



LARGER AND MORE LAW ABIDING?

THE IMPACT OF ENLARGEMENT ON COMPLIANCE IN THE EUROPEAN UNION

Tanja A. Börzel and Ulrich Sedelmeier

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Tanja A. Börzel and Ulrich Sedelmeier

Abstract

Research on European integration tends to assume that a larger membership weakens the legal system of the European Union (EU) through growing non-compliance with EU law. The main compliance theories expect this negative impact to be particularly salient if enlargement adds new members that are big, poor, Eurosceptic, or have inefficient bureaucracies. Against these expectations, this paper shows that enlargement has not led to a deterioration of compliance in the larger EU. In three of the EU's four enlargement rounds, the new member states comply better with EU law than the old member states. Only the Southern enlargement of the 1980s led to a substantial increase in non-compliance. Particularly surprising for the main theories of compliance is the good compliance of the post-communist new member states in the Eastern enlargement in the mid-2000s and the variation between the Southern and Eastern enlargement. This paper suggests that the use of pre-accession conditionality for the Eastern enlargement explains why these new members perform better than their Southern counterparts despite equally unfavourable country-level characteristics, such as low administrative capacities and high costs of compliance with EU law.

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1. Introduction

Research on European integration tends to identify a tension between the widening and the deepening of the European Union (EU). A larger membership is likely to increase the diversity of member state preferences. Such increased heterogeneity might not only manifest itself in greater difficulties to agree on common policies. It may also weaken the EU's legal system through growing non-compliance if (new) member states are unwilling to implement legislation that does not reflect their preferences sufficiently.

Against these expectations, enlargement has not led to a deterioration of compliance with EU law in the larger EU. This paper shows that in three of the EU's four enlargement rounds, the new member states comply better with EU law than the old member states. The Southern enlargement round in the first half of the 1980s is the only one that led to a substantial increase in non-compliance.

None of the main approaches to compliance is able to fully explain the compliance patterns across the four enlargement rounds. Particularly surprising is the good compliance of the post-communist new member states in the Eastern enlargement in the mid-2000s and the variation between the Southern and Eastern enlargement. This paper suggests that not 'newness' as such induces good compliance. Instead, we argue that the use of pre-accession conditionality towards the post-communist Central and Eastern European (CEE) members explains why they perform better than their Southern counterparts despite equally unfavourable country-level characteristics, such as low administrative capacities and high adjustment costs.

In order to establish our argument, the paper proceeds in four steps. First, we set out the contrasting expectations of three main approaches to compliance for the four enlargement rounds. Second, we present the empirical evidence of how these enlargement rounds have affected non-compliance. Infringement data show that the Southern enlargement is the only round in which the new members' compliance rates were inferior to those of the old members. This differential effect of enlargement on non-compliance contradicts the expectations of all three compliance approaches. Neither the administrative capacity of new members, nor their power of recalcitrance, nor wealth-related compliance costs, nor the perceived legitimacy of the EU varies across the four rounds according to their effect on non-compliance. The findings are particularly puzzling with regards to the variation between the Southern and the Eastern enlargement. The third section of the paper dismisses alternative explanations that suggest that compliance in the Eastern new members is not actually as good as we claim. We demonstrate that the good performance of the Eastern enlargement round is not simply a temporary 'newness effect'. While the EU tends to grant a 'period of grace', the compliance patterns over the first ten years of membership generally appear to remain stable afterwards. Nor is their good record the result of more generous transition periods and (temporary) exemptions for the Eastern new members. The paper then discusses how our findings on the general good compliance of the new CEE members compares with evidence presented in the literature on the poor application and enforcement of EU law in these countries. The decoupling of good formal transposition of EU directives into national law from their practical implementation on the ground is a problem, but one that is not exclusive to the CEE member states (Zhelyazkova 2016).

Having dismissed alternative explanations for the puzzling variation across enlargement rounds, in the fourth section we conduct a systematic regression analysis of compliance of all states that joined the EU during their first ten years of membership. Since the good performance of the new members in the Eastern enlargement seems most difficult to reconcile with the expectations of the compliance literature, we test for the effect of pre-accession conditionality on compliance in the new members. The analysis provides evidence that conditionality has a positive impact on compliance.

The paper concludes with a summary of its major findings and a brief discussion of their implications for future enlargement(s). We suggest that against many expectations enlargement had generally a positive impact on compliance with EU law. However, such a positive impact cannot be taken for granted. Especially if the conditions for compliance in new member states are unfavourable – as they generally are in most of the current and potential candidates in the EU’s accession queue in view of their low administrative capacities and wealth-related high compliance costs – conditionality plays an important role to ensure that compliance does not suffer after accession.

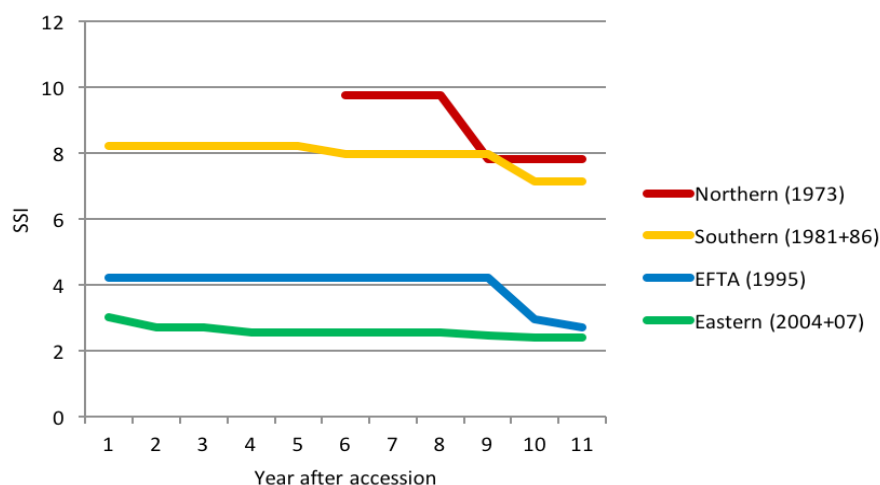
2. Enforcement, management and legitimacy – theoretical expectations on the relationship between enlargement and compliance

The literature features three prominent approaches to explain non-compliance with international and EU law (cf. Börzel et al. 2010; Checkel 2001; Tallberg 2002). Enforcement approaches to compliance with international law focus on governments’ deliberate decisions not to comply in order to avoid the costs of compliance (Fearon 1998). This is precisely the mechanism underpinning the hypothesis that greater preference diversity through enlargement leads to an increase in non-compliance. A key source of preference diversity and related costs of compliance is wealth: richer states with more demanding regulatory standards generally face lower costs in adjusting to EU legislation than poorer states. Enforcement approaches specifically pinpoint the size of a member state as a key factor that determines their power to resist compliance (Börzel et al. 2010): big member states whose votes are more important in EU decision-making can afford to care less about the reputational damage associated with non-compliance.

Most of the countries that have joined the EU are small, although each enlargement round, with the exception of the EFTA¹ enlargement in 1995, also included at least one larger member state. In view of the differences in state power across the various rounds (see Figure 1 below), power-based enforcement approaches would expect non-compliance to be particularly problematic in the Northern enlargement of 1973 (that included the UK) and the Southern enlargement (with Spain). Conversely, compliance would be less problematic in the Eastern enlargement (although it included Poland, it did so alongside 11 smaller states) and especially for the EFTA enlargement (that only included small states). With regard to differences in compliance costs, a focus on wealth (see Figure 2 below) would lead us to expect fewer problems especially with regard to the EFTA enlargement, but also the Northern enlargement, and more problems with the Southern and Eastern enlargement.

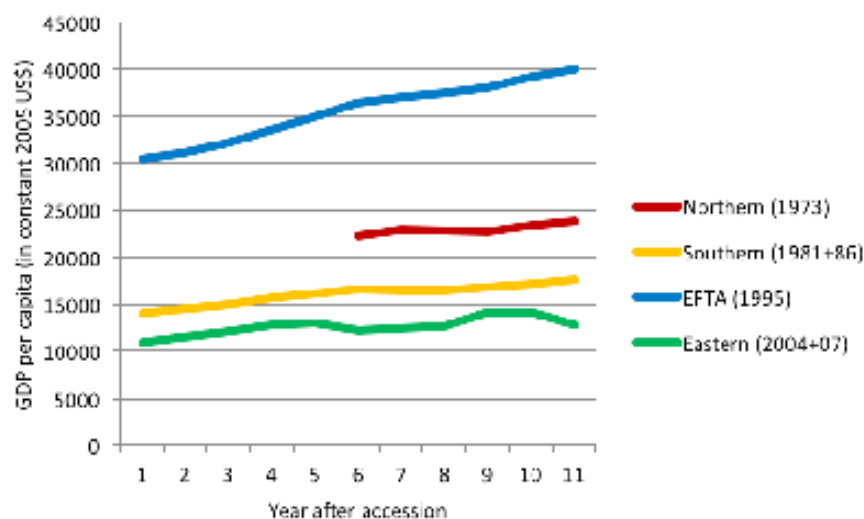
1 European Free Trade Association

Figure 1: Average Council Voting Power (Shapley-Shubik-Index) of new members across enlargement rounds during their first ten years of membership



Source: Averages of the Shapley-Shubik Power Index (SSI) (1954) based on calculations by Antonakakis et al. (2014).

Figure 2: Average GDP/capita (in constant 2005 US\$) of new members across enlargement rounds during their first ten years of membership

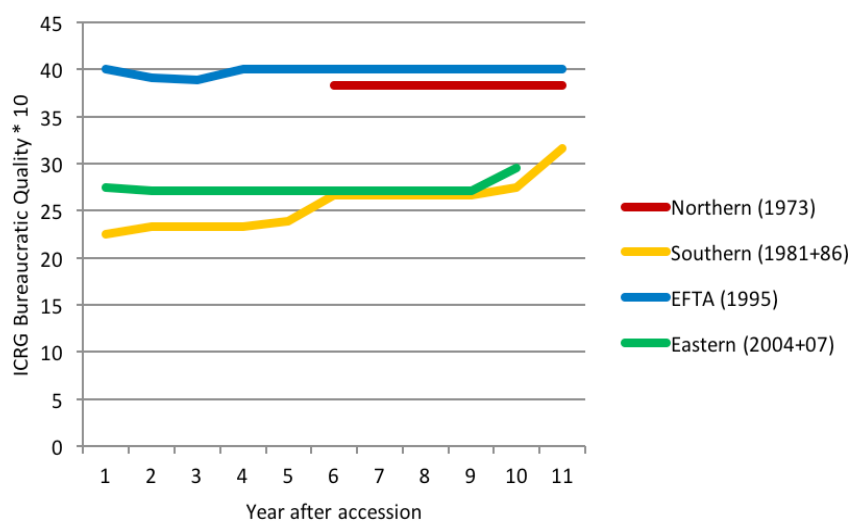


Source: World Bank.

Management approaches assume that non-compliance is a question of lacking capacities rather than political willingness (Chayes/Chayes 1993; Chayes et al. 1998; Haas 1998; Jacobsen/Weiss Brown 1995; Young 1992). Countries that use their administrative capacities efficiently in the implementation of EU law are better compliers than those that are weak and corrupt (Börzel et al. 2010; Hille/Knill 2006). Administrative capacities clearly separate the Northern and EFTA enlargement rounds, on the one hand, and the Southern and Eastern enlargement rounds, on the other (see Figure 3 below). The UK and Denmark (and to a lesser

extent Ireland) in the Northern enlargement, as well as Austria, Finland, and Sweden in the EFTA enlargement have high administrative capacities. By contrast, the Southern, Central and Eastern European countries which joined in the 1980s and 2000s, respectively, share some features of their political and administrative systems that undermine their capacity to effectively implement and comply with EU law: inefficient administrations ridden by patronage and corruption, legacies of authoritarianism, weakly organized societal interests, and low levels of socio-economic development (Börzel 2009; Cirtautas/Schimmelfennig 2010; Crawford/Lijphart 1997; Falkner et al. 2005; La Spina/Sciortino 1993; Pridham/Cini 1994; Sedelmeier 2008; Sissenich 2005). From a management perspective, the Southern and Eastern enlargement rounds should, hence, have resulted in a significant increase of non-compliance whereas the Northern and EFTA enlargement rounds should have had little effect on non-compliance.

Figure 3: Bureaucratic quality (ICRG) of new members across enlargement rounds during the first ten years of membership



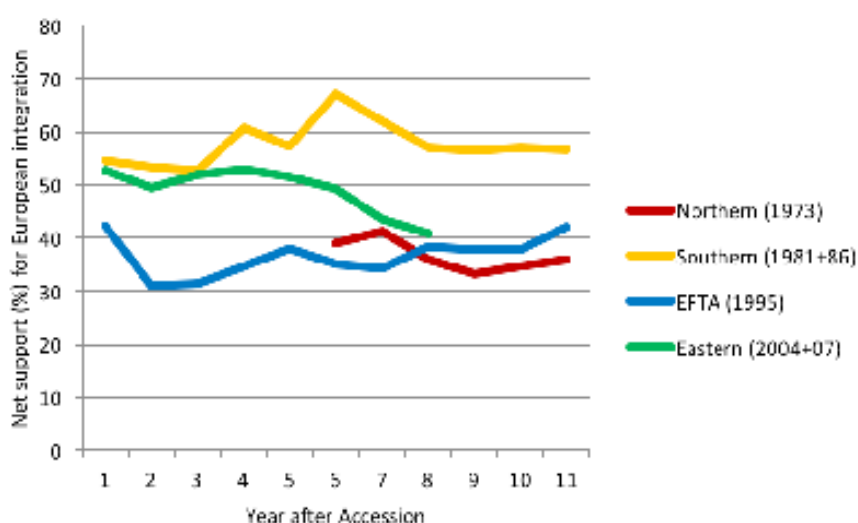
Source: International Country Risk Guide.

Legitimacy approaches, finally, focus as a key determinant of states' decisions about compliance on the extent to which states identify with the EU and consider the EU in general (and specific EU legislation) legitimate. At its most general, the perceived legitimacy of EU law can be seen as a function of the duration of membership. Joining the EU transforms candidate states into member states (Sandholtz 1996) that comply with EU law as a habit of obedience once they have internalized EU law. Compliance with EU law is then taken for granted and constitutes a value in itself (Hurrell 1995: 59). Socialization of both elites and publics into EU law takes time, so duration of membership matters. Widening of European integration by accepting new members could, hence, undermine compliance. However, for two of the enlargement rounds, institutional frameworks for the adoption of EU legislation prior to full membership could have alleviated this effect. The partial membership of Austria, Finland, and Sweden in the Single Market through the European Economic Area, and the pre-accession legislative alignment process of the Central and Eastern European countries might have fostered the internalization of EU law into the domestic legal systems before they joined. Nevertheless, socialization, especially beyond government elites, requires time. From this

perspective, we should then generally expect compliance problems at the beginning of membership and improvement over time.

Another strand of legitimacy approaches does not focus on the length of membership, but on prevailing attitudes within a state towards European integration as a key determining factor for compliance. Governments (and publics) that have a strong normative attachment to European integration are more likely to consider compliance with EU law as appropriate behaviour. In this respect, the Northern and the EFTA enlargement rounds again broadly contrast with the Southern and Eastern enlargements (similarly to the cleavage identified by management approaches; see Figure 4 below). The countries that joined in 1973 and 1995 are generally considered Eurosceptic (with the exception of Ireland, and to some extent Finland); they had initially chosen to remain outside the integration project and eventually joined as a result of economic considerations despite continued reservations against political integration. By contrast, for the Southern and Eastern European countries that joined the EU after their successful transition to democracy, EU membership was not only considered to be materially beneficial, but part of a return to the European community of states with which they share constitutive norms. From this perspective, these two enlargement rounds should have led to less compliance problems than the Northern and EFTA enlargements.

Figure 4: Net support (in %) for European integration in new member states across enlargement rounds in their first ten years of membership



Source: Eurobarometer (various years).

2.1. Non-compliance and enlargement: empirical evidence

Over the past thirty years, EU scholars and policy-makers alike have claimed that the EU suffers from compliance problems, which appear to be growing (Commission of the European Communities 2011; Cremona 2012; Falkner 2013; Krislov et al. 1986; Mendrinou 1996; Snyder 1993; Tallberg 2003; Weiler 1988). They base their assessment on the ever increasing number of infringement proceedings the European

Commission has been opening against member states for violating EU law (see Figure 4).² In general, we should be careful when interpreting information from infringement proceedings. First, infringement cases record cases of non-compliance that have been detected by the Commission. For detecting infringements, the Commission is strongly dependent on complaints sent by EU citizens, businesses, and civil society and private interest organizations. It is likely that some societal groups or citizens are more active than others. Second, infringement cases record the Commission's view of what constitutes a violation of EU law. In relation to this point, the Commission has increased its emphasis on monitoring compliance over time and has become more active in pursuing compliance with the EU's outputs. Having these caveats in mind, however, we should also acknowledge that infringement cases are the most systematic and comparable source of information on non-compliance.³

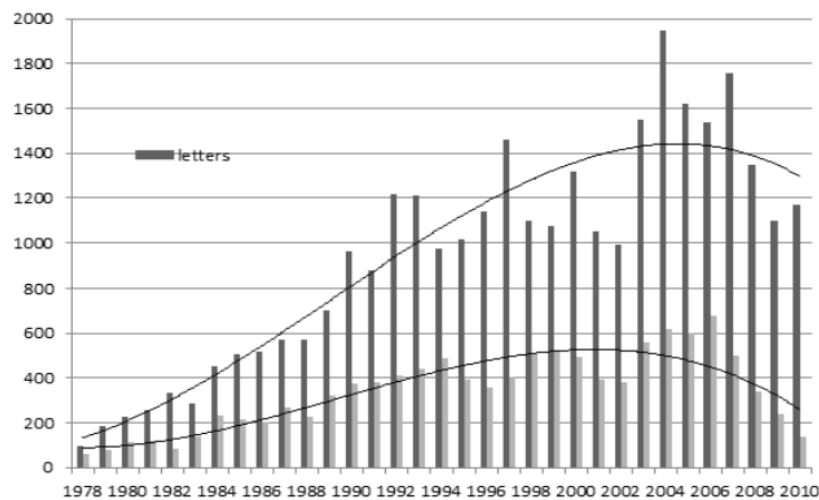
Yet while infringements thus have been undoubtedly rising, their growing numbers have to be put into context. When compared across years, infringement proceedings per se do not say much about changes in the level of non-compliance in the EU. They have to be measured against the number of legal acts that can be potentially infringed as well as the number of member states that can potentially infringe them. By 2010, the number of legal acts in force has increased more than tenfold since 1978, and 18 more member states had joined since then. Moreover, changes in the EU's compliance system, such as SOLVIT and the EU Pilot, can affect the detection rate of infringements or whether infringement cases are settled at an early stage of the process rather than escalating to more serious stages.

If the increasing numbers of EU laws and member states which can potentially violate them are controlled for, non-compliance in the EU has anything but decreased (see Figure 5). As regards enlargement, infringement numbers relative to violative opportunities have only increased after the Southern enlargement, but not after the EFTA and the Eastern enlargement.

2 The data is retrieved from the Berlin infringement database (Börzel and Knoll 2012), compiled with the help of the European Commission that made available the raw data that it uses to compile the descriptive statistics published in the Commission's Annual Reports on Monitoring the Application of Community Law. Unlike the aggregate data, this comprehensive database contains detailed information on the legal basis (CELEX number), type of violation, and the stage reached in the proceedings of the more than 10.000 individual infringement cases in which the European Commission issued a Reasoned Opinion to member states between 1978 and 2010.

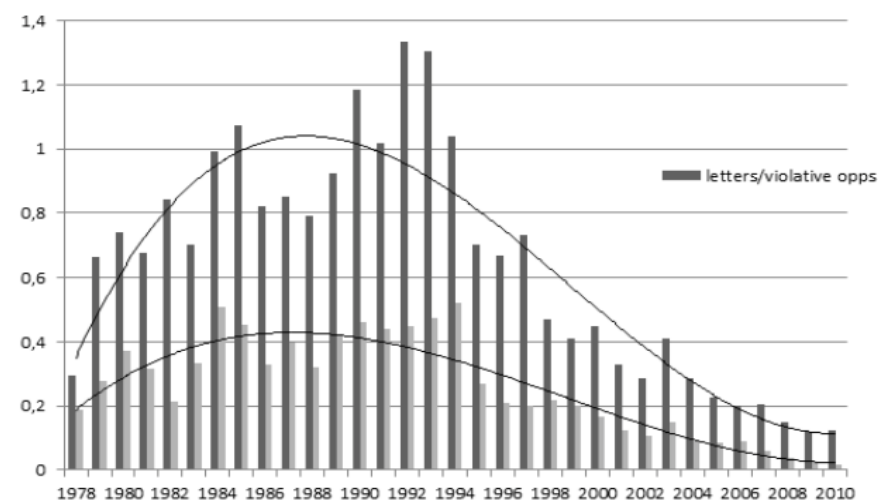
3 For a discussion of the validity of infringements as a measure for non-compliance see Börzel et al. 2010; critical Falkner et al. 2005.

Figure 5: Infringement proceedings, 1978-2010



Source: Berlin infringement database (Börzel/Knoll 2012).

Figure 6: Infringement proceedings relative to violative opportunities



Source: Berlin infringement database (Börzel/Knoll 2012).

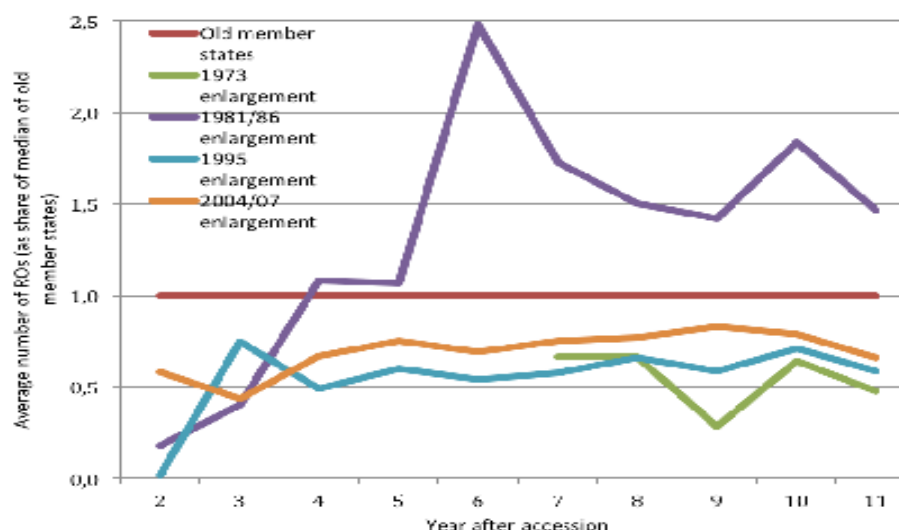
The picture becomes more nuanced when we compare the non-compliance of old and new member states for each enlargement round. Figure 7 (below) depicts the annual average number of infringements (Reasoned Opinions)⁴ by the new member states as a share of the median number of infringements of the (then) old members over a ten-year period after their accession, starting from the second year of membership (to allow for the time it takes for infringement procedures to reach the stage of Reasoned Opinion).⁵

4 We use these Reasoned Opinions to construct our dependent variable not only because of the depth of information about this first official stage of the infringement proceedings. Reasoned Opinions concern the more serious cases of non-compliance, i.e., issues that could not be solved through informal negotiations at the two previous stages (Mendrinou 1996; Tallberg 2002).

5 The data draw again on the Berlin Infringement Database (Börzel/Knoll 2012) for the years between 1978 and 2010 (the data for the first six years of the 1973 entrants are therefore missing). For the years 2011-2015, we used

Recording the infringements of new members relative to the annual median of the old members not only controls for changes in violative opportunities (the volume of legislation in force) but also changes in the EU's compliance system and the Commission's practice, since they affect old and new members equally at a given point in time.⁶

Figure 7: Average Reasoned Opinions per enlargement group compared to old member states (median) during the first 11 years of membership



Source: Own calculations from Berlin Infringement Database and infringement decisions published on the website of the Commission's Secretariat General.

Figure 7 reveals that the Southern enlargement is the only enlargement round that substantially increased non-compliance in the EU. Greece, Spain and Portugal display a considerably higher number of average infringements than the (then) old member states. By the sixth year of membership, the new members had exceeded the average infringements of the old member states, more than doubling them. Since then average infringements have dropped, but remain clearly above the level of the old members. Greece and Portugal quickly joined Italy and France in the group of compliance laggards, while Spain belongs to the middle group. The Southern enlargement, hence, accounts for the peak in the overall infringements we observe in the early 1990s (see Figure 6). While the increase was also driven by the intensified efforts of the Commission to enforce directives related to the completion of the Single European Market, Greece, Spain and Portugal clearly account for the largest part of the proceedings (Börzel 2001).⁷

the information contained in the regular updates about the Commission's decisions in infringement cases published online by the Commission's Secretariat General. The data allow us to make sure that each violation is counted only once, according to the highest stage it reached in the infringement proceedings. However, we should note that given the different sources used to obtain information about infringement cases, some differences may exist in the data reported in the Annual Reports and the website of the Commission's Secretariat General.

6 We calculate the (average) annual infringements of new members relative to the median (rather than the mean) of the old members, since there are extreme outliers among the old member states (especially Italy, and for later rounds, Greece). Thus, the median is a better indicator of non-compliance of old members than the mean.

7 The second peak in the mid-1980s, by contrast, is related to the publication of the first annual report on infringements.

In the other three enlargement rounds, the newcomers performed consistently better than the old member states. These enlargement rounds are also more homogenous with regard to the variation in the non-compliance rates of individual new members and they also remain fairly stable within a few years of accession. The non-compliance rates in these enlargement rounds are close, with the Northern enlargement round (data are only available from 1978) performing slightly better than the EFTA and Eastern enlargements. With Denmark, the Northern enlargement also brought one of the EU's consistent compliance leaders into the EU. In the EFTA enlargement, Finland and Sweden quickly joined the group of leading performers. The significant increase in overall infringements in the EU of 28 percent in 1996/97 (see Figure 6) was less related to the EFTA enlargement in 1995 but due to an internal reform of the infringement proceedings in 1996 that meant that Letters of Formal Notice (and consequently Reasoned Opinions) were issued more rapidly than before (Börzel 2001).

Finally, the Eastern enlargement has not increased non-compliance either. The 12 new member states that joined in 2004 and 2007 have generally scored better than the average of the EU-15. Most studies do not find a particular compliance problem in the East (Dimitrova/Toshkov 2007; Sedelmeier 2006, 2008, 2012; Steunenberg/Toshkov 2009; Toshkov 2008; Zhelyazkova et al. 2014). Moreover, they do not only transpose directives as fast, or even faster, than the old member states but also tend to settle their infringement procedures more swiftly (Dimitrova/Toshkov 2007; Sedelmeier 2008; Toshkov 2007a, 2008; Steunenberg/Toshkov 2009).

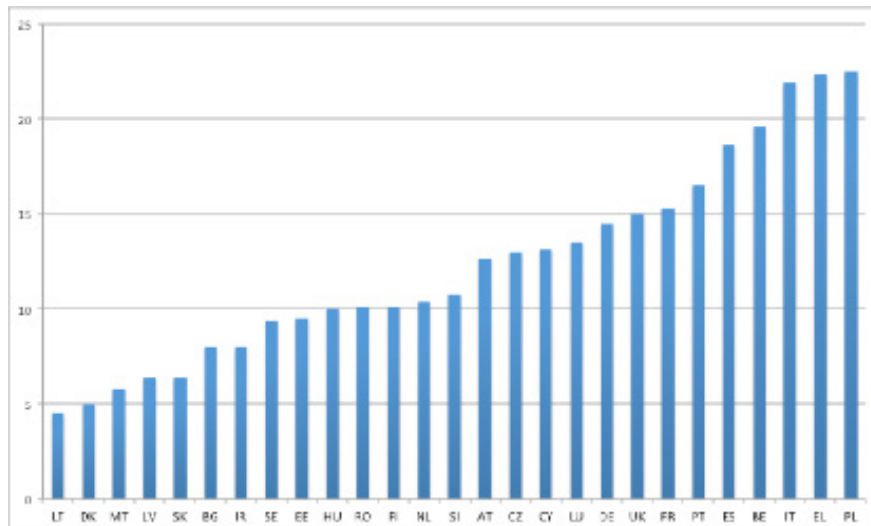
While most of the new member states outperform nearly all the old member states (Sedelmeier 2008, 2012), there is variation. Poland and the Czech Republic have been lagging behind the other new member states. While there has been a marked improvement for the Czech Republic since 2010, Poland has joined the compliance laggards in the enlarged EU. Some studies have also identified Bulgaria and Romania as potential compliance laggards. While such negative assessments usually focus on their limited progress with regard to fighting corruption and organized crime, for which the EU installed a specific post-accession monitoring mechanism (Gateva 2010; Pridham 2007, Spenzharova/Vachudova 2012), some authors also suggest that this applies to the compliance with EU law (Hille/Knill 2006; Knill/Tosun 2009; Noutcheva/Bechev 2008; Trauner 2009). For their first decade of membership, however, the infringement data do not bear out this negative assessment: Bulgaria and Romania range in the middle of the Eastern enlargement group alongside Estonia, Slovenia, Hungary, Malta and Cyprus. Lithuania, Latvia and Slovakia are consistently the best performers not only among these new members, but in the enlarged EU as a whole. Figure 8 depicts variation in compliance across the new member states and how they – as well as the states that joined in earlier enlargement rounds – position themselves in the enlarged EU since the accession of Romania and Bulgaria.⁸

Qualitative and quantitative case studies of specific policy areas also show that similar to the old member states, the CEE members differ significantly when it comes to complying with EU law (cf. Toshkov 2007b, 2008; Sedelmeier 2009; Schwellnus 2009). The variation across the CEE new members is not too surprising,

8 We chose this period since it covers all EU member states (except for Croatia that joined in July 2013). The data start in 2008 rather than 2007 (the accession year of Romania and Bulgaria), since the lead-time to process infringement cases could have biased the data in their favour).

but it should also not be overstated, not least since the performance of many newcomers also fluctuates – albeit generally at a very good level – over the first ten years of membership. While variation across the new members does not necessarily deny the effect of common socialist legacies on compliance in Central and Eastern Europe, “these legacies do not carry equal weight across the region” (Cirtautas/Schimmelfennig 2010: 428; cf. Seleny 2007).

Figure 8: Average annual number of Reasoned Opinions by member state (2008-2015)



Source: own calculations from infringement decisions published on the website of the Commission's Secretariat General.

In sum, despite continuous widening, non-compliance has decreased rather than increased in the EU. None of the main approaches to compliance can fully explain the non-compliance patterns across enlargement groups: for enforcement approaches, the generally positive performance of new members is unexpected. The enforcement approach also has difficulties to explain the positive compliance record of the Northern enlargement. Due to its size, the UK should have caused particular compliance problems, rather than demonstrating some of the loWest non-compliance rates. Enforcement approaches' focus on differences in compliance costs resulting from wealth differentials could explain the compliance problems resulting from the Southern enlargement, but not why the even less wealthy post-communist new members performed so well. By the same token, management approaches capture well the poor performance of the Southern enlargement round, which is largely due to these countries' weak administrative capacities. However, similar administrative deficiencies have not led to similar compliance problems in the Eastern enlargement. Legitimacy approaches, which focus on attitudes towards European integration are contradicted by the positive performance of the broadly Eurosceptic states in the Northern and EFTA enlargements as well as the negative record in the Europhile Southern new members. Length of membership does not seem to make a difference either given this variation among newcomers and the consistently bad performance of three of the founding members.

In view of the difficulties of the main approaches in the compliance literature to account for the variation across enlargement rounds, we first discuss and reject alternative explanations that might account in particular for the unexpectedly good compliance of the new members in the Eastern enlargement. In the subsequent section we conduct a systematic analysis of the compliance of all new member states' across the various enlargement rounds during their first ten years after accession in order to get a better understanding of what is specific to the Eastern enlargement round that might bolster compliance.

3. Newness, differentiated integration and decoupling: alternative explanations for the good compliance of new members

Before conducting a systematic analysis of the compliance record of new member states across the various enlargement rounds, we rule out alternative explanations for the good compliance of new members more generally, as well as for the particularly puzzling performance of the Eastern new members. The first set of explanations focus on the possibly temporary nature of new members' good compliance. The second alternative explanation focuses on a trade-off between compliance and differentiated integration; and the third on a decoupling between good formal compliance and undetected deficient behavioral compliance in the practical application of EU rules on the ground.

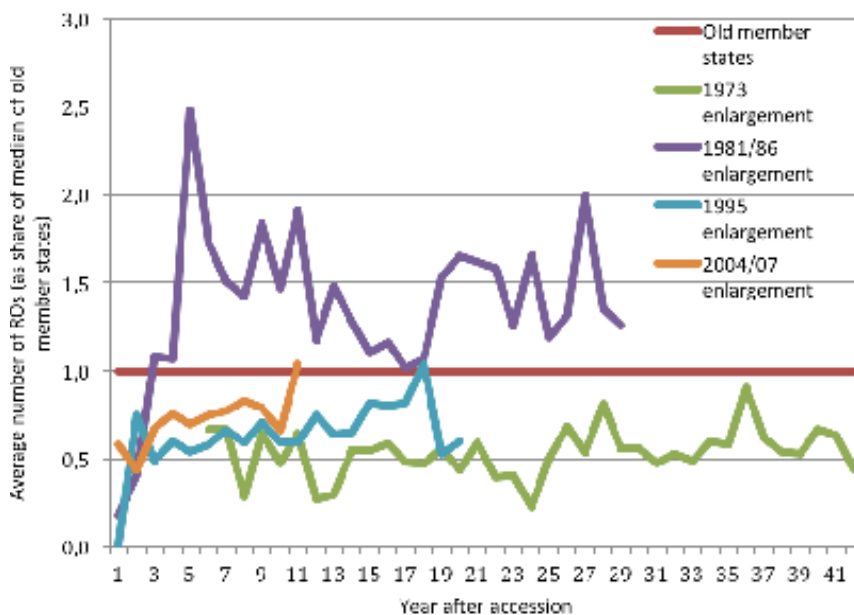
3.1. Are early compliance patterns misleading? Periods of grace and honeymoon periods

A possible bias in the infringement data for new members is that the early compliance patterns might not be indicative of longer terms trends. There are at least two possible reasons why this might be the case. First, it has been suggested that the Commission might grant new members a period of grace during which it does not pursue infringement cases as quickly as in the other member states in order to ease them into the EU's compliance system. In particular the Southern new members are said to have initially benefitted from a more lenient treatment (Börzel 2000), which would explain why their compliance became inferior to that of the old member states by the fourth year after accession. A second reason why initial good compliance patterns could be only temporary is that as newcomers, new member states might feel particular reputational pressures to establish a track record of good performance. They would then make extraordinary efforts during their first years of membership, but this effect should wear off once they do not any longer feel to be under particular observation. If such periods of grace and honeymoon periods indeed exist, they might cast doubts on whether the good record of new member states can be maintained after more than a decade after their accession.

In order to test the validity of this alternative explanation, we use descriptive statistics to compare infringements of new members relative to old members over time. Figure 9 show the average number of Reasoned Opinions for each enlargement round relative to the median number for the old member states for each year after accession. While we do not yet have much data on the Eastern new members' compliance after a decade of membership and the most recent year seems to indicate some deterioration in compliance, descriptive statistics of the longer-term records of the new members in earlier enlargement rounds suggest

that early compliance patterns are indeed indicative of longer-term trends. Compliance during the very first few years of membership might indeed have benefitted from a period of grace or a honeymoon period in the case of the Southern, and even the EFTA enlargement. But the compliance patterns during the first ten years remain otherwise fairly stable afterwards. While there is some fluctuation over time for the different enlargement rounds, there is certainly no general deterioration of compliance.

Figure 9: Compliance (Reasoned Opinions) of new member states relative to the old member states



Source: own calculations from the Berlin Infringement Database and infringement decisions published on the website of the Commission's Secretariat General.

3.2. Easing compliance through differentiated integration?

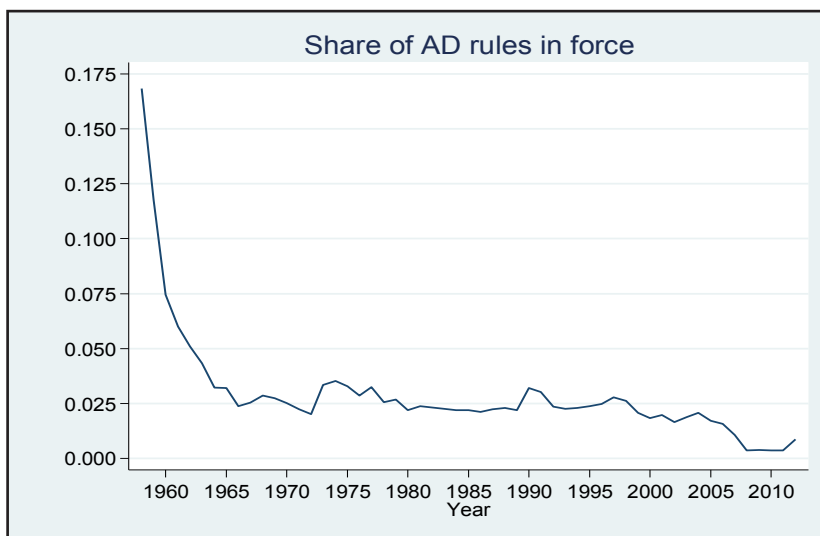
Differentiated integration may explain why non-compliance has not increased more after the various enlargement rounds. Exemptions for newcomers can ease their compliance problems. While they are only temporary, especially in the case of Eastern enlargement, some of these exemptions might not have expired for the CEE countries that joined respectively 12 and nine years, ago.

The use of differentiated integration in the EU's primary and secondary law has increased over the years, whereby opt-outs from EU treaty changes only started to take off after the Maastricht Treaty. The growing opportunity for member states to avoid legal obligations that would be costly, resource intensive or politically controversial could have helped to bring or keep down non-compliance. Yet, the member state have never made use of more than 12 percent of the opt-out opportunities granted by the EU treaties in any given year (Schimmelfennig/Winzen 2014). Moreover, the relative importance of differentiated integration for the EU's secondary law has declined. Rules that exempt member states from their obligations to comply with EU legal acts (almost exclusively directives) increased over the years and peaked in the early 2000s. Their share in the legislation in force, however, has been decreasing over time, from 17 per cent in 1958

to only one per cent in 2012 (Figure 9). The four peaks in the early 1970s, early 1990s, the late 1990s, and the mid-2000s are the result of temporary exemptions granted to new member states that joined in these periods – the enlargement rounds of 1973, 1995, 2004/2007, as well as German unification in 1990, but not in the case of the Southern enlargement in the 1980s. Could these differences in the use of differentiated integration explain why only the Southern enlargement led to an increase in non-compliance?

Yet, most of these opt-outs are temporary, i.e. phased out 10-15 years after accession with the number of exemptions for the newcomers converging with those of the old member states. Only the UK, Denmark, and Ireland have continued to obtain opt-outs. For the CEE countries, it may be still too early to tell but the number of exemptions granted to the new member states is only slightly above the old member states (with the exception of the UK, Denmark, and Ireland, of course). Figure 10 shows that exemptions after the Eastern enlargement resulted in a considerably smaller increase in the share of differentiated rules than in 1973 and 1995. They also seemed to have diminished rather quickly, partly because many entailed discrimination that old member states managed to impose on the CEE new members as part of the accession negotiations to mitigate economic and financial losses incurred by the newcomers, e.g. by opening up labor markets to them, by redistributing EU funds to them, or by facing the consequences of their limited capacities for effective border control (Schimmelfennig/Winzen 2014). Moreover, of course such discriminatory differentiation would also not have a positive impact on compliance as opposed to temporary exemptions from obligations with regard to applying EU law.

Figure 10: Share of differentiated rules in EU legal acts in force/AD (secondary law)



Source: Graph provided by Frank Schimmelfennig and Katharina Holzinger from their project 'Differentiated Integration in the European Union', available at: <http://www.eup.ethz.ch/research/diffintegration>, last access September 13, 2014.

3.3. *Decoupling of formal and behavioural compliance*

Another alternative interpretation of the good compliance of the new members has been particularly prominent in the case of Eastern enlargement. Some case study research suggests that the infringement data does not capture serious violations of EU rules by the CEE new members in their practical application and domestic enforcement (Avdeyeva 2010; Batory 2012; Cirtautas/Schimmelfennig 2010; Dimitrova 2010; Dimitrova/Steunenberg 2013; Falkner et al. 2008; Sedelmeier 2012; Slapin 2015; Trauner 2009).

These findings do not necessarily contradict the positive findings based on infringement data. Rather, they may point to a decoupling between good legal, or formal, compliance with regard to the transposition of EU legislation into national law, on the one hand, and behavioral compliance – poor practical application and domestic enforcement on the ground – on the other.⁹ In the ‘world of dead letters’ (Falkner et al. 2008), EU law gets swiftly incorporated into national law but is not put into action. Such decoupling was already observed during pre-accession phase of the Eastern enlargement, where “many rules have been only formally transposed into national legislation but are not fully or reliably implemented” (Schimmelfennig/Sedelmeier 2005: 226; see also Goetz 2005; Hughes et al. 2004; Jacoby 2004; Leiber 2007; Sissenich 2005).

Still, the compliance behavior of the new member states cannot be simply reduced to their being transposition leaders and application laggards. To start with, the formal compliance records of the Eastern new members vary too much for decoupling to be a uniform phenomenon. More substantively, case studies have so far failed to establish ‘dead letters’ as a pervasive problem for all Eastern new members. Evidence for this claim relies primarily on the study of social policy directives in the new members by Falkner et al. (2008). Yet social policy – and particularly gender equality at the workplace – is generally highly prone to decoupling in both old and new members in view of the difficulties of enforcement, even if the relevant enforcement bodies are particularly weak in post-communist new members (Falkner 2010). Little evidence of a general “Eastern world of dead letters” is found by other case studies. Toshkov’s (2012) detailed analyses of three policy areas – electronic communications, consumer protection and animal welfare – suggest that shortcomings with practical implementation and application of EU law in the Eastern member states are not “of a greater scale and different nature in CEE, and there is no evidence that the EU rules have been mindlessly copied and forgotten” (Toshkov 2012: 108). The comparative analysis by Zhelyazkova et al. (2016) that draws on in-depth conformity studies of practical application of 24 directives across four policy areas suggests that decoupling is not more prominent in the new members than in the old members (see also Zhelyazkova 2016).

Of course such counter-evidence to “decoupling” can also be criticized for relying on evaluation reports (the quality of which can also be contested, see Mastenbroek et al. 2015) and/or on a still limited number of policy areas. While it might therefore be too early to dismiss decoupling completely as a possible

9 The infringement data in principle also include cases of deficient application of EU law, not merely absent, late, or incorrect transposition. However, it is plausible that with the latter types of infringements – that relate to formal compliance – undetected non-compliance is less prominent and that such cases are therefore more fully represented in the infringement data.

explanation for the positive infringement record of the Eastern new members, it appears equally questionable that decoupling is a pervasive phenomenon that explains away their positive infringement records.

4. Analysis of compliance across new members and enlargement rounds: does pre-accession conditionality matter?

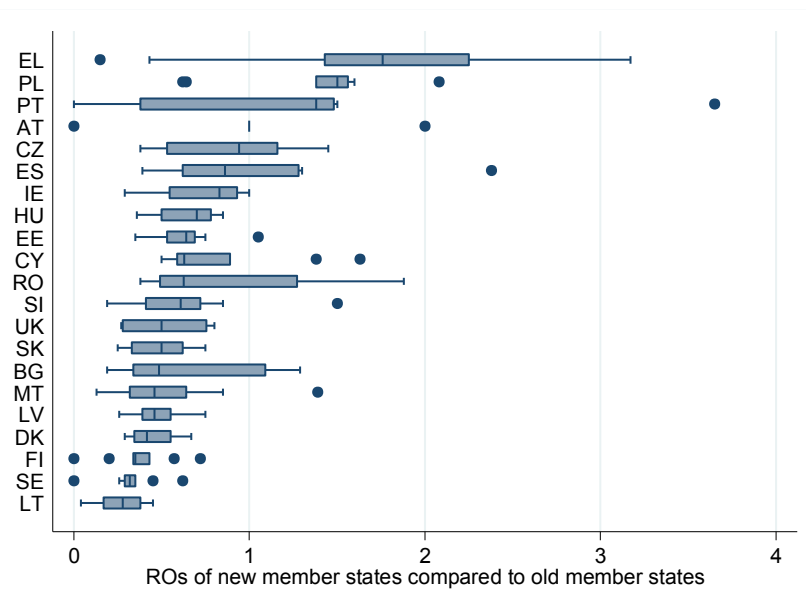
Since these alternative explanations cannot explain the unexpectedly good compliance of the new members, and the post-communist new members in particular, we conduct a systematic analysis of compliance in all new member states individually during their first decade after accession. Figure 11 depicts the annual number of Reasoned Opinions for all states that have joined since 1973 for their first ten years of membership (excluding the first year), expressed as a share of the median of the old member states. It shows that compliance during these periods varies indeed across the states involved in each of the four enlargement rounds. It is possible that the main approaches to compliance might struggle to explain compliance records for entire enlargement rounds that we focused on earlier, but are better able to account for individual new members' performance.

We therefore present preliminary results of different regression analyses of the four explanatory factors identified by the main compliance approaches – power, wealth, administrative capacities, and legitimacy (using the same indicators as in Figures 1-4 above). In order to test whether the experience of pre-accession conditionality can explain the surprisingly good performance of the Eastern new members, we include a dummy variable for all those countries that were subjected to conditionality.¹⁰ The units of analysis are country/years for each new member during their first ten years of membership (excluding the first year). We run stepwise regressions to compare the effect of collinear variables, testing three models that capture the dependent variable – compliance – in different ways.¹¹ In addition, due to the high correlation between the indicator for wealth (GDP/capita) and for administrative capacity, we run each model first excluding administrative capacity and then excluding wealth.

10 These are 12 post-communist countries that joined in 2004/2007, but also Cyprus and Malta. The dummy variable is therefore not simply a CEE country dummy, but rather an Eastern enlargement dummy. This dummy should help us to identify whether there is something about the Eastern enlargement round that differentiates it from earlier rounds, and conditionality seems an obvious candidate for such a difference. Of course the regression results as such would not be able to tell us whether it is conditionality or something else that is specific to this round, and we therefore discuss below possible ways in which conditionality could have such a positive effect on compliance.

11 We use three different dependent variables as a robustness check and to compare the effect of the independent variables on different operationalizations of the relative compliance performance. There is some legitimate debate about how to capture best compliance in such a way to control for time-varying factors that affect all member states equally (e.g. the Commission's enforcement practice, or the amount of EU legislation in force). Measuring non-compliance of a member state relative to 'violative opportunities' is one way of controlling for such factors, relative to the mean or the median of all (or some) member states is another).

Figure 11: Annual Reasoned Opinions of new member states compared to old member states during the first ten years of membership



Source: own calculations from the Berlin Infringement Database and infringement decisions published on the website of the Commission's Secretariat General.

The dependent variable in our first model is a new member state's annual number of Reasoned Opinions as a share of the median for the old member states. It is tested by OLS with robust standard errors. In this model, although the accession conditionality dummy has the expected sign, it does not reach significance. In fact, barely any of the variables do: only support for the EU (legitimacy) does (both when using GDP/capita and bureaucratic quality), but its significance is low – and counter to the expectation of the legitimacy hypothesis, it contributes to non-compliance.

The other two models provide support for the importance of pre-accession conditionality. In the second model, the dependent variable is the annual Reasoned Opinions of the new member states, expressed as the annual mean of all member states. It is tested by OLS with robust standard errors. In this model, the dummy for accession conditionality reaches significance when including GDP/capita – although not very strongly so – but not when using instead bureaucratic quality. In the former case, GDP/capita also reaches significance, while in the latter case, both power and bureaucratic quality do.

The third model uses as its dependent variable the absolute number of infringements. It uses a negative binomial regression with robust standard errors. The dummy for pre-accession conditionality is significant both when using GDP/capita (alongside support for the EU – again with a positive sign) and especially when using bureaucratic quality (again alongside support for the EU, with a positive sign).

Figure 11: Annual Reasoned Opinions of new member states compared to old member states during the first ten years of membership

Model	(1)		(2)		(3)	
Voting power [SSI]	0.02 (0.02)	0.02 (0.01)	0.38 (0.27)	0.67** (0.22)	0.02 (0.03)	0.01 (0.03)
EU Support	0.01* (0.01)	0.01* (0.01)	0.13 (0.08)	0.14 (0.08)	0.02*** (0.01)	0.02*** (0.01)
Conditionality	-0.30 (0.20)	-0.22 (0.15)	-7.64* (3.55)	-3.83 (2.71)	-0.47* (0.21)	-0.58*** (0.15)
GDP per capita	-0.01 (0.01)		-0.38** (0.14)		0.01 (0.01)	
Bureaucratic quality		-0.01 (0.01)		-0.35* (0.16)		0.00 (0.01)
constant	0.40 (0.38)	0.35 (0.48)	0.55 (6.50)	0.67 (7.65)	1.93*** (0.45)	2.22*** (0.42)
ln alpha constant					-1.07*** (0.11)	-1.06*** (0.12)
N	144	144	132	132	132	132
AIC	233.98	234.41	990.93	991.64	981.88	982.63
BIC	248.83	249.26	1005.34	1006.06	999.18	999.92

Standard errors in parentheses * p<0.05 ** p<0.01 *** p<0.001

Source: Authors.

In sum, the models do provide preliminary evidence that pre-accession conditionality has a positive impact on compliance after accession, and it helps explain the unexpectedly good performance of the new member states despite otherwise largely unfavorable conditions suggested by the main theories of compliance. While the analysis confirms that conditionality matters, it does not tell us what it is that makes conditionality have a lasting impact on compliance after accession.

At this point, we can merely speculate about how conditionality affects post-accession compliance rather than attempting a more systematic analysis. There are at least two main ways in which the experience of conditionality could continue to affect compliance positively (see also Sedelmeier 2008: 820-22). First, the creation of highly specialized administrative and legislative capacities during the pre-accession period to transpose large amounts of EU law in a short time may compensate for the relatively low general administrative capacities of the CEE countries. Second, pre-accession conditionality may also explain why

government attitudes towards European integration mattered in the new members after the Eastern enlargement although they do not have much of either a positive or negative effect on non-compliance in other member states. The experience of regular monitoring and assessments of progress with alignment during the pre-accession period has created for decision-makers in the post-communist countries a clear link between compliance and being a deserving and acceptable member state. Europhile governments in these countries are therefore more inclined to endeavour to comply well, while in the old member states, they do not perceive such a link.

5. Conclusion

This paper has shown that concerns that enlargement weakens the EU's legal system through increasing non-compliance by the new member states are unfounded. The net effect of the EU's enlargement rounds has been instead to improve compliance in the enlarged EU. The Southern enlargement round has been the only enlargement in which the new members have performed worse than the older member states. The positive record of new member states in general, and of the compliance patterns across the various enlargement rounds is difficult to explain through the main approaches in the compliance literature that focus respectively on state power and adjustment costs, administrative capacity, and the EU's perceived legitimacy. Particularly puzzling is the positive record of the Eastern enlargement round that contrasts with the Southern enlargement where the conditions were broadly similar. In order to test whether the experience of pre-accession conditionality, which was specific to the Eastern enlargement, can explain the positive record of these new members, we conduct regression analyses of all new member states during their first ten years of membership. These preliminary results suggest that conditionality indeed has a positive impact on compliance after accession is achieved.

Although we can only speculate at this point what aspects of conditionality have such a more durable impact, the lesson for future enlargements is clear. Concerns about compliance after accession should not be an impediment to accepting new members. However, to avoid a negative impact on compliance, pre-accession conditionality has an important role to play and needs to be taken very seriously. Rather than a newcomer bonus or differentiated integration, the creation of highly specialized administrative and legislative capacities during the pre-accession period may compensate for the otherwise limited administrative capacities. The pre-accession experience of regular monitoring of compliance has created for decision-makers in the post-communist countries a clear link between compliance and being a deserving and acceptable member state, which makes Europhile governments in these countries more inclined to endeavour to comply well. The importance of conditionality is particularly salient with regard to current candidate countries in South-Eastern Europe, where key conditions for compliance – such as administrative capacities and adjustment costs – are rather unfavorable.

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“Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond”

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