Network governance and delegation: European Networks of Regulatory Agencies.

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Abstract
European Networks of Regulators have been created in key network industries such as telecommunications, securities, energy and transport. They have been used as important examples of the growth of ‘network governance’ in Europe. Using a principal-agent framework, the article examines why the European Commission, national governments and independent regulatory agencies have driven the creation of these networks of regulators, the institutional character of these networks and their implications for regulatory governance in Europe. It argues that problems of coordination were the main factor advanced to justify establishing networks of regulators. The new networks have been given wide tasks and membership, but enjoy few formal powers or resources. They are highly dependent on the European Commission and face rivals for the task of coordinating European regulators. Hence at least in formal institutional terms, the networks illustrate how little movement there has been towards network governance.

The 1980s and 1990s saw a widespread phenomena in Europe of states switching from direct economic interventionism to delegated governance - both at the national and supranational levels, to such an extent that there have been extensive analyses of a ‘regulatory state’ or multiplicity of regulatory regimes (Majone 1996, Héritier and Thatcher 2002, Levi-Faur 2005). A key element was delegation of powers by national governments to supra-national bodies such as the European Union and to national independent regulatory agencies (Radaelli 2004, Thatcher 2002, Majone 1999). However, since the late 1990s, a further round of delegations has taken place to ‘European regulatory networks’ (ERNs). These have been given powers and functions both by the EU and by national governments and regulators. These networks have created much excitement, with claims that they presage ‘networked governance’ (Eberlein 2003, Eberlein and Grande 2004).

This article examines why the European Commission, national governments and independent regulatory agencies have accepted or indeed driven the creation of these networks of regulators, the institutional character of these networks and their implications for regulatory governance in Europe. It does so using principal-agent theory and the interests of different actors in the European ‘regulatory space’, which it uses as a starting point for analysis. It begins with traditional analyses of delegation in Europe and then recent work on network governance, and then sets out the principal-agent framework that
will be applied by the empirical work on ERNs. Thereafter it examines the pressures and 
problems that led to the creation of ERNs before turning to an analysis of the position of 
ERNs in Europe. The conclusion returns to broader themes of the position of ERNs in 
European governance and why they have been created.

The central argument is that the networks represent a new round of delegations designed 
to respond to the multiplication of regulators and their uneven development by co-
ordinating member state regulatory implementation and harmonizing regulatory 
governance. But, at the formal level, the networks of regulators remain highly 
constrained by existing actors. In particular, the European Commission and national 
regulators maintain many controls over the networks, who lack resources. The weakness 
of the networks and controls of their principals help to explain why delegation was 
agreed both by national and EU actors. It also suggests that if the networks are to have an 
impact on regulatory governance in Europe, they must develop informal resources and 
influence, since their formal institutional position is weak.

The article uses detailed case studies of the two most powerful and well-established 
ERNs, since they offer the maximum degree of delegation: the European Regulators 
Group for telecommunications and CESR (the Committee of European Securities 
Regulators) for securities.

**Principal-agent analysis and delegation in European regulation**

European regulation has been transformed by a series of delegations. At the supranational 
level, European states have given the EU progressively greater powers to extend its 
regulatory activities (Majone 1996). Using these powers, EU sectoral regulatory regimes 
have grown in major markets previously largely immune from EU action—such as 
telecommunications, financial services, electricity, gas, railways, postal services, food 
safety. EU regimes involved detailed EU regulation, notably: liberalisation through 
ending the right of member states to maintain ‘special and exclusive rights’ for certain 
suppliers; ‘re-regulation’, i.e. EU rules governing competition, ranging over a vast array 
of matters, such as interconnection of networks, access to infrastructure or universal 
service.

At the national level, governments have created new independent regulatory authorities 
(IRAs), both sectoral and general competition bodies, and/or strengthened existing bodies 
legally and organizationally separated from government departments and suppliers, are 
headed by appointed members who cannot be easily dismissed before the end of their 
terms and have their own staff, budgets and internal organizational rules.

However, a further set of delegations has taken place from the 1990s onwards that 
combine national and supranational levels, through the creation of European networks of 
regulators. As will be described in greater detail below, these include formal and informal 
networks of national regulators, but also involve the European Commission. They have 
been seen as an important move towards ‘network governance’ in Europe. This concept is
currently being developed and debates, but three elements can be set out here, linked both to the literature on policy networks (cf. Rhodes and Marsh 1992, Jordan and Richardson 1979, Sabatier 1998) and recent work on ‘new forms of governance’ (Slaughter 2004). One is the linkage within one body of actors from different institutional levels- national, EU and also international- and both public and private sectors- in a form of sectoral governance (See Héritier and Lemkuhl introduction). A second is a shift of power from previously well-established levels to organizations or individuals whose main role is linking actors. A third element involves a change in the mode of governance, away from hierarchy and towards consultation, negotiation and soft law.

How can delegation in European governance, including to ERNs, be analysed? One approach is to use Principal-agent (PA) theories. These explain delegation by elected politicians to non-majoritarian institutions in terms of the advantages gained by insulating IRAs from political pressures and their ability to perform functions for elected politicians (Thatcher and Stone Sweet 2002; Bendor, Glazer and Hammond 2001; Weingast and Moran 1983).1 PA theory has been applied to delegation to regulatory bodies in Europe (Thatcher 2002, Pollack 2003. Majone 1996). It is argued that governments have delegated both to IRAs nationally and to the EU to enhance credible commitment, especially in sectors such as utility industries, where governments seek outside investment or other long-term commitments but where other actors such as investors fear that governments will renege on promises (cf. Levy and Spiller 1996). Another reason has been to shift blame for unpopular or difficult decisions (Egan 1997; Hood 2004). A third factor has been to increase efficiency, especially in domains that are complex and technical (Majone 2001).

However, PA theory points out that delegation is a variable. Principals choose which powers to delegate to their agents. Equally, they maintain controls over the agent, such as appointments, budgetary and staffing resources and the ability to overturn agents’ decisions. Indeed, principals will be highly concerned to minimize ‘agency loss’ (i.e. agents acting against their preferences) through ‘shirking’ and ‘slippage’. They will seek to design institutions to minimize such agency losses, as well as using controls.

PA theory is a useful starting point to analyze the rise of ERNs for four reasons. First, ERNs were created explicitly by governments and the EU Commission. PA’s interest-based approach directs us to examine why these actors chose to delegate, and offers a range of possible reasons to explain delegation. Second, the EU’s legalized nature means that delegation of powers requires a legal basis. Since the formal institutional position of ERNs is set out, including their powers and the controls over them, PA analysis can be used to examine their formal independence. Third, application of PA theory requires definition of principals and agents. Hence it necessitates a careful study of who is delegating and who wields controls, a central issue in a complex polity such as the EU and especially for ERNs which are children of multiple parents (governments, IRAs and the EU Commission). Finally, the PA framework underlines the importance of

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1 However for an alternative view of delegation based on institutional isomorphism which results in non-functional delegation, see McNamera 2002.
institutional design since principals will be highly concerned with post-delegation events and mould their initial choices accordingly.

However, the PA tools must be wielded with care, and the limitations of the approach understood in analyzing delegation (cf. Coen and Thatcher 2005). In particular, it is based on a rational choice conception of institutions, which it presents as consciously and explicitly designed; hence it excludes non-rational strategies such as copying or the evolution of institutions (cf. McNamera 2002). Moreover, it focuses on the formal structure of delegation, leaving aside informal resources and controls. Finally, it examines post-delegation behaviour through the rather narrow prism of formal principals and agents and agency loss. It omits other actors in the ‘regulatory space’ who may be of great importance in governance (Scott 2000). It also downplays post-delegation behaviour that may alter the original delegation (Coen and Thatcher 2005).

This article begins with a PA framework to analyse who delegated to ERNs and why. It then turns to the institutional design of the delegation, notably the functions and powers delegated and the controls and institutional design that the principals of the ERN used to minimize agency losses. The conclusion links the findings back to arguments about network governance in Europe, as well as pointing to further research that is needed given the limits of the PA framework.

The creation of ERNs

EU regulation has offered an increasingly detailed framework governing the supply of network services such as telecommunications, energy, transport and postal services. In particular, it has laid down liberalization rules ending national monopolies (‘special and exclusive rights’) and re-regulatory rules on measures to govern competition.

EU regulation is implemented at the national level (with the important exception of some aspects of competition policy), not by the EU Commission which has few staff and financial resources. ‘National regulatory authorities’ (NRAs) are responsible for implementing EU legislation at the national level. NRAs can be governments or independent sectoral regulators (IRAs). These NRAs have been given powers and functions, notably to implement and enforce liberalisation and then regulate the ensuing competition. Since much regulation concerning liberalisation and re-regulation was based on EU legislation (albeit transposed into national law), sectoral IRAs in practice ended up implementing and interpreting much EU regulation.

However, EU regulation has said relatively little about the institutional framework for the implementation of regulation within member states. It has not laid down rules for the institutional form or powers of NRAs, nor insisted that NRAs be bodies independent of governments. Instead, it has confined itself to insisting that regulatory organisations be separate from suppliers and that they follow certain decision-making principles such as ‘fairness’ and transparency.
In this initial EU regulatory regime, it is possible to see two sets of delegation. One involved national governments delegating responsibilities to the EU which then delegated implementation to NRAs, notably IRAs. The other involved national governments delegating to IRAs (Thatcher 2002a). However, IRAs now have a double delegation— from both the EU and national governments— and hence two principals. PA analysis underlines that this could create problems for these two principals in controlling their common agent, namely IRAs. It also underlines the importance of institutional design, and hence points to the likely discretion and cross-national differences in implementation arising from the lack of EU regulation on the institutional form of NRAs.

Indeed, the evidence points to such difficulties. Co-ordination of different national regulators in implementing EU regulation was encouraged via informal agreements and working groups at the EU level, but the Commission struggled to establish regulatory norms and best practice. Moreover, IRAs differed in terms of their age, powers and autonomy (Coen 2005, Heritier 2005, Boellhoff 2005), as their institutional design and creation differed from one country to another. In fact, we still observe, after 20 years of deregulation and liberalization, significant constraints on ownership, diverging regulatory principles and different competing regulatory authorities (Thatcher 2002b). Implementation of all public policies faces problems of ‘agency loss’ as those putting policies into practice enjoy discretion and the ability to alter original a policy’s aims, but these features were magnified in the case of the EU, because legislation is broad and EU directives are binding on member states as to their aims but not the means of achieving them. In addition, the Commission’s limited resources made oversight of IRAs difficult, indeed largely ruling out any ‘police patrol’ strategy (McCubbins and Schwartz 1984).

Soon calls were made for independent ‘Euro-regulators’— i.e, (Majone 1997, 2001). But, national governments were reluctant to create such a body, even in telecommunications, the sector with the most advanced ‘partnership’ between member states and the EU Commission. Equally, the Commission was concerned about losing powers (helped by the legal doctrine of ‘non-delegation’— ie that the Commission cannot delegate its powers— cf. Majone 2001), while some firms were concerned about the remoteness of such a body— and perhaps of losing a friendly local IRA (Coen and Doyle 2000).

Instead, in line with broader moves to encourage the open method of co-ordination’ and subsidiarity (cf. European Commission 2001), European regulatory harmonization was encouraged and fostered through the formation of formal and informal horizontal networks of regulators (Coen and Doyle 2000, Eberlein and Grande 2004). Some of these had no formal powers and involved many different sectoral actors— the Commission, IRAs, firms, experts (for instance, the Florence process for electricity and the Madrid process for gas). But, others saw formal delegation to ERNs. The two most important were CESR and the ERG. Looking at these in detail helps us explain who delegated to ERNs and why.

CESR arose directly from the Lamfalussy commission, which was set up by the Commission and national governments to aid the creation of the single market in financial services and notably for the European Commission’s 1999 Financial Services
Action Plan (Commission 1999). The Commission’s initial report suggested the creation of a ‘regulators’ group’, which would be more palatable for respondents to the Lamfalussy consultation than would a European Securities Regulator. The Lamfalussy report noted the drawbacks of the existing regulators’ committee, FESCO (the Forum of European Securities Commissions), which had no official status, worked by consensus, and whose recommendations were not binding. Interestingly, FESCO itself advocated the creation of a more formal regulators committee which could be involved in the legislative process, offering evidence that national IRAs were in favour of CESR. The final Lamfalussy report described an EU Securities Regulators Committee (ESRC), which would both act as an advisory committee to the European Commission in developing new law, and act alone as a fully independent committee of national regulators to ensure more consistent implementation of Community Law.

The decision to establish a new body was taken by all the EU institutions. Thus an Ecofin Council communication of November 2000 confirmed the Council’s support for the creation of a regulators’ body, but also asked that the Council perform a role concerning particularly sensitive issues. A European Council Presidency communication of December 2000 also supported the creation of a regulators’ body as a part of the Lamfalussy process, although it noted that prior harmonization of national regulatory functions would be a desirable prerequisite. The European Parliament expressed its concern that the Commission’s powers would be overly extensive following the implementation of the Lamfalussy process, with its extensive use of comitology procedures. This followed advice from the Parliament’s legal and constitutional affairs committees, with the latter especially stressing a lack of adequate procedures available for separating legislative from executive acts. But, the Parliament did not attempt to block the creation of CESR despite failing to obtain a ‘call-back mechanism’ for the European Parliament and/or Council of Ministers, which had been rejected in the Lamfalussy Committee’s final report. CESR was then created as ‘an independent advisory group on securities in the Community’ by a Commission Decision in 2001.

Many parallels can be found between the creation of CESR and that of the ERG. During the 1990s, several proposals were made for a Euro telecoms regulator, including by the Commission. Firms were divided, with newer operators hoping for the creation of a single European telecoms regulator, but existing suppliers being concerned that

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4 Reported on p.44, ibid.
harmonization of regulation across the EU via the ERG might damage their commercial prospects. But, ideas of a Euro-regulator were rejected by member states.

Instead, the Commission turned to the idea of a less prominent and powerful body. The genesis of the ERG lay in the Commission’s 1999 Communications Review which looked at updating and unifying the various pieces of EU legislation in telecommunications that had accrued over the previous fifteen years. A Commission communication (Commission 1999) of November 1999 mooted the idea of increased coordination of National Regulatory Authorities’ (NRAs’) decisions at European Union level. It claimed that stronger EU-wide coordination was necessary since the NRAs would be delegated more power by the new regulatory framework. The Communication also noted that existing procedures for cooperation with CEPT (the European Conference of Postal and Telecommunications Administrations) had not worked satisfactorily. The CEPT was an existing organisation run through consensus and in an inter-governmental manner- ie without binding powers on its national members, and often concerned with standard setting rather than liberalisation and regulation of competition. Initially, a High Level Communications Group involving the Commission and NRAs was established under the telecommunications Framework Directive (European Parliament and Council 2002) to help improve the consistent application of Community legislation and maximise the uniform application of national measures. However, rapidly a short Commission Decision replaced it with a European Regulators Group for electronic communications networks and services in July 2002.

The history of CESR underlines the earlier general points made about ERNs. First, their establishment was closely linked to implementing EU regulation. They flowed from perceived difficulties of introducing the single market at the national level and coordinating a host of diverse NRAs. Second, ERNs followed the rejection of ideas of Euro regulators. They represented a response to coordination problems- ie delegation to increase efficiency- without creating a new supranational body. Third, they were proposed by the Commission or Commission-created bodies, accepted by national governments and IRAs, then set up formally by Commission decision. They are the fruit of an agreement between several actors.

The institutional design of ERNs: composition, functions, powers, resources and rivals

The European Commission and EU member states created ERNs but analysis of their institutional design reveals the weaknesses of the new ERNs and the strength of their

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principals, namely the EU Commission and national governments and regulators. Their membership is wide and ambiguous, making autonomous action difficult. They are given very broad functions but few powers. Their resources are limited and they face rival venues both for ‘networking’ functions and for more traditional government functions of deciding through hierarchy and hard law. A detailed analysis of the institutional design thus reveals limited delegation, many controls and an institutional context that allows policy makers to work through alternative organizations.

Composition of ERNs

The membership of ERNs is based on formal representatives from member state NRAs. It differs considerably from informal networks such as the Florence and Madrid forums, which involve private and public actors, including experts and regulatees. The role of the Commission has an important position. Nevertheless, the boundaries of ERN membership are not always clear cut, while the position of the Commission is ambiguous between a full member and an external ‘overseer. Here, we focus on formally-constituted ERNs (for analysis of the forums, see Eberlein 2005), whose features are well illustrated by the ERG and CESR.

The ERG consists of representatives of IRAs from the twenty-five EU member States. However, eligibility soon posed difficulties with respect to the degree of independence required for membership. The original 2002 Decision stated that the ERG “shall be composed of the heads of each relevant national regulatory authority in each Member State or their Representatives”. (Commission 2002: article 4) but also that it should be a group of independent national regulatory Authorities” (Article 1). The preamble made reference to ensuring sufficient separation from suppliers, especially if a member state had publicly-owned suppliers. 10 This raised important issues of whether an IRA was sufficiently independent from publicly-owned suppliers. The ambiguity was ended, at least in formal terms, but a new decision in 2004 (Commission 2004) that simply stated that eligible IRAs would be listed in an Annex and kept under review by the Commission. Nevertheless, this decision allowed the Commission considerable scope for further intervention to decide the ERG’s membership.

The ERG also has observers from EU Accession/ Candidate States and EEA States. In 2005, ERG granted observer status to Turkey and Croatia as EU accession countries. In addition, the Commission sits as an observer at the ERG. Its representatives are able to remain in the ERG whilst confidential issues are discussed. Although the Commission is represented on the ERG, it also works ‘jointly’ with the latter, as when they issued a joint paper on antimonopoly remedies. So the Commission appears to be both a partner with the ERG and a quasi member, as well as being one of its formal principals.

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10 Commission 2002: Preamble s2: “In accordance with the Framework Directive, Member States must guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services must also ensure effective structural separation of the regulatory function from activities associated with ownership or control.”
CESR is composed of one senior member from each member state’s competent authority in the securities field, with EEA representatives as observers. The identification of ‘competent authorities’ with the requisite degree of independence was a problem for CESR as it was for ERG. As at 2002, countries such as France, Finland, and Ireland all lacked a single NRA for the financial sector, with responsibilities being split between different bodies\(^{11}\). However, by 2002, CESR had members from most member states. the Commission is an observer at CESR, but can “it shall be present at meetings of the Committee and shall designate a high-level representative to participate in all its debates”, except when the Committee discusses confidential matters relating to individuals and firms in the context of improving cooperation among European Regulators\(^{12}\).

Functions and powers of ERNs

The functions given to ERNs are very broad and strongly linked to the Commission, at least according to the Decisions that create them. Thus for instance, the Commission Decision establishing CESR defined its role as “to advise the Commission, either at the Commission's request, within a time limit which the Commission may lay down according to the urgency of the matter, or on the Committee's own initiative, in particular for the preparation of draft implementing measures in the field of securities” [Art.2]. More specifically, CESR was required to consult extensively with market participants, consumers, and end-users, to present an annual report to the Commission, which would also be sent to the Parliament and Council. This role was expanded in CESR’s Charter to cover other tasks such as reviewing of implementation and application of Community legislation, the issuing of guidelines, recommendations and standards for its members to introduce in their regulatory practices on a voluntary basis, and the development of effective operational network mechanisms to enhance day-to-day consistent supervision and enforcement of the Single Market for financial services.

CESR was given roles within EU legislation on financial services. The ‘Lamfalussy process’ sets out a four level procedure which moves from the definition of the overarching regulatory framework through to its enforcement. The first stage follows standard EU procedure with the Commission making legislative proposals based on stakeholder consultation which are subsequently adopted through the co-decision process by the Council and European Parliament. This stage also sets out the implementing powers of the Commission. Level two concerns the adoption of implementing legislation laying down technical details for the framework principles agreed at level one. Here, the comitology procedure is used, with votes being taken by qualified majority at the European Securities Committee (ESC). The European Parliament is also consulted on the draft implementing measures and is given one month to pass a resolution on the final legislation where it considers the Commission to have exceeded its implementing powers. Level three is focused on the consistent implementation of Community legislation across the Member States. Here, comparisons of national regulatory practices are made and


\(^{12}\) Article 3.1, CESR, 2002, CESR Charter
recommendations for common standards are proposed. The final level concerns the monitoring of compliance of Member State laws with Community legislation. Where necessary, the Commission can pursue legal action through the European Court in cases where compliance is lacking.

CESR’s involvement in this process relates specifically to the second and third levels. But, its roles are mainly to provide advice and help to establish non-binding norms, a form of ‘soft law’. Moreover, its position is heavily dependent on other actors in the policy process, especially the Commission. Thus while level two legislation is adopted through formal EU comitology procedures, CESR has been given a mandate by the Commission to prepare technical advice in the form of implementing measures which it does based on its own formal consultation procedure. At level 3, CESR is responsible for leading the coordination activities. It can issue non-binding common guidelines and standards aimed at facilitating the interpretation and facilitation of Community legislation. It addition, it can conduct benchmarking exercises aimed at gauging Member State compliance with such standards. This is, in many ways, a complementary albeit softer activity to the Commission’s compliance tests at level four. It underlines that CESR can have influence through the creation of norms or ‘soft law’. But, overall, whilst CESR has been given a clear mandate within the Lamfalussy legislative process, it has considerable scope to influence level two Directives only insofar as it can influence the Commission, and risks being constrained by the ESC. Thus CESR’s major roles are advisory and coordination of implementation of Community regulation.

Similarly, the role of the ERG is to “advise and assist the Commission in consolidating the internal market for electronic communications networks and services”, and to “provide an interface between national regulatory authorities and the Commission”. (Commission 2002, article 3). It too was asked to “consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner”. (Commission 2002: Article 6). However, its mandate is even less wide than CESR’s in relation to the definition of implementing measures, as there is no well-specified equivalent to the Lamfalussy process for telecommunications legislation.

The powers of ERNs are often limited. Thus for instance, ERG decisions are not binding on its members. Even deciding its own rules of procedure required considerable agreement among member states and lacked autonomy from the Commission: these should be adopted by consensus or in the absence of consensus, by a two-thirds majority vote, one vote being expressed per Member State, subject to the approval of the Commission (Commission 2002: Article 5). CESR enjoyed marginally greater powers over its own internal functioning in that the Decision creating it allowed to adopt its own rules of procedure and organise its own operational arrangements. Nevertheless, the Committee had advocated that CESR use a voting procedure modeled on Qualified Majority Voting where it was not possible to reach consensus, and this has been adopted in CESR’s operations.
Thus ERNs face ambitious aims and are asked to consult widely and cover broad fields. Yet they lack formal powers to impose decisions on their members and indeed even to organize their own internal arrangements.

Resources of ERNs

The material resources of ERNs are decided by their members and the European Commission. ERNs are small organizations in terms of staffing and spending. Thus for instance, CESR secretariat is based in Paris started with 7 staff plus a secretary general, although this had grown to 15 by 2005. It also has a small budget, which led to comments from Baron Lamfalussy, that CESR lacked sufficient staff to make sure that the new regulatory framework worked properly\textsuperscript{13}. In 2002-3, the budget for CESR was increased by a third, apparently due to a willingness by members to contribute more and by 2005 it spent 2.4m euros (CESR Annual Report 2005: 77). The ERG has even fewer resources of its own: the Commission provided its staff, which appeared to number three persons in 2003, while from 2006, the ERG secretariat functions will from 2006 be integrated in the services of DG Information Society and Media (ERG Annual Report 2003, 2005). Hence ERNs are small even relative to the Commission, let alone the national IRAs and especially regulated firms.

Alternative decision-making venues

ERNs face several rivals for the functions of decision making, even at the EU level. The most important are the formally established EU committees. Thus for instance, in securities, the European securities committee (ESC) has significant powers over EU legislation. Like CESR, it was set up by a Commission Decision (Commission 2001) after lengthy discussions involving national governments, and the European Parliament. It is composed of representative of EU member states, thereby integrating national governments. It acts as an advisory committee to the Commission in both policy issues and draft legislation; this mandate is considerably more precise than CESR’s broad and undefined advisory function. In addition, in the so-called ‘Level 2’ of the Lamfalussy procedures, when broad directives are being proposed by the Commission, it acts as a normal EU committee- ie one that operates under the comitology procedure and whose approval is needed for Commission proposals to be passed without going to the full council of ministers (see Bergstrom et al 2004). Thus the ESC’s procedures form part of well-established EU comitology and it has legal powers over legislation.

A similar situation exists in telecommunications, with the existence of Communications Committee (Cocom), also set up by Commission decision (European Parliament and Council 2002). It is also composed of representatives of member states and acts both as an advisory Committee and a regulatory committee in accordance with general

\textsuperscript{13} Financial Times 13.3.02
Comitology procedures. In addition, it provides a platform for an exchange of information on market developments and regulatory activities.

CESR and the ERG also have well-established European and international organisations that operate through inter-governmental processes, notably consensus and the absence of powers to impose decisions on members. In telecommunications, there is the CEPT, created in 1959, extending beyond the EU to all European states. It has played an important role in standard setting as well as bringing together representatives from national administrations and traditionally, also operators. Then there is the ITU (International Telecommunications Union), which has members across the world. In securities trading, there is also IOSCO, founded in 1984, which is composed of securities regulators from around the world and seeks to set international standards, notably via ‘MOUs’ (memoranda of understanding). Its members cover more than 90% of the world’s securities markets and include the US.

Finally, there are rival informal networks of regulators that may result in institutional competition and venue shopping by those regulatees that can operate in a multi level policy process. In particular, in telecommunications, the Independent Regulators’ Group, established in 1997 as a group of European National Telecommunications Regulatory Authorities, continues to exist alongside the ERG. It has the advantage (for IRAs) that the Commission is not a member and of being run by IRAs themselves. Its mere presence raises questions over the level of confidence in the independence of the ERG with which it competes. Similarly, CESR’s power (specifically at level 2) is constrained by the ESC to which it is accountable. In electricity and gas, there are also the Florence and Madrid forums, that include private sector participants, although the Commission is also closely involved. Here, the role of the Committee of European Energy Regulators may potentially be eclipsed by the European Regulators Group for Energy and Gas.

Thus national governments, IRAs and the European Commission all have alternative venues for coordination to CESR and the ERG. The two networks are in competition for resources but also attention and power with other networks or committees that have their own distinct institutional advantages, such as greater formal powers or the ability to work without the Commission.

Conclusion

ERNs have been established in economically and politically strategic domains, notably network sectors. Using a PA framework, the reasons both for the decision to delegate and the institutional design of the delegation have been analysed. Delegation was undertaken by the Commission, but after extensive discussions with the member states and European Parliament. It was justified by the need for greater coordination in implementing EU regulation- ie by greater efficiency. However, the creation of ERNs only took place after another solution, the creation of Euro-regulators, had been rejected. ERNs can indeed be seen as a ‘second best’ method of dealing with implementation of EU regulation. They certainly appear a compromise between actors pressing for greater European integration and those fearing it, especially national governments.
The institutional design of ERNs reflects their genesis. They have been given lofty tasks, but few powers and resources. The European Commission and national actors (governments and IRAs) maintain many powers over ERNs. In addition, the existence of several other regulatory networks and organisations creates rivals to ERNs.

What are the implications of these findings for wider claims of the development of ‘network governance’ in Europe? The introduction set out three features of ‘network governance’: offering a form of sectoral governance; shift of power from previously well-established levels to organizations or individuals whose main role is linking actors; changes in the mode of governance, away from hierarchy towards more ‘horizontal’ and cooperatives forms of decision making.

The empirical findings of the case using the PA framework can be set against these three features. The analysis suggests that in formal institutional terms, ERNs bring together national IRAs and the European Commission. But, they do not bind together sectoral actors from private and public sectors- although ERNs are required to consult private actors, those actors are not full members. Moreover, the lack of powers of ERNs to impose decisions on national IRAs and their small size and reliance on the EU Commission (going so far as providing the secretariat for the ERG) suggest that ERNs are far from offering ‘sectoral governance’.

With respect to the second feature, few powers have been delegated to ERNs. Even worse (for claims of the spread of ‘network governance’), existing organisations retain strong formal powers- notably the European Commission, traditional EU committees, national governments and IRAs. There is little sign of a major shift in the allocation of formal powers in regulation.

This links to the lack of the third feature of network governance. In terms of the formal structure of decision making, hierarchy remains strong. In particular, EU Committees remain and continue to operate through voting and legislation. For their part, the ERNs have many aspects of a traditional inter-governmental organisation, including the importance of working by consensus. Indeed, their main formal powers are linked to that most hierarchical method of operating, namely passing legislation, on which they advise.

Before ending, the limits of the conclusions should be acknowledged. They largely flow from PA analysis, which focuses on formal institutional structures and the relationship between principals and agents. ERNs suffer from severe weaknesses in their formal position, but may be able to develop informal resources and linkages. These could include information, expertise, reputation and trust. If ERNs are able to obtain these resources, they may wield power that is out of proportion with their formal position. Moreover, as the regulatory space literature suggests, other actors may be more important to an organisation than its formal principal. For ERNs, linkages with the industry may supply a vital source of power. Thus ERNs may be able to alter governance by going beyond the formal institutional framework. But, the analysis presented here certainly
suggests that network governance is far from the formal institutional position of regulation in Europe today.
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