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TRANSNATIONAL REGULATORY NETWORKS AS A SOLUTION TO THE COMMUNITY CREDIBILITY CRISIS? THE CASE OF THE EUROPEAN COMPETITION NETWORK

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Transnational Regulatory Networks as a Solution to the Community Credibility Crisis? The Case of the European Competition Network

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Abstract: This paper asks what role European regulatory networks can play in order to remedy the credibility crisis of Community regulation, as emphasised by scholars such as Giandomenico Majone. The focus is on the European Competition Network, set up to coordinate the decentralised enforcement of EU antitrust rules by national competition authorities. We ask whether this forum enhances the regulatory credibility of member-state governments and, by extension, Community regulation by creating a politically insulated forum contributing to coherent regulatory practices in the EU. The paper adapts credible commitment theory to the transnational context, and assesses the theoretical framework by comparing the autonomy of competition agencies in four European countries; Germany, The Netherlands, Norway and Sweden. The paper argues that the network may indeed be a solution to the Community credibility crisis, enhancing the autonomy of national competition regulators and thus the credible commitment of member-state governments in a transnational context.

Key words: Transgovernmental networks, credible commitment, regulatory agencies, multilevel regulation, European competition policy.

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Transnational Regulatory Networks as a Solution to the Community Credibility Crisis? The Case of the European Competition Network

The European Union (EU) is plagued by a governance dilemma; the increasing number of competences of the EU is not matched by an expansion of administrative capacity (Eberlein and Newmann 2008). In successive treaty reforms member-states have delegated lawmaking tasks in virtually all areas of economic and social life, most notably to the European Commission (Commission). However, member-states have been reluctant to allow the EU to expand its own administrative machinery to implement Community law at the level of the nation-state (Dehousse 1997). The lack of administrative capacity is seen as a serious impediment to the "regulatory credibility" of the EU (Majone 2000). Despite this, member state governments remain reserved towards expanding the administrative capacities of the Commission. To overcome this dilemma, the European approach to the credibility problems has been the establishment of transnational networks of regulatory authorities. Transnational regulatory networks (TRNs) bring together the expertise and regulatory capacities of the member-states. Working together in a network may result in the development of shared understanding of the regulatory gaps and problems within the policy domains regulatory authorities operate (Eberlein and Grande 2005; Egeberg 2006).

Majone (2000) has made the argument that because of their features, TRNs could become an important solution to the EU's problem of regulatory credibility. Majone's thesis is based on the expectation that TRNs fulfil three conditions that deem them fit as vehicles for solving this problem: a) mutual trust and cooperation between the national regulators, b) a high level of professionalization of the regulators, and c) a common regulatory philosophy. In other words, the basic idea behind Majone's expectation is that when national regulatory authorities start seeing themselves as part of a transnational network, they become more motivated to appropriate Community regulations and more committed to the proper implementation of Community regulation within their national jurisdiction. Majone's

hypothesis forms the starting point for the research presented in this paper. We ask: does the integration of national regulatory authorities within European regulatory networks (ERNs) increase the credible commitment of Community regulation?

The regulatory credibility of the EU and that of the European Commission specifically, we argue, depends on the preparedness of national governments to credibly commit themselves to the EU policies that are implemented by their national regulatory authorities. Although Community laws prescribe national governments to put arrangements in place to ensure the credibility of EU policies, for instance by prescribing the creation of competent authorities that are autonomous from the interests they regulate and shielded from political interventions, the Commission has no formal powers to impose precise requirements onto national governments. Hence the regulatory credibility of the EU is (partially, at least) dependent on the extent to which national regulatory authorities that execute EU regulatory policies function autonomously vis-à-vis their national political principals.

We will examine this question based on an analysis of the European Competition Network (ECN). When Majone's article was published, the area of competition policy came closest to the fulfilment of these conditions. Under the provisions of Regulation 17/1962 Directorate General IV (now DG Competition) acted as a coordinator vis-à-vis national competition authorities (NCAs). For this reason, Majone believed that this policy-area would be well underway to solve the credibility problem. He was in particular expecting much from the plans to modernise competition policy and the establishment of the ECN. The network was established between 1999 and 2004, being fully operative when Council Regulation 1/2003 on the decentralised enforcement of EU antitrust provisions went into force on May 1st 2004. As six years have passed, we have the possibility to go back to Majone's expectations and see to what extent the ECN has increased the credibility of Community regulation.

We will do this by examining the autonomy of NCAs vis-à-vis their parent ministries in three EU member states (Sweden, Germany and The Netherlands) and one EEA country (Norway). The classical test of credible commitment theory (CCT) is the presence of formally autonomous regulatory agencies. Here, formal autonomy is considered a sufficient signal of non-intervention in market rules that politicians of a

coalition in power can give to market actors. Our analysis also touches upon the de facto autonomy of NCAs vis-à-vis their parent ministries. The reason for not focusing on de jure autonomy alone is because, on the one hand, evidence thus far has shown that de jure autonomy cannot easily be equated to de facto autonomy (Yesilkagit and van Thiel 2008) and, on the other hand, because the examination of de facto autonomy says more about the actual decision-making capacities of competition authorities and the actual credibility of competition regulation than the sheer presence of formally autonomous NCAs.

The paper proceeds as follows. Section two discusses credible commitment theory and adapts it to the context of transnational governance within the EU. Section three presents our research design and elaborates on our case selection. Section five presents the empirical findings that are subsequently discussed in section six. The paper ends with a conclusion.

CREDIBLE COMMITMENT IN A TRANSGOVERNMENTAL REGULATORY SETTING: THE THEORETICAL ARGUMENT

Whereas in current political debates the regulatory credibility of the EU is at stake, the issue here is also to what extent CCT can be extended to address regulatory policymaking in multilevel governance architectures, as CCT has been developed and tested primarily in research on central banks and monetary policymaking. At the basis of this textbook CCT lies the fundamental debate between rules versus discretion (Majone 1996; Kydland & Prescott 1977). Should politicians make economic policies on the basis of pre-announced rules or should they tailor policies to current economic conditions? The outcome of this choice is believed to have profound implications for economic growth (North & Weingast 1989; Keefer & Stasavage 2003). The theory claims that politicians' withdrawal from (detailed) economic policymaking activities is beneficial to economic growth. Currently within the EU and OECD, CCT has become a prescriptive theory for the institutional design of regulatory administration (OECD 2003; Jordana & Levi-Faur 2004). Politicians find it difficult to credibly

commit themselves to policies. Since a complete withdrawal from economic policymaking is practically impossible, given the problem of time inconsistencies[1] (Shepsle 1991), politicians design institutional arrangements that raise the transaction cost of intervening.

The most important prescription is the establishment of autonomous regulators staffed by experts and professionals within the relevant field of regulation. Formal autonomy places a regulatory agency outside the hierarchy of the executive. Political principals are fended off by laws, stipulating that they should not intervene at least in the individual regulatory decisions taken by their regulatory agents. The professionals working within the agency, it is assumed, are guided only by their professional norms and the norms of evidence-based policymaking (Christensen 2010). In practice, however, the evidence that supports CCT is mixed. Gilardi (2002) found that the need for arrangements securing the credible commitment of politicians grew larger in economic regulation and that the number of veto players within a political decision-making context could function as an equivalent to the delegation of formal autonomy to autonomous regulatory agencies. Elgie & McMenamin (2005) found that the need for credible commitment, as indeed indicated by the delegation of formal autonomy to agencies, occurred more often in the case of regulatory agencies than in the case of non-regulatory agencies. They also found that politicians were more willing to credibly commit themselves to policies with a high degree of technical complexity. In contrast to Gilardi, they found no support for the latter's thesis that veto players could function as a functional equivalent to formal autonomy. Yesilkagit & Christensen (2010), finally, found neither a causal relation between economic regulation and veto players, on the one hand, nor delegation on the other hand, but found that administrative legacies and path dependency had more explanatory power than the credible commitment thesis.

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[1] Policies that may occur optimal at t0 may become suboptimal at t1. Politicians have short time horizons because of short electoral cycles. The temptation to renege on the terms of policies agreed upon at the beginning of their term may loom large by the advent of new elections and changing voter preferences. Also the technological, economic or social conditions that applied at t0 may have been changed in due course, necessitating a review of the initial policy preferences.

Given this mixed evidence it is difficult to see why the creation of networks of competent authorities would solve the problem of regulatory credibility. Regulatory policymaking within the EU is increasingly taking place at the transnational level between member states and EU institutions. The regulation of utilities, transport, privacy protection, financial markets and markets in general is part and parcel of the EU internal market. The implication of all this is that the average member state government not only has a limited scope of influence on the political and economic decisions of other member state governments or on supranational policymaking, but also on how these decisions in the end will affect market conditions within their own national jurisdiction (Majone 1996).

Within the transnational context of EU regulation, national governments are faced with a dilemma concerning their regulatory credibility as the EU setting puts member state politicians in potentially wicked situations. On the one hand, it is in the interest of member state governments to credibly commit themselves to EU regulatory policies as this will be in the interest of a well functioning and globally competitive EU market; on the other hand, member states are in regulatory competition with each other and tempted to breach their credibility in order to protect their "home" market actors from regulatory advantages that the market actors of other member states enjoy. From the perspective of textbook CCT, this means paradoxically that a breach of credible commitment by a collation in power may well be in the interest of the regulated (cf. Singer 2007).

We put the thesis of Majone to a test and examine to what extent ERNs do indeed increase the regulatory credibility of the member states and therewith the credibility of the EU. Next to the conditions that Majone has already specified one may expect that ERNs will overcome the credibility problem for three important functions they fulfil: information-sharing, harmonization and cross-national enforcement of regulatory policies (cf. Slaughter 2004).

First, ERNs have the potential to enhance the expertise of autonomous regulatory agencies as they facilitate the diffusion of knowledge and best practices in the area of regulation within which the ERNs operate. Information-sharing between national regulators may contribute to the quality of the decisions that autonomous agencies make. Second, ERNs may enhance the policy credibility of European

regulatory policies by facilitating the harmonization of Community law. One important function of ERNs is that they facilitate discussions between different national representatives on the most plausible and optimal reading of the (often) open norms contained by European directives. The setting of common standards and the issuing of European guidelines will enhance a level playing field, i.e. the same explanation of EU norms in every member state enhances the policy credibility of Community policies. Cross-border enforcement is perhaps the ultimate means of forging credible commitment: market actors observe competitors being judged by the same standards in another jurisdiction and absence of protectionism by the politicians ruling within that jurisdiction. In other words, to potential investors in the European markets the emergence of ERNs is a strong barrier against interventions by national governments in regulatory decision-making, and the decisions affecting the relevant market are being informed by predominantly EU concerns of creating a single market with a level playing field rather than the protectionist leaning of national governments[2].

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[2] Students of CCT, however, can retort to the argument above by claiming that there is no need for a transgovernmental network to enhance the credibility of MS politicians because, as CCT argues, the establishment of autonomous regulatory agencies is sufficient to guarantee MS politicians' policy credibility. Against the CCT argument that the establishment of an autonomous agency is a sufficient condition for credible commitment, we reply by referring to recent studies on bureaucratic autonomy. These studies found that a straightforward causal relationship between the formal or de jure and actual or de facto bureaucratic autonomy of formally autonomous agencies does not exist (Yesilkagit 2004; Maggetti 2009; Yesilkagit & Van Thiel 2008; Egeberg & Trondal 2009). Ipso facto, this implies that formally autonomous agencies may not be a sufficient condition for policy credibility and that market parties, knowing this, will not take their cues from the existence of formally autonomous agencies only. In conclusion, we argue that the importance of formal autonomy as a determinant of credible commitment may be overestimated in the light of the fact that in practice formal autonomy may have little value. At the same time, however, we cannot rule out on the basis of these studies that formal autonomy does matter for the degree of credible commitment. We therefore have to take into account in this study the estimated effects of formal autonomy on credible commitment as well.

RESEARCH DESIGN

The research goal in this paper is to examine the impact of ERNs on the degree of credible commitment of member state governments[3]. As long as governments do not intervene in the policies and decisions of the national regulatory authorities that are entrusted with the implementation of EU policies, they will not only remain credible in the eyes of market actors but also in the eyes of the Commission. In turn, then, this will enhance the regulatory credibility of the EU. The main expectation is that ERNs will increase the autonomy of national regulatory agencies vis-à-vis their national politicians. The level of policy credibility is measured in this study not only in terms of the de jure autonomy enjoyed by national regulatory agencies, as expressed in their formal institutional design, but also as regards the de facto dimension. With de facto autonomy we mean the degree to which the actual control, steering and accountability relationships between political principals and regulatory agencies deviate from the control, steering and accountability relationship that is laid down in formal statutes and laws that establish the agency and/or formally prescribe the rules of engagement between the principal and the agency. For the national political principal to be credible, the de facto autonomy of a regulatory agency needs to be equal to its de jure autonomy, at a minimum.

We have to account for the following potential research design problems. One potential problem might be that there is no case to be found where the ERN effect is absent within an EU (and EEA/EFTA) setting since all member states' regulatory agencies will be members of the ERN whose effects we aim to study (cf. Haverland 2006). Another problem is that of observational equivalence: given the fact that most countries have formally autonomous regulatory agencies (*inter alia* as this is often

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[3] As outlined above, our main theoretical framework is that of delegation theories, although we aware of the fact that this research question may also have well been approached by a Europeanization framework. The main reason for our choice of delegation theories (of credible commitment) is twofold. First we aim to extend delegation theory to address delegation and institutional within the multi-level setting of the European Union; second, we are primarily interested in the delegation behaviours of national politicians rather than in issues of transposition and compliance of European legislation.

prescribed by relevant EU directives) it may be problematic to isolate the estimated effects of membership in an ERN from the estimated effects of formal autonomy. Next to these problems that need to be addressed by our research design, we also need an ERN that fulfils all the functions that we described above. We need an ERN as a case that has extended policymaking and implementation powers.

Our design has overcome these problems by selecting the case of the implementation of European competition policy (ECP) in four countries (Germany, The Netherlands, Sweden and Norway). To fulfil the condition of a strong ERN, we selected the European Competition Network (ECN), established as part of the modernisation of ECP. The ECN manages the cooperation between NCAs and the Commission's DG Competition. Of all existing formal networks, the ECN is arguably the most centralised (Wilks 2005). It regulates information-sharing between NCAs and DG Competition, harmonises ECP and facilitates multilevel enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union[4]. The problem of "no variation" is addressed by a pre-post case study design (Jensen & Rodgers 2001). As noted earlier, ECP underwent a large-scale reform through the enactment of Council Regulation 1/2003 and the establishment of the ECN. The ERN effect will thus be studied by comparing the policy credibility, that is, the de facto ministry-agency relationships, before and after the enactment of Regulation 1/2003 in the four countries presented above. Norway was added to this case design as this country is not a member of the EU but affiliated to the internal market through the European Economic Agreement (EEA) Treaty. Norway's participation in the ECN is

[4] Articles 101 and 102 prohibit cartels and abuse of market dominance respectively. The regulation and the accompanying Commission notice (2004) on the network cooperation arrange for case allocation rules. The formal framework allows the Commission to lift cases opened by NCAs to be handled at the supranational level, and impose on NCAs the duty to exchange information between each other and the Commission. NCAs, more importantly, cannot overrule existing Commission decisions, and NCAs are relieved from their competences if the Commission initiates proceedings. The powers conferred upon the Commission and the NCAs put important cases of antitrust outside the competences of the national governments and, under particular conditions, also take them out of the hands of the NCAs and thereby entirely out of reach for the member states.

restricted, and the Norwegian regulator has access to information sharing for the purpose of general policy discussions only.

The problem of observational equivalence is addressed by the selection of countries not because of the presence or absence of an autonomous competition authority but on the basis of their varying modes of agency governance, i.e. different legacies for the organization and handling of ministry-agency relationships. We believe that the mode of agency governance is a better selection criterion than the presence or absence of an autonomous regulatory agency. Formal autonomy has different legal and organizational connotations in different countries such that an "autonomous agency" in The Netherlands is not necessarily directly comparable to an "autonomous agency" in Sweden. Added and related to this fact is that studies have shown that de jure autonomy cannot be equated to de facto autonomy, as discussed above. Given these considerations, then, Sweden, The Netherlands and Germany have formally autonomous competition authorities, but not Norway. However, each country's mode of agency governance is different from each other. Sweden's mode of agency governance has a centuries-long legacy and is characterised by the presence of credibility norms *avant la letter* (Lægreid & Pedersen 1999; Smullen 2007). Germany's mode of governance is embedded within strictly hierarchical command-response based *Rechtstaat*-norms (Bach 2008; Bach & Jann 2009). The Netherlands, like Sweden, has a legacy of autonomous agencies but this tradition is rooted in the consociational and pillarized nature of Dutch politics and administration, rather than credibility (Christensen & Yesilkagit 2006). Norway too has a long legacy of autonomous agencies, organized at arm's length from their political masters, but nevertheless under the nominal control of their parent ministries. In the following we will show how these various traditions of agency governance have fared with the networked competition regime established by Regulation 1/2003.

CREDIBLE COMMITMENT AND MULTILEVEL COMPETITION GOVERNANCE: EMPIRICAL OBSERVATIONS

This section presents our analysis on the basis of data from semi-official sources as well as from secondary sources, as found in published studies. We will a) provide a short introduction to the economic governance models characterising the countries we study and key features of the national competition regime, b) outline the formal-legal relationship between the competition regulator and political principals and c) point to potential effects on this relationship following the implementation of Regulation 1/2003. Based on the case presentations, we will then make some tentative inferences regarding the role of ERNs in enhancing politicians' credible commitment in a transgovernmental setting.

The Netherlands

Until the adoption of the 1998 Competition Law, which replaced the Law on Economic Competition, the Netherlands was considered a "cartel paradise" (de Jong 1990). Cartels were tolerated to the extent that firms did not abuse their agreements to aggressively drive out other competitors or harmed consumers. The competition regime was based on the abuse principle and fitted with the Dutch neo-corporatist style of economic governance. The 1998 competition act implied a shift towards the prohibition principle, thus adapting the Dutch framework to the European competition regime.

Competition policy falls within the portfolio of the Minister of Economic Affairs. Whereas the implementation of the old competition act was entrusted to the Minister of Economic Affairs, the 1998 competition act saw the creation of the Dutch Competition Authority, *Nederlandse Mededingingsautoriteit* (NMa). Initially, the NMa was a Directorate-General within the Ministry of Economic Affairs and headed by a director general. Within this framework, the minister was fully responsible for the decisions of the NMa and enjoyed the authority not only to issue guidelines to the NMa on how the authority should interpret or enforce the competition law, but also

retained the right to intervene in politically salient decisions. It was assumed that these ministerial prerogatives were necessary, as the NMa was a new authority enforcing a new legislation and thus in need of political guidance as regards the application and interpretation of the law (van de Gronden and de Vries 2006). In 2005, the NMa became an autonomous administrative authority and the director general's post was replaced by a three-person board including a president. The board became the autonomous part of the body, while the staff remained civil servants of the ministry. The board has the power to give instructions to both of the NMa's investigative sections (anti-trust and concentrations departments) as well as the legal department entrusted with the adjudication of individual cases. The power of the minister to intervene in individual cases was abolished when the new structure was introduced in 2005, but the minister retained the initial power to instruct the board on how it should take account of other interests than economic ones.

The influence of DG Competition on the NMa can be measured at several levels. EU influence is exerted, at one level, through the ECN and the application of EU competition law in relation to national competition law, on the other level. As regards the first dimension, the NMa has participated in EU-level meetings ever since its creation in 1998. Since 2004 it has participated in various meetings in the ECN and cooperates closely with sister-agencies in other EU member states on the enforcement of EU competition rules. Following the yearly reports we can also establish that the NMa has participated in several advisory committees related to mergers as well as antitrust cases (NMa 1998, 2005). Under Regulation 1/2003, the NMa is fully subjected to the competition *acquis* and the procedures stipulated in the Commission Notice on cooperation within the network (2004) as well as the regulation itself. The NMa has interpreted and applied the national competition law with regard to European competition rules, which follows naturally from the obligation to contribute to harmonised enforcement practices as well as the supremacy of EU competition laws over national regulations (cf. Wilks 2005).

The NMa however also seems to have increasingly adapted its regulatory *priorities* vis-à-vis the European standard when putting competition rules into practice, i.e. by making use of its leeway in developing guidelines and notices with regards to how competition rules will be employed in practice, and has pushed

competition into new territories. In this regard, Yesilkagit (2007) found that the NMa has acted straightforward in declaring competition law applicable to all sectors where organizations – public or private – are employing economic activities. This has meant that the typical Dutch third sector areas – i.e. social housing corporations, health care delivery etc. – have been declared eligible for competition tests. In contrast to the German cartel authority, as we shall see below, the NMa has not softened the rules for medium-sized firms. Instead, the NMa has quite radically applied European competition rules in a system that has long been dominated by neo-corporatist and consensual modes of state-business and intra-business relationships, i.e. aligning its regulatory priorities vis-à-vis a distinct European version of economic liberalism, as championed by the Commission (cf. Buch-Hansen & Wigger 2010). This has arguably made the NMa's practices more salient, as recent developments in the ministry-agency relationship seem to suggest.

In a speech delivered by the Minister of Economic Affairs (interestingly, on the occasion of the NMa's tenth anniversary), the minister hinted at the possibility of curbing the autonomy of the NMa to issue guidelines in which the authority states how it will implement the provisions of the competition law. Three scenarios were sketched: 1) the NMa would draft guidelines and submit these for approval to the minister, 2) the ministry would draft the guidelines for the NMa, and, finally, 3) the competition act would be made more specific (Minister of Economic Affairs 2008). The scenarios were actually a reaction of the then Minister of Economic Affairs, Mrs. M. Van der Hoeven, against the decision to impose lower tariffs on the national gas company. The minister was displeased by the decision, which she considered to be against the general economic interests of The Netherlands. The first of these scenarios found its way into an amendment of the "relations protocol" in the Dutch competition act, explicating the relationship between the NMa and the Ministry of Economic Affairs (Staatscourant 12076, 29th July 2010). Article 13 of the Protocol states that the NMa must submit its draft executive decisions to the minister for approval. This intervention of the minister is a clear breach in the system of the ECN and it shows that national politicians nurture the ambition to be able to intervene as "deep down" as possible in the regulatory decision-making process of their national regulatory authorities.

Germany

The centralised system of notification and ex ante sanctioning of behaviour on the common market introduced by Council Regulation 17/1962 was largely modelled upon the German competition regime. Consequently, German experiences shaped the substance of early European competition policy and its evolution thereafter to a large extent. Nevertheless, German authorities have managed to uphold a genuine German approach to competition policy, characterised by being tailored to German practices (Eyre & Lodge 2000; van de Gronde & de Vries 2006). The ordo-liberal regulatory framework has thus been retained in German competition regulations, and the German competition law contains clauses that privilege small- and medium-sized enterprises (SMEs); i.e. the backbones of the German economy (Eyre & Lodge 2000).

Competition policy in Germany falls within the portfolio of the Minister of Economic Affairs, but it is administered by one of the oldest competition authorities in Europe, the *Bundeskartellamt* (BkartA), established in 1958. The BkartA has an autonomous status that is anchored by law. The president of the BkartA does not serve a fixed term, and it has its own staff and budget. What is more, the BkartA was located in Berlin when the German government resided in Bonn and after the German government moved its proceedings to Berlin, the BkartA moved to Bonn. Consequently, a geographical distance underscores the autonomy of the BkartA (OECD 2004). The minister has no authority, and it never had, to intervene in individual cases of the BkartA. It is however acknowledged that the minister may give instructions to the BkartA, but the minister has rarely made use of its prerogatives and if (s)he should do so, this would be considered highly inappropriate (OECD 2004; van de Gronden & de Vries 2006). Moreover, the German competition law allows the minister to authorise concentrations that has been disapproved by the BkartA, as was done in the *Ruhrgas* case.

Regarding the relationship between the BkartA and the European competition regime, the decentralisation of EU competition enforcement implied increased pressures to revise the German competition regime, adding to the challenges that had already been brought onto the established model of economic governance by the

unification of West and East Germany, increasing unemployment rates and subsequent deadlock in the relationship between the state and social partners. Key market actors, first and foremost the peak organizations of German enterprises were in favour of making the German competition law more in line with the EU provisions. The government initially opposed such a development as it would be harmful for the fabric of the German market model, emphasising a key role for SMEs, considering the EU rules to be too lenient. Whereas Regulation 1/2003 has led to adaptations in the competition legislation, the German regime has nevertheless retained special provisions securing the role of SMEs in the German economy (van de Gronde & de Vries 2006: 42).

One particular change that has been brought on by Regulation 1/2003 is the abolishment of the former provision in the German competition act which allowed the responsible minister to issue special authorizations (*Sondererlaubnissen*) to approve horizontal agreements that ran contrary to German law. These provisions were only supposed to be used for the upholding of the German economic regime in general, and the public interest. After this provision has been abolished, there have been some debates in the German competition law community as to whether such a power should indeed be permissible. It has been argued that, under specific conditions, it would be conceivable that the minister should be able to intervene in the individual cases handled by the BkartA, as long as instructions would not run contrary to the law. Nevertheless, the BkartA's formal autonomy gives it the possibility to neglect such instructions. Others, however, oppose the idea that the Minister should be able to give instructions to the BkartA individual cases on the ground that it would be highly contrary to the quasi-judicial structure of regulatory decision-making within the BkartA (van de Gronde & de Vries 2006: 48). Looking at the internal structure of the BkartA, it is easy to see why.

The BkartA features decision-making arenas within the organization that is even autonomous from the president of the authority, which takes decisions on behalf of the BkartA (OECD 2004: 22). The BkartA thus nurtures a strong organizational culture of regulatory autonomy, displayed not only by its formal status and decisively legal-adjudicative approach to regulatory decision-making which guarantees it immunity from political intervention, but also because of its personnel training

policies and socialisation practices (OECD 2004: 28). The BkartA has therefore over the years developed an autonomous position towards incumbent governments operating within a context embedded in a strong anti-cartel economic culture, sustained and possibly reinforced by the legalist paradigm characterising the German administration. For these reasons, the BkartA has been regarded as a key player in the ECN, as its accumulated experience with the EU competition regime combined with its general organizational self-esteem and strong level of autonomy would make it less susceptible for pressures from other networks actors, such as DG Competition (cf. Wilks 2005).

Sweden

Sweden's mode of economic governance has traditionally been linked to a strong state tradition, and it has a long history of corporatism (cf. Arter 1999). Sweden's traditional approach to competition policy was based on an abuse-based competition regime (Bue 2000). When Swedish politicians begun preparing Sweden's membership in the EU/EEA, a new competition act was put in place which more or less copied the competition prohibitions in the European competition regime (Bue 2000; Jacobsson & Sundström 2006)). The competition act has further been amended since, the latest from 2008, continuing the process of harmonisation towards the EU competition regime.

Competition policy in Sweden falls under the dossier of the Ministry of Enterprise, Energy and Communications (*Näringsdepartementet*) while the key operative actor is the Swedish Competition Authority (*Konkurrensverket*, KKV), established in 1992. The relationship between Swedish ministries and central agencies cannot be fully understood without taking into account the relevance of administrative legacies. The ministerial organizations are fairly small compared to their subordinate agencies, and extensive decision-making powers are delegated downwards to the central agencies (Jacobsson & Sundström 2009: 104). The Swedish mode of agency governance is that of political-administrative dualism (Lægreid & Pedersen 1999). This principle, which has been practiced since the 17th century and constitutionally protected since the 19th century (Smullen 2007), is based on the assumption that

politics and administration should be strictly separated. Ministerial steering of central agencies is as such formally prohibited and it is the government as a collective, not the individual cabinet minister, who is responsible for the proceedings of the central agencies (Lægreid & Pedersen 1999; Smullen 2007). When the agency takes decisions in individual cases, is shall apply the law independently and political interference is thus strictly prohibited (Smullen 2007). The implications of political-administrative dualism with regards to the relationship between the KKV and its political principal is that the ministry is formally responsible for all legislative matters while KKV enforces the competition act autonomously (Sundström 2000).

Within the context of political-administrative dualism, the general ministerial steering of central agencies in Sweden has in recent years come to rely extensively on New Public Management (NPM) oriented management techniques, such as the annual steering letters prepared as part of the budget-process (Jacobsson & Sundström 2009). However, research indicates that the formal steering framework and indeed the underlying principle of political-administrative dualism may have been challenged by the need to coordinate Swedish positions vis-à-vis the EU (Jacobsson & Sundström 2006; Jacobsson et al 2004)[5]. In the competition area this feature is illustrated by Sundström's (2000) analysis of the relationship between the KKV and its parent ministry regarding participation in advisory committees under DG Competition. The ministry would in some instances send its own officials to participate alongside agency-officials, regardless of whether the meetings involved legislative issues or discussions of individual cases, depending on the level of political salience

[5] That being said, Jacobsson (1984) found that politicians would steer central agencies indirectly by organizing decision-making processes and deciding upon what actors would deal with a certain issue. Depending on the salience of the issues at hand, and the available capacity in the ministries to handle them, issues were routinely lifted up to, and hived off from, the political level (Jacobsson 1984 in Sundström & Jacobsson 2007). Thus, the concept of dualism and how it materialises itself in actual political-administrative relations has been an enduring theme in the history of the Swedish administration (see Andersson 2006).

surrounding the issues being handled[6]. At the same time, however, the division of labour implied by the dualist framework also appeared robust. As Sundström & Jacobsson (2007) elaborate on the basis of Sundström's (2000) analysis, politicians refrained from controlling KKV-officials in the advisory groups as "the credibility of the agency would increase if politicians were kept at a distance – and increased credibility also meant increased possibilities to influence issues handled by EU's competition committees" (Sundström & Jacobsson 2007: 22). Following the enactment of Regulation 1/2003, moreover, we hypothesise that the importance of administrative legacy has been reinforced as regards the KKV's EU-related responsibilities.

The KKV is significantly embedded into the EU competition policy machinery and it is an active participant in the numerous working group meetings taking place within the ECN structure as well as the enforcement of individual cases involving EU competition rules (Swedish Competition Authority 2010). Regulation 1/2003 arguably reinforces the strict division of labour implied by the dualist legacy by making EU competition provisions "law of the land" for the KKV, thus consolidating the political insulation of the enforcement-side of the authority's EU-related proceedings. To this extent, we suggest that the regulatory autonomy of the KKV has been both consolidated and reinforced by its European embedding. However, we must acknowledge the potential disentanglement problem involved when making such an assertion valid for a "robust agency with a clear identity" with an approach to competition policy "including not only law enforcement but also advocacy for pro-competitive reform, action to strengthen the competition culture and an active dialogue with and support to academic research" (OECD 2007: 6). Nevertheless, the peculiarities of the Swedish administrative model combined with the new responsibilities emanating from Regulation 1/2003 suggests that it is possible to give consent to the assertion that the Swedish competition regulator "is now equally part of

[6] This involved three separate advisory committees that were set up to administer antitrust in the transport area where each member-state had the opportunity of sending two representatives (Sundström 2000: 47). In the general Article 81/82 advisory committee, however, the strict separation between the two levels appeared robust.

the EU administration as the Swedish, or maybe more" (Jacobsson & Sundström 2006: 92 (authors' translation)).

Norway

Like Sweden, Norway has traditionally been characterised by a strong state presence in the economy (Christensen 2004). Norway's traditional competition regime was based on price-regulation and whereas Sweden harmonised the legal framework towards the EU model, Norway's first designated competition act (of 1993) was largely based on the abuse-principle. The 1993 competition act would exist in parallel with the prohibition-based EEA-competition act, which came in place as part of the EEA-agreement (Bue 2000). A prohibition-based (i.e. EU harmonised) competition act was not put in place until 2004.

Competition policy in Norway falls within the dossier of the Ministry of Government Administration and Reform (*Fornyings- administrasjon og kirkedepartementet*), and the operative enforcer is the Norwegian Competition Authority (*Konkurransetilsynet*, KT), established in 1994. The relationship between ministries and agencies in Norway also has a historical component. Whereas, like Sweden, Norway has a long tradition of delegating specific tasks to (semi)independent central agencies (*direktorater*) organized outside the ministerial structure, the individual resort ministers have always been accountable for their proceedings and have traditionally therefore enjoyed the possibility to intervene in the activities of their subordinate central agencies (cf. Lægreid & Pedersen 1999). In 2003, the centre-right Bondevik-II government proposed a reform of regulatory agencies. The reform, which was only partly realised due to its high level of political salience, implied both structural devolution and physical relocation of several regulatory agencies (Christensen & Lægreid 2010). Concerning the first dimension, the reform proposed to narrow the scope of political intervention vis-à-vis regulatory agencies as well as instigating autonomous boards of appeal for several of these agencies. After a political compromise, physical relocation was implemented but no autonomous boards of appeal were established and the limitations on political

intervention were not made applicable for all regulatory agencies, as originally proposed (Christensen & Lægreid 2010: 262).

When the 2004 competition act was prepared, the political compromise involved in the agency-reform implied that no autonomous boards of appeal would be established and the government could only mobilise support for removing the possibility of giving political instructions in the treatment of individual cases if provisions were built into the act which would provide the government, as a collective, the possibility of overturning decisions taken by the KT in particularly important cases. Under the 2004 competition act, decisions taken by the KT can be appealed to the ministry, but the ministry cannot instruct the KT on its treatment of individual cases. The government is entitled to grant exemptions from the competition rules in cases of principal or societal importance, and the competition act was furthermore amended in 2008 to allow the government to annul merger-decisions taken by the KT on the aforementioned grounds without a prior appeal (Grønlie & Flo 2009: 346). In general, the ministerial steering of the KT takes place through annual steering letters and it enjoys a substantial level of autonomy in its handling of antitrust cases although, as noted, this autonomy has not been uncontested.

From a formal-legal point of view, the Norwegian competition regime is only partly embedded into the EU regime. Whereas a key rationale behind the EU-harmonisation of the national competition act was the perceived opportunity to participate in the (then pending) decentralised enforcement of EU competition rules – also visible in the fact that the KT was given competence to enforce the EEA competition rules – this was resisted by the Commission (Lægreid & Stenby 2010). Norway's participation in the ECN is therefore restricted to the general policy-discussions taking place in the forum. The ministry-agency relationship with regards to the ECN is regulated by a 2008 "cooperation notice" which delegates the bulk of ECN-related activities to the KT under the nominal control of the parent ministry (Solstad 2009). The KT has emerged as a quite active network-participant and is present in several meetings in the ECN structure as well as participating alongside the ministry in the advisory committees (Lægreid & Stenby 2010).

Norway's EEA-affiliation restricts access to the network. Moreover, as it is an explicit political goal that the application of Norwegian competition rules should be in

accordance with EU practices, having access to the numerous discussions taking place within the network is imperative in order to achieve this goal (cf. Lægreid & Stenby 2010). However, as the ECN is increasingly becoming an arena where new substantive policies are being discussed (Kassim & Wright 2010), KT's access to the network is a particularly important channel for seeking influence in the policy-area. As KT's European participation is an EEA-related matter, the ministry retains the right to give instructions and will do so in particular when discussions implying legislative issues develop within the network (Lægreid & Stenby 2010). From a formal-legal point of view the KT is therefore less autonomous in EEA-related matters than in matters concerning the application of the national competition law (Solstad 2009). However, access to the network has not been uncontested and from a theoretical point of view we might assert that as the network becomes an increasingly important arena for seeking influence over substantive policies, untimely ministerial steering of the KT's general network-participation might be counterproductive. Seeing as competition policy is an expert-dense policy-area where influence may be highly correlated with professional credibility (cf. Sundström & Jacobsson 2007), this assertion seems plausible. In practice, therefore, we hypothesise that the restricted participation rights in the network might make the ministry somewhat cautious of how control is exerted, and that the de facto autonomy of the KT within the ECN might be substantially higher than the legal framework surrounding its EU-related activities suggests.

DISCUSSION

Based on our case presentations, the pertinent question is how member-states' credible commitment has been extended and strengthened by the emergence of the ECN. We have discussed both the formal relationships between NCAs and their parent ministries, but also touched upon how these relationships may function in practice, within the context of the ECN in order to shed some light over this question. We will suggest the following inferences.

First of all, when an administrative model favouring minimal levels of political influence is absent domestically, ERNs can play an important positive role in

extending credible commitment above the nation-state. This is highly consistent with the Dutch case, whose experience of autonomous agencies reflects a more pragmatic reform line within a neo-corporatist economy and within a political-institutional culture characterised by a need to accommodate different religious and societal cleavages. The classical CCT argument does not account for the initial creation of Dutch agencies, and the NMa was only gradually and stepwise delegated more formal autonomy. Dutch politicians have generally been reluctant to allow the NMa to act fully autonomously, due to the fact that autonomous expertise-run bureaucracies do not fit the Dutch public administrative legacy. The forging of autonomy has been largely up to the NMa itself and Regulation 1/2003 has been an important vehicle for the NMa to gain autonomy from the ministry and thus for the credibility of Dutch politicians, as autonomy by itself is not uncontested and has to some extent even been curbed in recent amendments to the competition act. However, credible commitment remains a challenge to the Dutch political executive as the case of the clash between the NMa and the minister regarding the gas corporation showed. The ministerial intervention shows that Dutch politicians are intent upon curbing formal autonomy when issues are politically salient, i.e. when the NMa take decisions that counter the interests of the national champions.

The Swedish case illustrates that ERNs may serve to consolidate and reinforce already high levels of regulatory autonomy present at the domestic level. Regulation 1/2003 has arguably strengthened the autonomy of the Swedish regulator and it has done so by connecting to and reinforcing the underlying principle governing the relationship between the KKV and its political principal. Credible commitment, as such, is strengthened through the ECN as the KKV is both de jure and de facto autonomous and its autonomy is moreover supported by a strong professional culture.

The German competition regulator has emerged in a political-administrative context traditionally characterised by a strong *Rechtstaat* tradition with a command-and-control based mode of governance. However, the BKartA was an autonomous agency when the EU competition regime was established, and its de jure and de facto autonomy was consolidated several decades before the enactment of Regulation 1/2003. The real effect of Regulation 1/2003 is arguably visible in the need to adapt the ordo-liberal regulatory paradigm, emphasising the protection of small- and

medium-sized enterprises, to the neo-liberal regulatory framework that, it is argued, has been reinforced following the modernisation project (cf. Buch-Hansen & Wigger 2010). The autonomy of the BkartA has served to enhance German politicians' credibility in the eyes of these sectors of the economy. However, the challenge is to broaden the credible commitment of subsequent German governments in the eyes of all economic actors, large and small. Consequently, the credibility of the German government is based on the capacity of the BKartA to adapt to the new European regime. Comparing the Dutch and German case, we can suggest that both regulators are to raise their politicians' credibility by adapting and opening themselves for the ECN. In the Dutch case this is a necessity to ensure an autonomous position vis-à-vis the minister, and in the German case non-adaptation is more likely associated with credibility losses for the German economy.

Turning to the Norwegian case, a different picture emerges. The traditional mode of agency governance has been closely linked to the strong state tradition and political steering of agencies has been in line with the executive prerogative. As an EEA-member, the push from Brussels may have been weaker, explaining the late adaptation to the EU model. When faced with the possibility of participating in the decentralised enforcement of EEA competition rules, however, the Norwegian government acted swiftly to adapt to the EU model but its efforts was somewhat hampered by the Commission's decision to restrict the KT's participation in the network to general policy-discussions. Seeing as the KT's network participation is an EEA-related matter, the ministry retains the right to give instructions. However, as the ECN is primarily a forum for competition enforcers and not their parent ministries, combined with the fact that influence in the policy-area seems to be highly correlated with professional credibility (cf. Sundström & Jacobsson 2007), we suggest that in practice the ministry may be somewhat cautious of how it exerts political control over the agency. Consequently, we suggest that the de facto autonomy of the KT may have been strengthened following Regulation 1/2003, contributing to a similar but arguably unintended strengthening of credibility also in the Norwegian case. Table 1 below summarises our findings.

Table 1: Comparative overview of empirical findings

	Sweden	**Netherlands**	**Germany**	**Norway**
Mode of agency governance	-Political-administrative dualism, constitutionally protected -Cabinet is collectively responsible, not the individual minister - Ministerial steering prohibited	-Legacy dates back to late 19th, early 20th century -Functional decentralization rooted in pillarization consociationalism - Individual ministerial responsibility with limited intervention powers	-Rechtsstaat, hierarchical and command-response modes of steering and control -Individual ministerial responsibility with extensive powers to intervene	- Long tradition of agencies organizationally separated from ministerial organizations - Individual ministers accountable for regulatory agencies, but limitations on intervention powers - Government can overrule agency decisions
Competition authority	Konkurrensverket	Nederlandse Mededingingsautoriteit	Bundeskartellamt	Konkurransetilsynet
Year of establishment	1992	1998	1958	1994
Formal autonomy	Yes	Yes, but only since 2005, until then part of Ministry of Economic Affairs	Yes, since 1958	No, formally subordinated to Ministry of Government Administration and Reform
Antitrust policy legacy	Abuse system, prior to 1992 Competition Law	Abuse system, prior to 1998 Competition Law	Ordo-liberal, stood model to Regulation 1/67, initial ECP	Largely abuse-based prior to 2004 competition act which harmonised the Norwegian regime vis-à-vis the EU/EEA competition rules
Member of EU	Accession in 1995	Founding member EU	Founding member EU	No, EEA-member since 1994
Possible effects of Regulation 1/2003	Consolidating agency autonomy, supported by strong autonomous culture	Extending credibility by strengthening the regulator's autonomy	Credible commitment in the long run dependent on ability to adapt to new policies	Strengthening of de facto agency autonomy, extending credibility as unintended side-effect of associated ECN-membership

CONCLUSION

To what extent can we uphold Majone's thesis that transnational regulatory networks are capable of solving the EU's credibility problems? Our analysis suggests that ERNs indeed have the potential of increasing the credibility of political principals, but it is not a sufficient condition. Time inconsistency still applies when it comes to issues of high political salience: politicians will breach their credibility by overruling or by enabling the overruling of such decisions in the future. Nevertheless, time inconsistencies can be overcome in countries where an established mode of agency governance exists where non-intervention is the norm, exemplified by the Swedish case. Formal autonomy, then, needs to be accompanied by a culture of granting autonomy to experts, and is thus dependent on governments' trust in the viability of autonomous expertise.

In the light of CCT, we make an important observation that downplays one of the central tenets of the framework. Creating autonomous agencies through administrative design is a necessary, but not sufficient, condition for de facto autonomy and thus credible commitment. CCT, as we show, attaches too large weight on formal autonomy as a prerequisite for credible commitment. Moreover, policy legacies emerge as another determinant of policy credibility, further challenging some basic assumptions of CCT. The German case is illustrative in this regard. As was neither predicted by CCT, nor hypothesised by us, the level of credible commitment of politicians to a new policy paradigm is furthermore dependent on the capability of the autonomous agency to change the modes and practices that are based on the existing policy legacy towards the new one. Linked to this is a more theoretically relevant finding that goes beyond CCT and warrants further attention from the general literature on Europeanization, namely that ERNs may lead to an increase in de facto agency autonomy which is not linked to formal-legal frameworks and which may run contrary to governments' initial organizational preferences.

Networks may offer an additional source of legitimacy for agencies whose autonomy may be contested among domestic constituents. Moreover, transgovernmental imperatives may be hard to disregard for national governments as their influence over the future development of the EU competition regime may

ultimately depend on their ability to demonstrate credible commitment to their respective competition regulator's de facto autonomy, thus representing a powerful buffer against political attempts at curbing their operational autonomy. In the case of the ECN, then, we may draw the additional conclusion that public administration policies, implying role-specification and organizational specialisation, are no longer part of the national executive prerogative, but are increasingly scripted by transnational imperatives of regulatory governance that are both channelled and sustained through ERNs.

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