

Foreword

A Tribute to Professor John Usher

*David Edward**

This book is a tribute to the memory of Professor John Usher, who died in September 2008 at the tragically early age of 63. His death deprived us of one of the outstanding scholars in the field of European Union law. He was a man of truly encyclopaedic learning, always ready to share his knowledge with colleagues and students. ‘More than once’, said one of them, ‘I would ask him if he had heard of a 20-year-old judgment from an obscure court of first instance in an obscure provincial corner of France. Five minutes later he would be at the door with a copy of the judgment—plus an article he had written on it’.

John’s outward style was modest and unassuming and, at first, he may have seemed very serious—which he was, about things that mattered. But he had a wry sense of humour and he shared with his wife, Jean, a deep knowledge and love of music. He was an accomplished cellist and was happiest with his family and friends, making music, going to a concert or walking in the country. John was born in Hyde, Cheshire, and never lost the accents of his homeland. After graduating in law at the University of Newcastle in 1966, he won a scholarship to study French private law at the University of Nancy. He then went to the University of Exeter as assistant to Professor Dominic Lasok. At that time, Edinburgh and Exeter were the only universities in the UK that took seriously the study of European law and institutions.

Soon after the UK joined the EEC, John took a research post at the Court of Justice in Luxembourg, and was quickly recruited by the first British Advocate General, Jean Pierre Warner QC, as his Legal Secretary. With the British judge, Lord Mackenzie-Stuart, Warner had the task of introducing our conceptions of law to rather suspicious continental colleagues and of introducing EEC law to an equally suspicious British audience. The Advocate General has the privilege of setting out his own view of the law in his own way. Warner’s outstanding contribution was to explain, and embed in European jurisprudence, British conceptions of procedural fairness. John’s industry and knowledge of comparative law provided essential support behind the scenes. At that time, most of the work of the European Court concerned technical problems of customs, restrictions on imports and exports, and the minutiae of the Common Agricultural Policy. Few academics found these topics entrancing, but they were meat and drink to John Usher.

* Professor Emeritus, University of Edinburgh; Judge of the European Court of First Instance 1989–92, and of the Court of Justice 1992–2004. The first part of this Tribute is taken from the obituary written for *The Scotsman*. Permission to reproduce it here is gratefully acknowledged.

He said of himself that he was a black-letter lawyer and he made himself a world expert in aspects of European law that call for constant attention to detail and precise knowledge of mind-numbing texts in several languages—agriculture, company law and all aspects of tax and finance.

He brought these skills to Edinburgh in 1978 as Lecturer in the Centre of European Governmental Studies directed by JDB Mitchell, the Salvesen Professor of European Institutions. Mitchell, who had been the pioneer of European studies in the UK, died suddenly in 1980, just when financial constraints had begun to bite. John Usher had the responsibility of maintaining the work and reputation of the Centre (now the Europa Institute), including an annual training course for the Civil Service College. From Edinburgh, John went briefly to University College London until, in 1986, he succeeded Lasok in the Chair of European Law at Exeter. There his national and international reputation became firmly established. He published extensively on his favourite technical topics and also on wider aspects of European law, never forgetting that students need accessible books with clear exposition.

He was constantly in demand as a Visiting Professor, a speaker at conferences and, perhaps especially, as a specialist adviser to parliaments, governments and companies in Britain, Europe and North America. In addition to his teaching in this country, he was a Professor at the College of Europe in Bruges for over 20 years. His scholarly and practical distinction was fittingly recognized when he was called to the English Bar and simultaneously elected an honorary Bencher of Lincoln's Inn in 1993, and elected a Fellow of the Royal Society of Edinburgh in 1998.

Edinburgh was happy to be able to lure him back as Salvesen Professor of European Institutions and Director of the Europa Institute in 1995. He maintained the Institute's 'town and gown' tradition and was unfailingly generous in encouraging the work and ideas of younger colleagues. Almost immediately on his return he served with quiet efficiency a three-year term as Dean of Law, never shirking his teaching load. He had heroically undertaken another term as Dean when Exeter in their turn made him an offer he could not refuse. He returned to Exeter in 2004, and was about to take early retirement when leukaemia struck. John is survived by his wife, Jean, and two sons, one of whom was born in Luxembourg. The bureaucrats said he could not be called Alastair because that was not a saint's name. John won the battle, thereby anticipating by about 25 years the ruling of the European Court of Justice in *Garcia Avello*.¹

The essays in this book have been written by each contributor as a personal tribute to John, and they reflect the extraordinary range of his interests and knowledge. The focus of the book as a whole is the internal market, its context, its workings and its place in the development towards economic union—the topic with which John was most closely associated.

¹ Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-11613.

John's professional career began and ended in times of crisis. By the time he went to the Court in Luxembourg, the brief euphoria that followed British accession had been extinguished by the first oil crisis in October 1973. At the time of his death, the Lisbon Treaty had been signed, but it had been rejected in the first Irish referendum and there was still some doubt as to whether other Member States would refuse to ratify it. Lehman Brothers filed for bankruptcy two days after John's death. That crisis continues.

Between 1973 and 2008, there were many other moments of crisis when the Community and later the Union seemed to stand on the brink of dissolution. The single most important reason for its survival and growth was the internal market. What was then called the common market had been foreseen in the Spaak Report in 1956 as the key to Europe's recovery from economic stagnation. Part Two of the EEC Treaty setting out the Four Freedoms was entitled 'The Foundations of the Community'—a denomination thrown away for no obvious reason in the Maastricht Treaty. In 1973 the common market was, at best, inchoate. The legislative machinery of the EEC had seized up and the end of the transitional period had passed with very few of the measures in place that were envisaged in the Treaty. For almost two decades, until the passing of the Single European Act and the launch of the 1992 Programme, the primary responsibility for maintaining the impetus towards a working internal market fell on the Court, supported by the Commission and teachers and practitioners of Community law. What persuaded the politicians, including Mrs Thatcher, that the legislative machinery must be restarted was 'the cost of non-Europe'—the economic cost of *not* completing the internal market.

Twenty years later, the internal market remains incomplete in consequence of two problems identified by Mario Monti as 'integration fatigue' and 'market fatigue'.² No sooner had the Monti Report relaunched the internal market than the crisis of the Eurozone threw the Union into a slough of despond where, at the time of writing, it remains. John would, one suspects, have relished the technical details of the measures that are being taken to deal with the crisis. He would have been caustic about their deficiencies and would certainly have been called upon to help in their improvement.

Meanwhile the internal market must soldier on, fatigued but relaunched (if that is not too gross a mixing of metaphors). Without it, the problems of the Eurozone cannot be resolved and the long-term prospects of the Union itself will not be bright. Indeed, the need to maintain and strengthen the internal market is one of the few things on which all but the most extreme Eurosceptics agree—in principle. What is not agreed is what exactly the expression 'the internal market' means in practice. For some, the essence of the internal market is free trade. By this, they mean the free movement of goods and services, and perhaps also capital, which can be discussed in relatively abstract terms: insofar as they have an effect on the lives of

² See Mario Monti, 'A New Strategy for the Single Market: At the service of Europe's Economy and Society', 9 May 2010, available at <http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf>, 6.

ordinary people, the effect is indirect and largely unseen. Free movement of persons is another matter because the effects are visible and unsettling. A spirit of protectionism in labour markets can even be made respectable if it is dressed up in the language of the social market, which is said to make European capitalism virtuous while the American variety, red in tooth and claw, is not. For others, the internal market, as an area without internal frontiers within which goods, persons, services and capital can move freely, must mean all that it says. Protectionism in the market for goods, services or labour has no place in the domestic markets of the Member States and should have no place in the internal market of the Union. It stands in the way of healthy competition, which drives the market economy.

Neither point of view deals adequately with the complexity of life in the twenty-first century. Globalization and technology mean that no market can be purely 'internal'. Services can be provided without physical movement of anything—people or things. Three-dimensional objects (goods), designed in another country, can now be 'printed' as required using the appropriate computer program and raw materials: they do not have to be 'imported'. The protection of intellectual property is increasingly complex and expensive while, at the same time, there are pressures for 'open access' to the fruits of intellectual endeavour. How is copyright to be protected on the World Wide Web? EU law—the product, ultimately, of international law—cannot be insulated from compliance with international law in new forms: investment law and environmental law, to take only two examples. The doctrines of the internal market, which presuppose harmonized, if not uniform, rules of law, are challenged by the equal and opposite pressure of subsidiarity: we want to remain what we are, to do things in our own way, not according to the precepts of 'Brussels' and 'Luxembourg'.

The texts of the Treaties relating to the internal market remain almost unchanged since they were written in 1957–58. They have proved remarkably resilient and adaptable, and one can understand why those responsible for successive Treaty revisions have resisted any temptation to recast them. Do they remain fit for purpose 50 years later? What supplementary legislation is needed to complement them? And in a world of such rapid technological change, is there not a danger—even a probability—that today's legislation will already be out of date by the time it is enacted?

It is hoped that this book will generate discussion of these and other questions, all of which would have fascinated John Usher and stimulated his extraordinary productivity. We remember him as a teacher and scholar, but also as a colleague and friend. As one of us said: 'I think it all boils down to what everyone says of him, that he was a self-effacing and extraordinarily nice bloke. And there are far worse epitaphs.'