

HOW TO FORMALIZE TRANSNATIONAL NETWORKS – AND WHY

Rainer NICKEL

The 21st century started with fresh enthusiasm about a new global legal order that transcends both national borders and the worn-out paths of international law. Anne-Marie Slaughter, in her analysis of this phenomenon with the programmatic title “A New World Order” (2004), hailed the idea of knowledge and information networks of public officials as the locus of transnational co-operation and transnational law production. Also in the non-governmental (or hybrid) realm of transnational regulation the practice of “networked governance” has become a powerful social reality: In their impressive work on “Global Business Regulation”, Braithwaite and Drahos (2000) demonstrated that the globalization of trade has led to a globalization of business regulation on an unprecedented scale. Absent a global government or legislator, these rules are products of *transnational* regulatory structures, but they constantly influence or even determine legal rules and decisions on the *national/local* level. Many of these structures are organized as non-hierarchical networks of public, hybrid, or private entities that form regulatory regimes in a myriad of areas and on a myriad of issues. These new and powerful structures are certainly not universally welcomed; critics of the new world order, such as the No Global and Attac movements, portray it as a kind of neo-imperialism, as an agent of neo-liberalism, and as a threat to democratic self-government.

Notwithstanding their opposite judgment on the merits of transnational regulatory networks, both proponents and critics alike share the same analytical insight: that we can observe emerging structures of decision-making, information-sharing, and law-making that escape the formalized and traditional patterns of international (treaty) law. This contribution will use two important examples in order to illustrate the growing influence of regulatory networks: The first is the proliferation of the US GAAP, the “generally accepted accounting principles”, in national accounting law, and the second is the pilot retirement recommendations of the Joint Aviation Authorities (JAA) and their influence on national legislation.

Transnational regulations are neither (public or private) international laws, nor are they self-executing rules in the classical sense. Transnational regulatory networks lack the authority to establish binding law, and they are often under-formalized: The rules of membership are unclear, the rules of procedure are often vague, there are no internal legal means to challenge the results, and the networks have no means to impose their regulations on other actors. In other words, the networks function “in the shadow of the law”, but their products, such as recommendations and standards, are very influential and have even become a major part of domestic rule-making. This manifest reality raises two major questions: How to square transnational networks with the democratic promise (equal participation of citizens) and the promise of the fundamental principle of law (equal application of formally generated rules)? I will use the example of the EU and the genesis of its regulatory networks in order to suggest a tentative answer to these questions.