MULTILEVEL EU GOVERNANCE IN ENERGY INFRASTRUCTURE DEVELOPMENT:
A New Role for ACER?

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Multilevel EU Governance in Energy Infrastructure Development: A New Role for ACER?

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Abstract

In order to minimize the risks connected to the exponential expansion of intermittent renewable energy sources, European policy makers have agreed on the urgent need of increasing the interconnection of Europe’s electricity grids. However, the current European energy governance is characterised by a variety of institutional players having concurrent or even conflicting interests, linked by a complex network of responsibilities and delegation of powers. Analysing and understanding the current governance structure is therefore essential to identify and prevent the development of regulatory practices that could negatively affect the integration of Europe’s energy markets. This paper focuses on the issues of infrastructure development in the electricity sector and shows that a more centralised governance structure could be beneficial to better achieve the ambitious European energy targets. In particular, the paper looks at the issues arising from the multi-level decision making process relating to the Cross-Border Cost Allocation of key infrastructure projects, demonstrating that increasing ACER’s role in the decision-making process would not only allow to increase regulatory harmonization and the adequate representation of EU interests in the process, but would also create a more efficient administrative procedure and reduce the risk of regulatory capture.

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1. Introduction

1.1. European Energy Policy in a Nutshell

The European Union’s (EU) energy policy rests on the three key objectives of obtaining affordable, secure and sustainable energy. These common goals have been pursued through a policy strategy based on the reduction of CO₂ emissions, the promotion of energy efficiency and renewable energy sources (RES) and the development of a liberalised Internal Energy Market (IEM).

The EU mandated support for RES has attracted unprecedented levels of investment in RES in most of Europe. The recently released 2030 Framework for climate and energy policies has proposed even more ambitious RES targets, aiming at an overall 27% RES energy consumption by 2030 (Commission, 2014a).

The question on how such a high percentage of RES generated electricity will be integrated in the European energy networks becomes of paramount importance, especially when taking into account that the projected growth of RES production will largely derive from wind and solar power.

Intermittency and remoteness from consumption centres of utility scale RES have long been identified as the primary concerns. European policy makers have agreed that the most effective way to address these challenges is to increase the interconnection of Europe’s national energy markets through investment in transmission infrastructure and systematically addressing cross-border issues through harmonized rules and standards.

It is expected that the increasing demand, guaranteeing energy security and completing the de-carbonization process will require over €200 billion of investments in the next decade (“European Union Investments Needs”, 2011). This much needed capital will contribute to the expansion in the deployment of RES in Europe by making cheaper RES generated electricity more easily accessible to the wider European market, simultaneously minimising reliability concerns and enhancing European wide competition.
1.2. The European Energy Infrastructure Plan

The increase penetration of RES is not however the only concern facing European policy makers. Underinvestment in Europe’s ageing electricity infrastructure, especially following the financial crisis, has been subject to careful scrutiny in the past years (Chorafas, 2012 p. 43). Its out-dated technology and the numerous bottlenecks have been cause of inefficient transmission of electricity between Member States, isolation of the national energy markets and have slowed down the development of competition (Commission, 2001). EU Institutions have unanimously stressed the importance of developing interconnection infrastructure, often reiterating the need to fast-track the completion of the IEM.

In 2011, the EU Commission first proposed the Trans-European Network Regulation (TEN-E Regulation, 2013), that mapped the primary energy infrastructure needs and introduced measures to accelerate the most strategic projects by cutting the red tape and providing EU funding.

In particular, the EU identified twelve energy ‘priority corridors’, five of which specifically intended to address the urgent infrastructure needs of Europe’s electricity grids in order to strengthen cross-border interconnections and promote the integration of RES.2

In order to develop the energy priority corridors, the EU Commission identified, following the input of all the major regulatory stakeholders, a list of Projects of Common Interest (PCIs) that were considered strategic for the development of the IEM because of their significant cross-border impacts.3

The projects, if carried out, will benefit from a streamlined permitting process, managed by a single national authority consequently increasing their visibility and attractiveness for investors, as well as the possibility of receiving funding through the newly created Connecting Europe Facility (CEF).4

The TEN-E Regulation encouraged cooperation among the different regulatory stakeholders to tackle the main issues arising from cross-border infrastructure development such as the cumbersome permitting processes that increase transaction costs and inhibit investments.
The commitment to optimise network development was recently strengthened by the European Council and by the Commission that reiterated the importance of reaching the minimum target of 10% interconnection by 2020, as well as suggesting an increase to 15% by 2030 (Energy Union Package, 2015).

1.3. Delivering effective energy policy: the European challenge

Despite the general enthusiasm that has accompanied the plans for the development of a more integrated European energy infrastructure network, energy policy is still a contentious topic in European politics.

Member States have traditionally claimed an exclusive regulatory prerogative in the energy sector, arguing that national security concerns dictated that such competence should remain with the individual states.

The division of competences between the EU and the Member States in the energy field was thus a sensitive issue. Most notably, it has been abundantly clarified that decisions regarding a nation’s energy mix and the external dimension of EU energy policy remain a prerogative of the Member States (Commission, 2014b). Decisions regarding regulatory harmonization, on the other hand, have been devolved to the EU, with Third Energy Package (2009) representing a successful effort in fostering the completion of the IEM.

The resistance of most Member States to devolve further sovereignty to the EU in the energy sector has created a complex governance structure that was the result of a carefully negotiated balance of powers, where European policy makers strived to increase uniformity of implementation albeit resisting the more politically challenging centralisation of the decision making processes (Eberlein, 2008).

The Juncker Commission has stressed that the EU can no longer have energy rules set at the European level but applied by 28 different regulatory frameworks (Energy Union Package, 2015). This will also require a change in the MS’s infrastructure expansion policies shifting from an inward looking domestic focus to an integrated European planning strategy.
Indeed, the success of the Commission’s investment plan will largely depend on how the EU and its Member States will be able to create a favourable investment climate to incentivise private undertakings to finance this massive infrastructure gap.

The current energy governance structure is characterised by a variety of institutional players having concurrent or even conflicting interests, linked by a complex network of responsibilities and delegation of powers.

Analysing and understanding the current governance structure is therefore essential to identify and prevent the development of regulatory practices that could negatively affect the integration of Europe’s energy markets. This paper will focus on the issues of infrastructure development in the electricity sector and it will attempt to determine whether a more centralised governance structure could be beneficial to better achieve the ambitious European energy targets.

2. EU Energy Infrastructure Governance

It is possible to identify four key institutional actors that are responsible for the advancement of the IEM and the development of Europe’s energy infrastructure: (i) the EU Commission; (ii) the National Regulatory Authorities (NRAs); (iii) the Transmission System operators (TSOs) and (iv) the Agency for the Cooperation of the European Regulators (ACER). This section will illustrate the main responsibilities of these actors, particularly in relation to the development of energy infrastructure under the TEN-E Regulation.

2.1. EU Commission

As the main executive body of the EU, the Commission has a central role in the determination and implementation of Europe’s energy policy. Several of its Directorates General (DGs) share competences in the energy sector with the DGs Energy and Climate enjoying the majority of the responsibilities.

Another heavily involved Directorate is, without doubt, DG Competition. Before the liberalisation process began effectively to take place, competition policy was the only tool available to the Commission to exercise influence in the energy markets (Adrien De Hauteclocque, 2013).
The Commission is one of the principal actors in carrying out the completion of the IEM. In addition to having a key role in the implementation of the unbundling and third-party network access rules (Electricity Directive, 2009, Articles 9 and 32), the Commission was ultimately responsible in determining which projects would gain PCI status (TEN-E Regulation).

The Commission’s monitoring and policy settings responsibilities have been essential in the harmonisation and streamlining of the permitting and environmental assessment procedures.

The Commission is further responsible determining amount of financial assistance to be granted to the projects selected as well as the conditions and methods for their implementation (Regulation 1316/2013, Article 18).

Finally, pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Commission may ensure the compliance to European regulations by initiating infringement proceedings against any Member State that has failed to fulfil its obligation.

2.2. National Regulatory Authorities

National Regulatory Authorities (NRAs) were strengthened by the Third Energy Package (2009) in response to their ineffectiveness in preventing non-discriminatory network access and uniformly supervising market operators (Electricity Directive 2009, Preamble). The difficulties in guaranteeing a homogenous application of the European rules, were mainly attributed to the insufficient powers and discretion of NRAs, exacerbated by a frequent lack of independence from their governments (Electricity Directive 2009, Preamble).

The Third Energy Package (2009) made significant changes, expanding NRAs duties and obliging Member States to enact measures that would guarantee NRAs the ability to carry out their functions effectively.5

Currently NRAs are responsible for (i) determining transmission and distribution network access tariffs; (ii) monitoring the unbundling requirements and, more generally, overseeing of energy companies; (iii) consumer protection and (iv) the imple-
mentation of, and compliance with, legally binding decisions of the commission or ACER.

With regards to the development of cross-border infrastructure NRAs have a fundamental role in the permitting and tariff calculation processes. In particular, NRAs are responsible the Cross-Border Cost Allocation (CBCA) process as well as the recognition of any regulatory incentives necessary for the development of PCIs that are not autonomously commercially viable (TEN-E Regulation, 2013).

2.3. Transmission System Operators

Transmission System Operators (TSOs) are responsible for the wholesale transfer of electricity or natural gas from the point of production or importation to the points of distribution.

The role of TSOs has fundamentally changed following the implementation of the Third Energy Package. Historically, in fact, the functions performed by TSOs were carried out by the national vertically integrated utilities. The liberalisation process required the functional separation of transmission activities from the generation and supply activities to prevent possible foreclosing behaviours typical of network industries (Third Energy Package, 2009). The unbundling process created independent TSOs, responsible for the management and development of the national high-voltage network and all its related investments. This key role implies that TSOs will normally be the entities involved in the submission of PCI projects and the application to the related EU grants.

TSOs will participate in negotiations with all regulatory stakeholders with regards to their own investments as well those carried out by merchant operators by providing the necessary information and technical support on the grid.

In the context of developing an interconnected European energy market, TSOs have been awarded other important responsibilities. In particular, with the creation of the European Network of Transmission System Operators for Electricity (ENTSO-E), the Electricity Regulation (2009) conferred TSOs the responsibility of developing Network Codes to set uniform rules for the use of transmission infrastructure allow-
ing all network operators, generators, suppliers and consumers to operate more effectively throughout Europe (Electricity Regulation, 2009, Article 6).

ENTSO-E is further in charge of adopting a Ten-Year Network Development Plan (TYNDP), a biennial programmatic document that identifies the most pressing infrastructure gaps from a European perspective allowing for project promoters and regulatory stakeholders to best priorities investments efforts to maximize network-wide impacts (Electricity Regulation, 2009, Article 8).

2.4. *The Agency for the Cooperation of European Regulators*

The Agency for Cooperation of Energy Regulators (ACER) was established with the Third Energy Package with the primary purpose of closing the regulatory gap that existed in relation to the NRAs’ ability to deal effectively with cross-border energy issues (Macedo, 2011).

The creation of ACER was nevertheless surrounded by great controversy. In its inception, Member States could not find a consensus on the model of regulatory agency that the Commission had proposed (Council, 2007). Several Member States went as far as being ‘concerned’ (Council, 2008) with the powers that were being discussed for ACER, leading the Council to successfully limit the decision making autonomy of the Agency (Ermacora, 2010).

The challenging negotiations among the European institutions resulted in the adoption of the ACER Regulation (2009) that created an agency with primarily consultative functions and with limited binding decision-making powers. ACER is thus devoid of a standalone regulatory role, but rather acts as a forum to encourage cooperation among NRAs. This is perhaps best reflected in ACER’s governance structure where key regulatory policy decisions of the Agency must be approved by the Board of Regulators, operated by senior representatives of the NRAs.

The promotion of cooperation among NRAs is carried out principally by the exchange of information and best practices (ACER Regulation, 2009). ACER further provides interpretative advisory guidance on EU energy rules and a peer-review system for the NRAs (Electricity Directive, 2009, Article 39).
Finally, ACER exercises residual decision making authority with regards to (i) regulatory Exemptions (Electricity Regulation, 2009) and (ii) the terms and conditions for access to and operational security of cross-border infrastructure. In these instances, however, ACER will only be able to exercise its jurisdiction if the NRAs are unable to reach an agreement within six months (ACER Regulation, 2009, Article 8(1)-(3),(5) and Article 7(7)).

Under the TEN-E Regulation (2013) ACER’s responsibilities were expanded to include important monitoring and advisory functions. ACER must for example monitor the progress achieved in implementing the PCIs and make any necessary recommendations to facilitate the completion of such projects (TEN-E Regulation, 2013, Article 5). In addition, it provides an opinion in the selection of the PCIs, ensuring that the criteria and the CBA is applied consistently across the various regions.

Finally, the TEN-E Regulation assigns an additional residual decision making power to ACER with regards to decisions relating to CBCAs.

3. EU Infrastructure Governance in action

The multitude of actors, interests and responsibilities has inevitable repercussions on the complexity of the decision making processes. Indeed, the European infrastructure governance is often characterized by multistep procedures that require the input or determinations of multiple stakeholders, creating a process paradoxically in contrast with the streamlining spirit of the regulations.

An illustrative example is the process relating to the CBCA of PCIs pursuant to the TEN-E Regulation.

3.1. Cross-Border Cost Allocations

Cross-border cost allocations decisions relate to the apportioning of the costs sustained by the project promoters. The introduction of the requirement of performing a Cost-Benefit Analysis (CBA) for the selection of PCIs under the TEN-E Regulation, has encouraged the departure from the traditional cost allocation model based on the premise that each Country is simply responsible for costs associated with the assets located in its territory (Meeus & He, 2014).
By allowing the possibility for investment costs to be allocated outside the hosting countries, the TEN-E Regulation encourages innovative CBCA mechanisms that incentivize the realization of valuable interconnections that otherwise would struggle to be completed because of financing challenges (Robert Schroeder, 2015).

In particular, Article 12 of the TEN-E Regulation provides that the “…efficiently incurred costs…” of such PCIs that are not covered by the charges levied on the network users, should be borne by the TSO or project promoter of the Member States to which the project provides a net positive benefit.

In order to determine the net-positive impact of a PCI, the CBA takes into account a variety of benefits, such as: (i) increases in security of supply; (ii) avoidance of generation curtailments; (iii) reductions of national constraints; (iv) avoidance or delayed of investments; (v) increased reliance and grid safety; (vi) environmental sustainability or (vii) the effects on competition and market power (ACER, 2013a).

The determination of the CBCA is left to the NRAs of the Member States where the PCI will have the most significant economic impacts. Upon request of the project promoters, the NRAs must evaluate the project’s CBA and financial viability to determine to what extent each relevant Member State will have to bear the costs of the project.

The NRAs’ decisions take into consideration the Minimum Standards contained in ACER’s Recommendation No 7/2013 that aims to encourage the use of a consistent CBCA methodology and minimize delays (ACER, 2013b). If the NRAs are nevertheless unable to reach an agreement within six months from the request of to TSO or project promoter, the CBCA is decided by ACER, within a period of three to five months (TEN-E Regulation, 2013, Article 12).

3.2. Analysis of CBCA Governance Issues

The CBCA is a complex process that is based on a series of multiparty negotiations involving the TSOs and NRA of the Member States where the project is located, as well as the regulatory actors of any other Member State that experience net-positive benefits.6
The CBCA is thus inherently subject to the risk of opportunistic behaviours. The TSOs or NRAs that have greater expertise and bargaining powers will naturally be interested in achieving a cost allocation that is most favourable to them and not necessarily one that would maximise the joint value of all the participating parties.

In addition, the current system of CBCA facilitates an unjustified reliance on CEF funding. ACER’s CBCA Minimum Standards provide that only the Member States that experience a positive net benefit of at least 10% will be required to contribute to the costs.

The CBCA decisions to date have shown the tendency of NRAs to adopt incomplete CBCA decision that do not assess in detail the net-benefits of the Member States not directly involved in the project (Meeus & Keyaerts, 2015 c.s.). This has led to multiple NRAs to seek CEF grants to cover the financing gap, without assessing whether a net-benefitting Member State should be asked to provide compensation.

The possible contrasts in negotiations or lack of a well-defined CBCA can cause delays or stops in the works of the PCIs. Indeed, in many cases the CBCA assumed that the project would receive CEF funding, possibly causing further delays if the funding does not materialize (Meeus & Keyaerts, 2015 c.s.). Long delays could even change the nature of the existing benefits causing the CBA to be inaccurate, requiring an entirely new CBCA to be performed (Robert Schroeder, 2015).

Such concerns are only exacerbated by the risk of the back and forth between the NRAs and ACER. The resulting uncertainty could ultimately affect the incentives of private investors to bridge the financing gap if the EU wide credibility is reduced by cost sharing decisions that are based on uncertain or non-homogenously determined benefits.

4. A New Role for ACER?

4.1. Centralising EU Infrastructure Governance

It is clear that the completion of the IEM and the achievement of its ambitious targets will require a fundamental re-thinking of the roles of the numerous institutional actors. The current multi-level decision-making process should be better designed to
advance the development of energy infrastructure and create as little barriers to investment as possible.

The Commission has recently recognised the immediate need of aligning regulation to prevent market distortions and fragmentation, advocating for a more central role of ACER (Energy Union Package, 2015).

Specifically referring to decisions relating to Cross-Border Cost Allocations, the Commission has argued that ACER’s regulatory functions should be sufficient to enable it to ‘effectively oversee the development of the internal energy market [and] deal with all cross-border issues necessary to create a seamless internal market’ (Energy Union Package, 2015).

The more central role envisaged by the Commission for ACER in relation to CBCA could arguably be seen as unnecessary. Indeed, of the 14 PCIs that have undergone the CBCA process, 12 were settled by a coordinated decision of the NRAs and only two needed to be decided by ACER (Pototschnig, 2015).

While these numbers would seem to suggest that the current decision making process has yielded efficient results, a careful analysis shows that the resulting decisions are not as indicative as one might hope.

In particular, none of the 12 CBCAs that were settled by a coordinated decision of the NRAs regarded projects with net-losers (Meeus & Keyaerts, 2015). In other words, no contrasts could have arisen from the CBCA as no Member State was negatively affected by the construction of the particular PCI. Indeed, in the two cases where net-losses were identified, the NRAs were unable to reach a concurrent decision within the prescribe timeframe.

Furthermore, 10 of the 12 coordinated decisions regarded internal projects that had no cross-border elements (Meeus & Keyaerts, 2015). The allocation of the costs was thus based exclusively on the net benefits brought to a particular Member State with no real need of performing a re-allocation of the costs.

In addition, in those cases where the CBCA concluded that the net benefits were too dispersed to have been calculated appropriately, the NRAs relied heavily on the fact that the ‘financing gap’ would be closed by the CEF, automatically assuming that the funding would be granted (Meeus & Keyaerts, 2015).
The CBCA is certainly more controversial where a net-looser is present. Thus far, in both cases where a net-looser was identified (ACER, 2014 and 2015a) the NRAs were unable to reach an agreement within the prescribed six months, compelling ACER to make the final decision.

The CBCA performed by ACER created an inevitable duplication of the work. The same documents had to be reviewed twice and stakeholders were called in to give their input a second time with regards to all the aspects of the CBCA. ACER’s review went as far as to carry out ‘an in-depth analysis…including with the use of new parameters, values and information’, demonstrating a lack of coordination in the calculation methods (ACER, 2015a, para. 186, 196).

It is true that an analysis based on such a limited number of CBCA can only yield anecdotal evidence and that it is impossible to know ex ante how many PCI will actually cause net-losses. Although unlikely, it is possible that future PCI will require uncontroversial CBCA, negating the need of changing the current system. Nevertheless, it is intuitively possible to conclude that, due to the delicate nature of the interests represented in a CBCA, conflict among NRAs will likely occur, when there is a net-loser.

The lack of consistency of the CBCAs and the ensuing delays are easily avoidable by making ACER directly responsible of all CBCA decisions. This would however not necessarily remove the NRAs from the decision making process, as they would continue to have a support role, sharing their expertise and data in aid of ACER.

The streamlining of the CBCA decision-making process would not only allow to increase regulatory certainty and the adequate representation of EU interests in the process, but would also create a more efficient administrative procedure and reduce the risk of regulatory capture.

4.2. The Benefits

Increasing ACER’s decision-making power would most obviously facilitate the harmonization efforts in the CBCA process and more generally in the implementation of the TEN-E Regulation.
While it is true that ACER’s Recommendation 7/2013 provides a unified set of guidelines that all NRAs agreed on through the adoption by the Board of Regulators, such guidelines are by no means binding or enforceable. Arguably NRAs will only comply with Recommendation 7/2013 insofar as it does not affect their ability to successfully protect their interests.

Indeed in the CBCA relating to the Gas Interconnection between Poland and Lithuania (PCI 8.5), the NRA’s proposed a CBCA that markedly deviated from the guidelines, specifically in relation to the compensation to be provided to project promoters and on the allocation of compensation between the contributing countries (ACER, 2014).

Departures from such core elements of the Recommendation could greatly affect the consistency of the outcomes of the CBCA and the levels of the impact on tariffs, harming regulatory certainty and investor trust.

Centralisation of processes like CBCA becomes especially valuable when taking into consideration the great spectrum of resources and technical skills of the various NRAs. Allowing ACER to act with decision-making autonomy would guarantee that all CBCAs will be performed with the same level of expertise and resources as well as limiting the ability of NRAs to exploit possible bargaining power imbalances.

The centralisation of the CBCA process would also allow a more adequate representation of EU interests from the very first stages of the negotiations. As mentioned above, the CBCAs that have been decided so far, rely heavily on CEF funding because the benefits were too dispersed or too difficult to calculate. For example in the cases of Latvian-Estonian electricity interconnector (PCI 4.2.1) and Estonian internal electricity line (PCI 4.2.2), the NRAs agreed that 75% of the total investments costs are to be allocated to CEF (Meeus & Keyaerts, 2015).

The limited EU funding available should be accessed on the basis of a consistent application of the CBCA process that maximizes joint gains by correctly weighing the interests of the Members States and those of the EU as whole. As the Energy Union expands and integration increases, it will be progressively more difficult to determine which Member State will have to contribute to the costs of the infrastructure
and the current CBCA process is not designed to minimize inconsistencies and prevent systematic failures.

Centralisation thus represents the most adequate system to apportion responsibilities without overburdening the available funding mechanisms. It further allows to take into consideration the wider EU effects and prevent NRAs from declining to participate in CBCA process like in the case of the Italian and French regulators in the PCIs 5.10 and 5.12 relating to the Interconnection on TENP pipeline in Germany (Meeus & Keyaerts, 2015).

The third benefit derivable from centralisation is administrative efficiency. Extensive literature has shown that coordination and centralisation allow to significantly reduce administrative decision making and transaction costs by (i) streamlining disputes and reducing monitoring costs and (ii) creating regulatory economies of scales and preventing inefficient duplication of work (Freeman & Rossi, 2012).

While it is true that research points to decentralisation as the best system to represent the specific needs of different regions, centralisation will yield higher benefits when (i) there are great inter-regional externalities and (ii) the different regions are relatively homogenous (Oates, 1972 and Lockwood, 2004).

The nature of the EU energy policy goals indicate that centralisation could bring positive net benefits. Reducing the infrastructure gap will make the needs of the various regions progressively more homogenous and the increasing interconnection between Europe’s energy markets will yield greater inter-regional externalities as the shortcomings or failures in one region will have an impact on progressively larger areas.

As Freeman and Rossi (2012) further suggest, centralisation is unwarranted in the limited cases in which the creation of a new agency would be too costly or in which the coordinate outcome of the decision by multiple agencies would mirror the outcome that the lawmaker would reach when bargaining among themselves.

Such scenarios hardly apply in the case of ACER. While taking on more responsibilities would entail a larger budget, such costs would be unlikely to be prohibitive. Furthermore, the ultimate goals of the TEN-E Regulation suggest that EU lawmakers
could only be in favour of a more effective process to fast-track the completion of the required infrastructure projects.

Furthermore, the peculiarities of the EU infrastructure development process limit the benefits of a decentralised model identified by Freeman and Rossi (2012). The adversarial nature of the CBCA process makes it challenging to benefit from constructive inter-agency competition and the bargaining power imbalances and the differences in expertise and resources of the NRAs will limit the opportunities for agency compromise.

Finally, centralising the CBCA process could positively address the risks of regulatory capture and arbitrage. In particular, it is suggested that centralisation would reduce the risk of regulated entities influencing the single NRAs or taking advantage of the NRA’s shared jurisdiction to achieve the best possible deal.

Commentators have traditionally argued that a decentralising decision-making process may reduce the risk of capture by forcing interests groups to disperse their lobbying efforts among a greater number of agencies (Laffont & Martimort, 1999). Nevertheless, economic literature has shown that centralisation can lead to increase the accountability of decision makers and reduce aggregate political rents (Boffa, Piolatto & Ponzetto, 2013).

The non-federalist structure of the EU however is decisive in assessing the benefits of centralisation. Interest groups in the energy sector in Europe are historically connected to a single Member State and the incumbent operators, TSOs or national project promoters will, in most cases, have strong existing ties with the NRA.

The interest groups’ lobbying efforts are thus more likely be successful in a national setting than at the European level. Competition of interests among the regulated entities at the EU level inhibits joint lobbying efforts, abstracting ACER from the most common concerns of regulatory capture in a centralised governance settings as identified by Sirico Jr Louis (1980).
4.3. The Challenges

Increasing ACER’s decision-making autonomy is, nevertheless, faltered by three main practical challenges: (i) funding and personnel; (ii) Treaty delegation of powers limitations and (iii) political acceptability.

Currently, ACER has a budget of approximately €11 million and 80 staff members. These numbers are going to increase to approximately €20 million and 115 staff due to the new responsibilities of ACER under the REMIT Regulation (2011) with regards to wholesale energy market integrity and transparency (ACER, 2015b).

Considering the imminent adoption of the second PCI list (“Projects of Common Interest”, 2015) and the increasing number of CBCA that will be requested, ACER's resources will need to be additionally increased. However, its positive track record and the relative cost efficiency under which the Agency has operated so far, suggest that further increasing the budget and staff, will not be an insurmountable barrier.

A similarly positive conclusion can be adopted in relation to the legal challenges that could prevent the greater decision-making autonomy of ACER. Indeed, the limitations to the EU delegation doctrine in Meroni (1956) have long been thought to be anachronistic in light of the growing complexities of the EU Governance (Hatzopoulos, 2012, p. 325). Indeed, as Pelkmans and Simoncini (2014) suggest, the Meroni doctrine has frequently been used as an ‘excuse’ to stall or prevent discussions on the changing regulatory needs of EU agencies.

Recent jurisprudence of Court of Justice of the European Union (CJEU) has formally acknowledged the inadequacies of the Meroni doctrine, recognising in Short-selling (2014), that the TFEU does not limit the delegation of executive powers to the Commission.

Attributing more power to ACER would thus seem increasingly likely to pass constitutional scrutiny, especially given the specific technical and professional nature of the Agency’s expertise (cfr. Short-selling, 2014, paras. 82-83). After all, if a truly integrated and functioning single energy market is the ultimate goal of the EU and its Member States, the delegation doctrine should be applied in such a way to enable integration to occur effectively and efficiently.
Unfortunately, political acceptability will persist as a main challenge. The vested interests of Member States in the energy sector will remain strong, especially in the currently challenging energy security environment.

Nevertheless, the IEM and ACER have come a long way from 2009 and it is possible that the grievances of some Member State would resonate less in the Council today. In addition, the European Parliament has long been in favour of granting ACER more powers (European Parliament, 2008) further legitimising the recently expressed position of the Commission in the matter.

While energy policy has historically been hesitant to follow the path to integration, it is clear that more centralisation is desirable in the future, at least in relation to cross-border and wholesale energy issues.

5. Conclusions

The creation of ACER was met with abundant scepticism and suspicion. However, six years down the line, the views of NRAs and Member States seem to have evolved considerably. It could be argued, indeed, that ACER has successfully passed the initial “adjustment” phase having proven itself in the areas in which it currently has responsibilities.

While the idea of increasing centralisation might not be accepted by some Member State, there are several compelling reasons to support increasing ACER’s decision-making autonomy. Indeed, many of the considerations relating to the CBCA can be transferred to other areas in which ACER has residual decision making powers. Harmonisation and consistency could, for example, greatly benefit the EU energy infrastructure exemption regime (Hancher, 2011).

The ambitious goals of the European Energy Policy need to be pursued on a united front, promoting competition and harmonisation, particularly when it comes to guaranteeing investor security in financing the required interconnection infrastructure. Perhaps, a stronger ACER, appropriately backed by the Commission and the European Parliament, might just do the trick.

The five electricity priority corridors are identified in Annex I of the TEN-E Regulation and consist of (i) the Northern Seas offshore grid; (ii) the North-South electricity interconnections in Western Europe; (iii) the North-South electricity interconnections in Central Eastern and South Eastern Europe; (iv) the Baltic Energy Market Interconnection Plan in electricity and (v) the European Electricity highways.

For a detailed list refer to Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest L 349/28

In accordance with Regulation 1316/2013, the CEF determines the condition methods and procedures for providing EU Financial assistance to cross-border investments in the energy sector as well as in transport and telecommunication

See, for example, Articles 37 of the Electricity Directive and 41 of the Gas Directive

For example, the CBCA relating to PCI 8.5 Interconnection Poland/Lithuania involved input from TSOs and NRAs of Lithuania, Poland, Finland, Latvia, Norway, Sweden and Germany. The final CBCA was decided by ACER, delaying the procedure by over five months. For details see ACER Individual Decision No. 2/2015.
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