Competence Creep Through the Backdoor:
EU Energy Regulation and Competition Policy

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Abstract:
The EU energy markets are prerogative of the Member States and both subject to particular energy market regulation and more general competition policy regulation. The unique characteristics of the European states' energy sectors have kept them outside of the European Union loop competences for decades. However, the Lisbon Treaty, the EU competition policy reforms and shift of the EU integration mode towards less hierarchical and more decentralized process have provided new impetus to the European Commission to expand its activities into the energy sector. Based on two case studies, competition policy enforcement in the EU internal energy sector and the ‘agencification’ of the European energy regulators network, the paper argues that the expansion of the EU competences within the energy sector has not reached its limits yet, and that this sector is becoming increasingly supranational.
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INTRODUCTION

The energy policy of the European Union – or rather lack of it – was previously seen as one of the “major failures” of the European Community. It was explained by the multiple and complex role of the very European Commission (Padgett 1992), geopolitical sovereignty concerns of member states (Eberlein 2012, 149) and other reasons. Energy remains “politically charged commodities” (Goldthau 2010, 25) that are both subject to particular energy markets’ regulation and more general competition policy regulation, and the European Union has had exclusive competences only in the latter.

However, during the past decade a number of trends in the European Union energy sector have appeared and intensified: the European Commission has become increasingly actively using competition policy, namely, antitrust, tools in the EU natural gas and electricity sector; was awarded negotiation mandates with the possible energy sector providers; participated in gas supply contract negotiations between one EU member state, Poland, and the supplier Gazprom, and has established an agency of European energy regulation. Recent scholarly accounts have noticed changes in “overcoming significant obstacles to Europeanization endemic to the energy sector” (Eberlein 2012, 148, also see Maltby 2013), and prescribe to it the key role of the European Commission as an entrepreneur in using "windows of opportunities" for EU policy expansion opened by external developments and crisis.

These developments were taking place against the backdrop of other more general regulatory trends within the European Union, such as increase of variety of regulatory forms from top-down imposed EU legislation to more decentralized and less hierarchical versions of regulation (Groenleer and Kars 2008, 5); from hierarchical to soft-modes of the EU governance (Schmitter 2007); and turning the EU into a regulatory state, where metaphor of the EU’s creeping competence in new policy areas is even thought be misleading, and the idea of an inevitable process of centralization of the European Community is called a myth (Majone 2002).

Nonetheless, this paper demonstrates that for the case of the energy sector, things have taken a different dynamic than general trends of EU integration seem to be taking. It offers new insight into how the Commission gradually expands it competences, using its mandate of
market-making via competition policy tools and creating an agency of the energy regulators. The paper aims to show that the European Commission acts as a "purposeful opportunist" (Cram, Dinan, and Nugent 1999, 48), and exploits any opportunity to expand its liberalizing agenda into the energy sectors of the EU Member States. Despite the fact that the EU exclusive competences mostly apply to the EU legislative decisions and the EC does not have legislative powers, the Commission still finds room to act as an integration agent in the energy sector and goes beyond agenda setting in the energy legislation.

The paper also shows a phenomenon that in such process of creeping supranationalism, the strategy of the EC is reliance on networks rather than top-down hierarchical regulation. Interestingly, reliance on networks from first glance should decentralize rather than integrate the EU energy sector regulation and weaken the powers of the Commission. Nevertheless, we argue that the EU competition policy reforms and the Lisbon Treaty have given new impetus to the European Commission, and that the expansion of the EU competences within the energy sector has not reached its limits yet; furthermore, this sector is becoming increasingly supranational. In this vein, the paper aims to contribute to the debate of the Europeanization of the energy sector and of the role of the Commission – whether it is an “obedient servant” (Pollack 1995) or still the “engine of integration” even during recent trends of EU integration.

The first part of this paper offers an overview of the discussion about the exclusive and shared competences of the EU, the role of such competences for the Commission, and the discussion whether new regulatory trends in the EU increase or dissolve the power of the Commission. The second part presents two case studies of Commission activism in competition policy enforcement and regulatory institution sectors of the internal EU energy sector. The two cases serve to show that European Commission is strengthening its stand in the energy sector both via competition policy regulation and direct energy sector regulation in both cases it relies on networks.
THE END OR REESTABLISHMENT OF COMPETENCE-CREEPING?

There are numerous opinions announcing the end of the era of expanding the European Union’s competences into various areas of European policy making. They are based on different rationales. Firstly, the EU have already supposedly reached the limits of competence expansion and centralization (Majone 2002; van Ooik 2007). Secondly, as the EU increasingly becomes a "regulatory state" (Majone 1992; 1997; 2005), and new, decentralized modes of governance (European Commission 2001) take place within the Union with increased reliance on horizontal agencies, there is less place for supranational power concentration. Besides, while EU–level agencification was a marginal development before 1990, it began growing in importance in the 1990s and blossomed after 2000. Regulatory networks of public officials became a popular form of EU governance in the 1990s (Levi-Faur 2011a).

The vertical delimitation of competences between the EU and its Member States applies to the legislative decision making in the European Union. Legal scholars define the exercise of competences as issuing a secondary legislation such as directives, regulations and so on based on Treaty provisions (van Ooik 2007). By a standard decision-making procedure, the European Commission has a monopoly of proposing Community laws and setting the agenda. It is the Council of the European Union together with the European Parliament that adopts them, or, in certain cases, legal acts may be adopted by the Council alone (European Commission 2014). Thus, even in areas where the European Union has exclusive competences to issue a legislative decision, the European Commission’s powers are mostly limited to proposing them: the legislative proposals still have to undergo the unanimous or qualified majority voting procedures (van Ooik 2007).

In general, the European Commission is considered to play a key formal role in the EU policy process: carrying out the tasks of initiating policy, creating legislation, representing the EU abroad, acting as a watchdog to ensure implementation of EU policies, and taking responsibility for the administration of Commission programmes (Cram, Dinan, and Nugent 1999, 45). The Commission is considered to act as a "purposeful opportunist," which has learned to maximize its room for maneuver in the policy process, while attempting to direct conflict with Member States. It is argued that the Commission, as a matured bureaucracy, has
sophisticated means of expanding its competences in areas where it is difficult for the Member States to rein it in. The long-term effect of these activities can be to lock the Member States into commitments that they might not initially have chosen themselves. In this way the EC has some influence on the process of European integration more generally (Cram 1999, 48). Some literature suggest that the European Commission acts as a policy entrepreneur, and uses the policy windows in order to pursue its energy policy in the agenda-setting phase of the policy making cycle (Maltby 2013).

Neither the founding EEC Treaty (1957), nor the Maastricht Treaty (1992), provided the Community with the competence to develop energy policy (Yafimava 2013, 2). The Treaty of Lisbon or so-called Treaty of Functioning of the European Union (TFEU), which was adopted in 2007 and came into force in 2009, brought about two major changes in terms of vertical delimitation of competences between the EU and its Member States. Firstly, TFEU introduced a precise classification of competences distinguishing between three main types: exclusive competences, shared competences and supporting competences. Secondly, TFEU also added new spheres in the realm of shared competences between the EU and the Member States, such as the energy sector.

Thus, after decades of formally remaining mostly a prerogative of the Member States, in 2009, with the Lisbon Treaty, formal EU competences in the energy sector materialized (Yafimava 2013) when the latter was assigned to the shared competences by Article 4. Based on the previous Treaties, there had already been exclusive and shared competence allocation among the EU institutions and the EU Member states. However, they were not spelled out as clearly, and it was often left for the European Court of Justice and its case law to assign competences to specific policy areas.

Since the adoption of TFEU, in the area of exclusive competences (Article 3 of the Treaty) the EU alone is able to legislate and adopt binding acts in these fields. The Member States’ role is therefore limited to applying these acts, unless the Union authorizes them to adopt certain acts themselves. The exclusive competence in policy areas within the EU is a part of the harmonization agenda, or so-called Community Method.
In the area of shared competences (Article 4 of the TFEU), the EU and Member States are authorized to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence. Thus, even if this competence is called 'shared', the European Union has a priority of taking action there. This means that shared competences may become exclusive if the Union/Community has made use of them or, as Wessel (2007) explains, what is a shared competence now, may be a *de facto* exclusive competence in a couple of years. Besides, whenever these national policies conflict with Community policies, priority should be given to the Community rules (Wessel 2007, 46). In the area of supporting competences (Article 6 of the TFEU), the EU can only intervene to support, coordinate or complement the action of Member States. Consequently, it has no legislative power in these fields and may not interfere in the exercise of these competences reserved for Member States.

This raises a series of questions. Have such changes resulted in an actual expansion of the EU competences and supranational integration forces in the EU internal energy sector? What is the role of the European Commission, which is assumed to be tremendously interested in expanding the scope of Community competence to new areas and increasing its own competence and influence within the Union’s policy process (Pollack 1994, 102)?

There are other opinions: Wessel (2007), for example, states that even in the areas where the European Union has a shared competence with the Member States, those competences are still rather exclusive (more integrating) than shared (43). According to him, because of "the duty of genuine cooperation" and above all the "internal market logic" as interpreted by the Court of Justice, competences have been or can be transferred to the Community and the Union in a manner not strictly complying with the narrow boundaries of the attribution doctrine (Wessel 2007, 49).

Van Ooik, on the other hand, finds that "the competence limits have already been reached" (2007, 39) – thus, there is no more room for expansion even with the Lisbon Treaty. Even Pollack, who introduced the concept of "competence creep" by the European Commission (Pollack 1994) later announced its end (Pollack 2000). Majone (2005) argues while the most EU policies are regulatory in nature, European Union institutions use the "integration by stealth"
method and, in this respect, the Commission may be considered a sort of superagency. However, Majone also presents a point of view that the so-called "competence creep" by the European Commission is a myth and that expansion of the jurisdiction instead of increasing the powers of the EU/EC has actually weakened the powers of the European Commission. Among other reasons, Majone (2002) attributes it to "trends toward decentralized forms of governance" (380), and agencification of regulatory policy. He believes that new competences do not necessarily mean increased power for the Commission (Majone 2002).

Levi–Faur (2011) also draws attention to the tendency that in the European Union a new regulatory architecture is emerging that is expressed in the extension of regulatory capacities beyond the European Commission via two major forms of institutionalization: agencies and networks. In such a setting, agencies also replace networks and ‘agencification’ takes place. According to Levi–Faur, agencies and networks may be understood as administrative innovations that complement or compete with each other and with older and more established modes of regulatory governance, such as the Commission. Following his point of view, the Commission represents a mode of regulatory governance that is hierarchical and political, and the agencies represent a mode of regulatory governance that is based on a professional hierarchy of authoritative experts. Agencies represent the fragmentation of regulatory authority and the delegation of responsibility (even if limited) from the "political" Commission to "professional" and independent institutions (Levi–Faur 2011, 811-812).

Conversely, Kelemen (2002) does not always see the creation of EU-wide agencies and delegation of powers to them as decreasing the power of the Commission. According to him, the Commission is likely to be most reluctant to delegate powers to agencies in policy areas where it already has far-reaching competences (Kelemen 2002, 111). In his point of view, the delegation of information-gathering tasks to European agencies may encourage the Commission to act more aggressively in enforcement, as it would diminish the Commission’s concern that taking enforcement actions against member states will compromise its ability to gather information (Kelemen 2002, 112).

Groenleer and Kars (2008), who analyze the regulation of the telecommunications sector, warn that when creating EU agencies, for example, powers are usually not taken away
from the Commission; instead of being transferred horizontally, from Community institutions to agencies, they are transferred vertically, from the national to the EU level. Since such sectors as telecommunications or energy are already regulated by national agencies, the creation of additional agencies has so far not been acceptable to the Member States (Groenleer and Kars 2008, 6).

Therefore, Kelemen along with Groenleer and Kars predict that the European Commission would be reluctant to create agency in areas where it already has established executive powers for fear of losing them. For example, they note that the Commission strongly resisted the proposal from some EU Member States to create an independent European Cartel Office because it already had a strong Directorate general in competition and exclusive competence in this area conferred by the EU Treaties (Kelemen 2002, 111; Groenleer and Kars 2008, 7). However, as case studies show,

Against this backdrop, the question arises whether reiteration of the EU exclusive competences in competition policy legislation and expansion of EU competences in the energy sector would be translated to increased Commission activities in the area of energy? Would the Commission, as ‘the agent of integration’, use the opportunities to pursue the internal market agenda in the highly monopolized and heavily regulated energy sector? To answer these questions, two case studies presented in the second part of the paper analyze recent developments in the European Union competition policy enforcement in the EU energy sector and increasing energy regulatory policy agencification.
CREEPING COMPETENCE: COMPETITION POLICY AND ENERGY AGENCIES

Regulatory developments in the EU internal energy sector during the last decade offer an insight into the European Commission’s activism in the energy sector, whereas this sector has been a prerogative of the EU member states because of the crucial importance of energy for national economies. Two cases are examined in further detail: events are traced historically in (1) the competition policy application in the energy field, from inception of EC activism to takeover by the competition policy; and (2) "Agencification" of the energy regulation among the EU member states. The cases represent developments in two different regulatory regimes – competition policy application and industry regulation both applied to the EU energy sector.

The Commission’s antitrust activism in the energy sector

The Lisbon Treaty did not bring new major changes in terms of Union competences competition policy regulation as it has been an exclusive competence of the European Union already before. However, the EU competition policy regime has been fundamentally altered by the Regulation 1/2003 in the way in which the EU enforces its antitrust prohibitions of abuse of dominant position and cartels. The previous enforcement regime dated from 1962. The Commission proposed to "make better use of the complementarity that exists between the national authorities and the Commission, and to facilitate the application of the rules by a network of authorities operating on common principles and in close collaboration" (European Commission 1999, 32).

Regulation 1/2003 created a system of decentralized competition policy enforcement, in which the European Commission and the competition authorities of the EU Member States (national competition authorities) form the European Competition Network, which prosecute infringements of the TFEU (Wils 2013). During the investigations, the Commission officials are accompanied by their counterparts from the relevant national competition authorities. Therefore, the national competition authorities became agents of the European Commission DG Competition, and undertook a large part of the burden to supervise compliance of the undertakings with EU competition rules.
On the other hand, as an interpretation decision of the European Court of Justice has shown, the EC kept the prerogative to make a formal declaration that a business undertaking has not breached EU rules and can adopt so-called ‘non-applicability’ decisions. The national competition authorities are not able to issue binding decisions that no infringement of articles of TFEU regarding prohibition of abuse of dominant position and cartels took place, and they are also precluded from issuing individual exemptions (MacGregor and Gecic 2012). Wils (2013) draws attention to the fact that Regulation 1/2003 allowed for the Commission to prioritize its actions (298) and it may have been allowed to deal with more complex cases (300).

Besides the above mentioned changes, with adoption of Regulation 1/2003 the European Commission’s investigatory and sanctioning powers were increased, such as the increased possibility to ask oral questions during inspections, the possibility to use seals, the possibility to inspect private homes, the increased penalties for obstruction of investigations, and the higher level of periodic penalty payments for non-compliance with decisions. The Commission has "made a good use" of investigatory and sanctioning powers since the adoption of the regulation (Wils 2013). For example, it used a seal in 2006 during an inspection of the German energy company E.ON Energie AG headquarters, and later on imposed a fine on E.ON for breach of the seal.¹

An analysis of the Commission’s cases accessible in the DG Competition case database shows that whereas there were no cases of antitrust – abuse of dominant position or cartel – in the energy sector before 2000, from 2000 to 2013 there is a number of ongoing or completed investigations, altogether around 50 throughout the period (European Commission 2014). Before the EU enlargement, the energy antitrust cases naturally took place in the old EU Member States, most often in France and Germany’s natural gas and electricity sectors. After the Enlargement, the first new EU Member State to fall under investigation was Malta, when the Commission in 2007 opened infringement procedures against it for maintaining an import monopoly for petroleum products. Since 2009, energy markets of the new EU Member States have constantly been under investigation, while the Commission still occasionally opens probes in the energy markets of the "old suspects" – France and Germany.

¹ This was the first case in which the Commission fined a company under the Article regarding breaking the seals affixed by the European Commission (European Commission 2008).
Over time, the complexity of the cases has increased and the Commission performs investigations on a wider scope and in several Member States simultaneously. In 2005, despite the fact that the energy sector is the main area of DG Energy, the Commissions’ DG Competition opened the Sector inquiry into gas and electricity, which was concluded in 2007. Already during the period of inquiry, the Commission conducted numerous investigations. In 2006, it had until then unprecedentedly in the energy sector carried out unannounced simultaneous inspections at the premises of gas companies in five old Member States: Germany, Italy, France, Belgium and Austria (European Commission 2006).

The European Commission’s DG Competition antitrust activity in the European energy sector escalated in September 2011, when it directed its full attention to the natural gas markets in the new EU Member States. Commission officials carried out unannounced inspections at the premises of companies active in the supply, transmission and storage of natural gas in almost all new Member States that have natural gas import relationships with Gazprom (European Commission 2011). The probe, which has been labeled the "antitrust clash of the decade" (Riley 2012), is still ongoing.

To summarize our findings, the European Union already had exclusive competences in enforcing competition in the European Union, but the new Regulation that was adopted in 2003 freed the Commission’s hands to more complex cases by allowing it to employ the national competition authorities effectively as branches of the DG Competition. The regulation has also increased the EC’s powers during investigation. The Commission has actively used the changes and since 2000 has been playing an active role in enforcing competition in the energy sector. Not long after the 2004 EU enlargement, the Commission began conducting probes into the energy markets of the new EU Member States. The cases undertaken by the DG Competition also increased in complexity and scope, culminating with the antitrust investigation of Gazprom actions in the whole of Central and Eastern Europe. Therefore, despite the fact that the reform of competition policy enforcement in the European Union market ostensibly decentralized the actions of the Commission, the Commission actually strengthened its grip in the energy sector. Majone interpreted such delegation of tasks to national competition authorities as possibly weakening the Commission and making it "increasingly dependent on national administrative
authorities which vary considerably in terms of efficiency and effectiveness" (Majone 2002, 383). The analysis shows that this may not have been the case and he Commission deliberately used competition policy to target a sector that was initially outside the EU realm using new “toolbox” set by Regulation 1/2003.

The energy industry is very particular in having both the competitive parts of the industry, which can be exposed to competition, for example, supply to customers, and the non-competitive parts, such as operation of the networks (European Commission 2014). Thus, besides the regulation of general competition authorities, the European energy sector also falls under the supervision of special energy regulatory agencies. The next subsection analyzes the European Commissions’ actions in the area of internal energy regulation, where the EU does not have exclusive competences.

**Agencification of the network of energy regulators**

In 2000, the EU national energy regulators voluntarily created the Council of European Energy Regulators (CEER) by signing the "Memorandum of Understanding for the establishment of the Council of European Energy Regulators." The energy regulators aimed to "facilitate cooperation in their common interests for the promotion of the internal electricity and gas market." With the European Union expansion of 2004 on the way, the regulators in 2003 decided to formally establish themselves as a not-for-profit association under Belgian law and to set up a small secretariat in Brussels (CEER 2013).

In parallel to these voluntarily actions by the regulators, in 2001 the European Commission released a white paper on European governance, which revealed the Commission’s general preferences towards agencification: it stated there that regulators have an increasingly important role in applying Community law, but in order to improve the way "rules are applied and enforced across the Union," autonomous EU agencies needed to be created (European Commission 2001, 24). Later in 2002, in a special operating framework for the European regulatory agencies, the European Commission revealed its plans to use external executive agencies "rather than Commission resources to management tasks for spending programmes,"
and the plans to "use of regulatory agencies in the broader context of the exercise of the executive function" (European Commission 2002).

Furthermore, only two years after creation of the CEER, the European Commission took the first step towards institutionalizing the network of regulators and to draw it closer to the Commission’s supervision. In November 2003, the European Commission announced the creation of a European Regulators Group for Electricity and Gas (ERGEG). The Commission expected the ERGEG to "notably contribute towards guaranteeing a homogenous implementation, in all the Member States, of provisions from the recently adopted Gas and Electricity directives, as well as the new Community regulation on cross-border trade in electricity." As if one platform for the cooperation – CEER – had not already existed, the Commission stated that "the group will form a platform for cooperation between national regulatory authorities, as well as between these authorities and the Commission" (Agence Europe 2003).

Since then, CEER has worked as a preparatory body for ERGEG (European Energy Regulator 2011a). The ERGEG group was formed from heads of national energy regulatory authorities, and, unlike in CEER, Commission representation was provisioned. The representatives from countries in the European Economic Area and EU accession candidate countries were allowed to take part in the group’s works as observers. ERGEG was set up as its formal advisory group for the EC. The decision was explained as follows: "it is necessary to foresee an official structure for cooperation and coordination in the field of regulation" (Agence Europe 2003). CEER continued to exist, but now large sections of CEER and ERGEG’s activities overlapped.

Four years later, in 2007, the Commission attempted to make its grip even firmer and started a discussion about the need to expand the ERGEG and to create the so-called "ERGEG+" (Agence Europe 2007; European Commission 2007a). This proposal came in the EC’s Communication on energy policy for Europe, together with the proposal to continue "gradually evolving the current approach of reinforcing collaboration between national regulators" and "a new, single body at the Community to be set up" (European Commission 2007a). As a matter

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2 The three options that EC proposed were:
of fact, even if ERGEG in its website in 2011 called transformation into an agency a result of the "success" of its work, the Commission in 2007 had actually described ERGEG as a failure. The need to create an even more formalized institution was justified thusly: "In addition, the technical standards necessary for cross-border trade to function effectively need to be harmonized. Progress to date has fallen far short. The creation of the ERGEG and the electricity and gas regulations, have not provided the governance required" (European Commission 2007a). Among other issues, ERGEG was also pushing forward more competition in the European energy network (Agence Europe 2006), a field which falls under the responsibility of the European Commission's DG for Competition.

It should not come as a surprise that after some discussions on the median proposal – to create "ERGEG+" – the more radical solution was chosen, namely, to create a new institution, the Agency for the Cooperation of Energy Regulators (ACER) in Slovenia. ACER – a formal cooperation structure of the EU energy regulators – was officially launched in March 2011 and is seated in Ljubljana, and ERGEG was fully dissolved from 1 July 2011. Unlike ERGEG, ACER has the status of being an EU Agency and has its own staff and resources (European Energy Regulator 2011b). The Agency is accountable to the European Parliament, the Council and the Commission, where appropriate. Some of ERGEG’s work was passed to ACER, such as the (ERGEG) Regional Initiatives, and some of it to CEER.

CEER has continued to exist in Brussels, dealing with, as they say, "many complementary and not overlapping issues" to ACER’s work, such as international activity, smart grids, sustainability issues and customer issues. The CEER now has 29 members – the energy regulators from the 27 EU-Member States plus Iceland and Norway, as well as two observers – the energy regulators from Switzerland and FYROM.

a) Gradually evolving the current approach: reinforcing collaboration between national regulators by notably requiring Member States to give national regulators a Community objective, and introducing a mechanism whereby the Commission could review some decisions of national regulators which affect the Internal Energy Market.
b) A European network of independent regulators (“ERGEG+”): Under this mechanism, the role of ERGEG would be formalised, and it would be given the task to structure binding decisions for regulators and relevant market players, such as network operators, power exchanges or generators, on certain precisely defined technical issues and mechanisms relating to cross border issues. It would need the appropriate involvement of the Commission, where necessary, to ensure that due account was taken of the Community interest.
c) A new, single body at Community level would be set up. It would in particular be granted the responsibility for adopting individual decisions for the EU electricity and gas market related to regulatory and technical issues relevant to making cross border trade work in practice (European Commission 2007a).
The Commission acknowledged that even the creation of a more powerful network of national energy regulators was considered, duplicating the model network of competition authorities created under Council Regulation No 1/2003 discussed in the previous section. Nevertheless, as EC’s wording goes, “this would necessitate the creation of autonomous powers for the Commission in the energy sector (currently these powers only exist in the area of competition rules)” (European Commission 2009).

It is important to note that ACER became an EU institution with powers to make binding decisions despite the fact this institution was not established by the Treaty’s provisions. ACER can make proposals to the Commission regarding substantive decisions and make individual regulatory decisions which are binding on third parties concerning detailed technical issues that are delegated to them. The EC attempted to justify such rights by claiming that if the Agency made a decision, such a decision would only be binding for specific technical situations explicitly foreseen in the Regulation and Directives or provided on a case-by-case basis by binding Guidelines created by the EC. According to the EC’s proposal, the Agency would have no political discretion outside this framework (European Commission 2007b).

ACER also has a right to decide on issues related to cross-border infrastructure (e.g. terms and conditions for access and operational security) that regularly fall within the competence of the natural regulators. This applies if these regulators have not been able to reach an agreement within a specified period of time, or if they issue a joint request to do so. If the previous conditions are fulfilled, the ACER can also provide exemptions from the third-party access and other requirements to the direct electricity interconnectors or investments in new major gas infrastructures.

Shortly after being created, in 2012, ACER issued the first internal EU energy market report, which was previously published by the European Commission. In this report, the ACER blames the national regulatory agencies for still regulating the end-user energy prices and thus deterring the entry of competitors into the national markets (ACER/CEER 2012). This shows that the network which started its road of development as a voluntary cooperation of local energy regulators had, in the span of a decade, become institutionalized and started using the rhetoric of the European Commission. Furthermore, as inscribed in the Regulation establishing the
ACER, the Commission kept its grip on the ACER. For example, the Director of ACER is chosen from a shortlist adopted by the Commission, or, if the EC implies that cooperation of transmission system operators or decisions of national regulatory authorities “threaten effective competition and the efficient functioning of the market”, the ACER would immediately inform the EC, adopt necessary measures of Commission and act on its own initiative. This allows the ACER to be used for collecting information in the energy regulation, and then for the EC to “syphon” the Commission’s competences coming from the competition policy field to the energy regulation.
CONCLUSIONS

The European Union already had exclusive competences competition policy in the European Union, but the reform of the competition policy enforcement in 2003 freed the Commission’s hands for more complex cases, as it has allowed the European Commission to directly access competition policy authorities and use them as branches of the DG Competition. It has also increased the EC’s powers during investigation. The Commission has actively used the changes and since 2000 plays an active role in enforcing competition in the energy sector. It did not take long after the 2004 EU enlargement before the Commission started probes into the energy markets of the new EU Member States. The cases undertaken by the DG Competition also gained complexity and scope culminating with the antitrust investigation of Gazprom’s actions in the whole of Central and Eastern Europe.

The Commission became deeper involved in the energy regulation sector by establishing the European Regulators Group for Electricity and Gas (ERGEG), an additional platform for regulatory cooperation to the voluntarily established network Council of European Energy Regulators (CEER). Such action made CEER lose importance; however, the ERGEG also did not survive even a decade, and a formal body – the Agency for the Cooperation of Energy Regulators (ACER) – was created by the European Commission. In the last editorial, ERGEG called itself a victim of its own success, but it rather seems that this evolution was rather a success of the European Commission’s more general framework of agencification in the European regulatory space.

The early devolution of the CEER, the rise and fall of ERGER, and subsequent evolution to the ACER can be mostly explained by the agenda of the European Commission. Some authors would expect the EC to avoid establishing a regulatory agency where it already has a Directorate and some competence, in order not to lose control in the field by delegation.

This increased activism in energy sector regulation (regulatory authorities) and ex-post energy sector regulation (enforcement of the EU competition rules in the energy sector) shows that the Commission, as an integration agent, neatly exploits any possibility to increase its competences in the sector. Where the Commission announces its agenda of energy markets’ liberalization and enforces it, there is less room and competence left for the national Member
State policies. This proves that despite the fact that the EC actions in the energy sector at first glance seem like decentralizing (in both analyzed cases reliance on the networks), it contributes to integration, supranationalism, and the exclusivity of the Unions and Commission’s actions in the sector.
REFERENCES


