

**CONCEPTUALIZING AND  
THEORIZING EU REGULATORY  
NETWORKS**

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## **Conceptualizing and theorizing EU regulatory networks**

Michael Blauburger & Berthold Rittberger

**Abstract:** European regulatory networks (ERNs) play a central role in the formulation, deliberation and implementation of EU policies and have thus become objects of investigation in fast growing scholarly literature. We identify two shortcomings – one conceptual, one theoretical – in the literature on ERNs: First, we argue that the principal-agent approach, which is conventionally used to conceptualize ERNs, overlooks and even misrepresents central features of ERNs. By introducing and applying the “orchestration” framework to ERNs we demonstrate that it better captures the specific characteristics of ERNs. Secondly, explanations for the choice and design of ERNs have treated functional and power-based accounts as mutually exclusive. We argue instead that explanatory leverage can be gained by combining these two accounts by specifying their respective domains of application. While functional accounts enable us to illuminate why and under what circumstances ERNs are created in the first place (rather than EU agencies or delegation to the Commission), political accounts help us to shed light on variation in the design of ERNs (i.e. why actors opt for rather close or loose network structures). We illustrate the explanatory value-added of such an approach through two brief case studies on EU telecommunications and competition policies.

**Keywords:** European Union, governance, networks, orchestration, regulation.

## Conceptualizing and theorizing EU regulatory networks

### I. Introduction

EU regulatory networks (ERNs) are a pervasive feature of the EU's regulatory landscape and form an integral part of what commentators call the "Eurocracy" (Kelemen & Tarrant 2011) or the European Regulatory Space (Thatcher & Coen 2008, Levi-Faur 2011). Despite the rise of EU agencies and attempts by the Commission towards greater centralization of regulatory competencies, ERNs have proven remarkably resilient. While many ERNs resist the trend towards agencification, others are incorporated into newly created agencies, while still others have even been given an enhanced role in decentralized enforcement of European rules (Levi-Faur 2011). Previous studies have already come a long way in grasping the complex, multi-level character of ERNs (Coen & Thatcher 2005, Coen & Thatcher 2008, Eberlein & Grande 2005, Eberlein & Newman 2008) and in shedding light on the critical institutional design choices between centralized Commission competences, EU agencies or ERNs (Thatcher & Coen 2008, Kelemen & Tarrant 2011).<sup>1</sup>

Against this background, we make two claims, which aim at a more appropriate conceptualization of ERNs and at a better theoretical understanding of the functional and political rationales that underpin their formation and design. First, we argue that the concept of *orchestration*, recently introduced by Abbott and Snidal (2009, 2012) and further elaborated by Abbott *et al.* (2014b), is better suited than the often advanced notion of *delegation* to capture the informal and indirect style of governance, which is characteristic for ERNs. Secondly, rather than discarding *functional* or power-based *political* explanations of ERNs as either incorrect or mutually exclusive, we show that both strands of arguments can be combined fruitfully by focusing on their particular domains of application (Jupille *et al.* 2003). We illustrate the conceptual and explanatory value-added of such an approach by revisiting two important institutional choices concerning ERNs that have so far been

largely explained *either* politically *or* functionally: the adherence to network governance during the recent reform of EU telecommunications policy and the decentralization of EU competition policy enforcement.

## **II. Orchestration through ERNs**

According to our first claim, ERNs should be understood as compelling examples of *orchestration*, as conceptualized by Abbott *et al.* (2014b), rather than being described in terms of *delegation*. Most existing accounts of ERNs start from a principal-agent framework and conceptualize ERNs as instances of (non-) delegation. Before we introduce the orchestration framework to demonstrate its value added for the analysis ERNs, we will highlight the main assumptions and arguments that principal-agent approaches bring to the analysis of ERNs as well as the key criticisms encountered by this perspective.

### ***1. ERNs from principal-agent perspectives***

Thus far, scholarship on ERNs most commonly takes recourse to concepts inspired by the principal-agent framework to account for their creation and design. On the one hand, Kelemen and Tarrant define ERNs largely in the negative, i.e. by the absence of delegation, when addressing the “central design choice: *whether to delegate* regulatory authority to a centralised, EU-level body *or to leave* authority in the hands of national regulatory authorities ... cooperating through loose, decentralized regulatory networks” (Kelemen & Tarrant 2011, p. 923, emphasis added). On the other hand, notions of “double delegation” (Coen & Thatcher 2008, p. 51) or “dual delegation” (Eberlein & Newman 2008, p. 26) have been put forward to account for the particular multi-level character of ERNs. According to this conception, ERNs have two sources of delegated authority, as “they bring together two sets of agents from previous delegation” (Coen & Thatcher 2008, p. 52): the Commission and national regulators.

According to the principal-agent framework, delegation from principals to agents constitutes a *hard* and *indirect* form of governance (Abbott *et al.* 2014b): It is indirect, because the principal(s) institute a third party (the agent) to carry out decisions on the principal’s behalf and it is hard because of the mandatory nature of

these decisions. In line with a functionalist perspective on delegation, which is also common to the principal-agent framework (Pollack 1997), ERNs have been created to reduce the transaction costs of decision-making and policy implementation. ERNs are considered to assist domestic regulators in coordinating their activities by “providing ‘technical’ advice to the Commission, consulting the industry monitoring compliance with EU regulations, and establishing norms and benchmarks” (Coen & Thatcher 2008, p. 56). However, delegation decisions also come at a cost for the principal since the relationship between principal and agent is plagued by potential conflicts of interests and asymmetric information, resulting in shirking (whereby the agent is minimizing its efforts to fulfil his tasks) or slippage (whereby the agent pursues private interests that run counter to those of the principal) (see Hawkins *et al.* 2006, p. 8). As a result, the principal has to balance the expected functional benefits of delegating authority with the costs that accrue from controlling the agent in the post delegation phase.

The limits of a conceptualization of ERNs inspired by the principal-agent approach have been raised in various quarters. First, it is argued that the functional logic, which underpins principal-agent accounts, is indeterminate since functional problems can be translated into a myriad of institutional design options (cf. Thatcher & Stone Sweet 2002), among which ERNs are only possible solution. Second, some scholars argue that post-delegation dynamics are not well captured by the notion of a (formal) hierarchical control-relationship between the principal and the agent. Against the backdrop of increasing political uncertainty and the intractability of regulatory policy issues, Sabel and Zeitlin (2010) have argued that principals often may not know what the nature of the policy problem is and hence what their policy preferences are. Policy-making is thus seen as a process whereby “actors have to learn what problem they are solving, and what solution they are seeking, through the very process of problem-solving” (Sabel & Zeitlin 2010, p. 11). It is claimed that the formation of “networked deliberative decision making” structures, such as ERNs, allows the EU to develop a remarkable capacity for policy innovation and learning (Sabel & Zeitlin 2010, p. 2). Moreover, the deliberative, informal and non-hierarchical nature of problem-solving processes, which are characteristic for ERNs, defies the “command-and-control” logic upon which the principal-agent framework is based (Sabel &

Zeitlin 2010, p. 12). Even the proponents of the principal-agent framework partly acknowledge the conceptual limitations, in particular regarding the narrow focus “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” (Coen & Thatcher 2008, p. 68).

**2. *Introducing orchestration to the study of ERNs***

We argue that the orchestration framework developed by Abbott *et al.* (2014b) provides a new analytical perspective, which is particularly suited for capturing these specific characteristics of ERNs. The framework has already been successfully applied to empirical cases of hybrid, public-private European governance (Schleifer 2013). Our contribution demonstrates that orchestration also occurs in purely public governance arrangements. In contrast to delegation, orchestration is defined as a *soft* and *indirect* mode of governance through which an international organization “enlists and supports intermediary actors to address target actors in pursuit of (its) governance goals” (Abbott *et al.* 2014b, pp. 1-2). The framework distinguishes between three sets of actors: an orchestrator at the international level, an intermediary, and target actors at the national or subnational level. Whereas orchestration through private intermediaries often serves to “bypass states”, orchestration arrangements which include only public actors are designed to “manage states” in soft and indirect ways (Abbott *et al.* 2014b, p. 1). Applied to EU regulatory governance, this means that ERNs assume the role of an intermediary between the supranational Commission acting as orchestrator and national regulatory agencies (NRAs) as its domestic targets (see Figure 1).

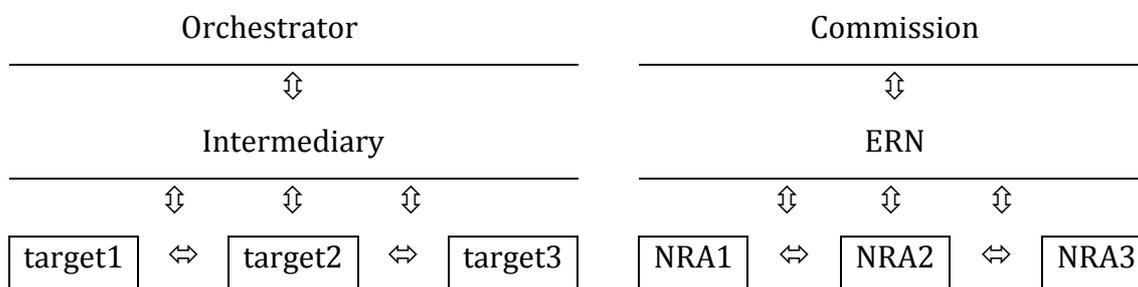


Figure 1: The orchestration framework and its application to ERNs

Orchestration differs from delegation and the concomitant principal-agent framework in a number of critical aspects. First, unlike in the principal-agent framework, the relationship between orchestrator and intermediary is not hierarchical, but based on voluntary cooperation: Orchestration is a *soft* mode of governance, since the orchestrator – other than the principal – cannot “command or control the intermediary” or agent respectively (Abbott *et al.* 2014b, p. 22). Second, the goals pursued by the orchestrator and the intermediary are correlated, since voluntary cooperation without goal compatibility would be impossible to obtain (see Abbott *et al.* 2014b, p 24). This stands in stark contrast to the principal-agent framework, which posits that principals and agents tend to possess incompatible goals, which gives rise to problems such as agency slack and slippage. Third, the relationship between orchestrator and intermediary is one of mutual dependence, since both actors possess qualities or capacities the other actor lacks; in the principal-agent framework, the principal delegates tasks to an agent to accomplish them more effectively, yet the principal can still resort to unilateral action. This is not an option for an orchestrator, who requires the cooperation of an intermediary (and vice versa) to obtain a particular governance goal (see Abbott *et al.* 2014b, pp. 23-24). The mutual dependence of orchestrator and intermediary also implies that both orchestrator and intermediary may have an interest in the initiation of orchestration. Various cases studies in the volume by Abbott et al. (2014a) find that orchestration is not only initiated “top-down” by the orchestrator, but that it is also demanded by intermediaries (and even targets) in a “bottom-up” fashion.

Conceiving ERNs in terms of orchestration thus offers several advantages over principal-agent and delegation approaches. First and foremost, the focus is directed away from formal institutional structures towards soft and informal elements of ERN governance. In formal terms, the Commission has only very limited control over ERNs, which, for their part, do not possess any significant formal decision-making powers over NRAs. Yet, ERNs may play an important role in EU regulatory governance by facilitating “open and collegial modes of governance” (Levi-Faur 2011, p. 812) and by “simultaneously inform(ing) EU policy and actual enforcement on the ground” (Eberlein & Newman 2008, p. 26). Secondly, the orchestration framework hints at a crucial precondition for governance through ERNs, which would

receive less attention from a principal-agent perspective: the correspondence of policy goals of the actors involved (Abbott *et al.* 2014b, p. 12). Given the absence of hard and formal control mechanisms against agency shirking, ERN governance presupposes the alignment or, at least, broad compatibility of policy goals between the Commission, NRAs and the ERN. As will be demonstrated in our case studies, while the Commission and NRAs may still disagree about concrete policy measures, e.g. regarding individual antitrust decisions or remedies, their informal cooperation through ERNs is based on a general agreement on policy goals, e.g. regarding the protection of competition and the liberalization of telecommunications. Thirdly, the orchestration framework captures the indirect mode of governance through ERNs and allows for describing the distinct roles of the actors involved. Thus, the Commission and national regulatory agencies are not just multiple principals of an ERN, but they assume different roles as orchestrator and target actors within the overall governance structure. The ERN also plays a separate role as an intermediary and can be conceived of as a collective actor in its own right, even though its composition may partially overlap with its alleged principals (Abbott *et al.* 2014b, p. 13).<sup>2</sup> In fact, contrary to a clear-cut principal-agent relationship, ERNs are typically composed of representatives from NRAs and often also include Commission officials. Finally, reframing the issue of ERN governance in terms of orchestration opens up new possibilities for comparison and, thereby, may contribute to a more realistic assessment of its potential and limitations. Rather than constituting a particularly “new” (Héritier 2002) or “experimentalist” (Sabel & Zeitlin 2010) mode of governance, examples of orchestration can be found across a wide range of issues in international governance ranging from development to financial policy, security to trade and human rights to climate change (see Abbott *et al.* 2014b). Moreover, as will be argued in the following section, orchestration may be more than just a “second best” alternative to harder and more direct forms of governance under specific circumstances.

### **III. Combining functional and political explanations of ERNs**

In the literature on the formation and design of ERNs, two sets of arguments are advanced, which are often treated as competitive and mutually exclusive. *Functional* explanations posit that ERNs are established to fill a “regulatory gap” between rule-

making authority located at the European level and implementation at the national level (cf. Eberlein & Grande 2005). As intermediaries, ERNs enable the Commission to indirectly draw on national regulatory agencies and leverage their authority in order to ensure consistent and effective application of EU regulation (Eberlein & Newman 2008, p. 26). On the other hand, *political* explanations view the establishment of ERNs largely as driven by the motivations of the major players in EU regulatory politics to enhance their institutional power and secure influence over policy outcomes. Whenever member state governments are concerned about the redistributive consequences of EU regulatory policies (Kelemen & Tarrant 2011, p. 932), they jealously guard their remaining autonomy in implementation. As a consequence, ERNs constitute only a “second best” or “third best” option for the Commission and the European Parliament compared to the accretion of their own powers (Dehousse 2008, p. 796, Kelemen & Tarrant 2011, pp. 927-928) or to the creation of strong European agencies (Coen & Thatcher 2008, p. 67).

According to our second claim, functional and political explanations of ERNs should not be treated as competitive or mutually exclusive. So far, most theoretical accounts of ERNs have tended to favour *either* functional *or* political arguments in their analyses of the EU’s regulatory landscape. While we strongly sympathize with efforts to provide parsimonious explanations of ERNs, we believe that a combination of functional and political accounts, each with its particular domain of application (Jupille *et al.* 2003), greatly increases our explanatory leverage. We suggest that a refined functional account should fare particularly well in explaining the conditions under which ERNs are chosen over EU agencies (section 3.1), while political accounts help us to understand why ERNs display stark variation, i.e. why some networks exhibit rather loose or close ties to their orchestrator (section 3.2). To illustrate our argument, we revisit two EU policies involving ERNs, which are considered major examples of either political or functional accounts in the existing literature: telecommunications and competition.

### ***1. In defense of functionalism: Why ERNs are not Euro-crazy***

Functional arguments posit that EU member state governments delegate regulatory authority to EU institutions, such as the Commission and EU agencies, to obtain

unbiased information in technically complex areas, to coordinate the activities of national regulatory authorities by acting as hubs, and to address commitment problems (Dehousse 1997, Majone 1997, Thatcher 2011). As hinted at above, regulatory policy-making in the EU is characterized by a gap between policy-making authority located at the EU level and the implementation of EU legislation, which remains the prerogative of the member states. This may lead, for instance, to problems of late, incomplete and incorrect transposition of EU legislation, as well as to deficits ‘on the ground’ when it comes to policy implementation through national regulators and compliance by regulated industries (Groenleer *et al.* 2010). From a functional perspective, ERNs are considered to play an important role in improving the implementing capacity of national authorities by demanding a more consistent and effective application of EU regulation: “they function to advise the Commission, draft implementing legislation, coordinate national enforcement, promote information exchange among national regulators” (Eberlein & Newman 2008, p. 32).

Functional arguments have been criticized on conceptual and empirical grounds. Conceptually, the main problem with functional accounts in the literature on EU regulatory policy-making is that they are *indeterminate*: credible, independent regulation and regulatory capacity can be provided by different types of regulatory bodies or arrangements, e.g. by the Commission, EU agencies or ERNs (see Eberlein & Newman 2008, Kelemen & Tarrant 2011). Criticism is also advanced on empirical grounds, because functional accounts fail to explain why ERNs prevail in those policy areas where particularly strong functional pressures for hierarchical or delegated governance could be expected (Thatcher 2011, p. 792). However, we argue that a refined functional explanation has more explanatory leverage and analytical bite than suggested by its critics. In order to address the problem of indeterminacy, we distinguish between regulatory competencies on the one hand and operational capacities on the other hand. We argue that ERNs tend to thrive in policy areas where the EU’s regulatory competencies are highly developed, but its operational capacities are particularly weak. Operational capacities refer to the resources necessary for the implementation of EU rules and policies (Abbott *et al.* 2014b, p. 28). For instance, the effective implementation of regulatory standards may require the incorporation into the policies, operations and processes of target actors, such as firms. This, in turn,

requires expertise on the particular workings of the target actors as well as access to these actors (Abbott & Snidal 2009, p. 65). Consequently, we would expect that in policy areas where comprehensive EU rules exist, which, however, cannot be transposed and implemented across the board, but require case-by-case implementation and a high level of local, street-level expertise, ERNs tend to provide functional advantages over alternative regulatory institutions, such as EU agencies, which tend to have neither the personnel and financial capacities nor the “local” knowledge to effectively orchestrate the target actors.

In order to illustrate our argument, we take recourse to the case of EU telecoms regulation, which is employed by Kelemen and Tarrant (2011, pp. 937-939, cf. Thatcher 2011, p. 803) in support of their own argument about the “political foundations of the Eurocracy”. Following their line of reasoning, the persistence of network governance in the field of telecoms essentially reflects the power struggles between supranational institutions and protectionist member states:

The Commission and European Parliament sought to increase the power of supranational bodies over implementation. To date, however, their proposals have been blocked by member state governments concerned over the distributional consequences (...) If the power to implement rules on access to telecoms networks were transferred to a centralised European authority, NRAs [national regulatory agencies, the authors] would largely lose their ability to shield national champions from distributional consequences. (Kelemen & Tarrant 2011, pp. 937-938)

We disagree with this assessment of the two authors. Drawing on our distinction between regulatory competences and operational capacities, we take a closer look at the latest round of negotiations on EU telecoms regulation. In fact, *functional* reasons were prominent in the decision to uphold the regulatory network structure and not give way to demands for a supranational telecoms agency. From the outset of the reform process in 2006, the Commission’s main preoccupation was not with the existing regulatory framework as such, but with its inconsistent application across member states.<sup>3</sup> The issue of how to settle this operational capacity-deficit was hotly debated within the Commission. Its own impact assessment warned that a European

regulator might just create “another layer of regulation which would increase the overall administrative burden” (European Commission 2006, p. 21, cf. Simpson 2011, p. 1121). When the Commission nevertheless proposed the creation of a European telecoms agency (‘EECMA’) in 2007, the EP – not member states – was the first to reject the Commission’s proposal. Rather than building a supranational alliance in favor of a supranational telecoms agency, the EP provided functional arguments to support a policy of “back to basics”, proposing an enhanced ERN orchestrated by the Commission:

(EECMA) counters the principles of subsidiarity, taking power away from Member States and NRAs who are on the field. It would be unnecessarily remote from the very markets it is designed to regulate, operating in isolation from those with day-to-day knowledge of those markets (...) The rapporteur argues that we should not be too quick to discard the positive qualities found in the current European Regulators Group for electronic communications networks and services (ERG), although notes that some reform is needed for its future success. (...) Thus, the rapporteur proposes (an enhanced network) which would take on many of the functions of the EECMA without taking on the nature of a heavy agency and would be based upon the good practice of the ERG whilst streamlining its functioning and working methods (...) This would (ensure) a greater degree of efficiency and legitimacy than the ERG has today, whilst safeguarding the effective participation of the National Regulatory Authorities (NRAs), and their invaluable on the ground experience. (European Parliament 2008, p. 88)

The rapporteur’s functional claims, which were largely shared in the debate of MEPs as well, can hardly be interpreted as merely ‘strategic’ – given that they go against the EP’s institutional preference for supranationalism. Moreover, the EP is typically said to be an unlikely victim of capture by concentrated interests (e.g. of incumbent telecoms operators) over diffuse interests (e.g. of consumers) (Eising 2008: 12).

It was only after the Commission had insisted on the idea of a strong EU telecoms agency that member state governments intervened in the Council and turned the Commission’s proposal into a network structure. Contrary to the expectation of the

political explanation provided by Kelemen and Tarrant (2011), governments did not line up in support or opposition of the proposal pitting liberal member states against protectionist member states with high ownership stakes. The Commission's proposal was rejected by a majority of member states during Council negotiations (Coreper 2008: 2)<sup>4</sup> rather than just a "blocking minority" (Kelemen & Tarrant 2011, p. 939) and it included opposition from the UK, which is typically regarded as a "liberalization-enthusiast" in the field (Humphreys 2008: 12).<sup>5</sup> The final Council decision was taken unanimously and essentially justified with the same functional arguments that had been forwarded by the EP (Council 2009, pp. 71-73, Simpson 2011, p. 1127).

EU competition policy offers another prominent example of an ERN, which has been predominantly explained in power-political terms so far (cf. Kassim & Wright 2009, p. 744). On the basis of Council Regulation 1/2003, EU antitrust enforcement was largely decentralized in 2004 and national competition authorities and the Commission established the European Competition Network (ECN). Interest-based political explanations of the Commission's proposal for fundamentally reforming EU antitrust policy mainly interpreted decentralization as a strategy to subordinate national competition authorities to strictly hierarchical Commission control. The reform was described as a "clever attempt (...) to engineer ever greater centralization" (McGowan 2005, p. 1001) or even as an "imperialist move" by the Commission (Wilks 2005, p. 446). These interpretations, however, cannot account for the reform's broad approval, which was necessary for its enactment. Mere "rhetorical appeal" to "decentralization and subsidiarity" (Kelemen 2011, p. 166) is insufficient to explain why governments and national competition authorities would accept such an alleged disempowerment. Yet, the reform of EU antitrust was broadly supported by the Commission, member states, business and competition experts alike (Büthe 2007, p. 185, Kassim & Wright 2009, pp. 747-750).

In fact, rather than reflecting a power-political struggle between the supranational and national level-actors, the reform of EU antitrust enforcement and the establishment of the ECN were largely motivated by functional considerations. Before 2004, firms had to notify any planned agreement on restrictive practices to the Commission and wait

for its approval. The Commission had become a victim of its own success, facing rising numbers of antitrust cases throughout the 1980s and 1990s (Blauberger 2012). Against this background, the Commission proposed the decentralization of EU antitrust enforcement in 1999 and mainly justified its proposal by a deficit of operational capacities:

It is no longer possible to maintain a centralised enforcement system requiring a decision by the Commission for restrictive practices (...). To make such an authorisation system work in the Community of today and tomorrow would require enormous resources and impose heavy costs on companies. It is essential to adapt the system so as to relieve companies from unnecessary bureaucracy, to allow the Commission to become more active in the pursuit of serious competition infringements and to increase and stimulate enforcement at the national level.

(European Commission 1999, p. 4)

Five years after its implementation, the Commission and national competition authorities displayed widespread agreement in their positive assessment of the reform and the functioning of the ECN (European Commission 2009, Kekelekis 2009). Even if one treats these political statements with caution, there is, indeed, strong evidence that the ECN functions in the way proclaimed (Kassim & Wright 2010, p. 16). Most strikingly, since 2004, actions against infringements of EU antitrust rules have “undergone an eightfold increase” (Wils 2013, p. 296), which is not the result of increased enforcement activities of the Commission, but owing to the additional operational capacities generated through the involvement of national competition authorities. Moreover, as will be shown in the next subsection, the hierarchical relationship between the Commission and national competition authorities, which was predicted by political accounts of the reform, is not reflected in the practice of the ECN so far.

In sum, to explain why policy-makers choose a particular regulatory governance arrangement over another, we argue that functional explanations fare better than their reputation suggests. What we tried was to highlight the *scope conditions* for functional accounts, i.e. when they should be particularly insightful and possess high

explanatory potential: The higher the gap between centralized regulatory rule-making authority and a lack of operational capacity “on the ground”, the more likely it is that functional pressures will inform and direct political actors’ choices. It was under these specific conditions, that the EP opted for a reformed telecommunications network and that the Commission was willing to decentralize and orchestrate the implementation of EU antitrust rules. Both cases thus run counter the expectation about their traditional institutional-political preference for supranationalism.

## **2. *Making the most of political accounts: Explaining intra-institutional variation***

Our attempt to demonstrate the value-added of functional arguments does not imply that we dismiss political arguments. It may very well be the case that ERNs are established for mainly political reasons under different scope conditions, e.g. if conflict among member states precludes delegation of significant regulatory competences in the first place (as was arguably the case with the Open Method of Coordination in social policy) (cf. Idema & Kelemen 2006 , p. 117). Moreover, we suggest that the argument about ERNs being “second best” does not exhaust the potential of political explanations. While most scholarship has thus far sought to explain the choice of a particular regulatory arrangement over a set of alternatives, rather little attention has been paid to the observation that ERNs themselves come in different forms. Various studies have already shown that regulatory networks in EU policy-making display considerable variation with respect to their institutional design and their political environment (Coen & Thatcher 2008, pp. 61-66, Kassim & Wright 2010), but we lack a systematic explanation to tap differences among ERNs. On the one hand, we observe ERNs, which *closely* tie the Commission and national regulatory authorities together; on the other hand, some ERNs enjoy greater independence from the Commission, i.e. they provide only a *loose* link between the orchestrator and its targets. Such close or loose network structures are not only reflected in the *formal-legal* relation between the Commission and an ERN, but also in the independence or dependence of an ERN on *financial* and *personnel* resources from the Commission, and in the *exclusivity* of their relationship (i.e. in contrast to a situation where alternative venues and mechanisms for policy coordination exist).

How can we account for the design differences displayed by ERNs? In line with the logic of an interest-based political explanation, we hold that agreement or disagreement about concrete implementing measures and individual decisions helps us to account for the actual design of ERNs, i.e. whether they display close or loose network structures. Even though governments, NRAs and supranational actors agree that, in order to effectively implement common policies, an operational capacity deficit has to be addressed by way of activating an ERN, they can still disagree in their assessment about individual implementing measures. Disagreement may stem from various sources such as redistributive conflicts, inter-institutional power struggles as well as technical disputes about efficient problem-solving.<sup>6</sup> When not only overall policy goals, but also preferences about implementing measures are aligned among governments, NRAs and the Commission, we expect the formation of close ties between ERNs and the Commission, the latter assuming the role as unchallenged orchestrator. Where, however, despite an overall agreement on policy goals, the Commission and NRAs disagree more frequently on the choice and application of individual implementing measures, ERNs tend to preserve greater independence and the leadership role of the Commission tends to be contested. Looser regulatory networks are the result. Again, we employ the telecoms case to demonstrate that a political explanation allows us to account for the design of a rather loose network structure, in which the Commission often plays only second fiddle. We then contrast this case with the ECN, which displays very close ties with the Commission.

The Body of European Regulators for Electronic Communication (BEREC) is a good example of a *loose* network structure. BEREC was built on an already existing network structure comprising national telecom regulators, the European Regulators Group (ERG). When it was established in 2009, the member states made sure that BEREC would be independent from the Commission, in legal and financial terms as well as with a view to personnel resources. The independence of BEREC is firmly established in its founding regulation (1211/2009), which posits that BEREC's central body, the Board of Regulators "shall neither seek nor accept any instruction from any government, from the Commission, or from any other public or private entity". The same article grants the Commission only observer status when participating at

BEREC meetings (Article 4 of Regulation 1211/2009). BEREC's legal independence is not only reflected in the largely informal and non-hierarchical practice of the network, but also in quibbles over seemingly symbolic issues, such as its name or the location of BEREC's office: Whereas the Commission proposed a "European authority" (EECMA), member state governments advocated a mere "Group of European regulators" (GERT); the finally agreed "Body of European Regulators" (BEREC) is a compromise between these two positions. And while BEREC's office is located quite distant from the Commission in Riga, national telecom regulators operate another permanent secretariat in Brussels under the auspices of the "Independent Regulators Group" (IRG) – a parallel network structure without formal ties to and being only reluctantly accepted by the Commission (European Commission 2007b, pp. 5-6). Regarding BEREC's financial and personnel resources, member states countered attempts by the Commission to make the network dependent on the Commission's resources and argued that "in order to ensure (BEREC's) independence, it should not be funded either fully or partly from the Community budget" (Council 2009, p. 73). As a result, BEREC has to draw on a combination of resources from its office and NRAs as well as on the parallel structures of the IRG, e.g. to hold its plenary meetings (BEREC 2011a, p. 20).

The design of BEREC as a loose policy network reflects divergent views on how to implement and enforce European telecom regulations. Whereas NRAs and the Commission share the overall political goal of liberalizing telecommunications (and are usually considered to be quite successful in this regard, cf. Simpson 2013, p. 909), they partly disagree on concrete implementing measures. Their main differences concern decisions about regulatory remedies imposed upon telecommunication operators with significant market power (European Commission 2007a, pp. 66f., Simpson 2011, p. 1125). National remedies include decisions on many technical aspects specific to the telecommunications sector, e.g. regarding termination rates among operators, access obligations, cost accounting methodologies, etc. (BEREC 2011b). Despite this technicality, disagreement between NRAs and the Commission about national remedies may also involve redistributive conflicts, e.g. between incumbent and newly entering telecom operators, and NRAs have been eager to guard the independence of their ERN and of day-to-day decision-making from Commission

intervention, e.g. by opposing the extension of Commission veto powers regarding individual remedies (Simpson 2013, p. 911-913). Whereas the Commission would like to further harmonize remedies in order to increase overall consistency, NRAs point at diverse local market conditions and their power to decide flexibly (ERG 2007). These (moderate) disagreements are reflected in the relatively loose relationship between BEREC, its orchestrator and its targets.

In contrast to BEREC, the ties between the ECN and the Commission can be characterized as very *close* (Kassim & Wright 2010, p. 16). In formal-legal terms, the ECN is not independent from the Commission. Unlike in the negotiations over BEREC, the issue of ECN independence is not addressed at all in its foundational documents; rather the “close cooperation” within the network is emphasized repeatedly (Council 2002). Apart from representatives from national competition authorities, the Commission is a member of the ECN itself – not just as an observer, but a full member and acts as *primus inter pares*. Regarding financial and personnel resources, the ECN does not dispose of an own budget, a secretariat or staff, but is managed by a small unit within the Commission’s Directorate General for Competition (DG COMP, Kekelekis 2009, p. 37).<sup>7</sup> Finally, the ECN is the undisputed intermediary for the Commission and national competition authorities to jointly discuss all aspects of European competition policy; no competing parallel structures exist.

The basis and, at the same time, the result of this close relationship between the Commission, the ECN and national competition authorities is a broad convergence of competition goals and concrete policies. Already before antitrust enforcement was decentralized, there had been a clearly observable trend of convergence of national competition policies towards common EU standards (van Waarden & Drahos 2002). From the Commission’s perspective, the existence of a common “culture of competition” was the precondition for proposing the decentralization of antitrust enforcement in the first place (European Commission 1999, p. 3, Kassim & Wright 2009, p. 749). The ECN was not an entirely new creation, but could build upon pre-existing forms of informal cooperation (Monti 2004, p. 4). Following decentralization, the practice of the ECN has not just contributed to ensure the

consistent application of European antitrust rules, but even promoted the voluntary harmonization of antitrust procedures across member states (Cengiz 2010, p. 669). From the perspective of national competition authorities, close links between the ECN and the Commission are not perceived as a threat for their independence, but rather as a safeguard against anti-competitive influences at the domestic level (Blauberger 2012, p. 63). Moreover, the Commission remains eager to further promote consensus among ECN members rather than to govern national competition authorities hierarchically. The Commission's interest in a close relationship with the ECN and its cautiousness not to alienate the network's members is particularly obvious in its exercise of self-restraint regarding hierarchical intervention. Most importantly, Article 11(6) of Regulation 1/2003 grants the Commission the right to relieve national competition authorities from their competences in an individual case by initiating an investigation on its own. Whereas this provision was originally interpreted as proving the inherently hierarchical nature of the ECN (Cengiz 2007, p. 420) or, at least, adding a strong "shadow of hierarchy", it has actually never been used since the decentralization reforms in 2004. From the Commission's perspective, insisting on its superior power would constitute a "worst case scenario" which "could lead to a breakdown in trust that would jeopardize the operation of the network" (Kassim & Wright 2010, p. 18). A recent case in which the Commission has come close to using its ultimate power for the first time is particularly telling. In December 2011, the Commission opened a formal antitrust proceeding concerning alleged anti-competitive practices of various ebook-sellers, which were already under investigation by the British Office of Fair Trading (OFT). In their press releases, the Commission compliments (and the OFT fully confirms) the "close cooperation" and the "substantial contribution" made by OFT while emphasizing that its own proceedings were just initiated after "OFT had closed its investigations on grounds of administrative priority".<sup>8</sup>

In sum, BEREC and the ECN are supposed to fulfill similar functions, but the ties between the Commission and the ERN are much looser in the field of telecoms. Given persistent disagreements, NRAs have been very cautious, not only opposing stronger powers for the Commission itself, but also guarding against too close ties between the Commission and BEREC. By contrast, building on broadly convergent competition

policy goals as well as implementing practices, the Commission and the members of the ECN have developed a very close and cooperative relationship.

#### **IV. Conclusion**

In this research note, we pursued a conceptual and a theoretical objective. Conceptually, we introduced the orchestration framework as an alternative to principal-agent approaches and demonstrated its suitability to capture the soft and indirect characteristics of ERNs. We revisited the cases of BEREC and the ECN to highlight and illustrate our main theoretical point: Rather than discarding either functional or political explanations for the formation of ERNs, our understanding of ERNs benefits from a combination of both accounts. BEREC as well as the ECN were mainly designed for functional reasons, i.e. to compensate for a lack of operational capacities at the EU level and to coordinate the decentralized implementation of common rules through NRAs in policy areas, which involve case-by-case decision-making and require considerable local expertise. In a second step, we drew on political explanations to account for differences between ERNs, which have been largely neglected so far, i.e. regarding the loose ties between BEREC and the Commission as compared to the close ties of the ECN to the Commission.

As a conceptual and theoretical framework, orchestration needs not be limited to cases in which the Commission assumes the role as orchestrator and in which ERNs are chosen *instead* of EU agencies. Accordingly, the impressive rise of EU agencies in the past decades does not imply that orchestration will yield to more formal, hard and hierarchical forms of governance. In his survey of 36 regulatory regimes in the EU, Levi-Faur (2011) finds that in over 40% of these regimes ERNs and agencies co-exist and “in most of these cases the networks are not independent from the agencies or the Commission” (Levi-Faur 2011, p. 823). This pattern is highly interesting from an orchestration perspective: Not only the Commission, but also EU agencies can be seen as potential orchestrators enlisting ERNs. Future research should explore the conditions under which EU agencies (rather than the Commission) enlist and cooperate with one or even several ERNs (rather than cooperating without an intermediary) to pursue specific regulatory objectives.

Akin to policy-making in transnational policy networks, the informal and soft nature of orchestration may lend itself to flexible and efficient solutions to address policy problems. At the same time, potential gains in flexibility and efficiency may come at the cost of a lack of transparency and accountability (see Slaughter 2004, Papadopoulos 2007). Orchestration blurs lines of political responsibility and inevitably gives rise to the question as to who is to be held to account when “things go wrong”? Our distinction between ‘close’ and ‘loose’ ERNs should be instructive in this regard: We expect that close networks, such as the ECN, should be characterized by a high level of like-mindedness among partaking supranational as well as domestic regulators (Cengiz 2010, p. 674), which increases the propensity for groupthink and thus a lack of critical reflection and immunity to criticism. In turn, loose networks should display a more heterogenous and pluralistic set of views by not excluding “weaker interests or actors whose preferences do not coincide with the network’s ‘mainstream’ orientation” (Papadopoulos 2007, p. 481). While the latter scenario is more conducive to effective accountability than the former, future research could thus explore whether loose ERNs are more accountable than close ERNs.

## Notes

<sup>1</sup> While this contribution challenges some of the assumptions and arguments in the debate about the formation and design of ERNs, there is a fast growing literature on ERNs, highlighting the consequences and effects of ERNs. Studies have addressed, inter alia, the impact of ERNs on the domestic adoption of regulatory standards (Maggetti & Gilardi 2011), the autonomy and discretion of domestic regulators (Yesilkagit 2011, Egeberg & Trondal 2009), the coordination among domestic regulators in ERNs (Van Boetzelaer & Princen 2012), or the regulatory powers of domestic regulators and their organizational growth (Maggetti 2013).

<sup>2</sup> While the orchestration framework has an affinity with network approaches (Börzel & Heard-Lauréote 2009, Kahler & Lake 2009) by emphasizing informal non-hierarchical actors relationships, orchestration is more specific since it differentiates among the different actor positions (orchestrator, intermediary, target) within the overall governance arrangement.

<sup>3</sup> See, e.g. the letter of then-Commissioner Viviane Reding of 30 November 2006 to the European Regulators Group, online: <http://www.irg.eu/template20.jsp?categoryId=260351&contentId=543347> (Last checked: 5 December 2013).

<sup>4</sup> See also “Telekomrat bremst EU-Kommission aus”, *Frankfurter Allgemeine Zeitung*, 2 November 2008, p. 19

<sup>5</sup> See also “Opposition to proposed EU telecoms authority grows”, Euractiv, 29 February 2008. The article reports: “The latest blast came from the British regulator Ofcom, supposedly one of Commissioner Reding's closest allies in her battle to reshape the European telecoms sector ... Nevertheless, when requested to speak about EECMA, Ofcom Chief Executive Ed Richards, speaking in the European Parliament this week, reiterated his bitter point of view. The new body would increase bureaucracy and costs, meddling with activities already carried out by existing authorities, he underlined. His comments echoed similar criticisms already raised by other regulators, the ERG as a whole, member states, incumbent operators and the European Parliament.”

<sup>6</sup> The argument that conflict over implementing measures may often have a distributional component does not invalidate our claim about the functional underpinnings of ERNs under the conditions specified in 3.1. The purpose of establishing an ERN can be seen as a coordination game with distributive conflict (Krasner 1991), whereby the parties involved agree to coordinate their activities to avoid undesirable outcomes, yet they may still disagree over the preferred measures to implement policy decisions.

<sup>7</sup> See:

[http://ec.europa.eu/staffdir/plsql/gsys\\_www.branch?pLang=EN&pId=319&pDisplayAll=0](http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=319&pDisplayAll=0) (Last checked: 5 December 2013).

<sup>8</sup> Commission press release IP/11/1509 of 6 December 2011: “Antitrust: Commission opens formal proceedings to investigate sales of e-books”. OFT case closure summary: <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/e-books>. (Last checked: 5 December 2013).

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