Mapping Switzerland’s Differentiated European Integration

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Abstract

In relation to the European integration process, Switzerland is sometimes called a cherry-picker, and sometimes a quasi-member of the European Union (EU). There are good reasons for both qualifications. Switzerland is the only Western European country that is not a member of the EU, and not even part of the European Economic Area (EEA). While all its neighbours shifted the control over national policy-making to some extent to the new centre in Brussels, Switzerland has resisted any delegation of authority to the EU. Does this mean that Switzerland is the last Gallic village in Europe? The subordination of EU member states to Brussels is neither total nor uniform across policies and countries. The same holds for Switzerland’s autonomy. The outsider concluded a large number of sectoral agreements with the EU and it has continuously transposed EU rules into domestic legislation. Theoretical and empirical studies of the European integration process research the different levels of European integration across policies and member states under the label differentiated integration. This paper proposes to study Switzerland as a case of differentiated integration and presents empirical data that measures the quality of Switzerland’s integration for the period 1990 – 2010. The empirical data shows that substantially, a broad range of EU rules have been extended to Switzerland either via sectoral agreements or via transposition into domestic legislation. This substantive rule extension became, however, only in recent years also legally linked to the EU.

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1. Introduction

The Swiss population decided in 1992 at the polls not to join the European Economic Area (EEA) that had been negotiated as an alternative to European Union (EU) membership. This decision came as a shock for the Swiss government, which had sent a membership application to Brussels just two month earlier. To the political leaders, EU membership appeared to be the only appropriate political answer to the multiple challenges of the accomplishment of the Single Market, international economic liberalisation, and a domestic economic recession. The popular vote removed EU accession from the political agenda, but Swiss politicians were still oriented towards Europe. The government re-invented a European policy compromise consisting of two parts: One is the negotiation of sectoral agreements with the EU which allow Switzerland to participate in certain EU regimes. The other is the adaptation of domestic legislation to EU law. The latter is known as the policy of “autonomous adaptation”. This “third way” – a compromise between complete isolation and full integration – is the continuation of the traditional foreign policy despite the unprecedented level of integration among Switzerland’s neighbours. According to Swiss officials, this compromise preserves autonomy because Switzerland decides case-by-case whether domestic adaptation, a sectoral agreement or an independent solution is the appropriate policy (Bundesrat 2010: 7341 f.).

Scholars disagree with regard to the results of this policy compromise. Since the 1990s, the EU has had such a large impact on Swiss policies and politics that some researchers state that Switzerland is “economically more integrated within the European Union than many of the EU’s own member states” (Goetschel 2003: 313, see also Goetschel 2007, Weder 2007). Others even call Switzerland a “quasi-member” of the European Union (Lavenex 2011; Maiani 2008). This judgement is challenged by Sieglinde Gstöhl (2007) who argues that Switzerland cannot be called a quasi-member, because the sectoral agreements lack any general institutional framework like common decision-making or implementing and supervising institutions. The truth about Switzerland’s differentiated integration probably lies in between these views. The sectoral agreements indeed cover an impressive range of issues, but they have remained selective even with regard to market access (e.g. free movement of services and capital). Similarly, Swiss-EU relations indeed lack general formal rules, let alone supranational institutions, but some agreements contain elements of supranational integration (e.g. Schengen association). Moreover, the sectoral agreements are based on informal principles reflecting the power asymmetry between the EU and Switzerland, and they are complemented by the practice of transposing EU rules unilaterally into domestic legislation.

The disagreement about the quality of Switzerland’s position in the European integration process results from two slightly different focuses on European integration. One focus highlights the impressive range of EU rules that are extended beyond EU borders. The other focus highlights the crucial role of central institutions for regional integration. Both aspects are part of definitions of regional and European integration in general and differentiated integration in particular. In order to assess the validity of the diverging judgments regarding the state of Switzerland’s European integration, we need to systematically evaluate Swiss European policies with regard to their similarity to what is normally defined as European integration. This paper seeks to provide the empirical grounds for such an assessment. To this end, it builds on recent definitions of differentiated integration and measures the integration quality of Swiss European policies empirically with regard to both aspects of regional integration: common policies and common institutions.
Although a comprehensive analysis from a differentiated integration perspective is a new approach
to analyse Switzerland, the various elements of Switzerland’s European policy have received broad
attention from scholars of both legal and political sciences. With regard to the integration quality of
the sectoral agreements, this paper builds on various studies conducted by legal scholars, who
discuss the agreements in comparison to the legal quality of ‘usual’ European integration (Epiney et
al. 2012; Jaag 2010; Thürer et al. 2007). With regard to other, less formal forms of integration, the
data collection can rely on legal case studies (cf. Cottier 2012), and on quantitative empirical studies
of EU influence on domestic legislation (Gava and Varone 2012; Kohler 2009; Arbia 2008; Mallepell
1999). The main contribution of the new empirical analysis is that it tries to tie the ends of what has
already been researched. First, it distinguishes instances of integration from other policies influenced
by the EU. This narrow focus will also narrow down the search for explanatory factors for the Swiss
integration outcome later on. Second, it conceives of the sectoral agreements and domestic policies
as related parts of Switzerland’s differentiated integration and takes into account the importance of
informal principles underlying the sectoral integration approach. Third, it explicitly measures the
diverging integration qualities of the various elements of Switzerland’s European policy.

The next section briefly summarises what we know already about Switzerland’s European policy. The
third section explains why and how we can conceive of the elements of this policy as instances of
differentiated integration and relates the discussion to recent theories of differentiated integration.
The fourth section describes how the empirical data on Switzerland’s differentiated integration was
collected. The fifth section presents descriptive results of the data collection and discusses the
results with regard to the diverging views about Switzerland’s ‘quasi-membership’ in the EU.

2. State of the Art: Tension between Legal Form and Integration Aim

Our knowledge about the functioning of the sectoral agreements is basically restricted to the
knowledge of their legal form, by which also the judgement that Switzerland by no means can be
called a quasi-member of the EU is informed. Legally, all sectoral agreements are treaties of
international law. Treaties of international law normally do not establish common institutions, and
they normally do not dynamically evolve. Changes to an international treaty have to be negotiated
between the parties to the treaty (Epiney et al. 2012). Legal scholars widely discussed not only the
tensions between the legal form and the integration aims of many agreements, they also uncovered
differences in the procedural provisions of different agreements and highlighted the importance of
informal principles underlying most sectoral agreements (Epiney et al. 2012; Thürer et al. 2007).
Informal principles are for example the use of ‘parallel provisions’ or the rule of ‘mutual recognition
of the equivalence of legislation’. Parallel provisions paraphrase EU law without directly referring to
EU law. Similarly, the equivalence principle does not formally oblige Switzerland to adapt its
legislation to EU rules. Some scholars, however, assume that the EU recognises the equivalence of
Swiss rules only once they have been adapted to EU requirements (Oesch 2012). Because of these
principles, it is misleading to deduce the integration quality of the sectoral agreements from their
legal form alone.

The evaluations of Switzerland’s integration position that point to a ‘quasi-membership’ probably
stem from the perception that the unilateral transposition of EU law has become the most
fundamental principle of law-making in Switzerland. Since 1988, the Federal Council examines every
bill presented to parliament with regard to its compatibility with the relevant EU law (Bundesrat 1988). Martin Philip Wyss (2007) observes that the EU compatibility examination led to a “mechanism of automatic adaptation”, and Matthias Oesch (2012) states similarly that the principle of legal adaptation to the EU has become more important than finding the most appropriate solution for a political problem. Although scholars agree that the adaptation to EU law is of a completely new quality and to be distinguished from comparative legal analysis they also agree that the principle still is pursued unsystematically (Oesch 2012; Baudenbacher 2012; Maiani 2013). Further, scholars assume that the transposition of EU law into domestic legislation is not only pursued unilaterally, but also related to the sectoral agreements. Tobias Jaag (2010) and Daniel Thürer et al. (2007) assume that the negotiations of the Bilaterals I and II were considerably simplified, because Switzerland already had adapted a significant part of the relevant domestic legislation to EU law. Thürer et al. (2007) and Oesch (2012) also assume that the proper functioning of the sectoral agreements can only be guaranteed if Switzerland continuously adapts domestic legislation to changing EU law.

In contrast to the sectoral agreements, the effects of the EU on Swiss law-making have been researched not only in qualitative, but also in quantitative studies. Two of these studies provide information about the share of domestic adaptations that is related to agreements, but both studies do not link the influence of the sectoral agreements to the quality of domestic legal change. Emilie Kohler (2009) examined all legal proposals in the period 2004 – 2007. Kohler found that half of the proposals dealt with an issue that was regulated by EU law, and that one third of these proposals was related to a sectoral agreement. She did not, however, link the relation to a sectoral agreement to the quality of the relation to the relevant EU law. Roy Gava and Frédéric Varone (2012) examined legal proposals as well as legal texts over time and across policy fields, and distinguished between “direct Europeanisation” related to sectoral agreements, and “indirect Europeanisation” in other cases. In their analysis of legal acts, they find that direct Europeanisation was much more frequent than indirect Europeanisation and that the share of this direct Europeanisation was steadily increasing over time. Based on the legislative proposals, on the contrary, they found more indirect than direct Europeanisation and no clear time trend.

All studies found that there is also an influence of the EU on domestic legislation that cannot be explained by sectoral agreements, but they discussed the quality of this influence to different extents and not in the light of its relation to integration. Gava and Varone (2012) used keywords and relied on computer-assisted coding to identify the “EU footprint” in Swiss legislation. This measure is an indicator for the general importance of the EU for Swiss law-making. Two earlier and less comprehensive studies provided more detailed measurement. Emilie Kohler’s (2009) results indicate that adaptations to EU law are often only partial transpositions of EU rules. Ali Arbia (2008) distinguishes between adaptations to EU law or implementations of sectoral agreements on the one hand and compatible reforms on the other hand. He observes more law-making in the second category. In order to assess the whole picture of Switzerland’s differentiated integration, we need to measure the quality of domestic adaptations to the EU as detailed as proposed by Kohler, and we need to examine the relation of domestic adaptations and sectoral agreements, as proposed by Gava and Varone. A measure of the integration quality has to be based on definitions of European integration and differentiated integration. The next section discusses how we can apply common definitions to Switzerland.
3. Theory: Switzerland as a Case of Differentiated Integration

Ernst B. Haas (1961: 366) defined regional integration as “the process whereby political actors (...) shift their loyalties, expectations, and political activities toward a new and larger centre, whose institutions possess or demand jurisdiction over the pre-existing national states.” Walter Mattli (1999) added to this definition that the shift is voluntary, concerns economic and/ or political integration, and that institutions of regional integration are supranational. Formally, Switzerland has to a large part resisted delegation of decision-making authority to EU authorities. Informally, however, Switzerland has accepted rules made by these authorities as the basic principles for the sectoral agreements, and probably also for parts of its domestic law-making. The focus on rules lies also at the heart of recent definitions of differentiated integration in the European Union, a notion that has become increasingly popular since the 1990s, because European integration developed not uniformly across countries and policies (cf. Stubb 1996). These definitions build the basis for the measurement of Switzerland’s European integration.

3.1 External Differentiated Integration as the Extension of EU Rules

Alkuin Kölliker (2006) identifies differentiation when EU member states have different rights and obligations with respect to specific policy areas. Similarly, Katharina Holzinger and Frank Schimmelfennig (2012: 292) define policies as differentiated when “the territorial extension of EU-membership and EU rule validity are incongruent”. In this vein, Sandra Lavenex (2009: 547) conceives of Switzerland as a case of flexible integration because the country “subjected itself to considerable sections of the acquis”\(^1\). Dirk Leuffen et al. (2012) call Switzerland a case of external differentiated integration. Early on, the notions internal and external differentiated integration were used by Stephan Kux and Ulf Sverdrup (2000) to hint at the fact that the significance of EU membership as an indicator for European integration is challenged by opt-outs by EU members and opt-ins by non-members.

Studies of differentiated integration normally focus on internal differentiation. Internal differentiation is present when a certain EU rule is not valid for a certain EU member and also called an opt-out. An example is the generally applicable social chapter in the treaty of Maastricht, from which the United Kingdom has a permanent opt-out. Actual empirical studies count opt-outs in order to measure differentiated integration (Schimmelfennig and Winzen 2013). In principle, Switzerland has opt-outs with regard to all generally applicable EU rules because it is not a member of the EU. Opt-outs can be accompanied by opt-ins. Opt-ins are present when a country applies an EU rule although it has an opt-out in this area and is not obliged to apply the rule\(^2\). An easy example is again the United Kingdom which has an opt-out with regard to the common border policy of the Schengen area, but nevertheless adopted some rules, like for example the directive on biometric passports (Adler-Nissen 2009). If we conceive of Switzerland as having a general opt-out, we can count every EU rule that is extended to Switzerland as an opt-in. Accordingly, I define Switzerland’s differentiated integration as the sum of these opt-ins, thus as the sum of EU rules that are extended to Switzerland.

\(^1\) The terms flexible and differentiated integration are often used interchangeably. I will use the term differentiated integration throughout this thesis, because the theoretical and conceptual work I draw upon mainly uses this term.

\(^2\) In such cases, a member state normally receives an opt-out in primary legislation with regard to a whole issue area. An opt-in is then achieved via the application or the transposition of secondary law that is based on the treaty provisions from which the country has an opt-out (Adler-Nissen 2009).
3.2 Substantive versus Legal Extension of Rules

The diverging views about Switzerland’s ‘quasi-membership’ in the EU stem from different focuses on the quality of the extension of EU rules to Switzerland. One focus highlights the substantive extension of rules, the other the legal autonomy of Switzerland. I propose to measure the quality of the substantive and legal extension of EU rules explicitly. The substantive quality of a rule extension measures to what extent the substantive content of an EU rule was extended. Previous studies showed that even if Switzerland transposes EU rules, it does so sometimes selectively. Kohler (2009) found that the most frequent way of rule transpositions were partial adaptations. In such cases, the EU rules that are extended to Switzerland lose some of their substance. The legal quality of a rule extension measures to what extent a rule is legally linked to the EU. The legal quality has to be measured because EU rules legally become Swiss legal rules when they are extended to Switzerland by a sectoral agreement, or by their transposition into domestic legislation. This is an important difference compared to EU member states, where EU law is distinct from national law. In member states, EU legislation is either directly applicable on their territory (regulations), or has to be transposed into national law (directives). In any case, the correct transposition and implementation is supervised by the European Commission and its violations can be sanctioned by the European Court of Justice (ECJ) (Tallberg 2002). In Switzerland, on the contrary, even if the substance of some legislation stems from the EU, the normal domestic institutions are responsible for supervision.

The substantive and the legal quality of the extension of EU rules to Switzerland can be put into relation to terms used by recent theories of differentiated integration. Dirk Leuffen et al. (2012) distinguish between horizontal and vertical differentiation in integration. Horizontal differentiation describes the differences with regard to territorial extension between policies, thus with regard to the number of member states participating. If an EU rule is extended to Switzerland, the according EU policy is horizontally differentiated, because a non-member state participates. Leuffen et al. discuss the internal market as an example of horizontal external differentiation because non-member states like the EEA EFTA states and Switzerland participate in the internal market. However, Switzerland does not fully participate in the internal market. For example, Switzerland did not introduce the free movement of capital and services, two of the four corner stones of the internal market (Tobler 2008). The substantive quality of the extension of EU rules thus measures the quality of the external horizontal differentiation. At least in the case of Switzerland, horizontal differentiation is not only a question of presence or absence but a matter of degree.

Whereas the notion horizontal differentiation describes differences in the territorial extension of policies, the complementary notion vertical differentiation describes differences in the level of centralisation between policies. The member states did not delegate their authority in all integrated policies to the same degree to European institutions. In some policies, the responsible EU body is an intergovernmental authority. In other policies, it is a supranational body. The notions vertical and horizontal differentiation describe differentiations between policies. The legally different status of Switzerland adds to the vertical differentiation between policies also vertical differentiation within EU policies, because the horizontal extension of an EU policy to Switzerland most often does not imply that Switzerland is to the same extent vertically integrated in that policy as are the member states. The legal quality of the extension of EU rules to Switzerland measures the vertical integration of Switzerland with regard to that rule.
3.3 The Extension of EU Rules and the Concept of Europeanisation

The present study resembles in several respects recent empirical Europeanisation studies that sought to measure the influence of the EU on domestic legislation (Brouard et al. 2012; Müller et al. 2010). The reason for this similarity is the definition of external differentiated integration as the extension of EU rules to Switzerland combined with the inclusion of domestic legislation. Europeanisation studies are often interested in the general impact of integration on national policies and seek to answer the question “what is left for national public policy” (Töller 2010: 420). Therefore, Europeanisation studies are not only interested in policy changes that result in policy convergence or harmonisation, but also in changes that lead to divergence between national and European policies (Radaelli 2002). In contrast to that, the focus on differentiated integration as the extension of EU rules to Switzerland is a focus on convergence or harmonisation results of the Europeanization process. Naturally, this narrower focus ignores some Europeanisation effects. For example, the flanking measures accompanying the Bilaterals I were a reaction to Europeanisation and an important domestic policy change. But the flanking measures did not extend an EU rule to Switzerland, thus were not integration measures, but they were a reaction to the anticipated consequences of the integration achieved by the FMPA.

The empirical analysis of the extension of EU rules can nevertheless profit from methodological insights from the Europeanisation literature, because it meets similar challenges. The first challenge concerns the choice of valid indicators to identify the extension of EU rules at the domestic level. Annette Töller (2010, 2012) critically discusses the validity of legislation as a proxy for policy changes. Important critics are that legislation is not equally important in all policies, that the EU can be used as a justification for legal changes even if it is not responsible, and that some EU rules do not require but prohibit certain legal changes. The first problem is not that severe for this study, because the definition of integration and differentiation is limited to legal rules from the outset. The other two problems are present. If the EU is used as an excuse for a policy reform, this leads to false positive cases in the empirical study. If an EU rule hinders the domestic legislator from introducing legal change, the respective effect cannot be observed with legislation as the proxy for integration. The variables used to measure the quality of the extension of rules seek to take into account both problems. Finally, Töller (2010) underlines that quantitative studies deliver only information about the “scope” of Europeanisation. The “extent” of Europeanisation, defined as the quality of the policy effect, can only be analysed in case studies. To some extent, this limitation holds also for the present study. Although the variables seek to explicitly measure the quality of the rule extension, they do so necessarily on a rather abstract level because of the quantitative research design.

The second challenge that this study shares with Europeanisation studies is the issue of establishing causal links to explanatory factors. Although causal explanations are not the aim of this paper, the empirical data should not make causal analyses impossible. While Europeanisation studies face the danger to link every domestic political change to developments at the European level, the present studies faces the danger to assume that every inclusion of an EU rule into Swiss law was included because its transposition produces some integration benefits for Switzerland. The Europeanisation literature provides different suggestions to deal with that problem. One is to explicitly distinguish convergence and divergence effects of Europeanisation (Radaelli and Pasquier 2007). The exclusive focus on transposition of or adaptation to EU law follows this advice (Bache et al. 2012). Another suggestion is that research should start with an analysis of the political changes at the domestic level, what this study also does (Radaelli 2012; Radaelli and Pasquier 2007).
Hopefully, the present study cannot only build on the Europeanisation literature, but also contribute to the discussion of Europeanisation of non-member states in general and Switzerland in particular. In general, the Europeanisation approach emerged against the background of integration theories that have focused on the ‘bottom-up’ influence of the member states on the development of European integration. Europeanisation, on the contrary, took a ‘top-down’ view, and started to research how integration retroacts on nation states (Ladrech 2010). Today, it is widely recognised that Europeanisation is part of a two-way relationship: European political processes affect domestic politics, but also domestic politics influence political change at the European level (Vink and Graziano 2007; Ladrech 2010; Bache et al. 2012). Nevertheless, European integration is the independent variable of interest in most Europeanisation studies that seek to explain political changes at the domestic level (Haverland 2005). The present study hopefully contributes to a better understanding of what Switzerland’s value on the integration variable actually could be.

4. Method: Measuring Integration in Swiss Legislation

It is much easier to discuss Switzerland theoretically as a case of differentiated integration and to apply the same definitions as are applied to member states, than to apply also the same empirical measurement. Based on the definition of differentiated integration as the extension of EU rules to Switzerland, we should measure the number of Swiss opt-ins by the number of EU rules that are extended to Switzerland. In practice, however, the identification of EU rules that are extended to Switzerland is a challenging task, because the information about the extension to Switzerland cannot be found in the EU rule itself. Therefore, we have to search for EU rules in Swiss legislation. This search is complicated by the fact that the extension of EU rules to Switzerland does not follow any formal rules. Most important, the federal administration does not systematically publish EU legislation that is included in sectoral agreements or that is transposed into domestic legislation. The Federal Council even rejected a parliamentary request to mark domestic legal acts that contain transposed EU rule (Nordmann 2006). The identification of EU rules thus needs to start with the evaluation of the content of Swiss legislation.

4.1 Population: The Relevant Parts of Swiss Legislation

Switzerland is a federal country organised based on the principle of subsidiarity. Subsidiarity means that the federal authorities are only allowed to adopt legislation in matters for which they are explicitly assigned the responsibility in the constitution (Vatter and Linder 2001). All other issues remain under cantonal authority. The conclusion of international agreements lies in the exclusive competence of the federal authorities. For the identification of EU rules that enter Swiss legislation via sectoral agreements with the EU, we thus can focus on federal legislation only. Swiss federal legislation is organised in two parts: One is called international law (Internationales Recht) and contains all international agreements that Switzerland has ratified. The sectoral agreements are published in this part of the federal legislation. They were identified by the title that names the

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3 Since 2000, the cantons also have a formal say in foreign policy making, but their role is limited to consultations at the domestic level (Bundesrat 1998).

4 Throughout the study, Swiss federal legislation refers to all legal texts of the Classified Compilation of Swiss Federal Legislation (Systematische Sammlung des Bundesrechts, URL: http://www.admin.ch/bundesrecht/00566/index.html?lang=de).
parties to the agreement. We count as sectoral agreement all agreements that were concluded between Switzerland and the EU, one of its predecessor organisations, or an EU institution (e.g. Europol). Because the aim is to identify EU rules, we include only agreements that are normative acts. Acts that simply approve or put into force other acts and corrigenda were not included.

The entry points of EU rules in the case of unilateral transposition are less clear. Existing empirical studies showed that cantonal legislation only very rarely touches fields regulated by the EU (Wyss 2007; Arbia 2008). Sometimes, when EU law dealt with issues previously regulated at the cantonal level, the responsibility for these issues was transferred to the federal level (Jaag 2010). Unilaterally transposed rules should thus also be identifiable in federal legislation. Generally binding federal legislation can be adopted by the parliament, by the government, or the departments. In contrast to the parliament, the government and departments need an explicit authorisation in a federal law adopted by parliament to issue legislation. Federal laws are thus the only instruments, which can introduce new issues into domestic federal legislation and thus the entry points for EU rules. However, EU legislation is often regulatory and contains technical standards. Scholars assume that Switzerland transposes most eagerly such EU rules, because the different technical standards constitute technical barriers to trade. At the same time, technical regulations are quickly developing issues. Therefore, the federal parliament sometimes adopts ‘framework laws’ that state the general necessity to adapt Swiss legislation continuously to the relevant EU laws in an area, and assigns the responsibility for this continuous adaptation to the Federal Council (Jaag 2010). In such cases, EU rules are transposed into Swiss legislation via government regulations.

Unfortunately, the identification of EU rules in government regulations is much more difficult than the identification of EU rules in federal laws. Unlike in the case of federal laws, the federal administration does not publish the results of the EU compatibility examination for the government regulations. EU rules could thus be identified in government regulations only based on the legal texts themselves. For an examination based on the legal text, one would need legal expertise on every issue. This is not feasible for an empirical study whose aim is to be as encompassing as possible with regard to policy areas and time. Government and other federal regulations are thus not considered in the data collection. This exclusion will probably hide some of the dynamics of Swiss differentiated integration, because regulations are the most quickly developing legal instruments. However, as every regulation must have a basis in a federal law, any new issue related to the EU should be also identifiable in federal laws. Federal laws are published in the second part of Swiss federal legislation that is called domestic law (Landesrecht). As in the case of sectoral agreements and for the same reasons, we consider only federal laws with a normative character.

The time period of the empirical research is the period from 1990 until 2010 and was chosen for historical and for practical reasons. The historical reasons are that differentiation has become an important characteristic of European integration only since the early 1990s, and that Switzerland has invented its approach to European integration at that time. Before the sectoral insurance and transit agreements between Switzerland and the EU entered into force in 1992, the only important sectoral agreement was the 1973 free trade agreement and its extensions. Also the examination of the EU compatibility, which was introduced in 1988, most probably had its first effects only in 1990, because a federal law on average needed one and a half years after the presentation of the draft to parliament and its adoption.
4.2 Units of Measurement: Changes in Swiss Legislation

The choice of the units of measurement has to take into account that not only the Swiss federal legislation, but also the body of EU rules has been steadily developing during the research period. When we identify the extension of an EU rule to Switzerland, any measure of the integration quality of this extension is necessarily valid only for the particular point in time when the EU rule is extended to Switzerland. An extension of an EU rule to Switzerland loses its external differentiated integration quality when the EU amends or abrogates the respective rule. Although some sectoral agreements contain provisions that regulate how the parties deal with the issues of new rules emerging in the EU in the area of the agreement, these new rules have always explicitly to be extended to Switzerland, either via the decision of Mixed Committees, or via an amendment of the agreement. With regard to the transposition of EU rules into domestic legislation, there exist no rules at all, if and how laws transposing EU rules should be updated to developments in the EU. Moreover, the guidelines for the authors of federal legislation discourage from the use of dynamic references (Bundesamt für Justiz 2007). It would thus be misleading to interpret an EU rule that is introduced into Swiss legislation at one point in time as an instance of external differentiation until the rule is abrogated in Switzerland.

The units of measurement for which we can provide a valid measurement of the extension of EU rules are the changes in the Swiss federal legislation. Accordingly, we measure the quality of the extension of EU rules in terms of the legal changes that are responsible for the rule extension. Legal changes can be the adoption or the amendment of a sectoral agreement or a federal law respectively. The choice of legal changes as units of measurement has also the asset that it enables us to measure the development of rule extension over time (cf. Töller 2010). Because we are interested in the content of sectoral agreements and federal laws, it goes without saying that we could consider only legal changes of which the contents were published in the Official Collection of Federal Legislation.

4.3 Coding Sources: Legal Texts and the EU Compatibility Examination

In sectoral agreements, EU rules are included either via so-called ‘parallel provisions’ or via direct references to EU secondary law. Parallel provisions paraphrase provisions and principles of EU legislation without actually mentioning the source. Therefore, they are only identifiable with legal expertise in the respective area. The literature mentions only two agreements that do not build on EU law: the Agreement on Pension Funds, and the Agreement on Proceeded Agricultural Goods (both Bilaterals II, see Epiney et al. 2012). Accordingly, we assume that every agreement between Switzerland and the EU potentially extends EU rules to Switzerland. We measure the quality of this extension with regard to the explicitness. This quality can be assessed on the agreement texts themselves, because explicit references to EU rules are easy to identify.

In case of the federal laws, on the contrary, EU rules are only very rarely mentioned directly in the legal texts. Not only does the federal administration not mark federal laws that contain EU rules, but the official guidelines for the authors of federal legislation even recommend that direct references to EU law should be avoided if the transposition of an EU rule is not based on a sectoral agreement (Bundesamt für Justiz 2007). If officials abide by these guidelines, we should only find direct

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5 Dynamic references refer to the actual version of a legal rule, whereas static references refer to a legal rule in a defined version (Bundesamt für Justiz 2007).
references to EU rules if their transposition is a consequence of a sectoral agreement. In all other cases, we should expect that the EU rule is paraphrased (Schweizerische Bundeskanzlei 2010)\textsuperscript{7}. Paraphrased EU rules in federal laws can only be identified based on the history of its drafting, its objective, and an analysis of its content, for which legal expertise in the respective area is necessary (Epiney and Schneider 2004).

As a consequence, and in contrast to the coding of the sectoral agreements, we cannot rely on the legal texts to identify EU rules in domestic legislation. Fortunately, the examination of the EU compatibility is conducted in a rather systematic way by the lawyers of different units of the federal administration since 1988. The results of this examination are included in the official reports accompanying every legal act presented to the parliament and provide the necessary information about the history, objective, and content of the bill (Bundesamt für Justiz 2007). The relevant reports are the Federal Council messages for bills initiated by the government and the reports by parliamentary commissions for bills initiated by the parliament. They are drafted by the administrative unit that prepares a bill. The conclusions with regard to the EU compatibility are systematically verified by the Directorate for European Affairs\textsuperscript{8}, the Directorate for International Law, and the Federal Office for Justice (Bundesamt für Justiz 2007). The involvement of these different bodies minimises the probability that the EU compatibility examination is not reported truthfully. Therefore, these texts are used as sources for our coding.

With the use of these official texts we rely on an indicator for the extension of EU rules. The quality of an indicator depends on its reliability and its validity. With regard to the reliability, the coding decisions of different researchers were systematically compared and the results indicated that the reliability is fair enough to allow for substantive conclusions (see Table 2 in the Annex). The question of validity is more difficult. The examination of the EU compatibility refers to the draft after the pre-parliamentary consultation procedure, but before the bill is discussed, probably amended, and finally adopted in parliament. If the parliament amends provisions of a law that are relevant for the EU rule transposition, the indicator is not valid any more. The crucial question is thus whether we can assume that the parliament does not change anything with regard to the transposition of EU rules.

The few empirical studies that report numbers with regard to the frequency of amendments by the parliament indicate to an active role by the parliament in general, but show that its role is less influential in Europeanised issues. Annina Jegher and Wolf Linder (1998) find for the years 1995-1997 that almost half of all federal laws were amended by parliament to a medium or a substantial degree, Adrian Vatter (2008) reports that 39% of bills were amended in the years 1996-2004. Hanspeter Kriesi (2001) states that the role of the parliament is especially important in controversial issues and when the pre-parliamentary phase does not result in a stable compromise. In that regard, Sciarini et al. (2002) show that ‘autonomous adaptations’ to the EU normally are less conflictive and that the pre-parliamentary phase is more important. Similarly, Jegher and Linder find that bills dealing with foreign policy issues are least likely to be amended by parliament (4.5%). In addition, the validity of the EU compatibility examination was checked based on the available legal studies on cases of EU

\textsuperscript{7} This could be an explanation for the finding by Gava and Varone (2012) that in legal texts, direct Europeanisation, thus references to the EU because of sectoral agreements, is much more frequent than indirect Europeanisation.

\textsuperscript{8} The Directorate for European Affairs is part of the Federal Department of Foreign Affairs and coordinates the European policy of the Federal Council. Until 2012, the Directorate was called Integration Office (Integrationsbüro).
rule transposition. In all cases, the coding decisions corresponded to the conclusions of the legal analyses, even in cases of selective transposition of rules. We thus assume that the EU compatibility examinations are a valid indicator for EU rule extension.

4.4 Measuring the Quality of EU Rule Extensions

Sectoral Agreements
Astrid Epiney and colleagues (2012) proposed a scheme to categorise the 17 most important sectoral agreements of the last two decades (Bilaterals I and II and some newer agreements). They examined the agreements with regard to four criteria that indicate the closeness of the agreements to EU law and the role of the ECJ. These criteria correspond well to the substantive and legal quality of the extension of EU rules to Switzerland. The first two criteria evaluate the closeness to EU law and measure whether an agreement directly refers to EU secondary legislation or whether an agreement contains ‘parallel provision’. These two criteria correspond to the substantive quality of the extension of EU rules. Unfortunately, parallel provisions cannot be identified without legal expertise in Swiss as well as EU law in every issue area, a resource not available to this study. Because Astrid Epiney et al. (2012) identify only two sectoral agreements that neither contain parallel provisions nor direct references to EU law, and because we consider only normative legal changes, we assume that all agreements are potentially extensions of EU rules. Further, we assume that the substantive quality of this ‘potential’ rule extension is higher if the agreement directly refers to EU law, or if it directly obliges Switzerland to adopt EU rules. In contrast to parallel provisions, direct references to EU law and adoption obligations are easily identifiable.

The two other criteria proposed by Epiney et al. are related to the legal or procedural quality of the sectoral agreements. One of these criteria is whether an agreement contains ‘dynamic’ provisions, i.e. whether it obliges Switzerland to transpose future EU legislation in the relevant field. The other criterion asks whether a sectoral agreement states that ECJ case-law is relevant for Switzerland or not. We used similar criteria for the purpose of measuring the legal quality of the extension of EU rules to Switzerland. A dynamic provision is distinct from an obligation to transpose EU rules into domestic legislation because it explicitly obliges Switzerland to adopt EU legislation not only before, but also after an agreement is signed. With regard to the question of monitoring of the agreements, we define the criterion broader than Epiney et al. and do not restrict the focus to the ECJ. We measure whether any EU authority has the competence to monitor the implementation of the agreement on Swiss territory. The detailed rules for the coding of the sectoral agreements are described in Annex 7.3.

Domestic Legislation
In a first step, the federal laws have to be analysed with regard to the question whether there exist EU rules for the issues or for part of the issues dealt with in the law, because national policies cover a broader range of issues than EU policies. If we come to the conclusion that there exist EU rules, we can evaluate whether the federal law reform (adaptation or revision) transposes these EU rules. If we

9 Examples for case studies: environmental law (Epiney and Schneider 2004), cartel law (Sturny 2012; Amgwerd 1998), law on value added tax (Imstefp 2012; Robinson 2013), internal market law (Herren 2012), patent act (Cottier 2006), law on equal treatment of men and women (Epiney and Duttwiler 2004), law on investment trust (Forstmoser 1999), consumer protection and corporate law (Baudenbacher 2012).
identify a transposition, we can evaluate this transposition with regard to the substantive and legal quality of the extension of the EU rule or EU rules. The substantive quality of the extension of EU rules is measured with variables similar to those proposed by Emilie Kohler (2009). We distinguish between transpositions that result in a full adoption of the relevant EU rules and transpositions that result only in a partial adoption of the relevant EU rule. Per definition, a transposition is a change with regard to the extension of EU rules to Switzerland. Either, it transposes an EU rule for the first time, or it removes inconsistencies remaining after a first transposition, or it adapts an earlier transposition measure to new developments in the EU.

As in the case of Europeanisation, also the extension of EU rules is not only a phenomenon of change, but can also be one of policy continuity. In terms of legal change, it is not possible to measure EU relevant policy continuity, because continuity does not require change. This problem is similar to the one that the effect of prohibitive EU rules constraining national policy-makers cannot be observed in terms of legal change (Töller 2010). In order to at least partly overcome this problem, we introduce a third variable to measure the substantive quality of EU rule extension. The EU compatibility examination normally discusses the status of the compatibility with EU rules of the concerned law as whole. Accordingly, the examination sometimes concludes that the parts of the law that were changed concern issues that are either not regulated by the EU, or that lie within the regulatory leeway allowed by the EU, but that the law as a whole is compatible with EU law. Such legal changes are coded as EU compatible changes.

The legal quality of the transposition of EU rules into Swiss legislation is in principle always the same. EU rules that are paraphrased into Swiss legislation become Swiss legal rules, no matter the origin of their substantive content. With regard to differentiated integration, it makes nevertheless a difference whether an EU rule was transposed in relation to a sectoral agreement or unilaterally. In the case of a sectoral agreement, we can assume that Switzerland and the EU agreed on the relevant EU rules, and accordingly, a transposition related to an agreement comes closer to a mutually agreed ‘ideal-type’ integration step. Transpositions of EU rules can occur during the negotiations of an agreement or as implementation measures after an agreement is signed. Accordingly, in order to measure the legal quality of EU rules extensions to Switzerland, we distinguish between transpositions of EU rules that are related to a sectoral agreement (either preparatory or implementing transpositions) on the one hand and unilateral transpositions on the other hand.

The substantive and the legal quality of EU rule transpositions are evaluated separately. The substantive quality of EU rule transposition is evaluated based on the congruence between the rule that is transposed into Swiss legislation, and the rule that is valid in the EU. The legal quality of the rule transposition is evaluated with regard to the relation of the rule to a sectoral agreement, thus to the ‘Bilateral law’. Accordingly, also a legal change that does not substantively transpose an EU rule can be related to a sectoral agreement. There are only very few such cases in the data set. The detailed rules for the coding of the sectoral agreements are described in Annex 7.2.

5. Results: Qualities of EU Rule Extension to Switzerland

Already in early discussions, differentiated integration was often discussed as a question of time, as indicated by the notion multi-speed integration, or of matter, as indicated by the label à-la-carte
integration (Stubb 1996). The above-cited definitions of differentiated integration are based on policy field differences. Kölliker (2006) relates policy fields and time, when he theorises the centripetal effects of European integration based on public goods theory. Assumptions about Switzerland’s differentiated integration are also often related to time and policy fields. Most of the treaties of the Bilaterals I were liberalisation treaties, and thus scholars often call Switzerland first and foremost an example of external differentiated integration in internal market issues (Leuffen et al. 2012). This section reports the legal and substantive quality of the extension of EU rules to Switzerland in terms of legal changes also per year and across policy fields.

5.1 Substantive Extension of EU Rules to Switzerland

Figure 1 shows the development over time of the substantive quality of EU rules in Swiss legislation in terms of legal reforms. The upper graph shows federal law reforms\(^\text{10}\); the lower graph shows sectoral agreement reforms. In both cases, a reform is either an adoption or a revision of a legal text. The reforms are reported for the years in which they were published in the Official Collection of Federal Legislation, what most often corresponds to the year when they entered into force. The lowest and darkest areas in both graphs represent the number of reforms with the strongest substantive quality of extension of EU rules to Switzerland. In case of domestic legislation, these are full adaptations, thus legal reforms that fully transpose the relevant EU rules. In the case of sectoral agreements, these are provisions that oblige Switzerland to adapt its legislation. We observe that the yearly number of such full substantive extensions of EU rules was on average below ten in domestic legislation, and below five in sectoral agreements until 2008. In most recent years, the numbers increased steeply.

In the upper graph, the topmost area represents the total number of yearly legal reforms that dealt with issues regulated at the EU level. The next lowest area shows the number of reforms that were compatible with the respective EU law, but did not transpose EU law. The tiny area above the full adaptations shows the adaptations that were selective, thus did not transpose the relevant EU law fully. In general, we can conclude that only a tiny share of the EU relevant reforms was not at least compatible with the EU rules. Active transpositions were less frequent than EU compatible law reforms. Selectivity was indeed a steady characteristic of adaptations to the EU, but Switzerland more often transposes EU rules fully than partially. This does not contradict Kohler’s finding of a prevalence of partial adaptations, because for her research period (2004–2007), also our data shows more partial adaptations. Most reforms in EU relevant areas for which we did not find a relation to a rule extension were observed in the periods 1995–1998 and 2005–2008.

In the lower graph, the topmost area represents the total number of sectoral agreement reforms per year. We observe a general growth since 2004, what contrasts with the domestic legislation, where the number of yearly EU relevant reforms seems to be subject to more fluctuation and the trend is less clearly increasing. The middle area shows sectoral agreement reforms with direct references to EU law. We observe that in recent years, direct references to EU law have become more frequent than obligations to adopt EU rules. Nevertheless, a considerable number of reforms do neither directly refer to EU law, nor contain adaptation obligations.

\(^{10}\) All number of federal law reforms in the paper 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.
Figure 1: Substantive quality of the extension of EU rules to Switzerland, number of reforms per year

Figure 2 refers to the same variables as Figure 1, but it shows the distribution of the substantive quality of EU rule extension across policy fields. Again, the darkest parts of the bars depict the number of reforms with the strongest substantive quality of EU rule extension. A comparison of the left graph describing domestic law-making and the right graph describing sectoral agreements shows that EU relevant domestic legislation covers a much broader range of policy fields in domestic legislation than the sectoral agreements. Whereas in domestic legislation, most policy fields with EU relevant reforms also experienced at least some full adaptations, most adaptation obligations in sectoral agreements stem from the three policy fields police coordination, agriculture, and transport. Police coordination and citizenship are the policy fields of the Schengen and Dublin association agreements, and transport contains the air transport agreement. These agreements are the ones that integrate Switzerland in a way that is very similar to the integration of member states. Why the agreements on agricultural issues contain so many adaptation obligations has to be researched further.

5.2 Legal Extension of EU Rules to Switzerland

Figure 3 shows the development over time of the legal quality of EU rules in Swiss legislation. Again, the upper graph refers to domestic legislation, and the lower graph refers to sectoral agreements. In both graphs, the topmost area is the same as in Figure 1 and reports the total number of EU relevant federal law reforms, or sectoral agreement reforms, respectively. If we compare Figure 3 with Figure 1, we see that a much lower number of law-making is strongly legally linked to the EU than is strongly substantially linked to EU rules. In the 1990s, only two reforms implemented a sectoral agreement,
and a handful of reforms were preparatory adaptations during the lengthy negotiations of the Bilaterals I. Apart from that, implementations seem to be a phenomenon that mainly accompanied the entry into force of new important treaties, like the Bilaterals I in 2002, and the Bilaterals II from 2004 on. Both graphs show peaks in 2008, when the most important treaties of the Bilaterals II, the Dublin and Schengen association agreements, entered into force.

The Schengen and Dublin agreements are probably responsible for the increase in implementation measures after 2008 and surely responsible for the appearance of dynamic provisions in the last years in the lower graph. An interesting finding is that the number of EU relevant domestic law-making as well as the number of implementation measures dropped in 2010, whereas the number of sectoral agreement reforms was still increasing. This fact could be related to the way the dynamic provisions of the Schengen and Dublin agreements are implemented: In these areas, new EU legislation is transposed to Switzerland by exchanges of diplomatic notes, thus new sectoral agreements. If international law is clear enough to provide the basis for decisions in individual cases, it is considered self-executing in Switzerland and does not need transposition in domestic law (Thürer et al. 2007). The first instance of a dynamic and a monitoring provision in 2002 represents the adoption of the air transport agreement.

Figure 4 refers to the same variables as Figure 3 and shows the distribution of the legal quality of EU rule extension across policy fields. With regard to sectoral agreements, the picture of the legal quality of rule extension resembles the picture of the substantive quality of rule extension described in Figure 2. Dynamic and monitoring provisions are a very seldom phenomenon and mainly related to the usual suspects, Schengen and Dublin, as well as air transport. Science appears among the issues with monitoring provisions, because EU authorities can inspect the correct implementation of research projects funded by EU programs based on the respective sectoral agreements also on Swiss territory.

With regard to domestic legislation, Figure 4 differs substantially from Figure 2. Whereas Figure 2 showed that EU relevant law reforms were to a large part at least compatible with the relevant EU law, Figure 4 shows that in most policy fields, less than half of the EU relevant reforms are related to sectoral agreements. Interestingly, the policy fields with most implementation measures in domestic law-making are not the policy fields with the most sectoral agreement reforms. Whereas transport and agriculture rank high in the frequency of agreement reforms as well as implementation measures, the reverse is for example true for customs and science.
Figure 2: Substantive quality of the extension of EU rules to Switzerland, number of reforms per sub-chapter of the Systematic Compilation of Federal Legislation
5.3 Inter-relation of Substantive and Legal Rule Extension

The distribution over time and policy fields already hinted at possible inter-relations between the substantive and the legal quality of the extension of EU rules to Switzerland. Table 1.1 reports the inter-relation between the legal and substantive qualities of rule extension in domestic law-making. Table 1.2 reports the inter-relation in sectoral agreement reforms. In domestic legislation, both qualities seem to be clearly related. Almost all implementations of sectoral agreements implied full transpositions of EU rules. Sometimes, full transpositions occurred already as preparations for sectoral agreements. Only one fifth of all full transpositions had no relation to a sectoral agreement. The reverse is true for imperfect substantive transposition of EU rules. Partial adaptations most often had no relation to a sectoral agreement. EU compatible reforms are not related to sectoral agreements.

Also in Table 1.2, the clear relation of a legally stronger quality of the extended rules is related to substantive extension of EU rules, but not vice versa. Every agreement reform with dynamic or monitoring provisions directly referred to EU law and/or obliged Switzerland to adopt some legislation. However, as monitoring and dynamic provisions are very seldom, it is difficult to interpret this result. The more interesting result is that more than half of all agreement reforms did neither explicitly refer to EU law, nor subject Switzerland legally to EU law.
Figure 4: Legal quality of the extension of EU rules to Switzerland, number of reforms per sub-chapter of the Systematic Compilation of Federal Legislation
Table 1.1: Inter-relation of substantive and legal quality of EU rule extension in domestic legislation

<table>
<thead>
<tr>
<th>Legal quality of EU rules*</th>
<th>Substantive quality of EU rules*</th>
<th>Full adapt.</th>
<th>Part. adapt.</th>
<th>Comp.</th>
<th>None</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implementation</td>
<td></td>
<td>84</td>
<td>15</td>
<td>0</td>
<td>4</td>
<td>103</td>
</tr>
<tr>
<td></td>
<td></td>
<td>17.07</td>
<td>3.05</td>
<td>0.00</td>
<td>0.81</td>
<td>20.93</td>
</tr>
<tr>
<td>Prep. adaptation</td>
<td></td>
<td>34</td>
<td>12</td>
<td>3</td>
<td>0</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6.91</td>
<td>2.44</td>
<td>0.61</td>
<td>0.00</td>
<td>9.96</td>
</tr>
<tr>
<td>None</td>
<td></td>
<td>35</td>
<td>54</td>
<td>159</td>
<td>96</td>
<td>202</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7.11</td>
<td>10.98</td>
<td>32.32</td>
<td>19.51</td>
<td>59.83</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>153</td>
<td>81</td>
<td>162</td>
<td>492</td>
<td>492 **</td>
</tr>
<tr>
<td></td>
<td></td>
<td>31.10</td>
<td>16.46</td>
<td>32.93</td>
<td></td>
<td>100.00</td>
</tr>
</tbody>
</table>

Note: * The three variables measuring the substantive quality of the extension of EU rules, as well as the two variables measuring the legal quality of the extension of EU rules into Swiss legislation are mutually exclusive. ** 492 is the total number of primary federal law reforms in EU relevant areas between 1990 – 2010.

Table 1.2: Inter-relation of substantive and legal quality of EU rule extension in sectoral agreements

<table>
<thead>
<tr>
<th>Legal quality of EU rules*</th>
<th>Substantive quality of EU rules*</th>
<th>Adaptation obl.</th>
<th>Direct Ref.</th>
<th>None</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monitoring prov.</td>
<td></td>
<td>3</td>
<td>16</td>
<td>0</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.20</td>
<td>6.37</td>
<td>0.00</td>
<td>6.37</td>
</tr>
<tr>
<td>Dynamic prov.</td>
<td></td>
<td>3</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.20</td>
<td>1.59</td>
<td>0.00</td>
<td>1.59</td>
</tr>
<tr>
<td>None</td>
<td></td>
<td>61</td>
<td>108</td>
<td>141</td>
<td>251</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24.30</td>
<td>43.03</td>
<td>56.18</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>66</td>
<td>127</td>
<td></td>
<td>251</td>
</tr>
<tr>
<td></td>
<td></td>
<td>26.29</td>
<td>50.60</td>
<td></td>
<td>100.00</td>
</tr>
</tbody>
</table>

Note: In contrast to the variables measuring the extension of EU rules into domestic legislation, the variables measuring the quality of the sectoral agreements are NOT mutually exclusive.

5.4 Discussion: Substantive Quasi-Member and Legal Outsider?

The distinction between the substantive and the legal quality of the extension of EU rules to Switzerland proved to be fruitful with regard to the diverging views on Switzerland’s ‘quasi-membership’ mentioned in the introduction. The substantive quality of the extension of EU rules to Switzerland – what I assumed to be the reason for the label ‘quasi-member’ – is indeed a phenomenon that occurred steadily over the last two decades and that affected a broad range of policy fields. The legal quality observed in the empirical data also seems to justify the qualification of Switzerland as an outsider to the European integration process because of the lack of institutional links to the EU.

The most important findings regarding the substantive quality of rule extensions are first that rules that are transposed into domestic legislation are most often transposed fully. Although a ‘Swiss

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11 The numbers reported in this table 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. In addition, earlier papers did not distinguish between federal law reforms in EU relevant areas and such in areas that are not regulated by the EU. Accordingly, the total number of reforms reported was considerably higher and the percentage shares lower.
finish’ is regularly observed, the number of such partial adaptations is significantly lower than that of full adaptations. This finding contradicts the common sense of Switzerland as a cherry-picker. The substantive rule extension, however, is to a large part not an active policy of rule transposition. The largest part of federal law reforms dealing with EU rules is just compatible with these rules. Further analysis of the data will show whether compatible reforms concern laws that transposed EU rules in the past, or whether compatible reforms are more frequent in cases when the EU rule is of a prohibitive character. The substantive quality of domestic law-making is also related to the sectoral agreements: Transpositions of EU rules as a consequence of a sectoral agreement are always active transpositions, and almost always full transpositions. This importance of the sectoral agreements for substantive rule extensions could not be observed to the same extent in the sectoral agreements themselves. More than half of the sectoral agreements reforms neither directly referred to EU law, nor obliged Switzerland formally to adopt EU law. From this finding, we can however not conclude that the sectoral agreements are not substantially linked to EU law. It is more probable that EU rules are extended through parallel provisions. There empirical significance, however, could not be measured here.

The most important findings regarding the legal quality are that rule extensions with a strong legal link to the EU are not only a more recent phenomenon than substantive rule extensions, but they are also less numerous and concentrated in specific years and issue areas. These findings hold for both domestic law-making and sectoral agreement reforms. Only the agreements of the Bilaterals I and II required implementation measures from Switzerland at the domestic level, and almost only the Bilaterals II contained some dynamic and monitoring provisions. These modest findings concerning the legal quality are surprising because the frequency of substantive rule extensions in domestic law-making as well as in sectoral agreements increased steeply in recent years. This difference could be related to the way the legal quality was measured. A dynamic provisions in a sectoral agreement, for example, may be observed only once, but provoke a number of substantive rule extensions in domestic law-making and sectoral agreements alike. Another explanation, however, is that the informal principles underlying Switzerland’s sectoral agreements are responsible for the frequency of substantive rule extension, and that there are indeed only few strong legal links to the EU.

6. Conclusion

This paper started with quotes from scholars that disagree whether Switzerland is a quasi-member of the EU or not. In order to understand the development of this ‘quasi-membership’, I proposed to measure the integration quality of Switzerland’s European policy with regard to the substantive and the legal extension of EU rules to Switzerland. This approach resonates with recent approaches to explain European integration as a process of differentiated integration. The measurement of Switzerland’s differentiated integration proved to be easier conceptually than methodologically. In particular, it is difficult to measure Switzerland’s integration in terms of EU rules – the unit of measurement that would allow for comparison with member states. Instead, the paper relied on Swiss law-making, encompassing both federal laws and sectoral agreements with the EU.

Nevertheless, the results allow for some tentative conclusion with regard to the quality and development of Switzerland’s differentiated integration. To some extent, the presented empirical analysis justifies both evaluations of Switzerland’s status in European integration cited in the
introduction. Switzerland adopted a wide variety of EU rules over the last twenty years and did so most often without deviations. But Switzerland also remained a complete institutional outsider. Only a few recent treaties provide institutional mechanisms that come close to the legal quality of European integration of the member states. However, both evaluations can also be qualified. With regard to substantive rule extension into domestic law, Switzerland seems to take a passive stance if transposition is not required by a sectoral agreement. With regard to sectoral agreements, the few dynamic provisions in recent years are probably responsible for the large increase in substantive rule extensions in domestic legislation and sectoral agreements alike. In that sense, we can also qualify Gstöhl’s (2007) prediction that it becomes increasingly difficult for Switzerland to participate in EU policies as the EU covers new policy issues. It seems still to be possible, but it seems to require a closer substantial and legal link to EU rules.

This paper looked at Switzerland from the point of view of definitions of European integration. European integration theories do not only provide definitions of the dependent variable, but they mainly provide general explanations for the outcome of European integration. The most interesting next step in research of Switzerland’s differentiated integration would be to explain the empirical patterns that were presented in this paper only descriptively.
7. Annex

7.1 Inter-coder reliability

The evaluation of qualitative sources does not go without any ambiguities. The data was collected by four coders who obeyed the same coding instructions that have been refined several times during a pre-test phase. Parts of the sources were evaluated by all coders independent from each other in order to test the reliability of the data obtained by the different coders. Table 2 shows the results of the reliability test using different indicators. The grey-shaded rows in Table 2 highlight the variables that are the most reliable according to the tests. According to the literature on content analysis, these indicators show ‘substantial agreement’ when assessed by Cohen’s kappa (Stemler 2001) and allow ‘tentative conclusions’ following the rigorous criteria of Krippendorf (2004: 429). The three last rows of Table 2 show the reliability indicators if we count two or three variables describing the extension of EU rules as one variable. This exercise was conducted to test whether the distinction between different forms of rule extension may lead to disagreement between coders. Indeed, the combined variables adaptation (full or partial adaptation) and EU rule compatibility (full or partial adaptation or only compatible reform) show better values than the single variables. Three coders coded German sources, one coded French sources.

Table 1: Inter-coder reliability

<table>
<thead>
<tr>
<th>Variable</th>
<th>Average pairwise agreement in percent</th>
<th>Fleiss' Kappa</th>
<th>Average pairwise Cohen's Kappa</th>
<th>Krippendorff's Alpha (nominal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full adaptation</td>
<td>94.066 %</td>
<td>0.660</td>
<td>0.659</td>
<td>0.661</td>
</tr>
<tr>
<td>Partial adaptation</td>
<td>88.005 %</td>
<td>0.472</td>
<td>0.477</td>
<td>0.473</td>
</tr>
<tr>
<td>Compatibility</td>
<td>90.025 %</td>
<td>0.482</td>
<td>0.489</td>
<td>0.483</td>
</tr>
<tr>
<td>Implementation</td>
<td>94.318 %</td>
<td>0.663</td>
<td>0.665</td>
<td>0.663</td>
</tr>
<tr>
<td>Full or partial adaptation</td>
<td>90.909 %</td>
<td>0.741</td>
<td>0.742</td>
<td>0.742</td>
</tr>
<tr>
<td>Partial adaptation or compatibility</td>
<td>83.207 %</td>
<td>0.535</td>
<td>0.535</td>
<td>0.536</td>
</tr>
<tr>
<td>Full or partial adaptation or compatibility</td>
<td>87.500 %</td>
<td>0.719</td>
<td>0.719</td>
<td>0.718</td>
</tr>
</tbody>
</table>

Note: number of coders: 4; scale level: nominal; number of cases: 132; number of decisions: 528. Source: values computed with ReCal3 by Freelon (2010).

7.2 Coding Rules Domestic Legislation

Identifying Substantive Extensions of EU Rules to Switzerland

Full Adaptation: A federal law reform (adoption or amendment) is concerned a full adaptation, if the provisions of the Swiss law for which there exists EU law are transposing EU rules (in the case of new adoptions of rules, or of the law), or if the rules that are changed in the respective reform (in the case of law amendments) are adapted to the relevant EU rules.

Partial Adaptation: A federal law reform (adoption or amendment) is similar to a full adaptation, with the difference that the EU rules that are transposed, or that a Swiss law is adapted to, are only partially respected. A statement that full integration in the field of the reform can only be achieved by a sectoral agreement does not count as an exemption in the sense of partial adaptation because
this statement does not concern the substantial extension of an EU rule to Switzerland, but only the recognition by the EU of this extension.

**EU Compatible Reform:** The variables full adaptation and partial adaptation do not fully capture the relation of a Swiss federal law with EU rules. Sometimes, a federal law is amended, this amendment does not transpose any additional or new EU rules, but the federal law remains compatible with the EU law. Sometimes, the EU compatibility examination in the federal council message is not very detailed and just states that a law reform is compatible with the relevant EU law. We cannot count such cases as adaptations based on the definitions above. But we cannot ignore that they are compatible with EU law and thus maybe contain EU rules for whatever reason. Such reforms are thus coded EU compatible.

**Identifying Legal Quality of EU Rule Extensions to Switzerland**

**Implementation:** With the implementation variable, we measure the vertical integration quality of a unilateral transposition of a rule. Implementation simply means that a legal change is a consequence of a sectoral agreement with the EU. Implementations happen only once an agreement was signed, but not necessarily only after it entered into force.

**Preparation:** With the negotiation variable, we measure a more informal relation of a domestic reform with the sectoral integration process. An reform is coded a preparation for a sectoral agreement, if the federal council message says that the transposition is made in order to ease, facilitate, or enable negotiations of a sectoral agreement in the respective matter. Preparations happen before an agreement is signed.

### 7.3 Coding Rules Sectoral Agreements

**Identifying Substantive Extensions of EU Rules to Switzerland**

**Reference:** This variable simply measures whether the text of a sectoral agreement contains direct references to EU law or not.

**Adaptation obligation:** International agreements introduce new norms, but they normally do not oblige the signing parties to adapt their own legislation to the legislation of their contracting parties. The variable adaptation takes the value one if an agreement deviates from this principle. A deviation is when an agreement lists concrete EU acts that Switzerland is expected to or has agreed to transpose into its domestic legislation, or if an agreement lists concrete Swiss domestic legal acts that have to be amended. We do not count as adaptation obligation if the agreement recognises concrete legal acts of the EU and the Swiss law as being equivalent without mentioning any necessity (past or future) to adapt Swiss legislation to achieve this equivalency, because such cases are already captured by the variable Reference.

**Dynamic Provision:** The normal principle of international law is that future law-making of one party to an agreement has no effect on the agreement (Epiney et al. 2012: 97). We count as a deviation from this principle if Switzerland is obliged to overtake new community legislation in the future, thus after signature of the agreement. Provisions that regulate how the parties have to inform each other about their new legislation, for example provisions about the responsibility of the mixed committees in that regard, are not counted as dynamic provisions, because Epiney et al. (2012) clearly state that such clauses do not change anything with regard to the static character of the agreements.
Monitoring Provision: In international law, every party to an agreement is responsible for the supervision of the implementation on its own territory (Thürer et al. 2007: 70, 76). We count as a deviation from this principle,

- if Switzerland is obliged to adhere to ECJ case law not only before, but also after a treaty has been signed;
- and/or if EU authorities (e.g. the Commission) are guaranteed a right to control the correct implementation of the treaty on Swiss territory and/or have the right to intervene in case of violations of the treaty's provisions;
- and/or if Switzerland or Swiss legal or natural persons can bring violations of the agreement to the ECJ;
- and/or if Switzerland, Swiss firms or citizens can be brought to the ECJ.

We do not count as deviations from the principle if an agreement explicitly names the Swiss authorities that are responsible for the monitoring of the correct implementation of the treaty, and if the mixed committee is responsible for dispute settlement, because the delegates decide in consensus and thus the mixed committee cannot decide anything against the will of the Swiss government.
8. References


