



# BEYOND UNIFORM INTEGRATION?

## RESEARCHING THE EFFECTS OF ENLARGEMENT ON THE EU'S LEGAL SYSTEM

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Asya Zhelyazkova, Tanja A. Börzel, Frank Schimmelfennig  
and Ulrich Sedelmeier

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## Abstract

Empirical evidence on the co-evolution of EU membership and its competences generally denies the existence of a trade-off between a deepening and a widening of the EU as a whole (Leuffen et al. 2013: 21). However, this picture may be rather incomplete, as it does not take into account whether the widening-deepening dilemma is resolved at the expense of the strength of the EU's legal system. Therefore, in Working Paper No. 8 we assess the extent to which enlargement has affected the following characteristics of the EU's legal system: 1) the volume of non-binding EU legislation relative to hard law (directives, regulations and decisions); 2) differentiated integration, where legislation is not uniformly binding on the entire membership as reflected by the amount of exceptions, derogations and exemptions from primary and secondary law; and 3) the level of non-compliance with EU legislation, where laws that are meant to bind member states equally are not uniformly and correctly implemented domestically. Our empirical analyses generally suggest that enlargement has not resulted in a weakening of the EU's legal system. Thus, soft law measures complement rather than substitute EU legislation, enlargement-induced differentiations are temporary in nature, and non-compliance has decreased rather than increased over time. In our future research, we will assess the possibility of indirect links between enlargement, differentiated integration and non-compliance. We will analyze the EU's legal strength in terms of other aspects of flexibility besides soft law and differentiated integration.

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## 1. Introduction

One of the main debates in the literature on European integration concerns the alleged relationship between ‘widening’ (expansion of membership) and ‘deepening’ (further integration through centralization of powers). It is a well-established view that more inclusive regimes impede co-operation due to the resultant heterogeneity in preferences (Buchanan/Tullock 1962). The rationale is that, as regimes expand their membership, the likelihood that at least one participant will be unwilling to support the co-operative outcome also increases. In the case of the European Union (EU), increased cooperation is associated with a continuous transfer of policy-making powers from the national to the EU level. Since the establishment of the European Coal and Steel Community (ECSC), the EU has considerably expanded its involvement and authority in almost all policy areas. At the same time, the number of members has increased from six countries participating in the ECSC to 28 member states, after the accession of Croatia in July 2013. Thus, empirical evidence on the co-evolution of the EU’s membership base and competences generally denies the existence of a trade-off between deepening and widening (Leuffen et al. 2013: 21).

However, this picture is rather incomplete, as it does not take into account whether the widening-deepening dilemma has been resolved at the expense of the strength of the EU’s legal system. While enlargement may not have hindered the EU’s expansion of policy-making powers, it may have negatively affected member states’ obligations to adopt and implement the EU’s legislative outputs as a way to manage the increased diversity in preferences and capabilities (Schimmelfennig/Winzen 2014). Is the link between ‘widening’ and ‘deepening’ EU integration intermediated by a simultaneous process of ‘loosening’ in the EU?

To address this issue, we focus on three general aspects of the EU’s legal system. First, in addition to generally binding EU legislation (directives, regulations and decisions), the EU also produces other, more flexible instruments that lack supranational enforceability and depend on voluntary application by the member states (recommendations, resolutions, guidelines, opinions, etc.). It is assumed that non-binding legislation presents an alternative to EU hard law in areas where the EU lacks the necessary expertise to foster integration and member states are reluctant to give up national sovereignty. Second, EU laws are not uniformly valid for all EU members (a phenomenon referred to as ‘differentiated integration’). For example, accession treaties contain transitional arrangements with derogations from EU rules for the new member states. Directives and regulations sometimes exempt at least some of the member states from the obligations of particular legal acts. Finally, the strength of the EU’s legal system depends on member states’ level of compliance with EU outputs. If the new EU entrants lack the capacity or willingness to implement EU rules, we are likely to observe an increased implementation gap in the aftermath of enlargement.

In sum, we assess the extent to which enlargement has affected the following characteristics of the EU’s legal system: 1) the volume of non-binding EU legislation relative to hard law (directives, regulations and decisions); 2) differentiated integration, where legislation is not uniformly binding for all members as reflected by the amount of exceptions, derogations and exemptions from primary and secondary law; and 3) the level of non-compliance with EU legislation, where laws that are meant to bind member states equally are not uniformly and correctly implemented domestically.

In this working paper we explore the development of the three characteristics separately across different enlargement rounds. Assessing the impact of enlargement on these three characteristics of the EU's legal system requires addressing different sub-questions that cannot be integrated in one overarching theoretical framework or a common research design. For example, whereas the link between soft law and non-compliance needs to be established, we already know that accession treaties include a high number of differentiations for the new member states. The questions that we need to address here are thus slightly different: What is the nature of those differentiations that are directly associated with enlargement? Do they exclude the new member states from certain benefits (discriminatory differentiation) or free countries from cumbersome obligations (exemptive differentiation)? Which of the new member states obtain more differentiations of a particular type and why? With regard to the impact of enlargement on soft law and non-compliance, we analyze the development of non-binding measures and cases of law violations over time. Has the share of non-binding instruments or infringement proceedings increased with the membership expansion of the EU? In the case of soft law, has enlargement caused proliferation of non-binding measures that are alternative to binding EU legislation? Regarding non-compliance, are the new member states more likely to infringe on EU law than existing member states? Understanding the impact of enlargement on these phenomena requires the application of different comparative research designs focusing on differences within and between member states and policy outputs over time.

Nevertheless, there are two common characteristics connecting soft law, differentiated integration and non-compliance. First, all three phenomena are considered to affect the integration capacity of the EU. Second, theoretical expectations about the impact of enlargement on all three aspects of the EU's legal order are generally based on assumptions about preference and capacity heterogeneity between new and existing member states.

## **2. Soft Law, Differentiated Integration and Non-compliance as Aspects of the EU's Integration Capacity**

Before turning to the separate theoretical and empirical analyses, it is important to establish how soft law, differentiated integration and non-compliance relate to the integration capacity of the EU.

In general, scholars associate the concept of soft law with new modes of governance promoting a more decentralized policy-making process to address domestic problems (Héritier/Lehmkuhl 2008). In the EU context, the concept encompasses various forms of non-binding instruments such as codes of conduct, resolutions, communications, declarations, guidance notes and action plans among others. However, there is a common basic principle that unites different forms of soft law. In contrast to the EU Community (EC) legislation (directives, regulations and decisions), member states are not formally obliged to comply with 'soft' measures and are thus not subject to formal sanctions from the EU Commission (the Commission) and the European Court of Justice (ECJ). Critics of the soft law approach point out that it should not be regarded as a substitute for binding EU measures. If soft law is mostly adopted as an alternative to EU legislation, this could indicate a limited integration capacity of the Union. Since application of soft measures

is voluntary, it is questionable to what extent soft law can be effective in cases of political conflict. If the main argument is that soft law emerges as a way to overcome disagreements among member states during the decision-making process (Schäfer 2006), it is unlikely that these disagreements will be resolved in the absence of effective enforcement mechanisms. As a result, soft law is less likely to have any tangible impact on the EU member states. Critics warn that unless it is implemented “in the shadow of legislation” (Scharpf 2001: 11), competition between different welfare systems could create ‘race-to-the-bottom’ scenarios (Scharpf 2001, 2003). For example, whereas Scharpf finds that the flexible nature of soft law has facilitated coordination between highly diverse welfare systems, he also stresses that all policy initiatives implemented under the Open Method of Coordination (OMC) have either complemented or bolstered the EU monetary policies and the Stability Pact. More recent studies also point out that informal and non-binding new modes of governance threaten the legitimacy of EU policy-making because they lack the certainty, transparency and the legal protection that are provided by the classic Community law (Idema/Keleman 2006; Majone 2009). In other words, the extent to which soft law weakens the EU’s integration capacity depends on whether it substitutes or supplements binding EU legislation.

Another characteristic of the EU’s legal system concerns differences in the level and intensity of member states’ integration, i.e. differentiated integration. Differentiated integration results from EU rules whose legal validity does not extend to all member states, and it can be regarded as a measure of the EU’s integration capacity. In the context of enlargement, the less differentiation the accession of new member states produces, the faster their transitional arrangements come to an end. In addition, the less the new member states contribute to additional differentiation in EU law as full members, the more effectively integrated they can be considered and the more capable of absorbing accession the EU appears to be. In addition, differentiated integration tells us something about how the EU treats accession countries. Does the EU discriminate against accession countries by withholding certain membership benefits from them? Or do the old member states accommodate them by granting temporary exemptions from EU obligations? And does the EU treat new member states equally?

Finally, the strength of the EU’s legal system is also affected by member states’ level of (non-)compliance with legally binding EU measures (hard law). Even if member states equally participate in EU legislation, non-implementation could threaten the capacity of the EU to integrate. For example, instead of negotiating exemptions from EU law, member states may choose to resort to non-compliance as a way to avoid costly policy obligations (Andersen/Sitter 2006). Thus, national policy-makers could reap the benefits from participation in legally binding measures without incurring the costs of implementation.

In short, soft law, differentiated integration and non-compliance are important indicators of the EU’s legal strength and thus affect the EU’s integration capacity. In the following sections, we turn to analyzing the impact of enlargement on each of these characteristics.

### 3. The Impact of Enlargement on the Development of Soft Law

The EU governance literature promotes the general idea that the amount of new and more flexible modes of governance has increased over time. While earlier studies argued that ‘softer’ measures of governance were gradually replacing the Community method of decision-making (Cini 2001; Kohler-Koch/Eising 1999: 275), more recent work points to the subordinate role of soft law (and softer modes of governances), which is restricted to particular policy areas (Börzel 2010; Héritier/Rhodes 2011; Kelemen 2011). However, it remains unclear how the number of different soft law instruments has developed over time and relative to binding EU legislation.

Different explanations exist for why the EU would (increasingly) produce non-binding instruments. Given that soft law instruments allow for more flexibility than hard law measures, general explanations could follow the standard principal-agent theory of delegation. Delegation models focus on two main explanations for flexibility: information asymmetries and preference heterogeneity. According to the first condition, soft law is likely to be used when policy-makers do not have the necessary knowledge about the actual effects of common policy in different national contexts. In this way, soft law grants local or national units the flexibility to experiment with different solutions to policy problems, while meeting commonly agreed objectives or guidelines. The second condition refers to the inability of policy-makers to agree on binding legislation due to high levels of preference diversity. In this case, soft law is often regarded as the only realistic political alternative that could address policy gaps where a lack of political consensus on a subject precludes the development of binding legislation. In the EU case, it is largely acknowledged that soft modes of governance, such as recommendations and resolutions, are the outcome of member states’ preference heterogeneity and diversity in domestic traditions. This claim is confirmed by observations that soft law has been largely applied in policy areas that address nationally sensitive issues such as state aid, taxation, and social policy. Enlargement rounds are expected to affect both conditions for delegation. First, increasing the number of member states adds to the existing diversity of national contexts and, thus, increases the uncertainty about how common policy would affect national outcomes in the new member states. Second, enlargement also adds to the potential of more heterogeneous preferences during the decision-making process. Following these arguments, one could expect that enlargement increases the use of soft law measures relative to hard EU law, such as directives, regulations and decisions.

However, this perspective may be too simplistic, as it does not take into account the possibility of anticipatory actions taken by EU member states and supranational institutions prior to enlargement. Accession to the EU happens gradually, which provides supranational actors and member states with ample opportunities to plan ahead and try to curb any expected negative effects from enlargement. For example, recent research shows that the EU often changes its institutional arrangements prior to accepting new member states as a way to facilitate decision-making and to avoid legislative gridlock (cf. Kelemen et al. 2014). Some authors even argue that the EU has boosted the rigidity of its outputs prior to the accession of the countries from Central and Eastern Europe (CEE) in order to restrict their implementation freedom in the aftermath of accession (Kelemen 2011; van der Veen 2014). Such changes could be driven by incentives to prevent

spillover effects of lower standards in the CEE member states to the rest of the Union (Woolfson 2006). Instead, soft law is mostly used to elucidate the interpretation of legally binding instruments.

In sum, there could be different mechanisms driving the relationship (or lack thereof) between enlargement and soft law measures, that could lead to contrasting expectations about the development of soft law instruments over time. Before exploring this relationship, however, it is important to define soft law in the EU context and distinguish between different soft law measures discussed in the literature.

### 3.1 Conceptualizing and Measuring Soft Law in the EU

Whereas the scope of EU hard law is clearly defined and encompasses directives, regulations and decisions, there is a variety of other EU instruments, whose legal status is unclear. The main common characteristic of these instruments is that they have not been attributed legally binding force. Given the limited number of Community instruments provided by the EC Treaty and the proliferation of instruments in daily practice, it is clear that many different instruments may be brought within the scope of soft law: recommendations, resolutions, guidelines, action plans, communications, declarations, white papers, green papers, etc. For example, scholars who focus on state aid policy often refer to the specific communications issued by the EU Commission that have administrative and informative function (Blauberger 2009; Cini 2001; Senden 2004). In other areas, soft law is drafted in the form of recommendations or resolutions that try to steer the behavior of target groups into a particular direction. These soft law instruments fulfill different functions and vary in their relationship with binding legislation and regarding their influence on member states' behavior. To account for these differences, we make a distinction between 'complementary' and 'steering' soft law instruments (cf. Senden 2004 for a similar, though somewhat more elaborate distinction between differing soft law instruments). Complementary soft law instruments usually provide interpretation of binding EU law or inform the member states about administrative actions to be taken by the supranational institutions (mostly the Commission) in individual cases. Notable examples include the communications and notices frequently adopted by the Commission in the area of competition policy and state aid. The Commission frequently adopts interpretative notices and communications, indicating how, in its opinion, Community law should be interpreted by the member states in the transposition and implementation process. The Commission's interpretative communication concerning the free movement of services across frontiers is an illustration of this. Communications and notices are rarely stand-alone measures, but rather supplement and support both primary and secondary EC law. Complementary soft law measures strengthen the EU's legal system, as they provide more practical and specific guidelines for achieving the EU objectives described in binding EU instruments. In certain ways, complementary soft measures resemble delegated EU acts, which are a new category of hard law introduced by the Lisbon Treaty. In particular, delegated acts are adopted solely by the Commission and aim to fill the gaps and supplement EU legislation. By contrast, stand-alone soft law instruments could be adopted due to the unwillingness of member states to transfer sovereignty to the EU on sensitive issues. This is generally the case for 'steering' soft law.<sup>1</sup>

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1 We excluded pre-law instruments from the analysis, which are usually intended as a preliminary step in the pro-

More precisely, steering soft law covers instruments that aim at establishing closer cooperation between the EU member states or even harmonization of national policy in a non-binding way. This category can be further subdivided into formal steering instruments (in particular the recommendations), and non-formal steering instruments that have arisen in Community practice, such as conclusions, declarations, guidelines, opinions and others. At least to a certain extent, steering instruments are intended to fulfill functions as alternatives to Community legislation and are presumed to realize harmonization of national law in a rather informal or indirect way (Senden 2004).

Based on the argument that enlargement leads to increased heterogeneity in policy preferences, which in turn impedes the EU's ability to produce hard law, we should observe a relative increase in the amount of steering soft law instruments over time and especially after enlargement rounds. In contrast, an increase in the share of complementary soft measures would suggest a shift in the opposite direction: enlargement has strengthened the EU's legal system rather than weakened it.

### 3.2 Development of Soft Law Relative to Hard Law over Time

To explore whether enlargement has produced any enduring or temporary effects on the share of soft measures, we compiled a data set of all complementary and steering soft law instruments that were adopted between 1967 and 2012 by either the Council of the EU, the member states' governments and/or the European Commission.<sup>2</sup> All necessary information was extracted from the Eur-lex database. We made a distinction between complementary and steering soft law based on the type of instrument. For example, recommendations and opinions fall in the category of steering soft law, while communications, notices and documents classified as information are considered to be complementary. In total, we have information on 17,430 soft law instruments. Despite the large number of observations, we should be careful when drawing conclusions based on information from the Eur-lex database. In particular, gradual changes in EU institutional arrangements could have led to the development of new forms of soft law and transformed the way soft law measures are generally classified. In some cases, a particular type of soft law instrument could even have been phased out. For example, the Lisbon Treaty has constrained the number of legislative soft law instruments to recommendations and opinions. To measure the volume of soft law relative to hard law, we use the time series data set for directives, regulations and decisions collected by Dimiter Toshkov.<sup>3</sup>

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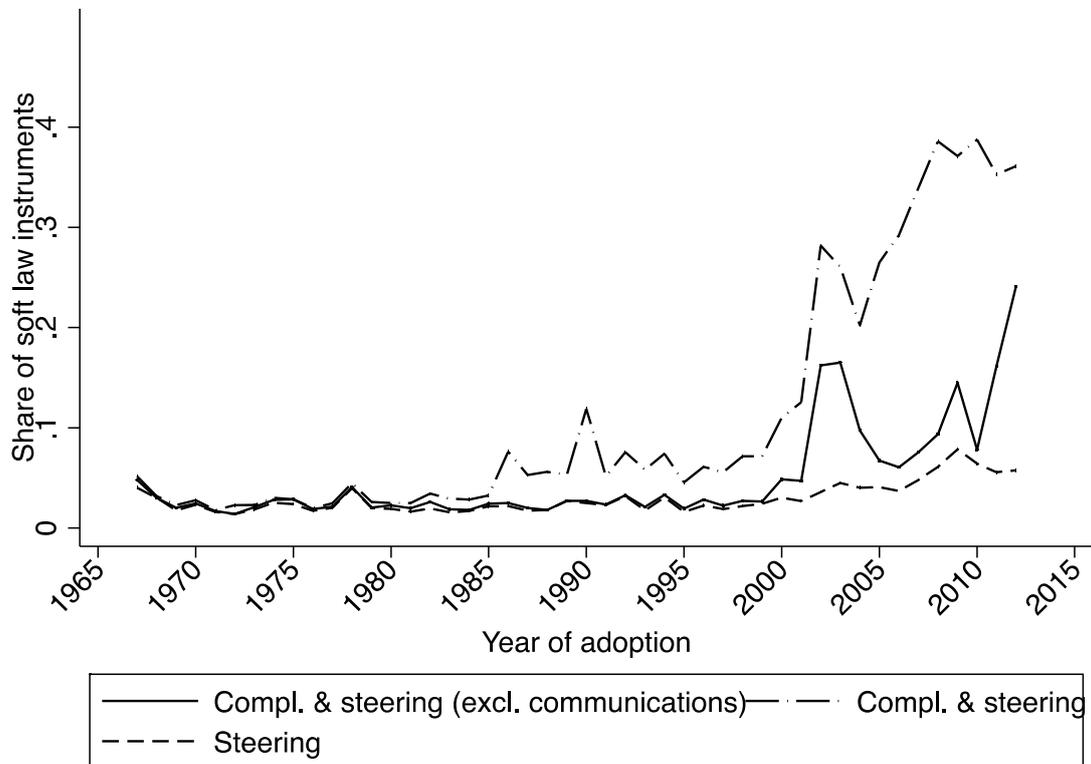
cess of negotiating legally binding measures. Examples include the legislative resolutions adopted by the EU Parliament and the Council common positions. Such cases are part of the process of adopting binding EU legislation.

2 At this stage, we have excluded instruments adopted solely by the EU Parliament, such as resolutions. The Parliament adopts a high number of legislative resolutions, which are not conceived as soft law, but mainly communicate the position of the Parliament on a legislative proposal. Own initiative resolutions could be conceived as soft law, but analyzing them is outside the scope of this research as it may reflect the dynamics within the organization of the Parliament rather than the general legislative process.

3 The data-set is available on his website ([www.dimiter.eu/Data.html](http://www.dimiter.eu/Data.html)).

Figures 1(a-d) illustrate the development and share of (different types of) soft law instruments relative to hard law between 1967 and 2012.

Figure 1a: Development of soft law relative to hard law between 1967 and 2012



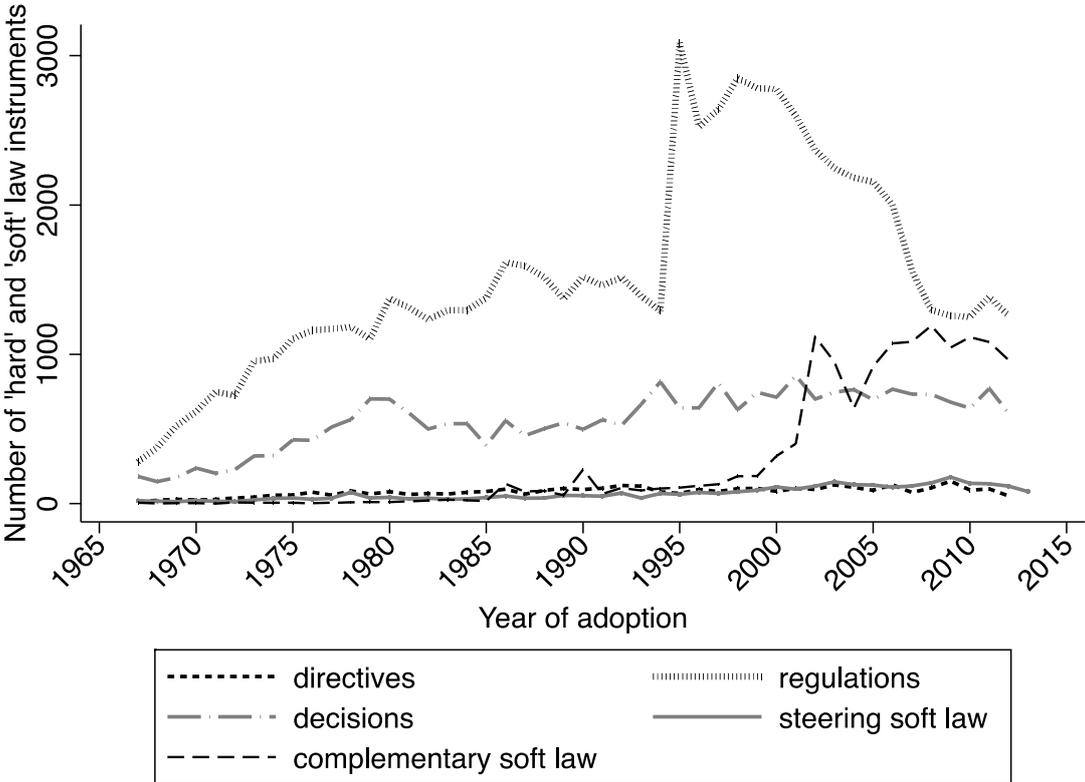
Source: Authors.

We generally observe that the share of all types of soft law instruments has increased considerably since 2000. Unsurprisingly, the sudden increase in non-binding legislative acts coincided with the adoption of the Lisbon Strategy in 2000, where the OMC was first defined and institutionalized. In addition, the steady increase in the adoption of soft law measures seems to confirm the idea of a (gradual or, in this case, sudden) shift towards softer forms of governance in the EU. More precisely, the share of legally non-binding instruments increased from nine percent to 40 percent between 2000 and 2007. However, this share has remained relatively stable ever since. Furthermore, Figure 1a shows that the sudden growth of soft measures is mainly due to an increase in the number of communications adopted by the Commission. Commission communications are standard complementary soft measures that inform the Community about actions taken by the Commission in a particular policy area (e.g. state aid) or about member states' application of EU legislation.

The main focus of our analysis is on the share of 'steering' soft law instruments, since – unlike complementary soft measures – they are conceived as an alternative to EU binding legislation and any substantial

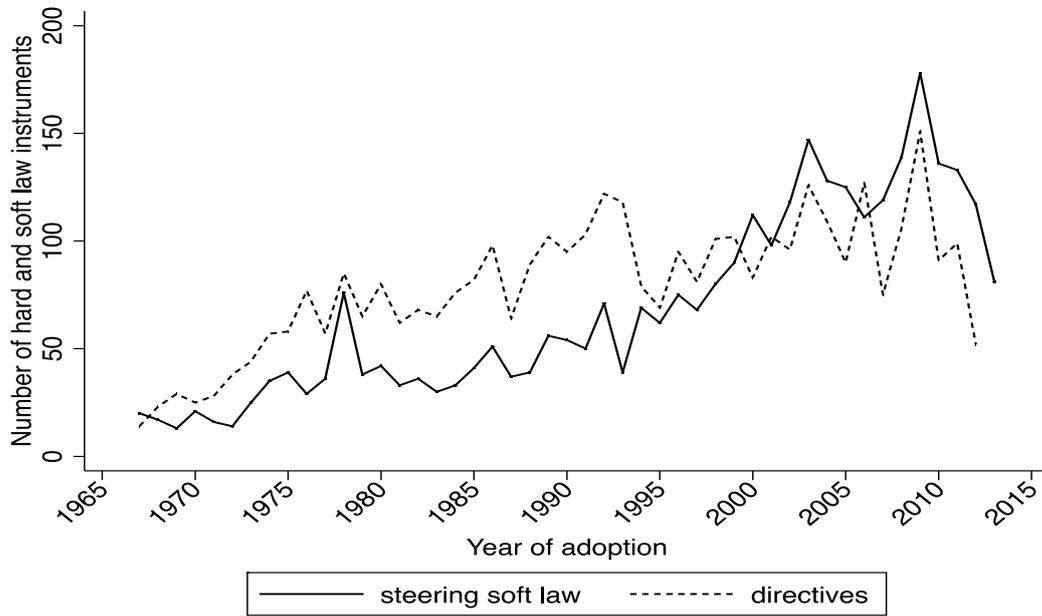
increase could therefore indicate a decreased capacity of the EU to produce binding legislation. Based on Figure 1a, however, the relative amount of steering soft measures has never reached more than eight percent. Figures 1b and 1c confirm this observation. Whereas the number of complementary soft measures has increased and remained rather high between 2001 and 2012, the development of steering soft measures has not been dramatic. The amount of steering measures has generally exceeded the number of directives adopted by the Union since 2001 (cf. Figure 1c). Nevertheless, it remains relatively low compared to other binding instruments and complementary soft law.

Figure 1b: Development of soft and hard law measures over time (per type of instrument)



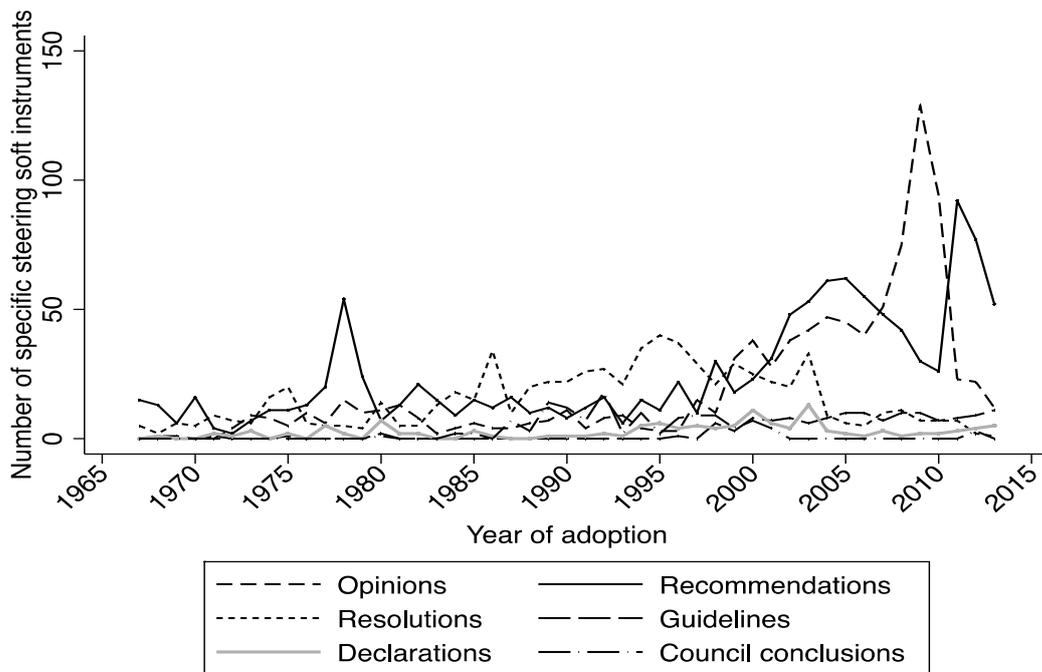
Source: Authors.

Figure 1c: Comparing steering soft law instruments and directives over time



Source: Authors.

Figure 1d: Comparing different steering soft law instruments over time



Source: Authors.

More precisely, the average annual number of steering soft measures is 113, which is relatively small compared to complementary soft measures (776) and binding EU law, such as decisions (687) and regulations (1793). In addition, the majority of steering instruments are opinions and recommendations (cf. Figure 1d). Recommendations are formalized in the treaties, which allows the ECJ and national courts to take them into account in their decisions. In other words, recommendations are still 'harder' than other types of soft law instruments. As already mentioned, the higher number of opinions and recommendations relative to other steering instruments (Figure 1d) adopted in recent years could be explained by changes introduced by the Lisbon Treaty, which now constrains legislative soft measures to recommendations and opinions.

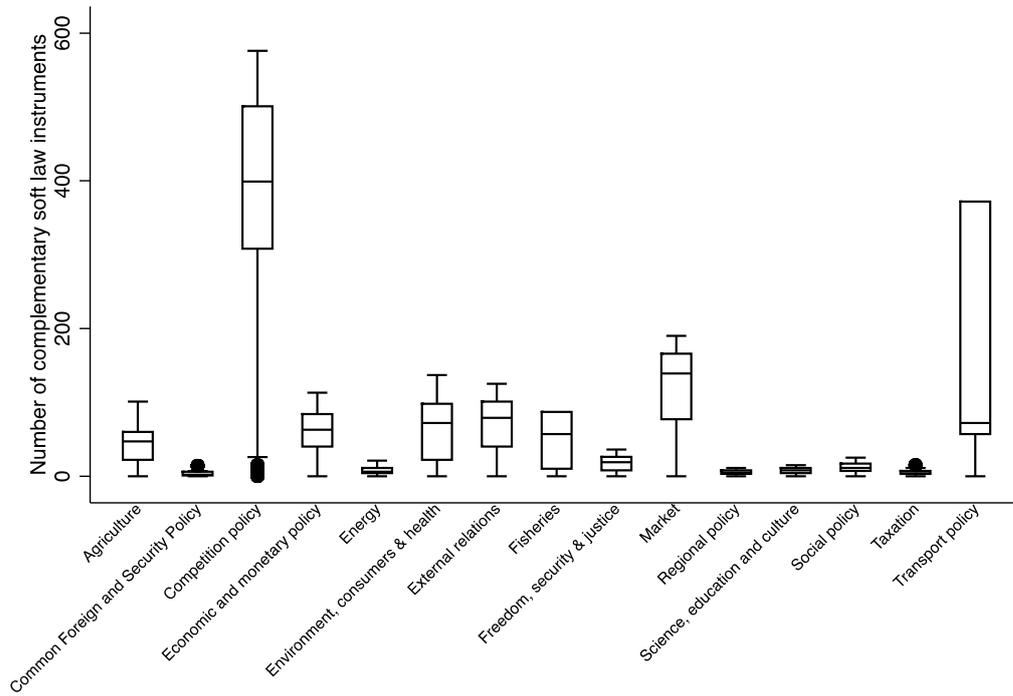
In sum, it is difficult to attribute any changes in the volume of soft law to a decrease in the capacity of the Union to produce binding instruments. Instead, it seems that the EU has expanded its activities to the production of complementary measures (such as communications and information notices). In particular, complementary soft law is often used to inform the Council and the EU Parliament about any progress made by the member states in the implementation of binding legislation and to provide additional guidelines to national authorities on how to apply EU legislation. It also informs the rest of the Community about the Commission's own implementation activities and planned actions in relation to hard law. Furthermore, any observed dynamics in the adoption of both steering and complementary soft measures do not appear to be directly related to the EU enlargement. Instead, such developments are rather associated with the emergence and the extension of the OMC approach to different policy areas – prompted by the increasing need to address market failures emerging from economic integration (Jacobsson 2004) – than with the various enlargement rounds.

Figures 2a to 2c also show marked differences between the topics addressed by the two types of non-binding EU instruments. Whereas the majority of complementary soft measures are associated with the EU Competition Policy (mostly state aid policy), most steering soft instruments are found in the EU Economic and Monetary Policy. On the other hand, there are relatively few soft measures in other nationally sensitive policy areas such as Taxation, Freedom, Security and Justice, and Common Foreign and Security Policy. This observation is somewhat surprising as these policies are associated with high preference heterogeneity between different member states, which has impeded agreements on more binding EU laws over time. It appears that member states' heterogeneity of preferences in these areas has not resulted in a shift towards less binding instruments. The high number of complementary soft measures in competition policy (state aid) is mostly related to the specific characteristics of the policy area. In particular, the treaties provide ample freedom of interpretation regarding the conditions under which state aid is allowed (Cini 2001). This has created a necessity to clarify existing ambiguities through the use of communications and information notices.<sup>4</sup>

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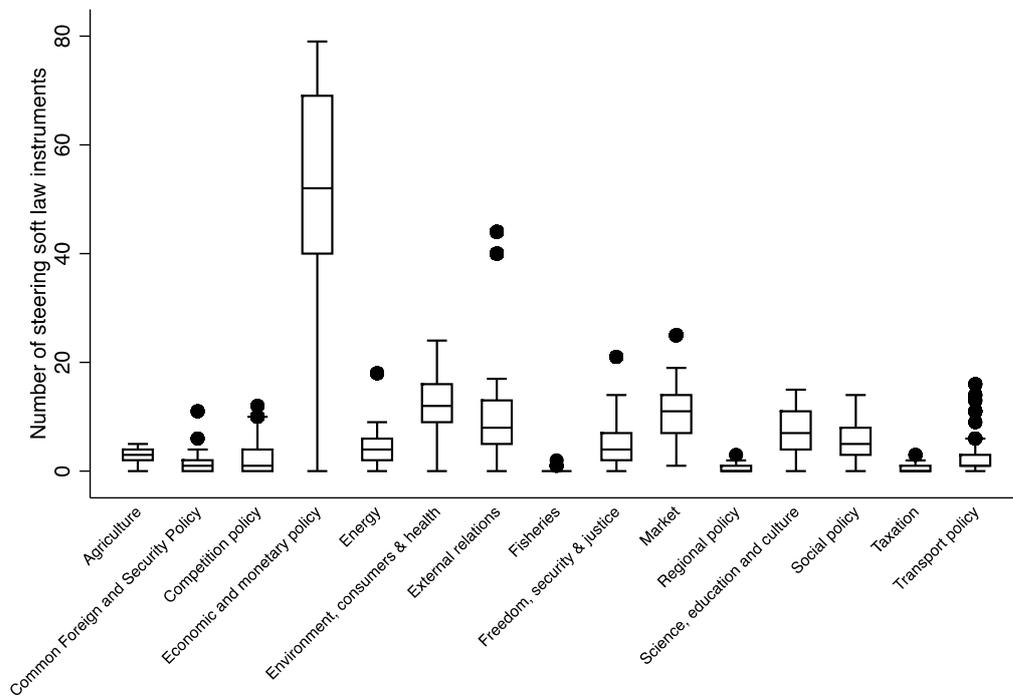
4 In addition, the European Commission calls for a new approach that extends the Lisbon Strategy to state aid policy in its 2005 State Aid Action Plan (SAAP).

Figure 2a: Variation in the number of complementary soft measures adopted each year across policy areas



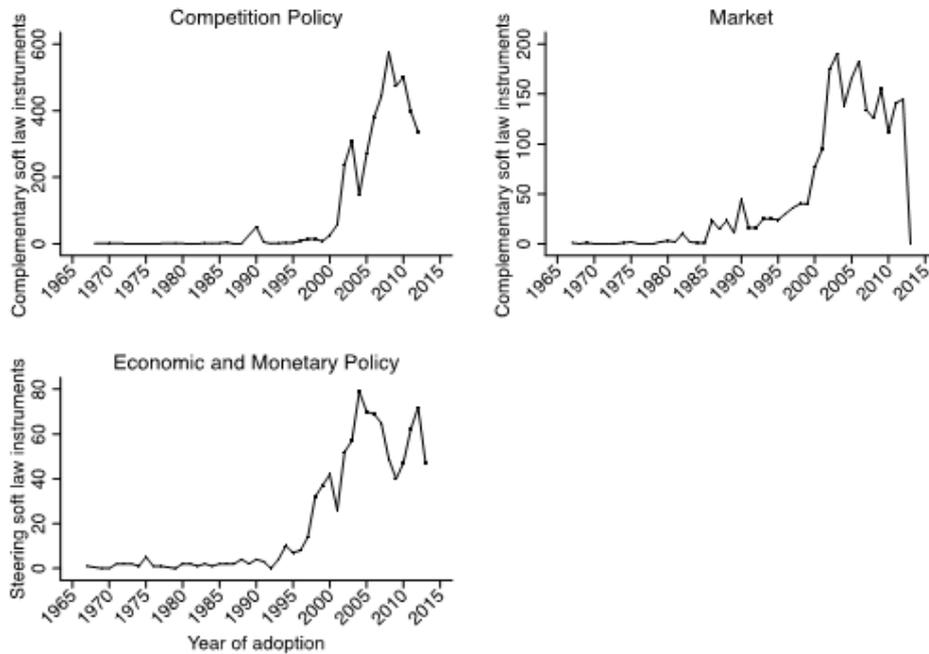
Source: Authors.

Figure 2b: Variation in the number of steering soft measures adopted each year across policy areas



Source: Authors.

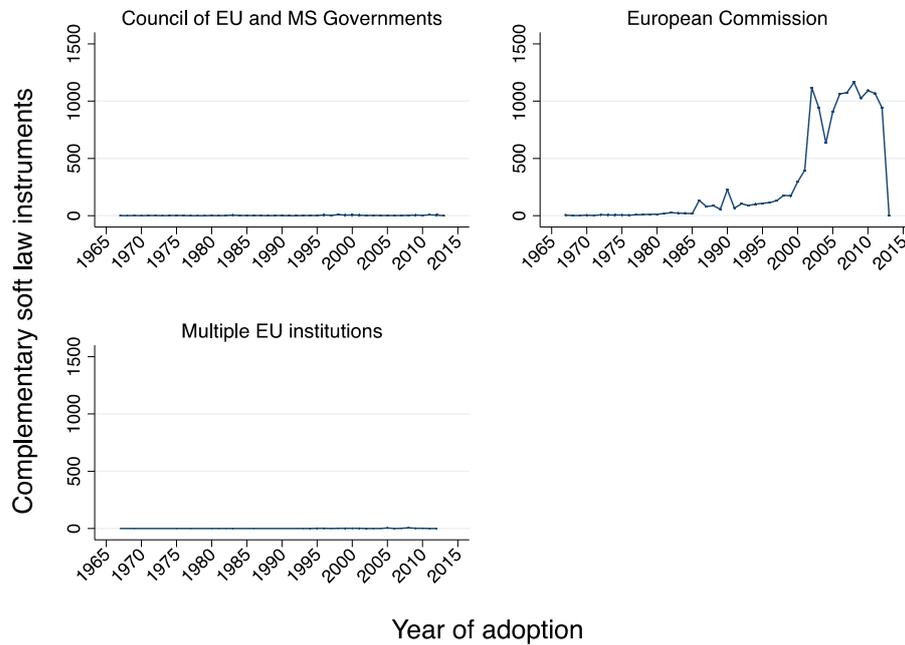
Figure 2c: Development of complementary and steering soft measures over time and across policy areas



Source: Authors.

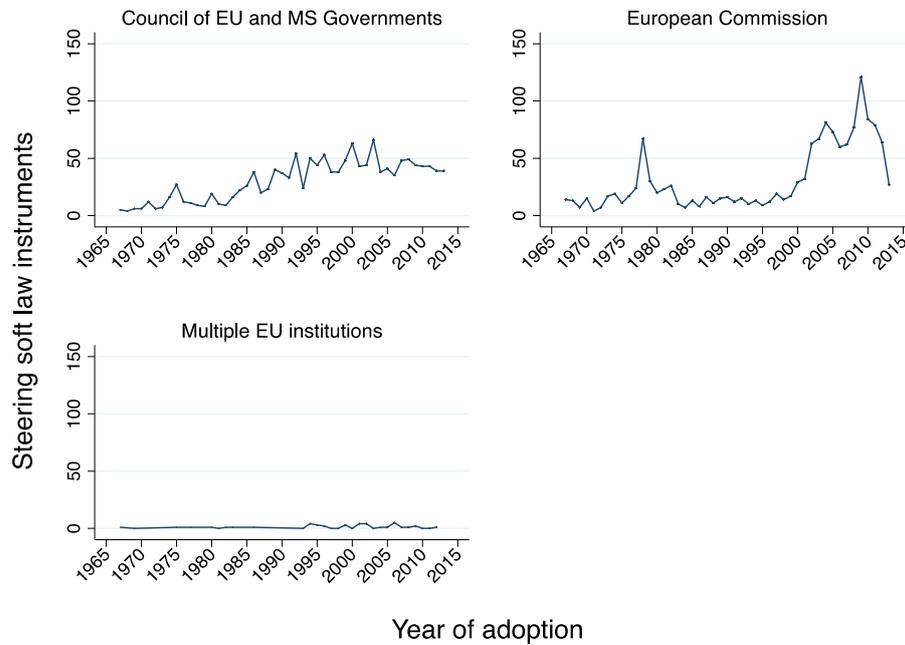
Finally, if member states' preference heterogeneity is associated with an increase in the volume of soft law measures and this is driven by enlargement, we should observe that member states' inability to agree on binding measures manifests itself in the adoption of more soft measures. Figures 3a and 3b show that complementary soft measures are generally adopted by the Commission alone, while there is more variation in the involvement of actors in the case of steering soft instruments. However, the amount of steering soft measures produced by the member states (and other EU actors) has not increased dramatically over the years. By contrast, the Commission increased its contribution to the adoption of soft law measures between 2000 and 2012. It is plausible that the Commission's activism in the production of soft law is partly related to its failure to get more member states to agree on binding legislation. However, such an argument runs contrary to the fact that the majority of the Commission's non-binding instruments supplement rather than substitute binding EU legislation. It is also unclear how any increase in complementary measures could be attributed to the accession of new member states since complementary soft law generally targets all countries and the dramatic increase started before the EU's 'big bang' enlargement to Central and Eastern Europe.

Figure 3a: Variation in complementary soft law over time and across different actors



Source: Authors.

Figure 3b: Variation in steering soft law over time and across different actors



Source: Authors.

In sum, there is no strong evidence to suggest that the EU's membership expansion has created difficulties for the EU to adopt binding legislation and thus shifted its focus to non-binding measures. While the overall share of soft law measures has increased over time, these instruments mainly complement existing EU Community instruments by informing and providing instructions about the application of EU law or about the activities of the Commission. By contrast, the number of steering instruments designed to substitute binding legislation has remained relatively low. In addition, the Commission clearly dominates the adoption of soft law measures, whereas the contribution of the Council is minimal and restricted to steering instruments. The fact that the majority of these measures complement existing EU law suggests that the Commission has expanded its competences to at least some nationally sensitive issues (e.g. state aid). However, we should be careful not to draw strong conclusions about the development of soft law measures based on Eur-lex classifications of soft law instruments. For example, the exact meaning and function of 'communications' as a form of complementary soft law could have changed over time and could also vary across policy areas. The same problem could hold for other types of soft law instruments, such as recommendations and opinions.

Whereas the precise empirical link between enlargement and soft law requires further investigation, it is clear that enlargement has not weakened the EU's legal system in terms of an increased use of soft law legislation. Instead, the use of complementary soft measures indicates further strengthening of the EU's legal order over time.

#### **4. The Impact of Enlargement on Differentiated Integration**

Unlike the case of soft law, the relationship between enlargement and differentiated integration is more clearly established. Enlargement has always been one of the major drivers of differentiation in European integration (Schimmelfennig/Winzen 2014). Each accession treaty contains transitional arrangements with derogations from the full and immediate validity of EU rules for the new member states. For example, new members are at first regularly excluded from participation in the Euro and the Schengen area. In addition, in the case of the Eastern enlargement, the temporary suspension of the freedom of labor movement for the new member states and the phasing in of agricultural subsidies were prominent and contested transitional arrangements. Last but not least, new member states often obtain additional time to implement secondary law after joining. Given these examples, it is not surprising that the number of differentiations generally increases immediately after enlargement (Schimmelfennig 2014; Schimmelfennig/Winzen 2014). Therefore, instead of investigating the evolution of differentiated integration over time, in this paper we focus on the nature of differentiations produced by accession treaties.<sup>5</sup> How can we explain enlargement-induced differentiation?

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5 We should note that accession treaties are not the only source of differentiated integration in the Union. Many differentiations originate from processes of 'deepening', where the EU increases its competences over new policy areas. Because we are interested in the impact of enlargement on differentiated integration, we only focus on accession-based differentiations.

We expect that differentiation originating from enlargement follows an instrumental logic in the sense that it reflects efficiency and distributional concerns (Schimmelfennig/Winzen 2014). In other words, the transitional arrangements in accession treaties are used as an instrument to overcome deadlock in accession negotiations deriving from conflict about the distribution of gains and losses from the accession of new member states (Plümper/Schneider 2007; Schneider 2009). Old member states, or powerful interest groups in these states, fear economic and financial losses as a result of market integration with the new member states (e.g. resulting from the opening of labor markets), the (re-)distribution of EU funds (e.g. in agriculture or regional policy), or weak implementation capacity (e.g. by joining the Schengen regime before effective border controls are in place). New member states, in turn, are concerned about pressures on domestic producers resulting from the opening of their markets and about losing competitiveness due to the obligation of implementing costly regulatory rules.

To the extent that the candidate states are in an inferior bargaining position, i.e. have no credible alternatives to membership while old member states can afford to reject them, old member states can credibly threaten to veto enlargement unless the new member states agree to forego those rights and entitlements that cause net losses for the already existing members. This bargaining situation is constrained in two ways. First, the old member states cannot discriminate against the new ones for an indefinite amount of time, as this would violate the fundamental principles of the EU as a legal order. Accession-based exemptions and discriminations are generally declared and justified as transitory arrangements softening the impact of enlargement and buying time for adaptation. In short, differentiation originating from enlargement is expected to be temporary and short-term.

Second, the new member states' costs of discrimination cannot exceed their benefits of membership. Otherwise, the candidates would reject joining the EU. As a corollary, candidates that are highly and asymmetrically dependent on the EU are also likely to accept a high number of instrumental differentiations. Thus, poorer new member states are prone to having a higher number of differentiations resulting from accession. Because they are more dependent on the EU and less competitive than wealthier new member states, the EU is both more capable of discriminating against them and more willing to accommodate them by granting exemptions. By contrast, wealthy candidates are less likely to qualify for redistributive schemes, at least when compared to poor candidates. In addition, wealthy candidates are less dependent on the EU and therefore more likely to reject discriminatory membership than poor candidates. They are also less likely to demand exemptions because their economies are strong enough to withstand increased market pressure. In short, differentiation originating from enlargement is likely to be more prominent in enlargement rounds with poorer candidates. Furthermore, it affects comparatively poor new member states more strongly.

#### 4.1 Variation among Accession Countries and Types of Enlargement-induced Differentiation

Not all differentiations are alike. Differentiations for accession countries come in two forms: Exemptions temporarily free new member states from obligations and costs of membership; discrimination deprives them from the rights and benefits of membership. Generally, new members seek to obtain exemptions and to avoid discrimination. Whether they are able to achieve these goals depends on their heterogeneity (difference to old member states) and their bargaining power. Heterogeneity creates demand for differentiated integration. The more differentiated the preferences and capacities of a new member state are from those of the old ones, the more differentiation the new and the old member states are likely to seek. On the side of the old member states, relatively poor candidates and those with weak governance capacity produce the strongest concerns about integration capacity and redistribution and thus create demand among existing members for differentiation in the form of discriminatory exclusion. By contrast, relatively small candidate countries mitigate such concerns. The smaller a candidate country is, the less important it is for the distribution of gains and losses and for the efficiency of the policy. On the side of the acceding member states, both wealthy and poor candidates have an interest in obtaining exemptions. Wealthier candidates may want to reduce their contributions to the redistributive policies of the EU and protect national regulatory standards, while poorer candidates may seek derogations regarding regulatory policies that would burden their industries or national budgets with considerable costs. Smaller size also tends to create more demand for exemptions. Small countries may not even engage in some of the agricultural or industrial activities that the EU regulates. Other EU rules (e.g. for competition in the energy sector) may be hard to implement for a very small country. Finally, the demand for exemptions increases with Euroscepticism – especially if integration is perceived as a threat to national identity and sovereignty.

Whether old and new member states are able to realize their demand for discrimination and exemptions depends on the supply of differentiations, which is determined by their relative bargaining power. New member states are more likely to obtain exemptions and avoid discrimination if they are wealthy, have strong governance capacity, are big and Eurosceptic. In general, wealthier candidates have less to lose from remaining non-members than poorer candidates (Mattli 1999), which strengthens their bargaining power vis-à-vis the old member states. The same is true for governance capacity: countries with weak governance capacity are more in need of integration to improve the functioning of their states. Euroscepticism also strengthens the bargaining power of candidate countries as governments can exploit skeptical public opinion to achieve a better accession deal. In addition, candidates' bargaining power is expected to vary with size. *Ceteris paribus*, smaller countries are both more dependent on market integration and have less voting power in the EU.

The combination of demand-side and supply-side conditions determines the outcomes of differentiation (cf. Table 1). In the case of old member states' demand for discriminatory differentiation of new member states, demand-side and supply-side conditions generally match. The relative poverty, weak governance capacity, and large size of new member states create a demand for more discriminatory differentiation. Relative poverty and weak governance capacity also decrease the bargaining power of new member states.

In addition, popular support for membership also reduces the bargaining power of new member states. Only size has a theoretically ambivalent effect: whereas a large new member state increases old member states' demand for discrimination, it also has more bargaining power and may thus reduce the discrimination desired by the old member states. It is an empirical question whether demand trumps supply.

*Table 1: Conjectures on differentiation*

	Demand increases with	Supply increases with	Outcome
Discrimination	Relative poverty, weak governance capacity, large size	Relative poverty, weak governance capacity, small size, popular support  Pre-accession phase	Poorer, weakly governed, larger (?), and more supportive countries suffer from more discrimination.  More discrimination in pre-accession period
Exemption	Relative poverty, weak governance capacity, small size, Euroscepticism	Relative wealth, strong governance capacity, large size, Euroscepticism  Post-accession phase	Wealthier, better governed, smaller (?), and more Eurosceptic countries obtain more exemptions.  More exemptions in post-accession period

*Source: Authors.*

By contrast, demand-side and supply-side conditions for exemptive differentiation generally do not match. Poorer, smaller, and more Eurosceptic countries, as well as new member states with weak governance capacity should have a higher demand for exemptions. But relative poverty and weak governance capacity also reduce their bargaining power. As a result, poorer and weaker new member states are likely to obtain fewer exemptions than wealthier and better-governed countries.

Only Euroscepticism works in favor of more exemptions both on the demand and the supply side. Size has the same theoretically ambivalent effect as in the case of discriminatory differentiation. On the one hand, larger countries may have more bargaining power to obtain exemptions. On the other hand, smaller countries may get away with more exemptions because they are less relevant for the overall policy outcome. Therefore, the assumed explanatory factors generally have opposite effects on discrimination and exemptions. State characteristics that increase discrimination are likely to reduce exemptions at the same time.

In sum, we expect that the wealthier, better governed, more Eurosceptic, and smaller a new member state is, the less it is subject to discriminatory differentiation and the more it benefits from exemptive differentiation.

## 4.2 Empirical Analysis of the Impact of Enlargement on Differentiated Integration

We use data from the EUDIFF1 and EUDIFF2 datasets.<sup>6</sup> EUDIFF1 captures differentiation in EU primary (treaty) law and is based on article-years. EUDIFF2 collects data on differentiation in secondary legislation and is based on legislative act-years. EUDIFF1 records the countries for which differentiations have been valid for each treaty article (including protocol articles) in force in a given year between 1952 and 2013 (cf. Schimmelfennig/Winzen 2014). EUDIFF2 does the same for all Council and Council/EP directives and regulations from 1958 to 2012 as well as decisions in the area of Justice and Home Affairs/Police and Judicial Cooperation in Criminal Matters from 1993 to 2009 based on the Official Journal (Duttler et al. 2013). For the purpose of this paper, the unit of analysis was changed from the article/act-country-year triad to ‘differentiations’. For treaty law, differentiations from the same policy area that start and end on the same date are treated as a single differentiation (cf. Schimmelfennig 2014; Schimmelfennig/Winzen 2014). In secondary law, we treat differentiations that have the same starting and termination dates and refer to the same legal basis as single differentiations. In order to capture variation in the duration of differentiations, each differentiation is weighted by the number of years it has been in force.

### 4.2.1 Duration of Differentiation

In the analysis of primary law differentiations since 1958 (Schimmelfennig/Winzen 2014), we find that accession-based differentiation is short-term: 5.7 years on average. The temporary nature of accession-based differentiation becomes clearer if we take into account long-term and on-going differentiations. If we define ‘long-term’ as the double of the average duration, we find that ten of the eleven differentiations that have been in force for more than twelve years result from treaty revisions (deepening), rather than enlargement. On-going differentiations are those still in force at the end of 2012. This is true for 36 percent of all differentiations. While enlargement accounts for 58 percent of all differentiations, it has produced 27 percent of the on-going differentiations. Whereas the effect of enlargement on differentiated integration is strong, it is limited in time.

This is also visible in a more focused analysis of the Eastern enlargement. Overall, new member states have contributed on average 47 differentiation years to differentiated integration in primary law between 2004 and 2013. This is more than three times the contribution of old member states (15.6).<sup>7</sup> However, this contribution has varied strongly over time. Figure 4 shows the new member states’ share of differentiations in treaty law for the period between 2004 and 2013.<sup>8</sup> In spite of slight increases in 2005 and 2007/2008, the

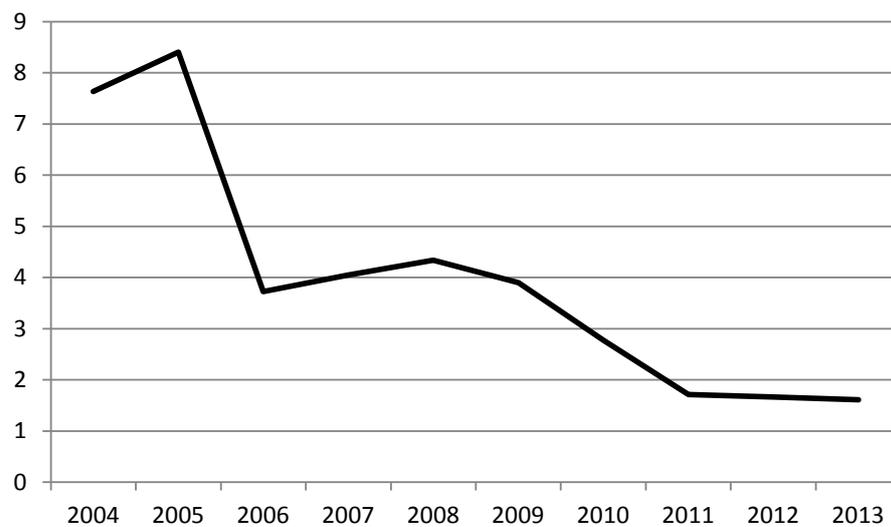
6 These datasets were established in the context of a collaborative project on ‘Differentiated Integration in the European Union’, co-directed by Katharina Holzinger (University of Konstanz) and Frank Schimmelfennig. Financial support by the German Research Association and the Swiss National Science Foundation is gratefully acknowledged.

7 Average numbers are weighted by number of new (12) and old member states (15).

8 The share is calculated by dividing the number of differentiations per new member states by the number of differentiations per old member state for each year.

overall trend is one of decline. Whereas the relative share of new member states' treaty-based differentiations was more than eight times that of the old member states in 2005, it dropped to 1.6 by 2013. That is, new member states contribute on average only a little more to differentiated integration than the old member states. This is clear evidence of 'normalization' of integration capacity. Moreover, more than half of the new members' differentiations have been in areas in which old member states have differentiations, too. In 2013, only one third of the differentiations were in policy areas without differentiations for old member states.

Figure 4: New members' relative share in treaty-based differentiations (2004-2013)

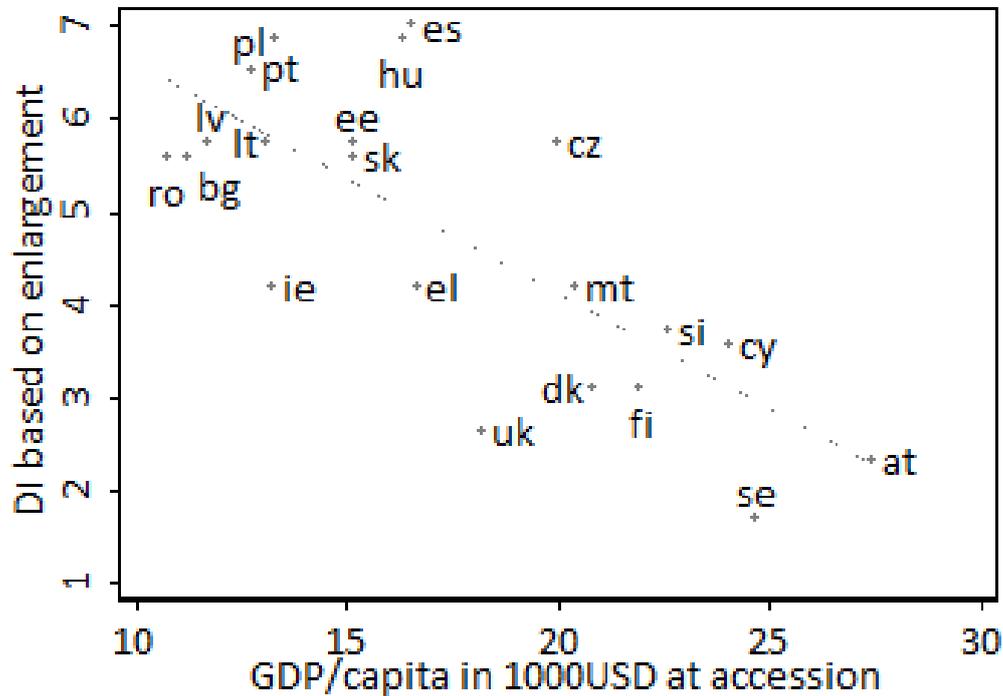


Source: Authors.

#### 4.2.2 Variation across Accession Countries

In general, we find that poorer new member states are more affected by differentiation originating from accession treaties than wealthier acceding countries. Figure 5 shows in a bivariate analysis that differentiations resulting from enlargement do, indeed, increase with poverty (measured as GDP per capita). The x-axis captures each country's share of all differentiation-years resulting from widening (horizontal axis). 100 percent represent the total number of differentiations multiplied by their duration.

Figure 5: Country-level variations in differentiations based on enlargement: wealth and differentiation

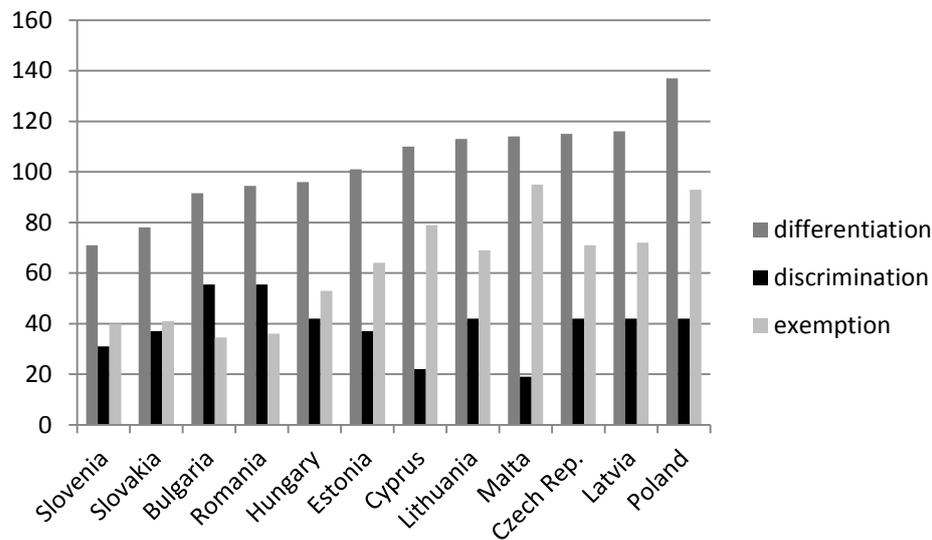


Source: Authors.

In the next set of analyses, we examine the countries of the 2004 and 2007 enlargement rounds and distinguish between discrimination and exemptions. The dependent variables are the aggregate measures of discriminatory and exemptive differentiations in differentiation-years for each of the twelve new member states that joined the Union in 2004 and 2007. The number of differentiations was multiplied by their duration in order to give long-term differentiations more weight.<sup>9</sup> The differentiation-years range from 71 for Slovenia to 137 for Poland. Moreover, the figure shows that the relative shares of discrimination and exemption vary strongly across the new member states. Whereas 60 percent of the Bulgarian differentiations are discriminatory, this is the case for only 17 percent of the differentiations of Malta (cf. Figure 6).

<sup>9</sup> In addition, we compensated for the fact that Bulgaria and Romania are in the data set for only six rather than nine years by multiplying their average annual differentiation-years by nine.

Figure 6: Differentiation by new member state



Source: Authors.

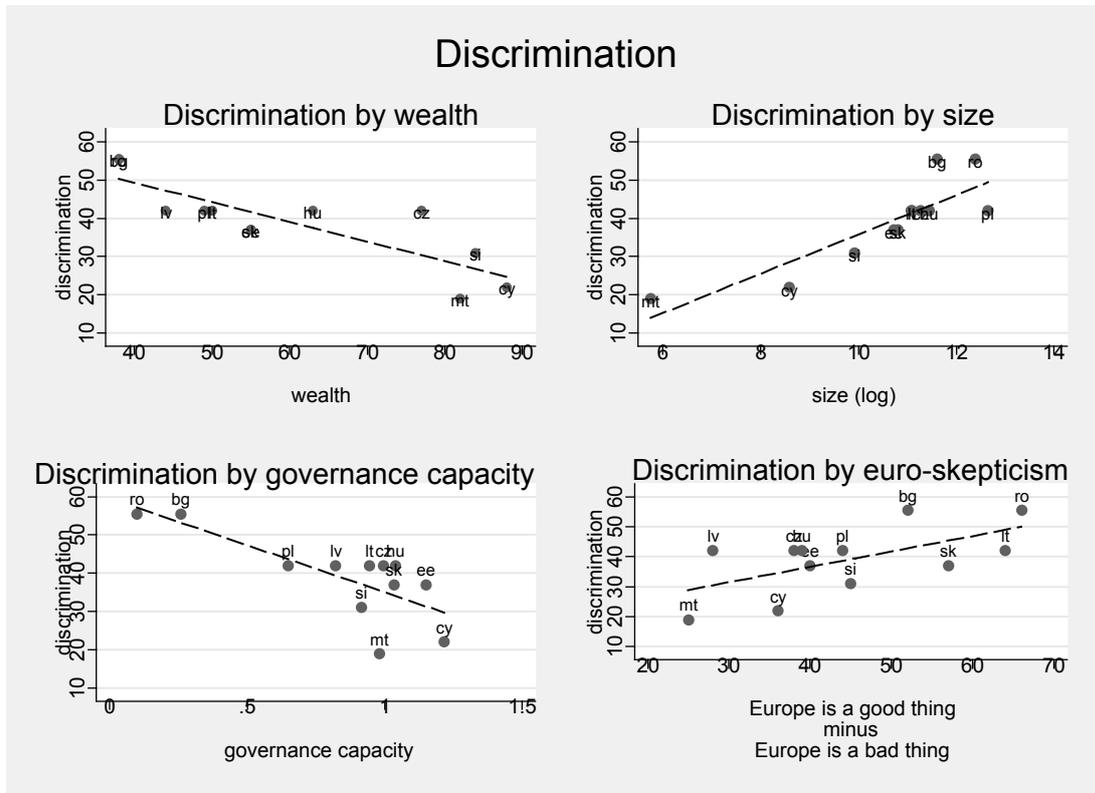
The explanatory variables are relative wealth, popular support/Euroscepticism, size, and governance capacity. The indicator for relative wealth is new member state GDP per capita as a percentage of EU GDP per capita in the year preceding the accession.<sup>10</sup> Euroscepticism is measured in the year of accession based on the *Eurobarometer* data; it represents the difference between the percentage of respondents saying that the EU was “a good thing” and the percentage of respondents saying the EU was “a bad thing”.<sup>11</sup> For size, we used the logged size of the state territory in square kilometers (to correct for the highly skewed distribution).<sup>12</sup> Finally, governance capacity is measured as the average score for ‘government effectiveness’ and ‘regulatory quality’ from the World Bank’s Worldwide Governance Indicators in the year of accession.

10 For the 2004 and 2007 enlargement rounds, the data was taken from Eurostat (<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tec00114>).

11 Note that this is actually a measure of popular support. Higher values indicate higher support. An alternative measurement based on respondents with ‘exclusive national identity’ provided no significant results and was dropped.

12 Alternatively, we used the logged size of the population. Both are highly correlated (0.87) and produce the same results.

Figure 7a: Correlates of discriminatory differentiation



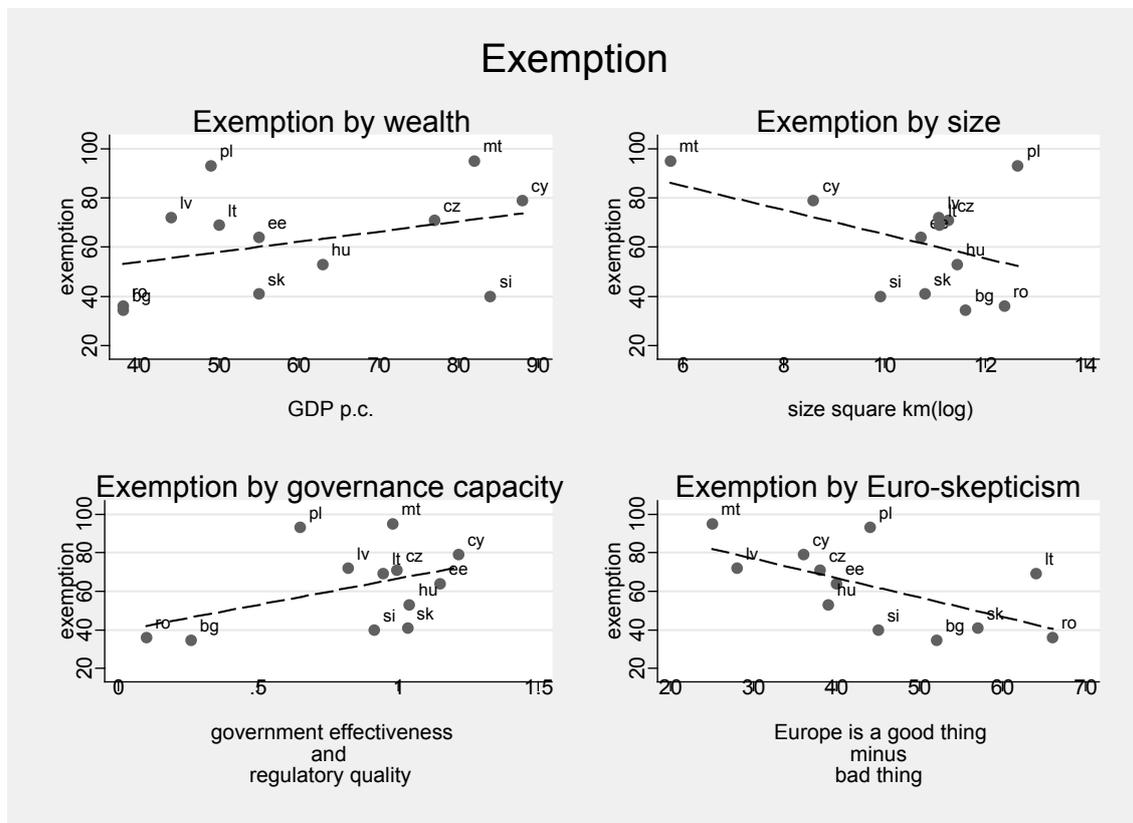
Source: Authors.

Notes: y-axis: discrimination-years for new member states between 2004 and 2012. Correlations: wealth  $r = -0.84$  (0.001); size 0.86 (0.000); governance capacity 0.68 (0.016); Euroscepticism 0.61 (0.037).

Figure 7a shows scatter plots and fitted lines for discriminatory differentiation. In general, discrimination is significantly correlated with all four variables.<sup>13</sup> As expected, discrimination decreases as wealth, governance capacity, and Euroscepticism increase. The theoretically open question of the effect is resolved empirically: discrimination decreases with size. This seems to imply that size does not bring advantages in bargaining. As a matter of fact, the findings support the view that small size reduces impact and salience and helps countries to fly under the radar or benefit from the indifference of the old member states. As the smaller new member states are also the wealthier ones, the precise cause of (lesser) discrimination is, however, hard to determine. It may very well be that countries like Malta, Cyprus, Slovenia, Estonia, and Slovakia found it easier to comply with EU rules and caused less concern among the old member states because of their relatively high wealth and governance capacities. Wealth strongly correlates with both size and governance capacity.

13 Please note that the analysis is bivariate only. Moreover, some of the independent variables are correlated with each other. Wealth is strongly correlated with both size and governance capacity. The correlation between logged size and wealth is  $-0.71$ ; the one between wealth and governance capacity is  $0.68$ . Both are significant at conventional levels. The correlation between wealth and popular support is  $-0.53$  (and not significant at the five percent level). The results therefore need to be interpreted with caution.

Figure 7b: Correlates of exemptive differentiation



Source: Authors.

Notes: y-axis: exemption-years for new member states 2004-2012. Correlations: wealth  $r = 0.35$  (0.263); size:  $-0.43$  (0.165); governance capacity  $0.44$  (0.154); Euroscepticism  $-0.62$  (0.033)

Figure 7b shows the same scatter plots for the number of exemption years per new member state. The general picture is that the lines go in the opposite direction to the lines on discrimination, and that the coefficients have the opposite sign. Wealthier, smaller, better governed, and more Eurosceptic countries are likely to obtain more exemptions than poorer, bigger, weakly governed and more supportive countries. In contrast to the correlations of discrimination, however, those of exemption are not significant at conventional levels, except for popular support of membership, which is significant at the five percent level in the case of both discrimination and exemption. This might have to do with the fact that Euroscepticism theoretically is the most determinate factor because it produces both more demand for exemptions and more bargaining power to realize this demand (but this could well be an over-interpretation).

The correlation of wealth and exemptions shows strong positive and negative deviations from the fitted line both at the low and the high ends of the distribution. Size fits well at the low end of the distribution.

Very small countries such as Malta and Cyprus obtain both considerably less discriminatory and considerably more exemptive discrimination. For larger countries, however, the relationship does not exist. Poland is the obvious outlier: it is the largest country in the sample and has obtained almost as many exemption-years as the Maltese micro-state. In other words, if Poland is removed from the sample, the correlation becomes significant. This distribution could also indicate that a large country like Poland might compensate for the disadvantages of size through its larger bargaining power. Governance capacity shows a similar distribution. While the countries with the lowest values of governance capacity, Bulgaria and Romania, have received the fewest exemption-years, the relationship does not hold for the countries of the 2004 enlargement. Although the results are not statistically significant at conventional levels, their general direction fits our general expectations.

In sum, we observe that the differentiation effect of enlargement has been short-term. Whereas enlargement contributes strongly to differentiation, it only does so for a limited period of time. Furthermore, poorer new member states are more affected by enlargement-based differentiation than wealthier ones. We distinguished between discriminatory differentiation, which benefits the old member states and exemptive differentiation, which benefits the accession countries. We observe that discrimination and exemption vary across new member states and that wealthier, well-governed, Eurosceptic and small countries are less likely to suffer from discrimination and more likely to benefit from exemptions.

## **5. The Impact of Enlargement on Member States' Non-compliance**

As argued in the case of soft law and differentiated integration, a higher membership number 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, but also in the weakening of the EU's legal system through increased non-compliance if (new) member states are unwilling to implement legislation that does not reflect their preferences sufficiently. Moreover, new member states may be resistant to compliance if domestic support for the EU as the law-making institution is low. Finally, enlargement can result in more non-compliance if the capacities of the newcomers to apply and enforce EU law are lower than those of the old member states. The following section sets out the contrasting expectations of three main approaches to compliance for the four enlargement rounds. We present the empirical evidence of how these enlargement rounds have affected non-compliance focusing on the development of non-compliance across enlargement rounds – future research will assess differences in non-compliance between new and existing member states more extensively for the case of Eastern enlargement.

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. Enforcement approaches also focus on the decreasing ability of EU institutions to monitor compliance for a larger membership, even if monitoring of the application of EU law is decentralized

and based on complaints raised by member states. Enforcement approaches specifically pinpoint the size of a member state as a key factor that determines its 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 EFTA enlargement in 1995, also included at least one larger member state. In view of the size of these larger states and of the number of countries involved in the various rounds, power-based enforcement approaches would expect non-compliance to be particularly problematic in the Northern enlargement (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 eleven smaller states) and especially for the EFTA enlargement (that only included small states).

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 with sufficient resources and the efficiency to pool them in the implementation of EU law are better compliers than those that are poor and corrupt (Börzel et al. 2010; Hille/Knill 2006). Administrative capacities clearly distinguish the Northern and EFTA enlargement rounds, on the one hand, and the Southern and Eastern enlargement rounds, on the other. The UK and Denmark (and to a less 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). 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.

Legitimacy approaches, finally, focus on the extent to which states identify with the EU and consider the EU in general (and specific EU legislation) legitimate as a key determinant of states' decisions about compliance. 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), which comply with EU law as a habit of obedience once they have internalized EU law. Compliance with EU law is 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. Therefore, the widening of European integration by accepting groups of new members could undermine compliance. However, in two of the three 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

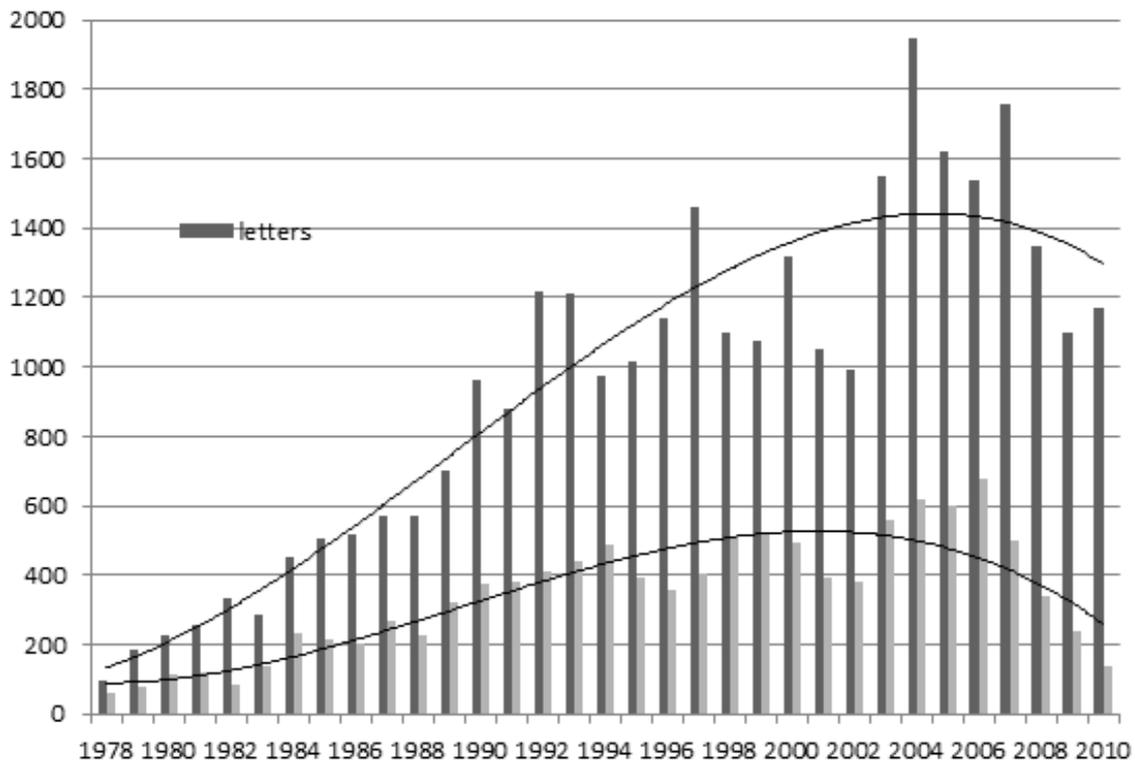
of the Central and Eastern European countries might have fostered the internalization of EU law into the domestic legal systems prior to accession. Nevertheless, socialization beyond government elites requires time, particularly in the case of the CEE countries. The Europeanization literature found little evidence for effective socialization processes (Schimmelfennig/Sedelmeier 2005; Schimmelfennig et al. 2006). Instead, reinforcement by reward was the dominant logic. But even if the CEE's accession was not only driven by the instrumental logic of conditionality (Kelley 2004; Kubicek 2003), the internalization of EU law mostly involved executive elites and hardly reached into the other two branches of government and the broader public (Goetz 2005; Jacoby 2001; Zubek 2008). Particularly, the acceptance of twelve new member states in 2004/2007 should have resulted in a temporary increase of non-compliance due to the need to socialize domestic actors into EU law.

Another strand of legitimacy approaches does not focus on the length of membership, but on prevailing domestic attitudes 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 behavior. 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). 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 also part of their return to the European community of states with which they shared constitutive norms. From this perspective, these two enlargement rounds should have led to less compliance problems than the Northern and EFTA enlargements.

## 5.1 Empirical Analysis of the Impact of Enlargement on Non-compliance

EU scholars and policy-makers alike have claimed that the EU suffers from a growing compliance problem, which is systemic or pathological to the EU (Cremona 2012; European Commission 2011; 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 (cf. Figure 8).

Figure 8: Letter of formal notice and reasoned opinions per year, EU 27, 1978-2010



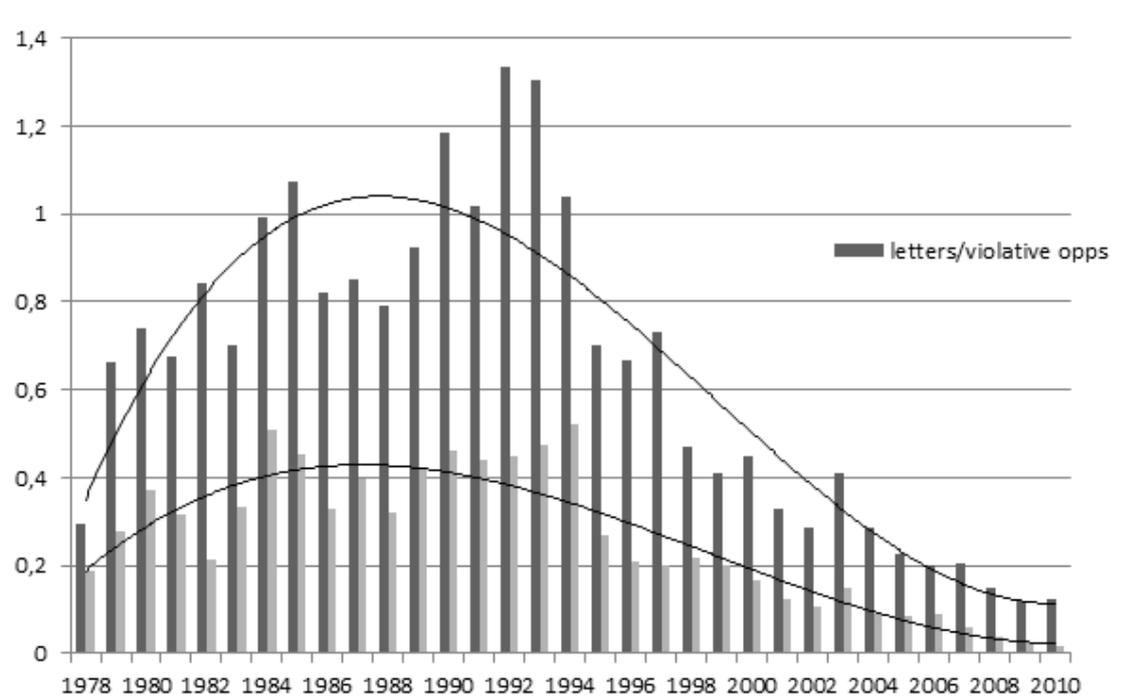
Source: Authors.

Infringements have undoubtedly been rising, from 97 annual Letters of Formal Notice in 1978 to 1168 in 2010 (Reasoned Opinions: 62 to 137). Yet, these numbers have to be put into context. When compared across years, infringement proceedings (Letters and Reasoned Opinions) per se do not say much about changes in the level of non-compliance in the EU. They have to be measured against the numbers 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. Furthermore, they can help to settle infringement cases at an early stage of the process rather than having them escalate to more serious stages. In addition, 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. Generally speaking, the Commission is strongly dependent on complaints sent by EU citizens and civil society organizations. It is likely that some civil society 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. With these caveats in mind, we should

also acknowledge that infringement cases remain the most systematic and comparable source of information on non-compliance.

If the increasing numbers of EU laws and member states, which can potentially violate those laws, are controlled for, non-compliance in the EU has rather decreased (cf. Figure 9). As regards enlargement, infringement numbers relative to violative opportunities have only increased after the Southern enlargement, but not after the EFTA and the ‘big bang’ Eastern enlargement.

Figure 9: Letter of formal notice and reasoned opinions relative to violative opportunities per year, EU 27, 1978-2010

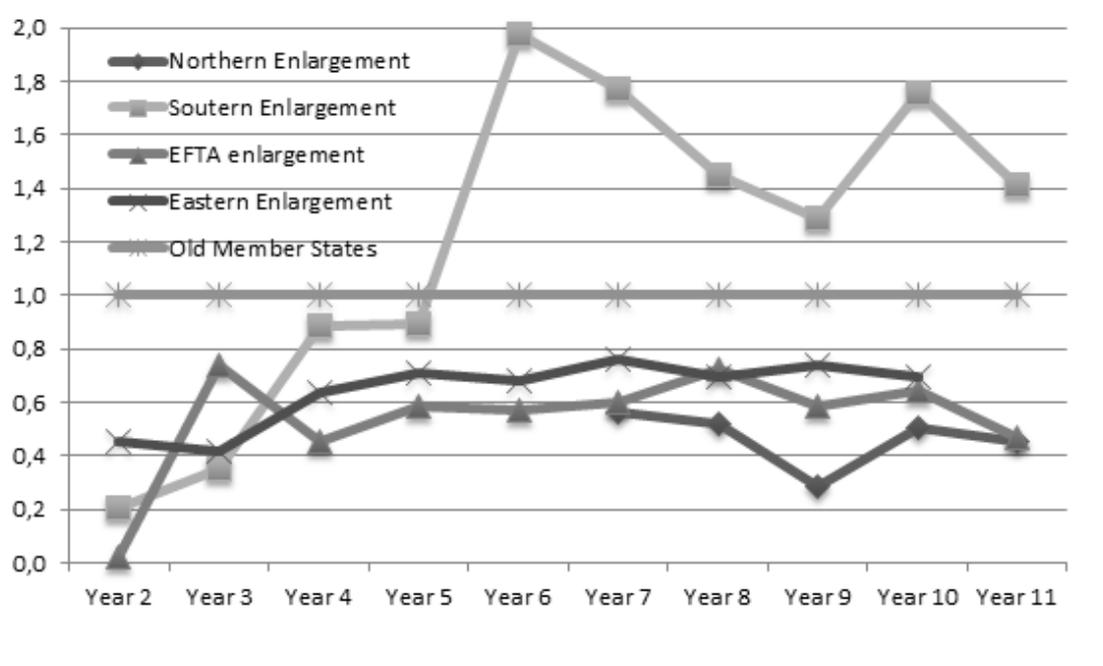


Source: Authors.

The picture becomes more nuanced when we compare non-compliance of old and new member states for each enlargement round. Figure 10 (below) depicts the average annual number of infringements (Reasoned Opinions) by the new member states as a share of the average 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). Recording the infringements of new members relative to the annual mean of the old members not only controls for changes in violative opportunities (the volume of legislation in force), but also for changes in the EU’s compliance system and the Commission’s practice, since they affect old and new members equally.<sup>14</sup>

14 To calculate the averages, we draw on the Berlin infringement database 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

Figure 10: Average reasoned opinions per enlargement group compared to old member states over time



Source: Authors.

Figure 10 reveals that the Southern enlargement is the only enlargement round that increased non-compliance. 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, almost 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 (cf. Figure 9). 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).<sup>15</sup>

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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 (Börzel/Knoll 2012). For the years 2011-2013, we used 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. 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). 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.

15 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 also appear more homogenous with regard to the variation in the non-compliance rates of individual new members, which also appear fairly stable over a few years of accessions. The non-compliance rates in these enlargement rounds are similar to those of 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 (cf. Figure 9) 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 twelve new member states that joined in 2004 and 2007 have generally scored better than the average of the EU15. Most of the new member states even perform better than nearly all the old member states (Sedelmeier 2008, 2012). Their performance, however, varies, with Poland and the Czech Republic lagging behind the other new member states, although with a marked improvement for the latter since 2010. Some studies have identified Bulgaria and Rumania as potential compliance laggards, not only with regard to fighting corruption and organized crime, for which the EU installed some post-accession monitoring (Gateva 2010; Pridham 2007), but also in other areas of EU law (Hille/Knill 2006; Knill/Tosun 2009; Noutcheva/Bechev 2008; Trauner 2009). For the first seven years of membership, however, the data do not bear out this negative assessment. Lithuania, Latvia and Slovakia are consistently the best performers; Estonia, Slovenia, Hungary, Malta, Cyprus, as well as Bulgaria and Romania range in the middle (Knill/Tosun 2009; Sedelmeier 2008, 2012; Steunenber/Toshkov 2009).

The variation across the new Central and Eastern European members is not too surprising, but it should not be overstated either. Not least, because 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). Like the old member states, the Central and Eastern European members differ significantly with regard to their interests, power, and capacities when it comes to complying with EU law (Schwellnus 2009; Sedelmeier 2009; Toshkov 2007, 2008).

In sum, despite continuous widening, non-compliance has decreased rather than increased in the EU. None of the main approaches to compliance appears to explain the non-compliance patterns across enlargement groups well: 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: the UK should have caused particular compliance problems, rather than demonstrating some of the lowest non-compliance rates. 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 countries of the Eastern enlargement round. 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 the variation among newcomers and the consistently bad performance of three of the founding members.

One possibility to explain these patterns of non-compliance might be to examine more closely to what extent certain explanatory factors have different effects in different enlargement rounds (Sedelmeier 2008, 2011). Generally, weak administrative capacities in the countries of the Eastern enlargement might appear to contradict the otherwise strong explanatory power of the management approach. But it is possible that the general administrative deficiencies can be compensated by 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. Moreover, there might be a reason why attitudes towards European integration did not have either a positive or negative effect on non-compliance in the first three enlargement rounds, but why it did have an effect in the Eastern enlargement. The experience of regular monitoring and assessments of progress with alignment during the pre-accession period might have created a clear link between compliance and being a deserving and acceptable member state for decision-makers in the post-communist countries. Europhile governments in these countries are therefore more inclined to endeavor to comply well, while in the old member states this is not the case.

## 6. Conclusion and the Way Forward

The ability of the EU to integrate new member states depends on the strength of the EU's legal system. The use of soft law, differentiated integration and non-compliance are important indicators of the EU's legal strength. In this paper, we discussed and analyzed the potential impact of enlargement on each of these three aspects.

Our empirical analyses show that the impact of enlargement on soft law, differentiated integration and non-compliance is more limited than general theories, focusing on an increase in diversity through enlargement, lead us to expect. We observe a clear relationship only in the case of differentiated integration, where accession treaties increase the number of differentiations after each enlargement round. Even then, however, accession-induced differentiations are only temporary in nature and there is a clear trend of 'normalization' in the number of differentiations obtained by most recent member states. In the case of soft law and non-compliance, the time trends point to the strengthening rather than the weakening of the EU's legal system. Thus, despite continuous widening, non-compliance has decreased. Furthermore, there is no indication that enlargement has contributed to a shift towards the adoption of 'softer' measures that are alternative to EU legislation. Instead, there has been an increase in soft law measures that strengthen the EU's legal system, as they complement existing legislation by providing guidance and interpretation of

legally binding instruments. Finally, the extensive use of soft law is largely restricted to too few policy areas to suggest any general impact of enlargement.

Nevertheless, enlargement may have affected the EU's legal system in a more indirect manner. In particular, increased heterogeneity of preferences and capacities could have pushed supranational actors to shift limited resources to less controversial channels of influence (Kelemen et al. 2014). The Commission, for example, has increased its contribution to the adoption of both steering and complementary soft law measures without the participation of member states. However, we need further empirical work to establish the extent to which the Commission has been driven by increased heterogeneity in preferences and capacities between new and old member states.

In addition, the relationship between enlargement and non-compliance could also be indirect. It is possible that differentiated integration could account for the somewhat counter-intuitive finding that there is no general negative effect of enlargement on non-compliance with EU law. Allowing for differentiated integration can ease the capacity requirements of EU law on the member states. In order to help them cope with adapting to European law, the EU grants transition periods and (temporary) exemptions. However, assessing this relationship empirically requires addressing counterfactuals about the amount of non-compliance in the new member states if differentiations had not been introduced (or at least finding appropriate comparable cases). To achieve this, we need to apply a micro-level analysis of member states' compliance with particular legislative acts. Such a study goes beyond this paper and will be the focus of our future research.

Finally, enlargement may have a more permanent effect on the EU's legal strength, if we shift our research focus to other forms of flexibility, such as optional provisions that grant leeway to member states in the application of EU rules. In this way, our future work will analyze the EU's legal strength in terms of aspects of flexibility other than soft law and differentiated integration.

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

The ‘big bang enlargement’ of the European Union (EU) has nurtured vivid debates among both academics and practitioners about the consequences of ‘an ever larger Union’ for the EU’s integration capacity. The research project MAXCAP will start with a critical analysis of the effects of the 2004-2007 enlargement on stability, democracy and prosperity of candidate countries, on the one hand, and the EU’s institutions, on the other. We will then investigate how the EU can maximize its integration capacity for current and future enlargements. Featuring a nine-partner consortium of academic, policy, dissemination and management excellence, MAXCAP will create new and strengthen existing links within and between the academic and the policy world on matters relating to the current and future enlargement of the EU.