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The Governance of Markets, Sustainability and Supply. Toward a European Energy Policy

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Abstract

European energy policy dates back to the founding days of integration, yet the emergence of supranational governance is a recent development. The article examines the extent to which European policymakers have succeeded in building up governance capacity, and what the facilitating and impeding factors were that have shaped the governance mix. The conceptual framework differentiates between orders of governance in the multilevel context, and between policy modes involving hierarchical and non-hierarchical settings and varying actor constellations. The article finds that governance capacity has emerged where second order governance (institutional and procedural rules) is concerned, while first order governance (the concrete policy process) remains the remit of national and private actors. This becomes even more obvious once the interaction between policy modes is taken into account: governance networks enhance governance capacity in the area of competition policy and agency governance; self-regulation by industry constitutes a fall-back option in case of insufficient governance capacity on cross-border issues; soft governance helps to bridge multiple policy areas and levels of governance. The article concludes that second order governance may prove effective where it combines with hierarchy but that it may fail to overcome both trade-offs between contradicting goals and resistance at lower levels.

Keywords

Competition policy; Energy policy; European integration; Governance; Internal energy market

There are only a few policy areas in which the European integration process can be traced back to the founding days of the Communities and where we can study 65 years of European governance, as the theme of this special issue suggests. The energy sector is a particularly interesting case due to its fundamental transformation as an area of public policy. Today's energy challenges have a completely different outlook compared to the rationale behind the European Coal and Steel Community (ECSC) back in 1951. At the same time, some key issues such as security of energy supply have time and again dominated the policy agenda, as have the difficulties of establishing supranational governance capacity in the field of energy. Thus, the history of European integration on energy policy is puzzling given that the sector constituted a nucleus of the European integration process and never disappeared as a European policy priority, yet we have seen decades of missed opportunities to shift governance towards the supranational level. An EU-wide governance framework only emerged with the realisation of the internal energy market from the late 1980s onwards. Throughout the last two decades it was advanced by the increased salience of issues relating to sustainability and security of supply. To shed light on the evolving and changing governance framework in European energy policy, the paper tackles the following research questions: *To what extent have policymakers succeeded in their efforts to build up governance capacity in the field of energy over the last six decades? What were the facilitating and impeding factors that have shaped the emerging governance mix?*

The first part of the article develops the conceptual framework, which in the second part is applied to the energy sector. In the context of this special issue, the article relies on Kooiman's seminal work on governance (Kooiman 2003). Of particular relevance is his distinction between second and first order governance, as it helps to capture variation over time and across levels. The conceptualisation of

individual policy modes furthermore differentiates between hierarchical and non-hierarchical configurations, and varying actor constellations. In the empirical part, the extent to which the governance of markets, sustainability and supply has become a 'European' issue is analysed in a longitudinal perspective. The facilitating and impeding factors that have shaped the emerging governance mix are then studied in more detail with respect to specific policy modes.

CONCEPTUALISING GOVERNANCE IN A DYNAMIC MULTILEVEL SETTING

The conceptual framework used in this special issue builds on Kooiman's distinction between third, second and first order governance (Kooiman 2003: 133-189; and in this issue, especially Caviedes, Chang, Maas). Meta-governance or third order governance is about the normative dimension that shapes the governing process, i.e. the realisation of governance norms such as rationality, responsiveness, effectiveness and legitimacy (Kooiman 2003: 170-189). Second order governance is about the structural and institutional setting, and first order governance about the day-to-day policy process (ibid.: 135-169). Second and first order governance are at the core of the flourishing literature on governance, which studies both the aspects related to the structure and process of policymaking (Börzel 2010; Mayntz 2005). Reflections on policy effectiveness and legitimacy at the level of meta-governance have been particularly relevant in the European context (Bolleyer & Reh 2011; Héritier 2003). The objective here is to map and explain the emergence of the governance mix in a specific policy field, focusing on aspects of first and second order governance. When answering the research question about impeding and facilitating factors, however, considerations relating to meta-governance such as policy effectiveness and legitimacy will also be of relevance. As argued by Ingeborg Tömmel elsewhere in this issue, at the European level we predominantly find instances of second order governance. First order governance - 'where governing actors try to tackle problems or create opportunities on a day-to-day basis' (Kooiman 2003: 135) - at the supranational level is mostly limited to the process of problem-definition, agenda-setting and decision-making, while implementation is delegated to lower levels. At the stage of problem-definition and agenda-setting it is necessary to make a convincing case that certain policy problems are better solved at the European, rather than at the national level (Lelieveldt & Princen 2011: 211-14). The policy output produced by European policymaking mainly results in second order governance, that is, the way in which 'problem solving and opportunity creation (first order governing) are embedded in institutional settings' (Kooiman 2003: 153). The predominance of governance of governance (Tömmel 2016) is due to functional factors, such as the scarcity of resources needed to build up governance capacity, as well as to political factors, including the resistance at lower levels to fully transferring policymaking competencies to the supranational level.

In order to understand the institutional structures and procedures on which such governance of governance in the European multilevel polity relies, various modes of governance have been discussed in the literature (e.g. Börzel 2010; Buonanno & Nugent 2013, chapter 7; Wallace & Reh 2015: 97-111). The conceptual framework to be applied here integrates various dimensions. On the one hand, the conceptualisation integrates Kooiman's differentiation between second and first order governance. On the other hand, it integrates the differentiation between hierarchical and non-hierarchical modes, as well as variation in terms of actor involvement. The discussion of hierarchy and actor involvement features prominently in the literature on European governance (Börzel 2010; Tömmel & Verdun 2009), and in the literature on new modes of governance in particular (Héritier 2003; Héritier & Lehmkuhl 2008). Integrating Kooiman's orders of governance adds analytical edge to the ongoing discussion about European governance. Consider the case of the various networks. While all networks operate at the level of second order governance, they do not necessarily rely on non-hierarchical modes, nor do they always include private actors. By contrast, where 'network' governance is understood in a narrow sense, it refers to an ideal-typical constellation alongside

markets and hierarchies (Powell 1990). In such ideal-typical policy networks public *and* private actors engage in informal negotiations, interact with equal status and engage in voluntary agreements that are collectively binding (Börzel 1998: 260, 265; Börzel & Heard-Lauréote 2009: 138). Such networks hardly exist in policy practice (Börzel 2010: 192), which is why the conceptualisation used here does not presuppose a non-hierarchical setting, but rather integrates purely public networks as well. Table 1 provides for an overview of governance modes that are specifically relevant in communitarised policy fields: competition policy, joint decision-making, agency governance, private governance and soft governance. These policy modes relate to the type of policy output (binding versus non-binding) *and* the ways in which such output is implemented (directly applicable versus decentralised modes of implementation). Soft governance, for instance, refers to non-hierarchical modes of coordination in the process of implementing policy goals, and not merely to ‘soft law’ as a specific type of policy output which is used by the Commission as an agenda-setting device (Braun 2009).

Table 1: Conceptualising European Governance

Governance Order Policy Mode	Second Order	First Order
<i>Hierarchical, public actors involved</i>		
Competition policy	European network of national authorities	European competition authority / national competition authorities
Joint decision-making	COM initiative Council and EP co-legislate	National authorities and private actors
Agency governance	European network of national agencies	Federal or single European regulator / national regulatory authority
<i>Non-hierarchical / private actors involved</i>		
Private governance	European network of (public and) private actors	Private actors
Soft governance	COM proposals and monitoring, coordination between member states, EP advisory role	National authorities

The first, and potentially most centralised, policy mode is competition policy. Where the European Commission becomes active as the highest competition authority in Europe, we encounter a rare case of first order governance at the European level. This configuration has also been conceptualised as ‘supranational centralisation’ (Börzel 2010: 198-200). To be sure, there are other instances of supranational centralisation in the case of the European Central Bank or the rulings of the European Court of Justice (ECJ). These governance modes where unelected supranational institutions do make decisions that directly apply in the member states are important for market-making policies or ‘negative integration’ (Scharpf 1999, chapter 2.2). The Directorate General (DG) Competition within the European Commission is the supreme competition authority in Europe, which draws on powers

granted by the treaties. European competition policy has experienced a trend towards decentralisation as discussed in the literature (e.g. Blauburger & Töller 2011; Lehmkuhl 2009; Tömmel 2016; Wilks 2015). Rather than seeking to concentrate first order governance capacity at the European level, the Commission has increasingly delegated cases towards national competition authorities. In order to do so it has been relying on the European Competition Network (ECN) as a device for second order governance.

Joint decision-making (Börzel 2010: 200-202) is the governance mode where the Commission holds the right of initiative, and where the Council and the European Parliament are co-legislators (ordinary legislative procedure in the Lisbon Treaty). It is the standard avenue to generate secondary law, even in the area of market-making policies, where the European Commission holds competition law prerogatives to engage in unilateral action. The option of introducing liberalising Commission directives based on Article 106.3 (TFEU) has hardly been used due to a variety of political reasons (discussed in detail by Schmidt 1998). The decision-making costs under joint decision-making are high, requiring agreement in the European Parliament and amongst the member states in the Council. Compared to negative integration, which relies on treaty-based competencies with no need for costly negotiation, European law-making faces a real risk of a joint decision-trap (Scharpf 2006). It is especially to avoid these decision-making costs and the risk of deadlock that policymakers may favour non-hierarchical or new modes of governance as an alternative route (Héritier 2003). The policy output of the joint decision mode mostly falls into the category of second order governance since European law usually defines broader policy and regulatory frameworks, rather than steering policy practice in detail. To be sure, this 'regulatory mode' of policymaking based on legal instruments and leaving more flexibility in implementation, had largely replaced the 'Community method' during the 1990s (Wallace & Reh 2015: 104). A more interventionist style of governance which had been used in the area of market integration as a means of harmonisation, failed to provide the desired results (Young 2015: 118-119). Second order governance is thus not only less demanding in terms of governance capacity at the supranational level, but also leaves more flexibility to lower levels and accommodates diverging national preferences. In the European multilevel system building up governance capacity through Community law usually faces resistance from lower levels of policymaking. When seeking to Europeanise new policy areas, therefore, the Commission and other interested actors will try to expand their policy remit in the framework of existing competencies.

Agency governance is another mode of hierarchical steering. The increasing number of European agencies could point to a trend of centralisation through 'agencification' (Levi-Faur 2011). Yet these agencies usually engage in second order rather than first order governance, relying on networks of national authorities. So far, first order governance through a federal or single European regulator has only been discussed as a scenario in the literature (Thatcher & Coen 2008: 814-815). The reasons why we do not see more supranational centralisation in the form of agency governance are at least threefold: the European Commission faces legal obstacles in delegating executive powers in line with the so-called 'Meroni doctrine' established by a ECJ ruling in 1958 (Chamon 2011; Majone 1997); the Commission is reluctant to establish a powerful agency which would compete with its own powers (Vos 2000); finally, the member states try to resist a major shift of regulatory competencies towards the European level, which would disempower national regulatory authorities (Thatcher & Coen 2008).

The term private governance is used in a broad sense including various possibilities of private actor involvement. Private actors may take part in the process of second order governance where they participate in governance networks composed of stakeholders and/or policymakers. Self-regulation by industry falls into the category of first order governance. Private actors formulate policy goals and engage in a detailed implementation process. Empirically, pure self-regulation is an unlikely scenario since private actors usually operate in a setting where political actors set either policy goals and/or procedural rules (Prosser 2010: 5-6), or at least cast a shadow of hierarchy (Héritier & Eckert 2008).

Self- or co-regulation thus involves governance of governance by public actors where these seek to steer the behaviour of private actors.

Soft governance occurs where interaction is non-hierarchical and outcomes are non-binding. Actor-wise it is usually initiated and monitored by the European Commission, but in essence relies on a process of voluntary coordination between the member states. The European Parliament's role is mostly confined to giving advice. The so-called 'Open Method of Coordination' (OMC), formalised during the Lisbon European Council in 2000, is a paradigmatic case of soft governance (Borrás & Jacobsson 2004). Soft governance sets broad policy goals at the European level, but leaves their implementation entirely to the national level. It is 'soft' in that it does not involve sanctions, but relies on mechanisms of reputation and learning. Therefore, it has also been discussed as an instance of 'experimentalist governance' (Sabel & Zeitlin 2010) which is characterised by a recursive and multilevel process relying on reporting, peer review and deliberation.

Network governance, private governance and soft governance are alternative routes of policymaking which, following the argument of this issue, should be particularly relevant in the EU context. Their emergence has been explained by factors relating to political capacity or policy effectiveness, and legitimacy aspects in the literature. Policy makers may benefit from non-binding coordination or the involvement of private actors thanks to lower transaction costs combined with enhanced policy flexibility (Héritier 2003). Others have emphasised the democratic quality of these governance modes in facilitating processes of learning and deliberation and allowing for participation in the policy process at lower levels of governance (Sabel & Zeitlin 2010).

The ways in which policymakers have built up capacity at the level of first and second order governance over time will be mapped in the following section. I will then go on to discuss how relevant individual configurations of the various policy modes are, and which factors have contributed to their emergence.

BUILDING UP EUROPEAN GOVERNANCE CAPACITY IN ENERGY POLICY

In the field of energy we can distinguish between policy problems relating to markets, sustainability and security of supply. For each, the European Commission, alongside other agenda-setting actors, needs to make a convincing case that the different economic, environmental and social goals of energy policy are better served at the European level than at the national level. The evolution of European governance capacity in energy policy has experienced different phases: during a first phase (1951-1957) the energy sector experienced pioneering change with the creation of the European Coal and Steel Community (ECSC), the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). A relatively long phase of stagnation (1958-1986) followed when subsequent efforts to shift energy governance towards the European level failed. During a third phase (1987-2002), the creation of an internal energy market triggered new dynamics, while the current fourth phase is one of consolidation and diversification (2003 to present).

The ECSC Treaty constituted the foundational moment of both European integration and European energy policy (Matlány 1997: 14-19). By creating a common market in coal and steel, the objective of the ECSC was related to political stability as much as economic integration. The ECSC pursued a rather interventionist style of governance *à la française* (see also Tömmel in this issue), and it remained limited in scope. In particular, at this stage, market integration was not considered for the electricity and gas sectors: while the so-called Spaak Report (The Intergovernmental Committee established by the Messina Conference 1956: 126-133), suggested the creation of Euratom and urgently recommended European action to secure sufficient energy supplies, it also argued that the

specificities of electricity and gas were incompatible with liberalisation (ibid.: 126). In governance terms, the authors of the report saw no need to expand the decision-making powers of the ECSC to new areas (ibid.:127-129). Although the Euratom Treaty established a European competence in selected areas of priority, it did not necessarily shift governance toward the supranational level where member states were free to choose policy measures. While in some areas coordination and cooperation was envisaged, for instance to pool resources and diffuse knowledge, in other areas Euratom engaged in risk regulation, by setting basic standards to protect workers and the population. Overall, Euratom emerged in a context where member states were keen to preserve their energy and military strategic competencies (Barnes 2008: 111). The Treaty remains in force to today, and has allowed the Commission to build up expertise specifically in the area of nuclear energy in dedicated departments (Black 1977: 179). While the ECSC was terminated in 2002, the basic institutional structure introduced during this foundational period remains in place.

This first, foundational period in the 1950s was followed by a second phase of almost three decades of stagnation. In the 1960s and 1970s, policymakers launched several initiatives, but at this stage no common framework emerged (Black 1977: 80-191). In 1958, the European Commission called for a coordinated energy policy in order to tackle the challenges posed by security of supply (EEC 1958: 48-49). In 1964, EEC member states envisaged the creation of an internal market and a common energy policy, yet no action beyond the declaratory level followed (Pollack, Schubert & Slominski 2010: 71). Throughout the 1970s, cooperation either remained bilateral in nature, was elevated above the European to the international level, or resulted in soft, intergovernmental modes of coordination. In direct reaction to the first oil crisis, several bilateral agreements were concluded by European states, and in 1974, all EEC members except France joined the International Energy Programme (Black 1977: 188-191). The International Energy Agency was set up as an autonomous organisation within the structures of the OECD, and an urgency mechanism to secure oil supply was also established. Besides international cooperation outside the Community, cooperation between member states entirely relied on non-binding mechanisms of soft coordination. Examples of such intergovernmental cooperation are the energy strategies agreed in 1974 and 1986 (Council of the European Communities 1974; 1986). By the early 1990s, energy policy was seen as being one of the 'weakest' areas of European integration (George 1991; Padgett 1992: 55). From a longitudinal perspective, however, such a lack of tangible results in building up institutionalised governance capacity should not be overemphasised. Rather, the persistent efforts of the Commission in setting the policy agenda prepared the ground for later integration steps.

Compared to stagnation throughout the two previous phases, the realisation of the internal market project can be seen as a 'turning point' (Matlárý 1997: 19). During this third phase, the Commission enjoyed increased leverage due to two avenues for activism: the internal market agenda and environmental policy. The 1987 Single European Act paved the way for the Single European Market and codified a European competence in the area of environmental policy. Energy-related measures could be adopted using prerogatives in either of these two policy fields, and the Commission produced a considerable number of policy proposals: the 1988 Strategy Paper 'The Internal Energy Market' (COM (88) 238) identified the opportunity costs of not realising market integration, promoted competition and market integration as key policy principles, and suggested a range of policy measures on electricity and gas. This was followed by a package of proposed legislation in 1989 on the transmission of gas (COM (89) 334) and electricity (COM (89) 336). The 1990 communication on 'Energy and Environment' (COM (89) 369) tackled the issue of environmental policy integration. Thus, by the beginning of the 1990s, the cornerstones of the economic and environmental dimension of energy policy had been defined.

The Maastricht Treaty codified, for the first time, a European competence in the area of Trans-European Networks (TENs), and an *acquis* of secondary law emerged from the mid-1990s onwards. EC directive 96/92 tackled liberalisation in the electricity sector, followed by directive 98/30 on gas

markets. In many ways these first directives were emblematic cases of governance of governance, setting a broad institutional framework which left ample leeway to member states when it came to concrete policy choices regarding regulatory authorities, access regimes and network ownership. The 1990s also saw a broadening energy policy agenda around the issues of competitiveness, security of supply and sustainability, with the Commission publishing various policy proposals during the mid-1990s (e.g. COM (94) 659, COM (95) 682, COM (97) 599). In the area of renewables, for instance, a non-binding target became enshrined in secondary law with the adoption of a directive in 2001 (directive 2001/77/EC). In substance, however, little progress was made in terms of 'greening' the European energy policy at this stage (Collier 2002: 176). By the end of this third phase, integration efforts had produced a solid policy output in the area of energy markets, while common policies on sustainable energy and security of energy supply still needed to be developed.

During a fourth phase, the energy *acquis* was consolidated and diversified: two additional rounds of legislation specified the rules governing market integration, a second renewable directive was adopted, and a dedicated energy chapter was introduced into primary law. The issue of energy security also gained in salience following the 2004 and 2007 enlargements (Buchan 2015: 359). In the area of market integration, a second legislative package, including separate directives on electricity (2003/54/EC) and gas (2003/55/EC), narrowed the range of options for the member states in the implementation process on a number of issues, in part through binding requirements on the introduction of an independent sector regulator as well as on regulated access to the electricity network. In 2009, European policy makers concluded negotiations on a third legislative package governing electricity and gas markets (directives 2009/72/EC and 2009/73/EC) through a more stringent regulatory framework, to be discussed in further detail below. Also in 2009, policymakers agreed on a new directive on renewables, which for the first time imposed binding targets on the member states (directive 2009/28/EC). Although in both areas, market integration and sustainability, binding objectives as well as a broad regulatory framework have been agreed at EU level, their implementation left ample discretion to the national level.

Similarly, the Lisbon Treaty codified a European competence in the energy field (Article 4 TFEU) but did not fundamentally alter policy dynamics. Energy policymaking falls into the remit of the ordinary legislative procedure, tax issues excluded, without interfering in national choices concerning the energy mix (Article 194 TFEU). In the field of security of supply a so-called 'solidarity clause' (Article 122 TFEU) requires member states to cooperate in cases of energy shortages. Under its President, Barroso (2004-2014), the Commission sought to push for further achievements, notably relying on soft law measures (Braun 2009): a Roadmap on Renewable Energy (COM (2006) 848) set out a strategy to increase the share of renewables; the Communication '20 20 by 2020' (COM (2008) 30) envisaged a 20 per cent target to be reached by 2020 in the area of emission reduction, a 20 per cent share in renewable energies, and a 20 per cent increase in energy efficiency; 'Energy 2020' (COM (2010) 639), forming part of the horizontal strategy 'Europe 2020' (COM (2010) 2020), reiterated these 20-20 targets; an updated strategy for the period to 2030 set a 40 per cent target for emission reduction, an EU level 27 per cent target for the share of renewable energy consumption (not imposing binding targets on the member states), and an indicative 27 per cent target for improvement in energy efficiency (European Council 2014).

Seen from a longitudinal perspective, the triangle of policy goals around markets, security of supply and sustainability, was followed in turn by second order governance measures in order to shape first order governance at the national level. The idea of an internal energy market, initially designed by economic elites (Matlár 1997: 19), came to be accepted as the policy paradigm of European energy policy (McGowan 2008; Youngs 2011: 47-48). In the area of security of supply the Commission used enlargement as a policy window to push for stronger European activism specifically in the area of gas supplies (Maltby 2013). Overall, the security of supply issue became so dominant in the policy discourse that a 'securitisation' of energy issues has been diagnosed (Natorski & Herranz Surrallés

2008). As these various policy objectives around markets, sustainability and security of supply do often involve trade-offs, they have, however, not been realised to the same extent (Buchan 2015). The EU's 'market liberalism' has been found to conflict with 'economic nationalism' especially where security of supply issues becomes increasingly important (McGowan 2008). In this context, securitisation strategies have been used by both EU and member state actors to argue in favour of *and* against a further shift of governance capacity to the European level (Natorski & Herranz Surrallés 2008). While the 'green Europeanisation' of energy policy overall has been more successful in terms of policy output when compared to security of supply issues, environmental issues are ultimately addressed in the internal market context (Solorio 2011: 405). There has furthermore been a shift towards a narrow focus on climate change goals which arguably impinges on the realisation of a wider sustainability agenda (Solorio 2013). At the same time, climate policy integration has been judged to be insufficient in areas such as renewables and gas pipelines in order to reach long-term climate policy objectives (Dupont & Oberthür 2012). The effectiveness of European second order governance in shaping substantive policy choices at the national level therefore plays an increasingly important role in view of multiple policy goals, multiple levels and heterogeneous interests in an ever wider Union.

GOVERNANCE OF GOVERNANCE IN THE EUROPEAN ENERGY SECTOR

Energy policy has transformed substantially since 1951. We have seen the emergence of an institutional and policy framework at the level of second order governance, while first order governance mostly has been left to the member states. How the governance of governance operates in the energy sector is addressed in this section. The focus is on the governance of markets, but also on governance devices which help to link internal market issues to the wider energy policy agenda. The characteristic constellations of European governance in energy policy are summarised in Table 2, applying the conceptual framework developed above (see Table 1).

The role of competition policy is eminent, but not so much at the level of first order governance as one might expect. Threatening to use competition law prerogatives helped the Commission to push through its liberalisation agenda during the first round of market legislation (Schmidt 1998), but a systematic link between competition policy and market-making secondary law was only established in the context of negotiating the third legislative package 2007-2009 (Eberlein 2012; Eikeland 2011a: 26-29; 2011b: 250-254). There is thus intense interaction between the use of competition law powers and the joint decision mode. DG Competition, cooperating closely with DG Energy, launched a major enquiry into competition in electricity and gas markets in the run up to the third legislative package. The enquiry proved to have a strong signalling effect in the area of ownership unbundling. In retrospect, the 'shadow of hierarchy' (Héritier & Lehmkuhl 2008; Scharpf 1993) cast by European competition law has been more effective than the third energy package introduced in 2009, which, due to political opposition, ran short of imposing ownership unbundling on the member states. Since DG Competition has limited capacity to deal with individual competition law cases, it seeks to steer competition policy at lower levels by tackling visible, high-profile precedent cases. Table 2 depicts the configuration in energy competition policy where the ECN diffuses policy practice towards national competition authorities, so that the bulk of first order governance in the member states should follow the direction of the few cases of first order governance at the supranational level.

As the evolution of energy policy has illustrated, the joint decision mode is conducive to a policy output which predominantly provides for second order governance. This leaves room for discretion to national authorities and the energy industry in implementing the *acquis*, i.e. to engage in first order governance (see Table 2 below). As in the area of competition policy, the Commission seeks to steer regulatory reform and change at lower levels through network structures. To that end, it

granted a formal mandate to the body of national regulatory authorities, the Council of European Energy Regulators (CEER), which generated policy advice as the European Regulators' Group for Electricity and Gas (EREG, created by COM decision 2003/796 EC). The third legislative directive lifted regulatory cooperation to the next level with the creation of an Agency for the Cooperation of Energy Regulators (ACER, EC no. 713/2009). ACER very much functions as a networked agency, as it relies heavily on the national IRAs' staff and resources, and thus is a far cry from the single or federal regulator model discussed previously. Some observers have argued that the institutional choice was at least partly motivated by the Commission's 'desire to dominate a weak agency' (Buchan 2015: 354). However, the member states overall are also reluctant to shift regulatory powers held by their national authorities towards the European level. As a result of the three legislative packages, independent energy regulators form a constitutive part of the multilevel regulatory architecture, and they play a key role in implementing the *acquis* at the level of first order governance. Agency governance at the supranational level, by contrast, is predominantly second order governance, as illustrated in Table 2.

Besides national administrations and regulators, private actors also engage in first order governance and implement European energy law. Of particular relevance are the infrastructure owners who run the long-distance and high-speed transportation lines. There is a risk that the integration of national and regional energy markets will fail without sufficient cross-border capacity – and close observers have argued that the European approach has to refocus on physical infrastructure to prevent this (Helm 2014). Transmission system operators (TSOs) have engaged in voluntary cross-border cooperation for decades out of technical necessity, while a truly European outlook has only emerged in reaction to the single market project. The European association of TSOs (ETSO), created in 1999, has operated various voluntary schemes. The third energy package attributed a formal mandate to the TSOs with the creation of a 'European Network for Transmission System Operators' for Electricity and Gas (ENTSO-E and ENTSO-G). ENTSO-E prepares the network codes for electricity grids and therefore is instrumental in implementing the internal energy market. Network structures were thus first introduced by private actors in order to engage in cross-border cooperation, and subsequently they have been used by DG Energy to steer infrastructure-related policy issues. The policy output of such network structures with targeted participation is much more tangible than that of wider stakeholder networks such as the Florence or Madrid energy fora, which were initiated by the Commission in the late 1990s as a mode of 'regulation by cooperation' (Eberlein 2005). While they have been conducive to new forms of institutionalised cooperation within the CEER and ETSO, the fora have not delivered as decision-making bodies (Eberlein 2003, 2005; Vasconcelos 2001). They continue to exist and generate wide policy input, and with their broad and inclusive membership serve as a tool of participatory governance. Networks with limited participation holding a clear policy mandate such as ENTSO play a central role in governance of governance, relying on a dedicated associational structure (ETSO) which brings together national TSOs at the level of first order governance (see Table 2).

Finally, soft governance serves as a governance device to link internal market issues to the wider energy policy agenda. A veritable governance architecture (Borrás & Radaelli 2011) has emerged with the various horizontal strategies such as '20 20 by 2020', 'Energy 2020' and 'Europe 2020'. Soft modes of coordination should, however, not be seen as a new phenomenon: back in 1956, the Spaak report suggested a number of measures in this regard (The Intergovernmental Committee established by the Messina Conference 1956: 127-129), and the Commission's first General Report stated that energy problems could 'be resolved only by the perfect coordination of the activities of the Executives of the three European Communities and of the Governments of the Member States' (EEC 1958: 49). In 1986, national governments stressed the need for flexibility in this policy area and encouraged the Commission to take measures to enhance the convergence and coherence of member state policies, informed by annual reports to be submitted by the latter, and resulting in

Commission assessment and reporting on a biannual basis (Council of the European Communities 1986, sections 7-10).

In today's energy policy, non-hierarchical coordination is an important device to integrate the various policy goals around markets, sustainability and security of supply (see Table 2). Soft governance not only facilitates coordination between member states, it is also conducive to an integrative approach within the European Commission, where several DGs work on energy related issues. In terms of policy output, such coordination takes the form of horizontal strategies such as those on '20 20 by 2020' or 'Energy 2020'. These strategies do rely on different policy modes and governance configurations. Taking renewables as an example, the 20 per cent goal was first envisaged by the '20 20 by 2020' strategy, and it became binding at the national level with the 2009 directive imposing individual national targets for the share of renewables in the energy mix (governance of governance through secondary law). With the new strategy adopted for the period until 2030 (European Council 2014), the policy regime is purely coordinative, where the aggregate target set at the European level is not complemented by binding national targets. Similarly, the Commission has sought to persuade member states to cooperate more closely in their management of capacity and renewables schemes (European Commission 2013). Such soft governance is, however, promoted in the shadow of hierarchy, namely the threat of competition law cases brought under an emerging energy policy state aid regime (Buchan 2015: 355.). Soft governance thus complements the other policy modes such as competition policy, agency governance, joint decision-making or private governance.

Table 2: European Governance in Energy Policy

Governance Order Policy Mode	Second Order	First Order
<i>Hierarchical, public actors involved</i>		
Competition policy	European Competition Network	DG Competition, national competition authorities / energy regulators
Joint decision-making	COM initiative, Council and EP co-legislate	National authorities and energy industry
Agency governance	CEER, ERGEG/ACER	National energy regulators
<i>Non-hierarchical / private actors involved</i>		
Private governance	Florence, Madrid fora ENTSO-E, ENTSO-G	ENTSO, national TSOs
Soft governance	Coordination between COM DGs and member states under Energy 2020, Energy 2030 etc.	National authorities

Overall, the room for manoeuvre at lower levels of governance and for private actors in European energy policy is striking (see Table 2). Network governance plays an eminent role at the level of second order governance, while first order governance is mostly left to member states and firms. Non-hierarchical modes of governance may prove effective in areas such as competition policy where

these operate in the 'shadow of hierarchy' (Héritier & Lehmkuhl 2008; Héritier & Rhodes 2010), but the governance capacity generated in other areas risks being insufficient to achieve the envisaged policy goals.

CONCLUSION

65 years of European energy policy provide for valuable insights into the dynamics of multilevel governance. A foundational phase (1951-1957) laid the groundwork for a European energy policy with the ECSC and Euratom, but integration proved limited. During the following three decades (1958-1986), policy initiatives ran short of gaining support, but prepared the ground for future developments through the establishment of a triangle of policy goals around markets, security of supply and sustainability. Governance capacity was eventually built up between 1987-2002 with the realisation of the internal energy market and the rising salience of issues related to security of energy supply and sustainability. Finally, since 2003, a phase of consolidation has seen two more rounds of market legislation, and the emergence of a governance framework for Europe's broader policy agenda. In response to the research question posed initially, it can be stated that European policymakers have succeeded in building up governance capacity where second order governance is concerned. By contrast, first order governance very much remains the remit of national and private actors. The facilitating and impeding factors that have shaped the emerging governance mix amount to functional reasons in terms of limited governance resources, as much as to power-based motives in a setting where national governments are not keen to cede policymaking competencies to higher levels.

To substantiate the argument about governance capacity, as well as about facilitating and impeding factors shaping the governance mix, five governance modes were studied in depth: namely competition policy, the joint decision mode, agency governance, private governance and soft governance. Governance networks boost the Commission's governance capacity in the area of competition policy and agency governance, and they also bring on board the policy expertise of private actors. Self-regulation by industry constitutes a fall-back option in the absence of sufficient governance capacity on cross-border issues. Finally, soft governance serves as a device to bridge multiple policy areas and levels of governance. Structured mechanisms of coordination and cooperation are supposed to bring about the realisation of overarching policy goals such as the 20-20-20 targets. Governance of governance may, however, fail to overcome the policy trade-offs between contradictory goals, and national reservations about establishing a common European policy. The extent to which the European governance framework in energy policy is adequate to tackle persisting problems of implementation, compliance and policy coherence is beyond the scope of this article, but related challenges will ensure that those interested in governance issues will continue to study this field of policy.

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