

European State Aid Control in the New Member States –

The Examples of Poland and the Czech Republic

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Abstract

This paper analyzes the impact of European state aid control in the new Member states. Two main arguments are derived from comparisons of state aid policies over time and across countries: First, changes in CEECs’ state aid policies can mainly be traced backed to the (anticipated) impact of post-accession state aid control by the European Commission rather than to accession conditionality. Second, despite strong tendencies of policy convergence we observe persistently different national strategies in dealing with European state aid control. More generally, studying the domestic impact of European state aid control provides us with a telling example of the peculiarities of complying with rules of negative integration.

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1 Introduction

This paper analyzes the impact of European state aid control in the new Member states. The control of national state aid policies is a highly relevant policy area, from a political perspective as well as for scientific reasons. State aid measures always create winners and losers and, thus, state aid control by the European Commission directly impacts on distributive questions. Moreover, although the Commission's main task is regulative – protecting competition – state aid control often involves balancing the goal of undistorted competition against other policy goals such as competitiveness or cohesion. In most Central and Eastern European Countries (CEECs), state aid has become an important instrument during the process of economic transformation, as a means to restructure their traditional industries as well as in order to attract new investments.

Despite its salience, however, state aid control remains seriously under-researched from a political science perspective. The adjustment of the CEECs' state aid policies towards European standards so far has almost exclusively been dealt with in a legal (Schütterle 2002; Cremona 2003a) or economic context (Atanasiu 2001; Hashi/Balcerowicz 2004). More generally, we can observe a certain neglect for some core areas of – mainly negative – European integration (Franchino 2005; Schmidt/Blauberger/Van den Nouland 2007), also within the literature on the European impact in the new Member states (Sedelmeier 2006a: 17). As will be shown, however, the process of adjusting to and complying with rules of negative integration is different from transposing European policies into national law.

The domestic impact of European state aid control in the new Member states will be analyzed by two different comparisons. First, the institutional settings in state aid control and the CEECs' state aid policies before and after accession will be compared. Second, different groups of new Member states will be distinguished according to their state aid policies and Poland and the Czech Republic will be discussed in greater detail. The analysis is based on two main sources. On the one hand, data on the state aid policies of EU Member states and on individual cases under investigation is provided by the European Commission's State Aid Scoreboard¹ and its State Aid Register². On the other hand, background interviews with 39 officials at Commission level as well as at Member state level have been conducted.

Two main arguments are derived from the comparisons over time and across countries: First, changes in CEECs' state aid policies can mainly be traced backed to the (anticipated) impact of post-accession state aid control by the European Commission rather than to accession

¹ Online: http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.html [05.05.2007].

² Online: http://ec.europa.eu/comm/competition/state_aid/register/ii/ [05.05.2007].

conditionality (section 2). Second, despite strong tendencies of policy convergence we observe persistently different national strategies in dealing with European state aid control (section 3). In the concluding section, the analysis will be put in the broader context of the peculiarities of implementing and complying with rules of negative integration.

2 Comparison I: State Aid Policies Before and After Accession

Different from other policy areas in which the transposition and implementation of European rules into national law has been the main accession requirement for the CEECs and different from what the progress reports of the Commission might suggest, adjusting national state aid policies to European standards has not been a process of continuous approximation. Both, with respect to the institutions of state aid control as well as regards the main state aid policies, the year 2004 marks a crucial turning point for the CEECs. Only by the date of accession, the exclusive competence to control national state aid measures has been transferred to the European Commission and since then, state aid policies in most of the new Member states have changed significantly.

The observed rupture in the state aid policies of the new Member states has one more methodological and one more substantive implication: First, focusing on systematic changes just before or after accession enables us at least in parts to isolate the specific European impact on the new Member states from other, global or national, factors. Second, the observed developments contrast with expectations derived from the literature on EU enlargement, particularly as regards the impact of accession conditionality and its potential lack of sustainability.

2.1 Learning to Play the Game

European state aid control does not require Member states to *adopt* national rules, but to *consider* European rules in the making of their state aid policies. Accordingly, the CEECs were not obliged to transpose the entire complex of European state aid law into national law in order to fulfil the *acquis* accession criterion. Instead, they had to establish a temporary system of national state aid control authorities. Until accession, these authorities had to play a similar role on a national level as the Commission plays on the European level – applying and enforcing European state aid rules and, thus, bringing national state aid policies in line with European law. The main effect of this Commission strategy, however, has not been to realize a fully fledged system of national state aid control and a continuous alignment of national

state aid policies but a thorough exercise of the CEECs in dealing with the principles and the procedure of European state aid control: “Harmonisation in this context takes on a specific character, one that is more about learning to play the game than about borrowing the rules” (Cremona 2003b: 287).

European state aid control is based on Articles 87 to 89 of the EC Treaty and its interpretation by the Commission decisions and soft law as well as judgments of the European courts. Article 87 (1) EC broadly defines the notion of ‘state aid’ (Plender 2003) and generally prohibits national state aid measures that might distort competition in the internal market. Article 87 (2) EC and, more importantly, Article 87 (3) EC list the exemptions from this prohibition, mainly interpreted in the Commission’s soft law. Article 88 EC contains the basic procedural rules of the European state aid control system, empowering the European Commission to take the leading role. Finally, Article 89 EC provides the basis for secondary legislation on state aid which has only been used after 1998 to codify into hard law basic procedural issues and to exempt certain categories of state aid from *ex ante* control by the Commission.

The CEECs’ commitment to adapt national state aid policies to European rules dates back to the entry into force of the Europe Agreements. Each of these agreements included a provision on the prohibition of state aid which is very close to the wording of Article 87 (1) EC, followed by another provision on possible exemptions to this prohibition that had to be assessed “on the basis of criteria arising from the application of the [EC Treaty] rules”. No procedural and legislative prescriptions equivalent to Articles 88 and 89 EC have been included in the Europe Agreements. Transposing and implementing the entire state aid *acquis* on the national level has been deemed unrealistic from the very beginning:

“It is, however, impossible for any national legislature to transpose completely into national law all non-codified substantive State aid acquis elements (e.g. the definition of the notion of State aid – given that a binding and exhaustive substantive Community definition does not exist) including all relevant Commission guidelines [...], frameworks [...], codes [...] and the rapidly increasing number of State aid judgements of the Luxembourg Courts”
(Schütterle 2002: 582)

In order to finalize accession negotiations on Chapter 6 (competition), the candidate countries had to fulfil three criteria: administrative capacity (i.e. the establishment of national

monitoring authorities), sufficient legislative alignment (i.e. the application of the state aid *acquis*), and a credible enforcement record.

Between 1997 and 2001 all CEECs adopted national state aid laws.³ On the one hand, these laws were only temporary transpositions of core elements of European state aid rules, leaving large parts of European law without equivalent on the national level. On the other hand, certain provisions went beyond what is codified on the European level, e.g. in providing positive catalogues of potential types of state aid and exhaustively defining core terms to be applied. Thus, national state aid laws were kept understandable also for legally trained entrepreneurs and can be seen as a contribution to the spreading of knowledge on state aid control rather than a reproduction of the complete system of European state aid control on the national level.

The role of the European Commission in state aid control was to be imitated by national state aid authorities. In most candidate countries, these authorities had already been established by the time national state aid laws came into force – sometimes as independent institutions, sometimes as subdivisions of the ministries of finance (Schütterle 2002: 580). Emulating the procedure of European state aid control, the granting of state aid became contingent on the notification to and approval by the respective national monitoring authorities.

The enforcement record of the national authorities is hardly comparable due to very diverse approaches in different CEECs (Schütterle 2003: 31). In general, the number of negative decisions or even decisions to recover illegally granted state aid was relatively low (Schütterle 2004: 489) and the Commission's evaluation of the enforcement record of various national monitoring authorities remained critical even in its last comprehensive monitoring report 2003.⁴ An important side-effect of the Commission's unprecedented strategy to rely on national state aid authorities, however, was the training of an administrative elite familiar with the rules and procedure of European state aid control.

Accession negotiations on Chapter 6 were among the lengthiest and most controversial of all chapters. In some cases, negotiations on state aid issues were concluded only shortly before or even synchronously with the general end of accession negotiations in December 2002. Transitional arrangements have been concluded with the majority of accession countries except for Slovenia and the Baltic States (see Känkänen 2003). The Accession Treaty, finally, had important implications for state aid measures that were decided upon before accession

³ An overview of the accession preparations of individual CEECs is given in a series of articles in the *European State Aid Law Quarterly* (Hargita/Remetei Filep 2004; Jagodic-Lekoveciv 2004; Pelka 2004; Vosu 2004; Bednár 2005; Lagzdina 2005; Cemnolonskis 2005; Andreou 2005).

⁴ In the monitoring reports 2003 on the Czech Republic, Malta, Slovakia and Poland, the enforcement record of national state aid authorities is still considered as not entirely satisfactory.

and that were still to be applied after accession. These measures had to be notified and at least implicitly to be approved by the Commission under the so called interim-procedure.⁵

Although the interim procedure enabled the Commission to exert its control function to a certain extent already with regard to state aid measures implemented before accession, the decisive institutional change took place with the date of accession. As of May 2004, national state aid laws became obsolete and had to be replaced by new, exclusively procedural, provisions in the CEECs. Upon accession, national state aid authorities lost all their competences to approve state aid measures and the authority to control national state aids has been transferred to the Commission. State aid must not be granted before being approved by the Commission and in cases in which state aid is granted illegally, the Commission may order the recovery of state aid. National state aid authorities continue to play a certain role in most CEECs in preparing notifications to the Commission, disseminating knowledge on European state aid rules and collecting data on national state aid policies.

Accession, however, has not only involved a loss of competences to the European level for the national monitoring authorities, but a major transformation of their role: during accession preparations, they were supposed to enforce EU law against the resistance of domestic state aid grantors and beneficiaries – after accession, they are demanded to help to push through certain notifications against reservations on part of the Commission. Negative assessments of aid measures by the national authorities are now being dealt with internally and informally in order to calculate the risk of a Commission investigation and to prepare against possible objections of the Commission. At the same time, the Commission is less willing to help the national authorities to fulfil their new function. While national case handlers could easily ask Commission officials for advice in enforcing European state aid rules before accession, they are now left alone with the task of convincing the Commission of the compatibility of certain aid measures.

To summarize, we can distinguish to clearly different institutional settings in the field of state aid control before and after accession. The differences become even more obvious when analyzing the actual state aid policies of the CEECs.

2.2 Key Indicators: State Aid Levels and Objectives

The initial ‘misfit’ between European state aid control and post-communist state aid policies was significant. In the early stages of the economic transformation process of the CEECs,

⁵ Overall, 559 such interim measures have been notified (Roebeling 2003). Except for several cases in which the Commission has opened formal investigations, it took until December 2005 until all these cases had been finally approved.

state aid measures had a “strong ‘crisis management’ feature” (Hashi/Balcerowicz 2004: 3) and were mainly designed on an *ad hoc* basis in order to rescue firms in difficulties. Typically, state aid was not granted in the form of direct subsidies, but through the less transparent toleration of payment arrears in tax and social security payments (Atanasiu 2001; Atanasiu 2005). In contrast, the European Commission has repeatedly outlined the goals of a reduction of state aid expenditures and a redirection of the remaining state aid towards transparent forms of state aid and horizontal objectives (e.g. not favoring particular sectors).⁶ Comparing new and old Member states according to their average state aid levels as well as their state aid objectives, we observe strong tendencies of convergence of the new towards the old Member states’ policies.⁷ However, this process has not been continuous, but can be separated into two different developments: Before accession, most CEECs were characterized by state aid policies significantly different and even diverging from those of the old Member states. After accession, the trend has been reversed and the new Member states’ policies have come close to the EU-15 average.

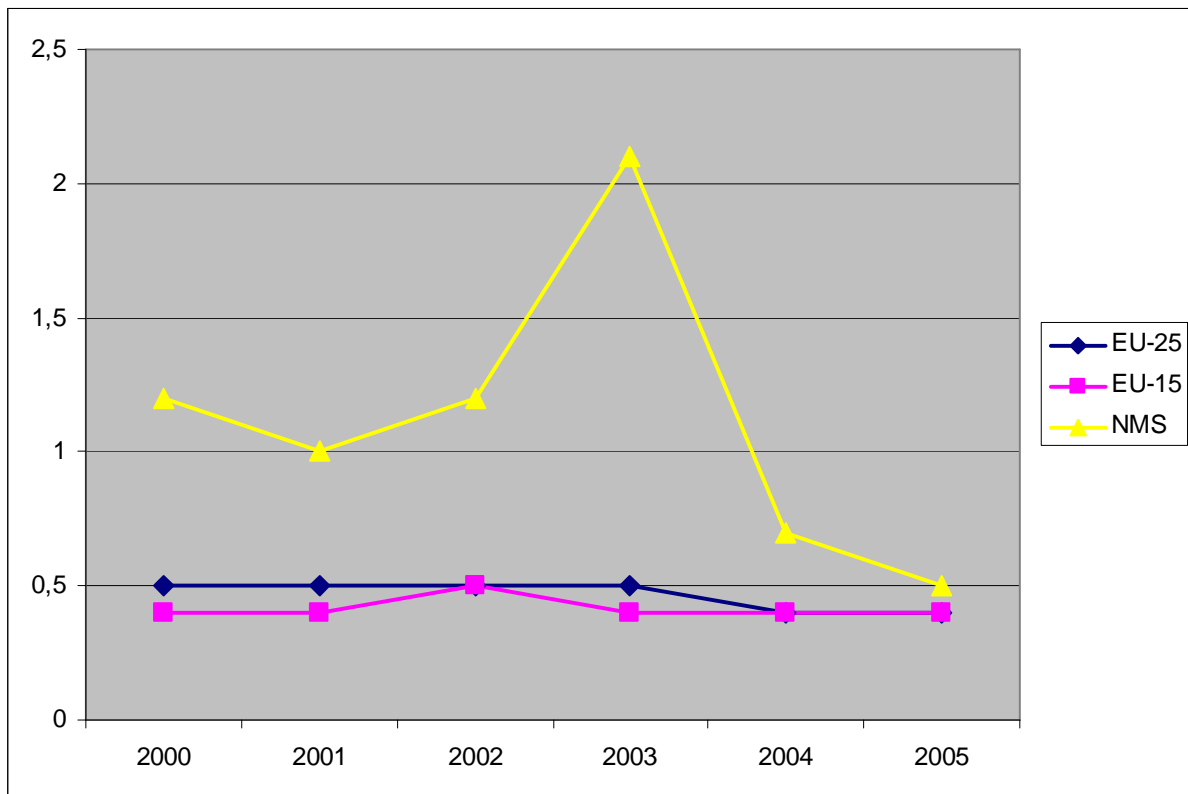
State Aid Levels

Reliable and comparable data on the state aid policies of the CEECs is only available from the year 2000 onwards.⁸ From 2000 to 2003, the average aid level in the CEECs amounted to 1.42% of the GDP as compared to only 0.39% in the old Member states. While the aid level peaked immediately before enlargement, in 2003, we observe a rapid decline after accession, clearly below the values of the years 2000 and 2001. The average aid level in the new member states converges towards an almost stable average aid level in the old Member states.

⁶ These goals have been formulated by the 2000 European Council in Lisbon and, since then, have been repeated regularly by the Commission, most prominently in its State Aid Action Plan of June 2005 (European Commission 2005).

⁷ The amount of state aid in relation to the GDP is called state aid level. As to the state aid objectives, the Commission distinguishes between two broad categories: sectoral and horizontal (i.e. non-sectoral) state aid. Although the goals of reducing and redirecting state aid towards horizontal objectives do not have binding character and, hence, do not exactly constitute standards of compliance or non-compliance, they provide us with aggregate indicators for national state aid policies and for the domestic impact of European state aid control. A more adequate standard of non-compliance would be the amount of state aid that was granted illegally and not yet recovered. As there have been only two Commission decision so far ordering recovery of illegal aid in the new Member states (see footnote 10), however, this standard is not yet applicable to the new Member states.

⁸ Since July 2001, DG Competition publishes its bi-annual EU State aid Scoreboard. As to the new Member states, two Scoreboard issues included subsection with a special focus on these countries (autumn 2002 and autumn 2004 updates). In the autumn 2005 update, data on the new Member states’ policies after accession has been included into the regular Scoreboard for the first time.



Graph 1: State aid as a percentage of GDP;

Source: Online EU State Aid Scoreboard, Autumn 2006

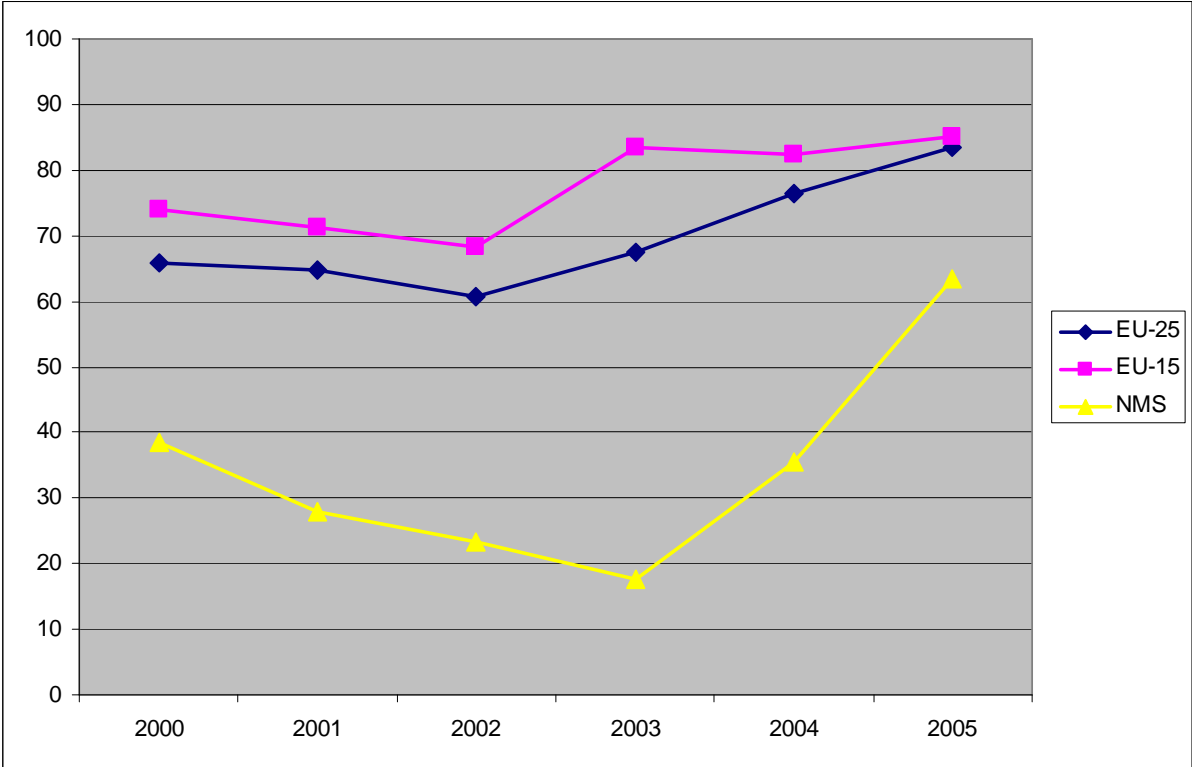
Taking into account the institutional change in the area of state aid control that was described above, we can interpret the development of the CEECs' policies as follows:

For the period before accession, we cannot observe a reduction in the CEECs' state aid levels that we should expect as a result of the credible enforcement of European state aid rules. We might consider the slight decline in aid levels from 2000 to 2001 as a result of these efforts. In 2002 and 2003, however, state aid in the candidate countries has risen up to a level three times higher than in the old Member states. Particularly high amounts of state aid have been granted during the crisis of the Czech banking sector in 2002 and for the restructuring of the Polish coal sector in 2003. Apparently, several of the CEECs used the window of opportunity between the conclusion of accession negotiations and accession in order to grant considerable amounts of state aid to their industries – for the last time without full Commission control. Ironically, this development demonstrates that the candidate countries increasingly understood European state aid rules and the approaching constraints of Commission control. As a result, the positive effect on state aid levels due to the anticipation of Commission control clearly dominated over the potentially negative effect of a credible enforcement of European state aid rules.

By contrast, the average state aid level in the CEECs has fallen dramatically in 2004; it continued to fall in 2005 and has reached a level less than half of the one in 2000. The difference between old and new Member states has almost disappeared. Thus, the absence of accession conditionality has not undermined the domestic impact of European state aid control in the CEECs. The instruments at the disposal of the Commission – its investigation powers and its competence to order recovery of illegally granted state aid – outweigh the loss of the stick of accession conditionality in the field of state aid.

State Aid Objectives

The picture gets even clearer when analyzing the objectives state aid is granted for in the new and old Member states. On average, the CEECs grant considerably higher shares of state aid to sectoral objectives than the EU-15 countries. Before accession, the share of horizontal aid has even been constantly falling in the CEECs, reaching its lowest level in 2003. After accession, the share of horizontal aid has risen in the new Member states, rapidly catching up with the old Member states.



Graph 2: Share of state aid to horizontal objectives as a percentage of total aid;
 Source: Online EU State Aid Scoreboard, Autumn 2006

Again, we can clearly distinguish between the CEECs’ state aid policies before and after accession.

Despite the Commission's preference for horizontal aid, the share of horizontal aid constantly fell until accession – accordingly, the share of sectoral aid grew. In general, the high demand for sectoral aid in the CEECs is related to the process of economic transformation. Sectoral aid is considered to be an important instrument in the course of restructuring and privatizing state-owned enterprises and in order to mitigate the social effects of this process (see Ellison 2005). However, the continuous rise of sectoral aid before accession and its rapid decline after accession has not been paralleled by a similar process of economic transformation. The origin of this development can only be found in the CEECs' adjustment to European state aid rules and their anticipation of Commission control. The constraints of European state aid law are particularly strict with regard to sectoral aid and, hence, several candidate countries took the last chance to subsidize the restructuring of their industries.

After accession, the weight of horizontal aid in the new Member states has not only grown in relative terms due to the restrictions on sectoral aid – even in absolute terms and despite the general reduction of aid levels, horizontal aid has become more prominent in seven out of ten new Member states in 2005 as compared to the time before accession.⁹

2.3 Anticipating Post-Accession Control

At least two conclusions can be drawn from the comparison of the CEECs' state aid policies before and after accession: First, the study of the new Member states and the comparison of their policies before and after accession offer a unique opportunity to identify and isolate the particular EU impact on its Member states' policies. Thus, insights from the new Member states can be a corrective for existing Europeanization research. Second, the empirical evidence available so far points to a considerable impact of European state aid law on the policies of the new Member states. This impact, however, can mainly be traced back to post-accession state aid control by the Commission and its anticipation on the national level rather than to accession requirements and conditionality.

Methodologically, the new Member states are highly interesting cases because they bring variation into research on the domestic impact of European integration. Europeanization research in particular has been criticized for over-emphasizing the EU influence on domestic policies and for omitting alternative explanations. Haverland has labelled this shortcoming the 'no-variance problem' of Europeanization research which "is typically confined to EU member states" (Haverland 2006: 135). Therefore, he argues for an inclusion of non-EU

⁹ See online: http://ec.europa.eu/comm/competition/state_aid/studies_reports/k5_3.xls [30.04.2007].

Member states into Europeanization research designs – well aware of potential disadvantages of this strategy: countries from very different regions might lack comparability with EU Member states; close neighbours are exposed to indirect EU influences (ibid.: 139f.). Studying the EU impact in the CEEC before and after accession might be an alternative way to bring variation into Europeanization research. Although this research design is not unproblematic either, the above example demonstrates the usefulness of the approach.

Adopting a typical ‘no-variance’ Europeanization research perspective and interpreting the above data on the development of the old Member states’ aid policies would probably lead us to identify little or no European impact. Despite the proclaimed goals, the overall EU-15 aid level has remained almost constant in recent years; the redirection of state aid towards horizontal objectives has been rather modest. Overall state aid expenditures, one could argue, do not show the presence of significant European constraints on national aid policies (Dylla 1997; Dylla 1998). Taking into account state aid data from a broader time period, the conclusion might be different. Significant decreases in aid levels in the 1980s and 1990s across most EU Member states are attributed to the impact of European state aid control (Wolf 2005). However, one might object, the distinction of European and global influences is not possible within this research design.

In contrast, the above data on the new Member states’ aid policies before and after accession support the argument that EU membership matters. With regard to previous EU enlargements an opposite argument has been made for the field of state aid policies: “perhaps formal integration in the form of membership is just that, a formality“ (Zahariadis 2002: 296). The strong ruptures in the CEECs’ aid policies before and after accession, however, cannot be explained but by the anticipated and actual effects of European state aid control. Domestic circumstances have not changed as rapidly and systematically across Member states as to explain the observations made. Global factors do not seem very plausible either, as they would have to explain rapid changes in the new and mostly stable policies in the old Member states at the same time. EU accession in general and the transfer of state aid control competences to the Commission in particular explain the changes in 2004 and 2005 as well as the ‘last minute’ aid measures in 2002 and 2003.

Considering the literature on EU enlargement, the main puzzle of the above findings consists in the timing of the European impact on national state aid policies. The Europeanization of the CEECs has been conceptualized as “as a process in which states adopt EU rules“ (Schimmelfennig/Sedelmeier 2005b: 7) and accession conditionality has been considered the

decisive facilitating factor in this process of rule transfer (Schimmelfennig/Sedelmeier 2004). Accordingly, EU influence on domestic policies should have been strongest before accession and if any change was likely to occur post-accession, this change should have reflected a decline in EU influence. By contrast, accession preparations in the field of state aid seem to have had the opposite effect of what was intended in the long-run: state aid levels and the share of sectoral aid in the CEECs have risen. After accession, the state aid policies of the new Member states have become largely compatible with EU state aid rules and converge towards the EU-15 average. The latter observation fits well with other preliminary findings on post-accession compliance, describing concerns about an ‘eastern problem’ as “vastly exaggerated” (Sedelmeier 2006a: 21; Sedelmeier 2006b). But how can we explain this development of the CEECs’ state aid policies in the context of the literature on EU enlargement?

First of all, conceptualizing the adjustment of national state aid policies in the CEECs to European law as an instance of ‘rule adoption’ might be misleading, particularly if this implies the notion of a process of continuous approximation. As has been shown above, European state aid rules are not meant to be transposed into national law, but they have to be considered in the making of national state aid policies and they are applied by the Commission in its state aid control. National state aid laws and the establishment of national state aid control authorities in the CEECs have been only temporary measures and they had a didactic function – familiarizing the candidate countries with the system of European state aid control – rather than the actual reproduction of this system on the national level. Thus, we can distinguish two clearly different institutional settings in the area of state aid control and, correspondingly, its different effects on national state aid policies in the CEECs.

Although pre-accession state aid policies in the CEECs did not reflect the long-term goals of European state aid control, this is far from saying that accession conditionality was without effect. Accession preparations required the candidate countries increasingly to take into account European rules on state aid control. The effect, however, was a rising awareness of the constraints of European state aid control and – anticipating these constraints – a policy of ‘last-minute’ state aid measures before accession. Although this effect has probably not been intended by the Commission, it clearly indicates the success of accession conditionality in motivating the candidate countries to learn the rules of the game. To summarize, external incentives and social learning might not be as different processes as is sometimes suggested (Börzel/Risse 2003; Schimmelfennig/Sedelmeier 2005a): In the field of state aid, accession conditionality was an incentive to learn.

After accession, the impact of regular European state aid control has fully been realized; the ‘last minute’ measures before accession have been more than compensated. While the instrument of accession conditionality is no longer available to the Commission, it has now the exclusive power to open formal investigations in state aid cases and to order recovery of illegally granted state aid. These instruments are much more suitable than the general stick of EU membership to differentiate between individual cases and to sanction or support certain state aid measures that are deemed (in)compatible with European state aid law. Moreover, in most cases, the Commission does not have to make use of its instruments. Only two negative Commission decisions in cases from the new Member states cannot explain the sharp decline in state aid levels after accession.¹⁰ Instead, the risks of lengthy Commission investigations and of potentially negative decisions are already anticipated in the making of national state aid policies. In particular, the performance of national competition authorities in the new Member states has been rated above average in most background interviews with Commission officials and has been considered a success of the accession strategy. Again, it is the anticipation of Commission control that largely explains the changes in CEECs’ state aid policies.

3 Comparison II: State Aid Policies of Different New Member States

Despite the observed convergence of the average policies of the new towards the old Member states, considerable disparities between the state aid policies of individual countries persist. Following the indicators of state aid level and state aid objectives, we can identify three subgroups of old and new Member states with similar policy orientations. Two countries will be compared in greater detail: Both, Poland and the Czech Republic, can be classified into the group of countries that have been considered most problematic by the Commission before accession – after accession, however, their state aid policies have developed differently.

Two conclusions are drawn from this country comparison: First, the state aid policies of some CEECs have already been largely compatible with European state aid rules in the early stages of the accession process and these policies have not undergone any major changes. As broadly debated in the literature on Europeanization, a certain ‘mismatch’ (Héritier/Knill/Mingers 1996) between the national and European level is a necessary but not sufficient condition for any adjustments. Second, countries with a similar original mismatch, therefore, may still

¹⁰ A negative decision has been taken in the case Frucona Kosice (O.J. 2005, C 233); a partly negative decision has been concluded in the case Huta Czestochowa (O.J. 2004, C 204).

differ in their adjustment of national state aid policies. While these differences could just depend on the speed of adjustment, there are strong arguments that – at least in parts – different national strategies in dealing with European state aid control may persist.

3.1 Types of State Aid Policies

In principle, four different state aid policy orientations can be described with the two indicators of state aid levels and state aid objectives. For three of these types, we can find country examples among the old as well as among the new Member states. While some CEECs can be classified into the same category before and after accession, others have more or less fundamentally changed their state aid policy, most often by a reduction of sectoral aid.

		state aid level	
		low	high
share of horizontal aid	high	<i>Estonia, Czech Republic (after)</i>	<i>Slovenia</i>
	low	-	<i>Poland, Czech Republic (before)</i>

Table 1 : Types of state aid policies

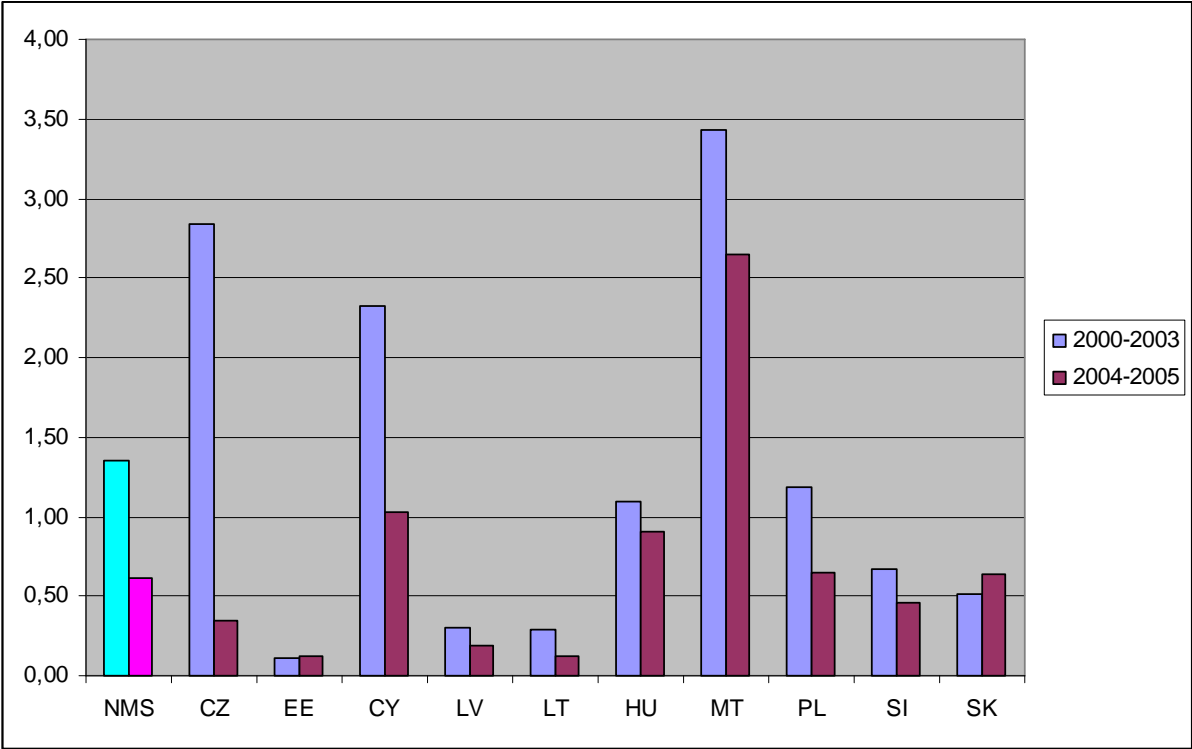
First, some CEEC did not spend significant amounts of state aid already before accession and if they granted state aid, they spent it mostly on horizontal objectives. In particular the Baltic countries, Estonia in the most extreme form, are representative for this group of Member states, similar e.g. to the Netherlands or Luxemburg among the old Member states. Accession negotiations on competition policy have been finalized with these countries rather early and no transitional arrangements have been requested.

Another group of countries is using state aid instruments more frequently, but still mainly for horizontal objectives. Already before accession, Slovenian state aid policy displayed characteristics similar to countries like Sweden or Denmark.¹¹ All of these countries spend state aid above the EU-25 average level, to a very large extent or exclusively on horizontal objectives.

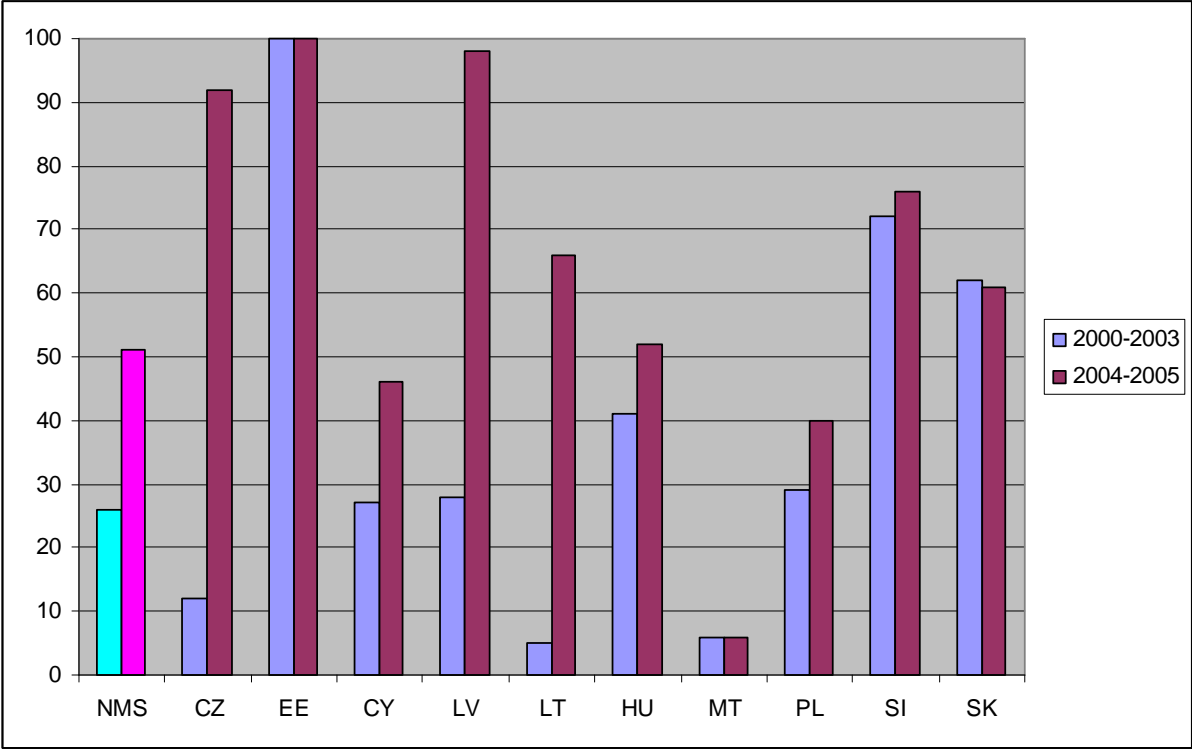
Finally, the largest group of CEECs was characterized by high aid levels and mainly sectoral aid objectives before accession. Although the state aid policies of Poland, Hungary, Malta and Cyprus have come closer to the EU-25 average, they still qualify for this group. The aid levels reached in these countries before accession are without comparison among the old Member states. Parallels exist to German state aid policy in the first half of the 1990s and to a certain extent to the cohesion countries Portugal or Spain. Accession negotiations with

¹¹ In Sweden, state aid amounted to 0.8% of GDP and was spent entirely on horizontal objectives in 2005. Danish state aid amounted to 0.5% of GDP; the share of horizontal aid was 97.1%.

this group of CEEC have involved some of the most controversial issues in the competition chapter and a series of transitional arrangements have been concluded.



Graph 3: State aid by new Member states as a percentage of GDP;
 Source: Online EU State Aid Scoreboard, Autumn 2006



Graph 4: Share of state aid to horizontal objectives by new Member states as a percentage of total aid;
 Source: Online EU State Aid Scoreboard, Autumn 2006

Taking the Commission's goals of a reduction of state aid expenditures and a redirection of state aid towards horizontal objectives as our starting point, we should expect the most significant impact of European state aid control in the third group of countries and no or only limited influence on the first and second groups of countries. By and large, these expectations fit with our observations.

In countries in which state aid is used very restrictively as a policy instrument anyway, the potential for further reductions or redirections of state aid due to European influences is very limited. Estonian state aid policy does not exhibit any major changes in recent years; having phased out certain types of sectoral aid, the same holds true for Latvian and Lithuanian state aid policies.

As to the second group of countries, old Member states such as Sweden and Denmark have shown that significant levels of state aid are well compatible with European state aid control as long as the aid objectives are mainly horizontal. From a Commission point of view, these countries are even seen as good examples of how to balance the negative goal of protecting competition against the positive goals of state aid. The state aid policies of Slovenia and Slovakia, coming closest to this type, have not changed significantly after accession.

Finally, most new Member states were characterized by high levels of mainly sectoral aid before accession – conflicting most strongly with the goals of the Commission – and, since then, they have changed their state aid policies more or less fundamentally. Out of this group, Poland and the Czech Republic have been chosen for country case studies as their state aid policies have changed after accession to very different degrees.

3.2 Poland and the Czech Republic

The development of Polish and Czech state aid policies will not be discussed separately, but in direct comparison of the two countries. First, the national systems of state aid control before accession will be described. Subsequently, data on the Commission investigations and on the adjustment of national state aid policies after accession will be presented. Finally, two sets of controversial cases will serve as examples of different national approaches towards the Commission. As to the time before accession, similarities between the two countries dominate – differences intensify after accession.

National State Aid Control before Accession

Accession preparations and negotiations in the field of state aid were among the most controversial and time-consuming of all issue areas, both, in the cases of Poland and the Czech Republic.

The Europe Agreements entered into force in February 1994 in the case of Poland and in February 1995 in the case of the Czech Republic. While the Czech Association Council was able to agree upon so-called implementing rules on state aid control within the prescribed period of three years, it took until 2001 to arrive at similar rules for Poland. Both countries adopted their first state aid laws only in 2000 – the ‘Act on State Aid’ was adopted on 24 February 2000 in the Czech Republic, the first Polish ‘Law on conditions of admissibility and supervision of State aid for entrepreneurs’ was passed on 30 June 2000 and later replaced by another law with the same title on 27 July 2002. While it was possible within Czech law to simply refer to European soft law provisions on the compatibility of state aid measures, Polish authorities were much more engaged in a temporary transposition of these rules into national law. As of May 2004, national state aid laws and according regulations became obsolete and have been replaced by the ‘Law on the procedural issues concerning public aid’ in Poland and the ‘Act on the regulation of certain relationships within the area of state aid’ in the Czech Republic.¹²

The task of controlling national state aid measures as quasi-Commissions before accession was delegated to the Office for Competition and Consumer Protection (UOKiK) in Poland and to the Office for the Protection of Competition (ÚOHS) in the Czech Republic. The president of UOKiK, directly subordinated to the Polish prime minister, had the competence to control and even to order recovery of illegally granted state aid (Sowa 2003: 10; Paczkowska-Tomaszewska/Jaros/Winiarski 2006). In the Czech Republic, the task of monitoring national state aid was first established within the Ministry of Finance and transferred to ÚOHS in 2000 (Bednár 2005). Data on the enforcement record of these national monitoring authorities is not very instructive and hardly comparable. As to UOKiK, all 64 Polish measures under control in the so-called interim procedure between 2002 and April 2004 have been approved and many of these cases have been notified to the Commission just on 29 or 30 April 2004 (Ambroziak/Kaliszuk 2004: 166). The Czech state aid decisions are better documented in the annual reports of ÚOHS¹³: In total, the office has taken 690 decisions on state aid measures from 2000 to 2004, out of which about 20 decisions have been negative.

In its progress reports, the Commission has evaluated the overall development of national state aid authorities and laws increasingly positive in both countries – the enforcement record,

¹² Both legal acts are available online on the websites of the national competition authorities. See for the Polish state aid law: http://www.uokik.gov.pl/en/legal_regulations/national_legal_acts/state_aid/ [05.05.2006]. See for the Czech state aid law: <http://www.compet.cz/en/state-aid/legislation/> [05.05.2006].

¹³ Online: <http://www.compet.cz/en/information-centre/annual-reports/> [05.05.2006].

however, was not seen as entirely satisfactory even in the last monitoring report 2003. Chapter 6 on competition was among the last chapters to be concluded during accession negotiations: in October 2002 in the case of the Czech Republic and just in December 2002 in the case of Poland. Similar transitional arrangements have been concluded with both countries in order to allow the restructuring of their steel industries until the end of 2006 within pre-defined limits. Further transitional arrangements with Poland concern the phasing-out of fiscal aid in special economic zones and certain types of environmental aid (vgl. Känkänen 2003; Schütterle 2004).

European State Aid Control after Accession

Since May 2004, the Commission's workload in the field of state aid control has increased significantly due to cases from the new Member states. Until the end of 2006, the Commission has decided in 297 cases from the CEECs.¹⁴ Out of these, the largest number of state aid measures under investigation was from Poland (90 cases), followed by cases from the Czech Republic (64), Slovakia (48) and other CEECs (with each 20 or less cases). In 29 cases from the new Member states, the Commission has opened formal investigations¹⁵ of which 15 concern Polish aid measures and 3 are related to Czech aid measures.¹⁶ The vast majority of these cases concern individual state aid measures for rescuing and restructuring firms in difficulty. Polish cases do not only account for more than half of the entire number of cases – moreover, whereas most cases from other CEECs are limited to questions from the transitional period around accession, there are constantly new investigations added in Polish cases.

As to the reduction of state aid levels and the redirection of state aid towards horizontal objectives¹⁷, the adjustment of Czech state aid policy has been most pronounced among all new Member states. Already in the first year of Czech EU membership, the national state aid level has fallen below the EU-25 average and sectoral aid has been reduced almost to zero. The same indicators exhibit significant adjustments of Polish state aid policy as well – yet, changes have been less strong and they have taken place later than in the Czech case. While there are no obvious reasons to doubt the sustainability of the changes in the Czech Republic,

¹⁴ Data compiled from the State Aid Register of DG Competition, see footnote 2.

¹⁵ The opening of a formal investigation procedure by the Commission must not be equated with non-compliance as, formally, it does not prejudice the Commission's final decision on the compatibility of a measure with European state aid rules. However, the Commission only launches an inquiry if it harbours concrete doubts about the compatibility of a measure and the likelihood of a negative decision increases significantly once the procedure is opened.

¹⁶ See Annex I for a list of all Polish and Czech cases in which formal investigations have been opened by the Commission so far.

¹⁷ See Annex II for absolute and relative figures on state aid levels and state aid objectives in Poland and in the Czech Republic from 2000 to 2005.

the picture is less clear with regard to Poland. If the Commission eventually approves some of the larger Polish state aid measures that are currently suspended until a final decision has been reached, the Polish state aid level would rise again significantly; the share of horizontal aid would fall.

Official statements from both countries on the overall development of European state aid control and on national state aid policies also indicate differing positions after enlargement. In its strategy paper on national state aid policy for the period from 2005 to 2010, the Polish Council of Ministers has reaffirmed the priority of rescue and restructuring aid in overcoming sectoral crises.¹⁸ In its comments on the Commission's State Aid Action Plan, Poland has criticized a perceived lack of sensitivity on part of the European Commission to issues of economic transition in the new Member states.¹⁹ Representatives from the Czech Republic, in contrast, have been remarkably silent as to potential criticisms towards the Commission and have largely supported the Commission's reform plans.²⁰

Controversial Cases

Before accession, fiscal aid in Polish and other CEECs' special economic zones has led to a highly political controversy in which the Commission had to step back from some of its initial demands (see Ambroziak/Kaliszuk 2004; Bohle/Husz 2005). Another area of political conflict has been the transitional arrangement for restructuring the steel industries in Poland and in the Czech Republic. Two final Commission decisions on alleged state aid to steel producers, positive in the Czech case²¹ and mixed in the Polish case²², show interesting similarities and differences between the two countries' approaches towards Commission control. Most telling, however, are two sets of restructuring measures concerning the Czech banking sector and the largest Polish shipyards.

The latter measures involve probably the highest profile cases from all new Member states. The Commission has already been observing the developments in the Polish shipbuilding industry with caution before accession and has critically reminded Polish authorities of their obligations under European state aid law in its monitoring report 2003. Due to insufficient documentation, the Commission refused to consider several Polish measures as already

¹⁸ Online: <http://www.mgip.gov.pl/Programy/> [05.05.2007]. For an in-depth comparison of the Polish state aid strategy and the State Aid Action Plan of the Commission, see (Ambroziak 2005).

¹⁹ Polish comments to the State Aid Action Plan, Online: http://ec.europa.eu/comm/competition/state_aid/others/action_plan/consult/36391.pdf [05.05.2007].

²⁰ Czech Office for the Protection of Competition, Annual Report 2005, p.23. Online: <http://www.compet.cz/en/information-centre/annual-reports/> [29.11.2006].

²¹ See: „State aid: Commission concludes Czech steel producer Třinecké železářny received no illegal aid”, Commission press release IP/06/1532, 09.11.2006.

²² See: „State aid: Commission concludes no aid involved in restructuring of Polish steel company Huta Czysta, but orders recovery of €4 million restructuring aid”, Commission press release IP/05/842, 06.07.2005.

finalized before accession (Cierna 2005) and has opened formal investigations concerning the three largest Polish shipyards in Szczecin, Gdynia and Gdansk in June 2005.²³ Several Commission deadlines to submit restructuring plans for achieving long-term viability of the shipyards have not been met by the Polish authorities.²⁴ Currently, the Commission requires Polish authorities to submit plans for reducing the production capacity of the enterprises affected by 40% in order to approve their restructuring – a requirement that is rejected by Poland as it would negatively affect the value of the enterprises and, thus, reduce the expected benefit of their privatization.²⁵ A negative decision would most likely bring about the bankruptcy of the shipyards and would affect about 16,000 workers in the shipyards themselves and 80,000 workers in other companies.²⁶ On the Polish side, Prime Minister Kaczynski has signalled his determination to save the shipyards even against a negative Commission decision: “The European Commission acts within the framework of European law [...] But if you ask me the question: am I ready to defend - at all costs - the shipyards where I spent weeks as a Solidarity demonstrator? The answer is ,I am ready to defend them. At all costs".²⁷

The restructuring of the Czech banking sector also involved considerable amounts of state aid and could have led to similar controversies. However, the Commission and Czech authorities were able to reach a compromise before accession and, thus, managed to keep most potential for conflict out of the regular system of European state aid control. In total, 16 measures related to the restructuring of the Czech banking sector had been notified to the Commission by the Czech Republic under the interim procedure. In the following, the Commission required the Czech authorities to retroactively justify the measures by elaborating restructuring plans for the enterprises concerned and to limit the duration and financial burden of the aid measures. In some cases, these requirements have been fulfilled ‘just in time’ on 30 April 2004; in one case even later on 28 June 2004 (see Rapp 2005: 414). In exchange, the Commission, in a rather innovative interpretation of its own rules and deviating from former practice, declared itself incompetent to investigate these cases as the aid measures were

²³ See “State aid: Restructuring of Polish shipyards under Commission scrutiny”, Commission press release IP/05/644, 01.06.2005.

²⁴ See “EU/STATE AID: Commission still waiting for shipyard restructuring plans”, Agence Europe, 5 September 2006.

²⁵ See “Shipyard Production Divides Poland and EU”, Polish News Bulletin, 16 March 2007.

²⁶ See “That sinking feeling - Polish shipyards need profits not public patronage”, Financial Times, 30 August 2006, p.12.

²⁷ Cited according to the Irish Times, 6 September 2006, p.11: “Polish shipyards' survival threatened as EU eyes state aid”.

‘granted before’ and were ‘not applicable after accession’.²⁸ The *de facto* positive decision of the Commission in the other Czech banking cases was considered a big success by the Czech authorities.

The Limits of Convergence

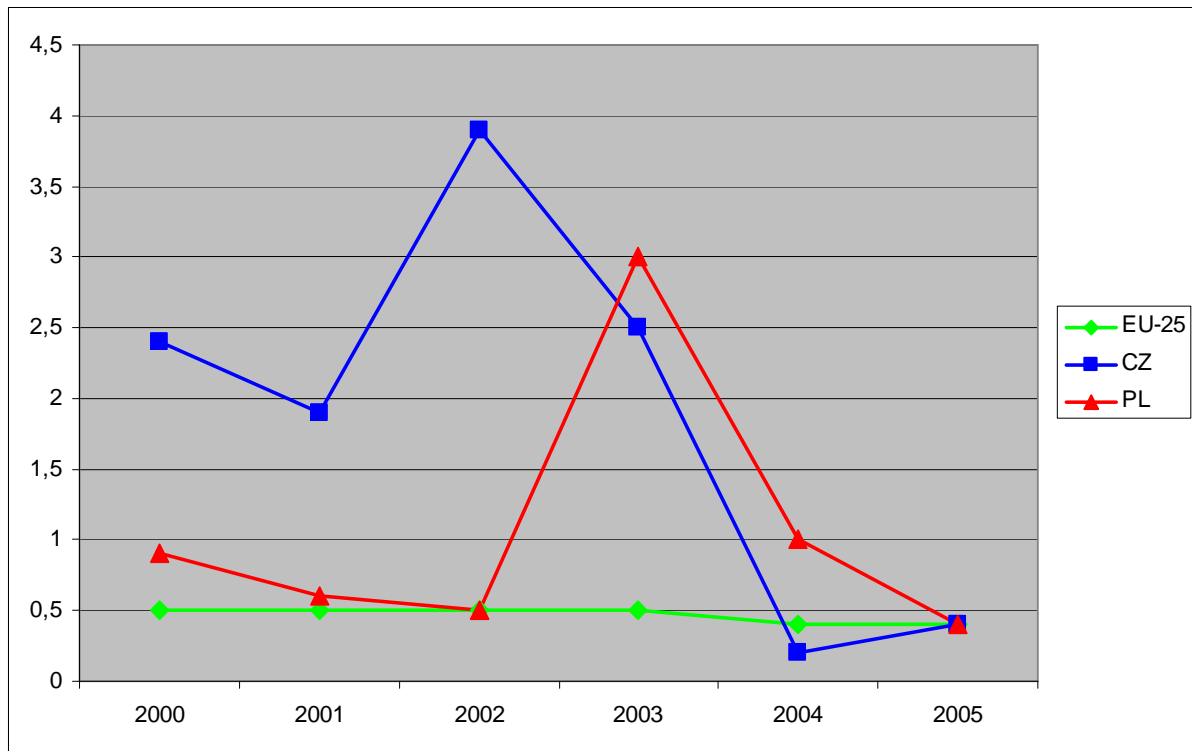
Although no major compliance problems have so far arisen with regard to the state aid policies of the new Member states, the domestic impact of European state aid control varies considerably. While the dichotomy of ‘compliance’ vs. ‘non-compliance’ seems too undifferentiated to grasp this variation, other categories from the literature on Europeanization are better suited to describe and to explain the observed differences across Member states.

The concept of ‘mismatch’ (Héritier/Knill/Mingers 1996) or ‘misfit’ (Dunia 1999) has been applied implicitly to differentiate between different types of state aid policies and the respective adaptational pressures arising on them from European state aid control. The concept has been debated in Europeanization research as a necessary but not sufficient condition for domestic change due to European integration (Börzel/Risse 2003: 60f.). Although, in principle, the concept is broad enough to be applied to very diverse forms of Europeanization, it has been mainly used in the context of the national transposition and implementation of European secondary law (see e.g. Risse/Green Cowles/Caporaso 2001: 6). In the analysis at hand, the Commission’s goals of a reduction of state aid and its redirection towards horizontal objectives have served as standards against which it was possible to judge the (in)compatibility of national state aid policies with European law. Thus, the concept of ‘misfit’ has been used in a case of negative integration and basic insights from the literature on Europeanization have been confirmed. On the one hand, we have found two different types of state aid policies in the CEEC – characterized by low aid levels or higher levels of mostly horizontal aid – that are largely compatible with European state aid law and that have not undergone major changes. On the other hand, changes in state aid policies have mainly taken place in those new Member states that exhibited significant incompatibilities with European state aid law before accession. Within this group of countries, however, the domestic impact of European state aid control still varies. An additional explanation beyond the degree of misfit is necessary.

²⁸ The only case in which the Commission decided to open formal investigations was the Agrobanka/GE Capital case. So far, no final decision has been taken by the Commission. See: “Formal investigation concerning State aid measures in favour of Czech bank Agrobanka”, Commission press release IP/04/904, 14.07.2004.

There are at least two alternative explanations why similar adaptational pressures might be filtered differently on the national level. Both, Polish and Czech state aid policies have been characterized by high aid levels and low shares of horizontal aid before accession – after accession, however, they have not developed in the same way. On the one hand, the adjustment of national state aid policies towards European state aid control might just be a question of time; different state aid policies in the short period after accession might just reflect differences in the speed of adjustment. On the other hand, national strategies in dealing with European state aid control might persistently differ.

Focusing on the speed of adjustment seems plausible for several reasons. Already before accession, variance in the transfer of *acquis* rules to the CEEC has been found to be mainly limited to questions of timing (Schimmelfennig/Sedelmeier 2004: 672). A comparison of the development of state aid levels in Poland and in the Czech Republic supports this explanation. For the most part, the shape of the Polish curve is very close to the Czech curve, just with a one-year time lag (see graph 5). While the state aid level in the Czech Republic already started to fall in 2003, it reached its height in Poland in the same year. In its progress reports before accession, the Commission repeatedly evaluated the Czech accomplishments in the field of state aid control as satisfactory slightly earlier than in the Polish case. As the examples of controversial cases have shown, Czech authorities managed to conclude many problematic cases just in time before accession while the Commission still investigates in a series of Polish cases from the interim period.



Graph 5: Polish and Czech state aid as a percentage of GDP;

Source: Online EU State Aid Scoreboard, Autumn 2006

Given the short period of observation, however, the evidence has to be treated with caution. An alternative explanation for the different adjustments of Polish and Czech state aid policies after accession might consist in persistently different strategies in dealing with European state aid control. On the one side, Member states can maximize certainty of getting Commission approval for their state aid measures while accepting (self-)constrained state aid policies. On the other side, Member states can maximize their autonomy in state aid policies while bearing the costs of legally uncertain control procedures and of defending their state aid measures in conflict with the Commission (see Modzelewska-Wachal 2003).

The Czech strategy in dealing with Commission control comes closer to the first ideal type; the Polish strategy corresponds to the second ideal type. The Czech banking cases have shown how both sides, the Commission and the Czech authorities, have been willing to compromise in order to avoid lasting conflicts after accession. In several interviews, Czech officials have admitted a lack of confidence and anticipatory obedience to the Commission. In 2005, 7 out of 28 notifications have already been taken back by the Czech competition authority before a Commission decision was taken.²⁹ One Czech interview partner stated that even in areas in which European state aid rules leave room for different policies one would like to have policies “dictated by the Commission” in order to minimize uncertainty and avoid conflicts.

²⁹ Czech Office for the Protection of Competition, Annual Report 2005, p.24. See footnote 20.

In contrast, the Polish shipyard cases are the most striking examples of an uncompromising strategy towards European state aid control. The Polish government has signalled its determinedness to give national policy goals precedence over European concerns in these cases. Interview partners from Poland have repeatedly admitted the uncompromising character of this strategy while expressing astonishment for the willingness of other new Member states such as the Czech Republic to adjust their state aid measures and to refrain from criticism with regard to the Commission. So far, Poland has been successful in avoiding negative Commission decisions and in the shipyard cases it also seems more likely that the Commission will take a positive, although conditional, decision.³⁰ The costs of this strategy, however, are considerable: the Commission's investigations in several interim cases continue even in the fourth year of Poland's EU membership, involving a high degree of legal uncertainty for the enterprises affected. Within the Commission, particularly at the level of case handlers within DG Competition, dissatisfaction with the collision course of Polish state policy rises and might lead to increasingly strict assessments of Polish state aid measures.

4 Conclusion: Complying with Rules of Negative Integration

In sum, we have identified a significant impact of European state aid law on the policies of the new Member states, being based on permanent state aid control by the Commission rather than on accession conditionality. Variation across Member states partly depends on different state aid policy orientations. Even among states with similar orientations before accession, however, the impact varies due to differences in the speed of adjustment or different national strategies in dealing with Commission control.

Discussing these findings in a broader context, European state aid control can be seen as an exemplary field for understanding how rules of negative integration impact on domestic policies and what complying with rules of negative integration means. Research on the domestic impact of international institutions, Europeanization research most prominently, is often framed in terms of implementation and compliance (see Treib 2006). Typically, this implies that a certain international norm or policy is taken as given, the process of translating it into national action is called implementation and the final outcome is measured with regard to its rule conformity (ibid.: 4). This understanding, however, is problematic in the realm of negative integration for several reasons.

³⁰ "No Shipyard Closures, Says Economy Minister"; Polish News Bulletin, 7 February 2007.

To begin with, negative rules such as in European state aid law do not require states to take action but, on the contrary, they mostly require states to refrain from certain actions. Moreover, restrictions are not formulated as exhaustive catalogues of actions to be omitted but as general prohibitions to hinder free trade or to distort competition. Hence, the misfit between European state aid law and national policies and the necessary adjustments can only be identified with regard to concrete cases and no once-and-for-all solution to comply with negative rules is available.

Implementing the state aid *acquis* during accession preparations, thus, did not require transposition into national law but taking European rules into account in the making of national state aid policies. One interview partner from Poland has labelled this process of adjusting to rules of negative integration as “implementation in practice”. The goals of reducing and redirecting state aid towards horizontal objectives have been used as indicators in order to evaluate the adjustment of national state aid policies towards European state aid law. It is, however, not these overall goals that are implemented by EU Member states, e.g. in the form of binding maximum aid levels or minimum shares of horizontal aid, but European state aid law is applied on a case-by-case basis by the Commission – making it more difficult to grant certain types of state aid while leaving more room for manoeuvre in the area of horizontal aid and, thus, indirectly leading to lower aid levels and higher shares of horizontal aid.

The concrete meaning of compliance or non-compliance with rules of negative integration, finally, has to be established on a case-by-case basis as well. Aid levels and aid objectives provide us with a first hint at potentially more or less problematic state aid policies. Nevertheless, we have seen that higher aid levels may well be compatible with European law as long as state aid is mainly granted towards horizontal objectives. In concrete cases, it is often unclear at the outset – both, for the Commission as well as for the Member states involved – what is compatible or incompatible with European rules. The final outcome, usually compliance, may not always result from national adjustments only, but it may also involve elements of a compromise between different interpretations and policy preferences as the Czech banking cases have shown.

The notions of implementation and compliance, thus, are not inapplicable to the realm of negative integration, but they have to be understood slightly different in order to fully comprehend the domestic impact of rules of negative integration.

Annex I

Case no.	beneficiary	type	objective	investigation launched	decision
C 55/2006	Bison-Bial	individual	r&r	2006-12-20	
C 52/2006	Odlewni Zeliwa Srem	individual	r&r	2006-12-06	
C 51/2006	Arcelor Huta Warszawa	individual	r&r	2006-12-06	
C 32/2006	Huta Cynku Miasteczko S.	individual	r&r	2006-07-18	
C 23/2006	Technologie Buczek	individual	r&r	2006-06-07	
C 49/2005	Chemobudowa Krakow	individual	r&r	2005-12-21	withdrawn
C 44/2005	Huta Stalowa Wola	individual	r&r	2005-11-23	positive
C 43/2005	Stranded costs	individual	other	2005-11-23	
C 22/2005	Poczta Polska	scheme	other	2005-06-29	withdrawn
C 21/2005	Poczta Polska	individual	other	2005-06-29	
C 19/2005	Stocznia Szczecinska Nowa	individual	r&r	2005-06-01	
C 18/2005	Stocznia Gdanska	individual	r&r	2005-06-01	
C 17/2005	Stocznia Gdynia	individual	r&r	2005-06-01	
C 3/2005	Daewoo / FSO	individual	r&r	2005-01-19	conditional
C 20/2004	Huta Częstochowa	individual	r&r	2004-05-19	mixed

Table 2: Formal investigations in Polish cases; Source: State Aid Register (DG Comp)

Case no.	beneficiary	type	objective	investigation launched	decision
C 12/2006	Transport combiné	scheme	r&r	2006-04-04	
C 45/2004	Trinecke Zelezarny	individual	r&r	2004-12-14	positive
C 27/2004	Agrobanka	individual	r&r	2004-07-14	

Table 3: Formal investigations in Czech cases; Source: State Aid Register (DG Comp)

Annex II

	2000	2001	2002	2003	2004	2005
state aid (in Mio. €)	1850,1	1465,4	997,9	6005,8	2033,7	907,6
- as a share of GDP in %	0,88	0,63	0,44	2,93	0,97	0,37
of which horizontal aid	1220,8	447,9	389,2	899,3	524,1	638,9
- as a share of total aid in %	66	31	39	15	26	70

Table 4: State Aid Levels and Objectives in Poland;
Source: Online EU State Aid Scoreboard, Autumn 2006

	2000	2001	2002	2003	2004	2005
state aid (in Mio. €)	1686,6	1445,4	3296,3	2337,5	268,9	387,0
- as a share of GDP in %	2,44	1,95	3,97	2,82	0,31	0,39
of which horizontal aid	242,8	273,2	338,0	227,7	221,0	385,3
- as a share of total aid in %	14	19	10	10	82	100

Table 5: State Aid Levels and Objectives in the Czech Republic;
Source: Online EU State Aid Scoreboard, Autumn 2006

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