Regulatory Networks, Legal Federalism, and Multi-level Regulatory Systems

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1 Introduction

Networks of regulatory agencies play an increasing role in the complex governance structures of multi-level regulatory systems. Especially interesting are transnational regulatory networks, in which regulatory agencies from different countries are collaborating for solving regulatory problems. One example is the International Competition Network (ICN) as an entirely voluntary and informal network of competition authorities from all over the world. In the EU networks of regulatory agencies of the member states play an important role within the European regulatory system, which in many policy fields encompasses regulations and regulatory agencies both on the EU and the member state level. Levi-Faur (2011) has shown that in 22 from 36 regulatory fields in the EU at least one active regulatory network existed in 2010. Two important examples are BEREC (Body of European Regulators for Electronic Communication) and ECN (European Competition Network) as regulatory networks in the telecommunication sector and in competition law. The European regulatory networks have been the focus of theoretical and empirical studies in the political science literature, both in regard to their roles within the European systems of regulation and in regard to their specific advantages and problems as a new form of governance in multi-level regulatory contexts (e.g., Eberlein and Grande 2005; Coen and Thatcher 2008; Blauberger and Rittberger 2015).

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In this article we want to analyse regulatory networks in multi-level systems of governance from a law and economics perspective. Based upon the economic theory of legal federalism, which focusses on the optimal vertical allocation of competences in a multi-level legal system (Van den Bergh 2000; Kerber 2008), we want to ask which role networks of regulatory agencies can play in two-level systems of regulation as present in the EU. In contrast to most of the political science literature, which views regulatory networks primarily as a second-best solution in comparison to the optimal centralisation of regulatory powers—at the EU level (e.g., Eberlein and Grande 2005; Blauberger and Rittberger 2015, 369), the economic theory of legal federalism can show that there are often complex tradeoff problems between the benefits and problems of purely centralised or decentralised solutions. Therefore optimal solutions might consist in sophisticated combinations of centralised and decentralised regulatory powers. Our claim in this paper is that regulatory networks might be an institutional innovation that can help to optimise the tradeoffs between the benefits and problems of centralisation and decentralisation. Drawing upon the many insights of the political science literature about regulatory networks we want to show that regulatory networks can fulfil a number of functions which allow for a better combination of the advantages of centralised and decentralised regulatory powers. In that respect this paper can be seen both as a contribution to the law and economics of legal federalism by introducing regulatory networks as an additional intermediate institutional solution between centralisation and decentralisation, and to the political science literature on regulatory networks for analysing them from the perspective of the economic theory of legal federalism. From that perspective we also claim that regulatory networks should not be seen primarily as transitory phenomenon, rather they can also be a valuable part of an optimal two-level system of regulations in the long run.

In Sect. 2 we present a brief overview of the research upon regulatory networks, esp. in the political science literature, from which we derive four different functions that regulatory networks can play in two-level legal systems. In Sect. 3 we analyse the potential benefits of regulatory networks from the economic theory of legal federalism by explaining how these functions can help to optimise the tradeoffs between centralisation and decentralisation. This theoretical analysis will be complemented in Sect. 4 by three case studies about BEREC and ECN (as European regulatory networks) and the ICN (as a global regulatory network). Brief conclusions can be found in Sect. 5.

2 Regulatory Networks: A Brief Review of the Literature

2.1 What Are Regulatory Networks?

Networks can be seen as institutions that consist of a number of entities, as e.g. firms, agencies, or organisations, and which facilitate coordination and cooperation

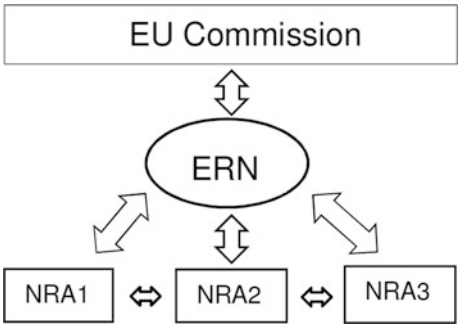

Fig. 1 European regulatory networks as part of European two-level regulatory systems; *ERN* European Regulatory Networks, *NRA* National Regulatory Authority

between these entities. From an institutional economics perspective, networks are a specific group of hybrid organisational structures between hierarchy and market (Powell 1990). In this article we are focusing on the group of transnational networks of regulatory agencies, i.e. that the entities of the network are regulatory agencies from different states.[1] Especially within the specific governance context of the EU, a large number of transnational networks of regulatory agencies of the Member States have emerged and play important roles within the European regulatory system. Maggetti and Gilardi (2011, 1) have defined European regulatory networks as "transnational groups that allow national regulatory authorities to formalise, structure and coordinate their interactions pertaining to the governance of a number of important domains, such as banking, securities, insurance, electricity, gas, telecommunications, broadcasting and competition". However, regulatory networks should not be viewed only as dealing with horizontal coordination problems between regulatory agencies, because they can also play an important role in regard to vertical coordination problems in a multi-level regulatory system (see Fig. 1).

Empirically, forms, characteristics, and functions of European regulatory networks differ widely (Levi-Faur 2011). They show a broad variety in regard to their emergence, (voluntariness of) membership, (informal or formal) organisational structures, independence, competences, and stability. Some regulatory networks (as the IRG, i.e. Independent Regulators Group, in the telecommunication sector) were initiated only by national regulatory agencies and run entirely independent from the EU Commission, whereas others (as BEREC) were initiated from the EU level. Typically, the decision rules of networks are flexible and informal, and membership is voluntary. However, European regulatory networks are increasingly getting institutionalised and formalised (Levi-Faur 2011, 813). In a number of regulatory networks, also the EU Commission itself is a member with certain rights or has at least an observer status. Some regulatory networks have own regulatory powers, whereas others do not play any legally defined role in the European regulatory

[1]Not included are regulatory networks, which also encompass private organisations as firms or NGOs (e.g., as part of private regulation).

regimes. Also the organisational structures of regulatory networks can be very different and change over time as well as one regulatory networks can be replaced by another. In contrast to agencies, networks typically have no own administrative or independent financial capacities (Levi-Faur 2011, 813); however, some of them rely on the budget of a separate office, financed by contributions of the Commission and the Member States (Batura 2012, 6 for the example of BEREC).

2.2 *Regulatory Networks as Governance Instruments in the Political Science Literature*

European regulatory networks have been an important research topic in the political science literature.[2] The theoretical and empirical studies in political science about European regulatory networks can be viewed as part of the broad stream of studies on the specific problems and forms of governance within the complex and unique institutional and political multi-level structure of the EU (see, e.g. Marks et al. 1996; Héritier 2003; Börzel 2010). Due to the difficulties of making political decisions on the EU level, traditional forms of governance as regulation through legislation were partly replaced or complemented by other, new forms of governance. Examples are the use of soft law and the "Open Method of Coordination" (OMC). The basic idea of the OMC was to trigger a process of convergence of policies in fields, where the competences were still largely at the member state level, by establishing a process of identifying best practices and making policy recommendations to the member states (Borrás and Jacobsson 2004; Arrowsmith et al. 2004; Zeitlin 2005; Kerber and Eckardt 2007). Important characteristics of these new modes of governance were, on one hand, their more informal and voluntary ("soft") nature (in contrast of traditional governing through "hard law"), and, on the other hand, their flexible (and also experimental) use in a complex multi-level governance context.

Many of the political science contributions to European regulatory networks start with the assumption of a "regulatory gap", i.e. that the EU is not capable of implementing the necessary effective and harmonised regulatory regimes, because too many regulatory powers still exist at the member state level (e.g., Eberlein and Newman 2008, 26). Since the solution of centralisation of regulatory powers has often not been politically feasible, one of the most important claims of this literature is that the European regulatory networks should be seen as a soft instrument for achieving a stronger harmonisation of the regulatory activities of the member states (Eberlein and Grande 2005; Blauberger and Rittberger 2015). Therefore the EU Commission is often identified as initiator of such regulatory networks (Coen and Thatcher 2008),

[2]See, e.g., Dehousse (1997), Eberlein and Grande (2005), Coen and Thatcher (2008), Eberlein and Newman (2008), Maggetti and Gilardi (2011), Levi-Faur (2011), and Blauberger and Rittberger (2015).

sometimes as a direct response to its failure of establishing a European agency due to the resistance of the member states (Simpson 2011 for the case of BEREC). The political science literature also deals with other research questions, as, e.g. the evolution of these European regulatory networks. Studies in this field have shown that regulatory networks are getting more formalised over time (Saz Carranza and Longo 2012), and based upon a broad empirical investigation, Levi-Faur (2011) claims that European regulatory networks have been increasingly replaced by (European) agencies or are themselves subject to a process of agencification ("agencified networks"). In an econometric study Maggetti (2014) showed that the participation of a national agency in a regulatory network has positive effects on the increase of its regulatory powers but not necessarily on its (organisational) growth. This touches interesting questions about the effects of being a member of regulatory networks in regard to strengthening the independence of national regulatory agencies (Danielsen and Yesilkagut 2014). However, it also raises serious concerns about their accountability vis-à-vis the national governments and parliaments (Lavrijssen and Hancher 2008).[3]

An important part of the political science research is focused on the analysis of the role as well as the advantages and problems of regulatory networks (network governance). In the following, we will structure this discussion by distinguishing four different functions that regulatory networks might fulfil:

1. **Rule-making**: Most of the studies on European regulatory networks emphasise their role in developing and improving regulations. Since the regulatory networks themselves usually have no direct powers for rule-making, their role lies primarily in influencing the rule-making process at the EU level, especially by providing expert advice (Coen and Thatcher 2008). The regulatory networks can have superior regulatory expertise, because they can draw on the knowledge and experience of the national regulators (especially due to their closeness to national markets). However, regulatory networks can also influence the rule-making at the national level, as they participate in the amendment of regulatory frameworks. Therefore, networks can provide the national regulatory agencies with an increased regulatory rule-making capacity and stronger political role vis-a-vis the formal national rule-making institutions as the government and parliament (Danielsen and Yesilkagut 2014, 354; Maggetti 2014, 481).
2. **Best practices and policy learning**: Since the national regulatory agencies usually have developed different regulatory practices in regard to their domestic markets, regulatory networks can also fulfil an important role as a forum for

[3]This is also connected to the view that European regulatory networks are in an area of conflict through a double delegation problem (principal agent theory), resulting from delegating authority from the national level to (1) the EU Commission, and (2) to independent national regulatory agencies (Coen and Thatcher 2008, 51–54).

mutual policy learning between the national regulatory agencies. In European regulatory networks this has often triggered processes of benchmarking and identifying "best practices" (as within the directly related "Open Method of Coordination"). This might lead to regulatory guidance for the national regulators, e.g. in form of norms, standards, and guidelines (Maggetti and Gilardi 2011). In that respect, regulatory networks can fulfil also an important role as channels for policy diffusion (Gilardi 2012) and as breeding ground for regulatory experimentation (Sabel and Zeitlin 2008). In contrast to the OMC, which is generally not seen as very successful (Arrowsmith et al. 2004), best practices and benchmarking procedures in regulatory networks are viewed as a successful soft governance instrument that has contributed significantly to more harmonised rules on the domestic level (Eberlein and Grande 2005; Eberlein and Newman 2008; Maggetti and Gilardi 2011).

3. **Effective enforcement**: Political scientists have emphasised the importance of European regulatory networks in regard to the effective and consistent implementation and enforcement of European regulations (Eberlein and Newman 2008, 26; Blauberger and Rittberger 2015). European regulatory networks seem to be particularly important in policy areas, where the EU has strong regulatory competencies but its operational capacities are weak (Blauberger and Rittberger 2015, 370). Through monitoring regulatory networks can help to close the "regulatory gap" in regard to an effective and equal enforcement of common rules throughout the EU. In that respect, the EU Commission has also been characterised as an "orchestrator", which uses the soft governance instrument regulatory networks as "intermediaries" for influencing the national regulatory agencies (Blauberger and Rittberger 2015). However, regulatory networks also facilitate a more effective enforcement by providing well-established channels for information exchange, communication, and coordination between the national regulatory agencies, building mutual trust between the participants of the network, and allowing for more flexible and effective regulatory solutions (Eberlein and Newman 2008; Radaelli 2008, 243; Maggetti 2014).
4. **Conflict resolution**: Since disputes might exist both horizontally between the national regulatory agencies (e.g., due to geographical spillovers) and vertically between the EU Commission and national regulators, it also can be asked whether regulatory networks also contribute to the resolution of such conflicts. In the political science literature this has been addressed only indirectly, e.g. by emphasising mutual trust, communication, and coordination through regulatory networks (Eberlein and Grande 2005; Sandström and Carlsson 2008), all of which facilitate conflict resolution.

3 Vertical Allocation of Regulatory Powers: The Role of Regulatory Networks

What might be the possible role of regulatory networks from the perspective of the economic theory of legal federalism? In contrast to most of the political science literature on regulatory networks,[4] the economic theory of legal federalism would not assume that the centralisation of regulatory powers or the harmonisation of regulations at the European level is the first-best solution. What the best allocation of regulatory powers in a two-level system of regulations is and how such a system should be designed institutionally, can only be determined after an analysis from a legal federalism perspective. Using also the insights of the political science literature, we want to ask in this section whether regulatory networks can also be a part of optimal institutional solutions in two-level regulatory systems which try to combine the advantages of centralised and decentralised regulatory powers.

Based upon the extensive literature on the economic theory of federalism, which has developed a set of economic criteria about the optimal allocation of competences for public goods and taxation in a federal system (overview: Oates 1999), the economic theory of legal federalism asks more specifically for the optimal allocation of regulatory powers in a federal multi-level system of legal rules and regulations.[5] There are a number of economic arguments which favour more centralisation of regulatory powers and harmonisation of regulations, whereas others emphasise the advantages of decentralisation and regulatory diversity (in much more detail: Kerber 2008, 75–85). For example, the consideration of information, transaction, and regulation costs usually leads to arguments for harmonisation. Different national regulations might also lead to negative welfare effects due to non-tariff barriers to trade or distortion of competition (leading to problems for the Internal Market in the EU). However, if either preferences and policy objectives connected to a regulatory problem or the extent of market failure problems differ between member states, then decentralised regulatory powers might allow for more efficient regulatory solutions than a uniform European regulation. Regulatory powers on the member states level might also allow for the development of better regulations, if the national regulatory agencies hold better knowledge about specific regulatory problems (decentralised knowledge) and/or lead to more regulatory innovation and mutual learning through more regulatory experimentation (laboratory federalism). An additional crucial question refers to the possible advantages and problems of regulatory competition, which can emerge in two-level systems with at least some degree of decentralised regulatory powers.

[4]Some political authors present regulatory networks also as a panacea, see e.g., Slaughter (2005).

[5]See for the relevant economic criteria and the analysis of regulatory competition, e.g., Sun and Pelkmans (1995), Garcimartín (1999), Van den Bergh (2000), Heine and Kerber (2002), Pelkmans (2006, 36–52), Van den Bergh and Camesasca (2006, 406–417), Kerber (2008), and the contributions in Esty and Geradin (2001) and Marciano and Josselin (2002, 2003). For the links to the subsidiarity principle see Kirchner (1997) and Backhaus (1998).

What general conclusions can be drawn from the theory of legal federalism about optimally structured two-level systems of regulations as in the EU (Kerber 2008, 85–87)? A first insight is that the optimal result depends crucially on the type of regulation and the specific regulatory problem. For different regulatory problems, the advantages and disadvantages of centralised or decentralised solutions usually differ widely. This will lead to different optimal vertical allocations of regulatory powers. A second insight is that nearly always significant tradeoff problems between the advantages and problems of centralised and decentralised solutions can be expected. Both insights are also true for the question whether (certain types of) regulatory competition can be expected to yield on balance more beneficial or more problematic (or even disastrous) effects. An important consequence is that most often neither a purely centralised or decentralised solution is optimal, rather the most promising solutions might be found in intermediate solutions, which try to combine advantages of centralisation and decentralisation in a sophisticated way (for contract law: Kerber and Grundmann 2006). This can be achieved in different ways: One possibility is to split the regulatory powers in a regulatory field between the EU level and the member states, i.e. that about some aspects the regulatory power is at the EU level whereas in regard to others it is at the member state level. Another possibility is the separation of rule-making and their enforcement: A centralisation and harmonisation of a regulation might be combined with a decentralised enforcement of these (European) rules, e.g. by national regulatory agencies. In the following, we want to show why also regulatory networks might be a specific type of such an intermediate solution that helps to optimise the tradeoffs between centralisation and decentralisation.

Rule-making: From the perspective of legal federalism there are advantages and problems, if rule-making is allocated either at the EU level or at the member state level. Networks of regulatory agencies in a two-level system of regulation can help to mitigate the problems of solutions, which are either primarily centralised or decentralised. If it is deemed as necessary to have a strong European regulation with a tendency to harmonised rules, then regulatory networks of national agencies might be a very helpful institution for getting access to decentralised knowledge and experiences of the national regulatory agencies about regulatory practices and the specific problems and market conditions in different member states. Although the EU Commission can also try to get direct information from each national regulatory agency, the expert advice given by regulatory networks to the EU Commission might be much more sophisticated and balanced through the internal discussion process within the network. This can increase both the quality of European regulations directly but also lead to better information and awareness about the problems of harmonised regulations due to different problems and conditions in the member states. This can also lead to the recommendation of regulatory solutions that give the national regulatory agencies a larger scope how to apply European rules or even allows for some limited rule-making at the member state level. However, regulatory networks can also help to solve problems of a system, in which rule-making is primarily decentralised. Here a regulatory network can help to give expert knowledge and information to the national regulatory

agencies about the effects of national regulations on other countries, which can influence the national rule-making and solve some of the coordination problems, which usually turn up in the absence of a (strong) centralised rule-making.

Best practices and policy learning: One of the important topics in the economic theory of legal federalism is the potential advantage of regulatory competition in regard to policy innovation, policy learning and diffusion (laboratory federalism). From an evolutionary economics perspective, decentralised regulatory powers allow for parallel experimentation with different regulatory practices, whose positive and negative experiences increase the knowledge about suitable and effective regulatory practices.[6] Even if regulatory competition is only possible as yardstick competition, because a direct choice between different regulations is not allowed, such a parallel experimentation process can lead to a step-by-step improvement of national regulatory practices by mutual learning between the agencies. Networks of regulatory agencies can be very suitable institutions for providing a communication infrastructure and organising a systematic process of the exchange of knowledge and experience, the comparative assessment of regulatory practices, and the spreading of this knowledge for the diffusion of more effective regulatory policies. Therefore the function "best practices and policy learning" is also part of the economic theory of legal federalism and its evolutionary economics perspective on policy innovation and mutual learning (Kerber and Eckardt 2007). Whereas the OMC was organised top-down from the EU Commission without using regulatory networks, benchmarking, the identification of best practices and policy recommendations can also be carried out by the regulatory networks themselves (without the initiative or help of the EU Commission). Therefore regulatory networks can be an instrument of the national regulatory agencies for using yardstick competition in a more effective way in order to further the innovation and diffusion of better regulatory practices. However, this function of regulatory networks can only work permanently, if it is not viewed primarily as a method for achieving more convergence and harmonisation (as this was done in regard to the OMC by the Commission). A permanent process of regulatory innovation, identification of best practices, and diffusion of superior policy is only possible, if also the creation of new variety of regulatory practices is allowed and even encouraged (Kerber and Eckardt 2007, 238–240).

Effective enforcement: From a legal federalism perspective, it need not be optimal that harmonised regulations are also enforced by a European regulatory agency. The advantages of decentralised knowledge (and in the European case also the problem of different languages) will often render a decentralised enforcement of regulations more efficient, even in the case of fully harmonised European regulations. Therefore effective enforcement might need a two-level system of

[6]For laboratory federalism see Oates (1999, 1131–1134); in regard to the interpretation of regulatory competition as an Hayekian evolutionary process of innovation and imitation and linking it to the political science literature on policy innovation and policy learning (e.g., Dolowitz and Marsh 2000), see Kerber and Eckardt (2007, with many references). This evolutionary perspective is close to the small literature in political science about "experimentalist governance" (Sabel and Zeitlin 2008).

enforcement, in which the national regulatory agencies (as well as private enforcement and national courts) might play an important role. However, such a solution might require safeguards for a consistent and equal application of the harmonised rules. Regulatory networks as institutions for exchange of information, communication, and monitoring (both horizontally between the national agencies and vertically in relation to the EU Commission) can facilitate such an effective, equal, and consistent enforcement of regulations, and therefore help to mitigate the problems of decentralised enforcement (see below the example of ECN in Sect. 4). However, this is not limited to the enforcement of harmonised rules. Even in the case of decentralised regulatory powers of the member states, regulatory networks can help to enforce regulations in cases with spillover effects to other member states by facilitating the bi- or multilateral cooperation between national regulatory agencies.

Conflict resolution: In a two-level regulatory regime, in which the regulatory powers in regard to rule-making and/or enforcement are split between a number of different decision-makers and agencies, there might be conflicts between these actors, e.g. in regard to non-clarified delineations of regulatory powers, specific regulatory decisions or the question which regulatory agency should deal with a specific case (case allocation). Regulatory networks can help in different ways. In regard to horizontal conflicts between two regulatory agencies, the discussion of the problems among the experts of the network can facilitate a solution. However, also in regard to the often more difficult vertical conflicts between particular national regulatory agencies and the EU Commission, the regulatory network can try to mediate or even provide arbitration-like functions, either in a purely informal way or in a formalised proceeding (see below the example of BEREC in Sect. 4). Regulatory networks might fulfil an important role in this respect and can therefore help to reduce the costs of conflicts within such two-level regulatory systems.

This discussion has shown that regulatory networks might not only be the result of unsatisfactory political compromises but can also be part of sophisticated optimal solutions for fine-tuning the vertical allocation of regulatory powers in multi-level regulatory systems. This claim requires some qualification but also allows some conclusions: (1) The economic theory of federalism is a normative theory, which analyses what might be optimal. Therefore we do not claim that the existing regulatory networks are already part of an optimal institutional solution. This is a question that has to be analysed for each regulatory network separately. (2) The different trade off problems between centralisation and decentralisation in regard to different regulatory problems imply that regulatory networks (a) might not always be recommendable as part of an optimal solution, and (b) that even if they are, then their optimal institutional design (in regard to memberships, functions, and rights) might be very different. Therefore we cannot expect that a "one-size-fits-all" model for regulatory networks exists. (3) Although the political science literature is right to analyse the evolution of regulatory networks, we claim from a legal federalism perspective that regulatory networks should not primarily be viewed as a transitory phenomenon towards a more centralised and harmonised regulatory system. Rather

regulatory networks should be viewed also as a potentially important part of long-term optimal solutions in multi-level regulatory regimes.

4 Three Case Studies: BEREC, ECN, and ICN

In this section we will take a closer look at three different regulatory networks, the Board of European Regulators for Electronic Communication (BEREC), the European Competition Network (ECN), and the ICN. Since BEREC is a regulatory network for the telecommunication sector and ECN and ICN are regulatory networks of competition authorities, all three regulatory networks have in common that their main objective is the protection of competition. But there are also important differences: Whereas BEREC is active in the field of sector regulation (with natural monopoly problems), ECN and ICN refer to general competition law. A different perspective is offered by the comparison between BEREC and ECN as explicit European regulatory networks with the ICN as a global network of competition authorities.

4.1 BEREC

Since the introduction of full liberalisation in the telecommunication sector in 1998, a comprehensive European regulatory framework was established, leaving a limited scope for own regulatory decisions to the national telecommunication regulators (Haucap and Kuehling 2006). The Framework Directive (2002/21/EC; in short: FD) and in particular the Article 7/7a FD procedure gave the Commission the right to monitor and influence the decisions of the national regulators. Within this regulatory framework and its specific allocation of regulatory powers between the EU Commission and the Member States, BEREC was established as the network of the national regulatory agencies in 2009 (Simpson 2011; Batura 2012). A former plan of the EU Commission for the establishment of a new regulatory agency at the European level failed due to the opposition of the EU Parliament and the national governments (Blauberger and Rittberger 2015, 370–371). BEREC is a fully autonomous Community body with own formal competences and an office in Riga (Latvia). Its decision-making body is the Board of Regulators (composed of representatives of the national regulatory agencies) which decides with a two-thirds majority. Parts of the organisational structure of BEREC are Experts Working Groups, which develop drafts of the network's documents for the Board. The EU Commission is not a member of BEREC but is present as an observer, e.g. in the working groups.

Within the Art. 7/7a FD procedure, which should ensure an effective and equal application of the European rules, BEREC has an own formal role. According to this procedure, the national regulators have to notify the Commission and the other national regulatory agencies of planned decisions in regard to a new market definition, a significant market power of firms or a specific regulatory remedy. If the Commission finds that the intended measure is not compatible with European rules, BEREC is required to analyse the problem and issue an own "opinion" in regard to

Table 1 Analysis of BEREC documents: Initiative, expert advice, soft law, and conflict resolution (May 2011–May 2013; see Table 2 in Appendix)

Who is the initiator?	BEREC	EU Commission	NRA
Number of documents	65	34	1
Role of BEREC?		Yes	No
Expert adviser vis-à-vis the EU level?		51	49
Soft law regulation vis-à-vis the national regulators?		57	43
Dispute resolution?		22	78

this dispute. Whereas in regard to the definition of markets and the assessment of significant market power the EU Commission has the final right to veto a decision of the national regulator (Art. 7 FD), in the case of a remedy it is the national regulator which can make the final decision (Art. 7a FD). In both cases, however, the opinion of BEREC has to be taken into "utmost account" by the Commission or the national regulator.

Before analysing in more depth the functions that BEREC fulfils as regulatory network, we want to present the results of a small empirical study one of us (Julia Wendel) made about the activities of BEREC. Since BEREC does not make decisions, but gives opinions and expert advice, writes reports and issues guidelines, the study focusses on relevant documents, BEREC has published on its website. The time period covered is May 2011 until May 2013. The overall 100 documents include 17 Public Consultations, 39 Reports/Snapshots, 31 Opinions, 4 Guidelines, 6 Common Positions/Approaches, 1 Advice and 2 other documents.[7] The documents were analysed in regard to four questions (for the results see Table 1 and the Appendix):

1. Who initiated the activity? This can be the EU Commission (34 % of the documents, e.g. as part of the Art. 7/7a FD procedure or as queries in regard to specific topics) or a national regulator (1 %), e.g. by asking for technical support. But in 65 % of the cases, BEREC itself took the initiative for making and publishing guidelines, common positions, and reports about certain topics and regulatory questions. This shows a high activity of the network itself (Batura 2012, 6–7).
2. The second question refers to the extent of giving expert advice on rule-making on the European level. This was done in 51 % of the documents.
3. To what extent did BEREC set non-binding rules, standards, and recommendations as part of its soft governance role for the national regulators? In 57 % of the documents BEREC provided guidance to the national regulators.
4. Did BEREC help to solve conflicts? In 22 documents, BEREC was involved in the process of conflict resolution.

[7]Not included are documents, which concern primarily internal organisation issues of the network.

Although BEREC has no formal rule-making power, BEREC contributes a lot to rule-making both at the EU and the member state level. As the empirical results about the published documents show, a very important part of the activities of BEREC is the provision of experts' advice to the rule-making institutions at the EU level. One example is the document BoR (13) 41, which provides a requested opinion by BEREC on a Commission draft on the Recommendation on non-discrimination and costing methodologies. Therefore BEREC could establish itself as a key player for advising the European institutions on telecommunication regulation (Batura 2012, 15). The empirical results also show that BEREC plays an important role in influencing rule-making at the member state level by using its soft governance instruments of developing guidelines and recommendations for the implementation of the European rules by the national regulatory agencies. An example is document BoR (12) 107, which includes legally non-binding Guidelines on the application of Article 3 of the Roaming Regulation. National regulators are expected to consider this document to the utmost account and must state objective reasons for the departure from the Guidelines (BoR (12) 107, 2). This soft governance role of BEREC is directly related to its function of best practices, information distribution and policy learning, because a number of the recommendations and guidelines published by BEREC are based upon the results of working groups for benchmarking and best practices. An example is document BoR (12) 127, which presents a common position on best practice in remedies in a specific market. Therefore Batura (2012, 15) is right to call the use of soft law by BEREC a successful example of "regulation by information" (see also Simpson 2011, 1124).

The objective to establish a functioning internal market in the telecommunication sector is supported by the improvement of effective enforcement of European rules through BEREC by monitoring the regulatory practices of the national regulators and providing channels of information exchange and coordination. The predecessor of BEREC, ERG, has been criticised (and finally replaced) for failing to achieve this goal (Simpson 2011). The monitoring function is well reflected in the network's documents. One example is the report BoR (11) 43 about the implementation of the "Next Generation Access"-Recommendation of the Commission (2010) as key measure of the Digital Agenda.[8] Moreover, with the provision of information channels by BEREC, national decisions might become more sensitive to concerns of other jurisdictions (national and EU ones), and EU decisions might evolve, taking into greater account specific national features (Batura 2012, 15). This can also increase the consistency of European rule application.

The activities of BEREC in regard to conflict resolution did not find much attention in previous research. However, both the legal rules in the Framework Directive and the BEREC documents show that conflict resolution is an important part of the tasks and activities of BEREC. Despite an explicit provision in the Framework Directive for solving horizontal regulatory problems between member

[8]BEREC also provided three opinions on earlier versions of the Recommendation (BoR (11) 43, 6).

states,[9] in the documents only one such case could be found.[10] BEREC is primarily active in regard to vertical conflicts (21 of 22 documents) and this is due to the role of BEREC in the Art. 7/7a FD procedure. If the Commission does not agree with a proposed regulatory measure of the national regulators, then it is a legal requirement that BEREC has to step in and give an own opinion on this dispute. Since the ultimate decision-maker (the Commission in regard to decisions on market definition and significant market power, and the national regulators in regard to remedies) have to take "utmost account" of this opinion, this conflict resolution mechanism falls short of a genuine arbitration solution (with BEREC as arbitrator) but is not far away from it. Thatcher (2011, 803) calls it the "main potential coercive 'power'" of BEREC. An example is document BoR (13) 95, concerning a Spanish case, in which BEREC—after conducting an own separate economic analysis—supports the concerns of the Commission that the Spanish national regulator CMT has not given sufficient evidence for its choice of price market regulation, and therefore recommends that CMT should amend its approach. An analysis of the 21 documents about such vertical conflicts shows that BEREC has agreed in most cases (18 documents) fully or mostly with the concerns of the Commission. However, the approach chosen by the network often differs from the reasoning of the Commission (PWC 2012), which can be interpreted as showing the independence of BEREC from the Commission.

Overall, the analysis of activities and functions of BEREC within the European two-level system of telecommunication regulation supports the claim that this regulatory network helps to optimise the tradeoffs between centralisation and decentralisation. BEREC helps to combine the advantages of decentralised regulatory decision-making due to better knowledge of the specific problems of national markets with the advantages of centralisation in regard to enforcing a consistent application of uniform European rules for achieving a functioning internal market in the telecommunication sector. The role of BEREC as quasi-arbitrator in vertical conflicts is a special characteristic of this regulatory network, which is much less common in other regulatory networks. In this regard BEREC can be seen as helping to balance the advantages and disadvantages of centralised and decentralised decision-making. A recent proposal of the EU Commission, which would include that the Commission also gets a veto right in regard to the remedies of national regulatory agencies, might endanger this balancing role of BEREC, because then the Commission would have in all cases the ultimate decision-making power.[11]

[9]Article 21 FD stipulates that "the competent national regulatory authorities shall coordinate their efforts and shall have the right to consult BEREC in order to bring about a consistent resolution of the dispute".

[10]Document BoR (13) 34 describes a case, where a Belgian company faces a cross-border impediment, which makes a cross-national regulatory action necessary. Ultimately the Dutch regulator (as one of the concerned national regulators) took action and asked BEREC for technical support.

[11]In regard to this proposal and its critique by BEREC, see document BoR (13) 142, 4, and Kerber and Wendel (2014, 190) supporting the rejection of this proposal of the Commission.

This issue is also part of the more general question for the optimal vertical allocation of regulatory powers in the telecommunication sector that cannot be discussed here (see from a legal federalism perspective the thorough analysis of Haucap and Kuehling 2006).

4.2 European Competition Network (ECN)

In contrast to many other European regulatory regimes, there was an early consensus between the EU Commission and the member states that the Single market needs the application of uniform European competition rules, consisting of Art. 101 TFEU (cartel prohibition and exemptions), Art. 102 TFEU (abuse of market dominance), and a common merger policy (Merger Regulation). There was not much resistance against voluntary bottom up-harmonisation of national competition laws with European rules and establishing the principle that the application of national competition laws must not contradict European competition law. Although the European competition law regime still consists of a two-level system of competition laws and competition authorities, it was clear that all relevant regulatory powers are allocated at the EU level.[12] With the ("Modernisation") Regulation 1/2003 the EU Commission started a process of the decentralisation of the application of the European competition rules by allowing both the national competition authorities and the national courts to apply directly Art. 101 and 102 TFEU (Wils 2013). This implied the abolition of the monopoly of the Commission for cartel exemptions according to Art. 101 (3) TFEU. Within this context the European Competition Network was established by the EU Commission as an instrument for ensuring the success of this decentralisation project in regard to the effective and equal application of the European competition rules (Cengiz 2010; Wils 2013).

The European Competition Network consists of the Commission and all national competition authorities in the EU. It is based upon a non-binding "Network Notice" of the Commission, which also has been adopted by the Member States (soft law). It is managed largely by officials of the Commission, and has primarily a hierarchical structure with certain enforcement and monitoring powers of the Commission. The main tasks of the ECN is sharing information, case allocation and ensuring efficient cooperation (Cengiz 2010, 666). Most important is that all competition authorities must inform each other about all cases, in which they apply Art. 101 and 102 TFEU. Between May 2004 and December 2012 the national competition authorities have informed the Commission and other members of the network about 1344 investigations and the intended final decisions in regard to the termination of infringements, imposition of fines, and the acceptance of

[12]The national competition laws as far as they are not fully harmonised can play only a role in small niches of competition law (with the exception of merger policy where the member states still have some scope for smaller mergers which are not subject to EU merger policy).

commitments in 646 cases (Wils 2013, 295). This leads to mutual information between all competition authorities and also allows the Commission to monitor closely the practices of decentralised enforcement. Linked to this top-down monitoring function is the prerogative of the Commission for intervening into the investigations of the national competition authorities, either through soft communication or, in extreme cases, by starting their own investigations. Since the effects of anticompetitive behaviour is often not limited to only one member state, the question which competition authority should deal with a specific case can be crucial for ensuring effective enforcement. Therefore the ECN fulfils an important role in regard to the allocation of cases, both horizontally between the national competition authorities and vertically between the national competition authorities and the Commission.

The literature about the European Competition Network shows clearly that it mainly fulfils the function of supporting effective enforcement (Cengiz 2010; Wils 2013). The mutual sharing of information and monitoring role as well as the allocation of cases are activities of the network that help to ensure an effective, consistent and equal application of European competition rules. In comparison to other networks, the ECN is less active in regard to rule-making both at the EU and member state level, although it also participates in policy discussions, and mutual information and monitoring can lead to a convergence of the practices at the national level. The ECN also has working groups for specific topics, which allow for mutual policy learning. However, benchmarking and best practices do play a smaller role than in other regulatory networks. The ECN also does not provide strong mechanisms for solving conflicts between the competition authorities. The main reason is that the ECN is not needed for conflict resolution, because the Commission has sufficient powers for deciding all conflicts. To what extent can the ECN play an own role in regard to the optimisation of tradeoffs between centralisation and decentralisation in competition policy? Due to the clear decision that the EU Commission as competition authority should have all relevant regulatory powers the ECN cannot play a large independent role and is mostly an instrument of the Commission for ensuring a consistent and effective decentralised enforcement of European competition rules. Therefore Cengiz (2010, 661) is right that the ECN is an atypical example of a European regulatory network. However, it is an interesting and partly surprising result that this hierarchical regulatory network still has been capable of achieving some of the benefits of voluntary, non-hierarchical regulatory networks as, e.g. an extensive communication culture (Blauberger and Rittberger 2015, 372).

From the legal federalism perspective, the ECN can help to reap the advantages of the specific combination of centralized rule-making with decentralised enforcement which characterises the European two-level system of competition laws. Whether this strong harmonisation of competition laws in the EU (and therefore also this hierarchical design of the ECN) is optimal from a legal federalism perspective is, however, an open question. For example, Van den Bergh and Camesasca (2006, 402–446) made a deep and critical analysis of the EU

competition law regime from this legal federalism perspective. Their results show a number of problems of the current system and also convincing arguments against a fully harmonised competition law in the EU. One important line of reasoning emphasises the advantages of decentralised experimentation with diverse competition rules and new regulatory practices for the evolution of an effective competition law. From this perspective, the hierarchical character of the ECN might be seen as a problem. However, it is very interesting that recently competition law scholars have observed that national competition authorities in the EU seem to experiment with new and diverse applications of European competition law, e.g. by developing new case groups or use new enforcement instruments (Monti 2014, 18). Monti raises the question whether the ECN might "evolve into a network that encourages diverse applications of competition law with a view to reflecting on how to best handle certain competition puzzles" (ibid.) but also sees the tension between the hierarchical governance mechanism of the ECN and such an experimentalist approach.

4.3 International Competition Network (ICN)

It is finally interesting to compare these European regulatory networks BEREC and ECN with the ICN, which works as a worldwide network of competition authorities within a very different institutional context (overview: Kovacic and Hollman 2011; Budzinski 2015). In the past all attempts to establish competition law rules at the global level for international markets failed. Therefore competition on international markets can only be protected by national competition law regimes, but this decentralised approach suffers from a number of problems in regard to coordination, conflicts, and particularly effective enforcement. Whether and to what extent the introduction of competition rules and enforcement agencies on the global level can be recommended as part of a multi-level competition law regime, could also be analysed from a legal federalism perspective. Since there are huge obstacles for agreeing on common substantive competition rules on the global level (due to different objectives and conditions in different countries), such analyses suggest that a combination of a more integrated system of procedural rules with minimum standards of substantive competition rules in an otherwise primarily decentralised multi-level competition law regime might be most capable of combining the advantages of centralisation and decentalisation in regard of the protection of competition on international markets (Kerber 2003; Budzinski 2008). However, since it was not possible that the states agree even on basic common rules for competition law, the ICN as an entirely voluntary network of competition authorities was founded in 2001.

In the meantime, the ICN is viewed as a very active and successful regulatory network with 126 members (competition authorities and regulatory agencies) from 111 countries (Sept. 2013) (Kovacic and Hollman 2011). It is a virtual network without an office and a budget, organised by a Steering Group (consisting of

representatives of competition authorities). Its main tasks are convergence, experience-sharing, supporting competition advocacy, and facilitate cooperation (ICN 2011, 4). This has been primarily done by the establishment of working groups, e.g. on cartels, mergers, unilateral conduct, advocacy, and agency effectiveness, who have developed and published best practice recommendations both on substantive as well as procedural rules for competition law and its enforcement. Additionally, the ICN has organised conferences and workshops on specific topics, and is particularly active in the dissemination of the competition experiences and best practices, especially also in regard to emerging and developing countries with new competition laws and often inexperienced competition authorities. Since the best practice recommendations are entirely voluntary, the basic idea of convergence is that states and competition authorities can use them for the enactment of their own competition laws and for competition law enforcement (opt in-solution). Although it is not entirely clear to what extent states and competition authorities have used this possibility, there seems to be a broad consensus that the ICN Recommended Practices and other guidance have influenced the worldwide discussion about competition law and its enforcement.

The ICN differs from the ECN and BEREC in several ways: (1) Since neither competition rules nor a competition authority exist at the global level, the regulatory powers are exclusively allocated at the national levels. Therefore the ICN is a purely voluntary bottom-up project of the national competition authorities. (2) The main function of the ICN is the development of best practice recommendations about the protection of competition and policy learning. (3) Since these best practice recommendations can influence also national policy discussions as well as the practice of national competition authorities, it can also be seen as a soft governance method, which can influence the making of competition rules all over the world. (4) However, the ICN does not monitor the competition law application of the member institutions or help otherwise to increase the effectiveness of competition law enforcement (beyond the provision of best practice recommendations). The ICN, in particular, does not play any role in competition cases, neither through providing mutual information about the cases or supporting directly the cooperation of national competition authorities. (5) Therefore the ICN has also no function in regard to the allocation of cases between national competition authorities (as, e.g. the ECN) nor does it provide any mechanism for solving conflicts between the competition authorities (as, e.g. BEREC).

5 Conclusions

In this article it was shown that networks of regulatory agencies as soft governance instruments can play an important role in multi-level regulatory systems for helping to optimise the tradeoffs between the advantages and problems of centralisation and decentralisation. Therefore regulatory networks can be part of sophisticated solutions for the optimal vertical allocation of regulatory powers in two-level systems of

regulation as in the EU. From the perspective of the economic theory of legal federalism the functions of regulatory networks, which mostly have been discussed already in the political science literature, namely helping rule-making, identifying best practices and promoting policy learning, improving effective enforcement, and supporting conflict resolution can help to combine advantages and avoid problems of centralised and decentralised regulatory powers. Since from a legal federalism perspective, optimal intermediate solutions between centralisation and decentralisation can look very different, it is not surprising that also empirically very different regulatory networks can be observed. This can be seen in the three case studies about BEREC, ECN and ICN. Whereas ECN is a regulatory network in a strongly centralised European regulatory context, ICN operates in an entirely decentralised context. In contrast to both, BEREC works in a regulatory two-level system with still some divided competences. Therefore the different functions of these regulatory networks are not surprising. Important for the further research on regulatory networks is that they should not be viewed primarily as a transitional phenomenon in a final development to centralisation and harmonisation, but should also be seen as potentially important institutions within long-term structures of multi-level regulatory systems.

Appendix

See Table 2.

Table 2 Analysis of the activities of BEREC (published documents. May 2011–May 2013)

Document name	Document type	Who initiates action? 1 = BEREC 2 = COM 3 = NRA	Expert advisor? Yes/No	Regulation by soft law? Yes/No	Dispute resolution? Yes (horizontal/vertical)/ No	Document name	Document type	Who initiates action? 1 = BEREC 2 = COM 3 = NRA	Expert advisor? Yes/No	Regulation by soft law? Yes/No	Dispute resolution? Yes (horizontal/ vertical)/ No
BoR (11)22	2	1	X	–	–	BoR (12)67	1	1	–	X	–
BoR (11)25	2	1	–	X	–	BoR (12)68	1	1	X	–	–
BoR (11)26	2	1	X	X	–	BoR (12)69	3	2	X	–	X(v)
BoR (11)27	2	1	–	x	–	BoR (12)71	3	2	X	–	X(v)
BoR (11)34	2	1	X	X	–	BoR (12)72	3	2	X	–	X(v)
BoR (11)35	2	1	–	X	–	BoR (12)78	2	1	X	–	–
BoR (11)36	2	1	–	X	–	BoR (12)79	2	1	–	X	–
BoR (11)42	2	2	X	–	–	BoR (12)80	2	1	–	X	–
BoR (11)43	2	1	X	–	–	BoR (12)81	2	1	–	X	–
BoR (11)44	1	1	X	X	–	BoR (12)83	5	1	–	X	–
BoR (11)46	2	1	X	–	–	BoR (12)87	1	1	–	X	–
BoR (11)51	2	1	X	X	–	BoR (12)88	5	1	–	X	–
BoR (11)53	2	1	X	X	–	BoR (12)91	3	2	X	–	–
BoR (11)54	1	1	–	X	–	BoR (12)100	1	1	–	X	–
BoR (11)55	2	1	–	X	–	BoR (12)103	5	1	–	X	–
BoR (11)56	2	1	–	X	–	BoR (12)104	1	1	–	X	–
BoR (11)57	2	1	–	X	–	BoR (12)105	1	1	–	X	–
BoR (11)64	3	2	X	–	–	BoR (12)106	2	1	–	X	–
BoR (11)65	3	2	X	–	–	BoR (12)107	4	1	–	X	–
BoR (11)67	4	1	–	X	–	BoR (12)108	2	1	X	–	–
BoR (11)70	1	1	X	X	–	BoR (12)109	3	2	X	–	–

(continued)

Table 2 (continued)

Document name	Document type	Who initiates action? 1 = BEREC 2 = COM 3 = NRA	Expert advisor? Yes/No	Regulation by soft law? Yes/No	Dispute resolution? Yes (horizontal/vertical)/ No	Document name	Document type	Who initiates action? 1 = BEREC 2 = COM 3 = NRA	Expert advisor? Yes/No	Regulation by soft law? Yes/No	Dispute resolution? Yes (horizontal/ vertical)/ No
BoR (11)71	7	2	X	–	–	BoR (12)119	7	1	X	–	–
BoR (11)75	3	2	X	–	X(v)	BoR (12)126	5	1	–	X	–
BoR (11)76	3	2	X	–	X(v)	BoR (12)127	5	1	–	X	–
BoR (12)10	1	1	–	X	–	BoR (12)128	5	1	–	X	–
BoR (12)12	1	1	X	X	–	BoR (12)130	2	1	–	X	–
BoR (12)13	2	1	–	X	–	BoR (12)131	4	1	–	X	–
BoR (12)14	2	1	X	–	–	BoR (12)132	2	1	–	X	–
BoR (12)15	2	1	X	X	–	BoR (12)139	1	1	–	X	–
BoR (12)22	3	2	X	–	X(v)	BoR (12)145	3	2	X	–	–
BoR (12)23	3	2	X	–	X(v)	BoR (12)146	3	1	–	X	–
BoR (12)24	2	1	X	–	–	BoR (13)01	3	2	X	–	X(v)
BoR (12)25	3	2	X	–	–	BoR (13)04	3	4	X	–	X(v)
BoR (12)26	3	2	X	–	X(v)	BoR (13)05	2	1	–	X	–
BoR (12)27	3	2	X	–	X(v)	BoR (13)15	4	1	–	X	–
BoR (12)28	3	2	X	–	X(v)	BoR (13)22	3	2	X	–	–
BoR (12)30	2	2	X	–	–	BoR (13)27	3	2	X	–	–
BoR (12)31	1	2	X	–	–	BoR (13)34	6	3	–	X	X(h)
BoR (12)32	1	1	–	X	–	BoR (13)36	2	1	–	X	–
BoR (12)33	1	1	–	X	–	BoR (13)37	2	1	–	X	–
BoR (12)40	2	1	–	X	–	BoR (13)40	3	2	X	–	X(v)
BoR (12)41	2	1	–	X	–	BoR (13)41	3	1	X	–	–

(continued)

Table 2 (continued)

Document name	Document type	Who initiates action? 1 = BEREC 2 = COM 3 = NRA	Expert advisor? Yes/No	Regulation by soft law? Yes/No	Dispute resolution? Yes (horizontal/vertical)/ No	Document name	Document type	Who initiates action? 1 = BEREC 2 = COM 3 = NRA	Expert advisor? Yes/No	Regulation by soft law? Yes/No	Dispute resolution? Yes (horizontal/ vertical)/ No
BoR (12)51	2	1	–	X	–	BoR (13)47	3	2	X	–	X(v)
BoR (12)52	2	1	–	X	–	BoR (13)53	1	1	–	X	–
BoR (12)53	2	1	–	X	–	BoR (13)54	1	1	–	X	–
BoR (12)54	2	1	–	X	–	BoR (13)55	3	2	X	–	X(v)
BoR (12)55	2	1	–	X	–	BoR (13)73	3	2	X	–	X(v)
BoR (12)56	2	1	–	X	–	BoR (13)93	3	2	X	–	X(v)
BoR (12)61	3	2	X	–	X(v)	BoR (13)94	3	2	X	–	X(v)
BoR (12)66	3	2	X	–	X(v)	BoR (13)95	3	2	X	–	X(v)

In total: 100 documents

Document type 1 = Public Consultation, 2 = Report/Snapshot, 3 = Opinion, 4 = Guideline, 5 = Common Approaches/Positions, 6 = Advice, 7 = Other; BoR = Board of Regulators (Year) document number, X = Yes, – = No, v = vertical; h = horizontal

Source BEREC public document register (http://berec.europa.eu/eng/document_register/welcome/)

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