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# How to tame the beast: the diverse development of European networks regulating finance and competition

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## ABSTRACT


European regulatory networks are increasingly becoming crucial venues for European governance. They typically emerged as relatively loose groups of national authorities in charge of meta-regulating sectoral policies. However, in the medium term, they experienced dissimilar developmental patterns. On the one hand, some networks (such as the Committee of European Securities Regulators – CESR) have been progressively institutionalized, transformed into European agencies, and acquired considerable regulatory powers, including enforcement. On the other hand, other networks (such as the European Competition Network – ECN) remained more flexible networked organizations embodying a soft coordination approach. This article aims at mapping these divergent patterns and explore their determinants. To do so, we investigate the cases of CESR and ECN with a documentary and interview-based comparative inquiry. Results indicate that agencification has also been a strategy enacted by European institutions, using the financial crisis as a window of opportunity, to regain control over a powerful network – CESR – that came to constitute an increasingly autonomous layer of governance. Contrariwise, as ECN did not spin out of control, its trajectory exhibits a remarkable stability.

**KEYWORDS** Competition; enforcement; European networks; finance; regulation; EU

## Introduction

This article focuses on the transformation of European regulatory networks (ERNs) into European Union (EU) agencies. Dealing with this question is crucial to understand the conditions for the emergence and consolidation of a multilevel political-administrative order (Curtin & Egeberg, 2009; Trondal & Bauer, 2017). While being increasingly diffused worldwide

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(Slaughter, 2004), regulatory networks are particularly prominent and organizationally sophisticated in the EU. They typically take the form of European administrative networks (Mastenbroek & Martinsen, 2018) with meta-regulatory powers. As such, they represent the cornerstone of regulatory governance in the EU, a differentially integrated polity relying on task-specific jurisdictions than span across multiple levels of governance (Bach & Ruffing, 2013; Coen & Thatcher, 2008; Coen & Windhoff-Héritier, 2005; Danielson & Yesilkagit, 2014; Mastenbroek & Martinsen, 2018; Vantaggiato, 2019). These European regulatory networks correspond to networked organizations that gather sector-specific independent regulatory agencies (IRAs) from member states and associated countries, while usually enjoying a certain autonomy from both the domestic and the European level. They have been established with the aim of, on the one hand, facilitating regulatory harmonization and – more recently – enforcement in the European Union and, on the other, of favoring information exchange, collaboration, and mutual support among domestic IRAs. The multilevel architecture wherein ERNs are enshrined is however complex, highly differentiated, and dynamic. Thereby, ERNs come in many different shapes and colors, and they change over time (Levi-Faur, 2011). Some of them progressively acquired organizational resources and further regulatory powers, and went through an institutionalization process to become European agencies working under EU law, while others remain stably configured as more flexible networks mainly undertaking a soft coordination approach (Maggetti & Gilardi, 2014). This begs the question: what accounts for these different trajectories of institutionalization?

The process of EU-agencification has been examined from several points of view, among which three can be identified as particularly pertinent for the present discussion. A **first** answer to the question of network institutionalization follows a functional perspective. For instance, following Mathieu (2020), the cross-sectoral variation of functional stakes accounts for the observed degree of regulatory integration. Agencification is thus expected to depend on the extent to which it is perceived as a solution to a pressing policy problem. A similar functional argument has been applied to the attribution of new and more extensive regulatory powers to existing agencies (Scholten & Scholten, 2017). The **second** argument is based on the politics of delegation, according to which EU-level regulatory authorities can be created only in policy areas where distributional conflicts are relatively low, that is, where the involved political actors do not oppose the creation of an agency (Tarrant & Kelemen, 2007). Accordingly, institutionalization is expected to take place in areas where the Commission, the European Parliament, and member states can find an agreement (Kelemen & Tarrant, 2011). The **third** line of reasoning follows an organizational perspective accounting for the formal structure of networks. Since agencification involves a

centralization of EU executive power under the auspices of the Commission, and the formal structure of networked organizations shapes their repertoire of political action (Egeberg et al., 2015), one would expect that the presence of more formalized European regulatory networks opposing this centralization process in specific sectors would possibly prevent the creation of fully-fledged EU agencies in these areas (Thatcher, 2011).

These studies are of undoubtable value to understand the creation and functioning of ERNs and EU agencies. However, their dynamics of institutionalization deserve additional attention. In this article, we focus on two specific regulatory networks presenting different trajectories: the Committee of European Securities Regulators (CESR) which brings together national financial regulators, and the European Competition Network (ECN), which ensures the effective cooperation of national competition authorities, as well as the enforcement of EU competition rules. These cases are particularly puzzling, as CESR and ECN are comparable on many functional, political, and organizational dimensions for which one would have expected a similar evolution, and yet their trajectories are highly divergent. Indeed, financial regulation and the regulation of competition entail similar functional stakes, as they incorporate an economic logic of delegation geared towards the need for ensuring credible commitments. They also have analogous distributive effects, focusing on the same type of regulatory target – large private firms – and both promoting competitiveness, transparency, and market integration. What is more, at the early stages of network development, both CESR and ECN displayed about the same level of organizational formalization. EU institutions are usually more in demand of expertise and advice in the area of financial regulation than for competition policy, for which they can rely on Directorate-General for Competition (DG Competition); however, such governance capacity has been (and could have still be) provided by the dedicated network CESR (De Visscher et al., 2007; Maggetti & Gilardi, 2011) without any need for further institutionalization and agencification. Similarly, while the direct creation of an independent competition authority at the EU level would have been probably opposed by the Commission to prevent a potential rival to DG Competition, once created ECN a dynamic of empowerment and autonomization would have been plausible as well, in the light of the typical trajectories of network development and evolution (Martinsen & Jørgensen, 2010; Vantaggiato, 2019). Two further contextual elements corroborate the comparability between CESR and ECN. They are both top-down, mandated networks, and they have been established in a similar time frame, CESR in 2001 and ECN in 2003.

However, in spite of these similarities, CESR has progressively acquired regulatory powers and has been eventually transformed into an agency (Ruffing, 2019), whilst the ECN's trajectory is one of remarkable stability (Kassim & Wright, 2010; Vantaggiato et al., 2020). What follows is an

investigation into what can account for this divergence, starting from our **main argument**, to be developed and qualified in the next section: agencification has been a means to regain control over CESR – to ‘tame the beast’ – that is, to make it *less* independent from the EU institutions, after it unexpectedly developed more powers and started behaving as an increasingly autonomous network located on a new layer of governance in between the national and the supranational level (see Egeberg & Trondal, 2011). In other words, we show that taking back control is another determinant of agencification, in addition to those mentioned earlier. The same did not occur to ECN as it never exceeded the scope of its mandate.

### The differential evolution of regulatory networks

The evidence at hand shows that, overall, European regulatory networks evolve over time. They have progressively acquired organizational resources and regulatory powers (Levi-Faur, 2011; Maggetti, 2014b). They also started producing and disseminating soft rules – in the form of non-binding standards, guidelines and recommendations in a number of important domains, such as banking and finance, electricity and gas, telecommunications, and competition regulation – that have been quite consistently adopted at the domestic level (Maggetti & Gilardi, 2014). In doing so, they came to enjoy a certain autonomy, which tends to increase over time (Maggetti, 2014a). European networks have been sometimes transformed into European agencies. As a result, European agencies have become an established feature of the EU multilevel polity, factually overcoming the boundaries of the Meroni doctrine (Meroni v High Authority [1957/1958] ECR 133) that would have prevented the delegation of powers to independent bodies. Nowadays, more than 30 agencies take part in the EU regulatory process, by filling in a governance space that was either empty or populated by more flexible European regulatory networks (Mastenbroek & Martinsen, 2018; Rittberger & Wonka, 2015).

It is crucial to remark that, while EU agencies remain essentially based on networks of national agencies, they constitute a less autonomous and more accountable layer of governance than pre-existing European networks with respect to European institutions (Egeberg et al., 2015; Egeberg & Trondal, 2011). The EU institutional environment strongly shapes the operations of agencies (Schout & Pereyra, 2011). In particular, EU agencies with regulatory tasks are tightly integrated in the machinery of EU institutions (Christensen & Nielsen, 2010). They are connected with the European Commission more closely than to any other institution or actor. The interventionism of the Commission, in turn, reduces their organizational independence (Ruffing, 2019). As such, European agencies constitute the pillar of a (partly) re-centered politico-administrative order in the EU, which is also expected to reshape policy-

making at the domestic level (Egeberg et al., 2014). Therefore, EU-agencification can be used as a means to take back control with respect to a network that underwent mission creep – the expansion of an organization beyond its original goals – and eventually spun out of control, from the perspective of EU institutions. On those grounds, we argue that:

EU-agencification can be a way to ‘tame the beast’, or, in other words, a purposeful strategy adopted by EU institutions to curb the autonomy of European regulatory networks that rose in power, when their autonomy and power are perceived as excessive or undesirable.

Of course, network members can also be strategically interested in the process of agencification, as it allows them to acquire more organizational resources, additional tasks, and increased legitimacy, even though they would lose some room for maneuver with respect to EU institutions. It is thus proposed that a process of autonomization – occurring as a byproduct of the double process of delegation that gave rise to an endogenous dynamic of network evolution – could ultimately result in the agencification of a pre-existing European regulatory network (such as for the case of CESR) (Coen & Thatcher, 2008; Eberlein & Newman, 2008); conversely, when the network remains under the control of EU institutions, its persistence is *ceteris paribus* more likely (as for ECN). In that regard, it is important to stress again that ‘taming the beast’ is not the only expected driver of EU-agencification; in line with an approach that accounts for equifinality, it constitutes a determinant that is specifically expected to play a role under the scope conditions specified above, namely, the presence of a network that underwent mission creep.

## Research strategy

As indicated in the introduction, to explore our argument we examine two similar cases whose trajectory is however highly divergent, configuring an open-ended ‘most similar system design’ geared towards the exploration of this variation. Indeed, both financial regulation – coordinated by CESR at the EU level – and the regulation of competition – overseen by ECN – follow an economic logic of delegation, which incorporates comparable functional stakes; they also have analogous distributive effects; they both provide advice and expertise to EU institutions; they are both top-down mandated networks that initially presented a similar level of formalization; and they have been established about at the same time, that is, CESR in 2001 and ECN in 2003. However, while the former has been transformed into a European agency (ESMA) in 2009, the latter remained about the same over time. Existing studies corroborate *ex-ante* the expectation of an association between autonomization and agencification. Indeed, CESR has been

considered to be one of the most developed networks in terms of competencies, powers and structural complexity (Coen & Thatcher, 2008; Maggetti & Gilardi, 2011; Van Boetzelaer & Princen, 2012), as well as the one that brought into being an autonomous layer of governance (Maggetti, 2014a). Empirical studies on ECN directly tackling this question are rarer, but it has been observed that this network remained stable over time, embodying a soft coordination approach (Cseres, 2010), mostly deprived of formal powers, and working largely under the shadow of the DG Competition of the European Commission (Gerard, 2012; Guidi, 2015; Vantaggiato et al., 2020; Wilks, 2005).

The cases of CESR and ECN are thus selected as they offer an ideal setting for examining the argument of interest. Against this background, the main goal of our empirical analysis is to **delve into the mechanisms** according to which the empowerment and increasing autonomy of regulatory networks could be perceived as a threat by EU institutions and ultimately result in replacing the network by a European agency. On the contrary, regulatory networks working in the 'shadow of hierarchy' (in this case, of DG Competition) should result in network persistence. It is worth noting that we conceive the study of mechanisms through their dual nature, that is, by looking at both the pathway through which a given trajectory occurs and the micro-foundations of such a relationship (Gerring, 2007). Accordingly, we will examine official documents to reconstruct the sequence of events leading to the diverging trajectories of CESR and ECN (Bennett & Checkel, 2014) in combination with in-depth semi-directive interviews with key actors to collect data on their perceptions of situational and action-formation mechanisms of behavior (Hedström & Swedberg, 1998). As a result, we seek to establish empirical narratives based on the occurrence of these mechanisms and evaluate their congruence with our argument (Blatter & Blume, 2008), also relying on counterfactual reasoning when needed (Levy, 2015; Mahoney & Barrenechea, 2019).

### **Data collection**

Two types of data sources have been used for the purposes of this research: documents and interviews.<sup>1</sup> First of all, we examined the most pertinent official reports and European Commission documents regarding our networks. In the case of CESR/ESMA, these documents include CESR annual reports (from 2000 to 2010), ESMA annual reports (from 2011 to 2019), as well as official documents and expert reviews issued by the European Commission on the establishment and development of both CESR and ESMA. With respect to ECN, we looked into the European Commission annual Competition Policy Reports (from 1995 to 2018) and official EU publications on competition policy regulations and the implementation of specific articles.

Then, we conducted nine semi-structured interviews in November 2019 to January 2020. The actors interviewed were selected on the basis of their professional (current or past) experience with and specific knowledge on the development and operational functions of the networks under investigation, CESR and ECN. Such actors are insiders with first-hand information of the matter as members of national authorities represented at network level, network executives, or policy advisors working in the European Commission and directly dealing with these networks. We also selected our interview partners so as to obtain a balance between the national and EU level perspective. To preserve their anonymity, they are quoted with a code (from IP1 to IP9). Each questionnaire included between 10 and 12 semi-structured questions that were tailor-made for each specific interviewee and served as a springboard for an open, in-depth discussion. The questions raised within the interviews were organized around four key themes which are relevant for understanding the processes of empowerment and autonomization from EU institutions, as well as of network institutionalization (if any), corresponding to: the reasons for establishing the networks and their historical trajectories; their main operational functions and structural changes; their evolution especially regarding their powers, autonomy, and accountability; and future challenges.

### ***Data analysis***

To examine our research question about the dissimilar trajectories experienced by the two networks under investigation (CESR and ECN), we analyzed the abovementioned data sources according to a thematic content analysis, which allowed us to identify common themes and patterns across the documents and the interviews. In particular, the goal was to uncover the mechanisms behind the developments of these two networks over time and assess their congruence with our argument. On the one hand, through document analysis, we examined official information concerning the trajectories of the investigated networks and their structural development over time. These pieces of information correspond to evidence on the official motivations and the processual mechanisms at work. On the other hand, with respect to the analysis of interviews, we looked at indications which allowed us to understand insiders' perceptions on network empowerment, autonomization, and institutionalization (if any), including changes in their main operational functions. Especially, we examined how actors interpreted the causal relationships between these attributes and the process of agencification, or, respectively, the lack of it, so as to illustrate the micro-level mechanisms at work. The two data sources have then been triangulated and the consolidated empirical analysis is presented in the next section, in the form of empirical narratives. As anticipated, in these narratives we seek to evaluate



the congruence of empirical evidence with our argument (Blatter & Blume, 2008), also relying on counterfactual reasoning (Levy, 2015; Mahoney & Barrenechea, 2019) when discussing ECN as a negative case (Mahoney & Goertz, 2004).

## The creation and evolution of CESR-ESMA and ECN

### **CESR-ESMA**

#### *The creation of the Committee of European Securities Regulators (CESR)*

A first platform named Forum of European Securities Commissions (FESCO) has been set up in 1997 to favor discussions and ad hoc gathering of financial market regulators (IP3). Then, during the 2000 French presidency, the so-called Lamfalussy Committee was formed to address the need for improving regulatory cooperation in the European Union, in accordance with the Financial Services Action Plan of 1999. In its report, the Lamfalussy Committee observed that the European framework suffered from some major drawbacks, such as its complexity and lack of harmonization, which often resulted in member states' tardiness in transposing and implementing EU rules.<sup>2</sup> Specifically, the Lamfalussy Committee highlighted the need to depart from the footsteps of FESCO by proposing the establishment of an independent body which would play a stronger role by offering advice to the European Commission on a regular basis and providing input to EU legislation on issues related to financial regulation in the single market (IP3 and IP7). As a result, the Committee of European Securities Regulators (CESR) was established in June 2001 by the European Commission (2001/527/EC) to strengthen regulatory cooperation between national authorities and with the European Commission. Thus, the role of CESR at that time was twofold: that of a horizontal coordination device as well as that of an advisory body (IP2, IP5 and IP7). On the one hand, it would work as a platform where national regulatory agencies exchange and align their views and develop common approaches on financial regulation; on the other, it would provide advice and develop expertise on technical issues such as, for instance, financial instruments and market directives, which would be used by the Commission when drafting EU legislation.<sup>3</sup>

Then, CESR experienced a process of organizational development and a remarkable widening of its tasks and scope. On the organizational side, more and more expert groups and standing committees were formed at its headquarters in Paris (IP7). In 2004 CESR established an influential Task Force – known as the Himalayan group – to evaluate the progress of securities regulation within the EU. During this period, CESR also created three expert groups to offer technical advice on issues such as voting rights and

on standards on information dissemination. In addition, a number of operational groups were also established from 2006 onwards (i.e., CESR-Fin) as well as working groups (i.e., CESR-tech, ECONET) to facilitate and strengthen CESR's role with respect to financial reporting standards, information technology governance, and impact analysis, respectively. Following this organizational expansion, CESR adopted qualified majority voting to facilitate its decision-making procedures and render the consolidation process between national regulators more effective (IP2, IP3 and IP8). As regards its regulatory activities, CESR developed a number of principles and guidelines, which progressively acquired the status of standards and became widely adopted and implemented at the domestic level. An example of such rules is CESR standard 1 on financial information, which represents a key contribution to the task of developing and implementing a common approach to the enforcement of International Financial Reporting Standards (IFRS) in Europe, by providing principles by which harmonization of the institutional oversight systems in Europe may be achieved (Maggetti & Gilardi, 2014). Such an activism corresponded to the coming into force of the Directive on Markets in Financial Instruments (MiFID) in 2007. This Directive represented a key strengthening of the EU securities regulation framework, whereby CESR played an important role not only in providing technical advice, but also in organizing the interactions among national supervisors, and leading discussions with stakeholders, for instance, credit rating agencies and retail investor associations (see CESR annual report 2007 for an overview). As a result, CESR achieved a central position in the European system of financial regulation.

### *The establishment of the European Securities and Markets Authority (ESMA)*

However, similar to the role played by the Lamfalussy Committee for the creation of CESR, another 'high-level group', chaired by Jacques de Larosière, initiated the transformation of CESR into the European Securities and Markets Authority (ESMA), which was then established in January of 2011, replacing CESR. In November 2008, this group was mandated by the European Commission to propose reforms to restore trust in the EU system of financial regulation, which was exposed by the newly emerging – at that time – financial crisis.<sup>4</sup> In a nutshell, the Larosière report of 2009 concluded that, under CESR, financial supervision in the EU remained mostly located at the national level and that a more effective mechanism was needed to ensure the consistent application of EU rules and to guarantee more coordinated decision-making on issues of financial regulation (CESR, 2010). The suggested measures included the creation of the European System of Financial Supervision (ESFS), which would consist of three European Supervisory Authorities (ESAs), one of which was ESMA, responsible for the financial markets. The proposals of the report were discussed by the Commission in

September 2009 and adopted by the Council in December of the same year. During the two-year transition period (2009–2010), CESR began its internal organizational preparations, which included, for instance, the conduct of its work via standing committees rather than workings groups. The ESFS was approved by the European Parliament in September 2010, then the transition process towards agencification was officially put into motion. As a result, ESMA was created as a legal entity with its own legal personality and with wider competences, based on CESR's organizational structures (IP2, IP3, IP5, IP7 and IP8). However, whilst CESR relied on a small team of approximately 20 people, financed on a voluntary basis, and it was essentially run by national authorities (IP3), ESMA's staff has augmented over the years occupying now over more than 270 people, becoming more professionalized and more integrated at the European level (IP4). As such, ESMA operates as an at-arm's-length EU agency working under EU law, which is more incorporated within the EU organizational structure than CESR, and whose budget goes through the Commission. Furthermore, unlike CESR, ESMA is directly accountable towards the European Parliament – where it appears before the Committee on Economic and Monetary Affairs (ECON) and with its chair and vice-chair appointed by the Parliament (IP3) – and towards the Council of the European Union and the European Commission, namely through regular reports on its activities at meetings and via its annual reports (IP7). As a consequence, ESMA is much less independent than CESR (IP3). One of our interview partners even argued that ESMA now works more for EU institutions than for the national authorities (IP2).

Against this background, understanding **the interplay between the two following factors stands out as crucial to understand the mechanisms at work**, leading to this process of EU-agencification.

(1) On the one hand, as mentioned earlier, the 2008 financial crisis was a key triggering factor. As a large-scale focusing event, the crisis legitimized pre-existing reform agendas. Many respondents have argued that had it not been for the crisis, ESMA would not have been established in 2011 (IP2, IP3, IP5 and IP7). This is because the crisis revealed a failure in the EU system of financial markets (IP3) and created a window of opportunity to reinforce EU regulation and regulatory convergence (IP7), as well as the accountability of the EU supervisory framework towards EU institutions. This narrative is corroborated by further evidence. In particular, as a reaction to the crisis, EU legislators – with no real opposition by the national authorities (IP8) – were in favor of a more profound integration and centralization that could not be achieved by a network such as CESR (IP2 and IP4). A more effective and stronger EU body was sought to carry out a new set of responsibilities and supervisory powers in certain areas of market regulation that were undermined by the crisis (IP2 and IP4). As an EU agency, ESMA was created to replace CESR and to give it a more formal status

with a three-fold role (IP5): to contribute to the development of a single rulebook in the EU; to reinforce consistent supervisory practices; and to carry out direct supervision in areas which are subject to EU oversight through its new enforcement powers such as credit rating agencies (CRAs) (EP Review of ESFS 2013) and EU trade repositories (TRs) (IP4; IP2). What is more, ESMA is in charge of adopting guidelines, issue recommendations and draft technical standards. These responsibilities are considered, according to one of our interview partners, as a non-binding but nevertheless impactful type of rulemaking power (IP4).

(2) On the other hand, agencification served not only instrumental (i.e., problem-solving) but also strategic goals, related to power struggles and bureaucratic rivalries. From the perspective of EU institutions, the crisis offered the possibility to place more emphasis on control over national authorities and their network (IP8, IP2 and IP4). In this sense, achieving agencification was an effective way to 'tame the beast', that is, to rebalance the role of CESR, whereby this network widened the scope of its regulatory activities in an unexpected way and acquired too much autonomy over time in the eyes of EU institutions. This emphasis on control against autonomy confirms prior research that has found that CESR started to work as an inter-governmental arena and then, over time, it configured a new layer of governance with increased powers and autonomy from both the national level and from EU institutions (Maggetti, 2014a). This new role of CESR was indeed regarded suspiciously by European institutions, and by the governments of some member states, which feared a loss of control over the network (IP2). Over time, CESR came to be perceived as a self-referential actor developing the role of an active political player in European governance (IP5). The network started acting as a cohesive policy community representing, above all, the sector-specific viewpoints of transnationalised financial regulators (IP3). This rising discontent, combined with the Commission's long-term goal of promoting EU-level agencification during the critical juncture provided by the financial crisis, was crucial to accomplish CESR's transformation into ESMA, a European agency with increased resources, powers, and competencies, but with less authority and, above all, with less independence than the authors of the de Larosière report would have expected. This was a political decision on the part of EU legislators, ultimately making ESMA more independent from national authorities but less so from the EU (IP2, IP3, IP5 and IP7). The more recent developments, epitomized by the further empowerment of ESMA, namely in the context of the short-selling case (see Chamon, 2018; Scholten & Van Rijsbergen, 2014), are coherent with our narrative, as they indicate a process of institutionalization and centralization of regulatory powers that also comes with increased accountability requirements.

## ECN

### *The creation of ECN*

Since 1995-96, the Commission had begun to express the need to strengthen the cooperation between itself and member states' competition authorities regarding the decentralized enforcement of EU competition law. This was considered necessary to prevent any contradictory decisions being made on the national level by competition authorities. The introduction of the Treaty of Amsterdam in 1997 further accentuated the need to reform EU competition policy and reinforce coordination (European Commission, 1998). The development of a legal framework which would ensure compliance with EU competition rules by all national authorities was regarded by the Commission as the only viable solution (European Commission, 1999). In the aftermath of the introduction of the single EU currency, and specifically in December 2000, the Commission adopted its proposal for a new regulation which would guarantee the more effective application of the rules on competition concerning agreements and decisions by associations of undertakings and restrictive practices (Article 81 of the EC Treaty) and abuses of dominant position (Article 82 of the EC Treaty),<sup>5</sup> which are liable to be anticompetitive, by all national competition authorities (European Commission, 2000).

Against this background, the European Competition Network (ECN) was established by the Council Regulation (EC) No 1/2003. Composed of the national competition authorities (NCAs) and the Commission, it brought a new procedural framework in the application of EU competition rules to ensure the effective enforcement of EU rules. Prior to the introduction of the new regulation, there was scarce interaction occurring between the Commission and the NCAs, and even among the NCAs themselves (IP1). The whole process was highly segmented since, on the one hand, there was the Commission, which was in charge of applying the EU rules, and, on the other hand, there were the NCAs which applied each their own national legislation (IP6 and IP9). To overcome this segmentation, the Commission planned to strengthen the powers of the national competition authorities and, at the same time, to reinforce their coordination (IP9). Thus, the establishment of the ECN was the result of 'a reflection, a self-assessment', on behalf of the Commission regarding the ways the enforcement system of the EU competition rules could become more effective (IP6). The ECN 'emerged as a response to increasingly vocal demands for comprehensive changes, wherein the credibility of the supranational regulator itself was at stake' (Danielsen & Yesilkagit, 2014, p. 367).

In this context, as mentioned above, one of the key objectives of EC Regulation 1/2003 was to establish ECN as a network which would allow NCAs to become more actively involved in the harmonized enforcement of EU

competition rules. Concretely, ECN represented a way to render more effective the division of casework between the Commission and the national authorities (Cengiz, 2010). Through the systematic exchange of information and the operation of various leniency programs (based on articles 11 and 12 of the new regulation), the ECN would improve the consultation and cooperation process between NCAs and the Commission regarding the new enforcement system. Furthermore, the ECN was established as an advisory board to provide more technical knowledge to the Commission (EC Competition report 2003).

### *The role and persistence of the European Competition Network (ECN)*

The abovementioned decentralization in the enforcement of EU competition law allowed for the deployment of more resources on behalf of the Commission in order to identify anti-competitive practices (IP6 and IP9). The EU moved away from the previous notification model – whereby the Commission had the monopoly with respect to rule enforcement – towards a system of parallel enforcement of competition rules (IP1), explicitly involving national authorities in the application of European dispositions (IP6). In turn, ECN became the cornerstone of this system, as it offered a platform where national authorities could discuss common issues (IP9) so as to ensure the consistent and coherent application of EU competition rules (IP6). By 2003, discussions were already underway within the newly established ECN regarding the transition process towards the new enforcement system. Various working groups and subgroups were created for this purpose. The following year, the ECN became fully operational. Additional working groups and supervisory processes were set up to help national authorities monitor more effectively individual cases dealt within the network and facilitate the mutual exchange of information (European Commission, 2005). During the following five years (2005–2010), the ECN has consistently served as an active forum for discussion and exchange of best practices. Via the ECN, the Commission has worked closely with NCAs to apply EU competition rules. From the EU perspective, it has proven a reliable platform whereby NCAs coordinated their enforcement actions and discussed general policy issues (European Commission, 2007). The Model Leniency Program was endorsed by ECN members on 29 September 2006. This program provided the basis for the soft harmonization of the leniency programs adopted by the ECN by setting out the specific provisions which such programs should contain. This, in turn, contributed to the greater convergence of national procedural laws and policies envisioned by EC Regulation 1/2003 (European Commission, 2008). NCAs had the power to adopt commitment decisions based on article 9 of the EC Regulation 1/2003 and – via the ECN – they could more effectively follow and cooperate on individual cases (based on article 9 of the same regulation). Against this background, the ECN also proved to be a consistent model with respect to the

implementation of competition law within the EU by the Commission and the member states alike (European Commission, 2010).

In the subsequent five years (2011–2016) the ECN continued to play an important role as a forum for discussion on various EU competition policy issues. The Commission and the NCAs also continued their close cooperation within the ECN to strengthen the convergence of national procedures for the enforcement of EU competition laws. In 2012, the ECN published a series of reports on the investigative and decision-making powers attributed to the NCAs. In addition, it proposed the refinement of the Model leniency Program introduced in 2006. Thus, for more than ten years the ECN represented the main platform for discussions and cooperation between the Commission and the NCAs regarding the harmonization of the enforcement of EU competition rules (European Commission, 2018). All in all, the ECN was considered by EU institutions as a ‘well-functioning’ network (Kekelekis, 2009). Against this background, the agencification of ECN has never been seriously thematized in the period under investigation. The preferences of the NCAs and of the European Commission stand out as largely aligned, so that such the current flexible governance arrangement appears to be a win-win solution (IP1, IP6, IP9). This argument is in line with the existing literature, indicating that the ECN provides opportunities to NCAs to contribute to agenda setting and to share resources (Vantaggiato et al., 2020), whilst allowing the Commission to steer the process and to retain its managerial role (Kekelekis, 2009).

Disentangling the **mechanisms behind this situation of remarkable stability is tricky**, as this is a negative case for the phenomenon of EU-agencification which is examined here. The study of a negative but relevant case – in the sense of a negative case presenting the conditions of possibility for a positive outcome – would imply to be able to ‘see nobody’, as for the White King in Alice in Wonderland (Mahoney & Goertz, 2004). It is however possible to engage in counterfactual reasoning to explore whether the evidence at hand is congruent with the main argument (Blatter & Blume, 2008), that is, the argument that ECN has not been agencified by EU institutions because there was no need to ‘tame the beast’, as it is still under control and working under the shadow of the Commission. The counterfactual to be considered is that, would the ECN have spun out of control, EU institutions would have tried to agencify it. This scenario seems plausible and in accordance with the minimal rewriting rule (Levy, 2015; Mahoney & Barrenechea, 2019). Early on, the Commission rejected the idea to create an independent European agency on competition issues (European Commission, 1997). At the time, this choice could have been understood as motivated by the goal of avoiding a competitor in this crucial policy area. However, once created the ECN, that is, a network with its own organizational and institutional dynamics, the counterfactual to be considered is the possible emergence of an empowered network constituting an autonomous level of governance, which is a

conceivable development, as shown by the case of CESR. If such an empowerment and autonomisation would have occurred, it is reasonable to expect that European institutions would have shifted their preferences towards its transformation into a less independent and more accountable European agency. This reasoning is corroborated by previous studies indicating that alternatives institutional designs were historically considered, including setting up an independent authority for competition policy, but were discarded, as European institutions were 'unexpectedly' able to develop competition policy as a specific public policy and, at the same time, centralize its decision-making process under the Commission (Warlouzet, 2016).

Eventually, a specification is in order as regards the foreseeable trajectory of ECN, illustrating an incremental but potentially transformative change in an overall context of developmental stability. In March 2017, the Commission proposed a set of new rules to enable national authorities to become even more effective enforcers of EU anti-trust laws. These new rules were introduced under the so-called 'ECN+' directive, which, apart from the introduction of the new EU anti-trust regulation EC 1/2003, configures the most important structural change of the ECN (IP1 and IP6). This directive was adopted by the European Parliament and the Council in December 2018. It intends to make sure that everyone has the same procedural powers to ensure consistent outcomes (IP6). To this aim, it will ensure that the NCAs will have all the necessary resources and enforcement tools to investigate a case (i.e., detect and sanction a company etc.) (IP1). It will also allow NCAs to become more independent in their decision-making processes from their political 'principal' at domestic level. In general, the NCAs have positively evaluated these ECN transformations since they will allow them to gain more powers so as to enforce EU competition rules more 'coherently' (IP6). The new directive is being transposed by the member states from 2021 onwards. One of the key future challenges, according to one of our interview partners, is to make sure that it is implemented consistently; if this is the case, then it would contribute to strengthen the role of the ECN as a whole (IP1).

## **Discussion and conclusive remarks**

The goal of this article was to shed light on the following puzzle: the two original European networks in charge of regulating finance (CESR) and, respectively, competition (ECN) at the EU level appear as highly comparable on many functional, political, and organizational dimensions that could have explained their evolution, and yet their institutional trajectory is very different (albeit somewhat partially converging towards the end; see below). While CESR has progressively acquired regulatory powers, achieved wide autonomy, and eventually transformed into a less autonomous and



more accountable European agency (ESMA), ECN remained so far rather stable by working in the shadow of the hierarchy of EU institutions. The case studies support the main assumption of this article: EU-agencification does not only follow a problem-solving logic. In making CESR less independent from EU institutions, decision makers *also* acted strategically to 'tame the beast', as CESR had started to acquire considerable powers and autonomy. The perception that the network spun out of control has been possibly considered by EU institutions as problematic from both a 'powering' and a 'puzzling' perspective, as it could both create dysfunctionality and raise legitimacy concerns. As argued by one of our interview partners, ESMA has indeed been purposely designed to be much closer to EU institutions than to the national authorities, both in terms of political steering and of accountability. Our analysis of the mechanisms at work allows us to add two elements to the sequence leading to EU-agencification in this specific case. On the one hand, national agencies followed the initiative of EU institutions on the creation of ESMA as they saw it as a helpful coordination tool and, at the same time, because they expected to receive further regulatory powers – or at least to be able to retain their own. On the other hand, the 2007/8 financial crisis constituted a critical juncture for reinforcing and re-centering financial regulation through EU-agencification – a long-term goal of EU institutions, made more urgent as the network was considered as out of control. Conversely, ECN remained a network essentially operating in the shadow of the Commission, while also providing national competition authorities a valuable venue for influence. At the same time, recent reforms tend to strengthen even more the role of the European Commission through the network and concomitantly reduce the grip of member states on their domestic regulatory agencies. In the case of CESR, agencification can be interpreted as a re-centering of regulatory powers at EU level. This type of 'radical' reform was probably considered neither possible nor necessary for ECN. However, it appears that, in both cases, domestic independent regulators trade some of the autonomy from European institutions that they had experienced – and sometimes actively developed – within their network for the attribution of new regulatory powers. Thereby, at the end of the day, there is possibly a similar logic of institutionalization at work, albeit at different degrees and with different implications.

## Notes

1. A list of documents and interview partners can be found in the supplementary materials.
2. For more details, see the 2001–02 CESR annual report and the 2002 Interim report of CESR to the European Commission.

3. For more details see the 2004 CESR annual report and the 2004 Interim report of CESR to the European Commission.
4. For more information see the 2009 and 2010 CESR annual reports.
5. Articles 81 and 82 of the EC Treaty have been substituted by articles 101 and 102 of the Treaty on the Functioning of the European Union.

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