



Conflicts between national regulatory cultures and EU energy regulations

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ABSTRACT

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 f.; 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 f.). 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.

³ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

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 directives⁴ 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 electricity⁵, and on access to the gas transmission networks⁶.

In the third regulatory phase of 2009, the EU further tightened the regulatory screws by replacing the 2003/2005 legislation with two new directives⁷ and three new regulations⁸. The new law prescribes *inter alia*⁹

- ownership unbundling of transmission systems and the functions of electricity generation or gas production respectively and energy supply in vertically integrated utilities¹⁰ with three complicated exceptions:
 - the Independent System Operator (ISO) model¹¹,
 - the Independent Transmission Operator (ITO) model¹², and
 - existing national arrangements which guarantee more effective independence of the transmission system operator than the ITO model¹³,

⁴ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

⁵ Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the networks for cross-border exchanges in electricity.

⁶ Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

⁷ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

⁸ Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003; Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

⁹ See the overviews of the 3rd legislative package by Lane (2009) and Gundel and Germelmann 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 System Operator (ISO), 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 their transmission networks if national arrangements are in place which guarantee more effective independence of the transmission system operator than the ITO model.

- legal unbundling of distribution system operators in vertically integrated utilities¹⁴,
- non-discriminatory third party access to the transmission and distribution networks¹⁵,
- annual ten-year network development plans¹⁶ for infrastructure investments,
- the establishment of a single regulatory authority with detailed and comprehensive duties and powers in each member state¹⁷,
- 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 level¹⁸,
- the establishment of a European Agency for the Cooperation of Energy Regulators to assist national regulatory authorities¹⁹.

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 model²⁰ 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)²¹ 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):

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) lit. 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.

¹⁸ Art. 4 of Reg. 714/2009 and Reg. 715/2009.

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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