Introduction

Steering the Good Ship Lollipop – the Legacy of Laurence W. Gormley

JUSTIN LINDEBOOM, DIMITRY KOCHENOV, GARETH DAVIES AND FABIAN AMTENBRINK

In his long and distinguished career, Laurence Gormley has addressed numerous topics of European and economic law, ranging from tax law[1] and public procurement[2] to judicial review and access to justice,[3] enforcement[4] and institutional questions.[5] The wide scope of his interests and knowledge is reflected in his superb textbooks, which remain familiar to all students of EU law.[6] Closest to his heart, however, has always been the law of the EU internal market, in particular the free movement of

[1] e.g. L. W. Gormley, *EU Taxation Law* (Oxford University Press 2005); 'Taxation', in D. Vaughan (ed.), *Law of the European Communities Service* (Butterworths 2000).

[2] L. W. Gormley, 'Remedies in Public Procurement: Community Provisions and the United Kingdom', in J. Lonbay and A. Biondi (eds.), *Remedies for Breach of EC Law* (Wiley 1997); 'Some Reflections on Public Procurement in the European Community' (1990) 1 EBLR 63.

[3] e.g. L. W. Gormley, 'Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?' (2013) 36 *Fordham ILJ* 1169; 'Judicial Review – A New Dawn after Lisbon?', in H. Koch et al. (eds.), *Europe, the New Legal Realism – Essays in Honour of Hjalte Rasmussen* (Djøf 2010); 'Judicial Review: Advice for the Deaf?' (2005) 29 *Fordham ILJ* 655; 'Public Interest Litigation', in D. O'Keeffe and A. Bavasso (eds.), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley. Volume I* (Kluwer 2000).

[4] e.g. L. W. Gormley, 'Infringement Proceedings', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

[5] e.g. L. W. Gormley, 'The "Institutional Balance" in the European Union', in P. G. Xuereb (ed.), *The Value(s) of a Constitution for Europe* (University of Malta 2004).

[6] P. J. G. Kapteyn and P. VerLoren van Themaat (ed. L. W. Gormley), *Introduction to the Law of the European Communities after the Coming into Force of the Single European Act*, 2nd edn (Kluwer 1989); P. J. G. Kapteyn and P. VerLoren van Themaat (ed. L. W. Gormley), *Introduction to the Law of the European Communities*, 3rd edn (Kluwer 1998).

goods, on which he has written two monographs[7] and countless articles.[8] He has provided comprehensive accounts of the evolution of free movement law[9] as well piercing critiques of the reasoning of the European Court of Justice (ECJ).[10] Stephen Weatherill is fully right that in the field of EU law, no one has done more to explore and elucidate the concept of a trade barrier than Laurence Gormley.[11]

'On the Good Ship Lollipop / It's a sweet trip to a candy shop', the legendary Shirley Temple sang in the 1934 movie *Bright Eyes*. The Good Ship Lollipop brings its bubbly passengers on a nice trip to a candy land 'Where bon-bons play / On the sunny beach of Peppermint Bay'. In the narrative of European integration, the EU internal market has long played the role of the Good Ship Lollipop, steering the people of Europe towards the candy land of an ever-closer union, where the ultimate objectives of the Treaty of Rome – the promotion of peace, prosperity and the values of the Union – are attained:[12] 'It's a nice trip, in to bed you hop, and dream away the neo-functionalist dream',[13] the Treaties continue to sing to us, in their song of the EU's political messianism.[14] The prophesy seems to be self-fulfilling and the mirage of the future appears to be intoxicatingly always sweet.

Are all the passengers equally naive, blinded by the beauty of this happy ship, though? Questions like 'What is it that we are sailing?'[15] and 'Where are we actually going?'[16] are heard more and more frequently, as the

[7] *EU Law of Free Movement of Goods and Customs Union* (Oxford University Press 2009); *Prohibiting Restrictions on Trade within the EEC: The Theory and Application of Articles 30–36 of the ECC Treaty* (North Holland 1985).

[8] Recently e.g. L. W. Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *ELRev*. 925; 'Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?' (2015) 38 *Fordham ILJ* 993.

[9] e.g. L. W. Gormley, 'Silver Threads among the Gold . . . 50 Years of the Free Movement of Goods' (2008) 31 *Fordham ILJ* 1637.

[10] e.g. L. W. Gormley, 'Assent and Respect for Judgments: *Uncommunautaire* Reasoning in the European Court of Justice', in L. Krämer et al. (eds.), *Law and Diffuse Interests in the European Legal Order. Liber Amicorum N. Reich* (Nomos 1997).

[11] See Weatherill, Chapter 6 in this volume.

[12] On the position of the internal market in the future of the EU, see Nic Shuibhne, Chapter 31 in this volume.

[13] See Lianos, Chapter 30 in this volume, p. 495.

[14] J. H. H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825. On the false promises of the EU internal market as a means to attain the objectives of the Treaties, see however Kochenov, Chapter 13 in this volume.

[15] J. Caporaso et al., 'Does the European Union Represent an *n* of 1?' (1997) 10 *ECSA Review* 1; R. Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) 46 *CMLRev*. 1069.

[16] J. H. H. Weiler, 'Journey to an Unknown Destination' (1993) 31 JCMS 417.

classical mantras are examined at close range: is the internal market really 'apolitical'?[17] Who are the losers drowning under the ship, thrown out and unwanted?[18] What if we disagree – can we change direction or come ashore?[19] Can we trust our maps and the knowledge we generate on the journey?[20]

Doubts and questions taken into account, the EU internal market emerges in a somewhat different light. It is not just a ship of cheery passengers on a happy adventure to an unknown destination bound to bring infinite good for all. It is also, in many ways, a carnivalesque ship of fools as the one decorating the cover of this very *Liber*: one might only consider the continuous battles between the EU institutions and the Member States in infringement proceedings compared by Laurence Gormley to Swiss cheese, 'full of holes on closer inspection';[21] curious EMU conundrums;[22] the lacking enforcement of the rule of law in neo-autocratic Member States;[23] EU's own glorious rule of law embrace accompanied by attempts by the Court of Justice to foreclose any attempts of contesting its authority no matter what;[24] and, ultimately, of course the pervading claims of supremacy by both the Member States' constitutional courts and the ECJ itself – if anything, not lacking in pretentiousness.[25]

[17] P. Agha, 'The Empire of Principle', in J. Přibáň (ed.), *The Self-Constitution of European Society* (Routledge 2016); A. J. Menéndez, 'Whose Justice? Which Europe?', in D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart 2015).

[18] C. O'Brien, *Unity in Adversity* (Hart 2017); G. Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law and Social Inquiry* 581.

[19] P. Allott, 'European Governance and the Re-branding of Democracy' (2002) 27 *ELRev.* 60; G. Davies, 'Democracy and Legitimacy in the Shadow of Purposeful Competence' (2015) 21 ELJ 2; F. Erlbacher, 'Article 50', in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2019).

[20] M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 ELJ 572.

[21] Gormley, 'Infringement Proceedings'.

[22] F. Amtenbrink and R. Repasi, 'Compliance and Enforcement in Economic Policy Coordination in EMU', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press 2017); M. Adams et al. (eds.), *The Constitutionalisation of European Budgetary Constraints* (Hart 2014).

[23] C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[24] D. Kochenov, 'EU Law without the Rule of Law' (2015) 34 YEL 74; J. H. H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique', in M. Adams et al. (eds.), *Judging Europe's Judges* (Hart 2013).

[25] See J. Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 OJLS 328; G. Palombella, 'Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two-Level System', in Closa and Kochenov (eds.), *Reinforcing*.

The ship of fools on this cover does not sail but in the minds of its curious occupants. It is rather drawn through the streets of mediæval Nuremberg during the Shrovetide Carnival parade, while its passengers are dressed as monsters, lawyers, fools and a variety of other creatures or things, 'throw[ing] fireworks, ashes, feathers, or other impurities [and using] light-headed, luxurious, immodest, impolite words and gestures in plays and rhymes'.[26] In mediæval times, such carnival parades allowed participants to forget their individual daily lives for a moment, increasing social unity through the joint participation in mockery and other bizarre rituals.[27] Without any doubt the events taking place in the narrative of the EU internal market are no less curious and stimulating for our (legal) imagination than those taking place at the Shrovetide Carnival's ship of fools, involving the selling of attractive inflatable dolls and sexy vacuum flasks,[28] fairies who are too old to be loved,[29] waitresses working hard in 'morally suspect' establishments,[30] an affluent young Chinese woman cleverly using Irish and EU law to give her Northern Ireland-born baby girl a better future,[31] and many other stories involving 'particular ways of life'.[32] Even though probably too subtle to call everything by its name,[33] EU law is definitely a rather glorious repository of buffoonery worthy of at least a mid-size carnival, thus mirroring the life itself.

Our ship embarking on an unknown destination of the Union's glorious goals is bound to follow the great Cavafy's insight quite literally:

[26] From a Nuremberg edict of 1469, as cited by S. H. Weisman, 'The Nuremberg *Schembartlauf* and the Art of Albrecht Dürer' (2010) 1(3) *Cerise Press: A Journal of Literature, Arts & Culture*, www.cerisepress.com/01/03/the-nuremberg-schembartlauf-and-the-art-of-albrecht-durer [accessed 23 October 2018].

[27] S. Sumberg, *The Nuremberg Schembart Carnival* (Columbia University Press 1941).

[28] 121/85 *Conegate*, EU:C:1986:114; U. Belavusau, 'EU Sexual Citizenship: Sex beyond the Internal Market', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

[29] 43/75 *Defrenne*, EU:C:1976:56, on which Laurence provides his usual, now classic, conceptual interpretation to the students of his EU Internal Market Law class by singing Arthur Le Clerq's 'Nobody Loves a Fairy When She's 40'.

[30] 115–116/81 *Adoui and Cornuaille*, EU:C:1982:183. Cf. L. W. Gormley, 'Free Movement of Workers and Social Security: As the Waitress Said to the Bishop' (1982) 7 *ELRev*. 399.

[31] C-200/02 *Zhu and Chen*, EU:C:2004:639. For the background story, see D. Kochenov and J. Lindeboom, 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge University Press 2017).

[32] F. de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity of EU Law' (2013) 50 *CMLRev*. 1545; Nicola and Davies (eds.), *EU Law Stories*.

[33] U. Belavusau, 'Sex in the Union: EU Law, Taxation and the Adult Industry' (2010) *European Law Reporter* 144.

> Ithaca gave you the delightful voyage:
> Without her you would never have set out:
> And she has nothing else to give you now.[34]

The doubtfulness of the actual offerings of a distant misty Ithaca notwithstanding, each ship needs a navigator to keep the foolishness of the other passengers, however distinguished and eager to steer, somewhat in check, and to ensure that the ship eventually heads towards its destination, even be it that such destination is in equal measure promising and unknown. The honouree of this book has done both jobs with an inimitable combination of brilliance, perseverance and style. In order to ensure that the ship of the internal market stays on track towards candy land, Laurence Gormley has argued forcefully in favour of keeping the good directions provided by the *Dassonville* judgment of 1974,[35] manoeuvring between Scylla[36] and Charybdis.[37] Meanwhile, he has used his wit to readily observe all the bizarre acts taking place on our ship, working hard to avoid the ship drifting off towards less fortunate destinations: ever warning against unsubstantiated and unwise reasoning by the ECJ,[38] the countless sirens who call for more regulatory freedom to the Member States,[39] and other mistaken interpretations of the proper route to take.[40] In many ways, Laurence has been the conscience of multiple generations of EU law scholars and members of the ECJ, reminding all of us of the numerous inconsistencies and misconceptions which surround the free movement of goods as well as the other freedoms.[41] He did it without discriminating, defending in equal measure the application of the freedoms to the well-off[42] and the downtrodden, if not morally flexible (as long as a carnival ship would permit such a characterisation at all).[43]

[34] C. P. Cavafy, *Poems by C. P. Cavafy* (J. C. Cavafy tr., Ikaros 2003).
[35] 8/74 *Procureur du Roi* v. *Dassonville*, EU:C:1974:82.
[36] C-267/91 *Keck and Mithouard*, EU:C:1993:905.
[37] C-142/05 *Mickelsson and Roos*, EU:C:2009:336; and C-110/05 *Commission* v. *Italy*, EU:C:2009:66.
[38] Gormley, 'Assent and Respect for Judgments'.
[39] On the seductions of the Lorelei and other siren calls to interpret EU internal market law 'more holistically', see Lindeboom, Chapter 5 in this volume, p. 81.
[40] Gormley, 'Inconsistencies and Misconceptions'.
[41] Ibid.
[42] L. W. Gormley, 'Keeping EU Citizens Out Is Wrong' (2013) *Journal des tribunaux droit européen* 316.
[43] Gormley, 'As the Waitress Said to the Bishop'.

Sound reasoning and precise formulations have taken centre stage in Laurence's work. In this respect we, as editors and *alievi* of Maestro Gormley, have to apologise for the title of this book, which rather imprecisely refers to the law of the EU *internal market*, the only excuse being it is in line with the current terminology of the Treaty.[44] However, as Laurence pointed out repeatedly, it is absolutely clear that what the EU economic constitution has created is much more than what the definition of the internal market in Article 26(2) TFEU provides: 'an area without internal frontiers in which free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'. This definition does not include a common external trade policy, a system of undistorted competition or the harmonisation of legislation for reasons other than the elimination of barriers to trade.[45] In reality, the pre-Lisbon terminology of the *common market* far more aptly describes what the Treaties have set in place: 'the meeting place of supply and demand from all the Member States without any discrimination by the Member States or the participants in it on grounds of nationality or any other distortion of competition'.[46] Or, in other words:

> a market in which every participant within the Community in question is free to invest, produce, work, buy and sell, to supply or obtain services under conditions of competition which have not been artificially distorted wherever economic conditions are most favourable.[47]

Keeping pace with the legal terminology as it currently confronts us, one cannot avoid the 'internal market' concept today, but it remains necessary to be reminded of the fact that the disappearance of the common market concept is primarily the result of the French government's insistence on removing the term from the Treaties, illustrated by President Sarkozy's Monty Pythonesque question 'what did competition give to Europe?'[48] All this rhetoric notwithstanding, it remains

[44] e.g. Arts. 3(1)(b) and 26 TFEU.
[45] L. W. Gormley, 'Competition and Free Movement: Is the Internal Market the Same as a Common Market?' (2002) 13 EBLR 517, 518.
[46] Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities* (1989), 78.
[47] Ibid.; Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities* (1998), 123.
[48] Press conference of President Sarkozy after the Member States' agreement to remove 'a system ensuring that competition in the internal market is not distorted' from (then) Art. 3(1)(g) EC Treaty, cited in A. Riley, 'The EU Reform Treaty & the Competition Protocol: Undermining EU Competition Law' (2007) 28 ECLR 703,

clear that both EU competition law[49] and the customs union[50] remain fundamental cornerstones of the EU internal market.[51]

The absence of precision and confusing terminology at times also permeated the case law of the Court of Justice. The most fundamental contribution of Laurence arguably having been his elucidation of the concept of a trade barrier, his razor-sharp analysis of the Court's phrasing continues to be of great importance, as exemplified by his recent work. Commenting on the relationship between a measure having equivalent effect and justifications, Laurence has shown how the Court not infrequently embarrasses itself by its conflicting phrasings:

> The Court's phrasing of the relationship between a measure having equivalent effect and justifications varies like the proverbial length of the Lord Chancellor's foot, as the classic examples below demonstrate. A measure must be regarded as
>
> 'constituting an obstacle to trade between Member States caught by Article [34] of the Treaty. However, such an obstacle may be justified by the protection of public health, a general interest ground recognised by Article 36 of the Treaty'.
>
> . . .
>
> Sometimes, however, the Court says that particular measures, 'constitute measures of equivalent effect prohibited by Article [34]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.'
>
> This formulation in [this latter judgment] is, with such a level of respect as might be thought due, clearly entirely wrongly expressed . . . In any event, the drafting is sloppy and the drafters should know better. A measure that is accepted as being justified does not cease thereby to be a 'measure having equivalent effect': it merely ceases to be prohibited. If it were otherwise, there would have been no need to have gone down the frankly disingenuous route of *Keck and Mithouard*.[52]

Notwithstanding the paramount importance of consistent terminology, Laurence's contributions of course have penetrated the substantive core of the free movement of goods as well. According to his most profoundly

[49] See Chapters 22 (Vedder) and 30 (Lianos) both in this volume, p. 350 and 495 respectively.
[50] See also Schütze, Chapter 12 in this volume, p. 200.
[51] L. W. Gormley, 'Some Problems of the Customs Union and the Internal Market', in N. Nic Shuibhne and L. W. Gormley (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012).
[52] Gormley, 'Inconsistencies and Misconceptions', 926–7.

held conviction, 'the *Dassonville* basic principle said it all in 1974; mutual recognition put the icing on the liquid cake in *Cassis de Dijon*, and that is all that was necessary';[53] it appears to be the case that Laurence considered everything after *Dassonville* as merely footnotes to that one famous judgment. More accurately, perhaps, Laurence has always emphasised two important truths: first, rigorous reasoning and a reasonable application of the existing case law are absolutely indispensable, leaving no room for *uncommunautaire* reasoning[54] and managerial considerations to the detriment to sound logic.[55] Second, within the boundaries of the case law, the ECJ ought to confine itself to solving individual cases with pragmatism and common sense, leaving the search for an overarching theory of EU internal market or a one-size-fits-all approach to those who like to engage in underwater basket-weaving.

At the very start of his career, Laurence was one of the first scholars who extensively studied the *Dassonville* judgment,[56] both in his dissertation for the Middle Temple,[57] and a few years later in his PhD thesis.[58] Together with Pieter VerLoren van Themaat, he coined the term 'rule of reason' – after the balancing of pro- and anticompetitive effects in US antitrust law – to describe the functioning of Article 34 TFEU after the *Dassonville* and *Cassis de Dijon* judgments. As a keen observer of the free movement case law in the 1980s, Laurence was never troubled by the Sunday trading cases. Unlike other colleagues who were anxious of the deregulatory potential of the *Dassonville* rule, Laurence maintained that it was absolutely clear that yes, bans on Sunday trading could hinder intra-Community trade, and, yes, they were justified on grounds of sociocultural policy, since the obstacles to trade were not disproportionate to the aim pursued.[59]

[53] L. W. Gormley, 'Free Movement of Goods and Their Use – What Is the Use of It? (2010) 33 *Fordham ILJ* 1589, 1627.
[54] See Gormley, 'Assent and Respect for Judgments'.
[55] See L. W. Gormley, 'Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*' (1994) 5 EBLR 63.
[56] For a contextual analysis of the *Dassonville* case, see Goebel, Chapter 7 in this volume, p. 134.
[57] L. W. Gormley, 'Articles 30–36 of the E.E.C. Treaty: The Cases and Some Problems with Special Reference to their Relationship with the Articles of the Treaty Concerning Competition' (dissertation for the Middle Temple, London, written under supervision of P. VerLoren van Themaat, August 1979).
[58] Gormley, *Prohibiting Restrictions on Trade*.
[59] L. W. Gormley, 'Annotation of Case 145/88, *Torfaen Borough Council*' (1990) 27 *CMLRev*. 141; 'Recent Case Law on the Free Movement of Goods: Some Hot Potatoes' (1990) 27 *CMLRev*. 825. See Sharpston, Chapter 8 in this volume, p. 150.

That the ECJ departed from their approach in *Torfaen*,[60] *Conforama*[61] and other cases[62] in the notorious judgment of *Keck* certainly was a great disappointment to Laurence, who has become *Keck*'s arguably fiercest, and certainly most longstanding critic.[63] In this first analysis of the case, Laurence highlighted, perhaps better than any other commentator, 'where the Court went wrong, why it went wrong and how the Court could have done it better',[64] as Kai Purnhagen recalls in this volume.[65] Laurence's analysis proved to be correct on many levels, for not only was he right in asserting that the language of the judgment was simply opaque, the dictum soon proved to be unworkable and obscured the case law further.[66] In our maestro's words: '[M]ight it be too much to hope that *Keck* will be consigned to a learning experience and be, like the devil, ritually renounced? It never achieved its purported purpose, simply sowed seeds of confusion, and, as an almost desperate caseload reduction attempt that has manifestly failed, was an immaculate misconception from start to finish.'[67]

Another one of those prevalent misconceptions concerning the free movement case law has been the debate on whether Article 34 TFEU contains a *de minimis* rule. Among many others proposed by Advocate General Jacobs as an alternative to *Keck* in *Leclerc-Siplec*,[68] Laurence has always emphasised that the Court rejected attempts in this direction clearly and long ago.[69] Nevertheless, *de minimis* arguments have continued to arise, in particular after the Court's focus on the 'considerable influence on the behaviour of consumers' of the measure at stake in *Commission* v. *Italy*,[70] and discussions concerning the horizontal direct effect of the free movement

[60] C-145/88 *Torfaen*, EU:C:1989:593.
[61] C-312/89 *Conforama*, EU:C:1991:93.
[62] For an overview and analysis, Sharpston, Chapter 8 in this volume, p. 150.
[63] e.g. Gormley, 'Reasoning Renounced?'; 'Two Years after *Keck*' (1996) 19 *Fordham ILJ* 866; 'Silver Threads among the Gold'.
[64] Gormley, 'Reasoning Renounced?'.
[65] Purnhagen, Chapter 10 in this volume, p. 176.
[66] See further Lindeboom, Chapter 5 in this volume, p. 81.
[67] Gormley, 'Inconsistencies and Misconceptions', 931.
[68] Opinion of AG Jacobs in C-412/93 *Leclerc-Siplec*, EU:C:1994:393.
[69] Gormley, 'Free Movement of Goods and Their Use', 1607; and 'Inconsistencies and Misconceptions', 931ff, referring e.g. to 177–178/82 *van der Haar*, EU:C:1984:144, paras. 12–13; 16/83 *Prantl*, EU:C:1984:101, paras. 20–1.
[70] C-110/05 *Commission* v. *Italy*, EU:C:2009:66, para. 56. See e.g. J. Hojnik, '*De Minimis* Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?' (2013) 6 EJLS 25; M. Jansson and H. Kalimo, '*De Minimis* meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 *CMLRev*. 523.

of goods.[71] However, Laurence forcefully argued that the 'ugly head'[72] of *de minimis* would be a 'very difficult, if not downright impossible exercise' which was not and should not be found in the case law at any time.[73] A sensible application of the remoteness test certainly should not be mistaken for a *de minimis* test,[74] and a pragmatic application of the personal scope of Article 34 TFEU and the degree to which it applies to private parties should be much preferred over theoretical basket-weaving.[75]

Not to be missed either, of course, is the market access case law which reinvigorated the debate on the scope of the free movement of goods.[76] Deviating from its standard language of the *Dassonville* rule, the Court decided to follow Advocate General Bot in focusing on whether a national measure impedes market access.[77] Laurence has rightly questioned whether this adds anything to the basic principles of *Dassonville*, 'other than a seemingly seductive name'.[78] Indeed, the approach taken by Advocates General Léger in *Italian Trailers*,[79] and Trstenjak in *Commission* v. *Portugal*,[80] showed that the principles from *Dassonville* could suffice to solve cases concerning restrictions on use, and that the market access rhetoric was indeed little more than a slogan.[81] Moreover, notwithstanding again confusing phrasing by the Court, Laurence was right to observe that the market access cases did not kill *Keck*, contrary to reports about its death.[82] The recent case law clearly showed not only that *Keck* is still alive, 'hanging on at least',[83] but also that the seductions of

[71] See e.g., C. Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods' (2012) 49 *CMLRev*. 177. On horizontal direct effect, see also Müller-Graff, Chapter 2 in this volume, p. 32.
[72] Gormley, 'Free Movement of Goods and Their Use', 1607.
[73] Gormley, 'Inconsistencies and Misconceptions', 931, citing Opinion of AG Tesauro in C-292/92 *Hünermund*, EU:C:1993:863, para. 17.
[74] See the discussion in Gormley, 'Inconsistencies and Misconceptions', 931–938.
[75] Gormley, 'Private Parties and the Free Movement of Goods'.
[76] C-265/06 *Commission* v. *Portugal*, EU:C:2008:210; C-142/05 *Mickelsson and Roos*, EU:C:2009:336; and C-110/05 *Commission* v. *Italy*, EU:C:2009:66.
[77] Opinion of AG Bot in C-110/05 *Commission* v. *Italy*, EU:C:2006:646.
[78] Gormley, 'Free Movement of Goods and Their Use', 1607.
[79] Opinion of AG Bot in C-110/05 *Commission* v. *Italy*.
[80] Opinion of AG Trstenjak in C-265/06 *Commission* v. *Portugal*, EU:C:2007:784.
[81] J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CMLRev*. 437.
[82] E. Spaventa, 'Leaving *Keck* Behind? The Free Movement of Goods After the Rulings in *Commission* v. *Italy* and *Mickelsson and Roos*' (2009) 35 *ELRev*. 914; I. Lianos, 'In Memoriam *Keck*: The Reformation of the EU Law on the Free Movement of Goods' (2015) 40 *ELRev*. 225. Cf. however Gormley, 'Free Movement of Goods and Their Use', 1627.
[83] Gormley, 'Inconsistencies and Misconceptions', 931.