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## Internal European Energy Policy: A Discursive Institutional Perspective

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In a broad sense this paper addresses the problem of the EU energy policy coordination. In particular it focuses on the establishment of new coordination mechanism – the Agency for the Cooperation of Energy Regulators. It does so through the prism of discursive institutionalism. It suggests that the ‘logic of communication’ deserves a better attention as an important driving force behind the institutional change. In order to unpack this ‘logic’ critical discourse analysis was used to look inside the institutional discourse which accompanied the establishment of the new EU-level agency. The results point to the importance of discursive conduct of legislative actors.

This short study aims to contribute to the research on the problem of policy coherence which accompanies the European governance. Achieving coherence and overcoming barriers to policy making and policy implementation is a long lasting concern. In recent times it has been amplified by the expansion of cross-cutting, compound policies, such as energy, development, security and environmental policies. Given the manifold divisions, cleavages and tensions within and across the EU institutions, a detailed and systematic study in this area is essential. In spite of this, empirical and theoretical research on this topic is rather limited. Theoretical explanations of what undermines the coherent governance remain a grey area.

The problem is not new and has been recognised by the European policy-makers long time ago. A simple search in *www.europa.eu* gives 200 returns of the word “coherence”.<sup>1</sup> It has also been addressed in the academic literature.<sup>2</sup> Despite of the growing research, the very studies about ‘coherence’ are incoherent. Very often the concept of coherence is differently defined and approached in various ways. This is not surprising since the coherent governance incorporates various categories and levels.<sup>3</sup> However, out of the different level of coherence this study’s main interest is in the internal policy coherence in the area of the EU energy policy.

The European energy policy has been overwhelmed by the discourse about the EU energy security for many years. During the overall period the vast number of required policy instruments has been debated. Among these instruments creation of the single European

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<sup>1</sup> The search on "coherence" matched 11029 of 283450 documents (excluding documents from EUR-Lex, which has a separate search engine).

<sup>2</sup> (Ashoff 2005; Bigsten 2007; Carbone 2009; Christiansen 2001; Cremona 2008; Gauttier 2004; Gebhard 2011; Krenzler and Schneider 1997; Missiroli 2001; Nuttall 2005; Portela and Raube 2008)

<sup>3</sup> Hertog and Stroß distinguish between horizontal/vertical and internal/external coherence (den Hertog and Stroß 2011) while Christiansen underlines the importance of institutional coherence (Christiansen 2001).

energy market is the most accepted policy response for energy security challenges. Despite of being the most acknowledged policy response, the progress towards the creating a functioning EU energy market has a number of flaws. Among the number of difficulties are the lack of coherence in the powers and remits of national energy regulators and the cross-border regulatory deadlock between national gas and electricity markets.

With time the energy sector has become more complex and involves a great number of technical rules and actors. At present electricity companies operate under rules which greatly diverge between Member States. For instance, if in case of the unpredicted supply shortfalls Hungarian company wants to buy electricity from Germany it must acquire transmission rights from numerous companies which operate with different technical rules. Such operation would require a great amount of time and has its consequences for energy security. Moreover, regulatory authorities in the Member States enjoy different competences and lack uniformity. Therefore, the integration of national energy markets requires national authorities to cooperate at the EU level on certain type of decisions. In order to make the single market a reality there is a great need for active cooperation between national regulatory authorities and between regulators and the Commission (inter-level institutional coherence according to (Christiansen 2001, 748).

This problem has been finally addressed by establishing ACER – a new formal coordination mechanism between national regulators. This research paper aims to investigate what was the main driving force which determined this institutional change. The process of its creation has taken 3 years and has been accompanied by intense debates between the EU institutions. Thus, the institutional discourse is the main interest of this study.

### Analytical framework

Policy coherence refers to the systematic process of collaboration with regards to goals, instruments, legal and institutional frameworks and directed towards the achievement of objectives within and across individual policies in the manner of synergy.<sup>4</sup>

It is important to note, that policy coherence is seen this study from the point of view of institutional change or continuity. Facing a need for coordination, the institutional agents might resolve to already existing mechanisms of coordination (continuity) or create a new arrangement (change). In case it is agreed to create a new institution the form and tasks of this institution is a matter of deliberation.

In order to investigate institutional change, this paper is set to follow theory of discursive institutionalism (DI). The general argument of this theory is that discourse has a real effect on the institutions. According to DI the main factor which determines the institutional change is actors' discursive abilities presented in a particular "logic of communication which enables agents to [...] deliberate about institutional rules and persuade one another to change those institutions or to maintain them" (Schmidt 2008, 314).

Discourse will be approached as a causal mechanism that may explain particular institutional arrangements. This point constitutes the core research question: *To what extent does discourse influence the content of new institutional rules?*

Discursive institutionalism presents a useful corrective to the limits of three new institutionalist approaches. The new institutionalism theories have difficulties in explaining

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<sup>4</sup> A modified and advanced definition based on (Cremona 2008; den Hertog and Stroß 2011).

the change because they have overemphasised the rule-following logic or in other words – a dominating role of the structure over agency.

Historical Institutionalism (HI), Social Institutionalism (SI) and Rational Institutionalism (RI) approach institutional rules as static and believe in agents who blindly follow these rules. Indeed, according to HI the action in institutions follows the rules of path dependence. RI underlines logic of consequences, while SI is focused on logic of appropriateness. Vivien Schmidt rightly notices: “But if everyone follows rules, once established, how do we explain institutional change?”(Schmidt 2008, 314).

The advantage of DI approach is that it brings agents back into the analysis. It does so by approaching the institution as a concept which features structure-agency duality. Institution is seen as simultaneously structure which frames the behaviour of institutional agents and construct of these agents.

In order to uncover the logic of communication between these agents three main conditions will be analysed, namely: background ideational abilities, foreground discursive abilities and institutional context (Schmidt 2008, 305).

Ideational abilities encompass knowledge, dispositions and perceptions reflected in the content of the discourse. Discursive abilities refer to the conduct of the agents to convey ideas through the interactive process. This variable refers to the available discursive resources and the proficiency of reasoning or power of persuasion in political debate. Institutional context is also an important factor since the agents’ behaviour is heavily influenced by the surrounding environment. In this framework institutional change is understood as an outcome of dynamic interactions between three institutional actors.

*Table 1: Analytical framework*

Conditions	Outcome
<ul style="list-style-type: none"> <li>• <i>Ideational content</i></li> <li>• <i>Discursive conduct</i> <ul style="list-style-type: none"> <li>○ <i>discursive resources</i></li> <li>○ <i>linguistic competences</i></li> </ul> </li> <li>• <i>Institutional context</i></li> </ul>	<p style="text-align: center;"><i>Institutional change</i> <i>(the body of institutionalised rules)</i></p>

### Methodology

This study was carried out with the help of critical discourse analysis. Hajer defines discourse as “a specific ensemble of ideas, concepts, and categorizations that are produced, reproduced and transformed in a particular set of practices and through which meaning is given to physical and social realities” (Hajer 1997, 44). The advantage of this definition is that encompasses not only content of ideas but also the interactive process by which they are communicated. Moreover, it emphasises the importance of context in which interaction is taking place. Additionally, it encompasses not only the structure but also the agency.

The analysis has focused on the documents of the European Commission, the European Parliament and the Council. All the analysed documents are the official texts related to the

creation of the ACER along the co-decision procedure (see Annex 1). Discursive actors under study are administrative and political actors, who seek to coordinate agreement among themselves on policy ideas.

The analysis has proceeded in two steps. In a first step, during the entry-level analysis the condition of ideational abilities was explored by mapping the topics which caused the main disagreement among the actors. In a second step, in order to explore the condition of discursive abilities an in-depth analysis has been applied paying special attention on argumentation (topoi) in the texts.

#### *Case study: establishment of the Agency for the Cooperation of Energy Regulators*

The EU energy policy has given birth to a number of informal and formal coordination mechanisms and add-ons to existing institutional arrangements. The most interesting examples include Network of Energy Security Correspondents, Gas coordination group, Early Warning Mechanism<sup>5</sup> and Energy Dialogues (with Russia, Norway, the US, India, China and OPEC). Energy subject has been injected into the Baku initiative, the Black Sea Synergy, the Eastern Partnership, the Union for the Mediterranean and Central Asia Strategy.

However, this paper takes the most recent example of institutional change – establishment of the Agency for the Cooperation of Energy Regulators (ACER). The case has met a number of selection criteria. It represents: a) compound polity with high need of coordination; b) intense process of interaction among different institutional actors; c) clear moment of institutional change.

ACER is an independent mechanism for coordination amongst national regulatory authorities. It contributes to putting in place the regulatory framework needed to make market opening fully effective and create a single gas and electricity market by assisting regulatory authorities and coordinating their action.

#### *Institutional context*

The proposal for a new agency constituted one element of a 3<sup>rd</sup> Energy Package aimed to facilitate the integration of the internal market and to help the EU achieve more secure, competitive and sustainable energy. The proposal for its establishment was drafted and debated as part of the package, together with the Directive concerning common rules for the internal market in natural gas, the Regulation on conditions for access to the natural gas transmission networks, the Directive concerning common rules for the internal market in electricity and the Regulation on conditions for access to the network for cross-border exchanges in electricity.

ACER was not created in the vacuum. It has been successor of European electricity regulatory forum, known as Florence Forum, established in 1998. Similar forum but with respect to the gas market was set up in Madrid 1999. The forums are gathered once or twice a year. The participants include the EU Commission, national regulatory authorities, Member State governments, transmission system operators, electricity and gas suppliers, consumers and network users. The goal of both forums is to informally discuss regulation and implementation measures necessary for common energy market. They operate on the basis of voluntary cooperation and make no legally binding decisions.

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<sup>5</sup> within the framework of the EU-Russia Energy Dialogue

In addition to the forums, in 2003 the Commission established an independent advisory group called European Regulators for Electricity and Gas (ERGEG).

### *Contextualization*

The primary producers and recipients of the analysed discourse were: the Commission (DG TREN), the European Parliament (ITRE Committee) and the Council. The European citizens were the eventual audience of the final document (Regulation). The analysed discourse was typical for the genre of law making political procedure.

The key disputable issues were the future competences of the Agency, its structure and governance. They can be summarized in Table 2.

### *Ideational content and Discursive conduct*

In its legislative proposal the Commission has taken a moderate discursive strategy. The main attention of its Explanatory Memorandum focused on justifying the necessity of the agency in comparison to alternative arrangements. Out of the three variants (either: 1. use existing ERGEG, 2. a more formal Agency approach or 3. an EU regulator) the Commission has chosen a mid-level solution, as “the option of setting up a Single European operator is premature at this stage and is likely to encounter strong resistance from a number of Member States and stakeholders.” (COM SEC (2007) 1179, p.4)

Commission has structured its argumentation along the topics of fully functional energy market and existing regulatory gap. It presented the arguments along the calculus approach (topoi) for agency as a reference to past experience referring to negative example of implementation of 2003 Directive and positive examples of functioning of the informal forums and the ERGEG; as well as general acceptance of the proposal by the stakeholders and national regulators. Furthermore, such categories as numbers, advantage were used. The Commission presented the cost-benefit calculations and stressed the added value of the future agency. The other categories of arguments were the disadvantages of the alternative solution. The Commission underlined the lack expertise and resources in the Commission.

The European Parliament has entered the deliberation in active discursive manner. It has introduced 73 amendments moving way beyond the Commission's proposals and aiming to give the agency much stronger decision-making powers and independence. The main topics which appeared in the text were competences of the agency, its location, structure and governance. According to the rules of procedure the rapporteur has provided clear justification to the proposed amendments. These justifications have been arranged along the normative categories (topoi): accountability; efficiency (stronger powers, speedy decision-making, efficient work of the Administrative Board, better coordination between Boards, power balance); transparency, democratic control, independence of the agency, financial autonomy, and credibility.

The majority of amendments adopted at the Parliament 1<sup>st</sup> reading were not incorporated into the Council's common position. The Council has rejected 48 amendments and limited the binding decision-making powers of the Agency. The Council limited Agency powers to grant exemptions (from the unbundling requirements of cross-border transmission systems) only as a last resort.

The grounds for rejection were organised around following arguments (topoi): inefficiency (duplication of tasks) and disadvantage.

After the 1<sup>st</sup> reading, the Parliament has taken a forceful discursive strategy. This resulted in a final agreement with regards to the Agency' structure and mandate. The final legislative act became a reality as the result of an informal compromise negotiated by Giles Chichester (rapporteur, ITRE Committee) in the team of six MEPs<sup>6</sup> with the Czech Presidency on the package of energy market legislation (3rd Energy package). The package was blocked by the Parliament over the issue of ownership unbundling of the energy companies. The Parliament insisted on the full separation of energy supply and production activities from transmission network operators. In the compromise, the Parliament gave way on ownership unbundling (allowing partial ownership separation) in return for concessions in other areas covered by the package, notably the mandate of a new community-level agency and the reinforcement of national regulators.

At its Plenary Session of 22 April 2009, the European Parliament adopted a compromise package. The amendments which were agreed with the Council concerned essentially the competences of the Agency regarding: monitoring progress in the implementation of projects to create new interconnector capacity; contributing to the implementation of TEN-E guidelines; monitoring competences regarding internal markets in electricity and natural gas in general and retail prices, access to the network and compliance with consumers' rights in particular. The Parliament has also ensured two members in the Administrative Board nominated by the Parliament.

## Conclusions

This study sprang from the interest in the role of discourse in the EU institutions in the area of energy policy. In a broad sense this paper aimed to address the problem of the EU energy policy coordination. With this aim the study focused on the recently established Agency for Cooperation of Energy Regulators. The research question which guided this research was: *To what extent does discourse influence the content of new institutional rules?*

As it proceeded to answer this question, institutional theories were searched for the best analytical framework. Yet, the theoretical tension has come on the surface. Particularly, the relative emphasis on logic of appropriateness, logic of consequences and path dependency has been found as dominating issues of recent institutional arguments. However, overemphasising the static aspect of structure as was done by the new institutionalism literature, left unexplained the birth, evolution, and death of institutional arrangements. Focusing only on structure might push towards a view of institutional arenas full of rule-following agents incapable to step outside the box and deliberate about the rules.

In order to resolve this theoretical tension the discursive institutionalism was used, attempting to go beyond the limitations of historical institutionalism, social institutionalism and rational institutionalism. An analytical framework of institutional change has been set to capture the linkages between institutional context, ideational and discursive abilities of the agents in generating institutional change.

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<sup>6</sup> Parliament's negotiating team was composed of Industry Committee Chair Angelika Niebler (EPP-ED, DE) as well as rapporteurs Eluned Morgan (PES, UK), Antonio Mussa (UEN, IT), Alejo Vidal-Quadras (EPP-ED, ES), Atanas Paparizov (PES, BG) and Giles Chichester (EPP-ED, UK). (Press release "Electricity and gas market: MEPs reach deal with Council Presidency", European Parliament, 24.03.2009.) Retrieved at: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20090324IPR52438>

The Agency for the Cooperation of Energy Regulators could be seen as a small step forward if compared with the option of a single Energy Regulator. On the other hands, this may be well seen as a smart move towards establishing a single European regulator in the future. Nevertheless, the Agency has received a proper structure and competences in order to improve cooperation between national authorities and move the energy market towards more competitive and efficient environment. The process of its establishment was accompanied by institutional discourse between the Commission, the European Parliament and the Council.

With the special attention to this discourse, the case study has demonstrated curious results especially with regards to the European Parliament. The Parliament had exercised a rather particular discursive strategy ensuring its position to be heard. Its success can be explained by an assertive discursive strategy and highly resonating justifications.

Although, it is early to draw generalisation, it can be argued that 'logic of communication' has all chances to provide institutional research with useful insights. Action in institutions does not always correspond to a rule-following logic whether an interest based logic of calculation, a norm-based logic of appropriateness, or a history-based logic of path dependence.

Table 2

Positions/Issues	<i>mandate</i>	<i>structure and governance</i>
Commission's initial proposal	<ul style="list-style-type: none"> <li>i) providing a framework for national regulators to cooperate;</li> <li>ii) regulatory oversight of the cooperation between transmission system operators;</li> <li>iii) individual decision powers;</li> <li>iv) general advisory role</li> </ul>	Administrative Board of 12 members: 6 by Commission 6 by Council
Parliament, 1st reading	<ul style="list-style-type: none"> <li>-issue opinions, recommendations and decisions addressed to transmission system operators, in relation to all technical matters pertaining to the good functioning of the internal energy market;</li> <li>-provide a framework within which national regulators can cooperate;</li> <li>-establish economic and technical terms and conditions for the development of codes and rules drafted by the European networks of transmission system operators and approve the codes and rules in order to ensure the efficient and secure functioning of the internal energy market;</li> <li>-supervise the execution of the tasks of the European networks of transmission system operators;</li> <li>-set methodologies and tariffs for compensation mechanisms between transmission system operators, based on an assessment of their actual costs;</li> <li>-coordinate the national regulatory authorities concerned in relation to their operations on regional electricity or gas markets;</li> <li>-together with the Commission, promote interregional cooperation among energy markets and integrate regional energy markets into the internal energy market;</li> <li>-shall approve (rather than provide an opinion on) the 10-year investment plan of the European Networks of Transmission System Operators for Electricity and Gas</li> <li>-take enforcement decisions and propose that the Commission impose fines in certain circumstances.</li> <li>- impose effective sanctions if barriers to cross-border trade are not removed</li> <li>- take binding decisions in regard to all issues affecting access and use of connected transmission systems involving more than one Member State if joint agreement has not been reached by the relevant national regulatory authorities.</li> </ul>	Administrative Board of 6 members: 2 by Commission 2 by Council 2 by Parliament
Council		Administrative Board of 6 members: 5 by Council 1 by Commission

<p>Parliament, 2<sup>nd</sup> reading</p>	<p><u>General tasks:</u></p> <p>the Agency may, upon a request from the <b>European Parliament</b>, the Council, the Commission or on its own initiative, provide an opinion or a recommendation to the <b>European Parliament</b>, the Council and the Commission on all issues related to the purpose for which it has been established.</p> <p><u>Tasks as regards the cooperation of transmission system operators:</u></p> <p>-adopt individual decisions, <b>as a last resort</b>, on:</p> <ul style="list-style-type: none"> <li>o on technical issues provided in the remaining Directives and Regulations that make the “third energy package”;</li> <li>o on competence over cross-border infrastructure where more than one state is involved ;</li> <li>o on exemptions in access to infrastructures located in more than one MS territory.</li> </ul> <p>shall monitor progress in the implementation of projects to create new interconnector capacity.</p> <p>-shall monitor the implementation of the 10 year network development plans.</p> <p>-shall inquire into the reasons for the inconsistencies and make recommendations to the transmission system operators concerned and national regulatory authorities or other competent bodies with a view to implementing the investments in accordance with the 10 year network development plans.</p> <p><u>Tasks as regards the national regulatory authorities:</u></p> <p>- shall provide a framework within which national regulatory authorities can cooperate.</p>	<p>Administrative Board of 6 members:</p> <p>2 by Commission</p> <p>2 by Council</p> <p>2 by Parliament (not MEPs)</p>
<p>FINAL LEGISLATIVE ACT</p>	<p><i>As an agreement was reached between Parliament and Council, Parliament's position at second reading corresponds to the final legislative act, Regulation (EC) No 713/2009</i></p>	<p>Administrative Board of 9 members:</p> <p>-2 by Commission</p> <p>-2 by Parliament (not MEPs)</p> <p>-5 by Council</p> <p>Chairman of the Board of Regulators – answerable to the EP.</p>

**Annex 1** Interinstitutional files: 2007/0197 (COD)

- Initial legislative document: Commission Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (COM/2007/0530 final).
- Commission Staff Working Documents accompanying the legislative package on the internal market for electricity and gas (SEC(2007) 1179; SEC(2007)1180).
- Position of the European Parliament adopted at first reading on 18 June 2008 with a view to the adoption of Regulation on establishing an Agency for the Cooperation of Energy Regulators (P6\_TA(2008)0296).
- Common Position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (14541/1/2008).
- Commission Communication on the Council position (COM(2008) 908 final).
- Position of the European Parliament adopted at second reading on 22 April 2009 with a view to the adoption of Regulation establishing an Agency for the Cooperation of Energy Regulators (T6-0242/2009).
- Opinion of the Commission on the EP position at second reading (COM(2009)312 final).
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