

Networks, committees or agencies?

The many faces of the EU regulatory space

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Abstract

If there is, as is now largely acknowledged, a general trend towards setting up EU-level regulatory agents in order to palliate the lack of EU regulatory capacity, how can we explain that the type of regulatory agent created varies between sectors and changes over time? Focussing on expert and scientific committees, regulatory networks, and EU regulatory agencies, this paper makes two conjectures. It first argues, in a functional institutionalist approach, that the type of regulatory agent depends on the distribution of implementing competences between the member states and the Commission. While national competences, spurring a need for coordination, would lead to the establishment of regulatory networks (coordination pattern), a significant delegation of competences to the Commission would lead the latter to suffer from a lack of expertise and resources which would be filled through the creation of expert committees (expertise pattern). In a second step, the paper conjectures that the subsequent replacement of regulatory networks and expert committees by EU regulatory agencies is best explained by policymakers' willingness to improve the effectiveness and quality of EU regulation. Two in-depth case studies on the regulation of food safety and electricity confirm the plausibility of the conjectures by providing good illustrations of the causal mechanisms at play in the expertise and coordination patterns, respectively. Besides taking a first step towards identifying the determinants of the many faces of the EU regulatory space, this paper underlines the need to refine the conceptualization of functional pressure and colouring the study of institutional choice, otherwise dominated by distributional and institutional factors, with a revamped functional approach.

Introduction

In 1985, the European Economic Communities (EEC) set the ambitious challenge to achieve the single market. The traditional Community method, relying on legislative harmonisation, had shown its limits. Policy implementation remained a national competence and in the absence of harmonisation at the level of implementation, regulatory divergences between the member states were still encumbering the development of cross-border trade (Dehousse 1997). New governance tools needed to be created. This context paved the way for the boom of comitology and the delegation of implementing competences to the Commission, which revealed a convenient way to harmonise implementing regulation without overloading the Council. Nevertheless, without proceeding to an extraordinary empowerment of the Commission – which the Member States were not ready to do, comitology remained largely insufficient (Dehousse 1997). The EEC was crucially lacking the regulatory capacity to address the huge regulatory challenge of the single market.

To fill this regulatory gap opened by the mismatch between the objective and the means, several kinds of regulatory agents were created (Dehousse 2002). Committees, regulatory networks and EU agencies proliferated, constituting what has been called the ‘EU regulatory space’ (Levi-Faur 2011). Generally proceeding from the pooling of national resources, expertise or competences at the EU level these agents are delegated different types of regulatory tasks such as providing scientific opinions, identifying best regulatory practices or elaborating guidelines.

The EU regulatory space is a relatively general phenomenon which takes different forms, depending on the sectors. While some sectors, such as utilities, tend to rely on regulatory networks, others make a more extensive use of committees. Furthermore, variation does also take place over time through changes of agents. In several sectors, EU regulatory agencies have replaced regulatory networks (Levi-Faur 2011) or expert committees (Krapohl 2008). How can we explain this sectoral variation and change over time in the type of regulatory agent created?

The development of these regulatory agents has attracted a considerable interest among scholars of EU regulatory governance and EU public administration (Trondal 2007). Some authors have discussed the EU regulatory space phenomenon as a whole, emphasizing how these new forms of regulatory governance constitute a ‘multi-level union administration’ (Egeberg 2006) or an ‘emergent European executive order’ (Trondal 2010) organized around the Commission. Others have focussed their research on specific types of regulatory agents, specialising on committees and comitology,¹ regulatory networks² or European agencies.³ While a few pieces of research investigate the relationship between two types of regulatory agents,

1 Joerges and Vos 1999, Christiansen and Kirchner 2000, Dehousse 2003, Egeberg et al 2003, Bergström 2005, Gornitzka and Sverdrup 2008, Héritier and Moury 2011. Brandsma 2013.

2 Dehousse 1997, Eberlein and Grande 2005, Eberlein and Newman 2008, Thatcher and Coen 2008, Coen and Thatcher 2008, Schout 2011, Boeger and Corkin 2012, 2013, Blauburger and Rittberger 2014.

3 Dehousse 1997, 2008, Majone 1997, Everson et al 1999, Kelemen 2002, 2005, Krapohl 2008, Dehousse 2008, Groenker, 2009, Egeberg et al 2009, Wonka and Rittberger 2010, Trondal et al 2012, Busuioc 2013.

either by looking at regulatory networks and EU regulatory agencies (Levi-Faur 2011, Kelemen and Tarrant 2011, Ottow 2012), or committees and EU regulatory agencies (Krapohl 2008), so far, the EU regulatory space has not been addressed frontally with the objective to explain why its manifestations vary across sectors and change over time.⁴

This paper takes a first step towards filling this important gap in our understanding of the EU regulatory space with arguments rooted in institutionalism and functionalism. It is first conjectured that, in the first stages of a given EU regulatory policy, the type of regulatory agent created depends on the distribution of implementing competences between the member states and the Commission. A situation where most competences for implementing EU regulatory policies remain national is likely to suffer from diverging regulatory practices among member states, which is expected to lead to the creation of a network of national regulatory authorities in charge of fostering regulatory consistency through coordination (coordination pattern). When the need for consistent implementing regulation is channelled by the delegation of regulatory authority to the Commission, the latter is likely to experience a need for assistance in the form of expertise-type of input, which shall explain the creation of expert committees (expertise pattern). The second argument proposed here consists in explaining the ‘agencification’ (Levi-Faur 2011) of regulatory networks and committees by policymakers’ willingness to improve the effectiveness of EU regulation. The conjectures are assessed with two case studies: the regulation of food safety for the expertise pattern and of electricity for the coordination pattern. The cases provide a good support to the conjectures and allow refining them by pointing at conditions under which they can hold.

The paper starts with a mapping of the *explanandum* on the basis of the extant literature in order to refine the research question (Section 1). Section 2 develops the analytical framework and the arguments. The two cases are then presented (Section 3) before being discussed in the light of the conjectures (Section 4). Finally, the conclusion wraps up the findings and highlights the empirical and theoretical contributions of the paper.

Mapping the EU regulatory space

The goal of this paper is to take a first step towards the identification of the conditions responsible for the variation in the types of EU regulatory agents created to help with the implementation of EU regulatory policies. Three types of regulatory agents are considered: expert committees, regulatory networks and EU regulatory agencies. This section reviews and summarises the extant literature on the three types of regulatory agents in order to allow a more precise formulation of the *explanandum* and of the research question.

⁴ Schout’s (2011) evaluation of the added value of an EU agency, by comparison to other forms of EU governance, should however be mentioned as an innovative approach consisting in holding EU agencies as functional equivalent to both networks and comitology committees.

Expert committees

While Comitology committees have been widely covered in the literature,⁵ not so much has been written on expert committees. Expert committees, also called scientific committees or expert groups (Guéguen and Rosberg 2004), are created to advise and assist the Commission. The Commission may set them up, consult them, and abolish them at will (Larsson and Murk 2007: 66, 73-75). Unlike comitology committees which are meant to represent national interests, the function of expert committees is to provide scientific or technical advices or evaluations. This is why they are composed of experts, irrespective of their nationality (Larsson and Murk 2007: 66).

Expertise is indeed increasingly necessary for the production of public policies (Gornitzka and Sverdrup 2010: 3-4). This is particularly true for EU public policies that display a rather high level of technicality (Majone 1996). In this context, the Commission's function of policy initiator requires a lot of technical information (Christiansen and Larsson 2003: 4). Given its limited resources, the Commission makes a particularly intense use of external expertise (Cini 1997: 105-106, Robert 2003: 58, Trondal 2007: 964) and the system of committees constitutes the most important channel for providing this technical input (Schaefer 1996: 6-9, Van Schendelen and Pedler 1998: 290, Christiansen and Kirchner 2000, Abels 2002: 13).

EU Regulatory networks

EU regulatory networks are composed of national regulatory authorities. Such networks can result from the bottom-up initiative of some national regulatory authorities or be created by the EU legislator or, most generally, by the Commission. Since this paper deals with the creation of regulatory agents by EU policy-makers, the term 'EU regulatory network' employed here refers only to those bodies that are created by EU institutions. Often created by the Commission, European regulatory networks generally count the Commission as a member without voting rights.

Regulatory networks were created to foster regulatory convergence among national regulatory agencies (NRAs) through voluntary coordination (Dehousse 1997, Coen and Thatcher 2008: 49-50). Under the traditional Community Method EU regulatory policies are implemented by the member states. Yet decentralized policy implementation allowed the development of significant divergences in administrative practices across the member states which revealed detrimental to market integration (Dehousse 1997, Eberlein and Grande 2005, Thatcher and Coen 2008). Given the member states' reluctance to empower the Commission or create more powerful bodies such as EU agencies, EU regulatory network emerged as a convenient compromise in many sectors (Dehousse 1997).

⁵ Dehousse 2003, Bergström 2005, Héritier and Moury 2011. Brandsma 2013.

European regulatory agencies

Many European agencies have been created over the last 15 years. Beyond their diversity, they can be defined by their legal personality and a certain degree of organizational and financial autonomy.⁶ EU executive agencies need being distinguished from EU regulatory agencies. Created and controlled by the Commission, EU executive agencies perform administrative and technical tasks on their behalf such as implementing community programmes. They are not the subject of this paper which, instead, focusses on EU regulatory agencies. EU regulatory agencies, created through secondary legislative acts (Kelemen 2005: 175, Groenleer 2006: 157-160), are seen as more powerful than executive agencies for they take part into the EU regulatory process.⁷

EU regulatory agencies are established to answer the need to fill the regulatory gap, resulting from the mismatch between the need for increased regulatory output for market integration and the little regulatory capacity available at the EU level (Dehousse 1997, Eberlein and Grande 2005). But EU agencies are not created *ex nihilo*; they tend to emerge out of the transformation of pre-existing institutional structures (Krapohl 2004, 2008, Martens 2009) and there are various paths of institutional change leading to the creation of EU agencies (Busuioc et al 2012: 4). Therefore, EU regulatory agencies tend to take over the functions and structure of pre-existing agents like committees (Vos 2000a: 1117, Krapohl 2004) and regulatory networks (Levi-Faur 2011, Thatcher 2011). Among the several tasks that can be attributed to EU regulatory agencies, the coordination of national administrative bodies and the provision of expertise and information to the Commission appear as particularly central.

Two delegation patterns and two agencification paths

The literature review first indicates that regulatory networks and committees have clearly distinct functional profiles. While regulatory networks are an answer to a need for coordination, expert committees are created to meet a need for expertise. EU regulatory agencies have a distinct position; their multifunctional nature makes them functional equivalents to both networks and committees. Furthermore, the literature suggests that the chronological dimension should be taken into account. The fact that EU regulatory agencies replace pre-existing agents such as committees and networks indicates that they are not created in the first stages of EU regulatory policies but rather emerge in relatively mature policies.

As a result, the EU regulatory space seems to lend itself to a typology of delegation patterns and agencification paths. While the coordination pattern would be characterised by a problem of coordination leading to the establishment of a regulatory network, the expertise pattern would define situations where the Commission's need for expertise is addressed through the creation of expert committees. Both delegation patterns may change over time through the agencification

6 Commission Communication. *The operating framework for the European Regulatory Agencies*. COM(2002) 718 final. Brussels 11/12/2002. p.3.

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

of regulatory networks and the agencification of expert committees. As a result of this typology, the research question can be divided into two sub-questions. First, how comes that a sector would fall, in the first place, into the coordination patterns versus the expertise pattern? Second, how can we explain the agencification of regulatory networks and the agencification of expert committees?

Competence distribution, delegation patterns and the search for effectiveness

Each sub-question is addressed with a conjecture. The question why a sector falls into the coordination or expertise pattern is first addressed with a functional institutional approach. Then, a functional argument is proposed to explain the agencification of networks and committees.

Functional institutionalism: competence distribution and delegation patterns

Why do some sectors fall into the coordination pattern and others into the expertise pattern? Given that networks and committees answer different types of problem, it is necessary to understand why some sectors suffer from a need to coordinate national authorities and others from a need to provide expertise to the Commission. Both types of governance problems are actually covered by the notion of regulatory gap which takes different meanings in the literature. Some authors understand it primarily as the lack of regulatory authority at the EU level (Dehousse 1997, Kreher 1997) spurring the need to foster coordination among the national authorities in charge of implementing EU policies. Others see it as the lack of resources and expertise at the Commission's disposal (Vos 2000a) explaining the need for external expertise-type of input. Implicitly, while the former assume that policy implementation is decentralized, the latter take, as a point of departure, the Commission's responsibilities in policy implementation.

This ambiguity in the notion of regulatory gap provides an interesting place to start with. It suggests that the type of problem – the lack of centralized authority versus the lack of expertise and resources – depends on which actor is supposed to act. The implementation of EU regulatory policies is, by default, a national competence. However, EU secondary legislation may delegate implementing competences to the Commission. Given that the extent of such delegations is not uniform across sectors or issues (Franchino 2007), the scope of such delegations shall make a relevant explanatory factor.

I thus conjecture that the delegation of implementing competences between the member states and the Commission shapes the type of problem likely to emerge in a given public policy, which determines the type of regulatory agent created. Two variants of this conjecture can be spelt out. On the one hand, in sectors where most implementing authority lies at the national level, a need for coordinating national administrative practices is likely to manifest. Yet when it comes to coordinating the activities of national implementing authorities, the most straightforward

solution is to gather these national authorities into a network so they can exchange on their practices.

On the other hand, when the need for harmonised implementation is channelled by the delegation of implementing competences to the Commission, a different type of problem is likely to emerge. Policy implementation tends to require a lot of resources and technical expertise which is precisely what the Commission is lacking. To palliate this, the Commission is likely to delegate the task to gather information and technical expertise to an agent. While the required expertise may be provided by other types of actors such as interest groups, the typical agent created by the Commission to cover this need is the expert committee.

This argument is anchored in an institutional approach; institutions matter because they affect actors' preferences. However, the causal mechanism presented here differs from those generally put forward by neo-institutionalists. For rational choice institutionalists, institutions constitute a set of opportunities and constraints but do not influence actors' preferences that remain exogenous to the analysis. Historical institutionalists tend to argue that institutions, because they involve a distribution of power, create vested interests. And for sociological institutionalists, actors' preferences reflect their institutional environment as a result of a process of socialisation. Drawing from functionalism, this paper argues that institutions shape problems, which eventually influence actors' preferences because actors are interested into solving their problems. Different institutional settings shape different types of problems and, therefore, different preferences which, ultimately, lead to different outcomes. To reflect the role of functional pressure within the influence of institutions, this process may be labelled 'functional institutionalism'.

Agencification and the search for regulatory effectiveness

Why do policymakers decide to transform regulatory networks into EU agencies? Regulatory networks are often portrayed as weak bodies. The interests of Member States and their national regulatory authorities not to give away their implementing powers would prevent to the delegation of substantial power to an EU regulatory agent (Thatcher and Coen 2008, Boeger and Corkin 2012, 2013). But networks are created to foster convergent regulatory practices and are nonetheless expected to perform. Unsurprisingly, the mismatch between the desired coordination output and the little power at the disposal of networks leads to a lack of effectiveness (Coen and Thatcher 2008: 67). EU agencies, even if lacking strong regulatory powers (Dehousse 2008, Thatcher 2011), are nonetheless more powerful than the regulatory networks they replace. I thus argue that, in view of regulatory networks' limited performance, policymakers decide to transform them into EU agencies in order to increase the effectiveness of regulatory coordination.

The agencification of committees is not as frequent as the agencification of networks so little has been written on the subject. It can nonetheless be conjectured that the agencification of committees is, as with networks, driven by policymakers' willingness to solve governance issues

related to the committee system. Indeed, the committee system is not deprived of problems. Being particularly opaque structures, expert committees lack transparency (Larsson and Murk 2007: 94). This feeds into a problem of accountability because the responsibility for the opinions adopted are not easily traceable (Christiansen et al 2007). Besides, the legitimacy of expert committees is also undermined by their technicality that sustains the image of an opaque technocracy (Christiansen and Larsson 2007: 8). The formalism of EU regulatory agencies, accompanied with a certain standard in terms of visibility and transparency, promises better performances than expert committees on the criteria of transparency, accountability and legitimacy.

In sum, while regulatory networks and committees were created to answer different types of problems, I conjecture that their agencification follows the same rationale. Functionally driven, the transformation of networks and committees into EU agencies allows for an increased formalism, authority, resources, transparency and accountability. I thus expect that policymakers' choice for agencification is rooted in the willingness to increase regulatory effectiveness.

Two in-depth case studies: food safety and electricity

The plausibility of the conjectures is evaluated through the in-depth study of two typical cases: the regulation of food safety and of electricity. With regards to the first conjecture, both sectors vary significantly regarding the explanatory factor, the distribution of implementing competences between the Commission and the member states. Very early in the development of EU food safety regulation, the Commission was delegated an important share of the regulatory authority. The opposite is true for electricity where the member states have long resisted extensive delegations of executive competences to the EU level. So food safety and electricity will allow to evaluate the impact of competence distribution on the emergence of the expertise and coordination patterns, respectively. Besides, both sectors feature the creation of an EU regulatory agency so they will also serve as evaluation for the second conjecture related to the role of policymakers' search of regulatory effectiveness in the agencification process.

The combination of the first and second conjectures requires covering the various stages in the evolution of regulatory policies. The first conjecture related to the emergence of the expertise and coordination patterns addresses the creation of regulatory agents in the first phases of regulatory policies. The transformation of these regulatory agents into EU regulatory agencies is expected to take place at a later stage. To capture both processes, the emergence and the subsequent change of regulatory agents, for each sector, the empirical study will start with the first steps of the EU in the sector and end with the creation of the EU regulatory agency. This broad time frame will allow covering the different elements of the analytical framework: the distribution of implementing competences, the type of governance problem met in policy implementation, the type of regulatory agent created, the effectiveness of the regulatory agent, and, finally, the agencification of the regulatory agent.

The data was compiled in 2013 out of interviews, official documents of the European institutions and secondary literature. For food safety, since the institutional developments leading to the creation of the European Food Safety Authority (EFSA) have already been widely covered by secondary literature, this constituted the most important data source and it was completed with 4 interviews. In electricity, the creation of the Agency for the Cooperation of Energy Regulators (ACER) is more recent so academic literature about it was still scarce at the time of the research. Most of the data for this sector was constituted out of 23 interviews and document analysis. Since the goal of this paper is to unveil how institutional frameworks performed in policy implementation, the types of governance problems they created and the consequent type of institutional solution put forward, the focus is very much on the preparation and evaluation of institutional arrangements which are responsibilities of the Commission. Hence, most interviews and documents analysed stem from the Commission. Interviews with other stakeholders such as national regulators, EU regulatory agencies and regulatory networks were also conducted in order to cross-check the information received from officials of the Commission.

The analysis performed here aims at assessing the plausibility of the conjectures; it does not constitute a strict hypothesis testing as this would require more cases. Instead, the exploratory nature of this research called for a qualitative investigation of typical cases as a first step in order to verify the plausibility of the main elements and causal mechanisms put forward in the analytical framework. Future work will be necessary to test the generalizability of the findings to other cases. Besides, while the paper aims at evaluating the impact of institutional and functional factors on the type of regulatory agents created, it acknowledges that other factors may play a role and is also meant as a call for investigating the variations in the manifestations of the EU regulatory space from other theoretical and methodological angles than the ones adopted here.

Food safety: the expertise pattern

T1: The old Community method

It is in the 1960s that the EU started to legislate in the food sector which, at the time, was divided into three sub-sectors: foodstuffs, veterinary and plant health.⁸ Back then, the Treaties did not allow policymakers to delegate implementing competences to the Commission. Regulatory harmonisation thus took the form of series of Directives, the most commonly used legislative instrument at the time.⁹ Very little discretion was left to the member states for transposition; the Directives were detailed enough to make implementing regulation largely unnecessary.¹⁰ Drafting such highly detailed texts required a technical and scientific expertise in the field that the Commission was lacking.¹¹ Several expert committees were thus created in the

8 Interview with an official of the Commission, October 2013.

9 Interview with an official of the Commission, November 2013.

10 Interview with an official of the Commission, October 2013.

11 Interview with an official of the EFSA, May 2013; Interview with an official of the Commission, October 2013.

1970s to assist the Commission in this task: the Scientific Committee for Food in 1974,¹² the Scientific Veterinary Committee in 1981,¹³ and the Scientific Committee for Pesticides in 1978.¹⁴ The expertise provided by expert committees was complemented with inputs from other types of committees - advisory committees and comitology committees.

T2: The Single European Act and the 'New Approach'

In the early 1980s, it became clear that, in the food sector as elsewhere, progresses towards full harmonisation were extremely slow. To overcome the flaws of the traditional method based on legislative approximation, backed with the ECJ's Cassis-de-Dijon judgement,¹⁵ the Commission presented a new strategy in its White paper on completing the internal market¹⁶ which was subsequently declined to the food sector.¹⁷ The 'New Approach' would combine the application of the mutual recognition principle and the delegation of implementing competences to the Commission.

First, food products would be subjected to the mutual recognition principle by default, except under some specific circumstances such as when public health might be affected. This distinction would allow to considerably decrease the amount of legislation by limiting harmonisation requirements to a few issues such as food safety and consumer protection and by applying the mutual recognition principle to the rest, i.e. food quality regulation. Second, for those issues that would still need EU-level regulation, the Commission proposed that, while major decisions would still be made by the Council, the more technical ones would be delegated to the Commission. Part of a horizontal strategy, this new approach was enshrined in the Single European Act which also allowed the Council to adopt decisions under the majority instead of unanimity.

The ambitious Single Market Programme to be achieved by 1992 monopolized the policymakers' energies in the subsequent years (O'Rourke 2005: 3, Alemanno 2006: 243). The Commission was delegated many powers (Krapohl 2007: 39) and 'comitology flourished' (Joerges and Neyer 1997: 614). In the face of such a monumental and highly scientific task, the Commission was lacking the necessary staff and expertise (Chambers 1999: 100). To palliate for this, the Commission drew heavily on the expertise of the scientific committees (Fallows 1990: 26) and

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

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

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

15 ECJ Judgement C- 120/78. *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)*.

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

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

even reinforced the scientific committee for foodstuff by increasing the maximum number of members.¹⁸

T3: The BSE crisis and the reform of the committees

This governance system based on the committees was deeply shaken in the 1990s with the BSE crisis (Vos 2000b: 231). It all started in 1985 with the first case of a cow dying in the United Kingdom (UK) of what was going to be labelled the Bovine Spongiform Encephalopathy (BSE). Because it was very similar to the scrapie disease affecting sheep which was not transmissible to humans, in spite of an ambiguous scientific basis, the expert group mandated by the British Government concluded that the BSE was not harmful to humans (Krapohl and Zurek 2006: 7-8).

The interpretation of the BSE as a purely veterinary issue prevailed in the EU as well. As a result, it was approached through veterinary regulation (Krapohl 2008: 127) and entrusted to the DG VI (Agriculture) which was advised by the Scientific Veterinary Committee (SVC). As the European Parliament revealed later, the SVC was both chaired and numerically dominated by British experts (St Clair Bradley 1999: 87). While knowledgeable on the issue, these experts were nonetheless subject to political pressure (Vos 2000b: 232) and tended to reflect the views of the British Ministry of Agriculture, Fisheries and Food.¹⁹ Yet British interests clearly favoured the veterinary interpretation of the BSE which justified the application of the mutual recognition principle. Would human health have been involved, restrictions could have been decided against the export of British beef. Given the huge influence of British thinking on the Commission (Vos 2000b: 232, Neyer 2000: 4), the EU failed to adopt adequate measures in the first years (Krapohl and Zurek 2006: 8).

Everything changed in 1996 when the British Government acknowledged that the BSE may be related to a new variant of the Creutzfeld Jacob Disease. In spite of lacking scientific evidence of this link, the Commission and the Standing Veterinary Committee (StVC) reacted promptly with a ban on British beef. A few months later, the European Parliament (EP) set up the 'Temporary committee of inquiry into BSE' which revealed that the BSE issue had been very seriously mismanaged. Amongst others, the Commission was blamed for having favoured market integration over public health and for the fragmentation of food safety management among various DGs. The SVC was criticized for its lack of transparency and its permeability to national interests. The EP concluded that serious reforms in the EU's approach to food policy were necessary and threatened the Commission to adopt a Motion of censure against the College of Commissioners to make sure the Commission would follow their recommendations (O'Rourke 1998: 178).

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

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

The Commission reacted promptly with the adoption of three major reforms in 1997: a reshuffling of competences between DGs to the benefit of DG SANCO (Health and consumer protection), a reinforcement of veterinary and foodstuffs control and a reform of the committee system (Krapohl 2008: 132). Regarding the committee system, the Commission replaced the previous scientific committees by new ones and increased their numbers from six to eight (O'Rourke 2005: 16), they completed this system with the creation of the Scientific Steering Committee (SSC) in charge of coordinating the work of the other eight committees and ensuring that public health is taken into account,²⁰ and they revised the rules regarding the recruitment of committee members to guarantee scientific excellence and independence.

T4: New institutional foundations (EFSA)

Shortly after the reforms, the 1999 Belgian dioxin crisis revealed the insufficiency of the measures just adopted. In order to deal with the urgency of the alert sent by Belgian authorities about the contamination of feedstocks with dioxins, the EC had to postpone work in other areas. Overloaded, the committees crucially lacked the flexibility required to react quickly; it was thus clear that they needed to be reinforced.²¹ The experts of the committees, exhausted, were calling for the creation of a permanent body to release them from the background work (Vos 2000b: 244). Besides, in 1999, as a result of the dioxin crisis and rising concerns about genetically modified food, the reforms of EC food safety policy had failed to reconquer the trust of European consumers. The lack of confidence did not only affect European public, but international partners of the EC as well. In the Beef Hormone Dispute which opposed the EC to the United States and Canada in 1996 before the World Trade Organization (WTO), the EC's position, while invoking the precautionary principle, was contradicting the WTO Agreement on the Application of Sanitary and Phytosanitary Measures which required to clearly distinguish between risk assessment and risk management. Influenced by consumer pressure, the EC mixed up the two (Echols 1998: 541), which severely undermined its credibility regarding the capacity to make an appropriate use of science for food safety regulation.

The dioxin crisis changed the views of the Commission and of the member states regarding the appropriate institutional arrangement for EU food safety regulation. In 1999, Romano Prodi replaced Jacques Santer and announced immediately that he wanted to create an EU equivalent to the US Food and Drug Administration (FDA) (O'Rourke 2005: 6-7, Testori and Deboyser 2014: 194) in order to restore the confidence of European consumers. On the same year, the Commission appointed three scientists to evaluate the opportunity of creating an EU agency for food safety. In order to match the immensity of the public concern after the 1990s food scares, the scientists advocated the establishment of a very powerful agency (Alemanno 2008: 4) and the Prodi Commission, soon after taking office, issued a White Paper on Food Safety about the creation of a European Food Authority. The corresponding legislative proposal followed quickly and, after a revision regarding the Rapid Alert System, went through a very smooth negotiation

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

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

and gave birth to the European Food Safety Authority (EFSA) in 2002. The elaboration of independent scientific opinions on any issue related to food safety constitutes the EFSA's main function. The agency's organs are: the Management Board, the Executive Director, the Advisory Forum, a Scientific Committee, and the Scientific Panels which are the functional equivalents to the scientific committees in the previous system.

Electricity: the coordination pattern

T1: The Florence Forum and the group of regulators (CEER)

The electricity sector has been traditionally managed through publicly owned monopolistic companies. Backed by the single market dynamics launched in the mid-1980s, the Commission issued a report advocating the creation of an internal energy market through the liberalization of national energy markets.²² After the adoption of a first Directive of limited impact in 1990 (Vasconcelos 2005: 90), the Commission proposed the adoption of common rules in electricity in 1991. Due to the Council's internal divisions and the opposition of monopolies (Eising 2002: 93), the negotiations painfully led to the adoption, in 1996, of a Directive planning a slow and partial transition towards liberalisation (Schmidt 1998, Eising 2002, Eising and Jabko 2001). Vertically integrated undertaking would be subject to account separation and network owners would have to guarantee third party access by choosing their preferred access model from a pre-established list of options (Eising and Jabko 2001, Schmidt 1998: 178, Vasconcelos 2005: 82,). Market opening would unfold in three stages so as to reach 33% of the consumers by 2003.

While the 1996 Directive was as a first important step towards the liberalisation of energy markets, nothing was planned to make sure that the liberalization would be accompanied with the integration of the national energy markets into a European market. The Directive left a wide discretion to the member states and the Commission was not given any relevant power for its implementation. In practice, the simultaneous liberalization of national markets revealed unable to 'ensure the compatibility – and even less convergence or integration – of these markets' (Vasconcelos 2005: 90). The issue of cross-border electricity trade quickly revealed problematic (Vasconcelos 2005: 82-92); coordination at the level of both the regulators and the transmission system operators (TSOs) was necessary to allow the exchange of electricity between countries (Eberlein 2003: 142).

To palliate this weakness, the Commission created the Forum on European Electricity Regulation (the Florence Forum). The main function of the Forum was to facilitate cross-border electricity trade through voluntary cooperation between stakeholders.²³ From 1998 onwards, the Commission, NRAs, national ministries, but also the industry, consumers, network users and other technical experts started to gather twice a year in Florence with the objective of producing regulatory and technical solutions to fill the regulatory gap. It was 'vital to extensively consult

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

23 Interview with an independent expert, February 2013.

and involve industry stakeholders and to mobilize much-needed expertise' (Eberlein 2003: 143). Hence, besides its role as a coordination platform, the Florence Forum was also meant to produce the expertise needed to pursue the EU regulatory process.

In the margins of the Forum, a few NRAs took the initiative to constitute a group of regulators. NRAs had been created in the member states in the late 1990s. Being new bodies in a new world of liberalization, they lacked points of references. So they started to meet regularly to exchange their experiences and discuss how they should interpret and implement the regulatory framework.²⁴ This cooperation was also motivated by the NRAs' willingness to counter-influence the TSOs within the Florence Forum who were resisting against the development of cross-border trade.²⁵ Over time, the network of NRAs was growing and led to the creation, in 2000, of the Council of European Energy Regulators (CEER).

T2: The regulatory network (ERGEG)

In the early 2000s, in spite of significant efforts, the Florence Forum's output failed to materialize in a reasonable period of time due to the blockage exerted by some TSOs (Eberlein 2003, Vasconcelos 2005: 91). Meanwhile, the heads of states were calling for an acceleration of energy markets integration²⁶ so the Commission proposed a second regulatory package in 2001 which was adopted in 2002 (Eberlein 2003, 2008). Substantially, the new framework strengthened the regime for third party access and the unbundling requirements for vertically integrated companies. On the institutional dimension, it made it mandatory for member states to create NRAs for the implementation of the framework²⁷ and delegated a few regulatory competences to the Commission, although the bulk of regulatory authority remained at the national level (Eberlein 2008: 82, Eberlein & Newman 2008: 41-42).

The second framework left a wide scope for uneven implementation by the national authorities (Eberlein 2008: 82) and the few competences delegated to the Commission were not enough for the creation of a genuine EU regulatory regime (Eberlein 2003: 141). Given the lack of effectiveness of the Florence Forum, it was necessary to 'give regulatory cooperation and coordination a more formal status in order to facilitate the completion of the internal energy market'.²⁸ This led the Commission to create a new regulatory network called the European Regulators Group for Electricity and Gas (ERGEG).

The format of an EU regulatory network was chosen for various reasons. First, the Commission appreciated the contributions of the group of regulators and wanted to formalize and strengthen

24 Interview with an independent expert, February 2013.

25 Interview with an independent expert, February 2013.

26 Recital 3 of the Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

27 Interview with an independent expert, February 2013.

28 Recital 5 of Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/796/EC).

this initiative.²⁹ Besides, unlike with the CEER which had the status of an association, the EU regulatory network form allowed the Commission to get involved in the network so as to collaborate more directly with the NRAs (Hancher 2007: 999).³⁰ Then, the ERGEG was also thought to be an important source of expertise to palliate the Commission's lack of resources.³¹ Finally, the NRAs themselves were favourable towards this evolution because it provided them with a stronger and more authoritative voice to influence the EU regulatory process.³²

Facilitating consultation, coordination and cooperation among NRAs and assisting the Commission in the preparation of draft implementing measures constituted the two functions of the ERGEG. This meant that, in practice, in order to foster regulatory convergence, the NRAs developed guidelines of good practices. While non-binding, the guidelines were charged with a certain degree of moral authority. Some of the guidelines produced by the ERGEG were subsequently codified by the Commission or the policymakers. In addition, the NRAs frequently discussed how the legislative framework should be interpreted.³³

T3: The big leap forward (ACER)

Around 2005, it became clear that a new thrust in EU energy regulation was necessary.³⁴ Incumbent companies had remained very powerful and the internal energy market had failed to materialize.³⁵ In a context of rising uncertainties regarding the security of supply and climate change, the Member States agreed with the Commission about the necessity to make real progress towards the liberalization and the integration of energy markets (Eikeland 2011: 251). The Commission thus proposed a third regulatory package in 2007 which was adopted in 2009. On the substantive side, the new legislation makes significant improvements regarding the unbundling issue. On the institutional aspect, very important changes took place with the replacement of ERGEG by the Agency for the Cooperation of Energy Regulators (ACER)³⁶ and the creation of the European Network of Transmission System Operators for Electricity (ENTSO-E).

The need for regulatory and technical coordination remained urgent as national implementations of the framework remained 'neither equivalent nor mutually compatible' (Glachant and Levêque 2009: 25). In spite of NRAs' pro-activity, the impact of the ERGEG on the creation of an EU regulatory regime for cross-border trade remained limited due to its lack of

29 Interview of an official of ACER, February 2013.

30 Interview with an official of the Commission, February 2013; Interviews with officials of ACER, February 2013;

31 Interview with an official of ACER, February 2013.

32 Interview with an independent expert, February 2013,

33 Interview with an official of CEER, February 2013.

34 Neelie Kroes, European Commissioner for Competition Policy. Speech/07/4. *Introductory remarks on Final Report of Energy Sector Competition Inquiry*. Press Conference, Brussels, 10th January 2007; Interview with an independent expert, February 2013.

35 Commission Communication. *Prospects for the internal gas and electricity market*. COM(2006) 841 final. Brussels, 10/01/2007. p.7.

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

formal power and binding decision-making powers.³⁷ Genuine market integration required more effective coordination and increased resources.³⁸ It was thus widely acknowledged in the sector that the institutional setting needed being upgraded to allow the adoption of binding regulatory and technical codes.³⁹

These favourable conditions paved the way for the delegation of many new regulatory competences to the Commission, in particular for the development and adoption of the so-called network codes for which the group of regulators and the group of TSOs feature as key actors along with the Commission. The network codes are series of rules that translate regulatory provisions into a technical language that allows their application by the technical branches of TSOs. After the Commission has identified the areas that require the development of network codes, ACER drafts framework guidelines on these issues in order to orientate the work of ENTSO-E which is responsible for drafting the codes. Once drafted, ACER revises the codes and if satisfied, passes them to the Commission who may formally adopt them under comitology to make them binding.

This new procedure for the network codes involved a massive delegation of competences to the Commission, ACER and ENTSO-E. In the network codes configuration, the Commission – together with the comitology committee - holds the ultimate regulatory authority and is assisted by ACER and ENTSO-E who draw into the expertise of their members, NRAs and TSOs respectively, in order to draft the network codes. While the network codes constitutes the bulk of ACER's mandate, the group of regulator keeps also important coordination functions through, amongst others, the development of non-binding guidelines, the diffusion of good practices, as well as the adoption of individual decisions on technical issues in a limited number of situations.

Empirical analysis

Conjecture 1: competence distribution and delegation patterns

The paper first conjectures that the type of regulatory agent created depends on the distribution of authority between the Commission and the member states for the implementation of EU regulatory policies. Where most regulatory authority is left to the member states, a problem of coordination is likely to emerge which shall lead to the creation of a regulatory network (coordination pattern). Alternatively, where most regulatory authority was delegated to the Commission, the lack of expertise and resources of the latter shall explain the creation of expertise committees (expertise pattern). The conjecture is largely supported by both cases (see table 1).

37 Interview with an official of ACER, February 2013.

38 Commission staff working document accompanying the legislative package on the internal market for electricity and gas. *Impact assessment summary*. SEC (2007) 1180. Brussels, 19/09/2007. p.14.

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

		FOOD	ELECTRICITY
T1	Competence distribution	N/A (no implementing regulation)	National
	Type of problem	Expertise	Coordination (and expertise)
	Type of agent	Committees	Forum
T2	Competence distribution	Commission	National
	Type of problem	Expertise	Coordination (and expertise)
	Type of agent	Committees	Network
	Reason for change of agent	N/A (no change of agent)	Effectiveness (capacity to produce output)
T3	Competence distribution	Commission	Mixed (commission + national)
	Type of problem	Expertise	Coordination and expertise
	Type of agent	Committees (new committee system)	EU agency
	Reason for change of agent	Effectiveness (quality of scientific output, transparency)	Effectiveness (power, working capacity)
T4	Competence distribution	Commission	
	Type of problem	Expertise	
	Type of agent	EU agency	
	Reason for change of agent	Effectiveness (quality of scientific output, working capacity, transparency, legitimacy)	

Table 1: Analytical summary of the data

The food sector provides an excellent illustration of the expertise pattern. The sector is characterised by large delegation of regulatory authority to the Commission. The latter, being unable to perform the highly scientific risk analyses required to regulate food safety, created a series of expert committees and delegated them the task to make the scientific evaluations on their behalf. This pattern is clearly characterised at T2 and T3. One must however note an exception with T1 where the Commission needed expertise-input and created committees in the absence of delegated implementing authority. This is due to the fact that the Treaties did not allow, by that time, the delegation of implementing competences to the Commission. Directives constituted the only legal tool available for EU-level regulatory action and were used as equivalent to implementing regulation which is why the Commission, in charge of drafting the Directives, needed external expertise-input. This finding allows refining the conjecture regarding the impact of delegated authority to the Commission on the creation of committees in two possible ways. One could first limit the validity of the conjecture to the post-SEA era, when the delegation of implementing competences to the Commission became possible. Alternatively, one could extend the conditions under which the committees are likely to be created to the

situations where EU legislative tools, e.g. Directives or Regulations, are used as functional equivalent to implementing regulation and involve an unusual degree of science or technicality.

The first conjecture is also supported by the good illustration of the coordination pattern provided by the electricity sector. The association between national competences and the need for coordination is characterised very clearly. To deal with this need for coordination, a network was then indeed created at T2, after another type of agent created at T1, a Forum, had failed to deliver satisfying results. We see here that the network was not set up as an immediate reaction to the need for coordination. Instead, a wide forum of stakeholders was established. There are several reasons for this. First, a particularity of the electricity sector is the need to bring about technical coordination on top of regulatory coordination. Any coordination initiative at the EU level thus required the involvement of transmission system operators (TSOs). Besides, at T1, not all countries had created NRAs so it was necessary to work with national ministries as well to guarantee that all countries were represented. Finally, in the late 1990s, the liberalization of the electricity sector was both a largely uncharted and highly technical territory. So the Commission wanted the Forum to be a brainstorming venue that would identify possible regulatory orientations; this explains why the membership to the Forum was so large, going beyond TSOs and national authorities. In sum, a network of NRAs would not have been appropriate at T1 given that the NRAs themselves were lacking strength and influence on the regulation of the sector. It is only at T2, once NRAs had emerged as key national regulatory actors and collectively appeared as a promising and stimulating EU-level regulatory actor, that the Commission created the regulatory network. This indicates a further condition under which the conjecture regarding the relationship between national competences and the creation of regulatory network can hold: the previous establishment of NRAs in the member states as the key implementation actors.

Furthermore, the electricity case shows that the Commission may also experience a need for expertise in the absence of delegated implementing competences. At the beginning of the liberalization process, the definition of policy orientations involved a fair amount of technicality so the drafting of legislation required technical expertise. This reinforces the observation made with the food case about the possibility for the Commission to experiment a need for expertise without delegated implementing powers in situations where legislation involve an unusual amount of technicality.

In sum, the cases allow to both confirm and refine the first conjecture. The causal link between the distribution of implementation competences, the type of governance problem felt and the type of agent created could be clearly identified. Besides, the data first highlights that the creation of committees is also possible in the absence of delegated competences to the Commission if the legislative tools are given a particularly technical character. Second, in case of national implementing competences, the need for coordination can only lead to the creation of a regulatory network after NRAs have been established in the member states and given the status of main national implementing actors.

Conjecture 2: agencification and the search for regulatory effectiveness

The second conjecture put forward in this paper relates to the functional rationale behind the replacement of regulatory networks and committees by EU regulatory agencies. This argument is also confirmed by the two cases (see table 1). In food safety, the BSE and the Dioxin crises revealed the dysfunction of the committee system. Denounced at T3 for providing biased and unreliable scientific evaluations and for lacking transparency, the committees were reformed. However, the new system revealed insufficient; the new committees proved unable to cope with the increased workload and to restore the confidence in the EU's ability to produce sound regulation. Only an EU agency type of structure, with significant resources, status and transparency seemed able to match the demand for confidence and for an increased and more reliable scientific output. The case also points at another weakness of the committee system that is not commonly mentioned in the literature: its limited working capacity.

In electricity, the regulatory network revealed insufficient to bring about the required regulatory coordination. Among stakeholders, it was widely acknowledged that the output of the group of regulators needed to be made binding in order move forward with market integration. Yet, legally, the adoption of binding implementing regulation and decisions require a more formal decision-making structure than a regulatory network. While it was finally decided that most of the binding regulatory authority would be delegated to the Commission and a comitology committee, the increased demands placed on the group of regulators under the third package and their formal involvement in the elaboration and adoption of implementing regulation required the establishment of an EU agency dotted with resources and legal status. Hence, both the electricity and food sector confirm that the replacement of previous agent by EU agencies is driven by policy-makers' willingness to improve the effectiveness of EU regulation.

Conclusion

This paper has aimed to take a first step towards filling an important gap in our understanding of the EU regulatory space. If there is a general trend consisting in creating EU-level regulatory agents in order to palliate the lack of EU regulatory capacity, how can we explain that the type of regulatory agent created varies between sectors and changes over time? Focussing on expert committees, regulatory networks and EU regulatory agencies, the paper makes two conjectures. First, in the earlier stages of an EU regulatory policy, the distribution of implementing competences shall explain the emergence of regulatory networks versus expert committees. While national implementing competences, spurring a need for coordination, would lead to the establishment of regulatory networks (coordination pattern), in case of significant implementing competences being delegated to the Commission, the latter is likely to experience a lack of expertise and resources, expected to lead to the creation of expert committees (expertise pattern). Second, the subsequent replacement of regulatory networks and expert committees by EU regulatory agencies is expected to be functionally driven, i.e. due to policymakers' willingness to improve the effectiveness and quality of EU regulation.

Both the coordination pattern and the expertise pattern as well as their functionally-driven transformation through the agencification of networks and committees are illustrated by, respectively, the regulation of electricity and food safety. The cases also allow refining the conjectures in two ways. First, they highlight that a need for expertise and the creation of committees can also happen in the absence of delegated implementing competences to the Commission in situations where EU legislation involves a particularly high degree of technicality. Second, the creation of a regulatory network to answer a need for coordination is conditioned upon the preliminary emergence of NRAs as key national actors for the implementation of EU regulation.

These findings provide a first element of answer to the sectoral variation and change over time in the type of regulatory agents created in the EU. These preliminary results need to be confronted to more cases in order to assess their generalizability. Hopefully, they will also serve as an encouragement for scholars of EU regulatory governance to explore the many faces of the EU regulatory space with other theoretical approaches. Indeed, the variations in the shape of the EU regulatory space is certainly also conditioned by other factors than the ones put forward in this paper. Further research is thus needed to reinforce and complete these findings.

Besides the empirical contribution to the literature on EU regulatory governance, this paper is also meant as a call for paying greater attention to the way functional pressure intervene in institutional choice. Generally downplayed because institutional outcomes are, most generally, sub-optimal, the functional factor is nonetheless behind most political decisions. The fact that problem pressure is often mediated by power distributional considerations does not make it irrelevant. Yet, being generally seen as a mere contextual element, problem pressure tends to be kept out of analytical frameworks.

This paper argues that functional pressure can be seen as a relevant variable in the analysis of institutional choices. To be made a proper variable, i.e. something that varies, the concept of functional pressure needs being refined. This paper distinguishes between types of functional pressure. A need for coordination is certainly not the same as a need for expertise and this difference is crucial in understanding the occurrence of regulatory networks versus that of expert committees. Further useful distinctions can be made: the degree of functional pressure felt can also vary significantly. This may help us to understand why the distribution of explanatory power between functionalism and politics vary depending on the situations.

Making functional pressure a variable also means that it can serve not only as an explanatory factor but also as an outcome that needs being explained. Policymakers may experience different kinds of problems. So how can we understand the variation in the type of governance problem met? This question has also been addressed in this paper from an institutional angle under the label 'functional institutionalism'. Institutions shape the type of governance problem met - which subsequently influences the type of institutional solution chosen. Besides illustrating how

functional pressure can be treated as an *explanandum*, this 'functional institutional' approach shall make a useful addition to the neo-institutionalist toolbox.

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