

## Debate

# Europeanization of Swiss Law-Making: Empirics and Rhetoric are Drifting Apart

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### Introduction

In recent years, the sectoral agreements with the EU have increasingly influenced Swiss domestic legislation, while the policy of “autonomous adaptation” less closely followed EU rules. This increasing tension between euro-sceptic domestic law-making and the dynamics of the sectoral integration is one of the main findings of the data set on Europeanization of Swiss legislation presented in this contribution. The data set was established based on the theory of differentiated integration and describes the share of Swiss federal law reforms in the period 1990 – 2010. Four qualitative categories measure the degree of congruence with EU rules and their relation to sectoral agreements with the EU. One third of all legal reforms were assigned to one of the categories of material congruence with EU law. About half of these Europeanization cases can be explained with sectoral agreement negotiations and implementations. In the following, this article explains the methodological approach of the data collection in more detail, presents the results over time and over policy fields, and discusses the relation of Europeanization and differentiated integration.<sup>1</sup>

### How to Measure Europeanization?

At the beginning of the data collection stood the task to measure Switzerland’s differentiated European integration. For the purpose of establishing a quantitative data set, differentiation of integration is defined narrowly as the differentiated validity of binding EU rules across countries. Thereby, the unit of analysis is an EU rule (Schimmelfennig and Winzen 2014). A telling example of differentiated internal and external validity of EU rules is the Schengen regime. Some EU member states, e.g. Great Britain, are not part of Schengen, whereas at the same time non-member states like Switzerland participate in Schengen. The differentiated integration approach is the reason why the data covers only instances of Europeanization that can be qualified as the extension or transfer of an EU rule to Switzerland. Thus, in the language of the Europeanization literature, we are interested in Euro-

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<sup>1</sup> The dataset was established by the author in the framework of the SNSF project No. 129731 about Differentiated Integration conducted jointly by the ETH Zurich and the University of Constance. The conceptualization of the data collection was supported by the other project members, mainly Frank Schimmelfennig and Thomas Winzen. The manual coding was conducted in collaboration with the student assistants Laura Gies, Fabien Cottier and Elena Lorenzo. This article profited from comments by Edith Siegenthaler and Gretchen Blegen. I wish to thank all supporters!

peanization outcomes that lead to a material convergence of rules. In the language of the differentiated integration literature, we focus on the horizontal external differentiation of policies (Leuffen et al. 2012).

### *Focus on Domestic Law-Making*

Like other recent studies, we focus on domestic legislation in order to quantify the Europeanization of domestic policies (Brouard et al. 2012, Töller 2010). Our study is based on a data set of Swiss federal legislation established by Wolf Linder and colleagues (Linder et al. 2009, Linder et al. 2011), to which we added the Europeanization variables. The dataset now encompasses all federal laws that were in force for at least one year during the period 1990-2010.<sup>2</sup> Every change in the body of law (new adoption of a law, total or partial revisions; no abrogation) was examined with regard to its connection to a sectoral agreement and/or an EU rule based on the messages published by the government or by the responsible parliamentary commission. These texts systematically evaluate the EU compatibility of federal law reforms since 1988. Because the authorities do not mark legal acts influenced by EU legislation as such, these texts are the only pieces of information available in a systematic manner. As the evaluation of EU compatibility naturally refers to the time of the legal reform, we can only make statements about the share of legal reforms affected by the EU and not about the state of the EU compatibility of the Swiss body of law.

### *Two Dimensions of Europeanization*

Our qualitative Europeanization categories measure Europeanization on two dimensions. The *vertical dimension* describes whether a legal change was related to the implementation of a sectoral agreement, and the *horizontal dimension* measures the material congruence of the respective federal law reform with the relevant EU rules. Europeanization related to a sectoral agreement is called direct Europeanization, Europeanization without legal obligation relating to a sectoral agreement is called indirect Europeanization (Sciarini et al. 2002, 2004). We counted only those measures as directly Europeanised that were based on a treaty obligation. The reference for this qualification is the ‘bilateral’ law. Law reforms like the flanking measures accompanying the ‘Bilateral I’ package were not coded as implementations because they were not mandatory. On the contrary, the reference to categorize law reforms on the horizontal dimension is EU law.

The categories of the horizontal dimension are called full adaptations, partial adaptations, and EU compatibility. *Full adaptations* bring the EU relevant parts of a Swiss law into full congruence with the relevant EU rule. An example is the total revision of the law on product safety in 2009. *Partial adaptations* adopt EU rules, but they do so selectively. For example, the total revision of the law on patents in 2006 was modelled on the patent directive, but retained the national exhaustion principle (Cottier 2006). These two categories are adaptations to EU law and results of the “autonomous adaptation” policy pursued since 1988 (Bundesrat 1988). Finally, *EU compatibility* is used to characterize legal reforms that are compatible with, but do not align Swiss legislation with EU legislation. Either the

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<sup>2</sup> Government and other regulations had to be excluded from the data collection, because regulation proposals are not published (Wyss 2007).

Table 1: The Europeanization of Swiss federal legislation 1990 – 2010<sup>4</sup>

		<i>Horizontal Dimension</i>			TOTAL
		Reference: EU law			
		Full adaptations	Partial adaptations	EU compatible reforms	
Total legal reforms: 1124 (100%)*					
<i>Vertical Dimension</i>	Direct	84	15	0	<b>99</b>
Reference: <sup>c</sup>	Europeanization	(7.47%)	(1.33%)	(0.00%)	<b>(8.81%)</b>
'Bilateral' law	Indirect	62	55	144	<b>269</b>
	Europeanization	(5.52%)	(4.89%)	(12.81%)	<b>(23.93%)</b>
	<b>TOTAL</b>	<b>146</b>	<b>70</b>	<b>152</b>	<b>368</b>
		<b>(12.99%)</b>	<b>(6.23%)</b>	<b>(13.52%)</b>	<b>(32.74%)</b>

*Notes:* This table and all other figures and numbers in this article refer only to 'primary' legal reforms. 'Secondary' reforms, i.e. law amendments that followed the reform of another law (e.g. adaptation of references, terms, article numbers etc.) were not counted. \*In total, 1124 primary law reforms are included in the data set. However, for 15 law reforms the Europeanization variables are missing because the coding sources were not available.

compatibility of the law has been established earlier, or the law was compatible with EU law from the beginning. This category partly captures Europeanization as policy continuity in addition to Europeanization as policy creation and policy change – but only for those laws that were revised in the research period.

## Results: Europeanization across Time and Policy Fields

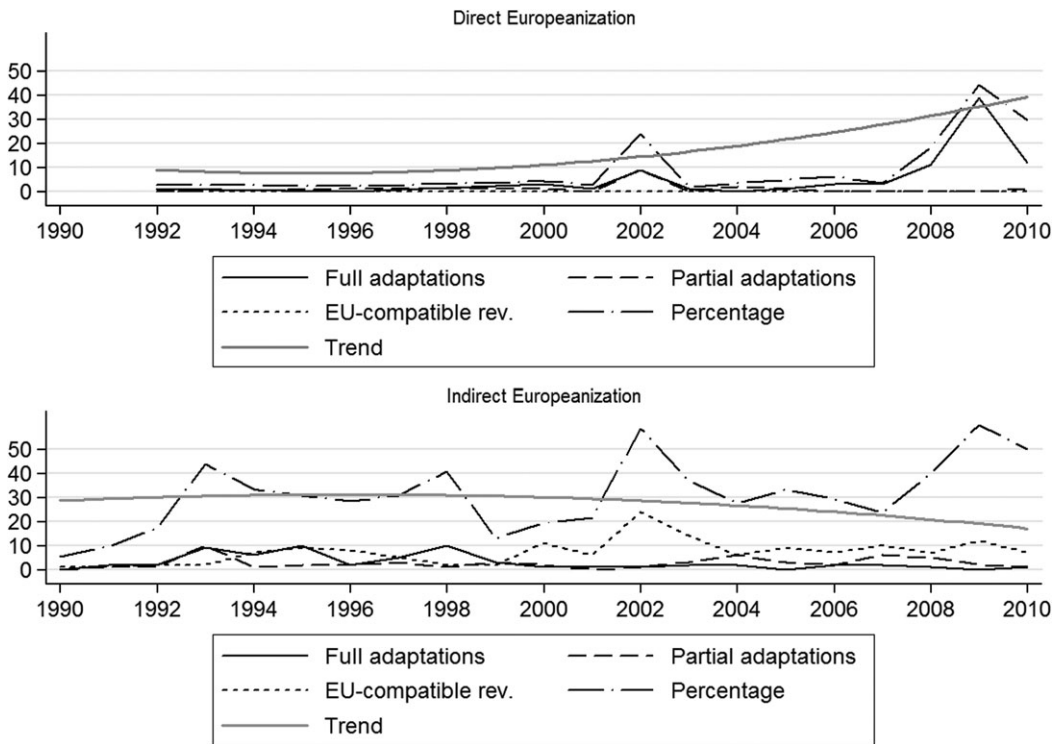
Table 1 gives an overview of the results. In total, one third of all legal reforms were assigned to one of the three horizontal categories of material congruence with EU law. On the horizontal dimension, we identified 13% of law revisions as full adaptations. Autonomous adaptations with a "Swiss finish", labelled partial adaptations, were less frequent than full adaptations.<sup>3</sup> EU compatible reforms were slightly more frequent than full adaptations. This findings resemble the results of Ali Arbia (2008), who researched the period from 1996 to 2005 and found a "high Europeanization degree" of 8.1% of laws, and a "medium Europeanization degree" of 40% of the laws. The slightly different numbers are not surprising because Arbia focused on a shorter time period and on a random selection of laws.<sup>4</sup>

The vertical Europeanization dimension shows that only one fourth of all Europeanized legal reforms was related to the implementation of sectoral agreements. In absolute terms, the sectoral agreements thus exerted a lower influence on federal legislation than the autonomous adaptation policy. Although direct Europeanization is less frequent, its impact is stronger than that of indirect Europeanization. More than eighty per cent of all

<sup>3</sup> When Switzerland transposes international or European rules into its domestic legislation, but changes some aspects of the respective rules, this is sometimes called a "Swiss finish" in public discourse (e.g. Schweizerische Depeschagentur 2012, Lanz 2012).

<sup>4</sup> The numbers reported in this table and in the following figures may slightly differ from numbers reported in earlier publications (Jenni 2012, 2013). Data analysis is on-going and sometimes reveals cases that were coded inconsistently with regard to the coding rules. In such cases, the coding was corrected. Such corrections can concern the Europeanization variables, but also the categorization of a reform as being a 'primary' or a 'secondary' law reform.

Figure 1: Development of direct and indirect Europeanization over time



Notes: In the data set, the federal law reforms are assigned to the year in which they were published in the Official Compilation of Federal Legislation (*Amtliche Sammlung des Bundesrechts*), URL: <http://www.admin.ch/bundesrecht/00567/index.html?lang=de>.

instances of direct Europeanization are full adaptations, in contrast with only every fourth instance of indirect Europeanization. This observation is consistent with the assumption that the EU usually insists that its agreements with third states closely follow Community Law (Jaag 2010, Oesch 2012). In addition, one third of all indirect adaptations (full and partial) were made during negotiations of sectoral agreements in order to achieve the recognition of equivalence of legislation by the EU. For example, in 2004 the law on chemical products was fully adapted to the EU because the federal council aimed to extend the mutual recognition agreement to this product category (Bundesrat 2000).

*Development over time: The Unease with the Increasing Influence of Agreements*

Over time, we observe an increasing share of direct, and a slightly decreasing share of indirect Europeanization. Figure 1 reveals that *direct Europeanization* became important only after the year 2000, with peaks in the years when the sectoral agreements of the first and the second package entered into force. The three cases of direct Europeanization before the first package of sectoral agreements were related to the *Free Trade Agreement* (1973)

and the *Insurance Agreement* (1992).<sup>5</sup> All but one partial adaptation identified as directly Europeanized were related to the first package of sectoral agreements. Most of them can be explained with the transitory phases until the final introduction of the Free Movement of Persons Agreement (FMPA). These transitory phases were not a Swiss invention. The old EU member states also protected their labour markets after Eastern enlargement by transitional arrangements restricting free movement (Schimmelfennig and Winzen 2014). Non-transitional deviations from EU principles occurred as well, but they disappeared until the end of the research period. Direct Europeanization may therefore be characterized as an instance of external differentiated integration. Differentiation inside and outside the EU probably follows a similar logic.

*Indirect Europeanization* has occurred since 1992, with a decreasing share of annual legal reforms affected by the policy of autonomous adaptation. Whereas in the 1990s most instances of indirect Europeanization were full adaptations, indirect Europeanization has more frequently obtained a “Swiss finish” after the turn of the millennium. This observation is consistent with the government’s more Eurosceptic composition since 2000 and its policy to negotiate sectoral agreements rather than pursue autonomous adaptations (Bundesrat 2006). The autonomous adaptations of the 1990s are mainly related to the “Swisslex” package passed after the rejection of the EEA agreement by the Swiss people in 1992, to the paradigm change in economic policy in the 1990s as a reaction to the internal market project of the European Union, and to the economic downturn in the early 1990s (Bundesrat 1993, 1994, Mach et al. 2001, Mach and Trampusch 2011). Indirect Europeanization in the past decade is less well researched. One third of the adaptations after 2000 served as preparations for future agreements.

### *Distribution across Policy Fields: Europeanization Is Not Purely Economic*

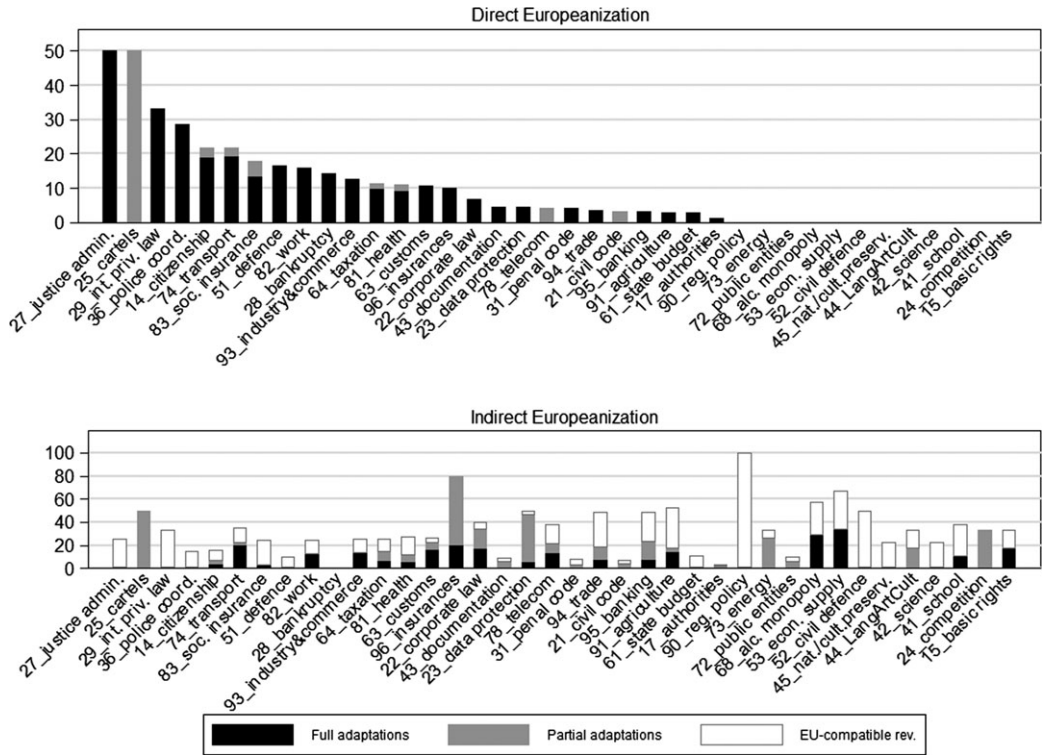
In absolute terms, the same policy fields are the leaders in direct and indirect Europeanization: social insurance and transport, followed by taxation (containing macroeconomic policies) and health (containing environmental standards). Social insurance is a surprising item in this list, but its presence can be explained by the necessity to comply with the FMPA. In relative terms, direct and indirect Europeanization differ. Figure 2 shows the percentage share of legal reforms affected by direct and indirect Europeanization across the sub-chapters of the *Classified Compilation of Federal Legislation* (SR).<sup>6</sup>

In the realm of direct Europeanization, civil law (justice administration and international private law) is strongly Europeanized because of the *Lugano Convention*. The Europeanization of citizenship is related to the FMPA. The Europeanization of police coordination and defence is related to the Schengen agreement. When we look at the relative share of indirect Europeanization, we finally arrive at the conventional story of Swiss European policy as a story of economic integration without political participation. With few exemptions (regional policy, civil defence, and data protection), the most indirectly Europeanized policy fields are related to economic policy. Among them are policy fields that were also

<sup>5</sup> Our data does not allow me to make a statement about the general influence of these and other earlier sectoral agreements on Swiss federal law-making because most of them were signed and entered into force well before the start of our research period in 1990.

<sup>6</sup> The compilation contains all Swiss federal legal acts in their actual version. It is organised in nine thematic chapters and 65 sub-chapters and accessible online under the URL: <http://www.admin.ch/bundesrecht/00566/index.html?lang=de>.

Figure 2: Percentage share of Europeanized law reforms per policy fields



Notes: The numbers of the policy field labels are the numbers of the respective sub-chapter in the Classified Compilation of Federal Legislation. The two first digits of the SR-number of a federal legal act correspond to the SR sub-chapter a law belongs to.

affected by some direct Europeanization, as for example cartels, insurance, trade, and banking.

*Europeanization and Differentiated Integration*

Figure 2 also reveals an important difference between direct and indirect Europeanization with regard to the horizontal dimension of Europeanization. None of the directly Europeanized reforms but more than half of the indirectly Europeanized reforms are EU compatible reforms – especially laws in policy fields not affected by direct Europeanization (e.g. regional policy, national economic supply, competition, alcohol monopoly, civil defence, preservation of nature and culture, science). In some of the policy fields with a high share of EU compatible reforms, the economic integration of the EU mainly prohibits certain state measures (e.g. regional policy, economic supply, competition, banking, trade, state budget). In others, there is little or no EU law (e.g. civil defence or penal law). The observations in the category of EU compatibility give an idea of the constraining effect of Europeanization. Where there are no sectoral agreements or few EU rules the main concern of the legislator seems to be not to leave the regulatory scope defined by EU law.

Can indirect Europeanization, especially in the form of EU compatible reforms or partial adaptations, be qualified as differentiated integration? Our results indicate that direct and indirect Europeanization probably are related phenomena. Although only one third of all Europeanized law reforms implement sectoral agreements, a considerable part of the indirect adaptations were preparations for sectoral agreements. The qualitative differences between direct and indirect Europeanization may indicate that they are related to different forms of differentiated integration. The prevalence of indirect Europeanization and EU compatible reforms in economic policy fields where the EU tends to introduce minimum regulations or prohibit certain measures may indicate that indirect Europeanization is enough for negative European integration. On the contrary, policy adaptations and direct Europeanization seem to be necessary in fields where the role of the state is not constrained, but rather enforced through European integration, like in the fields of law, police, and defence.

## Conclusion

This article described the following Europeanization trends for the period 1990 – 2010: First, direct Europeanization related to sectoral agreements increased, and indirect Europeanization decreased over time. Second, direct Europeanization increasingly consisted of full adaptations over time. Indirect Europeanization, on the contrary, was characterized by EU compatible law revisions, and in recent years, partial adaptations became more frequent than full adaptations. Third, direct and indirect Europeanization probably are related phenomena. Indirect adaptations often serve as preparations for negotiations with the EU. Further research is needed to explain the most specific Swiss forms of Europeanization: What causes indirect Europeanization? Although we know much about the adaptations in the 1990s and about economic policy change, we need to focus on the last decade, and we need to inquire the rationale behind partial adaptations and EU compatible reforms.

The results presented reflect the policy of the Swiss government, which in recent years has preferred sectoral agreements to autonomous adaptation. At the same time, they reveal increasing tensions inherent to external differentiated integration. While the EU insists on closer alignment and direct Europeanization becomes more frequent and more congruent with EU law, Switzerland becomes more reluctant in the realm of indirect Europeanization and is eager to find specific solutions. In this sense, Eurosceptic political rhetoric is increasingly drifting apart from legislative experience.

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