The Internal Market beyond the EU: the EEA and Switzerland

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The Internal Market of the EU

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Christa Tobler/
Jacques Beglinger,
Essential EU Law in Charts,
Budapest 2010

www.eur-charts.eu
Extension of the Internal Market

Four freedoms and their meaning in relations with third countries

- In principle, the Internal Market of the EU works only within the EU, to the exclusion of third countries.
- In some cases, (part of) the freedoms have been extended to third countries through agreements.
- The briefing paper looks specifically at the EEA EFTA States and at Switzerland. In how far do the four freedoms exist in relation to these countries?
The Internal Market beyond the EU: the EEA and Switzerland

The aim of the briefing paper

• To look at the functioning of the extended Internal Market.
• In doing so, to examine two different models of integration.
• To identify challenges.
• To point to ways to enhance the performance of the extended Internal Market.
The relevant agreements

Two rather different legal frameworks

• The EEA:
  – A multilateral legal framework.
  – Based on one agreement, namely the European Economic Area Agreement of 1992.

• Switzerland:
  – A bilateral legal framework.
  – Based on more than 120 agreements, 20 of which form the core of the so-called “bilateral law”.
Different degrees of extension

Almost encompassing vs. quite selective

• EEA - almost encompassing:
  All four freedoms, though with certain limits (goods).

• Bilateral law with Switzerland - quite selective:
  – Goods: essentially for industrial and agricultural goods.
  – Persons: for natural persons only, to the exclusion of companies and firms;
  – Services: for both natural and legal persons, but quite limited (only for certain services and only for a limited time per year; special derogation possibilities);
  – Capital: in principle not covered.
Temporal aspects
Highly dynamic vs. essentially static

• EEA - highly dynamic:
  Originally based on European Community law pre 1992, but since then on the level of secondary law continually updated by the Joint Committee.

• Bilateral law with Switzerland - essentially static:
  – Based on the law in force at the time of the signature of the agreements.
  – Limited possibilities of adaptation by some Joint Committees.
  – Only gradual extension of the Agreement on the free movement of persons to the 2004 and 2007 Member States.
Influence of the third countries on EU law relevant for the extension

Some vs. almost none

- The issue: secondary law adopted by the EU may become part of the extension of the Internal Market to third countries. Do these countries have an influence on its adoption and/or content?
- EEA EFTA States: no decision-making, but a certain degree of decision-shaping.
- Influence of Switzerland: only in very few contexts a bit of decision-shaping.
The meaning of free movement (1)

Same vs. different interpretations

- EEA: essentially the same interpretation by the European Court of Justice (ECJ) and the EFTA Court.
- Bilateral law with Switzerland - different interpretations may be possible; e.g.:
  - In some agreements: time limits to homogenous interpretation.
  - Interpretation different from EU law due a different framework; e.g. goods: the Cassis de Dijon principle is not applied by the Swiss Federal Tribunal.
  - Important questions are open or debated; e.g. persons and services: prohibitions of discrimination on grounds of nationality and of restrictions? Specifically: acceptability of certain flanking measures? Rights of service recipients?
  - Danger of divergent interpretations on the two sides.
Management

Relatively cumbersome vs. very cumbersome

• EEA - in certain respects relatively cumbersome:
  Due to the challenges presented by the highly dynamic nature of EEA law in particular for the Joint Committee (may lead to considerable time gaps).

• Bilateral law with Switzerland - very cumbersome:
  Due in particular to the large number of Joint Committees, which may lead to problems; e.g.:
  – Relatively few meetings of the Joint Committees.
  – Lack of communication between the different Committees.
  – Slow adaptation of the annexes (if at all - no duty to adapt).
Monitoring and enforcement

Common mechanism vs. unilateral mechanisms

• EEA: the usual elements of EU law applied in a two pillar system (Commission/ESA as watchdogs, national courts and ECJ/EFTA Court).

• Bilateral law with Switzerland - in general no common system:
  – In principle, the national authorities and courts are in charge.
  – May lead to different views on important issues (e.g. direct effect).
  – Procedures before the ECJ only within the EU; e.g.:
    • Preliminary ruling procedure; e.g. *Grimme* (2009).
    • Annulment procedure; e.g. *Champagne* (2007).
    • Enforcement procedure.
Overall findings

Part of the Internal Market vs. selective participation

- EEA EFTA States - “in principle a true part of the Internal Market”:
  - Based on a well-functioning, if somewhat cumbersome legal system.
  - Free movement plus other policies that complete the internal market (e.g. competition, company and financial services law).

- Bilateral law with Switzerland - “more and more integrated”, but still quite selectively:
  - Based on a very complex and quite cumbersome legal system that in a number of respects falls short of encompassing and full free movement.
  - Reluctant to add policies that complete the internal market.
Recommendations (1)

Concerning the EEA - relatively few

- Notification by the Commission of legislative proposals that fall within the scope of the EEA.
- Better involvement of the EEA EFTA countries in the decision-shaping process and in the implementation phase.
- Updating the EEA Agreement itself in view of the developments of EU law.
Recommendations (1)

Concerning Switzerland

• Comparatively more challenges.
• Accordingly, more recommendations; e.g.:
  – Creating awareness as well as political will for better cooperation and intensification of relations (Switzerland: half-direct democracy with referenda!).
  – Involving Switzerland more in the decision-shaping process.
  – Holding more meetings of the Joint Committees (JC).
  – Strengthening of the relations between the JC and the EU institutions.
  – Notification by the Commission of legislative proposals that fall within the scope of the bilateral law.
  – Ideally: create a common enforcement system.
Thank you for your attention!

For further information

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