# Regulatory Delegation in the European Union

## Networks, Committees and Agencies

Emmanuelle Mathieu

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# Regulatory Delegation in the European Union

## Networks, Committees and Agencies

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*To Marisa and Marti*

# Preface

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Such research would never have been possible without the help of the interviewees whom I want to thank for making themselves available and explaining to me everything I wanted to know about the governance of electricity, telecommunications and food safety regulation.

I would not be where I am today without my parents. Through their admirable example and consistent encouragement, they nourished in me a confident and enthusiastic spirit, eager to extend the boundaries of the comfort zone, reach higher and grow. Fearless, hardworking and adventurous, they passed on to me a set of values that constitute invaluable resources not only for scholarly research, but also for dealing with all the challenges life has to offer.

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Emmanuelle Mathieu
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# Contents


**1 Regulatory Delegation in the EU** 1

**2 Explaining Delegation Patterns** 25

**3 Food Safety** 51

**4 Electricity** 85

**5 Telecommunications** 127

**6 EU Regulatory Delegation and Institutional Design** 165

**Index** 187

# 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 |
| BEUC | The European Consumer Organisation |
| BSE | Bovine spongiform encephalopathy |
| CEER | Council of European Energy Regulators |
| CJEU | Court of Justice of the European Union |
| Cocom | Communications Committee |
| 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 |
| DG SANCO | Directorate General for Health and Consumers |
| DSO | Distribution system operator |
| EC | European Community |
| ECJ | European Court of Justice |
| EEC | European Economic Community |
| 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 |
| ETSO | European Transmission Systems Operators |
| EU | European Union |
| FDA | Food and Drug Administration |
| FVO | Food and Veterinary Office |
| GDP | Gross Domestic Product |
| GERT | Group of European Regulators in Telecommunications |
| GGPs | Guideline of good practices |
| GMOs | Genetically modified organisms |
| HLCG | High Level Communications Group |
| IRA | Independent regulatory agency |
| IRG | Independent Regulators Group |
| MEP | Member 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 |
| RAS | Rapid Alert System |
| 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 |
| TSO | Transmission system operator |
| TTE | Transport, Telecommunications and Energy |
| UK | United Kingdom |
| UNICE | Union of Industries of the European Community |
| WTO | World Trade Organization |

# List of Figures


| | | |
|---|---|---|
| Fig. 2.1 | The coordination path | 47 |
| Fig. 2.2 | The expertise path | 48 |
| Fig. 3.1 | Process of institutional change in food safety | 80 |
| Fig. 4.1 | Process of institutional change in electricity | 122 |
| Fig. 5.1 | Process of institutional change in telecommunications | 160 |

# List of Tables


| | | |
|---|---|---|
| Table 3.1 | Competence distribution and delegation patterns in food safety | 75 |
| Table 3.2 | Functionally driven reinforcement of the agent over time in food safety | 77 |
| Table 4.1 | Competence distribution and delegation patterns in electricity | 116 |
| Table 4.2 | Functionally driven reinforcement of the agent over time in electricity | 119 |
| Table 5.1 | Competence distribution and delegation patterns in telecommunications | 154 |
| Table 5.2 | Functionally driven reinforcement of the agent over time in telecommunications | 155 |
| Table 6.1 | Competence distribution and delegation patterns in food safety, electricity and telecommunications | 169 |
| Table 6.2 | Functionally driven reinforcement of the agent over time in food safety, electricity and telecommunications | 172 |

CHAPTER 1

# Regulatory Delegation in the EU

The realization of the single market programme adopted in the mid-1980s required a dramatic increase in the regulatory capacity of the European Union (EU). This need was addressed through delegation: several kinds of regulatory actors have been created (Dehousse 2002): committees, regulatory networks and EU regulatory agencies. The increasing array of these regulatory agents has spurred considerable interest among scholars of EU governance and EU regulation who, however, have tended to address this phenomenon in a fragmented way by specializing by type of regulatory agent. We thus find a juxtaposition of bodies of research on regulatory networks, committees and comitology and on EU agencies that hardly dialogue with each other.

It is only recently that scholars of EU public administration and regulatory governance have adopted a wider perspective and pointed at how the accumulation of regulatory and administrative actors in the EU formed what can be called an 'EU regulatory space' (Levi-Faur 2011), a 'multilevel union administration' (Egeberg 2006) or an 'emergent European executive order' (Trondal 2010). The overall picture of this EU regulatory space is dauntingly complex and has, so far, received only very little attention. The few pieces addressing EU regulatory space as a whole have unveiled some of its general characteristics such as its multi-level character (Egeberg 2006; Hofmann and Türk 2006), its compound structure



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(Trondal 2010), the central role played by the EU Commission (Egeberg 2006) and the growing importance of EU agencies in it (Levi-Faur 2011).

While these works should be praised for opening an important research avenue by identifying and describing EU regulatory space, they do not engage in the more fine-grained task of explaining the variety of its manifestations across sectors and over time. Hence, a middle-range approach is still missing between the literature specializing by type of agent and the emerging scholarship dealing with EU regulatory space as a whole. How can we explain the variation in the types of delegation patterns and regulatory actors across sectors and their evolution over time?

Answering these questions requires a preliminary mapping of the major delegation patterns involved in EU regulatory governance and their trajectories over time. Based on a review of the existing literature on delegation and EU regulatory governance, I identify three delegation patterns centred on expert committees (expertise pattern), EU regulatory networks (coordination pattern) and EU regulatory agencies (agencies pattern) and two paths of institutional change corresponding to the agencification of EU regulatory networks and the agencification of expert committees. This allows defining two more specific research 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? The chapter ends with a brief presentation of the conjectures, cases and findings of the book.

## Why Delegate in the EU? The Need for Coordination and Expertise

In order to map the major delegation patterns involved in EU regulatory governance, I will start with the identification of the delegation needs that are specific to EU regulatory governance before turning to the different kinds of regulatory agents that are employed to answer those needs. This first section reviews the common delegation rationales put forward by the literature and contrasts them with the literature on EU polity, EU public administration and EU regulatory governance in order to identify those delegation rationales that are relevant in the EU context. Indeed, the usefulness of delegation depends on the institutional context in which it is employed. As will be explained below, some types of delegation that are often found in national political systems are of limited value in the context of EU politics.

This contrast between the literature on delegation and that on EU politics and governance allows us to identify the two rationales that play an important role in EU regulatory delegation. The first one is the need to improve the coordination between national regulatory authorities. The second one is the provision of expertise and information to the Commission.

Why do policy-makers resort to delegation? First, international relations scholars have shown that the delegation of power to international organizations is generally explained by the need to guarantee a credible commitment to cooperation. Here, delegation steps in as a solution to a collective action problem. While states may have an interest in cooperating with other states (Keohane 1984), 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 benefitting from other states fulfilling their engagements, they may also gain from not fulfilling their own. This may generate free-riding behaviour, 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). In sum, when nation states entrust to a supranational body the task and powers to guarantee compliance with international agreements, they make a commitment to effective cooperation among themselves (Milward 1984; Moravcsik 1998).

This delegation rationale is highly relevant in EU regulatory governance. As EU policy-makers realized that the nationally based implementation of EU regulatory policies impeded the effective removal of internal barriers to trade and jeopardized the realization of the single market, they created EU regulatory networks and EU regulatory agencies to foster cooperation and coordination at the level of policy implementation, with a view to increase regulatory convergence (Dehousse 1997; Eberlein and Grande 2005; Coen and Thatcher 2008).

A second and often mentioned rationale for delegating power is the need, for policy-makers, to make a credible commitment to a specific policy line. This happens when policy-makers are squeezed between long-term policy objectives and short-term electoral concerns. Businesses per-

ceive such tensions. Anticipating that a given policy will be subject to subsequent modifications, they refrain from investing, which undermines the effectiveness of the policy adopted in the first place (Levy and Spiller 1996). In order to strengthen their policy commitment with more stability and credibility, policy-makers thus often resort to delegating regulatory powers to independent regulatory agencies (IRAs) (Majone 1996a; Gilardi 2008: 30–31).

As this delegation rationale is essentially meant as protection against short-term electoral concerns in nation states, it is based on an implicit assumption about the effect of policy decisions 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. Political parties use EU elections to test their domestic political agenda with the public and the policies proposed by the candidates 'rarely have much European content' (Franklin 2006: 228). It is thus highly unlikely that the EU ruling majority is tempted to flatter the electorate towards the end of its mandate. EU policy-makers are therefore unlikely to delegate in order to guarantee policy credibility.

A third rationale for delegating power is to preserve policy choices from political uncertainty. 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 (Moe 1990: 227–228). While this threat may motivate the delegation of regulatory powers to IRAs in national political systems, it is unlikely to play a significant role in the EU because the threat of policy overhaul due to a change of majority is minimal in the EU context. 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.

Firstly, the coalition and conflict dynamics behind the adoption of EU legislation is complex and involves several dimensions (Egeberg 2006). Actors' positions are not only determined by their partisan membership, but also by their preferences regarding EU integration and their nationality (Héritier 1996). Given this complexity, political leaders rarely manage to keep the policy flow entirely under control, the outcome of legislative negotiations is difficult to predict from the outset (Wallace 2005: 489) and the risk of policy overhaul driven by a new majority is relatively small.

Secondly, it has been shown that a high number of institutional veto players, as is the case in the EU, is a factor of policy stability because it makes it more difficult to revise the legislation once adopted (Tsebelis 2002; Kelemen 2004). 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). Thirdly, since lacking input legitimacy, the EU resorts to output legitimacy, which requires co-opting and persuading a much broader and diverse coalition of interest groups than in the nation states (Wallace 2005: 492). This further limits the possibility of departing significantly from the established Community acquis. In sum, since the risk of policy overhaul by the opposition is very limited in the EU, delegation aiming at preserving policy choices in situations of political uncertainty is rather unlikely.

A fourth delegation rationale corresponds to what is commonly referred to as a blame-shifting strategy, serving politicians' interests in being re-elected. When policy-makers are in favour of a policy that might not please their constituency, they can shift to a third party, not submitted to electoral pressure, the responsibility for those decisions that may be electorally embarrassing and keeping for themselves the valuable function of undoing the agency's wrong decisions when these occur (Fiorina 1977: 179–180; Thatcher and Stone Sweet 2002). Like the delegation for policy credibility, this delegation rationale assumes that EU decisions have an impact on EU elections. Yet, as explained above, EU elections are largely determined by national politics. EU policy-makers are thus unlikely to be blamed by the EU electorate for its decisions, which makes delegation driven by blame-shifting a mechanism deprived of significant benefit in the context of EU politics.

A fifth reason for delegating power is to remedy a lack of expertise. Public policy increasingly relies on 'relevant, timely and, especially, credible information' (Majone 1997: 264). 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. Besides, the liberalization process in several sectors has required the public sector to develop the resources needed to regulate highly technical sectors such as telecommunications and energy (Thatcher 2002: 131). Politicians and public

officials, as generalists, do not necessarily have the appropriate technical or scientific knowledge. In this context, the delegation of regulatory tasks to sectoral and specialized agencies staffed by experts can constitute an efficient solution (Baldwin and McCrudden 1987: 4–5). This motivation plays an important role in EU regulatory delegation. The Commission is essentially an institution of general competence, so it lacks the specialized staff able to deal with the highly technical dimension of regulation, and the literature often mentions the lack of EU-level scientific and technical expertise as a reason for creating regulatory agents.

Finally, a sixth delegation rationale consists in politicians' willingness to get 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 that are related to more general policy-making (McCubbins and Page 1987; Epstein and O'Halloran 1999). This is very true concerning the EU Commission which is often said to lack the staff needed to deal with the increasing demand for regulatory activity (Tallberg 2006: 207). The single market objective has involved a huge increase in the workload of the Commission on several fronts. It requires increasing not only the number of legislative proposals, but also the number of implementing regulations and the number of EU norms whose compliance is the responsibility of the Commission. Given that the size of the Commission has not grown in proportion to the increase in its regulatory responsibilities, it needs to increase its internal efficiency. In the face of such a challenge, the Commission has decentralized its administrative tasks (Vos 2000: 1119) and imported a large number of external experts to work on the preparation and drafting of new legislation (Trondal 2007: 964).

The confrontation between the literature on delegation and that on EU regulatory governance and EU politics underlines three major rationales that may motivate the creation of EU regulatory agents. These are 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 deal with the increase in workload. Delegation to protect policies from policy overhaul may be possible, although rather unlikely given that policy outcomes do not depend on partisan lines of conflicts only, and, more importantly, that high numbers of institutional veto players and the need to co-opt many interest groups guarantee a high

level of policy stability. Finally, delegation to ensure policy credibility and to shift the blame of unpopular decisions are highly unlikely motivations for delegation in the EU given that they rest on the assumption that EU policies affect the results of EU elections, a link that is largely denied by the literature.

For the purpose of this research, I retain two delegation rationales: the commitment to cooperation to increase regulatory convergence and the provision of assistance to the Commission to remedy its lack of resources and expertise. The latter rationale results from merging the Commission's need for expertise and that for efficiency which are analytically and empirically very close and similar. While expertise driven delegation extends the Commission's working capacity in qualitative terms, to remedy its lack of specific expertise, efficiency driven delegation does this in quantitative terms, to remedy the Commission's lack of resources. So both lead to an increase of staff at the EU level to help the Commission deal with its responsibilities. In fact, both delegation rationales are often presented together in the literature, as if they belonged to one broader logic (see for example Trondal 2007: 964; Vos 2000: 1119). Hence, the need for expertise and the need for efficiency are merged into a single delegation rationale, the need to expand the Commission's working capacity.

## To Whom to Delegate in the EU? Committees, Networks and Agencies

Both delegation rationales identified above, the need for coordinationto foster regulatory convergence among member states and to remedy the lack of resources and expertise within the Commission, are, according to the literature on EU regulatory governance, typically met by three regulatory agents: expert committees, EU regulatory networks and EU regulatory agencies.

### *Expert Committees*

Research on committees in the EU is extensive (see for example: Christiansen and Kirchner 2000; Dehousse 2003; Bergström 2005; Christiansen and Larsson 2007; Héritier et al. 2013; Brandsma 2013). 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 too: the

Council's working groups, the committees of the European Parliament (EP) and the expert groups advising the Commission (Larsson and Murk 2007).

This book 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 at all stages of the EU regulatory process, which includes policy implementation (Larsson and Murk 2007: 87–89). The number of such committees today amounts to over one thousand (Gornitzka and Sverdrup 2008: 745; Larsson and Murk 2007: 68). Contrary to other types of committees, the members of expert committees are not representatives of their member states but may be civil servants, as well as independent experts, interest group representatives and other stakeholders; and all of them enjoy 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 EU where the focus on regulation and problem solving involves a high degree of technicality (Majone 1996b). 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 wide use of external expertise (Cini 1996: 121) due to the increasing gap between its regulatory responsibilities and its limited size and resources (Cini 1996: 105–106; Robert 2003: 58). Indeed, the Commission has a genuine need for information (Christiansen and Larsson 2007: 4). The system of committees is the main channel that is used to gather the necessary expertise (Schaefer 1996: 6–9; Van Schendelen and Pedler 1998: 290; Christiansen and Kirchner 2000; Abels 2002: 13). Creating expert committees is a way to increase the Commission's technical knowledge and reinforce its capacity to produce norms, although they may also be used for other reasons such as legitimizing actions or for looking for support (Douillet and de Maillard 2010: 80; Robert 2010; Hrabanski 2011). The Court of Justice has even reinforced this tendency by making it mandatory for the Commission to consult scientific committees whenever it prepares an act with a view to

regulating a product that may have an impact on public health (Court of Justice 1994: para. 84). 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 (Larsson and Murk 2007; Gornitzka and Sverdrup 2008; Douillet and de Maillard 2010; Robert 2010; Hrabanski 2011; Rimkutė and Haverland 2015; Metz 2015). The questions typically addressed revolve around: the influence and power of expert committees in the regulatory process; the strategic use of expertise by the Commission; the socialization processes at work within expert committees; their accountability, legitimacy and opacity; their deliberative character.

### *Regulatory Networks*

In his seminal article, Dehousse (1997) explains how the need to foster regulatory convergence led to the creation of EU networks. The Community method traditionally used for market integration, relying on legislative harmonization 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).

How, then, can the uniformity of implementation be increased in a system based on decentralized implementation? European regulatory networks, understood as a network gathering the national authorities in charge of implementing a given regulatory framework, have been created to meet this challenge (Dehousse 1997; Eberlein and Grande 2005). While these networks answer a clear functional pressure in the form of a need for coordination of national practices (Dehousse 1997; Coen and Thatcher 2008), the choice of this particular institutional solution is also often presented as a result of political considerations. Regulatory networks would then have to be adopted as a second (or third) best option, after member states had refused to empower the Commission or to create an EU agency (Kelemen 2002; Coen and Thatcher 2008; Kelemen and Tarrant 2011).

While EU regulatory networks are often seen as a second best option, they have important advantages. They gather civil servants from national administrations and therefore draw from their knowledge and workforce (Dehousse 1997; Blauberger and Rittberger 2015). Networks also provide a platform for the European socialization of national civil servants and for the cross-fertilization of ideas, which is expected to contribute, over time, to the convergence of administrative practices (Dehousse 1997; Majone 2000: 295–298; Maggetti and Gilardi 2011, 2014). 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 means leads, unsurprisingly, to a lack of effectiveness (Coen and Thatcher 2008; Kelemen and Tarrant 2011). 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 have been able to impose on them (Thatcher and Coen 2008; Boeger and Corkin 2012, 2013).

### *Regulatory Agencies*

Over the last ten years, many European agencies have been created in regulatory policy fields such as health, food safety, environment, energy and aviation. The Commission defines an EU agency as an EU-level public authority with a legal personality and a certain degree of organizational and financial autonomy, created to perform clearly defined tasks (European Commission 2002: 3). Although they are not recognized by the European Community (EC) Treaty as a European institution, they are part of the broader EU legal framework, since they are often created by a secondary legislative act (Kelemen 2005: 175; Groenleer 2006: 157–160). EU agencies are thus more formal than committees and networks that can be created by the Commission on its own.

Notwithstanding these few common features, EU agencies display significant variation in terms of internal structure, relations with other institutions, tasks delegated and powers (European Commission 2002: 3). The Commission's distinction between executive and regulatory agencies has been widely integrated by scholars working on EU agencies. Executive agencies, which perform managerial tasks on behalf of the Commission, are created as a direct delegation of the Commission to the agency, without the intervention of any other actor.[1] Consequently, executive agencies are controlled exclusively by the Commission (Curtin 2009: 143). Unlike executive agencies, regulatory agencies are established by a secondary legislative act. They are 'required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector' (European Commission 2002: 4). 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, although these powers remain limited. The agencies studied in this book correspond to this latter type: EU regulatory agencies.

Although 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 (Geradin and Petit 2004; Curtin 2009), scholars of EU governance only started to write about them with the second wave of creation, initiated by Jacques Delors in the early 1990s (Dehousse 1997; Everson et al. 1999; Majone 1997; Vos 2000). The many reasons justifying the creation of EU agencies reported by this early scholarship can be classified into two categories. While for some authors, the major problem behind the creation of EU agencies is the situation of decentralized policy implementation that spurs divergent administrative practices (Dehousse 1997; Kreher 1997), others primarily emphasize the lack of resources and expertise at the Commission's disposal (Vos 2000). 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 behaviour (Dehousse 1997). This perspective is based on the assumption that policy implementation is done at the national level.

The second category of rationales put forward for the creation of EU agencies takes, as a point of departure, the Commission's insufficient

resources compared to its increasing responsibilities in policy implementation (Vos 2000: 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, the growing politicization of the Commission—through its increased dependency on the EP—would have called 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 2000: 1118; Everson et al. 1999). Second, deep crises at the end of the 1990s shattered the credibility of the EU executive: the BSE crisis and the corruption scandal of the Santer Commission. Overall, 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, and President Prodi 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 unsurprising that the range of tasks and functions delegated to them is so vast and heterogeneous.

In terms of institutional design, EU agencies often take the form of networks of national regulatory bodies and tend to be relatively weak bodies. This is explained by the interest of pre-existing actors in preserving their share of regulatory power, in particular the member states with their NRAs and the Commission (Kelemen 2002; Thatcher and Coen 2008; Dehousse 2008; Egeberg et al. 2009; Thatcher 2011; Boeger and Corkin 2012). Some scholars have noted that EU agencies tend to 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, agencies are not created *ex nihilo*; and yet if they 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 committees' and the power given to EU agencies would originally stem from committees (Dehousse 1997:

258). Agencies are said to be 'often based on existing committees' (Vos 2000: 1117), from which they evolve, while taking over their structure (Krapohl 2004). Regulatory network scholars, on the other hand, point at the progressive transformation of regulatory networks into EU agencies (Thatcher and Coen 2008; Ottow 2012) 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 agencies, which 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.

## Three Delegation Patterns and Two Paths of Institutional Change

How can we explain the fact that delegation patterns involved in EU regulatory governance vary across sectors and change over time? This introductory chapter maps the major delegation patterns based on the prior identification of the delegation needs for EU regulatory governance and of those agents that are most commonly employed to meet these needs. The resulting delegation patterns are therefore conceived as a combination of a specific regulatory agent with determined regulatory functions.

The first problem hampering the realization of the single market and leading to regulatory delegation is the need to improve coordination for the implementation of EU regulatory policies. Such a situation leads to the delegation of coordination tasks to an agent, which means that the agent is meant 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 decisions that are binding for the member states, a weak coordination mechanism could consist, for example, in the exchange of information and the development of common interpretations. Coordination tasks

thus encompass all types of coordination mechanisms, independently of their strength, as long as these mechanisms are meant to increase regulatory consistency among member states.

The other major problem met with in the implementation of EU regulatory policies is the Commission's limited resources and expertise. Here, delegation is meant to support the Commission through the creation of a third body. The agent is asked to assist the Commission by serving as a pool of experts and a working force, which the Commission can tap intoin 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 delegated task is thus considered to fall into this category whenever the agent provides the Commission with any form of scientific or technical input in order to feed the regulatory process.

The most common EU regulatory agents employed to cover the needs for expertise/information and coordination are expert committees, EU regulatory networks and EU regulatory agencies. Accordingly, we can identify three delegation patterns: the expertise pattern, the coordination pattern and the agency pattern. Expert committees are those groups composed of experts (civil servants, independent experts or stakeholders) that are set up and used by the Commission to gather expertise and information (expertise pattern). EU regulatory networks gather civil servants from national regulatory authorities in charge of implementing EU regulatory policies. Also created by the Commission, their major mission is to foster regulatory convergence among member states (coordination pattern). Finally, EU regulatory agencies are EU level public authorities staffed with EU officials, enjoying a legal personality and a certain degree of organizational and financial autonomy. They are created by the secondary legislative acts. Often (but not always) based on networks of national administrations, they can be used as both a platform to foster regulatory convergence and as a source of expertise and information by the Commission (agency pattern).

EU agencies tend to recycle previous institutional structures, such as regulatory networks and committees. Hence, delegation patterns evolve. We can find processes of institutional change, whereby EU agencies take over the mandate of regulatory networks or of committees. The agency pattern would thus replace the coordination pattern (coordination path) or the expertise pattern (expertise path).

Based on the three types of delegation patterns (coordination, expertise and agency) and the two processes of institutional change (coordination path and expertise path), the puzzle driving this research can be broken down into two specific questions. First, what makes a sector fall into the coordination pattern as opposed to the expertise pattern in the first place? Second, why and under which conditions do the coordination and expertise patterns develop into the agency pattern?

## Outline of the Book

Drawing on new institutionalism and principal-agent analysis, I first claim that, in the initial stages of an EU regulatory policy, the emergence of the coordination vs the expertise pattern is related to the distribution of competences, between the Commission and member states, for the implementation of EU legislation. The distribution of implementing competences shapes the type of problem faced by policy-makers, which determines the range of functionally relevant institutional options among which they can choose. Reluctant to give away much regulatory power, they choose the option that is least costly in terms of power. This explains the emergence of the coordination versus 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 coordination. In order to keep control on the regulatory process, member states opt for delegating coordination tasks to a network instead of a more ambitious option such as an EU agency. 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 to increase them. Eager to keep control on the use of expertise in regulatory policies, the Commission refrains from proposing the creation of a strong body such as an EU agency. Rather, the Commission meets 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 lead to 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, which unfolds 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, by 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. As policymakers reinforce the regulatory agent, they tend to do so in a conservative way, making sure the additional empowerment does not imply an important loss of power for them. In turn, this limited upgrade of effectiveness is likely to reveal insufficient, justifying another round of reform to further empower the regulatory agent. 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, I argue that the agencification of regulatory networks is more likely than the agencification of committees. An important difference between the coordination and expertise path is the level of distributional stakes of the Commission. In the expertise path, where the potential EU agency would inherit powers that would otherwise belong to the Commission, has more to lose than in the coordination path that is about pooling national competences at the EU level. The Commission is thus rather unlikely to advocate the creation of an agency in the expertise path , except in the case of very strong problem pressure.And since the Commission is responsible for initiating policy proposals, 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 out and explained in detail. The map-

ping covers the distribution of implementing competences between member states and the Commission, the presence of needs for expertise and for coordination, the regulatory agents created and the regulatory functions delegated to them, the eventual lack of effectiveness of the agent, and the feedback effect triggered on the revision of the delegation pattern. The empirical chapters are structured in a way that allows an assessment of the plausibility of the coordination and expertise patterns, as well as a tracing of 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 also allows a refining of the conjectures. First, two scope conditions for their validity are identified: the extent to which policy-makers decide to adopt technical measures by means of secondary legislation instead of implementing regulation; and the distribution of implementing competences at the national level between national actors. Second, the degree of technicality involved in the implementation of the sector appears as an important additional factor in the shaping of delegation patterns. 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.

The remainder of the book is structured as follows. Chapter 2 presents the theoretical framework of this research. It includes a detailed presentation of the arguments and their relationship to principal-agent analysis and new institutionalism. This is followed by three empirical chapters dealing with food safety (Chap. 3), electricity (Chap. 4) and telecommunications (Chap. 5). Finally, Chap. 6 wraps up the findings of the book and highlights its contribution to the literature on EU regulatory space, principal-agent analysis and theories of institutional design and institutional change.

## Note

1. The creation of an executive agency has, however, been framed by a Council regulation, which lays down the conditions under which such a delegation can take place and which limits its scope (Council of the European Union 2002).

## References

Abels, G. (2002). Experts, citizens, and Eurocrats—Towards a policy shift in the governance of biopolitics in the EU. *European Integration Online Papers, 6*(19).

Baldwin, R., & McCrudden, C. (1987). Regulatory agencies: An introduction. In R. Baldwin & C. McCrudden (Eds.), *Regulation and public law*. London: Weidenfeld and Nicolson.

Bergström, C. F. (2005). *Comitology: Delegation of powers in the European Union and the committee system*. Oxford: Oxford University Press.

Blauberger, M., & Rittberger, B. (2015). Conceptualizing and theorizing EU regulatory networks. *Regulation & Governance, 9*(4), 367–376.

Boeger, N., & Corkin, J. (2012). How regulatory networks shaped institutional reform under the EU telecoms framework. *Cambridge Yearbook of European Legal Studies, 14*, 49–73.

Boeger, N., & Corkin, J. (2013). Are expert networks driving the trend towards soft transnational coordination? In P. Jurcys, P. Kjaer, & R. Yatsunami (Eds.), *Regulatory hybridisation in the transnational sphere* (pp. 149–170). Leiden: Martinus Nijhoff Publishers.

Brandsma, G-J. (2013) Controlling Comitology: Accountability in a Multi-Level System. Basingstoke: Palgrave Macmillan.

Busuioc, M., Groenleer, M., & Trondal, J. (2012). The phenomenon of European Union agencies: Setting the scene. In J. Trondal, M. Busuioc, & M. Groenleer (Eds.), *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making*. Manchester: Manchester University Press.

Christiansen, T., & Kirchner, E. J. (2000). *Committee governance in the European Union*. Manchester: Manchester University Press.

Christiansen, T., & Larsson, T. (2007). Introduction: The role of committees in the policy-process of the European Union. In T. Christiansen & T. Larsson (Eds.), *The role of committees in the policy-process of the European Union. Legislation, implementation and deliberation*. Cheltenham: Edward Elgar.

Cini, M. (1996). *The European Commission: Leadership, organisation, and culture in the EU administration*. New York: Manchester University Press.

Coen, D., & Thatcher, M. (2008). Network governance and multi-level delegation: European networks of regulatory agencies. *Journal of Public Policy, 28*(1), 49–71.

Council of the European Union. (2002). *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.*

Court of Justice. (1994). Judgement C-212/91. *Angelopharm v. Hamburg.*

Curtin, D. (2009). *Executive power of the European Union. Law, practices, and the living constitution*. New York: Oxford University Press.

Dehousse, R. (1997). Regulation by networks in the European Community: The role of European agencies. *Journal of European Public Policy, 4*(2), 246–261.

Dehousse, R. (2002). Misfits: EU Law and the transformation of European governance. In C. Joerges & R. Dehousse (Eds.), *Good governance in Europe's integrated market*. New York: Oxford University Press.

Dehousse, R. (2003). Comitology: Who watches the watchmen? *Journal of European Public Policy, 10*(5), 798–813.

Dehousse, R. (2008). Delegation of powers in the European Union: The need for a multi-principals model. *West European Politics, 31*(4), 789–805.

Djelic, M.-L., & Quack, S. (2003). Theoretical building blocks for a research agenda. In M.-L. Djelic & S. Quack (Eds.), *Globalization and institutions*. Cheltenham: Edward Elgar.

Douillet, A.-C., & de Maillard, J. (2010). Les comités d'experts: une ressource institutionnelle pas toujours maîtrisée. *Politique européenne, 32*(3), 77–98.

Eberlein, B., & Grande, E. (2005). Beyond delegation: Transnational regulatory regimes and the EU regulatory state. *Journal of European Public Policy, 12*(1), 89–112.

Egeberg, M. (2006). Europe's executive branch of government in the melting pot: An overview. In M. Egeberg (Ed.), *Multilevel union administration*. Basingstoke: Palgrave Macmillan.

Egeberg, M., Schaefer, G., & Trondal, J. (2003). The many faces of EU committee governance. *West European Politics, 26*(3), 19–40.

Egeberg, M., Trondal, J. and Martens, M. (2009) Building Executive Power at the European Level. On the Role of EU-Level Agencies. ARENA Working paper 10.

Epstein, D., & O'Halloran, S. (1999). *Delegating powers: A transaction cost politics approach to policy making under separate powers*. New York: Cambridge University Press.

European Commission. (2002). *Communication from the Commission. The operating framework for the European Regulatory Agencies*. COM(2002) 718 final.

Everson, M., Majone, G., Metcalfe, L., & Schout, A. (1999). *The role of specialised agencies in decentralising EU Governance*. Report presented to the Commission.

Fiorina, M. P. (1977). The case of the vanishing marginals: The bureaucracy did it. *The American Political Science Review, 71*(1), 177–181.

Franchino, F. (2007). *The powers of the union: Delegation in the EU*. New York: Cambridge University Press.

Franklin, M. (2006). European elections and the European voter. In J. Richardson (Ed.), *European Union: Power and policy-making*. Abingdon: Routledge.

Gehring, T. (1999). Bargaining, arguing and functional differentiation of decision-making: The role of committees in European environmental process regulation. In C. Joerges & E. Vos (Eds.), *EU committees: Social regulation law and politics*. Oxford: Hartman Publishing.

Geradin, D. & Petit, N. (2004) The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform. Jean Monnet Working Paper 01/04. New York: NYU School of Law.

Gilardi, F. (2008). *Delegation in the regulatory state. Independent regulatory agencies in Western Europe*. Cheltenham: Edward Elgar.

Gornitzka, A., & Sverdrup, U. (2008). Who consults? The configuration of expert groups in the European Union. *West European Politics, 31*(4), 725–750.

Gornitzka, A., & Sverdrup, U. (2010). *Enlightened decision making. The role of scientists in EU Governance* (ARENA Working Paper 5).

Groenleer, M. (2006). The European Commission and agencies. In D. Spence & E. Geoffrey (Eds.), *The European Commission*. London: John Harper Publishing.

Guéguen, D., & Rosberg, C. (2004). *Comitology and other EU Committees and expert groups. The hidden power of the EU: Finally a clear explanation*. Europe Information Service.

Hawkins, D. G., Lake, D. A., Nielson, D. L., & Tierney, M. J. (2006). Delegation under anarchy: States, international organizations and principal-agent theory. In D. G. Hawkins, D. A. Lake, D. L. Nielson, & M. J. Tierney (Eds.), *Delegation and agency in international organizations*. Cambridge: Cambridge University Press.

Héritier, A. (1996). The accommodation of diversity in European policy-making and its outcomes: Regulatory policy as a patchwork. *Journal of European Public Policy, 3*(2), 149–167.

Héritier, A., Moury, C., Bischoff, C. S., & Bergström, C.-F. (2013). *Changing rules of delegation: A contest for power in comitology*. Oxford: Oxford University Press.

Hofmann, H., & Türk, A. (Eds.). (2006). *EU administrative governance*. Cheltenham: Edward Elgar.

Hrabanski, M. (2011). Les groupes d'experts de la DG agri : diversité des usages de l'expertise et socialisation aux normes d'action publique de l'Union européenne. *Politique européenne, 32*(3), 99–123.

Kelemen, D. R. (2002). The politics of 'Eurocratic' structure and the new European agencies. *West European Politics, 25*(4), 93–118.

Kelemen, D. R. (2004). *The rules of federalism: Institutions and regulatory politics in the EU and beyond*. Cambridge, MA: Harvard University Press.

Kelemen, D. R. (2005). The politics of Eurocracy: Building a new European state? In N. Jabko & C. Parson (Eds.), *The state of the European Union*. Oxford: Oxford University Press.

Kelemen, D. R., & Tarrant, A. (2011). The political foundations of the Eurocracy. *West European Politics, 34*(5), 922–947.

Keohane, R. O. (1984). *After hegemony: Cooperation and discord in the world political economy*. Princeton: Princeton University Press.

Krapohl, S. (2004). Credible commitment in non-independent regulatory agencies: A comparative analysis of the European agencies for pharmaceuticals and foodstuffs. *European Law Journal, 10*(5), 518–538.

Krapohl, S. (2008). *Risk regulation in the single market: The governance of pharmaceuticals and foodstuffs in the European Union*. Basingstoke: Palgrave Macmillan.

Kreher, A. (1997). Agencies in the European community—A step towards administrative integration in Europe. *Journal of European Public Policy, 4*(2), 225–245.

Larsson, T., & Murk, J. (2007). The Commission's relations with expert advisory groups. In T. Christiansen & T. Larsson (Eds.), *The role of committees in the policy-process of the European Union, legislation, implementation and deliberation*. Cheltenham: Edward Elgar.

Levi-Faur, D. (2011). Regulatory networks and regulatory agencification: Towards a single European regulatory space. *Journal of European Public Policy, 18*(6), 810–829.

Levy, B., & Spiller, P. T. (1996). *Regulations, institutions and commitment: Comparative studies of telecommunications*. Cambridge: Cambridge University Press.

Maggetti, M., & Gilardi, F. (2011). The policy-making structure of European regulatory networks and the domestic adoption of standards. *Journal of European Public Policy, 18*(6), 830–847.

Maggetti, M., & Gilardi, F. (2014). Network governance and the domestic adoption of soft rules. *Journal of European Public Policy, 21*(9), 1293–1310.

Majone, G. (1996a). *Temporal consistency and policy credibility. Why democracies need non-majoritarian institutions* (EUI RSC Working Papers 57).

Majone, G. (1996b). *Regulating Europe*. London: Routledge.

Majone, G. (1997). The new European agencies: Regulation by information. *Journal of European Public Policy, 4*(2), 262–275.

Majone, G. (2000). The credibility crisis of community regulation. *Journal of Common Market Studies, 38*(2), 273–302.

Martens, M. (2009). *Executive power in the making: The establishment of the European Chemical Agency (ECHA)* (ARENA Working Paper 8).

McCubbins, M. D., & Page, T. (1987). A theory of congressional delegation. In M. D. McCubbins & T. Sullivan (Eds.), *Congress: Structure and policy*. Cambridge: Cambridge University Press.

Metz, J. (2015). *The European Commission, expert groups, and the policy process: Demystifying technocratic governance*. Basingstoke: Palgrave Macmillan.

Milward, A. S. (1984). *The reconstruction of Western Europe, 1945–51*. Berkeley: University of California Press.

Moe, T. M. (1990). Political institutions: The neglected side of the story. *Journal of Law, Economics, and Organization, 6*, 213–253.

Moravcsik, A. (1998). *The choice for Europe: Social purpose and state power from Messina to Maastricht*. Ithaca, NY: Cornell University Press.

Nugent, N. (2006). *The government and politics of the European Union* (6th ed.). Basingstoke: Palgrave Macmillan.

Ottow, A. (2012). Europeanization of the supervision of competitive markets. *European Public Law, 18*(1), 191–221.

Quack, S., & Djelic, M.-L. (2005). Adaptation, recombination, and reinforcement: The story of antitrust and competition law in Germany and Europe. In W. Streeck & K. Thelen (Eds.), *Beyond continuity. Institutional change in advanced political economies*. Oxford: Oxford University Press.

Rimkutė, D., & Haverland, M. (2015). How does the European Commission use scientific expertise? Results from a survey of scientific members of the commission's expert committees. *Comparative European Politics, 13*, 430–449.

Robert, C. (2003). L'expertise comme mode d'administration communautaire: entre logiques technocratiques et stratégies d'alliance. *Politique européenne, 11*(3), 57–78.

Robert, C. (2010). Les groupes d'experts dans le gouvernement de l'Union européenne. *Politique européenne, 32*(3), 7–38.

Schaefer, G. F. (1996). Committees in the EC policy process: A first step towards developing a conceptual framework. In R. H. Pedler & G. F. Schaefer (Eds.), *Shaping European law and policy: The role of committees and comitology in the political process*. Maastricht: European Institute of Public Administration.

Tallberg, J. (2006). Executive politics. In K. E. Jorgensen, M. A. Pollack, & B. Rosamond (Eds.), *Handbook of European Union politics*. London: Sage.

Thatcher, M. (2002). Delegation to independent regulatory agencies: Pressures, functions and contextual mediation. *West European Politics, 25*(1), 125–147.

Thatcher, M. (2011). The creation of European regulatory agencies and its limits: A comparative analysis of European delegation. *Journal of European Public Policy, 18*(6), 790–809.

Thatcher, M., & Coen, D. (2008). Reshaping European regulatory space: An evolutionary analysis. *West European Politics, 31*(4), 806–836.

Thatcher, M., & Stone Sweet, A. (2002). Theory and practice of delegation to non-majoritarian institutions. *West European Politics, 25*(1), 1–22.

Thelen, K. (2003). How institutions evolve: Insights from comparative historical analysis. In J. Mahoney & D. Rueschemeyer (Eds.), *Comparative historical analysis in the social sciences*. Cambridge: Cambridge University Press.

Trondal, J. (2007). The public administration turn in integration research. *Journal of European Public Policy, 14*(6), 960–972.

Trondal, J. (2010). *An emergent European executive order*. Oxford: Oxford University Press.

Tsebelis, G. (2002). *Veto players: How political institutions work*. New York: Princeton University Press.

Van Schendelen, M. P. C. M., & Pedler, R. H. (1998). Are EU committees influential? In M. P. C. M. Van Schendelen (Ed.), *EU committees as influential policymakers.* Aldershot: Ashgate.

Vos, E. (1999). EU committees: The evolution of unforeseen institutional actors in European product regulation. In C. Joerges & E. Vos (Eds.), *EU committees: Social regulation, law and politics.* Oxford: Hartman Publishing.

Vos, E. (2000). Reforming the European Commission: What role to play for EU agencies? *Common Market Law Review, 37*, 1113–1134.

Wallace, W. (2005). Post-sovereign governance. In H. Wallace, W. Wallace, & M. A. Pollack (Eds.), *Policy-making in the European Union*. New York: Oxford University Press.

CHAPTER 2

# Explaining Delegation Patterns

How can we explain the variation among sectors and the change over time, in the type of delegation patterns observed? This is a vast question, and the configuration of the explanandum within EU regulatory space was mapped out in Chap. 1 to clear the way.

A 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 types of tasks. 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, EU regulatory space, as complex and nebulous as it may appear, lends itself to a typology composed of three distinct delegation patterns. The coordination pattern is characterized by regulatory networks in charge of coordinating national regulatory practices. The expertise pattern partly corresponds to what is often referred to as the committee system, where expert committees assist the Commission by providing information and expertise. The third pattern is centred on an EU agency that could produce either coordination with a view to harmonizing national regulation, or expertise in order to assist the Commission, or both. The agency



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pattern results from a process of institutional change where it replaces either the coordination pattern (coordination path) or the expertise pattern (expertise path).

This typology of regulatory patterns and paths of institutional change helps to address the overarching research puzzle by decomposing it into two specific questions. First, what makes a sector fall into the coordination pattern as opposed to the expertise pattern in the first place? Second, once created, how can we explain the reinforcement of the regulatory agents over time up to their eventual transformation into EU regulatory agencies?

A first set of conjectures, related to the first research question, are formulated according to an adaptation of the principal-agent (P-A) framework. The second research question is then addressed with a second set of conjectures, based on the effect of feedback loops on institutional change. Both sets of conjectures are then anchored and linked together into a general theoretical approach about institutional design and institutional change that is located at the crossroads between historical institutionalism and rational choice institutionalism. The chapter ends with a schematic overview of the processes expected to be found in the case studies.

## Varying Delegation Patterns

When deciding about which institutional answer to apply to a given problem, policy-makers are bounded by a limited range of relevant options. The range of options is highly dependent on the type of problem at stake: one effective solution to a given problem may be irrelevant to another problem (Martin 1992). Hence, a given problem can only be addressed by a few institutional options that may be considered functionally equivalent, although their effectiveness may vary. This, I argue, accounts 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. While networks tend to answer a need for coordination, committees are created to remedy the lack of expertise and resources within the Commission. So networks and committees tend not to exist alongside each other in a given range of institutional alternatives in a specific situation. Hence, to understand why a sector is characterized 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 of another prob-

lem 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 with the first question: the variation in the type of governance problem. Based on the review of how the delegation literature applies to EU regulatory governance (see Chap. 1) and an adaptation of the P-A framework (see below in this section), I conjecture 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 centralized. The Commission is thus unlikely to delegate for coordination reasons. Rather, it delegates the task to gather information and draft regulations because, given its limited resources, it cannot cope with the technicality of regulation and the workload.

The second question on the choice of network and committees over other possible institutional solutions is explained by a trade-off made by policymakers between the search for effectiveness and the willingness to maximize their institutional power. This question is strongly related to the issue of the agencification process and the 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.

### *Competence Distribution and Delegation Patterns*

My first argument is that the variation in the delegation pattern depends on the variation in the type of governance problem met within 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 type of problem and the delegation pattern, let us first consider the effect of the distribution of competences on the type of problem.

Analytically, whether 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 decentralized regulatory authority. Here, the member states are the principal. In the second case, the situation of reference is characterized by a centralized 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 then exerts it 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 (Franchino 2007).

The identification of the principal is particularly important because it is intimately linked with the delegation rationale, which derives from the type of problem. Policy-makers decide to delegate powers in order to solve a specific problem. Since the delegation is a mechanism that consists in transferring 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 owner is crucially linked with the rationale at stake in the delegation process. This is why it is important 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. This distinction, eventually, explains why a given sector falls into the coordination or into the expertise pattern.

It may be argued that, in such complex delegation configurations, it is not possible to identify clearly a principal, 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 member states to a supranational organization, 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 to explaining why EU regulatory agents, EU agencies in Dehousse's article, are endowed with so little power.

If 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 (characterized 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. 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. Third, 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, characterized by the dispersion of power, complex chains of delegation and multiple configurations of principals (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 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 conceiving institutional setting, in the form of competence distribution, 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 (see Chap. 1) revealed that regulatory delegation in the EU is used for remedying 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 specialization. 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 decentralized 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 ensures a coordinated implementation. Alternatively, where the Commission is delegated the bulk of the implementing regulatory authority, its limited capacity and specialization is likely to limit the its ability to make full use of its competences, unless its resources are significantly reinforced or part of the workload involved is delegated to 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 the implemention of decision-making competences to the Commission can provide a hierarchical type of solution to the need for coordination. 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 choose 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 maximization of power. Consequently, they proceed by trial and error, adjusting institutional arrangements gradually (North 1990). Given the high number of veto players in the EU, it is almost impossible for policy-makers to depart significantly from previously adopted policy decisions (Tsebelis 2002), in particular to remove competences that were previously delegated to the EU (Pierson 1996). Therefore, 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 will be unable to reverse it later. On the other hand, they know it is always possible to delegate more power in the future in case the first agent reveals it is 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, member states prefer a lighter coordination mechanism such as a network. This situation is one where member states hold most implementing competences so the distributional stakes of delegation are particularly high for them. Even if agreeing with 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 con-

trol on the process of EU coordination. Given the importance of member states in the EU decision-making process, their preference for a network is reflected in the outcome. Hence, in the first stages of a public policy where most implementing competences 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 remedying the Commission's need for resources and expertise, the reluctance of member states to empower the Commission eliminates 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 which favours transparency over opaque processes that are characteristic of committee governance. But both member states and the Commission prefer committees over an EU agency, although for different reasons. For member states, the creation of an EU agency involves a significant budget and 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 therefore favours 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. Hence, 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. This situation is likely to lead to the creation of expert committees to provide the necessary expertise-based input into the regulatory process.

### *Conjectures*

While I make 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 functions 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 to understanding why EU agencies are more likely to emerge in the coordination path than in the expertise path (see next section on changing delegation patterns).

Such situations of double delegations, 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 the main problem behind the creation of the regulatory agent was and what its main function is. 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 actors communicating with each other. This condition would not be met by a committee composed of independent experts who do not necessarily belong to national administrations.

Accordingly, one can formulate the following conjectures:

- *When most regulatory authority remains at the national level, policymakers are expected to set up a coordination pattern, that is, to delegate coordination tasks to an EU regulatory network: when most regulatory authority remains at the national level, market integration requires 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 or an EU regulatory agency, or delegating the implementing authority to the Commission; given member states' reluctance to lose much of their implementing power,*

*the outcome is 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, that is, to create expert committees and entrust them with the task to provide expert-based input to the Commission: 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 or an EU regulatory agency, or increasing the budget of the Commission; given member states' reluctance to empowering the Commission, and the Commission's reluctance to losing much control over implementing regulation, the outcome takes the form of expert committees responsible for providing expertise to the Commission.*
- *When the regulatory authority is shared between 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: when the regulatory authority is shared between member states and the Commission in similar proportions, the effective implementation of the policy requires 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 or 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 to losing control on the implementation process, the outcome is expected to be the delegation of both tasks to an EU regulatory network.*

## Changing Delegation Patterns

Why and under which conditions do the coordination and expertise patterns develop into a delegation pattern centred on an EU agency? 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 implementing 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 implementing 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 member states and the Commission, it is to the benefit of the Commission. EU public policies tend, indeed, to become increasingly centralized 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 involve gradually 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, which may take 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 propose, best explained by a combination of functional and power-distributional factors unfolding over time 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.

### *Agencification of Networks*

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 institutionalization of networks. Once created, NRAs and regulatory networks develop institutional interests of their own as well as lobbying capacity, which significantly limits the scope of modifications that policy makers are 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. Rather

than being replaced, in a process of radical change, by a more effective institutional structure such as an EU regulator, regulatory networks have only been gradually institutionalized (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). The very, politically driven, weakness of regulatory agents is precisely the reason why functionalism strikes back. As long as policy-makers resist from engaging in significant institutional change, the coordination 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 policy-making system, once an institutional move to increase regulatory capacity is made it is practically nearly 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 European regulatory space. However, while they emphasize the absence of significant changes, in spite of definite pressure due to the interest of pre-existing actors, the opposite is done here: emphasizing the persisting functional pressure to explain why there is change, in spite of the desire of pre-existing actors to hold 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 the 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.

### *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 coexist 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, pre-existing

actors with vested interests 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, for example by deciding who would be the chair and the committee members, 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 gathering 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 committee 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 member states, they are also expected to be reluctant to the replacement of committees by agencies because that would require a much bigger budget. The Parliament, on the contrary, prefers EU agencies, precisely because the higher transparency associated with these more formal structures allows a fire-alarm type of control (McCubbins and Schwartz 1984), convenient for the Parliament (Kelemen 2002), 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 modest committee system 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 is under great pressure for either lacking effectiveness or being particularly problematic in terms of accountability or legitimacy.

### *Conjectures*

- *Over time, there is a progressive reinforcement of the regulatory agent, in the form of an increase of regulatory authority or administrative means.*
- *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 higher the problem pressure, the more likely it is that the regulatory agent (network or committee) is transformed into an EU agency.*
- *The agencification of networks is more likely than the agencification of committees.*

## Explaining Institutions

The theoretical framework of the conjectures allies rational choice institutionalism and historical institutionalism. It is close to rational choice institutionalism because of its assumptions about the rationality of actors 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.

### *Assumptions about Actors' 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 EP. These three institutional actors have different preferences and the institutional outcome results from a negotiation between them. Most of the institutional choice about the delegation pattern is made at the legislative stage under the codecision procedure, which grants each of the three institutional actors a decisive weight regarding the outcome.

As to the formation of actors' preferences in a rational-choice approach, I assume actors to be driven by the need to maximize their interests. I consider two types of relevant interests: that actors are interested in increasing policy effectiveness (functional interest) and in maximizing their institutional power (distributional interest). Besides, I assume the rationality of

actors 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).

How do actors' drives for increasing their power and solving collective problems interact? In some cases, the functional and distributional interests converge towards the same 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 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' preferences result from a trade-off between policy effectiveness and power.

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 by actors between wealth maximization 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 maximize both effectiveness and power. The significant role played by functional pressure in shaping actors' preferences would be conditional on low distributional stakes.

For 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). In addition, distributional stakes are higher for member states in sectors where the implementation has 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 do not imply the transfer of national powers to the EU level, for example because it would entail the transfer of the powers stemming from the Commission instead (expertise path), member states are expected to be less reluctant about agencifica-

tion, although they may oppose it 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)—it 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 did not contribute to directly empowering the Commission, the creation of an EU agency still represents an opportunity for the Commission to increase indirectly its influence on the regulatory process, through the influence it would gain in the future on the new agency. For the Parliament, the distributional stakes are not expected to vary as they do for 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 is relevant, I think 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 provided 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.

In sum, when actors' 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 the quest of actors for power regarding the determination of situational preferences.

Finally, for strategic reasons, the preferences pursued by actors in the negotiation may differ from the preferences as resulting from this trade-off. First, I assume uncertainty to affect the preferences pursued by actors in the negotiation process. 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 in 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, which is 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 provides the better ratio between the increase of effectiveness and loss of power. Hence, they 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. The knowledge of policy-makers about this further increases the weight of distributional concerns in the definition of the preferences that are defended in the negotiation process.

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 an absence of agreement—the status quo—which would be worse for them.

### *Institutional Complementarity and Beyond*

The arguments in this book are structured around 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, my 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: Chap. 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 (North 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' (North 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 us to understand 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 would 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 also reinforces the effectiveness of the Commission in making use of its competences.

Drawing on the institutional complementarity concept, the argument presented in this book goes 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 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, that is, 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), in this book I include the dimension of power. Indeed, the 'Varieties of Capitalism' argument as well as functionalism in general have been criticized for ignoring the fact 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, I integrate the power distributional factor, without however limiting the explanation of institutional choice to the sole effect of power distribution. As presented 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 the uncertainty of actors 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 this 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 I expand the concept of institutional complementarity consists in connecting it to a broader argument about institutional change, which allows the overcoming of the static dimension of Hall and Soskice's theory. Given that actors tend to choose sub-optimal institutional solutions, I expect these solutions to be unable to solve the problems properly. This lack of effectiveness creates feedback effects that trigger the willingness of actors to adjust the institutional solution. Institutional change follows in order to improve institutional effectiveness. Here again, wherever the gains in effectiveness run against the maximization 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 this 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, subject 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: Chap. 1), policy feedback may also be a trigger for institutional change by provid-

ing policy-makers with information allowing them to understand better their problems and learn from past mistakes. By allowing policy learning, policy feedback provides policy-makers with 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 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.

## Tracing Delegation Patterns

In order to facilitate the evaluation of the conjecture, the presentation of the empirical material in the following chapters will be structured along the patterns and processes involved in the conjectures. In order to clarify this structure before moving on, I will provide 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.

### *The Coordination Pattern and the Coordination Path*

At T1, the coordination pattern is found where regulatory competences have remained at the national level. National implementation competences create a need for coordination which, given actors' preferences not to lose power, are 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 a view to solving the remaining problem of coordination. At T2, two institutional options are then available: reinforcing the network or delegating implementing competences to the Commission (see Fig. 2.1). Both options do not exclude each other, as they may be combined.

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 network's lack of effectiveness. The likely institutional

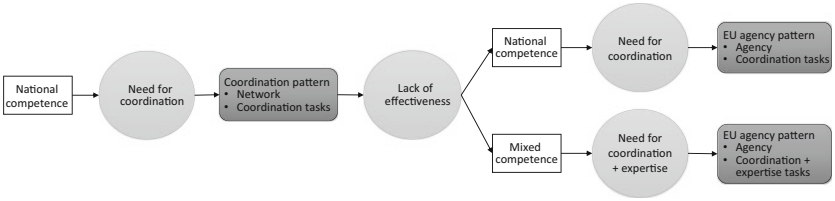


**Fig. 2.1** The coordination path

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 number 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.

### *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 remedy the lack of resources and expertise of the latter and given the interest of actors 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, transparency or legitimacy, 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 (see Fig. 2.2).

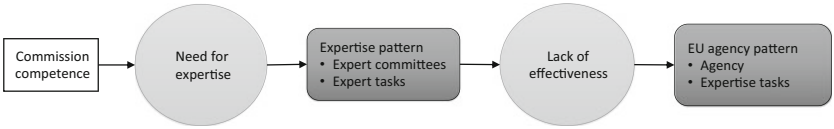


**Fig. 2.2** The expertise path

## References

Boeger, N., & Corkin, J. (2012). How regulatory networks shaped institutional reform under the EU telecoms framework. *Cambridge Yearbook of European Legal Studies, 14*, 49–73.

Boeger, N., & Corkin, J. (2013). Are expert networks driving the trend towards soft transnational coordination? In P. Jurcys, P. Kjaer, & R. Yatsunami (Eds.), *Regulatory hybridisation in the transnational sphere* (pp. 149–170). Leiden: Martinus Nijhoff Publishers.

Christiansen, T., & Larsson, T. (2007). Introduction: The role of committees in the policy-process of the European Union. In T. Christiansen & T. Larsson (Eds.), *The role of committees in the policy-process of the European Union. Legislation, implementation and deliberation*. Cheltenham: Edward Elgar.

Christiansen, T., Larsson, T., & Schaefer, G. (2007). Conclusion. In T. Christiansen & T. Larsson (Eds.), *The role of committees in the policy-process of the European Union. Legislation, implementation and deliberation*. Cheltenham: Edward Elgar.

Dehousse, R. (2008). Delegation of powers in the European Union: The need for a multi-principals model. *West European Politics, 31*(4), 789–805.

Douillet, A.-C., & de Maillard, J. (2010). Les comités d'experts: une ressource institutionnelle pas toujours maîtrisée. *Politique européenne, 32*(3), 77–98.

Franchino, F. (2007). *The powers of the union: Delegation in the EU*. New York: Cambridge University Press.

Hall, P. A., & Soskice, D. (2001). An introduction to varieties of capitalism. In P. A. Hall & D. Soskice (Eds.), *Varieties of capitalism: The institutional foundations of comparative advantage*. New York: Oxford University Press.

Hancké, B., Rhodes, M., & Thatcher, M. (2007). Introduction: Beyond varieties of capitalism. In B. Hancké, M. Rhodes, & M. Thatcher (Eds.), *Beyond varieties of capitalism. Conflict, contradictions and complementarities in the European economy*. New York: Oxford University Press.

Heclo, H. (1974). *Modern social politics in Britain and Sweden: From relief to income maintenance*. New Haven, CT: Yale University Press.

Kelemen, D. R. (2002). The politics of 'Eurocratic' structure and the new European agencies. *West European Politics, 25*(4), 93–118.

Kelemen, D. R., & Tarrant, A. (2011). The political foundations of the Eurocracy. *West European Politics, 34*(5), 922–947.

Kingdon, J. W. (2003). *Agendas, alternatives and public policies* (2nd ed.). New York: Longman.

Knight, J. (1995). Models, interpretations, and theories: Constructing explanations of institutional emergence and change. In J. Knight & I. Sened (Eds.), *Explaining social institutions.* Ann Arbor: The University of Michigan Press.

Krasner, S. D. (1988). Sovereignty: An institutional perspective. *Comparative Political Studies, 21*(1), 66–94.

Larsson, T., & Murk, J. (2007). The Commission's relations with expert advisory groups. In T. Christiansen & T. Larsson (Eds.), *The role of committees in the policy-process of the European Union, legislation, implementation and deliberation*. Cheltenham: Edward Elgar.

Martin, L. L. (1992). Interests, power, and multilateralism. *International Organization, 46*(4), 765–792.

McCubbins, M. D., & Schwartz, T. (1984). Congressional oversight overlooked: Police patrols versus fire alarms. *American Journal of Political Science, 28*(1), 165–179.

Nelson, D., & Silberberg, E. (1987). Ideology and legislator shirking. *Economic Inquiry, 25*(1), 15–25.

North, D. C. (1990). *Institutions, institutional change, and economic performance.* Cambridge: Cambridge University Press.

Pierson, P. (1996). The path to European integration a historical institutionalist analysis. *Comparative Political Studies, 29*(2), 123–163.

Pierson, P. (2000). Increasing returns, path dependence, and the study of politics. *The American Political Science Review, 94*(2), 251–267.

Pierson, P. (2004). *Politics in time: History, institutions, and social analysis.* Princeton: Princeton University Press.

Robert, C. (2003). L'expertise comme mode d'administration communautaire: entre logiques technocratiques et stratégies d'alliance. *Politique européenne, 11*(3), 57–78.

Skocpol, T. (1992). *Protecting soldiers and mothers: The political origins of social policy in United States.* Cambridge, MA: Harvard University Press.

Snidal, D. (1996). Political economy and international institutions. *International Review of Law and Economics, 16*, 121–137.

Thatcher, M., & Coen, D. (2008). Reshaping European regulatory space: An evolutionary analysis. *West European Politics, 31*(4), 806–836.

Thatcher, M., & Stone Sweet, A. (2002). Theory and practice of delegation to non-majoritarian institutions. *West European Politics, 25*(1), 1–22.

Tsebelis, G. (2002). *Veto players: How political institutions work.* New York: Princeton University Press.

CHAPTER 3

# Food Safety

The evolution of EU food policy is structured in four phases (T1, T2, T3, T4). The first phase (T1) covers the period stretching from the early 1960s to 1985. It is characterized by the traditional Community method, based on extensive legislative harmonization and the creation of several committees. As in other sectors, this technique is based on legislative acts that have proved very ineffective in terms of market integration. 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 harmonization 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 bovine spongiform encephalopathy (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 to meet the increased workload and the rising concerns of the public in the EU and on the international food market, culminates with the creation of the European Food Safety Authority (EFSA). The outcome of this data gathering and analysis is therefore very consistent with the conjectures.[1]



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## Legislative Approximation (T1: 1962–1985)

### *Massive Accumulation of Legislative Acts*

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 were 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 providing the purchaser with the possibility of making an informed choice, and fair competition (Fallows 1990: 14–16).

The development of the European Economic Community (EEC) 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 harmonization of the legislation applying to foodstuffs (Alemanno 2006: 239). Building on the policy objectives that national food legislations had in common, the EEC thus tried to establish a unified community-wide set of measures that would equally apply to all food producers of the EEC (Fallows 1990: 16). This endeavour was based on Article 100 of the Treaty of Rome, which allows the Council to issue directives for the approximation of national provisions. Many Council directives have thus been adopted in this first period in order to harmonise food legislation.

Historically, EU food policy has been divided into three sectors: food of animal origin, food stemming from plants, and what is called food-stuffs, that is, all the rest (food additives, materials in contact with food, production processes, labelling, and so on). 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 the Directorate General (DG) VI (Agriculture), foodstuffs, that is, anything that was not related to animals or plants, was endorsed by DG III (Industry).

The harmonization of foodstuff legislation was divided into two types of action. Horizontal directives were measures that applied to a wide range of foodstuffs. These include, for example, the regulation of food additives, labelling and the use of materials that could come into contact with foods. Vertical directives, also referred to as 'breakfast directives', aimed at regulating in great detail certain specific and narrowly defined food categories such as cacao, chocolate, sugar and honey.

This method of harmonization relied almost exclusively on the adoption of Council directives and led to a massive accumulation of legislative acts. For example, colouring substances 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 colourings were only one type of food additive, and food additives were only one subsection of horizontal legislation. The total number of legislative acts adopted between 1962 and 1985 amounts to nearly 350 (Deboyser 1989: 421–445). Up to the mid-1980s, the turning point between this period of legislative harmonization and the new approach (see next section), the vast majority of these acts were Council directives (Deboyser 1989: 421–446).

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 harmonisation of legislation 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 for guaranteeing the practical applicability of the EEC legislation in 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 mechanism allowed EEC legislation to be visible to national actors whose exclusive point of reference used to be national law.

The directives adopted by the Council were very detailed (Alemanno 2006: 240) and, in substance, were much more similar to regulations than directives. As these acts took the form of directives that should be transposed into national legislation, they involved delegations to 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 member states very little room for the implementation stage. For example, the first directive on colouring substances prohibits member states from using any other than those

listed in the annex (Council of the European Union 1962). Another article allows member states to authorize 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 between nations. These divergences were not significant, however, because in most cases member states 'copy-pasted' the directives, that is, they transposed the text of the directives into national law word by word, without any modification.

In this first phase of EEC food law, the bulk of the regulatory activity was carried out by the legislator, which produced a significant collection of directives. Very little power was delegated to either the member states or the Commission. It is only towards the end of the 1970s that the first measures directly taken by the Commission 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).

### *Setting Up the Committees*

All the legislation adopted was initiated and drafted by the Commission. This work involved a massive amount of resources and a high level of scientific expertise, which the Commission was lacking. Various committees were created to meet the need for expertise. In the foodstuff sector, the first was the Standing Committee for Foodstuffs (StCF), which was created in 1969 by a decision of the Council. It was a comitology committee, composed of representatives of 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 (Council of the European Union 1969). 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 of highly qualified scientific personnel'. This explains the creation of the SCF as a consultative body of the Commission and its composition of

'highly qualified scientific persons' (European Commission 1974). Finally, in 1975, the Commission created the Advisory Committee on Foodstuffs (ACF) in order to allow the stakeholders to bring their views to the debate and to offer opinions to the Commission (European Commission 1975).

Similar institutional developments took place in the other two sectors. Concerning veterinary issues, the Council created the Standing Veterinary Committee (StVC) in 1968 (Council of the European Union 1968), a comitology type of committee, and the Commission created, first, a Scientific Veterinary Committee (SVC) in 1981 (European Commission 1981) and then an Advisory Veterinary Committee in 1987 (European Commission 1987). The plant health sector also had its dedicated Standing Committee on Plant Health from 1976, a comitology type committee (Council of the European Union 1976), and a Scientific Committee for Pesticides from 1978 (European Commission 1978).

## The Single European Act and the New Approach (T2: 1985–1997)

### *Mutual Recognition and Delegation of Power to the Commission*

In the history of the EU, the mid-1980s mark the turning point of the Single European Act (SEA) and a strong political will to boost market integration. In 1985, the Commission adopted a White Paper on completing the internal market in which it recognizes that the traditional method of harmonization was not enough to create a genuine common market (European Commission 1985a). The strategy adopted since the 1960s relying on legislative approximation had proved a failure. Progress towards full legislative harmonization were extremely slow and member states kept postponing the deadlines for the completion of their harmonization programmes (Krapohl 2008: 123).

Article 94 of the EEC Treaty, 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. This was particularly problematic in the food sector which was a sensitive one for member states in that it touched on culinary cultures and traditions (Alemanno 2006: 241). For several years, Belgium blocked the adoption of a directive on chocolate, Germany prevented the harmonization of beer standards, and Italy made it impossible to agree a legal definition of the composition of margarine. The sensitivity

of the issue thus aggravated the procedural hurdle due to the need to reach unanimity. Finally, given the number and variety of existing food types, the vertical approach, consisting in the adoption of harmonized directives per type of food, was inadequate (Krapohl 2007: 38).

In order to facilitate the progresses towards market integration, backed by the famous 1979 Cassis de Dijon decision (Court of Justice 1979), the Commission presented a new strategy in the 1985 White Paper consisting of a combination of the principles of mutual recognition and a more efficient harmonization mechanism. A few months later, the Commission released a Communication declining this strategy for the food sector (European Commission 1985b), which became commonly referred to as the 'New Approach' and consisted in the combination of the mutual recognition principle with minimum harmonization, boosted with a more effective procedural approach.

The principle of mutual recognition, the first pillar of the New Approach, was consecrated by the European Court of Justice (ECJ) 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 might affect a non-economic general interest, such as public health, a product that was in conformity with the standards in one member state should be allowed on the market of other member states (O'Rourke 2005: 3). This was based on the concept that the various national regulations were mutually recognized as offering an equivalent level of protection.

While Cassis de Dijon is, by far, the most famous case of the ECJ in the food sector, many other food cases were brought before the Court during the first period of food regulation. The ECJ 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).

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

The second pillar of the New Approach can be defined as a streamlined use of harmonization, which entails two aspects. First, harmonization must be minimal. The Commission distinguishes between those areas that need to be regulated and those that do not. The ECJ's jurisprudence and the Treaty allow member states to prohibit the import of certain food products if they represent a threat to public health and other general interests. Those areas involving public health, because they offered the possibility for member states to restrict intra-community trade, were subject to legal uncertainty. The Commission thus identified them as the ones that would need harmonization. Consequently, further harmonization 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 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, whereas both used to be mixed in the past. EEC harmonization would apply to food safety, and food quality would be subject to the principle of mutual recognition.

Second, harmonization was to 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 introduced a distinction between major measures, requiring the attention of the Council, and more technical ones that could be delegated to it (Fallows 1990: 39). Accordingly, a framework directive, establishing the policy, was 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 SEA with the insertion of a new provision in the Treaty. Accordingly, the Council was to 'confer on the Commission in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down'. Soon after the adoption of the SEA, the Council issued the Comitology Decision of 13

July 1987 to systematize 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 fitted rather well along the lines of the Single Market Programme, the energy of policy-makers was monopolized by the 1992 single market programme run-up (O'Rourke 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 later, the StCF was referred to in about 35 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).

### *Extensive Use and Reinforcement of the Committees*

In the face of the monumental task of realizing the single market with its newly 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). Besides, 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 2000: 229). The Commission explained to the Court that it was 'not in a position to carry out assessments of this kind' (Court of Justice 1994: para. 32). 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 2000: 229). Hence, 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 intervened usually as a regulatory com-

mittee (Joerges and Neyer 1997: 616). The StCF was highly pressured by the Commission which tended to overload the agenda. As a 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 ECJ even made it an obligation to do so whenever issues of public health were involved (Court of Justice 1994: para. 32). The SCF was responsible 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 discussions. Thus, the Commission heavily exploited scientific arguments whenever they could help in promoting harmonization (Joerges and Neyer 1997: 617).

The increase of workload that went together with the delegation of new competences to the Commission was such that the committees were overloaded. In order to remedy this, the Commission decided to reinforce the scientific committee for foodstuffs by increasing the maximum number of committee members in 1995 (European Commission 1995).

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 was met with approval. The SCF progressively gained an excellent reputation and its work was highly regarded; and both the Commission and national representatives were satisfied with the functioning of the StCF (Vos 2000: 231).

## Reinforcing Committees after the BSE Crisis (T3: 1997–1999)

### *The BSE Crisis*

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

Since the scrapie affecting sheep was not transmissible to humans, it was hoped that BSE would behave in the same way (Krapohl 2008: 127). This corresponded to 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 aimed 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, DG VI (Agriculture) (the service in charge of the dossier) was being advised by the SVC. As has since been revealed by the EP (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 2000: 232), tended to reflect the thinking of the British Ministry of Agriculture, Fisheries and Food (European Parliament 1997). The central position of the British SVC on the management of the BSE crisis explains the heavy influence of British thinking on the Commission (Vos 2000: 232).

Given this British orientation in the management of the BSE crisis at the EC level, the European reaction to it 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 Court. Because it 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 itself to setting up an identification system for cattle (Krapohl 2008: 128) with compulsory registration for BSE, and when exports 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 by 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 carry out monitoring, arguing that 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 some 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 as well as 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 had then adopted a 'true policy of disinformation' (Vos 2000: 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' (Neyer 2000: 4). 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 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 2000: 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 allowed for other animals (Krapohl 2008: 128)—and to strengthen the existing regulations on the export of bovine cattle and offal.

The panorama changed in March 1996 when the British Government admitted that the link between BSE and a new variant of Creutzfeldt–Jakob 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 (European Commission 1996). In the face of the lack of scientific evidence, the UK protested, arguing this was a 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 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, however, 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 considered a gradual lifting of the ban. In turn, Britain committed itself to implementing 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 criticized 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 organizational dimension, the competence over veterinary issues lay with 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-specialization 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 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 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 included, in particular, the appointment of their members, the publication of their reports, and the transparency of their working methods. Their roles were to 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 was thus to 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 were to be rationalized, and the Commission was to 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 2000: 233). Finally, the EC's means for monitoring and inspection were to be reinforced and the Commission would pursue the objective of improving the EU's capacity in the field of inspections through the creation of a European agency for veterinary and phytosanitary inspections.[2]

### *Post-Crisis 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, pre-

sented at the plenary a list of changes the Commission intended to make that was almost identical to the list of recommendations of the EP (Santer 1997). 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 huge influence, which extended to the very detailed decisions made by the Commission with views to implementing the promised reforms (Chambers 1999: 106).

*Revising Policy Goals and Instruments*

In spring 1997, the Commission released two documents[3] to present a renewed approach to consumer health, food safety and food law, clarifying the goals of food safety policy as well as its tools and the principles governing their use. The goals of the food safety policy were adapted and expanded. They now included protection of public health and the safety of the consumer, the guarantee that regulation is backed by scientific evidence and risk assessment, and an effective system of control and enforcement. In addition, food safety regulation was also to ensure the free movement of goods on the internal market, the competitiveness of the European food industry to support exports (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 made the protection of the health, safety and economic interests of consumers objectives of the EC and inserted the obligation for the Commission to take particular account of 'any new development based on scientific facts'[4] (Vos 2000: 235–236).

To achieve the new major policy objective of consumer health, three major instruments were highlighted: scientific advice, risk analysis, and controls and inspections (Vos 2000: 234). The first element, scientific advice, was to meet standards of excellence, independence and transparency. The second element, risk analysis, was defined by the Commission as a systematic procedure and included risk assessment, risk management and risk communication. Risk assessment, the core of the scientific advice, would consist in evaluating hazards and their probability of occurring, while risk management referred to the political decision, which was based on the risk assessment. Finally, risk communication was to involve the transparent exchange of information with stakeholders (Vos 2000: 239). The third instrument, controls and inspections, essential for the actual enforcement of EC regulation, was, according to the Commission, to lie

with the industry and member states. The role of the EC in this field would be limited to monitoring the way national actors enforce EC law (Vos 2000: 239). The use of these policy instruments was to follow 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.

*Projects for Creating EU Agencies Were Abandoned*

Jacques Santer had initially raised the possibility of creating an independent agency responsible for institutional reform, modelled on the American Food and Drug Administration (FDA) (Chambers 1999: 105; Alemanno 2007: 162).[5] However, after visiting the FDA in April 1997, Emma Bonino, then Commissioner for Consumer Affairs, declared that the American model was not appropriate for the EU 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 idea of establishing an agency responsible for risk analysis was then left on the back burner for the following months, as the Commission focussed on the reforms mandated by the EP.

Another agency project, in the field of inspections and controls, was running in parallel. In spring 1996, the Commission initiated a project to transform one of its units responsible for inspections, OVPIC, into an independent agency. By 1995, OVPIC was facing a crucial lack of staff and, as part of 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), which 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. The proposal, made in May 1996, had been issued at the very beginning of the eruption of the BSE crisis. With the crisis, a new context surfaced and, in fact, became for the Commission a formidable opportunity to strengthen its inspection office while keeping it within the Commission. In January 1998, the Commission thus withdrew its proposal to transform OVPIC—by the time renamed the Food and Veterinary Office (FVO)—into an EU agency (Kelemen 2002: 106–107). This about-turn was justified by the opposition of the EP, which, at that point involved only under the consultation procedure, had suggested using 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. It can, however, be argued that this move was motivated by the Commission's interest in maximizing enforcement power (Kelemen 2002).

*Reforming the Commission and the Committees*

The institutional changes actually undertaken were, 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 consumers); 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, which was reinforced by important transfers of staff from other DGs. The size of 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 DG XXIV, instead of DG VI (Agriculture), as was previously the case (Vos 2000: 234).

The system of scientific committees relevant for food policy was also fully renewed. First, in June 1997, the Commission created a completely new type of scientific committee, the Scientific Steering Committee (SSC) (European Commission 1997a). The SSC's role consisted in coordinating the work of the other scientific committees and making specific types of interventions in the area of consumer health. The creation of the SSC aimed at answering the crucial lack of overview and coordination that had afflicted the committee system and which had been revealed to be so detrimental to consumer health. To ensure its coordination function, the SSC was given three specific tasks. First, it was to evaluate and monitor the working procedures used by the scientific committees and, if necessary, harmonize them. Second, for matters that necessitated consulting two or more committees, the SSC would identify which committees should be involved. Third, when there were evaluations stemming from national

organizations on which Community measures were based, the SSC would aid the Commission in evaluating whether EC scientific committees should be involved and, if so, which ones. The SSC's specific intervention tasks regarding consumer health were: delivering scientific advice on matters that were 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 that had existed prior to the decision (O'Rourke 2005: 16)—in areas related to consumer health and food safety (European Commission 1997b). These committees were asked to: examine critically the risk assessments made by scientists belonging to member states' organizations; develop new risk assessment procedures; and draft 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 were based. Finally, the committees were also allowed to draw the Commission's attention to any aspect or emerging problem within their area of competence.

The committees were composed of a maximum of 19 members, carefully selected to honour the principle of excellence. In order to attract high-level scientists, the members were remunerated for their services in addition to the reimbursement of travel and subsistence allowances. They were expected to 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 had to publicize their rules of procedures, agendas, minutes and opinions—including minority opinions.

It should also be noted that the Commission had also to rely on the assistance of the member states as regards scientific tasks on the basis of the directive adopted in 1993 (Council of the European Union 1993). The Commission was very much in favour of these kinds of cooperation arrangements, which allowed the pooling of information and resources, which was particularly cost-effective. The intention was to increase the use of this kind of resource in the future to complement the work of the SSC and the other scientific committees (O'Rourke 2005: 18).

## Setting Up a Big Agency: The EFSA (T4: 1999–)

### *The Remaining Weakness of the Committee System*

The system for providing scientific advice to the Commission, based on the scientific committees, was 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, the Commission was struggling to cope with increasing demands. As a consequence, the committees were overburdened. The Belgian dioxin affair showed that the system was not strong enough to cope with the demands placed on it. In May 1999, the Belgian authorities informed the Commission that feedstocks were contaminated with dioxins. The Commission activated its Rapid Alert System (RAS) allowing the exchange of information with 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 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 so as to respond more rapidly and flexibly (European Commission 1999: 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 the creation of an agency type of structure that would have permanent status and release the experts from background work (Vos 2000: 244).

The effect of the dioxin crisis on the public's trust, highly fragile since the BSE crisis, increased concerns about genetically modified food at the end of the 1990s. If, in the BSE case, 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 a 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 2000: 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 at 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, required that standards for food safety and animal and plant health set by member countries should be based on science. While member countries were encouraged to use international standards, they were also able to set higher standards (and therefore restrict importations on this criterion) only if these were based on a scientific risk assessment (Joerges 2001: 10–11). Yet, according to the risk assessment, the hormones affected 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 the Appellate Body ruled against the EC.

In this affair, the EC's position, while owing much to consumer pressure, was to invoke the precautionary principle that was gaining importance in Europe throughout the 1990s. This principle applied to situations where 'potentially dangerous effects deriving from a phenomenon, product or process have been identified, and … scientific evaluation does not allow the risk to be determined with sufficient certainty' (European Commission 2000a: 3). 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 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).

However, 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 is 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 realize 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.

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 required of it. 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.

### *Setting Up the EFSA*

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 would 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 its view—as 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 arose 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).

Soon after the Prodi Commission took office, in January 2000, under the direction of Commissioner David Byrne, DG SANCO included an adapted version of the proposition of the experts in its White Paper on Food Safety (European Commission 2000b). 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 the capacity of the scientific committees (Vos 2000: 245–246). The Commission, however, diverged from the experts' project in some respects. Most importantly, the EFA would be responsible for risk assessment (scientific advice) and risk communication. Risk management, that is the power to make regulatory decisions, would remain in the hands of the Commission and member states via their comitology committees. 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 for this deviation from the experts' report. First, such devolution of power would represent problems in terms of democratic accountability. Second, in order to be applied on behalf of the consumer, the control function must be embedded in the Commission's risk management process. Third, it would not be compatible with the EC Treaty. This last argument refers to the Meroni doctrine of the ECJ, which limits the possibility of delegating extensive power to EU agencies.

As regards the other tasks of the regulatory process, the White Paper first gave the task of risk communication, considered as crucial to foster consumer confidence, to the EFA. The new Authority was thus to become the first port of call when scientific information on food safety and nutrition were needed. Also, contrary to the experts' proposal, the competence for control would remain with the Commission. Finally, the Agency would operate the RAS, allowing the identification and quick notification of urgent food safety problems.

Next to the creation of the EFA, the White Paper put forwards further lines of reform. First, the legislation was to 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, member states and international levels. This approach was to foster the coherence, effectiveness and dynamism of food policy. In this view, the White Paper was to present 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 was based on three pillars: risk assessment, risk management and risk communication. Also, in order to improve stakeholder involvement across the sector, the Commission planned the creation of a new Advisory Committee on Food Safety. The precautionary principle and transparency also feature in the structuring principles presented by the White Paper (Vos 2000: 244–245).

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 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 its influence in the legislative process. The EP would

have gained an unusual involvement in the appointment of the members of the management board, which should involve a minimum of members who have backgrounds in consumer organizations; the executive director selected by the board should be heard by the EP before being appointed. Finally, a series of transparency measures was to apply to the Agency (Kelemen 2002: 108).

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

The EFSA's primary function is to provide independent scientific advice on all issues that may affect food safety. This broad mandate that 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 is to 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 to be 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).

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 members of the Management Board also include one representative of the Commission. Meeting at least three times a year, the Management Board's compe-

tences include the adoption of the budget and the work programme for the year. The Executive Director is appointed for five years by the Management Board which chooses him or her from a list of candidates set up by the Commission following open competition. The Director is in charge of the day-to-day management of the Agency. He or she ensures that the Scientific Committees and the Panels enjoy appropriate support for their work. Finally, he or she drafts the work programme of the Agency in consultation with the Commission. The Advisory Forum gathers representatives from the national food authorities of 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.[6] Both the Scientific Committee and the Panels adopt their opinion by majority, and minority opinions are recorded (O'Rourke 2005: 198). Finally, the EFSA occupies a central place within a network of national food agencies set up to exchange scientific opinions and information (Buonanno 2006: 272).

## Analysis

At T1, the conjecture about the relationship between the distribution of implementing competences and delegation pattern created are partially validated (see Table 3.1). While the relationship between the distribution of competences and the delegation patterns is not verified, the causal mechanism put forward in the conjectures does play a role in the design of the delegation pattern. Interestingly, the distribution of implementing competences did not fit any of the categories formulated in the conjectures. Neither the member states nor the Commission were delegated implementing competences. Up to the 1980s, EU food regulation consisted in a series of legislative measures that were so detailed that they did not need to be fleshed out into more specific and technical provisions. As a consequence, neither the member states nor the Commission were in

**Table 3.1** Competence distribution and delegation patterns in food safety

| | *T1* | | *T2* | | *T3* | | *T4* | |
|---|---|---|---|---|---|---|---|---|
| | *Expected* | *Found* | *Expected* | *Found* | *Expected* | *Found* | *Expected* | *Found* |
| Competence distribution | None | | Commission | | Commission | | Commission | |
| Main agent | N/A | Committees | Committees | Committees | Committees or agency | Committees | Committees or agency | Agency |
| Main function | N/A | Expertise | Expertise | Expertise | Expertise | Expertise | Expertise | Expertise |

charge of further developing and specifying EU legislation. While such a situation is not covered by the conjectures, extending their logic, we could expect that such a configuration would be characterized by the absence of a need for delegation. Nevertheless, several expert committees were set up in this period, corresponding to the development of the expertise pattern. How can we explain this unexpected outcome?

At T1, it was not yet legally possible for the legislator to proceed to the delegation of regulatory implementing power to the Commission. It was only in the mid-1980s, in the wake of the Single European Act, that this mechanism was extended from the agriculture sector to the remaining policy fields. As it was not possible to delegate to the Commission the task of further specifying EU legislation, this was done by legislation itself. The nitty-gritty kind of regulatory details, typical of implementing regulatory measures, were addressed by the legislator and regulated through secondary legislative acts. Legislative acts displayed an unusual degree of technicality and the Commission required as much expertise to draft them as it would have had these details been regulated through implementing regulation. The development of the expertise delegation pattern at T1 thus makes perfect sense with the conjectures and the causal mechanism presented, in a situation where legislative acts served as functional equivalents to implementation acts.

T2 consolidates the findings of T1 regarding the relationship conjectured between competence distribution and delegation patterns and it also provides some support to the expectation that a lack of effectiveness at T1 leads to a reinforcement of the regulatory agents (see Table 3.2). T2 corresponds to a radical shift in the policy-making strategy of the EU. To boost regulatory efficiency, legislative harmonization is replaced by a wide application of the principle of mutual recognition combined with the delegation of implementing powers to the Commission to proceed to regulatory harmonization in those areas where mutual recognition does not apply. The delegation of implementing competences to the Commission, which was not possible at T1, is now part of the EU institutional toolkit. This makes T2 more adapted to the evaluation of the conjectured relationship between competence distribution and delegation pattern and allows the consolidation of the results found at T1. With the development of the comitology mechanism, a massive share of regulatory authority and activity shifts from the EU legislator to the Commission. The expertise pattern created at T1, based on expert committees helping the Commission to draft regulation, is consolidated. On the one hand,

**Table 3.2** Functionally driven reinforcement of the agent over time in food safety

| | *T1→T2* | *T2→T3* | *T3→T4* |
|---|---|---|---|
| Change of agent | Committees→committees | Committees→committees | Committees→agency |
| Problem pressure | Moderate (increased workload) | Very strong (problems highlighted by the BSE crisis) | Very strong (workload and lack of confidence) |
| Reinforcement of the agent | Yes (increase of the number of members per committee) | Yes (increase in the number of committees and increased coordination among them) | Yes (permanent structure, budget, transparency) |

just as in T1, expert committees continue to provide information and expertise to the Commission to help drafting regulation. On the other hand, with the single market objective, the rhythm of regulatory activity increases and the committees are more solicited than ever. In order to absorb the additional workload, the scientific committee was reinforced in 1995 through an increase in the maximum number of its participants. Although this constitutes a modest reform only, it is nonetheless consistent with the conjectures and therefore can be seen as a manifestation of the conjectured reinforcement of regulatory agents over time, driven by effectiveness imperatives.

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. Regarding the latter aspect, the situation has not changed compared to T2: the Commission remains in charge of adopting a huge amount of implementing regulation and the committees remain in charge of providing expertise to the Commission. More interesting at T3 are the developments regarding the functionally driven reinforcement of the agent. The BSE crisis revealed that the system of committees put in place to provide the Commission with expertise was deeply flawed, suffering a lack of transparency, a lack of independence and a fragmentation between the different committees relevant to food across 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.

To address the institutional dysfunctionalities, several options were discussed within the Commission. While some were in favour of replacing the committee system by an EU regulatory agency, others preferred limiting the reforms to the modification of the system based on expert committees. The Commission chose the latter option, which supports the conjecture that the creation of an EU regulatory agency in the expertise path is not a very likely outcome given that an EU agency in this context can compete with the Commission for the allocation of power and budget. Creating a European agency would have implied for the Commission a loss of control on the production and use of scientific expertise in EU regulation. Besides, as the crisis was calling for a reinforcement of regulatory capacity at the EU level, an EU agency would have most likely absorbed the resources put at the EU's disposal. Leaving aside those institutional changes that were internal to the Commission, the post-BSE reforms carried out regarding the delegation patterns consisted in a deep reorganization and strengthening of the committee system. The six pre-existing scientific committees were abolished and replaced by eight new committees, subject to the coordination of another new committee, the latter being responsible for 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 members, to increase transparency and to improve the scientific quality of the opinions. These developments confirm both the argument about the functionally driven reinforcement of the agency and that regarding the unlikelihood of EU agencies being created in the expertise path.

T4 is the period in which the committee system is finally replaced by an EU agency. While revealing the intervention of sociological pressure alongside functional pressure, T4 does also support the validity of the conjectures. Together with T1, T2 and T3, this last phase of institutional development illustrates how the feedback between distributional interests of pre-existing actors and functional pressure translate into a gradual rhythm of institutional change and the fact that agencification in the expertise path is only possible in a situation of extremely high problem pressure. In the early 2000s, the committee system and the Commission

were, indeed, under stress. In spite of the reform of the committee system and the Commission, European institutions for food safety regulation had proved, once again, deeply problematic, which damaged their legitimacy. The Belgian dioxin affair revealed that the system of scientific committees was 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. The working capacity remained insufficient; the internal market needed a restored confidence of EU consumers; and trading partners needed to be reassured about the EC's capacity to produce sound scientific evaluations. If the BSE crisis was not enough at T3 to convince the Commission to proceed to a fundamental revision of the delegation pattern, the additional problems accumulating in the subsequent years made clear that a fundamental shift was necessary in order to restore the confidence of EU consumers and trading partners. This is the approached finally embraced by Prodi, who declared that setting up the EFSA was a top priority of his mandate. It is only after an accumulation of crises and ineffective institutional reforms that the need to improve the institutional structure, doubled with the sociological pressure in the form of a crisis of confidence, led the Commission to propose the replacement of the committees by an EU agency. This shows how difficult the creation of an EU agency in the expertise pattern is, i.e. in regulatory fields where most implementing competences are in the hands of the Commission.

In sum, the food safety sector provides very good support to the conjectures and makes a very good illustration of the expertise pattern and of the expertise path of reinforcement of the committee system (see Fig. 3.1). Two interesting unexpected findings allow us to specify the conjectures. First, the case reveals that a regulatory agent may be created and delegated expertise tasks while the Commission has not been delegated implementing competences, when the secondary legislation displays a high degree of technicality. Second, the replacement of the committees by an EU agency required a great deal of sociological pressure in addition to functional pressure. While the sociological factor was not expected, this nonetheless confirms the conjecture that the creation of agencies in the expertise path is particularly difficult to achieve.

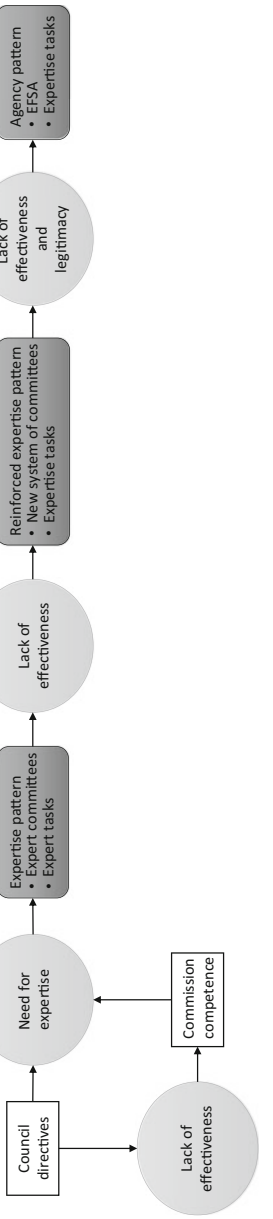


**Fig. 3.1** Process of institutional change in food safety

## Notes

1. The data for this chapter was drawn from official documents, secondary literature and expert interviews (I interviewed three officials of the Commission and one official of the EFSA). The interviews were conducted in October and November 2013.
2. In spring 1996, the Commission had issued a proposal to transform one of its units responsible for inspections, the Office of Veterinary and Phytosanitary Inspection and Control (OVPIC), into an independent agency. OVPIC was facing a crucial lack of staff and was finding it difficult to obtain more resources from the budget of the Commission. It appeared to the Commission that the only way to strengthen OVPIC was to transform it into a European agency with an independent budget.
3. Commission Green Paper. *The general principles of food law in the European Union*. COM(97) 176 final. Brussels, 30/04/1997; Commission Communication. *Consumer health and food safety*. COM(97) 183 final. Brussels, 30/04/1997.
4. Articles 153 and 95 (3) of the Treaty establishing the European Community, which became Articles 169 and 114 of the Treaty on the functioning of the European Union since the Lisbon Treaty.
5. The creation of such a European Agency had already been proposed by the EP Environmental Committee some years earlier (Chambers 1999: 105).
6. The areas in which the new scientific committees are created 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.

## References

Alemanno, A. (2006). Food safety and the internal market. In C. Ansell & D. Vogel (Eds.), *What's the beef? The contested governance of European food safety*. Cambridge, MA: MIT Press.

Alemanno, A. (2007). *Trade in food: Regulatory and judicial approaches in the EC and the WTO*. London: Cameron May Ltd.

Alemanno, A. (2008). The European Food Safety Authority at five. *European Food and Feed Law Review, 1*, 2–24.

Buonanno, L. (2006). The creation of the European food safety authority. In C. Ansell & D. Vogel (Eds.), *What's the beef? The contested governance of European food safety*. Cambridge, MA: MIT Press.

Chambers, G. R. (1999). The BSE crisis and the European parliament. In C. Joerges & E. Vos (Eds.), *EU committees: Social regulation, law and politics.* Oxford: Hartman Publishing.

Council of the European Union. (1962, November 11). Council Directive on the approximation of the rules of the Member States concerning the colouring matters authorised for use in foodstuffs intended for human consumption. *Official Journal of the European Communities.*

Council of the European Union. (1968). *Council Decision of 15 October 1968 setting up a Standing Veterinary Committee* (68/361/EEC).

Council of the European Union. (1969, November 19). Council Decision of 13 November 1969 setting up a Standing Committee for Foodstuffs (69/414/EEC). *Official Journal of the European Communities.*

Council of the European Union. (1976). *Council Decision of 23 November 1976 establishing a Standing Committee on plant health* (76/894/EEC).

Council of the European Union. (1993). *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).

Court of Justice. (1979). Judgement C-120/78. *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein.*

Court of Justice. (1994). Judgement C-212/91. *Angelopharm v. Hamburg.*

Deboyser, P. (1989). *Le droit communitaire relatif aux denrées alimentaires.* Bruxelles: Story Scientia.

Echols, M. A. (1998). Food safety regulation in the European Union and the United States: Different cultures, different laws. *Columbia Journal of European Law, 4*, 525–543.

European Commission. (1974). *Commission Decision of 16 April 1974 relating to the institution of a Scientific Committee for Food* (74/234/EEC).

European Commission. (1975). *Commission Decision of 26 June 1975 setting up an Advisory Committee on Foodstuffs* (75/420/EEC).

European Commission. (1978). *Commission Decision of 21 April 1978 establishing a Scientific Committee for Pesticides* (78/436/EEC).

European Commission. (1981). *Commission Decision of 30 July 1981 establishing a Scientific Veterinary Committee* (81/651/EEC).

European Commission. (1985a). *Commission communication. Completing the internal market.* COM(85) 310 final.

European Commission. (1985b). *Commission communication. Completion of the internal market: Community legislation on foodstuffs.* COM(85) 603 final.

European Commission. (1987). *Commission Decision of 7 January 1987 on the setting-up of an Advisory Veterinary Committee* (87/89/EEC).

European Commission. (1995). *Commission Decision of 6 July 1995 relating to the institution of a Scientific Committee for Food* (95/273/EC).

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

European Commission. (1997a). *Commission Decision of 10 June 1997 setting up a Scientific Steering Committee* (97/404/EC).

European Commission. (1997b). *Commission Decision of 23 July 1997 setting up Scientific Committees in the field of consumer health and food safety* (97/579/EC).

European Commission. (1999). *Commission White Paper on food safety.* COM(1999) 719 final.

European Commission. (2000a). *Commission communication on the precautionary principle*. COM(2000) 1 final.

European Commission. (2000b). *Commission White Paper on food safety.* COM(1999) 719 final.

European Parliament. (1997, February 7). *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.

Falke, J. (1996). Comitology and other committees: A preliminary empirical assessment. In R. H. Pedler & G. F. Schaefer (Eds.), *Shaping European law and policy: The role of committees and comitology in the political process.* Maastricht: EIPA.

Fallows, S. (1990). *The food sector*. London: Routledge, University of Bradford and Spicers Centre for Europe.

Gérard, A. (1987). *Le droit de l'alimentation dans l'Europe d'aujourd'hui : Actes du colloque européen de 1984.* Bruxelles: Presses Universitaires de Bruxelles.

Holland, D., & Pope, H. (2004). *EU food law and policy.* The Hague: Kluwer Law International.

James, P., Kemper, F., & Pascal, G. (1999). *A European food and public health authority: The future of scientific advice in the EU.* Brussels: European Commission.

Joerges, C. (2001). Law, science and the management of risks to health at the National, European and International level—Stories on baby dummies, mad cows and hormones in beef. *Columbia Journal of European Law, 7*, 1–19.

Joerges, C., & Neyer, J. (1997). Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector. *Journal of European Public Policy, 4*(4), 609–625.

Kelemen, D. R. (2002). The politics of 'Eurocratic' structure and the new European agencies. *West European Politics, 25*(4), 93–118.

Krapohl, S. (2007). Thalidomide, BSE and the single market: An historical-institutionalist approach to regulatory regimes in the European Union. *European Journal of Political Research, 46*, 25–46.

Krapohl, S. (2008). *Risk regulation in the single market: The governance of pharmaceuticals and foodstuffs in the European Union*. Basingstoke: Palgrave Macmillan.

Krapohl, S., & Zurek, K. (2006). The perils of Committee Governance: Intergovernmental bargaining during the BSE scandal in the European Union. *European Integration Online Papers, 10*(2).

Neyer, J. (2000). The regulation of risks and the power of the people: Lessons from the BSE crisis. *European Integration Online Papers, 4*(6).

O'Rourke, R. (1998). *European food law*. Bembridge: Palladian Law Pub.

O'Rourke, R. (2005). *European food law*. London: Sweet & Maxwell.

Santer, J. (1997, February 18). *Speech 97/39*. European Parliament. Strasbourg.

St Clair Bradley, K. (1999). Institutional aspects of comitology: Scenes from the cutting room floor. In C. Joerges & E. Vos (Eds.), *EU committees: Social regulation, law and politics*. Oxford: Hartman Publishing.

Testori, P., & Deboyser, P. (2014). The European Food Safety Authority: A view from the European Commission. In A. Alemanno & S. Gabbi (Eds.), *Foundations of EU food law and policy: Ten years of the European food safety authority*. Aldershot: Ashgate Publishing Group.

Vogel, D. (2001). *The new politics of risk regulation in Europe*. London: London School of Economics.

Vos, E. (2000). EU food safety regulation in the aftermath of the BSE crisis. *Journal of Consumer Policy, 23*, 227–255.

CHAPTER 4

# Electricity

The change over time of electricity policy is clearly structured in three periods (T1, T2, T3), corresponding to three regulatory packages. The first period (T1) corresponds to the first regulatory package, which was applied from the early 1990s until 2002. The situation, characterized by national implementation, spurred an acute need for both increasing the coordination between member states and for gathering expertise at the EU level. 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 2003 to 2009, the lack of effectiveness of the Florence Forum led the Commission to create the European Regulators Group for Electricity and Gas (ERGEG), an official regulatory network for coordination and expertise. Finally, taking stock of the lack of effectiveness of the network model in a context of increased pressure for integrating electricity markets, policy-makers introduced impressive changes with the 2009 reform (T3). Massive shifts of competence were made in favour of the Commission and the regulatory network was transformed into the Agency for the Cooperation of Energy Regulators (ACER), an EU agency. Among its various tasks, ACER's major role is to help the Commission in preparing the adoption of implementing regulation. This is done together with the group of TSOs, which was also formalized and integrated into the regulatory process. The



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electricity case thus confirms most of the elements of the coordination pattern and coordination path.[1]

## First Steps: The Florence Forum (T1: 1990–2002)

### *The Regulatory Gap*

In the Western world, the economic model that was applied for a long time was characterized 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 the United Kingdom, these changes emphasized the privatization 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 utility sectors into its 1985 White Paper on the single market, it caught up in 1988 with a report on the internal energy market (European Commission 1988: 6). Highlighting the cost of the absence of an EU policy in the energy sector, evaluated at 0.5 % of the gross domestic product (GDP), the Commission advocated the creation of an internal energy market as a mean to increase the GDP in Europe. 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 (Council of the European Union 1990), 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. Divergences of preferences in the Council were profound and the general 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). While, progressively, several member states came closer to compromise, a 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). The final adoption of the Directive took place in December 1996 (European Parliament and Council 1996), five years after the original proposal of the Commission.

Given the deep divisions within the Council, the liberalization could only be realized as a slow and partial transition. The resulting 1996 Directive, which allowed member states wide discretion for implementation (Eberlein 2003: 139; Eising and Jabko 2001: 745; Glachant and Finon 2003), 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 consumers in 2003. No target date was set for full liberalization (Eberlein 2003: 140).

The 1996 Directive did not only give member states large discretion, it also gave them a quasi-monopoly of regulatory authority for its implementation. This Directive did not yet require that member states create NRAs. As regards the Commission, it was hardly given any role in the implementation of the Directive: only three articles provided it with the possibility to make decisions, and these were far from being central to the framework.[2]

While the 1996 Directive addressed the objective of liberalizing national energy markets, it fell short with regards to setting the conditions for integrating them into a European market (Eberlein 2003: 140). Very little could be found on cross-border energy trade, the development of regional markets, the development of inter-connectors (infrastructure connecting different national networks across borders) 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 national transmission systems. It was therefore not only the coordination of regulatory authorities that was at stake, but also the coordination of TSOs. There are technical and operational requirements for 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 in order to develop a common understanding of their tasks. Although the Directive did not require member states to create NRAs, several established independent regulators. For the newly created NRAs, everything was new and it quickly became obvious that they needed to communicate with each other in order to understand what they could do, and how their tasks could be defined and performed.

In the face of the huge regulatory gap, the Commission was willing to make use of its power to initiate legislative proposals to push for the adoption of legislative acts harmonizing the regulatory exercise made by national authorities and setting the conditions allowing cross-border trade. But drafting such legislative regulation in the field of electricity regulation required a high level of technical expertise. The Commission was crucially lacking the knowledge and resources needed for the identification of relevant policy options to address the regulatory problems faced and for the elaboration of proposals (Eberlein 2003: 145, 2008: 77).

### *The Florence Forum*

In order to remedy the gaps of the Directive and facilitate the integration of national electricity markets, in 1997 the Commission developed the plan of creating a Forum on European Electricity Regulation, the so-called Florence Forum. 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 in order to move towards the integration of national markets.

The Forum gathers twice a year and its members are the Commission, the member states' representatives, NRAs, private actors and other stakeholders. One innovation has been to include third parties, along with European and national authorities, such as 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 that had to be overcome to

facilitate 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). 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 ideas. 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 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.

By gathering stakeholders of the electricity sector, the Florence Forum was serving different purposes. It was first meant to answer the need for coordination through structuring the dialogue between national regulatory actors, as well as between regulatory actors and market players. The cooperation was expected to lead to the adoption of voluntary agreements whose application would be subject to the social and professional pressure felt by members of the Forum. Second, the Forum was also a way to gather, generate and assess information or data relevant to the regulatory issues at stake. Indeed, the rationale of the Commission was also to use the output of the Forum to nourish legislative proposals that could then be formally codified through a formal EC decision-making process (Eberlein 2003).

In the first days of the Forum, while discussing the possibility of setting up a mechanism for cross-border electricity trade, the industry was arguing that such trade was technically and economically almost impossible. 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 organized. They explained to the Commission and the stakeholders that there were other possible approaches than that defended by the industry. The Commission, regulators and network users allied and, in Spring 2000, finally managed to convince the 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 creating the most obstacles to the progress 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. Member states could choose freely how to distribute their contribution of the fund among national users. Belgium and Germany wanted those users that produced cross-border flows to bear the costs—which equated to the creation of an export tariff. In addition to reintroducing 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 involved. The Commission therefore refused to approve the scheme (Eberlein 2003: 148), and 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 it was able to 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).

### *The Group of Regulators: The Council of European Energy Regulators*

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

experiences, the NRAs started establishing contacts with each other. The initiative came from the newly established authorities in the Mediterranean area in March 1997. A first meeting was organized 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. This led the group of Mediterranean regulators to establish 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. They also wanted to compare their mandate in order to assess whether their functions had been similarly defined. They saw that there was an overlapping area in their tasks, which, although not reaching 100 %, was large enough to allow them to take advantage of each other's experiences. There was thus both the need and the possibility to learn from each other and to exchange best practices and information. Besides 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.

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 pricing mechanism for cross-border transmissions of electricity made it obvious to the regulators that they needed to be organized, elaborate common positions and speak with one voice. Thus, organizing themselves into a network was also, for the regulators, a way of strengthening the regulatory voice within the Forum. This initiative was 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 into other areas and led them to cooperate on the preparation of the new energy regulatory package for which the CEER provided support to the Commission (Vasconcelos 2005: 92).

### *The Group of TSOS: European Transmission Systems Operators*

To remedy the fragmentation of the management of European grids into several TSOs, in 1998 the Commission started to encourage them to set up a federation that would include them all 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. Third, it would ease the dialogue between TSOs and the Commission by constituting a single interlocutor provided with the necessary resources and expertise. On 1 July 1 1999, the TSOs thus created their network: the European Transmission Systems Operators (ETSO) association (Eberlein 2003: 146).

## The Rise of the Regulatory Network: ERGEG (T2: 2003–2008)

### *A Remaining Regulatory Gap*

Although the Florence Forum made some contributions with regards to the development of common approaches to facilitating cross-border transactions, it was still seen as insufficient. Within the Forum, some transmission system operators were reluctant to implement the facilitating mechanism; German companies, in particular, wanted to block progress. 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 having been captured by the largest national industries. As a result of this resistance, the implementation of the mechanism, expected by October 2000, was delayed until 2003 (Vasconcelos 2005: 91). Hence, 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. 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. Meanwhile, difficulties were increasing within the Florence Forum, which reached their peak in 2001, a year marked by serious deadlocks in the discussions (Eberlein 2003: 148). In sum, while the political level was calling for accelerating market integration, the Forum did not seem to be sufficiently effective at remedying 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).

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—completed with 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 consisted of a Directive and a Regulation (European Parliament and Council 2003a, b), which were completed by a decision of the Commission to establish ERGEG (European Commission 2003). 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 the unbundling requirements for vertically integrated companies.

As regards the distribution of competences in the second package, the bulk of the regulatory activity remained at the national level (Eberlein 2008: 82; Eberlein and Newman 2008: 41–42). Member states retained regulatory authority on a wide array of topics: public services, consumer protection, environmental protection, security of supply, maintenance and construction of network infrastructure, technical regulation (including safety criteria), authorizations for building new generating capacities, tendering procedures 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 for third party access (to transmission and distribution

systems), *ex ante* approval of tariffs for third party access, authorization 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 for 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 member states were to implement the legislation, the EU required them to create NRAs. In a few instances, the EU legislation explicitly required that a task be 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 could be shared between the NRA and sub-national, regional authorities, or between the NRA and ministries or competition authorities. Governments were to provide NRAs with sufficient resources to be able to carry out their duties efficiently.

The Commission was given regulatory competences regarding four issues: inter-TSO compensation mechanisms for cross-border transmission services, transmission tariffs, congestion management and locational signals. In order to control the Commission in the exercise of these newly delegated competences, a comitology committee was created: the 'Committee on the implementation of legislation on conditions of access to the network for border exchanges in electricity' (European Parliament and Council 2003b). The implementation of electricity regulation therefore clearly remained nationally based; the powers delegated to the Commission were few compared to the amount of issues regulated independently at the national level.

The implementation of the first regulatory package left the problem of coordination unsolved. A small part of this problem was addressed by the delegation of regulatory competences to the Commission. However, these were few compared to the amount of remaining national regulatory competences, which, anyway, were defined in a manner that allowed them considerable scope for diversity in the implementations by member states (Eberlein 2008: 82). Therefore, the formal competence distribution of the new framework was not suited to the objective of creating a genuine EU regulatory regime (Eberlein 2003: 141) and the need for improving coordination among national authorities remained.

While the Commission was enjoying new regulatory powers, their use required technical knowledge. The Commission needed to understand how the market was developing at the time and had only very incomplete information on that aspect. This was already the case under the first regulatory framework and even more so 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. Since it was lacking resources, it had a crucial need for the information and expertise of the regulators.

### *The Regulatory Network: ERGEG*

In spite of many efforts, the Forum proved to be too weak to close the regulatory gap. So 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' (European Commission 2003: Recital 5). The Commission and the NRAs converged around the project 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 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, which 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 remedy its lack of resources. Yet the CEER, as an association created under private law, did not allow the Commission to be involved in the network. Formalizing and integrating the regulators' network would allow the Commission to consult them and receive opinions from them—which was the basis of a common interest. 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.

While the idea of creating an EU regulator existed already in the early 2000s, the Commission left this option aside and decided to set up a regulatory network called ERGEG. There was a political factor behind this choice. When the second package was negotiated, a difficult issue was the unbundling of the provision of an electricity service into different segments. It appeared to the Commission that it would have been too ambitious to target an agreement with member states and the EP on both unbundling issues and the creation of an EU regulatory authority. Alternatively, the use of intermediary steps based on a formalized version of the group of regulators, which would not be delegated much power, would have the effect of familiarizing 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. 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 DG Energy and Transport, who together drafted a first version of the proposal, were in favour of creating a strong body, the Commission's legal service denied this on the grounds that it was not legally possible.

ERGEG's mission partly overlapped with those of the Florence Forum. It was first expected to assist the Commission, in particular in the preparation of draft implementing measures. The 2003 regulation 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. Second, ERGEG was supposed to facilitate consultation, coordination and cooperation among NRAs for the consistent application of the framework. The functional overlap between the two bodies did not lead to the disappearance of the Florence Forum, which still exists today and maintains the important function of gathering all stakeholders in the sector.

Both tasks given to ERGEG also represented 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 a view to influencing the EU regulatory

process, which, in practice, means influencing the Commission. Yet, at T1, within the Florence Forum the NRAs were just one out of the many stakeholders consulted by the Commission, for 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, corresponded to what the NRAs were already doing through the CEER with their exchanges of best practices. The CEER continued to operate after the creation of ERGEG and remained very active. The CEER and ERGEG were in fact nearly the same group of NRAs, the major difference between the two bodies was their legal status. As a consequence, the CEER and ERGEG worked very synergistically and the latter came to be used by the regulators as a hat that they could put on when they needed to make use of their more formal status.

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 mechanism of legal enforcement. Nevertheless, there was a moral commitment to follow them. 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 provision, for example of a rule on unbundling. 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.

The dynamism of ERGEG is related to both the pro-activity of the NRAs and the Commission, which stimulated regulatory convergence by mandating the NRAs to work on various issues. While the attitude of the Commission in this respect is largely unsurprising, given its preference for regulatory harmonization, the pro-activity of the NRAs is interesting and worth considering. One might have expected some reluctance from them 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 initiative. In fact, the regulators saw the development of their network as a way to become

stronger: it provided them with support and backup. They did not feel their prerogatives to be threatened because they remained at the centre of the network and of its institutional development.

There were some very pro-European NRAs within ERGEG and which 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 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 wanted to improve cooperation between the regulators and thus fitted along the same lines as the Commission.

ERGEG's advisory function was exploited well by the Commission which gave a lot of work to the regulators, asking them for example to produce guidelines or best practices. The Commission, which was sitting in on ERGEG meetings, was able to influence its work programme. There was thus a dialogue on priorities, and the Commission was able to ask regulators to work on topics it was interested in. Part of the output of the network was codified by the Commission or the policy-makers at a later stage. This was the case of the regulation on cross-border trade in electricity, which had been developed, first by the 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 adopted under the third regulatory package in comitology. There are other examples where ERGEG had directly drafted texts. The Commission was taking the expertise of the regulators, and putting a formal rubber stamp on their advice and guidelines.

The NRAs have also been a huge source of information for the Commission, in particular with the benchmarking report, which allowed it to monitor what was happening. The report was written yearly by ERGEG. On the basis of national reports from all the NRAs, ERGEG carried out a benchmarking assessment to chart the evolution of electricity markets on several aspects, such as functioning, prices and tariffs. 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.

## The Agencification of the Network: ACER (T3: 2009–)

### *Remaining Obstacles to Market Integration*

Around 2005, there was a consensus in the sector, except among the incumbents, that the European reform in energy had stalled halfway and that a new thrust and instruments were needed to reach the policy objectives of market liberalization and integration (Kroes 2007). Liberalization was far from being fully effective: former monopolists remained very powerful and new entrants were facing serious difficulties. 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. TSOs, especially when vertically integrated, often failed to create the right conditions to foster competitive and liquid markets.

Things did not look any better for the dimension of market integration as the internal energy market remained far from a reality.[3] A significant indicator of market integration is the variation of prices among countries. Yet energy prices for commercial users vary significantly between member states. EU consumers had been given the legal right to choose their electricity and gas supplier freely from amongst EU companies. 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.

*Insufficient Coordination Between Regulators*

Although the second regulatory package introduced for the first time the possibility to regulate cross-border trade, the regulatory gap remained due to a lack of institutional means. 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 reflected on the third package, they realized 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 market structures among member states, there were different regulatory practices among member states. These divergences of regulatory practices were such that leaving the regulators working in an independent fashion could not solve the problem.

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 was consistent across the various member states. This was meant to take place through the development of EU rules, in particular as regards technical standards. Yet the forums and ERGEG had not led to the real push towards the 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. However, progress remained limited because they needed all regulators to have the necessary power, and to agree over each other's powers (European Commission 2007a: 48). Furthermore, ERGEG's guidelines were only voluntary, so the network's effectiveness was also influenced by its lack of binding decision-making power. The Commission concluded that the progress towards market integration required more effective coordination, with increased resources. This diagnosis was largely shared in the sector as all stakeholders had an interest in establishing a system in which the codes were obligatory for each network operator.

*The Lack of Independence and Powers of the Regulators*

The institutional obstacles to market integration were not limited to EU level regulatory coordination. The status of the NRAs was also found to be problematic in several respects. First, they were not strong enough on the national arena. While the second package required that 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. Spain and Germany were particularly affected by the lack of an independent

regulator. Besides, the new member states that entered the Union in 2004 had different administrative traditions and lacked the culture of independent regulation. 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 the provision of information to network users. For example, while tariff setting is one of the most important competences of the regulators, the Spanish one never did so because it was set by the ministry. The regulator was merely proposing the tariff, and the ministry could change it without giving much explanation. 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 driven by the creation of competitive energy markets only. They may still own part of the industry, be willing to promote national champions or to bring prices down for the consumers before elections. This conflict of interests can oppose 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.

Second, 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 (European Commission 2007a: 45). Heterogeneity in the competence of regulators is first an obstacle to EU-level cooperation among regulators. To create cooperation at the EU level, national actors need to have the same competences. It is important to create a sense of community and to allow discussion. On some issues, depending on the country, the national interlocutor could be the NRAs or the ministry. Equalizing the powers of the regulators allows them to speak to those 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.

Competence heterogeneity is in particular problematic when it comes to setting cross-border rules 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. Finally, levelling the competences of the NRAs is important for the implementation of the agreements reached between NRAs, that is, to make sure they can implement them. On occasions, regulators have reached an agreement, which they revealed to be unable to implement because the corresponding competence belonged to their ministry.

Third, the national scope of the mandate of regulators was also revealed to be problematic in a number of situations. 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 obligation to provide market access under certain conditions. The benefit provided by the new interconnector was one of the factors that might justify the decision to exempt the new interconnector 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. However, in several cases, national legislation did not allow the regulator to consider the European perspective to evaluate the benefit brought by the interconnector. Limited to a national perspective on the evaluation of the benefit of the interconnectors, it happened that NRAs could not exempt them, which would have been of great value at the level of the internal market. So it was necessary to broaden the mandate of regulators with a European dimension, to make sure they could take the European interest into consideration in their national decisions.

*Insufficient Coordination Between TSOs*

At the technical level, that is, at the level of TSOs, a series of aspects needed improvement to facilitate cross-border exchanges. First, cross-border transmission capacity needed to be increased. For this to happen, network investments had to be made with a pan-European perspective, which required 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 have been provided by 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' (European Commission 2007b: 17).

*The Commission's Lack of Resources*

Under the second regulatory package, based on 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 ERGEG was lacking.

## *The Great Leap Forward*

Around 2005, while the realization 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. The lack of competition in 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 latter issue was the one that 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 policy for Europe (European Commission 2006, 2007c) that emphasized and articulated three objectives: sustainable energy, competitive energy and security of supply. In this context, the internal energy market was defined as 'the cornerstone and most important means' to

meet these three strategic energy challenges (Hilbrecht 2012: 1). 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 blackouts and price surges (European Commission 2007c: 6).

With member states supporting the Commission's objective to push forward significantly market integration in the energy sector, the negotiations on the third package could achieve important improvements to the regulatory framework. In terms of institutional change, the two major elements of reform were the replacement of ERGEG by ACER and the delegation of important binding regulatory powers to the EU level.

*Massive New Competences for the Commission: Network Codes*

The third package involved a massive delegation of regulatory competences to the Commission. If the bulk of these new powers relate to the so-called network codes (see below in this section), the Commission also gained the right to intervene in a certain number of cases outside the realm of network codes. For example, the Commission may now require NRAs to withdraw any decision that would not comply with the guidelines attached to the regulatory framework or adopt guidelines specifying legislative provisions in the areas of unbundling, the cooperation of NRAs with ACER, the trading of electricity, or investment incentive rules for interconnector capacity (European Parliament and Council 2009a, b).

Network codes are sets of rules that operationalize regulatory provisions by translating them into technical terms in order 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 unfolding 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, and the competitive and low carbon energy sector). 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).

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 (ACER) that would have replaced the network of regulators. This option was, however, not conceivable for the Secretariat General and the Legal Service of the Commission. The negotiation between them and DG Energy and Transport revolved around the Meroni doctrine, a judgment of the ECJ dating back to the 1950s (Court of Justice 1958). Based on the principle of the institutional balance of power, this judgment limits the possibility, for the Commission, of delegating the powers it received from the Treaties. It had 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 judgment is subject to discussion and its applicability to today's cases of creating EU regulatory agencies is questioned by several stakeholders. The judgment is older than the creation of the EC and it could be argued that political will might have allowed the Commission to overcome this legal barrier. 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 itself.

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 Court of Justice of the European Union (CJEU). Yet, here, we are in a grey zone. The Meroni case, although old, has never been overruled or nuanced by the CJEU. On the other hand, it is true that when the Commission has a strong preference, it 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 jurisprudence and not to change the situation. This relates to their responsibility 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, 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, it was afraid that a system would develop where a second layer of institutions would come to have legal powers that were at the time reserved to it.

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 Court in the Meroni judgment. Yet 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. That is, they are located at a higher level than the services, and the green light of the Secretariat General of the Commission was necessary for transferring the proposal to the College of Commissioners for formal adoption. 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. However, DG Energy and Transport was not in favour of using the comitology procedure. They saw comitology as a cumbersome, lengthy and difficult process. They saw there would be a need to adapt and revise the codes often, which would imply a continuous process of comitology procedures. As a result, the Commission finally decided to keep the network codes voluntary in the proposal, reserving the intervention of itself and the comitology committee in case the TSOs did not act according to their mandate regarding the elaboration and implementation of the codes.

The proposal regarding the network codes was then subject to the co-decision procedure. 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 18 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 based on the energy sector, which was calling for a careful re-evaluation of the Meroni doctrine. Such a revision of the Meroni case should consider the context instead of applying the doctrine in a ‘simplistic, overly conservative manner’ (European Parliament 2008: 47). Firstly, while the EP acknowledged that the delegation of binding decision-making powers to other EU agencies had 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. In substance, the judgment would have prohibited the delegation of powers to an Agency and involve 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 interest 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 voluntary rather than binding, in order to avoid the comitology procedure. In this respect, the rapporteur argued that harmonization, 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 harmonization.

The Council, in its common position of 12 December 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 a second reading. 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 have been drafted by the European Network of Transmission System Operators for Electricity (ETNSO-E), the group of TSOs (see below) under the supervision of

ACER, the Commission formally adopts them in comitology under the regulatory procedure with scrutiny.

The details of the network code procedure are as follows:

1. The Commission requests that the Agency submits (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 will contribute to non-discrimination, effective competition and the efficient functioning of the market. The Agency will consult ENTSO-E and the other relevant stakeholders concerning 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 it submits the network code to the Commission and may recommend its adoption. If the Commission does not adopt the code, it must state the reasons why.
4. ENTSO-E will 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 harmonization 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 can ask ENTSO-E to provide a duly reasoned explanation as to why it has failed to do so. The Agency will inform the Commission of this explanation and provide its opinion thereon.

As a result of this negotiation around the question of the network codes, the Commission was delegated a massive amount of new regulatory powers. These new competences require a lot of technical knowledge. Drafting regulations and guidelines about the harmonization 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 it does not have the resources, technical expertise or knowledge to deal with this on its own. This is particularly true of the drafting of network codes, which are highly technical rules. If the Commission is lacking the resources to draft such regulations, the NRAs and the TSOs are the actors that hold the necessary knowledge and who are consequently called upon to play a prominent role in the elaboration of the codes.

*The Agency for Cooperation of Energy Regulators (ACER)*

**Establishment**

The evaluation of the second regulatory package highlighted the need for EU level binding decisions, which ERGEG was unable to provide given its lack of formality. Hence, the Commission wanted to transform the legal status of the regulators' network in order 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. Hence, the choice for an EU agency as an institutional model was due to the need to give the group of regulators the possibility of adopting binding decisions. However, there was a second reason why the EU agency model was needed. It was necessary to give NRAs support in their work, for example a permanent staff or informatics resources. The CEER had a few employees but it was an association under private law that could not be given any decision-making power. On the other hand, ERGEG had no employees, it was just a hat used to articulate formally common positions and provide advice. Yet providing regulators with such administrative support has budgetary implications that required a certain level of institutional framework. ERGEG could not constitute a legal basis for receiving Community funding and therefore have a staff and resources. Given that DG Energy and Transport was seeking an instrument with as much legal power as possible, it became clear from the beginning that the only legal possibility was to set up an agency.

Both the EP and member states immediately agreed on the necessity to transform the network of NRAs into an EU agency. The EP, usually sceptical about EU agencies, was very enthusiast about ACER from the outset. As for the member states, they had already agreed 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' (Council of the European Union 2007: 10). While, at that stage, they were still divided with regards to the legal nature of the mechanism, that is, 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. The Council also underlined that the mechanism should represent the views of the NRAs and ensure an effective and balanced representation of member states. Later, in its common position of December 2008, the Council agreed with the principle of

creating a regulatory agency that would be independent of member states and the Commission and whose tasks should be well circumscribed.

One could have expected more resistance from member states and from the EP, since they are usually sceptical about EU agencies. With regards to the EP, several interviewees explain its enthusiasm for ACER in terms of the successful and intense lobbying of Members of the European Parliament (MEPs) by the NRAs. 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. The rapporteurs may also have played a role: those that dealt with the package saw the need to improve the institutional structure and to create a common market. As for 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' (European Council 2007: 17) 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 bit proposal with several sensitive topics, in particular unbundling and the third country clause. ACER was further down in the ranking of sensitive negotiation issues. Member states have limited resources for the negotiations, and these were mostly channelled by the more difficult topics like unbundling.

**Functioning**

ACER is a multifunctional body called to intervene in many different situations. Its major task is the role it plays as an advisor of the Commission for defining the areas that require the adoption of network codes. Its role is not limited to advising the Commission on network codes. It also involves the provision of opinions to the Commission, the EP or the Council on all issues related to the purpose for which it was created, either upon the request of the latter or on its own initiative.

ACER also has an important role in terms of regulatory coordination among NRAs. This includes the adoption of non-binding guidelines for

the diffusion of good practices and, when requested by an NRA or the Commission, giving opinions about the compliance of NRAs with the guidelines attached to the framework. Individual NRAs having difficulties with the implementation of the framework may also ask ACER for an opinion; so ACER also has a role of assistance vis-à-vis NRAs.

ACER is also responsible for the supervision of the cooperation of TSOs. This role was given to ACER because the NRAs are the ones that have the expertise for such supervision; 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. For example, where ACER considers that an ENTSO-E work programme or development plan do not contribute enough to certain objectives such as non-discrimination or the establishment of cross-border trade, it provides a reasoned opinion and recommendations to ENTSO-E, the EP, the Council and the Commission.

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). It appoints the Director and the members of the other organs, adopts the work programme of the agency and exercises budgetary power and authority over the Director. The Board of Regulators is composed of one representative per member state, which comes 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 Board of Regulators is the decision-making body regarding the core of the regulatory work of the Agency and is involved in higher-level decisions such as the appointment of the Director. The Director, appointed for five years (with the possibility of extension for another three years) implements the work programme, the budget and manages the staff of the Agency. The Board of Appeal is composed of six members, appointed for five years (renewable), selected from current or former senior staff of the NRAs, competition authorities, or other national or Community institutions with relevant experience. 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. 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 DG Energy and Transport to convince the Secretariat General of the Commission to adopt it, the latter was reluctant because it thought the structure would be too complicated.

This structure is the result of the willingness of NRAs and the Commission to give a central role to the former within the Agency. It also explains the enthusiasm of the NRAs for ACER: they would maintain control through the Board of Regulators. The NRAs and the Commission coordinated a great deal in 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. This was a crucial lobbying issue for the NRAs which wanted to make sure the Agency would not become too independent from them. They 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 separate from them and which makes independent decisions.

*A European Network of TSOs: ENTSO-E*

ENTSO-E was created by the third regulatory package and endowed with a formally defined role in its implementation. The drafting of the network codes is a highly technical and specialized activity. While the regulators initially argued that they should develop the rules that the TSOs would have to comply with, DG Energy and Transport was of the opinion that it would be impossible to have the codes developed without giving TSOs a decisive role in it. The TSOs were the only actors with the expertise. 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 regarding the development of the codes. This point was among the most difficult regarding the discussion between the NRAs and the Commission on the elaboration of the proposal. The Commission held on to its idea and introduced a significant amount of self-regulation. 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 was not accepted. So, in this third package, for the network codes, ENTSO-E appears as a fundamental regulatory agent, expected to draft implementing regulation based on their expertise and experience.

To meet the need for coordination among TSOs, the third package formally mandates ENTSO-E with a series of responsibilities. First, with respect to research and innovation, TSOs should cooperate to 'identify, finance and manage research and innovation activities necessary to driving the sound technical development and evolution of the European electricity and gas networks' (European Commission 2007d: 14). Second, with a view to facilitating cross-border grid operation, TSOs should 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.

*Empowered NRAs*

The problem identified by the Commission was the lack of uniformity of the power of NRAs 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 the empowerment of NRAs, both expands their competences and significantly reinforces their independence. The EP supported this move and even wanted to broaden the responsibilities of the NRAs beyond the Commission's proposal. While the Council welcomed the Commission's proposal to empower NRAs and reinforce their independence, it did not agree with the EP that it was necessary to go beyond the Commission's proposal.

Still, the outcome is a formidable extension of 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 a regulatory authority which would 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 2009 Directive 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 not seek or take instructions from any government or other public or private entity.

The legal texts give further details as to how this independence should be guaranteed. NRAs should be able to take autonomous decisions, independently of 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. Appointment and dismissal of the management of NRAs are also addressed: management 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.

Second, NRAs are then given a European mandate. This is done through the extension of the policy objectives NRAs are expected to contribute to, with a view to including 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. 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[4] so as to include, among others: monitoring the compliance of TSOs and DSOs with the various obligations of the framework, reviewing the investment plans of the TSOs and evaluating their consistency with the European-wide ten-year network development plan, monitoring and reviewing network security and reliability rules, moni-

toring 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 make sure that regulatory authorities are able to carry out their duties efficiently. 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 of issuing binding decisions on electricity undertakings, carrying out investigations on the functioning of electricity markets in cooperation with the national competition authority, requesting any relevant information from the electricity undertakings, and imposing sanctions on companies in case of non-compliance.

Finally, the new chapter on NRAs also entails two articles related to the interaction between the NRAs and ACER on the one hand, and the Commission on the other, regarding compliance with the guidelines (European Parliament and Council 2009a: articles 38, 39). 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 level of interconnection capacity. The second article provides the Commission with the possibility of vetoing any decision of the NRAs for which it has serious doubts as to its compatibility with guidelines referred to in the regulatory package or in the cross-border regulation.

## Analysis

While T1 confirms some aspects of the conjectures, it is also rich of unexpected elements that allow refining the mechanisms put forward in the conjectures (see Table 4.1). Characterized by a nationally based implementation of EC legislation, T1 was expected to show the emergence of a coordination delegation pattern. On the one hand, all elements of the coordination pattern were found. The decentralized implementation led to a need for regulatory coordination, which pushed the Commission to

**Table 4.1** Competence distribution and delegation patterns in electricity

| | *T1* | | *T2* | | *T3* | |
|---|---|---|---|---|---|---|
| | *Expected* | *Found* | *Expected* | *Found* | *Expected* | *Found* |
| Competence distribution | Member states | | Member states | | Mixed | |
| Main agent<br>Main function | Network<br>Coordination | Forum<br>Coordination<br>+expertise | Network<br>Coordination | Network<br>Coordination<br>+expertise | Network or agency<br>Coordination<br>+expertise | Agency<br>Coordination<br>+expertise |

set up a regulatory agent that would endorse coordination tasks, and a regulatory network, which was also created. On the other hand, several elements made the picture more complex than expected. The Commission's rationale to set up an agent was not due to coordination needs only; it was also driven by the necessity to gather information and expertise. The regulatory agent created to answer both needs for coordination and expertise was not a regulatory network but a wider platform for gathering different types of actors (NRAs, national ministries, TSOs and stakeholders): the Florence Forum. Finally, if a regulatory network was created, it resulted from an initiative of the national regulatory authorities themselves, instead of a decision of the Commission.

The functional logic behind the creation of the Florence Forum is twofold and therefore it is delegated both coordination and expertise tasks. On the one hand, it was meant to foster dialogue, cooperation and coordination among stakeholders in order to reduce the regulatory gap through voluntary and soft agreement. This corresponds to the delegation of coordination tasks to the regulatory agent that are characteristic of the coordination pattern. On the other hand, it was also about codifying some of the outputs of the discussions through the legislative process as a way to close the regulatory gap. Used as a platform for producing drafts to be adopted by EU policy-makers, the Florence Forum also endorsed the tasks typical of the expertise delegation pattern, which is an unexpected outcome in a situation of nationally based implementation. The conjectured emergence of an expertise pattern in situations of implementation competences delegated to the Commission is based on the assumption that the technical dimension of a given policy is addressed through implementing regulation. However, in T1, as the Commission has not been delegated implementing powers, those technical measures are channelled through secondary legislative acts. As in T1 in the food sector, secondary legislation is meant to be used as a functional equivalent to implementing regulation and therefore would display a degree of technicality more typical of implementing than legislative acts. Responsible for issuing these legislative proposals, the Commission needed the input of experts in order to draft them. This explains why the Forum was delegated expertise tasks while the Commission had not been given specific implementing powers.

Another unexpected outcome is that the Commission created the Florence Forum to answer the needs of coordination and expertise, instead of a regulatory network composed of NRAs only. A first explanation lies

in the distribution of implementing competences at the national level, among national actors. NRAs were still not set up in all member states, so if the Commission wanted to gather the national authorities responsible for policy implementation from all member states, it was necessary to invite ministries along with NRAs. The second factor is the degree of technicality required to set up rules that would foster cross-border exchanges of electricity. 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, as TSOs are those actors that possess most of the technical expertise.

As regards the creation of the regulatory network, the CEER, although it was not created by EC policy-makers as specified in the conjectures, 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 CEER had two rationales. One reason was the NRAs' willingness to coordinate their positions in order to have a bigger impact in the debates within the Florence Forum. The second reason was to 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 organize 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.

T2 offers a clearer picture that fits very well with the conjectures regarding both the relationship between competence distribution and delegation pattern and the functionally driven and gradual character of the institutional change (see Table 4.2). First of all, the adaptation of the delegation pattern was motivated by the willingness to improve policy effectiveness. Due to the variety of interests involved in its composition, the Florence Forum revealed it was unable to produce much tangible output. This lack of effectiveness and results is what motivated the creation of another regulatory agent to take the lead in the process of coordination and provision of draft guidelines to the Commission.

The second agent created, ERGEG, was a regulatory network. In its interactions with the CEER, the Commission realized the added-value

**Table 4.2** Functionally driven reinforcement of the agent over time in electricity

| | *T1→T2* | *T2→T3* |
|---|---|---|
| Change of agent | Forum→network | Network→agency |
| Problem pressure | Strong (forum unable to produce regulatory convergence) | Very strong (increased urgency to integrate markets, lack of effectiveness of the network) |
| Reinforcement of the agent | No (change of agent instead, in order to have a platform with NRAs only) | Yes (permanent structure, budget, more powers) |

and potential of the institutional formula consisting in gathering NRAs into a regulatory network. The Commission thus wanted to empower the group of regulators by creating a formal EU body. By 2002, as all member states had already created NRAs, it was possible to constitute a group of national regulators without involving the ministries. As it seemed too early to negotiate the establishment of an EU agency with member states, the Commission opted for setting up a lighter structure in the form of an EU regulatory network. We thus find, as expected, that the lack of effectiveness of the previous agent (the forum) led to the reinforcement of the delegation pattern through the creation of a new agent (ERGEG), which, given power distributional considerations, remained limited to the format of an EU regulatory network. This outcome follows perfectly the conjectures. The only additional unexpected element lies, here again, in the importance of expertise in a situation characterized 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 in the few competences delegated to the Commission.

T3 also provides a robust support to the conjectures, as it features a functionally driven replacement of the regulatory network by an EU agency and offers additional support to the conjecture about the relationship between competence distribution and delegation pattern. In spite of the 2002 reforms, the institutional framework remained insufficient to meet the challenge of coordination and market integration. Yet the geopolitical context was pressuring the EU to integrate its energy markets. As all policy-makers and most stakeholders were convinced that it was necessary to upgrade the institutional structure in order to allow the adoption

of binding regulatory provisions at the level of policy implementation, it was decided to reinforce the institutional framework for the implementation of EU energy legislation.

First, in the face of particularly high and increasing pressure to integrate markets, and given the weaknesses of ERGEG, 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 were 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 represented a huge leap forward compared to the previous delegation pattern based on the regulatory network in a sector in which 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 related to the security of supply in the background of the revision of the framework.

Second, the new regulatory framework also involves the establishment of ENTSO-E, the European network of national TSOs. 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 apply the EU regulatory framework. Yet the fact that the management of the grid 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.

Third, the Commission was delegated a massive amount of new implementing competences, in particular in the field of the network codes, to be exercised together with the relevant comitology committee. As member states were still in charge of implementing a significant part of the

legislation, T3 introduces a situation of mixed competence distribution, that is, a situation where both the Commission and member states hold a significant amount of implementing competences.

The new competence distribution led both coordination and expertise needs to be felt in the electricity sector. While important powers had been delegated to the Commission, a very large share of issues remained the competence of member states, which explains the remaining need for coordination. While it was already present at T1 and T2, the need for expertise characterized at T3 is much more important. The preparation and drafting of the network codes do not only represent a huge amount of work, but also are extremely technical tasks. Hence, a very large share of the expertise needs felt at T3 was new and directly related to the delegation of new competences to the Commission with respect to the network codes. This situation led policy-makers to delegate both coordination and expertise tasks to the regulatory agents. 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. This provides further support to the conjecture about the relationship between competence distribution and delegation pattern, as it shows that the change in competence distribution is accompanied by a change in the mandate of the regulatory agent.

Overall, the electricity sector also makes a very good fit with the conjectures on the emergence of the delegation pattern, and offers material that helps to refine them. First, we find that the creation of the regulatory network in case of need for coordination is conditional upon the previous establishment and empowerment of NRAs at the national level (as is also the case in the telecommunications sector). Second, as also found in the food safety case, the delegation of expertise tasks to a regulatory agent can take place in the absence of delegated implementing competences of the Commission, when secondary legislation displays an unusual degree of technicality. The electricity sector also confirms the conjectures on the evolution of the coordination pattern. The different phases in the process of institutional change in the electricity sector illustrate that the reinforcement of the agent is a gradual process, and that the creation of an EU agency does only happen in situations of strong problem pressure and after previous institutional solutions have proved ineffective (see Fig. 4.1).

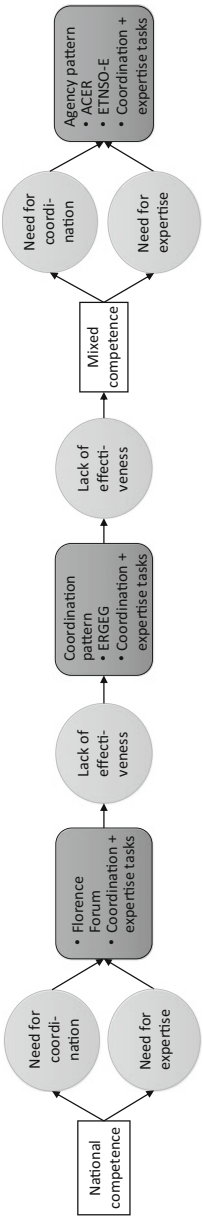


**Fig. 4.1** Process of institutional change in electricity

## Notes

1. The data for this chapter derives mainly from official documents and expert interviews and, to a lesser extent, from secondary literature. I interviewed 11 officials of the Commission, one official of the Council, four officials of NRAs, two officials of ACER, one official of the Council of European Energy Regulators, three independent experts and one staff member of the industry. The interviews were conducted in February 2013.
2. Article 19(5b) of Directive 96/92/EC 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 member states adopting temporary safeguard measures. In case these were to disturb the functioning of the internal market, under certain conditions the Commission may decide that the member state concerned must amend or abolish 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.
3. Commission Communication. *Prospects for the internal gas and electricity market*. COM(2006) 841 final. Brussels, 10/01/2007. p.7.
4. For the full list of competences, see Article 37 of the 2009 Directive (European Parliament and Council 2009a).

## References

Andersen, S., & Sitter, N. (2007). *Re-politicising regulation: Politics, regulatory variation and fuzzy liberalization in the single European energy market*. 2007 EUSA Biennal Conference, Montreal.

Cameron, P. (2005). Completing the internal market in energy: An introduction to the new legislation. In P. Cameron (Ed.), *Legal aspects of EU energy regulation*. Oxford: Oxford University Press.

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

Council of the European Union. (2007, November 28). *Preparation of the TTE (energy) Council on 3 December 2007*. 15193/1/07 REV1. Brussels.

Court of Justice. (1958). Judgement C-9/56. *Meroni v. High Authority*.

Eberlein, B. (2003). Regulating cross-border trade by soft law—The Florence process in the supranational governance of electricity markets. *Journal of Network Industries, 4*(2), 137–155.

Eberlein, B. (2008). The making of the European energy market: The interplay of governance and government. *Journal of Public Policy, 28*(1), 73–92.

Eberlein, B., & Newman, A. L. (2008). Escaping the international governance dilemma? Incorporated transgovernmental networks in the European Union. *Governance, 21*(1), 25–52.

Eikeland, P. O. (2011). The third internal energy market package: New power relations among member states, EU institutions and non-state actors? *Journal of Common Market Studies, 49*(2), 243–263.

Eising, R. (2002). Policy learning in embedded negotiations: Explaining EU electricity liberalization. *International Organization, 56*(1), 85–120.

Eising, R., & Jabko, N. (2001). Moving targets national interests and electricity liberalization in the European Union. *Comparative Political Studies, 34*(7), 742–767.

European Commission. (1988). *Commission working document. The internal energy market.* COM(88) 238 final.

European Commission. (2003). *Commission Decision of 11 November 2003 on establishing the European Regulators Group for electricity and gas* (2003/796/EC).

European Commission. (2006). *Commission Green Paper. A European strategy for sustainable, competitive and secure energy.* COM(2006) 105 final.

European Commission. (2007a). *Commission staff working document accompanying the legislative package on the internal market for electricity and gas. Impact assessment.* SEC (2007) 1179.

European Commission. (2007b). *Commission communication. Prospects for the internal gas and electricity market.* COM(2006).

European Commission. (2007c). *Commission communication. An energy policy for Europe.* COM(2007) 1 final.

European Commission. (2007d). *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.

European Council. (2007, May 2). *Brussels European Council 8/9 March 2007—Presidency conclusions.* 7224/1/07 REV 1. Brussels.

European Parliament and Council. (1996). *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.*

European Parliament and Council. (2003a). *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.*

European Parliament and Council. (2003b). *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.*

European Parliament and Council. (2009a). *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.*

European Parliament and Council. (2009b). *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.*

European Parliament. (2008). *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.

Glachant, J.-M., & Finon, D. (2003). The making of competitive electricity markets in Europe: No single way and no "single market". In J.-M. Glachant & D. Finon (Eds.), *Competition in European electricity markets: A cross-country comparison*. Cheltenham: Edward Elgar.

Glachant, J.-M., & Levêque, F. (2009). The electricity internal market in the European Union: What to do next? In J.-M. Glachant & F. Levêque (Eds.), *Electricity reform in Europe. Towards a single energy market.* Cheltenham: Edward Elgar.

Hancher, L. (2000). Cross-border transmission of electricity in the European energy market: Regulatory issues. *Journal of Network Industries, 1*, 127–155.

Hancher, L. (2007). The new European energy policy. Future challenges—Future regulatory frameworks? In M. Roggenkamp & U. Hammer (Eds.), *European energy law report IV* (pp. 87–107). Antwerpen: Intersentia.

Hilbrecht, H. (2012, May 10). *Speech.* Targets without governance? The pursuit of the strategic energy objectives of the European Union. Florence.

Kroes, N. (2007, January 10). *Speech/07/4.* Introductory remarks on Final Report of Energy Sector Competition Inquiry. Press Conference, Brussels.

Schmidt, S. K. (1998). Commission activism: Subsuming telecommunications and electricity under European competition law. *Journal of European Public Policy, 5*(1), 169–184.

Vasconcelos, J. (2005). Towards the internal energy market, how to bridge the regulatory gap and build a regulatory framework. *European review of energy market, 1*, 81–103.

CHAPTER 5

# Telecommunications

The change of EU telecommunications policy occurred in three stages, one per regulatory package. The first package (T1) stretched from 1988 to 2002 and was characterized by a nationally based implementation, a need for coordination that was met through a comitology committee where the Commission diffused 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 featured 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), aimed 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 hybrid body located at the crossroads between a network and an EU agency, consisting of a reinforced network assisted by the Office, a small EU agency, in charge of administrative and logistical tasks. The telecommunications sector thus provides good support to the conjectures.[1]



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## Commission Leadership and Comitology Committee (T1: 1988–2002)

### *Regulatory Divergence and Barriers to Market Entry*

The action of the EU in the field of telecommunications started with a Green Paper, issued by the Commission in 1987, on the Development of the Common Market for Telecommunications Services and Equipment (European Commission 1987). At that time, while all activities related to the sector were integrated in a ministerial black box, the Green Paper sketched a scenario for the development of the sector based on a separation between the regulatory dimension on the one hand, and the commercial and operational ones on the other hand. Technological innovation in the sector was rapidly progressing, pushing costs down and demand up. This tendency constituted the major trigger for the liberalization process of the sector. 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 liberalization would allow them to access a much bigger market that would boost their profits, even in a situation of reduced market shares. Besides, the managers of these public enterprises, who were civil servants, saw how they could personally gain from a privatization process in terms of the level of their remuneration.

One year later, in 1988, the Commission made an ambitious move. Relying on Article 90 of the EC Treaty, it adopted a Commission Directive for the liberalization of terminal equipment (European Commission 1988). Article 90, anchored in 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 of adopting directives or decisions, addressed to member states, to ensure the application of the article. Although member states were substantially in agreement with this evolution, France and other countries contested the use of this procedure before the ECJ, arguing that the adoption of directives was reserved for the Council (Schmidt 1998: 173). The Commission nevertheless persisted with this strategy and prepared a second Commission directive to achieve a more contentious policy goal: the expansion of liberalization to all telecommunications services other than voice telephony.

The Commission's aggressive approach gave rise to intense discussions with member states who were worried about the possibility of opening the telecommunications market on the basis of the mutual recognition principle. Amongst others, they wanted to accompany liberalization with a system of authorizations that would allow them to keep some control on market entries. The discussions led to the adoption, in 1990, of two legislative acts that would become the two pillars of the first regulatory package: a Commission Directive for liberalization, and a Council directive for re-regulation. On the one hand, the Commission Directive, called the Services Directive (European Commission 1990), liberalized all telecommunications services other than voice telephony, although market entries could however be regulated by member states through national licensing regimes (Thatcher 2001: 564). On the other hand, the Council Directive, called the ONP Directive, aimed at harmonizing the conditions of open access to public telecommunications networks, the so-called open network provisions (ONP) (Council of the European Union 1990). Here again, the Commission Directive was challenged before the Court by a few member states.

In the following years, as the ECJ validated the Commission's capacity to use Article 90(3) of the EC Treaty, and given the member states' reluctance to liberalize effectively telecommunications services, the Commission continued to use the Article 90(3). Several Commission Directives were thus adopted to extend liberalization to other areas, such as satellite services and equipment in 1994 (European Commission 1994), cable television (TV) networks in 1995 (European Commission 1995) and mobile and personal communications in 1996 (European Commission 1996b). For the Commission, this piecemeal approach was expected to lead eventually to a full liberalization of all telecommunications services and networks, including voice telephony. Given the reluctance of member states, the Commission had to wait until 1996 to introduce full competition which was supposed to be effective in 1998 (Kiessling and Blondeel 1998: 575–576; European Commission 1996a). In parallel with the activity of the Commission, the Council (and later the Council and the EP) adopted a series of Directives with a view to re-regulating the sector, notably with respect to universal service, interconnection and licensing, and numbering (Thatcher 2001: 568). Among the acts adopted by the Council, the Licensing Directive (European Parliament and Council 1997a) was seen as particularly problematic by the Commission because it acted as an important barrier to competition (Thatcher 2001: 569) and led to a sig-

nificant divergence of national regulatory regimes (Kiessling and Blondeel 1998: 585).

The implementation of the regulatory package resulting from the accumulation of these legislative acts was entrusted to member states who were left with a wide margin of discretion. Therefore, member states retained considerable power within the regulatory framework, including on crucial matters such as licensing, interconnection and universal service (Thatcher 2001: 572–573). In many instances, EC legislation specified that some of the national implementing competences should be exercised by national regulatory agencies (NRAs). Back in the 1990s, the concept of a national regulatory agency was still in the process of being developed, and definitions provided by EC acts left considerable discretion to member states regarding the institutional features and procedures of NRAs (Thatcher 2001: 172–173). EU legislation provided a first definition of an NRA as an agency that is legally distinct and functionally independent of telecommunications operators. The definition was specified in 1997: in those member states that 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. Hence, in the 1990s, the concept of an NRA was not the same as that of an IRA, which was independent of the government. 'In most member states both the independent regulator and the government ministry are NRAs for the purposes of EU telecommunications legislation' (European Commission 2000c: 39).

While constructing this regulatory framework, the major concern of the Commission was not to gain regulatory power but to introduce competition in the telecommunications sector, which remained very monopolistic until the late 1990s. This was seen as a task for the national regulators. As a consequence, the various legislative acts did not rely, for their implementation, on significant delegations of executive powers to the Commission. A few executive powers were nonetheless delegated to the Commission, for example regarding the possibility of determining the rules for uniform application of the conditions under which access to a public telecommunications network could be limited (European Commission 1997: Article 3(5)). These powers had to be exercised under the control of two comitology committees, the ONP Committee, established in 1990 under the ONP Directive package, and the Licensing Committee, set up in 1997 by the Licensing Directive.

Throughout the 1990s, the Commission became aware that nationally based implementation coupled with 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 reported the 'disparity of interpretation and application of Community legislation' (European Commission 1999: 9–10) and laments the remaining fragmentation of the European telecommunications market (European Commission 1999: iii). In this respect, licensing represented a major issue in the 1990s as member states fiercely held on to their national licensing schemes. The Council rejected a proposition made by the Commission in 1992 to give away their competences on licensing through the application of the mutual recognition principle and the creation of a 'Community Telecommunications Committee' (European Commission 1992). As a consequence, before entry into force in 1998 of the Licensing Directive, the conditions under which a licence 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' (European Commission 1999: 10). Licensing was not the only sub-field affected by the lack of market integration. Interconnection rules and rates, as set out in the 1996 Interconnection Directive (European Parliament and Council 1997b), were 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 diverged considerably with respect to their approach to the funding of a universal service. According to Kiessling and Blondeel, this variation came to 'act to some extent as entry barrier for cross-border operators and will increase market fragmentation' (1998: 589–590).

### *Commission Leadership, Comitology Committee and the Group of Regulators*

To address the problems of regulatory divergence regarding licensing, the Commission made various attempts to create an EU body that would serve as a coordinating platform for NRAs. In 1992, it proposed the creation of a Community Telecommunications Committee (European

Commission 1992) and, in 1996, the establishment of a European Union Telecommunications Committee in the form of an advisory committee (European Commission 1996c). Both attempts were rejected by member states.

In fact, it was the ONP Committee that was used as a platform for exchange between the Commission and the national administrations, with a view to fostering coordination and the consistent implementation of the framework. The ONP Committee, being a comitology committee, had been created for 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 too. It was also a way for the Commission to assist member states in the implementation of the framework. This could take the form, for example, of discussions around 'guidance papers' or 'committee papers' which were independent of the adoption of a regulation or recommendation as specified in the legislative texts. Such papers would, for example, explain concepts of the regulatory framework, such as the separation between commercial activities and regulatory functions, or cost orientation as a method for calculating interconnection rates.

Interestingly, this dialogue between the Commission and member states through the ONP Committee also hosted some exchanges between the Commission and the regulators. Many of the discussions in the ONP Committee related to the operational work of the NRAs. Therefore, a number of member states' ministries brought their experts from the NRAs with them to 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; they were unofficially included only to assist the national ministries.

Explaining how the major concepts of the regulatory framework should be understood was meant, for the Commission, to be a way to harmonize how the framework might be interpreted by national regulatory authorities. This, in turn, was meant to pave the way for gradual regulatory convergence through the diffusion of ideas. In fact, in the 1990s, as liberalization was still unexplored territory for the great majority of stakeholders, the Commission was able to position itself as an intellectual leader regarding the development of commercial principles and rules regarding market opening and interconnections. This was possible because the field was not overly technical. Rather, the development of competition relied a lot on law principles in which the Commission had a lot of expertise.

Regarding the technical aspects, the Commission internalized member states' experts by seconding national experts who were already working for the Commission on detachment.

The Commission also relied on the ONP Committee for collecting information in order to understand what was happening on the ground, at the national level. National administrations were particularly solicited by the Commission with a view to drafting the yearly recommendation on the interconnection rates benchmark. In the early days of liberalization, no one had regulated the 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 member states that had already liberalized and recommended the regulators to locate their interconnection rates between the cheapest and the third cheapest. For this exercise, the Commission needed information from the NRAs regarding the interconnection rates used in their own countries.

Independently of the regulatory framework and the coordination of its implementation by the Commission and the ONP committee, the NRAs created on their own initiative an informal network of regulators called the Independent Regulators Group (IRG), which was created in 1997, following the initiative taken by 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. Within the IRG, regulators discussed how to interpret and apply the framework, looking at how the others were doing, and taking inspiration from each other. Although the IRG was not meant to foster regulatory convergence among NRAs, it probably did, to some extent, contribute to the regulatory consistency of the framework.

The communication between the Commission and the NRAs was not channelled through the IRG. In the late 1990s, the Commission was still sustaining a traditional style of interaction with member states through the ONP Committee. So it is in the ONP Committee that NRAs were informally invited to European discussions. This was also true regarding the Commission's practice for gathering information on national regulatory practices. Rather than asking the NRAs directly, the Commission turned to the ONP Committee. Under the first regulatory framework, the Commission never consulted the IRG or asked it to provide any information because it considered the IRG was not an official representation of the NRAs but a very informal network. It may however be worth mentioning

that the IRG issued a first position paper in 1999, following the proposal of the Commission to reform the regulatory package.

## The Commission's Empowerment and the Regulatory Network: ERG (T2: 2002–2009)

### *Empowering the Commission*

In the early 2000s, the Commission prepared a reform of the regulatory framework. Three important problems needed to be addressed: the need to adapt the framework to technological developments, the limited effect of the first framework on liberalization, and the absence of market integration among member states. A first 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.[2] Under the first framework, regulatory constraints varied according to the technology used. In order to prevent competition distortion between providers of similar services, the 2002 framework set the principle of technological neutrality: regulation was to be approached via services, independently of their technological support. Such services included call origination from a fixed telephone, call termination on a mobile telephone, or wholesale broadband access. The second motivation for reform was that the 1997 reform, expected to bring about complete market opening, had not had sufficient impact on the liberalization of the markets. Some operators continued to maintain a dominant position that allowed them to control the market.

Finally, the Commission had outlined that the telecommunications markets had remained fragmented in national markets and that the provision of pan-European services was encumbered by the considerable divergence in how the regulatory framework was interpreted and applied in member states. It was particularly important that similar operators were treated in similar ways, wherever they operated in the EC. Coordination thus needed to be enhanced (European Commission 1999: 9). Yet, neither the ONP Committee nor the IRG were suitable platforms to do this.

For reasons of membership, the ONP Committee was not the appropriate venue to foster a convergent interpretation and application of the framework. Comitology committees gathered representatives of 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 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.

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 criticized by the Commission who also felt that the IRG was a way for regulators to act as a counter-power, trying to find arguments against its ideas and proposals. In the Commission's perception, the IRG was more interested in defending national interests than promoting a European view. Furthermore, the European Commission wanted to be involved in the network of NRAs, but the regulators were keeping their doors closed. For these different reasons, the Commission did not perceive the IRG positively and wanted to replace it with another network of regulators in which it could be involved.

The Commission thus prepared a new regulatory framework that would address the three issues above. First, to deal with the technological convergence, the new regulatory framework would be based 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. Therefore, the new regulatory framework was technologically neutral and regulation was approached by service, independently of the technology used to provide it.

Second, lack of competition on the telecommunications market led the Commission to elaborate a new regulatory approach inspired by competition law. Telecommunications regulation would be subject to market analyses, based on the concept of a powerful operator and transferred from competition law. The market analysis process is divided into three steps. The first one is the market definition, that is, 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,

that is, the choice of the 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.

Third, regarding the need to increase regulatory convergence, the Commission started by commissioning 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 be best executed at the European level, it was more appropriate to improve existing structures than establish a new European agency (European Commission 1999: 8–9).

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 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' (European Parliament and Council 2002: Recital 11).

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 SMP created in 1998 was very rigid. If an operator had 25 % of the market share or more, it was automatically designated as having SMP. So the use of a threshold was abandoned. Instead, from 2002 onwards, 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, and so on. This represented 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 identified 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.

Given the new powers and discretion allocated to the NRAs, there was a strong risk that, without coordination, different member states would develop into very different regulatory environments. There was thus a clear need for stronger coordination. So the Commission proposed to compensate the wide discretion of the NRAs with a veto power of its own on the market analyses 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.

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 harmonized implementation of the regulatory framework (European Parliament 2001a: 29). 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. However, the a priori intervention of the Commission, consisting in preventing NRAs from taking certain measures, ran counter to the institutional balance established in the Treaty. But, taking note of the EP'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 but they would need to explain their reasoning. The Council's proposed amendments thus aimed at restoring the final authority of NRAs on the whole market analysis procedure (Council of the European Union 2001: 5).

The EP's amendments in the 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 proposed another type of compromise: keeping the Commission's veto power on 'those areas most critical for achieving the single market objectives of the Directive' (European Parliament 2001b: 20–21). 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 (European

Commission 2002b: 3) and accepted by the Council, became the core of the new market regulation system.

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. First, the period in which this package was negotiated followed 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 as a way to move quickly towards a regulatory regime that would be subject to competition policy only. Telecommunications 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. While the Commission kept repeating to the historical operators that *ex ante* regulation would disappear once competition was present, the latter thought that the transition would be quick. Having misinterpreted the consequences of such a far-reaching reform, the incumbents did not oppose it, which allowed for a favourable political climate. Third, the negotiation had been facilitated by the fact that the three negotiators of the package were competent in the field. Commissioner Erkki Liikanen for the Commission, Rik Daems, the Belgian competent Minister for the Council, and Malcom Harbour for the Parliament were able to discuss the details of the regulatory package and solve many aspects of the negotiation directly among themselves.

The Commission was thus delegated important executive powers. First, it would supervise NRAs' individual decisions about market analysis, with a veto power on market definition and identification of SMP operators. In addition, it was also given the responsibility to adopt a recommendation on the relevant markets to be regulated as well as recommendations with a view to harmonizing the application of the framework by member states. Besides, the Commission would be able to adopt technical implementing measures to support the harmonization of the use of numbering resources.

In sum, with respect to the need to increase regulatory convergence, this regulatory package represented a huge leap forward. The new powers of the Commission, particularly its veto power on the market analyses per-

formed by the NRAs, covered a very big share of the regulatory authority in the sector, although the NRAs remained 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 member states and the Commission held significant implementing powers.

Although significant new competences were delegated to the Commission, an important need for coordination among NRAs remained under the second regulatory framework. Indeed, the new framework significantly broadened the discretion of NRAs (European Commission 1999: 51). While part of this discretion was balanced by the veto power of the Commission on market definition and the identification of SMP operators, the choice of remedies remained without a binding coordination mechanism. Coordination thus remained necessary at the level of the choice of remedies.

Interestingly, despite the new responsibilities conferred on it regarding 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 had 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, joining staff from DG Competition and DG Information Society. However, the Commission's 1999 review mentioned that a new body, composed of NRAs and the Commission, could help the latter in drafting the recommendation on market definition and provide ideas for the adoption of implementing measures (European Commission 1999: 52–53).

### *Setting Up the Regulatory Network: ERG*

Given that a significant amount of regulatory power would remain in the hands of the NRAs, the Commission was convinced of the necessity to have the NRAs cooperating and developing a common approach. 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 is the case in comitology committees.

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 for exchange of technical information with the NRAs. For the coordination dimension, NRAs were to adopt common positions and codes of practice, related to the application of the legislation, with a view to promoting its uniform application, facilitate pan-European services and resolve cross-border disputes between consumers and operators. As regards the exchange of technical information, the NRAs were to '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, such as 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 member states that would be likely to affect the internal market (European Commission 2000d: Article 21).

However, the Council deleted from the Commission's proposal the article about the HLCG. After having consulted its legal service, it explained 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' (Council of the European Union 2001: 6). Member states wanted to retain their gate-keeping role between national implementation and the Commission through comitology committees. 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 it would examine the possibility of setting up such a group on its own initiative (European Commission 2001a).

The ERG was then created by a Decision of the Commission, on the margins of the regulatory package (European Commission 2002c). The ERG was a network of national regulatory authorities where, unlike in the IRG, the Commission was represented and ensured the secretariat. The main reason behind the creation of the ERG was to encourage the cooperation of NRAs with a view to the development of a common doctrine. Coordination tasks are thus central in the mandate of the ERG. First, they were expected to develop common positions in order to make a harmonized

use of their regulatory discretion. The regulators thus started to develop common positions on, for instance, how to regulate wholesale broadband, the wholesale access market or local loop unbundling. The IRG/ERG Guide explains that NRAs were, in particular, required to agree between themselves on the appropriate regulatory instruments and remedies. One way to do that was 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 might then be published as a Common Position. Common positions were not binding on NRAs, though the ERG monitors their 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).

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 (European Commission 2001b: 2). Initially, the regulators abstained from engaging in this exercise. The cooperation style of the ERG was such that NRAs, collectively, were not willing to tell individual NRAs how they should regulate their national market. They considered that individual NRAs were in a better place to know what should be done because they knew their national market best. Besides, they did not want to be told what to do when they are the ones submitting a decision project. However, in 2006–2007, as the Commission started to work on preparing the transformation of the ERG, the regulators started to adopt a common position on those market analyses, which the Commission was considering vetoing, in order to show that they were able to be proactive. They did so in a defensive way, though, willing to defend their fellow NRAs against the Commission. The first case was a complicated one, involving the Dutch NRA, which had submitted to strong political pressures. In order to get support, it had 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 further developed this practice, which was welcomed by the Commission.

Besides its coordination function, the ERG was also, for the Commission, a way to gather the views of the regulators on issues related to market analysis because they were the actors who were on the ground. The ERG was meant to provide the Commission with input on technical issues, that is, the choice of remedies. While the Commission had no decision-making power on this choice, 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 termination rates or for next-generation networks. In the market analysis procedure, in case of strong disagreement between NRAs and the Commission, the latter always consulted the ERG. Over time, the advisory role of the ERG gained importance.

### *The Group of Regulators Remains: IRG*

The Commission aimed to replace the IRG by the ERG. But the NRAs did not want the IRG to disappear because they wanted to safeguard their independence from the Commission. As a result, the ERG was created on top of the already existing IRG. One of the main differences between the IRG and the ERG was the involvement of the Commission in the latter, while the former was completely independent of the Commission. The Commission could attend every meeting and activity of the ERG and it also held the Group's secretary. Therefore, the shift from the IRG to the ERG represented for the NRAs 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. They wanted to keep a forum where they could cooperate without the presence of the Commission. In practice, the IRG and ERG became 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 meant that, before gathering together with the Commission, under the ERG hat, the NRAs first met together without the Commission, under the IRG hat. There was no difference as to which topic was dealt with in one or the other forum. Relevant issues were dealt with in both; the IRG hat was just used by the NRAs to keep the Commission out of the meeting room when they wanted to be on their own. So, although the IRG and the ERG overlapped with regard to both their membership and their functions, the NRAs found a way to articulate the activities of both networks in practice by dividing

them into horizontal cooperation (NRAs among themselves) and horizontal–vertical cooperation (NRAs among themselves, together with the Commission).

### *The Comitology Committee: COCOM*

The new regulatory framework also revised the system of comitology committees with the creation of the Communications Committee (Cocom), which replaced both the ONP and Licensing Committees. Like the ONP Committee, Cocom served not only as a pure comitology committee, but also as a platform for exchanging information between the Commission and 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 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 member states, in general ministries. One factor that influences the choice of the Commission to turn to 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. 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 the NRAs: they may be the NRAs' responsibility in some member states and the ministry's responsibility in others. In such cases, Cocom might provide a more appropriate forum, although some topics are also discussed with both Cocom and the ERG.

The NRAs may accompany their member states to Cocom, but this varies depending on the state. Since, under the comitology process, Cocom had the role of controlling the Commission in its use of the veto against the NRAs' market analyses, it had to take positions itself on these analyses. 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 one NRA would never vote against another NRA, the instructions from them was always to abstain from voting. Additionally, the presence of some NRAs

accompanying their member states in Cocom would take advantage of this to convey the views of the ERG.

## The (Partly) Failed Agencification of the Network: BEREC (2009–)

### *Member States' Opposition to Further Empowerment of the Commission*

Three years after the entry into force of the second regulatory package, the Commission started to discuss how it might be reformed. 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 the 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' (European Commission 2007e: 79). The NRAs have been delegated considerable discretion in implementing the regulatory framework, and the efforts of the ERG to improve coordination had proved insufficient to bring regulatory consistency (European Commission 2007e: 66–67, 2007f: 3).

The ERG may foster convergence among its members in two ways. One is adopting common positions or guidelines. The other is by engaging in peer review on each other's market analyses. As regards the former, the ERG was known for adopting positions that were general enough to accommodate the diversity of the 27 national approaches. 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 it a weak structure, which, according to some, was unable to provide a significant input into the regulatory debate, at least until 2006–2007. This turning point corresponds to the moment when Commissioner Viviane Reding presented her project to transform the ERG into an EU agency. The regulators understood then that, in order to defend their autonomy, they should show more proactivity in the construction of the internal market; they then started to produce a more complete work and come up with clearer positions.

In spite of the efforts made by the regulators under pressure of the Commission's proposal, the latter remained convinced that 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.

Besides, the Commission wanted the disappearance of the IRG. When giving an opinion on market analyses, when the Commission was requesting ERG opinion, the regulators used to present IRG opinions. Furthermore, regulators used to discuss many things among themselves, under the IRG hat, excluding the Commission. This did not please the Commission, which criticized the IRG as 'a parallel body which operationally overlaps with the ERG'. The IRG had some influence on the 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; and, in addition to being unable to deliver efficient results in terms of harmonization, it was problematic in terms of accountability and transparency (European Commission 2007g: 5).

Member states did not share the Commission's willingness to engage deep institutional reforms of the regulatory package. In spite of this, the Commission, led by Commissioner Viviane Reding, put a very ambitious proposal to the table. As the Commission's proposal included many things member states had previously made clear they did not want, negotiations were very conflictual.

A contentious aspect regarded the new competences to be delegated to the Commission. The latter wanted to extend the veto power it enjoyed on market analyses to the choice of remedies, a key issue of telecommunications regulation. Despite the support of the EP, 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 the NRAs' draft remedies. If an NRA does not comply with the Commission's opinion, it would then have to justify its position (Council of the European Union 2008b: 7). 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.

While the Commission did not manage to gain the veto power on the choice of remedies, the reform has slightly expanded its capacity to

adopt executive implementing measures. First, the Commission's faculty to adopt harmonization measures, introduced in 2002, 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 harmonized 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 be done two years after having first adopted a recommendation on the same issue. Second, the Commission has been delegated the possibility of adopting recommendations and/or guidelines in relation to a few modalities of application of the related market analyses. 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.

The new package maintains NRAs as the central actors of the implementation of the framework and even reinforces them; they also remain 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 competences on consumer protection.

The year 2009 has also significantly empowered the NRAs on the national arena and considerably reinforced their independence. The NRA should be 'protected against external intervention or political pressure liable to jeopardize its independent assessment of matters coming before it' (European Parliament and Council 2009c: Recital 13). 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 exercise their competences autonomously of policy-makers and the eventuality of public ownership of the incumbent. This is justified by the idea that governmental interference in regulation distorts competition. 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' (European Parliament and Council

2009a: Recital 13). 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.

### *Limited Upgrading of the Regulatory Network: BEREC (T3: 2009–)*

*Negotiations*

The potential creation of a new EU regulatory agency to replace the ERG was another very disputed point of the negotiations. The 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. Besides, anticipating an increase in its competences in particular regarding the choice of remedies, the Commission saw the need to consolidate the group of regulators into an effective advisory body to assist it. Unlike for market definition and identification of SMP operators, the choice of remedies does not only require legal and economic expertise, but also 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 its planned new role.

When preparing the transformation of the ERG, DG Information Society came to the conclusion that the best solution would be to create a large secretariat, with about 30–40 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 was to create an agency. This is how DG Information Society conceived the idea of creating an EU agency as part of the third package. Commissioner Viviane Reding then seized upon this idea and presented the future body as a European regulator. The Commissioner's cabinet communicated to the staff of DG Information Society that they should not discourage journalists from using the term 'European regulator' because this was the term that Commissioner Reding was using herself. Also, while the DG was considering the creation of a secretariat, that is 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 DG Information Society. Several interviewees were of the opinion that Commissioner Reding was in fact pursuing political prestige.

The Commission thus proposed the creation of the European Electronic Communications Market Authority (EECMA), an EU agency that would be constructed on the basis of the network of NRAs. The new body's profile would be essentially advisory, that is, it would mainly assist the Commission through the provision of expertise and information. 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 EECMA would be the regulatory agent providing support to the Commission with these new competences. The proposal also involved the delegation of a few coordination tasks to 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' (European Commission 2007g: Article 8). EECMA was also supposed to endorse the definition of transnational markets and to provide the framework allowing the cooperation of NRAs. In terms of status, EECMA would be a Community body, that is, an EU regulatory agency with legal characteristics. It would therefore be subject to the EU regulation of such bodies, which involves amongst other things reporting to the Commission and hosting a representation of it in the governing board of the agency.

A further noteworthy element of the Commission's proposal was to merge the European Union Agency for Network and Information Security (ENISA), an existing EU agency working on cyber security, with EECMA. This answered tactical requirements. When the third regulatory package was discussed, there was an increasing scepticism from the Parliament and member states regarding EU agencies, and there 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 Island of Crete, in Greece, which meant it was very difficult to recruit staff. Finally, given that ENISA dealt with cyber security, it seemed justified to bring this field closer to that of the regulation of electronic communications.

The EP, while renaming EECMA the Body of European Regulators in Telecommunications (BERT), generally agreed with the proposal of the

Commission, except for the merging with ENISA (European Parliament 2008). The Council, on the other hand, showed very strong opposition to almost all the elements of the Commission's proposal (Council of the European Union 2008a). The Commission thus withdrew its proposal and presented an amended one in November 2008. On the one hand, the Council agreed with the need to formalize the status of the group of regulators and to improve the coordination among them. It 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 the tasks of the network, of its functioning and its relations with the other EU institutions.

On the other hand, the Council rejected vehemently the transformation of the ERG into an EU agency. 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 characteristics. They considered that 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 else than an EU agency. Indeed, they wanted to create administrative and technical support to assist the work of the group of regulators. Yet the only type of structure at the EU level that could be funded under the EU budget to endorse such a role 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, BEREC, which consisted of the group of regulators, and on the other hand, the 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.

*Structure and Missions*

The Office is a Community body with legal characteristics, that is an EU agency, in charge of: providing administrative support to BEREC, amongst others, by 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 is 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 him or her in the execution of his or her tasks, is responsible for the appointment of the staff, and assists the work of the expert working groups. The Administrative Manager is accountable to the Management Committee and should perform his or her duties independently of any member states, any NRA, the Commission or any third party. He or she is designated for three years, renewable once. In addition to being in charge of the management of the Office, he or she provides administrative and organizational assistance to the Board of Regulators, the Management Committee and the Expert Working Groups.

'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' (European Parliament and Council 2009d: Recital 6). 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. For carrying out the tasks conferred on it by the regulation, BEREC acts independently, that is the Members of the Board of Regulators neither seek nor accept any instructions from any government, from the Commission or from any other public or private entity. The Commission will attend BEREC meetings as observer and is represented at an appropriate level. As for its internal decision-making process, the Board of Regulators acts by a two-thirds majority of all its members.

In terms of functional profile, BEREC combines coordination and expertise tasks. This means that it is expected both to strengthen the coordination between NRAs and to provide expertise and advice to the Commission. The coordination tasks reflect the fact that BEREC was created in order to foster regulatory consistency with a view to stimulating market integration. The introductory part of the regulation establishing BEREC explains that 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 harmonization of NRAs' practices is thus required. Against this background, the Commission created the ERG in 2002 and

BEREC was created to continue the work of the ERG, that is, to improve the harmonization of how NRAs make use of their discretion when implementing the regulatory framework as made clear by the recitals. In practice, this relates above all to the choice of remedies.

A series of coordination tasks have thus been delegated to BEREC with a view to promoting cooperation and coordination among NRAs. In this respect, 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 they initially 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 institutionalized with the 2009 reform. It involves the obligation, for BEREC, to comment on the NRAs' projected choices 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. In addition to the procedural change of the market analysis process, BEREC should foster coordination by developing and disseminating the NRAs' best practices, common approaches, common methodologies, guidelines, and so on. Finally, the new framework gives BEREC a new role in situations of cross-border dispute. 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, the 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.

BEREC's mission also involve serving as an advisory body, in particular to the Commission. It means that BEREC should issue an *ex ante* opinion to provide an input every time the Commission makes use of its delegated competences, regardless of the type of act to be adopted by the Commission. This advisory role thus applies to the adoption of decisions, recommendations and guidelines issued by the Commission. Hence, in each article delegating the Commission the power to adopt recommendations, BEREC's input is inserted as a procedural requirement. BEREC is thus called upon to intervene in the adoption of harmonization measures, of guidelines regarding the modalities of application of market analysis

procedure, and of the recommendation that defines relevant markets as well as to the identification of transnational markets.

BEREC's new advisory role is particularly relevant in the context of market analyses, where it now intervenes 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 decisions entirely. On the other hand, the ERG did not have any role here, so BEREC's involvement is a net increase of advisory competences for the regulators. Many interviewees justified the shift of advisory functions from Cocom to BEREC by referring to the latter'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 Cocom, with member states representatives, offering opinions within the market analysis procedure.

Finally, BEREC was also given a more general advisory role. The use of its expertise will not be limited to the Commission, but be exploited by other actors in case of need. BEREC has therefore the possibility of issuing opinions to the EP and the Council, both on request and on its own initiative. The latter will also be able to ask BEREC to assist them in their interaction with third parties. Another interesting evolution is BEREC's new task of assisting individual NRAs. Over time, the Commission realized 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 of the market size of 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. 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, upon request, provides assistance to the NRA concerned in completing the analysis of that market. This is a new role for BEREC in comparison to the ERG. Here, BEREC is given the role of assisting individual NRAs when they need help.

## Analysis

T1 provides a partial support to the conjectured relationship between competence distribution and delegation pattern. Several elements of the coordination patterns are present, but not precisely in a configuration that might be expected. First, the data fully validate the relationship between a nationally based implementation and the need for coordination. In the 1990s, as member states had kept the bulk of regulatory authority, the absence of coordination, in particular regarding licensing, represented a significant obstacle to market integration.

However, this need to coordinate national regulatory approaches has not lead to the creation of a regulatory network. Instead, it has been dealt within an existing comitology committee, the ONP Committee (see Table 5.1). 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. In fact, some national ministries came to Cocom accompanied by their NRAs. Therefore, Cocom allowed the Commission to interact with both ministries and NRAs, although only to a certain extent. And as long as not all member states, or at least a great majority of them, had established and empowered an NRA, it would not have been appropriate, from the viewpoint of EC policy-makers, to create a network of NRAs in order to foster regulatory convergence. Therefore, until the late 1990s, national ministries remained the 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 harmonized implementation of the framework. The use of the ONP Committee for coordination purposes was also due to the fact that possible alternatives had been discarded by member states who refused twice to create a specific body such as an EU agency for the coordination of licensing.

While the ONP Committee served as the venue, coordination was not meant to happen through the delegation of coordination tasks to the committee, that is, through the effort of national ministries to align mutually their practice. Rather, the endeavour towards regulatory convergence took another form, much more as a top-down process. The

**Table 5.1** Competence distribution and delegation patterns in telecommunications

| | *T1* | | *T2* | | *T3* | |
|---|---|---|---|---|---|---|
| | *Expected* | *Found* | *Expected* | *Found* | *Expected* | *Found* |
| Competence distribution | Member states | | Mixed | | Mixed | |
| Main agent | Network | Comitology committee | Network | Network | Network or agency | Hybrid (Network/agency) |
| Main function | Coordination | Receiving instructions | Coordination +expertise | Coordination | Coordination +expertise | Coordination +expertise |

Commission used to distribute implementation papers to explain how the framework should be interpreted. Some discussions with national representatives were most probably involved but, essentially, the Commission acted as a leader. This was possible given that the liberalization of telecommunication markets relied on commercial and legal expertise, while the level of technical expertise required was rather low. This allowed the Commission to take the intellectual lead on liberalization, to devise its own harmonized interpretation of the legislation and to use the ONP committee to diffuse its doctrine to national authorities. Interestingly, this shows that the design of delegation patterns is also affected by the degree of technicality.

Then, as in the electricity sector, a regulatory network, the IRG, was created as a result of a bottom-up initiative by the regulators themselves, instead of by a decision of EC policy-makers. Regulators wanted to learn from each other to gain insights on how to deal with the challenges they had in common with their counterparts, although this cannot be assimilated to a willingness to foster convergence or to a coordination endeavour if we understand coordination as the effort made by regulators to align mutually their behaviour with a view to achieving a common objective. Nevertheless, mutual learning leads, de facto, to a certain degree of coordination by producing convergence among regulators, at least to a small extent.

While T2 confirms most elements of the conjectures, it also offers an unexpected and interesting addition to the conjecture regarding the relationship between the distribution of implementing competences and the mandate of the regulatory agent. On the one hand, T2 complies with the functionally driven reinforcement of the delegation pattern and with the creation of a regulatory network in the coordination pattern (see Table 5.2). On

**Table 5.2** Functionally driven reinforcement of the agent over time in telecommunications

| | *T1→T2* | *T2→T3* |
|---|---|---|
| Change of agent | Comitology committee→network | Network→hybrid (network-agency) |
| Problem pressure | Strong (Regulatory divergence, need for a platform coordinating NRAs) | Strong (Regulatory divergence, the network lacks effectiveness) |
| Reinforcement of the agent | No (change of agent instead, in order to have a platform with NRAs only) | Yes (Permanent structure, budget, more powers) |

the other hand, it features an important delegation of new competences to the Commission that are not matched by the delegation of expertise tasks to the regulatory agents.

The institutional setting of T1 lacked effectiveness and was not in measure to create the regulatory convergence required to integrate the different national markets. This was one of the reasons why the regulatory framework was modified in 2002; a new institutional framework was necessary to push regulatory convergence. This led to two important institutional developments: the delegation of implementing powers to the Commission and the creation of the ERG, a regulatory network. The delegation of new powers to the Commission were very significant, so it led to a mixed distribution of competences, that is, a situation where both the Commission and member states are important implementation actors.

Unexpectedly, these new powers did not clearly lead the Commission to require external expertise and assistance, at least not to the extent anticipated. 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 has thus been able to cope effectively and efficiently with its new responsibilities without any external assistance. This suggests that the impact of the delegation of implementing competences to the Commission on its need for expertise and assistance is conditional upon the type of expertise required to exert the implementing competences. The Commission's need for external input would only be verified in case the expertise required is of a technical nature. By contrast, in case the implementing competence require legal expertise only, the Commission is able to deal with its responsibilities without external input.

The second major institutional change at T2 is the creation of the ERG. While the Commission had been delegated important regulatory powers, member states remained key actors of the implementation process and were still enjoying room for discretion in several areas, which required coordination. As the second package obliged member states to allocate the responsibility over most of these issues to their NRA, a comitology committee could not serve anymore as a coordination platform at the EU

level, as used to be the case at T1. 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. The comitology committee structure was thus not adapted to the inter-NRAs coordination platform, and the Commission set up an EU regulatory network, the ERG, to answer the need for coordination among NRAs. This confirms what is observed at T1 regarding the impact of the distribution of competences at the national level between NRAs and ministries on the type of institutional venue for coordination at the EU level. While coordinating issues that fall under the competences of the NRAs in all member states require an EU regulatory network, the coordination of issues that may be in the hands of NRAs or ministries depending on the member states are addressed within a comitology committee.

The ERG was created as a second-best solution, after a more ambitious option had been opposed by member states. The Commission had included in its legislative proposal the establishment of an HLCG. Fearing this body might compete with the comitology committee where they sit with their ministries, member states opposed the creation of this regulatory agent. As a consequence, the Commission created the ERG based on a Commission Decision, in parallel to the legislative package. As expected, to answer the need for coordination, member states opted for the least ambitious option in order to keep control of policy implementation, which explains the creation of an EU regulatory network.

If the Commission was able to endorse the bulk of its new responsibilities about market analysis 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. This need for expertise and information is addressed by both the ERG and a comitology committee, Cocom. The involvement of Cocom here follows a similar rationale as exposed above. 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 allocation of licences. While the precise distribution of tasks between the NRAs and the ministries depended on the country, 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 Cocom and the ERG. This explains why the Commission was consulting one or the other body depending on the topic.

T3 makes an excellent fit with the conjectures and, in particular, illustrates very well the gradual process of reinforcement of the agent and the crucial role of functional pressure and distributional interests in it. The reform is essentially motivated by the lack of effectiveness of the institutional setting at T2. This regarded, in particular, the choice of remedies where the ERG failed to compensate the important discretion left to 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.

While T3 clearly reinforces the delegation pattern by replacing the ERG by BEREC, it also corresponds to a partly failed agencification process. On the one hand, the reform replaces the ERG, a loose network, by BEREC, which is a new body with more competences and subject to the two-thirds 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. This corresponds to a net reinforcement of the delegation pattern.

On the other hand, BEREC is by far the Commission's preferred institutional outcome, which consisted in creating a large EU agency. On the one hand, an EU agency has been created: the Office. On the other hand, the Office is a very small agency, and the Commission 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 market integration had not been fully achieved, the absence of additional problem pressure for member states explains why they were particularly sensitive to the threat 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 conflictual position towards the NRAs, which sustained defiance on the part of the regulators vis-à-vis the Commission's endeavours to Europeanize the sector further.

This illustrates well how, in the absence of a very urgent problem pressure, national actors are more focussed on their institutional power and how the extent of reinforcement of the agent achieved is relatively limited. T3 also shows well that agencification is more likely after the public policy has gone through several reforms, even where problem pressure remains constant. The degree of problem pressure was relatively constant between T2 and T3, yet the agency was created in T3 only, after the EU regulatory network revealed itself as unable to achieve the desired degree of regulatory convergence.

T3 also fits well with the conjectured relationship between the competence distribution and the mandate of the regulatory agent. First, as NRAs still had important leeway in implementing EU legislation, BEREC was first meant to coordinate national practices to bring regulatory consistency. Besides, as the Commission was delegated a few additional competences compared to T2, BEREC was mandated to issue opinions and provide expertise and information to the Commission with respect to these new competences. We see here that the Commission's gain of competences goes with the extension of the mandate of the regulatory agent to include more expertise tasks. This is due to the fact that, unlike at T2, these new competences do require expertise of a technical nature.

Overall, the telecommunications sector provides good support to the conjectures by validating most of its elements (see Fig. 5.1). Three unexpected findings indicate, however, how to specify the conjectures. First, as also seen in the electricity sector, the creation of a regulatory network in a coordination pattern is conditional upon the previous establishment and empowerment of NRAs within member states. Second, the delegation of coordination tasks to a regulatory agent in the coordination pattern can be replaced by a diffusion of the Commission's own vision of the interpretation of the legislation in cases where the elaboration of such interpretation does not require technical expertise. Third, the low level of technicality required for the implementation of the legislation can also significantly diminish the Commission's need for expertise where it has been delegated implementing competences.

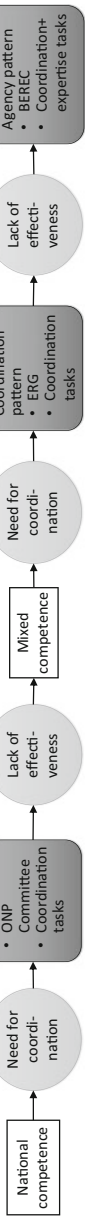


**Fig. 5.1** Process of institutional change in telecommunications

## Notes

1. The data for this chapter stem mainly from official documents and expert interviews and, to a lesser extent, from secondary literature. I interviewed 15 officials from the Commission, two from the Council, two from NRAs, one from the IRG, four independent experts, two officials from national permanent representations and one staff member of the industry. The interviews were conducted in May 2012.
2. For example, making a call to a fixed telephone could be done from a fixed telephone network, from a mobile telephone network, or from a cable network. Listening to the radio no longer relied exclusively on broadcasting networks; it could be done via the internet, through a fixed telephone or cable network.

## References

Council of the European Union. (1990). *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).

Council of the European Union. (2001, July 20). *Common position*. 10420/01 ADD 1. Brussels.

Council of the European Union. (2008a, July 18). *Draft minutes*. 2877th meeting of the Council of the European Union (transport, telecommunications and energy), held in Luxembourg on 12 and 13 June 2008; Brussels.

Council of the European Union. (2008b, November 27). *Press release*. 2907th Council meeting—transport, telecommunications and energy. Brussels. 16326/1/08 REV 1 (Presse 345).

European Commission. (1987). *Green Paper on the development of the common market for telecommunications services and equipment*. COM(87) 290 final.

European Commission. (1988). *Commission Directive of 16 May 1988 on competition in the markets in telecommunications terminal equipment* (88/301/EEC).

European Commission. (1990). *Commission Directive of 28 June 1990 on competition in the markets for telecommunications services* (90/388/EEC).

European Commission. (1992). *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.

European Commission. (1994). *Commission Directive of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications* (94/46/EC).

European Commission. (1995). *Commission Directive 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* (95/51/EC).

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

European Commission. (1996b). *Commission Directive of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications* (96/2/EC).

European Commission. (1996c). *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).

European Commission. (1997). *Informal consolidated text of the ONP framework directive* (Directive 90/387/EC—revised).

European Commission. (1999). *Commission communication. Towards a new framework for electronic communications infrastructure and associated services. The 1999 communications review.* COM (1999) 539 (unofficial version).

European Commission. (2000c). *Commission staff working document. Europe's liberalised telecommunications market—A guide to the rules of the game.*

European Commission. (2000d). *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.

European Commission. (2001a). *Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.* SEC/2001/1365 final—COD 2000/0184.

European Commission. (2001b). *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).

European Commission. (2002b). *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.

European Commission. (2002c). *Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services* (2002/627/EC).

European Commission. (2007e). *Commission working document. Impact assessment.* SEC(2007) 1472.

European Commission. (2007f). *Commission communication. Report on the outcome of the review of the EU regulatory framework for electronic communications networks and services.* COM(2007) 696 final.

European Commission. (2007g). *Commission, Proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority.* COM(2007) 699 final.

European Parliament and Council. (1997a). *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.*

European Parliament and Council. (1997b). *Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).*

European Parliament and Council. (2002). *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).*

European Parliament and Council. (2009a). *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.*

European Parliament and Council. (2009c). *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).*

European Parliament and Council. (2009d). *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.*

European Parliament. (2001a). *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.

European Parliament. (2001b, December 4). *Committee on industry, external trade, research and energy.* Recommendation for second reading. FINAL A5-0435/2001.

European Parliament. (2008). *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 Communications Market Authority. A6-0316/2008.

Kiessling, T., & Blondeel, Y. (1998). The EU regulatory framework in telecommunications: A critical analysis. *Telecommunications Policy, 22*(7), 571–592.

Schmidt, S. K. (1998). Commission activism: Subsuming telecommunications and electricity under European competition law. *Journal of European Public Policy, 5*(1), 169–184.

Tarrant, A., & Kelemen, D. R. (2007). *Building the Eurocracy: The Politics of EU agencies and networks.* Biennal European Union Studies Association Convention. Montréal.

Thatcher, M. (2001). The commission and national governments as partners: EC regulatory expansion in telecommunications 1979–2000. *Journal of European Public Policy, 8*(4), 558–584.

CHAPTER 6

# EU Regulatory Delegation and Institutional Design

## The Many Faces of EU Regulatory Space Explained

Following the adoption of the Single European Act (SEA), the EU was caught between a very high demand for regulatory harmonization, including at the level of policy implementation, and a lack of regulatory capacity. To remedy this gap, different kinds of regulatory agents were created and delegated various types of regulatory functions. Over time, these regulatory agents have grown both in number and in relevance within the EU landscape to form the EU regulatory space. While the literature is divided between scholars specializing by type of agents and others by addressing the general characteristics of EU regulatory space as a whole, a meso-level approach addressing the different manifestations of the space is still missing. To make a first step towards filling this gap, I have explored the reasons behind the variation of delegation patterns observed across sectors and over time.

Based on a review of the literature, I first identified three delegation patterns, based on three distinct regulatory agents and two paths of institutional change. While expert committees are set up to provide expertise to the Commission (expertise pattern), EU regulatory networks are created to foster coordination and regulatory convergence among national authorities responsible for implementation (coordination pattern). Finally, EU agencies are essentially multifunctional: they may be endowed with



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both types of tasks, expertise and coordination (agency pattern). In the first stages of the development of a given public policy at the EU level, policy-makers tend to opt either for the expertise pattern or for the coordination pattern. The EU agency pattern appears later, as a result of the transformation of either the expertise pattern (expertise path) or of the coordination pattern (coordination path). This mapping has allowed me to formulate two research questions. First, why does a sector fall into the expertise pattern or in the coordination pattern in the first place? Second, why and under which conditions do both patterns change towards the agency pattern?

### *The Sectoral Variation of Delegation Patterns*

Regarding the first question, I argue that the emergence of an expertise versus a coordination pattern depends on the distribution of implementing competences between member states and the Commission. Where implementing competences are mainly in the hands of member states, the most likely outcome is a coordination pattern. Conversely, when implementing competences are mainly in the hands of the Commission, the most likely outcome is the expertise pattern. This relationship is analytically composed of the articulation of three causal mechanisms. First, the distribution of competences determines the kind of governance problem met, and therefore the delegation rationale. Second, the delegation rationale determines the range of functionally meaningful delegation patterns. Third, the power distributional concerns of actors lead policy-makers to opt for the delegation pattern that is least damaging for them in terms of power.

The relationship between the distribution of competences and the kind of governance problem met is analytically addressed by an adaptation of the principal-agent analytical framework. It has been necessary to adapt this framework because of the complexity of the delegation configuration, characterized by both a multiplicity of principals and a multiplicity of threads of delegation (shifts of power involved). To cut through this complexity, the notion of principal has been broken down and specified. Defined as the owner of the competences that are delegated to the agent, the principal can now be clearly identified. However, the identification of the principal is related to the delegation rationale, which, in turn, has an important impact on the delegation pattern. On the one hand, where the principal is the member states, that is where the implementing competences are in the hands of the member states, we are more likely

to find heterogeneous implementation and, therefore, the need to foster regulatory convergence through coordination. In this context, delegation aims at fostering regulatory coordination. On the other hand, where the principal is the Commission, that is where the Commission, through executive powers delegated under comitology, does most of the implementation, its lack of resources and expertise is likely to create a need for external support in the form of the provision of expertise. In such a situation, one can expect delegation to have a distinct objective: that of gathering expertise and a workforce to assist the Commission.

The impact of the type of problem met, and therefore of the distribution of competences, on the range of functionally conceivable delegation patterns is anchored in an adaptation of Hall and Soskice's concept of institutional complementarity (Hall and Soskice 2001). One can intuitively understand very well that the type of problem determines a limited range of possible solutions. For example, for very useful an expert committee may be to give expertise and information to the Commission, they are inappropriate venues to foster regulatory convergence among the member states. Given that an expert committee is composed of experts whose selection is not based on nationality, they do not provide a representation of the member states in charge of implementing EU regulation, so they cannot serve as a venue for member states to coordinate their implementation of the regulatory framework. Put in theoretical terms, the range of institutional solutions considered by policy-makers is limited to those options that are functionally adapted to, that is institutionally complementary (Hall and Soskice 2001) with, the institutional framework and the governance problem associated with it. Where most implementation competences are in the hands of member states and where the delegation rationale is the need to foster regulatory convergence, the range of functionally conceivable solutions are the delegation of coordination functions through the empowerment of the Commission (through the delegation of executive powers), the establishment of an EU regulatory agency, or the creation of an EU regulatory network. Conversely, when the Commission holds most implementation competences and where delegation aims at gathering expertise and a workforce, the range of conceivable solutions are the delegation of expertise functions through the empowerment of the Commission (through an increase of its budget), the establishment of an EU regulatory agency, or the creation of expert committees.

Finally, if policy-makers intend to solve governance problems, they are also careful about the impact of their institutional choices on their own institutional power. I expect this power-distributional consideration to

lead policy-makers to choose the delegation pattern that is least costly in terms of power. In the case of national implementation and the need for regulatory convergence, this suggests establishing an EU regulatory network. In the case of Commission-led implementation and the need for expertise, this leads to the creation of expert committees.

The validity of these conjectures has been examined with three cases, corresponding to three important policy fields: food safety, energy and telecommunications. I have studied the regulatory governance of the three sectors and its evolution since the inception of these public policies at the EU level, up until the creation of an EU regulatory agency. The cases allow us both to confirm the general validity of the conjectures and to identify the scope conditions for their validity.

The food safety case, divided into four periods (T1, T2, T3, T4), provides support to the conjectures related to the expertise pattern, which, characterized by the creation of expert committees for helping the Commission with its executive competences, emerges at T1 and is consolidated at T2 (see Table 6.1). The emergence of the expertise pattern at T1 and its consolidation at T2 is indeed related to the Commission's growing need for expertise support with a view to drafting regulation. Interestingly, the Commission's need for support already emerges at T1, although no implementing competences have been delegated to the Commission in this period. This is explained by the fact that measures that would normally be implementing regulation have been 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 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. From T2, which starts with the adoption of the SEA, the delegation of executive competences to the Commission become possible. Policy-makers thus start to delegate massively implementing competences to the Commission, which leads to the consolidation of the expertise pattern that emerged at T1. The food safety sector thus illustrates well the conjecture regarding the emergence of the expertise pattern and specifies that its validity is subject to the possibility, for policy-makers, to delegate implementation competences to the Commission.

The electricity and telecommunications cases, which are divided into three periods (T1, T2, T3), also both confirm the validity of the conjectures related to the emergence of the coordination pattern and specify

**Table 6.1** Competence distribution and delegation patterns in food safety, electricity and telecommunications

| | | *Food safety* | | *Electricity* | | *Telecommunications* | |
|---|---|---|---|---|---|---|---|
| | | *Expected* | *Found* | *Expected* | *Found* | *Expected* | *Found* |
| T1 | Competence distribution | None | | Member states | | Member states | |
| | Main agent | N/A | Committees | Network | Forum | Network | Comitology committee |
| | Main function | N/A | 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 | Hybrid (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 | | | | |

an important scope condition. In both cases, the nationally based implementation led to the need to foster regulatory convergence at T1, which led to the establishment of EU regulatory networks at T2. Given that not all member states had set up NRAs at T1, the Commission could not create an EU-wide regulatory network composed of NRAs. It is only at T2 that, in both sectors, NRAs had emerged as the key national implementing actors in all member states. From there, it was possible for the Commission to set up an EU regulatory network, which is, indeed, what had been done in both sectors at T2. If regulatory networks had not been set up at T1 already, other platforms were used to foster convergence. Interestingly, as a consequence of the different degree of technicality of sectoral regulation, the solutions chosen in both sectors differed. Given the high degree of technicality in the electricity sector and the necessity to involve the transmission system operators, the Commission set up the Florence Forum, a wide platform gathering not only NRAs and ministries, but also the stakeholders. By contrast, in telecommunications, the low level of technicality made it possible for the Commission to lead discussions about the interpretations of the regulatory framework with national ministries within the relevant comitology committee.

### *The Evolution of Delegation Patterns*

How do the coordination pattern and the expertise pattern evolve over time and under which conditions are they most likely to be replaced by the agency pattern? To this second question, I answer with four distinct conjectures. First, the delegation pattern follow a process of gradual reinforcement over time. Second, the transformation of the delegation pattern into an agency pattern is more likely to take place in the later stages of reform of a given policy field. Third, the agencification of the network or committees is more likely in situations of high functional pressure. Fourth, the agencification of networks is more likely than the agencification of committees. The first three conjectures are derived from the interaction of functional and power-distributional factors and the fourth one is anchored in the interaction between institutional and power-distributional factors.

I first conjecture that the change of the delegation pattern over time takes the form of a gradual reinforcement of the agent. I explain the gradual process of reinforcement with a dynamic interaction between policy-makers' willingness to solve governance problems and their concern about the power-distributional impact of their decisions. In the face

of functional pressure, policy-makers may opt, in the first place, for a sub-optimal 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. This conjecture is fully supported by the cases. All reforms of delegation patterns in all sectors have involved some form of reinforcement of the agent (see Table 6.2). These reinforcements were motivated by the willingness to improve the effectiveness of the delegation pattern, the previous one having at least partly failed to achieve properly the objectives of regulatory convergence or the production of reliable expertise for the Commission. In the food safety sector we see an increase in the number of experts per committee between T1 and T2, an increase in the number of committees between T2 and T3, and the replacement of committees by an EU agency between T3 and T4 which involves a massive increase of budget and institutionalization. In electricity, the Florence Forum created at T1 was complemented by an EU regulatory network at T2, which was significantly reinforced by its transformation into an EU agency at T3. Telecommunications follows a similar trajectory where the network created at T2 was reinforced and institutionalized through its partial agencification at T3.

The following three conjectures regard the conditions under which the creation of an EU agency is most likely. According to the second conjecture, within a given policy field, the creation of an EU agency is most likely in the later stages of the process of reforms to which the public policy has been subject. The reasoning here is very close to the previous conjecture. As policy-makers are reluctant to lose power, they give it away only gradually. Each further step towards more delegation is agreed only after policy-makers have fully realized and acknowledged that the previous agent was unable to meet the goals that were assigned to it. This is why the agencification of the previous agent is likely to take place at the later stages in the transformation process of a public policy. This is confirmed by the cases where the agencification takes place at T3 or T4 only. While the idea of creating an agency in telecommunications had been in the air since T1 already, the Commission was only able to achieve the establishment of a hybrid between agency and network at T3. In electricity, the Commission also considered proposing the creation of an EU agency at T2 but refrained from doing so because it knew member states were not

**Table 6.2** Functionally driven reinforcement of the agent over time in food safety, electricity and telecommunications

| | | *Food safety* | *Electricity* | *Telecommunications* |
|---|---|---|---|---|
| T1→T2 | Change of agent | Committees→committees | Forum→network | Comitology committee→network |
| | Problem pressure | Moderate (increased workload) | Strong (forum unable to produce regulatory convergence) | Strong (regulatory divergence, need for a platform coordinating NRAs) |
| | Reinforcement of the agent | Yes (increase of the number of members per committee) | No (change of agent instead, in order to have a platform with NRAs only) | No (change of agent instead, in order to have a platform with NRAs) |
| T2→T3 | Change of agent | Committees→committees | Network→agency | Network→hybrid (network-agency) |
| | Problem pressure | Very strong (problems highlighted by the BSE crisis) | Very strong (increased urgency to integrate markets, lack of effectiveness of the network) | Strong (regulatory divergence, the network lacks effectiveness) |
| | Reinforcement of the agent | Yes (increase in the number of committees and increased coordination among them) | Yes (permanent structure, budget, more powers) | Yes (permanent structure, budget, more powers) |
| T3→T4 | Change of agent | Committees→agency | | |
| | Problem pressure | Very strong (workload and lack of confidence) | | |
| | Reinforcement of the agent | Yes (permanent structure, budget, transparency) | | |

ready for such a step. In food safety, the Commission itself resisted taking the step towards setting up a fully fledged EU agency at T3, and finally came up with the proposal at T4 only.

The third conjecture emphasizes the impact of the degree of problem pressure felt by policy-makers on the likelihood of agencifying networks or committees. Policy-makers' preferences about institutional design are often a trade-off between their willingness to solve problems and their power-distributional concerns. I conjecture that (where power-distributional stakes remain constant) the higher the problem pressure felt by policy-makers, the more likely the agencification of the agent is. This conjecture is confirmed by a comparison between electricity and telecommunications at T3. While electricity is generally portrayed as a sector with higher distributional stakes than the latter, because related to the issue of security of supply, the Commission's proposal to create a powerful EU agency succeeded in electricity but failed in telecommunications. This is explained by the formidable rise of concern by member states about the security of supply in the mid-2000s, which turned market integration into a key strategic instrument in order to decrease the EU's energy dependency on third countries. Given the urgency of the issue, member states accepted the creation of a powerful EU agency. As similar circumstances were absent from the telecommunications sector in that period, the negotiations on the Commission's proposal turned into a battle for power, largely deprived of problem solving considerations.

Fourth, I conjecture that the agencification of networks is more likely than the agencification of committees. Agencification in the expertise and coordination paths varies in terms of the distributional impacts on the policy-makers. While the agencification of networks consists in a further uploading of national competences to the EU level, the 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 agencify committees than networks. This is highly relevant because the Commission has the competence for the initiation of legislation. Hence, proposals with a view to agencifying 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 food safety sector illustrates very well the Commission's reluctance towards the replacement of expert committees by an EU agency and the difficulty of seeing an EU agency emerging in a sector where the Commission holds most of the implementing competences. The problem pressure that

fell on the Commission after the BSE scandal at T2 was enormous. The system of committees had spectacularly failed to produce safe scientific opinions and the EP was pushing for the creation of an EU agency in the sector. A proposal to create an agency in the field of inspections was even on the table in the same period. But as the Commission saw the opportunity to increase its powers in the field of food safety regulation, they withdraw the inspection agency proposal and opted for a reform of the system of committees rather than their replacement by a new governance system based on an independent agency. It was only after the subsequent scandals in the early 2000s, a massive loss of legitimacy in the eyes of European citizens and of international trade partners, that the Commission made the leap forward and proposed the creation of an EU agency for food safety, which was then quickly adopted by member states and the EP. Although the food safety case is one of successful agency creation in the expertise path, the reluctance of the Commission to take the agencification step, in spite of the very strong dysfunctionalities of the committee system and the deep loss of legitimacy, shows how high the obstacles are for the agencification of committees.

## Empirical and Theoretical Contributions

### *The EU Regulatory Space*

My central empirical objective is to fill the gap in our understanding of EU regulatory space. Between the research on specific types of regulatory agents and that on the general characteristics of EU regulatory space, I have engaged in a third way by identifying the reasons why delegation patterns vary between policy areas and change over time. The results of this study both deepen our understanding of how EU regulatory space is structured and refine our knowledge of distinct types of regulatory agents individually.

I have revealed the conditions under which we may expect the emergence of expert committees, EU regulatory networks and EU regulatory agencies. While the system of expert committees is related to the early delegation of important implementing competences to the Commission, public policies where most implementing competences have remained at the national level are more likely to see the emergence of an EU regulatory network. Both types of delegation pattern evolve over time, undergoing a gradual process of reinforcement, in the form of increased staff, budget or

competences, which may culminate with the creation of an EU regulatory agency.

These findings, in turn, also feed our knowledge of each type of agent individually. For example, they offer a new perspective on the creation of expert committees and could help us to understand why the number of expert committees vary between sectors. Gornitzka and Sverdrup (2008) point to several factors: the number of interest groups in the policy field, the type of policy (distributive vs regulatory) and the size and specific routines of the corresponding DG. I have indicated at least another three factors that were not considered by them: 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.

I have also offered new insights into the emergence and evolution of EU regulatory networks. Dehousse showed that, in the wake of the single market programme, the decentralized implementation of EU regulatory policies was calling for the establishment of EU regulatory networks to foster convergence (Dehousse 1997). This claim however remained general, ignoring the fact that some important EU regulatory policies were deprived of EU regulatory networks. I have addressed this question by showing that the extent to which the implementation of EU regulatory policies is decentralized varies across sectors. As a consequence of this, the need for regulatory convergence, and the likelihood for the emergence of EU regulatory networks, vary accordingly. Besides, the telecommunications and electricity cases also underline the emergence of NRAs in member states as an important condition for the rise of EU regulatory networks (Eberlein and Newman 2008; Mathieu 2016).

The gradual reinforcement of EU regulatory networks over time has been addressed by Thatcher and Coen (2008), who emphasize the importance of pre-existing arrangements and power-distributional concerns to explain why, in spite of functional pressure, networks are reinforced only gradually. My argument is very similar to theirs, although it focusses on the remaining and unaddressed problem pressure to explain why, in spite of strong power-distributional concerns, networks are gradually reinforced. The more significant addition that I make, compared to Thatcher and Coen's study, lies however in the sectoral differentiation. While their argument is formulated generally and applies to a series of sectors equally, I point to the varying strength with which networks are reinforced, which I explain by the varying strength of problem pressure affecting member

states, as illustrated by the comparison between telecommunications and electricity at T3. This finding is particularly interesting because it contrasts with Kelemen and Tarrant's argument about the impact of the varying level of distributional stakes on member states' preference for a regulatory network versus an EU agency (Kelemen and Tarrant 2011). They claim that if functional pressure can trigger policy-makers' willingness to proceed to institutional change, functional imperatives do not affect the choice of a network versus an agency, which is solely determined by political considerations and not affected by functional imperatives (Kelemen and Tarrant 2011: 923). If I acknowledge the impact of the varying level of power-distributional stakes on the choice between network and agency, I contend and I have shown that this choice is *also* determined by the varying strength of problem pressure.

Finally, this research has also expanded our understanding of EU agencies. Functional explanations for the creation of EU agencies have tended either to refer to the regulatory gap argument or to fall into the ad hoc approach. I have 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.

I have also specified the conditions under which the creation of EU agencies is more likely First, EU agencies are most likely to appear as a result of the transformation or replacement of a pre-existing regulatory agent; therefore they are not expected to appear in the first stages of a given EU public policy, but rather after a couple of legislative reforms have been passed. Second, the agencification of pre-existing agents is more likely in situations of high problem pressure. Third, the distribution of implementing competences and the type of pre-existing agent is also related to the likelihood of agencification. Where the Commission holds most implementing competences, since it is interested in keeping control of policy implementation, the emergence of an EU agency is less likely than in sectors where implementation is in the hands of member states. Indeed, in situations of national implementing competences, the Commission has nothing to lose from the transformation of a regulatory network into an EU agency.

Finally, I have also offered new insights regarding the amount of power delegated to EU regulatory agencies. There, the dominant argument consists in focussing on the numerous pre-existing actors who, reluctant to lose power and/or to see the agent being captured by another principal, refrain from delegating far-reaching powers to the EU regulatory agent (Dehousse 2008; Thatcher 2011). Some scholars, however, tend to generalize their argument to all EU regulatory agencies (Dehousse 2008) or, at least, to agencies operating in economic sectors (Thatcher 2011). This overlooks the fact that the amount of power delegated to EU regulatory agencies may vary significantly, even within the field of economic regulation. By contrast to these works, I point at the role played by sectoral variation in the degree of problem pressure in the variation in the amount of powers delegated to EU agencies, as illustrated by the comparison between the electricity and telecommunications sector at T3.

### *Delegation*

Studies of delegation have mainly investigated the reasons behind delegation and the power relationships between principals and agents. Both types of question, however, 'too often are studied in splendid isolation' (Tallberg 2002: 24). If generally overlooked, the impact of the delegation rationale on delegation design has been marginally discussed in the literature in a few works (Martin 1992; Majone 2001; Tallberg 2002). These few articles address this question in terms of relatively simple delegation configurations only, that is, in situations of vertical delegation, where nation states delegate part of their national power to supranational authorities. Besides, while two of these works limit their *explanandum* to the extent of autonomy left to the agent (Majone 2001; Tallberg 2002), only one of them studies the impact of the delegation rationale on the type of agent chosen.

I have addressed the type of agent chosen as an *explanandum*, which includes the dimension of power relationship between the principal and the agent, but is not limited to it as it involves other dimensions, such as the functional profile of the agent. Furthermore, I have proceeded to an adaptation of the principal-agent analytical framework that allows studying this question in complex delegation configurations. Indeed, delegation configurations in the EU regulatory state are particularly complex, because the latter may emerge from a transfer of national power up to the EU level (vertical thread of delegation) and/or from a transfer from

the EU legislator down to an EU bureaucratic agent (horizontal thread of delegation). Thanks to this adaptation of the principal-agent framework, I have been able to study the impact of the delegation rationale on the type of agent chosen in complex delegation configurations that combine vertical and horizontal threads. I have unpacked the different dimensions that tend to be conflated in the concept of principal and narrowed down its definition to the actor whose competences are delegated to the agent. This clarification has allowed me to decompose analytically complex delegation configurations into simpler delegation acts. This simplification allowed me to explain the type of agent chosen by referring to the identity of the principal. Instead of studying delegations with multiple principals and several threads of delegation, we can break them down into two types of delegation, each being characterized by a distinct principal and a distinct delegation rationale. Vertical delegations are those delegation acts where national implementing competences are delegated to an EU agent. Horizontal delegations are those delegation acts where the Commission delegates to a bureaucratic agent part of its implementing competences. Where the principal is the member states, the delegation rationale consists in making a credible commitment towards cooperation, and the delegation pattern is based on a regulatory network. Where the principal is the Commission, the delegation rationale consists in gathering expertise and a workforce to support it, and the agent takes the form of expert committees.

Furthermore, while most applications of the principal-agent framework look at delegation in a snapshot fashion, I have looked at it as a phenomenon that unfolds over time, and evolves through feedback loops. This approach answers an important need in the field of delegation studies, as argued by Tallberg (2002), who also pointed to the feedback effect of delegation output on the revision of the delegation pattern. One of the three scenarios of such feedback effects identified by Tallberg corresponds very well to the argument I have made about the gradual reinforcement of the regulatory agent. In Tallberg's words: 'from the point of view of political principals, delegation may be flawed because … political agents … do not possess the powers or the discretion required to produce the desired effects [and] the sub-optimal consequences of delegation can be corrected at later stages', which may lead EU policy-makers to boost 'the powers of the supranational institutions … in response to the incapacity of previous delegation to achieve the desired effect' (Tallberg 2002: 37–38). Tallberg then gives two examples to illustrate this scenario, related to the

fields of justice and home affairs and the creation of the open method for cooperation in employment, social affairs and education. The research presented in this book gives much credit to this argument by studying it in a systematic way with three case studies and by extending it to the field of EU regulatory governance.

### *Institutional Design and Institutional Change*

First, I have offered a refined conceptualization of the process of institutional choice. While most approaches focus on exogenous problem pressure and/or on negotiations among policy-makers' (looking at their preferences and bargaining power) for explaining institutional choice, I have pointed to an intermediate analytical step which, although largely overlooked, reveals crucial in understanding institutional outcomes in European regulatory space. Between the emergence of a need for setting up a new institution and the negotiation between policy-makers regarding the shape of the new institution, there is an intermediate step: the selection of a range of potential institutional options to be discussed among policy-makers. While such an approach is not novel as such (see Kingdon 2003), it has not received much attention within the literature on institutional design. Furthermore, I have addressed this question in a way that differs from Kingdon. While Kingdon identifies the political, sociological and cultural factors in the selection of policy alternatives, I point to the functional reasons why only a limited range of options can be seen as relevant to the problem at hand. This is done by adapting the concept of institutional complementarity (Hall and Soskice 2001) to the sectoral variation in the institutions set up for regulatory governance in the EU. While some delegation patterns represent a useful complement 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.

Second, I have revamped the famous concept of 'institutional complementarity', one of the building blocks of the theory on varieties of capitalism (Hall and Soskice 2001). 'Institutional complementarity' means that the effectiveness of an institution depends on its institutional context. While very promising, this concept and the theory of the varieties of capitalism have been widely criticized for overlooking political

and power dynamics and for being unable to accommodate institutional change. While using the concept of institutional complementarity, I have adapted it to the necessities of the research question and, in doing so, extended its applicability while avoiding replicating its weaknesses. First, as already mentioned, I consider that a given institutional complementarity can be found with several functionally equivalent institutional options, which opens room for institutional selection. Second, policy-makers choose among the different options following a trade-off between their willingness to improve regulatory effectiveness and their desire to maximize their institutional power. The trade-off depends on the relative level of functional pressure and the 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 apolitical institutional complementarity concept. Third, I have also overcome another important limitation criticized by 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 because policy-makers may choose to replace a first option by another one. A series of feedback loops then leads policy-makers to adjust incrementally the delegation pattern in order to optimize the agent's contribution towards their policy objectives.

Third, by making functional pressure a cornerstone of my theoretical framework, I have departed from the current scholarly trend that tends to despise functionalism as an obsolete theory. Functional pressure tends to be treated as a contextual element rather than being given a more prominent role in analyses about institutional design. At best, functional pressure is introduced in the form of an exogenous shock that triggers policy-makers' willingness to proceed to institutional change. Even so, implicitly or explicitly, it tends to be considered as deprived of explanatory value regarding the specific institutional design finally chosen by policy-makers (Dehousse 1997; Kelemen 2002; Kelemen and Tarrant 2011). I contend that functional pressure does play a significant role in shaping institutional outcome and that its explanatory power is not limited to policy-makers' willingness to introduce change. The questions of whether to change a given institutional setting and how to change it are intimately linked. Limiting the impact of functional pressure to the first question only leads to biased and partial explanations of the second question.

Taking problem pressure seriously requires analytical refinements, something that the literature has largely neglected. By identifying different types of functional pressure and distinguishing between low, moderate and strong functional pressures, I have elevated 'functional pressure' to be a proper variable or factor, that is, as a key element within an analytical framework that may *vary*. As soon as functional pressure is conceived as a variable, it can then be treated as both an *explanandum* and an *explanans*. This is what has been done in this book. The type of problem pressure is first seen as the consequence of distinct institutional frameworks. Depending on the distribution of implementing competences, whether mainly national or Commission-led, distinct types of problems appear, a coordination problem in the first place and a lack of expertise in the second place. Then, the type of problem pressure is turned into a factor that shapes the type of agent chosen by policy-makers. Based on the concept of institutional complementarity, I indeed argue that the effectiveness of regulatory agents depends on the type of problem at hand. Finally, the impact of problem pressure on institutional outcomes is not limited to a differentiation of *types* but also to one of *degrees*. The degree of problem pressure was indeed shown to play a crucial role in policy-makers' choice for the extent of reinforcement of the delegation patterns.

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. 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. This underlines the necessity to discuss the interaction between functional pressure and other types of factors, which is another contribution of this book which not only indicates how actors' sometimes conflicting interests in maximizing power and solving problems combine to explain institutional choice, but has also discussed how their interaction unfolds over time, through a series of feedback loops. Far from reproducing the weaknesses of classical functionalism, such as ignoring the divergence of actors' preferences and the ineffectiveness of institutional outcomes, I have extracted the core of the functionalist argument (functional needs affect institutional choices) and turned it into a sophisticated set of propositions in which the functional factor interacts with institutional and power-distributional elements over time

through feedback loops. I have thus provided a significant added-value by refining the conceptualization of functional pressure and coloured the study of institutional choice, otherwise dominated by distributional and institutional factors, with a revamped functional approach.

## A Research Agenda

As this research is based on three case studies, a first need for further research is the generalization of the results. Several conjectures have been put forwarded and confirmed in this book. These were shown to be applicable to EU regulatory policies so that the generalization exercise would in the first place be done using this population of cases. Do the conjectures travel well across sectors? When are they validated and when are they disconfirmed? Which further scope conditions may we identify? In a second stage, it would be interesting to assess whether the mechanisms underlying the conjectures could also be observed in non-regulatory policies, for example in the field of justice or police cooperation. EU agents do also exist in non-regulatory sectors, so it would certainly be rewarding to evaluate the extent to which the specificity of regulatory policies would lead to a distinct impact on the dynamics of creation and the evolution of agents.

This book also invites further research on expert committees, in particular on the determinants of their importance in a given public policy. Expert committees have mainly been approached in terms of legitimacy, transparency, effectiveness as well as regarding the power of the Commission on these committees and the use of their outputs (Larsson and Murk 2007). However, systematic sectoral comparisons on the importance of expert committees in the policy process are scarce. Gornitzka and Sverdrup (2008) have highlighted that the number of such committees are 'remarkably unevenly distributed among different policy domains' and point to several explanations for this, such as the differences in legal and administrative capabilities of the DGs and the gradual development of routines and norms among them. This book would indicate at least three factors that were not considered in their study: the distribution of implementing competences between the Commission and member states, the presence of another type of body in the sector that may already be providing expertise, and the technicality of the policy. In spite of this, the varying importance of expert committees in the policy process remains a relatively uncharted territory. Hence, much remains to be explored on the differentiated use of expert committees across sectors.

Research on EU regulatory networks is quite extensive already, and this book has addressed some of the few remaining gaps in our understanding of EU regulatory networks. One aspect that would nevertheless deserve more attention is the impact of the development and empowerment of NRAs in member states on the emergence and evolution of EU regulatory networks. As the latter are composed of NRAs, they are conditioned by them. The telecommunications and electricity cases have shown how the creation of NRAs was a condition for the emergence of EU regulatory networks. As I have suggested elsewhere, further dimensions can be explored, such as the impact of the autonomy, competences and capacity of NRAs on the intensity and scope of the network's activity (Mathieu 2016). It would be interesting to work on the conditions for the generalization of these conjectures.

Beyond the focus on EU regulatory networks, a topic that deserves more attention is the study of the different venues through which administrative coordination is performed in the EU. We saw that EU regulatory networks only emerge after NRAs have been created in all member states. Before this, other types of platform had been used for coordination: the wide forum in electricity and the comitology committee in telecommunications. This difference has been explained by the different degrees of technicality between both sectors. In case of high technicality, those actors that possess the expertise are involved in the coordination platform, even if these are private actors. Other factors may affect the choice of one type of coordination platform over another. This would certainly yield interesting insights into the processes of institutional design and coordination in the EU.

Finally, although EU agencies have already been widely covered by scholars of EU regulatory governance, they certainly deserve further attention as they are a complex phenomenon. One possible way to expand our knowledge about them is to focus on the extent to which they embody a process of institutional convergence. This convergence process is particularly striking when one pays attention to the way the institutional trajectories in electricity and food safety have come closer to each other. Whereas the initial delegation patterns were radically different in both sectors, the agencification step implies a considerable similarity between both sectors, now characterized by the presence of a strong EU regulatory agency delivering mainly expertise in the form of draft regulations or scientific opinions that are then subsequently formally adopted by the Commission in comitology.

Part of this explanation has been implicitly answered in this book by 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 the 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 to exercise more powers. It was indeed explained by interviewees in all three sectors investigated that, because of legal constraints, the only way to fund a regulatory agent within 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-makers 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 they are not the monopoly of regulatory policies; they are also created in areas that are independent of 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.

Finally, as the cases have confirmed the relevance of the theoretical approach adopted in this research, this book is also a call for taking functional pressure seriously and enriching the study of institutional choice and institutional change, presently dominated by institutional and power-distributional explanations, with a revamped functional approach.

## References

Dehousse, R. (1997). Regulation by networks in the European Community: The role of European agencies. *Journal of European Public Policy, 4*(2), 246–261.

Dehousse, R. (2008). Delegation of powers in the European Union: The need for a multi-principals model. *West European Politics, 31*(4), 789–805.

Eberlein, B., & Newman, A. L. (2008). Escaping the international governance dilemma? Incorporated transgovernmental networks in the European Union. *Governance, 21*(1), 25–52.

Gornitzka, A., & Sverdrup, U. (2008). Who consults? The configuration of expert groups in the European Union. *West European Politics, 31*(4), 725–750.

Hall, P. A., & Soskice, D. (2001). An introduction to varieties of capitalism. In P. A. Hall & D. Soskice (Eds.), *Varieties of capitalism: The institutional foundations of comparative advantage*. New York: Oxford University Press.

Kelemen, D. R. (2002). The politics of 'Eurocratic' structure and the new European agencies. *West European Politics, 25*(4), 93–118.

Kelemen, D. R., & Tarrant, A. (2011). The political foundations of the Eurocracy. *West European Politics, 34*(5), 922–947.

Kingdon, J. W. (2003). *Agendas, alternatives and public policies* (2nd ed.). New York: Longman.

Larsson, T., & Murk, J. (2007). The Commission's relations with expert advisory groups. In T. Christiansen & T. Larsson (Eds.), *The role of committees in the policy-process of the European Union, legislation, implementation and deliberation*. Cheltenham: Edward Elgar.

Majone, G. (2001). Two logics of delegation agency and fiduciary relations in EU governance. *European Union Politics, 2*(1), 103–122.

Martin, L. L. (1992). Interests, power, and multilateralism. *International Organization, 46*(4), 765–792.

Mathieu, E. (2016). When Europeanization feeds back into EU governance: EU legislation, national regulatory agencies, and EU regulatory networks. *Public Administration, 94*(1), 25–39. doi:10.1111/padm.12156.

Tallberg, J. (2002). Delegation to supranational institutions: Why, how, and with what consequences? *West European Politics, 25*(1), 23–46.

Thatcher, M. (2011). The creation of European regulatory agencies and its limits: A comparative analysis of European delegation. *Journal of European Public Policy, 18*(6), 790–809.

Thatcher, M., & Coen, D. (2008). Reshaping European regulatory space: An evolutionary analysis. *West European Politics, 31*(4), 806–836.

# Index

**A**
accountability, 9, 37, 39, 47, 71, 78, 145
administration, national. *See* ministries
Advisory Committee on Food Safety, 72
Advisory Committee on Foodstuffs (ACF), 55
advisory role, 142, 151, 152
Advisory Veterinary Committee, 55
agencies
  European agencies, 10
  executive agencies, European, 11
  independent regulatory agencies (IRAS), 4
  national regulatory agencies (NRAs), 10, 12, 35, 43, 87–90, 92–103, 106–13, 115–22, 123n1, 127, 130–59, 161n1, 170, 175, 183
  regulatory agencies, European, 1–3, 7, 11, 14, 26, 89, 105, 130, 174, 177
Agencification, 99–115, 144–52
agent
  change of agent, 36, 77, 119, 155, 172
  regulatory agent, 1, 2, 6, 7, 13, 14, 16, 17, 25–9, 33–7, 39–41, 44–6, 76, 77, 79, 109, 113, 117, 118, 120, 121, 148, 155–9, 165, 171, 174, 176–8, 181, 184
  reinforcement of the agent, 41, 77, 119, 121, 151, 158, 159, 170–2
Alemanno, A., 52, 53, 55–8, 65, 68, 70–2
Austria, 98
Autonomy. *See* independence

**B**
Belgium, 55, 90
benchmarking, 98
binding rules, 107
blame shifting, 5. *See also* delegation, rationale

Note: Page number followed by 'n' refers to endnotes.



E. Mathieu, *Regulatory Delegation in the European Union*,
DOI 10.1057/978-1-137-57835-8

Blondeel, Y., 129–31
Body of European Regulators for Electronic Communications (BEREC), 127, 145–7, 158, 159
Body of European Regulators in Telecommunications (BERT), 8, 9, 38, 148
Boeger, N., 10, 12, 35, 36
Boltz, Walter, 98
Bonino, Emma, 65
Bovine spongiform encephalopathy (BSE) crisis, 12, 51, 59–67, 71, 77, 79
Britain. *See* v
British experts. *See* United Kingdom (UK)
Busuioc, M., 12, 13
Byrne, David, 71

**C**

Cassis de Dijon, 56
centralization, 33, 37
Christiansen, T., 7, 8, 37
Coen, D., 3, 9, 10, 12, 13, 35, 36, 175
Commission, 3, 5–17, 25–35, 37–44, 46–8, 52–79, 81n2, 85–101, 103–15, 117–21, 123n2, 127–53, 155–9, 161n1, 165–71, 173–6, 178, 181–4
committees
  comitology committees, 7, 9, 12, 58, 71, 107, 130, 134, 135, 139, 143
  expert committees, 2, 7–9, 14, 15, 25, 31, 32, 34, 37, 38, 44, 76–8, 165, 167, 169, 173–5, 178, 182
common positions, 91, 96, 109, 140, 141, 144. *See also* guidelines
Communications committee (Cocom), 143, 144, 152, 153, 157, 158
Community body. *See* agencies, European agencies
competence distribution, 27–32, 37, 75, 76, 94, 116, 118, 119, 121, 153, 154, 159, 169
competence owner. *See* principal
competition, 52, 57, 74, 86, 90, 94, 99, 103, 106–8, 111, 114, 115, 128–32, 134–6, 138, 139, 146, 156
competition law, 128, 135, 136, 139, 156
competition policy, 41, 106, 107, 138
compliance, 3, 6, 61, 111, 114, 115, 141
confidence, crisis of, 77. *See also* legitimacy
conjectures, 2, 16, 17, 26, 32, 33, 39, 46, 51, 74, 76–9, 115, 118–21, 127, 155, 158, 159, 168, 170–2, 182, 183
consumer protection, 52, 56, 57, 66, 69, 93, 115
control, 4, 15, 29, 30, 32, 34, 38, 52, 54, 57, 58, 61, 64–6, 71–3, 78, 81n2, 94, 112, 120, 129, 130, 132, 134, 143, 157, 173, 176. *See also* independence
cooperation, 3, 6, 7, 54, 62, 67, 74, 85, 89, 91, 92, 95–8, 101, 103, 104, 110, 111, 114, 115, 117, 140, 141, 143, 148, 150, 151, 178, 179, 182, 184
coordination, 2, 3, 9, 10, 13–17, 25–8, 30–7, 40, 41, 43, 44, 46–7, 66, 71, 74, 77, 78, 85–7, 89, 92, 94–7, 99, 100, 102, 109, 110, 113–21, 127, 132–5, 137, 139, 140, 142, 144, 145, 148–51, 153–7, 159, 165–73, 176, 181, 183, 184

Corkin, J., 10, 12, 35, 36
council, 5, 8, 17n1, 28–30, 39, 42, 52–5, 57, 62, 67, 73, 86, 87, 89–91, 93, 94, 104, 107, 109–11, 113, 115, 120, 123n1, 128, 129, 131, 136–8, 140, 145, 146, 149–51
Council of European Energy Regulators (CEER), 91, 92, 95–8, 109, 118
Court of justice, 8, 9, 56, 58, 59, 105
credible commitment, 3, 178
crisis, 41, 59, 65, 68, 70, 71, 78, 79, 123n1. *See also* Bovine spongiform encephalopathy (BSE) crisis; Dioxin, Belgian
cross-border trade, 41, 87, 88, 91, 93, 95, 98–100, 102, 111, 113, 118

**D**

Daems, Rik, 138
decentralized implementation, 9, 30, 115, 175
Dehousse, R., 1, 3, 7, 9–12, 28–30, 175, 177, 180
delegation
  horizontal, 28, 178
  path, 165, 166
  pattern, 2, 13–15, 17, 25–48, 74–9, 115–21, 127, 153–5, 158, 165–74, 178–81, 183; agency pattern, 2, 14, 15, 166, 170; coordination pattern, 2, 14, 15, 25–7, 33, 46, 86, 115, 117, 120, 121, 153, 155, 159, 165, 166, 168, 170; expertise pattern, 2, 14, 15, 17, 25–8, 34, 38, 47, 76, 79, 117, 165, 166, 168, 170
  rationale, 2–7, 12, 28–30, 33, 166, 167, 177, 178
  thread of, 177, 178
  vertical, 29, 177, 178
diffusion, 111, 132, 159, 184
Dioxin, Belgian, 68, 70, 79
Directorate General (DG)
  energy, transport, 96, 105, 106, 109, 112
  information society (infso), 139, 147, 148, 158
discretion, 87, 107, 130, 131, 136, 137, 139, 141, 144, 146, 151, 156, 158, 178. *See also* decentralized implementation
distributional stakes. *See* power, power distributional interests
distribution system operator (DSO), 93, 94, 114
divergence, regulatory, 30, 100, 128–31. *See also* decentralized implementation; regulatory gap

**E**

Eberlein, B., 9, 87–94, 98, 175
effectiveness, 3, 4, 10, 16, 17, 26, 27, 31, 36, 39–42, 44–6, 72, 76, 77, 85, 100, 115, 118, 119, 155, 156, 158, 171, 172, 179–82
effectiveness, lack of, 10, 16, 17, 36, 45–8, 76, 80, 85, 118, 119, 122, 158, 160, 171, 172
efficiency, 6, 7, 27, 43, 76, 104, 148
Egeberg, M., 1, 2, 4, 7, 12
Eising, R., 86, 87
EU agencies. *See* agencies
EU elections, 4, 5, 7
EU regulatory space, 1, 2, 17, 25, 165, 174–7
European Council, 62, 93, 110
European Electronic Communications Market Authority (EECMA), 148

European Food and Public Health Authority (EFPHA), 70, 71
European Food Authority (EFA), 71
European Food Safety Authority (EFSA), 51, 68–74, 80, 81n1
European Network of Transmission System Operators for Electricity (ENTSO-E), 108, 111–13, 120
European Parliament, 8, 60, 86, 93, 94, 104, 106, 110, 115, 123, 129, 131, 136, 137, 146, 149, 150
European Regulators Group (ERG), 127, 134–45, 147–52, 156–8, 160
European Regulators Group for Electricity and Gas (ERGEG), 85, 92–8, 100, 103, 104, 109, 118–20, 122
European Transmission Systems Operators (ETSO), 92
European Union Agency for Networks and Information Security (ENISA), 148, 149
exchange of best practices, 89, 95. *See also* benchmarking
expertise
  legal expertise, 155, 156
  technical expertise, 6, 15, 59, 88, 108, 118, 155, 159
expertise path. *See* institutional path
expertise pattern. *See* delegation, pattern

**F**
feedback effect, 17, 45, 178
feedback loop, 16, 26, 35, 38, 45, 171, 178, 180–2
Florence Forum, 85–93, 96–8, 117, 118, 120, 122, 170, 171
Food and Drug Administration (FDA), 65, 70, 71
Food and veterinary office (FVO), 65, 66
food quality, 57
food safety, 10, 16, 17, 51–81, 121, 168, 169, 171–4, 183
formalization, 38, 109. *See also* institutionalization; reinforcement
France, 60, 61, 86, 128
Franchino, F., 3, 28
free movement. *See* market integration
functionalism, 36, 44, 180, 181
functional pressure. *See* problem pressure
functional profile. *See* mandate

**G**
Germany, 55, 56, 60–2, 86, 90, 92, 100
Gilardi, F., 4, 10
Glachant, J-M., 87, 100
Gornitzka, A., 8, 9, 175, 182
gradualism. *See* incrementalism
Grande, E., 3, 9
Groenleer, M., 10
Group of European Regulators in Telecommunications (GERT), 149
guidelines
  guidelines of good practice (GGP), 97
  non binding, 10, 110

**H**
Hall, P.A., 43–5, 167, 179
Hancher, L., 89, 95
Harbour, Malcom, 138
harmonisation, legislative, 53

harmonisation, regulatory. *See* regulatory convergence
harmonization, 9, 51–3, 55–7, 59, 76, 97, 107, 108, 138, 145, 150, 151, 165
Héritier, A., 4, 7
high level communications group (HLCG), 140
historical institutionalism, 26, 39

**I**
implementation, policy
  centralized implementation (*see* competence distribution)
  decentralized implementation (*see* competence distribution)
incrementalism
  incremental institutional change, 17, 179–82
  incremental policy change, 39
incumbents, 99, 133, 138, 144, 146
independence, 30, 32, 64, 67, 71, 77, 78, 92, 100, 101, 113, 114, 136, 142, 146
Independent Regulators Group (IRG), 133–5, 139–43, 145, 155, 158, 161n1
independent regulatory agencies (IRAs). *See* agencies
information, need for, 8
inspection, 61, 63–6, 81n2, 174
institutional change, 2, 12–17, 26, 35, 36, 45, 66, 70, 78, 80, 104, 118, 121, 122, 156, 160, 165, 176, 179–82, 184
institutional choice. *See* institutional design
institutional complementarity, 43–6, 167, 179–81. *See also* institutional matrix
institutional convergence, 183. *See also* institutional isomorphism
institutional design, 12, 17, 26, 165–84
institutional isomorphism. *See* diffusion; sociological pressure
institutionalization, 35, 171
institutional matrix, 43. *See also* institutional complementarity
institutional path
  coordination path, 14–16, 26, 33, 40, 41, 46–7, 86, 120, 166, 172, 176, 184
  expertise path, 14–17, 26, 33, 35, 40, 41, 47, 48, 78, 79, 166, 173, 174, 176
institutional power. *See* power, power distributional interests
interconnection. *See* network (infrastructure)
interests, actors, 35, 36, 47
internal market. *See* market integration

**J**
Jabko, N., 86, 87
Joerges, C., 58, 59, 69

**K**
Kelemen, D.R., 5, 9, 10, 12, 36, 38, 40, 65, 66, 72, 73, 137, 140, 141, 176, 180
Kiessling, T., 129–31
Kingdon, J.W., 43, 179
Kirchner, E.J., 7, 8
Knight, J., 43, 44
Krapohl, S., 12, 13, 55–8, 60–3, 66

**L**
Larsson, T., 7–9, 37, 38, 182
learning, 45, 46, 90, 91, 155
Legal Service (of the Commission), 96, 105, 106, 140

legislative approximation. *See* harmonisation, legislative
legitimacy, 5, 9, 37, 38, 47, 79, 174, 182
Levi-Faur, D., 1, 2, 13
liberalization, 5, 86–8, 91, 93, 99, 128, 129, 132–4, 155, 156
licensing, 129–31, 143, 153
Liikanen, Erkki, 138

**M**
Majone, G., 4, 5, 8, 10, 11, 177
mandate, 4, 14, 32, 35, 47, 60, 65, 73, 79, 91, 102, 106, 110, 113, 114, 120, 121, 140, 155, 159, 184
market analysis, 135, 137, 138, 141, 142, 146, 151, 152, 157, 158
Market definition, 137–40, 145–7, 152
market fragmentation. *See* market integration
market integration
  barriers to, 128–31
  market fragmentation, 131
  single market programme, 1, 16, 58, 175
Martens, M., 12
McCubbins, M.D., 6, 38
Meroni doctrine, 71, 105–7
ministries, national, 117, 132, 134, 153, 170
Mogg, John, 98, 110
monitoring. *See* inspection
multiple streams, 57
Murk, J., 8, 9, 37, 38, 182

**N**
national regulatory agencies (NRAs). *See* agencies
network (infrastructure), 91
network codes, 104–8, 110, 112, 113, 120, 121
network, EU regulatory, 2, 3, 7, 10, 14, 32–5, 44, 46, 119, 157, 159, 165, 167, 168, 170, 171, 174, 175, 183
new approach, 53, 55–9
Newman, A.L., 93, 98, 175
Neyer, J., 58, 59, 61, 62
North, D.C., 31, 40, 41, 43, 45, 46, 91

**O**
Office of gas and electricity markets (Ofgem), 98
Office of Veterinary and Phytosanitary Inspection and Control (OVPIC), 65, 81n2
*Office, The*, 81n2, 127, 149, 150, 158
Open network provision (ONP) Committee, 129, 130, 132–4, 143, 153, 155, 160

**P**
Pierson, P., 31, 45
policy stability, 5, 7, 101
political uncertainty, 4, 5
power
  institutional power, 27, 31, 39, 40, 159, 167, 180
  power distributional interests, 40
powerful operator, 135
precautionary principle, 69, 72
preferences. *See* interests
principal
  competence owner, 29, 30
  definition of principal, 29, 30
  multiple principals, 178

principal-agent (P-A). *See* delegation
privatization, 86, 128
problem pressure
  intensity/degree/strength of, 159, 173, 175–7, 181
  type of, 15, 26–8, 35, 44, 57, 167, 181
Prodi, Romano, 12, 70, 71, 79
public health, 9, 56–60, 63, 64, 68–70, 77

**R**
rational choice institutionalism, 26, 39
rationality, bounded, 31, 39, 45
recommendation, 63, 64, 67, 111, 132, 133, 137–40, 142, 145, 146, 151, 152, 157
Reding, Viviane, 144, 145, 147
regulatory capacity. *See also* regulatory gap
  expertise, lack of, 5, 26, 37, 181
  resources, lack of, 7, 11, 30, 33, 47, 95, 103, 165, 167, 176
regulatory consistency. *See* regulatory convergence
regulatory convergence, 3, 7, 9, 14, 15, 97, 119, 132, 133, 136, 138, 153, 156, 158, 159, 165, 167, 168, 170–2, 175
regulatory divergence, 30, 128–31, 155, 172
regulatory gap, 33, 86–8, 92–5, 99, 117, 176
reinforcement
  of the agent, 16, 41, 77, 119, 121, 155, 158, 159, 170–3, 177
  of the delegation pattern, 119, 155, 158, 181
  gradual, 16, 45, 132, 162, 170, 175, 178
remedies, 135–7, 139, 141, 142, 145–8, 151, 158
risk assessment, 58, 64, 67, 69–73
risk communication, 64, 71–3
risk management, 64, 69–73
Robert, C., 8, 9, 38

**S**
Santer, Jacques, 12, 63–5, 70
Schmidt, S.K., 86, 87, 128
Scientific Committee for Food (SCF), 54, 58, 59
scientific opinion, 11, 37, 67, 74, 77, 79, 174, 183
scientific panels, 73, 74
Scientific Steering Committee (SSC), 66, 67
Scientific Veterinary Committee (SVC), 55, 60, 61, 63
security of supply, 93, 103, 104, 114, 120, 173
Significant market power (SMP). *See* powerful operator
Single market programme. *See* market integration
sociological pressure, 78, 79
Soskice, D., 43–5, 167, 179
Spain, 100
Spiller, P.T., 4
Standing committee for foodstuffs (StCF), 54, 58, 59
Standing committee on plant health, scientific committee for pesticides, 55
Standing veterinary committee (StVC), 55, 62, 63
Sverdrup, U., 8, 9, 175, 182

**T**
Tallberg, J., 6, 177, 178
Tarrant, A., 9, 10, 36, 40, 137, 140, 141, 176, 180

technicality, 8, 17, 27, 76, 79, 117–19, 121, 155, 159, 170, 175, 182, 183
technological convergence, 134, 135
technological innovation, 128, 134
technological neutrality, 134, 135
Thatcher, M., 3, 5, 9, 10, 12, 13, 28, 29, 35, 36, 129, 130, 175, 177
transmissible spongiform encephalopathy (TSE), 59, 67
transmission system operator (TSO), 94, 95, 101–3
transparency, 32, 37, 38, 47, 59, 63, 64, 67, 72, 73, 77, 78, 98, 99, 115, 136, 145, 182
Trondal, J., 1, 2, 6, 7

**U**
United Kingdom (UK)
  Britain, 61, 62
  British experts, 60
Universal service, 129–31, 157

**V**
varieties of capitalism. *See* institutional complementarity
Vasconcelos, J., 86–92, 95
veto power, 137–9, 145, 152
voice telephony, 128, 129
voluntary agreement. *See* guidelines
Vos, E., 6, 7, 9, 11–13, 58–66, 68, 71, 72

**W**
workload, 6, 27, 30, 51, 59, 77, 139, 152, 172
World Trade Organization (WTO), 69, 79