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# Building Transnational Civil Liberties: Transgovernmental Entrepreneurs and the European Data Privacy Directive

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**Abstract** Democratic nations have long struggled to set the proper balance between individual freedom and government control. The rise of digital communications networks, market integration, and international terrorism has transformed many national civil liberties issues into important international debates. The European Union was among the first jurisdictions to manage these new transnational civil liberties with the adoption of a data privacy directive in 1995. The directive substantially expanded privacy protection within Europe and had far-reaching consequences internationally. While international relations scholars have paid considerable attention to the global ramifications of these rules, research has not yet explained the origins of the European data privacy directive. Given the resistance from the European Commission, powerful member states, and industry to their introduction, the adoption of supranational rules presents a striking empirical puzzle. This article conducts a structured evaluation of conventional approaches to European integration—liberal intergovernmentalism and neofunctionalism—against the historical record and uncovers an alternative driver: transgovernmental actors. These transgovernmental actors are endowed with power resources—expertise, delegated political authority, and network ties—that they employ to promote their regional policy goals. This article uses the historical narrative of the data privacy directive to explain the origins of a critical piece of international civil liberties legislation and to advance a theoretical discussion about the role of transgovernmental actors as policy entrepreneurs within the multilevel structure of the European Union.

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Democratic nations have long struggled to set the proper balance between individual freedom and government control. The development of sophisticated communications systems, combined with the new security environment sparked by

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international terrorism, has transformed many national civil liberties issues into important international debates. Records of an intimate personal character—web clicks, credit card transactions, even retina scans—increasingly pass across territorial borders. The French efforts to force multinational corporations such as Yahoo to filter out “dangerous” web pages or the U.S. government’s demand that European passports include biometric data are merely a few examples of recent tensions.<sup>1</sup> A new area of international cooperation and conflict, transnational civil liberties, has been created by the interaction of national systems with distinct conceptions of freedom.

Europe became the first region in the world to manage these emerging transnational civil liberties issues with the adoption of a data privacy directive in 1995.<sup>2</sup> This legislation required all member states to enact similar provisions concerning the collection, processing, and transfer of personal information in the public and private sectors, and it mandated the creation of powerful national independent regulatory agencies—data privacy authorities—that monitor and enforce these rules.<sup>3</sup>

In contrast to other areas of the world such as the United States, where personal information is widely traded like a conventional good, European rules limited the commodification of individual data. As a result, the political economy of the European information society has followed a distinct trajectory.<sup>4</sup> The European privacy directive also included an extraterritorial clause, which barred the transfer of personal information from Europe to countries that failed to adopt “adequate” protections. This posed a critical challenge to the international economy as few countries had regulations that met the European Union standard. The United States, which long supported market-based solutions, rejected the legitimacy of the EU’s legislation, stoking the first trade conflict of the information age.<sup>5</sup> European rules have raised a series of security disputes between the United States and Europe, as the United States has expanded international data collection as part of its war on terrorism.<sup>6</sup> Against U.S. objections, European rules became the de facto international standard with more than thirty countries following the European approach.

Given the far-reaching regional and international implications of the directive, it is important to understand the origins of the legislation, which present a striking empirical puzzle. During much of the 1980s, the major players in European politics showed no interest in regional legislation. The European Commission, which

1. See, for example, “The Internet’s New Borders,” *The Economist*, 9 August 2001, 9–10.

2. See the Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 95/46/EC, 1995 O.J. (L 281) 31.

3. Five member states that had no previous national regulations adopted data privacy rules: Belgium, Greece, Italy, Portugal, and Spain.

4. See “Europe Zips Lips; U.S. Sells ZIPs,” *New York Times*, 7 August 2005, 1.

5. See “Bid to Avert Threat of ‘Cyber Trade War’,” *Financial Times*, 10 September 1998, 6.

6. See Alane Kochems, “EU Privacy Directive Could Prohibit Information Sharing with U.S. Law Enforcement,” Executive Memorandum No. 992, 14 February 2006, Washington, D.C.: Heritage Foundation. Available at (<http://www.heritage.org/Research/HomelandDefense/em992.cfm>). Accessed 26 April 2007.

holds tremendous agenda-setting power in this area, repeatedly rejected calls to initiate supranational rules. National governments in powerful member states, who have considerable authority in the European policy adoption phase, sought national action. Firms organized domestically and transnationally to oppose pan-European efforts. The European Court of Justice also remained silent on the issue. This article explores why in the early 1990s, after years of inaction, the European Union and its member states passed regional privacy rules. Specifically, this article explains the adoption and timing of the privacy directive.

In addition to the empirical puzzle, the passage of the directive poses a quandary to the two major theoretical explanations of European integration. Both liberal intergovernmentalism and neofunctionalism mispredict the outcome as their respective protagonists opposed the directive.

My structured evaluation of these conventional approaches against the historical record reveals an alternative driver of European public policy—transgovernmental policy entrepreneurs. Fearing that market integration would threaten levels of protection across Europe and undermine their regulatory authority, national data privacy authorities created by earlier domestic legislation pushed for pan-European rules. Collaborating with their peers, they employed extensive expertise to define a supranational agenda. Using domestically delegated power to ban the transfer of cross-border data flows, they blocked data transmissions to member states with no or lax legislation. National data privacy agencies leveraged authority granted to them nationally to change the cost-benefit analysis of supranational policymakers. These regulatory actions threatened to undermine the free flow of information within the single market, pressuring the European Commission and several powerful member states to lift their opposition to the harmonization of supranational rules.

The historical narrative provides a remarkable example of the power of transgovernmental networks, which has been largely neglected by studies of European policymaking. Emerging research on “new modes of governance” has paid increasing attention to collaboration between the European Commission and networks of national regulators, where regulatory networks play an important role in policy development and implementation.<sup>7</sup> At the same time, international relations scholars have rediscovered transgovernmental networks as critical coordination mechanisms of global governance, capable of improving international best practice and harmonizing enforcement.<sup>8</sup> The data privacy case takes these arguments a step further, demonstrating the ability of transgovernmental actors not only to shape regulatory outcomes but sometimes to foist their preferences upon key decision makers.

The article proceeds in four parts. First, I present the two dominant theories of European integration—liberal intergovernmentalism and neofunctionalism—and derive empirical expectations. I then construct a historical narrative of the origins

7. See, for example, Börzel 1998; and Kohler-Koch and Rittberger 2006.

8. See Slaughter 2000; and Raustiala 2002.

of the 1995 European data privacy directive, using process-tracing and counterfactuals to examine the expectations of the described theories across time.<sup>9</sup> The third section discusses the findings of the narrative and highlights a key missing causal factor in current explanations: transgovernmental actors. In particular, I use the narrative to develop three mechanisms by which such actors exert their influence—expertise, domestically delegated authority, and network ties—and generate possible boundary conditions for transgovernmental entrepreneurship.<sup>10</sup> The final section concludes with lessons for European politics and international relations theory.

### **National Interests or Commission Activism?**

While extensive academic research has analyzed U.S.–European privacy disputes, few scholars have concentrated on the initial European decision to enter the privacy debate.<sup>11</sup> This article focuses specifically on how the issue of data privacy moved from the domestic to the supranational political arena and what explains the timing of the directive’s adoption in 1995. Anecdotal accounts of the European decision implicitly or explicitly rely on one of two explanations, both grounded in European integration theory. The first, which is based in a liberal intergovernmental argument, focuses on the economic interests of the most powerful member states to explain regional politics.<sup>12</sup> This perspective expects that the preferences of national economic actors drive the negotiating position of each member state. These economic preferences are aggregated nationally and represented at the European level by a unitary national executive.<sup>13</sup> The relative economic and broader political power of the nation, then, determines the ability of a government to achieve its domestic national preferences at the supranational level. Starting in the 1970s, powerful European governments including France, Germany, and the United Kingdom (the “Big Three”) adopted stringent data privacy rules. Other large markets such as Italy and Spain, however, failed to pass similar reforms. According to the liberal intergovernmental argument, the unequal regulatory playing field within the internal market disadvantaged companies in those early adopter countries of data privacy rules.<sup>14</sup> National firms from high-regulatory countries should have lobbied their governments for supranational intervention to compel all member

9. The narrative is based on sixty interviews conducted by the author between 2002 and 2006, as well as an analysis of primary and secondary sources. Interview subjects included a broad range of civil servants, politicians, and business representatives from both national and European levels. As the outcomes of interest—timing and adoption—are inherently concerned with dynamic and temporal processes, the historical narrative technique is particularly appropriate. See Büthe 2002; Hall 2003; and Mahoney 2003.

10. For the importance of case studies in theory development, see Gerring 2004.

11. See Haufler 2001; Long and Quek 2002; Farrell 2003; and Heisenberg 2005.

12. See Moravcsik 1993 and 1998.

13. See Putnam 1988.

14. This follows the logic of the trading-up argument found in Vogel 1995.

states to adopt equivalent regulations.<sup>15</sup> The “Big Three” governments should have used the European Union to externalize their domestic regulatory regimes and promote their national industries.

To confirm the liberal intergovernmental account, I would expect to find evidence in the narrative that powerful member states supported supranational action, that critical industries lobbied their national governments to back European intervention, and that national executives, representing domestic industry, conducted policy negotiations. As I will show, the historical narrative and the sequencing of events do not bear out these expectations.

The second general approach is derived from the neofunctionalist tradition and argues that the European Union central bureaucracy, the European Commission, has the ability to expand its competencies and broaden the scope of supranational decision making.<sup>16</sup> Using large community projects to expand its jurisdiction, the leadership of the Commission has succeeded in promoting certain issues even against the wishes of powerful member states.<sup>17</sup> In other cases, civil servants in the Commission bureaucracy have slowly introduced new policy ideas into regional politics.<sup>18</sup> Using both formal and informal mechanisms, the Commission institutionalizes the supranational structure and expands the tasks for which it is responsible.<sup>19</sup> By directly funding transnational networks and interest groups, the Commission fosters a set of interests that privilege regional concerns. Transnational associations offer an important ally to Commission proposals, building a European coalition for policy action. In the case of data privacy, it has been argued that the Commission supported European rules to extend the European market and its authority in the emerging information society.<sup>20</sup> Under this perspective, the Commission is viewed as an independent actor capable of driving regional policy.

To support a neofunctionalist account one would expect to uncover evidence of entrepreneurship from either high-ranking Commission officials or civil servants in the Internal Market Directorate. The theory predicts that supranational officials would promote the creation of and seek a coalition with transnational interest groups. Transnational business groups should support and press for regulatory harmonization.

The following narrative examines the development of regional data privacy regulation and evaluates the two dominant approaches to European integration. The narrative begins by providing background context on initial national regulatory developments that set the stage for regulatory fragmentation in Europe. These con-

15. Several historical accounts of the directive suggest that the legislation reflected French and German economic interests; see Platten 1996; and Wuermeling 1996.

16. See Jabko 2006; and Stone Sweet, Sandholtz, and Fligstein 2001.

17. Sandholtz and Zysman 1989.

18. Posner 2005.

19. H eritier 2001.

20. See Pearce and Platten 1998; and Heisenberg 2005.

ditions existed between the 1970s, when initial national legislation was passed, through the late 1980s, when a pan-European initiative began. The narrative reviews early supranational policy efforts, demonstrating opposition by the Commission, member states, and industry. The second half of the narrative reveals the important role that transgovernmental policy entrepreneurs played using policy expertise, delegated authority, and network ties to force their preferences on other regional policymakers.

## **The Origins of the European Data Privacy Directive**

### *National Responses to the Computer Age—Policy Networks and Regulatory Fragmentation*

Advanced industrial democracies first confronted data privacy concerns in the 1960s as governments and large corporations experimented with computer-driven monitoring systems. Governments and industry hoped to develop large-scale databases in order to rationalize operations, increase efficiency, and reduce fraud. These massive surveillance projects, however, raised citizen concerns that such systems could be used for nefarious purposes ranging from discrimination to political control. Scandals involving government misuse of surveillance broke out across the advanced industrial democracies stoking these fears.<sup>21</sup> Citizens and politicians called for legislative proposals to counter these threats.

As part of national privacy debates, activist lawyers formed the core of domestic policy networks involved in developing legislation. These lawyers initially examined how computer technology affected legal practices such as the implication of digital records for researching precedent. Coming to prominence in the wake of the peace and student movements of the 1960s, these activists soon turned their attention to the more general societal implications of computer technology. Academics created university working groups that debated the interaction between technology and personal freedom. These groups developed detailed legislative proposals and trained a generation of legal scholars committed to the socially responsible use of technology.<sup>22</sup>

Despite a common push for protections against the threat of the computer, national governments adopted a range of policies.<sup>23</sup> In the late 1970s several founding members of the European Community—France, Germany, and Luxembourg—adopted reforms that established data privacy rules for the public and private sector. Legislation empowered independent regulatory agencies to monitor and enforce compliance with national data privacy regulations. Institutional design shielded

21. Hondius 1975.

22. The motivations of the legal community were described to the author in interviews with members of these early efforts in France, Germany, and the United Kingdom. See Bennett 1992; and Simitis 1995.

23. Bennett 1992.

data privacy authorities from direct government influence. These agencies were generally housed separately from executive government ministries, were composed of civil servants and political leadership appointed for extended tenure periods, and were guaranteed a minimum budget. Responsible for monitoring executive agencies, legislation focused on buffering data privacy authorities from government influence. While the exact national powers and levels of independence varied, legislation granted many of these agencies the authority to block the transfer of personal information to companies or countries that failed to maintain adequate privacy regulations.<sup>24</sup> Other countries, such as Switzerland, adopted limited rules, which covered only the public sector. These limited systems enacted some sectoral legislation for sensitive industries such as health care or banking but generally relied on market mechanisms and self-regulation to manage private-sector privacy issues. A final group of nations, ranging from Italy to Belgium, failed to adopt privacy legislation at all. The member states of the European Community thus entered the 1980s with very different regulatory systems.

#### *Early Attempts to Formulate an International Response—Expertise Without Delegated Authority*

As European countries considered national legislation in the early 1970s, data privacy experts from European countries met internationally to discuss the implications of cross-border data flows for personal privacy. Growing economic interdependence accompanied by mobile firms and dense intergovernmental cooperation meant that personal information increasingly moved across borders. An epistemic community composed of data privacy experts from various countries emerged that feared that unconstrained, technology would threaten the civil liberties of European citizens. These data privacy experts lobbied European institutions for precautionary action against the dangers associated with transnational data flows.<sup>25</sup> If a subset of European countries did not pass data privacy rules, these underregulated nations could potentially become data havens—with organizations locating their central data banks in these countries and circumventing national rules.

Privacy experts scored some initial success with the European Parliament that passed a series of resolutions calling for pan-European rules.<sup>26</sup> Despite the Parliament's recommendations, the Commission showed little interest in data privacy during the 1970s. Rejecting the Parliament's recommendations, the Commission argued that supranational privacy rules would raise the costs of doing business in Europe. Moreover, the Commission believed that privacy rules were a public-sector issue over which the Community did not have jurisdiction.

24. For a description of the institutional design of data privacy authorities, see Flaherty 1989.

25. See *Transnational Data Report*, 1 March 1978, 1–8.

26. The European Parliament passed a series of resolutions calling for supranational action, including those of 3 May 1976 O.J. (C 100) 27; 8 May 1979 O.J. (C 140) 147; and 9 March 1982 O.J. (C 87) 39.

The Council of Europe proved to offer a more congenial platform for initial international efforts. Created in 1949 to promote collaboration within Europe including members and nonmembers of the European Community, the Council of Europe is primarily an intergovernmental body that facilitates cooperation in the areas of human rights and legal affairs. In the early 1970s the Council established a working group composed of national experts to examine the issue of data privacy. The working group made a set of recommendations to the Council concerning the use of personal information in the public and private sectors. These were then elaborated in the Council of Europe *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*, which was passed in 1981. By the end of the 1980s, nine countries had ratified the Convention.<sup>27</sup>

Although the Convention prompted legislative data privacy debates in the United Kingdom, the Convention did not produce comprehensive coverage of data privacy within Europe. The Convention, as with any intergovernmental bargain, had multiple loopholes and served primarily to reduce friction associated with transborder data flows. The Convention was not self-enforcing (that is, it required national implementation legislation), it did not provide for a supranational regulation of transborder data flows, and it prioritized trade over the protection of personal privacy. Most worrisome for the data privacy policy community, however, was the lack of any regulatory action by five European Community members: Belgium, Greece, Italy, Portugal, and Spain. The case of Spain proved emblematic of the Convention's shortcomings, as the country ratified the Convention in the early 1980s but failed to adopt national implementing legislation. As the liberal intergovernmental account would predict, the policy network of data privacy experts that helped set the Convention's agenda did not have the power to guarantee implementation by national governments.

### *Resistance from Major European Policymakers*

Despite the fact that a third of the European Community had failed to adopt national data privacy rules in response to the Council of Europe Convention, the major players in Community policymaking resisted calls for supranational action. In 1981 the European Commission rejected a recommendation by the Parliament for Community legislation. The Commission argued that governments under the auspices of the Council of Europe Convention should adopt national legislation to address transnational frictions.<sup>28</sup> As always, the Commission held a range of views on the issue. But the Internal Market Directorate argued that data privacy was primarily

27. The countries that ratified the Convention prior to the presentation of the draft European privacy directive in 1990 included Austria, Denmark, France, Germany, Luxembourg, Norway, Spain, Sweden, the United Kingdom.

28. See Commission Recommendation 1981 OJ (L246) 31.



a public-sector issue related to the regulation of member-state government data-banks. The European Community did not have jurisdiction over public-sector issues, while in matters concerning the private sector, the Internal Market Directorate resisted pan-European data privacy rules. The Commission Directorate viewed data privacy harmonization as inflicting increased regulatory costs on business. Both on political and administrative levels, the central bureaucracy of the European Union resisted engaging in the data privacy debate. Contrary to the neofunctionalist expectation that the Commission would seek to expand its task set, the Commission rejected the Parliament's call to action.<sup>29</sup>

Strong opposition by pan-European industry associations to supranational action further undermines a traditional neofunctionalist explanation. The Union of Industrial and Employers' Confederations of Europe (UNICE), the largest cross-sector trade organization in Europe, condemned the directive as placing a huge burden on industry.<sup>30</sup> The European Direct Marketing Association and the European Banking Federation echoed this sentiment, declaring that the directive was unnecessary and dangerous.<sup>31</sup> Transnational business did not provide the impetus for supranational action.

Rather than allying with transnational industry players to promote harmonized rules, the Commission supported industry efforts to maintain national regulations through the mid-1980s. It is only in 1990 that the Commission switched its position and actively backed pan-European rules. This switch also occurred despite continued resistance from national and transnational industry.

Disconfirming liberal intergovernmental predictions as well, national governments and interest groups showed little interest in supranational action during the 1980s. There is no evidence that any member state pushed for EC intervention in the area of data privacy. The British government strongly opposed such a move, arguing that it would retard economic development and increase public administration bureaucracy. The British position did not change, maintaining the only veto in the final Council of Ministers' vote. Neither the German nor the French government actively promoted supranational rules.<sup>32</sup> The German interior minister, echoing the Commission, argued that the sensitive nature of data privacy issues for business and public security required national action.<sup>33</sup>

While one might anticipate that industry from high-regulatory countries would have favored pan-European rules as a means to level the regulatory playing field, this was not the case. Industry groups across the largest member states opposed

29. The Commission's position is described by a commission official in Papapavlou 1992; and Simiatis 1997.

30. See *European Report*, "UNICE Calls for Changes in Proposal on Personal Data," 1651 1991, 3.

31. See *Marketing*, "EC Scheme for Data Protection Stuns UK," 12 July 1990, 3; and *Transnational Data and Communications Report*, November/December 1992, 43–45.

32. As reported to the author in interviews with data privacy experts in the two countries.

33. For the comments of then interior minister Wolfgang Schäuble, see *Frankfurter Rundschau*, 8 August 1989, 1.

European action in the 1980s. This opposition was particularly virulent in the United Kingdom and Germany, both countries with high regulatory standards.<sup>34</sup>

The position of German business is perhaps the most striking. Despite the fact that Germany stood to gain considerably from upward harmonization, business did not promote European rules. As Dr. Friedrich Kretschmer, representative of Germany's most powerful trade association, the Bundesverband der Deutschen Industrie (BDI), stated in November 1989 just prior to the release of the first draft of the privacy directive:

There is no general wish by industry for an Europeanization of data privacy legislation. . . . The differences in national rules benefit our competitors in countries with fewer regulations and result in cost savings. German industry, however, does not view this competitive advantage as a serious problem.<sup>35</sup>

A survey conducted by the Gesellschaft für Datenschutz und Datensicherheit (GDD), the German private-sector data protection trade association, confirmed BDI's position. Ninety-one percent of the 255 firms who responded to the survey believed that the European initiative would exacerbate market fragmentation within Europe.<sup>36</sup> The results, representing a wide array of sectors and firm sizes, show the striking lack of interest of German business in harmonization. Counter to the predictions of liberal intergovernmental theory, industry from the most powerful member states lobbied against supranational action.

By the middle of the 1980s, a consensus emerged that national—and not supranational—action should be the primary mechanism to resolve data privacy issues. Given the lack of interest by industry, member states, and the Commission, the narrative examines further the origins of the directives.

*Transgovernmental Policy Entrepreneurship—Expertise, Delegated Authority, and Network Ties*

During the 1980s, the data privacy community underwent a transformation from a policy network composed primarily of legal experts to an institutionalized group of substate actors with domestic authority. As negotiations began in 1976 over the Council of Europe Convention, only one country, Sweden, had a national data privacy authority. By the end of 1988, eleven agencies existed in Europe, of which seven were members of the European Community.

At the same time as delegated authority expanded, data privacy agencies constructed a network composed of their peers in other member states. Transgovernmental cooperation—collaboration between substate actors—began in 1979 when

34. See *Marketing*, "EC Scheme for Data Protection Stuns UK," 12 July 1990, 3; and *Computerwoche* (Internet Edition), "Wirtschaft fürchtet Nachteile durch verschärften Datenschutz," 21 December 1990.

35. See Kretschmer 1989. Translation by the author.

36. See Gesellschaft für Datenschutz und Datensicherung 1992.

the German data privacy agency organized the first conference of data privacy commissioners in Europe.<sup>37</sup> The group met annually to debate pressing issues, share information, discuss best practices, and release joint resolutions on political matters. The network established working groups in the early 1980s on key issues ranging from internal market reform to telecommunications policy. These groups met several times per year to develop collaborative policy initiatives. Over a ten-year period, the transgovernmental network of agencies built up their credibility as data privacy experts and formulated a coherent proposal for European Union reform.

Data privacy authorities feared that mobile capital within the European internal market might compromise national protection levels. Firms from high-regulatory countries could relocate their operations to nations with lax standards. These “data oases” would undermine the comprehensive regulatory system and threaten data privacy norms within Europe.<sup>38</sup> Additionally, regional market integration promised to increase the transfer of personal information across national and to supranational administrative units. As long as a third of Europe lacked privacy rules, these data transfers would place personal information at risk and threaten the authority of data privacy agencies.

With the failure of the intergovernmental Council of Europe Convention to guarantee privacy regulations across the member states by the middle of the 1980s, national data privacy authorities coupled their expertise and network ties with their newly acquired enforcement powers to motivate supranational action.

### *Mobilizing Expertise to Frame the Initiative*

Starting in the late 1980s, the transgovernmental network framed the issue of supranational data privacy protection as a prerequisite to further market and administrative integration in Europe. Playing on the symbolic importance of the single market to both the Commission and member states, the data privacy agencies resolved in a 1989 meeting in Berlin that the European Community must take action on data privacy to guarantee the free flow of information within the Community.<sup>39</sup> The privacy authorities argued that the internal market initiative symbolized by the Single European Act would increase transborder data flows. European firms would participate in multiple national markets, and governments would share data cross-nationally to administer the single market. The threat existed that firms would locate data processing in data oases such as Belgium or Italy. Several German data processing firms had already moved operations to the Benelux countries

37. *Transnational Data Report*, “European Data Production Chiefs to Meet in Bonn,” 1 March 1979, 1.

38. See Fauvet, *Transnational Data and Communications Report*, November 1989, 17–18; and Simitis, *Transnational Data and Communications Report*, November 1989, 23–28.

39. See the comments of the President of the CNIL in Fauvet, *Transnational Data and Communications Report*, November 1989, 17–18.

to avoid stringent German rules. The conference concluded with a resolution demanding supranational action.<sup>40</sup>

Lobbying by the transgovernmental network increased over the following months. In a March 1990 conference, the data privacy authorities threatened that if the European Community did not enact privacy rules by 1992, they would block data flows. The comments of the data privacy commissioner of the German state of Hess, Spiros Simitis, summarized the authorities' position,

If there are no common rules by 1992 amongst the twelve Community members then quite simply five of the countries of the European Community without such laws will have to be treated in exactly the same way as those with no rules for data privacy. Therefore, there will be no personal data transfers to those countries because data commissioners will oppose such transfers.<sup>41</sup>

As at the previous Berlin conference, this conference ended with an appeal to the European Community to pass a privacy directive to avoid data blockages and secure individual liberty within the emerging single market of the community.

#### *Using Delegated Authority to Alter the Reversion Point*

The transgovernmental network of data privacy authorities relied on the domestic authority granted to its members to alter the preference calculation of the Commission and the member states. Through a series of threats to transborder data flows, data privacy agencies changed the regulatory reversion point.<sup>42</sup> In other words, they changed the regulatory status quo that would exist in the absence of supranational legislation, altering the cost-benefit to other European policymakers of inaction. One of the most visible attempts to raise the issue to the European Community level occurred in July 1989, when the national data privacy authority of France threatened to block data transfers between Fiat's corporate offices in France and Italy. Invoking Article 24 of the French law, the French Data Privacy Authority (*Commission Nationale de l'Informatique et des Libertés*—CNIL) argued that Italy did not have adequate regulations.<sup>43</sup> The CNIL blocked the transfer of information about French citizens, forcing Fiat Italy to find a solution to the data impasse. After intensive negotiation with the CNIL, Fiat Italy agreed to sign a data privacy contract promising to handle personal information coming from Fiat France according to French national rules.<sup>44</sup> The president of

40. According to a senior official at the German federal data privacy agency in an interview with the author.

41. See *Transnational Data and Communications Report*, "Simitis Reports Data Protection Chaos," June/July 1990, 26.

42. For a discussion of reversion points, see Richards 1999.

43. *Journal Officiel de la République Française* 1978. Loi No. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.

44. See *Transnational Data and Communications Report*, "No Fiat for Fiat," November 1989, 10; and *Business Week*, "Privacy vs. Marketing: Europe Draws the Line," 3 June 1990, 124.

the CNIL argued in a speech shortly after the Fiat case that “the Europe of trade must not take precedence over the Europe of human rights.”<sup>45</sup>

The CNIL again leveraged its power to block data exports in September 1989, this time between France and Belgium. With support from the European Community, several member states constructed a European cancer registry that involved the networking of records among multiple public health institutions. The French research center, the Gustave Roussay Institute, planned to join the European Organization for Research and Treatment of Cancer (EORTC), which was based in Belgium. The CNIL argued that sensitive medical data could not be sent to Belgium since Belgium did not have national data privacy legislation. The CNIL demanded that Belgium pass privacy legislation.<sup>46</sup>

The controversy surrounding the Schengen agreement instigated by the data privacy authorities in the late 1980s proved even more disruptive. Initially a bilateral border control accord to permit the free movement of individuals between Germany and France, the Schengen agreement was quickly joined by Belgium, the Netherlands, and Luxembourg. Although not directly a European Community initiative, the Commission viewed the plan as an essential first step in achieving the free movement of labor within the economic area.

To create an area of free movement, the Schengen countries had to find a means to police the entry points of the emerging single border. As part of the agreement, the Schengen Information System (SIS) networked the national customs and border control databases so as to permit mutual policing of national borders. However, Belgium did not yet have data privacy legislation. At the tenth annual data protection commissioner conference in 1988, the Luxembourg delegation, which had only weak domestic authority to regulate market access, used its horizontal network ties to inform the German and French groups of the planned information system and the threat it might pose to privacy.<sup>47</sup> French, Luxembourg, and German data privacy authorities argued that sharing sensitive police information with Belgium would violate national regulations. The agreement stalled until a data privacy solution could be found. Under pressure from the transgovernmental network, Belgium pledged to rush through legislation, and the members of the Schengen agreement developed a data privacy clause along with a data privacy monitoring authority for the SIS.<sup>48</sup>

45. See Fauvet, *Transnational Data and Communications Report*, November 1989, 17–18.

46. See *Transnational Data and Communications Report*, “CNIL Urges Belgian Data Law,” February 1990, 24.

47. The president of the CNIL made this argument at the eleventh international data commissioners’ conference. See Fauvet, *Transnational Data and Communications Report*, November 1989, 17–18.

48. Simitis, a leading German data privacy expert, argued, “These provisions were introduced on demand of the data protection authorities of the Member States.” See *Transnational Data and Communications Report*, “Simitis Reports Data Protection Chaos,” June/July 1990, 26. This was confirmed by senior officials at the German federal data privacy agency and the French CNIL in interviews with the author.

The blocking of data flows by the CNIL, the stalling of the Schengen agreement by the network, and direct appeals by data privacy authorities changed the debate for the European Commission and the member states. In contrast to the position taken by the Internal Market Directorate in the early 1980s, Commissioner Bangemann concluded that data privacy was now central to the internal market and for guaranteeing the free movement of individuals within the Community.<sup>49</sup>

The European Commission also realized that the exchange of personal information implicated not only business activity but also a pan-European public administration. From taxes to border controls, data blockages by national data privacy authorities threatened fundamental European Community projects and therefore fell under the Community's purview. The European Commission adopted the frame offered by the transgovernmental network when it presented its draft of the privacy directive in 1992:

The moves to complete the internal market have created a need to exchange personal data between private or public firms in different member states, between national authorities providing mutual assistance in areas as diverse as customs, taxation and the fight against fraud, and between associations or foundations engaged in activities relating, for instance, to medical research, social work, education or culture.<sup>50</sup>

Far from simply a policy spillover concerned with the technical details of market integration, data privacy authorities used their domestically delegated authority to change the preference calculation of actors at other levels. A counterfactual helps to highlight the difference between the neofunctionalist argument and the events described here. Had the single market proceeded prior to the institutionalization of independent data privacy regulators empowered to control market access, it is unlikely that the European Commission would have adopted supranational rules. The Commission had no interest in expanding its competencies into the field of privacy. The period of epistemic community cooperation demonstrated the inability of data privacy experts to motivate European action by expertise alone. The member of the Internal Market directorate responsible for formulating the directive argued explicitly that the Commission was held hostage by data privacy authority demands.<sup>51</sup> Only when these actors had been transformed into a transgovernmental network with domestically delegated power did they alter the reversion point and spur international action. The timing of supranational adoption, then, corresponded to a change in the resources available to transgovernmental actors domestically.

49. As explained by a Commission official in the Internal Market directorate responsible for data privacy in an interview with the author.

50. See *RAPID*, 23 October 1992, 59.

51. Interview with the author.

*Leveraging Network Ties to Fix the Agenda*

The Commission quickly composed a draft framework privacy directive so as to allay the concerns of data privacy authorities. Little consultation occurred with the private sector prior to the draft's presentation. Instead, the Commission organized a drafting committee comprised of Commission officials and representatives from data privacy authorities. A member of the CNIL was seconded to the Commission as a policy specialist and the Commission relied heavily on the advice of national data privacy officials.<sup>52</sup> This drafting process established important vertical ties between the transgovernmental network and the Commission.

The release of the draft agenda in the early 1990s ushered in a round of intense lobbying by industry. After losing the agenda-setting effort, firms pushed for the inclusion of national regulatory styles to minimize adjustment costs. The sunk costs associated with national data protection regimes overwhelmed the advantage associated with uniform harmonization. Lobbying for the subsidiarity principle, which holds that action not required at the European level should be left to the member states, European business supported flexibility in national enforcement models.<sup>53</sup>

National privacy authorities did not see this push for subsidiarity as a threat to their underlying agenda and used it to prevent a centralization of oversight authority in the hands of the European Commission.<sup>54</sup> National data privacy authorities focused on guaranteeing individual rights across the EU for the public and private sector, not standardizing enforcement around a single system or regulatory institution.<sup>55</sup> Calls for subsidiarity actually further empowered national data privacy agencies in the enforcement process. Both industry and data protection authorities could support the same goal for different reasons—industry in countries with existing regulations hoped to limit the implementation costs of the directive, whereas data privacy authorities committed themselves to raising data protection levels across the EU, while respecting national enforcement institutions.<sup>56</sup> Data privacy

52. Internal Market Commissioner Mogg emphasizes the expert role of data privacy authorities: "For the Commission, the question is now where do we go from here? The Commission is in a learning process, ready to hear from those who have the experience, and first of all the Data Protection Commissioners." See Mogg 1991.

53. For example, the European Chamber of Commerce called on the EU to recognize national peculiarities in data protection and promote subsidiarity in the draft, see *European Report*, "Chambers of Commerce Demand Review of Data Protection Proposal," 8 April 1993, 1850. In an interview with the author, an official from a European trade association argued that business supported subsidiarity because they feared the costs of regulatory change.

54. A Commission official involved in drafting the directive explained in an interview that data privacy agencies pressed for the creation of a network of national regulators, the Article 29 Working Party, as a means to prevent centralized oversight by the European Commission. See Bignami 2005.

55. See additionally *EG Magazin*, October 1990, 4–5.

56. See *Transnational Data and Communications Report*, "Resolution by the Conference of German Federal and State Data Protection Commissioners," March/April 1991, 45–46. Additionally, the German Federal Data Protection Commissioner strongly supported the integration of the subsidiarity principle into the directive. See *Handelsblatt*, "Ein Bisschen mehr an Bürokratie ist der Preis der Harmonisierung," 12/13 March 1993, 3.

authorities relied on their network of national constituencies to promote their institutional goals at the supranational level.

National data privacy authorities played a pivotal role in overcoming final concerns and reaching a political deal. National governments made a series of demands in the summer of 1993 that if not resolved could have stalled negotiations.<sup>57</sup> Contrary to the two-level game metaphor dominant in the liberal intergovernmental framework, data privacy authorities were vertically embedded in the international bargaining process. This meant that alongside many national ministers sat national data privacy authorities, whose expertise in the field had tremendous sway. As Internal Market Commissioner John Mogg explained, “In these negotiations the contribution of the European Data Protection Commissioners, where it existed, has been very helpful not only in clarifying and enriching the debate but in the finding of a final compromise.”<sup>58</sup> In a move highlighting the importance of transgovernmental actors in mediation processes, the German delegation appointed Dr. Joachim Jacob, the German federal data privacy commissioner, to represent the German presidency during the negotiations. Given his expertise in the area, the German government felt he would best conclude the negotiations. The German data privacy authority, highly aware of the interests of the transgovernmental network, navigated the final negotiations.

The position of countries without privacy legislation prior to the adoption of the directive presents a final challenge to the liberal intergovernmental approach. Following the logic of the theory, firms from countries without legislation should have preferred the regulatory status quo and in turn lobbied their governments to prevent supranational action. Given the distribution of votes within the Council of Ministers in 1994, when the directive was adopted, countries without legislation—Belgium, Greece, Italy, Portugal, and Spain—had a clear blocking minority under the qualified majority voting procedure used for the issue of data privacy. If national economic interests had dominated the push for regulation, these countries could have prevented the directive’s passage. Instead, all of the late adopter countries voted in favor of regional legislation.<sup>59</sup> In short, the liberal intergovernmental account does not predict supranational policy.

A common position by the Council was concluded in March of 1995, and the Council and the Parliament passed the directive in October of 1995. As a result of the directive, five countries—Belgium, Greece, Italy, Portugal, and Spain—adopted national legislation. The remaining countries were forced to amend their preexisting laws to comply with the directive.

57. See *VDI Nachrichten*, “Europäischer Datenschutz liegt weiter auf Eis,” 7 January 1994, 4. For a comprehensive discussion of political fights among the member states in the Council of the European Community, see Simitis 1995.

58. Mogg 1994.

59. Platten 1996.



## Discussion—Transgovernmental Policy Entrepreneurs

During a period of intense market-making known best for the passage of the Single European Act, the European Union adopted sweeping civil liberties legislation that set an international standard for privacy protection. This occurred despite initial opposition from the European Commission, member-state governments, and national firms. The historical narrative suggests that this remarkable expansion in human rights resulted from the concerted effort of transgovernmental policy entrepreneurs—data privacy authorities. Independent regulatory agencies were motivated by their belief in the importance of privacy laws for the protection of European citizens and their fear that market integration would undermine their national regulatory authority. Data privacy authorities, collaborating across borders, used a variety of power resources to alter the preferences of other critical European policymakers. These agencies proved more important to the policy outcome than standard theories of European integration, liberal intergovernmentalism, or neofunctionalism, would predict.

Given the lack of traction from conventional approaches, the narrative refocuses attention on transgovernmental actors as an alternative driver of regional policy-making.<sup>60</sup> This literature begins by rejecting a monolithic view of the state as a single actor in international politics and posits that governments are composed of numerous officials such as regulators, judges, and parliamentarians who seek to shape external affairs independent of their national governments.<sup>61</sup> While transgovernmental networks have received renewed attention in both the literature on new modes of governance within European studies and by international relations scholars, much of this work has focused on the ability of such actors to coordinate rule development and enforcement.<sup>62</sup> The case of data privacy suggests that in addition to overseeing and modifying existing policy, such actors may in fact be capable of policy entrepreneurship. In other words, such actors not only fulfill governance needs but may also impose their preferences on other policymakers.<sup>63</sup>

The question then becomes how and why can transgovernmental actors become policy entrepreneurs. Following Moravcsik's definition, policy entrepreneurs "aim to induce authoritative political decisions that would not otherwise occur."<sup>64</sup> Delegated agencies develop preferences that are distinct from national governments.

60. See Bermann 1993; Slaughter 2000; and Slaughter 2004. For an earlier effort, see Hopkins 1976.

61. Keohane and Nye 1974, 43, define transgovernmental relations as the "set of direct interactions among subunits of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments." Slaughter 2004, 50, argues that "[t]he most highly developed and innovative transgovernmental system is the European Union."

62. See generally Raustiala 2002; and Slaughter 2004. In Europe, see specifically Dehousse 1997; Eberlein and Newman 2008; and the work of Coen and Thatcher as part of the new governance project, available at ([www.eu-newgov.org](http://www.eu-newgov.org)). Accessed 1 October 2007.

63. In their original article, Keohane and Nye 1974 distinguished between transgovernmental policy coordination and transgovernmental coalition builders. While much recent research has focused on the former, this article builds on the latter. For an earlier effort, see Crane 1984.

64. See Moravcsik 1999, 271.

They derive their preferences from a variety of sources including professional training, ideological commitments, and a desire to maintain their authority.<sup>65</sup> Considerable research, especially in the neofunctional tradition, has focused on the role of the Commission and the European Court of Justice as policy entrepreneurs.<sup>66</sup> In many sectors, these bodies enjoy formal authority to shape either the passage of new laws and regulations or to strike down their implementation and enforcement.

Transgovernmental actors, however, rarely have formal authority in the supranational decision-making process. They cannot directly introduce, pass, or strike down legislation. Instead, they must rely on informal tools to shape agendas, mediate disputes, and mobilize support for their interests. Transgovernmental actors use a variety of power resources to lobby for their preferred policy goals including expertise, domestically delegated authority, and network ties. Following work on bureaucratic autonomy, it is clear that these power resources draw on different underlying processes, both material and relational.<sup>67</sup> This does not prevent transgovernmental actors from using these different resources, alone and in combination, to obtain a desired policy outcome.

To advance the discussion about the mechanisms by which transgovernmental actors influence regional outcomes, I take each in turn. Afterwards, I examine the generalizability of the phenomenon and offer several boundary conditions that situate the potential of transgovernmental power.

### *Expertise as a Source of Power*

Like epistemic communities, transgovernmental actors use technical expertise to define problem areas and offer policy solutions, playing a critical role in agenda formation and policy mediation.<sup>68</sup> The European Union governing bodies face tight budget constraints and therefore do not have in-house technical specialists in many issue areas. Transgovernmental actors, by contrast, develop a wealth of first-hand experience in their specific policy subsystem and include individuals with a range of technical knowledge.<sup>69</sup> As directives are drafted, transgovernmental actors advise the Commission on how to formulate the language of European directives, playing an active role in rule development and rule enforcement. These domestic officials also represent and advise member-state governments as they formulate their national policy position and negotiate in the Council of Ministers. This means that

65. See Keohane and Nye 1974; and Risse-Kappen 1995. The goal of this article is not to identify the sources of these preferences, but to isolate the mechanisms by which transgovernmental actors achieve their goals given a specific set of preferences.

66. See, for example, Burley and Mattli 1993; and Stone Sweet, Sandholtz, and Fligstein 2001.

67. Barnett and Finnemore 2004 focus on expertise, delegation, and values as three roots of authority. Carpenter 2001, by contrast, identifies the legitimacy provided by networks. For a detailed analysis of forms of power, see Barnett and Duvall 2005.

68. See Adler and Haas 1992; Ziegler 1995; and Verdun 1999.

69. See Hopkins 1976.

transgovernmental actors simultaneously provide the Commission and member states with the information necessary to draft a specific policy.

Transgovernmental actors leverage this information asymmetry in several ways. During the policy formation and mediation processes, they use their information advantage in a manner commonly described in rationalist approaches to bargaining. When transgovernmental actors hold scarce information, member states and the Commission rely on their technical expertise to reduce the transaction costs associated with international cooperation as demonstrated by the reliance of the Commission on data privacy authorities in the drafting of the directive.<sup>70</sup> In a more sociological vein, transgovernmental actors frame issues to overcome objections to proposals. Data privacy authorities shifted the debate from purely about the protection of individual citizens to the completion of the internal market. This frame facilitated the creation of new alliances in support of regional harmonization.<sup>71</sup>

### *Domestically Delegated Authority as a Source of Power*

Within the context of multilevel governance, however, transgovernmental actors are not merely expert groups endowed with information: some have the power to use domestically delegated authority to raise the cost to political elites of supranational policy inaction. Authority within the European Union is distributed simultaneously across a number of overlapping institutional jurisdictions.<sup>72</sup> Power relations among levels are not necessarily discrete or subordinate.<sup>73</sup> This structure of the European Union opens up access points for policy entrepreneurs.<sup>74</sup> Many data privacy authorities in Europe, for example, have the domestically delegated power to block the transfer of data to firms in countries that lack adequate data privacy standards. They leveraged this authority to alter the cost-benefit to other European policymakers of inaction. This argument draws on the rational institutional literature that stresses the power of the reversion point in international bargaining.<sup>75</sup> The reversion point is the notion that there exists a particular default regulatory environment in the absence of a negotiated policy change. Transgovernmental actors within Europe include public officials that enjoy considerable independent enforcement and implementation powers. Regional governments, national courts, and independent regulatory agencies have delegated authority at the national or subnational level to change the regulatory status quo. If they choose to exercise their authority, it can cause considerable regional regulatory frictions. Such transgovernmental actors become de facto veto players in the multilevel con-

70. See Keohane 1984; and Moravcsik 1999.

71. See Kingdon 1995; McNamara 1999; and Schimmelfennig 2001.

72. See Hooghe and Marks 2000; Hooghe and Marks 2003; Aalberts 2004; and Bache and Flinders 2004.

73. See Börzel and Hosli 2003; and Hooghe and Marks 2003.

74. See Peterson 1995; and Zito 2001.

75. See Richards 1999; and Gruber 2000.

text. The multilevel governance system of the European Union creates the opportunity structure for transgovernmental actors to deploy power previously confined to the subnational level on the broader European stage.

The extent of delegated authority that a transgovernmental actor can wield is a function of the institutional design of domestic political institutions.<sup>76</sup> Constitutions provide national courts and subnational governments particular powers to enforce and implement policies. Similarly, governments delegate statutory policy instruments to regulatory agencies including control over market access, the power to levy administrative fines, and the power to investigate bureaucratic and firm behavior. Differences in institutional design—such as dedicated budgets and long-term leadership appointments—expand the ability of such agencies to exercise policy autonomy, by buffering regulatory agencies from direct political control. The domestic institutional setting defines the scope of authority available to transgovernmental actors and the degree of autonomy they enjoy to express their preferences in European politics. In addition to the institutional competence to regulate cross-border data flows, data privacy authorities enjoy considerable statutory buffers to direct political control.<sup>77</sup>

### *Networks as a Source of Power*

Finally, the power of transgovernmental actors is amplified by their network structure. Networks in their most basic definition are a set of more than one interconnected nodes. Transgovernmental networks describe the regularized interaction between substate actors. While these networks may interact with nonstate actors in larger policy networks, transgovernmental networks themselves are made up exclusively of public actors. Such networks have both horizontal and vertical dimensions.<sup>78</sup> Horizontal cooperation describes relationships between officials across the member states. Networks of national regulators devoted to a specific issue area demonstrate such horizontal ties. The vertical dimension comprises interactions that take place across the levels of European governance. Interconnections between national or subnational actors and supranational officials exemplify vertical ties.

Network power is derived from patterns of information flows and delegated authority within the network, as well as from the legitimacy that the network enjoys

76. For the importance of domestic institutional design in international affairs, see Mattli and Büthe 2003. In the context of multilevel governance, see Jeffery 2000.

77. Identifying the institutional resources available to transgovernmental actors helps to explain variation in entrepreneurship activities among different types of substate actors. The expertise and delegated authority of subnational governments centers on procedural domains of policy administration and enforcement. It makes sense that they would influence implementation debates. Independent regulators, by contrast, have detailed technical knowledge in substantive issue areas and are more likely to engage in the policy development phase. For the importance of variation in expertise and regulatory capacity, see Bach and Newman 2007.

78. See Slaughter 2004.

by creating ties to constituencies and other organizations. It is inherently relational whereby variation in ties across the dimensions affects the resources available to such networks to instigate policy entrepreneurship.<sup>79</sup> Horizontal networks amplify the effect of both information asymmetries and domestic delegation. A statement from the European network of Securities and Exchange Commissions, for example, has a much larger framing effect than that of the Securities and Exchange Commission of Spain. Officials that lack strong enforcement authority in their home jurisdiction, for example, may serve as a tripwire, identifying regulatory breaches and then informing officials with powerful statutory authority in other jurisdictions. Starting in the late 1980s, the national data privacy authorities released collective statements demanding European action. Similarly, during the Schengen debate, the data privacy authority of Luxembourg, which had only limited regulatory authority at the time, informed its more powerful peers in Germany and France.

Vertical ties solidify the importance of a particular information advantage. As supranational institutions build relationships with a transgovernmental network, they come to rely on that network's specific perspective. At the same time, the network embeds itself in the rule development and negotiation process at the supranational level. Data privacy authorities were both integrated into the European Commission's drafting process and accompanied many member-state representatives in the Council of Ministers meetings. Vertical ties, then, enhance the ability of transgovernmental actors to make their preferences known and to control agenda formation. These dynamics have been central to the progress of data privacy legislation in the EU as data privacy authorities have formed a horizontal transgovernmental network of their peers and have forged vertical links with the Commission and the European Parliament.

Distinct from arguments stressing spillovers and the functional demands of market integration, the transgovernmental entrepreneurship argument emphasizes power and shrewd politics.<sup>80</sup> While in some instances transgovernmental actors serve to resolve technical dilemmas that result from market integration, the narrative demonstrates how these actors create the very need for policy action. Rather than a natural alignment between subnational and supranational actors as has been argued in many neofunctionalist arguments, data privacy authorities exercised their authority to alter the preferences of other supranational actors. While both member states and supranational bodies attempt to use transgovernmental actors for their specific ends, transgovernmental actors have a set of resources that enable them to exert autonomous policy influence. Rather than driving an inevitable institutionalization of supranational competencies, market integration and the multilevel governance structure open up opportunities for policy entrepreneurship.

79. For a description of network power, see Padgett and Ansell 1993.

80. For a detailed analysis of the spillover argument, see Stone Sweet, Sandholtz, and Fligstein 2001.

Drawing generalizations from a single episode of European integration must be done cautiously. Nevertheless, similar research findings and empirical trends add credence to the transgovernmental entrepreneurship argument. Studies across a range of sectors including environmental policy, immigration and defense, and internal market development note the importance of transgovernmental actors for policy entrepreneurship.<sup>81</sup>

Additionally, institutional reforms at both the member-state and supranational levels have sown the seeds for a revolution in transgovernmental politics. As European governments liberalized their economies and privatized national industries, they have replaced direct command and control economic intervention with arm's-length regulation.<sup>82</sup> Governments have shifted from state planning and Keynesian demand management to setting and enforcing the rules of competition. This form of governance, identified in the literature as "the regulatory state," relies on a whole host of new political institutions—regulatory agencies, administrative courts, and ombudscommissions.<sup>83</sup> These institutions are active in transgovernmental networks.<sup>84</sup> At the same time, national governments have granted increasing autonomy to subnational governments. From the United Kingdom to Spain, regional governments enjoy expanded independence and authority as a result of broad decentralization efforts.<sup>85</sup> With the continued expansion of the regulatory state and devolution of authority, I suspect that transgovernmental actors will increasingly find themselves among the critical policy entrepreneurs in European politics.

An expansion in the supply of such actors, however, does not guarantee that they will be able to affect regional policy outcomes. Assuming that transgovernmental actors are well-resourced and have distinct policy preferences from other policymakers, what conditions shape the likelihood that they will influence the policy agenda or impose their policy preferences on other actors? While not an exhaustive list, the historical narrative suggests two factors common in broader theoretical debates that should affect transgovernmental entrepreneurship.

First, the level of issue complexity in the data privacy case presented an important background condition. Data privacy policy encompasses a set of complex debates spanning fields of computer science and law. This complexity repeatedly contributed to the ability of data privacy authorities to interject themselves into the policy formation and mediation processes. More generally, organizational theory suggests that institutions will look to specialists to overcome problems of issue complexity.<sup>86</sup> Unable to solve information gaps internally, institutions delegate to

81. See Alter 1998; Smith 2004; Lavenex 2006; and Perkmann 2007.

82. Vogel 1996.

83. See Majone 1996; Jabko 2003; Héritier 2002; and Gilardi 2005.

84. Informal networks have sprung up among human rights commissions, consumer protection agencies, and aviation authorities. Networks recognized by the European Union include banking, competition policy, electronic communication, energy, insurance, and securities. See Eberlein and Newman 2008.

85. See Hooghe and Marks 2000, appendix 2.

86. See Thompson 1967; and Scott 1998.

experts. Both the principal-agent perspective and more sociological approaches have used this logic to explain a broad range of phenomena within European politics.<sup>87</sup> I therefore hypothesize that the level of issue complexity will affect the ability of well-resourced transgovernmental actors to play an active role in agenda setting and policy mediation. When an issue is highly complex, transgovernmental actors will be well-positioned to use their expertise and information advantage to define and frame the terms of the policy agenda. In less technical fields, policymakers will be less willing to listen to transgovernmental actors.

While issue complexity frames the likelihood of transgovernmental agenda setting and participation in mediation, it does not explain the more dramatic finding of the narrative whereby data privacy authorities pushed through their policy preferences against the wishes of other policymakers. A second factor regarding the level of environmental uncertainty offers a potential framework to explain such variation. In the privacy narrative, the radical political and economic change brought on by the single market initiative affected the ability of the transgovernmental network to reshuffle political coalitions. Sociological theories of entrepreneurship suggest that high levels of environmental uncertainty offer an important precondition for such coalition-building.<sup>88</sup> In such periods, as was the case with the creation of the single market in Europe, political alliances become more malleable. The distribution of resources, which had been settled by previous political bargains, becomes once again contestable.<sup>89</sup> New and old political players may have an interest in upsetting the position of dominant actors, and entrepreneurs have the opportunity to be agents of interest reaggregation. In cases where the broader political environment is stable, political incumbents will have less interest in disturbing the status quo distribution of power and fewer opportunities exist for entrepreneurs to forge new alliances.

These two factors provide a first cut at the boundaries of transgovernmental power and temper conclusions that transgovernmental actors will dominate all domains of regional politics. I anticipate that in sectors characterized by high levels of issue complexity and environmental uncertainty, well-resourced transgovernmental actors will be most likely to assert their preferences as policy entrepreneurs. The continuing transformation of the European economy and polity marked by events as diverse as enlargement, the further integration of home and justice affairs, and the construction of an internal market for services will cer-

87. For a review of the principal-agent debate in the European context, see Pollack 2003 and the New Gov project (at [www.eu-newgov.org](http://www.eu-newgov.org)). For the sociological approach, see Adler and Haas 1992; Verdun 1999; and Zito 2001.

88. Fligstein 2001, 123, argues: “[s]imilarly, in more fluid social conditions, either in a serious crisis or in the emergence of a field in the first place, skilled social actors play even more visible roles. They design alternative frames for the organization of the field, propagate those frames, and convince other actors to cooperate toward newly defined identities and interests.” See also DiMaggio 1988; and Fligstein 2001.

89. See Sandholtz and Zysman 1989; and Fligstein and Mara-Drita 1996.

tainly offer researchers testing grounds for the argument identified in the data privacy case.

## Conclusion

For scholars of international relations the European privacy directive marks the founding moment of a new effort to tackle an emerging set of global issues concerned with government and corporate control over individual lives. In contrast to traditional human rights concerns, which address the appropriate treatment of individuals within a jurisdiction, transnational civil liberties confound the equation by placing individuals under the potential control of multiple masters, each with their own rules. Delicate national compromises are reopened for international debate in this new era; questions of free speech, police power, and privacy have already raised considerable international tensions among the advanced industrial democracies.<sup>90</sup> As technologies based on genetic screening and biometric monitoring improve and market integration advance, such concerns will no doubt raise further conflicts and debate over the need for international cooperation. How these new transnational civil liberties issues get resolved will have major implications for individual freedom and the underlying philosophical tenets that shape the role of the “West” in international affairs.

For scholars of the European Union and transgovernmental politics, the narrative suggests specific mechanisms of political entrepreneurship. Complementing previous work on transgovernmental actors, which stresses policy development and implementation, this study identifies how such actors can impose their preferences on key decision-makers. The intention here is not to create a new dichotomy in European studies, constructing the latest ‘privileged’ actor. The findings suggest an integrative framework that focuses on the mechanisms of influence, rather than any single unit. Within the context of multilevel governance, member states and supranational institutions play a critical role, particularly in the high politics of institutional transformation. But studies of European Union policymaking must also consider the more mundane everyday shaping of regional governance—decisions that affect everything from the functioning of the internal market to the basic rights of its inhabitants.<sup>91</sup>

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90. See Farrell 2006; and Newman and Zysman 2006.

91. Anderson 1995.



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