DOI:
10.1016/j.enpol.2018.12.046

Document Version
Peer reviewed version

Delegation of Powers and the Rule of Law: Energy Justice in EU Energy Regulation

Imelda Maher,

UCD Sutherland School of Law, Belfield, Dublin 4, Ireland

Imelda.maher@ucd.ie

Oana Stefan, (corresponding author)

King's College London, Strand, London WC2R 2LS, United Kingdom

Oana.stefan@kcl.ac.uk

ABSTRACT

This article examines the legal frameworks surrounding the EU's energy policy and its associated institutional architecture. Particular focus is on the Agency for Cooperation of Energy Regulators (ACER). Taking stock of ongoing debates concerning the Energy Union and recently proposed reforms, the purpose of this analysis is twofold. First, from a theoretical perspective, this article explores the limits of the principal/agent model for European integration after the Treaty of Lisbon. It argues that a rule of law analysis should supplement this model in order to improve the encapsulation of the complexities of delegation in policy areas such as energy. Second, this will enable a reflection on the principle of energy justice and the way in which it is articulated by policy and governance changes in the EU.

KEYWORDS:

energy justice; ACER; Clean Energy Package; rule of law; principal agent theory; accountability

1 Introduction

This article answers the calls to analyse EU energy law as a distinctive legal field (Heffron et al., 2018), and to promote energy justice as the most appropriate driver for regulation (Heffron and Talus, 2016a, 2016b; Heffron and McCauley, 2017).[1] Regulating EU energy presents important challenges, with Member States retaining wide powers in this area of shared competence. Article 194 TFEU introduced an express legal basis for policy cooperation, creating the premise for formalized delegation. The current system is hybrid, with regulatory and enforcement powers being delegated to (public) national regulatory authorities and to (private) transmission system operators, organized in networks and coordinated by ACER. These arrangements provoke fundamental questions: who are the principal decision-makers and to which agents do they delegate powers; how do principals and agents interact, given the relative autonomy of the latter; and what exactly is being delegated in energy regulation, a *locus classicus* of intertwining supranational policies? Following an analysis of the balance of powers in EU energy governance, the article contributes to policy development by showing that rule of law values are at stake. Indeed, energy regulation still needs to improve accountability, transparency, and legitimacy, even though the recent Clean Energy Package reform (or the 'Winter Package' EC, 2016a) addressed some of these challenges.

The analytical framework of the article draws on a model suggested by Maher (2009), complementing the principal-agent theory from political science with a rule of law analysis in order to fully encapsulate the complexities of delegation in EU competition policy. Applying this model to the EU energy sector, the article determines whether the rule of law is included in the mechanisms structuring the cooperation, coordination, delegation and re-delegation relationships that exist between ACER, a 'network agency', and the Commission, NRAs, private actors, and networks of authorities and/or private actors. In this respect, the article

[1] Abbreviations: ACER - Agency for Cooperation of Energy Regulators; C- Council of the EU; CEP – Clean Energy Package; CBCA - cross-border allocation of costs; DSO – distribution system operators; EC – European Commission; ECJ – European Court of Justice; ENTSOe - European Network of Transmission System Operators for Electricity; ENTSOg European Network of Transmission System Operators for Gas; EP -European Parliament; GC-General Court; MS – (EU) Member States; NRAs – National Regulatory Authorities; P/A – principal/agent; PCI - projects of common interest; REMIT - Regulation on Wholesale Energy Market Integrity and Transparency; ROCs – Regional Operational Centres; TEN-E - Trans-European Networks – Energy; TEU – Treaty on the European Union; TFEU – Treaty on the Functioning of the European Union; TSOs – Transmission System Operators.

contributes to the literature on energy justice with a systematic legal analysis of agency accountability (as called for, more generally, by Mastenbroek and Martinsen, 2017). Energy justice, understood as the 'just and equitable decision-making and results for all members of society at each stage of the energy cycle' (Heffron and Talus, 2016a: 8), should be the main trigger of energy law in the 21st century (Heffron et al., 2018). Ensuring transparency and accountability of the various power relationships in energy governance is one of the eight principles of energy justice (Sovacool et al., 2016). These are also core concepts in administrative law and a specific articulation of the rule of law principle that no one is above the law. The article argues that increasing and clarifying ACER's powers as well as enhancing its institutional capacity, would improve accountability and promote the rule of law, ultimately contributing to the goal of energy justice.

The second section looks at the rule of law and its relevance to a principal-agent analysis. The third section outlines how powers are delegated within energy policy, focusing on the role of ACER. The fourth section analyses ACER and delegation of powers from a rule of law perspective, before concluding.

2 Analytical framework: the P/A model and the Rule of Law

2.1 The need for a refined P/A model of analysis

P/A models were initially borrowed by political science from economics and have been employed to study the EU for over twenty years (Pollack, 1997). The framework is simple: principals (Member States) delegate powers (competences) to agents (the EU and its institutions) to undertake certain tasks. The questions that have been traditionally addressed are why, how, and with what consequences do national governments delegate political authority to supranational institutions? (Tallberg, 2002). However, in the increasingly complex decisional context of the EU following the Lisbon Treaty, the model needs to be applied liberally, yet handled with care (Maher et al:2009). In other words, the P/A theory needs to be refined, the questions asked redesigned, while the empirical application thereof should be expanded (Delreux and Adriaensen, 2017).

This article answers this call, by focusing on a key aspect of the P/A model: the concern for control of the agent and the exercise of their discretion by the principal (e.g. McCubbins et al,

1987; 1989). This has an important functional dimension: how can the principal exercise control when the agent has more expertise and better access to information? In energy, the question is further complicated by the need to balance the 'energy trilemma' stemming from three conflicting regulatory aims: economics (finance), politics (energy security) and environment (climate mitigation). With EU decision making on energy requiring a just and equitable way to manage these competing aims (Heffron and McCauley, 2017; Schneider, 2018), the normative dimension of the control that the principal exercises over the agent becomes crucial. Relying on previous work (Maher, 2009), we argue that this normative dimension needs to be routed in considerations of the rule of law. While recent literature has focussed on the analysis of rule of law values in specific areas, such as the network codes (Lavrijssen and Kohlbacher, 2018), our article addresses more generally the delegation of power in EU energy law.

2.2 The rule of law concept and its articulation with energy justice

The concept of energy justice resonates with a broad conception of the rule of law (Rose, 2004), by relying on values such as human rights, justice and fairness (Sovacool et al., 2016). While noting the importance of these values, this paper is concerned with a narrower conception of the rule of law (Marmor, 2004), substantiated in the fourth principle of energy justice: all people should have access to fair, transparent and accountable forms of energy decision-making (Heffron and Talus 2016a). This relates essentially to the legitimation of executive power, and the key tenet that everyone is subject to the law, and no one is above the law. Consequently, the fourth principle of energy justice can be unpacked alongside two elements. One is the democratic delegation of powers by the people, to government, and its appropriate exercise. The second is accountability for the exercise of those powers, usually through elections, judicial review and accountability of government to parliament.

In relation to the first element, for power to be exercised within the parameters of the rule of law, the rules through which laws are articulated must comply with certain key attributes. Dicey, a highly influential jurist in the common law tradition, noted how law must operate by way of general rules (all statutes apply to everyone because everyone is subject to the law); those rules must be clear (at least they can be interpreted by a court of law in a coherent fashion); promulgated prospectively and both possible to comply with and consistently

applied (the law cannot be applied retrospectively as the individual has to be able to organize their business knowing what is legal). Legal compliance must not be impossible (Dicey, 1914). Hence, there is a strong ex ante requirement as to how laws are framed: certainty; predictability; clarity and prospectivity are all required.

The second element, accountability, goes beyond rule formulation to rule implementation, and is primarily *ex post*. Liberal democracies are characterised by an independent judiciary, and the right of the individual to have access to the courts is seen as critical by lawyers (access in principle at least – regard is not had here to the prohibitive cost of litigation and the limited legal aid available for administrative law actions with which we are concerned). The constitutionality of a measure, or its exercise, can be challenged, when it is ultra vires i.e. outside the law and beyond the parameters of authority conferred by legislation. The exponential growth in judicial review in the common law world in the last 30 years can, to some extent, be linked to the growth of the regulatory state and the welfare state, with a concomitant emergence of a functional approach to law (Rubin, 1990-91; Unger, 1976). The nature of accountability has also changed. Traditional public accountability structures, such as parliamentary accountability (e.g. through an annual reporting obligation) and judicial accountability (dispute resolution), have proved less effective considering the fragmentation of the state, the growth in discretion, and the growth in agencies operating at arm's-length from executive principals (Scott, 2000, Graham, 2000). The legitimate exercise of power by agents is of concern from a rule of law perspective, given there is no direct democratic mandate, a weakening of the authority to exercise power and an increasing need for accountability.

Accountability is closely connected to a major functional concern in the P/A literature: control. This necessarily raises the question as to the difference between these two concepts (Mulgan, 2003; Bovens, 2007; Maher, 2009). Control can be seen as a functional consideration predicated on effectiveness, while accountability provides a normative dimension. Another way of explaining their difference, is one of *ex ante* managerial control over decision-making, and *ex post* oversight as accountability (Scott, 2000). However, given it is not clear where the distinction lies, it might be better to simply view them as a continuum (Scott, 2000; Maher:2007). While differences exist in the literature, all are agreed that for accountability,

the elements of explanation, reporting and engagement are a constant (Maher, 2007). It is alongside these general parameters that compliance with the fourth principle of energy justice in the European Union can be assessed.

3 Delegation of powers in EU energy regulation

3.1 Competence as prerequisite

Competence in energy is shared between the EU and the MS (Art 4(2)(j)TEU). The EU can legislate in this area but so too can the MS, and the shape of the policy depends, in part, on how powers are shared between them. The policy aims to ensure the functioning of the energy market, security of supply, to promote efficiency and saving, develop new and renewable forms of energy, and finally to promote interconnection between energy networks (Art 194 TFEU). MS retain the right to determine the conditions for exploitation of energy resources, the choice between those resources, and the general structure of energy supply. In addition, the Union shall contribute to the development of trans-European networks in the area of energy infrastructure (Art 170 TFEU). Regard needs to be had to other legal principles, notably subsidiarity and proportionality (Art 5(3)&(4) TEU). Under the former, the EU shall only act insofar as the objectives cannot be achieved by the MS and under the latter, the Union shall only do that which is necessary to achieve the objective. This sharing of competence can be seen in the articulation of policy in secondary legislation, with the Third Energy Package[2] providing the MS with significant discretion (Talus, 2013).

A necessary condition for the delegation of power is that the principal has competence to do so. Sharing competences means that it is more difficult to determine who is the principal, making multiple principals more likely. Formal legal competence is one way of distinguishing delegation from influence, and only those with formal authority within the respective field can be seen as principals. However, the challenge with this test is that the list of EU competences is modest. In energy, competences are functionally driven and vague, especially in relation to how they are shared (Thompson, 2015). Clarity is, however, difficult to achieve through secondary legislation, such as the proposed CEP. While the draft Recast Energy Directive, for

[2] Electricity Directive (EP&C, 2009f); Gas Directive (EP&C, 2009e); Agency Regulation (EP&C, 2009b); Electricity Regulation (EP&C 2009c), Gas Regulation (EP&C 2009d), REMIT Regulation (EP&C, 2011), TEN-E Regulation (EP&C 2013)

example, introduces some important measures in order to help achieve the EU renewable energy sources targets, the vague text of Article 194(2) TFEU could allow MS to determine their own energy mix, regardless of what is set at EU level. Authors go as far as to argue that the new governance model introduced by CEP hardens the open method of coordination employed in the energy sector in ways that might clash with the competence boundaries of A194(2)TFEU (Ringel and Knodt, 2018). Matters are complicated further by the fact that energy is a focus of intertwining national policies, including state aid, security, international relations, and the environment.

Energy policy is therefore a field where there is incomplete delegation by the MS to the EU, as explicitly acknowledged by the Treaty. This creates a fertile ground for horizontal delegation to sectoral governance actors (Eberlein, 2008). The EC re-delegates policymaking responsibilities to national agencies and private stakeholders to achieve energy markets liberalisation and an internal market in energy, creating a system of double regulation, one being supranational (the Commission itself), and a hybrid national-supranational regulator, ACER (Chiti, 2009). The challenge is how to develop a coherent policy, where the 'double' delegation of function (Coen and Thatcher, 2008) becomes complex, with independent regulators at national level, combined with an EU network providing coordination, monitoring and support.

3.2 To whom is the power delegated?

The strategy of the EC has been to close the 'regulatory gap' generated by the failure to harmonize sensitive sectors (such as energy), through promoting informal harmonization by transnational regulatory networks (Eberlein and Grande, 2005). The creation of NRAs in energy was pushed through three liberalization packages, with the final outcome a network of national regulatory authorities. This is indicative of the compromises inherent in competences sharing. These authorities were entrusted with various tasks, including interconnection and unbundling, network access, and tariffs. They cooperated voluntarily at first, through the European Regulators Group for Electricity and Gas (EC, 2003), a platform tasked formally with advising the EC. This was insufficient (EC, 2006) to close the regulatory gap between the NRAs and the Commission and to establish a legal framework for cross-border energy trade. The need for a European regulator was apparent. In 2011, ACER was

created, an agency with limited powers, but still an upgrade from the voluntary cooperation it replaced.

ACER has the most complex organizational structure of all network administrative organisations (Iborra et al, 2018). It cooperates closely with the EC, the NRAs, and the TSOs. The TSOs themselves cooperate within the European networks of transmission system operators for gas (ENTSOg) and electricity (ENTSOe). CEP proposes setting up further cooperation entities, such as regional operational centres, to complement the TSOs and to prevent fragmented and uncoordinated national actions. (EC, 2016b, Art 32(3)) Furthermore, CEP envisages cooperation between the TSOs and the Distribution System Operators (DSOs), as well as the creation of a new DSO entity for electricity, comprising the unbundled/not vertically integrated DSOs. (EC, 2016b, Arts 49-51)

Alongside ACER, and formally constituted outside the EU, the Council of European Energy Regulators (CEER) provides another platform for cooperation between electricity and/or gas NRAs from the EU, Iceland and Norway. It is meant to complement but not overlap with the work of ACER (Eberlein and Grande, 2005), with both bodies sharing some common members.

Other forums provide for coordination or/and advice to the EC. They consist of various formations of officials from MS, representatives of ACER, ENTSOG, the industry and consumers. For instance, an early voluntary platform, the Florence Electricity Forum, together with the Madrid Forum (on the internal gas market and cross-border trade), play an important informal role in the creation of network codes (Groenleer, 2016). Another example is the Gas Coordination Group, which facilitates the coordination of measures concerning security of gas supply (EP&C, 2009a).

The system is complex, (see figure 1), with certain actors acting at certain times as agents, and at other times as principals. This is perhaps inevitable given the indistinct boundaries of shared competences and the range of potential tensions between the aims of the policy. The system has developed in stages, currently culminating in ACER, which has the power to coordinate, monitor and make decisions in technical (rather than policy) matters. Facing the Commission and a wide range of stakeholders, including NRAs, it straddles the public and private spheres, raising questions as to whom it is accountable, and who is accountable to it, and for what.

Potentially upward (to the Commission), downward (to the stakeholders – though perhaps outward accountability might be a better term here), and horizontally (to NRAs and the CEER) (Scott, 2000).

EU AND BEYOND	EU LEVEL	NATIONAL LEVEL

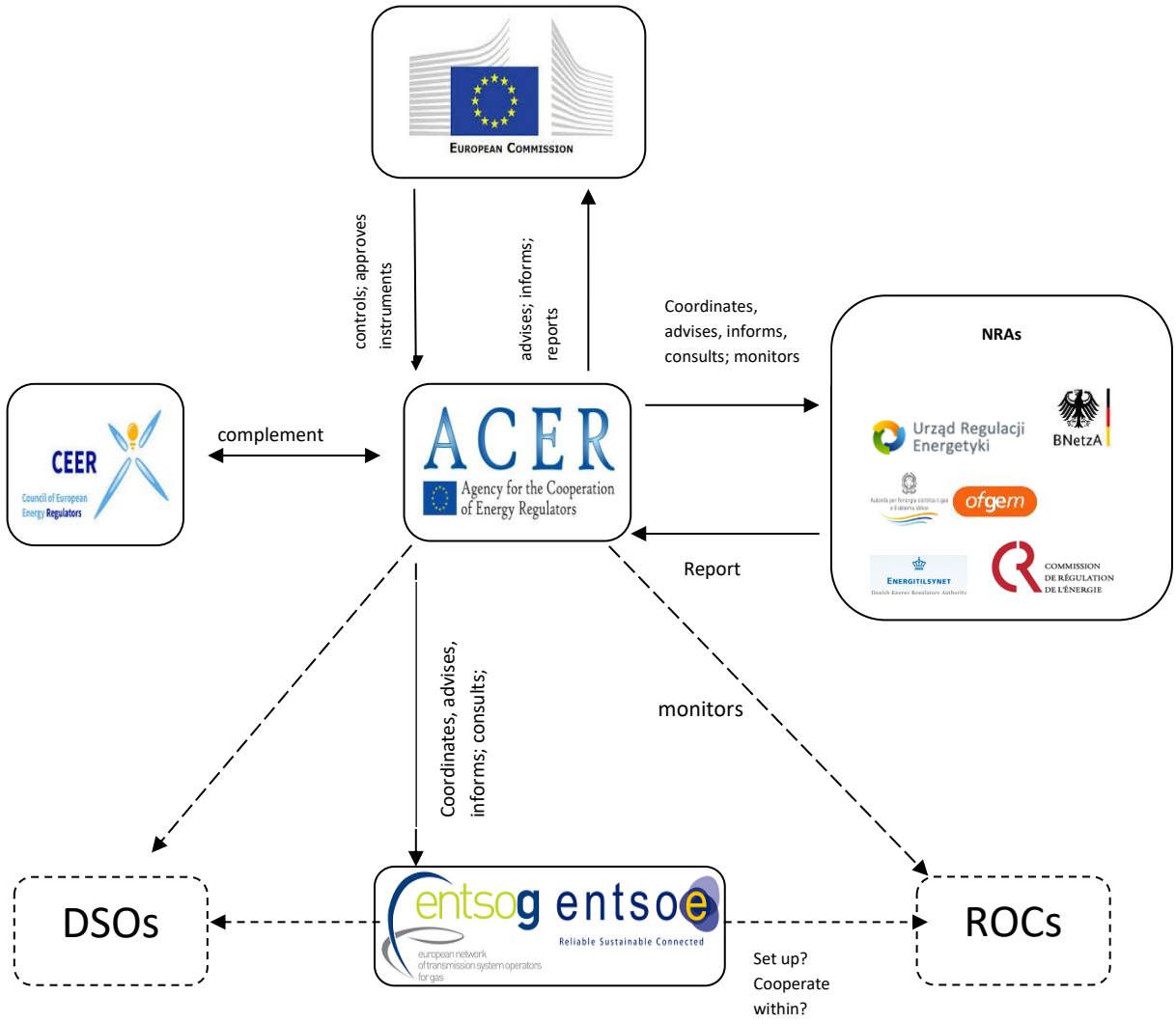

Fig 1: Diagram of Various Agents/Principals in the Energy Sector and their links to ACER

3.3 What power is delegated?

The complexity of the system is reflected in the range of legal instruments which underpin it. While the main Agency Regulation is the legal foundation of the ACER, its tasks are spread over all instruments of the third energy package. This makes it difficult to track where delegation has occurred, by whom and of what tasks. Furthermore, with energy, we notice a departure from the classic P/A dyadic model of competence sharing, where the EU and the MS were being given separate tasks and limited ways of interaction. Instead, regulation in the sector follows an 'integrative paradigm' whereby the Commission and regulatory networks are working together towards the application of European law (Hancher and Larouche, 2011). It is against this background that ACER exercises its tasks to encourage cooperation between European energy regulators.

The institutional layout of ACER raises challenges for these tasks. In particular, the Agency relies on *voluntary* cooperation of NRAs and secondment of experts from those authorities to participate in its work. This assumes the NRAs will continue to support the agency through working groups, and coordination groups (ACER, 2015a). This is not exclusive to the energy field, but is common to regulation through networks, where trust and willingness to cooperate are crucial (Eberlein and Grande, 2005).

Further challenges to ACER's activity stem from the fact that the Agency was only delegated limited powers, according to a strict reading of the leading CJEU judgment, *Meroni* (ECJ, 1958) According to the '*Meroni* doctrine', the EU institutions can only delegate implementing powers that are clearly defined and supervised by the delegator (or the judiciary) (ECJ, 1981) on the basis of specific and objective criteria. Discretionary powers involving political judgment that might upset the institutional balance cannot be delegated (Scott, 2005; Yataganas, 2001). Following *Meroni*, the European Parliament's proposals to grant more powers to ACER were systematically rejected (Chamon, 2016), with ACER's powers reduced further because MS vigorously asserted their shared competence (Ermacora, 2010).

ACER supports and coordinates NRAs in performing their functions whilst carrying out complementary regulatory tasks alongside them. It can issue recommendations and opinions (non-binding soft laws that are influential). It cannot veto actions by TSOs or NRAs, given the

Meroni doctrine, and has decisional powers on only technical issues.[3] Under the REMIT regulation (which deals with monitoring market integrity and transparency), ACER is responsible for gathering and centralizing information.[4] In a policy area involving highly specialized technical knowledge, information becomes an important tool for regulation and control (Eberlein and Grande, 2005), with ACER acting as a node within a wider network of regulatory bodies (Burris et al., 2008).

The role of ACER is crucial for projects creating an Energy Union. The agency uses several tools to promote market integration, such as regional initiatives, the network codes and market monitoring, as well as the Gas Market Model. However, its actions are limited in areas such as energy security and energy poverty, with authors arguing that these regulatory tools are too indirect to address politically and socially charged issues (Labelle, 2017). This raises important questions as to ACER's ability to contribute to the field of energy law and promotion of energy justice. The fact that ACER operates mainly through soft law, hampers its capacity to ensure oversight on the development of the internal energy market, and to address relevant cross-border issues. To a limited extent, the CEP proposals strengthen ACER's role by focusing on its role as a coordinator. At the regional level, it would supervise the ROCs, with the NRAs of the geographical areas in which a ROC is established exercising regulatory functions (EC, 2016c, Art 8). New decision-making power would be granted to ACER in relation to capacity mechanisms, concerning the methodologies establishing generation adequacy and risk preparedness, and in relation to developing common methodologies, in order to enable cross-border participation (EC, 2016c).

4 Analysis: EU Energy Governance in the Context of the Rule of Law

Our theoretical framework suggests that a key concern is to give effect to the notion that no one is above the law, and that those subject to the law only agree to be ruled because they have delegated their autonomy to the ruler. Therefore, the question of legitimacy of action significantly increases the further the exercise of power is from the direct electoral mandate.

[3] For example network codes, certification of TSOs, provision of information, rules for trading of electricity and on investment incentives for construction of inter-connector capacity under the Third Package, as well as decisions on investment requests, including cross-border cost allocation under the TEN-E Regulation.
[4] To this end, ACER has set up an online portal on the REMIT information system (ARIS), which will enable market participants to report transactions as provided for in the Regulation and implementing acts.

Through accountability mechanisms legitimisation of delegated authority is realised. This has little to do with input, usually associated with democratic politics (Scharpf, 1999). Instead, output legitimacy can be sought through audit and inspection (McCubbins et al, 1987, 1989), leaving procedural/process legitimacy as the main concern (Maher, 2009), which Thatcher and Stone Sweet (2002) argue can be a substitute for electoral legitimacy. Assessing accountability mechanisms is therefore key to determining whether the rule of law is observed by the current EU energy regulatory framework (subsection 4.1).

Even if not a sufficient substitute for input legitimacy (Schmidt:2012), the perception of fair process has an important functional as well as a normative role in improving rule compliance (Tyler and Huo, 2002, ch. 4; Wenzel, 2002). Schmidt (2012), adopting the term throughput legitimacy, has also sought to focus attention on the process of governance, particularly the 'efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation *with* the people' (at 2), going beyond narrower procedural concerns, such as giving reasons or ensuring a right to be heard, shedding light on what Schmidt calls the 'black box' of governance. Throughput legitimacy resonates particularly well with the fourth principle of energy justice, 'transparency and accountability' (Heffron and Talus, 2016), making these criteria relevant for the analysis of EU energy regulation (see subsection 4.2).

Other characteristics of law and general considerations of legitimacy and accountability, are also seen as crucial to the rule of law. Lon Fuller (1964) identifies eight characteristics of law: generality, promulgation, no retroactivity, clarity, no contradictory rules, no impossible prescriptions, stability and consistent application. These will not categorically identify an activity as being within the rule of law, because such checklists do not sufficiently address substantive matters (specifically in relation to Fuller (see Hart, 1958; Manderson, 2010; Cane, 2010). Nonetheless, this exercise will shed light on roles, legitimacy, and the framing function of law in relation to policy elaboration, which are essential in evaluating EU energy law as an autonomous field. The focus on the rule of law also provides a useful conceptual bridge between the disciplines of law and politics, given that the concept is relevant to both. Selected Fullerian criteria will be employed to test several problematic aspects of EU energy governance. EU energy laws are general, were properly promulgated, do not apply

retroactively, and do not contain impossible prescriptions. Our assessment in subsections 4.3 will focus on the issues of clarity, the potential existence of contradictory rules, stability, and the consistent application of the regulatory framework.

4.1 Accountability

Lavrijssen and Hancher (2009) suggest that network agencies raise important issues of accountability. The Agency Regulation attempts to address this by requiring ACER to consult and report to EU institutions and bodies (EP&C, 2009b, Arts 12, 13(5) & 15(5)). The Boards of ACER are construed to ensure representation of interests of the Union, MS (Administrative Board) and regulators (Board of Regulators). In turn, ACER monitors both the ENTSOs and the NRAs, and is accountable to the Commission for this role (EP&C, 2009c, Art 9; EP&C, 2009d, Art 9). However, holding MS to account for a NRAs' failure to achieve their tasks is complicated. The Commission would need to show that the measures were reasonable, within the authorities' powers, and did not encroach on the competence of another authority, such as the competition authorities (Johnston & Block, 2012).

While the involvement of ACER, the Commission, the NRAs and the ENTSOs in energy regulation might seem redundant, recent research argues that this redundancy might lead to positive outcomes from an accountability perspective. For instance, the interaction between all these entities in the creation of network codes (Fig 2) raises the question of whether work is unnecessarily duplicated. However, practice shows that ACER does not simply adopt views expressed by ENTSOs in its draft network codes (example EC, 2017b), nor does the Commission simply rubberstamp ACER's work (EC, 2017a). It is expected that this participation increases the potential for reliability, responsiveness and innovation in energy regulation (Groenleer, 2016).

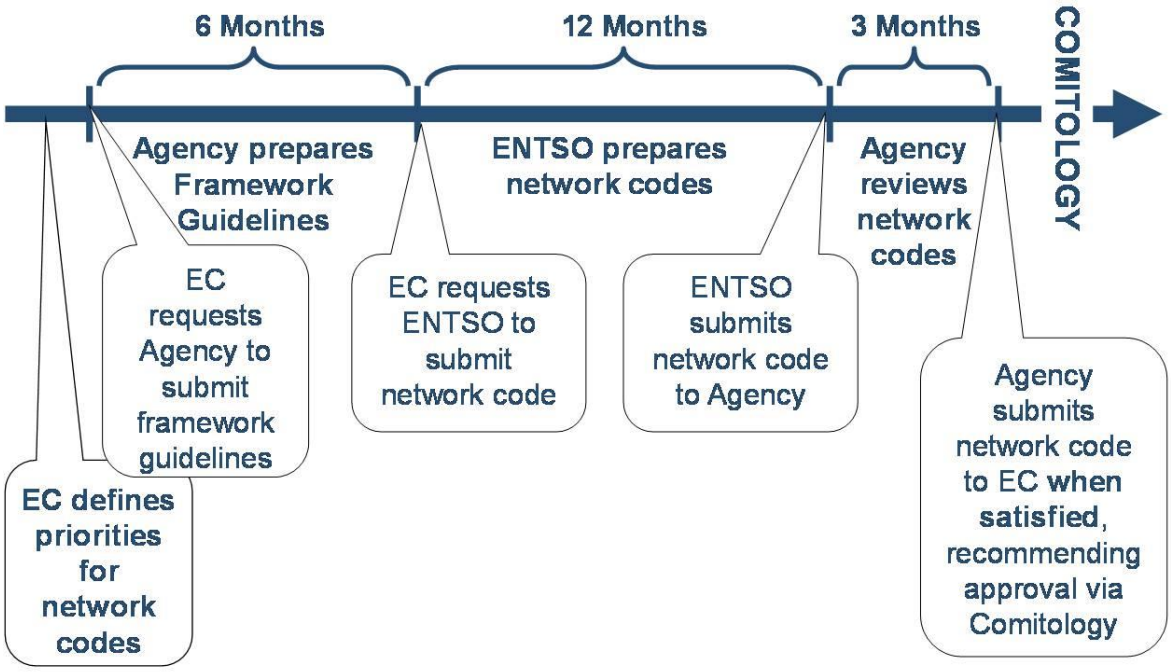

Fig 2 The Creation of Network Codes. Source: ACER

The Lisbon Treaty enlarged the jurisdiction of the CJEU to cover acts of agencies intended to produce legal effects vis-à-vis third parties. In the case of ACER, access to European Courts is placed at one remove, by the creation of an internal Board of Appeal. While there is some provision for a member to not sit where there is a conflict of interest, this is not a judicial body in terms of membership, although it carries out a judicial role. It provides an evaluation by peers, whose decisions can then be challenged before the CJEU. Given that ACER mainly acts through soft law, review of such instruments is sometimes impossible, be it by the Board of Appeal or by the CJEU (Stefan & Petri, in press). One episode of the German-Austrian bidding zone split saga[5] is illustrative in this regard. In *E-control*, the Austrian regulator sought the annulment of an ACER opinion issued under Article 7 of the Agency Regulation. The opinion recommended, at the request of the Polish regulator, the implementation of a coordinated capacity allocation procedure on the German-Austrian border. E-control's claim was rejected

[5] Traditionally, the territory of Austria, Germany, and Luxembourg represented one sole bidding zone for electricity. Recently, calls have been made for that zone to split, given the significant power flows through the transmission grids in neighbouring countries. (See also ACER Decision No 06/2016 of 17 November 2016 on the Electricity Transmission System Operators' Proposal for the Determination of Capacity Calculation Regions currently challenged by E-Control in the pending case Case T-332/17).

by both the Board of Appeal (ACER, 2015b) and by the Court (GC, 2016 & 2017) on grounds that Article 7 opinions lacked legally binding effects.

The need for accountability emerges also from a soft law dialogue between ACER and the Commission. In 2010, the Commission published an interpretative note on the independence of the NRAs (EC, 2010), and ACER responded in 2016 with a recommendation (ACER, 2016). Several proposals appear particularly useful, such as the creation of a system of accountability of NRAs to national parliaments (rather than national governments). Accountability could be strengthened through increasing institutional independence and improved clarification of the respective roles played by the NRAs and the MS. Clearer rules of procedure or nomination, appointment and dismissal of key positions within the NRAs may also help avoid regulatory capture and promote the independence of the authorities. Finally, one should not overlook the importance of financial independence and adequate resourcing, with ACER advocating for funding through cost-reflective fees.

4.2 Consultations and transparency

Consultations with the stakeholders improve transparency and are needed for effective accountability. ACER is required 'to consult extensively and at an early stage when carrying out its tasks with market participants, TSOs, consumers, end-users and, where relevant, competition authorities.' (EP&C, 2009b, Art 10(1)). Consultations must be open and transparent, tasks concerning TSOs are to be transparent, and the Agency publishes on its website the agenda, background documents, and minutes of the meetings of its governance boards. The third energy package created a legal framework conducive to accountability, transparency, and impartiality of national regulators (Heffron, 2016, p 53). These requirements, reflecting the prominence given to transparency in Article 15 TFEU, underlie a broad conception of institutional openness, which includes not only access to objective and reliable information or documents (EP&C, 2009b, Art 10(2)), but also has a participatory function (Curtin et al, 2013).

Are such consultations considered by the institution concerned? Article 10(3) of the Agency Regulation ensures oversight, at least in relation to consultations on framework guidelines and amendments to network codes (Fig 2). ACER is required to show how the consultation has

been taken into account and why observations have not been followed, consequently facilitating oversight. Consultations are not necessarily required for all delegated acts. While stakeholders must be consulted when amending network codes, the Commission is not bound by consultations to modify the guidelines of Article 18 of the Electricity Regulation and Article 23 of the Gas Regulation; it simply has to follow the comitology procedure. The Commission is not bound to consult when modifying, rejecting, or drafting a new guideline which would form the basis of network codes. Finally, ACER suggested in its 2016 recommendation to formalising best practices on stakeholder consultations at the national level.

Consultations play an important role in enforcement, with a functionality platform to support the implementation of gas network codes being recently set up by ACER in cooperation with ENSOg. This is a process which has been created with the support of the Commission, involving a web-based tool through which stakeholders can discuss different issues arising from the implementation of the gas network codes. The idea is that interested parties actively participate in policy/law making, by developing solutions to problems. However, the platform has not been that active, and a new initiative to enlarge the ambit of its addressees is being put in place (ACER, 2017).

4.3 Analysis of problematic Fullerian criteria

4.3.1 No Contradictory Rules

Where objectives are inconsistent, the risk increases of inconsistency and uncertainty in the law. The consequences are twofold. First, this can make legal compliance and enforcement more difficult. Second, in the supranational context, this creates uncertainty regarding the decision maker and its competence. Energy policy objectives are notoriously conflicting. For instance, the objective of ensuring a free market clashes with the objective of security of energy supply (Talus, 2013; Helm, 2012), which is illustrated by crises, such as that in 2006 when Russia stopped supply through Ukraine. The opening of markets for renewables stipulated by CEP might conflict with climate mitigation targets, as provided under current policy frameworks (Kettner-Marks and Kletzan-Slamanig, 2018). More generally, investment is needed in order to achieve Article 194 TFEU goals, and this cannot be left completely to the markets. Such investment will require legal certainty, predictability of market conditions, as well as the reassurance that the State/EU will offer some support.

Energy is situated at the intersection of various areas of EU action. This generates overlaps between the activity of different institutions and agencies, creating tensions and contradictions. Cooperation between national regulators and national competition authorities is crucial (Heffron, 2016). This is not specific to energy, with MS engaging recently in reforms to enhance coherence in the enforcement of the law by competition authorities and sector regulators (Graham, 2016). Competition has been used by the Commission to regulate the energy field on a case by case basis, through the monitoring of State aid or mergers (Eberlein and Grande, 2005; Eberlein, 2008; Helm, 2012), while the enforcement focus has shifted in the last decade at the national level (Scholz and Purps, 2012). Even if the enforcement of competition rules should be used with caution, and not as a substitute for regulation (Eberlein, 2008), these rules need to be seriously considered by ACER in its activity. More specifically, these rules are relevant when ACER carries out its monitoring duties[6] regarding competition law aspects of energy regulation, and, on that basis, it may submit to the European Parliament and the Commission an opinion as to how to address the problems identified. Furthermore, the information sharing entrusted to ACER under the REMIT regulation might raise competition concerns, particularly the risk of collusion (Feltkamp and Musialski 2013). In this context, good cooperation with the national competition authorities is vital for the maintenance of the rule of law, given that it is the latter who have both the expertise and the jurisdiction in competition law (Hrabcakova & Liptak, 2014). The new CEP proposals might create new overlaps because ACER is empowered to draw up standards to assess system adequacy (EC, 2016c), which in turn can be used to determine compliance of capacity mechanisms with State aid rules. This can be problematic since, under the Treaty framework, it is the Commission who has exclusive competence to assess compatibility of State aid with the internal market.

Overlaps with financial services regulation might also occur, with REMIT imposing an obligation to inform the European Securities and Market Authority (ESMA) wherever there is suspicion that market abuse might affect financial instruments. Other overlaps might exist in relation to the activity of bodies competent in environmental matters. Over fifty planning,

[6] ACER monitors: whether network codes/draft documents of ENTSOs promote effective competition; the internal markets in electricity and natural gas, in particular their retail prices , access to the network and compliance with consumer rights (A11 Agency Regulation).

reporting, and monitoring obligations of the climate *acquis* are streamlined within the recently agreed Regulation on the governance of the energy union, while entrusting the European Environment Agency (and not ACER) with the task of assisting the Commission in its work regarding decarbonisation and energy efficiency. (EP&C, 2018, Art 42)

4.3.2 Clarity

The above discussion concerning the various intersections between fields of regulation is also relevant to assessing clarity. ACER's tasks are spread throughout multiple legislative instruments dealing with the various aspects of energy regulation. CEP consolidates some of these tasks in the proposed Agency Regulation, therefore contributing to enhanced clarity.

Two institutional design issues reduce the clarity of the law and how it is implemented. First, the initial failure to put in place a pan-EU agency. Second, the shared competence of the EU and the MS. Regarding the first, two parallel and closely overlapping regulatory networks are active in energy: ACER and the CEER. They share similar memberships (except that CEER membership extends to EFTA countries) and the same main objectives (EP&C, 2009b, Recital 5; CEER, 2015, Arts 3&5). Although they differ in the sense that ACER exercises powers stemming from EU legislation, while CEER has no competence to issue decisions and no obligation to offer advice, in practice, ACER and CEER do overlap (Maggetti, 2013).

The second design issue regards the relationship between ACER and the NRAs. While NRAs are supposed to cooperate (EP&C, 2009c, Art 6; EP&C, 2009d, Art 7), clashes of competence might arise given the cross-border character of energy transmission. ACER is supposed to respect the independence and powers of the NRAs, under subsidiarity (EP&C, 2009b, Recital 29). Its main objective is to foster NRA cooperation and participation. However, the actual extent of the competence depends on the way subsidiarity is interpreted (Haverbeke et al, 2010), while further complications stem from the interplay between the areas of exclusive competences of ACER and of the NRAs. One example of the latter regards the implementation of network codes and guidelines. These are adopted by the Commission following comitology, and ACER has monitoring powers over their consistent implementation. However, ACER lacks enforcement powers, so it counts on the cooperation of national authorities for implementation. The potential for a clash of competence is addressed by the fact that senior

representatives from the NRAs sit on the ACER Board of Regulators (Haverbeke et al., 2010). The proposed CEP provides for some enforcement powers for ACER: the competence to decide on terms, methodologies and algorithms for the implementation of electricity network codes and guidelines (EC, 2016c, Art 5). This would contribute to enhancing clarity, (as well as consistency), at least to a certain extent.

Finally, clarity and consistent application may be undermined both by the nature of the legal instruments used by ACER in carrying out its functions, and by the absence of any specific steer in relation to the content of such measures in primary legislation. For instance, ACER develops framework guidelines that will be the basis for ENTSOs' network codes, but there is no precise indication in the third package as to what the framework guidelines or network codes should contain. Also, ACER has the competence to issue opinions with regards to the activity of the NRAs (EP&C, 2009b, Art 7(4)). Such opinions may be followed, or disregarded by the NRAs, and, as confirmed by recent case law, have no legally binding force (GC, 2016; GC, 2017). Should some of these opinions be breached, upon notification from ACER, nothing prevents the Commission, in principle, from starting infringement proceedings. Such uncertain legal nature and effects of soft law instruments raise clarity concerns, especially considering that the soft law developed within the network of regulatory authorities is becoming more and more relevant and is being adopted at the national level as a result of the high policy interdependence between the members of the network (Maggetti, 2013; Maggetti and Gilardi, 2014). It seems that, paradoxically, ACER's lack of decision-making powers is supplemented in practice by a broad discretion to issue non- binding instruments, which can ultimately undermine the *Meroni* doctrine.

4.3.3 Stability

ACER contributes to the stability of the regulatory system through its advisory functions for European institutions (EP&C, 2009b, Art 5). For this role to be meaningful, it is important to ensure the independence of the Agency, and of the national regulators. Departing from the Common Approach on Decentralised Agencies (EP,C&EC, 2012), ACER has an Administrative Board and a Board of Regulators, conferring independence from private stakeholders, political institutions, and the Commission (Chiti, 2009, p 1429). The CEP proposals opted for preserving the two boards, as concentrating administrative and regulatory functions would be

'premature' at the current stage of market integration. Nonetheless, it is important to note that, as for any EU agency, independence from EU institutions is limited by financial arrangements as well as by the boundaries of EU policies (Chamon, 2016).

Decisions are taken within the Board of Regulators, made up of representatives from the NRAs. While independent, the members, with one vote each, can act on behalf of their national authority (EP&C, 2009b, Art 14(5)). Ermacora has argued in favour of similar vote weightings as those used in the Council (2010) but this would suggest a political dimension to the work of the Board that may not be consistent with its exercise of delegated authority and its independence from either MS or the Commission. CEP aligns voting rules with the rules laid out in the Common Approach on Decentralized Agencies (simple majority for current business instead of 2/3) (EC, 2016c, Recital 34). The Administrative Board adopts the work programme and has budgetary powers. It represents EU and national interests, including nominees from the Commission, Parliament, and Council. While Members of the Parliament are expressly excluded from sitting on the Board (EP&C, 2009b, Art 12), Commission officials, by the nature of their job, cannot be independent from the Commission. However, this composition ensures that ACER benefits from the administrative expertise of the Commission services, therefore potentially enhancing consistency and the socialization of members of the Board leading, to a form of what Mashaw (2006) calls social accountability, which is akin to peer review. The ACER Director, appointed by the ACER Administrative Board (representing EU interests) from a choice of three candidates suggested by the Commission and following a positive opinion from the Board of Regulators (consisting of NRAs), has the power to take the recommendations, opinions, and decisions, subject to the guidance and opinion of the Board of Regulators.

Regarding the NRAs, the third energy package ensured greater independence from market and political interests, therefore increasing the potential for system stability. It imposed a single authority per MS, being distinct and independent from any other public or private entity and having a separate annual budget allocation (EP&C, 2009e, Art 39; EP&C 2009f, Art 35). This might have created some problems in continental countries from a separation of power perspective, with executive agencies' powers limited to the mechanical application of the law (Hancher and Larouche, 2011; ECJ, 2009) However, research shows how, through Commission pressure, institutional isomorphism and participation in ACER, exceptionally independent

regulatory agencies can develop in countries not necessarily sharing the independent agency model – such as Germany (Ruffing, 2014). A challenge ahead for ACER is to coordinate the cooperation of the DSOs within the proposed new entity for electricity. This is because their diversity is high (with around 2400 DSOs active in the MS) and their independence questionable (with further DSO unbundling dropped out from the final proposals) (Hancher and Winters, 2017).

4.3.4 Consistent application

Network industry regulation is generally criticized on the grounds of consistency in implementation and application, with MS approaching issues from divergent points of view (Hancher and Larouche, 2011). On the positive side, ACER's structure, with a Board of Regulators comprised of senior officials from the NRAs, is conducive to cooperation between authorities, an important requirement for ensuring the consistency of the regulatory energy framework across Europe. Furthermore, ACER plays an important advisory role, and can make recommendations to assist the authorities in sharing good practices, and such recommendations may in turn become legally binding through Commission endorsement. (EP&C, 2009b, Art 7(3)). There is of course room for improvement on this front, with ACER's 2016 recommendation suggesting the need to strengthen cooperation at the EU level by including in the legislation an obligation for the NRAs to cooperate at the level of ACER, with participation in the meetings of the Board of Regulators considered as a minimum.

On the negative side, ACER's powers are limited to issuing non-binding acts or soft law, giving it capacity to highlight and influence but not sanction. The latter remains the role of either the EC or national authorities. For example, ACER can only have a limited contribution to the development, throughout Europe, of consistent technical specifications on connectivity to generation and distribution installations. It cannot *require* such consistency, given that it can only make non-binding recommendations on technical rules adopted by the MS. (EP&C 2009f, Art 5; EP&C, 2009e, Art 8) Also, ACER can only recommend amendments to national ten year network development plans laid out by the ENTSOs (EP&C, 2009c, Art 8(11); EP&C, 2009d, Art 8(11)), where they are inconsistent with the Union-wide network development plan. Furthermore, ACER's oversight in relation to the compliance of decisions taken by NRAs with the guidelines referred to in the third energy package is limited. ACER neither has the initiative

of this compliance control (which can be undertaken solely upon request by an NRA or the Commission), nor does it have any real decision making power in this regard, as it can only issue a non-binding opinion. In case the NRA disregards such opinions, ACER cannot impose any sanctions; it can only inform the MS concerned and the Commission, which can secure a judgment under an Article 258 TFEU infringement procedure where the MS fails to meet its obligation (EP&C, 2009b, Art 7; EP&C 2009f, Art 39; EP&C, 2009e, Art 43). A final example concerns ACER's powers with regard to ensuring wholesale energy market integrity and transparency. If it suspects that REMIT has been breached, ACER may ask an NRA to supply information, commence investigations, take appropriate action to remedy the breach, and create and coordinate investigatory groups in case there is suspicion of cross-border impact. The responsibility for binding legal action however lies with the NRAs and not ACER.

ACER's powers are limited to achieve a consistent application of the law in the area of trans-European energy infrastructures. Expensive projects of common interest (PCI) are financed, according to the TEN-E Regulation (EP&C, 2013, p 39-75), by the MS concerned, and the NRAs have the competence to decide on the cross-border allocation of costs (CBCA). ACER can decide on CBCAs only if the NRAs fail to reach an agreement. In an attempt to ensure consistency, ACER issued a non-binding recommendation (ACER, 2013) laying out unified guidelines on how NRAs should split bills for PCIs. Yet, in a case concerning the Gas Interconnection between Poland and Lithuania, the NRAs proposed a CBCA that departed from ACER's unified guidelines (ACER, 2013),[7] showing the limited reach of such soft law instruments. In the end, the NRAs failed to reach an agreement on the Polish-Lithuanian project, and ACER used its residual decision-making power (EP&C, 2013, Art 12(6)) and set the CBCA in line with its own guidelines. Nonetheless, one can easily imagine a situation where NRAs *agree* on allocations that depart from the unified guidelines. Fresa (2015) suggests that the law should be changed to give ACER more power to make CBCA decisions for PCIs. Such centralization would ensure consistency, promote the European interest, while maintaining a high standard of expertise at the level of the regulator.

[7] The NRAs proposal it established different ways of compensating the project promoters and differing allocations of compensation between the contributing MS.

CEP proposes the strengthening of ACER's coordination role, and this will help ensure consistency, with most of the new measures aimed at preventing fragmentation ensuing from national decision-making on cross-border issues. For example, new decisional powers are attributed to ACER in relation to capacity mechanisms. Such tools, aimed at ensuring security of supply, are essentially State aid interventions. Article 107 TFEU stipulates that interventions must be approved by the EC. CEP gives a role to ACER to create common standards to assess compatibility with the internal market of capacity mechanisms introduced by the MS (EC, 2016b, Art 19). Such common standards will help improve both consistency and clarity in the application of the law. However, this proposal would mean, in practice, delegating the power to set criteria for State aid assessment from the Commission to an Agency, which raises competence concerns. Another proposal to enhance consistency is the strengthening of ACER's coordination role at the regional level, by granting ACER power to supervise the ROCs and competence to decide on methodologies enabling providers to participate in market-wide capacity mechanisms (EC, 2016b, Arts 21-22).Both these measures are aimed at carving out regional specificities and adapting to the application of general rules, consequently creating scope for diversity.

5 Conclusions and policy implications

This article assessed centralization and (re)-delegation of powers in EU energy regulation, drawing on the framework of the P/A theory from political science, while supplementing the analysis with a rule of law perspective. It endorsed various proposals to improve the current system of accountability, and it is important to highlight the following. First, in EU energy regulation, meaningful cooperation between authorities active at various levels of governance and in different sectors of activity (such as competition) is crucial for preserving the delicate balance of shared competences. Second, ACER's powers need to be strengthened, by either restructuring its functions in order to avoid competence overlap or by allowing ACER to issue more legally binding decisions and reduce its dependency on national regulators or the EC. At first sight, such a suggestion might seem to conflict with the *Meroni* doctrine. However, it needs to be noted that the *Meroni* doctrine carries different meanings according to the academic literature or institutional practice and has been significantly reduced following the *Short-Selling* case (ECJ, 2014) to the simple prohibition of delegating discretionary powers,

understood in controversially loose terms (Chamon, 2016). Furthermore, if one is to take *Meroni* and *Short Selling* seriously, one should note that an important component of the doctrine concerns accountability, institutional balance, and, more specifically, judicial review. Or, as illustrated by the case law, the plethora of non-binding instruments issued by ACER is not amenable to review by Courts or even by ACER's own Board of Appeals. Third, the financial implications of increasing ACER's powers should not be overlooked, and appropriate funding should be granted to the Agency, as suggested by its Director in various activity reports.

This article provides a necessary normative context within which to view delegation of executive powers and further substantiates the principle of energy justice, as a foundational principle for energy law as an autonomous legal field. A narrow conception of the rule of law resonates with procedural energy justice, or 'the equal ability of all social groups to be able to participate in decision-making processes in proposed energy developments' (Heffron et al, 2018: 42). In this respect, it transpired that for a field of shared competence like energy, transparency as a prerequisite for the exercise of effective accountability, is important. Furthermore, issues arise as to the scope of consistency and clarity in energy law, which reflect underlying tensions as to the scope of delegation and the inconsistency of competing objectives in the policy field. Given these tensions, the rule of law is a current work-in-progress in EU energy law. With soft law mechanisms, this may be the most that can be hoped for and realised. This suggests that accountability should remain a primary focus in order to foster energy justice in Europe.

Acknowledgements

The authors are grateful for comments from the anonymous reviewers of Energy Policy as well as from the participants at the following events: *Use and Limitations of the Principal-Agent Model in Studying EU Politics*, (April 23 and 24 2014, Université Catholique de Louvain); the *UK Energy Law and Policy Association 2015 Annual Event*, (September 10-11 2015, University College, Oxford); the *Research Seminar at City University*, London, of 15 February 2018. Thanks to Maria Kendrick, Monika Tobjasz, Ronan Riordan, and Francis McNamara for research assistance.

[i]

[i] **References**

ACER, 2013. Recommendation 7/2013 regarding the cross-border cost request submitted in the framework of the first union list of electricity and gas projects of common interest https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2007-2013.pdf

ACER, 2015a. Work Programme 2015, http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Work%20Programme%202015.pdf

ACER, 2015b. Decision of the Board of Appeal of the Agency for the Cooperation of Energy Regulations [26 December 2015]. A-001-2015. Available at https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Decisions/238%20A-001-2015%20BoA%20decision%20(non%20confidential%20version)%202112-2112.pdf, last accessed 14th of November 2018.

ACER, 2016. Recommendation No 1/2016 On Ensuring the Independence of the Agency for the Cooperation of Energy Regulators and of National Regulatory Authorities, 30 May 2016 http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf

ACER, 2017. ACER and ENTSOG upgrade the functionality platform to support the implementation of gas network codes. Press Release 1/08/2017. Ljubljana. http://www.acer.europa.eu/Media/Press%20releases/ACER%20PR-05-17.pdf

Bovens, M., 2007. 'Analysing and Assessing Accountability: A Conceptual Framework' 13(4) European Law Journal 447.

Burris S., Kempa M. and Shearing C., 2008. 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship' 41 Akron Law Review 1.

Cane, P., 2010. The Hart Fuller Debate in the Twenty-First Century. Hart, Oxford.

CEER, 2015. Articles of Association of the Council of European Electricity Regulators ASBL – Consolidated on 15 September 2015. Available at https://www.ceer.eu/documents/104400/-/-/c688187c-ab7c-a737-0c52-4eeff4f0446d, last accessed 15 November 2015.

Chamon, M., 2016. EU Agencies: Legal and Political Limits to the Transformation of the EU Administration. Oxford University Press, Oxford.

Chiti E., 2009. An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies. 46 Common Market Law Review 5 1395.

Coen D. and Thatcher M. 2008. Network Governance and Multi-level Delegation: European Networks of Regulatory Agenciess. 28 Journal of Public Policy 49.

Curtin D., Hofmann H. and Mendes J., 2013. Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda. 19 European Law Journal 1.

Delreux T., Adriaensen J., 2017. Conclusion. Opportunities and Challenges for the Principal–Agent Model in Studying the European Union. In: Delreux T., Adriaensen J. (eds) The Principal Agent Model and the European Union. Palgrave Macmillan.

Dicey, A. V., 1914. Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century, 2017, Routledge.

Eberlein B., 2008. The Making of the European Energy Market: The Interplay of Governance and Government. 28 Journal of Public Policy 73.

Eberlein B. and Grande E., 2005. Beyond delegation: transnational regulatory regimes and the eu regulatory state. 12 Journal of European Public Policy, 89.

EC - European Commission, 2003. Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/796/EC). OJ L 296, 14.11.2003, p. 34–35

EC - European Commission, 2006. Communication from the Commission, Inquiry pursuant to A17 of Regulation 1/2003 into the European gas and electricity sectors. COM (2006) 851 final.https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006DC0851

EC – European Commission, 2010 – Staff Working Paper, Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas "The Regulatory Authorities" of 22 January 2010. https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_regulatory_authorities.pdf

EC - European Commission, 2016a. 'Clean Energy for All Europeans'. Brussels, Belgium. https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans (hereinafter CEP). Up to 5 December 2018, the EU adopted four out of eight proposals of this package: the Energy Performance in Buildings Directive (2018/844, OJ L 156,

19.6.2018, p. 75–91), the Energy Efficiency Directive (PE-CONS 54/18), the Renewable Energy Directive (PE-CONS 48/18), and the Governance Regulation (PE-CONS 55/18).

EC - European Commission, 2016b. Proposal for a Regulation of the European parliament and of the Council on the internal market for electricity (recast). COM(2016) 861/2 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0861

EC - European Commission, 2016c. Proposal for a regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast). COM(2016) 863 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:863:FIN

EC - European Commission, 2017a. Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas. OJ L 72, 17.3.2017, p. 29–56.

EC - European Commission, 2017b. Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013. OJ L 72, 17.3.2017, p. 1–28.

ECJ - European Court of Justice, 1958, Judgment in Case C - 10/56 Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community EU:C:1958:7

ECJ – European Court of Justice, 1981, Judgment in Case 98/80 Romano, EU:C:1981:104

ECJ – European Court of Justice, 2009, Judgment in Case C-274/08, Commission v Sweden, ECLI:EU:C:2009:673

ECJ – European Court of Justice, 2014, Judgment in Case C - 270/12 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union EU:C:2014:18

EP&C – European Parliament and Council, 2009a. Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005. OJ L 211, 14.8.2009, p. 36–54.

EP&C – European Parliament and Council, 2009b. Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators. OJ L 211, 14.8.2009, p. 1–14.

EP&C – European Parliament and Council, 2009c. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the

network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003. OJ L 211, 14.8.2009, p. 15–35.

EP&C – European Parliament and Council, 2009d. Regulation (EC) No 715/2009 of the European Parliament and of the European Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005. OJ L 211, 14.8.2009, p. 36–54.

EP&C – European Parliament and Council, 2009e. Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. OJ L 211, 14.8.2009, p. 94–136.

EP&C – European Parliament and Council, 2009f. Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC. OJ L 211, 14.8.2009, p. 55–93.

EP&C – European Parliament and Council, 2011. Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, OJ L 326, 8.12.2011, p. 1–16

EP&C – European Parliament and Council, 2013. Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009. OJ L 115, 25.4.2013, p. 39–75.

EP&C – European Parliament and Council, 2018. Regulation Of The European Parliament And Of The Council on the Governance of the Energy Union and Climate Action, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, not yet published, PE-CONS 55/18

EP,C&EC – European Parliament, the Council of the EU, and the European Commission, 2012. Joint Statement on decentralized agencies. https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf

Ermacora, F., 2010. The Agency for the Cooperation of Energy Regulators (ACER). in Jones C W and Webster W, EU Energy Law. The Internal Energy Market 3rd edn, Claeys & Casteels, Leuven.

Feltkamp, R. and Musialski, C., 2013. Integrity and Transparency in the EU Wholesale electricity Market – New rules for a better functioning market? OGEL (Journal of Global Energy Law & Regulation), Vol. 5

Fresa, S., 2015. Multilevel EU Governance in Energy Infrastructure Development: A New Role for ACER?
http://www.diw.de/documents/dokumentenarchiv/17/diw_01.c.508434.de/fresa.pdf

Fuller, LL, 1964. The Morality of Law. Yale, New Haven.

GC - General Court, 2016 E-Control v ACER, 2016. Case T-671/15 E-Control ECLI:EU:T:2016:626.

GC – European Court of Justice, 2017. E-Control v ACER, 2017. Case T-63/16 E-Control ECLI:EU:T:2017:456.

Graham, C., 2000. Regulating Public Utilities: A Constitutional Approach. Oxford, Hart.

Graham, C., 2016 UK: The Concurrent Enforcement by Regulators of Competition Law and Sector-Specific Regulation. Journal of European Competition Law & Practice, 7 (6), 407.

Groenleer M., 2016. Redundancy in multi-level energy governance. TARN working paper 6/2016. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865683

Hancher L. and Larouche P., 2011. The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest. in Craig P and Búrca G (eds), The Evolution of EU Law 2 edn. Oxford University Press, Oxford.

Hancher, L. and Winters, B.M., 2017. The EU Winter Package Briefing Paper. http://fsr.eui.eu/wp-content/uploads/The-EU-Winter-Package.pdf

Hart, HLA, 1958. Positivism and the Separation of Law and Morals. 71 Harvard Law Review 593.

Haverbeke D., Naesens B. and Vandorpe W., 2010. European Energy Markets and the New Agency for Cooperation of Energy Regulators. 28 Journal of Energy and Natural Resources Law 403.

Heffron, R., 2016. “Shared Governance” ACER and the Roles of the National Energy and Competition Regulators in the EU. in Cameron, Peter and Heffron, Raphael, Legal Aspects of EU Energy Regulation – The Consolidation of Energy Law Across Europe. second edn, Oxford University Press, Oxford.

Heffron, R. J. & McCauley, D., 2017. The concept of energy justice across the disciplines. Energy Policy, 105, 658-667.

Heffron, R. J. and Talus. K., 2016a. The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers. Energy Research and Social Science, 19, 1-10.

Heffron, R. J. and Talus. K., 2016b. The development of energy law in the 21st century: a paradigm shift? Journal of World Energy Law and Business, 9 (3), 189-202.

Helm, DR., 2012. European Energy Policy. in E. Jones, A. Menon and S. Weatherill (eds) The Oxford Handbook of the European Union, Oxford University Press, Oxford.

Hrabcakova, B. and Liptak, T., 2014. EU Legislation on the Electricity Market: Introducing Competition - Interaction between Sector-Specific Regulation and EU Competition Rules - Third Legislative Package. 13 Common Law Rev. 62

Iborra, S.S., Saz-Carranza, A., Fernández-i-Marín X. Albareda A., 2018. The Governance of Goal-Directed Networks and Network Tasks: An Empirical Analysis of European Regulatory Networks Journal of Public Administration Research and Theory, Volume 28, Issue 2, Pages 270–292

Johnston A., Block G., 2012. EU Energy Law. Oxford University Press, Oxford.

Kettner-Marx, K., Kletzan-Slamanig, D., 2018. The Status of Climate Policy Integration in EU. Energy Policy WIFO Working Papers, No. 551.

Labelle, M., 2017. Regulating for Consumers? The Agency for Cooperation of Energy Regulators. in Andersen, Svein et al., Energy Union Europe's New Liberal Mercantilism?, London, Palgrave.

Lavrijssen, S. and Hancher L., 2009. Networks on Track: From European Regulatory Networks to European Regulatory 'Network Agencies'. 36 Legal Issues of Economic Integration 23

Lavrijssen, S. and Kohlbacher, T., 2018. EU Electricity Network Codes: Good Governance in a Network of Networks TILEC Discussion Paper No. 2018-001. https://ssrn.com/abstract=3098081 or http://dx.doi.org/10.2139/ssrn.3098081, accessed 05/12/2018

Maggetti, M., 2013. The Politics of Network Governance in Europe: The Case of Energy Regulation. 37 West European Politics 497.

Maggetti, M. and Gilardi F., 2014. Network governance and the domestic adoption of soft rules. 21 JEPP 1293.

Maher, I., 2009. Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network. 7 Comparative European Politics 414.

Maher, I., Billiet S., Hodson D., 2009. The principal-agent approach to EU studies: Apply liberally but handle with care Comparative European Politics. 7 (4), 409-413

Manderson, D., 2010. HLA Hart, Lon Fuller and the Ghosts of Legal Interpretation. 28 Windsor Yearbook of Access to Justice 81.

Marmor, A., 2004. The Rule of Law and its Limits. 23 Law and Philosophy 1

Mashaw, JL., 2006. Accountability and Institutional Design: Some Thoughts on the Grammar of Governance. in ML Dowdle, (ed) Public Accountability: Designs, Dilemmas and Experiences, Cambridge Unviersity Press, Cambridge.

Mastenbroek, E. & Sindbjerg, Martinsen, D., 2017. Filling the gap in the European administrative space: the role of administrative networks in EU implementation and enforcement. Journal of European Public Policy, 25:3, 422-435

McCubbins, M.D., Noll, R.G. and Weingast, B.R., 1987. Administrative Procedures as Instruments of Political Control of Law. 3(2) Journal of Law, Economics and Organization 243.

McCubbins, M.D., Noll R.G., and Weingast B.R., 1989. Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies 75 Virginia Law Review 431.

Mulgan, R., 2003. Holding Power to Account: Accountability in Modern Democracies. Palgrave Macmillan, Basingstoke.

Pollack, M., 1997. Delegation, agency, and agenda setting in the European Community. International Organization, 51(1), 99–134.

Ringel, M. and Knodt, M. 2018. The governance of the European Energy Union: Efficiency, effectiveness and acceptance of the Winter Package 2016. Energy Policy 112, 209-220.

Rose, J., 2004. The Rule of Law in the Western World: An Overview. 35(4) Journal of Social Philosophy 457.

Rubin, E.L., 1990-91, 'The New Public Law: The Concept of Law and the New Public Law Scholarship' 89(4) Michigan Law Review 792.

Ruffing, E., 2014. How to Become an Independent Agency: The Creation of the German Federal Network Agency. 23 German Politics 43.

Scharpf, F.W., 1999. Governing in Europe. Oxford University Press, Oxford.

Schmidt, VA., 2013. Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'. 61(1) Political Studies 2.

Schneider, J.P., 2018. Energy and Trans-European Networks. in Hofmann, H., Rowe, G., and Türk, A.H., Specialized Administrative Law of the European Union. Oxford University Press, Oxford.

Scholz, U., Purps, S., 2012. The Application of EU Competition Law in the Energy Sector. Journal of European Competition Law & Practice, 3(1), 76.

Scott, C., 2000. Accountability in the Regulatory State. 27(1) Journal of Law and Society 38.

Scott, C., 2005. Agencies for European Regulatory Governance: A Regimes Approach. in Géradin, D., Muñoz R., and Petit N. (eds) Regulation through Agencies in the EU: A New Paradigm of European Governance. Edward Elgar, Cheltenham.

Sovacool, B. & Heffron, R., McCauley, D. and Andreas G., 2016. Energy decisions reframed as justice and ethical concerns. Nature Energy. 1.

Stefan, O. & Petri, M., in press. Too Weak to Be Controlled: Judicial Review of ACER Soft Law, Yearbook of European Law, p.1-26.

Tallberg, J., 2002. Delegation to supranational institutions: Why, how, and with what consequences? West European Politics. 25(1), 23–46.

Talus, K., 2013. EU Energy Law and Policy A Critical Account. Oxford University Press, Oxford.

Thatcher, M. and Stone Sweet, A., 2002. The Theory and Practice of Delegation to Non-Majoritarian Institutions. 25(1) West European Politics 1.

Thompson, E., 2015. The European Union's Energy Policy: Two Track Development in Witzleb N., Arranz A.M. and Winand P. (eds), The European Union and Global Engagement: Institutions, Policies and Challenges. Edward Elgar

Tyler, T.R., and Huo, Y.J., 2002. Trust in the Law: Encouraging Public Cooperation with the Police and Courts. Russell Sage Foundation, New York.

Unger, R., 1976. Law in Modern Society. Free Press, New York.

Wenzel, M., 2002. The impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Rule of Taxpayers' Identity. 87 Journal of Applied Psychology 629.

Yataganas, X.A., 2001. Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies. Jean Monnet Working Paper 3/01 www.jeanmonnetprogram.org/archive/papers/01/010301-04.html