Autonomy and Coordination in Multi-actor Multi-level Constellations.
Case study of energy regulators in Belgium

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ABSTRACT

Since the last 25 years, regulatory governance has become increasingly more complex. National governments have delegated tasks to other levels of government, both upwards (e.g. EU) and downwards (subnational governments). In addition, tasks have been placed at arm’s length by the creation of independent regulatory authorities. Previous researchers have argued that these kinds of fragmentation will lead to the development of new coordination mechanisms, most notably between the European Commission and the regulatory authorities at the national level. However, such a collaboration may place significant dilemma’s on the authorities, when they are confronted with conflicting demands from their parent ministry and from the Commission.

This paper explores how fragmentation affects the behaviour of regulators in the context of energy regulation in Belgium. The actor constellation appears to be particularly fragmented, as regional governments are active in this field as well, in addition to the federal and EU-level, and these regional governments have also delegated tasks to their own newly-created independent agencies. We find that regulators coordinate with their counterparts at other levels of government. However, the fragmentation also evokes competition between regulators, particularly regarding contacts at the EU-level. The EU allows only one body per Member State as a point of contact, and both the federal and regional regulators compete to become this single point of contact. For regulatory agencies, being a member of the transnational networks provides important benefits, such as access to technical expertise and formal safeguards for autonomy from the parent minister. We find that networking intensifies the conflicts between the federal and regional regulators.

These findings suggest that agencies develop a strategy to increase their formal autonomy, by linking up directly with the Commission. Finally, the findings demonstrate that collaboration at the supranational level can have unintended consequences by triggering centrifugal forces at the national level.

INTRODUCTION

In recent years policy sectors have been characterized by a growing interdependence between the EU-level and the national level. To an increasing extent, tasks are fragmented across different levels of government, as a result of a ‘dual delegation logic’. The first form of delegation concerns transferral of regulatory power from the Member States to the European Commission (EC), though this transfer has been incomplete. Whereas the EC is competent to make rules, Member States have typically kept the powers and resources needed to implement the decisions for themselves, so that the EC has no
authority in implementing the rules it creates. This situation has been labelled as the ‘governance dilemma’ (Keohane 2001): the establishment of an internal market requires greater coordination beyond the Member State, but due to different national concerns each state will have its own interpretation of how rules should be implemented, resulting in regulatory opportunism (EberleinXX). Since the overall goal of the EU framework is to ensure the equal treatment of market competitors across the Single market on a common ‘level playing field’ (EberleinXX), divergent national implementations run counter this goal. In order to overcome these potential negative effects of the governance dilemma, the EC has drawn on a second form of delegation, this time within Member States, where implementation tasks are hived off from ministerial departments and allocated to newly-created National Regulatory Authorities (NRAs).

The dual delegation logic entails that these two forms of delegation are strongly interrelated, leading the EC to strengthen its ties with the NRAs by creating European Regulatory Networks (ERNs). These are informal networks composed of the NRAs of all Member States and of the EC. They are intended as a platform to share information regarding issues of implementation. These networks are often given the task to develop guidelines of good practice for the implementation of the directives. If all NRAs adopt these guidelines, then harmonisation can still be achieved by the EC (Coen and Thatcher 2008), despite different national interests.

Hence, to compensate its lack of formal competencies regarding policy implementation, the EC uses informal governance to link up directly with the NRAs, which are responsible for implementation in their own country. Such issue-specific networks are a further step into the development of a genuine ‘multi-level union administration’ (EgebergXX). The distinctions between national and supranational spheres of competences are increasingly blurred, as the EC and the NRAs must work together to establish an internal market. Similarly, the development of these networks can have a profound impact on the institutional constellation at the Member State level. A crucial condition for the success of the networks is that members are autonomous from their national governments (Eberlein & Grande 2005). Harmonisation can only be achieved if NRAs can put aside their national interests and adopt a ‘European view’ instead. Since agencies are already semi-detached from ministers and are less sensitive to political interests than ministries, the EC prefers to link up directly with the agencies,
rather than with the minister. However, by linking up directly with the NRAs, the EC challenges the internal consistency of national administrations.

Adopting a European view for agencies as opposed to the national viewpoint of ministries may intensify conflicts between NRAs and ministries, since the power balance between agency and ministry at the national level is changed via the creation of ERNs: the former is now able to bypass the latter. Hence, in order to understand the importance of this multi-level union administration, one has to look at how it affects the position of its members and relations with other actors, also on the national level.

The objective of this paper is to reveal how patterns of conflict and cooperation among energy regulators in Belgium are transformed by membership in ERNs. Energy regulation is characterized by the same dimensions of fragmentation as described above. First, tasks are fragmented between the EC and Member States. Several evolutions have necessitated increasing rule-making activity of the EC, such as growing concerns of the scarcity of energy sources and the related security of supply; the interrelation of energy and environmental concerns and the inherent difficulties in breaking the national natural monopolies of incumbents. These problems have necessitated a more coordinated approach towards energy regulation, while Member States have been reluctant to delegate authority to the EU over such a critical policy field. Energy regulation is also characterized by fragmentation at the national level. The EC has required Member States to create independent regulatory authorities that are responsible for implementing and enforcing the EU Directives. However, energy regulation in Belgium is unique since a third dimension of fragmentation can be added. The Belgian dual federal framework holds that tasks are divided over the national (federal) and subnational (regional) level. Both levels have the full legislative and executive authority over their assigned exclusive competencies. Hence, there is no hierarchical relation between federal and regional bodies. Taking this threefold fragmentation into account, the paper explores the evolution of lines of conflict and cooperation that exist between 1) NRAs and the EC; 2) NRAs and their ministry; as well as 3) federal and subnational actors in energy regulation in Belgium.

The paper draws on document analysis and semi-structured interviews with representatives of regulatory authorities in Belgium (one federal regulator and three regional regulatory authorities), as
well as their principals (interviews with personal staff of the minister and with the ministerial departments). The paper first discusses how the role of the EU in energy regulation has evolved, with particular attention to how the EU has shaped national regulators through its requirements for independence of the NRAs, and how the Commission has promoted cooperation between NRAs through the creation of a network and the recent creation of a European agency. Then, we describe the specific Belgian actor constellation in the field and how the EU has impacted the power balances between these actors. Finally, we describe how the Belgian regulators interact with the EU-level. We end with a discussion and conclusions.

**NRAS IN EUROPEAN REGULATORY NETWORKS**

The literature has argued that membership of European regulatory networks could potentially transform the members in two ways. First, NRAs adopt a more ‘European’ viewpoint of regulatory needs. They work very closely with the EC, providing it with information on issues of policy implementation, but increasingly also on policy preparation. By interacting with the EC, NRAs learn the viewpoints and, over time, will tend to take over the objectives and priorities of the EC, which is the establishment of an internal European market, at the expense of particular national concerns. The idea is that, by integrating them in the ERNs, NRAs become socialized to a cosmopolitan, rather than a ‘local’, outlook on regulatory issues (Majone). This is not neutral: while a more ‘European’ outlook may help to achieve more harmonisation, it may also downgrade other legitimate regulatory concerns, voiced in the domestic arena, that do not fit the supposedly ‘superior’ or ‘functionally necessary’ EU world view (Eberlein). This is not to say that national concerns are completely ignored. Instead, NRAs have been said to take up a dual-hatted role. On the one hand, they remain a part of national governments. They assist their minister in policy formulation (e.g. comitology) and in the transposition of directives into national legislation. On the other hand, they operate in close collaboration with the EC and other Member State NRAs in the stage of policy implementation. This
situation may lead to dilemma’s for NRAs, when they are confronted with contradicting demands from ministers (national hat) and the EC (European hat).

A second transformation refers to the technocratization of NRAs. By engaging in networks, NRAs come into contact with other Member State NRAs, which share a common professional background and are confronted with similar regulatory challenges. Whereas networks have little or no formal powers, they are centres of expertise. By sharing tacit knowledge, ERNs may gradually form a sort of distinct epistemic community (RadaelliXX). Fuelled by processes of normative isomorphism, NRAs develop a shared understanding of specific regulatory problems. Using their professional expertise, NRAs will agree on developing regulatory best practices and elaborate guidelines that define a unique best way. These best practices or guidelines are said to be technocratic: based on expertise and technically sound analysis, rather than political interests.

Both types of transformation also affect the relations between NRAs and other actors. The first transformation may increase the de facto autonomy of the NRA vis-à-vis its parent department and its minister. Egeberg found that, whereas representatives of council or comitology working groups see themselves as representatives of national governments, those on Commission working groups tend to assume a more multi-faceted role. Their activities are significantly less coordinated nationally than those of council or comitology WG and are therefore sites of Europeanization (Egeberg et al Chapter 5). Representatives from agencies, which are already semi-detached from ministries, tend to emphasize their independence from national governments even more clearly. Egeberg concludes that such agencies are considerably less sensitive to political inputs than ministerial departments. The fact that many activities take place with minor or without ministerial control may lead to a situation where ministries are bypassed, meaning that NRAs link up directly with the EC regarding issues of implementation and enforcement of legislation. In addition, to the extent that ERNs are increasingly being asked to advise the EC on policy preparation, ministries may also be bypassed for policy formulation and external representation (e.g. representing the EU in World fora). The second transformation may reinforce conflicts with parent departments as well. Technocratic rule-making is not neutral. Professionals desire to push their own agenda, shaping a specific outlook on regulatory needs and priorities. Networks will make sure to frame policy issues as ‘common’ and ‘technical’ concerns, and downplay distributive or political effects. This politics of expertise may seek to confront
governments with a technically sound ‘fait accompli’, denouncing government intervention as improper politicization of technical issues. According to Eberlein, ERNs often have a bias for creating more competition. They use their agenda-setting powers to move debates on the ‘right’, pro-competition track by playing the politics of expertise, that is pushing the specific expert readings of the issue at stake. Hence, informal governance by ERNs can introduce a substantive policy bias. In addition, individual NRAs experience peer pressure to comply with the network consensus. Individual NRAs do not want to be seen as failing to meet the professional standards, in their domestic arena, of their profession.

At the same time, the two transformations, while creating conflicts with national governments, can increase cooperation with the EC. Through their interactions, the EC and NRAs develop a common logic of appropriateness/understanding. Because of the Europeanization of the NRAs taking place within the ERNs, the NRAs and the EC have a large mutual trust (Egeberg et al Ch5). Through their close interaction, they will gradually align their objectives and their relations become mutually beneficial. For the Commission, the value of the ERNs lies mainly in the opportunity to ‘buy in’ the expertise and support of the NRAs (Egeberg and Trondal 2009). For the NRAs, the partnership means that they gain access to the resources of the Commission, first and foremost money and legislative competences. These resources make the EC into somewhat more than an equal partner, and it has indeed been a key player in many of the networks, going as far as vesting formal competencies in them.

This generally mutually beneficial and high-trust relation does not preclude conflicts between NRAs and the EC. First, because of their double-hattedness, NRAs may sometimes choose sides with their national governments. Second, to the extent that the EC is not considered as an expert, the technocratic mentality of NRAs may also cause conflicts in case of disagreements with the EC. According to Martens (XX) some networks were initially rather sceptic towards the EC.

**Evolving Regulation of Energy at the EU Level**

*Creating an internal market*
Energy markets can be divided into four distinct activities: production (which is the generation of electricity in power plants), transmission (the transport of electricity over long distances, via high voltage power lines or high-pressure for gas), distribution (transport via low voltage, local grids or low-pressure lines for gas) and supply (selling the electricity or gas to the end user, e.g. households, firms).

The last 25 years, the EU has attempted to create an internal energy market. National markets had traditionally been dominated by monopolies of large, vertically integrated (across the four markets) firms. Liberalisation efforts concentrated on splitting up the different integrated markets into competitive markets (production and supply) and non-competitive markets (distribution and transmission/transport). The latter are regulated because they are naturally monopolistic: the sunk costs to build the infrastructure are so big, it is economically unfeasible to replicate these costs and build parallel infrastructure. Thus, potential new players are forced to use the existing infrastructure, owned by the incumbent. This way, vertical integration of markets hinders liberalisation, because incumbents can use several mechanisms, including discriminatory pricing, to discourage competition.

The first legislative package (Directive 96/92/EC for electricity and Directive 98/30/EC for gas) aimed to reduce the degree of vertical integration by requiring Member States to lay down minimum requirements so that the activities of the incumbent as transmission network owner would operate separately from its generation and distribution activities. These framework Directives resulted in a variety of institutional approaches, which hindered the coherence and effectiveness of the liberalisation efforts. Additionally, the Directives did not address the root of the problem: the incumbent was still able to discourage potential new entrants. Therefore, a second legislative package (Directive 2003/54/EC for electricity and Directive 2003/55/EC for gas) replaced the 1996 Directives, imposing more strict rules on unbundling, so that the competitive segments of the incumbent would be “independent at least in terms of its legal form, organisation and decision-making from other activities not relating to transmission”. Though this meant an unbundling in accounting terms, the Directives still allowed that transmission network operators were owned by companies that also had production and supply undertakings. Moreover, nearly all Member States failed to properly transpose the second package, resulting in a multitude of infringement procedures in 2004 and 2009. Finally, the ‘Chinese
walls’ imposed by the 2003 Directives could not prevent that incumbents installed cross-subsidization mechanisms from network activities towards supply activities.

In September 2007, the Commission began work the third legislative package, which was finalised in 2009 (Directive 2009/72/EC for electricity and Directive 2009/73/EC for gas). This last package introduced a full ownership unbundling: Member States are required to ensure that no company is able to control at the same time a production or supply undertaking and exercise control over a transmission system operator. At best, a supply or production undertaking may have a minority share in a transmission system operator or transmission system. In addition, it was understood that common technical standards across the internal market were missing, resulting in insufficient interconnection and cross-border trade (European Commission 2007b: 15). Therefore, a European Network of Transmission System Operators for Electricity (ENTSO-E) and for Gas (ENTSO-G) were established (Regulation 714/2009 and Regulation 715/2009 respectively), involving all European transmission operators. These networks draft common standards and codes that allow a greater harmonisation on issues such as interconnection, third-party access, data exchange, operational procedures in case of an emergency, capacity allocation rules, congestion-management, network security and reliability rules. All transmission operators are required to cooperate through ENTSO and to operate their networks in accordance with those network codes.

**Shaping national regulators**

In addition to unbundling rules, the Directives prescribed from the second package on the creation of “one or more national regulatory authorities”, as an important factor for guaranteeing non-discriminatory access to networks and for a more effective regulation (Directive 2003/54/EC art. 23). The Member States had to decide by themselves what the functions, competencies and administrative powers of these authorities would be, but they should at least be competent to fix or approve the transmission and distribution tariffs or decide on the methodologies underlying the calculation of those tariffs, on the basis of a proposal made by the transmission network operator or the distribution network operator. In addition, these regulatory authorities needed to be independent from the regulated companies. Of particular interest is that the Commission deemed more effective regulators as a
prerequisite to achieve a well-functioning internal market. Although the second package laid down certain provisions regarding the national regulatory authorities, country reviews carried out by the Commission had revealed a lack of uniformity. Whereas some Member States had well-established bodies with substantial powers and resources; many Member States had only just begun to establish their NRAs and had granted them only weak powers.

In order to harmonise the regulators’ competences and especially in order to upgrade the mandates of the weak regulators, the third package stipulates additional requirements for the national regulatory authorities. They must be able to take binding individual decisions regarding distribution and transmission tariffs, as well as regarding the ownership structure of specific companies, with the aim of unbundling. They must also have extensive monitoring capabilities, for instance regarding the compliance of transmission and distribution system operators with third party access rules, unbundling obligations, congestion and interconnection management; transparency obligations and the general level of market opening and competition; network security and reliability. NRAs must also review the investment plans of the transmission system operators, and provide an assessment of how far the transmission system operators' investment plans are consistent with the European-wide 10-year network development plan. To enable such monitoring, NRAs receive far-reaching powers with respect to information-gathering. They may require any relevant information from the regulated companies and can even carry out inspections, including unannounced inspections, with any transmission systems operator. Furthermore, regulators can issue penalties if companies do not comply with the market rules.

In addition to strengthened powers, the Commission, backed by he European Council, argued for greater independence of NRAs, stating that the ‘effectiveness of regulators is frequently constrained by the lack of independence from government and sufficient powers and discretion (European Commission 2007b: 24)’. Competencies were often fragmented between the regulators and their ministry or sometimes also the general competition authority. Specifically, many regulators did not have effective powers regarding core regulatory tasks such as ensuring compliance regarding unbundling, third party access, consumer protection and market surveillance. Hence, whereas the second package stressed the importance of independence vis-à-vis regulated industries, the third package also payed attention to independence of regulators from government. This was seen as
“extremely beneficial to competition, ensuring a level-playing field for companies in Europe” (European Commission 2007b :4)

This independence was strengthened in two ways. The first way was to centralize all tasks with the regulatory authority. Whereas the second package prescribed that Member States should create one or more regulators, the Third legislative package mentioned that each country “designates a single national regulatory authority at national level” (Directive 2009/72/EC art.35). The Directives allowed that other regulatory authorities are established at the regional level within the Member States, but there should be only one senior representative who represented the Member States and served as the contact point at the EU level. The fact that Member States could only have one regulatory authority was mainly intended to prevent that core regulatory duties were split between the NRAs and the ministry (European Commission 2010).

The second way to increase independence was to insulate the regulator from political interests. The Directives prescribed that the NRA must be legally and functionally independent from any other public or private entity. It should not take any direct instructions from any government or other public or private entity when carrying out regulatory tasks. In order to do this, the regulator had to be able to take autonomous decisions, without having to ask approval from any other public body, it had to have a separate annual budget allocation and it had to be autonomous to implement the budget. It also had to have sufficient human and financial resources to carry out the regulatory tasks identified in the legislative package. The members of the board had to be appointed for a fixed term of five up to seven years, renewable once (Directive 2009/72/EC Art.35). There are strict conditions under which the members of the board can be removed from office. It is the sole responsibility of the NRA to determine how it operates and is managed, including staff related matters. Sharing personnel and sharing offices between the NRA and any other public body is not in line with the Directive (European Commission 2010).

Notwithstanding, although NRAs are granted a considerable extent of autonomy and strengthened powers, they do not operate in a vacuum. The Directives provide that there should still be a judicial and parliamentary supervision of the regulator. For instance, the approval of the budget by the Parliament does not constitute an obstacle to the regulator’s autonomy (Directive 2009/72/EC). In
addition, whereas the Directives provide independence vis-à-vis national governments, they also enforce certain duties upon them. They are obliged to perform certain monitoring tasks to ensure a harmonised implementation of the Directives. In addition, the Directives impose certain obligations to inform and to cooperate with the European institutions. Regulators must work in ‘close cooperation with the Agency, regulatory authorities of other Member States and the Commission’ (Directive 2009/72/EC art.36). More specific, regulators must cooperate in regard to cross-border issues with other regulatory authorities and with the Agency. It must comply with and implement all relevant decisions of the Commission. It must report annually to the Commission and the Agency (cfr. infra), on the steps taken to implement the Directives. It must monitor the investment plans of the transmission network operators and review whether they are consistent with the ENTSO-E Community-wide development plan (Directive 2009/72/EC art.37).

Coordination between national regulators at the EU-Level

The following section describes which bodies have been established for the coordination between NRAs at the EU-level following the legislative packages, either at the initiative of the Commission, or at the initiative of the NRAs themselves.

CEER

CEER (“Council of European Energy Regulators”) is a private not-for-profit association established in March 2000. It was formed at the initiative of ten national energy regulatory authorities. Following the first legislative package at the end of the 1990’s, regulators from several Member States were confronted with similar problems regarding the implementation of the package. These authorities felt a need to create an informal platform by which they could privately exchange information and cooperate regarding common interests with respect to the promotion of the internal electricity and gas market. The number of members gradually increased and CEER currently has 29 members - the energy regulators from the 27 EU-Member States plus Iceland and Norway.
In addition to being a platform for the exchange of experiences regarding the implementation of the legislative packages, CEER also develops guidelines of good practice, produces other reports and produces documents that communicate the opinions of its members. Given its informal and voluntary basis, CEER has no formal powers. However, because the produced documents are approved in consensus by all national European energy regulators, its documents, reports and opinions have gained a large moral authority, because its positions can be seen as the uniform positions of the national regulators (Verhoest et al. 2008).

**ERGEG**

In the course of the implementation of the first package, the European Commission felt a need to create closer ties with the regulatory authorities of the Member States. Because the first legislative package only aimed at minimum harmonisation and conferred much freedom to the Member States, the Commission could do little against the growing divergence with which Member States implemented the objectives of the first package. To counter this, the Florence Electricity Regulatory Forum and the Madrid Gas Regulatory Forum were created, bringing together multiple stakeholders from government, regulators and industry on a regular basis. These fora are not endowed with legal powers to make binding decisions but instead the aim is to achieve consensus on reducing technical and legal obstacles for achieving cross-border trade.

However, there was continuous opposition from several Member States and notably their incumbents to develop these principles into detailed economic and technical rules. (European Commission 2003) This forced the Commission to seek alternative solutions (Hancher 2007: 99), i.e. to collaborate with a body containing only the regulators, thereby avoiding that opposition from incumbents prevented the group from taking decisions. Such a body already existed, namely CEER. However, the existing format could not be used, since the European Commission was not part of CEER. Therefore, the Commission Decision of 11 November 2003 formally established the European Regulators Group for Electricity and Gas (ERGEG). This group comprised of the heads of the national authorities competent in the field of electricity and gas regulation in the Member States. Its objective was to “facilitate consultation, coordination and cooperation of national regulatory authorities, contributing to a consistent application, in all Member States,” of the 2003 Directives (European Commission 2003).
After the creation of ERGEG, CEER remained in existence. In practice, the two networks overlapped each other to a large extent, since both consist of the national regulatory authorities. They often produced documents together, presenting themselves as the European Energy regulators. For instance, they published a joint working programme and published joint annual reports on their activities. They also shared the same secretariat. When the European Energy Agency (ACER) became fully functional in March 2011, ERGEG ceased all its activities, which were largely incorporated within ACER, while a small set of activities (e.g. customer issues) were taken over by CEER (source: CEER website). At the time that ERGEG was still operational, each member regulator was expected to participate in all working groups (Lybaart 2010). However, the level of participation differed according to the interest and importance of the working group for each regulator. As one member stated:

“Of course, we are formally a member of all WG’s. That is important, because if you’re not a member, you don’t receive the documents. But that is not the same as active participation. For some WG’s, we only participate in the sense that we receive all the documents and sometimes we read them. For others, we attend meetings and provide some input or comments on the draft texts. The highest level of participation is being involved in the drafting of the documents or chairing the documents. Writing documents, organising meetings, seek compromises, send drafts of texts and modify texts is very time-consuming.”

Hence, although each national regulator participated by filling out the country survey, each WG was managed by a small team of national regulators that prepared the documents, revised them and organised the meetings. Respondents from the Belgian CREG estimated that they spent about 5 FTE on ERGEG and CEER-related activities. Hence, it would be impossible to play such an active role in all WG’s. Respondents estimated that the most active countries may well have spent up to 10 FTE.
In practice, the Commission often asked CEER-members to produce a report, and CEER instructed its working groups to produce the document, and afterwards sent it to the ERGEG Plenary for approval. Hence, all advices issued by ERGEG passed CEER but the reverse was not true. This meant that the position of the European Commission the main difference was between ERGEG and CEER: completely absent in CEER, but having a big influence in ERGEG. Since CEER does not need the permission of the Commission before documents are published, it could take a more pro-active stance than ERGEG (Verhoest et al. 2008). This was also reflected in the output of both networks: CEER could produce more opinion and position papers, and send them directly to stakeholders, while ERGEG mainly produced consultation documents, because of requirements for Community decisions. In addition, while most of the discussions in CEER made it to ERGEG, and arguments were channelled through the latter, it was not impossible for CEER to defend a particular point of view directly before the Council, not bringing it to ERGEG and thus bypassing the Commission.

Because of the position of the Commission and the lack of decision-making powers, it has been argued that ERGEG enjoyed only a limited autonomy vis-à-vis the Commission (Hancher??). However, interview respondents did not consider the regulators as merely dependent from the Commission. Rather, it was characterized as a relation where both actors are mutually dependent upon each other. The Commission depends on the national regulators because of their knowledge regarding the implementation of current regulations. In addition, the NRAs also have much expertise regarding the need for new regulations:

“I have the feeling that there is a large extent of mutual respect between the Commission and the NRAs. The voice of the NRAs is heard, because these are the people that have the expertise. Who else should provide this expertise?”

The relations between the NRAs and the Commission via ERGEG have been beneficial for both actors. Via ERGEG, the NRAs have had a direct contact with the Commission, and the Commission could access the expertise of the NRAs. These close relations have also strengthened the status of ERGEG vis-à-vis the regulatees:

“Ergeg is an advisory body, but because of the good relations with the Commission, they have a de facto decision-making competence. In conferences organised by the network operators,
ERGEG delegates are frequently invited as speakers. Hence, they have a large moral authority.

The fact that the structures of CEER and ERGEG quasi overlapped each other demonstrated the good relations between the NRAs and the Commission. Instead of seeking an entirely different kind of network, the Commission co-opted the existing network. In turn, the NRAs merged the working groups of CEER and ERGEG instead of maintaining an entirely parallel structure for CEER. Even if there would have been a large dispute between the NRAs and the Commission, the NRAs could still have used CEER to bypass the Commission and publish an advice without having to ask the consent of the Commission. It remains to be seen how these working practices evolve given the creation of ACER.

ACER

Although the Commission regarded ERGEG as “an important player” (European Commission 2007b: 25), it did not have the power to take binding decisions. Each individual national regulator could decide whether or not to implement the recommendations adopted by ERGEG. Progress was dependent on all the involved regulators agreeing on improvements and having the necessary powers and duties. Therefore the Commission argued that “a greater impetus is therefore required, including more detailed EU coordination requiring increased resources” (European Commission 2007b:25) The Commission argued that it could not perform the harmonising tasks and the development of infrastructures itself because it did not have any experience in such matters. It required the expertise of the NRAs and “only a body emanating from the national regulators can catalyse all the necessary resources of national regulators that is fundamental to achieving success on these issues” (European Commission 2007d: 10).

Originally, three possible configurations were considered (European Commission 2007b). The first option was a gradual evolving of the then-used approach: reinforcing collaboration between national regulators by requiring Member States to give national regulators a Community objective, and introducing a mechanism whereby the Commission could review some decisions that affect the internal energy market. The second option was 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 adopt 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. However, the national regulators would remain responsible for crucial tasks such as approving tariffs. It would need the appropriate involvement of the Commission, where necessary, to ensure that due account was taken of the Community interest. This approach was the preferred option of the Commission because it was politically the most acceptable solution for the Member States; it would also allow for a fast response, reflecting the growing interdependence and coordination; than the adoption of new directives; as well as the putting a burden of additional infringement procedures in case of implementation failures at the national level (Hancher 2007). The third option was the creation of a new, single body at the Community level. 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. This third option was adopted in the end, with the creation of the Agency for the Cooperation of Energy Regulators (ACER).

**Structure and tasks of ACER**

The agency was established by Regulation 713/2009 and consists of several bodies. The *Administrative Board* consists of nine members, two appointed by the Commission, two by the European Parliament, and the five others by the Council. The members of the Board remain in office for four years, but for the first mandate they may be in office for six years. The Board meets at least twice a year and adopts its decisions by a two-thirds majority, whereby each member has one vote. It appoints the Director of the agency, and exercises disciplinary authority over him or her. It also formally appoints the Board of Regulators and of the Board of Appeal. A member of the Administrative Board can not be a member of the Board of Regulators. Its main activities are the yearly adoption of the work programme, after consultation with the Commission and approval of the Board of Regulators, the adoption and if necessary revision of the multi-annual programme, and the adoption of the annual report.
The Board of Regulators consists of the senior representatives of the NRAs, one per member state, and one representative of the Commission, who has no voting rights. The Board appoints a chairman among its members who serves for a renewable period of 2.5 years. The Board acts with a two-thirds majority. It advises the Administrative Board on the appointment of the Director and approves the work programme for the next years. The Board performs the core regulatory tasks of the agency. The basis of these tasks are provided in articles 6-11 in the Regulation, and they consist in general of giving opinions and recommendations, monitoring of the cooperation of transmission network operators in ENTSO-E and ENTSO-G, monitoring of the implementation of the third package through the national regulators, taking binding decisions on access to or operational security of cross-border infrastructure if NRAs do not reach a mutual agreement, the organisation of extensive consultation procedures, and monitoring of the internal markets for electricity and gas.

The management of the Agency lies with the Director, appointed for five years. The Director prepares the work of the Administrative Board and participates, without having the right to vote, in the work of the Administrative Board. The director adopts and publishes the decisions that have received a favourable opinion of the Board of Regulators, and prepares a draft working programme of the coming year, as well as drawing up a preliminary budget and a draft of the annual report. Finally, he/she oversees the staff of the agency.

Finally, decisions of the agency may be appealed before the Board of Appeal, consisting of staff of national or EU institutions that have experience in energy matters. They may not have any other position within the Agency.

The revenues of the agency comprise of a subsidy from the Community and voluntary contributions of Member States or NRAs. The Regulation also foresees that the agency can impose a fee when it is asked to take an exemption decision. A preliminary draft of the budget is made by the Director of the agency. The Administrative Board then makes an estimate of the revenues and expenditures of the next year, based on the draft of the director. The Board of Regulators produces an advice on this estimate, which is then sent to the Commission.
Independence of ACER

In contrast to ERGEG, ACER will have some extent of decision-making competences and will have a permanent staff. The Regulation stipulates that, for all of the agency’s bodies, the members should be independent in the sense that they should not seek or follow instructions from actors such as the governments of Member States, the Commission or other public or private entities. One concern has been the autonomy of the agency vis-à-vis the Commission. In the Commission’s original proposal for the establishment of the agency, the Administrative Board comprised of twelve members, of which six were to be appointed by the Commission and six by the Council. Considering the extensive programming tasks (e.g. preparing the work programme) and monitoring tasks (e.g. oversight of the director), this body has a lot of power in the agency. If the Commission would be able to appoint half of the board, it would have a large influence compared to the NRAs. The NRAs objected to this initial proposal because it would create a dual structure where the Administrative Board would compete with the Board of Regulators over the topics that need to be discussed in the agency. Hence, the position of the Commission was reduced in the final regulation. In addition, whereas the original proposal outlined that the Administrative Board had to consult with the Board of Regulators regarding the appointment of the Director, the final regulation required that the Administrative Board obtains a favourable opinion of the Board of Regulators. Furthermore, whereas the Administrative Board had full disciplinary authority over the Director in the preliminary works, the final regulation provided that the Administrative Board had to consult with the Board of Regulators.

Within the Board of regulators, the NRAs are relatively autonomous from the Commission, since its representative has no voting rights. A crucial role is for the Director, who is for a large part accountable to the Administrative Board. The Commission also has an indirect influence on the appointment of the Director. However, the Director will at the same time have to work closely with the Board of Regulators, because he adopts and publishes all decisions and opinions made by this body. Hence, the impact of the Board of Regulators will depend to a large extent on how the Director balances the preferences of the Administrative Board and of the Board of Regulators.

For the first working years, the Board of Regulators will take over the working method of ERGEG, assimilating the working groups for which the agency has a competence. Requests for advices will not
come directly from the Commission, as was the case in ERGEG, but from the Director. The role of the agency staff may be somewhat unclear in the start-up phase of the agency. The number of the staff has been deliberately kept limited to about 50 (European Commission 2007d). According to interview respondents, this is a rather low number compared to the resources that NRAs have put into ERGEG activities (cfr. infra), and certainly in the first years of development, the expertise of the NRAs in the agency is likely to be higher than the expertise of the newly-hired permanent staff.

With respect to the Member States, the NRAs are obliged to work in full independence. They are forbidden to seek or follow any instructions from their governments. At the same time, the agency does exert some degree of influence on the NRAs. In the case where NRAs cannot find an agreement regarding cross-border infrastructure, these disputes are brought before the agency, which can issue a binding decision. However, the agency does not replace the NRAs. The tasks reflects similar objectives like those of ERGEG (produce advices, stimulate cross-border trade) but the agency has no authority regarding competences of NRAs regarding licensing, the approval of tariffs or preventing anti-competitive behaviour.

**IMPACT OF EU REGULATION ON POWER BALANCES BETWEEN NATIONAL ACTORS**

*Regulatory landscape of energy in Belgium*

The Belgian dual federal system holds that each level has exclusive competencies. When a competence is allocated to one level, then this level has all legislative and executive authority. Thus, the federal level has no competence in matters regulated by the regional level and vice versa. With regard to energy regulation, the federal level is competent for all issues concerning transmission networks, this is the transport of electricity along high-voltage power lines. For gas, this means the transport of gas through high-pressure pipelines. The regional level is generally competent for regulating distribution networks, this is the transport through local or regional low-voltage lines (low-pressure pipelines for the transport of gas) that will eventually supply the electricity to end users such as firms and households. For both levels, the regulation entails the granting and retraction of licenses
for companies that want to enter the Belgian market, as well as setting technical and economic standards for the networks (e.g. regarding the security of supply). Both levels have some competence to impose public service obligations. For instance, the Flemish level has developed obligations in order to prevent energy poverty and with respect to the transparency of invoices that are sent to customers. However, the approval of tariffs is solely the responsibility of the federal level, both for transmission and for distribution tariffs. Hence, whereas distribution network operators turn to the regional level for obtaining a license, they must turn to the federal level to have their tariffs approved. Both levels have extensive advisory tasks. These advices are often produced after consultations with the regulatees. Regulators generally have several instruments to perform their tasks. They can set standards, decide on the granting and retraction of licenses and they have certain monitoring capabilities. Hence, the Belgian energy market is regulated by one federal regulator and three regional regulators, one for each region (Flanders, Brussels, Wallonia). With respect to technical standards and public service obligations and market power, each level of government regulates one natural monopoly and one liberalised market. Regarding tariffs, all markets are regulated only by the federal regulator.

These task divisions are expected to change somewhat in the near future. For energy, the Flemish government has been lobbying to transfer the approval of distribution tariffs from the federal to the regional level. According to the Flemish government, the current task divisions bring about many inconsistencies and inefficiencies (Vreg 2008). For instance, the regions decide on the technical criteria and the public service obligations to which distribution network operators must comply. However, the regions cannot monitor what costs are incurred by these obligations, because the tariffs are approved only by the federal level. The Flemish regulator VREG (Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt) has argued for homogenous competences, so that the regions are competent for all aspects of distribution networks, including regulating the tariffs (VREG 2008). Up to now, the federal regulator has been strongly opposed to this transfer.

Despite the seemingly clear separation of tasks, coordination between the levels remains necessary. For instance, if the federal level decides on the tariffs of the distribution network operator, it needs information on what kind of obligations the regions have imposed upon the operators. Coordination is also necessary regarding EU-affairs. Specifically, the levels coordinate regarding the transposition of
new EU-legislation. In addition, the levels coordinate in order to agree on which opinion will be communicated to the EU regarding proposals for new European regulations.

Coordination between the administrations of the different levels of government is usually organised in Concertation Committees. Each policy domain has its own committee, where the functional ministers and their administrations of the federal level and the three regions are represented. For energy, the regions and the federal level have formally established the ENOVER group (Concertation Energy) by means of a collaboration agreement signed by all governments in 1992. With regards to the transposition of EU directives, the ENOVER group appoints one administration that is responsible for drafting the laws and decrees that need to be developed, depending on the specific interests and expertise of the administration. The other regions then usually copy these drafts and present these to their own regional parliament for approval. The group also discusses which opinions should be defended at the European level, representing the Belgian viewpoint on proposals for new EU regulations. These viewpoints are then forwarded to the Belgian Permanent Representative to the EU.

**Inter-agency coordination**

Since the ENOVER group is mainly involved in policy preparation through the drafting of new laws, the regulators are in principle not invited on these meetings. Therefore, they have created their own concertation group, the FORBEG (Forum of Belgian Energy Regulators). Unlike ENOVER, FORBEG has no legal basis and is a fully informal body, where the federal and regional regulators meet each other on a voluntary basis. The group meets every two months, but they have established working groups regarding the implementation of the legislative packages. These working groups meet more frequently. Analogous to the working method of ENOVER, FORBEG assigns which regulator will draft proposals on how to implement legislation. Above all, FORBEG is a vehicle for exchanging information rather than for making actual decisions. Regulators pass on experiences in order to learn from each other, or provide information that other regulators need to perform their tasks (e.g. what costs are incurred for companies through public service obligations imposed by the regions). In addition, regulators communicate on the initiatives that have been taken by ERGEG and CEER, and sometimes pass on the documents that have been produced by these bodies since the last FORBEG-
meeting. Regulators also jointly draft the benchmark report of the degree of competition of the Belgian energy market that Member States have to send to the European Commission. The regions prepare the part on the distribution networks for their region and pass it on to the federal regulator, which prepares the part on transmission networks and integrates the different parts into one document.

There are no structural linkages between the ENOVER and FORBEG groups. The membership to these bodies is mutually exclusive and the reports of the meetings are confidential. This implies that the regulators are completely autonomous in deciding which topics are discussed within FORBEG and also regarding which information will be communicated to ERGEG (e.g. opinions, comments on drafts of advices to the European Commission, country reports). In turn, regulators are not involved in discussions in ENOVER, regarding which viewpoints will be communicated to the permanent representative. Hence, both for domestic as for EU-level issues, the activities of the administration and of the regulators are fully separated.

In practice, FORBEG is the only body by which the regions coordinate with the federal regulator. However, the regions themselves meet each other informally outside of FORBEG. They mutually exchange experiences on issues that are exclusively regional competences but may occasionally also discuss how they will collaborate with the federal regulator in FORBEG.

**Impact of EU regulation on the position of the federal regulator**

The relations between the federal regulator CREG and the federal government during the last years have been characterized by repeated disputes regarding competences, on a variety of subjects. In this paper we highlight one such dispute, where CREG used the European framework to successfully reverse a decision made by the federal government seen as an infringement on the autonomy of the national regulator.

In 2008, CREG was charged to make a proposal for a new methodology to determine distribution tariffs, and based this on a ‘cost-plus’-system. This entails that distribution network operators have to declare what costs they need to make to operate the network (e.g. investments, personnel,…). The
regulator then judges whether these declared costs are justified. The approved tariffs are the sum of these justified costs plus a certain profit margin for the operators. Declared costs that are considered as unjustified (e.g. excessive personnel costs) are rejected and cannot be charged in the tariffs. However, the government amended this proposal in the new law, and distinguished between ‘manageable costs’ and ‘non-manageable costs’. The former are costs that can be controlled by the operator (e.g. personnel costs), while the latter are beyond the control of the operator. The law determined that the difference between estimated and realised manageable costs flows directly to the network operator, whereas differences between the estimated and realised non-manageable costs have to be paid by the end users. Hence, efficiency gains (reductions in manageable costs) would not be automatically reflected in lower tariffs. According to CREG, this was done “as a direct consequence of interventions of the distribution operators and in contrast to the European regulations. The rules were modified to the advantage of the network operators and at the expense of the competences of the regulator” (CREG 2010a).

According to CREG, the EU legislative packages designate the approval of tariffs only to the national regulatory authority, so that the government should either have taken over the methodology of the CREG without any modifications, or should have asked CREG to make a new proposal on the methodology. CREG thus urged repeatedly to change the law, “… in strict compliance to the new European Directives that have come into force since 2009. The Directives offer a unique chance to change the current legislation regarding tariffs, and to restore the competences allocated to the regulator” (CREG 2010a).

At the end of 2010, a Constitutional Court ruling confirmed that the 2003 EU Directives intended that the sector regulator should be able to independently approve the tariffs. According to CREG, this ruling demonstrated “that the government is not allowed to interfere with the activities of CREG” (CREG 2010b).

**Impact of EU regulation on autonomy of Flemish regional regulator**

The Flemish Government asked the Flemish regulator VREG to draft the new decrees that are needed to implement the third package regarding the issues that are a regional competence.
In its advice (VREG 2010), it argued that the Directives do not bring about major changes in the tasks of VREG, mainly because unbundling was already integrated in the legislative framework. One exception relates to the licensing of suppliers. Before a firm can enter the Belgian market, it needs to demonstrate its compliance to the Belgian rules by requesting a Belgian license. In the case of distribution companies, this license is granted by the regional regulator. After the third package, these restrictions will be abolished. In order to facilitate cross-border trade, companies anywhere in the EU can enter the Belgian market. They only need to obtain a license from one Member State, and as soon as they have obtained this, they may enter the entire EU market. Hence, they need not obtain a specific Belgian license.

Notwithstanding no major steps were necessary regarding the tasks, VREG argued that its statutes needed to be changed considerably with respect to its internal structure, because it needed more autonomy in order to be consistent with the Directives (VREG 2010). According to the agency, the provision of the 2009 Directives that national regulators should not seek or take direct instructions from any government or other public entity when carrying out the regulatory tasks, necessitated a greater autonomy for the VREG (Directive 2009/72/EC art.35). Though VREG is considered to have a far-reaching autonomy, and only a small set of agencies in Belgium have acquired a similar status, its parent minister still retains some oversight capabilities. First, the minister, in conjunction with the Flemish Government, appoints and dismisses the board of directors, though the board can appoint additional independent directors without having to ask the consent of the minister. In addition, the minister may demand access to all internal documents of the agency and may demand any further explanations from the agency staff on the organisation’s decisions. Furthermore, the establishment decree of VREG foresaw the appointment of a government commissioner by the minister, who could appeal all decisions of the agency that he/she deems incompatible with the general interest or the decrees of the Flemish government, suspending the execution of the decision. Though these government commissioners have never been appointed, VREG argued that the mere possibility in the decree still meant too much dependence from the minister. Finally, the Flemish government periodically evaluates the VREG’s CEO.
To cope with the requirements of the third package, VREG proposed a number of changes to its structure. First, the CEO would have to be evaluated by the board of directors, not the government. This means that the composition of the VREG board would have to change as well: currently the CEO is part of it, which means he/she would have to evaluate himself/herself. In addition, at this point in time another member of the board is also the CEO of a different executive agency (Vlaams Energie Agentschap). Rules would have to be created to avoid this in the future, since this could be seen as another agency giving instructions to VREG. Furthermore, the tenure of board members would have to be limited to a one time renewability, and its dismissal would only be possible in exceptional circumstances (current situation: tenure renewable every time, and Flemish Government can always dismantle the board). Finally, VREG argued that the performance contract it had made with its minister also impeded independence. In the current system, both actors agree which objectives the regulator must achieve in the next 5 years. Each year the VREG develops an annual plan in which it outlines its main objectives for the next year, in line with the multi-year objectives in the performance contracts. However, since such a contract requires the signature of the minister, the regulator formally is not able to set its own objectives, since the signature of the minister reflects an approval of the minister. VREG argued that it should be fully autonomous in developing its multi-year objectives.

To be complete, we add that VREG also investigated whether it needed alternative sources of funding, but since the directives state that having to let the legislator approve the budget does not impede budgetary autonomy (Directive 2009/72/EC), VREG concluded that it was sufficiently autonomous in that regard. At one point in time, VREG also argued that full independence could only be maintained if it was turned into an agency that falls under the authority of the parliament; but eventually it decided that this was not strictly necessary.

The advice of VREG seems to have had a significant impact. The minister has acknowledged the need for more autonomy under the third package and has proposed to increase the autonomy according to VREG’s advice (Van den Bossche 2010). This means that referring to the EU directives can be used as a tool to enhance autonomy, even if it is not clear whether the EU really requires such autonomy. One respondent noted that the Directive only applies to the single national regulator required under the 2009 Directive. Since the current single point of contact for the European Commission is CREG, the autonomy demanded in the Directives may only apply to the federal regulator.
In contrast to the Flemish energy regulator, the other regional regulators have opted not to demand autonomy to the same extent. For instance, whereas the government commissioners only exist formally for the Flemish regulator, they have been factually appointed for the Walloon regulator and the latter intends to keep the government commissioners. As the head of the regulator says:

*In the 8 years that the regulator exists, the government commissioners haven’t made a single appeal. Hence, I am not convinced that we need to change the laws.*

In addition, according to this respondent, the fact that the government appoints the agency head is no impediment to independence since these appointments are relatively objective:

*There is a system of rankings and normally the government appoints the highest ranked candidate. So you could say that the government would only have a real influence when there are two candidates that are ranked equally.*

Hence, when asked what the impact of the third package would be, the Walloon regulator argues:

*The impact will be very very weak. I don’t think a change of our statutes will be necessary.*

Hence, these diverging responses from the Belgian regulators indicate that the requirements of the third package seem to leave some space for interpretation. Out of the three regional regulators, VREG has been most active in demonstrating a need for more autonomy from the minister, even though it is unclear whether the Directives actually apply to it (argument of CREG), let alone that the Directives really require the proposed changes (arguments of other regional regulators).

*Impact of EU regulation on federal-regional relations*

**Representation into CEER/ERGEG**

CREG is the institution representing Belgium in the plenary of ERGEG and the General Assembly of CEER. Starting from its establishment in 2000, CREG was one of the ten founding members of CEER. At the time, CREG was the only independent regulator in Belgium, so it was logical that it became the only Belgian member of the informal CEER network of national regulators. In addition, the international co-operation through CEER was merely aimed at informally exchanging information and mutual learning.
Following the creation of the regional regulatory authorities in 2006, representation at the EU-level networks became increasingly more contested. Initially, the regions insisted that they had to be more actively informed regarding the activities of CEER/ERGEG and regarding the opinions that CREG defended in these networks. At first, CREG was reluctant to do so, arguing that it could not discuss the activities of a network with organisations that are not a member of these networks. Therefore, the Flemish government requested to become a member of ERGEG. This was possible because the Commission Decision on the establishment of ERGEG stated that Member States could designate ‘one or more competent bodies with the function of regulatory authorities’ (art.2). After several debates, the regional and federal regulators agreed that VREG would become a member of the Customer Working Group of ERGEG, where it represents the Belgian regulators. It would inform the other regulators of its activities in the working group during the FORBEG meetings. For all other working groups, as well as for the general assembly and plenary meetings of CEER and ERGEG, CREG remains the only Belgian representative.

VREG has identified the membership of European networks as a strategic resource. Contacts with regulators in other countries are seen as a valuable source to learn from the experiences of other regulators:

‘when the minister asks us to perform a certain study, it is good to have an informal network to fall back on, to ask how our colleagues have undertaken such studies; to obtain data or just to have a sounding board so that we can ask our colleagues’ advice on what methodology we should apply’.

In addition, access to international networks allows regulators to increase their influence on policy-making. First, because of the exchange of experiences, international contacts increase its expertise vis-à-vis the minister. Second, by referring to ERGEG documents or CEER position papers in the advices that VREG produces to its minister, these advices gain a larger moral weight. Respondents from the regional regulators indicated it is much harder for a minister to ignore its advice when this advice reflects the same opinion of a highly reputable actor such as ERGEG. Third, because of the close relationship between ERGEG and the European Commission, regulators have a large say in the preparation of directives that ultimately will have to be transposed by the regulator’s minister. Hence, in case the minister does not follow the advice of the regulator, the latter potentially has a large
indirect power when the ERGEG documents are adopted by the European Commission, so that national ministers still have to implement these decisions:

“In the network, there is a two-way communication. Not only are regulators confronted with similar problems, we also start thinking, what causes these problems and what needs to be improved in order to solve them? There is a strong need to pass information upwards. I feel that regulators really have an impact in the preparation of new rules. Maybe not directly on our own minister but via the European institutions, and then ultimately on our own minister.”

Particularly, the membership of the customer working group of ERGEG is of crucial importance for the VREG:

“The customer working group is about improving customer protection. This mainly relates to distribution network operators and that is an exclusively regional competence. If the federal CREG would attend those meetings, they would have to participate in discussions on topics for which they have no competences. It is more efficient if the Belgian representative is someone from the regions, who has knowledge and authority over these issues. You can only defend customer’s interests if it is a part of your core competencies’. CREG would just be like a fifth wheel on the wagon if they would sit there.”

Notwithstanding, the representation into the customer working group remains contested. As a federal respondent said:

‘we have allowed them to sit in the working group [emphasis added]. But of course, because we are the only official Belgian representative in the plenary, we receive all documents from the working group as well. Until now, we have not really paid much attention to these documents but we will do so in the very near future. Besides, the federal level has a minister for consumer protection, so I believe that this is actually a federal competence, not regional.’

**Representation in ACER**

The implementation of the third package poses further problems for the relations between the federal and regional regulators. Whereas the second package allowed Member States to designated multiple NRAs, the third package explicitly requires Member States to appoint only one representative that will serve as the single point of contact with the EU institutions. Hence, whereas both the federal and
regional regulators could in principle mandate representatives to ERGEG, under the third package they have to agree on which one becomes the only representative.

CREG considers itself as the national regulator as mentioned in the third Package, because it is the only body that has an authority over the entire Belgian territory, whereas the regional regulators are confined to their own region. In addition, it argues that the main activities of ACER are about exclusively federal competences:

“Issues on transmission, cross-border trade, interconnections or gas storage are all federal competences. The regions have no competence here, nor any expertise.”

However, VREG wants to maintain and even expand its role on the EU-level. Participation in ERGEG under the second package was already strategically important to VREG, and the third package even increases this need for coordination with regulators in other Member States. The fact that distribution network operators can enter the Belgian market while having obtained a license from a different member state implies that VREG should coordinate with other NRAs regarding the granting and retraction of licenses.

Hence, VREG has questioned the notion of a single national regulatory authority:

I would not label CREG as the national regulator. Suppose there is a large-scale reform of the state, and almost nothing is federal anymore, it would not be logical that they would be the sole mouthpiece for anything regarding regulation in Belgium.”

In an advice issued to the Flemish Government, VREG argued that the political evolution is such that competencies on the federal level will be transferred to the regional level in many policy sectors. In addition, competences for which an authority over the entire territory is needed (e.g. transmission networks) are increasingly embedded in a wider regional or European framework. Hence, VREG implicitly argued that the federal regulator CREG will become increasingly irrelevant (p.3??). At the same time, a full regionalisation of competencies holds risks that markets will become too small if regulators imposed divergent obligations. Hence, VREG argued that coordination between regulators should be increased. Specifically, it argued for a formalisation of the role of FORBEG by making a collaboration agreement that would be signed by all regulators, and which would give this body a formal statute. In addition, this formalized FORBEG should appoint the senior representative of Belgium in the Board of Regulators of ACER. According to VREG, the Directives do not explicitly
require that the senior representative is appointed by the national regulatory authority alone. Instead, it can be appointed “jointly by the national and regional regulators” (VREG 2010: 43). This formalisation would effectively increase the influence that VREG has regarding EU affairs. Whereas CREG had until now voluntarily allowed VREG to attend ERGEG working group meetings, the proposal would give VREG a structural and guaranteed position regarding contacts with the EU. Considering that there are three regional regulators and one federal regulator, the regional regulator would even form a majority within a formalized FORBEG. The CREG denied this request but the Flemish government has taken over the proposal of VREG and has been negotiating with the federal government to reshuffle these competences (Van den Bossche 2010).

DISCUSSION AND CONCLUSIONS

The regulation of energy is characterized by a growing interdependence between actors at different levels of government, changing the dynamics of cooperation and conflict.

![Figure 1: double delegation logic](image)

Figure 1 shows the ‘dual delegation logic’ as described in the Europeanization literature. Whereas national governments delegate rule-making authority to the European Commission (arrow 1), the competence to implement and monitor the compliance of these rules is delegated to national regulatory authorities (arrow 2). This creates a governance dilemma for the EC, which is not able to directly
enforce a harmonised implementation of its rules. In order to resolve the effects of the governance dilemma, the EC has sought to link up with the NRAs through the creation of ERGEG (arrow 3). This affects the relation between NRAs and their own parent ministry: NRAs are forced into a double-hatted role, where demands from the EC conflict with demands of their own government. This is demonstrated by the aforementioned case of the distribution tariffs, where the method developed by the federal regulator CREG contrasted with the approach proposed by the government.

**Figure 2: third dimension of fragmentation**

In the context of energy regulation in Belgium, the dual delegation logic needs to be complemented with a third dimension of fragmentation. The actor constellation includes a task division between the regional and federal bodies as shown in figure 2. The federal government has delegated some authority, regarding distribution, to the regions (arrow 4) but the authority over production and
transmission has largely been maintained at the federal level. In turn, the three regional governments have also delegated implementation tasks to newly created independent regulatory authorities (arrow 5). Through the creation of FORBEG, the regional and federal regulators coordinate and share information regarding the activities of ERGEG (e.g. discussing advices to the EC, drafting reports about the Belgian energy market that need to be communicated to the EC) (arrow 6). However, the effectiveness of these coordination mechanisms has been questioned by the regional regulators. Whereas the EC and ERGEG have shown increased interest for issues such as customer protection and renewable energy, the regional regulators have indicated that these issues are of less interest for the federal CREG, because the CREG’s core business lies in production and transmission activities. Hence, the regional regulators, particularly the Flemish VREG, have increasingly attempted to form direct links with the EC instead, by seeking a more active role in ERGEG, notably via the Customer Working Group (arrow 7). This created tensions with the CREG, which considers itself as the single point of contact at the EU-level. The growing activities of the regions at the EU-level are regarded as a bypassing of the federal regulator.
The replacement of ERGEG by ACER will have an impact on the relations between the actors, as shown in figure 3. The shift from informal governance to a more formal organisation (arrow 8) may well change the relations between the NRAs and the EC. Whereas both actors had generally very friendly relations in ERGEG, mutual tensions may increase somewhat after the establishment of ACER. Their criticisms over the initially proposed organisational structure of ACER, combined with the fact that CEER will remain in existence parallel to ACER, suggests that NRAs attempt to safeguard their autonomy vis-à-vis the EC more strictly. Our case findings also suggest that the creation of ACER is likely to intensify the conflicts between the regional and federal regulator (arrow 9). The third legislative package explicitly states that each Member State can assign only one agency as a member of ACER, but for both the federal and the regional agencies membership of ACER has many benefits. First, ACER provides the same valuable information for its members that had been
present in ERGEG. This represents the technocratic character of transnational networks, allowing individual agencies to significantly increase their own know how and technical expertise. A second advantage is that the third legislative package guarantees a considerable extent of autonomy vis-à-vis the parent minister for the NRAs that are a member of ACER, beneficial to both the federal and regional regulators.

HIER AANVULLEN

In sum, we do indeed find that cooperation at supranational level increases conflict at national level bypassing yes, but mainly regional level /....certainly in energy, a strong regulation of EC is necessary…creates new conflict

For Belgium, the CREG is member

This evolution reflects the governance dilemma of the Commission. Under the first package, the Commission did not have the competences to enforce unbundling and did not have the expertise regarding cross-border issues. It adopted ERGEG but this was not an entirely new network. Rather, it was a co-optation by the Commission of an existing structure (CEER). Via Ergeg, the Commission and the NRAs have developed a close, mutually beneficial relationship. The NRAs provide expertise on the preparation of new legislation and implement the existing legislation. In turn, the Commission has strengthened the competences and the political independence of the NRAs. This relationship has given ERGEG much credibility. However, the creation of the EU regulatory network has not resulted in full coherence, as demonstrated by the large number of infringement procedures launched by the Commission under the 2nd package. Although ERGEG has a good reputation, it could only issue advices.

With respect to the interrelations between national and EU-level, we see that national conflicts, such as reflected in the relations between CREG and VREG, may be exported to the EU arena. The development of the third package has increased the tensions between these two regulators, regarding which one represents the Belgian opinion. It is interesting to note that, whereas the provision that only
one representative can be appointed per member state was intended to reduce power struggles between the NRAs and their ministries, has created a new power struggle between the regulatory authorities at the different levels of government.

The future role of CEER is currently not clear yet. Just like the CEER remained in existence after the creation of ERGEG, it will remain in existence after the creation of ACER and the abolishment of ERGEG, because the national regulator want to maintain a forum where they can meet in full autonomy, without the European Commission. However, the scope of the activities of CEER are not clear yet (see meeting boards). Most likely the working groups that work on topics for which ACER has a competence (e.g. electricity and gas directives) will be abolished and fully transferred to ACER. Other working groups, such as consumer protection, financial instruments, will likely remain in existence. CEER also has the intention to maintain the working group on the implementation of the third package, but in a different form. The idea is to broaden the scope of the WG and change it into a ‘legal instruments’ WG. However, the relationship between CEER and the other institutions is not clear yet. It is not clear with whom the CEER will communicate regarding matters for which the ACER has no competence. It is not clear whether CEER will consult the ACER; and if it will receive requests from ACER or directly from the European Commission. ERGEG will effectively be replaced by ACER. The agency takes over most of the tasks of the network but will also be able to take binding individual decisions in some cases. However, the agency does not replace the NRAs and many core regulatory competences remain exclusively of the NRAs. Notwithstanding, it seems evident that the legislative packages have increasingly insulated the NRAs from their minister and have tied them more closely to the EU.
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