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Torbjørn Jevnaker

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Pushing administrative EU integration: the path towards European network codes for electricity

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ABSTRACT The expansion of the European Union's (EU's) administrative capacity could ultimately strengthen the influence of EU bodies at the expense of national governments. Recent scholarship has focused on the establishment of executive-administrative capacity beyond the European Commission, as in the form of EU agencies or networks. Previous research has identified interest constellations and existing transnational networks as important explanations, showing how the interests of national- and EU-level organizations have tended to group along a national–supranational axis. In 2009, the EU adopted a procedure for making binding EU legislation (network codes), delegating substantial tasks to a new EU energy agency (ACER), a new private European association (ENTSO-E) and to the Commission. Prior to the procedure's adoption, however, 'intra-sectoral' divisions overshadowed national–supranational divergence. Enquiring into the causes, this article finds that complementary use of perspectives can deepen our understanding of why and how the 'European administrative space' emerges.

KEYWORDS Agencies; delegation; European administrative space; institutionalism; network codes; regulation

1. INTRODUCTION

Recent scholarship has examined the expansion of administrative capacity at the European level as a new type of integration within the European Union (EU) (Trondal and Peters 2013: 304). Early studies focused on the role of national or EU-level regulatory agencies in the implementation and application of EU legislation (Egeberg 2006). However, these bodies have increasingly been consulted in the European Commission's work on preparing proposals for EU legislation; and, unsurprisingly, the establishment of executive-administrative capacity beyond the Commission has begun to attract greater attention (Busuioac et al. 2012; Egeberg et al. 2012; Egeberg and Curtin 2008; Egeberg and Trondal 2011; Martens 2012; McNamara 2001; Pierre and Peters 2009; Rittberger and Wonka 2011). Expanding executive-administrative capacity at the EU level improves the Commission's 'ability to set independent policy agendas' and strengthens its supranational influence (Trondal and Peters 2013: 303). Previous research has identified interest constellations and existing networks as factors that explain EU decisions on European executive-administrative capacity. National- and EU-level organizations have interests that tend to group along a national–supranational axis. Whereas the European Parliament (EP) and the Commission have pushed for expanding EU-level capacity, member states have seen this as a threat to national sovereignty (see Dehousse [2008]; Kelemen and Tarrant [2011]). Moreover, domestic organizations (e.g., independent regulatory agencies) have lobbied their governments – or other parts of the EU's policy-making system – in order to stop the establishment of EU bodies (e.g., an EU agency) that could challenge their individual power (see Thatcher [2011]).

In 2009, the EU adopted a procedure for regulating policy-making within the electricity sector. The Procedure for Developing Network Codes specified a mandatory process for developing binding EU legislation, ‘network codes’ (EU 2009), as common rules for existing and future cross-border electricity networks. Such rules would regulate the management of powerlines between countries, in technical as well as in market terms (e.g., how electricity production should be connected to the network; how capacity on cross-border networks should be calculated for market transactions; what the security rules should be).¹ This network code procedure (NC procedure) regulated how two new European organizations would contribute to policy preparation together with the Commission: an EU energy agency (Agency for the Co-operation of Energy Regulators [ACER]); and a private European association outside the formal EU structure (European Network of Transmission System Operators for Electricity [ENTSO-E]). Both were given substantial tasks in policy preparation (Jevnaker 2012). All parties generally favoured locating more power at the EU level: member states remained largely silent on the issue, and existing transnational networks within the electricity sector mobilized to strengthen the role of the two new executive-administrative bodies, even though they would replace existing networks and although the individual influence of each national member would probably decrease compared to existing arrangements. This seems puzzling, as previous literature would lead us to expect the member states – backed by their domestic stakeholders – to mobilize against supranationalists like the Commission and the EP. Instead of a national–supranational conflict line, discussions on the NC procedure largely concerned the distribution of competences between ACER and ENTSO-E. The conflict could be characterized as ‘intra-sectoral’, because these two organizations gathered domestic players from different parts of the electricity sector.

This article analyses the causes behind the establishment of a procedure that formalized the roles of non-Commission bodies in EU policy preparation to explain how and why they were given such a mandate.² Drawing on previous research on the establishment of such bodies, it examines the establishment of a procedure that regulates executive-administrative competencies in Europe. While less attention has been paid to procedures that regulate the role of non-Commission bodies in EU policy-making, understanding why such procedures are adopted is vital to understanding ‘the European political-administrative space’, and ultimately, EU integration (Egeberg et al. 2014).

Two approaches will be utilized to account for the adoption of the NC procedure. The perspective deduced from rational-choice institutionalism explains the adoption of EU legislation – like the NC procedure – by analysing the preferences of EU policy-makers (the Commission, the EP and the member states within the Council of Ministers). However, domestic organizations have increasingly been mobilized at the EU level, with implications for EU policymaking. Not restricted to addressing national governments, they can provide informal input to EU policy-making by targeting the Commission or the EP. This is an important aspect of the broader phenomenon termed ‘multilevel governance’ (Hooghe and Marks 2001). Moreover, the NC procedure was established in a context of pre-existing transnational institutional arrangements for co-ordinating cross-border networks. The second perspective, from historical institutionalism, explains the background for the adoption of the NC procedure by tracing such co-operation over time, including how this affected existing transnational networks’ interaction with the EU regarding the NC procedure.

Process-tracing was used to reconstruct the course of events, including the positions of the various actors, to reveal the mechanism linking causal factors to outcomes (George and Bennett 2005: 206–10). Data on the legislative process leading up to the EU’s adoption of the NC procedure were collected from public EU records, position papers and media coverage 2005–9, and from relevant earlier research. Information on previous co-operation on operating cross-border networks was also found here, with supplementary data gathered from historical studies, and from annual reports from the predecessors to ENTSO-E and ACER. Written sources were complemented by semi-structured in-depth interviews with elite informants. Given the need for data on underlying conflicts of interest not necessarily reflected in public records, five centrally positioned senior representatives from the Commission, Eurelectric, European Transmission System Operators (ETSO), Statnett and Norway’s Mission to the EU were interviewed in 2012. These informants had either participated in or closely observed the relevant events. They were asked to evaluate the situation prior to and after the establishment of the NC procedure, and to recount the course of events leading up to its adoption. They were also asked about the positions and responses of EU bodies and major stakeholders. Preferences were operationalized as stated positions that were triangulated with interview data, to reduce

potential bias. Data from the various sources were cross-checked. It should be noted that the terms 'European' and 'EU' (apart from in official designations) are not used synonymously, as the former includes non-EU countries as well as institutional arrangements that are not formally part of the EU structure.

The article is structured as follows: the next section presents the theoretical framework more in detail, followed by a chronological account of the co-operation on cross-border electricity networks in Europe. The analysis uses data from that account to explain the adoption of the NC procedure, finding that organizational changes at the domestic level contributed to strengthening intrasectoral divergences at the expense of the traditional national–supranational conflict line. The theoretical implications of this are discussed in the conclusion, in which the impact of growing administrative capacity on EU integration is also noted.

2. CHOICE AND HERITAGE

Formal adoption of the NC procedure was an institutional change. In order to explain this, attention should be directed to the interests of formally empowered policy-makers within the EU – the Commission, EP and Council. The impact of previous co-operation on cross-border networks should also be considered, given the opportunity for informal input from transnational networks gathering domestic organizations from the electricity sector, and the collective empowerment of these groups within the NC procedure. The two perspectives chosen here seek to explain institutional change from different but complementary angles: rational-choice institutionalism is a snapshot interest-based actor perspective, whereas historical institutionalism – in the variant used here – considers the structural impact of pre-existing institutions on interests.³

Rational-choice institutionalism sees the organizations that have institutionally given formal influence within a policy-making process as the relevant actors, and analyses their interests as causal factors for the outcome of that process. Actors are self-interested and rational, and evaluate institutional design instrumentally: gains from the current state of affairs are compared to those expected from a potential alternative. Outcomes then follow from the sum of deliberate choices made by relevant actors seeking to realize their preferences within a short time-span (Hall and Taylor 1996; Kelemen and Tarrant 2011). The NC procedure was adopted under codecision rules: it had to be formally proposed by the Commission, and subsequently supported by a sufficient majority among the member states in the Council of Ministers as well as by a majority within the EP (Hix and Høyland 2011). Although preferences might vary within these bodies, they are treated as unitary actors – any internal divisions are regarded as being solved internally prior to external action – except the Council, which is seen as an arena for member states that are actors in their own right (Kelemen and Tarrant 2011).

The Commission and the EP were expected to favour allocating more competence to the EU level because this would allow for delegation to them, in line with their self-interest in enhancing their own influence. Their first preference was delegation of competence to themselves, with delegation to the EU level more generally as a second preference. Previous research has also revealed the EP's interest in transparency and regulatory overview (Kelemen and Tarrant 2011: 928). Keen to retain individual influence, the member states would be reluctant to delegate power to the EU level, except when deemed necessary to reduce transaction costs (including by ensuring credible commitment) in addressing common challenges. Moreover, member states were expected to be more sceptical to delegation if they saw an issue as having distributional implications and, conversely, less sceptical if no distributional implications were evident (Kelemen and Tarrant 2011). Here, distributional implications are understood as affecting or intervening with national sovereignty. Thus, the adoption of the NC procedure, including the specific distribution of executive-administrative tasks, was expected to have occurred because the Commission and the Parliament saw this as boosting EU-level competence, while the member states did not regard it as a threat to national sovereignty. If the procedure was adopted, any disagreements among these three bodies concerning the details and tasks would have been solved through compromise.

Historical institutionalism puts less emphasis on choice, focusing on the longer historical development whereby existing institutions structure actors and their interests, and thus subsequent institutional change (Aspinwall and Schneider 2000; Hall and Taylor 1996). Relatively stable, institutions may change, but in a

‘path-dependent’ way: pre-existing institutions affect the direction and form of subsequent change (Pierson 2004; Thelen 1999). As a gradual transformation and not a clean cut, such incremental change ‘eats into [the] old core’ (Streeck and Thelen 2005: 31).⁴ Thus, elements of the old and the new ‘path’ may coexist. Particularly relevant here is the impact of such incremental institutional change on the constitution of actors and their interests that may affect later institutional change (Aspinwall and Schneider 2000: 7). Studying this requires tracing the causal chain of events that ultimately brought about the change – including identifying the separate stages of a path-dependent development along a temporal dimension (Pierson 2004: 80), as well as the mechanisms that keep it on this path (Thelen 1999: 396). As a shift in the constitution of actors and their interests could emerge gradually, the specific path of institutional evolution must be traced back to the starting point where a change occurred.

The NC procedure was established in a context of pre-existing voluntary arrangements for cross-border co-ordination among domestic organizations, which is expected to have influenced the input that the latter provided to EU policy-makers. Complementing the analysis of formally empowered EU policy-makers, I enquire into the informal involvement of actors from the energy sector. The establishment of, and executive-administrative task distribution within, the NC procedure is expected to have occurred on the background of developments within pre-existing co-operation on cross-border networks among domestic organizations. Specifically, I expect the legacy of previous developments in co-ordination to have influenced their inputs to the NC procedure – inputs that could have been given directly to EU policy-makers and not restricted to the national level (see Hooghe and Marks [2001]). The historical perspective will be used in tracing the evolution of the institutional arrangements that preceded the NC procedure, and whether this affected the feasibility of delegating executive-administrative tasks to new sector-specific EU/European bodies. This includes consideration of the interplay between the constitution of the domestic organizations that engaged in this co-operation, and the associations, networks and fora where they co-operated. I also examine whether structural shifts in the constitution of the actors affected the feasibility of adopting the NC procedure.

While the perspective from rational-choice institutionalism explains institutional change as the product of interests of EU policy-makers, historical institutionalism explains institutional change as product of previous arrangements that evolve over time. The latter traces the evolution of the institutional arrangements that preceded the NC procedure, examining structural shifts in the constitution of the domestic member organizations that were involved in this co-operation. Rather than considering the outcome as the result of EU-level negotiations or stemming from previous arrangements, the two are seen as offering complementary insights – and using different perspectives in a complementary way is ‘most relevant for obtaining increased insight on a specific case’ (Rones 2009: 47). By using several theories, the sum of these parts can give a more complete picture of the truth. Each perspective is put to work separately, before inquiring whether the combination of the two offers a deeper account; and while different perspectives may have diverging theoretical underpinnings (Rones 2009: 50), the separate explanations thus offered can be combined as long as they do not mutually exclude one another. Thus, I use the rationalchoice perspective to highlight the negotiations among the main EU bodies, and the historical perspective to shed light on the impact of previous changes within the electricity sector.

3. CO-OPERATION ON CROSS-BORDER NETWORKS IN EUROPE

Post-war Europe saw the emergence of separate national electricity systems, each usually dominated by a vertically integrated company (Squicciarini et al. 2010: 1): a company with activities covering the entire value chain, including production, transmission and supply to customers. These companies were nationally oriented, with vested interests in retaining control of their national market (van der Vleuten and Lagendijk 2010). Nevertheless, cross-border co-operation arose, to ensure security of supply (Squicciarini et al. 2010; UCTE 2009). On a voluntary basis, these companies negotiated bilaterally on terms and conditions for operating cross-border networks. Broader regional associations for crossborder co-ordination among vertically integrated companies from continental Europe (the Union for the Co-ordination of Production and Transmission of Electricity [UCPTE]), and from the Nordic region (Nordel), were established (Nordel 2009: 4; UCTE 2009). Vertically integrated companies also co-operated within the Union of Producers and Distributors of Electricity (UNIPEDA) (UCTE 2009: 8), later also within Eurelectric (Jabko 2006: 105). Overall, these companies allotted relatively modest resources to crossborder co-ordination (ETSO

interview). They engaged in voluntary negotiations for facilitating common practices, but the need for consensus resulted in slow progress. The relatively few ensuing agreements contained regional recommendations rather than binding EU legislation (Commission interview; Eberlein 2003; Eberlein and Grande 2005; European Commission 2007e), and their scope was often limited, having been established through bilateral or regional negotiations. Despite co-ordination, then, differing practices for operating cross-border networks existed across Europe (Commission interview; Eberlein 2003; European Commission 2007a, 2007d).

3.1. The first EU package and the rise of European transmission co-operation

Policy-makers and stakeholders alike were starting to consider the possibilities for regulating the energy sector at the EU level. Following the Single European Act and the accompanying general market integration programme, substantial discussions within the Council and in the Commission were initiated on energy market integration (Eikeland 2011: 17; European Commission 1988). The EP mainly had a consultative role. Little competence on energy issues had been delegated to the supranational level, and general economic EU law promoting market integration had not been applied to the electricity sector. However, the Commission's ambitious plans for market integration encountered member state resistance. The Commission sought to overcome this by fostering consensus within the electricity industry – a bottom-up strategy aimed at reducing opposition (Eikeland 2004). After prolonged negotiations between the Commission and the Council, as well as within the Council, the first Electricity Directive was adopted (EU 1996). It required 'unbundling of accounts' for vertically integrated companies, which meant that they were required to keep separate accounts of transmission and production activities. The Directive also introduced a regulatory mechanism.

Viewing this legislation as insufficient, the Commission continued to address sector actors directly, and sought to enhance existing voluntary cross-border cooperation. In 1998, the Commission contributed to initiating the Florence Forum of political and business representatives from the electricity sector (Eberlein 2003), and also encouraged the companies responsible for national transmission networks (transmission system operators or vertically integrated electricity companies) to co-operate on the EU level; in 1999, these companies founded the European Transmission System Operators (ENTSO). Representing transmission interests from all of Europe, not just the EU, ENTSO was the first association of its kind (Buchan 2010: 366). Alongside these developments, existing regional industry associations were redefined as transmission associations: UCPTTE dropped the P for Production, becoming the Union for the Co-ordination of Transmission of Electricity in 1999 (UCTE 2009: 35), and in 2000 Nordel also became a pure transmission association (Nordel 2009: 4). Other associations for cross-border co-operation were also changing: in 1999, UNIPEDDE and Eurelectric merged (Jabko 2006), which meant that distribution network operators (operators of local networks, as opposed to transmission system operators that run the overarching central network) and producers remained organized together within the new European producer association (Union of the Electricity Industry [Eurelectric]). Distribution networks were not subject to the unbundling requirements applicable to transmission networks.

3.2. The second EU package and changing outlooks

Seeing competition as low, and progress slow in energy market integration (Eikeland 2004: 8), the Commission initiated a process for revising EU energy market regulation. In 2003, the EU passed a second package, where the second electricity directive required 'legal unbundling' and separate energy regulators (EU 2003a). For the electricity industry, this meant that transmission and production activities must now be performed by separate organizations, although full separation of ownership was not required, and one of the two could be placed in a subsidiary (Buchan 2010). Nevertheless, transmission system operators (TSO) were emerging as separate entities from the previous vertically integrated companies. In practice, ownership unbundling was developing in many countries. Within government, regulatory overview of the national market was to be placed in an entity separate from the more political decision-making within national ministries – in practice, an agency (Buchan 2010). Most EU member states at this point had an energy regulator, as EU energy market legislation was preceded by or coincided with corresponding national reforms (Buchan 2010). Alongside the second package, the Commission established an EU network for national energy regulators (European Regulators Group for Electricity and Gas [EREG]). EREG was to

advise the Commission particularly in matters of implementation of energy market legislation, and to ease co-ordination among national energy regulators (European Commission 2003). ERGEG had a horizontal structure and produced consensus-based recommendations.

During the deliberations on the second package, the transmission operators started considering taking a more active role in developing the market. However, any special position for TSOs together with national regulators on cross-border issues – with the latter rather nationally oriented – was a fairly alien concept in Brussels at the time (ETSO interview). The general outlook remained national in scope, but TSOs were increasingly willing to engage in cross-border matters, and their internal discussions on these matters were picking up speed (ETSO interview).

3.3. Towards a third package and the NC procedure

Meanwhile, the Commission remained dissatisfied with the state of market liberalization and market integration (EurActiv 2006): it regarded the voluntary negotiations as inadequate (European Commission 2007e), and the output as having unclear legal status (Commission interview). Moreover, it saw the patchwork of practices for operating cross-border networks as a barrier to trade, and thus to market integration (Commission interview; European Commission 2007a, 2007d).⁵ With positive signals emerging from the member states on revising EU energy market legislation (EurActiv 2005), the Commission saw an opportunity for stronger EU-level governance and more centralized co-operation on cross-border electricity issues (Commission interview; van der Vleuten and Lagendijk 2010).

Following initial work (European Commission 2006, 2007b, 2007c, 2007d), with positive signals from the EP (European Parliament 2007) and the member states (European Council 2007), the Commission tabled a proposal for a new Electricity Regulation that included the NC procedure (European Commission 2007e). The proposal outlined the steps for making a specific network code which would oblige TSOs and national regulators to perform executive-administrative tasks at the EU level – the former via a new private European association, the European Network of Transmission System Operators for Electricity (ENTSO-E), and the latter via a new EU agency, the Agency for the Co-operation of Energy Regulators (ACER). In a process initiated by the Commission, ENTSO-E would draft a network code. The draft legislation would then be taken to comitology treatment by the Commission, where it could be formally adopted as EU law. ACER was to provide advisory input to the Commission and to ENTSO-E throughout the process (Commission interview).⁶

This proposal was welcomed by the TSOs – by now separate companies in most member states, although some remained subsidiaries of producers (Commission, ETSO, Eurelectric interviews) – while regulators and producers reacted to what they considered to be delegating regulatory tasks to TSOs (ETSO, Eurelectric interviews). Through ERGEG and Eurelectric, regulators and producers sought to get the EP to strengthen the role of ACER at the expense of ENTSO-E (ETSO, Eurelectric interviews). Seeing member states as less attentive to this issue – and more interested in discussing other parts of the proposed third package – they targeted the EP (ETSO, Eurelectric interviews).⁷ Although supportive of major parts of the Commission's proposal, the EP subsequently suggested that ACER's role be expanded, and that specific deadlines be connected to the various steps of the procedure. Specifically, EP proposed that ACER should make framework guidelines that would be binding for ENTSO-E's subsequent drafting of network codes. The Commission found the deadlines acceptable, but opposed binding framework guidelines, citing the lack of treaty basis for delegating such powers to ACER (Commission interview; European Parliament 2008: 2). The Council took a similar stance: While supportive of the proposed procedure, the member states had mixed views regarding the role of ACER (Council of Ministers 2008a: 6). A strong ACER was not supported in Council, so binding framework guidelines failed to gain the necessary support. However, a sufficient majority was in favour of ACER making non-binding guidelines (Council of Ministers 2008a: 10; 2008b: 2). The latter was endorsed by the Commission (Commission interview), and was also acceptable to the TSOs (ETSO interview). The revised proposal was adopted as EU law in 2009 by the Parliament and Council.

Table 1. *The final NC procedure*

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1. The Commission requests ACER to formulate a (non-binding) framework guideline on an area defined in a priority list.
 2. ACER consults with stakeholders, and writes the framework guideline, within 12 months.
 3. ENTSO-E consults with stakeholders, and drafts a network code on the basis of the framework guideline, taking regional specificities into account, as appropriate.
 4. ENTSO-E sends draft network code to ACER.
 5. ACER reviews the draft network code, and writes an opinion. ACER may also send the draft network code back to ENTSO-E with comments.
 6. ACER sends the draft network code to the Commission.
 7. The Commission evaluates the network code, and forwards it to a committee of national representatives (comitology).
 8. Committee reading and vote on the network code (comitology).
 9. EP and Council scrutiny of adopted network code (comitology).
 10. Network code becomes binding EU legislation with direct application.
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Sources: *EU (2009)*; *Jevnaker (2012)*.

The final NC procedure is presented in Table 1. Beyond the revisions of ACER's role, the Commission's initial proposal had remained largely intact throughout the legislative process. The Commission was surprised at this, noting that the Regulation had given it a strong mandate in internal energy market-making (Commission interview). Although the Commission would initiate and – together with national representatives in comitology – finalize the process of making a network code, the two new EU/European organizations, ACER and ENTSO-E, were given important roles: they would flesh out the details by making the draft legislation. The introduction of deadlines meant that regulators and TSOs had to deliver non-binding framework guidelines and draft network codes, respectively, on time. Failure to comply would trigger sanctions in the sense that the tasks of ENTSO-E or ACER would be transferred upwards: TSO failure to agree collectively within ENTSO-E on a draft network code on time meant that ACER could take over this task, or ultimately the Commission. The latter could also make the framework guidelines if ACER failed to reach agreement on time. Thus, unlike the voluntary negotiations that resulted in a patchwork of agreed but non-binding practices, the NC procedure placed formal obligations subject to deadlines on TSOs and national regulators. Acting through their respective European organizations (ENTSO-E and ACER), they would have to perform executive-administrative tasks as part of a policy-making process that would create binding EU legislation.

4. COMMON GROUND WITHIN THE EU: EMERGING OVER TIME?

In order to be adopted, the NC procedure needed formal support from the Commission, EP and member states, whose preferences will be examined through the lenses of rational-choice institutionalism. The legacy from developments within pre-existing co-operation on cross-border networks will be analysed through historical institutionalism, because the domestic organizations – collectively empowered by the NC procedure through ENTSO-E or ACER – had previously engaged in cross-border co-operation, and because they provided important input to the EU policy-making process.

4.1. Commission, EP and Council support for the network code procedure

The Commission and the EP were expected to favour delegation – preferably to themselves – whereas member state positions were expected to depend on whether the issue was perceived as having distributional implications. Comparing the preferences expected from rational-choice institutionalism with those identified in the empirical data, we find that the Commission was in favour of changing the status quo, having received positive signals (official statements) from the member states and the EP. The Commission could therefore propose a NC procedure that was in accordance with its preference for allocating competence at the EU level. Nevertheless, the proposal did not restrict network code development to EU bodies. Viewed through the lenses of rational self-interest it seems surprising that the Commission assigned such a large role to

ENTSO-E – formally not an EU entity – but the Commission cited the need for technical expertise, which was in the hands of TSOs (European Commission 2007e). Although assigning power to another organization corresponds to the expected second preference of the Commission, the empirical data show that, in part, this was actually its stated position: this set-up served the Commission's interest in faster harmonization without having to expend resources on the actual drafting itself. Nevertheless, the data show that the Commission also sought to ensure delegation to itself – by proposing a role for itself in the early and final stages of the NC procedure, which corresponds to the first expected preference.

The amendments proposed by the EP fit well with its expected interest in EU level competence as well as its concern for transparency and regulatory overview. It supported a stronger role for ACER within the NC procedure (binding framework guidelines), rather than to provide advisory input at stages not specified in the procedure. That the EP wanted these tasks to be performed by ACER and not itself fits best with the expected second EP preference. However, that is not surprising, given amount of detail to be discussed during the process of making network codes. Additionally, EP involvement was ensured in the comitology stage, where the EP and the Council could scrutinize the decision made by the comitology committee. The EP's divergence from the Commission's position could be explained by its expected preference for regulatory overview, as well as by its self-interested concern in retaining an institutional balance of power vis-à-vis the Commission: a stronger ACER, wanted by the EP, would also serve to limit the Commission's influence including in pre-comitology.

The member states were positive to the Commission's proposal, agreeing on the need for an EU framework for co-operation on technical cross-border networks. They did not regard network code development as having major distributional implications because they did not expect the proposed measure to intervene with national decision-power on energy matters.⁸ As expected, this reduced reluctance towards delegation, and the member states agreed to the transfer of competence to the EU level when they supported the Commission's proposal. The role of ACER, however, was deemed a more political issue, which the member states saw as intervening with national sovereignty. Perceived of as having distributional impact, this increased opposition to delegation. The member states held mixed views on the role of ACER, but a sufficiently strong majority was sceptical, so the expected resistance to delegation under perceived distributional impact was confirmed. Here, differing perceptions of what constitutes distributional impact might exist among member states, as some backed the idea of a stronger ACER. Although the Commission and Council resisted binding framework guidelines, EP support was also required for the adoption of the NC procedure – support that was ensured through a compromise where non-binding framework guidelines were added.

As expected from rational-choice institutionalism, support from the Commission, the EP and member states was necessary for the adoption of the NC procedure. Their preferences were reflected in the NC procedure. The positions of the Commission and EP were consistent with expectations (support to supranational solutions), but both preferred delegating major executive-administrative tasks to other more specialized bodies located at the European/EU level. This is in accordance with research of the Commission's motivation for supporting delegation to regulatory agencies at the EU level (Tallberg 2007: 207). Nevertheless, the Commission and the EP ensured that they would be included in the process, the Commission during initiation as well as comitology, where the EP could also play a role. Regarding the distribution of executive-administrative tasks, the EP's attempt at strengthening ACER's role was watered down by resistant member states that saw this as a threat to national sovereignty. The Commission's proposed mandate to ENTSO-E was not perceived in such a way, and was left unchanged.

This account shows how the Commission and EP wanted to empower TSOs and national energy regulators, respectively, to participate in executive-administrative tasks at the EU level through the NC procedure. However, it cannot explain the emergence of domestic actors able and willing to take on this mandate through new European/EU organizations. We now turn to structural shifts that gradually changed the domestic actor landscape, and transnational co-operation, in a way that, together with an active Commission, facilitated the introduction of the NC procedure.

4.2. Legacy of earlier developments

A key feature in historical institutionalism is the ‘legacy’ of pre-existing co-operation on cross-border networks, where gradual change is expected to have affected the feasibility of delegating executive-administrative tasks to EU-level bodies (ENTSO-E and ACER). Moreover, the latter provided informal input to the EU policy-making process. The following analysis complements the previous section.

Initially, co-ordination on cross-border networks was decentralized and voluntary: consensus-based decision-making prevailed, and the individual domestic organizations enjoyed considerable autonomy within existing networks. This set-up catered to the nationally oriented interests of the involved organizations – vertically integrated electricity companies seeking to retain control of their national markets. However, the EU’s first and second energy market packages imposed organizational reform at the member state level. For industry, gradually stricter requirements for horizontal specialization entailed growing separation between production and transmission activities (unbundling). For government, requirements for vertical specialization meant that regulation would be administered by a separate governmental entity (agencification). At the member state level, this EU legislation triggered domestic organizational changes of relevance to co-operation on cross-border networks: Unbundling meant that vertically integrated companies were separated into producers and transmission system operators, whereas agencification meant that national energy regulators emerged as separate entities from sector ministries – the latter thereby increased the distance to the national government. This organizational restructuring created new domestic actors – especially TSOs and energy regulators – that were decisive in preparing the stage for the NC procedure. Moreover, they would form the membership base of ENTSO-E and ACER.

Interest constellations were changing as a consequence: the resistance of regulators and TSOs to more expansive cross-border co-operation and centralization became weaker than in their predecessor organizations. Centralization entails a reduction in the influence of the individual organization, due inter alia to majority voting. Although ties between production and transmission companies were changing slowly in some member states, unbundling was altering the outlook of TSOs. Production interests had been central in maintaining decentralized cross-border co-operation among TSOs, but now unbundling gradually made production interests relatively less important, and transmission interests relatively more so. Similarly within government: although many emerging energy regulators maintained close contact with sector departments, the relative influence of national governments – whose concerns for national sovereignty had limited cross-border co-operation – on regulatory overview was reduced as regulators became increasingly independent. By changing the constitution of these domestic organizations, incremental changes in EU legislation served to reduce resistance to more expansive co-operation on cross-border networks.

This affected the organization of cross-border co-operation. Existing regional industry associations had previously dealt with production and transmission issues. Redefined as TSO associations, the relative influence of producer interests was reduced within these associations. A clear indicator of the direct link between organizational change at the national and international levels is that transnational co-operation among distribution system operators – much less subjected to unbundling requirements – remained organized together with producers within Eurelectric, an interest group representing both interests.⁹ Another impact of the domestic changes was the establishment of a network for co-ordination specifically among national energy regulators (ERGEG). Generally, the establishment of EU-wide bodies for co-operation on cross-border networks (ETSO, the Florence Forum and ERGEG) indicates a gradual shift towards centralization, with acceptance of more expansive co-operation. The Commission pushed for this development by directly addressing domestic and transnational organizations within the power sector, and by contributing to the establishment of such EU-wide bodies. By capitalizing on voluntary cross-border co-operation, the Commission sought to circumvent resistance from national governments. Although co-operation remained voluntary and consensus-based, the dynamics were slowly changing. The establishment of transnational associations for such co-operation on a European scale was a vital step that would facilitate the later decision to mandate ENTSO-E and ACER to engage in expansive co-operation regulated by the NC procedure.

By the time the third package was brought forward, national regulators and especially TSOs had experience from European/EU associations like ERGEG and ETSO. Having negotiated on recommendations and voluntary agreements, the TSOs had had to face the challenge of ensuring credible commitment and compliance. This made them welcome the idea of network codes as binding law with EU-wide application – they were opening to the idea of centralization, and seeing the benefits thereof. It is hardly surprising that TSOs supported a proposal that would retain major TSO influence, but the formal obligation to do so collectively (through ENTSO-E) entailed a loss of influence for the individual TSO. This change in position among the European TSOs cannot be understood in isolation from the organizational changes at the national level along with the developments in cross-border co-operation described above. Again, the importance of EU legislation for the domestic organizational change and the change in TSO outlook stands out when we consider producers' response to the Commission's proposal: the producer association Eurelectric was sceptical to the proposed role for TSOs, seeing the TSOs as partial and with interests diverging from those of Eurelectric's members. Instead of backing the TSO position, the producers now supported the national regulators. Despite the uneven progress in unbundling across member states, this divergence between Eurelectric and TSOs is a strong indicator of a change in position from the days of vertically integrated companies.

National regulators were sceptical to the NC procedure's distribution of executive-administrative tasks, wanting a larger role vis-a-vis the TSOs.

Instead of seeking to limit the transfer of competence to the EU level, they lobbied the EP for a stronger collective mandate for themselves (through ACER) at this level: empowerment at the expense of the individual energy regulator. This encountered resistance from the member states in the Council, which also paid more attention to other elements of the third energy market package. Thus, national regulators turned to the EP. That they chose to address the Parliament collectively, instead of each individual regulator targeting its national government represented in the Council, is another consequence of the gradual change. Such divergence between national governments and national energy regulators would have been unlikely if they had remained integrated in the same organizational unit at the domestic level. Previously favouring little and decentralized cross-border co-operation, and focusing more on the national electricity system, TSOs as well as national energy regulators were now interested in stronger cross-border co-operation. Seen through the lenses of historical institutionalism, then, EU energy market legislation rearranged the constitution of domestic organizations, which gradually changed the dynamics of cross-border co-operation. Gaining experience within more specialized and EU-wide/European entities, the positions of the domestic organizations on cross-border co-operation underwent changes. Although the national system was still the main concern, TSOs and national energy regulators were willing to yield individual autonomy in order to gain collective empowerment at the EU level in specified cross-border matters. The NC procedure marked a shift from decentralized towards centralized co-operation, as seen with the positions of these two groups as they engaged collectively within existing transnational networks in order to influence EU policy-makers – the TSOs allying with the Commission, the regulators finding resonance within the EP. This account of a path-dependent gradual change, with a legacy from previous developments, can illuminate why the various sector actors held different interests as they approached different parts of the EU, as well as their ability and willingness to take on the tasks delegated to them through the NC procedure.

We have seen that the interests of the major EU bodies, notably the Commission, did influence the distribution of tasks within the NC procedure. Second, the gradual changes within the electricity sector and existing co-operation on cross-border networks were crucial for energy-sector support of the new procedure. Otherwise, existing co-operative arrangements could have represented a barrier to establishing the new arrangements, despite attempts from the Commission. However, previous changes had shifted their interests towards more centralized European arrangements. Moreover, given the roles of ENTSO-E and ACER in the procedure, it seems less likely that the Commission would have designed the procedure that way if their constitutive members – TSOs and national energy regulators – were opposed: without these prior changes, the domestic organizations that would constitute the later ACER and ENTSO-E might not have been able or willing to be part of this EU administration.¹⁰ Thus, while the interests of the major EU bodies (the EP, Council and Commission) did influence the distribution of tasks within the NC procedure, their general

positions concerning the procedure were also coloured by their contact with various sector actors, whereas member states were less engaged by the latter on this matter.

5. CONCLUSIONS

Rational-choice institutionalism uses ‘settled’ positions in order to explain the outcome. This perspective expects the explanatory factors to be found in the political negotiations among the main EU institutions, with preferences located along the national–supranational axis. Although this offers a partial explanation, particularly on the specificities of the comitology step of the NC procedure, it cannot explain the peculiar alliance of TSOs and the Commission on the one hand and national regulators and the EP on the other. Positions here were aligned according to ‘placement’ within the electricity sector. Moreover, the different groups of sector actors were generally supportive of setting up an extensive EU-level arrangement, thus roughly grouping their positions at the more supranational end of the spectrum. Previous research identified the national–supranational axis as important for understanding outcomes. While differing positions along this axis can shed light on the diverging views among the Council, EP and the Commission on comitology, this cannot explain the disagreement between the EP and the Commission on the role of ACER. When, however, we consider the alliances of these two with different segments of the electricity sector, the divergence becomes more understandable. Moreover, the restructuring of the electricity sector organizations over time can explain the lack of mobilization along national lines. Thus, historical institutionalism offers a framework for more extensive inquiry into the background for such positions, tracing their development over time. Simply put: if a snapshot perspective of actor positions offers a satisfactory account of outcomes, rational-choice institutionalism is a useful perspective. If, however, this leaves major puzzles – like the peculiar alliances and conflict lines, and the lack of activation of the national-supranational conflict line with regard to the procedure in general – the background for positions must be examined more carefully. Rational-choice institutionalism explains outcomes as the product of negotiations among actors with different interests, whereas historical institutionalism adds a second layer by examining the development of interests over time.

Given the centrality of intrasectoral rather than national–supranational conflict lines, this article has focused on the evolving interests of sector actors. Coupling the analyses offered by the two perspectives enabled an understanding of how the two axes interacted to shape the adoption as well as the content of the NC procedure. Taking into account changes within the pre-existing networks and their constitutive members helps to explain why the national–supranational dimension was of relatively low salience. These changes had paved the way for consensus on a supranational solution, although the parties did not agree on the distribution of tasks between the new EU/European bodies, i.e., ACER and ENTSO-E. With cross-country agreement, it is unsurprising that the member states proved less involved in the process, and that the various sector actors sought to influence the Commission and EP. While an explanation based on self-interest of the main EU institutions engaging in negotiations illuminates some parts of the NC procedure (comitology and the non-bindingness of framework guidelines), the overall adoption of the procedure would remain largely in the dark without the additional analysis of changes within pre-existing networks and in the constitution of their members.

What does this expansion of European executive-administrative capacity within the power sector mean for EU integration? Generally, the formal inclusion of domestic actors in EU policy-making enhances their ‘double-hattedness’ – splitting their loyalties between national and EU authorities (Egeberg 2006; Egeberg et al. 2012) – here not only for implementation but also for the making of EU policy. Specifically, the provision of technical expertise from ENTSO-E and ACER to the Commission strengthens its ability to make proposals for EU legislation for the power sector. Expansion of the EU-level bureaucracy does not necessarily strengthen supranational influence vis-à-vis member states – but it certainly allows for such an increase. How this unfolds in practice is indeed a relevant topic for future research.

Biographical note: Torbjørg Jevnaker is a research fellow at the Fridtjof Nansen Institute, Norway.

Address for correspondence: Torbjørg Jevnaker, The Fridtjof Nansen Institute, PO Box 326, 1326 Lysaker, Norway. email: tj@fni.no

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NOTES

- 1 More information about network codes can be found at <http://www.entsoe.eu>.
- 2 An earlier version was published as Jevnaker (2012).
- 3 Other variants are more attentive to norms and slow-moving shifts in culture (see Hall and Taylor [1996] for an overview).
- 4 Historical institutionalism also emphasizes change caused by external shocks, but no such event was identified as having a causal effect on the NC procedure. The blackouts in 2003 and 2006 that affected much of Europe could be categorized as external shocks, but did not affect the structuring of actors or alter the direction of their interests – although the 2006 blackout did strengthen the already-held preference of the Commission for more comprehensive cross-border co-operation among TSOs (Commission interview; van der Vleuten and Lagendijk 2010). Seen in a longer perspective, the NC procedure fits better in the category of gradual rather than dramatic institutional change.
- 5 Another obstacle is insufficient physical capacity on cross-border networks.
- 6 A first Electricity Regulation was introduced with the second energy market package; its annex contained common ‘guidelines’ on cross-border networks that could be revised by a regulatory committee of national representatives (comitology) (EU 2003b). However, the Regulation did not specify procedures for harmonizing these.
- 7 Mandatory ownership unbundling, and conditions for third-country ownership of transmission networks (Eikeland 2011).
- 8 However, representatives from the electricity sector noted in interviews that this would probably be the case, because cross-border networks are connected to national networks, so EU decision-making on cross-border networks through network codes would affect national sovereignty over how national networks would be regulated.
- 9 Distribution system operators operate the distribution network; TSOs operate the transmission network. The latter is used for transmitting bulk electricity over longer distances, also across national borders; the former is used to distribute electricity from transmission networks locally.
- 10 Once adopted, however, the NC procedure would allow the Commission to carry out tasks on behalf of sector actor organizations ACER and ENTSO-E if they did not deliver input on time. Referred to as a ‘shadow of hierarchy’ within the governance literature, such a threat has been expected to affect the influence the behaviour of actors engaging in negotiations (Bòrzel 2010), and could thus ensure a higher pace in harmonizing legislation on these issues as compared to previous arrangements.

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