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Network or agency?

The choice for flexibility vs effectiveness in EU regulatory governance

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Abstract

If much has already been written on EU regulatory governance through networks or agencies, we are still lacking explanations regarding institutional variation across sectors. Why do some sectors rely on EU regulatory networks and others on EU agencies? What drives policymakers' preferences between flexibility and effectiveness? In the late 2000s, the Commission proposed the transformation of loose regulatory networks into powerful EU agencies in two sectors: energy and telecommunications. Surprisingly, while the proposal succeeded in energy, it failed in telecommunications. Given that the energy sector has always been closer to national sovereign considerations than telecommunications, one would rather have expected an opposite outcome. This puzzle, I argue, can only be solved by taking into account the variation in the level of functional pressure felt in both sectors. Anticipating higher benefits from increased cooperation in energy than in telecommunications, the member states favoured a powerful agency in the former case and opted for a limited institutional upgrade in latter. Besides improving our understanding of cross-sectoral variations in EU regulatory governance, the paper also contributes to the study of institutions by showing how the variation of functional pressure intervenes in the process of institutional design.

Introduction

While studies on the emergence of regulatory networks and regulatory agencies abound, few of them conceptualize them as alternative regulatory agents. Yet regulatory networks and EU agencies often serve the same objective, that of coordinating regulatory practices across the member states. The literature has shown that, in many sectors, as the implementation of EU regulatory policies remained a national competence, the need for regulatory coordination across the EU has pushed for the establishment of EU regulatory networks and EU regulatory agencies. But we still have no systematic explanation of why some sectors rely on networks while others on EU agencies. In the only piece of work addressing this question, Kelemen and Tarrant (2011) found a determinant effect of the level of distributional stakes for the member states. In policy fields involving important national interests, member states would resist the creation of EU agencies and, instead, opt for a less ambitious but more flexible institutional solution in the form of an EU regulatory network.

However, this explanation does not help understanding why, in 2009, the Commission's ambitious attempt to transform pre-existing regulatory networks into powerful EU regulatory agencies succeeded in energy but failed in telecommunications. Energy having traditionally been a sector closer to national sovereign considerations than telecommunications, it is surprising that the member states welcomed better the idea to strengthen EU regulatory governance in energy than in telecommunications. Since the 1990s, both sectors had followed a very similar path of institutional development (Thatcher and Coen 2008, Ottow 2012). National regulatory authorities, created in the late 1990s, immediately established contacts with their peers in other member states, which led to the bottom-up creation of transnational regulatory networks. In the early 2000s, interested in the concept of regulatory networks and willing to be involved in their functioning, the Commission created formalized versions of the networks by anchoring them into the EU regulatory frameworks before proposing their transformation into EU agencies in the late 2000s. But while the agencification process was successful in energy, it failed in telecommunications. How can we explain this divergence?

This puzzle, I suggested, can only be solved by focussing on the level of functional pressure pushing for regulatory coordination. Where the functional benefits expected from coordination are higher, member states are more likely to accept the creation of an EU agency. The amount of power delegated to the EU for regulatory governance depends not only on the distributional stakes implied for the member states - as shown by Kelemen and Tarrant (2011), but also on the level of functional pressure felt in a given policy field and at a given moment in time. While functional pressure is often merely seen as a background element in theories of institutional design, I argue that it should be treated as a proper factor that varies across situations and is therefore able to account for institutional variation.

On the basis of an overview of the literature on the EU regulatory space, the paper first points at the necessity to explain the sectoral variation in the EU regulatory governance. Under which conditions do EU policymakers opt for an EU regulatory network versus an EU agency? The paper then exposes the theoretical framework, which emphasizes that the varying strength of functional pressure should be taken into account for understanding varying institutional outcomes. I then

proceed with the empirical part of the paper, starting with the energy sector before presenting telecommunications. The conclusion wraps up the paper, its findings and contributions.

The EU regulatory space: Networks and agencies

Research on EU regulatory governance started with a first wave of studies shedding light on the functional rationales behind the emergence of new kinds of regulatory bodies. EU regulatory networks and EU agencies were found to provide an institutional solution to an increasingly problematic situation in the field of the implementation of EU regulatory policies. The achievement of market integration required regulatory harmonisation, for which legislative approximation only revealed insufficient. Harmonisation was needed for policy implementation too, yet the EU was lacking the tools to act at this level. EU regulatory agencies and EU regulatory networks were thus created to palliate a variety of problems such as the need for increased technical expertise, administrative and regulatory capacity, administrative and regulatory convergence and credible commitment towards EU policies (Dehousse 1997, Majone 2000, Eberlein and Grande 2005, Thatcher and Coen 2008).

Having identified the functional drive sustaining the growing population of EU regulatory networks and EU agencies, EU regulatory governance scholars explored how political considerations had shaped the choice for these specific institutional solutions. As a result of inter-institutional power struggles between policymakers, the choice for creating EU regulatory networks and EU agencies was made at the expense of alternative options such as further empowering the Commission. The tension between, on the one hand, the Commission's and the EP's desire to enhance regulatory supranationalism and, on the other hand, the reluctance of member states towards such a shift would have been crucial in the emergence of a compromise in the form of delegation of regulatory competences to third bodies, typically composed of representatives of national regulatory agencies (Dehousse 1997, Kelemen 2002, 2005). Besides, as EU regulatory delegation involves several principals, i.e. the Commission, the member states, the European Parliament and often the national regulatory agencies, it could only lead to the establishment of weak regulatory bodies. The principals would not only be reluctant to give power away but also fearful of the potential capture of the agent by the other principals. Consequently, they would only allow a limited delegation of power to the agent (Dehousse 2008, Coen and Thatcher 2008, Thatcher 2011).

While these accounts on the EU regulatory space tend to converge towards the acknowledgement that EU agencies and EU regulatory networks are relatively weak bodies, they obscure that this process is subject to significant sectoral variation. EU agencies are more institutionalized and powerful governance tools than networks and while some sectors' institutional setting revolves around EU agencies, other rely on regulatory networks, as illustrated by the cases discussed in this paper. While both the energy and telecommunications sectors were characterised by the presence of an EU regulatory network since the early 2000s, in the late 2000s, the Council fiercely opposed its transformation into an EU agency in telecommunications but validated it without difficulty in the energy sector.

The only piece of work that addresses the variation in the amount of power delegated to EU regulatory bodies across sectors emphasizes the role of distributional conflicts to explain the

varying preferences of member states across sectors (Kelemen and Tarrant 2011). A sector with high distributional stakes would be found where member states 'have a material interest in economic actors operating in the sector'. This would be particularly the case in sectors characterised with public ownership in many member states (Kelemen and Tarrant 2011: 932). This factor, however, does not help understanding the institutional divergence between telecommunications and energy sectors. The level of public ownership is similar in both sectors (Kelemen and Tarrant 2011: 933-935). Besides, because of its inter-dependency with the crucial issue of security of supply, energy regulation has traditionally remained a more sensitive sector from the viewpoint of national sovereign considerations than telecommunications.

The literature has thus produced an important amount of knowledge on the characteristics of the EU regulatory space. We know that EU regulatory agencies and EU regulatory networks emerged out of the need to increase the EU's regulatory capacity for policy implementation and that, as a result of power struggles between EU institutional actors, these rather weak regulatory agents were preferred over more ambitious institutional options. However, an important gap remains. While these studies have drawn the general contours of the EU regulatory space, they have not addressed the sectoral variations of its institutional dynamics. Such comparative work aiming at explaining variation is still lacking. Kelemen and Tarrant (2011) made a first step in this direction and identified the importance of distributional stakes to explain why member states' preferences vis-à-vis supranational options could vary between sectors. If this is certainly an important factor, it fails to explain the differences between telecommunications and energy regulatory institutions. Further research is thus necessary to identify additional and/or complementary explanations to the sectoral variation of EU regulatory governance.

Network or agencies? The role of functional pressure

Kelemen and Tarrant (2011) argue that the variation in the degree of integration in EU regulatory governance, materialized in the choice for an EU agency vs an EU regulatory networks, depends on the distributional stakes the policy field represents for the member states. According to them, functional considerations would not play a role in the design of the institutional solution to a given problem. If functional pressure could explain policymakers' initial drive for finding institutional solutions, the precise form they would be given would be better explained by political considerations (Kelemen and Tarrant 2011: 923).

While I acknowledge the importance of power distributional considerations for institutional design, I argue that functional pressure plays a determinant role too and can help understanding the sectoral variations in EU regulatory governance. To understand institutional outcomes, I focus here on the formation of actors' preferences. I suggest that, just as distributional considerations, expected functional benefits can play a role in shaping actors' preferences about institutional design. Actors preferences over institutional outcomes would thus reflect both distributional and functional considerations. The respective weight of one consideration over the other in the formation of preferences would be subject to variations across situations.

I assume actors to be driven by the willingness to maximise their interests and I consider two types of interests relevant for institutional design. Actors are interested in both increasing policy effectiveness and maximising their institutional power. In some situations, both interests of a

given actors' may converge towards the same institutional outcome. This is often the case with the Commission, who may promote further integration to address collective action problems while increasing its own power. Often, however, the interest for policy effectiveness and that for institutional power would call for distinct institutional outcomes. This is what often happens to the member states, whose desire to solve collective action problems requires giving power away to EU bodies. Divided between two conflicting objectives, actors have to make a trade-off. Whether the trade-off shall favour one interest over the other depends on how pressing both interests are in the situation.

The level of distributional stakes for the member states is a first element affecting the trade-off between the quest for power and that for effectiveness. The extent to which the trade-off takes into account functional imperatives would depend on the political costs of doing so. In the absence of important distributional stakes, actors' preferences will be largely oriented towards problem solving. Alternatively, when distributional stakes are significant, actors' preferences shall favour power over policy effectiveness. This is the assumption made by Kelemen and Tarrant (2011) in their account of member states' choice for EU regulatory networks versus EU agencies. Distributional stakes for the member states may vary between sectors. For example, they are higher in utilities sectors where member states tend to be willing to protect their national incumbent company from competition, either because they partly own the company or simply to promote national economic interests.

However, whether actors' trade-off favours power or effectiveness does not only depend on the level of distributional stakes, but also on the degree of functional pressure. Often, because it is treated as a contextual element, functional pressure is implicitly assumed to remain constant across situations. This is a huge over-simplification of reality. The necessity to solve a given policy problem may be more or less pressing. Interdependencies between member states, which is their functional incentive for delegating power to the EU level, vary between policies and over time (Schimmelfennig et al 2015: 8). Crises followed with far-reaching institutional reforms, such as that of the Eurozone, show that pressing institutional necessities do have an impact on the depth of reforms adopted, including in policy fields subject to high national sensitivity. In situations of high necessity, actors are more likely to accept losses of power. Conversely, when the expected benefits of delegation are low, actors' are much less likely to accept paying the political price of giving power away. Hence, the trade-off between functionalist and distributional interests in the definition of actors' preference do not depend on the level of distributional stakes only, but also on the strength of the functional pressure.

In fact, EU integration scholars have also emphasized the role of functional pressure in integration dynamics, not only as the initial drive fostering the delegation of power to the EU, but also as a factor explaining variation in the degree of integration across policy fields. When member states form their preferences regarding which institutional outcome they prefer, their preferences are heavily dependent on the gains that they expect from collective rule making and cooperation. According to liberal inter-governmentalism, far-reaching integration would take place when the member states expect high benefits from cooperation while fearing significant risks of non-compliance by the other member states (Moravcsik 1998: 9). This variation in the strength of the functionally driven demand for more Europe was also recently shown as being responsible for the difference in the degree of integration observed in two 'core powers' sectors. While the Eurozone

crisis would have triggered an extensive fiscal integration, the absence of strong functional drive in the military sector would account for an only very moderate military integration (Genschel and Jachtenfuchs 2013: 256).

In sum, I argue that functional pressure does not only play a role in pushing policymakers for adapting institutional arrangements. They are also a factor of the precise shape given to the institutional solutions developed, although they are not the only one - power distributional considerations play an important role too. While studies on EU integration showed that the amount of functional pressure was a determinant factor of sectoral variation in the amount of power delegated to the EU, this theoretical approach has not been applied to the EU regulatory space. The only piece of work addressing the sectoral variation in the amount of power delegated to EU regulatory agents denied the effect of functional considerations and, instead, emphasized the role of power distributional considerations (Kelemen and Tarrant 2011). This paper suggests that a good understanding of the sectoral variation in the amount of power delegated to EU regulatory agents requires not only a focus on politics, but should also pay attention to functional pressure. I thus conjecture that, in situations with similar levels of distributional stakes, the higher the functional pressure, the more likely it is that policymakers opt for establishing an EU agency instead of an EU regulatory network.

Energy

The emergence and development of EU energy regulation started in the late 1980s and, until the mid-2000s, unfolded at a very slow pace. Back in the 1990s, the relevant actors of the sector were the national publicly owned monopolistic energy companies working hand in hand with national administration. Their reluctance vis-à-vis the market liberalization and integration agenda promoted by the Commission since 1988,¹ made it very difficult to make substantial moves in the first years. The Commission's first directive proposals setting up common rules in the sector met a huge resistance by several member states, concerned about the protection of their national industry from competition (Schmidt 1998, Eising 2002). The difficulty to reach a compromise was such that it took five years to strike a deal. The resulting 1996 Directive had been considerably watered down compared to the Commission's proposal and left its implementation in the hands of the member states who also enjoyed a broad discretion for its execution (Eising and Jabko 2001: 745, Eberlein 2003: 139, Glachant and Finon 2003).

In the late 1990s, it became clear that the simultaneous liberalization of national markets 'did not ensure the compatibility - and even less convergence or integration - of these markets' (Vasconcelos 2005: 90). The most prominent example of such difficulties was the absence of rules and institutional setting to facilitate cross-border exchanges. In order to address this 'regulatory gap', the Commission created the Florence Forum, a wide platform gathering the Commission, national regulators, ministries, operators and stakeholders in order to produce voluntary agreements on those aspects that were not covered by the legislative framework (Eberlein 2003, Vasconcelos 2005).

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

However, blocked by powerful national industrial interests opposed to the market integration and liberalization agenda, the Florence Forum, relying on voluntary agreements only, could not deliver substantial outcomes in terms of adoption and enforcement of regulatory decisions (Eberlein 2003: 151). Progresses towards market integration required another kind of governance structure and a new legislative impetus. Although the idea of setting up an EU regulatory agency was already in the air in the early 2000s, anticipating the member states' resistance, the Commission had refrained from proposing it, opting instead for a weaker and more flexible structure in the form of a regulatory network.² In 2002, policymakers adopted the second regulatory package, which introduced several regulatory improvements³ and established the European regulators group for electricity and gas (EREGG).

The reforms quickly revealed insufficient. Policy implementation had essentially remained in the hands of the member states, the practices of national regulatory authorities were diverging and the EREGG's capacity to bring national regulators together under a commonly coordinated approach remained limited due to the non-binding status of its guidelines. On top of these regulatory obstacles, huge technical hurdles were also preventing the effective flow of energy across borders. As a result of the combination of regulatory and technical problems, market liberalization and integration processes were considerably encumbered (Kroes 2007).⁴ National incumbent companies kept dominating a market in which challenging operators were struggling to enter; prices variation, a crucial indicator of market integration, kept diverging significantly between member states; and the new rights about the free choice of energy supplier and the non-discriminatory access to the grid were hardly applied in practice.

It was not until the mid-2000s that the development of EU energy regulation, very gradual until then, suddenly accelerated with the preparation and adoption of the third regulatory package. The Commission identified various factors that kept blocking progresses. Besides the vertical integration of energy companies, a major obstacle to market liberalization and integration, several institutional weaknesses were identified. Most stakeholders agreed with the Commission about the need to address the lack of institutional means for cross-border regulation and the significant divergences observed between national regulatory practice (Glachant and Levêque 2009: 25).⁵ It was crucial to replace the loose network-based coordination with an institutional structure allowing the adoption of binding rules at the EU level.⁶

Initially reluctant to far-reaching reforms in the energy sector, the member states changed their views in the mid-2000s as they realized that the lack of competition and smooth cross-border energy flows was interfering negatively with other policy goals, in particular the security of supply and climate change. As explained in details by Eikeland (2011: 251), this period was marked by a growing concern about the security of supply due to rising tensions on both the demand and the supply of energy sources on global markets. On the demand side, given the economic and industrial rise of China and other emerging countries, the international competition for energy

2 Interviews with an official of the Commission and an official of the Council, February 2013.

3 Example of regulatory changes introduced are: granting all consumers the right to change supplier by 2007, introducing legal unbundling and increasing transparency requirements regarding network access.

4 Interview with an independent expert, February 2013.

5 Interviews with officials of the Commission, of the Council, of NRAs and of the CEER.

6 Commission Communication. *An Energy Policy for Europe*. COM(2007) 1 final. Brussels, 10/01/2007.

resources was rapidly growing. On the supply side, the reliability on affordable energy supply was increasingly questioned: natural reserves of fossil fuel sources were shrinking, wars and unrest in the Middle East casted a veil of geopolitical uncertainty; and distrust in Russia was growing. Europe's dependency from Russia was intensifying after Gazprom's acquisition of a series of European wholesale companies and the 2004 Eastern enlargement. Yet Russia's reliability was increasingly questioned, in particular after the 2006 gas crisis when Gazprom cut off gas supplies to Ukraine, which triggered fuel shortages further down the pipeline to Europe in France, Italy, Germany and Poland. As a result of this changing geopolitical context causing tensions for the security of supply, member states came to view a well-functioning energy internal market as a way to reduce dependency on third party for energy supplies.

Against this background, following a call from Tony Blair,⁷ the 2005 Hampton Court EU summit heralded the rise of energy policy to the top of EU's political agenda (Rehn 2008). Given the rising tensions regarding Europe's security of supply, the heads of the member states agreed on the need to take forward work in the energy sector, in particular by improving coordination and establishing a common European grid. They also called the Commission to devise a more coherent EU energy policy that would link together the three major objectives of energy policy: a competitive energy market, security of supply and climate change.

Following the mandate of the member states, the commission took action and issued a Green Paper outlining the new strategy for European energy policy, which makes the internal market the 'cornerstone and most important means' to address the other two strategic energy challenges, security of supply and climate change.^{8,9} Given the new impetus given to the project to integrate national energy markets, it became urgent to reform the institutional structure for achieving effective regulatory coordination. The European Council thus 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'.¹⁰

Encouraged by the European Council's demands, the Commission put a very ambitious proposal on the negotiation table.¹¹ In institutional terms, the pillars of the proposal were not only the creation of an EU energy agency, but also the establishment of the network of transmission system operators (TSOs), the creation of the revolutionary network codes procedure (Jevnaker 2015) and the significant empowerment of national regulatory agencies. First, the ERGEG would be

7 Euractiv, "Blair calls for stronger EU energy policy cooperation", 31/10/1005.

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

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

10 Brussels European Council. *Brussels European Council 8/9 March 2007 – Presidency conclusions*. 7224/1/07 REV 1. Brussels, 2 May 2007. p. 17.

11 The toughest part of the proposal was the introduction of mandatory ownership unbundling, a radical measure supposed to remedy to vertically integrated operators, which was seen as one of the biggest obstacles to market liberalization and integration. The regulation concerning unbundling belongs to the substantial part of the policy and is, therefore, not discussed in the paper that is, rather, concerned with the institutional dimension of the policy.

transformed into a powerful EU agency, the Agency for the Cooperation of Energy Regulators (ACER). In particular, ACER would be given a determinant role in the elaboration of the network codes, a series of EU-level binding rules harmonising a wide spectrum of issues related to the technical and economical dimensions of energy regulation. Given the technicality of the sector, the elaboration of the network codes could only be done with the involvement of TSOs, which is why the Commission also proposed the establishment of the European Network of Transmission System Operators for Electricity (ENTSO-E) and the European Network of Transmission System Operators for Gas (ENTSO-G).¹² The network codes would be drafted by ENTSO-E and ENTSO-G under the supervision of ACER who would have the power to reject them or require ENTSO-E and ENTSO-G to amend them, before sending them to the Commission for formal adoption in comitology. Finally, having found that the lack of independence of energy NRAs and the heterogeneity of their competences was an obstacle to regulatory coordination and market integration, the Commission also proposed to significantly strengthen NRAs' independence and enlarge their competences.

Although very ambitious, the proposed institutional reforms including the creation of ACER, went through the negotiation process remarkably smoothly. Neither the EP nor the Council challenged the relevance or necessity to create ACER and set up a procedure for adopting binding network codes. Regarding ACER, while the Commission's proposal was issued in September 2007, in November of the same year, the Council already acknowledged the importance of establishing an institutional mechanism to improve NRAs' coordination and empower them where this can provide added-value.¹³ While, at the outset, the Council was still unsure whether this mechanism should take the form of an agency, they nonetheless made clear very early that the mechanism should be independent from both member states and the Commission,¹⁴ before validating the agency formula in December 2008.

Since the member states accepted without difficulty the transformation of ERGEG into an agency, the negotiating position of the Council focussed on how this institutional concept should be fleshed out, in particular on the scope of the agency's power and mandate. For example, while the EP pushed for extending ACER's power compared to the Commission's proposal, the Council tried to reduce them. The discussions also revolved around the specific role of ACER within the network codes procedures, whether it would be given the power to actually adopt some of them instead of having all codes adopted by the Commission in comitology. The *Meroni* doctrine,¹⁵ prohibiting the delegation of binding regulatory decision-making power to EU agencies played in favour of the Council and of the Commission who preferred relying on comitology for formal decision-making, as opposed to the EP who was in favour of a large empowerment of the agency.

In sum, in terms of institutional mechanism for regulatory coordination, the outcome of the negotiation is the creation of ACER, one the most powerful EU regulatory agencies ever created, enjoying, amongst others, a determinant role in the adoption of the network codes, a revolutionary harmonisation procedure for such a sensitive sector as energy. Undoubtedly, the

12 Interview with a former official of the Commission, February 2013.

13 Council of the European Union. *Preparation of the TTE (energy) Council on 3 December 2007*. 15193/1/07 REV1. Brussels, 28 November 2007. p. 10.

14 Council of the European Union. *Preparation of the TTE (energy) Council on 3 December 2007*. 15193/1/07 REV1. Brussels, 28 November 2007. p. 10.

15 Cases C-9/56 and C-10/56. *Meroni v. High Authority* [1957/1958] ECR 133.

prior mandate given by the Heads of states to the Commission to push through market integration in the energy sector has very favourably conditioned the Council's position towards the Commission's proposal. Whereas the member states had consistently opposed resistance towards substantial Europeanization of energy regulation, it was only in a context of growing stress regarding the security of supply in the mid-2000s that the member states considered worthwhile giving away part of their power to the EU level. The formidable institutional leap forward realized in 2009, in particular through the establishment of ACER, could only have been possible thanks to a strong functional pressure, which boosted the attractiveness of EU integration for the member states as they saw they could draw substantial collective benefits from it.

Telecommunications

Initially regulated as monopolistic markets, national telecommunications went through a first stage of very gradual market opening throughout the 1990s. Having both gathered political support and relied on an aggressive negotiation and integration strategy (Schmidt 1998), the Commission managed to get the member states, although reluctant, agreeing to slowly advance, in a piece-meal approach, along the agenda of telecommunications liberalization and market integration. The implementation of the various legislative acts adopted in this first period was in the hands of the member states who enjoyed a very wide discretion. Among others, the issue of licencing remained an important obstacle to the emergence of foreign new entrants on national telecommunications markets. As Member states had consistently rejected the application of the mutual recognition principle, the important divergence between national licensing regimes remained a significant hurdle for market integration (Thatcher 2001, Kiessling and Blondeel: 589-590).

The second regulatory framework, adopted in 2002, introduced a completely new regulatory system in order to push the liberalization and integration of national markets. A new general authorization regime solved the problem related to the diverging national licencing regimes. Except in a few well-circumscribed areas, any operator may now offer their service in any member state without the need to apply for a licence. The regulation of the conditions under which operators offer their services, in particular regarding interconnection services, crucial to the liberalization process, is now done through the new market analysis procedure. Inspired by competition law, this regulatory procedure gives an important discretion to the national regulatory authorities while requiring their coordination with national competition authorities and, most significantly, with the Commission who managed to acquire a determinant role in this process in the form of veto power on a significant share of the regulatory issues composing the market analysis process.

The second package thus represented a formidable leap forward in terms of centralization of powers. It was negotiated in the early 2000s, a period when all governments had great hopes with the rise of numerical economy. In the 2000 Lisbon Treaty, member states expressed an exceptional support in favour of information and communication technologies, while the justifications for their effectiveness were still scarce. In a context of economic difficulties, the

member states expected much benefits from the telecommunications sector and this has greatly eased the negotiation.¹⁶

In parallel to the adoption of the legislative package, the Commission created a regulatory network, the ERG, gathering NRAs with views to foster coordination on those issues that did not fall under the Commission's veto power and to serve as an advisory body to the Commission on telecommunications issues. In the subsequent years, the ERG adopted a series of common positions on various topics, which were often criticized in the sector for lacking effectiveness. The ERG's was a very flexible and loose structure, only able to adopt non-binding measures under unanimity. Furthermore, as a result of the need to have all regulators' consents, ERG's common positions were limited to the lowest common denominator.¹⁷ Being famously vague enough to accommodate for a wide variety of national practices, the ERG's common positions would have been often deprived of genuine contribution towards regulatory convergence.¹⁸ In order to address the structural weaknesses of the ERG, the Commission intended to replace it by a more powerful body such as an EU agency.

Unlike in the energy sector, the telecommunications sector was not suffering from genuine cross-border problems. The flow of electricity and gas across borders had remained extremely limited due to severe technical and regulatory obstacles, such as the lack of interconnection capacity. By opposition, in telecommunications, there was no problem of congestion. The only cross-border issue that required a more intense coordination was that of roaming. Having adopted an international roaming regulation, the Commission had already solved the only genuine cross-border problem of the telecommunications sector.¹⁹ What the Commission thus wanted to achieve was the further harmonization of national regulatory practices.

In this context, very different views on the necessity to reform the institutions of EU telecommunications regulations emerged. On the one hand, the member states and their regulators believed there was it was not necessary to reform the system. In the mid-2000s, when consulted whether they wanted to change the framework, the majority of ministries clearly said there was no need to reform it. It had been implemented for a couple of years only, so it was too early to envisage a reform.²⁰ As for the NRAs, they were the opinion that the Commission's willingness to push for more harmonisation was not necessary. They considered that their bottom-up approach, consisting in harmonising the regulatory principles only, leaving discretion to the NRAs regarding how to implement these principles in their national context, was sufficient.²¹ NRAs were also very keen on preserving their autonomy and determined to oppose a strong resistance to the Commission's attempts to push towards further integration (Boeger and Corkin 2012).²²

16 Interview with a former official of the Commission, June 2012

17 Interview with officials of an NRA, June 2012.

18 Interview with various independent experts, staff from telecommunications companies and officials of the Commission, June 2012.

19 Interview with officials of an NRA, June 2012.

20 Interview with an official of a national permanent representation, June 2012.

21 Interview with an official of an NRA, June 2012. Note that this argument should be taken with care: one interviewee from the Commission mentioned that, it was because not all NRAs followed the same regulatory principles and approaches, that further harmonisation was necessary.

22 Interview with an official of a national permanent representation, June 2012.

Within the Commission, two distinct approaches emerged. On the one hand, the DG Info developed the project of anchoring the group of regulators into a more permanent structure that would provide them with resources and continuity to allow them to work more effectively and efficiently. They conceived this as a sort of big secretariat, so as a relatively low-key institution, which would nevertheless have to take the form of an EU agency, as this is a legal requirement for allocating community budget to such a permanent structure. On the other hand, when the project reached the Commissioner Vivian Reding, she gave it a very distinct turn. She communicated about her ambition to create a powerful European telecommunications regulator and decided to issue an extremely ambitious proposal.²³ First, the creation of this powerful new regulator would not only result from the transformation of the ERG, but also absorb another pre-existing agency, ENISA, active in the field of network and information security. Second, the Commission would be delegated veto power on those remaining aspects of the market analysis process, which had remained a national competence in the second framework. Third, it planned the delegation of significant competences to the EU in the field of radio spectrum, a policy field in which the member states had consistently firmly rejected all attempts of Europeanization.

The proposal of the Commission issued by Commissioner Reding was thus at odds not only with the preferences of the member states and NRAs, but also with its own administrative services. The staff of DG Info in charge of negotiating the package were thus placed in a delicate situation, having to defend a proposal they thought was not only politically aggressive and unrealistic, but also inappropriate and exaggerated compared to the needs of the sector.²⁴ On the other side of the negotiation arena, the member states united in their opposition to the Commission's project, which was pushing for changes that they had previously made very clear they did not want.²⁵ In the backstage, the NRAs, determined to defend their autonomy against what they perceived as an attempt of the Commission to impose an unnecessary top-down centralization and control the NRAs,²⁶ mobilized the power and influence that they had gained over the last years to lobby against the Commission's proposal (Boeger and Corkin 2012).²⁷ Even the EP, generally favourable to the transfer of competences to the EU level, was positioned against the Commission's project. They considered that the big regulatory authority wanted by the Commission would add red tape by creating a large bureaucracy. Besides, the proposed arrangements would be overly centralized and hurt the principle of subsidiarity as the specificities of national markets required flexibility in the application of EU regulatory principles.²⁸

As a result, the inter-institutional negotiation process led to an outcome that was very remote from the Commission's original plans. The ERG was replaced by the Body of European Regulators for Electronic communications (BEREC), an atypical two-tier structure, composed of two organizationally distinct entities. There is, first, the Board of regulators, which is the new form given to the network of regulators, whose decision-making process has nevertheless been

23 Interview with former official of the Commission, June 2012.

24 Interview with an official of a national permanent representation, June 2012.

25 Interview with official of a national permanent representation, June 2012.

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

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

28 European Parliament, Committee on Industry, Research and Energy, Draft report on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, 2007/0249(COD), 17.04.2008, p. 78.

streamlined with the adoption of the majority principle instead of unanimity. The second constitutive element of BEREC is the Office, a tiny EU body providing the Board of regulators with administrative support. Due to legal constraints, the member states had to give the Office the form of an EU agency, although its power and mandate is far from being comparable to that of other EU agencies.

The Commission's ambitious plans, seen by many stakeholders as motivated by political considerations rather than sectoral necessities,²⁹ failed to convince the member states. The latter, persuaded that such a reform was largely unnecessary, did not have any good reasons to accept the delegation of further regulatory power. In the absence of clear functional drive and necessity behind the Commission's proposal, the negotiation turned out as a fight for power between the institutions, in particular between the member states and the Commission.

Conclusion

The rise of the EU regulatory space has attracted much scholarly interest. Having identified the functional rationale driving this process of institutional development, EU regulatory governance scholars examined the impact of inter-institutional politics on the design of EU regulatory agents. Accordingly, the weak institutional profile of EU regulatory networks and EU agencies would be due to power struggles between the Commission, the Council, the EP and even the NRAs (Dehousse 2008, Coen and Thatcher 2008, Kelemen 2002, 2005, Boeger and Corkin 2012). As most of these studies engaged into cross-sectoral generalizations, they overlooked the sometimes significant sectoral variation in the amount of power delegated to these regulatory agents. A first step towards filling this gap was made by Kelemen and Tarrant (2011) who underline the role of distributional stakes to account for the discrepancy between the establishment of an important EU agency for the regulation of medicine and member states' preference for a loose network in the telecommunications sector.

If the comparison of telecommunications with medicine regulation supports their argument, contrasting telecommunications with energy indicates that other factors must be at work. While both sectors have been subject to a public monopolistic regime for a very long time, due to its links with crucial industrial and geopolitical issues such as the energy mix and the security of supply, energy is more sensitive than telecommunications in terms of national sovereignty. However, in the late 2000s, while the Council revealed surprisingly favourable to the creation of a powerful EU regulatory agency in the energy, they strictly opposed a similar development in the telecommunications sector.

This paper shows that this institutional divergence can only be understood by paying attention to the sectoral difference in the strength of functional pressure. It is only in the mid-2000s, characterised by a growing tension and uncertainty on the global energy market, that the member states realized the depth of their vulnerability to and dependency on unpredictable third countries. This context shed a new and positive light on the market integration project, now seen not only as a method for achieving competitive energy markets, but also, crucially, as a mean to reduce European countries' dependency on third countries. This explains why the heads of states

²⁹ Interviews with officials of national permanent representations, NRAs, former official of the Commission, staff from telecommunications companies, June 2012.

mandated the Commission with the task to propose a renewed EU energy policy, including the establishment of a reinforced mechanism for regulatory coordination. One can therefore understand why the negotiations with the Council unfold so smoothly and led to the creation of a powerful EU regulatory agency.

The telecommunications sector shows an opposite dynamic. Generated by the rise of the information society in the early 2000s, Member states' enthusiasm for the telecommunications sector stalled in the mid-2000s. As a result of the disillusion regarding the economic benefits of the information society and the absence of technical obstacle to the development of cross-border telecommunications services, no genuine functional pressure or expected benefit could justify delegating new extensive powers to the EU and creating an EU agency. In spite of Member states reluctance towards significant institutional deepening, the Commission launched negotiations around the proposal to create a very powerful EU regulatory agency. Most stakeholders, including the member states and the NRAs, disagreed with the Commission that a deep institutional reform was necessary. The proposal was thus seen as a driven by political considerations only and member states opposed a common front to the Commission. As a result, institutional changes were limited and the Commission did only managed to upgrade the functioning of the regulatory network and create a tiny body to provide administrative assistance to the network.

This paper shows how the varying level of functional pressure can explain the varying degree of regulatory power delegated to the EU. Policymakers' institutional choice for an EU regulatory network or an EU agency is highly dependent on the level of functional pressure felt on a given policy field in a given moment in time. The higher the functional pressure, the higher member states' expectations from EU-level cooperation, and the more likely is the establishment of a powerful EU agency instead of a network. This paper thus makes a useful addition to the literature on the EU regulatory space, which has largely neglected to investigate sectoral variations in the type and power of regulatory agents.

Besides improving our understanding of the institutional dynamics of EU regulatory space, the paper is also meant as a call for taking functional pressure more seriously into the study of institutional design. In this research field, functional pressure is often treated as a mere contextual element, while the determinant explanatory power is often the privilege of institutional or power-related factors only. One can observe this tendency in the scholarship related to the EU regulatory space and the design of regulatory networks and EU agencies. In this research field, the need to increase regulatory and administrative convergence has systematically been presented as the context in which other variables, such as actors' distributional interests and negotiation dynamics among EU policymakers are singled out as determinant in explaining institutional outcomes (Kelemen 2002, 2005, Dehousse 2008, Coen and Thatcher 2008, Thatcher and Coen 2008, Kelemen and Tarrant 2011). Studies of institutional design often overlook that functional pressure does also vary and can, consequently, contribute to explaining variation in institutional outcomes. I hope this paper will convince readers that theories of institutional design would greatly benefit from a refined emphasis on functional pressure.

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