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The Policy Effects of Multilevel Regulation in Europe. Insights from the Energy and Postal Sector

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Abstract

This paper examines the policy effects of multilevel regulation in Europe. It finds that the extent to which negative integration effectively narrows the range of policy options available domestically tends to be overstated. Drawing on empirical evidence from EU-induced reform in electricity supply and postal delivery, the paper illustrates that liberalisation and institutional reorganisation may lead to relatively little policy change. Although a lack of centralised regulatory capacity at the European level is identified as a key explanatory factor for the cases studied, the findings also point to the relevance of sector specificities and the role of exogenous drivers of change.

1. Introduction

Regulatory governance within the European Union (EU) has become a topical issue ever since Majone first introduced the notion of a 'regulatory state' (Majone 1994) in the mid-1990s. It points to a specific situation at EU-level where a restrictive budget forecloses comprehensive measures of (re)distribution. Instead, there has been a significant expansion of supranational rule-making over time (Kohler-Koch et al. 2004; Thatcher 2001: 304; Majone 1994). The scope of centralised, supranational rule-making capacity however remains limited in the multi-level governance system of the EU, where supranational and national public actors as well as private actors engage in the formulation and implementation of rules. This contribution analyses regulation in the EU's multi-level system from a governance perspective. The declared objective will be twofold: first, to capture the structure and actor constellations of multi-level governance and second, to assess its policy impact. The empirical focus of the paper is on regulatory governance and policy change in the electricity and postal sector.

With the electricity and postal sector the paper looks at two politically sensitive cases which have been on the European reform agenda since the mid-1990s. Both sectors have gone through three difficult rounds of supranational policy-formulation, both of them have already been or are about to be fully opened to competition, and both have experienced substantial institutional reshuffling across levels of governance. Yet in substantial terms EU-induced policy change is rather limited, if not - speaking from a reformer's perspective -, disappointing: in electricity competition is slow to emerge domestically, and market integration so far has only emerged at a regional scale; postal markets mainly function as national markets and achieved levels of end-to-end competition rarely pass the 10% margin. How can we explain this discrepancy between political reform agenda and policy realities? To what extent is the lack of policy change due to a lack of regulatory capacity at the European level? In what follows, I will first develop a conceptual framework of analysis and then go on to discuss key features of multi-level regulatory governance in the EU before presenting the two sector case studies.

2. Multilevel Regulatory Governance

While there is widespread consensus on the rise of regulatory governance, assessing its policy effects is a challenging endeavour. Based on the general observation that liberalisation and privatisation reforms throughout the last decades have triggered several waves of "re-regulation" (Levi-Faur 2005; Héritier 2001: 848) rather than resulting in mere deregulation, regulatory governance has become a prominent theme in political science research in Europe (Lodge 2008). Given this widespread interest, it does not come as a surprise that central notions such as "regulation" and "governance" have been understood in very different ways. In the following sections I will first delineate the realm of regulatory governance, and then go on to consider specificities in the EU's multilevel context.

2.1. The realm of regulatory governance

In order to capture the characteristics of this new governance paradigm, terms such as "regulatory state" (Majone 1994), "regulation inside government" (Hood et al. 1999), "regulatory society" (Braithwaite 2003), "post-regulatory state" (Scott 2004) and "regulatory capitalism" (Levi-Faur 2005) have been coined. The underlying understanding of "regulation" is multi-faceted and the term has been defined in a myriad of ways. Generally speaking, a major distinction can be made between a broad, policy-oriented understanding of regulation and a narrower, actor-oriented definition of the term. In line with the typology established by Lowi (1964) "regulatory" policy refers to rule-setting activities by all types of actors which do not involve a (re)distribution of resources (Héritier 1987: 39). Such an encompassing use of the term is also at the basis of the famous 'regulatory state' hypothesis (Majone 1994), which has been of central importance to describe the emerging European order. By contrast, Selznick's classical definition of regulation as "sustained and focused control exercised by a public agency over activities that are valued by the community" (Selznick 1985: 363) is more concise in terms of agency. In a similar vein, Levi-Faur has suggested to consider rule-setting "as regulation as long as they are *not* formulated directly by the legislature (primary law) or the courts (verdict, judgment, ruling and adjudication)" (Levi-Faur forthcoming 2011, chapter 1). Thus here regulation merely refers to the promulgation and execution of rules by administration, bureaucracies and private actors and excludes legislative or judicial rule making.

Both, the policy-oriented as well as the actor-oriented approach to regulation are relevant for this paper. Apprehending the effects of regulatory policy-making will be an incomplete exercise where rule-setting through the legislature is not being considered, given that the definition of the broad regulatory framework and the overarching policy objectives usually remains in the political arena. At the same time, the narrow understanding of regulation directs our attention to the role played by non-majoritarian and private actors outside the political arena. While administrative and bureaucratic actors engaging in regulation dispose of public authority in a concise area of regulatory activity, private actors may also take over regulatory tasks outside a delegated setting. Such regulatory, and often delegated, governance materializes in different forms, varying in terms of the public-private distinction and the level of organizational autonomy (Flinders 2008: 5). Focussing on the allocation of competencies between public and private actors, a basic distinction can be made between *public regulation,* where solely public actors are involved in rule-making, *co-regulation,* where public and private actors share rule-making capacity, and *self-regulation,* where solely private actors engage in rule-setting. Public regulation outside the legislature and judiciary is produced by administrative and bureaucratic bodies such as ministerial departments, executive agencies, non-ministerial departments, non-departmental bodies or central banks. Scholars and practitioners interested in their role and activity have been very creative in denominating them (Chester 1979), e.g. as ‘non-majoritarian institutions’ (e.g. Thatcher and Stone Sweet 2002), ‘para-statal bodies’, ‘extra-governmental organisations’ or ‘quangos’ (Barker 1982). Co-regulation constitutes a middle course where rules or policy objectives are being defined by a public authority, but are being complemented with regulatory detail, and also implemented by private actors. Such arrangements, which are thus characterized by joint decision-making with public actors have also been coined ‘regulated self-regulation’, ‘delegated self-regulation’ (Ronit and Schneider 2000: 23) or ‘negotiated agreements’ (OECD 1999: 18). While a co-regulatory arrangement is characterised by shared responsibility, self-regulatory arrangements are characterised by a situation where regulator and regulatee coincide. Under pure self-regulation, private organizations devise and manage their own rules without outside interference. Alternative terms which have been used to describe such arrangements are for instance ‘autonomous and voluntary regulation’ (Ronit and Schneider 2000: 23) or ‘unilateral commitment’ (OECD 1999: 16).

2.2. Regulation in the EU

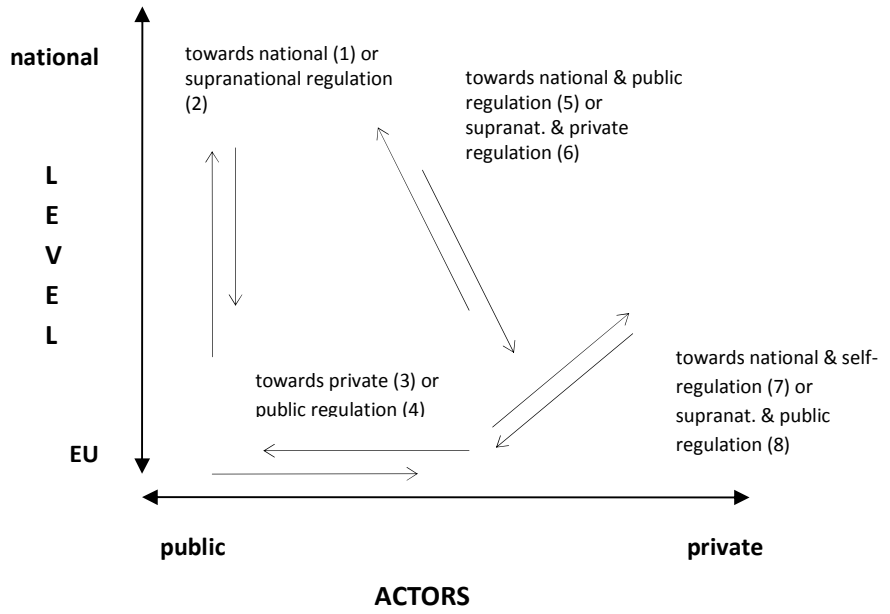
The conceptual framework for the empirical analysis of various settings of multi-level governance will be two-dimensional, integrating relevant actor constellations and levels of regulation (see table 1 below). The assessment of governance patters will rely on a narrow definition of regulation as rule-setting outside the legislator and judiciary. Besides the three categories of actor constellations described above (public regulation, co-regulation, self-regulation based on a narrow definition of regulation), I suggest three categories of allocation of competencies. The first category is *supranational regulation,* where supranational actors hold direct rule-setting capacity. The second one is *multi-level regulation,* where public authority is spread across levels of governance. The third one is *national regulation* where rule-making capacity is exclusively residing at member state level. In areas where centralisation is strongly developed, supranational actors are in position to directly devise and enforce rules. Here the predominant mode of action is hierarchy (Börzel 2010: 198-200). Given that EU legislation can only be formulated as a result of successfully conducted negotiation, it most of the time introduces multi-level regulatory frameworks where the formulation of more detailed rules, and/ or their implementation are delegated towards lower levels of governance. Also, areas which are of vital national interest may be completely left within the realm of national regulation. When combining the two dimensions, allocation of competencies across levels and actor constellations, we end up with nine basic settings of regulatory governance in the EU as laid out in the table below.

Table 1 – Modes of regulatory governance in the EU

level **actors**	**supranational**	**multi-level**	**national**
public	supranational public regulation	multi-level public regulation	national public regulation
public-private	supranational co-regulation	multi-level co-regulation	national co-regulation
private	supranational self-regulation	multi-level self-regulation	national self-regulation

Different modes of regulation will not exist in isolation, but most of the time will combine as a governance mix with manifold effects of interaction. Due to the high capacity requirements for hierarchical steering, the scope of supranational regulation will necessarily be limited and notably not embrace all phases of the policy cycle. Multi-level regulation is thus very likely to combine with supranational regulation in many instances, notably where implementation tasks are being delegated towards lower levels of territorial governance. Regulatory powers and implementation tasks may further also be delegated towards the regulatees. Thus co- or self-regulatory arrangements may combine with supranational regulation especially in sectors where regulatory design and/ or enforcement involve a high level of complexity or uncertainty. Even where there is no obvious or formal link between modes of regulation, these do not merely coexist. Rather, important effects of interaction can be expected. The possibility of supranational rule-making arrangements casting a 'shadow of hierarchy' (Scharpf 1993: 67) has been widely discussed in the literature on EU governance (e.g. Börzel 2010; Héritier and Lehmkuhl 2008). The underlying assumption is that the mere possibility of hierarchical intervention will significantly alter actor behaviour. Thus a credible threat to engage in centralized regulation may change the way in which multi-level regulation and national regulation, as well as co-regulation and self-regulation, are being executed. Finally, different patterns of interaction and evolution may be expected in a longitudinal perspective: there may be tendencies towards either centralisation or decentralisation, or hybrid solutions resulting in complex governance structures; actor-wise there may be empowerment of private or public actors, respectively, with trends such as agencification, emergence of network governance or the promotion of voluntary approaches. Thus the evolution of regulatory modes may go in all possible directions and is likely to result in complex and hybrid governance constellations. Combining possible levels of regulation and conceivable actor constellations, eight different evolution patterns may be discerned at the analytical level as indicated in the figure below. Several patterns of evolution may coexist at one point in time and in one policy area, and the status quo may be characterised by very different levels of stability.

Figure 1 – Evolution patterns of regulatory governance in the EU



3. European Multi-level Regulatory Governance at Work

In this section I will examine the allocation of competencies to regulatory actors and across levels of governance and thereby apply the conceptual framework in two areas of Europeanised sector regulation. With the electricity and postal sector the paper looks at two politically sensitive cases which have been on the European reform agenda since the mid-1990s. Both sectors have gone through three difficult rounds of supranational policy-formulation, both of them have already been or are about to be fully opened to competition, and both have experienced substantial institutional reshuffling across levels of governance. Each time I will briefly outline the main characteristics of sector regulation and its evolution over time in order to map the governance space in accordance with table 1. I will then provide detailed empirical evidence for this assessment following a public-private and national-supranational continuum for the two dimensions.

3.1. Private governance and multi-level regulation in electricity

Liberalisation and regulatory reform in the electricity sector have been stipulated by European directives in 1996, 2003 and 2009. The first directive (1996/92/EC) launched market integration, while the second directive (2003/54/EC) granted all EU consumers the right to choose their electricity supplier not later than 2007. Institution-wise the introduction of independent regulators at national level has become mandatory with the second directive, and a process of incremental centralisation and formalisation of regulatory cooperation has led to the creation of an Agency for the Cooperation of Energy Regulators (ACER) and a European Network of Transmission System Operators for Electricity (ENTSO-E) with the third legislative package. The evolution of regulatory governance in the electricity sector can be described as a slow, yet continuous process towards more supranational regulation relying on public network governance as well as on private governance. Confining "regulation" to rule-setting by either non-majoritarian or private actors, the current status quo is dominated by both multi-level public and co-regulation, as well as national public regulation (see table 2). Furthermore, it can be argued that there are elements of co-regulation at the national level and some elements of multi-level self-regulation. In what follows I will elaborate on the empirical findings which are at the basis of this assessment

Table 2 – Modes of regulatory governance in electricity

level **actors**	**supranational**	**multi-level**	**national**
public	(ACER 2009)	CEER 2000 ERGEG 2003 ACER 2009	national regulators
public/ private		Florence Forum 1998 ETSO 1999/ERGEG, KOM ENTSO-E 2009/ACER, KOM	national TSOs – national regulators
private		UCTE 1951 NORDEL 1963 ETSO 1999	

The status quo prior to EU-induced institutional change was dominated by national legislative measures to regulate the sector (in the absence of independent sector regulators in most countries) at the national level, and aspects of multi-level self-regulation amongst network

operators at the international level. So the first important move was the one towards public regulation (narrowly defined) at the national level, i.e. the delegation of regulatory tasks out of the political arena towards independent sector regulators. In the electricity sector the creation of a sector regulator has only become mandatory with the second directive, while the first directive allowed for non-regulated variants of access to the network in line with French and German concerns. This transfer of competencies was of course not adequate in order to address the emerging cross-border issues in the process towards an integrated energy market. Knowing that member states were not ready to transfer regulatory powers towards the supranational level, a first move of the Commission was to launch a process of informal coordination amongst public and private actors with the so-called "Florence Forum" established in 1998. The Forum convenes twice a year and brings together officials from national regulators, ministries and the European Commission as well as stakeholders from the industry alongside other interested parties. Being composed of public as well as private actors, the Forum resembles thus a co-regulatory arrangement, yet this process of "regulation through cooperation" (Cameron 2002: 283) was deprived of any formal rule-making capacity and thus purely based on voluntary cooperation (Eberlein 2003: 144). In practice the Forum failed to build consensus and conclude agreements (Héritier 2003: 122-123) in key areas such as cross-border tariffication (Eberlein 2003: 147-148) which has ultimately been addressed by the introduction of secondary law (regulation EC no. 1228/2003).

What this loose mechanism of multi-level co-regulation has generated, though, were first organisational structures to facilitate cooperation amongst national regulators and national TSOs, respectively. National regulators created a Council for the Cooperation of Energy Regulators (CEER) in 2000. The CEER is based on a non-legal memorandum of understanding, has no formal regulatory powers and is financed by contributions from the national authorities. To strengthen transnational cooperation, national regulators have been mandated with formal powers when a European Regulators Group for Electricity and Gas (ERGEG, created by COM decision 2003/796 EC) was created in the context of the second legislative package. As in other sectors the informal network CEER has continued to coexist alongside the official advisory body to allow for cooperation outside the official mandate. With the third legislative package ERGEG has been replaced by an "Agency for the

Cooperation of Energy Regulators" (ACER, created by regulation EC no. 713/2009). The denomination of this new body already reveals that we do not witness the emergence of a EU energy regulator proper speaking. Rather, ACER is a networked body which strongly relies on national regulators. The director of ACER is supposed to follow the opinions provided by ACER's Bord of Regulators which is composed of senior representatives of the National Regulatory Authorities and one representative of the Commission who has no voting right.[1] This being said, the body will constitute a small nucleus of supranational regulation with a team of around 40 EU officials being at its disposal. By contrast, the new Body of European Regulators of Electronic Communications (BEREC, created by EC regulation no. 1221/2009) is an even more hybrid organisation which disposes of some supranational secretariat but otherwise relies on its national members.[2] Although ACER disposes of relatively few regulatory powers and is a small entity compared to regulatory capacity at the national level, there is overall a trend towards supranational public regulation.

The interesting thing in the energy sector is that this trend towards centralised public regulation combines with a trend towards supranational co-regulation. The third directive (2009/72/EC) and the amended regulation on cross-border trade (EC no. 714/2009) formalise the role of TSO cooperation within the newly created ENTSO-E and attribute important co-regulatory powers to the network operators. This evolution has not been uncontroversial, raising the question whether they become too much of a "network regulator" while at the same time operating this central infrastructure facility. Seen from the past record of TSO cooperation, however, the emerging governance regime at the European level appears only consequential. TSOs in Europe out of technical necessity have been co-operating across borders long before national regulatory authorities and European regulation have been introduced in the sector. The Union for the Coordination of Transmission of Electricity (UCTE) in Central Western Europe, for instance, dates back to 1951. NORDEL, which is the UCTE's equivalent for the Nordic countries, exists since 1963. After the introduction of the first legislative package at the European level and the launch of market integration national

[1] ACER's internal governance is assured by an Administrative Board, dispute settlement is in the hands of its Board of Appeal. See ACER's website at www.energy-regulator.eu (last access 23.02.2011).
[2] For more information see BEREC's website at www.erg.eu.int (last access 23.02.2011).

TSOs started to organise at the European level within their new organisation European Transmission System Operators (ETSO) from 1999 onwards. In 2001, ETSO became an international association with direct membership of 32 independent TSO companies from the 15 EU member countries plus Norway and Switzerland. Since then, it has subsequently been enlarged to the TSOs of East and South East European countries. In the absence of public regulation addressing certain issues, TSOs for many years have resolved cross-border issues through self-regulation within their organisation. One such area of self-regulatory activity within ETSO was the negotiation of voluntary agreements on Inter-TSO-Compensation for cross-border flows since 2002.

3.2. The predominance of national regulation in the postal sector

European secondary law in the postal sector dates from 1997, 2002 and 2008. Whilst only timid first steps to reduce the scope of national legal monopolies were taken in the first directive (1997/67/EC), the second directive (2002/39/EC) introduced intermediary steps, and a date for full liberalisation was finally set in the third directive (2008/6/EC). Institution-wise the postal market until very recently formed an exception in the European governance architecture as no formal body for the cooperation of national regulators had been introduced. In the context of implementing the third postal directive, however, a European Regulators Group for Postal Services (ERGP) has been established (Commission decision 2010/C 217/07). Compared to the electricity sector, governance dynamics in the postal sector are even slower and more incremental. Apart from setting the broad regulatory framework through European secondary law, regulation mainly resides at the national level and the trend towards multi-level cooperation through a governance network of national regulators is a very recent one. Thus overall the governance mix in the postal sector is characterised by far less variation in comparison to electricity regulation as illustrated by the table below.

Table 3 - Modes of regulatory governance in the postal sector

level actors	supranational	multi-level	national
public		ERGP (2010) [CERP (1959)]	national regulators
public-private		CEN	
private			

Similarly to the energy and other network industries, the status quo prior to EU-induced institutional change was dominated by national legislative measures in the absence of regulation through non-majoritarian bodies. Due to centralised service provision the postal operators across Europe usually formed part of their respective ministry. As a result one single body fulfilled both operative and regulatory tasks without them being structurally separated. This had to change once the first European directive required that "each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators" (article 22 of directive 1997/67/EC). This being said, European secondary law leaves ample leeway to the member states when it comes to the actual institutional design of these bodies and notably the independence from their parent ministries.

Compared to other sectors the role of national bodies in regulatory governance at the European level is insignificant. For a long time the only formalised involvement of national regulators was within the Comitology procedure. The so-called postal directive committee, which follows the regulatory committee (IIIa) procedure, is composed of member state and Commission representatives. However, national governments could call on their regulators to participate and give input. In practice, the postal committee proved to be a forum aiming at disseminating information rather than a decision-making body. This is a major difference in comparison to the electricity sector, where a number of implementation measures were subject to agreement in Comitology. Another peculiarity was the non-existence of a formalised body facilitating cooperation amongst national regulatory bodies. In the absence of such a network governance structure, regulators continued to cooperate informally within the intergovernmental group that

predates the European reform process, the Committee of European Postal Regulators (CERP). CERP is the sectoral branch of the European Conference for Telecommunications and Posts (CEPT).[3] Established in 1959, CEPT was originally constituted by the monopoly-holding postal and telecommunications administrations. Once the operators created their own, sector-specific organisations in 1992 (PostEurop for the postal sector), and once EU law prescribed the separation between operational and regulatory functions for the two sectors, the tasks of CEPT had been redefined. Firstly, CEPT became a body of policy-makers and regulators which would no longer deal with operational issues. Secondly, to respond to the substantial separation between the sectors, CEPT established three committees: CERP for postal matters and two others to deal with electronic communications issues (European Radiocommunications Committee, ERC and European Committee for Regulatory Telecommunications Affairs, ECTRA). Another development was to expand the scope of geographical coverage. Central and Eastern European Countries became eligible for membership, and today CEPT is composed of 48 countries. As a consequence of its history, CERP is composed of both, ministry representatives and postal regulators. The CERP member countries can choose whether they send ministry representatives, regulators, or both. Some CERP countries have not established NRAs, so they will obviously send ministry representatives.

While the first two directives did not even touch upon the issue, the third directive emphasised the need for "close cooperation" and "mutual assistance" (article 22 of 2008/6/EC) between national regulators, but did not introduce any institutional innovation in this respect. Only in the context of implementing the third directive and full, EU-wide market opening by January 2011 did this situation change. Based on a study providing further evidence for the need for closer cooperation (WIK-Consult 2009) and two high-level conferences bringing together key actors in European postal regulation[4], the Commission eventually came to the decision to introduce a formal body for the cooperation of postal regulators. The European Regulators Group for Post (ERGP) was established on 10 August 2010 and held its first meeting on 1 December 2010, electing its first chair person and adopting its rules of procedure (ERGP (10) 2). It is composed of

[3] Website at www.cept.org (last access 11.05.2009).
[4] Documentation of these meetings can be found at the Commission's internal market website on postal services, available at www.ec.euopra.eu/internal_market/post/conference_en.htm (last access 13.09.2010).

the heads of the national regulators and disposes of a secretariat provided by the European Commission. Besides facilitating consultation, coordination and cooperation between national authorities, ERGP is supposed to develop best regulatory practice and to function as an expert advisor to the European Commission.[5]

4. The Policy Effects of Multi-level Regulation

When looking at substantial reform outcomes, the surprising news is that change is rather limited, if not - speaking from a reformer's perspective -, disappointing: in electricity competition is slow to emerge domestically, and market integration so far has only emerged at a regional scale; postal markets mainly function as national markets and achieved levels of end-to-end competition rarely pass the 10% margin. The following sections will seek to explore the extent to which multi-level regulatory governance in these sectors accounts for policy outcomes. In so doing alternative explanatory factors such as sector specificities and exogenous determinants of change will be considered.

4.1. The long road to market integration in the energy sector

Policy objectives in the Energy sector are manifold, yet interrelated and often not easy to reconcile. The three key challenges for the EU's policy are the realisation of the internal energy market, security of supply and environmental sustainability. In this paper I will focus on progress towards achieving the first objective. In view of the current status quo it is adequate to distinguish between competition at the member state level on the one hand, and progress towards market integration on the other hand.

Although electricity markets according to the second directive were deemed to be fully open no later than 2007, actual competition is slow to develop in most member states. The Commission in its most recent communication on progress in the sector dated 11 March 2010 (COM (2010) 84 final) reported high levels of concentration both in electricity wholesale and retail markets. For

[5] ERGP does not yet dispose of its own web presence. Most updated information can be found at the Commission's DG internal market website on postal services at www.ec.europa.eu/internal_market/post/news_en.htm (last access 23.02.2011).

instance, the market share of the three largest companies in the retail market transgressed the 80% margin in 14 member states (ebd.: 7). Detailed findings on concentration and market power had already been generated in the course of the Commission's sector inquiry which was conducted between 2005 and 2007 (COM (2006) 851 final: 5; SEC (2006) 1724, 10 January 2007, part 2: 115-134). Speaking for the situation in Germany, the Federal Cartel Office has backed up such findings in its sector inquiry published last month.[6] The data illustrates that the four big players on the German electricity market (RWE, E.ON, Vattenfall and EnBW) continue to control about 80% of the first-time sales market. Based on the observation that these providers appear to be indispensible for covering electricity demand, the competition authority concludes that they factually dispose of a dominant position in the German market. In the analysis of the reasons for these unsatisfactory market outcomes institutional arrangements and governance issues have been addressed notably when it comes to the enforcement action by national authorities (COM (2010) 84 final: 2). One of the motives for the Commission to launch infringement proceedings in June 2009 against 25 member states for non-compliance with the second electricity directive was that national regulators lacked effective means of penalties to sanction violations with European law (IP/09/1035; COM (2010) 84 final: 10). Besides effective regulatory oversight, the industry structure and notably vertical integration has been found to be a significant impediment for change (COM 2006 851 final: 6; SEC (2006) 1724, 10 January 2007, part 2: 135-149). The Commission concluded from its sector inquiry that vertical integration of supply and network reduces the network operators' incentives to grant access to their infrastructure to third parties, and that legal unbundling was not sufficient to address the issue. It thus made ownership unbundling a cornerstone of the proposal for the third electricity directive (COM 2007 (528) final). Strengthened by an unprecedented synergy between its double role as an agenda setter of European legislation and as the supranational competition authority (as discussed by Eikeland 2011), the Commission nevertheless failed to impose ownership unbundling on the member states. The legislative output (directive 2009/72/EC chapters IV and V) allows for three unbundling options, i.e. ownership unbundling proper speaking, the Commission's compromise proposal to introduce an independent system operator (ISO), and

[6] Bundeskartellamt (2011): Sektoruntersuchung Stromerzeugung Stromgroßhandel. Bericht gemäß §32e Abs. 3 GWB, Januar 2011 (B 10-9/09). Downloadable from the Federal Cartel Office's website at www.bundeskartellamt.de (last access 22.02.2011).

finally the 'third way' pet solution of France and Germany to introduce independent transmission operators (ITO).[7]

Similarly to competition at the domestic level, market integration has developed at a very slow pace if at all. After more than two decades of supranational legislation market integration at a European scale has not emerged, and what we see is the coexistence of national markets besides achievements at a regional scale. The demand for interconnector capacity at many borders has increased and often exceeds available capacity (SEC (2006) 1724, 10 January 2007, part 2: 152). According to the Commission empirical evidence points to a situation where there is a lack of incentives to a) use existing capacity efficiently, and b) to invest in new interconnector capacity (ebd.: 153-165). With respect to the use of existing capacity, congestion management is of pivotal importance. So far very different methods in managing congestion have coexisted across Europe, while supranational governance set a general framework without detailed prescriptions. First principles were laid down in the Annex of Regulation 1228/2003 where it was stipulated that network congestion shall be addressed with non-discriminatory market based solutions and non-transaction based methods. This Annex has been substituted by "Guidelines on the management and allocation of available transfer capacity of interconnections between national systems" in 2006 (2006/770/EC), agreed upon by Comitology procedure. The Guidelines state that capacity shall be allocated only by means of explicit or implicit auctions. It further prescribes how the NRAs shall monitor the use made by TSOs of congestion income, yet it does not establish a hierarchy between the three options: investment in existing infrastructure, construction of new lines, lowering the tariff. So far the multi-level governance has maintained the TSO's autonomy for their zones. This leaves TSOs with leeway to manage congestion to their advantage, i.e. to generate extra profit by shifting congestion. There is a similar difficulty to tackle the second challenge, the construction of new cross-border capacity. Not only is there a lack of willingness from market actors to engage in long-term and costly infrastructure investment, in addition long and cumbersome authorisation procedures at the local level hamper the swift construction of new lines. The latter problem was tackled in the context of the 'Priority

[7] FAZ 07.06.2008: „Rat einig über Grundsätze der Energieentflechtung", available at www.faz.net (last access 22.02.2011); Le Monde 21.05.2008: „Paris et Berlin refusent de scinder la production et le transport d'énergie", www.lemonde.fr (last access 22.02.2011).

Interconnection Plan' (COM 2006 846 final) which identified a few cross-border projects and assigned high-level coordinators in order to increase visibility and bring the authorisation process forward.

Overall it seems that the European governance regimes was probably "too fragmented to guarantee the establishment of a rational European network" (Bjørnebye 2006: 334). The third legislative package will enhance regulatory capacity on cross-border issues, but it is yet to be seen whether the new governance arrangements will be sufficient to bring about meaningful change. The new legislation introduces binding, EU-wide network codes which are to be developed by the transmission system operators, based on framework guidelines formulated by ACER. To ensure infrastructure investment, transmission system operators furthermore have to agree on EU-wide ten-year network development plans, on which ACER will give an opinion.

4.2. Return to sender? Liberalisation in the postal sector

As it was stated in the most recent report commissioned by the Directorate General Internal Market and Services (Olkholm et al. 2010: 12), the three main themes in the postal sector are the Universal Service Obligation (USO), labour market issues and competition. Arguably European legislation has put most emphasis on creating a competitive market and guaranteeing the USO through regulatory means, whereas labour market issues are exclusively dealt with at the domestic level. Therefore, and in analogy to the analysis of electricity regulation, I will mainly focus on competition and consider USO regulation solely inasmuch as it affects market dynamics. This being said, there is not much point to differentiate between competition at the domestic level, and market integration at the European level, since the postal business still very much functions in terms of national markets.

Most updated empirical evidence on the situation in EU postal markets leads to the conclusion that competition develops very slowly if at all, and that incumbent operators continue to be dominant players in the letter post segment (Olkholm et al. 2010: 80). Even among the "frontrunners in Europe" the level of competition rarely goes beyond the 10% threshold in the market for addressed letter mail (ECORYS 2008: 114-117; WIK-Consult 2004: 94): Sweden is fully open to competition since 1993, yet new entrants have not achieved much more than 9% of

mail volume by 2007; the UK abolished the reserved area in 2006, yet Royal Mail still dominates the market with close to 100% in mail delivery[8]; regulation for competition in Germany by the end of 2007 has generated a market share of above 10% in the licensed area (Bundesnetzagentur 2008: 24); the highest shares have been achieved by Spain (approximately 12%) and the Netherlands (14%);

To what extent can this absence of market dynamics be retraced to regulatory governance issues? Member states enjoy ample leeway in their choice of sector-specific regulatory regimes when it comes to key regulatory issues such as the institutional design and competencies of national regulators, licencing regimes and the scope of the USO. Speaking about institutional arrangements, it appears that the shift towards non-majoritarion "regulation" proper speaking has been very limited. Key decisions remain in the realm of the legislator and only in a few countries (Czeck Republik, Denmark, Slovenia and the UK) can the regulators decide on major determinants of the regulatory framework (WIK-Consult 2006: 110). Even then, the introduction of an independent regulator has been delayed in many countries leading to proceedings for non-compliance with the requirement of structural separation (IP/01/1139). By today Italy is the only country which has not introduced an independent regulator, while regulatory independence continues to be challenged in many member states (Olkholm et al. 2010: 15). Institutional arrangements concerning statutory independency vary significantly across countries. Issues such as appointment rules of agency heads (in Ireland and the UK by postal minister), the lack of fixed terms (Estonia and Finland) or a relatively short term of office (Malta, Sweden, UK) gave reason for concern (WIK-Consult 2006: 19). Also, the range of responsibilities diverges significantly across member states (WIK-Consult 2006: 110). Similar variation can be observed when it comes to substantive regulatory choices. The scope of authorisation regimes, for instance, has been defined very differently across countries (Campbell et al. 2008: 202-205; ECORYS 2008: 57-61). The Netherlands and the Czech Republic have not introduced authorisation requirements, other countries operate with general authorisations (Austria, Denmark Ireland, Slowenia and Slowakia), or with different authorisation categories (Germany, France, Poland, Sweden and the UK) and another group of countries requires authorisation for all services which fall under the

[8] According tot he UK regulator's figures for 2007/2008, see http://www.psc.gov.uk/index.html

USO. The requirements to be fulfilled in order to obtain authorisation are sometimes quite demanding and may constitute a barrier to entry (Campbell et al. 2008: 204). Being a cornerstone of postal regulation, scope and coverage of the USO are a key determinant for emerging competition. Variation is again significant (Campbell et al. 2008: 198; ECORYS 2008: 47-48). The inclusion of letters and parcels is standard in all countries, whilst only half of them include the delivery of newspapers and periodicals. Decisive for the volume of mail subject to the USO is whether or not bulk mail forms part of it. So far, Spain and the Netherlands have excluded the latter from the USO. Bulk mail is part of the universal service in Austria, the Czech Republic, France, Italy, Lithuania, Poland and Slovakia. Among those countries with the broadest scope of the USO in terms of services included figure Denmark, France and Portugal. In many member states the services delivered under the USO are furthermore exempt from VAT.[9]

A brief comparison of potential explanatory factors in the "frontrunning" countries points to the relevance of regulatory regimes, understood in a wide sense including the regulatory framework set by the legislator. The high level of competition in Spain which has been achieved ahead of full market opening was mainly due to the scope of the reserved area, which excluded domestic intra-city and bulk mail. Also, the VAT exemption of the incumbent was limited to the reserved area. Beyond that, the relatively poor quality of the services delivered by the national post office has certainly helped new entrants to gain ground. As a consequence, a large number of small local and regional private operators is active on the Spanish market (ECORYS 2008, country sheet summaries: 115). The Netherlands exhibit similar features of a rather lean, pro-competitive regulatory environment: printed matter is not reserved, and the VAT exemption for the incumbent is also limited to the reserved area. Overall the Dutch market is being characterised as „relatively open" characterised by „little regulatory interference" (ECORYS 2008, country sheet summaries: 87). By contrast, the Swedish market was characterised by a decline in mail volumes. Entry into the market is legally speaking relatively easy, yet the main competitor CityMail initially faced many difficulties which have partly been resolved by settling disputes with the incumbent concerning the access regime (ECORYS 2008, country sheet summaries: 87). In the UK the most obvious competitive advantage for Royal Mail was the VAT exemption applicable

[9] Based on Council Directive 77/388/EC of 17 May 1977 (amended by a new directive 2006/112/EEC) on the harmonisation of the laws of the Member States relating to turnover taxes, which exempts postal services from VAT.

for all services, in all other respects the regulatory regime seems fairly balanced (ECORYS 2008, country sheet summaries: 123). An exogenous factor which is specific to the sector is density of population which has a significant impact on operators' cost structures. Here the Dutch case would hint to the fact that ultimately population density is decisive for competition to emerge. The Netherlands has the highest population density in the EU with 394 inhabitants per km² (ECORYS 2008, country sheet summaries: 89). With Germany another liberalisation frontrunner figures amongst the most densely populated countries of the EU. Sweden, counting 20 inhabitants per km² (ECORYS 2008, country sheet summaries: 121) as well as the UK, with a population density above average but many areas with difficult accessibility, would further fit into the picture: here the reserved area has been abolished, but the degree of competition on the market is still low. Spain, by contrast, has achieved a relatively high degree of competition despite exhibiting low population density (87 inhabitants per km²) which is unequally dstributed over the country (ECORYS 2008, country sheet summaries: 117).

At this stage it appears that cooperation amongst national authorities could mainly be aimed at harmonising regulatory practices across the EU. In its work programme for 2011-2012 (ERGP (10) 05), ERGP identifies several priorities in this respect, such as giving an opinion on how to calculate the net cost of the Universal Service Obligation and delivering reports on issues related to accounting, price and access regulation.

5. Conclusions

In this paper I have sought to examine the policy effects of multilevel regulation in Europe from a governance lens. To that end I have developed a conceptual framework based on a dual distinction between levels of regulation and actor constellations, generating nine possible options of non-majoritarian and private regulation in the EU. Considering the evolution of EU regulatory governance over time, I have argued that manifold trends may combine, resulting in different levels and actor constellations being involved. This conceptual framework was then used to compare regulatory governance and its policy effects in the electricity and postal sector. It appeared from empirical evidence that both network specificities and prevalent market structures have complicated market creation and integration alongside governance arrangements in the

electricity sector. There was clearly a regulatory gap on cross-border issues related to market integration, but regulatory oversight also proved difficult at the national level. The third legislative package seeks to address some of these deficiencies by strengthening regulatory cooperation within a newly created European agency and by formalising private governance through network operators. In the postal sector there is no such regulatory gap in the absence of a pressing need to cooperate across borders in order to foster domestic competition and market integration. Empirical evidence however points to a situation where domestic legislation and regulation may impede rather than foster competition. This comes in addition to sector specificities such as dropping mail volumes and important economies of scale which in themselves have negative consequences for levels of competition. In the context of implementing the third postal directive we currently see the emergence of formalised cooperation among postal regulators which is deemed to overcome regulatory obstacles to market creation and achieve some regulatory harmonisation in this respect.

With the electricity and postal sector the paper has looked at two examples where the EU's declared policy objective of creating an internal market has so far not been achieved. The underlying governance arrangements and their evolution vary significantly across the two areas: in electricity we see a complex mix of governance across levels in which private actors play a pivotal role; in the postal sector there is a predominance of national legislation and regulation and no formal involvement of private actors; in electricity there is clearly a trend towards more supranational regulation, which is however accompanied by a second trend towards co-regulation; in the postal sector the trend towards more supranational regulation for a long time was absent, and with the creation of the EPRG today is in its infancy; Such evidence has two more general implications with respect to multi-level governance and its effects in the EU. First, there is not a single trend of evolution over time, so that different modes coexist and develop incrementally. Thus the multi-layered and polycentral structure of European regulatory governance is here to stay. Second, the extent to which negative integration effectively narrows the range of policy options available domestically tends to be overstated. The paper illustrates that EU-induced liberalisation and institutional reorganisation may lead to relatively little policy change. Although a lack of centralised regulatory capacity at the European level is identified as a

key explanatory factor for the cases studied, the findings also point to the relevance of sector specificities and the role of exogenous drivers of change.

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