

## **Balancing Competence and Control: Indirect Governance-Triangles in EU Regulation**

Felix Biermann and Berthold Rittberger

LMU Munich

**Abstract:** In the past decades, the EU has witnessed a remarkable rise in the number of specialized regulatory agencies and European regulatory networks (ERN). Regulatory governance in the EU does not, however, present policymakers with a binary choice of either opting for agencies or ERNs, to address competence-control trade-offs, which underpin the governor's dilemma. We argue that EU member states, the Commission and the European Parliament – acting as a collective governor – combine indirect modes of governance, orchestration and delegation, and hence two types of intermediaries (ERNs and agencies), to address governance challenges ensuing from regulatory policy failures. By creating indirect governance-triangles, the governor attempts to enhance competence (control) by complementing a pre-existing delegation (orchestration) relationship with an orchestration (or delegation) relationship. We illustrate our argument by drawing on two cases studies of regulatory policymaking failures in the EU: In the field of food safety, the EU sought to overcome a competence deficit by enlisting a second intermediary, the 'Focal Point Network' (an ERN), alongside the European Food Safety Agency; in the case of aviation safety, the EU created an agency, the European Aviation Safety Agency, to overcome a control deficit which enabled the agency to rein in existing regulatory networks.

**Keywords:** European Regulatory Networks, EU Agencies, Delegation, Orchestration

## 1. Introduction

The European Union (EU) is often referred to as a “regulatory state” (Majone 1994), in which a multitude of actors engages in extensive rule-setting to fashion a common market and to manage its externalities. Consequently, the creation of a “Single European Regulatory Space” (SERS) (Levi-Faur 2011) has led to a proliferation of regulatory institutions occupying the EU’s regulatory landscape, the so-called “Eurocracy” (Kelemen and Tarrant 2011). Since the early 1990s, the EU has witnessed a remarkable rise in the number of specialized regulatory agencies, which assist the EU’s administrative system – centered around the European Commission and its component Directorates-General – by providing expert advice, preparing regulatory decisions, or assisting national and local authorities with the implementation of EU-level rules (Groenleer et al. 2010; Versluis and Tarr 2013). Alongside regulatory agencies, another institutional innovation has come to populate the “Eurocracy”, European regulatory networks (ERN). Unlike EU agencies, ERNs comprise a multitude of different regulatory actors – public and private, domestic and supranational – whose inter-relationships tend to be more informal; and unlike an agency, an ERN does not answer to a principal. Moreover, ERNs lack centralized administrative capacities and independent financial resources (Levi-Faur 2011: 813). Akin to agencies, ERNs fulfill an important regulatory function in the construction of the single regulatory space, since ERNs often act as focal institutions in an effort to harmonize the EU’s fragmented regulatory landscape (Levi-Faur 2011: 811). In this function, ERNs also serve as forums where interactions between domestic regulatory agencies and EU-level actors are institutionalized. ERNs are thus predestined to “simultaneously inform EU policy and actual enforcement on the ground” (Eberlein and Newman 2008: 26; Blauburger and Rittberger 2015). These two regulatory institutions – EU agencies and ERNs – are two prominent instances of indirect governance in EU regulatory policy-making. Governance with and through EU regulatory agencies can be conceptualized as governance by *delegation*: The Council, the

European Commission, and the European Parliament (EP), acting as principals, grant authority to an EU agency through a formal ‘contract’ (a founding regulation). This ‘contract’ defines the agency’s mandate and hence its regulatory objectives and tasks; it lays down the agency’s internal working structures, principles for staffing, and financial resources, as well as monitoring mechanisms to ensure that the agency can be held accountable. ERNs, in turn, are instances of *orchestration*, a soft and more informal form of indirect governance. In an orchestration relationship, a governor (most commonly the European Commission, but also member states) enlists an intermediary (an ERN) to address a regulatory target in pursuit of specific regulatory objectives (Abbott et al., 2015). Unlike in a delegation relationship between a principal and an agent, the governor – in an orchestration relationship – can neither command nor control the intermediary. Instead, their relationship is based on voluntary cooperation and mutual dependence: both actors possess capacities that the other actor lacks (Blauberger and Rittberger 2015: 368)

EU agencies and ERNs have been extensively studied in the literature on the “Eurocracy” and the SERS. There is a lively debate offering different accounts for the choice and design of these two types of regulatory institutions (Thatcher and Coen 2008; Kelemen and Tarrant 2011; Blauberger and Rittberger 2015, 2017; Tarrant and Kelemen 2017). This literature suggests that governors – when designing regulatory institutions – have a choice to make: they *either* opt for an agency, *or* they opt for an ERN. Empirically, however, the SERS and its constituent regulatory regimes is characterized by the co-existence of regulatory institutions: the majority of regulatory regimes in the EU finds agencies and ERNs operating alongside each other (Levi-Faur 2011). In this contribution, we ask why regulatory agencies and regulatory networks frequently co-exist in the same regulatory regime.

We address this question by building on competence-control (CC) theory (Abbott et al. 2018).

While the literature suggests that EU policy-makers either delegate regulatory tasks to an EU

agency or enlist an ERN to pursue their regulatory objectives, we argue that the choice of regulatory institutions and hence the indirect governance modes actors implement is rarely clear-cut. Indeed, we demonstrate in our contribution that the collective governor – the Council, the Commission, and the EP – draws on and combines two types of regulatory intermediaries, EU agencies and ERNs, to address particular regulatory challenges, which underpin the CC trade-off in EU regulatory policy-making.

We demonstrate that the process of agencification (Groenleer 2009; Rittberger and Wonka 2011) is not necessarily about replacing ERNs with agencies (Thatcher and Coen 2008), nor is it about a competitive, zero-sum relationship between agencies and networks, whereby the former attempt to bring the latter under their control (Levi-Faur 2011: 826). Instead, we show that the relationship between networks and agencies is, at times, a synergetic one, whereby both regulatory actors empower each other and the governor. By combining two governance modes – orchestration and delegation – governors attempt to moderate the governor’s dilemma. They do so by creating indirect governance-triangles involving two intermediaries, agencies and networks, either to (re-)establish hierarchical control (by granting authority to an agency alongside a pre-existing ERN), or to mitigate a competence deficit (by enlisting an ERN alongside a pre-existing agency). These indirect governance-triangles allow the governor to reduce the intensity of the CC trade-off. Combining two modes of indirect governance, orchestration and delegation, can help the governors to reduce actual or potential control deficits when enhancing competence, and vice versa.

## **2. Indirect governance-triangles in EU regulatory policy-making**

The construction of the EU’s common market is an ongoing process, characterized by the continuous adoption and reform of measures of economic and social regulation. Rule-setting as well as the effective implementation of regulatory measures throughout the EU’s member states

remains a challenge to the EU, its member states and national regulatory authorities (NRAs). Since the EU lacks centralized implementing capacities (Keohane 2001), it engages intermediaries. As the demand for and supply of regulation expanded in the context of the single market program, the 1990s experienced a wave of newly created EU agencies (Groenleer 2009; Wonka and Rittberger 2010), as well as ERNs (Eberlein and Grande 2005; Eberlein and Newman 2008; Thatcher and Coen 2008) to assist the EU in the regulatory policy-making cycle, e.g. by preparing regulatory decisions and supporting their effective implementation.

Governance through agencies and ERNs corresponds – almost ideal-typically – to two types of indirect governance (Abbott et al. 2018): EU agencies can be considered instances of *delegation*. The Council, the Commission, and the EP – acting as collective governor – grant regulatory functions to EU agencies, such as standard setting, risk assessment, or product certification. Agencies can be defined as administrative organizations with a formal mandate, functional capacities, and internal hierarchy pursuing a circumscribed set of (mainly) regulatory tasks (Levi-Faur 2011: 813). Importantly, and irrespective of the agencies’ degree of autonomy (Groenleer 2009; Wonka and Rittberger 2010), the governor maintains hierarchical control over the agency. Control mechanisms include the governor’s representation in the agency’s supervisory or management boards, control over the agency’s budget, the possibility to change the agency’s mandate, or even to shut it down completely.

ERNs, in turn, are characterized by “a set of relatively stable relationships of a non-hierarchical and independent nature which link a variety of actors” (Levi-Faur 2011: 813). We conceive of governing with ERNs as *orchestration*, whereby a governor enlists a regulatory network to realize joint regulatory objectives. ERNs are composed of individual national regulatory authorities (NRAs) that “function to advise the Commission [as well as the Council and the EP], draft implementing legislation, coordinate national enforcement, promote information exchange among national regulators” (Eberlein and Newman 2008: 32), and offer an informal

setting for consensus-building. Since the governor cannot hierarchically control ERNs (Blauberger and Rittberger 2015: 42), she has to rely on inducements, such as material support and persuasion “to nudge the intermediary towards using its authority and competencies as the governor desires” (Abbott et al. 2018: 5).

The bulk of the literature on the EU’s “Eurocratic” institutional structure suggests that policy-makers opt for either ERNs or EU agencies when addressing regulatory policy challenges. While some argue that agencies and ERNs might co-evolve in particular regulatory regimes, there is a consensus that one form of indirect governance will eventually come to dominate the other (Levi-Faur 2011; Thatcher 2011). Theory-building efforts have chiefly concentrated on the motivations driving the governor(s) to opt for *either* agencies *or* ERNs (Kelemen and Tarrant 2011; Blauberger and Rittberger 2015, 2017; Tarrant and Kelemen 2017). Some have suggested that ERN’s can be considered an intermediate step on the path towards centralized regulatory agencies, while others emphasize that ERNs possess important functional advantages over agencies, which might help explain their perseverance (Eberlein and Grande 2005; Eberlein and Newman 2008; Blauberger and Rittberger 2015). Yet, these accounts on the interaction between agencies and ERNs fall short of explaining why and under what conditions a governor may intentionally draw on both an agency *and* an ERN to address regulatory challenges in a particular policy area.

In order to address this gap in the literature, we take the governor’s dilemma as a theoretical point of departure. We argue that governors may combine different modes of indirect governance in an attempt to moderate the CC trade-off when faced with regulatory policy failures. By building indirect governance-triangles, engaging both EU agencies and ERNs, the governor attempts to get the ‘best of both worlds’: securing hierarchical control via a formalized relationship with an EU agency (through delegation), while – at the same time – ensuring intermediary competence by drawing on independent and informal ERNs (through

orchestration). In the ensuing sub-sections, we distinguish two pathways through which orchestration and delegation can be combined. They differ with respect to (a) the institutional status quo in a given regulatory regime, (b) the type of governance problem the governor faces, and (c) the governor's motivation to opt for one of the two pathways.

## **2.1 Combining delegation with orchestration: the control triangle**

The first of the two indirect governance-triangles, the control triangle, combines a delegation relationship with a pre-existing orchestration relationship (see Figure 1). At  $t_0$  the governor (G) stands in a non-hierarchical, i.e. horizontal orchestration relationship with an intermediary ( $I_1$ ), an ERN, to govern her governance targets (T). Subsequently, at  $t_1$  the governor decides to grant authority to a second intermediary, an EU agency ( $I_2$ ), which helps the governor to control the ERN indirectly. This delegation relationship complements the pre-existing orchestration relationship.

What motivates a governor to complement an existing orchestration relationship with a delegation relationship? Taking a pre-existing orchestration relationship between the governor and an ERN as a point of departure, the governor may be motivated to increase her control over the implementation of regulatory measures by bringing in an agency, without foregoing intermediary competence. When governors opt for ERNs as intermediaries, they often do so to maximize 'competence' without having to bear the often heavy costs of control. For instance, ERN's provide a high degree of "local, street-level expertise" and the ability to decide on a case-by-case basis and therefore are highly competent in regulatory regimes where rules cannot be implemented according to a one-size-fits-all approach (Blauberger and Rittberger 2015: 370). ERNs also possess epistemic authority, for their deliberations on technical matters take place in a de-politicized context, which can be conducive to effective problem-solving (Eberlein and Newman 2008: 30, 33).

While the governor could increase control by turning the ERN into an agency, the governor would risk losing the specific functional advantages provided by the ERN's informal network structure. Setting up an agency to co-orchestrate the ERN together with the governor allows the governor indirect control over the ERN via its formal and hierarchical relationship to the agency. While not being hierarchically superior to the ERN, the agency, as specialized regulatory body, may be better endowed to monitor and influence the ERN's operations than the governor. For instance, an expert-body, such as an EU agency, is potentially in a better position than the governor to act as an unbiased, impartial broker vis-à-vis the main governance targets, national authorities and stakeholders. At the same time, keeping the network in place allows the governor to preserve the benefits from the ERN's specific properties as loosely coupled, non-hierarchical network. Therefore, forming an indirect governance-triangle by bringing in a hierarchically controlled agency to a pre-existing orchestration relationship allows the governor to hedge in the ERN indirectly without threatening its independence and its characteristics as informal expert body.

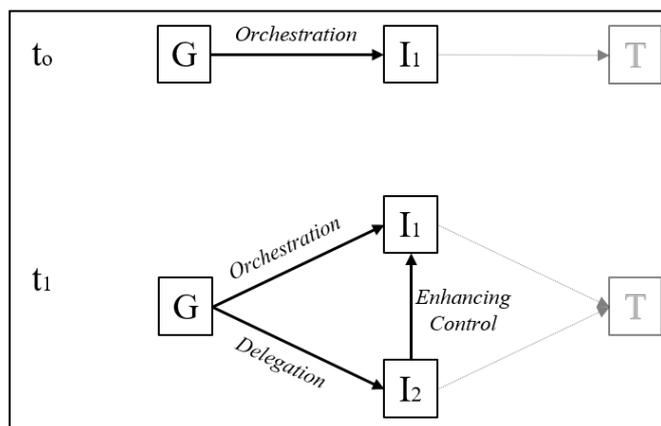


Figure 1 The control triangle

Under what conditions do governors seek to enhance control over networks by bringing in an agency? A governor is likely to seek closer control over governance outcomes when she is confronted with acts of *voluntary non-compliance* (Börzel 2003) on the part of network actors,

which potentially undermine the efficiency of a regulatory policy regime. The informal character of ERNs, as well as the lack of hierarchical control can be problematic if governor and intermediary cease to agree on how to achieve their main regulatory objectives, for instance, when network actors advance different interpretations of what particular regulatory measures imply, or if non-compliance with regulatory measures cannot be effectively sanctioned in areas requiring domestic implementation (Groenleer et al. 2010). If such problems arise or are recurrent, the regulatory regime is characterized by a lack of enforcement powers on the part of the governor (Fearon 1998). To remedy this situation, the governor could benefit from creating an agency as a credible commitment device to enhance control over governance outcomes by centralizing negotiations about the implementation of regulatory measures, as well as by having the capacity to monitor and potentially sanction non-compliance (Abbott and Snidal 1998). In sum, while ERNs lack the means to develop and enforce formal agreements, an agency provides the means to ensure exactly that. At the same time, the governor is unlikely to ‘drop’ the ERN, as long as it provides sought after competence and regulatory expertise.

## **2.2 Combining orchestration with delegation: the competence triangle**

The second type of indirect governance-triangle, the competence triangle, combines a pre-existing delegation relationship with an orchestration relationship. As illustrated in Figure 2, the governor (G) and an EU agency ( $I_1$ ) entertain a delegation relationship, characterized by vertical, hierarchical control at  $t_0$ . The governor then supplements this relationship by enlisting an ERN ( $I_2$ ), with the objective to enhance the agency’s ( $I_1$ ) competence at  $t_1$ .

One of the functional advantages of agencies over loosely coupled regulatory networks lies in the centralization and bureaucratization of expertise, which the governor can more easily draw upon, given the formal and hierarchical delegation relationship. Assume that the governor intends to enhance the competence of her intermediary ( $I_1$ ), an EU agency: She can do so by

expanding the agency's staff, budget, or its mandate. However, increasing the competence of the intermediary is also likely to endow the intermediary with more autonomy and hence impedes control efforts: the governor thus faces a CC trade-off.

Yet, governors have an alternative: Rather than providing an EU agency with more leeway to stimulate intermediary competence, the governor can flank the agency with an ERN. The task of enlisting an ERN can be assumed directly by the governor, or the governor can mandate the agency to enlist the ERN. In order to avoid competition between the two intermediaries, as well as to avoid a duplication of their tasks, and thus to ensure their cooperation, we can expect the governor to delegate parts of the task to orchestrate the ERN to the agency.

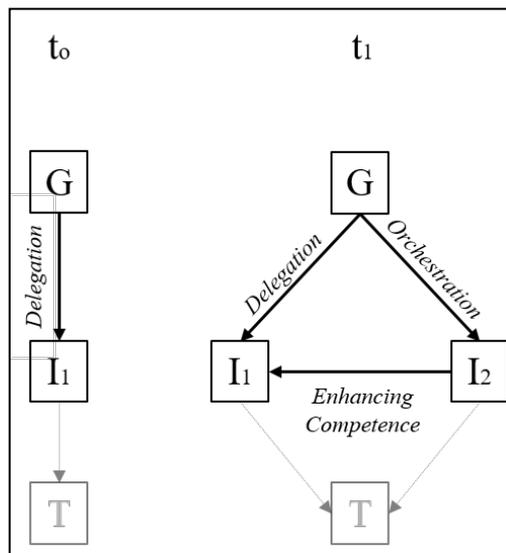


Figure 2 The competence triangle

Adding an orchestration relationship to a pre-existing delegation relationship can be an apt measure to counter an intermediary's *involuntary non-compliance* (Börzel 2003), most notably to resolve a competence deficit. Regulatory competence deficits can occur when the intermediary – an EU agency – lacks the capacities and/or expertise to effectively address regulatory problems. An intermediary's involuntary non-compliance can be countered by capacity-building, for instance by expanding the mandate, resources or staff of the intermediary

(Börzel et al. 2012: 459–60; Chayes and Chayes 1995). Empowering the agency might thus bring about competence-enhancing effects. However, this strategy has two possible drawbacks for the governor. First, since individual member states may have different individual assessments about the CC trade-off, disagreement among a (collective) governor (e.g. member states in the Council) may foreclose the option of agency empowerment. Second, depending on the regulatory problem to be addressed, empowering an EU agency may prove inefficient. For instance, if the regulatory problem requires local and case-by-case knowledge and expertise (Blauberger and Rittberger 2015), enhancing centralized capacities amounts to a misallocation of resources. Following this rationale, the governor may thus seek to tap into the expertise and knowledge of national or local authorities to support the agency in providing assistance with implementing measures. Enlisting an additional intermediary – an ERN – the governor expects functional benefits, i.e. effectiveness in fulfilling the intermediary’s mandate. Moreover, the agency can draw on additional resources by co-orchestrating an ERN. At the same time, the governor does not relinquish control since she keeps the agency in the fold while letting it orchestrate the ERN. Table 1 summarizes the main arguments presented in this section.

	<b>Control triangle</b>	<b>Competence triangle</b>
Regulatory status quo	Orchestration relationship (governor-ERN)	Delegation relationship (governor-agency)
Governance-triangle	Governor grants authority to agency alongside existing governor-ERN relationship	Governor/agency enlist ERN alongside existing governor-agency relationship
Governor's primary motivation	Enhancing control (while maintaining competence)	Enhancing competence (while maintaining control)
Scope conditions	Voluntary non-compliance, enforcement deficit	Involuntary non-compliance, lack of capacity

*Table 1* Indirect governance-triangles

### **3. Moderating the governor's dilemma**

In this section, we offer two empirical illustrations of the two indirect governance-triangles and their respective pathways. The first case study is an example of a control triangle: The Commission has been orchestrating the European Civil Aviation Conference (ECAC) and its associated body, the Joint Aviation Authorities (JAA) for a long time, when it subsequently proposed to transform the latter into the European Aviation Safety Agency (EASA) to co-orchestrate ECAC. The second case study is illustrative of the competence triangle. The Commission, the European Parliament and the Council delegated tasks to the European Food Safety Authority (EFSA), which – at the behest of the collective governor – subsequently formed, enlisted and started to co-orchestrate an ERN, the so-called Focal Point Network. We argue that the co-existence of ECAC and EASA on the one hand, and the co-existence of EFSA

and the Focal Point Network on the other are a consequence of the collective governor trying to moderate the CC trade-off inherent in indirect governance relationships.

### **3.1 When orchestration does not suffice: the regulation of aviation safety**

In 1955, the representatives of 19 national aviation agencies formally created the European Civil Aviation Conference (ECAC), an intergovernmental network with the objective to promote “coordination, a better utilization and the orderly development of [...] air transport” (Henrich-Franke 2007: 86). ECAC consists of representatives of the National Aviation Authorities (NAAs) and was set up with an “intermediate status”, i.e. it is not fully independent of the International Civil Aviation Organization (ICAO) (ECAC 2014b), but autonomous in elaborating its own work program as an intergovernmental technical consulting body (Kassim and Stevens 2010: 62). ECAC was envisaged as a forum for discussion and exchange, issuing regulatory recommendations of a non-binding nature to its member states. Over time, ECAC’s membership base quickly expanded and now comprises 44 countries, including all EU member states.

With its first ever memorandum on air transport in 1979, the European Commission emphasized the necessity to establish relations with ECAC and achieve “continuous concertation” in order to reach the goal of “an air transport system in the Community with domestic characteristics” (European Commission 1979: 15). From 1990 onwards, after the creation of the Joint Aviation Authorities (JAA), another ERN established as an associate body of ECAC, and following the adoption of the second and third ‘packages’ of Council Regulations on air transport in 1990 and 1992, the tone was set for an integrated and liberalized “European Single Aviation Market” (European Parliament 2018). In addition, the Commission, the Council, and the European Parliament subscribed to the common goal to establish a Single European Sky. In order to reach this objective, the Commission, “came to recognize the value of cooperation with established

aviation bodies, notably ECAC” (Kassim and Stevens 2010: 129) and its associated body, JAA. Representatives of the European Commission were now “systematically invited to participate in ECAC meetings in the various fields of the organisation's activities” (ECAC 2014c) and the relationship between JAA and the EU was handled within the same framework of relations (ECAC 1990). Given the Commission’s objective to liberalize air transport and to meet the concomitant regulatory demand to harmonize rules regarding aviation safety, the Commission increasingly turned to ECAC. As the former Director General of the Danish Civil Aviation Authority put it: “the Commission does not, in a number of cases, have sufficient expertise within its own ranks and relies heavily on outside assistance and does, in most cases, cooperate and harmonize with ECAC.” (Eggers 1991, p. 114) For instance, the Commission and ECAC have jointly developed a framework for regulating airworthiness and noise emissions, whereby ECAC’s draft recommendation constituted the basis for the Commission’s draft directives on these issues (Eggers 1991, p. 116).

Against this backdrop, the relationship between the Commission and ECAC, later including JAA, can be best conceived of as an instance of *orchestration*: Neither ECAC nor JAA derived their authority from the Commission; the Commission was thus not in a position to command and control ECAC and JAA: It “lacked a distinct administrative leverage” to influence the two networks and had to rely on persuasion (Pierre and Peters 2009: 346). Indeed, close regulatory cooperation and effective problem-solving ensued because the Commission lacked particular capacities (expertise) and because both actors realized that their regulatory policy objectives coincided (Eggers 1991).

In 2002, the Council and the European Parliament adopted a regulation establishing the European Aviation Safety Agency (EASA). The creation of EASA can be conceived of as an act of delegation, a contractual, hierarchical relationship between a (collective) principal and an agent, which envisages substantial hierarchical controls over the agent’s budget, staff, and

mandate. Moreover, both the member states and the Commission are represented in EASA’s management board (Regulation (EC) No 1592/2002: Art. 20, 25, 48). EASA is an EU agency that “should assist the Commission in the preparation of the necessary legislation and assist the Member States and the industry in its implementation” (*ibid*: para. 12). EASA replaced JAA in 2009 both with a view to its operational functions (e.g. airworthiness licensing) and with regard to JAA’s seat in ECAC’s regular plenary sessions. ECAC remains an important player in European civil aviation, with regular ECAC/EU dialogue forums taking place. Yet, from 2002 onwards the Commission delegated additional orchestration tasks to EASA, which engages in regular cooperation formats with ECAC, both on managerial and operational levels. Thus, while EASA has no hierarchical control over ECAC, it closely monitors and influences ECAC’s interactions with non-EU members. Figure 3 depicts the control triangle consisting of an orchestration relationship at  $t_0$ , which was complemented by the establishing a delegation relationship at  $t_1$ .

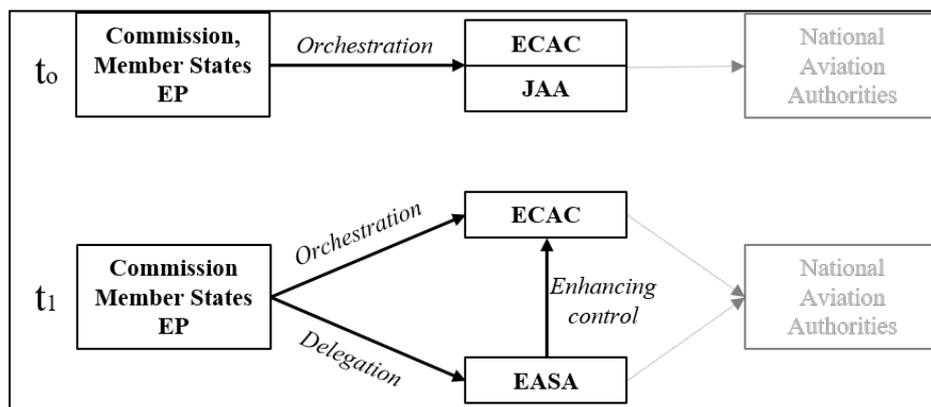


Figure 3 Control triangle in European aviation safety governance

Why has the collective governor, the member states, the Commission, and the EP decided to create an agency, EASA? What is more, why did the collective governor continue to draw on ECAC’s expertise? In a nutshell, why does the EU continue to rely on ECAC alongside the

newly created agency? We argued that adding a delegation relationship to a pre-existing orchestration relationship is driven by the governor's motivation to enhance control in a particular regulatory regime. The creation of EASA should thus reflect this motivation. Moreover, we also expect that governors do not simply "agencify" existing networks so as to maintain the advantages in competence provided by the ERNs. In other words, we argue that complementing a pre-existing orchestration relationship (ECAC) with a delegation relationship (EASA) is the result of the collective governor's attempt to enhance control without foregoing intermediary competence.

During the 1990s, with the impressive increase in air traffic, aviation safety developed into a policy area attracting "considerable public interest" (Pierre and Peters 2009: 353) and was subject to "increasing concerns over the health and welfare of passengers during flights" (Regulation (EC) No 1592/2002: para. 3). In light of the potentially very severe consequences of insufficient regulations, the bottom-up approach followed by the JAA, which had no executive powers, no sanctioning mechanism, and no ability to adopt binding rules and uniform standards in Europe was seen as a major shortcoming of the governance system in aviation (Siedenburg 2009: 107). More specifically, there was skepticism concerning the fuzzy orchestration relationship with JAA and the situation "to delegate authority to an organization over which you have no control" (interview, EU senior official, September 11, 2000, cited in Pierre and Peters 2009: 346).

Similarly, because of diverging member state preferences, ECAC was created without a clear legal status (Henrich-Franke 2007: 86–7). It was the most important framework for pan-European cooperation in the aviation sector and served as an informal cooperation forum for European members and international organizations, such as ICAO (Council of Europe 2006: para. 42). ECAC has a special relationship with ICAO, an UN agency managing the standard-setting Chicago Convention on International Civil Aviation, and serves as its regional European

branch. The orchestration relationship between the Commission and ECAC during the 1990s can be described as follows: “the Commission had increasing responsibilities but few staff, whereas ECAC had an expert staff and an efficient organization which could be used to prepare recommendations for EC action on a technically sound basis” (Kassim and Stevens 2010: 158). In short, the governor had little control over both JAA and ECAC, the latter featuring a significant degree of technical expertise and far reaching networking resources.

For the EU, creating EASA and thereby agencifying JAA, while keeping ECAC as an orchestrated regulatory network, was expedient for two reasons. First, the creation of EASA enabled the collective governor, especially the Commission as the main governor in the aviation safety regime, to augment control over regulatory outcomes. The governor directly increased her influence over rule implementation and the application of standards in the member states which had not taken place consistently and uniformly through JAA (Pierre and Peters 2009: 346; Groenleer et al. 2010: 1221), by turning the latter into an agency. Moreover, both the Commission and EASA being represented in ECAC (Permanent Representation of France at ICAO 2017), the governor increased its control indirectly over ECAC by co-orchestrating it together with EASA. On the one hand, through the formalization of JAA and its incorporation into EASA, the Commission, the member states, and the EP can now closely monitor and enforce the implementation of regulations in the realm of civil aviation safety in the EU member states. Before EASA’s creation, the EU member states had considerable room for maneuver in translating, interpreting, and applying standards commonly agreed through JAA – “There were even differences between the three German translations of Germany, Austria and Switzerland” (Siedenburg 2009: 107). EASA’s safety standards were no longer voluntary but legally binding and thus the scope for preferential rule interpretation and compliance à la carte was diminished considerably. The Commission, through its representation in EASA’s management board, can now directly influence agenda setting, rulemaking and implementation in the European aviation safety regime, which used to take place in JAA and ECAC. While the Commission’s role in

ECAC was not exceeding that of an observer, it is now represented as a regular member in EASA's management board (Regulation (EC) No 2016/2008: Art. 34). Thus, EASA offers a much more benign environment for the Commission to control the contents of regulatory proposals than ECAC did. Moreover, through EASA the governor has direct access to a permanent staff of around 750 (Pierre and Peters 2009) and can thus interact with the NAAs and ECAC on an equal footing, which is a precondition to understand and control implementation on the ground. Creating EASA through an act of delegation thus enabled the governor to enhance control over implementation, which was considered necessary to secure the effectiveness of the aviation safety regime.

On the other hand, by tasking EASA with the orchestration of ECAC, the Commission increased its influence over ECAC by proxy. The Commission's rather loose orchestration relationship with ECAC was complemented with stronger control-mechanisms characteristic of the delegation relationship with EASA. This allowed the Commission to enhance its role as governor vis-à-vis the NAAs in the civil aviation regime. EASA's management board comprises representatives from all national civil aviation authorities, which mostly act as ECAC representatives as well.<sup>1</sup> This sets strong incentives for member states to streamline the work of both ECAC and EASA and provides the grounds for goal convergence, which is a crucial condition for efficient orchestration (Abbott et al. 2018: 14). This development also strengthens the role of EASA, as, due to its perceived independence, it is in a better position to orchestrate ECAC effectively compared to the Commission acting on its own.

The second advantage of establishing a governance-triangle over a full agencification of the aviation safety regime is the preservation of ECAC's unique competence derived from its configuration as a loosely coupled regulatory network. Even though ECAC reduced its safety

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<sup>1</sup> In 2018, 22 out of 33 members of EASA's management board also serve as the ECAC representatives of their member states (cf. EASA 2018; ECAC 2018)

activities to avoid “overlaps and duplications” (ECAC 2014a), it continues to be an important player in the civil aviation regime. The Single European Sky, one of the EU’s flagship projects, can only be completed through cooperation with both EU and non-EU members, as well as with ICAO (Council of Europe 2006: para. 42). When EASA was created, decision-making on aviation was included in the *acquis communautaire*. This was problematic for third countries, which were no longer able to influence the outcomes and thus were reluctant to be bound by regulations they had no say in (Pierre and Peters 2009: 352). Relying exclusively on EASA, which has no jurisdiction in third countries, thus would have posed a grave risk to the Single European Sky project. ECAC’s membership base, in turn, comprises almost all European states and thus has the “ability to serve as a ‘bridge’ for its non-EU Member States” (ECAC 2012: 5) acting as depoliticized facilitator and supporting “the adoption and implementation of EU standards in all [of ECAC’s, the authors] Member States” (ECAC 2015: 3). Without ECAC offering an informal forum to prepare pan-European positions, the Commission, the Council, and the EP would also lose a valuable partner in international negotiations in the ICAO framework.

In sum, by adding EASA and hence a delegation relationship to the pre-existing orchestration relationship between the Commission and ECAC, the EU was able to moderate the CC trade-off in the policy field of aviation safety. First, by incorporating JAA into EASA the EU was able to enhance her control over rule implementation, preventing voluntary non-compliance through binding and enforceable regulatory outcomes. Second, by having EASA orchestrate ECAC the EU was also able to increase its control over ECAC and its non-EU members. Finally, maintaining ECAC as an ERN complementary to EASA allows the Council, the EP, and the Commission to preserve ECAC’s competence stemming from its unique properties as an informal, pan-European regulatory network.

### 3.2 When delegation does not suffice: the case of European food safety regulation

The governance of EU food safety regulation is illustrative of the creation of a competence triangle: A governor adds an orchestration relationship to a pre-existing delegation relationship in order to enhance intermediary competence whilst maintaining control over the intermediary's behavior and regulatory outcomes.

EFSA was created in 2002 through a joint regulation of the European Parliament and the Council<sup>2</sup> as a reaction to declining consumer confidence against the backdrop of the several food crises (e.g. BSE) at the end of the 1990s (Abels and Kobusch 2010). Various governance failures regarding risk assessment, management, and communication generated heightened public awareness and political pressure for an effective and consistent approach to food safety in the EU. The BSE crisis in particular opened a “window of opportunity for the development of a more internally integrated food safety policy” (Ugland and Veggeland 2006: 616). EFSA was designed to become an expert body preparing independent risk assessments of food and feed, forming the basis for risk management regulations prepared by the Commission and adopted by the Council and the EP. Akin to EASA, the EU's collective governor maintains substantial hierarchical control over EFSA. Its management board consists of 15 member state representatives plus one Commission representative and decides on the agency's work program, budget, and staff (Regulation (EC) No 178/2002: Art.25, 26, 43). In addition, the agency is subject to a review clause, according to which EFSA's activities are externally evaluated every six years (*ibid*: Art.61). In sum, the establishment of EFSA can be conceived of as an act of delegation, since the agency derives its mandate from a formal grant of authority (via an act of secondary legislation) and is subject to substantial hierarchical controls.

Shortly after EFSA took up its work, EU member states decided together with the agency on the establishment of a permanent network consisting of national “focal points”, i.e. national

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<sup>2</sup> Regulation (EC) No 178/2002.

regulatory agencies, in 2006. This “Focal Point Network” (FPN), a European network of national risk regulators, was asked to fulfil a number of “mandatory tasks”, such as information sharing and offering training opportunities for national experts (EFSA n.d.), yet neither EFSA nor other EU institutions possess the formal authority to grant or rescind the authority of the FPN. Instead, the agency and the governor emphasize goal convergence between governor, agency, and the network, highlighting the “mutual benefit” arising from a “stronger and better risk assessment methodology” (EFSA 2008: 2). When the FPN became operational in 2008 (EFSA 2014: 4), EFSA and the Commission began to jointly orchestrate the FPN by offering soft inducements, such as funding opportunities, access to information, networking and cooperation opportunities (Food Safety Authority of Ireland 2016). This led to the situation depicted in Figure 4, whereby the EU, acting as collective governor, adds an orchestration relationship with the FPN to a pre-existing delegation relationship with EFSA, thus creating a competence triangle.

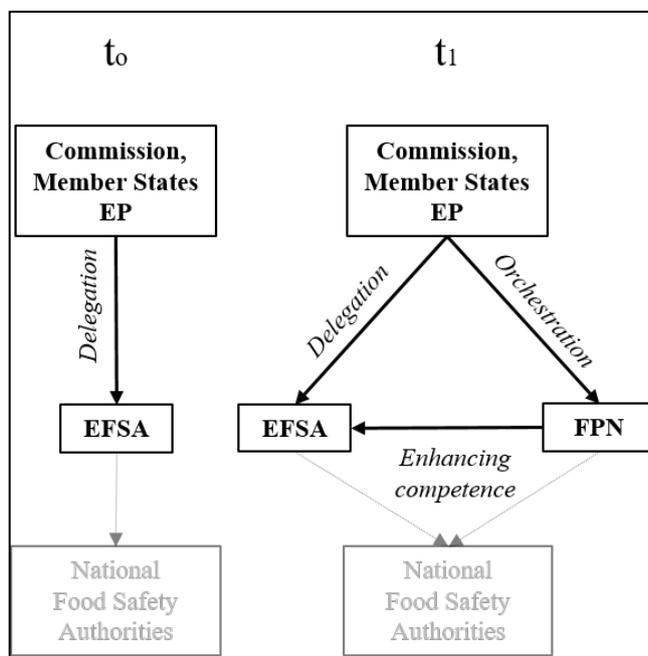


Figure 4 Control triangle in European food safety governance

Why has the EU decided to establish the FPN alongside EFSA, instead of expanding EFSA's role? Following our line of argumentation, we expect that the governor, in light of deficient governance results, enlisted the FPN to increase intermediary competence while maintaining control over key governance tasks. Indeed, the FPN was created to reduce the CC trade-off (Abbott et al. 2018) in two dimensions: to improve EFSA's competence in risk assessment on the one hand, and to improve the coherence between risk assessment and risk management on the other, while leaving the governor's control over risk management unaffected.

EFSA is chiefly tasked with risk assessment, which represents one of three pillars of risk analysis (risk assessment, risk management, and risk communication). EFSA's role is limited to issuing scientific opinions and to working towards ensuring the coherence between risk assessment and risk management (Regulation (EC) No 178/2002: para. 34-35; Groenleer 2009: 201). Thus, while the creation of EFSA represents a step towards coordinating risk assessment capacities, it does not possess risk management authority (Alemanno 2008). All three EU institutions, the Commission, the EP, and the Council shared an "interest in preventing the delegation of regulatory powers to an independent EU agency in food safety policy" based on each institution's "strong preference for influencing decisions on risk management" (Roederer-Rynning and Daubjerg 2010: 328). The Commission wanted to "retain both regulation and control" (European Commission 2000: para. 33), the EP's Legal Affairs Committee feared "a shift of competencies" (Buonanno et al. 2001: 13), and the member states "were unwilling to delegate power to an EU agency" in the sensitive food safety regime (Roederer-Rynning and Daubjerg 2010: 327).

The governors' control preference not only plays out in the separation of risk management and assessment but also in EFSA's design. EFSA draws on the expertise provided by temporary national experts organized in scientific committees, as well as on risk assessments provided by national regulatory agencies, while not having its own permanent European scientific staff

(Abels and Kobusch 2010: 17). “Priming national scientific expertise” (Abels et al. 2014: 75), EFSA’s design assures that national perspectives are taken into consideration and any *a priori* hierarchy between opinions is being prevented (Paeps 2004: 17).

To fulfil its mission, EFSA is tasked to provide sound risk assessments, ensure coherence between risk assessment and risk management, as well as the consistency of risk communication (Alemanno 2008: 6). However, EFSA displayed weaknesses in achieving each of these objectives from the outset. In 2004, the Commission and the member states voiced their concerns over the low quantity of opinions issued by EFSA, its inability to meet deadlines, and poor coordination and communication with the member states (Paeps 2004: 17). An external evaluation report repeated the latter reproach one year later: “The coordination between EFSA, DG SANCO and the MS is not optimal” (Bureau van Dijk 2005: 24–5). This lack of coordination was exemplified by a joint EFSA-Commission risk assessment on genetically modified organisms, which was followed by a contradictory Council Decision undermining EFSA’s reputation. With regard to risk communication, EFSA’s performance did not always please the governor. In 2005, for example, Herman Koëter, then Acting Director, provided dietary advice during the bird flu crisis, overstressing EFSA’s mandate by engaging in risk management communication, which is the *domaine réservé* of the Commission (Alemanno 2008: 21). Taken together, EFSA faced criticism on several fronts: It was accused of failing to deliver its scientific opinions in a timely fashion, the coordination between risk assessment and risk management was considered cumbersome and incoherent, and some member states criticized the agency for engaging in risk communication that reached beyond its mandate.

However, rather than being framed as ‘shirker’, EFSA’s risk assessment deficits were attributed to a deficiency in capacities, especially with a view to human and financial resources (Ernst & Young 2012; Alemanno 2008: 8). Similarly, the lack of coordination between risk assessment

and risk management as well as the cacophonous risk communication were not understood as instances of agency drift but as an expression of a lack of channels for efficient and timely information exchange with the National Food Safety Agencies and limitations in EFSA's mandate (Bureau van Dijk 2005). In short, EFSA's failures were widely conceived as instances of involuntary non-compliance.

Confronted with this situation, the Commission, the EP, and the Council *could have* reacted by increasing EFSA's competence directly. Expanding EFSA's mandate to include risk management and expanding its staff, providing it with permanent experts instead of temporary agents, however, would have implied the creation of a possibly more autonomous EU expert body. The creation of an ERN, the FPN, provided a way out of the competence-control conundrum: The FPN was considered a possibility to increase competence, while keeping EFSA under control.

In 2006, EFSA, with support of the EU member states and the Commission, decided to establish "focal points" in the member states "as regards the national networks composed of risk managers, national authorities, research institutes, stakeholders and consumers" (EFSA 2006: para. 33). The role of these focal points is twofold: To "support the Advisory Forum, which deals with strategic aspects of cooperation between EFSA and Member States, and to build a network at national level" (EFSA 2008: 2). As such, the FPN's role is to increase EFSA's risk assessment competence, its ability to work towards a coherent risk communication and consistency with risk management (EFSA 2006: para. 30). Most importantly, it is supposed to do so without compromising the collective governor's control over governance tasks.

First, the FPN centralizes the various national expert bodies and functions, acting as a hub for national food safety authorities to collect and disseminate information. Thus, through its horizontal networking function, it reduces the number of points of contact for both EFSA and national authorities, while sustaining the provision of expertise from national networks of

experts. This allows EFSA to draw on a large number of national agencies, NGOs and interest groups in a cost-effective way, which enhances its credibility as competent and comprehensive risk assessor.

Second, by setting up the FPN and by acting as co-orchestrator with EFSA, the member states were able to improve the coordination between risk assessment and risk management. The focal points directly support the members of the EFSA Advisory Forum, which consists of representatives of all member states (EFSA n.d.: 3), and in which “EFSA’s cooperation activities are centralized” (Abels et al. 2014: 83). As many of the representatives of the Advisory Forum wear a double hat serving also as Focal Point representatives,<sup>3</sup> the FPN’s vertical interface function guarantees that national perspectives on risk assessment find their way into EFSA’s priorities. This works also the other way around. The Focal Points are considered “EFSA’s ‘ambassadors’ in the Member States” (Food Safety Authority of Ireland 2016) facilitating information exchange. Moreover, contrary to EFSA, many national food safety authorities do not separate risk assessment and management (Abels and Kobusch 2010: 18). Therefore, the existence of the Focal Points ensures that national regulatory authorities are at least aware of EFSA’s risk assessments when elaborating their risk management strategies at the national and at the European level.

Finally, there is no hierarchical control mechanism between EFSA and the Focal Points, but EFSA’s only instruments to incentivize the national authorities are offering funding opportunities, access to information, networking and cooperation opportunities (Food Safety Authority of Ireland 2016). This means that the Commission, the EP, and the Council are not at risk of losing grip, but remain in the driver’s seat when it comes to prioritizing risks and taking decisions on regulations.

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<sup>3</sup> 10 out of 28 Advisory Forum members in 2018 serve as national AF representatives and are additionally mentioned as contact of the Focal Point (cf. EFSA 2018a, 2018b)

In light of EFSA's involuntary non-compliance, its risk assessment deficits and its need for more capacities, the creation of an ERN instead of expanding EFSA's mandate, budget, or staff enabled the collective governor to increase its competence by providing it with access to national expertise. Moreover, the creation of the FPN facilitated the coordination between risk assessment and management without diluting its separation. Combining delegation with orchestration, the governor was able to keep control over risk management and enhance risk assessment competence.

#### **4. Indirect governance-triangles: sources of instability**

In this contribution, we have argued and illustrated that the establishment of indirect governance-triangles, i.e. the combination of delegation and orchestration relationships, can help governors to navigate the governor's dilemma by enhancing competence while maintaining control, and by enhancing control while maintaining competence. The Commission, the member states, and the EP face no binary choice to either orchestrate an ERN or to delegate authority to an agency. Depending on the governance challenge at hand, they may have a strong interest in combining these two modes of indirect governance. Complementing a pre-existing orchestration relationship with the delegation of authority to an EU agency is a viable strategy to increase ex-post control over both intermediaries while maintaining their competence. Analogously, enlisting an ERN in addition to a delegation relationship enables the governor to enhance intermediary competence without risking a loss of hierarchical control.

While this is, at first sight, good news for the governor, we can neither make, nor test the claim that these governance arrangements persistently deliver the desired regulatory outcomes. As every governance arrangement, indirect governance-triangles may face exogenous shocks, such as crises; they may also be subject to "endogenous instability" (Abbott et al. 2018: 18ff). One

source of instability is potentially rooted in the relationship between the two intermediaries. Levi-Faur (2011, p.826) describes the relationship between ERNs and EU agencies to be either competitive – the agency tries to bring the ERN under control (“agencified networks”) or as co-operative, where the agencies employ networks for self-empowerment (“networked agency”). These two types of dynamics undermine the foundations of the indirect governance-triangles.

First, if the relationship between the agency and ERN in an “agencified network” is, indeed, competitive, an erosion of intermediary competence may ensue. If an agency itself is willing and able to enhance its control and to establish a hierarchical relationship vis-à-vis the ERN – e.g. by controlling its budget, staffing, or access to information – the latter loses its very characteristic as a loosely coupled, non-hierarchical network. As such, it degenerates into becoming a subsidiary of the agency and forfeits its competence to elaborate regulatory solutions autonomously.

Second, if a “networked agency” is able to employ an ERN for self-empowerment purposes, the agency may use the ERN to escape control from the governor and to *expand its discretionary operating space*. Enlisting a sub-intermediary (e.g. an ERN) can improve the intermediary’s (e.g. the agency’s) epistemic authority and thus bolster its standing vis-à-vis the governor and the governance targets. By working together with domestic experts and authorities organized in an ERN, an EU agency can gain legitimacy and reputation, rendering interference by the governors more difficult to justify to stakeholders. This, however, may undermine the hierarchical control mechanisms and lead to bureaucratic drift.

In sum, while we have shown that indirect governance-triangles offer the governor a way to moderate the CC trade-off, the success of this strategy to minimize losses in competence (control) when enhancing control (competence) depends on the design of the relationship between the two intermediaries. In order to secure both intermediary competence *and* control, we believe that it is paramount for the collective governor to play an active part as co-

orchestrator to assure a separation of powers between the two intermediaries. Co-orchestrating a network together with an agency and monitoring the relationship between the two intermediaries therefore seems to be a promising approach to establish a synergetic relationship and to prevent the two intermediaries from colluding against the governor's interests.

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