Consultations in energy policy –
Effective instrument of citizen participation or "myth and ceremony"?

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Abstract

The German energy transformation ("Energiewende") is a major political experiment. This experiment does not only comprise new policies, but also establishes fundamentally different governance structures. The planning of electricity grids had once been a prerogative of the executive and state-owned enterprises. Now, the planning process involves extensive stakeholder consultations, which is a substantial institutional innovation. However, up to now, we do not know how public participation influences the decision-making process, nor do we know what motivated legislators to establish consultation procedures in the first place. The academic discussion on public participation offers four theoretical perspectives to answer these questions: The first perspective stems from democratic theory and argues that consultations improve the input legitimacy of policies. Second, the political exchange approach argues that consultations enhance the output legitimacy of policies by adding technical expertise to the policy process. Third, according to the principal-agent approach, consultations establish fire alarms that allow political principals to govern their administrative agents. Fourth, the most skeptical perspective stems from sociological institutionalism and sees consultations as “myth and ceremony”, as symbolic actions designed to conform to widely held notions of legitimacy. Applying these four perspectives, the paper uses process tracing to analyse the decision-making process that led to the establishment of consultation procedures in German grid expansion laws. The analysis shows that the German political elite pursued a clear aim with the introduction of consultation procedures: They wanted to generate acceptance for grid expansion. However, they had no clear belief why consultations might generate legitimacy and possibly acceptance. Hence, they gave no clear guidelines for the institutional design of the consultation procedures. Our conclusion is therefore pessimistic: Public participation in German grid expansion policies may be nothing more than “myth and ceremony”, consulting for its own sake.
1. Introduction

Administrative actors face a complex task when planning of large infrastructure projects. Approval procedures are long and cumbersome. Issues of health and environment protection have to be reconciled with economic viability and citizen preferences. Thus, administrative actors increasingly fulfill political and “mediating” roles (Döhler 2014: 86), and have to legitimize their decisions.

From the perspective of citizens, large infrastructure projects often lack legitimacy, and thus cause major protest. Protests against the so-called “Airstrip West” of Frankfurt airport lasted for 25 years and culminated 1987 with deadly shots at two police officers.¹ The protest against the nuclear reprocessing plant in Wackersdorf in the 1980s also caused much public debate, not the least because of the violent clashes between police and protesters. Adding to the protest on the street, 880,000 objections against the project were submitted in the formal approval procedure.²

In recent times, the train station project Stuttgart 21 is remarkable. The project met with major protests, but political actors were able to manage the situation by holding a referendum and extending public participation procedures.

To solve these legitimacy problems, political actors have introduced public participation into the planning procedures for infrastructure projects. The extremely controversial case of the extension of the German power grid is a case in point. If Germany wants to transform its energy system to renewable energies, new high voltage lines need to connect the windy North of Germany with the major industrial centers in the South. However, these high voltage power lines are contentious. Two of the crucial laws – the energy industry law (Energiewirtschaftsgesetz, EnWG) and the grid expansion acceleration act (Netzausbaubeschleunigungsgesetz, NABEG) from 2011 introduce extensive public participation to the planning process (Weyer 2011). The transmission system operators (TSOs) that build the grid and the administrative actor charged with oversight, the Federal Network Agency (Bundesnetzagentur, FNA) have to consult the public on their major planning decisions in the earliest stages of the planning process. Moreover, these two laws seem to be the harbingers of a new trend in German policymaking. The EnWG and the NABEG are used as blueprints for planning procedures in other policy fields.³ For example, public participation is now enshrined in the Federal Transport Infrastructure Plan, and the new law for the finding a location to store nuclear waste (Bull 2014).

¹ See e.g. http://www.faz.net/aktuell/politik/inland/startbahn-west-die-waldbuerger-1623748-p4.html
² See e.g. http://www.planet-wissen.de/natur_technik/atomkraft/atommuell/wiederaufbereitungsanlagen.jsp
³ Gutachten für die Bundestagsfraktion Bündnis 90/Die Grünen: Bessere Planung mit mehr Bürgerbeteiligung, August 2012.
In light of this trend towards public consultation, it is all the more important to ask why consultations can generate legitimation. From a superficial perspective, it seems somewhat self-evident that political actors hope for “better” decision-making by introducing public consultations. However, it is still unclear how public participation can reach this aim, what mechanisms connect public participation and “better” decisions. This paper examines, which goals the German legislators tried to achieve with the public participation obligations of the EnWG and the NABEG. What was the reasoning of political actors? What are their causal beliefs that explain why and how consultations generate legitimacy? Do different political actors assign different functions to public participation? The answer to these questions is crucial to elucidate in later research whether these hopes can be fulfilled by the actual consultations.

The paper is informed by four theoretical perspectives. Legislators may first see consultations as a way to generate input legitimacy by incorporating as many citizen views as possible in the policymaking process. Second, legislators may want only the input of experts and informed citizens to increase the output legitimacy of administrative decisions. Third, consultations may simply be symbolic actions to appease potential protesters and function as “myth and ceremony”. Fourth, the intention of legislators may be to use consultations as fire alarms, as a way to control the private and administrative actors that perform the consultations. A last reason to introduce consultation is rather atheoretical, but probably prevalent: Legislators want large infrastructure projects to be accepted by the population, notwithstanding whether this acceptance is based on input legitimacy, output legitimacy, a functioning delegation chain, or symbolic actions.

Our analysis of the legislative process that led to the new EnWG and NABEG shows that legislators primarily wanted to achieve an increase of input legitimation and acceptance for grid expansion. Most often, they give no clear reasons why public participation should be implemented. They simply take for granted that public participation is somehow “appropriate” and “good”, but seldom specify why and how public participation works. By implication, EnWG and NABEG offer little guidance on how consultations should be carried out. It seems that consultations are performed for their own sake. If this conclusion holds true, there is ample reason to doubt whether public participation in German grid expansion actually can reach its aims. If consultations are just “myth and ceremony”, citizens may develop high expectation regarding their power to influence policies. Later on in the process, they will be disappointed, as there is little actual impact of their preferences on policies.

This paper is divided into five sections: The next part discusses the relationship between consultations and legitimacy. The third part describes methods and data. The fourth part examines the
legislative process that led to the introduction of public participation into EnWG and NABEG. How was the political conflict structured? What were the positions of political actors? The fifth and last part concludes and shows further venues for research.

2. How do consultations create legitimacy?

The literature on public consultations is extremely heterogeneous. However, five main (and possibly conflicting) goals and mechanisms of consultations can be identified: The first goal is to increase the democratic input legitimation of policies by incorporating as many stakeholders as possible in the decision making process (Kohler-Koch and Rittberger 2007, Kies and Nanz 2013). The second goal is to increase output legitimation, by adding expertise to the decision making process (Bouwen 2004, Eising 2004). As a third perspective, consultations can been seen as symbolic actions to legitimize decisions. The consultations do not have a “real” aim with regard to the latter decision, but exist for their own sake. The mere fact that a consultation has taken place may legitimize the final decision (Meyer and Rowan 1977, Saurugger 2010). A fourth goal of consultations can be derived from principal agent theory. Principals may force an agent to consult other actors as a way to install a “fire alarm”. The principal needs not to constantly monitor the agent’s decisions, but if consultations performed by the agent indicate that many actors are dissatisfied with the agent’s decisions, the principal may step in and control the agent (McCubbins and Schwartz 1984, Lupia and McCubbins 1998). Legitimacy in this regard is the result of a functioning chain of delegation. The fifth perspective is the often implicit assumption of political actors that legitimacy in turn creates acceptance of new policies. This section discusses these five perspectives and derives observable implications.

The first theoretical perspective on consultations is the normative perspective of democratic theory. Consultations can generate input legitimacy because all stakeholders – not only a small set of policy insiders – can now contribute their preferences to the policymaking process (Fung 2006). Thus, consultations are about getting as much input as possible, and not only from experts, but from ordinary citizens who might be affected by a policy. From this perspective, consultations are a means to ameliorate deficits of representative democracy. Consultations legitimize administrative decisions by giving the addressees of the decision more input. Increasing input legitimacy can be seen as normative aim in itself, but also as a mechanism to generate acceptance for a policy. The connecting hypothesis is that people accept decisions that have been produced in a legitimate way.
As an observable implication of this perspective we should find input legitimacy arguments in political actor’s justifications for the introduction of consultations. Political actors should stress that the possibilities to influence politics in a representative democracy are not sufficient to adequately capture citizens’ preferences. Thus, the justification for the introduction of consultations should not be that administrations make technically bad decisions, but that these decisions are not responsive to citizens’ preferences.

The second perspective on consultations is resource exchange theory used in interest group research (Bouwen 2004, Eising 2004, Klüver 2013). The argument is that consultations structure political exchange between interest groups and the consulting actor. Political actors do not possess enough information to develop polices, as regulatory issues grow increasingly complex. Interest groups and companies can deliver expertise in return for incorporation into the political decision process. From this perspective, consultations are institutionalized arenas for exchanging information and access to decisionmaking. Their purpose is to improve the technical quality of decisions, and hence, their output legitimacy. This argument is prevalent in research on the European Commission, the classical case of an administration in need of information (Bouwen 2004). Again, this perspective may be related to acceptance. The connecting hypothesis is that people accept technically good decisions.

Exchange theory predicts that political actors design consultations in a way that attracts actors with expertise (Broscheid and Coen 2007), that is, access to the consultation is tightly regulated. The justification for the introduction of consultations is the lack of output legitimacy. Legitimation is not seen as a problem of incorporating stakeholders’ preferences, but as a problem of getting enough information to make technically sound decisions.

Third, it is possible that consultations are just „myth and ceremony“, and result from processes of institutional isomorphism. Sociological institutionalism assumes that institutions are created and changed to meet widely held beliefs about “appropriate” behavior (Meyer and Rowan 1977, DiMaggio and Powell 1983, Fink 2011). Introducing new institutions is a symbolic action that can nevertheless confer legitimacy on an actor or a decision, if the actors’ environment sees the new institution as “the thing to do” (DiMaggio and Powell 1983: 151). The actual functioning of the institution is secondary. Decoupling may occur, that is, the actual social practice does not follow the formal institutional rules (Meyer et al. 1997). This accusation is frequently voiced by citizens against consultations. Often, participants of consultations can not see whether and how their opinions influence the policy process. The whole consultation is seen as windowdressing. Thus, consultations can even have a de-legitimizing effect. The symbolic act – to consult – creates high
expectations on the part of citizens. They get the impression that they have power to influence decisions. However, in the later stages of the decisionmaking process, citizen input has no effect. Citizen’s expectations are not met, and the institution backfires. An observable implication of this theory is that actors point to examples in other countries or policy areas, or point to generally held expectations (Fink 2011, Ruffing 2014). A solution is seen as “state of the art” without further arguments why this solution is functional. This is a classical case of the “dog that did not bark” type of evidence. Whenever actors do not see the need to justify their decisions, this hints at the fact that they see their decision as taken for granted and the “obvious” thing to do.

The fourth perspective on consultation is that consultations may be an important means for principals of the consulting institution to collect information about the actions of their agents (McCubbins and Schwartz 1984, Lupia and McCubbins 1994). The German grid expansion planning institutions are a case in point. The legislator delegates grid expansion to the FNA, which in turn delegates the task of drafting a first plan for grid expansion (Federal Requirements Plan, the Netzentwicklungsplan) to the TSOs. The TSOs as the companies running the grid have technical and economical expertise, and can estimate which new power lines are needed. However, they may also have an incentive to overstate the need for grid expansion, as building and operating grids is their business model. Thus, the EnWG mandates that they consult the public before submitting their final grid expansion plan to the FNA. The FNA, in turn, has to consult the public before submitting their approved version of the grid expansion plan to the legislator. Thus, these consultations may work as fire alarms, allowing companies, organizations and citizens to comment on the draft plan of the TSOs. The FNA can then use this input to improve its own decision whether to accept or change the TSO draft. As the FNA also has to consult its plan, the legislator may in turn use these comments in its own assessment of the grid expansion plan. The legitimizing effect of consultations is their contribution to a well-functioning chain of delegation.

The principal-agent perspective shares some assumptions with the exchange theoretical perspective, in particular its focus on the information-generating function of consultations. However, the principal-agent perspective is not concerned with direct communication between stakeholders and the consulting body, but with the information the principals of the consulting body acquire through the consultations. As with the other three perspectives, acceptance may be a long term goal arising from the short term goal of controlling the agents. An unbroken chain of delegation running from the voter via the legislators and the federal government to the FNA and the TSOs could result in acceptance of grid expansion policies by the voter as the ultimate principal.
The observable implications of the principal agent perspective differ considerably from the implications of the other perspectives. An analysis of the lawmaking process introducing the consultation procedures should reveal conflicts of interest between the consulting body and its principal. The consulting body should prefer a “narrow” consultation regime, whereas the principal favors “broad” consultation obligations to give as many stakeholders as possible the opportunity to trigger the fire alarm.

Each of the four perspectives includes acceptance of policies as an important long term goal of public participation. This goal can be related to the governance debate that assumes that governments can no longer hope to hierarchically govern complex societal problems, and are dependent on co-operation by societal actors (Mayntz 2010, Töller 2012). The limits of governmental steering have been shown by implementation research (Mayntz 1980). Thus, many authors assume that the successful implementation of policies is only feasible if assisted by the policy addressees (Benz et al. 2007). Infrastructure projects are often prone with serious implementation problems, as the construction process may be thwarted by grassroot protests, an unmanageable flood of statements submitted to the planning process, or lawsuits. Thus, acceptance of a project – minimally defined as the acquiescence of a large part of the population – is indispensable for the success of major infrastructure projects.

Hence, an important question is whether there is a causal relationship between legitimacy and acceptance. In principle, acceptance can be generated by increased input legitimacy, increased output legitimacy, the legitimizing effects of a ‘state of the art’ procedure, or a functioning chain of delegation. As there are several possible mechanisms to generate acceptance, there may of course be disagreement between political actors which road to acceptance is the most promising one. The acceptance perspective is therefore to some extent orthogonal to the perspectives discussed above. Acceptance is only an outcome and may be caused by all of the legitimacy mechanisms sketched above. We introduce acceptance as a fifth perspective, to account for the fact that acceptance may be paramount for political actors.

The observable implications of the acceptance perspective are that political actors should stress the need of speedy grid building and reducing protest. Preferences submitted in the consultation procedure should be taken into account to the extent that they are backed up by many actors, and by actors with a credible veto position (e.g. the possibility to file a lawsuit).

Table 1 gives an overview of the five perspectives. It is important to note that the four legitimacy inducing mechanisms can hardly work simultaneously (although political principals might hope so). The four mechanisms have very different implications concerning the institutional design of
consultation procedures. For example, a consultation procedure geared towards input legitimacy has to integrate as many actors as possible - a consultation procedure geared on generating output legitimacy should in contrast attract only experts. The four perspectives are therefore not only different but equitable views on the same phenomenon. They entail different beliefs about how consultations affect policy-making and how they should be working in practice (Wesselink et al. 2011). Therefore, it is of great interest to examine which beliefs political actors had when establishing consultation procedures and whether they followed one of these guiding models.

Table 1: Five perspectives on consultations and their observable implications

<table>
<thead>
<tr>
<th>Normative perspective / Input legitimacy</th>
<th>Exchange theory / Output legitimacy</th>
<th>Isomorphism / Legitimacy induced by symbolic action</th>
<th>Principal agent approach / Legitimacy induced by a complete chain of delegation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultation as a means to induce input legitimacy</td>
<td>Consultations as a means to induce output legitimacy</td>
<td>Consultations as superficial compliance with widely shared normative standards</td>
<td>Consultations as a means to control the agent</td>
</tr>
<tr>
<td>Broad participation of all stakeholders envisaged</td>
<td>Consultations as an institutionalized arena for political exchange</td>
<td>‘Consulting for the sake of consultation’</td>
<td>Not the consulting body benefits from the consultation input, but its principal</td>
</tr>
<tr>
<td></td>
<td>Generation of expert knowledge is the main objective</td>
<td>Legitimacy induced by symbolic action</td>
<td>Legitimacy induced by a functioning chain of delegation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Alternative option: Procedure raises high expectations and does not live up to them</td>
<td></td>
</tr>
</tbody>
</table>

Acceptance perspective: Each of the four legitimacy inducing mechanisms might in the long run increase the acceptance of policies.

3. Empirical data and methods

This article conceptualizes the political decision-making process as a bargaining process between the actors involved in legislation, in particular the German government, the parties in the German parliament, and the federal states. Their chances to influence policies depend on their position in parliament (governing parties vs. opposition), the fact whether an approval law or an objection law is under consideration, and which ministry is responsible for drafting the law.

Therefore, the main empirical basis of the analysis are the documents of the legislative procedure for the EnWG and NABEG, in particular the minutes of the German parliament and the Federal
Council, the recommendations for decisions of the committees, and the committee hearing documents. To get a comprehensive picture of the positions parties had with regard to consultations, we analyse the manifests for the elections to the German parliament in 2009, as well as official party documents concerning public participation. Furthermore, the publications of the FNA and the TSOs have been analysed to explore their preferences with regard to public participations, and we have conducted semi-structured interviews with TSOs officers involved in public participation processes.

The party and legislation documents were hand-coded to assess in how far they represent the five perspectives discussed in the theoretical section. Each of the perspectives has been treated as one dimension, and each sentence can be assigned to more than one dimension, if for example one sentence contains arguments referring to several perspectives.

A first finding is that most documents of the legislative process – with the exception of specialised party position papers – contain only a low proportion of statements actually referring to public participation. In the documents of the parliament and the Federal Council, this can be attributed to the fact that the participation procedure has been discussed in the same session as the energy transformation in general, and the new Atomic Energy Law. Basically, the “Atomausstieg” dominated the debate, and public participation seems to have been a minor concern. Therefore, in contrast to the approach of the often cited Party Manifesto Project (Budge et al. 2001) we do not evaluate the share of statements referring to participation in relation to statements referring to other issues. In contrast, we focus only on statements concerning public participation and analyse to what extent they can be assigned to the different perspectives (see also Radulova 2011).

4. Policymakers beliefs about the legitimacy-creating mechanisms of public consultation

The far-reaching consultation obligations in the procedure for approving new grids were established in 2011 and laid down in the amended Energy Industry Law (EnWG) and the Grid Expand-
sion Aacceleration Law (NABEG). Both laws oblige the FNA and the four German TSOs (Amprión, Tennet, TRansnetBW and 50 Hertz) to engage in comprehensive public participation when planning grid expansion projects. Both laws were part of a package of measures adopted after the Fukushima disaster, heralding the German “Energiewende”.

Before consultations were introduced in the EnWG and the NABEG, electricity grids were planned in corporatist arenas: The drafts of the German Energy Agency (Dena) were developed behind closed doors, involving in particular the TSOs, associations of the energy industry, and the Federal Ministry for Economic Affairs. Now, the EnWG stipulates three rounds of public consultation when planning the demand for new grids: The TSOs develop so called scenario frameworks that outline the development of the German energy market. These scenarios are then consulted in public. The FNA approves these scenario frameworks. Based on the scenarios, the TSOs develop a draft for the so called Federal Requirements Plan, that defines in very broad patterns between which places in Germany new power lines are to be built. The first draft of this plan is open for public consultation; the TSOs have to take into account the public’s statements when revising the plan. This second draft is submitted to the FNA, which after a third round of consultations can approve the plan and send it to the German Parliament and the Federal Council, which can then adopt the plan as a federal law.7

4.1 The run-up to EnWG and NABEG

Our main research question is which beliefs political actors in Germany had about the working of consultations, and which objectives they pursued when introducing public participation to the grid planning process. A first interesting result is that none of parties elected for parliament in 2009 saw the need to establish public participation in grid expansion policies in its election manifesto. To be sure, all parties besides the Christian Democratic Union (CDU) and the Christian Social Union (CSU) claimed that in general public participation has to be strengthened. For example, the Free Democrats (FDP) called for a “Strengthening of the democratic decision-making processes by enhancing transparency and citizen participation” (own translation), and the Greens postulated “more transparency and citizen participation” (own translation) as instruments for

6 http://www.dena.de/publikationen/energiesysteme/ena-netzstudie-i.html
7 § 12a, b and c EnWG. The essence of the new law is that grid projects contained in the federal law are subject to faster approval procedures. The normal approval procedure has to assess whether a power line is „necessary“, while the projects contained in the Federal Requirements Plan are necessary by definition and subject to new fast-track approval procedures.
environmental policy. Specific proposals for participation procedures can however not be found in the manifestos, and there is no link between participation and energy policy.

Furthermore, the fact that public participation played no major role in German policy-making as late as 2009 can be seen from the Power Grid Expansion Act (Energieleitungsausbaugesetz, EnLAG), adopted in 2009, the predecessor of EnWG and NABEG. In this act, participation rights on the federal state level had even been reduced, to foster a speedy grid expansion. According to the minutes of the EnLAG debate “The central aim of the government draft […] is the acceleration of the planning and approval procedure for building important high voltage power lines. Heart of the draft law is a Power Grid Expansion Act authoritatively stating the economic necessity for 24 top priority grid expansion projects. According to this statement, the projects have to be implemented, the authorities responsible for planning and approval procedures are no longer allowed to assess the economic necessity. Omitting this assessment procedure, we gain valuable time.” (own translation, emphasis SF/ER).

The question of acceptance was discussed in the EnLAG debate. However, public participation was not discussed as a possible means to achieve this goal. Instead, the assumption was that acceptance can be achieved as a consequence of technical decisions. In particular the Greens assumed that new power lines would be accepted by the public if they were implemented as buried cables. FDP, CDU/CSU and Social Democrats (SPD) assumed that acceptance would be more of an economic question: New grids will be accepted by the public if they do not result in overly high electricity prizes. Only the The Left (Die Linke) opposed the reduction of participation rights in the parliamentary debate.

Only two years later, the positions of the parties in parliament had changed fundamentally. Evaluating the minutes of the German parliament and the Federal Council on the EnWG and NABEG debate, it becomes obvious that introducing far-reaching consultation obligations was not even contested. Members of all parties argued for an extension of public participation and not one of the speakers in the debate contested this position.

In fact, the acceleration of grid expansion and the acceptance of these new grids were still the most important issues in the debate. However, they were now linked in most speeches to public

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9 Bündnis 90/Die Grünen, „Der grüne neue Gesellschaftsvertrag“, S.132
10 See http://dipbt.bundestag.de/dip21_web/searchProcedures/simple_search_list.do?sellId=15422&method=select&pagesize=100&sort=3&direction=desc
11 Peter Hintze (CDU), BT-Drucksache 16/183.
12 See Hans-Josef Fell (Grüne) or Marko Mühlstein (SPD), BT-Drucksache 16/183.
13 See e.g. Gudrun Kopp (FDP) or Rolf Hempelmann (SPD), BT-Drucksache 16/183 and 16/220.
14 See http://dipbt.bundestag.de/extrakt/ba/WP17/362/36235.html
participation, one example being the statement of Chancellor Angela Merkel: “We have to achieve a considerable acceleration and at the same time more acceptance. [...] Therefore, the federal government adopted a draft for a grid expansion acceleration act [...] In this draft we want to ensure still an early and comprehensive citizen participation.”

Thus, as political actors obviously assumed that public participation in planning procedures can increase the acceptance of new grids, the next question concerns their underlying beliefs: How did political actors conceptualize the need for public participation, what was their belief about the mechanisms that link participation to legitimacy, and, ultimately, acceptance? Did they hope to achieve this acceptance via input or output legitimacy, the superficial compliance with widely shared norms, or by establishing a functioning chain of delegation?

4.2 Position papers in the run up to the reform

To get a comprehensive picture of German party positions, we analysed whether German parties already had position papers or memoranda that outlined their negotiation positions in the run up to the EnWG and NABEG discussions. We researched the party’s web sites, and sent requests to the party central offices and the parliamentary groups. CDU and CSU replied that they had no party position papers. Although we contacted The Left several times, we obtained no position papers and found no documents on public participation on their web site. The Social Democrats agreed on a position paper on public participation (“Mehr Demokratie leben”) at their party convention in December 2011. As this paper was adopted by the party executive as early as in March 2011, it is included in our analysis. The parliamentary group of the FDP adopted even two positions papers on citizen participation in spring 2011. The Greens called for more public participation in their position paper „Die Grüne Position: Bürgernahe Planung im 21. Jahrhundert“.

The most widely used claim in the position papers was to enhance the input legitimacy of grid expansion using consultation procedures. The second most used claim was that consultations increase the acceptance of grid expansion (see Table 2). The position of FDP as one of the governing parties (and the only one that advocated public participation) is of particular importance: In their position papers, input legitimacy and acceptance are equally important. Public participation is seen as having a dual nature, an example being the following statement: “Omitting citizen participation, one example being the statement of Chancellor Angela Merkel: “We have to achieve a considerable acceleration and at the same time more acceptance. [...] Therefore, the federal government adopted a draft for a grid expansion acceleration act [...] In this draft we want to ensure still an early and comprehensive citizen participation.”

15 BT-Drucksache 17/114.
16 http://www spd.de/ presse/Pressemitteilungen/10828/20110321_mehr_demokratie_leben.html
17 Beteiligung und Erneuerung: 16 Punkte zur Bürgerbeteiligung und Planungsbeschleunigung bei privaten und öffentlichen Investitionen.
Bürgerbeteiligung ausweiten, Petitionsverfahren weiterentwickeln, Bürgerplenumverfahren einführen.
participation] is on the one hand a problem, because long-standing political and judicial conflicts – which may take years for settlement and delay the respective project - may result from a lack of public acceptance. In particular this lack of acceptance is a symptom for the waning integrative and consensus building function of our current planning instruments. If many citizens feel that their interests are not sufficiently taken into account when planning infrastructure projects, we as a liberal party have to react to this. We want a vibrant civil society." (own translation)  

Table 2: Position paper arguments relating to citizen participation in the run-up to the EnWG and NABEG debate (CDU, CSU and The Left had no position papers)

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Input legitimacy</th>
<th>Output legitimacy</th>
<th>Isomorphism</th>
<th>P-A approach</th>
<th>Acceptance</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPD</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Greens</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>FDP</td>
<td>5</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>14</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>8</td>
</tr>
</tbody>
</table>

All in all, in particular the FDP as a governing party entered the negotiations of the EnWG and NABEG with a clear position on public participation. Its coalition partners – CDU and CSU – had no well-defined position on public participation. Therefore, it is plausible that in particular the FDP put public participation on the governmental agenda, believing that participation does at the same time enhance the input legitimacy and public acceptance of grid expansion. From the opposition, SPD had the most clearly defined position on public participation, with input legitimacy being the SPD’s primary goal.

4.3 The genesis of EnWG and NABEG

Being on the governmental agenda does not ensure a policy’s adoption. Therefore, in a second step, the legislative process on EnWG and NABEG has to be analysed. The legislative process started with a draft prepared by the Federal Ministry of Economic Affairs – led by the liberal

18 Positionspapier Beteiligung und Erneuerung, p.3
Minister Philipp Rösler. Several months before, the Ministry had published a key position paper on public participation, which already contained consultation obligations for the TSOs.\footnote{Available at \url{http://www.bmwi.de/BMWi/Redaktion/PDF/E/eckpunkte-enwg-novelle.property=pdf.bereich=bmwii2012.sprache=de.rwb=true.pdf}}

Evaluating the minutes of the plenary and committee debates on EnWG and NABEG, we found 31 passages referring to public participation. 12 passages claimed the introduction of consultation procedures without any accompanying arguments. According to our reasoning, this lack of supporting arguments may be an indication for institutional isomorphism – if actors do not see it necessary to support a new policy, they may see it as taken for granted. 19 passages gave reasons for the claim and can therefore be clearly coded in relation to the dimensions discussed above.

Three of the statements were coded on the \textit{input legitimacy} dimension. One of these statements was made by Patrick Döring (FDP), two were found in the position of the Greens in the Committee of Economics and Technology, one of them being the claim that “public participation on grid building has to be organized in a different way, the actual chances of the citizens living close to the grids and the NGOs to exert influence in the planning procedure have to be improved.” (own translation)\footnote{BT-Drucksache 17/6366}

Two arguments were coded on the \textit{exchange theory dimension} and refer to the technical improvement of the grids. They were brought forward by the Greens and The Left in the Committee, one example being “Public participation enhances the decision-making quality” (own translation)\footnote{BT-Drucksache 17/6366}

The Left made the only argument clearly referring to the \textit{isomorphism} dimension, pointing out that the current procedure was not in line with the EU public participation directive. However, the high proportion of statements that demanded public participation without accompanying arguments could imply that isomorphism played a prominent role. Many actors claimed that that consultation is indispensable, however, without any reasoning why this might be the case.

No arguments in the parliamentary debate were coded on the \textit{principal agent dimension}. This suggests that the fire alarm function of consultations was not of paramount importance for the political principals in the legislative process. Nevertheless, they might use consultation statements later on to control their agents. Further analyses have to shed light on these processes.
Most political actors see acceptance as the key objective of public consultations. Eleven statements name public participation as a means to enable an accelerated and more consensual grid expansion. This argument was made by members of all parties in German Parliament. Therefore, the political actors shared the belief that public participation enhances the acceptance of grid expansion.

Table 3 gives an overview of the arguments in the parliamentary debate. All in all, the political actors gave only a few statements specifying how consultations improve decision-making, but shared the belief that consultations result in increased acceptance of policies. Therefore, it is hardly surprising that almost no conflicts arose on the institutional design of the consultation procedure. These results are very much in line with the assumptions of the isomorphism perspective: Institutions are attributed with a set of effects without considering why and under what conditions we can expect these effects (Meyer et al. 1997).

Table 3: Arguments in the parliamentary debate on EnWG and NABEG

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Input legitimacy</th>
<th>Output legitimacy</th>
<th>Isomorphism</th>
<th>P-A approach</th>
<th>Acceptance</th>
</tr>
</thead>
<tbody>
<tr>
<td>CDU/CSU</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>SPD</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Greens</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>FDP</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>The Left</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>11</td>
</tr>
</tbody>
</table>

In the Federal Council, participation rights were hardly disputed. Instead, the debate focused on the shift of planning competences from the federal states’ authorities to the FNA. In fact, the federal states tried to negotiate privileged participation rights for themselves. The federal states wanted the right to be the first actors to comment on the first draft of the Federal Requirement

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22 „Die Beschleunigung des Netzausbaus ist sinnvoll und kann gesellschaftliche Akzeptanz finden, wenn parallel die Bürgermitbestimmung ausgebaut und das gesamte Verfahren transparent wird.“ (The Greens, BT Drucksache 17/6366)

„Die Öffentlichkeitsbeteiligung ist zur Verbesserung der Akzeptanz […] bereits im Vorfeld zu gewährleisten“ (The Left, BT Drucksache 17/6366)

„Die schönsten Programme zur Offshore-Windenergie nützen gar nichts, wenn es in Niedersachsen und in Schleswig-Holstein einen organisierten Bürgerprotest gegen einen Netzausbau gibt und der Bund gesetzgeberisch keine Maßgaben und keine Vorschläge macht, wie Bürgerbeteiligung und Planungsbeschleunigung zusammengebracht werden können“ (Patrick Döring, FDP, BT-Drucksache 17/117)
Plan by the TSOs, thereby obtaining “first class participation rights”. “When approving the network development plan the federal structure of the Federal Republic of Germany should be taken into account in an adequate manner. This will also answer the purpose of increasing acceptance. [...] Involvement should be organized on a step by step basis, starting with the federal states’ planning authorities. This involvement should take place as early as possible in the procedure, meaning during the drafting of the plan.“ (emphasis ER/SF, own translation)\(^{23}\) This argument implies that the federal states attached paramount importance to acceptance. However, for them, involving their own planning authorities was the means to achieve acceptance. Another demand of the federal states was veto power for the FNA advisory council – in which the federal states are represented - giving the council the possibility to veto a Federal Requirement Plan. This demand resonates with a principal agent logic: The federal states as principals aimed for a mechanism for controlling their agent – the FNA. However, both proposals of the Federal Council were rejected by the federal government.

4.4 The role of the FNA and the TSOs

To get a more nuanced picture of the lawmaking process, we also researched whether and how the norm addressees, namely the FNA and the TSOs, have influenced the new participation regime. After all, it is they, not the federal government, who have to organise the consultations and obtain stakeholder input.

Like most political actors, the FNA saw the new participation regime as a way to generate acceptance for grid expansion: “The transparent assessment of the need for new electricity grids is a major element of generating acceptance for grid expansion.” (own translation)\(^{24}\) In the minutes of the Bundestag committee meetings, there is however little evidence that the FNA was a major driver of consultation obligations for the TSOs, as a principal-agent perspective would have suspected. The main concern of the FNA was the expansion of its staff and budget to fulfil its new consultation obligations.\(^{25}\) For example, in the minutes of the committee meeting, the FNA states that “The FNA will quickly adapt to the new tasks [...]. The success and speed of grid expansion, however, hinges on the resources of the FNA. Thus, we must make sure that the FNA is adequately staffed and funded.” (own translation)\(^{26}\) The FNA was very successful with its demands:

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\(^{23}\) BT-Drucksache 17/6248

\(^{24}\) „Die transparente Bedarfsplanung stell[et] für die Bundesnetzagentur ein zentrales Element für die Akzeptanz des erforderlichen Ausbaubedarfs dar“. BT-Drucksache 17/6366

\(^{25}\) BT-Drucksachen 17/6365 und 17/6366.

\(^{26}\) „Die BNetzA werde sich auch in die neuen Aufgaben der räumlichen Planung und Planfeststellung zügig hineinfinden. [...] Der Beschleunigungserfolg hänge unstreitig auch von der tatsächlichen Ausstattung der zuständigen
A well-staffed new department was established within the FNA. Hence, the FNA was not opposed to the introduction of consultations.

Additionally, the FNA used arguments that hint at institutional isomorphism. In the hearings of the EnWG, it argued that the new German consultation regime was a German version of the EU regime for consultation in energy policy.\(^27\) Grid expansion plans on the European level are generated similar to the German plans. ACER – the European Agency for the Cooperation of Energy Regulators – co-operates with the European TSOs to produce a European plan for grid development, including consultations at the early stages of the policy process. These consultation are used by very few stakeholders. However, as the German FNA is a member of ACER, our conclusion is that the FNA found it easy to acquiesce to the new German consultation regime because it was similar to the already-existing European procedure.

Besides the FNA, the TSOs are the main actor affected by the new consultation rules. Additionally, we can surmise that the preferences of these main economic actors have been considered by the ministry of economics that prepared the EnWG and NABEG. One of the four TSOs – 50Hertz – explicitly stated its position during the committee hearings: “The acceleration of planning procedures must be accompanied by better institutions of public participation.”\(^28\) However, the minutes of the committee hearings give no reason for this position. The sociological-institutionalist perspective might interpret this lack of reason-giving as evidence for the fact the consulting has become taken for granted, that is, participation is seen as so appropriate and given, that there is no need for further justifications.

In addition to analysing the minutes of committee meetings, we conducted semi-structured telephone interviews with the officers responsible for public relations / public participation of the TSOs. These officers were asked whether their companies had clear preferences concerning public participation during the lawmaking process that led up to EnWG and NABEG. The answer was that none of the companies had clear preferences during the lawmaking process (however, due to the relatively late liberalization of the market and unbundling of companies in Germany, Amprion, Tenet and TransnetBW were still nascent companies in 2010/11). The second question was what role the obligation to perform public participation plays for these companies. The answer was relatively uniform: All companies stated that they consult the public routinely, going beyond the obligations constituted in EnWG and NABEG. This answer resonates with an analy-
sis of their webpages and publications. In other words: The TSOs consult the public anyway, and the new consultation regime only codifies existing practices. As a justification for consultations, the companies used arguments that can be seen as examples of acceptance, input legitimacy, and institutional isomorphism, with the bulk of the arguments concerning acceptance. At the same time, their expectations about the attainability of these aims are rather modest. Companies see consultations as a way to ensure that people that have up to now not opposed grid expansion remain silent (interview #1). They see a reduction of lawsuits against grid projects as a measure of success for public participation (interview #3). This (modest) increase of acceptance of grid projects is seen as the reasons why companies spend money for public participation at all (interviews #1 and #2); increasing acceptance is also the internal selling point to justify public participation departments in the overall company structure (interview #2).

Many arguments of the TSOs reflect institutional isomorphism. For example, one officer argued “You can simply not build grids without public participation anymore. These times are gone.” (interview #2). The public simply expects that consultations take place, and companies have to act accordingly (interview #2). Another officer stated that public consultations may increase the legitimacy of grid expansion projects, but that at the end of the day, political actors – and not the TSOs – have to generate legitimacy for grid expansion.

To conclude, neither the TSOs nor the FNA were major proponents of the new consultation regime. But neither of them opposed the new consultation regime. In other words, the legislator did not have to work against opposition by the regulated actors, but met with “silent acquiescence”.

5. Discussion

The aim of this paper was to elucidate, which beliefs political actors in Germany have about the impact of public consultations in energy policy. Who were the proponents of public participation in the policy process? What hopes did (and do) they have, and why do they think that public participation works?

This aim is not only relevant for grid expansion, but of importance for broader questions of governance in Germany. First, rationalist theories assume that actor’s beliefs and worldviews not only structure the debate, but also guide institutional design. For example, a consultation that is supposed to generate output legitimacy should look differently than a consultation designed to
generate input legitimacy (Wesselink et al. 2011) Hence, the actor’s beliefs and motives will be reflected in concrete institutional design.

Second, the public participation regime established for grid expansion is seen as a blueprint for public participation in German policymaking in general. The beliefs that legislators had when designing NABEG and EnWG will most likely guide further German laws, and set the agenda for the future of citizen-government interaction in Germany in the years to come. Hence, we expect to see more laws of the same kind in the future. For example, the planning procedure for roads and railways (Bundesverkehrswegeplanung) is directly modeled according to EnWG and NABEG, and presumably guided by the same beliefs and worldviews about participation. The Standortauswahlgesetz (the law regulating the search for an ultimate disposal place for nuclear waste) is also concerned with acceptance, basically mandating the administration to consult the public and assess in advance how much acceptance for a nuclear waste disposal place there is.\footnote{Art. 10 (4): „Über die Ergebnisse jeder Bürgerversammlung und das Gesamtergebnis nach Abschluss der mündlichen Erörterung ist eine Niederschrift anzufertigen. Hierbei ist unter anderem darzulegen, ob und in welchem Umfang Akzeptanz besteht.“} Most importantly, the Verwaltungsverfahrensgesetz (administrative procedures law) now contains the principle of “early public participation”, urging all branches of the administration to consult the public as early as possible if a planning procedure presumably touches upon stakeholders’ interest.\footnote{Art 25 (3): „Die Behörde wirkt darauf hin, dass der Träger bei der Planung von Vorhaben, die nicht nur unwesentliche Auswirkungen auf die Belange einer größeren Zahl von Dritten haben können, die betroffene Öffentlichkeit frühzeitig über die Ziele des Vorhabens, die Mittel, es zu verwirklichen, und die voraussichtlichen Auswirkungen des Vorhabens unterrichtet (frühe Öffentlichkeitsbeteiligung).“}

Given all these developments, it is all the more important to answer the question whether the public participation regime in grid expansion actually works the way the political principals think it works.

Thus, if we see EnWG and NABEG as manifestations of a broad trend towards public participation in German administrative procedures, we can identify the FDP as one of the main drivers of this trend. The FDP was the only government party that had a clear position on public participation. CDU and CSU had no position papers on public participation, and did not debate the topic during the plenary sessions. Thus, we conclude that the FDP was the main driver of the introduction of public participation in EnWG and NABEG, all the more so, as FDP politicians held the ministry of economics (first Rainer Brüderle, then Philipp Rösler) that drafted the new laws. If we take the FDP’s statements in their position paper and during the plenary sessions as indicative of its beliefs, then the FDP had two major aims. First, the FDP wanted to increase input legitimacy, based on a liberal view of the citoyen. Second, the FDP was concerned with the slow expansion of the German electricity grid and wanted to increase the speed of project approval by increasing
citizens’ acceptance of new power lines. The votes of the other German parties were not necessary to pass the EnWG and the NABEG, however, our analysis shows that these parties had similar beliefs about the desirability of public participation. The SPD most clearly sees public participation as a way to increase input legitimacy. The Greens – somewhat surprisingly – have no very pronounced position on public participation. For them, input legitimacy and acceptance of grid expansion are paramount.

In total, the acceptance of grid expansion seems to be the dominant aim of public participation for all political actors. In light of our theoretical discussion, the German political elite thus formulated an aim of public participation, but did not postulate a mechanism that specifies how this aim might be reached. Very often, public participation was called for without specifying why it is important or how it should work. This is problematic, because this neglect of mechanisms implies that legislators did not give much guidance on the concrete institutional design of the consultation procedures. FNA and TSOs are obliged to consult the public and to let the results of the consultations somehow “inform” their decisions, but EnWG and NABEG do not specify how exactly consultations are to be carried out, and how the public statements are to inform policies.

The cautious conclusion of this paper is, therefore, that we should not be over-optimistic concerning public participation in German grid expansion policies. Political actors have stated an aim – acceptance of grid expansion – but they have not specified how this aim is to be reached. In consequence, they have neglected to give clear guidance on institutional design. Thus, it is likely that consultations are only “myth and ceremony”, that raise high expectations for public participation, but fail to deliver.

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31 The title of the position paper „Mehr Demokratie leben“ is clearly modelled after Willy Brands „Mehr Demokratie wagen“.
References


