

Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union

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This article investigates the role of transgovernmental networks of national regulators in addressing collective action problems endemic to international cooperation. In contrast to recent work on transgovernmental actors, which emphasizes such networks as alternatives to more traditional international institutions, we examine the synergistic interaction between the two. Building on the broader premise that patterns of “dual delegation” above and below the nation-state enhance the coordinating role of networks of national agencies in two-level international governance, the article examines the formal incorporation of transgovernmental networks into European Union (EU) policymaking. The focus on authoritative rule-making adds a crucial dimension to the landscape of EU governance innovations while connecting to the broader study of transgovernmental networks in international governance. The article develops an analytical framework that maps these incorporated networks across different sectors in terms of function, emergence, and effectiveness. Two case studies of data privacy and energy market regulation are presented to apply and illustrate the insights of this mapping.

Introduction

International cooperation increasingly confronts what Robert Keohane has termed the “Governance Dilemma” (Keohane 2001). Rising interdependence expands the set of functional tasks managed by international organizations and to meet these demands, such organizations require greater centralization and resources (Abbott and Snidal 1988). The demand/supply equation for international coordination, however, rarely clears as nation-states tend to jealously guard their sovereignty. International organizations, then, often lack the tools and skills to monitor and oversee the development and implementation of international rules. The capacity gap threatens to undermine the legitimacy of these international organizations and imperil the larger cooperative project.

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This article uses developments within the European Union (EU) as a “living laboratory” to shed light on a possible solution to this governance dilemma (Jupille, Caporaso, and Checkel 2003, 8). Notwithstanding its advanced degree of integration, the EU remains a “highly decentralized and atomized” political authority structure (Hix 2005, 5), not unlike other international bodies in global governance. On the one hand, the growth of functional interdependence, as the EU has moved into additional policy areas, generates a greater need for policy coordination. On the other hand, political authority in an enlarging EU remains fragmented, since member states are reluctant to transfer regulatory powers to the EU level, fearing the supranational concentration of power. This constitutes a major challenge to the traditional EU governance mode of uniform Community legislation, leading some to question the long-run governability of the Union (Scharpf 1999).

Recent EU scholarship has focused on if and how so-called new modes of governance that rely on voluntary coordination of member state policies can resolve these challenges. We argue that the excessive focus on voluntary modes such as the Open Method of Coordination (OMC) tends to overlook an alternative and increasingly important exit from the governance dilemma: *incorporated transgovernmental networks*. In this approach, transgovernmental networks comprised of *national regulatory authorities* (NRAs) are consciously embedded in the supranational policymaking process. Explicitly granted the authority to assist in rule development and enforcement, incorporated transgovernmental actors oversee the harmonization process and guide further integration. They combine supranational coordination within the transgovernmental body with national delegated authority. Their decisions then simultaneously inform EU policy and actual enforcement on the ground.

We argue that this network mode arises from patterns of *dual delegation in a two-level governance context*. Member states have delegated regulatory powers to EU institutions in a large number of areas, but this delegation is typically incomplete: It excludes powers and resources necessary for detailed rule-making, implementation, and enforcement. To address this regulatory gap, EU governance draws on the rise of domestic, *horizontal* delegation, from member state executives to independent regulatory agencies. Regulatory authority available by virtue of domestic, horizontal delegation is thus leveraged to compensate for incomplete international, vertical delegation. By bridging research on transgovernmental networks with the new governance debate within the EU, the study is uniquely positioned to provide novel insights into questions of international coordination.

To build the case for incorporated transgovernmentalism the article first establishes the theoretical foundations of the project by connecting the argument to initial research on transgovernmental networks, which emphasized the potential synergies between international organization and such networks. This is contrasted to recent research on the EU that

has tended to stress the voluntary, deliberative nature of transgovernmental cooperation. The third and main section elaborates our authority-based concept of incorporated transgovernmentalism, explaining how it differs from existing network approaches and accounts of group participation in policymaking. It develops an analytical framework that maps the key dimensions and determinants of incorporated transgovernmentalism across different sectors: its mechanism and function, emergence, and effectiveness. The following section, then, applies this grid to two contrasting case studies: data privacy and energy. The final and fifth section concludes with implications for EU governance, connecting our argument to recent work on the shadow of hierarchy and new modes of governance (Héritier and Lehmkuhl 2008) and for transgovernmental networks in international affairs, identifying the ability of international organizations to serve as a catalyst for transgovernmental cooperation.

Transgovernmental Networks in Global Governance

The thickening density of international interdependence marked by cross-border information flows, trade liberalization, and global financial markets has spawned a proliferation of research concerned with the governance of international affairs. These trends undermine the ability of states to manage evermore complex international relations (Rosenau 2002; Strange 1996). Shifting from “government to governance,” new, nonstate actors such as MNCs or nongovernmental organizations (NGOs) obtain a primary role in resolving international collective action problems (Cutler, Haufler, and Porter 1999). At the same time, however, a disaggregated perspective on domestic state structure reveals the role of governmental subunits or agencies: Courts, regulators, or competition authorities directly interact with their counterparts in other countries, not by interstate diplomacy but via transgovernmental networks (Slaughter 1997, 2004). Lower-level officials through direct interaction pursue their own professional agenda, independent of national decisions (Risse-Kappen 1995, 9). They build “coalitions with like-minded agencies from other governments against elements of their own administrative structures,” which may result in “policy coordination beyond what would otherwise have been the case” (Keohane and Nye 1974, 44, 46; Newman 2008). Transgovernmental networks are credited with providing a “fast and flexible” alternative to the cumbersome formality of interstate cooperation (Slaughter 2004).

The contemporary literature on transgovernmental cooperation builds on the seminal work of Robert Keohane and Joseph Nye (1974). However, it studies transgovernmental networks essentially as an alternative to, or in relative isolation from interstate cooperation (Whytock 2005). It is less sensitive to the nexus between transgovernmental networks and international organizations that was central to the argument of Keohane and Nye

(1974). They pointed out that international organizations provide an enabling environment for transgovernmental networking, an “arena for subunits of governments to turn potential or tacit coalitions into explicit coalitions” (51). And they interestingly cited decision making in the European Communities as a prime example of this process. Slaughter (2000) acknowledges government networks within international organizations as one type of transgovernmental network and discusses the importance of vertical ties between supranational officials and their domestic government counterparts with reference to the EU. Raustiala (2002, 6) recognizes that interstate and transgovernmental cooperation are largely “synergistic.” In these accounts, the exact mechanisms linking horizontal and vertical government networks in two-level settings remain poorly specified. To understand such “synergies,” it is useful to turn to the European case, where both empirical and theoretical work has started to examine these processes in more detail. The next section reviews existing work emphasizing informal, deliberative techniques before presenting the incorporated transgovernmental strategy.

Transgovernmental Networks and Governance in the EU

The EU as an international organization lacks administrative capacity to implement its policies. This is the source of the EU variant of Keohane’s Governance Dilemma. Since “greater centralization is politically inconceivable, and probably undesirable,” the EU response to the functional need for “increased uniformity” is “regulation by networks” (Dehousse 1997, 259), that is, networking national officials in issue-specific arenas and drawing them into the EU decision-making process.

Relevant studies of networking of substate government officials have so far focused on the EU committee system and more recently, the OMC in the context of “new” modes of governance. Much of this literature has emphasized deliberative and often informal networking mechanisms designed to attenuate the national interest orientation of member state representatives, in favor of functional best practice, or a common supranational good. Deliberative networking mechanisms have also been identified as elements of broader patterns of “experimentalist” governance, with the recursive revision of goals, metrics, and procedures (Sabel and Zeitlin 2007).

The most extensively investigated mechanism to integrate national officials is the baroque EU committee system and comitology in particular (inter alia Christiansen and Kirchner 2000; Egeberg, Schaefer, and Trondal 2003; Schaefer 2002). The task of the much-studied comitology committees that are staffed with specialist member state officials is to oversee the Commission in its execution of Council decisions (Rhinard 2002, 192). Scholars working in a rationalist principal–agent perspective insist on the nature of comitology as a mechanism for member state principals to control the supranational agent Commission in the execution of common

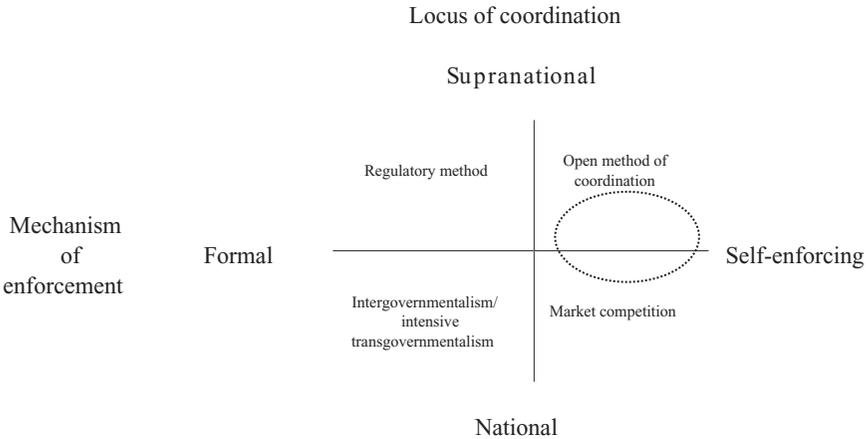
policies (Pollack 2003). However, a very prominent constructivist view in EU scholarship depicts comitology as a key forum for deliberative and informal processes in which the better argument and technocratic consensus can prevail over political bargaining and formal voting (Joerges and Neyer 1997).

This information-based networking logic also underpins the recent proliferation of specialized EU agencies in a variety of technical areas (e.g., Dehousse 1997; Everson et al. 1999; Kelemen 2005; Majone 1997). The EU has created over 20 decentralized bodies outside the Commission structure to address the need for technical expertise in the administration of the single market. In contrast to independent regulatory agencies as found in the U.S. context, EU agencies generally have a more circumscribed mandate and little direct regulatory authority. EU agencies typically operate as hubs in a network of national experts, delivering “regulation by information,” rather than by regulatory fiat (Kelemen 2005; Majone 1997, 274).

The deliberative nature of interaction between national officials is also at the center of the so-called OMC that typifies the influential “new” governance approach. OMC is a procedure designed to foster iterative processes of mutual learning by way of joint target-setting and peer review as well as benchmarking of member state experiences under broad, unsanctioned European guidance (Eberlein and Kerwer 2004; Héritier 2003). This mechanism to coordinate national policies has received extraordinary attention since the 2000 Lisbon European Council codified OMC as a broadly applicable instrument of EU Governance (Borrás and Greve 2004; Trubek and Mosher 2001; Zeitlin and Pochet 2005). The OMC was quickly touted as the “third way” in EU governance, carving out new ground between unworkable harmonization on the one hand and the perils of noncoordination or regulatory competition on the other (Trubek and Mosher 2001, 21). Subsequent empirical investigations of OMC processes in different areas have led to a skeptical assessment of its effectiveness, especially when it comes to politically sensitive measures and domains (e.g., Borrás and Jacobsson 2004.)

Notwithstanding these sophistications in the study of new governance, the debate continues to focus predominantly on patterns of coordination that are nonregulatory and eschew formal authority. “New” governance is typically associated with nonbinding or low-obligation type of policies that give actors a high degree of discretion (e.g., Knill and Lenschow 2004). The emphasis is very much on negotiated or deliberative techniques of decision making that are contrasted with the use of formal authority (Börzel, Guttenbrunner, and Seper 2005). Figure 1 visualizes the debate on modes of EU governance on two axes—the locus of coordination which shifts from national to supranational and the mechanism of enforcement which shifts from formal authority to self-enforcing. The dashed oval represents the focus of much recent EU governance research.

FIGURE 1
Current Focus of EU Governance Research



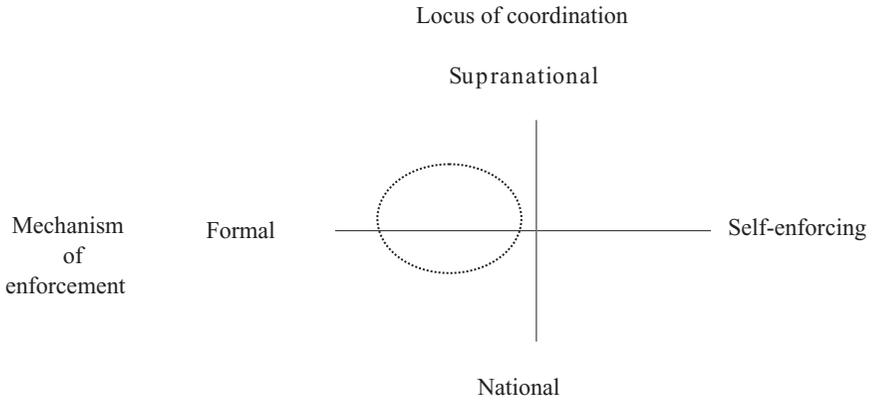
Bringing Authority Back in: Mapping Incorporated Transgovernmentalism

The central argument of this article is that the prevailing focus on self-enforcing and deliberative mechanisms of new governance tends to overlook an alternative, and, in practice, increasingly important exit from the international governance dilemma: *incorporated transgovernmental networks, composed of NRAs*. International organizations leverage authority delegated horizontally to independent regulators at the national level to compensate for incomplete vertical delegation. EU legislation, for example, has formally incorporated transgovernmental networks into supranational rule-making and enforcement. The space associated with this governance strategy is depicted by the dashed oval in Figure 2.

As Nicolaides (2004, 600) points out, “More recently established networks composed of independent national authorities, rather than representatives of the Member States, have not yet been subjected to the same academic scrutiny.”

The crucial difference highlighted by Nicolaides between independent, or “NRAs,” and other member state representatives involved in transgovernmental exchanges lies in the nature of public authority and in the degree of bureaucratic autonomy. In contrast to many arm’s length “executive agencies” that have received a lot of attention in the context of new public management reforms (Pollitt et al. 2004), NRAs specialize in rule development and enforcement as opposed to decentralized service delivery. And while semi-autonomous bodies such as “quangos” do enjoy some formal independence from ministerial departments (Pollitt and Talbot 2004), the autonomy of NRAs is more substantial in that their very institutional design explicitly buffers them from direct political control;

FIGURE 2
Incorporated Transgovernmentalism



many have long-term leadership tenure, guaranteed budgets, and control over personnel appointments. Furthermore, they have been granted statutory authority to control market access, administer fines, and formulate new regulatory rules.

These independent agencies are typically found in economic sectors in which policy consistency and credibility are key to the effectiveness of regulation, such as in central banking or utility regulation (Majone 1996). This type of bureaucratic autonomy, then, goes beyond the inherent discretion that “street-level bureaucrats” (Lipsky 1980) enjoy in policy implementation.

There has so far not been much reflection on the implications of this novel type of agency independence and authority on the nature of transnational bureaucratic interaction in an international organization context. European networks of regulatory agencies have only recently captured systematic attention as coordinating devices in the broader literature on the delegation to nonmajoritarian bodies in domestic and international governance (Coen and Thatcher 2008; Thatcher and Stone Sweet 2002).

Going beyond this delegation perspective that stresses the limits of formal powers granted to these networks as regulatory agents, we are specifically interested in instances when such networks are formally incorporated into supranational rule development and enforcement. We can empirically observe the spread of this novel coordination mechanism in an expanding range of sector from financial services to utilities.¹

It is important to point out that organized groups of national regulators constitute a specific type of policy network.² Since the network is transgovernmental in character, it is restricted to substate public officials. While policy networks are mostly defined as informal interaction of public *and* private actors (Börzel 1998, 260; van Waarden 1992), we build on the concept of transgovernmental networks in the transnational relations

literature that employs the network concept to designate the direct, loosely structured interaction of substate officials, or subunits of national governments.³

In what follows, we present an initial analytical map to explain the mechanism of “dual delegation” underpinning the operation of these networks, what they do, when they are likely to emerge, and why they may be more or less effective at achieving supranational coordination.

Mechanism and Function

Incorporated transgovernmental networks exist within a two-level structure of “dual delegation” (Newman 2005). National governments have simultaneously ceded authority to supranational institutions and substate NRAs. Given the inherent difficulties of international policy coordination that puts limits on vertical delegation, supranational organizations have embedded substate actors into processes of rule development and rule enforcement. These transgovernmental networks rely on authority granted to member agencies at the domestic level to implement and enforce agreements reached at the European level. *They formulate rules, which become binding owing to the two-level mobilization of delegated authority.*

As seen earlier, incorporated transgovernmental networks, then, differ from existing bureaucratic interactions between member state officials in two related respects. First, the government officials involved enjoy a large degree of formal *delegation* and are not, like other member state officials, subordinate to bureaucratic chains of command. Second, they can bring direct formal *authority* to bear, without political recourse to legislatures.

To be sure, transgovernmental networks share the broader policy universe in a given sector with other actors, including private actors, and they will most likely participate in larger public–private policy networks. Yet, networks of regulators are much more than simply one organized group lobbying for political influence on regulatory outcomes. As incorporated transgovernmental networks are composed exclusively of public officials, they wield the shadow of hierarchy in their policy discussions and coordination efforts (Scharpf 1997). This domestic regulatory authority—coordinated within the incorporated transgovernmental network—becomes an extension of supranational policymaking.

On this basis of dual delegation, incorporated transgovernmental networks participate in supranational rule-making, enforcement, and implementation. In Europe, they function to advise the Commission, draft implementing legislation, coordinate national enforcement, promote information exchange among national regulators, and make recommendations to the public on emerging regulatory issues. These regulatory groups organize and interact with sectoral stakeholders as supranational legislation is developed and at the same time devise on-the-ground strategies for implementation.

Emergence

The question then becomes what accounts for the emergence of this governance strategy across sectors. We argue that changes in internal governance tied to the development of a regulatory state have expanded the feasibility of adopting incorporated transgovernmental networks, generally. Delegation at the national level of relatively autonomous substate actors is an essential precondition. Nevertheless, such networks have not been universally adopted (see Table 1 for examples).

We hypothesize that the move toward incorporated transgovernmentalism is deeply tied to the development of the regulatory state in Europe (Majone 1996). With sectors ranging from telecommunications to energy liberalized and state industries privatized, arm's-length regulations that enforce and manage market competition have replaced direct command and control state intervention (Héritier 2002). Independent regulatory agencies have been created to oversee such markets. While this form of government was first popularized during the New Deal and Great Society in the United States, it gained traction in Europe first in the 1970s (Thatcher and Stone Sweet 2002). It was only in the late 1980s and early 1990s that the institutional structure of the independent regulatory agency diffused widely in Europe. In addition to national reforms, EU legislation has actively encouraged this development in many sectors by adopting directives that require member states to create independent regulatory agencies. Implementation and enforcement at the national level has increasingly shifted away from executive ministries to NRAs. This regulatory revolution has facilitated the rise of incorporated transgovernmentalism as national regulators have been appointed and have become available to coordinate a viable supranational governance strategy (Eberlein and Grande 2005; Egeberg 2006).

We expect that the variable adoption of incorporated transgovernmental networks across sectors can be explained by the intersection of two political logics. In the first instance, incorporated transgovernmentalism has a *bottom-up flare*, where *state preferences align in technically complex sectors*. We hypothesize that member states will support the incorporation of such networks in technical fields where *coordination problems* define the overriding logic of collective action (Mattli and Büthe 2003). In these sectors, member states have a desire to intensify cooperation as such cooperation is both individually and collectively rational. In cases of simple coordination, cooperation requires nothing more than agreement on technical specifications. In more complex "Battle of the Sexes" games, states want to minimize the adjustment costs associated with coordination but still prefer coordination over noncoordination (Snidal 1985). Once a political decision has been reached to move forward with supranational integration, the member states have very little incentive to defect. Nevertheless, monitoring and oversight is required to oversee individual firm compliance and to adapt regulatory rules over time. In sectors that are

TABLE 1
The Rise of Incorporated Transgovernmentalism

| Issue Area | Name | Incorporation Year | Directive |
|--------------------------|--|--------------------|--|
| Banking | Committee of European Banking Supervisors (CEBS) | 2003 | Commission Decision of November 5, 2003 establishing the CEBS |
| Competition policy | European Competition Network (ECN) | 2002 | Council Regulation of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty |
| Data privacy | Working Party on the protection of individuals with regard to the Processing of Personal Data (Article 29 Working Party) | 1995 | Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data |
| Electronic communication | European Regulators Group (ERG) | 2002 | Commission Decision of July 29, 2002 establishing the ERG for Electronic Communications Networks and Services |
| Energy | European Regulators Group for Electricity and Gas (ERGEG) | 2003 | Commission Decision of November 11, 2003 on establishing the ERCEG |
| Insurance | Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) | 2003 | Commission Decision of November 5, 2003 establishing the CEIOPS |
| Securities | Committee of European Securities Regulators (CESR) | 2001 | Commission Decision of June 6, 2001 establishing the CESR |

highly technical and defined by coordination problems, member states will see little benefit in ceding sovereignty to centralized supranational oversight (Snidal 1985). Incorporated transgovernmental networks, by contrast, offer a more commensurate and specialized response; member states relinquish authority to international organizations via their own national regulatory bodies.

The second logic of emergence is characterized by *top-down activism*, as international organizations attempt to assuage state concerns in *politically sensitive issue areas* where a sovereignty transfer would involve *significant redistribution and challenge well-entrenched national policies*. Following recent work on international organization entrepreneurship, we anticipate that the Commission will lobby for incorporated transgovernmental networks as a second-best solution in highly politicized sectors (Jabko 2006). Lacking the tools to coordinate supranational policy in many sectors, the Commission will attempt to expand the set of issues that fall under supranational competencies. Ideally, the Commission would establish a super regulator as has been proposed in the field of financial securities and telecommunication. The highly politicized nature of such sectors, however, limits the willingness of governments to establish such bodies. The Commission has encouraged the creation of independent regulators and the formation of incorporated transgovernmental networks as a depoliticization strategy. International organizations, such as the EU, are not only passive arenas for coalition-building among transgovernmental actors (Keohane and Nye 1974), but international organizations may serve to actively recruit and construct networks of incorporated agencies from the top down.

More generally, then, we argue that the emergence of incorporated transgovernmental networks is a function of the interaction between member state and Commission preferences given the level of issue politicization. Far from a mono-causal story, our argument acknowledges that problem type does not fully determine the choice of governance strategy but interacts with context-specific actor constellations and strategies to produce variable outcomes. Given a similar policy problem and level of issue politicization, the presence of influential stakeholders available for Commission coalition-building can contribute to the emergence of this governance strategy whereas its absence may hamper it.⁴ It is undeniable, however, that incorporated transgovernmental networks have been replicated across an expanding number of sectors.

Effectiveness

Relying on authority granted within the framework of dual delegation, these networks have several advantages in terms of effectiveness. Research has demonstrated that transgovernmental actors enhance the speed and flexibility of governance responses (Slaughter 2004). It was, after all, the burden of the regulatory method that motivated European policy officials to advocate for the incorporated transgovernmental

approach in the area of financial services. The “group of wisemen” in the Lamfalussy report explicitly argued that such a strategy could speed up the legislative process both in rule development and implementation (European Commission 2001). By relying on national independent regulators to work out the specifics of implementing directives, the process removes much of the time-consuming back and forth among the European institutions. It also removes the need for some national implementing legislation, as independent regulators directly enforce decisions taken in the transgovernmental network. By embedding these networks formally within international law, this speed and flexibility may be leveraged to coordinate supranational goals.

We isolate two factors—expertise and regulatory authority—as central to the effectiveness of incorporated transgovernmentalism (Bach and Newman 2007; Newman 2008). Horizontal networks of member state regulators draw on the collective experiences of its members to assess regulatory needs and monitor compliance (Slaughter 2004). They are then well positioned to develop new legislative proposals and assess firm behavior in their sectors. European institutions rely on this expertise in both regulatory development and enforcement efforts (Barnett and Finnemore 2004). In addition to an information advantage, network members mobilize their relationships with actors from their respective domestic political settings (Carpenter 2001; Padgett and Ansell 1993). Many national regulators have developed close working relationships with both industry and national elected officials. These network ties prove critical as implementing legislation is developed or evaluated.

Additionally, transgovernmental groups are composed of actors with domestic regulatory authority. Often empowered to reprimand noncompliance, levy fines, or bar market access, network members enter negotiations or enforcement activities with real regulatory power. Far from simply participants in a discussion, such networks use their expertise to frame agendas and then leverage their delegated domestic authority to rally support and manage compliance.

That being said, such networks may vary in their ability to coordinate supranational policy developments. Here we hypothesize that professional homogeneity and the degree of delegated authority, as well as administrative capacity, shape the variable ability of such networks to perform. Breakdowns occur if there is considerable disagreement among the regulators on a particular policy issue. Such disagreements are mitigated by the common training and policy approach of many members of these committees (Majone 2000). As has been demonstrated in areas as diverse as central banking and the environment, regulatory agencies often share a common policy worldview that promotes common agenda-setting and a “cosmopolitan” rather than “local” perspective (Gouldner 1957, 1958). Professionalization is the most important driver of convergence in this regulatory context.

Strength or weakness of an independent regulator depends on the extent of delegated, regulatory authority and on the available administrative capacity. Some institutions are granted broad statutory authority to sanction and enforce regulation while others serve in a more advisory ombudsman function. Institutional design affects the degree of political autonomy such agencies enjoy. Similarly, regulatory relationships with constituents and reputation bolster the ability of these agencies to act independently (Carpenter 2001). Where independent regulators are weak, we anticipate that such solutions will quickly devolve into intergovernmental solutions. Regulators may also be weak in regards to their independence from and control over the regulated industry, which raises the classical danger of regulatory capture.

Governments may decide to delegate powers to independent regulators for a variety of reasons (e.g., Huber and Shipan 2002; Thatcher and Stone Sweet 2002): They require the regulators' expertise in an increasingly complex policy world, they seek to shift or avoid blame, or the government of the day seeks to entrench and protect its policy choices from intervention by future governments. The dominant approach in the literature has argued, from a principal-agent perspective, that delegation is a function of transaction costs—in particular, of the need for "credible commitment" (e.g., Majone 1999). In the utility sector, for example, agency delegation signals to private investors that, by tying their hands, governments are committed to protect private long-term investments. Such principal-agent concerns may also limit the amount of authority delegated to these agencies.

Given the effects of path dependency, we anticipate that the initial decisions about institutional design based on the principal-agent demands facing the principal in the period of institutional creation will have long-term effects on the regulatory authority of an independent agency in a given sector (Newman 2007; Pierson 2004). The extent of national delegated authority, whether the result of institutional stickiness or existing principal-agent needs, plays a critical role in the ability of such incorporated networks to manage the supranational demands of a sector (Bach and Newman 2007).

Building on the insights of recent governance research (NewGov 2007; Scharpf 1997) we hypothesize that the extent of domestic delegation to NRAs, and hence of policy effectiveness, is a function of the policy problem in combination with context-specific actor constellations and strategies. We expect that strongly entrenched and highly redistributive policies will tend to raise issue politicization and, thus to severely constrain delegation. Yet, entrepreneurship and coalition-building between an activist Commission, existing NRAs, and powerful stakeholders may be able to alleviate these constraints. Conversely, we expect novel and distributive, coordination type of policies to result in a higher level of delegation, with the presence of supportive coalitions as an additional push factor.

Incorporated Transgovernmental Networks in Practice

We present two case studies that apply and illustrate the insights offered by the analytical map developed above. The case studies do not provide a test of the hypothesized relationships, for example, between the extent of domestic delegation and effectiveness. Nor can they map the full variety of interaction between policy problems and actor constellations. However, they are valuable as an examination of the robustness of the analytical map (George and Bennett 2005).

We deliberately present two temporal extremes with data privacy among the first historical example of incorporated transgovernmentalism in the EU and energy among the most recent. Moreover, the two cases cover both economic regulation (of market access and conditions in energy) and social regulation (consumer protection and regulation of negative externalities in data privacy). Finally, they illustrate the two political logics of emergence (bottom-up vs. top-down) and the crucial role of domestic authority for effectiveness.

Data Privacy

Function. The EU adopted a directive for the protection of personal information in 1995 (Newman 2008). The directive requires that all member states implement comprehensive regulations regulating the collection and processing of personal data. National regulation is implemented and supervised by an independent regulatory agency—data privacy authorities. The directive also includes an extraterritorial clause that prevents the transfer of personal information to countries outside of Europe that have failed to adopt adequate privacy protections.

In addition to requiring member state action, the directive formally established one of the earliest incorporated transgovernmental networks within the EU. Article 29 of the directive calls for the creation of a working party of national data privacy authorities. The Article 29 Working Party is empowered to advise the Commission on emerging data privacy concerns facing the EU, make recommendations regarding the implementation and enforcement of the directive, and evaluate the adequacy of levels of protection in countries outside of the EU. The Commission supports a secretariat for the Working Party in Brussels, which has greatly enhanced transgovernmental cooperation. The Working Party has an annual work plan, which is run collectively by the members and is steered by a chair elected from the national privacy authorities. Subgroups of officials from the various agencies meet regularly on topics ranging from biometric data to Internet cookies. These efforts are supported by the financial, technical, and linguistic resources of the Commission sponsored secretariat.

Since its formation in 1997, the Working Party has actively engaged supranational rule enforcement and development in the area of data privacy. They have released over 100 opinions on a wide range of topics,

setting guidelines for national implementation of the directive, calling for or evaluating new European legislation, and determining the adequacy of protection levels in foreign countries.⁵

Emergence. Transgovernmental cooperation in the area of data privacy dates back to the 1970s when national legislation on data privacy created independent regulatory agencies. During this period, governments and businesses across the advanced industrial societies began investing in large mainframe computer systems. Proposals emerged to construct large consumer and citizen databases in order to increase efficiency, better target services, and minimize fraud. Such organizational optimism, however, quickly confronted a powerful set of interests that opposed such efforts under the banner of privacy (Hondius 1975). By the end of the 1970s, a core set of countries including France, Germany, and Sweden had adopted comprehensive data privacy legislation. These laws established a clear set of rules for the collection, processing, and exchange of personal information for the public and private sectors (Bennett 1992).

These national laws also created new independent regulatory institutions—data privacy authorities—that were empowered to monitor and enforce the new regulations. Although the exact powers vary across the member states, generally, these agencies have the authority to advise their governments on issues pertaining to data privacy, maintain registries of databanks, investigate and sanction violations of the law, and communicate publicly on critical issues in the field. They also generally enjoy significant autonomy from national executives as they have dedicated budgets, long-term leadership tenure, and organizational independence from executive ministries. Concerned that large multinational corporations might transfer personal information to countries with lower regulatory standards, many of these data privacy authorities were also delegated the authority to regulate interstate information exchanges.⁶

These young regulatory bodies quickly took up the transnational issues associated with cross-border information exchanges, organizing themselves from the bottom up. It was clear that both multinational businesses and European governments would share information across jurisdictions. Regulators from nations with comprehensive rules feared that this would place their citizens' privacy at risk and jeopardize their newly acquired regulatory authority (Hondius 1975). To meet this transnational challenge, the regulators formed a transgovernmental association, which met annually at the Data Protection Commissioners' Conference starting in Berlin in 1979. Working groups were formed to examine critical cross-border issues such as telecommunications, and data privacy authorities worked through multiple international organizations to formulate a coherent set of international norms. Early efforts included a set of fundamental data privacy principles, which were agreed upon in 1980 by the Organisation for Economic Co-operation and Development (OECD), and a Council of Europe Convention on the processing of personal information in 1981

(Council of Europe 1981; OECD 1980). While these agreements codified fundamental privacy principles and confirmed the international dimension of the issue, they failed to solve the problem of regulatory arbitrage. Both relied on national implementation legislation and by the end of the 1980s a third of the European Community had not yet adopted comprehensive rules. European data privacy authorities, then, began working to develop concrete proposals for a European Community proposal (Newman 2008).

During the directive's negotiation, the Commission originally sought centralized oversight. Member states, however, were reluctant to cede total authority to the Commission, fearing that they would lose control over the policy domain (Bignami 2005). National regulatory authorities, which played a critical role in advising the Commission during the drafting phase, argued in favor of a Working Party arrangement. The national regulators supported by member state governments believed that such a body offered a useful compromise. It guaranteed policy coordination while retaining some national control and safeguarding the bureaucratic interests of national regulators.⁷

Effectiveness. The actions of the Article 29 Working Party, created as part of the 1995 privacy directive, have had far-reaching effects for national enforcement and implementation within Europe. The Working Party's opinions have been interpreted by courts as part of the directive's legislative intent and have been enforced (UNICE 2002). The Working Party has set standards as diverse as the use of Internet cookies to biometric data. Business practices determined unacceptable by the Working Party face potential punishment by national regulators (who conveniently comprise the Working Party). It was, for example, the Spanish data privacy authority that fined Microsoft for failing to comply with an international agreement brokered between the United States and the EU on cross-border data trade. More recently, the Working Party has negotiated with Google, resulting in the company altering its internal data retention policy. The Working Party relies on regulatory authority delegated in the national context to coordinate policy across Europe.

Internationally, the Working Party plays a major role in shaping the external enforcement of the directive. Members of the Working Party have over thirty years of experience to evaluate foreign country data privacy efforts and the authority to advise the Commission on the adequacy of these foreign regulations. Threatened with being excluded from the European market, countries ranging from Albania to Argentina have modeled European rules (Bach and Newman 2007). Those countries deemed inadequate, such as Australia and the United States, have been forced to engage the EU in international negotiations (Farrell 2003). The Commission relies on the argumentation of the Working Party to inform its opinion, constrain its bargaining position with delegates from other countries, and improve the resulting international settlement.

In the area of rule development, the Working Party actively advises the European political institutions on new areas affecting privacy. While these opinions are not binding, they have played a significant role in European policymaking as many European institutions rely on the Working Party's opinions in their line of argumentation. In a recent debate over the retention of telecommunications data, the Working Party warned that initial proposals from the Council would violate the European Human Rights Convention (Article 29 Data Protection Working Party 2004). These warnings were then taken up by the European Parliament in its effort to scale back the initial Council proposal. Not only was the argumentation of the Working Party integrated into the debate, but they will be part of a committee including parliamentarians, industry, and law enforcement that will monitor the implementation of the new legislation. The Working Party has identified a host of other issues in their work plan where rule development is in progress including online authentication, SPAM, and biometric data in passports.

Data privacy offers an early bottom-up example of incorporated transgovernmentalism in the EU. As one of the first sectors in Europe to experiment with independent regulators (the French data privacy authority, for example, was one of the earliest independent regulator to be created in France), it has been at the cutting edge of the development of the European regulatory state. This long tradition of delegation in the area combined with the natural transnational character of cross-border data flows made data privacy a logical case to expect transgovernmental cooperation. Interestingly, as the EU moved to enter the sphere of data privacy regulation in the 1990s to facilitate the integration of the internal market, it has relied on the expertise and domestically delegated authority to guide implementation and harmonization in the issue area. The Article 29 Working Party has then actively participated in managing the implementation of the directive and promoting harmonization within the member states at the same time that it has shaped the future course of privacy policy at the supranational level.

Energy

Function. In 2003, the EU adopted two directives for electricity and gas that mandate the full liberalization (by July 2007) and the cross-border integration of European energy markets (Cameron 2005). In addition to establishing broad rules for companies and markets (e.g., regulated third-party access to the monopoly networks), the legislation has created a novel framework for the regulatory cooperation between national authorities and their incorporation into supranational coordination.

The EU does not enjoy sector jurisdiction over energy issues, and implementation and market regulation rests with national authorities. In order to ensure proper enforcement of EU rules, the energy legislation makes it mandatory for member states to vest designated "NRAs" with a

minimum set of functions, competences, and administrative powers to regulate national energy markets. These powers include in particular the setting or approval of network tariffs, or at least the methodologies underpinning tariff calculation (Cameron 2005, 19–22).⁸ Furthermore, NRAs are required to cooperate with each other and the Commission in view of contributing to the development of the internal market. In November 2003, the Commission created the “European Regulators Group for Electricity and Gas” (EREG) as a formal cooperation mechanism. Its members are the heads of the NRAs in energy. The EREG acts as an advisory committee to the Commission. Its purpose is “to advise and assist the Commission in consolidating the internal energy market,” and to facilitate “consultation, coordination, and cooperation of national regulatory authorities, contributing to a consistent application” of Community legislation.⁹

The Regulators Group is run collectively by the members and is steered by a Chair. Subgroups of officials from the various agencies meet regularly on topics ranging from cross-border tariffication to regional electricity markets. The Commission provides the Secretariat to the Group, is represented at a high level at Group meetings, and heavily relies on the regulators’ technical expertise. In short: the Commission sustains and uses EREG as a privileged partner in supranational rule enforcement and development.

Emergence. It was never an option to delegate direct regulatory powers to the Commission in this politically sensitive area, let alone to establish a federal EU energy regulator. The energy case typifies a constellation where a sovereignty transfer to the EU level is hampered by highly redistributive and nationally entrenched policy problem features. By the same token, it illustrates how incomplete vertical delegation gives rise to the alternative strategy of fostering, networking, and incorporating national regulatory agencies, with the Commission as entrepreneurial alliance builder.

Equally, the energy case demonstrates how this novel governance strategy is closely tied to the development of the regulatory state in Europe and the transformation of governance in key industries (Majone 1996). Until the early 1990s, the European electricity and gas sectors were organized as monopolies (McGowan 1996). This picture only changed when global privatization and liberalization seized infrastructure and networks industries, including electricity and gas (e.g., Schneider, Fink, and Tenbücken 2005). In Europe, Britain was the first country to adopt comprehensive electricity market reforms in 1990, which served as reform script (Padgett 2003). An activist Commission successfully reframed energy as a market commodity and incorporated the energy sector into the single market mold (Jabko 2006).

Given the resistance of powerful incumbents and national governments to European harmonization, progress on EU liberalization was slow, with

a first set of weak EU energy market legislation voted in 1996 (electricity) and 1998 (gas). Yet, the idea of open energy markets had gained ground, and several member states opted for faster market opening. Following the British template, countries began to delegate powers to new regulatory authorities designed to monitor liberalized markets. Until 2000, all member states with the exception of Germany had created independent regulatory agencies for energy.¹⁰

In contrast to the bottom-up flare of transgovernmental cooperation in data privacy, the Commission played a crucial role in fostering and institutionalizing regulatory cooperation between agencies. The energy case thus follows our second logic of emergence, as a second-best solution in a highly politicized sector. A key component of this strategy was the mobilization of and alliance with sector stakeholders in broader policy fora (Eberlein 2008).

The first avenues for networking were the Florence Forum for electricity and the Madrid Forum for gas, set up by the Commission in 1998 and 1999.¹¹ These informal fora bring together national regulators and market actors, such as network operators and industry consumers, to develop best-practice rules for sector regulation based on professional standards and industry expertise. As part of this process, the Commission encouraged national regulators to federate in a European group that would enjoy a privileged role in supranational rule-making. In March 2000, 10 regulatory authorities constituted the Council of European Energy Regulators (CEER), a transgovernmental group of energy regulators based on a memorandum of understanding. The Commission promoted this association as a single regulatory voice on the EU level by mandating CEER to develop a system of cross-border trade in the Forum context. CEER then provided the organizational foundation for the creation of the formal Regulators Group, ERGEG, in 2003.

Effectiveness. In contrast to data privacy, the regulatory state and incorporated transgovernmentalism in the energy sector are at a very early stage of development. This makes an assessment of achievements difficult, or at least preliminary.

In terms of *expertise-based, supranational rule development*, the Regulators Group has already made key contributions to the development of the internal energy market. The Regulations on cross-border trade in electricity and gas¹², for example, codified the policy proposals developed by the Regulators Group (and earlier by CEER) in the Forum context. In 2006, the ERGEG launched major “regional initiatives” to facilitate the creation of regional electricity and gas markets as a pragmatic first step toward a future single European market. More generally, the opinions and recommendations put forward by the Regulators Group are broadly referred to as statements of best practice by the Council and the Parliament, as well as by industry actors and associations such as Eurelectric. The Group’s legitimacy rests on a high level (and unique concentration) of professional expertise in a specialized regulatory domain.

However, the profile of energy regulatory agencies varies considerably in terms of age and experience, size, administrative capacity, and, crucially, extent of delegated authority (European Commission 2007; Larsen et al. 2006; Pedersen 2007). An experienced and well-resourced agency such as the British energy regulator OFGEM has far greater enforcement capacities than a freshly created, small agency in a new member state that might also lack a market regulatory culture. An important institutional factor is that some member state governments split regulatory duties between the regulatory authority and the ministry, or the competition authority. In many cases, regulators do not have the necessary powers or discretion to address regulatory concerns beyond network access.¹³ Lack of full independence from government and insufficient powers constrain the effectiveness of *authority-based, domestic enforcement*, and result in regulatory asymmetry between national jurisdictions.

It is too early to say if these are transitory problems of an emerging regulatory regime that needs more time to get established. The politically sensitive character of energy policy, with strategic national resources, industries, and essential services at stake, suggests that some government principals may wish to permanently limit the amount of authority delegated to independent agencies.¹⁴ On the other hand, there is considerable support from industrial consumer groups to bolster domestic delegation and European networking.

The energy case thus illustrates top-down, Commission activism and coalition-building in an effort to promote incorporated transgovernmentalism as second-best, depoliticization strategy. However, it also highlights the constraints on effective rule enforcement by incorporated transgovernmental networks: The politically sensitive, redistributive character of an issue area limits the extent of domestic delegation of authority.

Conclusion

As the tasks managed by and the members participating in the EU expand, EU policy makers are limited in their ability to centralize power on the supranational level to address the need for policy coordination. These limits to vertical delegation pose a "Governance Dilemma" (Keohane 2001) that characterizes international governance more generally. In the EU context, it has spurred scholarly interest in "new" modes of governance. This scholarship has so far excessively concentrated on voluntary, deliberative mechanisms of transgovernmental coordination.

We focus instead on a novel governance strategy, labeled "incorporated transgovernmentalism." Networks of NRAs are formally incorporated through legislation into the supranational policymaking process. These national regulators enjoy a variety of policy resources developed at the domestic level such as issue expertise, links to national constituencies, and control over market access. By constructing a supranational framework for

these networks, international organizations may access these resources to navigate policy development and oversee supranational policy enforcement. Domestic, horizontally delegated authority is leveraged to facilitate international coordination.

Far from an ad hoc solution to a single policy area, we argue that incorporated transgovernmentalism as a strategy has proven itself in an expanding set of sectors. Avoiding the political pitfalls of complete centralization in international agencies and the weak coordination capabilities of purely intergovernmental networks, incorporated transgovernmentalism presents a possible third way for overcoming national government opposition to further international cooperation.

Such networks are not only a second-best political solution, but provide a distinctive, flexible, and effective mechanism for international coordination. Contrasted to the limited knowledge and budgets of many international organizations, national regulators have the advantage of extensive market information and contact to local regulated constituencies. Using national powers to alter administrative procedures, agreements reached by supranational networks of national regulators may not require formal legislation passed by either national or supranational parliaments. Working supranationally to assist rule development and nationally to oversee supranational rule enforcement, these networks are uniquely situated to respond quickly to international governance needs.

We believe that such networks also have the potential to alter international political dynamics. Regulatory networks are not seen as agents structurally constrained by the control of their principals (as in Coen and Thatcher 2008). Rather, we stress the entrepreneurial and coalition-building capacity of Commission and existing NRAs, often allied with sector stakeholders, to expand domestic delegation and to bolster EU-level coordination activities. Within the setting of dual delegation, monitoring and control mechanisms of both member states and the Commission over these networks are attenuated. This, in turn, opens the door for incorporated transgovernmental networks to inject their own goals into the policy process (Newman 2008).

That being said, the availability and effectiveness of this novel governance strategy critically depends on the extent of domestic delegation of authority, as demonstrated by our case studies of data privacy and energy regulation. These studies apply a conceptual framework that looks at how attributes of the policy problem combine with context-specific actor constellations and strategies (NewGov 2007) to produce variable delegation and effectiveness outcomes within the incorporated transgovernmentalism model. This conceptual framework can be used in future research to test the generalizability of our case study findings in the expanding number of sectors in which this model has been replicated; moreover, it can also account for "nonemergence," that is, the persistence of traditional intergovernmental arrangements in cases where highly redistributive and

entrenched policies result in strong issue politicization that cannot be overcome by entrepreneurship and coalition-building between the Commission, existing agencies, and sector stakeholders (e.g., postal services; Eckert 2007).

This work, then, contributes to a new body of EU governance research that investigates the emergence and effectiveness of “regulatory expert networks,” as a typical variant of “new modes of governance.”¹⁵ A key hypothesis underlying this line of research is that, under certain conditions, the effectiveness of “new,” functional governance arrangements, such as regulatory expert networks, depends on the shadow of governmental hierarchy (Héritier and Lehmkuhl 2008). Expanding on this framework, this article demonstrates that “hierarchy,” in the form of domestic governmental authority, can also operate as an important *resource* of functional governance arrangements and not only as an external shadow. Domestic authority, mobilized and leveraged via transgovernmental networks that build on issue-specific support coalitions between Commission, regulatory agencies, and sector stakeholders, plays a key role in facilitating supranational policy coordination.

For scholars interested in global governance more generally, the article reexamines the interaction between transgovernmental networks and international organizations. While Keohane and Nye (1974) recognized as early as the 1970s that transgovernmental actors and international organizations exist in a complex web of interactions, recent work on global governance has tended to view each in relative isolation (Raustiala 2002). This article, however, returns to the initial questions raised in the 1970s and builds an analytic map for thinking about these interactions—when they emerge and why they are effective. We show how the relationship between transgovernmental coalitions and international organization can be mutually reinforcing. International organizations are not only passive opportunity structures for coalition-building among transgovernmental actors, but international organizations may actively foster, recruit, and incorporate transgovernmental networks in order to enhance their policy-making capacity.

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Notes

1. We are grateful to one of the referees for suggesting that the European System of Central Banks (ECB) might be considered the earliest and most extreme form of an incorporated, organized group of independent national regulators. However, the ECB operates as an independent Treaty agency (also different from the community agencies discussed above). This is a case in which, one could argue, the governance dilemma has been resolved by full vertical delegation of powers to a nonmajoritarian body on the supra-national level.
2. We conceive the network concept as a form of governance, in contrast to hierarchy and market, not as a model of state/society relations (see Börzel 1998).
3. In his definition of transgovernmental coalitions, Risse-Kappen (1995, 38) uses the term "transboundary networks among subunits of national government." Raustiala (2002) and Slaughter (2004) explicitly employ the term transgovernmental networks to designate interaction-based, peer-to-peer ties between substate officials outside formal negotiations.
4. In the postal sector (Eckert 2007), the Commission has so far failed to encourage the creation and incorporation of transgovernmental networks of NRAs, whereas in the energy sector (see below) the presence of industry stakeholders has helped the Commission to push for stronger delegation to and networking of NRAs.
5. The opinions and recommendations of the Article 29 Working Party can be found at http://europa.eu.int/comm/justice_home/fsj/privacy/workinggroup/index_en.htm.
6. While these agencies were universally independent, their exact regulatory powers differed across Europe. Some had clear powers to investigate and sanction while others were granted an ombudsperson status. For a detailed explication of the regulatory structure and delegated authority of these institutions, see Flaherty (1989). These powers, however, have been equalized to a degree through the passage of the European directive in 1995.
7. Interview with Commission official involved in the directive's negotiation, June 2007.
8. National governments are obligated to equip these bodies with sufficient resources so that they can carry out their duties "in an efficient and expeditious manner"; see Article 23(7), Directive 2003/54/EC (electricity) and Article 25(7), Directive 2003/55/EC (gas). However, the regulatory functions may be shared between the NRA and subnational, regional authorities, or between NRA and ministries or competition authorities.
9. Commission Decision of November 11, 2003 on establishing the European Regulators Group for Electricity and Gas (2003/7 96/EC).
10. The 1996 and 1998 legislation did not contain an explicit requirement to establish independent NRAs but only to create "appropriate and efficient mechanisms for regulation, control, and transparency." While most member states conformed, to varying degrees, to the NRA model, Germany opted for industrial self-regulation monitored by competition authorities (Eberlein 2000) and only switched to an agency model in 2005.
11. For details on the Forum processes see Eberlein (2005).
12. Regulation (EC) No. 1228/2003 of June 26, 2003 on conditions for access to the network for cross-border exchanges in electricity; Regulation (EC) 1775/2005 on access conditions for the gas transmission networks.
13. A recent consultant report on regulatory competences of energy regulators noted that: "there remain insufficiencies in respect of the scope of activities, available powers, and regulators' ability to exercise independent regulation"

(Study of the Powers and Competencies of Energy and Transport Regulators, Europe Economics and TIS, October 2006, cited in European Commission 2007, 13).

14. An indicator for this is that countries like France, Spain, or Germany, seem determined to retain influence over industry structure and to bolster “national champions” in a rapidly consolidating European energy market (*The Economist*, December 2, 2006: “Political and business interests collide as Europe’s energy firms consolidate”).
15. We refer to the “New Modes of Governance” (NewGov) Integrated Project, funded by the EU under its Sixth Framework Program, at: <http://www.eu-newgov.org>. In particular, relevant projects on “regulatory expert networks” are conducted in the context of Project Cluster 2 (“Delegation, Hierarchy, and Accountability”).

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