination among them, the regulators did so spontaneously, which indicates that the situation created a genuine pressure for creating a regulatory network type of body.

Finally, the Commission was in crucial need of information and expertise, in spite of not having been delegated any substantial executive powers. This is explained by the fact that the Commission lacked expertise and information for the preparation of legislative texts. While it was assumed that legislative texts remained general enough not to spur such needs, which would rather characterise regulatory activity at the implementation level, this situation proves, on the contrary, that a very high degree of technicality may already be involved at the legislative stage.

2.2.2 T2: The second regulatory package (2002-2009)

2.2.2.1 Summary of the data

The Florence Forum structure did not prove to be strong enough to overcome the national economic interests that kept blocking progress towards the inter-connection of national networks. The regulatory gap remained open. The Commission thus launched a revision of the regulatory framework in order to address this issue. In the second regulatory framework, few new executive competences were delegated to the Commission. The implementation of the new

framework thus remained in the hands of the member states, leaving the question of the regulatory gap unresolved. New solutions were required to address the need for coordination. On the expertise side, the Commission was still, as at T1, in need of expertise and information. This need has even been increased with the few new executive competences delegated.

While the Florence Forum continued its activities, remaining the locus of the discussion between regulators and TSOs and the Commission, a new agent was created in the form of a regulatory network, the European Regulators Group for Electricity and Gas (ERGEG). The Commission chose the network form instead of an agency because they saw the need to move only gradually on the institutional front in order to acquire the agreement of the member states. The new ERGEG would not replace the CEER. In fact, both networks have become complementary. The ERGEG was delegated both coordination and expertise tasks. It was in charge of facilitating coordination among NRAs for a consistent application of the framework, which it did through the adoption of a series of (non-binding) guidelines of good practice. Besides, the creation of the ERGEG was also motivated by the willingness of the Commission to take advantage of the pooling of NRAs' expertise and experience to palliate its lack of resources. Some of the output of the ERGEG was indeed later codified by the Commission – via either comitology or legislative processes.

2.2.2.2 Analysis

T2 provides an almost perfect illustration of the conjectures. First, with respect to the shift from T1 to T2, the revision of the delegation pattern was, as conjectured, motivated by the lack of effectiveness of the previous agent: the Florence Forum. Second, regarding the relationship between the competence distribution and the delegation pattern, as conjectured, the Commission creates a regulatory network in charge of fostering coordination among NRAs. Finally, the choice for a regulatory network instead of a European agency is also in line with the conjectured gradual nature of the process of institutional change. The only point that departs from the conjectures – and which was already discussed for T1 – is the presence of an important need for expertise and information accompanied by the delegation of expertise tasks to the agent in the absence of significant delegations to the Commission.

2.2.3 T3: The third regulatory package (2009-)

2.2.3.1 Summary of the data

The deep transformation of the delegation pattern at T3 was meant to improve radically the coordination mechanisms established in 2002, which did not prove strong enough to close the regulatory gap. Between the two regulatory packages, problem pressure was increasing. In

2005, the member states realised that an integrated electricity market could bring highly desirable advantages, such as contributing to the security of the energy of supply within the Union, which was an increasingly important concern in a context of growing international instability. But the development of a suitable cross-border flow of electricity was still impeded by huge obstacles of a technical, operational, and regulatory nature. The ERGEG was limited, above all, by the non-binding nature of its guidelines, and the operational coordination among TSOs had not been achieved.

In terms of governance, the most important changes brought by the third package were the massive delegation of powers to the EU level through the new procedure for network codes; the creation of the Agency for the Cooperation of Energy Regulators (ACER); the formal involvement of the TSOs in the regulatory process through the European Network of Transmission System Operators for Electricity (ENTSO-E); and the empowerment of NRAs. DG Energy and transport had initially planned to have the network codes drafted by ENTSO-E and adopted by ACER. Negotiations within the Commission prevented such a proposal. The necessity to preserve the Commission's executive role, backed by the Meroni doctrine, made it impossible to delegate to an EU agency the power to make general and binding regulatory decisions. In the co-decision process, while the EP was in favour of relaxing the interpretation of the Meroni doctrine, the Council, keen to preserve its own involvement through comitology committees, joined the Commission and its strict interpretation of the Meroni doctrine. As a result, the formal adoption of the network codes has been entrusted to the Commission under comitology. The drafting of the codes is made by ENTSO-E, under the supervision of ACER. And the prior identification of priority areas requiring the adoption of network codes is undertaken by the Commission – after consulting ACER.

This new procedure related to the network codes implies a considerable increase in the Commission's executive competences. The NRAs, however, remained in charge of many aspects of electricity regulation as not everything was covered by the network codes. The competence distribution thus became clearly mixed, exhibiting a significant share of regulatory authority at the level of both the Commission and the NRAs. On the one hand, the Commission was far from possessing the expertise to prepare and draft the network codes. On the other hand, the coordination remained necessary on those other aspects of electricity regulation that were not covered by the new competences of the Commission. Similarly, coordination was still needed among the TSOs. With a mixed distribution of competences, both coordination and expertise requirements needed to be addressed through regulatory delegation.

The network of regulators was transformed into ACER, an EU agency. The network structure was too weak and informal to receive the new competences and tasks that needed to be

delegated to the group of NRAs. In particular, they were given a legally defined responsibility to intervene in various regulatory decision-making processes by issuing opinions or advice and the capacity to make binding individual decisions. From a legal point of view, such a reinforced and formalised participation in the EU regulatory process could not be given to an informal network. It could only be attributed to a more formal body, i.e. an EU agency. Furthermore, the increased workload required from the group of NRAs also necessitated an increase of resources. It was necessary to set up a structure that would provide administrative support and continuity to the work of the regulators and to fund it with the EU budget. Here again, the legal framework of the EU made this impossible to realise without the creation of an EU agency. In sum, the increased responsibilities delegated to the group of regulators cried out for a reinforced institutional structure. The regulatory network format was thus replaced by the EU agency model.

A similar process explains the creation of ENTSO-E. The necessary coordination among TSOs required establishing a platform under EU law and mandating them to come up with clear coordination outputs. Furthermore, the new framework gave TSOs a formal role in the EU decision-making process. This constituted an additional reason for creating a structure that would be anchored in the EU institutional framework.

Finally, with views to improve regulatory coordination, the regulatory package has also significantly empowered the NRAs, with a considerable expansion of their responsibilities and a significant reinforcement of their independence. It was necessary to harmonise the competences of NRAs across countries in order to ease discussion and coordination among them. This has been done through the delegation of a long list of regulatory competences to the NRAs within the regulatory framework. The lack of independence of some NRAs which was also encumbering the adoption and implementation of EU-level guidelines had also been addressed by a reinforcement of the independence requirements in the framework.

2.2.3.2 Analysis

As with T2, T3 is a good fit with the conjectures. First, as expected, the delegation pattern established at T2 proved insufficient to meet the challenge of coordination and market integration. And this lack of effectiveness has triggered the reform of the delegation pattern.

Second, the link between distribution of competences and types of tasks delegated met is also validated. At T3, a significant part of the coordination requirements were met through the delegation of regulatory authority to the Commission under comitology. As a consequence, the electricity sector showed a mixed distribution of competences. This led both coordination and expertise needs to be felt in electricity sector, which was addressed by the delegation of expertise tasks to the regulatory agents. While a need for expertise was already present at T1

and T2, the need for expertise characterised at T3 is much more important. The preparation and drafting of the network codes not only represents a huge amount of work, but it is also extremely technical. Hence, a very large share of the expertise needs felt at T3 was new and clearly due to the delegation of new competences to the Commission with respect to the network codes. The co-existence of both coordination and expertise needs at T3 led the policy-makers to delegate, accordingly, both types of tasks to the regulatory agents. Here again, while the regulatory agents had already been delegated expertise tasks at T1 and T2, there is a huge net increase in the amount of expertise tasks required from them at T3.

Third, in the face of particularly high and increasing pressure to integrate markets, policy-makers decided to reinforce considerably the regulatory agent. Accordingly, the regulatory network was transformed into a relatively powerful EU agency. The amount of powers delegated to the EU agency have been limited due to the interest of pre-existing actors, the Commission and the Council, in preserving their role in the implementation process. Nevertheless, ACER is among the strongest of the existing EU agencies. It also it represented a huge leap forward compared to the previous delegation pattern based on the regulatory network in a sector on which the member states have traditionally been keen to maintain a lot of control. Consistent with the conjectures, this significant reinforcement of the regulatory agent is due to the particularly high problem pressure felt in the sector during the revision of the framework.

Finally, it should be noted that the creation of ENTSO-E as an additional regulatory agent was not covered by the conjectures. Here again, this can be explained by the functional necessity, in the electricity sector, to develop coordination among the TSOs in order to overcome the technical obstacles to cross-border flows of electricity. This element nonetheless provides indirect support of the conjectures in that it mirrors, at the level of the TSOs, the conjectures on the coordination pattern and coordination path that were developed to be applied to the NRAs. The TSOs are the actors that *de facto* implement the EU regulatory framework. Yet the fact that system operating is handled at the national level through the TSOs represents a huge problem of coordination when it comes to interconnecting the different national grids. A previous delegation pattern had been set up with the Florence Forum, but revealed itself to be largely inadequate to meet the coordination requirements. EU policy-makers have thus created another agent, in the form of a network of TSOs, with a reinforced coordination mandate. The network of TSO is also more formally involved in the EU regulatory process, through its role with the drafting of network codes, to meet the increased demand for expertise. We thus see with the group of TSOS, as with the group of regulators, a process of gradual reinforcement of the regulatory agent structuring them, accompanied by an extension of their mandate towards more expertise functions.

2.3 Telecommunications

2.3.1 T1: The first regulatory package (1988-2002)

2.3.1.1 Summary of the data

At T1, the implementation of the regulatory framework is predominantly done at the national level and the Commission is delegated a few powers under comitology. Divergent applications of the framework were impeding the integration of markets, in particular in the areas of licensing, interconnection rules and rates, as well as modalities for the funding of universal service. The need for coordination was thus clear. However, the member states refused twice the creation of specific bodies for the coordination of licensing.

Little expertise was needed for the Commission however, despite the few executive competences delegated. The kind of knowledge required to draft proposals and recommendations was not so much of a technical but of a legal and commercial nature. The Commission nonetheless required information from the member states, to have a view of what was happening on the ground. In the field of radio spectrum, despite a few harmonisation powers delegated to the Commission, the bulk of the regulatory authority remained national. The need for coordination was thus very high. But the need for expertise was equally high, despite the fact that very few competences were actually delegated: radio spectrum management is indeed a very technical field.

Both the need for coordination and the need for information were addressed through the ONP Committee. The ONP Committee was a comitology committee and had therefore been created for the purpose of controlling the Commission when making use of its delegated powers. Hence, in spite of not having been created to meet the demand for coordination and information, it has been used for these purposes too. Coordination was mostly addressed through the diffusion and discussion of Commission implementing papers, which consisted in clarifying how the regulatory framework should be interpreted.

In 1997, the newly created regulators gathered and created, in a bottom-up fashion, an informal network called the IRG. They felt the need to discuss the interpretation of the framework and to exchange best practices regarding the common challenges they were facing.

Finally, the European Conference of Postal and Telecommunications Administrations (CEPT) played an important role in providing expertise to the Commission in the field of radio spectrum frequencies and numbering. The CEPT had been created in 1959 as an intergovernmental body gathering European telecommunications monopolists in order to foster, amongst others, the

coordination of the use of radio spectrum frequencies to avoid interferences between countries and the coordination of numbering resources. The CEPT was completely independent from the European Communities and its membership covered the entire European continent. The CEPT was the sole body in Europe capable of dealing with the complexities of the management of radio spectrum and numbering resources. Therefore, as the EC entered this field, by giving the Commission the possibility to adopt a few implementing regulation for harmonisation, policy-makers turned to the CEPT for the provision of the technical expertise required. The CEPT had already worked on the issues addressed by EC directives and decisions, so some of the legislative acts consisted in making binding pre-existing recommendations that emanated from the CEPT. And where no CEPT output could be readily made binding, the CEPT would be mandated by the Commission to produce a recommendation that would then be codified through the comitology process.

2.3.1.2 Analysis

Overall, T1 in the telecommunications sector does not provide strong support to the conjectures. The only element of the conjectures that is fully validated is the relationship between the nationally based implementation and the need for coordination.

The need for coordination, however, has not led to the creation, by EC policy-makers, of a regulatory network in charge of coordination tasks. First, under the first regulatory framework, the coordination venue was the Open Network Provision (ONP) Committee. The ONP Committee gathered representatives of the national ministries who remained the key actors of national implementation during most of the 1990s. Indeed, in the early 1990s, NRAs had not yet been created and once they were, it took some time before they became the central actors of the implementation of telecommunications regulation at the national level. Of course, the timing and the gradual character of the shift of competences from the ministries to the NRAs varied between countries. And as long as not all the member states, or at least a great majority of them, had established and empowered an NRA, it would not have been appropriate, from the point of view of EC policy-makers, to create a network of NRAs in order to foster regulatory convergence. So, until the late 1990s, national ministries remained central actors of policy implementation and the ONP Committee, composed of representatives of national ministries, was the most appropriate venue to discuss how to foster a harmonised implementation of the framework. It should also be specified that the use of the ONP Committee for coordination purposes is also due to fact that possible alternatives had been discarded by the member states who refused twice to create a specific body for the coordination of licensing.

Second, while the ONP Committee was the coordination venue, it was not delegated coordination tasks.[429] National representatives were not expected to discuss among themselves or provide common interpretations or principles. Rather, the endeavour towards regulatory convergence took another form, much more as a top-down process. The Commission used to distribute implementation papers to explain how the framework should be interpreted. Some discussions with the national representatives were most probably involved but, essentially, it was the Commission acting as a teacher.

Then, as in the electricity sector, a regulatory network has been created as a result of a bottom-up initiative of the regulators themselves – instead of a decision of EC policy-makers: the Independent Regulators Group (IRG). For the regulators, however, the objective of the network was not coordination *per se*. They rather wanted to learn from each other to gain insights on how to deal with the challenges they had in common with their counterparts. Hence, the reason the IRG was created was not so much to meet the need for coordination as such, if we understand coordination as the effort made by regulators to mutually align their behaviour with views to achieve a common objective. However, mutual learning shall lead, *de facto*, to a certain degree of coordination by producing convergence among regulators, at least to a small extent.

With respect to the expertise dimension, the confrontation of the two sub-sectors – radio spectrum and telecommunications – indicates one relevant factor that was not integrated in the theoretical framework: the technicality of the sector. While the Commission is delegated a few executive competences in both sub-sectors, the resulting need for expertise and external support is extremely different. In telecommunications, as the relevant knowledge is of a legal and commercial nature, the Commission has been able to establish itself as an intellectual leader – capable, in particular, of explaining to national ministries how to implement the framework. The picture is very different in the highly technical area of radio spectrum where the Commission is unable to produce any harmonising regulation without the help of the CEPT.

Finally, the radio spectrum sub-sector does also show that a significant need for external assistance for drafting technical regulations can be dealt with through venues other than

429 This relies on a distinction between coordination as a process and coordination as an outcome. Seen as a process, coordination refers to the activity performed by a group of actors to mutually adjust each others' behaviour in order to guarantee the consistency of the aggregated regulatory output. However, the consistency of an aggregated regulatory output can be pursued by other means, for example through hierarchy. There, a third body would guide the behaviour of the group of actors in a top-down dynamic. There, coordination is rather defined as an outcome that can be achieved by various means, in particular through mutual adjustment or hierarchical processes. In this particular case, the ONP as 'coordination venue' means that it was the ONP committee venue through which coordination – as an outcome – was achieved. The absence of delegation of coordination tasks to the ONP committee refers to the fact that the process through which coordination was achieved was not the mutual adjustment between the members of the ONP committee. Rather, coordination was pursued with top-down mechanisms.

scientific or expert committees created by the Commission. Similarly, the need for coordination in the management of the radio spectrum is also channelled by the CEPT and not by a European regulatory network. A combination of two factors explains why these tasks were delegated to the CEPT. First, the CEPT already existed and was the only body in Europe that was capable, in terms of expertise, of producing what was needed for EC regulation. Second, the member states have always opposed the creation of an EU body to replace the role of the CEPT in the European regulatory process. They have always wanted to retain the control over radio spectrum management. The CEPT was an intergovernmental body, completely independent from the EC. The CEPT was thus convenient because it allowed the member states to keep the Commission and the integration process at a distance. Hence, as regards the radio spectrum management, both the coordination and the provision of expertise have been done through the CEPT.

2.3.2 T2: The second regulatory package (2002-2009)

2.3.2.1 Summary of the data

In the early 2000s, several factors motivated a revision of the regulatory framework and, among them, the need to increase regulatory convergence. And neither the ONP Committee nor the IRG was suited to do so. Since the late 1990s, the NRAs had become the key national actors of implementation, which made the ONP Committee, composed of representatives of national ministries, largely irrelevant as a venue to coordinate national regulatory practices. And while the IRG, as a regulatory network, gathered the regulators, the Commission had no grip on it and the regulators showed no willingness to work voluntarily in order to foster regulatory convergence.

At T2, the most radical institutional change operated with views to foster regulatory convergence was the delegation of a significant share of regulatory authority to the Commission in the freshly designed market analysis process. The market analysis process, adapted from competition policy, is composed of three sub-decisions: market definition, identification of dominant operator, and choice of remedies. There, the role of the Commission took the form of a veto power on all market definitions and identifications of dominant operators made by the individual NRAs in their member states, i.e. the first two elements of the market analysis process. The NRAs nonetheless had the final word on the third one, the choice of remedies, on which the Commission had the capacity to make recommendations only. The Commission also had the possibility to adopt recommendations, which included the recommendation on relevant markets that plays a central role for the market analysis process. A new comitology committee has been created to accompany the Commission in the use of these new competences: the Communications Committee (Cocom).

The new market analysis process introduced a significant level of sophistication compared to the previous regulatory framework. It provided many tools to tailor the regulatory decisions to the specificities of the markets. Doing so, it also significantly broadened the room for interpretation and the risk for regulatory divergence. While the Commission's veto power palliated this risk for market definition and the identification of dominant operators, the scope for divergence remained large for the choice of remedies. Coordination was thus needed at this level. As for the need for expertise, in spite of having been delegated important responsibilities within the market analysis process, the Commission did not require the assistance of an external body in this respect.

The need for coordinating the approaches adopted by the NRAs in the choice of remedies was dealt with by the European Regulators Group (ERG), a new regulatory network created by the Commission. This network format was adopted after the Council had refused the Commission's more ambitious proposal to create a High Level Communication Group because the body would threaten the implementing power they exerted through comitology committees. Unlike the IRG, the ERG was anchored in the EU legal framework and provided the Commission with an observatory position as well as with the secretariat of the network. Given the implication of the Commission and its more formal status, the ERG was supposed to channel the work of the group of regulators towards regulatory convergence better than the IRG did. The provision of external input, in the form of expertise or information, was channelled by both the ERG and the Cocom. The Commission was consulting one or the other body depending on the topic, sometimes both were consulted for the same topic.

Finally, the IRG remained very active during the second regulatory package, despite the Commission's wish to make it redundant through the creation of the ERG. In fact, the regulators used the IRG as a way to gather and discuss without the Commission. In particular, the regulators systematically used to discuss among themselves before ERG meetings in order to isolate and weaken the Commission. Progressively, however, they reduced the time dedicated to IRG meetings to the benefit of ERG meetings.

As regards the radio spectrum area, T2 did not represent any important change. A few more powers were delegated to the Commission and despite the Commission's wish to change the regulatory agent, the CEPT remained the body in charge of coordination and the provision of expertise.

2.3.2.2 Analysis

T2 is pretty consistent with the conjectures. First, the institutional setting of T1 lacked effectiveness and was not in measure to create the regulatory convergence required to integrate

the different national markets. A problem of coordination was thus still felt before T2 and the second regulatory framework has modified the institutional settings with views to palliate this. Part of the solution consisted in creating the ERG, a regulatory network, in order to improve the delegation pattern of T1 where regulatory agents did not prove able to produce coordination and convergence. Second, while functionally driven, the creation of the ERG is also a second-best solution after a more ambitious option, in the form of a High Level Communication Group, had been opposed by the member states. The improvement of the delegation pattern unfolds gradually.

T2, however, also presents two elements that were unexpected. First, while the Commission had been delegated important regulatory powers, these did not trigger a corresponding need for expertise and assistance, at least not to the extent anticipated. This was due to the fact that market definition and the identification of dominant operators were competition law concepts. And if any actor in Europe is expert and well staffed in EU competition law, it is the Commission itself. The Commission has thus been able to effectively and efficiently cope with its new responsibilities without any external assistance. If the Commission was able to endorse the bulk of its new responsibilities on its own, it nevertheless needed some form of input in terms of expertise and information, in particular to draft recommendations and write reports on the state of the implementation of the policy in the member states.

Second, the Commission's need for expertise is not only addressed by the ERG, but also by the Cocom. The explanation is the same as in T1 with regards to the expertise role of the ONP Committee. If the NRAs had become the main national actors for the implementation of the framework, several topics remained in the hands of the ministries, such as, typically, universal service or the attribution of licenses. Of course, the precise distribution of tasks between the NRAs and the ministries depended on the country. But the regulatory framework provided, at least, a set of core tasks, in particular related to the market analysis process, that member states had to transfer to their NRAs. The distribution of competences at the national level between ministries and NRAs then spilled over to the distribution of competences at the EU level between the Cocom and the ERG. This explains why the Commission was consulting one or the other body depending on the topic.

2.3.3 T3: The third regulatory package (2009-)

2.3.3.1 Summary of the data

A few years after the entry into force of the second regulatory package, the telecommunications internal market was still far from being realised. On the one hand, the veto power of the

Commission on market definition and identification of dominant operators had allowed the development of a consistent regulatory approach on these issues. On the other hand, the choice of remedies was still subject to wide divergences among the member states. The ERG structure showed itself to be too loose and allowed regulators to continue to resist the harmonisation endeavour the Commission wanted them to engage in. It was necessary to reform the institutional setting, and in particular to reinforce the regulatory agent. Convergence in the field of remedies required setting up an improved mechanism of coordination between the NRAs.

Against both the expectations of the member states and the opinion of the DG Information Society, Commissioner Reding decided to make a very ambitious proposal. While the DG was in favour of the creation of a low-profile secretariat that would have given continuity and consistency to the work of the regulators, the Commissioner proposed the creation of a big EU agency, with important powers in the field of radio frequencies management and which would absorb ENISA, a small EU agency specialised in the security of information networks. On top of this, the Commission hoped to be delegated a veto power on the choice of the remedies. This frontal approach antagonized the member states. The Commission thus had to come back with a new, watered down proposal, leaving aside the delegation of power in the field of radio frequencies and the merger with the European Union Agency for Network and Information Security (ENISA). Still, negotiations were conflictive and the final outcome is pretty far from the second proposal of the Commission, as the Council managed to remain united to avoid far-reaching changes.

No significant shift in the competences of the Commission was achieved, despite the Commission's wish to be given the veto power on remedies. So the distribution of competences remains mixed, in a configuration very close to that established at T2. Given the lack of engagement of the NRAs towards regulatory harmonisation within the ERG, it was necessary to reinforce the coordination mechanism in order to force the regulators into a more cooperative behaviour. As regards the need for expertise, while not having been delegated the authority on the choice of remedies, a new decision-making procedure would guarantee a deeper involvement of the Commission in the matter. Unlike market definition and the identification of dominant operators, which are legal issues, the choice of remedies involves a significant amount of technicality. The Commission would thus need external support to assume its increased involvement in the procedure.

In order to meet the demand for improved coordination as well as for more expertise, the ERG was transformed into the Body of European Regulators for Electronic Communications (BEREC). While the Commission was willing to have the ERG replaced by a powerful EU agency, the outcome is an atypical two-layer structure, deprived of significant powers. On the one hand, the

member states wanted to avoid the agencification of the ERG at all costs; on the other hand, they were willing to create a sort of secretariat to provide the group of regulators with administrative and logistical support. Yet, the only way to fund such a structure with the EU budget, even a very small one, was to make an EU agency. And since they did not want the group of regulators to be an agency, they created two distinct bodies. While BEREC, composed of the Board of Regulators as a unique organ, is not an agency, the Office, which plays the role of secretariat for the group of regulators, is an EU agency, albeit a very small one.

BEREC is delegated both coordination and expertise functions. For the coordination dimension, BEREC first took over the mandate of ERG to produce common guidelines. However, the group of regulators would be able to adopt an act on the basis of a two-thirds majority, instead of unanimity – as was the case with the ERG. A second and very important coordination task was the peer review process for the choice of remedies. In the absence of authoritative and hierarchical tools for the remedies, a complex and heavy procedure was designed in order to increase soft pressure on the NRAs, in particular by involving the group of regulators in a formalized peer review process. In case the Commission doubted the consistency of the draft decision of the NRAs with the internal market, the Commission would have the capacity to launch this complex and lengthy procedure in which the fellow regulators would have to take a position on the draft decisions of the NRA. After several procedural stages, unfolding over several months, the NRAs would still have the last word on its decision. But it would be socially very difficult for a regulator, especially for the small ones, to maintain a decision that would run against the opinion of the group of regulators on top of that of Commission. The third important coordination task lies in the possibility of asking BEREC for an opinion in cases of cross-border disputes between regulators.

BEREC has also reinforced advisory tasks compared to the ERG. It is now formally involved as a consultative body in the decision-making procedures applying to the Commission. Every time the Commission makes use of its delegated competences, BEREC should issue an *ex ante* opinion, sometimes even replacing the Cocom. Under the second package, the Cocom was consulted every time the Commission considered opposing its veto to a decision of an NRA. BEREC would then be consulted in these situations. BEREC also became an advisory body to the Council and the EP as it has been given the capacity to provide them with advice or opinions.

With respect to the radio spectrum management, no significant change in competences was registered at T3 and the CEPT remained the regulatory agent.

2.3.3.2 Analysis

T3 fits the conjectures very well. First of all, the reform is motivated by the lack of effectiveness of the institutional setting at T2. This regarded, in particular, the remedies where the ERG failed to palliate the important discretion left to the member states. The ERG structure proved too weak to force the regulators to coordinate their approaches in order to foster regulatory convergence. The regulatory agent needed to be reinforced and this is what drove the 2009 reform.

On the level of the relationship between the competence distribution and the delegation pattern, T3 provides good support to the conjectures. With a mixed competence distribution, BEREC was delegated both coordination and expertise tasks. Its coordination tasks were mostly aimed at bringing consistency where NRAs had important leeway, i.e. in the choice of remedies. And its expertise tasks were answering the new competences delegated to the Commission – although it should be recalled here that, as in T2, the most important competence of the Commission, its veto power, is assumed solely by the Commission.

With regard to the reinforcement of the agent, T3 corresponds to a partly failed agencification process. The Commission's ambition was the creation of a large agency. On the one hand, an agency has been created – the Office. But on the other hand, the Office is a very small agency, and it has failed to integrate the group of regulators in its structure. Several factors explain this. First, in the period surrounding the reform process, the telecommunications sector was not at the forefront of member states' concerns. Their enthusiasm for the information society of the early 2000s had decreased. While it was clear that markets were not integrated enough, the absence of additional problem pressure for the member states – such as in the electricity sector – explains why they were more sensitive to the prospect of losing power through delegation. Furthermore, the NRAs themselves were hostile to the Commission – as they have always been in the telecommunications sector. This hostility existed even in the early days of the IRG and it was further fuelled by the 2002 regulatory package with the market analysis procedure. The veto power configuration placed the Commission in a hierarchical and conflictive position towards the NRAs which sustained defiance from the part of the regulators vis-à-vis the Commission's endeavours to further europeanize the sector.

Finally, with the third regulatory package, the expertise role of BEREC was broadened, to the detriment of the Cocom in particular. The model of the regulatory agent based on NRAs, rather than on ministries, is progressively gaining ground. This is a logical and functional consequence of the evolution of roles at the national level between ministries and NRAs.

3 Comparison between the three sectors

3.1 The relationship between competence distribution and delegation pattern

The relationship between the distribution of competences and the delegation pattern can be studied by comparing not only between sectors, but also, between periods within each sector (see table 5.1). Considering each combination [Sector – Period] as one case, this makes ten cases in total. Then, the relationship between competence distribution and delegation pattern can be broken down in two: the relationship between competence distribution and type of regulatory agent, and the relationship between competence distribution and type of regulatory function delegated. So there are ten cases to evaluate two sub-conjectures. Among the ten cases, five are perfectly consistent with the conjectures, two do not confirm the conjectures only for the determination of the regulatory function, and three refute the conjectures in both of its aspects – regulatory agent and regulatory function.

3.1.1 Findings

It can first be noted that the three cases that are in complete disagreement with the conjectures correspond to T1 in the three sectors. This may partly be related to the fact that the first stage in the creation of a public policy tends to be hazy and that it takes time for policy-makers to 'find their feet' and come up with a relatively stable and efficient structure for the implementation of a public policy. While this remark is general and may apply to all three sectors, a specific comment on the case [Food T1] should be made. T1 in the food sector took place a very long time ago, running from the early 1960s to the mid-1980s. This period ended with the Single European Act and, with it, the Single Market Programme and a series of new decision-making tools and techniques to accelerate market integration. Yet the conjectures have taken as an assumption the availability of decision-making tools and techniques that were only introduced in the mid-1980s, in particular the use of delegated powers to the Commission under comitology. This automatically discards the case [Food T1] as a relevant case for evaluating the conjectures.

		FOOD		ELECTRICITY		TELECOMS	
		EXPECTED	FOUND	EXPECTED	FOUND	EXPECTED	FOUND
T1	COMPETENCE DISTRIBUTION	MEMBER STATES		MEMBER STATES		MEMBER STATES	
	MAIN AGENT	Network	Committees	Network	Forum	Network	Comitology committee
	MAIN FUNCTION	Coordination	Expertise	Coordination	Coordination + expertise	Coordination	Receiving instructions
T2	COMPETENCE DISTRIBUTION	COMMISSION		MEMBER STATES		MIXED	
	MAIN AGENT	Committees	Committees	Network	Network	Network	Network
	MAIN FUNCTION	Expertise	Expertise	Coordination	Coordination + expertise	Coordination + expertise	Coordination
T3	COMPETENCE DISTRIBUTION	COMMISSION		MIXED		MIXED	
	MAIN AGENT	Committees or Agency	Committees	Network or Agency	Agency	Network or Agency	Network - Agency
	MAIN FUNCTION	Expertise	Expertise	Coordination + expertise	Coordination + expertise	Coordination + expertise	Coordination + expertise
T4	COMPETENCE DISTRIBUTION	COMMISSION					
	MAIN AGENT	Committees or Agency	Agency				
	MAIN FUNCTION	Expertise	Expertise				

Highlighted cells: Divergence between expectations and findings

Non highlighted cells: Match between expectations and findings

Table 5.1: Findings on the relationship between competence distribution and delegation patterns

If we leave aside [Food T1], there are only two cases in which the type of regulatory agent created did not correspond to the expectations: [Electricity T1] and [Telecoms T1]. In both cases, the expected type of regulatory agent was a regulatory network, i.e. a network composed of the national authorities in charge of implementing the regulatory framework. In both sectors, these national actors are NRAs. But, at T1, not all countries had created NRAs and the NRAs that had been created could demonstrate vast discrepancies in their powers and mandate. This first obstacle was coupled with the fact that NRAs, at T1, were not the only relevant national actors involved in the implementation of the framework. So any attempt to foster coordination and convergence in national implementations had to take into account the fact that several national actors would have to be involved in one way or another.

With respect to the type of actors relevant at the national level, in both sectors, national ministries were still important actors at T1. In spite of these common points, this factor – the variety of relevant national actors – led to different delegation patterns in the two sectors. In [Telecoms T1], coordination went through the comitology committee, where the Commission circulated and presented implementation papers designed to guide national administration in the interpretation of the framework. The comitology committee was gathering civil servants from the national ministries, but some of them came to the committee together with their NRAs. So comitology committees allowed the Commission to interact with both ministries and NRAs, although only to a certain extent. While probably not ideal, this arrangement was relatively suited to a situation where, at the national level, regulatory competences were shared between the ministries and the NRAs and where the line of demarcation between regulators' and ministries' responsibilities used to vary a great deal between countries. The way coordination was supposed to be achieved in [Telecoms T1], however, was not through the delegation of coordination tasks to the comitology committees. The Commission was very much in the position of intellectual leader in the liberalisation of telecommunications, which, at the time, was addressed mostly with a legal and commercial type of expertise rather than a technical one. The absence of high technicality in [Telecoms T1] led the Commission to approach the need to foster regulatory convergence by simply diffusing its doctrine to national authorities. It was not necessary to delegate the coordination task to the national authorities themselves.

If technicality was low in [Telecoms T1], it was very high in [Electricity T1]. The Commission could not drive regulatory convergence on its own, it needed national actors. And in electricity, this went as far as it was necessary to involve the TSOs and even other stakeholders on top of the national regulators and ministries. Allowing cross-border flows of electricity required, in the very first place, a properly functioning interconnection of the grids, which involves a huge amount of coordination at the technical and operational level. The level of technicality involved

to do so made it impossible to engage in this endeavour without the TSOs, relying on regulatory authorities only. This is why the Commission opted for the Forum format at T1, allowing for a wide membership going beyond the regulatory authorities and ministries.

In [Electricity T1], the Forum was therefore delegated a coordination mission but would also provide expertise to feed in the regulatory process. This feature, the delegation of expertise tasks to the agent in the absence of significant delegated powers to the Commission, is common to [Electricity T1] and [Food T1]. This is due to the fact that, in both cases, the Commission needed expertise in order to draft legislation. So the explanation lies in the unusual degree of technicality involved in legislative texts that would normally be characteristic to implementing regulation. In [Food T1], this is simply explained by the fact that it was not yet possible to delegate executive competences to the Commission in this period. In [Electricity T1], given that the first regulatory package did not provide the Commission with the authority to adopt a regulation aimed at facilitating the interconnection of grids, the Commission opted for the legislative route to do so. In [Electricity T2], while the implementation remained largely based on the member states, the Commission had been delegated a few executive competences, which, given the high technicality of the sector, led to a significant need for expertise.

If [Electricity T1] and [Food T1] are characterised by the delegation of expertise tasks in the absence of delegated executive competences to the Commission, the opposite situation can be found in [Telecoms T2]. As already mentioned, an important branch of the regulation of telecommunications involved little technicality as competition law constituted the kind of expertise required. As the Commission had significant in-house resources and expertise in competition law, no external support was needed.

Before concluding this section on the relationship between competence distribution and delegation pattern, a last comment should be made regarding the change over time. The explanation provided in the first chapter on the change in the regulatory tasks relied on the change in the distribution of competences so it is relevant to discuss it in this section. The data is here perfectly consistent with the conjectures. It was expected that, over time, coordination regulatory mandates would be expanded to include expertise tasks, but that the opposite would not be true. This is confirmed by the three cases. The food sector, which started with the delegation of expertise functions at T2, ends with the same type of mandate at T4. On the other hand, in both electricity and telecommunications, the initial mandates – which were predominantly about coordination – have gradually involved more and more expertise over time.

To sum up, the competence distribution allows us to understand most of the delegation patterns presented. But it cannot explain everything and the comparison has allowed the identification of two other important factors. First, the electricity and telecommunications sectors revealed that, in a situation characterised by a need of coordination, the shape of the regulatory agent used for coordination is influenced by the configuration of actors at the national level. If the coordination of national implementation practices is at stake, it is indeed necessary to gather at the EU level all key national actors of implementation. This configuration may involve (alongside the NRAs) the ministries, but also the regulated operators, as is the case in electricity. This configuration of national actors and, consequently, the shape of the corresponding EU regulatory agent, not only varies between sectors, but also changes over time. While this sectoral variation seems to be related to the level of technicality involved for the achievement of suitable coordination, the transformation over time is, at least to some extent, related to the progressive establishment of NRAs as central national actors of the implementation, which is itself largely influenced by EU legislation. Indeed, in both utilities sectors, the successive reforms of the regulatory frameworks were accompanied with a reinforcement of the NRAs and the expansion of their mandates to the detriment of ministries. These EU-driven changes in the national distribution of powers has thus paved the way for the emergence of EU regulatory networks as central regulatory agents at the EU level.

The second factor that has been highlighted by the comparison is the degree of technicality. The degree of technicality involved in the implementation of a regulatory framework first determines the extent of the need for expertise felt by the Commission in order to make use of its delegated executive competences. This relationship is particularly visible when comparing [Electricity T1, T2] and [Telecoms T1, T2]. While the amount of delegated competences was far lower in electricity, the need for support in the form of external expertise was much higher. This is also reflected by the comparison, within the telecommunications sector, between telecommunications and radio spectrum management (not in the table). While the Commission never managed to be delegated significant competences related to the radio spectrum, its need for external provision of expertise was nevertheless very high. Finally, [Telecoms T1] shows that the degree of technicality, quite unexpectedly – but understandably, is also related to the need to delegate coordination tasks to an external body composed of national implementing authorities. If coordination is to be exercised on issues of low technicality where the Commission holds a significant expertise itself, the coordination may take the form of the Commission instructing national administrations instead of having national administrations exchange with each other and come up with a common approach.

3.1.2 Theoretical discussion

3.1.2.1 The empowerment of NRAs and the establishment of regulatory networks

The impact of the distribution of regulatory competences at the national level on the establishment of networks highlights the relevance of the functionalist approach, albeit in a different way than considered in the theoretical framework. To take place, delegation acts should not only answer a need, they should also rely on available institutional capacities. In other words, to be concluded, a contract requires both a demand and an offer. Setting up EU regulatory networks is not only conditioned on the need for coordination (demand), but also on the existence and capacity of its building blocks, NRAs, to engage into a coordination endeavour (offer). More generally, as EU regulatory agents are generally composed of national civil servants or representatives of national administrative actors, the constellation of these actors at the national level is likely to affect the way in which their competences or resources are pooled at the EU level. This adds credit to Eberlein and Newman's argument (2008) that the development of regulatory networks was conditioned by the rise of IRAs in the member states. The need for coordination at the EU level would be met by leveraging the national regulatory authority delegated to independent agencies.

Interestingly, this can be bridged with other works that unveiled another crucial dimension of this positive relationship between the empowerment of NRAs and the creation of NRAs (Coen and Thatcher 2008, Thatcher and Coen 2008, Boeger and Corkin 2012, 2013). Willing to avoid losing at the EU level the power that they gained at the national level, NRAs push for setting up regulatory networks as an answer to EU's need for coordination instead of more ambitious options. Indeed, weak and loose regulatory networks, unable to make binding decisions, do not represent a serious threat to their autonomy. This argument is also echoed in the thesis with the electricity and telecommunications cases. While the electricity case underline the significant role played by national energy regulators in the elaboration of the legislative proposals related to the establishment of ERGEG and ACER, the telecommunications case exemplifies very well NRAs' reluctance towards the creation of a powerful regulatory agent at the EU level.

The thesis thus confirms two distinct mechanisms, previously identified by the literature, through which the empowerment of NRAs fosters the establishment of regulatory networks. One is functional: in the face of the demand for coordination, NRAs provide the 'institutional offer' necessary to set up regulatory networks. The other is grounded into power considerations: once established and empowered, NRAs resist the creation of powerful EU bodies that could significantly constraint their discretion. Hence, they use their informational and lobbying resources to push for the creation of weak coordination bodies, i.e. regulatory networks. In sum,

the rise of independent NRAs does not only make it institutionally possible for networks to emerge given their institutional compatibility with IRAs, they also significantly increase the likelihood for networks to be preferred over other possible institutional solutions.

Interestingly, this synthesis between both mechanisms reflect the theoretical logic behind the first set of conjectures of the thesis which operate a distinction between the emergence of functionally relevant delegation patterns - functional relevance being seen as institutional complementarity, and the politically driven preference for weak agents, i.e. networks in the coordination path, over stronger regulatory agents. It thus seem possible to integrate this finding very harmoniously within the argument of the thesis. Two factors would foster the emergence of EU regulatory networks: a nationally based policy implementation and the delegation of implementing competences to IRAs at the national level. Both factors would condition the creation of regulatory networks through a combination of functional (in the sense of institutional complementarity) and distributional mechanisms. First, while the nationally based implementation would provide the 'institutional demand' for coordination, the delegation of implementing tasks to NRAs would provide the 'institutional offer' necessary to build a network. Second, whereas the nationally based implementing competences would lead member states to push for adopting rather weak coordination mechanisms, the implementing competence of the NRAs would lead them to lobby for shaping the coordination mechanism as a network of NRAs.

3.1.2.2 Types of expertise, types of functional pressure

The impact of the different types of expertise relevant to the regulation of a sector on the Commission's demand for external help indicates another kind of functional factor than the ones behind the conjectures of the thesis. Here, the variation in the type of need (technical expertise versus legal expertise) derives from the sector itself, from the nature of the economic, informational and technical interactions between stakeholders. The kind of functionalism developed in this thesis is rooted in institutions and it relies on the concept of institutional complementarity. Different kinds of institutional arrangements produce different kinds of governance needs that can be met by different types of institutional solutions.

The finding about the importance of technicality is interesting in several respects. First, it shows that functional pressure relevant to the design of regulating institutions may differ with respect to their source, i.e. to the type of phenomenon that originates them. They can derive from the pre-existing institutional framework, as proposed in this thesis with the institutional complementarity approach, or they can derive from the characteristics of the interactions between market players and other relevant stakeholders.

Second, while the thesis makes a distinction between the need for coordination and the need for expertise, other kinds of variation in the type of functional need seem also very relevant for explaining institutional choice. The need for expertise, one of the two types of need addressed by the thesis, deserves being broken down into two kinds of expertise: technical expertise versus legal expertise. The Commission's decision to set up a regulatory agent for assistance in the elaboration of regulation seems to depend not only on the need for expertise, but also on the nature of the expertise required. When the expertise required is of a technical nature, the Commission needs external help and shall set up a regulatory agent. When it is of a legal nature, the Commission shall be able to manage it with its own staff. This finding speaks for taking functional pressure seriously in the study of institutional choice and suggests that the development of typologies of functional pressure, which has been largely ignored by new institutionalist scholars, constitute a promising research venue.

3.2 Functionally-driven reinforcement of the agent

The question addressed here is the change over time of the regulatory agent. The dynamic between functional pressure and distributional concerns has led to the following conjectures:

- The higher the problem pressure, the more likely the agencification of the agent
- The agencification of networks is more likely than the agencification of committees
- The agencification of the agent is more likely after the public policy has gone through several reforms
- Over time, there is a progressive reinforcement of the regulatory agent

Considering the combination [Sector – Reform] as one case, it makes seven cases in total (see table 5.2). In the table, for each case, the strength of the problem pressure is qualified (moderate (+), strong (++), very strong (+++)) and it is indicated whether the change of the agent implied a reinforcement or not. All conjectures are confirmed by the data.

		FOOD		ELECTRICITY		TELECOMS	
T1 > T2	CHANGE OF AGENT	**COMMITTEES > COMMITTEES**		**FORUM > NETWORK**		**COMITOLOGY COMMITTEE > NETWORK**	
	PROBLEM PRESSURE	**+**	Increased workload	**++**	Forum ineffective	**++**	Comitology committee membership not adapted
	REINFORCEMENT OF AGENT	**YES**	Increase of the number of members per committee	**NO**	Change of agent for change of membership (to have a structure with NRAs only)	**NO**	Change of agent for change of membership (to have a structure with NRAs)
T2 > T3	CHANGE OF AGENT	**COMMITTEES > COMMITTEES**		**NETWORK > AGENCY**		**NETWORK > NETWORK-AGENCY**	
	PROBLEM PRESSURE	**+++**	Problems highlighted by the BSE crisis (coordination, transparency, public health)	**+++**	Network lacked effectiveness + increased problem pressure	**++**	Network lacked effectiveness
	REINFORCEMENT OF AGENT	**NO**	Committees were re-organized and revised, but little reinforced as such	**YES**	Permanent structure, budget, more powers	**YES**	Permanent structure, budget, more powers
T3 > T4	CHANGE OF AGENT	**COMMITTEES > AGENCY**					
	PROBLEM PRESSURE	**+++**	Lack of confidence				
			Workload				
	REINFORCEMENT OF AGENT	**YES**	Permanent structure, budget, transparency				

Highlighted cells: Divergence between expectations and findings

Non highlighted cells: Match between expectations and findings

Table 5.2: Findings related to the transformation of the regulatory agent over time

The data confirms that the agencification of the agent is likelier in cases of strong problem pressure. Significant EU agencies were created in the food and electricity sectors, in situations of very strong problem pressure. In telecoms, problem pressure was lower and the outcome was a mix between a network and a small agency.

Comparing the food and electricity sectors reveals that agencification is indeed likelier for networks than for committees. In electricity, the agency appeared between T2 and T3 with a very strong problem pressure. On the other hand, in food, a very strong problem pressure between T2 and T3, doubled by the support of the EP for the creation of an agency, has not been enough to lead to agencification. The Commission decided to keep the responsibility for the management of scientific expertise. It is only between T3 and T4, when functional pressure was not only extremely strong again, but doubled by a deep crisis of confidence, that the Commission was in favour of the creation of an agency. So, looking at the transition between T2 and T3, an agency was created in electricity but not in the food sector while both sectors were under a similar amount of pressure.

Third, the data also shows that the agencification is more likely after the public policy has gone through several reforms, even where problem pressure remains constant. This appears clearly in the food and telecommunications sectors. In food, both the reforms T2>T3 and T3>T4 were undertaken under very strong problem pressure, but the agency was created in the latter reform. And in telecommunications, a strong problem pressure was behind both reforms and, here as well, the agency was created in the latter one.

Finally, the data also shows clearly that, over time, the functionally-driven change of regulatory agents leads to a reinforcement of the regulatory agents, although two precisions should be made here. First, the functionally driven process of regulatory change does not systematically take the form of a reinforcement of the agent; second, the agencification process is not systematically the result of functional pressure only. Regarding the first precision, in four cases out of seven, the change of the agent consisted of a reinforcement, either through an increase in the working capacity or budget or via the delegation of more powers and decision-making capacity. In the other three cases, the changes were mainly of another nature. In [Food T2>T3], the system of scientific committees has been, above all, reorganized. This reorganization aimed at introducing more transparency, improving the coordination among the different committees, increasing the independence of the members and allowing public health to feature as the primary policy goal. These changes were accompanied with a reinforcement of the committees: the number of committees rose from six to eight. But this reinforcement was not the main element of the reform. Regarding the second precision, the agencification process in the food safety sector is not only due to functional pressure but was also, very importantly, a sociological

phenomenon. In order to restore its damaged credibility and legitimacy, the Commission launched the establishment of the EFSA, largely as a symbolic action (Edelman 1964) aimed at reassuring the public and its trade partners.

With the BSE crisis, the dioxin crisis and the judicial failure in the Beef Hormone case before the WTO, the sociological pressure was very high on the EU. Most probably, it is this very high degree of pressure that explains that the Commission could overcome the loss of power resulting from the creation of the EFSA. This suggests that the relevance of sociological factors for delegation may depend on the level of the sociological gains anticipated. This echoes and complements Pollack who argues that, if sociological rationale may motivate delegations, it can only be so when the power distributional stakes are low. Where such a sociologically motivated delegation would bear significant losses of power, policy-makers would not do it in the absence of a clear expected functional benefit (Pollack 2007: 16). Hence, the relevance of sociological motives for delegation would depend both on low power distributional stakes and/or high anticipated sociological gains.

This relationship between sociological and power distributional factors makes an exact parallel to the assumptions of the thesis regarding how the relationship between functional and power distributional factors affect actors' preferences. Extrapolating on this, one could develop the assumption that actors' preferences make a trade-off between, on the one hand, losses of power and, on the other hand, anticipated gains that could be both of functional or sociological nature.

In both [Electricity T1>T2] and [Telecoms T1>T2], the change of agent consists in creating a regulatory network as the main regulatory agent for coordination purposes. In both cases, the regulatory network replaced a pre-existing agent: the Forum in electricity and the comitology committee in telecommunications. In both cases, the creation of this new agent was triggered by the need to have a group gathering NRAs, and NRAs only. NRAs were becoming the main national actors for implementation, it was thus necessary to organise the coordination among NRAs so they can exchange on the way they apply the framework and work toward the definition of a common doctrine. In [Electricity T1>T2], while the NRAs were part of the Forum, such coordination was not possible because it was made difficult by the presence of the TSOs who, on top of this, were obstructing the progress towards the identification of solutions for interconnecting the grids. And in [Telecoms T1>T2], the comitology committee structure was not adapted to play the role of an inter-NRAs coordination platform. Even if some NRAs used to attend the committee, they were not able to interact freely. First, not all NRAs could attend, and second, the NRAs that did attend were expected to assist their ministries rather than represent their own institutions.

In conclusion, the change in regulatory agent is always functionally driven, and the higher the problem pressure, the bigger the change, with the possibility of agencification in cases of very high pressure. For similar levels of problem pressure, agencification is more likely in the coordination path than in the expertise path, and it is more likely in the later stages of policy change in either case. Finally, although the reinforcement of the agent may not take place at each reform, over time, the accumulated outcome of the various reforms is, in all sectors, the reinforcement of the agent.

Conclusion

1 Research framework

Following the adoption of the Single European Act, the EU was caught between a very high demand for regulatory harmonisation, including at the level of policy implementation, and a lack of regulatory capacity. To palliate this gap, different kinds of regulatory agents have been created and delegated various types of regulatory functions. Over time, these regulatory agents have grown both in number and relevance within the EU regulatory process. Taken as a whole, they form the EU regulatory space. Research on the EU regulatory space has, so far, suffered from fragmentation. The literature shows a significant amount of work on each type of regulatory agent, but comparative research addressing the variation between types of regulatory agents is still crucially missing from the picture. The variation in the type of regulatory function endorsed by these agents has been even less investigated. To make a first step towards filling this gap in the literature on the EU regulatory space, this thesis has addressed the following question: How can we explain the variation between sectors, and the change over time, in the form of regulatory agent (committee, network, agency) and the type of regulatory function delegated (coordination, expertise)?

Starting with a review of the literature on delegation and EU regulatory governance has allowed us to identify two empirical phenomena. First, the literature suggests that there are three types of delegation patterns corresponding to three combinations of regulatory agent and regulatory function. While the role of scientific and expert committees is to provide expertise to the Commission (expertise pattern), the function of regulatory networks is to foster coordination and regulatory convergence among national authorities responsible for implementation (coordination pattern), and EU agencies are essentially multifunctional: they may be endowed with both types of tasks, expertise and coordination (agency pattern). The second phenomenon indicated by the literature is that a given public policy, when initially developed at the EU level, tends to fall into either the expertise or the coordination pattern. The EU agency pattern is only expected to appear as the result of a transformation of either the expertise pattern (expertise path) or the coordination pattern (coordination path). This preliminary empirical mapping, based on the review of the literature, allows us to re-formulate the research question by splitting it in the following two sub-questions: First, why does a sector fall into the expertise pattern

versus the coordination pattern in the first place? Second, why and under what conditions do both patterns change towards the agency pattern?

In order to address the sectoral variation in the type of delegation pattern, the definition of the principal had been adapted in order to break down the complexity of multiple-principals configurations in P-A frameworks. The principal has been defined as the original owner of the competence that is delegated. Doing so enables us to consider the identity of the principal as the factor explaining the type of delegation pattern applying to the sector. Where, on the one hand, the principal is the member states, i.e. where the implementation of the sector is mostly done at the national level, the divergent interpretation and application of EU regulation is likely to lead to a problem of coordination. Given member states' reluctance to delegate power to the EU, this need for coordination shall be addressed *a minima*, through the creation of a network of national implementing authorities, entrusted with coordination functions (coordination pattern). Where, on the other hand, the principal is the Commission, i.e. where the Commission, through executive powers delegated under comitology, does most of the implementation, the Commission's lack of resources and expertise is likely to create a need for external support in the form of the provision of expertise. Given the Commission's reluctance towards losing control over the use of scientific expertise, this need for expertise shall be met by the creation of an agent easily controllable by the Commission, i.e. expert committees who shall be responsible for putting their expertise at the disposal of the Commission with views to help the drafting of implementing legislation (expertise pattern). In sum, the distribution of competences for the implementation of EU regulatory policies between the member states and the Commission is conjectured to be the main explanation for the development of the coordination versus expertise pattern in the first stages of a given public policy.

Theoretically, this approach is anchored in a version of rational choice institutionalism that places a significant emphasis on functional pressure. The emergence of a given problem (coordination versus expertise) is rooted in the institutional framework (in the form of competence distribution). The range of institutional solutions considered by policy-makers is limited to those options that are functionally adapted to, i.e. institutionally complementary (Hall and Soskice 2001) with, the institutional framework and the governance problem associated to it. Finally, given policy-makers interest to maximise power (in addition to their interest to maximise policy effectiveness), they choose the option that is least threatening for their institutional power.

The second sub-question is, again, divided in two. First, why does the type of regulatory function delegated to the regulatory agent change over time? Second, why does the type of regulatory agent change over time? The change in the type of regulatory function delegated is explained, as

with sectoral variation, by the change in the distribution of competences. In a given public policy, the distribution of implementing competences may change over time, changing the type of needs met by the policy-makers, which shall lead to a change in the tasks given to the regulatory agent. While this change is expected to be seen in the coordination path, it is unlikely to occur in the expertise path. Given the direction taken by EU integration, the changes in the distribution of implementing competences, if any, will be in favour of the Commission. The expansion of a public policy may thus show an increase in the need for expertise, and a decrease in the need for coordination – but not the reverse. Regulatory functions are thus expected to move towards increasing the importance of expertise over coordination.

The change in the type of regulatory agent follows a different rationale. The literature review indicates that the change of agent takes the form of a progressive reinforcing of the regulatory agent – network or committee – possibly leading to its agencification. This phenomenon has partly been addressed by the literature, which, in general, emphasises the distributional concerns of policy-makers to explain the amount of power delegated to the agent – which is linked to the type of regulatory agent. High distributional stakes would, for example, justify the choice for a regulatory network instead of an EU agency (Kelemen and Tarrant 2011). Such a snapshot approach is, however, incomplete because it ignores the feedback loop process triggered by the initial delegation. In the face of functional pressure, policy-makers may opt for a suboptimal institutional solution in order to preserve their own powers. But this lack of effectiveness may spark a subsequent revision of the delegation framework in order to address the remaining problem pressure. The dynamic between functional pressure and distributional concerns, unfolding over time through feedback loops, is thus likely to lead to a progressive reinforcement of the regulatory agents.

In cases of very strong problem pressure, this reinforcement process may culminate in the agencification of the agent. Agencification is thus first dependent on the amount of problem pressure, but there are other elements to consider in order to understand the agencification process. First, given policy-makers' interest in maintaining their own power, the regulatory agent is only gradually reinforced. An agent is thus reinforced after its predecessor has shown itself to be unable to meet the goals that policy-makers assigned to it. As a consequence, agencification is likely to take place at the later stages in the transformation process of a public policy. Second, agencification in the expertise and coordination paths vary in terms of the distributional impacts for the policy-makers. While the agencification of networks consists in a further uploading of national competences to the EU level, agencification of committees implies a delegation of the Commission's control on the management of scientific expertise in the EU. The Commission is thus likely to be more reluctant to agenficy committees than networks. This

is highly relevant because the Commission has the competence for the initiation of legislation. Hence, proposals with views to agencify committees are less likely than proposals to agencify networks. As a result, the agencification process is more likely in the coordination path than in the expertise path.

The evaluation of these conjectures has been realised on the basis of three in-depth case studies centred on three sectors: food safety, for the expertise path, and electricity and telecommunications, for the coordination path. Each sector has been divided in a series of steps (T1, T2, T3, T4) corresponding to the major revisions of the regulatory frameworks since the development of the corresponding public policy at the EU level. For each sector and for each step, a detailed account of the relationships between the following elements has been given: lack of effectiveness of the previous delegation pattern (except for T1), distribution of implementing competences, coordination problems, expertise problems, and regulatory agents created and regulatory tasks delegated. The data has been extracted from document analyses, interviews with elites (53 interviews in total) and secondary literature.

2 Findings

Regarding the effect of the distribution of competences on the type of agent and the type of delegated functions, with each combination [Sector Period] being considered as a case, there is a total of 9 relevant cases – [Food T1] having been found irrelevant for the evaluation of the conjectures. In most of them, the expected effect was confirmed. In two cases the expected regulatory agent was not found and in four cases there was a divergence between the regulatory functions actually delegated and the expectations.

For the coordination pattern, while the competence distribution explains most of the findings, the type of regulatory agent is also influenced by the distribution of competences between the relevant actors for implementation at the national level. In particular, the creation of regulatory networks as regulatory agents only appeared once NRAs had emerged as central actors of the national implementation in the majority of member states. As long as ministries were still important actors of national implementation, the comitology committee provided a natural coordination venue as illustrated by [Telecoms T1].

In [Electricity T1] a different regulatory agent was chosen due to the importance of another factor, the degree of technicality involved in the implementation of the regulatory framework. The high level of technicality made it necessary to involve the TSOs in the coordination endeavour at the EU level. As a consequence, it was necessary to create a structure that would

host not only the ministries and NRAs, but also TSOs and this led the Commission to create the Florence Forum.

The degree of technicality also explains the unexpected findings related to the delegation of both coordination and expertise functions in electricity. While in [Telecoms T2], no significant expertise functions were delegated in spite of the delegation of significant executive power to the Commission, the opposite was true in [Electricity T2]. In telecommunications, the new implementing powers were closely related to competition law, in which the Commission has a great deal of expertise and resources and therefore no need for any external support. In electricity, however, the few new competences of the Commission were associated with a very important need for additional expertise due to their high level of technicality.

In addition, [Telecoms T1] shows that the low degree of technicality involved in the implementation also reduces the need for the delegation of coordination tasks. As the Commission was able to elaborate a centralized interpretation of the framework, it could simply diffuse its doctrine to national authorities instead of asking them to devise a common approach.

Finally, [Electricity T1] indicates a final factor that influences the use of expertise in the absence of delegated executive competences to the Commission: the use of legislative procedure in order to adopt highly technical measures. The same phenomenon was observed in [Food T1] although in the latter case, the use of legislation to adopt technical measures was due to the impossibility, at the time, to delegate executive competences to the Commission.

The second sub-question regarded the transformation of the delegation patterns. Its first element, the change in the regulatory functions delegated, is explained, as conjectured, by the change in the distribution of competences. Its second element, the transformation of the regulatory agent and its eventual agencification, was expected to be explained by the dynamic between functional pressure and distributional concerns unfolding over time, through an accumulation of feedback loops and reforms. All conjectures associated to this second sub-question are verified although the food case reveals an additional factor in the form of sociological pressure. First, in all three sectors, this dynamic did lead to a progressive reinforcement of the regulatory agents, in the form of increased resources or increased responsibilities and powers. Second, the comparison between telecommunications and electricity shows that the likelihood of agencification, as well as the extent of this process – the creation of a weak versus a strong agency – increases with the functional pressure felt by policy-makers. Third, EU agencies are only created in the later stages of the transformation of the policy – at T3 or T4. Fourth, agencification is more likley in the coordination path than in the expertise path. The food sector however revealed that the intense pressure leading to the

agencification process was not only of a functional nature but also, importantly, of a sociological nature.

3 Contributions to the literature on the EU regulatory space

The major contribution this thesis makes to the study of the EU regulatory space consists in de-compartmentalizing a strand of research that has tended to investigate the different types of regulatory agents separately. According to the extant literature, scientific and expert committees used to be addressed within the sphere of the role of scientific expertise in the EU; regulatory networks are associated with regulatory coordination, and EU agencies are created to palliate a broad regulatory gap whose definition may vary depending on the author and the sectors investigated. The thesis has first built on this typical association between types of regulatory functions delegated and types of regulatory agents created before going beyond this association by investigating the reasons behind the broadening of the mandate of a given regulatory agent or the conditions under which policy-makers may change an agent to assume an ongoing regulatory function.

First, the pre-existing association between type of function and type of agent has been leveraged by its combination with an adapted version of the P-A framework. This helps explain why a sector would, in the first place, experience the creation of committees in charge of providing expertise or the creation of a network in charge of coordination. As conjectured, the distribution of implementing competences between the member states and the Commission has proven central in explaining these variations. Other factors have also been unveiled by the case studies, namely the distribution of competences at the national level between implementing actors, the degree of technicality involved[430] for the implementation of the policy, and the extent to which policy-makers opt for the legislative tool in order to adopt technical measures that would otherwise be implementing measures. Depending on how these factors are combined, the very need for coordination or expertise may be affected, a regulatory network may be required to provide expertise as well as coordination, coordination may be channelled through structures other than regulatory networks and expertise may be provided by bodies other than committees.

430 This contradicts one of the assumptions made in the research framework. Indeed, it was assumed that, at the implementation level, different sectors would involve a similar degree of technicality or science. Consequently, the variation in the type of sector or the type of regulation was assumed not to affect the need for expertise or coordination.

While the empirical data has shown under which conditions the association between regulatory agent and regulatory function may be undone in the first stages of a given public policy, the thesis has also addressed this disconnection over time, in the form of the broadening of the mandate of a regulatory agent to include other types of functions or in the form of a change of agent for a given type of function. The change in the type of tasks delegated to a regulatory agent is explained, as conjectured, by the change of needs in the sector, which is related to the change in the distribution of competences for policy implementation. As for the change of agent, the data shows, in line with the conjectures, that it is best explained functionally, by the need to improve the effectiveness of delegation patterns, the previous agent having been found insufficient for achieving the goals for which it was created.

With this transversal approach to the EU regulatory space, the dissertation has discussed the conditions under which different types of regulatory agents may serve as functional equivalents. This does not only contribute to the transversal understanding of the EU regulatory space, but also to each individual sub-field of research independently. It could, for example, contribute to the question addressed by two specialists of expert committees (Gornitzka and Sverdrup 2008): why does the number of expert committees vary between sectors? This dissertation would indicate at least three factors that were not considered in their study: the distribution of implementing competences between the Commission and the member states, the presence of another type of body in the sector that may already be providing expertise, and the technicality of the policy itself.

The dissertation also contributes to broadening the knowledge on regulatory networks and their relationship with EU agencies. In this field, Kelemen and Tarrant (2011) explain the choice for either a network or an agency by the distributional stakes involved, but their analysis does not integrate the evolutive dimension contained in the phenomenon of network agencification and underplays the role played by the variation of functional pressure between sectors. And while Thatcher and Coen (2008) address the gradual centralisation and reinforcement of regulatory networks, they do not address the variation in the strength of this process between sectors, and their study, being empirically limited to the pre-2008 period, does not cover the creation of EU agencies in the sectors investigated. Finally, while Levi-Faur (2011) maps the co-existence of networks and agencies in a wide variety of sectors, he does not address the explanations behind the transformations and the sectoral variations of these institutional constellations.

Finally, this research also expands our understanding of EU agencies. Functional explanations for the creation of EU agencies have tended to either refer to the regulatory gap argument or to fall into the ad hoc approach. The dissertation has traced a middle way between the two, breaking down the concept of regulatory gap into two variants: the lack of regulatory authority,

and the lack of regulatory resources and expertise. EU agencies are then presented as the result of two different processes of institutional change: the coordination path and the expertise path. EU agencies may be the successor of regulatory networks in a sector marked by the need to improve coordination and regulatory consistency or they may replace scientific committees where the most pressing issue is the Commission's need to gather expertise and external resources. A series of interconnected typologies has been created, distinguishing between two types of competence distribution (national versus commission), two types of pre-existing agents (networks versus committees), two delegation rationales (coordination versus expertise), and two types of functional profiles for EU agencies (coordination versus expertise). This has fleshed out the concept of the regulatory gap while remaining abstract enough to provide general explanations, as well as providing an explanation for the variation in the type of functions endorsed by EU agencies.

4 Contributions to the P-A literature

The thesis makes a number of contributions to the P-A literature. First, the P-A literature is very much focussed on explaining power relationships between the principal and the agent. Scope of authority delegated, discretion, control mechanisms and agency drift have provided focal points for most P-A analyses. The thesis unveils additional interesting variations in the delegation process, such as the difference in the type of tasks delegated and the type of actor chosen to serve as an agent. While the choice in the type of agent reflects the discussion about the distribution of power between principal and agent, it is not limited to this dimension. Types of agents may exhibit different structures and functional profiles. Although unusual among P-A studies, such a functional distinction among agents can nevertheless be very well accommodated by the P-A framework. Indeed, the P-A literature is based on a list of potential delegation rationales. There are many reasons why policy-makers choose to delegate power because delegation can serve very distinct functional objectives. Surprisingly, outside a few exceptions (Martin 1992, Tallberg 2002, Majone 2001) P-A scholars have not addressed the consequences of the variation in the functional rationale of delegation. While P-A is often portrayed as a functionalist approach, it rather seems that most P-A studies rather focus on power distributional dynamics and have neglected investigating the wealth of functionalist mechanisms through which delegation rationales shall affects the design and consequences of delegation. The thesis explores this route by linking the delegation rationale to the type of regulatory agent chosen and functions delegated.

Second, the thesis has addressed chains of delegation, another theme of delegation studies that deserves further investigation. Often, the principal in one round of delegation further delegates

the power that it initially received as an agent in another configuration. Hence, in chains of delegation, each delegation act is conditioned by the delegation acts located higher up in the chain. The shape given to EU regulatory networks and EU agencies was conditioned by the previous delegations of power to actors such as the Commission and NRAs (Coen and Thatcher 2008, Dehousse 2008, Thatcher 2011). Whereas these studies have explored the power distributional mechanisms that link different delegation acts located along the chain of delegation, the thesis shows the functional dynamics that link successive delegation acts. By creating different institutional frameworks for regulatory governance, previous delegations have an influence on the type of governance problem likely to emerge and the kind of delegation pattern likely to be established to address them. This mechanism is embedded in the more general argument about institutional complementarity (Hall and Taylor 2001) (see below).

Third, the thesis accommodates the P-A framework within a relatively rich theoretical framework that combines an enhanced and fine-grained emphasis on functional factors, an interaction between functionalist and power distributional dynamics and a historical approach taking into account feedback loops. As said above, the analytical developments about functional dynamics address a gap in the delegation literature that has tended to focus on the distribution of power between the principal and the agent. For the same reason, the interaction between functionalist and power distributional considerations in the formation of actors' preferences about the design of delegation does also answer a need for further explorations (Tallberg 2002: 42). Then, as most P-A analyses approach delegation as a one shot phenomenon, the thesis provides a solid framework and analysis of how delegation can unfold over time and be gradually redefined and adjusted, thereby addressing another important challenge of delegation studies (Tallberg 2002: 42). Finally, although this was not integrated into the theoretical framework, the findings related to the creation of the EFSA confirms the relevance of legitimacy as a factor of delegation as highlighted by sociological institutionalist scholars (Finnemore 1993, McNamara 2002). However, I underline the need to consider the trade-off made by policy-makers between anticipated sociological gains of delegation and its costs in terms of power (Pollack 2007). Likewise, it is crucial to proceed to careful empirical analyses in order to ascertain to what extent delegation was motivated by sociological versus functional anticipated gains. Indeed, one should distinguish situations where the search for legitimacy is the sole or major motivations from cases where it was the mere positive side effect of a decision otherwise due to functionalist considerations.

Finally, the study complements the existing knowledge about how multiple principals configurations affect the design of delegation. The literature explains that, given the multiplicity of principals involved in the delegation decision, EU regulatory agents such as EU agencies or

networks could only be set up as weak bodies, deprived of far-reaching decision-making power and autonomy (Coen and Thatcher 2008, Dehousse 2008, Thatcher 2011). This category of actors is however wide and heterogeneous enough to deserve more fine-grained investigations so as to unveil the differences between the types of actors that compose it.

Previous P-A analyses that aimed, precisely, at explaining the varying powers and discretion given to supranational agents depending on issues or situations (Pollack 1997, 2003, Franchino 2005, 2007) – as opposed to making general arguments about whether EU institutions remained under the control of the member states or not – pointed at the constellation of preferences among the principals as an important explanatory factor. Their analytical framework could however not be replicated in this study which addressed a more complex delegation process than the one-dimensional upload of competences from the member states to EU institutions that made their empirical cases. Besides this vertical delegation thread, the creation of EU regulatory agents involves also a horizontal delegation between the executive and policy-makers as principals and bureaucratic agents (Dehousse 2008).

The fact that the establishment of EU regulatory agents combines different threads of delegation created two analytical obstacles. First, it made it more difficult to map the distributional stakes for the principals, in particular for the Commission that combines the desire to upload significant competences to the EU level and the reluctance towards empowering a rival actor in implementation politics. Clarifying the Commission's distributional stakes required distinguishing those cases where the EU regulatory agents arises mostly out of a vertical delegation versus those where they result from a horizontal delegation. In the first case, the competences delegated stem from the member states and the Commission could be assumed to have a preference for creating a strong regulatory agent. In the second case, the competences delegated are taken away from the Commission; there the latter could be assumed preferring limiting the scope of powers delegated to the agent.

However, operating such a distinction between vertical and horizontal delegations by associating different principals to each situation (the member states for the vertical delegation and the commission for the horizontal one) would prevent from taking into account the effect of the negotiation dynamics among principals on the delegation design (Dehousse 2008). Indeed, the situations analysed would be reduced to one principal, either the member states or the Commission, depending on the delegation thread considered. This analytical obstacle was solved by providing a refined conceptualisation of the principal. The actor that is commonly considered as principal is generally associated to three roles. The principal owns the competences that are delegated, makes the decision about the delegation, and controls the agent. In multiple principals configurations, these roles may be distributed asymmetrically among principals, so

the identity of the principal would depend on which of the three roles we choose to focus on. Whereas focussing on the actor that holds the competence allows distinguishing between vertical and horizontal delegations, centring the research on the decision-making dimension enables one to address the inter-institutional politics that takes place in the decision to delegate.

In sum, the contributions of this thesis to the P-A literature are: extending the type of mechanisms investigated, generally anchored in power distributional approaches, to functional dynamics; addressing the theme of chains of delegation and unveiling the functional links between different delegation acts along the chain; accommodating the P-A framework with a rich theoretical approach that combines a refined functionalist perspective, power-distributional dynamics, and power-and historical analysis with feedback loops; and, finally, operating sophisticated analytical distinctions within the P-A framework that enabled studying variation of institutional designs in multiple principals configuration involving several threads of delegation.

5 Contributions to the literature on institutional design and institutional change

A first contribution to the literature on institutional choice consists in the emphasis made on the phase preceding the decision-making process, i.e. on the emergence of governance problems and the limited range of functionally relevant institutional solutions. While such approach is not novel as such (see Kingdon 2003), it has not received much attention within the literature on institutional design. Besides, the thesis has addressed this question in a way that differs from Kingdon. While he identifies the political, sociological and cultural factors of the selection of policy alternatives, I point at the functional reasons why only a limited range of options can be seen as relevant to the problem at stake. This is done by adapting the concept of institutional complementarity (Hall and Soskice 2001) to the sectoral variation in the institutions set up for the regulatory governance in the EU. While some delegation patterns would palliate the weaknesses of a given institutional framework and therefore make good institutional fit with it, they may be useless in another context. The functional value of a given delegation pattern would thus depend on its complementarity with the institutional framework. The variation in the institutional context would explain the variation in the range of functionally relevant delegation patterns.

While using Hall and Soskice's concept of institutional complementarity, the thesis also adapts it to the necessities of the research question and, doing so, it extends its applicability and avoids replicating its weaknesses in three ways. First, as already mentioned, it considers that an

institutional complementarity can be served by several functionally equivalent institutional options. Second, policy-makers choose among the different options following a trade-off between their willingness to improve regulatory effectiveness and their desire to maximise their institutional power. The trade-off depends on the relative level of functional pressure and of distributional stakes involved in the situation. Hence, the choice among several functionally equivalent institutional alternatives allows relaxing the weight of functionalism by adding power and politics to the initially a-political institutional complementarity concept. Third, the thesis also overcomes another important limitation reproached to the Varieties of Capitalism theory, the fact that it leaves no room for change. Acknowledging that there are several functionally equivalent institutional options allows conceiving institutional change, as policy-makers may choose replacing a first option by another one. A series of feedback loops then leads policymakers to adjust incrementally the delegation pattern in order to optimize the agent's contribution towards their policy objectives.

The findings that were not covered by the theoretical framework of the thesis do also provide interesting theoretical insights. First, as explained in the discussion chapter, the creation of the EFSA confirms the relevance of sociological institutionalism in the study of delegation (McNamara 2002, Finnemore 1993). The combination of the functional and sociological pressures as well as the very high level of sociological pressure suggest that the sociological factor in delegation may reveal crucial in explaining delegation only when sociological pressure is extremely high, when combined with functional pressure and/or when the power distributional stakes are low (Pollack 2007).

The second unexpected finding relates to NRAs' emergence as powerful bodies at the national level as a pre-condition for regulatory networks to be established at the EU level. This echoes previous studies that present NRAs' empowerment as an obstacle to the creation of powerful EU regulatory agents, leading instead to the creation of networks, characterized by their lack of strong powers (Coen and Thatcher 2008, Boeger and Corkin 2012, 2013). NRAs would indeed be reluctant to give away to the EU level the power they gained at the national level and they would mobilize their lobbying and information resources to make sure the EU regulatory agents is centred around their network. The findings completes this power-distributional account of the relationship between the empowerment of NRAs and the establishment of regulatory network with a functional mechanism. Setting up regulatory networks requires a demand for coordination on the one hand, but also an offer of adequate and available institutional resources on the other hand. The institutional resources necessary to set up regulatory networks are NRAs enjoying a key position in the national regulatory environment. Hence, without them, the

demand for coordination cannot leverage NRAs' capacities and pool them into a regulatory network and needs being channelled through a different type of structure.

In sum, by providing a very rich account of the different ways in which functionalist dynamics affect institutions, the thesis offers a revamped and refined version of functionalism and reassert its value for studying institutional design and institutional change. In the past decades, power distributional approaches and neo-institutionalism have been on the rise, and functionalism has been relegated to the status of obsolete theories. Functionalism is often discredited because policy-makers tend to solve their problems with suboptimal institutional solutions. Although institutional outcomes rarely resemble what might have been the most efficient solution, it does not mean that the expected effectiveness of the chosen institution does not play any role in the process of institutional choice. Of course it does. If institutions are often suboptimal it is because effectiveness is not the only intervening factor in the process of institutional choice, not because functionalism is deprived of any explanatory power.

Problem pressure is everywhere; it can be found behind nearly all instances of institutional change. Yet, most of the time, it remains in the background of research on institutional choice and institutional change. Sometimes briefly referred to in the introduction of a research question, sometimes merely taken for granted, problem pressure is rarely given a prominent role within analytical frameworks. Yet the very confinement of problem pressure as exogenous to the analyses has prevented its refined development, as both *explanandum* and *explanans*, which could have revealed many new potentialities.

Problem pressure can take many different forms and degrees of intensity. It is common sense to consider that two different problems might justify two different institutional outcomes. Again, it is not to deny that other factors intervene and that we may find instances where different types of problems lead to a similar institutional solutions or instances where the difference in institutional solution may have another explanation. Nevertheless, pretending that policy-makers, in the process of institutional choice, are unaffected by the variation in the types and/or intensity of their problems means being blind to, at least, one part of the explanation in the variation of institutional designs.

Taking problem pressure seriously does, therefore, require analytical refinements, something that the literature has largely neglected. The absence of typologies and differentiation in the intensity of problems may certainly explain why the literature on the EU regulatory space has remained fragmented along the types of regulatory agents. Given that each type of regulatory agent is typically associated with one type of problem, the absence of problem typology inhibits the explanation of the preference for one regulatory agent over another. And the few studies that

address the choice between types of regulatory agent, e.g. between regulatory networks and EU agencies, can only do so because of the functional similarity between the two. Regulatory networks and EU agencies, although diverging in terms of effectiveness, are functionally equivalent in the sense that they are designed to address the same type of problem, i.e. the need for coordination (Levi-Faur 2011: 814). Confining research designs to institutional variations within one given type of problem has channelled research questions towards issues such as the amount of power delegated or the independence granted to the regulatory agent, which are typically answered with reference to actors' interest in maximizing power. But the power distributional theories would be unable to account for the presence of scientific committees in one sector and of regulatory networks in another. This is probably why the research on the EU regulatory space has remained divided into types of regulatory agents and concentrated on variations within these types, instead of addressing the variations between different types. The variation between types of regulatory agents and types of regulatory functions can only be understood by acknowledging the variety of governance problems met by policy-makers and their importance in the determination of the preferences of policy-makers, something that has been neglected to date.

Much remains to be done in order to understand how functional pressure affects actors' preferences and institutional outcomes, as well as how functional pressure is created itself. The dissertation makes a few steps in this direction. First, it considers problem pressure as both *explanandum* and *explanans*. This approach consists, first, in explaining how institutions shape the type of governance problem met by the policy makers and, second, in arguing that the different types of problems lead to different types of functionally relevant delegation patterns. The data is largely consistent with this approach, although other factors have also appeared to be relevant in explaining the choice for the type of regulatory agent and the type of regulatory function delegated. Second, within a given type of problem, the thesis also shows that the degree of problem pressure (moderate, strong, or very strong) is a relevant factor for explaining the choice of the regulatory agent among functionally equivalent options. Here, functional pressure thus intervenes as a complementary explanation to objects often addressed with reference to actors' interests to maximize their power alone. Furthermore, the thesis has not only indicated how actors' sometimes conflicting interests in maximizing power and solving problems combine to explain institutional choice, but it has also revealed how their interaction unfolds over time, through a series of feedback loops, thereby explaining the gradual process of regulatory agent reinforcement. This argument can be applied to understand the evolution of other delegation patterns in the EU – and maybe also to delegations to international organizations. For example, in the area of justice and home affairs, keen on avoiding agency shirk, in the Maastricht Treaty, the member states delegated on very limited powers the Commission and none to the CJEU. The

measures adopted to limit unwanted consequences revealed too constraining to allow the EU institutions to make progresses towards policy goals. The member states then corrected this mistake in the Amsterdam Treaty by expanding the role of the Commission and the CJEU (Tallberg 2002).

6 Need for further research

Besides complementary research that would aim at deepening and evaluating the generalizability of these findings, this thesis indicates a few particularly promising venues for future research. While the thesis has explained the diversity of delegation patterns across sectors and over time, the empirical picture also points at elements of institutional convergence. Different starting points characterise the expertise and the coordination path: respectively, the expertise pattern and the coordination pattern. Yet, over time, both patterns change towards the agency pattern and the wide institutional discrepancies between both types of sectors – in terms of competence distribution, types of regulatory agent and functions – characteristics of the first stages of the policy, have gradually reduced. Part of this explanation is implicitly answered in the thesis by the reference to the distribution of competences becoming more similar. In the coordination path, the gradual increase in the competences delegated to the Commission is followed by the rising importance of expertise and decreased importance of coordination in the mandates of the regulatory agents.

However, this does not explain the convergence in the type of regulatory agent towards the EU agency model. One possible explanation, which is very close to the argument made in the dissertation, could be found in a combination of functional and institutional constraints. Over time, EU public policies are developed, deepened, extended, and refined. This process of expansion of substantive regulation requires a corresponding upgrading of the institutional settings. More resources and more powers need to be made available. While other types of regulatory agents, because of their informality, would not be able to meet this growing demand, EU agencies have the required level of formality that makes it possible for the agent to be allocated a budget and exercise more powers. It has indeed been explained by interviewees in all three sectors investigated that, because of legal constraints, the only way to fund a regulatory agent with the EU budget is to create an EU agency. Alternatively, the diffusion hypothesis may also be worth considering. Once EU agencies have been created in a few sectors, it makes it easier for policy-maker to choose this institutional form at a later stage. Increased awareness of this institutional option combined with a better familiarity with the model would have increased, over time, the prospect of EU agencies being favoured over other types of agents. The multiplication of EU agencies across sectors is also particularly striking when we consider that

EU agencies are not the monopoly of regulatory policies; they are also created in areas that are independent from market integration pressures, such as police cooperation. Here, we thus clearly see a situation where different types of problems lead to a similar institutional outcome. It would therefore be particularly promising to explore the process of multiplication and diffusion of the EU agency model across sectors by contrasting it with the different kinds of problems these agencies are expected to solve.

The phenomenon of institutional convergence goes beyond the choice of the EU agency model for regulatory delegation. It also features a convergence of the activities of the regulatory agent and its interactions with other actors. The rising importance of expertise tasks in the mandate of regulatory agents located in the coordination path has already been discussed. Interestingly, this development is accompanied by the emergence of a new type of regulatory procedure where EU agencies assist the Commission in preparing draft regulations that are subsequently adopted in comitology. Such a procedure is found in the three sectors investigated here, as well as in other sectors such as medicine, banking, or securities regulation. The convergence at the procedural level can probably be explained by a combination of functional pressure, institutional constraints, and actors' interests in maximizing their power. On the one hand, over time, policy-makers have become increasingly convinced of the necessity of binding decision-making power at the EU level for implementation. On the other hand, backed by the Meroni judgement, the Commission and the member states prefer to use the comitology procedure rather than delegating binding decision-making power to an agency. As a consequence, formal authority is often delegated to the Commission, under the control of comitology committees, and the regulatory agent is given an advisory position, at the level of the preparation of the draft regulation.[431]

Besides, there is a tendency among EU agencies stemming from the expertise path and specialised in the provision of expertise to create and sustain networks with national bodies. The EFSA has a programme of scientific cooperation with national focal points, in order to share the work and scientific data. In the coming years, this programme is expected to be reinforced.[432] The European Environment Agency (EEA) which is an agency typically created to provide expertise and information, also works in cooperation with national focal points in order to pool data and information. These developments cannot qualify as regulatory networks, nor are they meant to produce regulatory coordination. However, they introduce a dimension of exchange

431 However, this advisory position may provide the agency with significant power where their advice is particularly technical or scientific, as in the pharmaceutical sector for example.

432 European Food Safety Authority – Scientific Cooperation Unit. *Technical Report on Scientific Cooperation between EFSA and Member States: Taking Stock and Looking Ahead.* Parma, 11 January 2011.

between national bodies at the EU level. Even if an EU agency can enjoy many more resources than scientific committees do, they are still limited and need to cooperate with the member states in order to gather the necessary information and scientific expertise. In sum, while the regulatory functions delegated in the coordination path increasingly involve, over time, the provision of expertise tasks to the Commission, EU agencies stemming from the expertise path do also, over time, develop increasing interactions with the member states.

It is sometimes argued that the EU regulatory space is undergoing a process of fragmentation with the multiplication of the number and types of regulatory agents involved in the different areas of EU regulation. Yet, the process just described regarding the institutional convergence towards a model of regulatory agent based on EU agencies featuring increasingly similar types of mandates and interactions with other actors, provides another perspective on the issue. The multiplication of EU agencies as large, formalized, and multifunctional bodies, often absorbing other types of agents such as networks or committees, would rather suggest a tendency towards consolidation and systematisation of the EU regulatory space.

In sum, this dissertation indicates that, beyond the apparent maze of types of agents involved in EU regulation, a convergence or systematisation process seems to be unfolding in the EU regulatory space. This process of convergence could be approached from different angles: convergence of mandate of the regulatory agents, convergence towards the EU agency model, convergence in the interactions of the regulatory agent with other actors, or convergence of regulatory decision-making procedures. This convergence process may constitute the most promising avenue for research opened by this dissertation.

Besides the convergence theme, the data reveals other interesting research venues. In particular, it indicates that the distribution of competences at the national level between NRAs and the ministries affects the type of regulatory agent created and activated at the EU level for various purposes. The variation between sectors in the relative importance of comitology committees and regulatory networks in policy implementation, as well as the change over time in this relation constitutes an uncharted and interesting area of research. Relevant factors could include the distribution of implementing competences between the EU and the national level as well as the distribution of implementing competences between NRAs and ministries at the national level. While the distribution of competence between the national and the EU level would determine the demand for coordination and the likelihood of comitology committees to be set up, the distribution of competences among NRAs and ministries would affect 'the institutional offer' relevant to answer potential needs for coordination.

Finally, as the cases have confirmed the relevance of the theoretical approach adopted in this research, this dissertation is also a call for taking functional pressure more seriously into account in the explanation of institutional choice and institutional change. To do so, functional pressure, as a factor, needs to be refined into types of problems met and the amount of pressure associated with the problem. It has also been shown that functional pressure does not need to be confined to the role of factor, but can also be treated as an *explanandum*. As suggested by the thesis, institutional settings affect the types of problems met by policy-makers. The variation in the types of problems can then explain the variations in institutional outcomes. While other factors more widely used in institutional analysis, such as actors' distributional concerns, are not denied, the main message here is that the introduction of a refined approach of functionalism may explain a great deal of institutional phenomena that cannot be understood by the mere combination of distributional factors and institutions alone.

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