

Application of the CJEU case law via EU's agreements

Case of EEA

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Structure of today's lecture

- > What is the EEA?
- > EEA and homogeneity
- > CJEU's views on homogeneity
- > CJEU caselaw and homogeneity
- > Judicial dialogue in the EEA
- > Conclusion



What is the EEA?

- > Established by the Agreement on the European Economic Area from 1992
- > Objective: Creating a homogeneous European Economic Area
- > Scope:
 - > free movement of goods, persons, services and capital
 - > competition, state aid, government procurement
 - > social policy, the environment, education and research and development



Main features of the EEA Agreement

- > EEA Agreement = internal market
- > EEA ≠ customs union, common agriculture and fisheries policies, justice and home affairs, common foreign policy etc
- > EEA ≠ direct affect or supremacy for EEA EFTA States
- > Two pillar structure: Monitoring, enforcement and judicial control rests with each pillar (EU and EFTA pillars)
- > Dynamic agreement: The EEA is continuously updated to include new EU *internal market* legislation



EEA: The principle of homogeneity

- > Principle of homogeneity: overriding principle of the EEA Agreement
- > Homogeneity: The same rules across the EEA and applied uniformly
- > How is this achieved:
 - > EEA reproduces relevant provisions of the TFEU
 - > EU internal market legislations included in Annexes to the EEA Agreement and continuously updated
 - > Monitoring and enforcement - European Commission/ EFTA Surveillance Authority
 - > Judicial control – CJEU and the EFTA Court



CJEU's view on homogeneity

- > Opinion 1/91
 - > Identical provisions are not sufficient to achieve homogeneity
 - > Divergence in “aims and context” is an obstacle to achieving homogeneity
 - > ECJ has “exclusive jurisdiction” over the Community’s legal order
 - > The proposed EEA Court was not compatible with Community law
- > Opinion 1/92
 - > Divergence in “aim and context” persist
 - > Nevertheless, the revised provisions on dispute settlement were considered to be compatible with Community law
- > Ospelt (case C-452/01)
 - > It is for the Court to ensure that provisions in EEA that are identical to Community law are applied uniformly within the EEA



CJEU caselaw and homogeneity

- > CJEU caselaw essential component of homogeneity
- > Article 6 EEA
 - > EEA law shall be applied in conformity with ECJ caselaw decided before date of signature
- > Article 3.2 Surveillance and Court Agreement
 - > For later caselaw, the EFTA Court shall “pay due account” to rulings after the date of signature
- > Caselaw of the EFTA Court
 - > Persistently refers to CJEU caselaw
 - > Restemark (Case E-1/94)
 - > L’Oreal (Case E-9/07)



Judicial dialogue in the EEA

- > Two courts apply EEA law at the international level
- > Possibility of divergence?
 - > CJEU goes first
 - > EFTA Court usually follows precedents by CJEU
 - > Rare exceptions: Kellogs
 - > EFTA Court goes first
 - > May influence later CJEU's caselaw
 - Kellogg's case (E-3/00)
 - > May revise its case-law to align with later CJEU case law
 - L'Oreal (E-9/07)
 - > Different interpretations lead to identical results (different routes to the same destination)
 - Jabbi (Case E-28/15)



Addressing divergence

- > So far – differences in interpretation have not undermined homogeneity
 - > EFTA Court may later recalibrate its case law
 - > Court may apply different reasoning/legal basis to arrive at the same substantive conclusion (Jabbi)
- > What if divergences in case-law persists?
 - > Article 105 EEA
 - > Article 111 EEA
 - > Contracting Parties may request a ruling from the CJEU
 - > Provisions have never been used



Conclusion

- > Two international courts are entrusted with ensuring homogeneity within the EEA
- > These two courts are independent and equal
- > Despite divergence in “aims and context” and two separate courts, homogeneity has been maintained
- > Is the CJEU the “authoritative interpreter” of EEA law?
- > Is the CJEU the final arbiter of EEA law?

