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Dealing with the EEA Agreement: Where is the Beef?

University of Oslo, Gamle Festsal, 6 October 2015

1.

“Where is the beef” is an American catchphrase which goes back to a slogan for the fast food chain *Wendy’s*. The commercial which was launched in 1984 attacked competitors *Mc Donald’s* and *Burger King* for offering big buns and a small beef patty. In the primaries of the 1984 presidential campaign, Democratic candidate Walter Mondale, a Minnesotan with Norwegian roots, used the phrase to characterise the economic program of Senator Gary Hart as being without substance. Hart replied by saying “Here is the beef!” Meanwhile, “where is the beef?” is an aphorism questioning the substance, the content of an idea.

In an EEA context, the “beef” is single market law. The Court has emphasised more than once that the EEA Agreement has created a market. It has also rendered a number of landmark judgments on EEA single market law. In the field of fundamental freedoms, one may mention *Kellogg’s* (nutritional need and precautionary principle in food law), *Fokus Bank* (taxation of outbound dividends) or *Olsen* (taxation of the beneficiaries of a trust). In competition and State aid law, *Husbanken II* (State guarantee for a publicly owned bank), *LO* (relationship between collective bargaining and antitrust law) and *Norway Post* (standard of judicial review) are important examples. Central judgments concerning harmonised economic law are *Eidesund* and *Langeland* (no obligation of the transferor of a business to pay premiums into a supplementary pension scheme transferred to the purchaser), *Maglite/L’Oréal* (international exhaustion of trademark rights), *Merck v Paranova* (parallel importer of pharmaceuticals

adding his own design), *Periscopus* (adjustment of bid price with reference to “market price”), *Inconsult* (website as a durable medium), the *DB Schenker* cases (public access to documents), or *Icesave* (no State liability if a deposit guarantee fund is unable to pay in a systemic crisis).

2.

With these (and other) judgments, the Court has exercised considerable influence on the development of EU single market law. Altogether, the ECJ, its Advocates General and the General Court have made some 170 references to the Court's case law. There are also a considerable number of references by high courts in the EU and even in the non-EEA member state Switzerland.

3.

It is all the more surprising that academic literature in the EFTA pillar has barely dealt with the substance of these cases. Exceptions exist in the field of taxation and, to a certain extent, in labour law. But as a rule, authors from the EEA/EFTA States tend to limit themselves to address institutional and constitutional matters. The usual discourse turns around issues such as legitimisation and the distribution of powers, national sovereignty vs. supranationality, direct effect, primacy and State liability, conform interpretation and provisional applicability of EEA law, fundamental rights and most recently the EU Charter, the independence of the Court vis-à-vis the ECJ, or methods of interpretation including the accusation of judicial activism. A special focus lies on the distribution of powers between the Court and the national supreme courts under the preliminary reference procedure. Most of these questions have been clarified by the Court.

4.

After more than 20 years, commentators can no more limit themselves to discussing these issues and to complaining that the Court is stealing the EEA/EFTA States' sovereignty. The focus must be on what the EEA Agreement means for citizens and market actors (entrepreneurs, workers, investors, dealers,

consumers) in both EEA pillars. This is more challenging than the eternal talk about sovereignty and institutions.

5.

With this, economics become relevant. Examples are the different schools of thought in competition economics (Harvard vs. Chicago, Post-Chicago etc. [*LO*; *Hegelstad v Hydro Texaco*; *HOB-vín I*; *Posten Norge*; *Abelia*; *Wow Air*]), the principle of liability as a constituent element of a market economy (liability vs. too big to fail, bailing out vs. bailing in banks [*Icesave*]); the relevant consumer model (circumspect or illiterate [*EFTA Court Inconsult vs EC Content Services*]); the relevant contractual model (liberal or social [*Icelandic loan indexation cases*]); market rule or mandatory bid rule in capital market law (*Periscopos*); relationship between the fundamental freedoms and collective bargaining (*Holship*, pending); relationship between the EEA competition rules and collective bargaining (*LO*, *Holship* [pending]).

6.

In the burger world, *Wendy's* answered the question posed at the beginning after 27 years by declaring "Here's the beef!" The EEA Agreement is now 22 years old. The EEA/EFTA Community has five more years to answer the beef question in the context of EEA law.