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

Author(s):
Jenni, Sabine

Publication Date:
2014

Permanent Link:
https://doi.org/10.3929/ethz-a-010345751

Originally published in:
Swiss political science review 20[2], http://doi.org/10.1111/spsr.12098

Rights / License:
In Copyright - Non-Commercial Use Permitted

This page was generated automatically upon download from the ETH Zurich Research Collection. For more information please consult the Terms of use.
Once you have Acrobat Reader open on your computer, click on the Comment tab at the right of the toolbar:

This will open up a panel down the right side of the document. The majority of tools you will use for annotating your proof will be in the Annotations section, pictured opposite. We’ve picked out some of these tools below:

1. **Replace (Ins) Tool** – for replacing text.
   - Strikes a line through text and opens up a text box where replacement text can be entered.
   - How to use it:
     - Highlight a word or sentence.
     - Click on the Replace (Ins) icon in the Annotations section.
     - Type the replacement text into the blue box that appears.

2. **Strikethrough (Del) Tool** – for deleting text.
   - Strikes a red line through text that is to be deleted.
   - How to use it:
     - Highlight a word or sentence.
     - Click on the Strikethrough (Del) icon in the Annotations section.

3. **Add note to text Tool** – for highlighting a section to be changed to bold or italic.
   - Highlights text in yellow and opens up a text box where comments can be entered.
   - How to use it:
     - Highlight the relevant section of text.
     - Click on the Add note to text icon in the Annotations section.
     - Type instruction on what should be changed regarding the text into the yellow box that appears.

4. **Add sticky note Tool** – for making notes at specific points in the text.
   - Marks a point in the proof where a comment needs to be highlighted.
   - How to use it:
     - Click on the Add sticky note icon in the Annotations section.
     - Click at the point in the proof where the comment should be inserted.
     - Type the comment into the yellow box that appears.
5. **Attach File Tool** – for inserting large amounts of text or replacement figures.

How to use it
- Click on the Attach File icon in the Annotations section.
- Click on the proof to where you’d like the attached file to be linked.
- Select the file to be attached from your computer or network.
- Select the colour and type of icon that will appear in the proof. Click OK.

6. **Drawing Markups Tools** – for drawing shapes, lines and freeform annotations on proofs and commenting on these marks. Allows shapes, lines and freeform annotations to be drawn on proofs and for comment to be made on these marks.

How to use it
- Click on one of the shapes in the Drawing Markups section.
- Click on the proof at the relevant point and draw the selected shape with the cursor.
- To add a comment to the drawn shape, move the cursor over the shape until an arrowhead appears.
- Double click on the shape and type any text in the red box that appears.
Europeanization of Swiss Law-Making: Empirics and Rhetoric are Drifting Apart

SABINE JENNI
European Politics Research Group, ETH Zurich

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.1

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 Europeanization 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).

1 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!
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. 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 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.

2 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

<table>
<thead>
<tr>
<th>Vertical Dimension</th>
<th>Reference: EU law</th>
<th>Full adaptations</th>
<th>Partial adaptations</th>
<th>EU compatible reforms</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Reference:</td>
<td></td>
<td>84 (7.47%)</td>
<td>15 (1.33%)</td>
<td>0 (0.00%)</td>
<td>99 (8.81%)</td>
</tr>
<tr>
<td>‘Bilateral’ law</td>
<td>Europeanization</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indirect Reference:</td>
<td></td>
<td>62 (5.52%)</td>
<td>55 (4.89%)</td>
<td>144 (12.81%)</td>
<td>269</td>
</tr>
<tr>
<td>Europeanization</td>
<td></td>
<td>146 (12.99%)</td>
<td>70 (6.23%)</td>
<td>152 (13.52%)</td>
<td>368</td>
</tr>
</tbody>
</table>

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, articles) are not included in the data set. Missing because the coding sources were not available. In total, 1124 primary law reforms were assigned to the three horizontal categories of material congruence with EU law. Autonomous adaptations with a “Swiss finish”, labelled partial adaptations, were less frequent than full adaptations. 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.

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 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

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 De- peschenagentur 2012, Lanz 2012).

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.

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).\(^5\) 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

\(^5\) 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.
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 “Swiss-lex” 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).

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 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 compati-
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.

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.

References


1 Sabine Jenni is a PhD candidate in the European policy research group at the ETH Zurich. In her PhD, she analyses the causes and mechanisms of Switzerland’s differentiated integration in the European Union. E-mail: sabine.jenni@eup.gess.ethz.ch

2 © 2014 Swiss Political Science Association


Dear Author,

During the copy-editing of your paper, the following queries arose. Please respond to these by marking up your proofs with the necessary changes/additions. Please write your answers on the query sheet if there is insufficient space on the page proofs. Please write clearly and follow the conventions shown on the attached corrections sheet. If returning the proof by fax do not write too close to the paper’s edge. Please remember that illegible mark-ups may delay publication.

Many thanks for your assistance.

<table>
<thead>
<tr>
<th>Query reference</th>
<th>Query</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>AUTHOR: Figure 2 has been saved at a low resolution of 170 dpi. Please resupply at 600 dpi. Check required artwork specifications at <a href="http://authorservices.wiley.com/bauthor/illustration.asp">http://authorservices.wiley.com/bauthor/illustration.asp</a></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>AUTHOR: Please provide corresponding author details as per journal style.</td>
<td></td>
</tr>
</tbody>
</table>