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Summary

The basic premise of this paper is that Europeanization is more than transposition and implementation. The effects of European Union membership in the member states are felt also in more indirect ways, for instance in the unintended consequences of European legislative acts. These indirect effects are likely to be particularly strong in the new member states, which have had to adopt the full *acquis communautaire* in a very short time and have not been allowed to adapt any of the provisions of European law to their specific circumstances (except for a small number of transitional periods). Conceptualizing European law as a set of constraints on domestic policy options, this paper analyses the nature of these constraints and the types of conflicts between the new member states and the European Commission which may result from the presence of these constraints. The paper then suggests how these conflicts may be resolved, by using the interaction-oriented analytical framework of actor-centered institutionalism (ACI).

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Introduction

The important influence of European law on domestic policies, a common argument goes, is visible in the immense amount of European directives and regulations that have to be implemented in the member states (Börzel and Risse 2000: 3). The implementation of secondary European law and its preconditions are a main field of study within the literature on Europeanization (Börzel and Risse 2002; Börzel 2003). Similarly, research on EU Eastern Enlargement has been increasingly interested in the third Copenhagen criteria – the transposition and implementation of the *acquis communautaire* in the new member states (Grabbe 2003). However, other, more indirect forms of European legal influence on national policies take a back seat in this research: “The analysis of Europeanization has had a very strong focus on the implementation of European policies so far or at least tends to equate the Europeanization of (national) public policies with the implementation of European policies on the national level“ (Töller 2004: 2).

A complementary perspective is taken in the project at hand. Our starting point is the assumption that domestic policy-making in the member states always takes place in the context and under the constraints of European law. Rather than focusing on the implementation of specific secondary Community law, we therefore analyze what happens when member states conflict with Community law in domestic economic policy-making. How and to what extent do European primary and secondary law constrain the options available to national policy-makers? How do member states and European institutions, particularly the European Commission and the European Court of Justice, manage to solve conflicts between the different levels and to reconcile their interests in allowing some national flexibility while assuring the integrity and unity of European law? By addressing these questions, we aim to advance our understanding of the interaction between national and European levels and to direct the attention to issues of legitimacy in cases of conflict. The sort of compromises that have been agreed upon when important policy goals in the old member states conflicted with European law may provide important lessons for the management of the Union after accession.

The following text proceeds in five steps. First, we locate our project within existing research, particularly in relation to the literatures on Europeanization and EU enlargement. Second, we identify three lacunae in the literature that are going to be tackled by our research. The third and fourth sections address the two main research questions. In the former, we focus on the question of how domestic policies are influenced and constrained by the European legal context. In the latter, we turn to the question of how conflicts between the national and European levels are solved. Finally, the role of New Modes of Governance (NMG) in the solution of these conflicts is discussed.

Literature Review

The impact of European law on domestic policies is the subject of different disciplines and within each discipline it can be studied from various perspectives. Our investigation from a political science point of view therefore has to take into account insights from legal studies (e.g. on the jurisdiction of the ECJ) and economics (e.g. on the characteristics of small states), and it draws on various, often overlapping literatures within political science, particularly those on Europeanization and EU enlargement.

Europeanization

Scientific interest in “Europeanization“ has rapidly grown since the 1990s (Featherstone 2003: 5), but the meaning of the concept is far from being uncontested (Olsen 2002; Eising 2003; Featherstone 2003). In their often-cited study, Risse et. al. define Europeanization as “the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions” (Risse, Green Cowles et al. 2001: 3) and then study the “impact of Europeanization (...) on the domestic structures of the member states” (ibid: 1). In another definition, Radaelli includes the “(a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’, and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies“ (Radaelli 2003: 30).

While the definition of Risse et. al. is synonymous to European integration (Eising 2003: 393), the definition of Radaelli embraces both, the development of European institutions and policies on the one hand, and their impact on the member states on the other hand. It is the latter aspect that is at the centre wide parts of the Europeanization literature (Olsen 2002: 932). Hence, a clear conceptual distinction between ‘European integration’ for the development of European institutions and policies and ‘Europeanization’ for the impact on domestic institutions and policies seems more appropriate (Eising 2003: 396). According to this definition, European integration is the precondition for Europeanization. While traditional research on European integration adopted a ‘bottom-up’ perspective, the study of Europeanization inverts independent and dependent variables and takes a ‘top-down’ perspective. In the terminology of international relations theory, the research on Europeanization follows a ‘second-image reversed approach’ (Gourevitch 1978; Schimmelfennig 2002).

The analysis of the domestic impact of European law is part of this Europeanization research program. One of the key questions in the literature concerns the implementation of secondary European law and the conditions of its success or its failure. Various studies compare the transposition and implementation of particular directives in different member states (e.g. Falkner, Hartlapp et al. 2004). Moreover, compliance researchers have also gathered quantitative data on the implementation of European law in the different member states over time (Börzel 2000; Börzel 2003). There exists wide agreement that European influence on the member states varies (Héritier 2001) and that a certain degree of “mismatch” (Héritier 1996) or “misfit” (Risse, Green Cowles et al. 2001) between the European and national levels is necessary for adaptational pressures to emerge. Different intervening variables, ultimately determining the degree of Europeanization, are discussed in the literature: the number of veto players (Haverland 2000; Héritier 2001), formal institutional incentives (Börzel and Risse 2000), parties and party programs (Treib 2003) are among the most prominent rational institutionalist factors, ‘norm entrepreneurs’ and political culture are additional sociological institutionalist explanatory variables (Börzel and Risse 2000).

This focus on the implementation of secondary European law, however, does not fully grasp the influence of European law on the member states and the entirety of Europeanization mechanisms. Knill and Lehmkuhl distinguish three mechanisms of Europeanization and relate them to ideal-typical ways of European policy-making (Knill and Lehmkuhl 1999). The first mechanism, the ‘positive’ prescription of institutional models is characteristic for European regulatory and harmonization policies (‘positive integration’, Scharpf 1999). It is this form of Europeanization most implementation studies deal with. Knill and Lehmkuhl, however, delineate two additional mechanisms: On the one hand, ‘old’ regulatory and liberalization policies (‘negative integration’) impact on the member states by changing national opportunity structures. On the other hand, policies of framing trigger change by altering the expectations and beliefs of domestic actors. The latter mechanism has increasingly attracted scientific interest in the debate on NMG, particularly in the context of the Open Method of Coordination (OMC Schäfer 2004). These forms of ‘soft law’ are interesting for our project insofar as they complement or get into conflict with ‘hard’ European law. Less studied (Schmidt 2004), but highly relevant for our project is the Europeanization through negative integration, particularly through internal market law and competition law.

EU enlargement

Research on the enlargement of international organizations in general and on the recent round of EU enlargement more specifically, can be divided into two subcategories: One strand of research focuses on the explanation of enlargement or accession *decisions*. The preferences of the old member states, candidate countries and European institutions have already been extensively examined (vgl. Schimmelfennig and Sedelmeier 2002: 505f.; Nugent 2004). Another strand of research analyzes the *impact* of enlargement on the member states and on the organization itself. Predominantly, researchers and politicians have been interested in the decision-making capacity of the enlarged EU and in its capacity to act (Nugent 2004). In practice, major institutional reforms as the Treaty of Nice and the European Constitution have been justified to a large extent by the need to anticipate possible set-backs and “to make the Union fit for enlargement”¹. Widening, it was argued, should not become an obstacle for further deepening of European integration, e.g. by developing new EU policies.

The possible impact of enlargement on already existing EU policies and their functioning, however, has been partly neglected: “the enforcement of the *acquis* has so far not been considered particularly problematic. But that is changing with the accession of Central and Eastern European countries – whose governments had no voice in the accumulation of the existing body of European law, and whose economic, social, and institutional conditions and interests differ fundamentally from those of the countries that had shaped its content over more than four decades” (Scharpf 2003: 89).

The question concerning the impact of accession on the new member states, finally, has been considered “most relevant” and at the same time “largely neglected” (Schimmelfennig and Sedelmeier 2002: 507). On the one hand, this dimension of enlargement seems most promising for cross-fertilization with the Europeanization literature and for the testing of already established hypotheses. On the other hand, most studies on the consequences of EU enlargement on the new member states have been mainly descriptive and lack systematic comparison between countries or policy-areas (ibid.). Research on Europeanization ‘going East’ (Grabbe 2003) has mirrored a practical shift of emphasis: “While the first part of the 1990s was dedicated to the building of central democratic institutions, more recently the link between the creation of an effective bureaucracy as a main instrument of the post-Communist state and

¹ http://www.europarl.eu.int/igc2000/press/12052000_en.htm

European integration has become stronger“ (Dimitrova 2002: 172). During the accession process, attention was increasingly directed from the first to the third Copenhagen criteria and the main focus of enlargement research turned from transition studies to more specific investigations on the European impact on particular policies in candidate countries (e.g. Jacoby and Cernoch 2002).

Explanations of the domestic impact of enlargement mainly focused on peculiarities of the accession process and on common characteristics of the candidate countries. The recent accession process, it was argued, differed from earlier EU enlargement rounds in several respects (Grabbe 2001; Dimitrova 2002; Jacoby and Cernoch 2002; Grabbe 2003; Nugent 2004). First, the number of candidate countries was higher than ever before. Second, the body of European law has been much more elaborated than in earlier rounds. Third, the accession conditions set up by the EU even went beyond ensuring the full transposition of the *acquis* (Grabbe 2001: 1015; Dimitrova 2002: 175). Fourth, the whole accession process was characterized by high asymmetry between member states and candidate countries, both in terms of economic and political development and in bargaining power. Regardless of the differences among the candidate countries, Grabbe therefore came to the conclusion: “the accession process is pushing the applicant countries towards greater convergence with particular institutional models than has occurred within the existing EU“ (Grabbe 2001: 1014). As to the common characteristics of the new member states, two aspects feature most prominently in the literature – post-communism and the state of economic development. These aspects will be further elaborated on in section three.

Lacunae in the Literature

Having located our project within current strands of political science research, we now turn to three specific lacunae in this literature and to our possible contributions. First, research on the domestic impact of European legal integration has so far mostly been concerned with the implementation of secondary law and has thereby neglected other domestic effects of European law. Second, most of the existing studies on the EU and its member states take an inherently euro-centric perspective that misses important national aspects and excludes feedback-effects of Europeanization. Third, many implementation and enlargement studies tend to reproduce the EU’s emphasis on allegedly apolitical questions of efficiency instead of legitimacy.

Legal impact beyond the implementation of European secondary law

The positive prescription of policies and institutional models is but one possible mechanism of Europeanization, it was argued above. Accordingly, the research focus on the implementation of secondary European law is (a) insufficient to detect less obvious domestic effects of European law and (b) tends to oversimplify often complex political processes that are merely categorized in terms of ‘compliance’ or ‘non-compliance’.

(a) Implementation research, A. Töller criticizes, “falls short of realising unintended consequences of policies or any kind of consequences of European ‘driving forces’ that cannot be labeled precisely as a ‘policy’“ (Töller 2004: 2). Our basic assumption is that domestic policy-making in the member states always takes place in the context of primary and secondary European law and consequently, that the scope of policy options available to domestic decision-makers is thereby constrained (Schmidt 2004: 20). Töller’s criticism therefore can be illustrated in an analogy to the classical debate on the ‘second image of power’ and the concept of ‘non-decisions’ (Bachrach and Baratz 1962; Bachrach and Baratz 1963). While implementation studies typically deal with domestic ‘decisions’ of implementing positive European prescriptions, they do not comprehend the world of ‘non-decisions’, i.e. all instances of domestic policy-makers not taking a certain decision because of the constraints of European law.

Needless to say that this constraining influence of European law often can be traced back to decisions on the European level, but ‘non-decision’ here refers to the loss of policy-options from a national perspective. The ambiguity of the term has been noted amongst others by C. Offe. What he calls the two connotations of ‘a decisions, not to...’ or that of ‘something else than a decision’ (Offe 1977: 17), comes close to Töller’s “‘driving forces’ that cannot be labeled precisely as a ‘policy’” on the one hand, primarily referring to negative integration, and the “unintended consequences of policies” on the other hand.

To detect cases of ‘non-decisions’ might be empirically more difficult than to record national implementation measures, but this must not lead us to the conclusion “of discarding ‘unmeasurable elements’ as unreal“ (Bachrach and Baratz 1962: 952). In the European case this warning seems even doubly justified. First, negative integration – an important ‘driving force’ of national ‘non-decisions’ – has a structural advantage in the EU (Scharpf 1999) compared to positive integration. Second, while Bachrach and Baratz saw ‘non-decisions’ as essentially favoring the *status quo*, they often replace formerly existing domestic policies in the European context and can therefore involve important changes.

How then can this constraining impact of European law on domestic policies be conceptualized? In order to address this question our project takes a route that differs from most implementation studies in that we start from a less euro-centric view (see below) and that we focus exclusively on conflicts between European law and domestic policies. Three preliminary mechanisms of European legal influence beyond implementation have been identified so far: First, domestic legislative projects may simply, voluntarily or involuntarily, contradict a piece of European law. As the ECJ interprets the validity of European law widely, it is sufficient that a national regulation could potentially impact cross-border transactions. Very often, this type of conflict does not fit the “voluntaristic understanding” (Töller 2004: 2) of the implementation literature. Second, the EU may promote the restriction of domestic policy options in a more proactive way. This is the case in the classical domain of negative integration, e.g. when markets of former state dominance are opened up or when state aid is declared as incompatible with the Single Market. Third, the implementation of secondary European law may indirectly affect other domestic policy areas for budgetary reasons. High costs of positive integration (under the constraints of EMU) leave governments with less money for other expenditures.

(b) It would be the wrong conclusion, however, to replace the dichotomy of ‘compliance’ vs. ‘non-compliance’ by another one. The category of ‘non-decision’ is meant to be only one extreme on a continuum with domestic-policy making in outright disregard of European law at its opposite side. Hence, a bias similar to implementation studies, registering “policy outputs either as compliant or non-compliant [... leaving] little conceptual room for discovering contingent effects of Europeanization” (Töller 2004: 2) can be avoided. The interesting question then arises on how flexible certain compromises between European law and domestic policies are, i.e. on what point of the continuum we can locate a certain compromise and how we can explain such a particular outcome. Two arguments can be made why to expect flexible solutions between our two extremes – one more general argument on the interpretable nature of law and one more specific argument on the case of EU enlargement. First, law in general and European law in particular is never without gaps and ambiguities. The European Commission or the ECJ therefore have considerable leeway to interpret European law in favor or at the expense of national autonomy. Second, under the highly asymmetrical situation of the accession process, the new member states had to accept many rules that were – considered individually – hardly in their national interest (Ellison 2005: 9ff.). After enlargement the power balance has shifted and the new member states might try to broaden their scope of action, without generally calling into question the European legal order.

The dominance of a euro-centric perspective

Research on Europeanization, it was defined earlier, deals with the impact of European integration on domestic policies and institutions. The independent variable ‘European integration’ shall explain, from a ‘top-down’ perspective, why certain changes on the national level occur, measured by the dependent variable ‘Europeanization’. This perspective, however, (a) tends to take the European level not only as the starting point of the causal explanation, thereby leaving aside possible feedback effects on the process of European integration, but often (b) also leads to research designs that are guided by euro-centric considerations.

(a) Feedback effects on the process of European integration are typically left aside: “Students of Europeanization usually bracket European institutions and processes, i.e. take them as given and analyze their effects on the Member states. How Member States responses to Europeanization feed back into EU institutions and policy processes is rarely explored“(Börzel 2003: 3). A positive exception has been Börzel’s own conceptualization of EU policy-making (‘up-load’) and implementation (‘down-load’) as a two-level-game (Putnam 1988). For the case of new member states, however, this approach is largely unsuitable as these countries did not participate until recently in the development of the European legal order they have had to adapt to. There has been research on the impact of enlargement on the decision-making capacity of the EU (Nugent 2004), it has been noted above. The question of how the transfer of the *acquis* to ten new member states might react on already existing EU policies and the European legal order, has attracted less attention and cannot be addressed from a mere ‘top-down’ perspective.

(b) Not only does the European level constitute the starting point for the causal mechanism under examination, but also are most Europeanization research designs guided by euro-centric considerations. Implementation studies take secondary European law as their basis and then ask for factors explaining the varying implementation records across member states and policy areas. National idiosyncrasies are interesting insofar as they explain “that a European policy has different impacts in different member states [... The] analysis has to include this domestic process in order to understand the impact of European policies on national legislation, and to assess whether and how Europe ‘matters’” (Héritier 2001: 9). Haverland therefore criticizes Europeanization studies as being unaware of what he calls the ‘no variation problem’: “Quite often only cases are chosen where potential EU pressures, incentives or ideas are present. Hence selection is based on the key independent variable“ (Haverland 2005: 2). An alternative approach would have to start from a national perspective of policy-making, taking European influence into account as one factor among others.

In the case of EU enlargement, the euro-centric perspective of most studies can partly be attributed to the accession process itself. The asymmetrical distribution of bargaining power between the EU and the candidate countries, the un-negotiable *acquis*, the inexperience of domestic actors in European affairs and their inadequate inclusion in the accession process contributed to a euro-centric perception: “Articulation of many domestic interests has been suppressed by the one-way logic of the approximation process“ (Jehlicka 2002: 23). Enlargement research mirrored this point of view: “The top-down perspective of analysis is thus essentially maintained. Little attention has so far been paid to CEEC’s interests, preferences and priorities“ (Ebd.: 2). One year after accession, the actual constellation has changed and thus, a perspective seems more appropriate that directs equal attention to national concerns in the new member states. The EU has lost its most powerful instrument of accession conditionality and the new member states have become active participants of the EU decision-making process. Domestic interests that have been suppressed or ignored during the accession process should now regain importance and become articulated more prominently. This expectation applies by no means exclusively to the development of new EU policies, but might also affect

already incurred liabilities: “Experiences with implementation in the EU show that actors sometimes try to win back at the implementation stage what they lost at the decision-making stage. There is no reason to assume that actors in CEE will be any different“ (Dimitrova 2002: 186).

Europeanization research therefore is not sufficiently equipped to (a) include the study of feedback effects triggered by national responses to European legal integration and to (b) comprehend the peculiarities and the complexity of national policy processes in the new member states “in which European impulses are only one factor among others” (Töller 2004: 2). For this reason, Töller recommends to supplement traditional implementation studies by a broader neo-institutionalist approach such as actor-centered institutionalism (ibid: 3). We therefore propose an actor-centered institutionalist research design that focuses on conflicts between European law and domestic policies, thereby taking equally into account interests and strategies on both levels and resisting an allegedly chronological investigation “in which attention is first directed to the European level, where a European measure is passed, and then focuses on the national level, where implementation is supposed to take place“ (Töller 2004: 3).

The priority of questions concerning efficiency

Finally, the implementation literature tends to privilege issues of efficiency over questions of legitimacy and in so doing it endorses the image of technocratic governance the EU often tries to propagate itself. The negative implications are twofold: (a) Political conflicts are reframed in the allegedly apolitical language of ‘efficiency’ and ‘problem-solving capacity’ while subjacent issues of legitimacy remain hidden. (b) When the discussion turns to issues of legitimacy, the latter is understood in a rather crude sense that overestimates the potential legitimizing power of NMG.

(a) Traditionally, European governance has been legitimized above all by its “superior efficiency [...] in identifying citizens’ needs and delivering results, compared to that of separate national state structures. [...] Technocrats are meant to deal with technical questions, which are questions about the most appropriate and efficient means of governance” (Tsakatika 2005: 197). Following the common distinction between input- and output-oriented legitimacy (Scharpf 1999), European governance mainly rests on the latter: “Traditionally, output factors constitute the major focus of legitimizing EU regulatory policy“ (Knill and Lenschow 2003: 5). Knill and Leschow distinguish three output-factors: (1) the capacity of taking political decisions, (2) their degree of implementation and compliance, and (3) their problem-solving capacity. While the first two factors are measures of efficiency more narrowly defined, the third factor describes output legitimacy in its proper sense. The requirements to achieve output legitimacy are less demanding than those related to input legitimacy – “by the same token, however, the legitimizing force of these mechanisms tends to be more contingent and more limited“ (Scharpf 1999: 11). The predominant focus on efficiency and output-legitimacy therefore becomes problematic when it obfuscates the highly political nature of much of EU policy-making: “The intensive concern with decision-making and implementation diverted attention from questions of input legitimacy. While this narrow evaluative basis did fit the technocratic image of the EU as an institution established to deal with problem-solving deficiencies, it is inadequate once we consider the EU as a new polity or system of governance” (Knill and Lenschow 2003: 5).

Unconsciously or not, implementation research often tends to replicate this efficiency bias without adequately questioning its own normative assumptions. Implementation studies, A. Töller criticizes, “tend to be characterized by a normative interest in ‘Making European Policies Work’, as the title of the first systematic implementation study clearly illustrates” (Töller 2004: 2). ‘Compliance’ and ‘success’ are used synonymously {ibid.; \Falkner, 2003 #411}. It

would be even more problematic to adopt this perspective in the case of EU enlargement, where input legitimacy has been doubly questionable. First, the candidate countries did not participate in the development of the rules they had to adopt (Scharpf 2003: 89) and only very few exceptions have been permitted (Dimitrova 2002). Second, input legitimacy has been debatable not only on the European level but also on the national level: “The whole accession process has an ‘executive bias’ because of the structure of negotiations and the fact that EU actors mostly see the process of adopting EU norms as an administrative exercise (...) The danger for democracy in the enlarged Union is that only the top layer of central state officials will have become ‘Europeanized’, while the public remains excluded from European integration” (Grabbe 2001: 1029).

(b) More recently, however, questions of input legitimacy have attracted increased attention, particularly in the debate on NMG. First, NMG have non-binding character and are therefore less demanding in terms of legitimacy. Second, NMG are characterized by a wide inclusion of affected actors and are thus believed to exhibit a high degree of input legitimacy. The expectations as to the potential of NMG are high: By means of NMG, it is hoped, “decision-making processes will be speeded up and solutions appropriate to the complex nature” of European governance will be arrived at (Héritier 2003: 105), ‘procedural legitimacy’ is increased and thus “helps to ensure compliance and thereby policy effectiveness” (ibid: 108).

The ideas of political ‘conflict’ or ‘authority’ seem absent in the world of NMG: “policies, which are equally beneficial to all concerned, lend themselves to consensual politics and voluntary modes of governance“ (ibid: 111). Indeed, in these cases NMG can be expected to be legitimate and efficient – but the type of policy mentioned is not very problematic anyway. While it was argued above, that implementation studies tend to neglect issues of political conflict and underlying questions of legitimacy, the literature on NMG raises the question of legitimacy in cases where there are no conflicts at hand. The impression emerges, that the debate on NMG, too, fails to address the question of legitimacy. ‘Input legitimacy’ in situations that are ‘equally beneficial to all concerned’ is either meaningless or simply another way of increasing output-efficiency, namely by including additional actors and their knowledge in order to maximize the overall benefit. In most cases, however, input legitimacy refers to a situation where the justification of majority rule is the essential problem (Scharpf 1999: 7) and majority decisions do not necessarily favor all concerned equally: “Worse yet, it can be shown analytically that the majority rule will lead to normatively indefensible policy outcomes if it is used to aggregate the purely self-interested preferences of individuals” (ibid.). The idea of input legitimacy therefore is much more complex and demanding than is assumed in the NMG literature and the potential legitimizing power of NMG is therefore very limited.

It would certainly be unfair to criticize implementation studies for an exclusive focus on issues of efficiency or to deny NMG any utility – two conclusions, however, can be drawn from what has been said above: First, an increased awareness of issues of legitimacy and the limits of legitimate European governance is necessary, particularly with respect to the new member states. Second, we need a realistic appraisal of the potential of NMG and the persistence of ‘Old Modes of Governance’. Both aspects are at the core of our investigation of compromises between European law and domestic policies.

Indirect Influence of EU Law

Having located the lacunae in the literature with respect to the conceptualization of Eastern enlargement and its consequences, both for the NMS and for the European legal order at large, we will now make some preliminary suggestions concerning the contribution our project hopes to make to this literature.

The aim of the project ‘The Domestic Impact of European Law’ is twofold: first, the project aims to assess the ways in which and the extent to which EU primary and secondary law constrain the options available to national policy makers in the ten new member states (NMS) of the EU; and second, the project aims to investigate how these conflicts between EU laws and national interests are dealt with by the EU institutions, particularly the Commission and the ECJ.

One way for the European institutions and the NMS to settle their disputes would be to forge a compromise in which both parties see their interests at least partially reflected, and it will be argued below that type of conflict solution may become more frequent in the enlarged Union. An obvious prerequisite of formulating this expectation is the assumption that EU law is not static and that its application is not uniform, but instead that EU law can be flexible to a degree and that its application can be variable to a degree, depending on the broader implications the choice for uniform or variable application would have on the integration project as whole. By examining cases in which EU law and its application can be said to be variable, this study aims to ‘measure’ this flexibility in certain areas (the policy areas are still to be chosen). If the study can show a pattern in the way the Commission negotiates cases of conflict with the NMS and in the outcomes of such negotiations, it would perhaps be possible to make some suggestions regarding the future development of EU law in the face of the present (and with future enlargements increasing) diversity among the economic interests of the member states.

The present section will elaborate further the first aim of the research and attempts to discover how various types of EU law may pose constraints on the ability of the NMS to pursue their policy goals. The second aim of the research is the topic of section four, which will attempt to show how certain compromise outcomes can be reached given the strategic considerations of the NMS and the Commission.

Diversity of New Member State Domestic Interests

Conflicts between NMS interests and EU legal provisions could occur more frequently in the EU-25 than in the EU-15, because the diversity of economies and societies (and therefore likely the diversity of interests) is greater now than it was before enlargement, and because these interests have not before been accommodated in the *acquis*, the body of law developed by the 15 old member states (OMS) to suit their own preferences and diversity of interests. Given the asymmetry of the accession process, the NMS did not have a chance to introduce their own domestic interests into the EU legal framework during the accession negotiations, as these were geared exclusively towards attaining full transposition of the *acquis* by the NMS (Dimitrova 2002: 175/6). A small number of derogations and transition periods were granted, but this does not exempt the NMS from having to adopt the *acquis* in full. These measures served to postpone the date of complete harmonization in some policy areas but they do not entail an acknowledgment of the existence of durable incompatibilities between domestic and EU goals. In other words, they treat such incompatibilities as temporary phenomena which should dissolve relatively quickly as a result of either convergence towards the EU mean or economic growth.

It should be noted here that an increase in the number of member states is in itself not enough to assume that there will also be an increase in the variety of interest present in the EU (for instance, the 1995 enlargement did not do much to increase the variety of interests because Austria, Sweden and Finland were in many ways similar to the, at the time, 12 incumbent member states, especially because these countries were already members of the European Economic Area (EEA), (Young and Wallace 2000: 109). The greater variety of interests which exists in the EU after the most recent enlargement round may be due to a number of

NMS characteristics which have already been alluded to above, most notably the comparatively lower economic development of the CEECs², the (economic, geographic and demographic) 'smallness' of the CEECs, and their corresponding economic specialization³ and regulatory characteristics (Schmidt 2005: 7/8), their recent experience of a postcommunist transformation and relatively low degree of consolidation of the changes (to a large extent demanded by the EU through its administrative capacity requirement) made to their domestic administrative institutions (Dimitrova 2002: 182/3), the different directions taken by CEECs in the reform of the welfare state after the end of communism and the corresponding increasing variety of welfare state institutions and policies in Europe⁴ (Kovács 2002: 169), and finally their recent experience of independence (and in some cases of statehood) and corresponding reluctance to allow any more policy making competences (sovereignty) to shift to the EU than strictly necessary (Mather 2004: 110), which would make the NMS wary of the 'creeping competences' of the EU (c.f. Leibfried and Pierson 2000: 280).

Linking Domestic Interests with EU Law

From the above list of factors contributing to a greater variety of interests among the member states, it is possible to derive some slightly more specific expectations about potential areas of conflict, provided that the NMS interest is salient enough for it to risk a dispute with the Commission and a court case before the ECJ. In brief, these factors were: economic development, specialization as a result of smallness, remaining institutional instability, dissimilar welfare state institutions and policies, and importance of recently acquired autonomy. In this section, an attempt is made to relate these sources of diversity to various types of EU policies according to the greater or lesser impact they have on national interests. There are various ways of distinguishing between types of EU laws, and three types of divisions are described here: the difference between policies resulting from positive integration and legal acts resulting from negative integration; the difference between regulatory, redistributive, macroeconomic, global and citizen policies; and the difference between policies which are the exclusive competence of the EU, which have shared competence and which remain within national competence.

Positive and Negative Integration

Whereas negative integration is well-known for its constraining impact on the member states, the picture for positive integration seems somewhat more diversified. Logically, EU positive secondary law should affect national policy making in the same way as does existing national legislation (after all, it is transposed into domestic law). At first glance, therefore, to ask in what way and to what extent positive EU law impacts national policy making appears to be

² Although this point should not be exaggerated since there were also a large differences among the economic performances of the EU-15 member states, and in some cases the new member states outperform the old ones (e.g. the Slovenian GDP is higher than that of Greece) Nugent, N. (2002). The Government and Politics of the European Union. Basingstoke / New York, Palgrave Macmillan..

³ Although some of the EU-15 member states are also small and also have specialized economies, a CEEC specialization in a different area would nonetheless constitute a new economic interest which was not before present within the EU.

⁴ It should, however, be borne in mind that from the fact that CEEC welfare state institutions are different than those in the EU-15, it does not follow automatically that the NMS are less able to comply with EU law. The newly formed welfare states in CEE are based on neoliberal principles and are therefore quite close to the ideological preferences expressed in much of EU law. It may therefore be the case that CEEC governments have little difficulty complying with present (mostly OMC-based) and future EU welfare state policies and will not be tempted to adopt deviant policies.

the same question as if one were to ask about the way in which and the extent to which legislation of national origin impacts national policy making (especially given the fact that in many cases substantial scope exists for interpretation of the provisions of directives and, especially, framework directives).

However, an equation of secondary EU law and national law on the sole basis that both are codified in the national legal order and are implemented by national administrations overlooks a number of critical differences between the two. One such difference is true for all member states (old and new) and is inherent in the structure of the European legal framework: from the perspective of the member states, all EU law (positive and negative) is ‘constitutional’ in nature because of the doctrine of supremacy and because (due to the many veto players) EU law cannot be changed as easily as most national laws. If an existing national legal provision is incompatible with the policy goals of any incumbent government, this government can override the provision by creating a new law which will make the old one obsolete, but in the case of EU law it is impossible to make such changes without a proposal from the Commission and the consent of the majority of other member states and the EP. This high consensus criterion makes it very difficult for member states to change the law in such a way that it would no longer conflict with their interests. Therefore, the two types of law should in principle be expected to have the same conflict-generating potential.

Types of EU Policies and Their Domestic Impacts

This distinction is more informative as the first one, as it deals with categories of substantive policy areas and therefore the effects on national interests suggest themselves more clearly. Our research will not deal with citizen policies and global policies, but will instead focus on regulatory, redistributive and macro-economic policies, because the aim of the research is to assess the impact of EU hard law on domestic policy making and hard law can be found mostly in the first pillar and in the EMU (for the eurozone). EU regulatory policy can affect national policy interests in two ways: intentionally, in the sense that many regulatory policies are cross-sectoral and are meant to influence a large number of other policy areas (e.g. EU environmental policy), and unintentionally, in the sense that these policies often have profound adverse consequences on many domestic policy areas (e.g. the four freedoms have led to regulatory competition among the member states). Redistributive policy (e.g. the CAP) tends to create vested interests domestically and may prevent reforms of certain sectors from taking place. Finally, the NMS are exercising budgetary discipline in order to meet the EMU convergence criteria (and are at the same time confronted with EU-related costs, such as for the implementation of the *acquis* and the participation in EU policy-making), which may leave them without the financial means to pursue the policies of their choice.

Division of Competences

Policy making competences have increasingly been shifted from the national level to the European level in the past decades, but the member states have not been willing to relinquish their sovereignty over a number of policy fields which are close to the heart of the nation state. Under the Treaties, European legislative action must be in accordance with the principles of subsidiarity and proportionality⁵. These principles form the basis of the division of

⁵ Art 5 TEC provides definitions of both principles: ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the

competences between the EU and the member states, with policy areas which are not part of the objectives of the treaty (such as culture and education) remaining within national competence, and policy areas which are conferred upon the EU in the Treaty being the exclusive competence of the EU (for instance policies relating to the realization of the internal market, the conclusion of association treaties, structural and cohesion policy, and monetary policy for the eurozone). Shared competence exists in areas in which action at the European level brings advantages of scale but in which the member states also retain their own competences where European action would not bring clear benefits or is considered undesirable (for example in the areas of consumer protection, transport, research and technology, energy, and environmental policy).

The significance of the division of competences for the emergence of possible conflicts lies in the fact that policies which are made under exclusive or shared competence, can and do impact upon areas of member state competence (as in the case of internal market regulations causing regulatory competition and thereby impacting the ability of member states to tax companies, or in the case of state aid policy limiting the ability to support (Schmidt 2004) privatized public services). At the time the NMS made the decision to join the EU, they took the division of competences as given and expected to lose autonomy in some areas but not in others. However, a situation in which core national competences are increasingly subject to European constraints is literally not what they bargained for and they are likely to resist any further erosion of their competences (which may lead them to decide to adopt policies to further their own economic goals despite existing EU legislation which indirectly forbids certain courses of action). Furthermore, there remains a high level of legal uncertainty in the EU as a result of a shifting division of competences, which makes it difficult for the member states to know in which cases they are allowed to legislate and in which cases the competence belongs at the European level (Schmidt 2004).

Thus one could formulate the very general expectation that conflicts may arise between member states and European-level policies with economic consequences and/or with consequences for core national competences (e.g. internal market rules, environmental policies, health and safety policy, and consumer protection policy; but also monetary policy in the form of convergence towards EMU rules). Conversely, it is more difficult to predict what kinds of national policies will give rise to conflicts as this depends on political decisions which have yet to be made by NMS policy makers. However, on the basis of the factors of diversity mentioned above, conflicts may be expected if EU law (directly or indirectly) affects policy making in economically and institutionally important areas such as the following: employment and social policies, macroeconomic and taxation policies, flagship industries and former state services, and judicial and administrative affairs, but it should be noted that this list is by no means conclusive given the unpredictability of indirect effects of EU law.

Conflicts and Compromises

The interests of the NMS and the possible ways in which these interests can come into conflict with EU law have been discussed in the previous section. This section will build on the previous one and will focus on what may happen after a NMS has adopted a policy which is incompatible with European law. Once this has happened, the Commission must decide how it will respond, based on its own interests. After a brief methodological discussion, this section will therefore start with an elaboration of the interests of the Commission, and will then

Community' (subsidiarity). 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty' (proportionality).

move on to describe the possible outcomes of the sequential game (in which the NMS makes the first move and the Commission the second) played by the actors in individual cases of conflict.

Interaction-Oriented Policy Research

Once a potential policy conflict has been identified, the analysis of that conflict will proceed along the lines of an interaction-oriented approach rather than a substantive policy approach, in other words the interaction of the actors in a particular institutional setting offers an explanation of real world phenomena (Scharpf 1997). This allows for relatively parsimonious explanations and for comparison across cases, whereas a substantive policy view emphasizes ‘thick’ idiosyncratic explanations. In cases of conflict between the NMS and the Commission, these two main actors are in principle considered to be unitary actors, with specification of internal (e.g. political parties or individual ministers/Commissioners and ministries/Directorates General) or external (e.g. FDI or the IMF) interest groups following only if these may have had an impact on the strategies of the players or on the outcome of the interactions. Both the NMS and the Commission have multiple interests which could lead them to make various choices, making it difficult for them to behave rationally in the theoretical sense of the word (i.e. having complete and transitive preference orderings). Nonetheless, the rationality assumption is maintained for analytical purposes. In interaction-oriented terms, the goal of the research project is thus to investigate whether or not a pattern of interaction between the actors is emerging which systematically favors a flexible attitude towards EU law in an attempt by all parties to pursue their respective interests.

The Commission as the Representative of the Interests of the Union

The Commission can be said to have two basic interests: (a) the uniform application of EU law, and (b) the preservation of its own legitimacy in the member states (and by extension the legitimacy of the EU as a whole). However, the law-enforcement choices which would increase its legitimacy in the new member states could decrease its legitimacy in the old member states and vice versa.

(a) The Commission acts as the ‘Guardian of the Treaty’ and must ensure that European law is correctly and uniformly applied by the member states. Thereby the Commission aims to reduce legal uncertainty within the EU to minimum levels and to make sure that the objectives laid down in EU law are achieved. The member states are first and foremost responsible for the transposition and implementation of the *acquis*, but it is the task of the Commission to monitor these processes and to intervene in cases of suspected infringement (usually such cases are brought to its attention by businesses or citizens who believe that their rights are violated by a particular national measure which is incompatible with EU law). The infringement procedure prescribes that an exchange of letters should take place between the Commission and the member state, while at the same time negotiations may be conducted between these two parties in order to find a solution. If the Commission observes that the infringement still exists after it has sent its ‘reasoned opinion’ (a statement demanding compliance within a certain period of time), it may refer the case to the ECJ⁶.

(b) Thus one of the major interests of the Commission, uniformity of application of EU law, runs counter to the interests of those (new) member states which, for whatever reason, do not wish to comply with EU law in individual cases. However, the parties also have a mutual interest in avoiding infringement proceedings and court cases: the new member states because these proceedings are time consuming, costly and may draw negative attention to the country

⁶ http://www.europa.eu.int/comm/internal_market/en/update/infr/index.htm

as a ‘bad’ member state, and the Commission because strict enforcement of the *acquis* would lower its own legitimacy; and by extension the legitimacy of the EU at large, within the new member states. If governments and populations become discontent with what they perceive to be unfair treatment by the Commission (i.e. if they feel that EU law is enforced without exception and important national interests are being ignored), then this could conceivably lead to widespread non-compliance and eventually to the disintegration of the fabric of EU law as a whole. Thus strict application of EU law could have the exact opposite effect than was originally intended and it can be said that the interests of the European Commission are to a large extent similar to those of the NMS: a failure to address NMS interests would mean a drop in the legitimacy of the Commission in countries which are already sceptical about the promise of EU membership as a result of the long and difficult accession process, leading to problems not only for the Commission but also for the CEE governments which brought their countries into the EU.

The opposite argument could be made for the preservation of the legitimacy of the Commission (and that of the European integration project) in the old member states. Should the Commission decide to apply European law more flexibly vis-à-vis the NMS than it has done in the past vis-à-vis the EU-15 states, this is likely to spark one of two (not mutually exclusive) reactions in the old member states: first, protests about discriminatory treatment, resulting in a loss of credibility of the Commission as the impartial ‘Guardian of the Treaty’, and second, attempts to take advantage of the opportunity provided by loose application of EU law in NMS to press for more freedom of interpretation of EU law for themselves, leading to a progressive weakening of adherence to European law in the old member states.

In short, the Commission must walk a very tight rope between strict enforcement on the one hand (leading to loss of legitimacy in the NMS and possible disintegration of the EU legal framework) and not enough enforcement on the other (leading to a loss of legitimacy in the OMS and also to possible disintegration of the EU legal framework). It can be expected that both scenarios are unappealing to the Commission as well as to the vast majority of member states⁷, and that therefore all parties have a strong incentive not to allow conflicts of interest to escalate but rather to work constructively to find solutions. Only if compromises can be forged between the Commission and the NMS which can be justified with reference to a legitimate and unique, country-specific, interest can the Commission avoid a situation in which such compromises are seen as precedents by the other member states. This appears to be the only way in which the Commission can steer clear of the two undesirable ends of the continuum between strict enforcement and too much leniency and to arrive at compromises respecting the ‘legitimate diversity’ (term borrowed from Scharpf, 2003) present in the EU.

Modelling Outcomes

A Range of Outcomes

This subsection will present the possible outcomes of the conflicts graphically, which will show how they relate to each other in terms of the flexibility of interpretation of EU law involved in each outcome. The outcomes in the figure can be seen as ‘primary outcomes’ be-

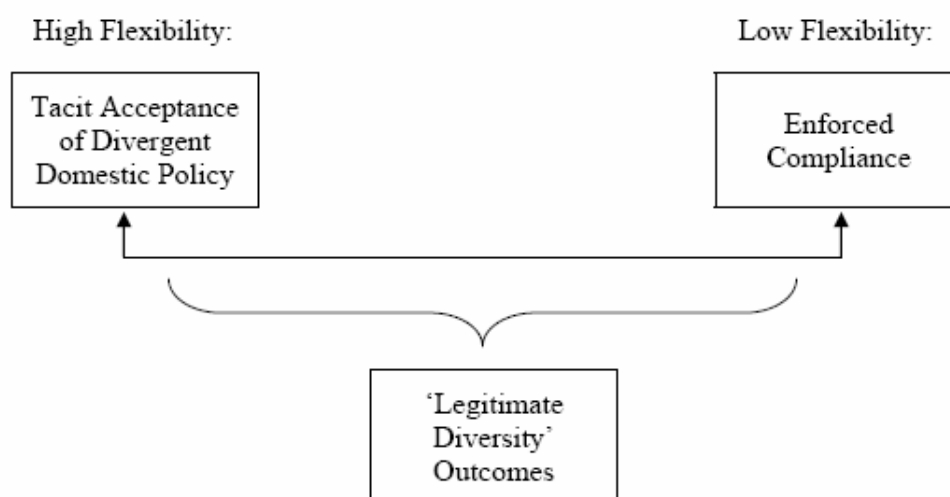
⁷ It can be assumed that the interests of the Union are also the interests of the new member states as it is illogical that the member states would deliberately want to damage or weaken an organization that they have worked hard to join over more than a decade. Therefore there may be an ‘inbuilt stabilization mechanism’ in the interactions between the NMS and the Commission in the sense that both parties would attempt to get as much of what they want as possible, but not to the point where this would be detrimental to the core interests of the other since this would also have negative consequences for themselves. Our empirical research should show if this is indeed the case.

cause they relate directly to the cases at hand. The typology does not include what may be viewed as ‘secondary outcomes’ (i.e. the consequences that go beyond the individual cases such as the effects of repeatedly choosing certain strategies on the attitudes of the OMS vis-à-vis the Commission, or the effects of repeatedly choosing certain strategies on the unity of EU law). Secondary outcomes are important and they figure prominently among the underlying reasons for taking individual decisions, but they are not among the individual outcomes which have a bearing on the overall flexibility of EU law, the ‘measurement’ of which is one of the goals of this research.

One cautionary remark must be made with respect to figure 1 (below): first, since the degree of flexibility is not (and cannot) be quantified, the only purpose of ranging the outcomes on the scales is to show graphically the relation between outcomes which entail ‘more’ and ‘less’ flexibility in their interpretation of the *acquis*. In other words, this is an ordinal scale and the distances between the points on the scales have no separate meaning as is the case with interval and metric scales.

Figure 1: Graphic Representation of Possible Outcomes

Figure 1. Graphic Representation of Possible Outcomes



Level of Commission Enforcement

The horizontal line in the figure represents the outcomes of interactions between the NMS and the Commission and ranges from high to low flexibility of Commission interpretation of EU legislation. The left extreme of the line represents the outcomes of conflicts in which the Commission did not attempt to enforce EU law, resulting in unchallenged domestic legislation incompatible with EU law. At the opposite end flexibility of interpretation is low and cases of non-compliance are brought before the ECJ. The right extreme also includes national non-decision but does not include NMS choices to adopt policies which are in concordance with EU law. This is because the decision not to adopt a non-compliant policy (i.e. non-decision) can be a direct result of the interactions between the Commission and the NMS, but what the NMS decides to do subsequently (whether to adopt an alternative policy or not) is a domestic decision which can be taken without the Commission playing a role.

Compromises representing various degrees of ‘legitimate diversity’ can be found in the middle of the range of outcomes. The term ‘legitimate diversity’ encompasses all forms of idiosyncratic compromises, and depending on the precise contents these compromises could be

located at any point along the continuum (except at the extremes). However, since it is impossible to predict the different forms that ‘legitimate diversity’ may take, the figure could not be more differentiated than it is now. ‘Legitimate diversity’ compromises are struck in cases in which national conditions, circumstances or problems deviate significantly from the EU mean, so much so that the existing EU legislation would have a much stronger negative effect on certain sectors of the economy of a particular NMS than on those of the other member states. When a country can convincingly show that it suffers disproportionately from strict application of EU law, the Commission may decide that an exception is warranted and may apply EU law less strictly than it would otherwise do, making an agreement with the NMS in question specifying (or conversely deliberately leaving unspecified) the extent of the infringement that is allowed.

Besides the immediate outcomes of negotiations between the NMS and the Commission, the ‘legitimate diversity’ category may also include the longer-term outcomes of coalition building at the European level to change the law, or to replace or complement the law with NMG (these are not ‘secondary outcomes’ because they still pertain to the individual cases of conflict). Lastly, this category may also contain ‘compromises’ in ECJ interpretations of the law, because a referral to the ECJ should not automatically be equated with a victory for the Commission and may result in a much more balanced ‘compromise’ outcome.

Strategies of the Players

In the above discussion of interests and outcomes, one crucial step has thus far been overlooked: the strategies adopted by the players. It is through these strategies that the interests lead to outcomes, and only by showing that particular strategies are more likely to be adopted than others would it be possible to identify a ‘pattern of interaction which systematically favours a flexible attitude towards EU law’ as it has been described in the previous section. It will be argued below that the NMS and the Commission each have two basic ‘ideal typical’ strategies available to them when they are confronted with incompatibilities between salient NMS interests and EU law, and that both players are more likely to seek compromises than to choose a non-compromising strategy.

NMS Strategies

When a new member state finds that it has a certain (economic) interest which runs counter to a piece of EU legislation, the government must reflect upon the following things: first, it can try to take away the source of the problem by attempting to build a coalition with other member states in an attempt to change the law at the European level, or it can try to persuade the other member states and the Commission to apply NMG in addition to or instead of hard law to the area in question. However, quite apart from the practical feasibility of these courses of action, the NMS would still need to do something to address the immediate issue at hand, which is the second thing the government should reflect upon. With respect to the immediate actions to be taken, the NMS must make a choice between two possible strategies, seen graphically in figure 2 below.

‘Compliance’: The figure shows the NMS compliance strategy as a black dot below ‘Low Flexibility’. There are two ways in which a NMS may ‘comply’, i.e. refrain from adopting ‘deviant’ policies despite the effects this would have on the national interest that is at stake, both of which can be conceived of as ‘non-decision’ in Bachrach’s terms. First, a NMS may opt not to adopt a new policy at all, and second, a NMS may adopt policies which are in conformity with EU law but which are not in its economic interest. The latter option will be chosen in cases where the country must legislate on a particular issue because the consequences of not legislating at all would be worse than those of leaving the matter aside completely (they

would then consider EU law a constraint on policy making like any other). The choice not to legislate, on the other hand, is likely to be made in cases in which legislating is not immediately warranted. Instances of refraining from legislating may well be frequent, but they are also difficult to detect since they do not leave a paper trail and are not widely discussed in the media.

The compliance strategy (in both its forms) may be chosen if the likely costs of going through an infringement procedure and a possibly being convicted by the ECJ are higher than what the country stands to gain by not complying with the law. A NMS may also choose this strategy to avoid the negative consequences of non-compliance for its reputation as a ‘good’ member state, or because the country seeks to establish such a reputation for itself. However, it should not be assumed that compliance (in either one of its forms) is a purely domestic matter in the sense that no negotiations take place with the Commission prior to the decision to comply. It may well be the case that a NMS consults with the Commission when an incompatibility between its own preferences and EU law occurs, and that the Commission persuades the NMS to act in accordance with EU law or to choose non-decision if the envisaged legislation would breach EU law.

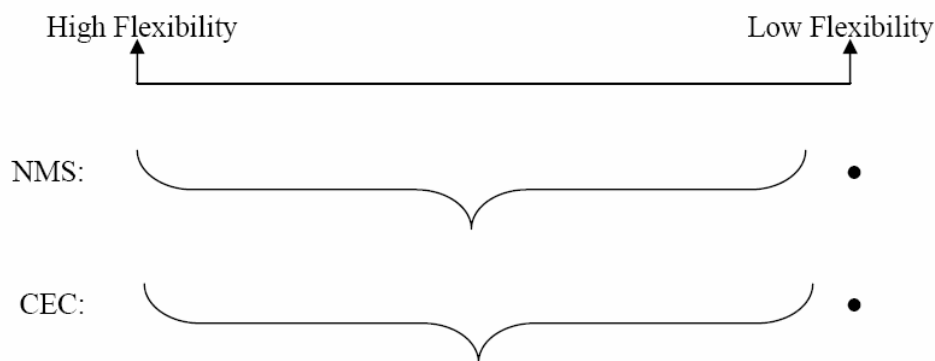
‘Non-Compliance’: In figure 2, the non-compliance strategy is represented by the parenthesis to the left of ‘Low Flexibility’. This strategy entails all NMS actions which do not fall under the heading of ‘compliance’ (in mathematical terms, if compliance is x , non-compliance is $1-x$). Typically under the non-compliance strategy, a NMS would go ahead with its preferred policy, but it is also conceivable that a NMS adopts a policy which can already be seen as a type of compromise position, hoping that the Commission would look more favorably upon such a policy than upon a policy which deviates further from EU law. Furthermore, even if a NMS adopts a substantially deviant policy at the outset, one must assume that the country is willing to renegotiate its contents. This is because reaching a compromise and getting some demands met is always a superior option than being taken to court and most likely losing the case (given the track record of the Commission at the ECJ this is not an far-fetched expectation⁸), or indeed from adopting the compliance strategy from the outset and thereby foregoing any chance of reaching a compromise.

The non-compliance strategy would therefore in many cases be the more rational of the two strategies, not least because during the long period between the adoption of a deviant domestic policy and the start of possible court proceedings, the NMS can take action at any time to remedy the situation and can thereby prevent having to appear before the ECJ. This delaying tactic is therefore also part of the non-compliance strategy and allows the NMS to buy some time to deal with the domestic problem in question.

⁸ Although if a country believes that it has a strong case it may of course be uninterested in compromises and aim for direct legal action instead, but because of the high litigation costs and the risks involved for the reputation of the country, this should happen only in a minority of cases.

Figure 2: Graphic Representation of Player Strategies

Figure 2. Graphic Representation of Player Strategies



Commission Strategies

It has already been mentioned that the Commission always reacts to the actions of the NMS in cases of conflict. It is the NMS which decides to comply or not to comply in a case of incompatibility of a national interest with EU law, and the Commission makes the second move only if the NMS opts for the non-compliance strategy⁹ (otherwise there is nothing to react to for the Commission). As is the case for the NMS, the Commission can also take a number of actions, but has just two strategies (these should also be seen as ideal types) when confronted with a NMS which has created an infringement of EU law by pursuing an inadmissible policy. The actions which cannot be considered to be strategies to handle the immediate conflict are: the proposition of new legislation (this is no strategy because during the legislative process the infringement remains unresolved) and the use of NMG (this is no strategy because NMG represent a ‘lower’ form of integration which is an unlikely choice when hard law is already in place; see the section on NMG for more on this topic).

‘Enforcement’: When reflecting upon the strategies of the Commission, the same picture emerges as for the NMS, with one strategy being concentrated on one point (again below ‘Low Flexibility’) and the other strategy being the opposite of this one point. The enforcement strategy is located below the ‘Low Flexibility’ end of the spectrum because it is the only strategy in which the Commission would not allow the NMS any scope for domestic-problem solving if this would result in an infringement of EU law.

The Commission may opt for a strategy of strict enforcement in the interest of the unity of law within the Union and in the interest of preventing the ‘spread’ of non-compliance from the NMS towards the OMS. One of the instruments of this strategy is the use of threats with sanctions in an attempt to frighten the member state in question into compliance before the case is brought to court¹⁰. However, if the member state cannot be persuaded to comply, the Commission has proven in the past that it does not hesitate to take judicial recourse to guarantee the unity of law since this is its right and its duty. Paradoxically, this strategy could cause

⁹ This does not preclude the possibility that the Commission attempts to avoid such conflicts (e.g. by monitoring potential conflict areas and offering solutions before the NMS takes the decision not to comply), but this research project focuses on what happens after a conflict has arisen and therefore only strategies dealing with actual conflicts are of interest here.

¹⁰ Another sanctioning option would be to impose symbolic sanctions, but since these do not address the infringement itself they cannot be considered part of the strict enforcement strategy.

the exact situation it is designed to prevent: strict enforcement would have negative consequences for the popular perception of the EU as such, of the Commission and of EU law in the new member states, which may spark instances of non-compliance throughout the region and seriously compromise the integrity of EU law.

‘Compromise’: Similarly as in the case of the NMS, the parenthesis in figure 2 means that all actions which are not part of the enforcement strategy are part of the compromise strategy. This strategy would allow the Commission to increase or maintain the legitimacy of EU law in the new member states (and its own legitimacy as the institution responsible for monitoring the application of this law), and thereby also to preserve the integrity of EU law because (unlike strict enforcement) it would show the new member states that their interests are taken into account. A further reason for choosing this strategy is a pragmatic one: since the Commission services do not have unlimited administrative capacity for the preparation of court cases (and since the ECJ is already quite overburdened), it may be more pragmatically sensible to compromise than to clog the system with numerous new cases.

It is important to note that the Commission would only choose this strategy in cases in which a unique, country-specific, overriding economic interest of a NMS is at stake (in all other cases, strict enforcement would be warranted). The decision of whether a conflict is due to such an important state interest (as opposed to an issue with less profound consequences for the national economy) is not always unproblematic, since NMS have an interest in emphasizing the importance of the problems they wish to negotiate. Cases for which the national importance has been accepted form the basis of the concept of ‘legitimate diversity’, meaning that real economic interests of member states in an increasingly diverse Union can be accepted as an inevitable characteristic of a multi-faceted polity and EU law can provide ways of dealing with diversity flexibly. Diverging interests can be accommodated under the umbrella of EU law if the member states are given more discretionary space for implementation or have the opportunity to opt out of certain arrangements. This more flexible understanding of EU law is not immediately applicable to the cases of conflict to be analyzed here, but it is assumed that the need for increased flexibility will become most directly visible in the application of existing EU law and that this may clear the way for a more flexible *acquis*. In many cases, laws are codifications of what is already being done in practice, and therefore a more flexible interpretation of the *acquis* vis-à-vis the NMS could be a first step towards a new development in the history of EU law, a development in the direction of ‘legitimate diversity’.

New Modes of Governance

As to the definition of New Modes of Governance, we so far relied on the criteria of voluntarism and inclusion, established by A. Héritier (2003: 106). Accordingly, NMG are ways to reach non-binding agreements on policy goals and instruments by the active participation of concerned actors. By focusing on a major aspect of established European governance, ‘hard’ European law, we aim to present a foil against which the potential and the limits of NMG can be assessed.

On the one hand, NMG are often seen as an option particularly in policy areas where no or little ‘hard’ Community law exists (Borrás/Jacobsson 2004). The Open Method of Coordination (OMC) is the most prominent example. With regard to European governance in the accession process, one could have expected the use of NMG (Börzel/Guttenbrunner/Seper 2005: 3) – yet, the “dominance of ‘old governance’ in EU rule transfer” (Schimmelfennig/Sedelmeier 2004: 674; Börzel/Guttenbrunner/Seper 2005) seems beyond controversy. At least two factors might contribute to an explanation of this fact: First, the aim of the accession process was to reach complete legal harmonization, an aim to which the non-binding NMG by

definition are hardly suitable to contribute. Second, due to the high asymmetry of the accession process, the EU's potential for old modes of governance was higher towards the candidate countries than towards its own member states – even in the absence of formal hierarchy. While the EU cannot threaten member states with exclusion in case of non-compliance, this is exactly what accession conditionality meant to the candidate countries.

On the other hand, less attention has been directed to the question, whether NMG might be applicable in policy areas where governance by hard law dominates. In our investigation of conflicts between European law and domestic policy-making we will therefore address the role of NMG as one possible way of conflict solution. However, reservation as to the potential of NMG in these cases seems to be advisable. The Commission has shown a clear preference for old modes of governance wherever feasible. The very word *acquis* represents something that has been achieved and it would be illogical for the champion of European integration to trade a piece of that achievement for an arrangement to which compliance is optional. This would mean a reversal of integration, a 'shallowing' rather than a deepening of cooperation and it can be expected that the Commission will hardly be willing to take such a decision. The only way in which NMG could be included in this analysis of conflicts is if the Commission decides to complement the problematic laws with NMG. The new member states would then have to work towards benchmarks and be subjected to a kind of peer accountability until they reach the point of compliance. However, as in the case of proposing new legislation, while initiating NMG the Commission must still decide how to handle the infringement in the meantime.

Next Steps

The most important next step for us to take will be the selection of cases for our two PhD projects. Depending on the specific aims of the individual research projects, our cases will have to be well-suited for analysis of the indirect impact of European law in comparative research designs. Possible forms of comparison would be: comparison of a small number of policy areas in a small number of new member states; comparison of a slightly larger number of new member states but only with respect to one policy area; comparison between selected old member states and new member states, etc. We will of course rely on established social science methodology when selecting our cases.

We are pursuing several avenues to find cases (we must collect a large pool of possible cases in order to make a good selection). One such avenue is the constant monitoring of newspapers and internet sources from the new member states, as well as a variety of web-based resources on the EU itself. We use this method to find conflicts and to follow up on them, but also as a preliminary fact-check (before we start with the actual in-depth empirical research) by cross-referencing the information provided by one source with the information provided by others. A second, more direct, avenue will be embarked on within the next few months and will consist of a series of (also preliminary) interviews with Commission officials who are currently responsible for maintaining relations with CEECs in the policy fields covered by their DGs, and possibly also with Commission officials who were closely related to the monitoring of the accession preparations with respect to these same fields. What we hope to find in the former case are current discussions between the Commission and the new member states regarding the creation of domestic policy proposals in the context of EU law, whereas in the latter case we hope to find clues to such discussions which were already present during the accession process but which may have only emerged after enlargement took place. In addition to these interviews, we also intend to contact the Permanent Representations of the new member states to the EU, expecting that the officials working there are also well-informed about national policy goals and their relation to EU law.

Finally, the policy areas in which we believe salient national interests (as listed above) are most likely to be affected by EU law are those which are economically, politically and institutionally important. Examples include labour market policies (including negative income taxes), anti-discrimination legislation, policies relating to flagship industries and former public services (most notably state aid), regional policy. We are currently in the process of mapping the general characteristics of and political preferences regarding these policy areas in the new member states, which, together with our first round of interviews, should give us a clear idea of which kinds of conflicts are taking place (or may take place in the future) and in which countries. This will then provide the basis for our detailed investigation of selected cases, which should result in an answer to our two research questions and in an increased understanding of the development of European law through its interaction with domestic policy making.

Literature

- Bachrach, P. and M. S. Baratz (1962). "Two Faces of Power." American Political Science Review **56**(4): 947-952.
- Bachrach, P. and M. S. Baratz (1963). "Decisions and Nondecisions: An Analytical Framework." American Political Science Review **57**(3): 632-642.
- Börzel, T. A. (2000). "Why There Is No Southern Problem. On Environmental Leaders and Laggards in the EU." Journal of European Public Policy **7**(1): 141-162.
- Börzel, T. A. (2003). Guarding the Treaty. The Compliance Strategies of the European Commission. The state of the European Union VI: Law, Politics, and Society. T. A. Börzel and R. A. Cichowski. Oxford / New York, Oxford University Press: 197-220.
- Börzel, T. A. (2003). "Shaping and Taking EU Policies: Member State Responses to Europeanization." Queen's Papers on Europeanisation(2).
- Börzel, T. A. and T. Risse (2000). "When Europe Hits Home: Europeanization and Domestic Change." European Integration online Papers **4**(15).
- Börzel, T. A. and T. Risse (2002). Die Wirkung internationaler Institutionen. Von der Normanerkennung zur Normeinholung. Regieren in internationalen Institutionen. M. Jachtenfuchs and M. Knodt. Opladen, Leske+Budrich: 141-182.
- Dimitrova, A. (2002). "Enlargement, Institution-Building and the EU's Administrative Capacity Requirement." West European Politics **25**(4): 171-190.
- Eising, R. (2003). Europäisierung und Integration. Konzepte in der EU-Forschung. Europäische Integration. M. Jachtenfuchs and B. Kohler-Koch. Opladen, Leske+Budrich: 387-416.
- Ellison, D. L. (2005). Divide and Conquer: The EU Enlargement's Successful Conclusion? Grinnel, Iowa, Grinnel College.
- Falkner, G., M. Hartlapp, et al. (2004). "Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?" West European Politics **27**(3): 452-473.
- Featherstone, K. (2003). Introduction: In the Name of "Europe". The Politics of Europeanization. K. Featherstone and C. M. Radaelli. Oxford / New York, Oxford University Press: 3-26.
- Gourevitch, P. A. (1978). "The Second Image Reversed: The International Sources of Domestic Politics." International Organization **32**(4): 881-911.
- Grabbe, H. (2001). "How does Europeanization affect CEE governance? Conditionality, diffusion and diversity." Journal of European Public Policy **8**(6): 1013-1031.
- Grabbe, H. (2003). Europeanization Goes East: Power and Uncertainty in the EU Accession Process. The Politics of Europeanization. K. Featherstone and C. M. Radaelli. Oxford / New York, Oxford University Press: 303-330.
- Haverland, M. (2000). "National Adaptation to European Integration: The Importance of Institutional Veto Points." Journal of Public Policy **20**(1): 83-103.
- Haverland, M. (2005). "Does the EU cause domestic developments? The problem of case selection in Europeanization research." European Integration online Papers **9**(2): 1-14.
- Héritier, A. (1996). "The Accomodation of Diversity in European Policy-Making and Its Outcomes: Regulatory Policy as a Patchwork." Journal of European Public Policy **3**(2): 149-176.
- Héritier, A. (2001). Differential Europe: The European Union Impact on National Policymaking. Differential Europe. A. Héritier, D. Kerwer, C. Knillet al. Lanham, Rowman & Littlefield Publishers: 1-22.

- Héritier, A. (2003). New modes of governance in Europe. The state of the European Union VI: Law, Politics, and Society. T. A. Börzel and R. A. Cichowski. Oxford / New York, Oxford University Press: 105-126.
- Jacoby, W. and P. Cernoch (2002). The Pivotal EU Role in the Creation of Czech Regional Policy. Norms and Nannies. The Impact of International Organizations on the Central and East European States. R. H. Linden. Lanham, Rowman & Littlefield: 317-339.
- Jehlicka, P., Ed. (2002). Environmental implications of eastern enlargement of the EU. The end of progressive environmental policy? San Domenico, EUI.
- Knill, C. and D. Lehmkuhl (1999). "How Europea Matters. Different Mechanisms of Europeanization." European Integration online Papers 3(7).
- Knill, C. and A. Lenschow (2003). "Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation." European Integration online Papers 7(1).
- Kovács, J. M. (2002). Approaching the EU and Reaching the US? Rival Narratives on Transforming Welfare Regimes in East-Central Europe. The Enlarged European Union. Diversity and Adaptation. P. Mair and J. Zielonka. London, Cass: 175-204.
- Leibfried, S. and P. Pierson (2000). Social Policy. Left to Courts and Markets? Policy-Making in the European Union. H. Wallace and W. Wallace. Oxford / New York, Oxford University Press.
- Mather, J. (2004). The Citizenry: Legitimacy and Democracy. European Union Enlargement. N. Nugent. Basingstoke / New York, Palgrave Macmillan: 103-117.
- Nugent, N. (2002). The Government and Politics of the European Union. Basingstoke / New York, Palgrave Macmillan.
- Nugent, N., Ed. (2004). European Union Enlargement. Basingstoke / New York, Palgrave Macmillan.
- Offe, C. (1977). Einleitung. Macht und Armut. Eine theoretisch-empirische Untersuchung. P. Bachrach and M. S. Baratz. Frankfurt am Main, Suhrkamp: 7-34.
- Olsen, J. P. (2002). "The Many Faces of Europeanization." Journal of Common Market Studies 40(5): 921-952.
- Putnam, R. D. (1988). "Diplomacy and Domestic Politics: The Logic of Two-Level Games." International Organization 42(3): 427-460.
- Radaelli, C. M. (2003). The Europeanization of Public Policy. The Politics of Europeanization. K. Featherstone and C. M. Radaelli. Oxford / New York, Oxford University Press: 27-56.
- Risse, T., M. Green Cowles, et al. (2001). Europeanization and Domestic Change: Introduction. Transforming Europe. M. Green Cowles, J. A. Caporaso and T. Risse. Ithaca / London, Cornell University Press: 1-20.
- Schäfer, A. (2004). "Beyond the Community Method: Why the Open Method of Coordination Was Introduced to EU Policy-making." European Integration online Papers 8(13).
- Scharpf, F. W. (1997). Games Real Actors Play. Actor-Centered Institutionalism in Policy Research. Boulder, CO, Westview Press.
- Scharpf, F. W. (1999). Governing in Europe: effective and democratic? Oxford / New York, Oxford University Press.
- Scharpf, F. W. (2003). Legitimate Diversity. The New Challenge of European Integration. The state of the European Union VI: Law, Politics, and Society. T. A. Börzel and R. A. Cichowski. Oxford / New York, Oxford University Press: 79-104.

- Schimmelfennig, F. (2002). Introduction: The Impact of International Organizations on the Central and Eastern European States - Conceptual and Theoretical Issues. Norms and Nannies. The Impact of International Organizations on the Central and Eastern European States. R. H. Linden. Lanham, Rowman & Littlefield: 1-29.
- Schimmelfennig, F. and U. Sedelmeier (2002). "Theorizing EU enlargement: research focus, hypotheses, and the state of research." Journal of European Public Policy **9**(4): 500-528.
- Schmidt, S. K. (2004). Legal Uncertainty as a Necessary Condition for Integration. Fifth Pan-European International Relations Conference 'Constructing World Orders'. The Hague.
- Schmidt, S. K. (2004). Rechtsunsicherheit statt Regulierungswettbewerb: Die nationalen Folgen des europäischen Binnenmarkts für Dienstleistungen. Hagen, FernUniversität Hagen.
- Schmidt, S. K. (2005). Probleme der Osterweiterung: Kleine Länder in der Europäischen Union. Köln.
- Töller, A. (2004). "The Europeanization of Public Policies - Understanding Idiosyncratic Mechanisms and Contingent Results." European Integration online Papers **8**(9).
- Treib, O. (2003). "Die Umsetzung von EU-Richtlinien im Zeichen der Parteipolitik: Eine akteurzentrierte Antwort auf die Misfit-These." Politische Vierteljahresschrift **44**(4): 506-528.
- Tsakatika, M. (2005). "Claims to Legitimacy: The European Commission Between Continuity and Change." Journal of Common Market Studies **43**(1): 193-220.
- Young, A. R. and H. Wallace (2000). The Single Market. A New Approach to Policy. Policy-Making in the European Union. H. Wallace and W. Wallace. Oxford / New York, Oxford University Press: 85-114.