

‘More in than out’ – Switzerland’s Association with Schengen

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ABSTRACT

Drawing on the concepts developed in the external governance literature this paper argues that the conclusion of the Schengen Association Agreement symbolises a qualitative change in the bilateral relations between the EU and Switzerland. The argument on the qualitative change in the intensity of relations is developed by comparing the situation in Schengen related matters before and after the conclusion of the Swiss Schengen Association Agreement. Although the regulatory boundary was formally not shifted prior to the conclusion of the Schengen Association Agreement, various forms of policy transfer led to a high degree of policy convergence. In contrast hereto the organisational boundary was only ‘tentatively’ shifted in the pre-Schengen era owing to the fact that Switzerland remained excluded from the key implementation networks (SIS, Dublin). The conclusion of a dynamic integration treaty in Schengen matters shifts the EU’s regulatory boundary towards Switzerland in an unprecedented manner, a process that has been accompanied by a multiplication of possibilities for organisational inclusion. The article concludes by critically reflecting on the limited exportability of this advanced form of ‘flexible integration’.

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Introduction

The Schengen Association Agreement (SAA), which is a partial integration agreement in a core area of statehood, symbolises a new quality of interactions in the relations between the EU and Switzerland. The SAA constitutes a radical departure from the Swiss preference for agreeing on punctual intergovernmental agreements in the bilateral relations with the EU.¹ The conclusion of a partial integration treaty means that Swiss domestic legislation in internal security matters has to be updated every time a ‘new’ Schengen relevant act is adopted by the EU institutions. The evolutionary character of the SAA has turned the area of internal security into a ‘laboratory’, in which the Swiss political system is learning to cope with the constraints and possibilities offered by the process of European integration. Some might be surprised to hear that such an advanced form of integration has been reached in a core area of statehood, but as Sandra Lavenex et al. have argued previously, the legacy of intergovernmental decision-making, flexible integration arrangements within the EU and the strong focus on operational or transgovernmental cooperation in justice and home affairs (JHA) matters have made this area particularly amenable to the emergence of ‘flexible integration’ arrangements in the relations with non-member countries (Lavenex et al. 2009; forthcoming).

The first SAAs were concluded in 1996, when the negotiations on the association of the Nordic countries, Iceland and Norway, with Schengen cooperation were completed. As a result of Sweden and Finland joining the EU and Denmark becoming a Schengen member, a solution had to be found to intertwine the free areas of movement established by the Nordic Passport Union and Schengen. The SAAs, which are currently in force with the Nordic countries, were concluded in 1999 in response to the integration of the Schengen acquis into EU law under the Treaty of Amsterdam. Aforementioned SAAs served as model agreements, when the negotiations with Switzerland were conducted. In Switzerland political actors have been demanding a closer association with the Schengen states since the early 1990s. For instance in 1993 an expert group chaired by Nationalrat ‘Leuba’ asked the Federal Council to look into concluding an agreement with the Schengen states. The expert group feared that Switzerland was becoming an ‘island of insecurity’ for rejected asylum seekers and criminals. Prior to 2001 the Schengen states responded negatively to Swiss demands for association with Schengen. When, in 2001, the Feira European Council decided that the adoption of an EU directive on the taxation of savings would be made dependent upon the prior conclusion of an agreement with relevant third countries, the EU consented to opening negotiations on Schengen association in return for Switzerland’s consent to negotiate an agreement on the taxation of savings and the fight against fraud with the EU.

¹ In the area of air transport an integration treaty was concluded under the first round of bilateral agreements in 1999, but the far more limited scope of aforementioned agreement makes it difficult to compare the two..

The SAA negotiations with Switzerland proved difficult. The main stumbling stones concerned the adaptation of the partial integration treaty to the requirements of Swiss direct democracy and article 51 of the Schengen Implementation Convention on mutual legal assistance. In October 2004 the SAA was signed giving rise to the entry into force of the institutional provisions of the SAA. While Switzerland completed the ratification of the SAA in June 2005 following the ‘yes’ vote in the popular referendum of 5 June 2005, the EU only ratified the SAA on 1 March 2008 after all member states had ratified the agreement. From April 2008 to October 2008 the Schengen Evaluation Committee assessed whether Swiss legislation and law enforcement practices were in compliance with the Schengen *acquis*, and after the positive conclusion of the evaluation on 27 November 2008 the Council decided to lift the land borders with Switzerland as of 12 December 2008. The ‘airport borders’ were abolished after the summer flight schedules were introduced on 29 March 2009.² Finally, the first referendum on a piece of Schengen implementing legislation will take place on 12 May 2009, given that the facultative referendum was successfully launched against the introduction of ‘biometric or e-passports’.

The following article empirically substantiates the claim that the SAA constitutes a qualitative shift in the intensity of EU-Switzerland relations. It does so by juxtaposing the scope of regulatory adaptation and the density of institutional or organisational ties in Schengen related matters before and after the conclusion of the SAA. The comparison will reveal that the relations have been deepened both at the regulatory and the organisational level. The first section summarises the external governance literature, from which the key concepts have been derived. In section two the situation before the conclusion of the SAA is illustrated, while section three presents the situation after the SAA. The conclusion summarises the main findings and critically reflects on the findings presented in the study.

Applying a governance approach to the relations with Switzerland in Schengen matters³

The expansion of institutionalised patterns of interaction to the international realm is part of a broader ‘governance’ turn in the academic literature on the EU. The protagonists of the governance approach refute the dominance of the actors-based analysis of EU external relations by claiming that the EU is first of all a regional integration project that by its mere existence has intended and unintended effects on the policies of neighbouring countries. These outcomes in terms of policy transfer are, in turn, influenced by the institutional set-up of the EU. Indeed it has been shown that in particular so-called new modes of horizontal

² Council Decision of 27 November 2008 on the full application of the provisions of the Schengen *acquis* in the Swiss Confederation (2008/903/EC), OJ L 327/15.

³ This conceptual section summarises the framework developed by the Newgov project team (S. Lavenex, D. Lehmkuhl and N. Wichmann).

governance, such as intensive transgovernmentalism in the area of JHA (on transgovernmentalism cf. Lavenex 2009), are more open to the inclusion of non-member countries than more hierarchical modes of governance such as supranationalism, which is the traditional Community method (Lavenex et al. 2007; 2009). The notion of external governance has been coined to capture these various attempts by the EU to include third countries into the realisation of its internal policy objectives (Lavenex 2004).

The external governance approach draws on the studies of eastern enlargement that had analysed how the EU expanded its system of norms, rules and policies to the candidate countries (Friis 1999; Schimmelfennig & Sedelmeier 2004). Aforementioned studies seek to identify the dominant logic of action displayed by the EU in relations with non-member or future member countries. In the context of enlargement it has been argued that the main mechanism through which the EU transferred its policies was governance by conditionality. The latter is a hierarchical approach in which the EU capitalises on its superior bargaining power in order to induce third country compliance (Schimmelfennig & Sedelmeier 2004: 674 ff.). An analysis of EU-Switzerland bilateralism through the ‘conditionality’ prism makes little sense, considering that Switzerland does not want to join the EU, and therefore, the key mechanism of ‘accession conditionality’ is of limited use.

The non-applicability of the conditionality model does not mean that the external governance approach is *per se* inapt to capture EU-Switzerland relations. What I propose to do instead is to analyse EU-Switzerland relations in the Schengen domain as a manifestation of ‘network governance’, which is a second type of external governance (cf. e.g. Lavenex et al. 2007: 370). The choice of network governance in this case study is particularly pertinent, as prior studies have revealed that network governance features prominently in EU-Switzerland relations (cf. e.g. Lavenex et al. 2008: 325-326). Network governance denotes a constellation in which the EU and the partner country are characterised as equal partners. Drawing on Anne Marie Slaughter’s work on transgovernmental networks (Slaughter 2004: 52ff.), Sandra Lavenex et al. propose a distinction between three different types of network governance (Lavenex 2008; Lavenex et al. 2007)⁴:

- a. *information networks* – they do not produce regulatory instruments but are set up to diffuse policy-relevant knowledge and ideas among the members. Usually, this goes hand in hand with the objective of distilling this information and identifying best practices. Expertise and professional reputation play an important role in these networks.

⁴ In order to avoid conceptual confusion with EU jargon Slaughter’s terminology is modified, and the terms of implementation instead of enforcement networks and regulatory instead of harmonization networks are used.

- b. *Implementation networks* - they focus primarily on enhancing cooperation among national regulators to implement/enforce existing laws and rules – be them national, international, or European. In EU law these networks are complementary to the hierarchical modes of governance in that they add a more cooperative implementation structure to the essentially unilateral decision-making process. Often, implementation networks also promote capacity building through technical assistance and training.
- c. *Regulatory networks* – they are the most powerful ones in terms of governance since they have an implicit or explicit legislative mandate and are geared at the formulation of common rules and standards in a given policy area. According to Slaughter, “behind the facade of technical adjustments for improved coordination ...and uniformity of standards lie subtle adjustments” of national laws (Slaughter 2004: 59). In so far as they are inclusionary and voluntary, these networks represent the most advanced form of flexible sectoral integration in terms of shared governance.

What is common to both governance by conditionality and network governance is that the EU extends the reach of its rules towards non-member countries. Drawing on the work of Michael Smith on the different boundaries of political order (Smith 1996: 13 ff.), Sandra Lavenex has proposed to refer to this expansion of the reach of EU rules as a shift of the EU’s ‘regulatory boundary’ (Lavenex 2004: 683; 2008). A first indicator that external governance is present is, thus, that the regulatory boundary, i.e. the reach of EU rules and norms has been extended to a non-member state. What differentiates hierarchy from the network mode of governance is that the ‘network governance’ constellation refers to a parallel opening of the EU’s policy making structures, which is referred to henceforth as a shift of the ‘organisational boundary’. A shift of the organisational boundary occurs if the non-member states are granted access to the EU’s policy-making structures. Shifts in the ‘organisational boundary’ are assessed by analysing the institutional structures that have been put in place to accompany the adoption and the implementation of EU policies in the non-member country.

In a previous article on external governance in internal security matters in the relations with the ENP countries it has been argued that the predominance of an operational instead of a legislative *acquis* and the existence of numerous law enforcement networks have favoured the inclusion of non-member states (Lavenex & Wichmann 2009). Whereas the securitisation of JHA issues and the absence of ‘trust’ in relations with ENP countries hinder these inclusive dynamics from fully unravelling, the homogeneity of problem situations and the high degree of political-administrative capacity in the Western neighbour states constitute favourable scope conditions for the emergence of network governance. The following empirical sections, to which I will turn now, illustrate that network governance has been present in EU-Switzerland relations in internal security matters from the outset, but that this form of interaction has become even more prominent since the conclusion of the SAA.

Before the Schengen Association Agreement: unilateral adaptation and a “multilateral” compensation strategy

Prior to the conclusion of the SAA the regulatory boundary was formally not shifted in the relations with Switzerland. Surprisingly the absence of a formal obligation did not preclude the alignment of Swiss internal security legislation and law enforcement practices with the EU member states'. It has been argued previously that the alignment with European norms was the result of two parallel processes: firstly, the 'unilateral' emulation of European standards in Swiss law, and secondly, a compensation strategy aiming to enhance Swiss inclusion in bi- and multilateral law enforcement networks to make up for the formal exclusion from Schengen (Möckli 2001). Following Sandra Lavenex and Emek Uçarer I will argue that during the period lasting from the 1950s to 2004 the extension of the regulatory boundary was spurred by various informal modes of 'policy transfer' ranging from unilateral emulation (policy learning) to adaptation by negative externality (Lavenex & Uçarer 2004: 430).⁵ What is particularly interesting in the context of the present analysis is that policy transfer has not only affected the content of legislation but also organisational structures and practices.

The main change in Swiss immigration policy preceding the SAA was the alignment of Swiss policy with the EU's core differentiation between liberalised rules for intra-European migration coupled with a restrictive stance on the immigration of third country nationals. This policy change was a direct consequence of the conclusion of the bilateral sectoral agreement on the free movement of persons in 1999. The popular approval of this agreement came as a surprise, considering that fears about the liberalisation of intra-European immigration were one of the main reasons why the Swiss population had voted against joining the European Economic Area (EEA) in December 1992 (Koch & Lavenex 2007). Nowadays the agreement on the free movement of persons is considered the most beneficial agreement for the Swiss economy; this explains why most political parties, save the Swiss Peoples' Party, strongly supported its indefinite continuation during the February 2009 referendum campaign. The Swiss population has also expressed its support for the free movement of persons with the EU on numerous occasions by endorsing the extension of the regime to the new EU member states in September 2005 and February 2009. In sum, the changes made to the core principles of Swiss immigration policy were the result of the conclusion of the agreement on the free movement of persons, and not the outcome of a process of voluntary alignment.

⁵ Unilateral emulation emphasises the occurrence of voluntary 'learning' processes, during which one country takes over a policy solution that was previously successfully tested in another context. By contrast, adaptation by negative externality stresses the fact that EU policy measures can "alter the domestic interest constellations so that the costs of non-adaptation are perceived to be higher than those involved in a unilateral alignment with EU policy" (Lavenex & Uçarer 2004: 421).

In the area of asylum policy Switzerland was the first state in Europe to adopt the domestic legislation required to introduce the Dublin system. The Dublin system implements the general principle that the first member state or associated country that enables an asylum seeker or irregular immigrant to enter the joint territory shall be responsible for examining that person's asylum request, and in the case of a negative decision, to return the person to the country of origin (e.g. Lavenex 2001). As a result of the federal decree of 1990 the federal authorities refused the application of asylum seekers having transited through safe third countries and asylum seekers having lodged a first demand in a Dublin state. Switzerland was also the first European country to apply the concept of safe countries of origin. Asylum seekers from safe countries of origin can be returned to their country of origin without an analysis of the merits of the asylum demand (Brochmann & Lavenex 2002: 64). A further illustration of voluntary alignment with EU standards in the asylum domain occurred, when Switzerland followed the EU's approach of granting 'humanitarian or temporary protection' to the persons fleeing the violence in Kosovo.

In recent times Swiss asylum legislation has increasingly diverged from the EU's minimum standards, because Switzerland has adopted unilateral measures to curb asylum seeking. A case in point is the new Swiss rule stipulating that demands from asylum seekers without identity papers are treated as 'manifestly unfounded', unless the asylum seekers can convince the authorities in a first hearing that they have a valid asylum case (Maiani 2007: 823).⁶ One of the reasons why Switzerland adopted more restrictive asylum laws was the country's exclusion from the Dublin system prior to December 2008. It was feared that the asylum seekers having failed to obtain asylum in the EU would try a second time in Switzerland. In other words, the negative externality triggered by the exclusion from the Dublin system has been one of the driving factors behind the Swiss 'restriction spiral'.

Visa policy is a further illustration of alignment in response to a negative externality. In fact, the introduction of a 'uniform Schengen visa' for stays of less than three months had negative repercussions on tourism in Switzerland. In a nutshell, the problem was that the tourists needed two visa – one for Switzerland and one for the Schengen area - if they wanted to visit both territories on their trip to Europe. Since the costs associated with lodging two visa requests were considered disproportionate, many travel groups drove around Switzerland. This unsatisfactory situation led the Federal Council to declare in 2000 that the Schengen visa issued for nationals of Thailand and the Gulf States would be recognised as a valid visa for entering Switzerland. As a result of the unilateral policy alignment with the Schengen standards Switzerland did not have to make many changes in the area of visa policy, when it

⁶ Whether the more restrictive law in Switzerland proves to be an obstacle to the functioning of the Dublin system remains to be seen (Maiani 2007: 824).

became a Schengen member in December 2008.⁷ The SAA has, however, had an impact on the practices associated with the issuance of visa, because the consular personnel now has to consult the SIS and register the issued visa in the Visa Information System. Overall the argument could be advanced that Switzerland made the most important step, i.e. renouncing sovereignty over the issuance of national visa policy, before concluding the SAA in response to a negative externality, which had arisen owing to the exclusion from the visa regime.

Although criminal law has not been subject to explicit harmonisation efforts at the European level, a process of convergence can also be detected in this stronghold of national sovereignty. Convergence has been spurred by the case law of the European Court of Human Rights and the various conventions that the European states subscribed to in the framework of the Council of Europe and the EU (cf. e.g. Jörg & Swart 1995). That Switzerland has not remained aloof from the convergence trend is demonstrated by the fact that the 2002 efficiency bill shifted the responsibility for prosecuting certain crimes with an international or inter-cantonal dimension from the cantonal to the federal level. The transfer of competences to the federal was followed by the creation of the Federal Criminal Court in Bellinzona and the granting of additional resources to the central law enforcement authorities. The bill aiming to introduce a federal procedural criminal code, which will replace the twenty-six cantonal laws, represents a further step in the centralisation process. Criminal lawyers have argued that the most recent reform proposal mirrors reforms that are underway in most other federal countries in Europe (Riklin 2006). In sum, convergence in criminal law matters has been triggered by a combination of alignment as a result of the conclusion of international agreements and of ‘voluntary emulation’.

The intensification of international police cooperation has had an impact on the organisation of policing in Switzerland. Although formally the cantonal competence in police matters is unaffected by international cooperation, the conclusion of agreements in the policing domain has led to a strengthening of the central level (e.g. Aden 2001). Since international police agreements require designating one national interlocutor for the purpose of information exchange and assistance requests, a centralisation trend is observed in most countries. In Switzerland the central policing level was also strengthened, insofar as the 2002 efficiency bill introduced a number of federal crimes, for the prosecution of which a ‘new’ federal police authority was made responsible. The creation of the national Sirene office, i.e. the Swiss SIS-contact point, has further reinforced centralisation at the federal level. Heiner Busch has shown that the Swiss copied the organisational model of the German Bundeskriminalamt with

⁷ Some minor changes were required as regards the alignment of the Swiss visa list with that of the EU, nationals of Bolivia and of some small states became exempt from the visa obligation (Antigua and Barbuda, Bahamas, Barbados, Dominica, Fiji Islands, Grenada, Guyana, Jamaica, Kiribati, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Salomon Islands, Surinam, Trinidad and Tobago, Tuvalu) whereas South Africans now need a visa to enter Switzerland (Bundesrat 2004: 179)

a federal police office that combines investigatory powers in the case of federal crimes (Bundeskriminalpolizei) and intelligence gathering functions (Busch 2001). Once again in the policing domain there is no harmonised European model, but since the national practices are converging one could speak of the emergence of European policing standards.

In the area of law enforcement practice a number of similarities can be detected between the EU and Switzerland. For the most part, Switzerland has copied and emulated practices that were developed in other contexts. A case in point is the technologisation of law enforcement, which has been a trend all over Europe. It is a matter of fact that the European countries have been developing automated systems for storing finger prints, for exchanging information on sought and wanted persons and for strengthening the controls on their external borders. Irrespective of Schengen membership Switzerland was one of the first countries to introduce a central finger print data base, the Automated Fingerprint Identification System (AFIS). This data base contains the fingerprints of all criminals and, more controversially, of asylum seekers. In 1994 the Swiss police also introduced a system for registering all persons, for which a search warrant was issued, the so-called RIPOLO system. The police cooperation agreement concluded with Germany foresaw an exchange of information between the Swiss RIPOLO system and the German INPOL data system.

New law enforcement practices have also been introduced in the area of border control, insofar as the practices of executing 'random checks' and 'mobile controls' were relied on before the entry into force of the SAA. Mobile controls and random checks were necessary, because it was no longer possible to control all persons and goods in transit between the EU and Switzerland. In consequence only a minor percentage of goods and persons crossing the borders were checked in the past (about 1%) and about 40% of the personnel was affected to mobile controls (USIS 2003: 87-58). With the conclusion of the SAA the replacement of static control through mobile controls and random checks has become the official policy.

So far it has been argued that Swiss and EU legislation and working practices in the internal security domain have converged, although no explicit obligation to align legislation existed prior to the conclusion of the SAA. This process of convergence has been fostered by various forms of policy transfer combining in particular voluntary emulation and adaptation in response to negative externalities. In addition to these non-intended forms of policy transfer I also found some instances, in which policy transfer resulted from the conclusion of bi- and multilateral cooperation instruments. Those agreements explicitly demand the alignment of domestic legislation with international standards. As I will show in the following section a number of these agreements were concluded before the Schengen Implementing Convention was signed in the EU, whereas others were created at Swiss instigation during the 1990s to avert the negative consequences of exclusion.

Organisational boundary: Limited inclusion in law enforcement networks

To be able to exchange information and intelligence in an informal setting the European states created a number of transgovernmental networks. Among these groups feature the Club of Berne and the Club of Vienna (Lavenex 2006: 237, citing Bigo 1996 and Busch 1988). The consultations in aforementioned informal bodies have been continued to-date, for example the EU states meet with counter-parts from ‘like-minded states’ in the Counter Terrorism Group and the Task Force of Police Chiefs. It is interesting to note that Switzerland participated on an equal footing with most European states in these informal information exchange bodies inspite of its non-membership in the European Union. Alongside these informal information networks the European states also established formal consultation bodies, in which they have discussed the elaboration of new standards (regulation) and the implementation of existent rules. The modalities of Swiss participation in the formal groups vary on a case-to-case basis.

Among the standard-setting setting bodies one has to mention the pivotal role occupied by the networks established by the Council of Europe. It has been argued previously that Switzerland has been an active participant in the law enforcement fora created under the auspices of the Council of Europe, e.g. in the CAHAR Group dealing with asylum, the Committee on Migration, Refugees and Demography and the Pompidou Group (Lavenex 2006: 237). The first European standards on judicial cooperation in criminal matters were negotiated under the auspices of the Council of Europe. Indeed, judicial cooperation in criminal matters has been based on the Council of Europe Conventions on extradition (1957) and on mutual legal assistance (1959) for fifty years. The foundation of cooperation in the law enforcement domain under the auspices of the Council of Europe is the cooperation principle. The cooperation principle embodies two fundamental principles of criminal law, namely territoriality and sovereignty (Weyembergh 2004).⁸ In the framework of the Council of Europe the European Economic Community (EEC) member states could not rally support for abolishing the ‘cooperation principle’, which is why they moved their discussions on cooperation in the area of criminal law to alternative discussion fora.

One of these alternative venues was the Trevi Group, in the framework of which the EEC member states intensified their cooperation in the areas of terrorism and policing as of 1975. Trevi was organised in five working groups that met to discuss different aspects of internal security cooperation (fight against terrorism, police training/public order/hooliganism, organised crime/drugs trafficking, safety and security at nuclear installations, contingency

⁸ Other groups in which Swiss officials participated were the Intergovernmental Consultations on Asylum in Geneva and the Budapest Group. Both groups discussed measures to curb down on irregular immigration.

measures to deal with emergencies and immigration) (Bunyan 1993: 2). The consultations in the Trevi Group were conducted at the level of the Home/Interior Ministers as well as at the level of senior officials (Bunyan 1993: 1). During the course of its existence various non-member states were granted observer status in Trevi. The observers were not invited to participate in the discussions of the Trevi group, but they were briefed by the `troika' officials after the meeting. Sweden, Austria, Morocco, Norway, Switzerland, Finland, Canada and the USA were the privileged *Friends of Trevi* (Bunyan 1993: 1). Through these Trevi consultations Swiss officials were informed about what was going on in Trevi, and in particular, they learned about the launching of Schengen. What the Swiss did know at the time was that the Schengen Group would discontinue the practice of allowing non-member countries to attend its meetings

As time progressed cooperation in the law enforcement became increasingly formalised. Formalisation also meant that the discussions took place in institutionalised settings such as the Schengen and the Trevi Groups, from which Switzerland was excluded. The absence of a strong lobby for Swiss inclusion in Schengen comparable to the pressure exerted by the Nordic member states on behalf of Norway and Iceland led to the EU explicitly rejecting the Swiss demand for Schengen membership (Möckli 2001: 135). Swiss demands for association with Dublin were never formally rejected, but since the EU never followed up on its promise to include non-member states in the Dublin system, it implicitly reneged on its initial promise. To compensate for the exclusion from Schengen Switzerland sought to intensify its network of multilateral and bilateral contacts. At the multilateral (regional) level it instigated the *Alpensicherheitspartnerschaft*, which is a forum for law enforcement practitioners covering the ten 'Alpine' countries. In this informal consultation forum information is exchanged on various internal security problems (organised crime, irregular immigration etc). In spite of its ambitious objectives the *Alpensicherheitspartnerschaft* was not able to remedy all the disadvantages linked to the exclusion from Schengen. In particular the forum was not able to provide Switzerland with an access to the SIS information system.

At the bilateral level Switzerland concluded police cooperation and readmission agreements with the neighbouring countries. The police cooperation agreement concluded with Germany goes beyond the Schengen minimum standards. It has four main components: "joint analyses of the security situation, mutual notification of current focus areas in fighting crime, a commitment to looking out for mutual security interests and a right of initiative to improve mutual security" (Crowe 2005: 424). The agreement grants the police officers of the neighbouring country extensive rights such as the right to conduct preventive and deterrent surveillance operations without any geographical or temporal restrictions (Cremer 2000). Moreover, the agreement authorises police officers to apprehend criminals on the territory of the neighbouring country. The clauses on the deployment of police forces and of equipment to

assist the neighbouring country during major international events are also exemplary in their reach. The Swiss have asked for German assistance during the meetings of the World Economic Forum in Davos and the 2008 European Football Championship. The police agreements concluded with France and Italy are classical police cooperation agreements. They pursue the objective of enhancing the exchange of information between law enforcement officials in the border regions. To facilitate the exchange of information between the parties Joint Police Centres have been created in Chiasso and Geneva.⁹

Overall the pre-SAA period is characterised by the absence of a formal regulatory boundary shift. Notwithstanding the absence of a formal boundary shift, a high level of alignment of Swiss legislation with European standards can be ascertained. This process of alignment is the result of various forms of policy transfer ranging from voluntary emulation to adaptation in response to the occurrence of negative externalities. At the organisational level I have detected a differentiated pattern of inclusion and exclusion of Swiss authorities in various bi- and multilateral law enforcement cooperation fora. The section also made it clear that the increased formalisation of law enforcement cooperation reinforced the exclusionary dynamics in the relations with the non-member countries. For Switzerland the most immediate disadvantage of exclusion was that the country did not have access to the Dublin system or to the SIS. The following section will show that the SAA grants Switzerland access to aforementioned networks but only in return for submitting itself to a far ranging shift of the regulatory boundary, to which I will turn next.

A far ranging shift of the EU's regulatory boundary through the conclusion of the SAA

The far ranging shift of the regulatory boundary results from the fact that the associates have to take over the entire corpus of existent Schengen law as well as the further developments of the *acquis*. Schengen cooperation creates a border-free area while at the same time establishing a number of 'compensatory measures' in the areas of border control, police and judicial cooperation, visa policy and with respect to asylum policy. The precise content of the Schengen obligations is explicated in Schengen Executive Committee decisions, legal acts adopted by the EU Council and various soft law instruments. Schengen relevant legislation is nowadays mainly adopted on issues pertaining to border management, return policy, visa policy and police cooperation. In contrast hereto immigration and asylum policy as well as judicial cooperation have been moved to the EU's Area of Freedom, Security and Justice. The decision on the Schengen relevancy of a legal act is adopted by the EU Council based in

⁹ The Joint Police Centres bring together the various authorities involved in law enforcement cooperation in the border region (police, judicial authority, border guards) under one roof. The presence of all authorities facilitates cross-border law enforcement cooperation by eliminating the transaction costs related to coordination.

particular on political considerations.¹⁰ The uncertainty as to whether a measure will be defined as Schengen relevant or not constitutes a challenge for the associates, because they do not know whether a measure affects them or not (Wichmann 2006: 103-106).¹¹ During the negotiations on the SAA many Swiss policy makers expected that Schengen would remain relatively static.¹² This expectation has not come true considering that during the first four and a half years of Schengen membership the Swiss authorities have been notified of 78 Schengen relevant legal acts.¹³ Though most of the acts have merely required technical changes, some have been politically salient such as the creation of the Rapid Border Intervention Teams (RABIT), the Swedish Initiative on the facilitation of information exchange between the law enforcement authorities of the member states or the Returns Directive.

The SAA is the first occasion on which Switzerland has accepted submitting itself to the obligation to align its legislation with EU standards in a dynamic manner. The majority of the other EU-Switzerland bilateral agreements, save the agreement on air transport, are static.¹⁴ Integration treaties exert a high degree of adaptation pressure on the associate non-member states. The pressure manifests itself in an obligation to ‘update’ domestic legislation in a dynamic manner, to follow closely the case law developments in the EU and to adapt the law enforcement practices to the Schengen standards. The pressure results from the overarching objective of the SAA, which strives to achieve legal homogeneity across the entire Schengen territory. The application of uniform control standards is particularly important in the Schengen area, because the Schengen system as a whole is only as strong as its ‘weakest link’. To ensure that the non-member Schengen associates apply the standards correctly, three key measures have been put in place: firstly, a dynamic incorporation procedure which ensures that Swiss law is ‘updated’ to developments in the EU, secondly, a Schengen evaluation procedure that is carried out before the agreement enters into the operational phase, and thirdly, an information exchange system between the authorities.

Since the associate member states are not EU member states, the adoption of EU legislation does not have any legal effects on their domestic legal order; i.e. they are formally sovereign to decide whether they want to adopt a piece of EU law or not. This also means that an EU

¹⁰ In essence the EU Council has to choose whether it wants the United Kingdom and Ireland on board or whether it wants to include the three Schengen Associates in the discussions.

¹¹ Cf. the controversial question on the Schengen relevancy of the European Arrest Warrant in 2001.

¹² The author received this information in a number of interviews that she conducted in Brussels and Berne for her MA thesis on the SAA that she submitted at the College of Europe in May 2004.

¹³ The Swiss Integration Office keeps a thematic file where the relevant information can be found on <http://www.europa.admin.ch/themen/00500/00506/00510/00764/index> (accessed on 20 February 2009).

¹⁴ As a general rule the EU asks Switzerland to accept a dynamic incorporation obligation in the matters covered by an agreement, but Switzerland normally refuses. That this is a controversial issue comes to the fore in the Council Conclusions of 8 December 2008 on the relations with the EFTA states, in which the Council indicates that the static nature of the bilateral agreements has given rise to the “inconsistent application of agreements”; moreover, the Council demands that “any future bilateral agreements will have to ensure the “simultaneous application and interpretation of the constantly evolving *acquis*” (Council of the European Union 2008: 7-8).

legal act must be translated into Swiss implementing legislation, before it becomes binding on the Swiss authorities. An incorporation procedure has been put in place to ensure that EU legal acts are followed up in Swiss legislation (Cornu 2006; Epiney et al. 2007). In a first step, the Council notifies Switzerland about the adoption of a new Schengen relevant act. Once the official notification has been received, the Swiss government informs the Council of the constitutional requirements required to translate the EU act into Swiss law. In the case of minor (technical) adaptations the Federal Council can make the changes by executive decree, whilst political questions requiring the amendment of legislation are passed on to the Swiss Parliament. According to the Swiss Constitution decisions adopted by the Parliament are subject to an optional referendum. This means that if within 90 days after the parliamentary approval of a bill 50'000 signatures are collected, a referendum is held. In principle, Switzerland has to align its domestic legislation as soon as possible, but if a referendum is held, then the country is granted a two-year grace period to complete its constitutional procedures. Once the latter are completed, Switzerland and the EU complete an exchange of notes – an instrument of international law – confirming the application of the measure.

A second measure to ensure legal homogeneity is the Schengen evaluation procedure that takes place before the operational phase of Schengen cooperation begins, i.e. before the internal borders are lifted. The evaluation procedure ensures that the Schengen member states do not only adapt the necessary legislation, but that they also implement the standards in practice. Schengen evaluation is a long process, during which the applicant country has to fill out numerous questionnaires on the legislative and executive measures it has adopted to implement the Schengen *acquis*. In a second step the Council's Schengen Evaluation Committee examines 'sur place' whether the technical infrastructure is up-to-date and the rules are correctly applied. The Schengen evaluation process of Switzerland was completed in fall 2008. The favourable opinion of the Schengen Evaluation Committee preceded the Council decision of 27 November 2008, based on which the internal borders with Switzerland were lifted as of 12 December 2008. The establishment of information exchange systems between the Courts in the EU and Switzerland and between the administrative entities in both territories is the third measure for ensuring legal homogeneity across the entire territory.

Together these various measures exert a high adaptation pressure on the associate member states, because they are backed by the 'termination clause'. The latter stipulates that in the case of persistent differences in legislation, administrative practices and case law between the EU and an associate state, the SAA can be terminated after three months, if the parties do not reach an agreement in the Mixed Committee within ninety days. The termination clause adds an element of 'uncertainty' in the relationship between the EU and Switzerland, because no one knows what will happen if Switzerland refuses to adopt a piece of implementing legislation, for instance as a consequence of a negative referendum outcome. The uncertainty

arises, because no judicial authority has been established that is responsible for solving disputes between the parties. Dispute settlement is ultimately a competence of the Schengen Mixed Committee, which is composed of government representatives from Switzerland and the EU. The latter decides whether ‘persistent differences’ in application can be observed and whether these differences justify the termination of the agreement or whether alternative solutions allowing for the continuation of the agreement can be found. A first test for the compatibility of the dynamic incorporation procedure and Swiss direct democracy is scheduled for 17 May 2009. To-date there are only speculations on how the EU will react if the Swiss population says ‘no’ to the parliament’s bill of 13 June 2008 implementing the EU Council’s decision on the introduction of biometric passports in the Schengen area.

Overall the preceding section has shown that the degree of the regulatory boundary shift and the degree of adaptation pressure is high in Schengen related matters. It is against the backdrop of this unprecedented shift of the regulatory boundary that I will now analyse the EU’s decision to open policy making structures and the Schengen law enforcement networks up to the participation of the associate countries.

Organisational openings: access to decision-shaping and participation in regulatory and implementation networks

The most far reaching shift of the organisational boundary has taken place by the granting of far-reaching decision-shaping rights to the associate states. Although decision-shaping falls short of access to decision-making, it offers the associate states a number of venues for influencing EU policy making. The participation rights are most extensive at the preparatory or pre-pipeline stage of policy formulation, during which the Commission is obliged to consult the EFTA states experts when drawing up Schengen relevant legislation¹⁵. These consultations normally take place in expert Working Groups, in the framework of which the Commission discusses policy proposals with representatives from the member states. At this stage of the policy making process no formal voting occurs and the associates can participate in the discussions on equal footing with the representative of the EU member states.

Decision shaping rights are also granted to the associate states, when the implementing measures are drawn up by the Commission in the comitology committees. In the Schengen domain the comitology committees fulfil highly technical tasks, for instance they are responsible for elaborating the technical specifications for the biometric identifiers on the

¹⁵ The expert groups on the principle of availability, on data protection and on the common borders manual are mentioned in this context (Gutzwiller 2006: 251-252).

Schengen visa or for developing the IT infrastructure for the operation of SIS II.¹⁶ These technical meetings are normally attended by the IT or fingerprint specialists from the member state Interior Ministries. The interviewees told me that in these technical meetings the best technical solution counts more than the nationality of an expert. While the participation rights of the associates during the comitology stage are extensive, they fall short of participation in decision-making. This means that when a comitology committee proceeds to voting on an implementing measure, the associate states have to leave the meeting room.¹⁷ The decision-shaping rights granted at the early stage of policy making and during comitology can also be found in the EEA agreement.

What makes the SAA unique is that it grants the associate states an “active observer status” in the Council working bodies at the various levels of seniority. *De facto* the associate states have, therefore, been granted access to the core ‘legislative body’ in the JHA domain, the Council of the European Union. Formally the associates attend the meetings of the Council in Mixed Committee (COMIX) formation. In COMIX meetings the EU-25 (27 minus the UK and Ireland) and the Schengen associates discuss Schengen relevant policy proposals. For the associate states the possibility to participate in the COMIX Working Groups is the most important venue for exerting influence, because it is at the technical stage that EU legislation is shaped. The COMIX Working Groups are composed of senior law enforcement practitioners and of officials from the Ministries of Interior and Justice of the Schengen states.¹⁸ Since the Working Groups normally discuss the technical aspects of the policy proposals, expertise and persuasion skills are key factors for exerting influence during the discussions. Apparently the absence of voting rights does not constitute a handicap at this stage of the process, because voting is rare and decisions are normally taken by consensus.¹⁹

When the proposals leave the technical stage and are fed into the political Council machinery, the associate states’ influence decreases. At the SCIFA (Strategic Committee on Immigration, Frontiers and Asylum questions), Article 36 Committee (senior national interior ministry officials), Coreper (Committee of Permanent Representatives) and Council meetings the political aspects of the policy proposal are discussed. It is at these stages of decision-making that the absence of voting rights can become a disadvantage.²⁰ At the political level the associates predominantly rely on informal lobbying strategies, for example, alliance building with ‘like-minded’ member states to make their voice heard. The choice of the allies depends

¹⁶ Swiss experts participate in the following comitology meetings: VIS Committee, SIS II Committee, SIRENE Handbook, ARGO, data protection, Schengen Border Code, Dublin Committee and Eurodac Committee (Gutzwiller 2006: 250-252).

¹⁷ Over time the Commission legal service has become more restrictive on granting the EFTA states observer status in the various Committees, but there are regular discussions on how narrow or broad the decision-shaping rights are to be interpreted ([Interview Borgvad](#)).

¹⁸ The associate states have been granted access to sixteen Council Working Groups (Gutzwiller 2006).

¹⁹ This observation was made by all of our interview partners in Switzerland and Norway ([Ref](#)).

²⁰ Interview information ([Interview Borgvad](#)).

on the issue under discussions; whereas in some cases the associates liaise with neighbouring countries (e.g. Nordic countries for Norway and Iceland), on other occasions they bond with states from further afield. For instance, when the original version of the Swedish Initiative on enhancing the exchange of information between law enforcement authorities was negotiated in the Council, Switzerland found allies in the United Kingdom, Ireland and Denmark, which were also opposed to surrendering sovereign rights to the EU in policing matters.²¹ The four countries opposed the proposal for different reasons, but the result of the joint intervention was a watering down of the initial proposal.²²

While the main change introduced by the SAA was the opening of the legislative working structures to Switzerland, the agreement has also enabled Switzerland to become a member in numerous regulatory and implementation networks. To my knowledge there are no 'pure' regulatory networks in the JHA domain, but a number of implementation networks have also been endowed with regulatory functions. A case in point is the Dublin Contact Committee, in the framework of which the officials in charge of Dublin cooperation in the member states, come together to discuss issues pertaining to implementation. When the officials discover that the application of the Dublin 'hierarchy of responsibility' leads to a contradictory outcome, they decide on a 'common line to take'. Aforementioned Dublin Contact Committee decision thereafter applies to all cases in which comparable facts are observed. Put differently, the soft law standards established by the Dublin Contact Committee have a regulatory impact on the future application of the Dublin Convention.²³ No voting takes place at these expert meetings which is why the associate states participate on an equal footing.

Access to the Schengen implementation networks has been the most immediate benefit of Swiss Schengen membership. The conclusion of the SAA has meant that Switzerland now has access to the Schengen Information System (SIS), the Visa Information System (VIS) and the Eurodac finger print system. In the Schengen area most information exchange nowadays takes place through these information systems, while the alternative systems of information exchange, for example through Interpol, are no longer used for cases involving Schengen members. For the Swiss police the possibility to access SIS is the key advantage of Schengen, in that it allows the country to participate in the real-time exchange of information on persons that are apprehended or sought for having committed a crime. Since August 2008 Switzerland has been connected to the SIS, and according to the Swiss law enforcement authorities the experiences with the new system are entirely positive.²⁴

²¹ Interview information (Interview Reto Gasser).

²² Switzerland insisted on maintaining the principle of dual criminality for carrying out acts of sovereignty (observation etc) on the territory of another country. The distinction between tax evasion and tax fraud has sofar allowed Switzerland to uphold key elements of banking secrecy (Pfenninger 2007).

²³ Information received in interview with Reto Haberstich.

²⁴ On a first report see <http://www.tagesanzeiger.ch/schweiz/standard/SchengenSystem-funktioniert--55-Kriminelle-geschnappt/story/13816850> (last accessed 22 February 2009).

As regards access to the Dublin system a separate agreement had to be negotiated, so that Switzerland could become associated with the Dublin regulation. Since 12 December 2008 Switzerland has been an operational member of the Dublin system, and thus, it has been able to access Eurodac. The latter contains the finger prints of all asylum seekers that have lodged an asylum demand in the Dublin area. According to the first reports of the Federal Office of Migration the experiences with Eurodac have been positive.²⁵ According to an official report 997 hits occurred, and 140 asylum seekers were readmitted to another Dublin state during the first four months of Dublin membership. In return Switzerland has been asked to take charge of 52 asylum seekers. The ‘material’ benefits associated with access to SIS and the Dublin system were the main arguments advanced in favour of Swiss Schengen membership during the referendum campaign. The SAA has not only allowed for Swiss participation in the Schengen networks, it has also acted as a catalyst for formalising the relations with further JHA implementation networks, e.g. in the framework of the agencies.

During the last months Switzerland has begun to negotiate an agreement on the Swiss association with the EU’s Agency for the Management of External borders (Frontex). The association agreement specifies the Swiss modalities of association with Frontex, i.e. the financial contribution as well as all other rights and obligations. As the Frontex regulation 2007/2004 constitutes a further development of the border management provisions of the Schengen *acquis*, Swiss association with Frontex is a direct consequence of the entry into force of the SAA. As an associate Frontex member Switzerland gains access to a whole range of Frontex activities. On the one hand, the head of the Swiss Border Guards will be able to participate in the meetings of the Frontex management board as an ‘active observer’ with limited voting rights. On the other hand, Swiss border guard officials will in the future be able to take part in the Frontex joint training sessions. Moreover, they will gain access to Frontex’s joint risk assessments, and Switzerland will be invited to contribute to the joint Frontex operations. Finally, when the RABIT regulation is incorporated into Swiss law, the country will contribute personnel and infrastructure to the multinational border guard teams. According to an interviewee the main advantage of association with Frontex is that Swiss border guard officials are provided with an opportunity to expand their personal contact networks with homologues in the member states.²⁶

The conclusion of cooperation agreements with Europol, the European Police Office, and Eurojust, the European Union’s Judicial Cooperation Unit, is not a direct consequence of the signature of the SAA. In other words, no explicit linkage was made between the SAA and the conclusion of cooperation agreements with the EU’s coordinating bodies. Though officially

²⁵ http://tagesschau.sf.tv/nachrichten/archiv/2009/04/07/schweiz/positive_bilanz_im_asylbereich (accessed 16 April 2009).

²⁶ Mentioned as one of the main advantages by a Swiss interview partner (Interview Contin)

the two are not linked, it is interesting to note that the EU waited with the conclusion of the cooperation agreements, until the negotiations on the SAA were completed. Whereas the Europol cooperation agreement was signed on the same day as the SAA was concluded, Eurojust only opened negotiations with Switzerland pursuant to the signature of the SAA. The cooperation agreements define the rules for exchanging personal and strategic information between Switzerland and the EU coordinating bodies. In the case of Eurojust the cooperation agreement formalises the contacts between the Federal Office of Justice and Eurojust, which have existed for many years. It is a fact that Eurojust has asked Switzerland for mutual legal assistance in a number of cases in the past (examples cf. Eurojust 2008). Finally, the cooperation agreements allow the partner country to send a liaison officer to the Europol/Eurojust headquarters in the Hague. Switzerland has sent a liaison officer to Europol but not to Eurojust.²⁷ The cooperation agreements contribute to familiarising the parties with each others' legal/policing system and they allow for an exchange of best practices among the participants. Finally, they contribute to enhancing the personal contact networks between law enforcement officials that are crucial for their every day work.

The preceding sections have shown that the far ranging shift of the regulatory boundary in the Schengen domain has been accompanied by an opening of policy-making bodies and of JHA implementation networks. The qualitative shift observed with respect to the expansion of the regulatory boundary has, therefore, also had an impact on the degree of inclusion in the JHA networks. One may, therefore, conclude from this analysis of the situation before and after the conclusion of the SAA that there is a parallelism in the degree to which the EU shifts the regulatory and the organisational boundary in the internal security domain.

It is important to note that this observation on a parallelism between the two types of boundary shift in the Schengen domain cannot readily be exported to other policy areas. It is, for instance, a matter of fact that the EEA, which is another example of an integration treaty, does not offer Norway, Iceland and Liechtenstein the same extent of decision-shaping rights. Schengen association is therefore an exceptional arrangement that was devised in response to a specific problem at a particular point in time. Indeed, the first SAAs were established at a time when Schengen was still a purely "intergovernmental"²⁸ framework of cooperation, and it was developed to allow the countries participating in the Nordic Passport Union to travel freely in the Schengen zone (on this point see Bracke 2003). There is no doubt that it was only due to this Nordic precedent, which was established at the insistence of the Nordic EU member states, that Switzerland could demand such a favourable arrangement.

²⁷ Factsheet on the Eurojust cooperation agreement retrieved from <http://www.europa.admin.ch/themen/00499/00503/00683/index.html?lang=de> (accessed 22 February 2009).

²⁸ In 1995 Sweden and Finland joined the EU and on 19 December 1996 Denmark joined Schengen. On the same day the first Schengen association agreements with the member states of the Nordic Passport Union entered into force. At this time Schengen was not yet incorporated into EU law.

Conclusions

This paper has argued that the SAA has symbolised a qualitative shift in the bilateral relations between the EU and Switzerland by moving the interactions from static intergovernmental cooperation in technical matters towards integration in a dynamic cooperation framework that touches upon core areas of state sovereignty. The existence of such a qualitative shift was demonstrated by comparing the situation before and after the conclusion of the SAA. Whereas the regulatory boundary was formally not affected in the pre-SAA era, various forms of policy transfer led to an alignment of Swiss legislation with EU standards. In the pre-SAA period the organisational boundary was only ‘tentatively’ shifted by allowing for Swiss inclusion in a number of intergovernmental and trans-governmental networks. With the entry into force of the SAA the regulatory boundary was formally shifted towards Switzerland, and the opportunities for organisational inclusion multiplied. From these observations I have concluded that in the Schengen domain there is a parallelism between the shift of the regulatory and the organisational boundary.

The contribution has also demonstrated that flexible integration in the internal security domain entails a number of advantages and challenges for Switzerland. As regards the former one should mention that participation in Schengen allows for expanding the formal and informal contacts between the law enforcement officials working in Switzerland and their homologues in the EU member states. These contacts facilitate the every day contacts between the Swiss authorities and their EU partners. Moreover, Schengen association has allowed Swiss officials to make first experiences with the functioning of the Brussels machinery. Although everyone underlines the positive experiences the parties have made with the SAA (Council of the European Union 2008: 7), there are also some challenges. In this context, one has to mention in particular the upcoming referendum on the introduction of biometric passports, which shows that it is difficult to reconcile Swiss direct democracy with the legal homogeneity criterion underlying the Schengen territory.

A final caveat needs to be added, when it comes to generalising the findings on ‘flexible integration’ formulated in the case study. First of all, there is no other EU policy area in which so far reaching concessions have been made to non-member states, and one may doubt whether the enlarged EU will ever make a comparable offer to a non-member state in the future (a similar reflection can be found in a recent report on the EEA, cf. Júlíusdóttir & Wallis 2007). A second impediment to exporting the Schengen model to other settings is that it relies on the fulfilment of a series of demanding background conditions. In particular one should not forget that the emergence of flexible integration in the area of internal security is

contingent on the fulfilment of demanding background conditions, such as a symmetric problem constellation, the absence of securitisation in the relations with the EU, and a high level of trust. Moreover, the third country has to have the administrative capacity to effectively participate in the EU's working structures and to implement the Schengen standards. These enabling background conditions make it difficult to imagine that the Schengen model of 'flexible integration' could readily be exported beyond the circle of the EFTA member states, to which it presently applies.

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