



Bachelor Thesis

European Studies/Public Administration

# The Governance of a New European Market

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*Have Member States lost their pivotal role in regulating the  
Internal Energy Market?*

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## **Glossary**

ACER	Agency for the Cooperation of Energy Regulators
CEER	Council of European Energy Regulators
Coreper	Comité des Représentants Permanents <sup>1</sup>
DG ENER	Directorate General for Energy
DG TREN	Directorate General for Transport and Energy
Dir.	Directive
EREGG	European Regulators Group for Electricity and Gas
DSO	Distribution System Operators
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
(E)IEM	(European) Internal Energy Market
EMU	Economic and Monetary Union
ENTSO-E	European Network of Transmission System Operators for Electricity
ENTSO-G	European Network of Transmission System Operators for Gas
EP	European Parliament
ERI	Electricity Regional Initiatives
ERN	European Regulatory Network
EU	European Union
GRI	Gas Regional Initiatives
i.a.	inter alia
IRA	Independent Regulatory Authority
ISO	Independent System Operator
ITO	Independent Transmission System Operator
LI	Liberal Intergovernmentalism
MLG	Multi-level Governance
NRA	National Regulatory Authority
NPM	New Public Management
OMC	Open Method of Coordination
QMV	Qualified Majority Voting
Reg.	Regulation
SEA	Single European Act
SGEI	Services of General Economic Interest
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPA	Third Party Access
TSO	Transmission System Operators

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<sup>1</sup> French for *Committee of Permanent Representatives*

## ***Abstract***

In March 2011, the Third Legislative Package on establishing a Single European Energy Market has come into effect. The new legislations aim to draw a line under the lengthy discussions on liberalizing and Europeanizing the national energy markets. A vital question in this regard is the assigned role of Member States in the new regulatory regime, in particular, if they have lost their pivotal position in the regulation of the market. The thesis seeks to investigate this question.

Relying on three overall approaches to European Governance (Liberal Intergovernmentalism, Multi-level Governance, and Network Governance) as well as on Tanja A. Börzel's analytical scheme of governance forms, the analysis seeks to characterize the policy by examining relevant section of EU primary and secondary law. Additionally, evidences are collected by consulting scientific literature.

The analysis will show that competences are shared among private as well as public actors whose interactions are covered by three effective shadows of supranational hierarchy. Thus, according to the Treaty provisions, a governance form of joint decision-making can be detected which stands under a hierarchy shadow of Commission and the ECJ to apply competition law. Moreover, the examination of the Third Legislative Package, the secondary law, will reveal that albeit the day-to-day regulation is driven by Independent Regulatory Authorities, their leeway is as well constrained by a shadow of supranational hierarchy which is executed by the Commission and its facilitator, the new European agency ACER. Additionally, the competences of Member State actors are limited by the involvement of private actors. Finally, the third supranational hierarchy shadow can be detected in the informal arena of private-public negotiations which are limited by the Commission's option to continue the regulation of the market without private involvement.

Hence, according to EU primary as well as secondary law, supranational hierarchy shadows monitor the governance forms of joint decision-making, agency cooperation and private self-regulation. In such a complex system, Member States have consequently lost their pivotal in the regulation of the European Internal Energy Market.

## 1. Introduction

“A real market with secure supply”, this is the slogan the European Commission is using to promote its Third Legislative Package on accomplishing the Single Energy Market. In March 2011, the two directives and three regulations have come into force realizing the contested project of a genuine and EU-wide market in energy supply. According to Eberlein (2008), it was “a long way of liberalisation” since Member States were not keen to share their decision-making power in a sector which they considered to be of strategic geopolitical and economic importance, and an essential public service (p. 75).

Only developments as the global trend of liberalization and privatization of public utilities as well as the efforts of the European Commission to remove barriers for cross-border trade in all economic sectors triggered a slow process of cooperation. A first Electricity Directive in 1996 and a Gas Directive in 1998 made the first steps in reducing the national diversity in regulating the energy market (Levi-Faur, 1999, p. 179). However, this First Legislative Package and also the amendments to the Second Package in 2003 did not achieve their goals as they failed to establish a well-functioning European Energy Market (Eberlein, 2008, p. 75; Eikeland, 2011, p.249). Thus, the Commission launched a third proposal which aimed at establishing a European supervisory agency to enhance the cooperation among national regulators and which eventually shall open the market for cross-border trade of electricity and gas. Adopted in 2007 and enforced in March this year, it shall change the governance structure leading to more cooperation among national authorities.

A crucial question in analysing the regulatory framework of the new Internal Energy Market (IEM) is the assigned role for the Member States. As stated above, they perceive energy policy as a key part of their sovereignty and accordingly, one may expect, that they never will allow the delegation of crucial competences in energy policy to a supranational institution as the European Commission. To review this expectation, the bachelor thesis aims to examine if the Member States have lost their pivotal role in regulating the Internal Energy Market. Member States are thereby broadly defined by including besides national governments also other Nation State actors, such as National Regulatory Authorities (NRAs). Moreover, regulation refers to Majone’s (1996) definition as “rules issued for the purpose of controlling the manner in which private and public enterprises conduct their operation” (p.9). Accordingly, the focus will be on non-monetary interventions (e.g. requirements, creation of incentives or prohibitions) to the exclusion of distributive and redistributive measures, such as subsidies, structural funds or expenditure for building energy grids.

The theoretical framework for the analysis are the distinct approaches to European Governance. Thus, first the prominent approaches Liberal Intergovernmentalism as advocated by Moravcsik (1991, 1993, 1995) and its opposing concept Multi-level Governance as favoured by Hooghe and Marks (1993, 2001, 2003, 2010) will be applied followed by the public-private concept of Network-Governance (Kohler-Koch & Eising, 1999). Subsequently, Börzel's (2007, 2008) analytical scheme of governance forms will be applied to generate well-founded hypotheses for the three aforementioned European Governance approaches.

After a brief background chapter on the IEM, the thesis will seek to test these hypotheses in its analysis part. In a first step, the constellation of the actors as laid down in the Treaties will be examined; special attention shall be given to possible competence shifts as a result of the amendment by the Lisbon Treaty. Hereinafter, the competence and governance structure according to the new legislative package, the secondary law, will be analysed followed by a compact, but all-encompassing characterisation of the policy.

Concluding all the findings, the hypotheses will be tested on their applicability to eventually give evidences whether Member States have retained their pivotal role or whether they have become equivalent actors in the new governance system.

## 2. Theoretical framework

### 2.1 The distinct approaches to European Governance

Several approaches to European Governance can be distinguished. In the beginning of the European integration process, the scientific debates focused mainly on the dispute Intergovernmentalism as maintained by Hoffmann (1964; 1966) versus Neo-functionalism as advocated by Haas (1958). Yet, having lost their explanatory strength, both have been replaced in the past years by numerous new theoretical concepts. The thesis, however, will limit itself to the most renowned approaches Liberal Intergovernmentalism and Multi-level Governance completed by the public-private actor concept Network Governance.

#### 2.1.1 Liberal Intergovernmentalism

Following Moravcsik's reasoning in explaining EU policy-making, the Member States must have retained their principal role in regulating the Common Energy Market. Building on this state-centric view of European Governance, the American scholar elaborated during the first half of the 1990s his Liberal Intergovernmentalism (LI) approach. He claimed basically "that the [EU] can be analysed as a successful intergovernmental regime designed to manage economic interdependence through negotiated policy coordination" (Moravcsik, 1993, p.474). Five hypotheses are especially note-worthy:

First, he rejects the neo-functionalistic prediction that European economic integration is triggered by spill-over effects (ibid, p.475). Instead, the major agenda-setting decisions for integrating national policies like energy have been negotiated in the European Council and the Council of the European Union (in the following labelled as *the Council*) among national governments (Moravcsik, 1991, pp.25; Jordan, 2001, p.203). They thus determine the course of integration insofar that the final policy outcomes reflect the relative balance of power between the major European states.

Second, states are rationale, self-interested actors. While agreeing in this aspect with the Intergovernmentalism and Realism view on International Relations (IR) Moravcsik deviates from their thinking when mentioning that states should not be perceived as black boxes. On the contrary, he argues that the national interests "emerge through domestic political conflicts as societal group compete for political influence" (Moravcsik, 1993, p.481). Following this reasoning, national governments are playing what Robert Putnam explains as a *two-level game*. At the first stage, the domestic arena, governments seek to aggregate the national societal preferences which they then defend at the second stage in the international bargaining process (Jordan, 2001, p.203; Pollack, 2001, p.225). Accordingly, Moravcsik introduced a liberal



perspective to Hoffmann's intergovernmental model by assuming that states' preferences are determined by their domestic society groups and are thus variable (Moravcsik, 1993, p.481).

However, the domestic and international arena must be regarded as two discrete levels. Subsequently – and that is the third assumption – the state's preferences are very inflexible at the European negotiation table. The governments are responded to the demand of electoral politics and try to impose the national interests. The outcome of the bargaining process reflects, therefore, the lowest common dominator of major European states' preferences, whereas the small reluctant governments can be convinced by offering side-payments (Moravcsik, 1991, p.26).

Fourth, states are still the gatekeeper between the distinct levels of national and European policy-making. Although the representation of interest groups has increased remarkably in Brussels, demands to the political system are still and primarily articulated through the channels of intergovernmental bargains (ibid.).

Finally, the current EU institutions do not decrease the power of national governments and rather strengthen Member States' dominances in the EU legislative process. The European institutions, for instance, provide the Member States with an institutional setting – a common forum for negotiations, established decision-making procedures and monitoring of compliance - which is highly capable at decreasing the transactions costs. Additionally, they also “strengthen the autonomy of national political leaders vis-à-vis particularistic social groups within their domestic polity” (ibid.). Unpopular and difficult enforceable policy issues can be transferred to the European level. Accordingly, national legislative institutions as the parliament can be bypassed.

In summary, Moravcsik still assigned a predominant role in EU policy making to national governments and is in this regard in the tradition of his intergovernmentalists predecessors. However, he refined Hoffmann's theory in adding a liberalistic view of preference building within the nation states.

Albeit Moravcsik's publications lead to a contested debate on the nature of the European Union and its integration process, only a few scholars defended his approach. On the contrary, several criticisms (i.e. by Jordan, Wincott, Hooghe & Marks) have been raised. One of the strongest claims in this regard is that Moravcsik focused too much on intergovernmental negotiations (SEA, Maastricht Treaty, etc.) and failed to test his theory in small-scale politics (Bache et al., 2011, p.13). Besides, the following weaknesses have been detected as well:

Institutionalists, for instance, claim that after the launch of QMV and the co-decision procedure, EU decision-making becomes more decentralized among the three main EU

institutions (Commission, Council, and Parliament). Moreover, Marks and Hooghe (2001) maintain that states have already lost their gatekeeper role, as interest groups have already established their liaison bureaus in Brussels (p.9). Some scholars even detected conceptual weaknesses in the LI approach, such as Wincott who identified a contradiction between a liberalistic view of national interest formation and government's autonomy, whereas Jordan claims that the term state is not properly defined: First, Moravcsik obviously equates state with head of government and ministers, whereas the term society refers to interest groups and political parties, but also to civil servants and cabinet ministers (Jordan, 2001, p.204). A clear cut between the notion *state* and *society* is, therefore, not given. Secondly, Jordan rejects Moravcsik's claim of a unitary state. Rather states should be perceived as an amalgam of different sub-actors (e.g. different ministries) which act not always consistently (ibid.; Fairbrass & Jordan, 2010, p.153). Consequently, states act at different, sometimes three or four levels simultaneously. Putnam's two-step theory is thus not applicable for explaining such a complex structure, as it overlooks the interwoven mechanism of the EU system (Jordan, 2001, p.204).

Despite this plethora of criticism, recent work by Moravcsik and Schimmelfennig (2009), nevertheless, defended the approach in maintaining that though LI seems best applicable for intergovernmental negotiation under unanimity, the theory can be widely used – also for everyday EU decision-making (as cited in Bache et al., 2011, p.74). That the extension of QMV to a variety of EU policies should have rejected his approach is according to Moravcsik merely an ill-conceived conclusion. Instead, governments are far more compensated for their partial withdrawal of sovereignty by an enhanced ability to achieve policy outcomes they want (cf. Marks & Hooghe, 2001, p.4).

Accordingly, if Moravcsik's claims are correct, national governments are still the decisive actors in the Internal Energy Market and are only so far keen to co-operate with their European neighbours as long as positive externalities arise in form of a secure national energy supply or lower energy costs due to an intensified competition among the providers. Supranational actors may participate in the regulation of the Market, but merely to facilitate the Member States' work in providing them, for instance, established negotiation fora. Private actors, instead, have no influence at European level and articulate their interest merely in the national arena.

### 2.1.2 *Multi-level Governance*

The advocates of Multi-level Governance, on the contrary, would deny that Member State have retained their dominant role in the Energy Market. Instead, they perceive the EU as “a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional, and local” (Marks, 1993, p.392).

In his study on EU structural policy in 1992, Gary Marks first used the term Multi-level Governance in explaining the concept as the outcome of two major developments: The conferral of competences to the European supranational institutions as well as the delegation *downwards* to subnational authorities (Marks & Hooghe, 2001, p.4). Hence, individual state sovereignty is, in contrast to Moravcsik's reasoning, dispersed by collective decision-making among different layers and by the independent role of the EP, the Commission and the European Court of Justice (ECJ) (Marks et al., 2003, pp.342). In this regard, Marks and Hooghe (2001) distinguish MLG from LI in the following characteristics:

First, the increasing use of majoritarian decision making procedures, such as the QMV, has significantly limited the control of individual national governments on the outcome in the bargaining process in the Council (Marks & Hooghe, 2001, p.4; Bache et al., 2011, p.33). Since its launch with the enforcement of the SEA in 1986 the bulk of policy areas in the EU are nowadays ruled under this procedure. Consequently, the individual state can be outvoted. That Member States can theoretically prevent such an outvoting in referring to the Luxembourg Compromise as argued by Moravcsik, is considered by MLG advocates only as an ineffective veto instrument. In contrast, Marks and Hooghe (2001) submit for consideration that the Luxembourg compromise was seldom used in the past 20 years (p.5).

Secondly, the competences in the decision-making process are not centralized by one actor, but rather shared by different actors in a horizontal dimension (at one stage) as well as in a vertical one (among the stages). Thus, MLG does not merely set its analytical focus on the state as a whole and rather seeks to have a more in-depth insight into the Member States and the EU system. Marks et al. (2003), therefore, introduced a clear distinction between the terms institutions and actors referring the former to the "state (and the EU) as a set of rules" (p.348) and the latter to "particular individuals, groups, and organizations which act within those institution" (ibid.). MLG is hence not a state-, but an actor-centric approach.

Referring this new concept to the horizontal dimension of EU decision-making, the LI perception of supranational actors as facilitator for national governments would be clearly mistaken. Instead, advocates of Multi-level Governance emphasize the proactive and sometimes independent role of EU's political entrepreneurs, namely the European Commission and the European Court of Justice (Benz, 2007, p.302). The former, for instance, holds an agenda-setting monopoly. The Commission is thus alone entitled to "initiate and draft legislation which include the right to amend or withdraw its proposal at any stage in the process, and it is [moreover] the think tank for new policies" (Marks & Hooghe, 2001, p.12). The competences of the Council and the EP are at this decisive stage of policy-making limited to a formal request for the Commission to draft legislation. Moreover, the second European *entrepreneur*, the ECJ, has

demonstrated its proactive role in deepening integration by judgments such as *Costa v. ENEL* on supremacy and *Van Gend en Loos* on direct effect of EU law which are both recognized as starting points for the constitutionalization process of the treaties (Knodt & Große Hüttmann, 2006, p.236; Chalmers et al., 2010, p.275). Finally, the gradual extension of the co-decision procedure to a wide range of policy fields enabled the Parliament to veto against the Council's decisions. Thus and in contrast to LI reasoning, the EP rather increases than reduces transaction costs for national governments (Marks & Hooghe, 2010, p.8). Member States are accordingly in numerous policies dependent on the Commission's proposals and the opinion of its co-legislator, the EP.

Moreover, when looking on the vertical dimension, subnational actors such as regional or local authorities have significantly gained decision-making power. However, in contrast to federalism where subnational actors are also incorporated in the policy-making process, MLG highlights that the different layers are not nested in a hierarchical manner but interconnected (Kohler-Koch & Rittberger, 2009, p.7; Knodt & Große Hüttmann, 2006, p.227). This would mean for the following analysis that subnational actors would sometimes skip the national level to cooperate directly with the European institutions on energy policy. The channels for such a multi-layered interconnection could be, for instance, the comitology procedure, where an increasing number of subnational authorities participate in the committees on monitoring the Commission's executive work (Marks & Hooghe, 2001, p.25).

The interwoven structure of EU policy making refers to the last salient MLG feature that the strict distinction of a domestic and international political spheres as argued by intergovernmentalists is abrogated. States are, therefore, no more able to act as gatekeepers and do not alone bring their domestic preferences as national interest aggregates to the European level. On the contrary, national interest groups join together to European umbrella associations to increase their advocacy role in Brussels and even subnational authorities "could form alliance with their counterparts in other Member States, which influenced national government's negotiating position in EU matters" (Bache et al., 2011, p.34).

Consequently, the two-level game assumptions as maintained by Moravcsik is replaced by an overarching, multi-level policy network in which states hold a crucial but not dominant role (Jordan, 2001, pp.199). Competences are shared in a vertical as well as horizontal interwoven structure whose complexity is capable at leading to uncertainty and unintended outcomes in the policy making process (Marks, 1993, p.403). States, therefore, play at best a *primus inter pares* role in the EU governance play.

Since its first mentioning in 1992, MLG has been the issue of numerous discussions in scientific publications. Some scholars even assigned the new approach the position of replacing neo-functionalism in the dichotomy to (Liberal) Intergovernmentalism. Yet, other researchers, such as Jordan, regard MLG more critically by raising the following criticisms: First, MLG is not a purely new concept. Instead, it is based on the “familiar” neo-functionalist reasoning of independent supranational actors and coalition-building between Commission and subnational authorities which already have been explained by Puchala’s concordance system in 1972 (Jordan, 2001, p.201; Knodt & Große Hüttmann, 2006, p.240). Nevertheless, George (2010) argues in responding to this criticism that the central neo-functionalistic notion of spillover effects is not present in MLG. Marks’ and Hooghe’s approach could be, therefore, at best regarded as a refinement of neo-functionalism, not as a mere copy (p.112). Second, several authors, such as Jordan (2001) assert that MLG describes only the functioning of the EU but is “incapable of providing clear predictions or even explanations of outcomes in the governance process” (p.201; cf. also Bache & Flinders, 2010, p.203). Third, it overstates the autonomy of subnational actors (SNA) (George, 2010, p.119) and fourth, assumes that they are passive beneficiaries in the Europeanization process. Thus it fails to notice that even SNA have struggled for a conferral of competences to their level (Knodt & Große Hüttmann, 2006, p.241; George, 2010, p.122). Fifth, it does not take into account the international level of interactions where the EU’s entrepreneurs such as the Commission have significantly increased their competences share, for instance, as sole representative of the 27 Member States in the WTO negotiations (Jordan, 2001, pp.201; George, 2010, p.124). Moreover and sixth, Jordan (2001) claims that participation should not be mixed up with having a real impact on the legislative process: A representation in Brussels or a forum at EU level such as the Committee of Regions “does not necessarily imply that they have the power to shape outcomes” (p.201). Finally, MLG is criticised for its narrow focus on subnational authorities which preclude other private actors such as interest groups (Knodt & Große Hüttmann, 2006, p.241; George, 2010, pp.122).

However, in responding to this criticism and in contrast to their first MLG definition (cf. Marks, 1993, p.392) Marks and Hooghe (2001) seem to include private actors in their contemporary concepts when mentioning that nation states are not “replaced [...] but supplemented by other actors – private and third sector in a more complex geography” (p.20). Nonetheless, the focus in the following sections remains predominantly on subnational authorities and the multi-level structure. Moreover, to increase its generalizability and meet the criticism of MLG as a theoretical concept, Marks and Hooghe refined their approach in dividing it into two different categories of governance structures. The first, MLG I, is characterized by a general-purpose jurisdiction, non-intersecting memberships and a system-wide, durable architecture on limited

number of levels (Marks & Hooghe, 2001, p.19; Knodt & Große Hüttmann, 2006, p.244). An example would be the German Federal Republic but also the EU system which both adopt the *trias politicas* – an elected legislature, an executive and a court system (Marks et al., 2003, p.236). On the other hand, MLG II is defined by a task-specific jurisdiction, intersecting memberships and a flexible design in an unlimited number of levels (Marks & Hooghe, 2001, p.25; Bache & Flinders, 2010, p.195). In Europe such a governance type can be present in cross-border regions in which particular policy problems are tackled in cooperation to increase the efficiency of the public measures. Applying this to the subsequent analysis, a cross-border exchange regime of energy supply would be an excellent example. This form of MLG II could be then nested into a wider governance structure, MLG I, which primarily regulates with public actors from multiple levels (e.g. the ECJ, regional regulative agencies etc.) the European Energy Market. In such a complex structure Member States would consequently have lost their decisive role.

### 2.1.3 Network Governance

Finally, the last approach to be discussed is strongly connected to Hooghe's and Marks' MLG theory. However, whereas Multi-level Governance focused in the past foremost on the vertical interdependence and its component *multi-level*, the network approach as advocated by the German scholars Kohler-Koch, Eising, and Börzel seeks to highlight the horizontal interdependence, so its *governance* component (Benz, 2009, p.18; Börzel, 2009, p.34). Consequently, also private actors would play an important role in the regulation of the Single European Market in Energy Supply which interact together with their public counterparts in complex networks at various tiers to generate and implement political decisions (ibid.).

Two different theoretical views on networks and governance have been elaborated in the past years. The first, the Anglo-American policy-network approach as laid down in works by Rhodes aims at examining the influence of interest groups on state's decision in a given policy area. The other one, in contrast, explains networks as an alternative form of governance to states and hierarchies. It is more normative than analytical compared to the former and is more concerned on the structures and processes in which joint policy-making by public and private actors could be embedded (Bache et al., 2011, p.31; Börzel, 2009, p.29).

This last concept defined as Network Governance has been developed in works by Kohler-Koch and Eising. Their approach shall be applied for the analysis on the European Energy Market with a particular emphasis on the five following features:

First, according to the Network Governance approach “[t]he state is vertically and horizontally segmented and its role has changed from authoritative allocation ‘from above’ to the role of an

‘activator’” (Kohler-Koch & Eising, 1999, p.5). The governments’ main task is henceforth no more to decide for the people but bring relevant public and private actors together by offering them an institutional framework to reduce transaction costs and give stability to self-regulatory agreements (ibid., p.26). This is the state’s activator role.

Secondly, the preferences of the involved actors at the European negotiating table are not as inflexible as Moravcsik assumes. Instead, due to a dominance of regulatory policies at EU level the participants are problem-solving oriented and seek less to maximize their individual utility (Kohler-Koch & Rittberger, 2009, p.8).

Thirdly and most prominently, the patterns of decision-making have changed: The governance system is no more hierarchically structured with the state at the centre, but organized by negotiations among participants on equal footing (Jordan & Schout, 2006, p.6; Coen & Thatcher, 2008, p.50). Moreover, networks do not only include those who have been elected to solve the problem but also participants who can bring needed resources (legitimacy, information, expertise) into the forum (Börzel, 2009, p.30). As this, of course, involves numerous private actors, “the once clear-cut borderlines between the public and private spheres become blurred” (Kohler-Koch & Eising, 1999, p.26). How present the state is in such networks, is according to Jordan and Schout (2006) the decisive criterion to distinguish in a model of self-organizing systems and those with a governments in a steering role (p.210)<sup>2</sup>. Additionally, they identified in EU governance a variety of settings beginning with informal meetings with no operating procedures, rules and regularity up to strong regulated fora with exact procedural rules at fixed dates. Their hypothesis in this regard is that contested policies such as energy market regulation will require high-regulated networks at EU level with a public actor in a guiding position (ibid.)

Fourthly, all participants accept the outcomes of the bargaining process as binding decisions, even if it contradicts their preferred option (Börzel, 2009, p.33).

Eventually, network governance in the EU also highlights the multiple levels of policy-making. Subsidiarity is the guiding principle which stipulates that only those policies should be treated at the EU level which could not be effectively solved at a lower stage (Kohler-Koch & Eising, 1999, p.26). Thus and as mentioned above, Network Governance in the EU does not merely involve negotiations on the horizontal level between various public and private actors, but also between the distinct tiers – supranational, national and subnational.

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<sup>2</sup> However, for the following Network Governance will be treated in its ideal form of private-public negotiations on equal footing, thus as a self-organizing system. The model of governments in a steering role, in contrast, refers to private self-coordination in the shadow of supranational hierarchy (cf. chapter 2.2).

Network Governance is thus characterised by its private-public interactions in which states negotiate at equal footing or are at best the activator and moderator of bargaining processes. Accordingly, the regulation of the European Energy Market would be shared among private and public actors in which states have lost their decisive role. However, some scholars have criticised Network Governance: On a normative perspective the concept with its numerous elected as well as non-elected actors and overlapping competences is liable to lead to a diffusion of responsibility (Jordan & Schout, 2006, p.274). Furthermore, it undermines parliamentary sovereignty and government executive control when numerous interest groups such as companies are involved in EU decision-making processes (Kaiser et al., 2009, p.11). From an analytical perspective, Jordan and Schout (2006) doubt if Network Governance without a guiding state could be realized in day-to-day policies (p.210). Someone, for instance, has to design the network, maintain its structure, diagnose frictions and solve conflicts (ibid.). Hence, the concept's ideal form of a non-hierarchical structure would never be feasible. Apart from this, it is not at all ensured if national governments are willing to share their task of policy-making. Börzel (2009), for instance, argues that based on empirical findings, crucial decisions in the EU are still bargained under the institutionalized legislative process between the Commission, the European Parliament and the Council (p.38).

Having discussed three prominent and distinct approaches to European Governance, their criticisms have revealed that all are not able to explain the EU system to the satisfaction of the scientific community. Hence, the thesis will in the following add to the overall theoretical concept of European Governance a modular approach which does not seek to explain the EU system in its entirety, but in its plurality and distinctness of policy areas and governance modes.

## **2.2 The modes and forms of governance**

Fritz W. Scharpf (2001) was one of the first authors claiming in his article *Notes toward a Theory of Multilevel Governing in Europe* that the EU system should not be analysed through the theoretical lens of holistic thinking (p.26). Instead, by emphasizing the variances of competence structures among the distinct EU policies, the German scholar explains the need for "lower-level and simpler concepts describing distinct governing modes in European polity" (ibid. p.8). Such a model would suit more accurately to the high-complex governance system in the EU. Moreover, it is to a greater extent applicable for studies of national government or International Relations raising thus the concept's generalizability to non-EU polities (ibid.).

The four following governance modes Scharpf discussed in his article have been further elaborated by numerous political scientists (cf. i.a. Benz 2005, 2009; Tömmel, 2008; Börzel



2007, 2008). Nowadays defined as the forms and patterns of interactions among institutional actors, the term governance modes can be distinguished in the ideal type of hierarchy, negotiations, competition (mutual adjustments), and networks (Tömmel, 2008, p.26).

1. *Hierarchy* refers to unilateral policy-making and regulation by a central government (Benz, 2009, p.86). Thus, it apparently falls outside the scope of governance modes which are based on interactions rather than on authoritative instructions *from above*. However, to maintain a complete toolkit for explaining *all* governance options in the EU, hierarchy as one important mode will not be excluded. Applying the term to the European Union would thus mean that supranational actors, such as the European Commission, the European Central Bank (ECB) or the ECJ, would exercise their power without effective influences by Member States' governments (Scharpf, 2001, p.14).
2. *Negotiations*, on the other hand, are based on interactions by institutionalized actors who though not equally allocated in rights or share of resources (information etc.) have always the option to veto. Unilateral preferences by the counter side are, therefore, not enforceable (Tömmel, 2008, p.26).
3. *Competition* or more specifically *mutual adjustment* is the result of increasing economic interdependence which forces national governments to adapt their domestic policies in response, or anticipation of the policy choices of other governments (Scharpf, 2001, p.11). The rationale behind it in EU politics is to enhance regulation standards while accomplishing the Single Market project. However, likewise it can lead to *a race to the bottom* in terms of employment standards or public health care (ibid, p.20).
4. *Coordination* as forth governance mode aims inter alia to prevent such detrimental effects of liberalized competition (ibid.). It is often used when binding decisions are owing to diverging Member States' interests not expected. The procedures included in this governance mode are various, but have all the common features of voluntary cooperation and jointly agreed objectives (Tömmel, 2008, pp.26; Benz, 2009, p.86). A prominent example would be the Growth and Stability Pact as an Open Method of Coordination (OMC) in the Economic and Monetary Union (EMU).

In practice of EU politics, however, these modes of governance are mixed among or, more precisely, nested into each other and occur, therefore, seldom in their ideal manifestation (Benz, 2009, p.91). In this regard, the vast majority of European negotiations, for instance, are nowadays embedded in a hierarchical structure since the increasing use of the co-decision procedure (QMV + EP as co-legislator; cf. chapter 2.1.2) has undermined the negotiation principle that participants, so Member States, control the process at least by their veto (Börzel,

2008, p.66). Thus the defeated minority has to bow the majority's instruction in the Council: A hierarchy has evolved as a shadow behind the negotiations. The same applies to hierarchy in the shadow of competition when authorities are competing with other organization in terms of effectiveness in New Public Management (NPM) schemes and to other possible mixes of governance modes (ibid.).

Building on this nesting assumption, Tanja A. Börzel developed an analytical scheme by subdividing the aforementioned ideal categories according to their mix of governance modes<sup>3</sup> (negotiations in the shadow of hierarchy etc.) and according to their mix of participants (public/private/public-private). The results are so-called governance forms defined by Börzel as institutionalized forms of political coordination (ibid., p.69). They are distinguished as follows (cf. table 1):

1. *Supranational Centralization* is the hierarchical mode of EU's supranational actors (Commission, ECB, ECJ etc.). It is most prominently in the EMU where the ECB steers the monetary policy autonomously (Börzel, 2007, p.198).
2. The form of *supranational joint decision-making*, in contrast, describes public negotiations in the shadow of hierarchy when negotiations in the Council are constrained by QMV, EP involvement and enforcement power of the Commission and the ECJ (ibid., p.200). Representing the ordinary legislative procedures, this form is today the most common in formal EU policy-making. Despite the significant role of the Commission and ECJ, the Council, however, retained its dominant role in controlling the process through its Committee of Permanent Representatives (Coreper), its numerous working groups and expert committees which "prepare legal proposals and execute Council decisions (comitology)" (ibid.). Additionally, the shadow of (supranational) hierarchy decreases when decisions are made under unanimity and without the Parliament (Börzel, 2008, p.70).
3. *Mutual recognition* as form of public-actor competition in the shadow of hierarchy aims to limit the race to the bottom without creating a centralized European regime of regulation. Launched by the ECJ's judgment Cassis de Dijon (1979) it stipulates that in the absence of harmonization a product lawfully marketed in one Member State should be allowed to be sold in any other Member State, even when it does not fully comply with the standards of the state of destination (Chalmers et al., 2010, p.764; Majone, 2010, p.23).
4. The *intergovernmental mode* explains primarily the Council's negotiations in high politics such as in the Common Foreign and Security Policy where decisions are made on unanimity and without the participation of the EP. Member states have, therefore, retained

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<sup>3</sup> It should be noted that the modes of negotiations and coordination are summarized by Börzel to bargaining systems based on mutual influencing.

their veto; a hierarchical shadow does not exist. Yet, another form is also the coordination in so-called European Regulatory Networks (ERN) where according to Coen and Thatcher (2008) Independent Regulatory Agencies (IRA) attune their policy measures in institutionalized bargaining and coordination fora (pp.49).

<i>institutionalized rule structures</i>	Hierarchy			Negotiation System		Competition System
<i>modes of co-ordination</i>	hierarchical (asymmetrical influence)			non-hierarchical (mutual influence)		Non-hierarchical (mutual adjustment)
	Authoritative Decision			Agreement via Bargaining or Arguing		Competition
<i>governance mix (embeddedness)</i>		negotiation in the shadow of hierarchy	competition in the shadow of hierarchy		competition in the shadow of negotiation	
<i>actors</i>						
public	supranational centralization (supranational/hierarchical mode)	supranational joint decision-making - majority - unanimity (joint decision mode)	mutual recognition	intergovernmental co-operation (intergovernmental mode)	open method of co-ordination – governmental	regulatory/ tax competition
public-private		private self-co-ordination in the shadow of hierarchy		network governance	open method of co-ordination – intermediate	
private				private interest government		
forms of governance (institutionalized forms of political co-ordination) in the EU						

**Table 1:** The forms of Governance according to Tanja A. Börzel

Source: Börzel, 2007, p.198

5. The *Open Method of Coordination (OMC) in its governmental form* represents the competition in the shadow of negotiations among public actors and has been already explained with the Stability and Growth Pact (cf. above). It is based on the non-binding forms of benchmarking and best practice policies (Héritier & Lehmkuhl, 2011, p.52). *The intermediate form*, in contrast, aims to include private actors as well, but has been scarcely observed in European politics (Börzel, 2008, p.72).
6. *Network Governance*, moreover, describes bargain systems between public and private actors at equal footing (for further explanation cf. chapter 2.1.3).
7. *Private self-coordination in the shadow of hierarchy* refers to the delegation of regulative policies from public to private actors. Thus first, public actors confer their competences by directives defining “the overall framework and private actors subsequently decide on the specifics of the regulation” (Héritier & Lehmkuhl, 2011, p.60). Moreover, supranational actors such as the Commission retain their right of ultimate decision when an agreement in the private forum is not possible (Börzel, 2008, p.73).
8. *Private interest government* are according to Börzel the sole governance form without public actors (ibid.). Concrete examples are the umbrella associations in Brussels, where national interest groups merged together and seek to define their common interest out of the various national preferences.

9. *Regulatory and tax competition* is eventually the last form of governance representing the ideal mode of competition. It encompasses all competition based interactions which neither apply to mutual recognition, nor to the OMC (ibid.). This would refer, for instance, to the mutual adjustment of Member States' tax rates to maintain their competitiveness on the European Market.

In summary, several modes and forms of governance can be distinguished demonstrating that European Governance involves, indeed, a huge variety of policy-making tools.

### 2.3 Hypotheses generation

Due to its accuracy in explaining the various options, the thesis will in the following apply Börzel's scheme to the European Internal Energy Market. Thus, its governance structure will be categorized in one or maybe several governance forms. The thesis will, therefore, be able to determine more precisely the governance structure of the policy, than the overall concepts of LI or MLG would do. Nonetheless, the overall concepts as well as the distinct governance forms shall be applied to the analysis simultaneously. Table 2 shows, how the two theoretical concepts can be combined:

		The Governance Approaches		
		Liberal Intergov.	Multi-level Governance	Network Governance
Governance forms according to Börzel	Supranational Centralization	Only scarce influence by liberalizing the market on case law	Sign. influence by liberalizing the market on case law (incl. the threat to use it)	Sign. influence by liberalizing the market on case law (incl. the threat to use it)
	supranational joint decision-making	Present, but with a decisive role for the Council	Present, with a balanced decision-making power	Present, with a balanced decision-making power and sign. influence by private actors
	Mutual recognition	Only scarce influences	Significant influence while highlighting the need for harmonizing national rules	Sign. influence by highlighting the need for harmonizing nat. rules
	Intergovernmental mode	Regulation by Council or IRA negotiations	Not present	Not present
	OMC (in its gov.& intermediate form)	Only scarce influences	OMC supervised by the Commission to control the implementation process	OMC supervised by the Commission to control the implementation process
	Private self-coordination in the shadow of hierarchy	At best scarce influences or for elaborating non-binding rules	Sign. influence under supervision of the Commission	Sign. influences with any or less supervision by the Commission
	Network Governance (in its strict sense)	Not present	Can be present	Private-public negotiations at equal footing with a significant share in policy-making

**Table 2: Combination** of the overall approaches to European Governance with Börzel's analytical scheme of governance forms as laid down in table 1. Network Governance in its strict sense refers thereby to private-public bargains at equal footing, whereas its overall approach, so Network Governance in a wider sense, allows also for other Governance forms, such as supranational joint decision-making with a significant influence by private actors.

Derived from table 2, three distinct hypotheses can be generated:

1. If Moravcsik's LI approach is most applicable, the Internal Energy Market must be primarily regulated by the governance forms of intergovernmental cooperation (including IRA cooperation) or joint decision making in a lower shadow of (supranational) hierarchy. Member States have, therefore, retained their pivotal role.
2. If, in contrast, Hooghe's and Marks' MLG approach is most applicable for explaining the governance structure, the regulative regime must be determined by forms of joint decision making or private self-coordination in a large shadow of hierarchy, mutual recognition or by the OMC. Member States would play at best a *primus inter pares* role.
3. If, finally, Kohler-Koch's and Eising's Network Governance approach is most applicable, the regulation would be driven in private-public negotiation systems on equal footing. Member States would consequently have lost their decisive role as well.

Which hypothesis is the most likely to be met for the regulative structure of the European Energy Market? To gather some evidences for a first expectation, a brief introduction on the specific nature of an Energy Market is necessary. This is the aim of the following background chapter.

### **3. Background**

The energy market is not a simple concept, but rather a complex set of sub-markets for distinct energy sources. Three different markets - for energy generation, transmission and retail - are encompassed by its definition (Eberlein, 2010, p.61). Moreover, it is vital to distinguish between primary and secondary sources of energy: The first one describes the present good as found in its natural state such as coal, oil, gas, nuclear fuels or renewable energy sources (Dehousse, 2007, p.11). It can be used directly, but also be transformed through combustion or kinetic processes into secondary energy, notable in electricity or heat (Dehin et al., 2007, p. 26). In the following, the thesis will focus on the Internal Market in Electricity and Gas, as both have been at the centre of liberalization and Europeanization initiatives (Dehousse, 2007, p.15; cf. chapter 1). Yet, since both markets are strongly related to each other and have been liberalized simultaneously, they shall be assessed together under the label European Internal Energy Market (Dehin et al., 2007, p.25). Moreover, it should be noted, that the analysis will limit itself to the regulation of the Single Energy Market to the exclusion that distributive or redistributive measures (cf. chapter 1) but also other parts of EU energy policy such as external energy policy or the promotion of renewable energy sources are not considered.

Thus, what are the specific features of the energy market(s) in Europe? Its characterization can be simply drawn on the basis of its overall objectives efficiency, security of supply, and sustainability.

The first refers to an energy supply by a competitive energy branch at reasonable prices (Schulenberg, 2009, p.28). However, in particular the cost-effectiveness can be undermined by the so-called Transmission and Distribution System Operators (TSO/DSO) which both (the former at the long and the latter at the short distance) link the Energy Operators with the consumer through their gas and electricity grids (Dehin et al., 2007, p.27). Since it is for competitors not profitable to enter into the market by constructing a second high-voltage line, for instance, the first operator usually retains its dominant position. Hence, the network segments are characterized by natural monopolists who may charge excessive prices for transmission services (Mankiw & Taylor, 2008, pp.340). Moreover, they are often owned by the energy operators themselves which are due to the high investment costs for building and maintaining the grids not keen to share the networks. The so-called vertically integrated companies, consequently, discriminate other operators in the usage or charged them with excessive network tariffs (Pollak et al., 2010, p.71). Therefore, either a public regulation or a nationalization of the energy sector is obviously needed to achieve cost-effectiveness (ibid.). The EU opted in its Third Legislative Package for a regulated third-party access (TPA) which shall ensure the access of

the grids for all energy companies against payment (Reichert & Voßwinkel, 2010, p.16; Eising, 2002, p.92). Moreover, to avoid market manipulation by vertically integrated companies, their corporate sectors *energy generation* and *transmission* shall be unbundled (Héritier & Moral Soriano, 2002, p.371; Dehin et al., 2008, p.33). Albeit the Commission favoured the strictest form, an ownership unbundling which provides for a complete proprietary separation of network operators from the energy company, it had to acknowledge also two further options whilst the legislative process for the Third Energy Package (Reichert & Voßwinkel, 2010, p.16). One is the possibility to establish upon approval by the Commission an Independent System Operator (ISO) which is personally as well as in terms of property rights independent from the energy company, but whose revenues are still for the parent group (Pollak et al., 2010, p.121). The energy operator, therefore, loses the control of the network but receives the amount of network tariffs (ibid.). The third option as launched in the discussions by France and Germany is the Independent Transmission Operator (ITO) which is in terms of legal property rights not separated from the energy operator but stands under strong regulatory surveillances (Reichert & Voßwinkel, 2010, p.17; Eikeland, 2011, p.252).

Likewise, the second goal of supply security defined as the secure and uninterrupted satisfaction of energy demand on a long-term basis shows the need for a strong and present state in energy markets. Electricity, for instance, cannot be stored, therefore, “distortions and disparity between consumption and generation, even for a millisecond, may cause burnout, blackouts, and damage to equipment” (Levi-Faur, 1999, p.180). Furthermore, electricity is the necessary condition for the usage of important goods and services, such as public transport or the IT equipment (Schulenberg, 2009, p.33). In this regard, foremost the access of non-EU companies, such as the Russian operator Gazprom, to the grids was highly contested throughout the Union and is now ensured by the Third Legislative Package under certain conditions (Pollak et al., 2010, p.123; cf. also chapter 4.2.2).

Eventually, the principle of sustainability defined as an energy supply in accordance with environmental policy demonstrates the policy’s high sensitivity for Member States. Whereas, the objective as such is widely recognized, the mean to achieve it is still contested. Some countries as France favour the construction of nuclear power plants to meet the CO<sup>2</sup> reduction targets, whereas its European partner Germany has recently announced its exit-strategy to abandon this sector. In this regard, the respective energy mix in each Member State differs significantly (Schneider, 2010, p.28). Moreover, clear divergent perceptions of the state’s duties in this market sector (state-owned Energy Operators in France and Italy vs. privatized enterprises in the UK) give evidences to assume that Members States would never allow to lose their pivotal role in regulating the new European Internal Energy Market (ibid., p.27; Eberlein, 2010, p.63).

Hence, this chapter shows that Member States are due to the importance of energy markets not likely keen to liberalize the sector for the Single Market project. A regulative framework is obviously needed to prevent monopolistic situations. Moreover, an Europeanization towards a competence increase for supranational actors may be as well unlikely to occur, as long as inconsistencies in market structures – in terms of energy sources and regulation – inhibit the cooperation. Hence, for the following analysis the thesis expects that only the first hypothesis of chapter 2.3 will not be falsified:

*Since the regulation of energy markets is in the public interest and cooperation at European level is complicated by basic divergences, Moravcsik's LI approach is expected to be most applicable in explaining the regulation of the Internal Energy Market primarily by governance forms of intergovernmental cooperation (including cooperation of IRAs) or joint decision-making in a lower shadow of (supranational) hierarchy. Member States have, therefore, retained their pivotal role.*



## 4. Analysis

The following aims at analysing the thesis' research question, if Member States have lost their pivotal role in the IEM regulation. This will be examined by a two-tier analysis which first will scrutinize the governance structure according to the Treaty provisions (primary law) followed by an thorough study on the rule of competences as laid down in the relevant legislations (secondary law). However, such an approach would only enable the analysis to detect the governance forms which potentially *can*, but not actually *do* occur. Thus, the thesis will rely also on recent and relevant scientific literature which, additionally, can be used for the interpretation of the legal texts.

### 4.1 Competences and governance structures according to primary law

Since December 2009 the EU is based on two new foundations. These are the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) which has superseded the old Treaty establishing the European Community (TEC) in its rule of competences. In particular for the governance structure of the Internal Energy Market some shifts are note-worthy.

The amended provision of Art. 4 (2) TFEU, for instance, assigns the EU for the first time<sup>4</sup> an explicit competence in energy policy which it has to share with the Member States (Pollak et al., 2010, p.112). Therefore, Member States are in accordance with Art. 2 (2) TFEU allowed to legislate to the extent that the Union has not legislated (Chalmers et al., 2010, p.208).

Additionally, an own chapter for energy policy including a special competence for this policy has been amended to the Treaty as referred to in Art. 194 TFEU (Fischer, 2010, pp.351; Schneider, 2009, p.301). The provision first stipulates the objectives of EU energy policy followed by the determination of the legislative procedures to achieve and ensure these goals. Albeit special EU competences in energy policy are, therefore, for the first time enshrined in the Treaties, its mere launch shall not be overstated giving the fact that passed legislations as the First, Second, and Third Energy Packages have been based on the General Single Market provision ex Art. 95 TEC (Art. 114 TFEU). Hence, provisions to launch its proposal on energy market policies were already given for the Commission. In this regard, it is vital to examine if the new provision has further widen the scope of EU competences in the regulation of the Energy Market or if it holds merely a declaratory effect. Before investigating the legislative procedures as laid down in Art. 149 (2), (3) TFEU, special emphasis will be made on the objective Art. 194

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<sup>4</sup> Although Art. 3 (1) lit. u TEC determined that EU activities can encompass measures in the field of energy, the provisions was never interpreted as a basis to legislate (cf. Pollak et al., 2010, pp.109).

(1) lit. a TFEU which constitutes the competence basis for completing the Single Energy Market (Reichert & Voßwinkel, 2010, p.13).

Considering the objective's wording, "to ensure the functioning of the Energy Market", a minimal extension of competences can be detected: Whereas regulatory legislation based on ex Art. 95 TEC required a barrier for intra-community trade, such as discriminatory measures, future legislations based on Art. 194 TFEU can also encompass measures to combat *non-discriminatory* market failures without an explicit cross-border criterion. Such a reading of Art. 194 (1) lit. a TFEU can be derived from its reference to Energy Market in contrast to *Internal* (Energy) Market as laid down in ex Art. 95 TEC (Schulenberg, 2009, pp.380). Hence, the Union is nowadays also entitled to launch regulatory measures to prevent, for instance, an extensive increase in energy costs for remote rural areas within a specific country (ibid.).

The procedure for legislating secondary law as referred to in Art. 194 (2) TFEU is the ordinary legislative procedure. Being according to Art. 294 TFEU the co-decision mode, it shares the policy-making competence among the Commission as sole agenda-setter and the EP and Council as equal partners of decision-making, whereas the latter has to decide on QMV. However, the launch of the new provision did not lead to a major change in European energy politics since the old provision ex Art. 95 TEC has already allowed for policy-making on energy issues under the ordinary legislative process (Schulenberg, 2009, p.406). Furthermore, the Member States reserve their sovereignty according to Art. 194 (2) TFEU in the "right to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply". Thus, a denuclearization, for instance, would be excluded from the co-decision mode (Pollak et al., 2010, p.113). Finally, all measures of a primarily fiscal nature require a special legislative procedure under which the Council acts unanimously and without effective EP involvement as those legislations affects one part of Member States core sovereignty, the budgetary policy (Schulenberg, 2009, p.406). Yet, being a (re)distributive policy instrument, it falls out of the thesis' focus.

In a nut-shell, the amended TFEU provisions have increased the Union competences in a limited scope. Though not explicitly mentioned in the old treaties, the Commission already achieved to base its legislative package on the General Internal Market provision ex Art. 95 TEC which stipulated a co-decision mode of policy-making. Therefore, it can be concluded that the new chapter on energy policy hold only a declaratory function; however, it constitutes a clear competence basis raising thus transparency as well as legal certainty (Pollak et al., 2010, pp.113). Therefore, the introduction of the energy chapter renders an integration step visible which already has been taken.

Nevertheless, it should be taken into account that the Commission and the ECJ can also act under a governance form of supranational centralization: The former could, for instance, apply competition rules (Art. 101-106 TFEU) against the utilities to combat the mono- and oligopolistic structure on the energy markets (Eikeland, 2008, p.18; Geden & Fischer, 2008, p.32). In 2009, GD Competition imposed fines against the two major European energy operators E.ON and GDF Suez of 553 Mio. Euro each to punish their dominant position on the gas market (Pollak et al., 2010, p.100; Eikeland, 2008, pp.19). Furthermore, the ECJ could liberalize the market by applying the free movement provisions. In 1994, the Court already made a first step, in this regard, defining electricity as a good being applicable for the free movement provisions<sup>5</sup> (Pollak et al., 2010, p.101). Moreover, the ECJ is instructed to review whether Member States comply with the non-discriminatory principle of commercial state monopoly enshrined in Art. 37 TFEU (Schulenberg, 2009, p.266). Consequently, the Commission as well as the Court seems to have effective instruments to liberalise the market by breaking-up monopolies and opting for negative integration policy instruments, so the dismantling of discriminatory obstacles.

Yet, in practice, the ECJ has already limited itself and the Commission's competences by its case law. Its ruling in *Campus Oil* in 1984, for instance, has confirmed that the derogations of public policy and security referred to in ex Art. 30 TEC (Art. 36 TFEU) apply to the energy ex- and imports, restricting thus the applicability of the free movement provisions (Pollack et al., 2010, p.101). Additionally, ex Art. 86 (2) TEC (Art. 106 (2) TFEU) constitutes a major constraint in stipulating that undertakings providing services of general economic interest (SGEIs) "shall be subject to the rules contained in the Treaties, in particular, to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".<sup>6</sup> Referring to this provision, the ECJ interpreted in its series of *Energy Monopoly Judgments*<sup>7</sup> in 1997 that liberalising energy markets raises concerns on the security of supply objective, thus obstructing the undertakings' performance of this particular task (Chalmers et al., 2010, p.1032; Schulenberg, 2009, p.299). The Court consequently opposed the Commission's pro-market position (Pollak et al., 2010, p.101). Owing to its general wording - "subject to the rules contained in the Treaties, in particular, to the rules on competition" - Art. 106 (2) TFEU functions consequently as a vanishing point for Member States and companies to avoid the liberalisation of the energy market by the free movement provisions, the

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<sup>5</sup> Later the ECJ affirmed the applicability of gas to the free movement provisions as well (Pollak et al., 2010, p.101).

<sup>6</sup> Another constraint could be seen in Art. 14 TFEU which has been inserted in the Amsterdam Treaty at the request of France highlighting the importance of SGEIs. Its implication of European Law is, however, contested (cf. Pollak et al., 2010, p.101).

<sup>7</sup> The 1997 energy monopoly judgments encompass the proceedings against exclusive im- and export rights for electricity in France (here also for gas), Netherlands, Italy, and Spain initiated by the Commission in 1991 on the basis of ex Art. 31 (Art. 37 TFEU) (Schulenberg, 2009, p.266).

competition rules, and the rules on commercial state monopolies (Schulenberg, 2009, p.294). Establishing a European Internal Energy Market by negative integration was thus almost not feasible and raised the need for a regulatory framework at European level to ensure that the market project was not failed at this stage.

This exemplifies the reciprocal relationship between secondary law and the competition rules of primary law: On the one hand, regulations and directives establishing a regulatory European framework are capable at reducing the scope of Art. 106 (2) TFEU insofar they effectively ensure the objective of supply security. On the other hand, competition rules and progressive ECJ rulings can be used by the Commission as potential threat against Member States in the legislative process to harmonize their policies (Schulenberg, 2009, p.298; Pollak et al., 2010, p.102). Likewise the Commission can influence negotiations in the Council by initiating infringement proceedings on the basis of Art. 258 TFEU before the ECJ when Member States have improperly implemented directives (Geden & Fischer, 2008, p.38; Eikeland, 2011, p.248). In 2006, the Commission opted for this instrument after its own assessment reports on the implementation of the Second Legislative Package of 2003 had revealed deficiencies in the enforcement (Geden & Fischer, 2008, p.59; Dehin et al., 2008, p.35). 17 Member States have been brought before the Court, “in the hope that they will get the message and will be prepared to enter into debate for a common policy” (Héritier & Moral Soriano, 2002, p.371). It successfully marked the starting point for the Third Energy Package.

Applying the findings to Börzel’s scheme, two distinct governance forms can be thus detected: The first as laid down in Art. 194 TFEU is the co-decision mode under QMV which shares the policy-making competence among the Commission, EP, and Council. Though for the first time enshrined in the Treaties, the amendment of an energy chapter has not significantly increased the Union competence. The second governance form in the policy is the supranational centralization mode which functions as a shadow of supranational hierarchy when the Commission and the ECJ threat to apply i.a. competition rules to continue the liberalization of the market. However, this shadow has been diminished by the Court itself confirming Art. 106 (2) TFEU and Art. 36 TFEU as barriers for negative integration.

Whether this shadow is low enough to conclude that Moravcsik’s LI approach is most applicable in explaining that Member States have retained their decisive role is hard to say. For a single state it seems clear, that under QMV governments could hardly prevent unwanted legislations alone. A majority in the Council, on the contrary, is able to block those directives or regulations. When then the Commission threatens to opt for negative integration, Member States can whip out the card of Art. 106 (2) and Art. 36 TFEU. Yet, this strategy is increasingly constrained by the establishment of the European regulatory regime as laid down in the

legislative energy packages. The application of competition rules thus wins back its sharpness; the aforementioned E.ON and GDF Suez decisions are demonstrating this.<sup>8</sup> Moreover, it has to be bear in mind that the success of such a strategy is in the hand of the *supranational* entrepreneur ECJ. And though it ruled in the past more *Member States-friendly*, it may one day revise its judgments. Hence, after even examining EU primary law, the hypothesis as generated in chapter 3 is already in question.

## **4.2 Competences and governance structure according to secondary law**

Having revealed that Member States' competences are constrained by a supranational shadow of competition law and the co-decision mode in the legislative procedure, the following part will set its focus on the provision as laid down in secondary law. The directives and regulation are much more important in explaining the regulatory governance structure as the legislation aims to specify the vague Treaty articles (Pollak et al., 2010, p.115; Sanden, 2009, p.79).

Accordingly, this section will examine the competence provisions as referred to in the Third Legislative Package. It consists of five legislative acts with (1) *Directive (Dir.) 2009/72/EC on common rules for the internal market in electricity*, (2) *Dir. 2009/73/EC on common rules for the internal market in natural gas*, (3) *Regulation (Reg.) (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity* and (4) *Reg. (EC) No 715/2009 on conditions for access to the natural gas transmission networks* as amendments to the Second Energy Package of 2003. The fifth legislation, *Reg. (EC) No 713/2009*, aims at establishing the European Agency for the Cooperation of Energy Regulators (ACER).

The following analysis will show that competences and tasks are shared in a new European Regulatory Network among six distinct actors or sets of actors, namely among the Commission, Member States' scrutiny committees, the National Regulatory Authorities (NRA), ACER, the two European Network of Transmission System Operators (ENTSOs), regional initiatives, and the private-public fora.

### *4.2.1 The Commission and the comitology*

Chapter 4.1 has already shown that the Commission is according to primary law equipped with more or less effective tools to accelerate the completion of the IEM. In this regard, also the Third Legislative Package assigns the supranational entrepreneur crucial competences to ensure an effective regulatory framework. To maintain a clear structure, the Commission's task and competences according to the secondary *acquis* will not yet be examined in this chapter in detail. Due to its close linkages to the other regulatory actors, the NRAs, the new agency ACER,

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<sup>8</sup> Additionally, it is estimated, that E.ON's sale of business operation as a result of pressure by the Commission can be amounted in 2008 with approx. seven Billion Euro (Pollak et al., 2010, p.123).

and the ENTSOs, an in-depth analysis will be done in the chapters on the respective institutions simultaneously.

Notwithstanding, an accurate reading of the five legislation revealed that, in general, the Commission is primarily concerned with the supervision of the other regulatory actors and the adoption of guidelines to specify or adapt the current legislations to changing circumstances (cf. Schneider, 2009, pp.57). Such a specification of the secondary *acquis* includes also the right for the Commission to set-up minimum standards for harmonization (ibid., p.63). This raises two considerations: First, the Commission performs not as a pure regulatory actor in the Internal Energy Market regime but as a coordination and monitoring unit (Sanden, 2009, p.201). Borrás called it, therefore, correctly a *network broker* (cited in ibid.). Secondly, the Commission acts as a legislator since it seems to be allowed to amend the given directives and regulation by supplementing specifying elements at their discretion. Yet, the Commission's leeway decreases when considering that the autonomous legislation is monitored by the committees of Member States' representatives through the so-called comitology procedure. According to their scope of supervisory power, these "small-scale Councils" (Tömmel, 2006, p.129) can be distinguished in the three categories advisory, administrative, and regulatory committees (ibid.).

Under the advisory procedure the Commission acts more or less autonomously. It can take the notification of the Member States' representatives into account but is not required to do so (Huster, 2008, p.42). Under the administrative procedure, in contrast, the committees are able to prevent the Commission's measures – but only when they achieve to vote with a qualified majority against the legislative act. Do they fail to reach a qualified majority, is the legislation enacted anyway (Tömmel, 2006, pp.129). The last procedure refers, finally, to the regulatory committees of scrutiny where the representatives have to approve the legislation under QMV. If they fail to reach QMV under this procedure, is the Commission required to forward the proposal to the Council and the Parliament which are then instructed to decide under the ordinary legislative procedure (Huster, 2008, p.44).

This last mentioned procedure does apply to the Third Legislative Package. According to Art. 51 (3) Dir. 2009/73/EC and Art. 28 of Reg. (EC) No 715/2009, the *Committee on the implementation of common rules on the transport, distribution, supply and storage of natural gas* is instructed to monitor the Commission's task in the gas market, whereas the *Committee on the implementation of legislation on conditions of access to the network for border exchanges in electricity* has been - as referred to in Art. 46 (2) Dir. 2009/72/EC and Art. 23 (1) of Reg. (EC) No 714/2009 - set-up to control the Commission in the regulation of the electricity market. Consequently, the Commission's tasks are supervised by the harshest form of monitoring. However, empirical studies have shown that measures by the Commission have been rarely

rejected in the regulatory committees. An explanation can be found in the facts that first, the Commission is often keen to adapt its measures to the Member States' interest and secondly, uses effectively the intergovernmental forum for the consensus-building of its own proposals (Tömmel, 2006, p.131; Huster, 2008, pp.162).

Moreover, the Commission publishes beyond the comitology procedure annual benchmarking reports which shall, as governance form of OMC, reveal how the Third Legislative Package is implemented in each Member State (Sanden, 2008, pp.274).

Hence, the Commission is the coordinating supervisor in the regulation of the Internal Energy Market with an assigned task to specify the present legislations. Although these tasks are in turn monitored by the comitology procedure, the committees rarely block the Commission's work. Instead, it is used as a forum of consensus-building in which a co-decision mode among the Commission and the Member States ensures supervision in the interest of both.

#### *4.2.2 The European Regulatory Network and the new agency ACER*

The Commission is thus a *network broker* and coordinating supervisor in the IEM regulation. A strict centralized system of supranational hierarchy has consequently not emerged. Instead, the following will show that the EU opted for a more decentralized system with a network of National Regulatory Authorities (NRAs) guided by a monitoring European agency and the Commission.

Already the forerunners of the current energy legislations, the First and Second Energy Package, provided that Member States shall establish competent authorities for the regulation of the network access which acts independently from the industry as well as from their national governments (cf. Art. 20 (2) Dir. 96/92/EC; Art. 21 (2) Dir. 98/30/EC; Art. 23 Dir. 2003/54/EC; Art. 25 Dir. 2003/55/EC). The new provisions again emphasized the independence requirement by stipulating that NRAs are not allowed to act upon instruction of governmental tiers or other public as well as private institutions (Art. 35 (4) Dir. 2009/72/EC; Art. 39 (4) Dir. 2009/73/EC). Additionally, Art. 35 (5) Dir. 2009/72/EC and Art. 39 (5) Dir. 2009/73/EC specify the financial as well as personnel autonomy of the NRAs by ensuring them a separate budget and an independent governing committee whose members shall not be part of other industrial or public bodies.

The tasks delegated to the NRAs are numerous including the certification of transmission system operators (TSO) and its tariffs to the networks, the implementation of binding decisions by ACER and the Commission, the monitoring of TSO/DSO's investment budget, the companies' compliance with the unbundling requirements, observations on energy price transparency, and regular assessments on the process of liberalization (Art. 37 Dir. 2009/72/EC, Art. 41 Dir. 2009/73/EC; cf. also Pollak et al., 2010, p.126).

However, the national authorities are not entitled to perform all these tasks autonomously but are nested in a complex system of competences among Commission, ACER, and the two Member States' control committees. The certification of transmission system operators (TSO) from EU countries (Art. 10 Dir. 2009/72/EC; Art. 10 Dir. 2009/73/EC) and non-EU states (Art. 11 Dir. 2009/72/EC; Art. 11 Dir. 2009/73/EC), for instance, reserves for the Commission not only the right to be informed but also to intervene whenever it considers to take measures (cf. also Reichert & Voßwinkel, 2010, p.19). Besides, the Commission is also allowed to set under the comitology procedure specifying guidelines for the certification process of EU and non-EU operators (Art. 3 (5) Reg. (EC) No 715/2009; Art. 11 (10) Dir. 2009/72/EC; Art. 3 (5) Reg. (EC) No 714/2009; Art. 11 (10) Dir. 2009/73/EC).

Furthermore, an interwoven structure can be detected considering the call by the Third Legislative Package for more effective cooperation and exchange of information among the NRAs and in relation to the ACER and the Commission. The latter holds thereby in coordination with the Member States' committees a central steering role in providing guidelines under the comitology procedure (Art. 38 Dir. 2009/72/EC; Art. 42 Dir. 2009/73/EC; cf. also Pollak et al., 2010, p.127). Finally, the new provisions assign the right to NRAs to make binding decisions against network and energy operators, to carry out studies on the functioning of the energy markets, to demand certain information, and to impose dissuasive sanctions (Art. 37 (4) lit. a-d Dir. 2009/72/EC; Art. 41 (4) lit. a-d Dir. 2009/73/EC).

Albeit the cooperation among NRAs is for the first time explicitly mentioned in EU secondary law, the European Regulatory Network is not at all a new concept. Established in 2000 by ten Member States, the European Regulator Groups (CEER) already demonstrated the benefits arose from regulatory cooperation. Although major states as Germany were not yet part of this group - Germany's NRA, the *Bundesnetzagentur*, was only set-up during the implementation phase of the Second Energy Package in 2005 - the Commission decided in 2003 to use this institutional cooperation as an advisory committee under the label of the European Regulators Group of Electricity and Gas (ERGEG) (Eberlein, 2008, p.43). It marked a crucial step towards the institutionalization and Europeanization of the NRAs (Sanden, 2009, p.83).

While CEER continues to exist as an interest group for Europe's energy regulators, ERGEG has been transformed into a new European agency (CEER, 2011). The Agency for the Cooperation of Energy Regulators (ACER) established on the basis of the Reg. (EC) No 713/2009 shall not replace the NRAs but supplement its work (Pollak et al., 2010, p.124). Based in Slovenia's capital Ljubljana the agency acts with its own legal personality as independently as the NRAs (Reichert & Voßwinkel, 2010, p.20).



This is foremost reflected in the organizational structure of the Agency's supreme body, the Administrative Board. This committee appoints and supervises the Board of Appeal, the Director, and the Board of Regulators where senior representatives of the NRAs execute the principal tasks of the agency (Art. 13, 14 Reg. (EC) No 713/2009). Moreover, the Administrative Board adopts the work programme and exercises the budgetary power (ibid.). Its independence is obviously guaranteed since its nine members are appointed by the three main EU institutions: two by the EP, two by the Commission, and five by the Council. Moreover, the Director, the highest-ranked representative in the Agency, can be only dismissed by the Administrative Board in consultation of the Regulatory Board (Art.13 (9) Reg. (EC) No 713/2009). Similar to the ECB the Agency can, therefore, act in a non-instruction bound and depoliticized arena.

Encompassing various measures, the Agency's tasks can be divided into the categories of market monitoring, TSO cooperation, NRAs supervision, and regulation of cross-border infrastructures (cf. ACER, 2011).

Whereas market monitoring refers i.a. to the submission of an annual recommendation report to the EP and the Commission, TSO cooperation describes the supervision of the two new established European Networks of Electricity and Gas TSOs (ENTSO-E/ENTSO-G; cf. also chapter 4.2.3). In this regard, ACER is instructed to monitor ENTSOs' organizational framework and activities. Referring to the supervision of NRAs, the agency shall promote the cooperation among the regulators and is, moreover, instructed to investigate cases in which NRAs, the Commission or the institution itself consider that a decision taken by another NRA was not in compliance with the guidelines (Art. 7 (4) Reg. (EC) No 713/2009). If ACER comes after an objective assessment to the same conclusion, it has to inform the Commission which is then entitled by Art. 39 Dir. 2009/72/EC or Art. 43 Dir. 2009/72/EC to force the NRA to revise its decision (Pollak et al., 2010, p.125). Moreover, binding decisions can be submitted by ACER in the field of cross-border regulation when either NRAs have upon a joint request conferred their regulative competence for a particular case to ACER or simply failed to act within a given period (Art. 8 Reg. (EC) No 713/2009). Eventually, it decides also on exemption from network tariffs and regulation as well as unbundling requirements when the new infrastructure shall be located in the territory of more than one Member State (Art. 9 Reg. (EC) No 713/2009).

Hence, the European Network of Regulators describes a particular set of Member States' negotiation and cooperation in which not governments (or their instruction-bound representatives) act but Independent Regulatory Authorities in transgovernmental fora, such as ACER's Board of Regulators. Moreover, it could be shown that the authorities, so also the Member States, have retained important tasks but are also constrained in their regulative work and cooperation by a hierarchy shadow, since ACER and the Commission monitor their activities

with an effective right to intervene. Thus, the network of regulators can be categorized as negotiation and cooperation in the shadow of hierarchy or - to highlight the participation of non-majoritarian actors – as incorporate transgovernmentalism as defined by Eberlein and Newman (2008, p.26; cf. also Sanden, 2008, p.279).

#### 4.2.3 *Self-regulation ENTSO-E/G*

Apart from establishing a European regulatory agency, the Third Legislative Package provides also for the foundation of a private cooperation among European Distribution and Transmission System Operators (DSOs/TSOs) (cf. Art. 4, 5 Reg. (EC) No 714/2009; Art. 4 & 5 Reg. (EC) No 713/2009). The so-called *European Networks of TSOs for Electricity (ENTSO-E) and Gas (ENTSO-G)* aims at fostering the cross-border collaboration by harmonizing technical standards among national grids and optimizing the cross-border management (ENTSO-E, 2011).

The idea of TSO cooperation was not new, as already six preceding organizations<sup>9</sup> tried to enhance transnational grid connection. In the new gas and electricity associations, however, the distinct actors are incorporated appearing as a single actor for gas and electricity at European level. Their task as referred to in Art. 8 Reg. (EC) No 714/2009 is foremost the elaboration of network codes, compiling a non-binding ten-year Network Development Plan and reporting annually on the status-quo of network cooperation. Networks codes refer thereby to guidelines for the usage of EU-wide transmission networks (Reichert & Voßwinkel, 2010, p.20). Since it encompasses legally binding rules and procedures for network security and connection, energy efficiency, data exchange etc. (Art. 8 (6) Reg. (EC) No 714/2009), it seems to give a remarkable say in terms of technical standards' harmonisation to the private actors ENTSO-E/G. However, it should be noted that the leeway of this private self-regulation is limited by framework guidelines and only binding upon approval of the Commission. Likewise, the latter can either decide to elaborate own network codes under the comitology procedure or delegate this task to the agency ACER (Art. 5 Reg. (EC) No 713/2009).

Hence, though the Third Legislative Package has certainly enhanced the status of private self-regulation, it obviously does not represent a pattern of network governance as a private-public negotiation at equal footing. Instead, ACER and in particular the Commission monitor and constrain the self-regulation. ENTSO-E/G describes, therefore, private self-regulation under a shadow of supranational hierarchy.

#### 4.2.4 *Regional Initiatives*

So far, the two previous chapters focused on regulative cooperation at European level. The Third Legislative Package, however, allows also for regional initiatives which shall function as

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<sup>9</sup> For more information cf. ENTSO-E website: <https://www.entsoe.eu/the-association/history/>

interim steps for speeding up the establishment of an EU-wide market (Eberlein & Newman, 2008, p.42). Already set-up by ERGEG in 2006, seven electricity (ERI)<sup>10</sup> and three gas regional initiatives (GRI)<sup>11</sup> have been launched since (CEER & ERGEG, 2010, p.3; Eberlein, 2010, p.69). Due to ERGEG's replacement by ACER, the coordinating and supervising tasks on regional NRA and TSO cooperation are nowadays delegated to the new European agency (Art. 6 (2) Dir.; Art. 6 (9); Art. 7 (3) Reg. (EC) 713/2009).

The regional approach to TSO and NRA cooperation shall thus reflect the various characteristics within the IEM while effective monitoring by ACER and regular conferences with all regional groups<sup>12</sup> shall ensure that the long-term goal of establishing a *Single* European Market is still pursued (CEER & ERGEG, 2010, p.6). Consequently, the elaborated forms of governance from the two previous chapters, namely incorporate transgovernmentalism for NRA cooperation and private self-regulation under a hierarchy shadow for TSO collaboration, can be detected in these initiatives in their regional shape. Moreover, with its task-specific jurisdiction (accelerating the IEM project), its intersecting memberships (Germany, for instance, participates in four ERIs) and flexible design, it represents a perfect example of Marks' and Hooghe's MLG II type.

#### 4.2.5 *The public-private networks*

In the wake of the first round of legislations the Commission acknowledged that liberalizing and Europeanizing the national energy markets require not only top-down legislation, but also a broad consensus-based bottom-up approach of policy-making (Eberlein, 2010, p.64; Eikeland, 2008, pp.12). Accordingly, stakeholder meetings, such as the Regulatory Forum of Florence in 1998 or the Gas Regulatory Forum of Madrid in 1999 have been established by the Commission. Albeit not enshrined in the Treaties or the legislations, the informal fora shall be examined in this thesis as well because of their crucial position in the regulatory policy.

Currently, there are five fora: The already mentioned meetings in Madrid and Florence as well as the conferences for renewable energy in Amsterdam, for fossil fuels in Berlin, and the newly-formed London Forum on consumer protection in the energy sector (Sanden, 2008, p.238). Due

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<sup>10</sup> The seven ERIs are as follows: (1) Baltic: Estonia, Latvia, Lithuania;(2) Central-East: Germany, Austria, Poland, Slovak Republic, Hungary, Czech Republic; (3) Central-South: Germany, France, Greece, Italy, Austria, Slovenia; (4) Central-West: Belgium, Germany, France; (5) Northern: Denmark, Germany, Finland, Norway, Poland, Sweden; (6) South-West: France, Portugal, Spain; (7) France-Ireland-UK;

<sup>11</sup> The three GRIs are as follows: (1) North-West: Belgium, Denmark, Germany, France, UK, Netherlands, Sweden, Norway (observer status); (2) South South-East: Bulgaria, Greece, Italy, Austria, Poland, Hungary, Romania, Czech Republic, Slovak Republic; (3) South: France, Portugal, Spain;

<sup>12</sup> Cf.: [http://www.energy-regulators.eu/portal/page/portal/EER\\_HOME/EER\\_ACTIVITIES/EER\\_INITIATIVES/Regional\\_Initiatives\\_Conferences/2010%20RI%20Conference](http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_ACTIVITIES/EER_INITIATIVES/Regional_Initiatives_Conferences/2010%20RI%20Conference)

the thesis' focus on the electricity and gas markets, this chapter, however, will limit its analysis on the Fora of Madrid, Florence, and London.

Chaired by the Commission and including National Regulatory Authorities (NRAs), the new agency ACER, Member State governments, transmission system operators as well as their new federations ENTSO-E/G, network users, electricity and gas traders, consumer associations, power and gas exchanges, the participants of the Florence and Madrid Fora meet biannually in an informal setting to discuss pertinent issues on the liberalization of the markets and to exchange experiences concerning the implementation of the legislations (Sanden, 2008, pp.238). A central part of the two-day debates are hereby the regulatory proposals put forward by the NRAs, ACER or the Commission "to which the regulatory addressees [...] respond. Other market players and stakeholders then participate in an open debate" (Eberlein, 2008, p.78). Moreover, smaller working groups prepare the plenary meetings in bargaining less controversial and more detailed regulatory issues in advance (ibid.).

Consequently, the fora could represent the pattern of Network Governance in the regulation of the Internal Energy Market. Some crucial characteristics as mentioned in chapter 2.1.3 on Kohler-Koch's and Eising's approach can be detected in analysing the regular meetings: It brings together public as well as private actors, their bargains are problem-solved oriented and activated by the supranational "government", so the Commission. However, when it comes to the decisive criteria, a deviation from Network Governance cannot be overlooked: There are neither negotiations at equal footing among public and private actors, nor decisions which all participants accept as binding rules.

Instead, the real purpose of the fora is to function as an advisory panel for the Commission to come up with well-drafted legislative proposals (Sanden, 2008, p.268; Eberlein, 2008, p.7). Due to its broad stakeholder involvement, the meetings, therefore, serve the Commission with technical expertise while being a critical barometer and forum of test voting for its legislative proposals (Sanden, 2008, pp.242). In this regard, the biannual fora shall identify appropriate solutions to the regulatory challenges even before the usual legislative bargains among Commission, Council, and EP commence (Eberlein, 2008, p.7). They thus shall prepare consensus among the stakeholder – foremost in the technical aspects of the future legislation where Commission's Directorate for Energy (DG ENER) lacks on in-depth expert knowledge (Sanden, 2008, pp.242).

However, a negotiation pattern on equal footing is not given since the Commission can always threat to forward the open questions to the usual, respectively formal legislative procedure. The public actors are accordingly in an event of policy gridlock in the public-private bargains in the privileged position to continue the negotiation under the ordinary legislative

procedure among themselves alone. Additionally, the Commission could invoke direct competition law to accelerate the discussion with reluctant Member States governments or the energy industry (Eberlein, 2010, p.70). Hence, the private-public negotiations are covered by a double shadow of (public) hierarchy (cf. Eberlein, 2008, p.84). It is, therefore, more appropriate to categorize the fora in Börzel's scheme as private self-regulation under a shadow of hierarchy, than under Network Governance at equal footing. This correspond also to the findings by Börzel (2008, p.82) and Eberlein (2008, p.85).

Moreover, the Open Method of Coordination (OMC) can be detected in the public-private networks since the fora function as exchange platforms for all participants to formulate objectives, to compare the achievements, and analyse why some parties are dragging behind. Non-compliances with the unbundling requirement by energy operators, for instance, are accordingly identified in an open arena and can be discussed directly (Sanden, 2008, p.270; Eberlein, 2010, p.67).

The set-up of the London Forum has recently transferred the public-private negotiations to the field of consumer protection. Within the new setting, Europe's Citizens shall assert their consumer rights more effectively which represents one key objective of the Third Legislative Package (cf. Art. 3 Dir. 2009/72/EC; Art. 3 Dir. 2009/73/EC). In terms of composition and functioning, however, it scarcely differs from the other fora, as consumer associations, namely BEUC – the European Consumers' Organization - and its national pendants, were already represented in the Madrid and Florence meetings (Sanden, 2008, p.266). Notwithstanding, the London Forum improve the influence of consumer associations since it provides them with a setting where agenda are exclusively focused on their particular concerns, the energy-related consumer rights.

In a nutshell, the public-private networks of Madrid, Florence, and London constitute private self-regulations under a double shadow of hierarchy which encompasses also tools of the OMC governance form. Hence, the competences by private actors in the fora are limited. A Network Governance form as defined by Kohler-Koch and Eising does consequently not exist.

### **4.3 Characterization of the governance and competence structure**

The two previous chapters 4.1 and 4.2 explained which actors are involved in the IEM regulation. Based on primary and secondary law as well as on scientific insights, various governance forms could be detected (cf. table 3). The following section aims to combine these findings to eventually come up with an all-encompassing, but concise characterization of the policy. The thesis will thereby come back to the expected hypothesis as laid down in chapter 3 and will test if Moravcsik's approach is most applicable in explaining the regulation of the market.

While focusing on the tasks of the listed actors, the findings as summarized in table 3 show a crucial role for the NRAs. Being at the core of the regulative policy for the Internal Energy Market, they are entitled to execute the day-to-day regulation, such as the certification of TSOs and their network tariffs, the compliance of energy operators with the unbundling requirement, as well as further monitoring tasks. Chapter 4.2.2 demonstrated that the NRAs are fully independent from and not instruction-bound by their respective governments. Thus considering their broad definition as mentioned in the introduction, Member States have apparently retained an important say in the regulation of the market. Yet, their source of policy-making has shifted from a politicized one driven by national governments to a non-majoritarian form of governance performed by Independent Regulatory Authorities (IRAs). In this regard, Morvacsik's LI approach might be most applicable.

Legal source and constellation of actors		Assigned task(s)	Governance form(s)
1. law	<i>Commission - Council - EP - ECJ</i>	Legislative task and liberalization by case law	Joint decision-making mode under a shadow of supranational hierarchy
2. law	<i>The Commission and the comitology</i>	<u>COM</u> : overall supervision and specifying legislation <u>Committees</u> : Deciding with COM on legislative specifications, network codes, and compensation amount for cross-border TSOs	Miniaturized co-decision mode with OMC pattern (and less EP involvement)
	<i>The European regulatory network (ERN)</i>	<u>NRAs</u> : Certification of TSOs and their network tariffs, implementing ACER/COM's decisions, market assessments, and monitoring of TSOs investment budget, price transparency, and the energy operator's compliance with the ownership unbundling requirement <u>ACER</u> : Market monitoring, supervision of ENTSOs, NRAs supervision, deciding on regulatory exemptions	Transgovernmental negotiation and cooperation in a shadow of supranational hierarchy OR Incorporate transgovernmentalism
	<i>Network regulation by ENTSOs</i>	Network codes, network development plan, reporting on network development	Private self-regulation under a shadow of supranational hierarchy
	<i>Regional Initiatives (ENTSOs + ERN in a regional shape)</i>	Similar tasks as ERNs and ENTSOs at regional level	Incorporate transgovernmentalism AND private self-regulation under a shadow of supranational hierarchy in a regional shape
	<i>The private-public networks (the informal arena)</i>	Preparatory work for COM's proposal and market assessment by OMC	Private self-regulation under a shadow of supranational hierarchy with OMC pattern

**Table 3: Tabular summary** of the actor constellation according to EU primary and secondary law. Clearly, it could be shown that all detected governance forms stand under shadows of supranational hierarchy.

Yet, such a conclusion would overlook the large shadow of supranational hierarchy in the regulative policy. The column on governance forms in table 3 highlights its striking omnipresence as nearly all regulative sub-regimes are embedded by supranational monitoring. This includes also the actually independent NRAs which cooperate and negotiate at European level under the supranational supervision of the new agency ACER. Consequently, the NRAs are - although independent from their national governments - not fully unconstrained by the European supranational actors. This is, in particular, evident for its relationship to the Commission which is entitled to intervene in the regulation of the NRAs, such as in the TSO certification process. ACER supports the Commission in this task in informing the supranational actor on violation of guidelines by NRAs. Likewise, the new agency is instructed to regulate market measures with cross-border issues. The negotiations and cooperation of NRAs are, therefore, embedded in a large shadow of hierarchy which is executed by the Commission and its facilitator ACER. This shadow even does not significantly decrease when taken the comitology procedure into account. With the exception of the establishment of the network codes (cf. below) and the compensation amounts for cross-border TSOs (cf. Art. 13 (4) Reg. (EC) No 714/2009), chapter 4.2.1 shows that the committees affect only decisions when the Commission aims to specify the present regulations and directives, thus performing a legislative task. Its function as *chief warden of regulation* is accordingly not constrained by the comitology procedure.

Apart from the supranational shadow of hierarchy, Member States' competences are, additionally, limited by the involvement of private actors. As explained in chapter 4.2.3, the TSOs themselves are entitled to set-up network codes under their new associations ENTSO-E/G. This private self-regulation is not supervised by Member States' NRAs, but by the supranational actors ACER and the Commission. The latter has to approve the network codes and can even decide to delegate this task to ACER or to elaborate the codes itself. Yet, as stated above, this last-mentioned option must be approved by the comitology procedure (cf. chapter 4.2.3).

A similar picture can be drawn for the governance structure according to EU primary law since the Council has to share its decision-making competence with the EP while being constrained by a large shadow of hierarchy. The launch of an own energy chapter by the Lisbon Treaty brought, in this regard, only scarce competence gains for the EU and is more of a declaratory nature. No matter whether according to the old TEC or new TFEU provisions, the Commission and the ECJ remain entitled to accelerate the legislative process by governance forms of supranational centralization, such as the application of competition law. Albeit this liberalisation strategy through negative integration is limited by the barriers of Art. 106 (2) TFEU and Art. 30 TFEU as the ECJ acknowledged in its Energy Monopoly Judgments of 1997, their

effectiveness will presumably decrease with the new European Regulatory Network: The Court's rationale for confirming the applicability of the aforementioned Treaty provisions was to guarantee the goal of supply security. Chapter 4.1 showed, however, that this objective is now pursued by the Third Legislative Package in fostering Member States' cooperation and setting-up a regulatory framework. The threat to invoke competition law has, therefore, regained its effectiveness. Hence, a second hierarchy shadow can be detected covering the joint-decision-making mode among Council, EP, and Commission.

Finally, a third supranational shadow can be discovered in the informal private-public fora where the Commission can either threaten to continue the bargains on regulative policies in the public-driven legislative process among Council, EP, and Commission or by applying case law with the help of the ECJ. Furthermore, the broad involvement of private actors in the informal fora demonstrates that boundaries between the national and European arenas become blurred. Putnam's two-level theory as advocated by Moravcsik is subsequently not most applicable since private actors as TSOs, consumer organizations or energy operators are present at European stage of policy-making. National governments have thus lost their gatekeeper role.

In a nut-shell, the regulation of the Internal Energy Market is characterized by governance forms of joint-decision-making, agency cooperation, and private self-regulation which each stand in a large shadow of supranational hierarchy. Contrary to expectation, LI is thus not most applicable, but Hooghe's and Marks' MLG approach as their hypothesis with the emphasis on large hierarchy shadow and private self-regulation (cf. chapter 2.3) almost exactly awaits the found governance forms in the market. Moreover, central MLG characteristics could be detected, such as a complex and interwoven policy structure in which competences are horizontally as well as vertically segmented. Additionally, the discrete levels of national and European politics are melted together as shown in the public-private networks, and Member States are not still able to function as gatekeeper to the European arena.

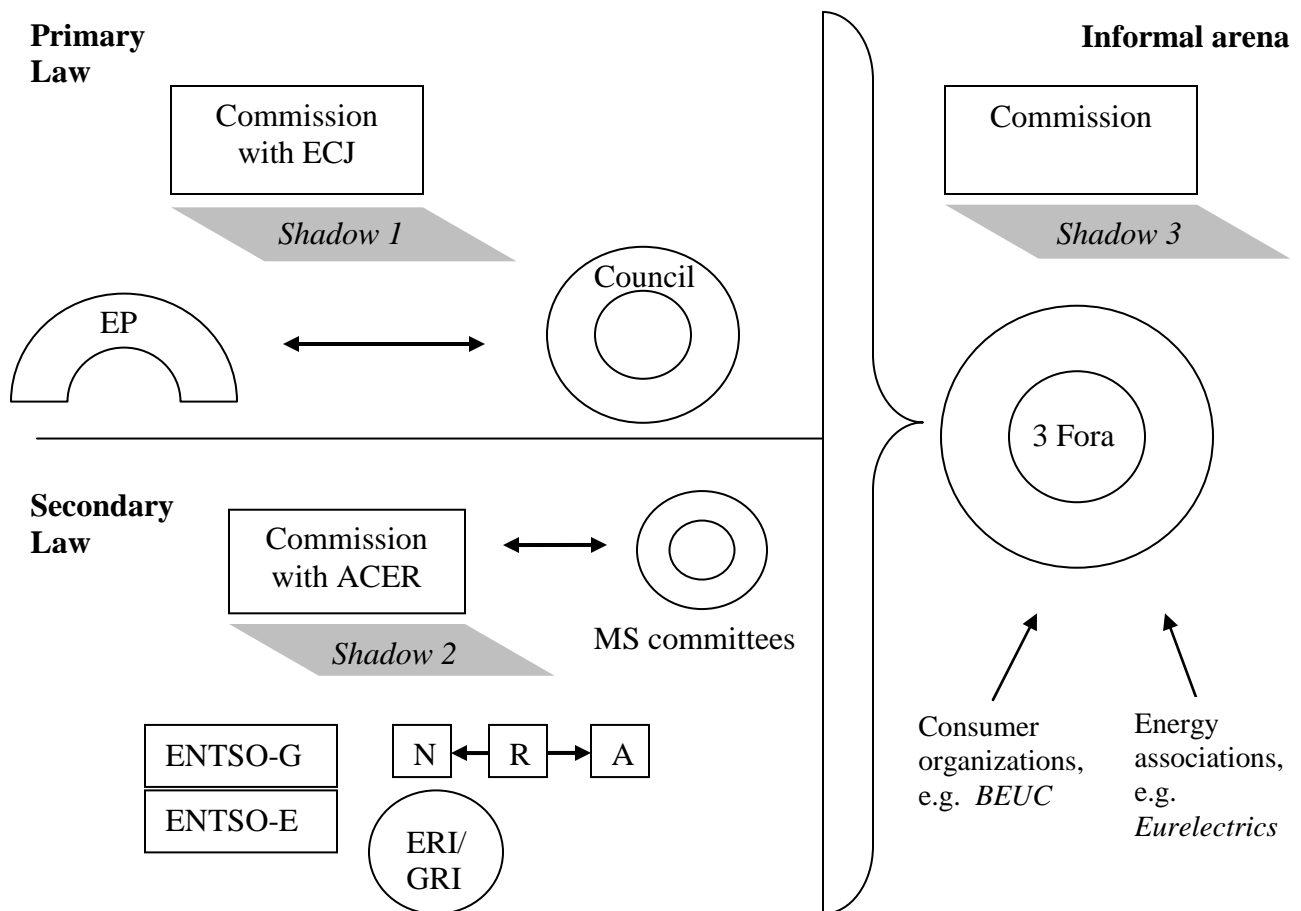
Yet, before coming to the conclusion, it must be as well considered that the thesis was in crucial parts, such as in the chapter 4.2.2 or 4.2.3, limited to an examination of the competence structure as laid down in the *acquis* provisions. Due to the novelty of the legislations, the *actual* interplay of ACER or ENTSO-E/G with the other actors could not be thoroughly determined. The scientific community has not yet responded to the recent establishment of the new regulatory framework whereby an own field study with expert interviews and observations of board sessions was not feasible for the purpose of a Bachelor thesis.

Nonetheless, as mentioned in the introduction, the thesis never aimed to provide an ultimate answer on the research question, but rather sought to give first evidences of Member States new role in the IEM regulation. How the formal competence structure will finally evolve *in*



*practice*, could be the aim of following studies. Regarding the future perspective, a likely consequence is that even *grand decisions* on the general energy supply structure, such as Germany's recently adopted exit from nuclear energy, become undermined in their effectiveness: In statistics on the energy mix *as generated* within the German borders, the atomic energy will perhaps be disappeared in the following years. Yet, in figures on the more important energy mix *as consumed* within their territory, they will presumably remain (Geden & Fischer, 2008, p.79; Reichert & Voßwinkel, 2010, p.24). How large the divergences between the two markets are, depends on the consumer themselves and their habits in terms of using their new freedom in choosing the energy provider they consider to be most suitable – and this EU-wide.

Hence, according to the EU provisions, the regulative competences of the IEM are shared among distinct actors and effectively covered by three shadows of supranational hierarchy (cf. figure 1). Member States are, therefore, playing at best a *primus inter pares* role.



**Figure 1: A sketch of the actor constellation** in the regulative IEM policy. The grey surfaces represent the three hierarchy shadows in the respective arenas while the large brace visualizes that all the listed actors from the left side are assembled in the three public-private fora of Florence, Madrid, and London.

## 5. Conclusion

This thesis aimed at examining whether Member States have lost their pivotal role in the regulation of the Internal Energy Market. It thus seeks to characterize the governance and competences structure of the regulative policy by taking a broad definition of the term Member State as a basis. Accordingly, not solely national governments are encompassed by the concept, but also other Nation State actors, such as Independent Regulatory Authorities.

To draw an exact characterization, the analysis is underpinned by two theoretical concepts: First, the overall approaches to European Governance are applied, namely Moravcsik's state-centric Liberal Intergovernmentalism, Hooghe's and Marks' actor-centric Multi-level Governance approach as well as Kohler-Koch's and Eising's private-public concept Network Governance. Secondly, due to some deficiencies of the aforementioned approaches, Börzel's analytical scheme of governance forms as modular approach of policy-making has been added. Having combined both theoretical concepts, three distinct hypotheses for each overall approach to European Governance could be generated.

Building on these considerations and after a brief background chapter on the energy market, the governance structure was eventually examined on the basis of the EU primary and secondary acquis. In both chapters, it could be shown that the regulation is shared among distinct actors which perform their task in three shadows of supranational hierarchy. According to the Treaty provisions, the joint decision-making among the Council, EP, and Commission is *shadowed* by the threat of the Commission and the ECJ to invoke i.a. competition law in case of policy gridlocks. The analysis on the Third Legislative Package, the secondary law, moreover, revealed that agency cooperation by the NRAs are constrained by task-sharing with private actors (e.g. with the ENTSOs) and the monitoring shadow by the Commission and ACER. Finally, also the public-private negotiations in the informal fora are covered by a hierarchy shadow. Thus, Chapter 4.3 characterizes the IEM regulation by governance forms of joint-decision-making, agency cooperation and private self-regulation under large shadows of supranational hierarchy. The presence of the latter is consequently typical for the new Energy Market Regulation regime and falsified the expected LI hypothesis. Likewise, the supranational shadows even inhibit public-private negotiations at equal footing, disproving, therefore, also the Network Governance hypothesis. Hence, Hooghe's and Marks' MLG concept remains as most applicable approach in explaining the regulation of the Internal Energy Market.

**To conclude**, Member States' leeway in the regulation of the IEM is constrained by supranational hierarchy shadows and private self-regulation. In such an interwoven system, they have consequently lost their pivotal role.

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