Conflicts between national regulatory cultures and EU energy regulations

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The research question is whether and to what extent the regulatory approach of command and control which is dominant in the energy sector accounts for implementation and enforcement deficits, and should be replaced or, at least, complemented by reform measures based on the public administration concept of collaborative governance. After a brief overview of the 2009 EU legislative package of energy regulations, three concepts of regulatory cultures are identified for Great Britain, France, and Germany which are based on the state paradigms of the enabling state (GB), the providing state (F), and the ensuring state (D). The main characteristics of the three national regulatory systems are outlined for the energy sector. Differences and conflicts between national regulatory cultures and EU energy regulations are identified, and linked to implementation and market deficiencies. Finally, alternative approaches to energy regulation are outlined on the basis of the concept of collaborative governance.

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1. Introduction

Fifteen years of EU command and control regulations1 aimed at liberalizing European energy markets have not resulted in truly competitive and integrated electricity and gas markets in Europe (European Commission, 2009b, 2011). Incomplete implementation and enforcement of EU energy legislation by EU member states are held responsible for the shortcomings of the European liberalization efforts (European Commission, 2009b).

The question is whether and to what extent the dominant regulatory approach of command and control regulations based on neoclassical economic theory is a major cause for implementation and enforcement deficits, and should be replaced or, at least, complemented by reform measures based on the public administration concept of collaborative governance2.

2. Main characteristics and conceptual foundations of EU energy regulations

2.1. EU directives and regulations

According to neoclassical market theory integrated competitive energy markets will emerge when the following requirements are met (Brunekreeft, 2003; 16 ff.; Joskow, 2008: 12 ff.; Spanjer, 2009: 3251):

- the abolition of closed service areas which involves the introduction of free generation, imports, supply, trade and consumer choice of energy,
- non-discriminatory third party access to transmission and distribution grids,
- unbundling of vertically integrated utilities,
- the establishment of regulatory authorities.

In the first regulatory phase of 1996/1998, the EU issued two directives3 and established general principles for limited competition, third party access to the transmission and distribution grids, and unbundling. The establishment of regulatory authorities was left to EU member states. The directives were based on the

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1 Command and control regulations consist of legal commands, prohibitions and permits (licenses) which are enforced through fines and physical coercion. Command and control regulations are binding on private and public regulatees, and, in the case of EU directives, on member states, which have to transpose the directives into national law.

2 The term "collaborative management" is often used synonymously with "collaborative governance" (see Bingham et al., 2008: 3 ff.). The latter term is preferred here, because it implies structural and procedural components of collaboration, and avoids the possible misunderstanding that collaboration is only an activity.

assumption that competitive markets would emerge “naturally” once legal barriers to competition were removed.

In the second regulatory phase of 2003/2005, the EU replaced the 1996/1998 directives with two new directives which contained detailed regulations for third party access to the energy networks, legal unbundling of vertically integrated utilities, and the requirement to establish national independent regulatory authorities. The EU also issued two regulations on access to the networks for cross-border exchanges in electricity, and on access to the gas transmission networks.

In the third regulatory phase of 2009, the EU further tightened the regulatory screws by replacing the 2003/2005 legislation with two new directives and three new regulations. The new law prescribes inter alia:

- ownership unbundling of transmission systems and the functions of electricity generation or gas production respectively and energy supply in vertically integrated utilities, with three complicated exceptions:
  - the Independent System Operator (ISO) model,
  - the Independent Transmission Operator (ITO) model, and
  - existing national arrangements which guarantee more effective independence of the transmission system operator than the ITO model.

This short overview of the three phases of regulating EU energy markets shows that the EU produced a large amount of detailed and complex regulations whose number increased in each regulatory phase. For instance, each of the two 2009 directives on the electricity and gas markets encompasses more than 20 additional articles as compared to its 2003 predecessor. The regulations consist of commands, prohibitions, permits, controls and sanctions which, after transposition into national laws, are addressed to utilities and other stakeholders of the energy markets. The rules must be implemented and enforced by national public authorities. It seems that the uncritical belief in the market forces of the first EU liberalization directives has now been replaced by an equally uncritical belief in the capacity of government to impose market competition by command and control regulations.

### 2.2. Transfer of the British regulatory model to the EU level

Conceptually, the EU regulations largely follow the British model of restructuring energy markets (Ranci, 2003: 121, Bulmer et al., 2007: 2, 83, 91, 93 f.; Thatcher, 2007a: 159). The British model is characterized by command and control regulations providing for ownership unbundling of transmission systems from energy generation and supply, a price cap regulation for tariffs on network services, and a central independent regulatory authority with far-reaching powers. In its annual report of 2008/2009, the British regulatory authority (Ofgem, 2009: 24/25) considered itself “the leading voice in Europe”, and reported as “key achievements for 2008—2009”, inter alia, that “Ofgem has provided the European Union with a strong steer in its bid to inject competition into its energy markets and its moves to consolidate the regulatory framework.”

### 2.3. Neoclassical economic theory as conceptual base of energy regulations

Conceptually, the British regulatory model and EU energy regulations are off-springs of neoclassical economic theory (Spanjer, 2009: 3251). While there are many facets of neoclassical economics, their common foundation are the following basic assumptions (Weintraub, 2002):

- legal unbundling of distribution system operators in vertically integrated utilities
- non-discriminatory third party access to the transmission and distribution networks
- annual ten-year network development plans for infrastructure investments
- the establishment of a single regulatory authority with detailed and comprehensive duties and powers in each member state
- the creation of two European Networks of Transmission Systems Operators (ENTSO) for electricity and gas through which all transmission system operators shall cooperate at Community level
- the establishment of a European Agency for the Cooperation of Energy Regulators to assist national regulatory authorities

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9 See the overviews of the 3rd legislative package by Lane (2009) and Gundel and Gennert (2009).
10 Art. 9 (1) of 2009/72/EC and 2009/73/EC.
11 Pursuant to Art. 13 of 2009/72/EC and Art. 14 of 2009/73/EC the ISO model enables vertically integrated utilities to retain the ownership of their transmission networks if they transfer the technical and commercial operation of the transmission networks to a separate body, called Independent Transmission Operator (ITO), to be designated by member states and complying, inter alia, with the rules of independence as outlined in the scheme of ownership unbundling.
12 Pursuant to Art. 17 of 2009/72/EC and 2009/73/EC the ITO model also allows vertically integrated utilities to retain indirect ownership of their transmission networks if they transfer the ownership including the technical and commercial operation of their transmission networks to a separate body, called Independent Transmission Operator (ITO) which belongs to the vertically integrated utility and is designated by member states. The ITO has to comply, inter alia, with a set of special organizational provisions like the establishment of a supervisory board, and with detailed procedural rules ensuring its independence from the vertically integrated utility.
13 Pursuant to Art. 9 (9) of 2009/72/EC and 2009/73/EC vertically integrated utilities can retain ownership of the transmission networks if national arrangements are in place which guarantee more effective independence of the transmission system operator than the ITO model.
14 Art. 26 of 2009/72/EC and 2009/73/EC.
15 Art. 32 of 2009/72/EC and 2009/73/EC.
16 Art. 13 (2) lit. c., (4) and Art. 22 of 2009/72/EC; Art. 14 (2) c., (4) and Art. 22 of 2009/73/EC.
17 Art. 35, 37 of 2009/72/EC and Art. 39, 41 of 2009/73/EC.
19 Art. 1, 6—9 of Reg. 713/2009.
20 See Littlechild 1983 who is considered the architect of the UK model, and the contributions in Bartle (2003).
21 Office of Gas and Electricity Markets.
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