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A Commentary on Selected Opinions of Advocate General Jacobs

Rosa Greaves*

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Abstract

This Article seeks simply to demonstrate, by reference to carefully selected opinions, Advocate General Jacobs' commitment to the establishment of the internal market (as illustrated by HAG II, Leclerc-Siplec, Alpine Investments, and Silhouette) and to the development of a Community legal order in which individual rights are fully protected at national and Community levels (in, for example, Konstantinidis, Vaneetveld, Unilever, and UPA).

A COMMENTARY ON SELECTED OPINIONS OF ADVOCATE GENERAL JACOBS

*Rosa Greaves**

INTRODUCTION

Francis Jacobs retired in December 2005, having been a member of the European Court of Justice (“ECJ” or the “Court”) for seventeen years and the second-longest holder of the office of Advocate General.¹ He took up his appointment as the European Project had just been restarted, following the adoption of the Single European Act² and the establishment of the Court of First Instance (“CFI”).³ The Single European Act provided the Community with further legal bases for action and reformed its

* Allen & Overy Professor of European Law and Director of the Durham European Law Institute, Durham University, UK. I am grateful to Albertina Albers-Llorens (University of Cambridge, UK), as well as Roy Davis and Colin Warbrick (University of Durham, UK), for advice on various aspects of this Article. I would like also to thank Sebastian Harter-Bachmann, a research student at the University of Durham (UK), for his assistance with sources and references.

1. Francis Jacobs was appointed Advocate General in October 1988 as the successor to Sir Gordon Slynn. Prior to Sir Slynn’s tenure, Advocate General Karl Roemer held the office from February 1953 to October 1973. According to Article 222 of the Treaty Establishing the European Community (“EC Treaty”), the Court shall be assisted by eight Advocates General. For the text of the current consolidated version of the EC Treaty as amended, see Consolidated Version of the Treaty Establishing the European Community, O.J. C 325/33 (2002) [hereinafter Consolidated EC Treaty]. Given that there is a smaller number of posts than Member States, there is an informal agreement between Member States that five Advocates General are appointed from the five largest Member States (France, Germany, Italy, the United Kingdom, and Spain), while the other three rotate among the remaining Member States. Author’s Note: All textual references to articles of the EC Treaty refer to the Consolidated EC Treaty. In cases decided prior to the Treaty of Amsterdam, references to articles of the EC Treaty are to the text of the original and the numbers will differ from those mentioned in the text of this Article.

2. Single Europe Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]).

3. See Treaty Establishing the European Community, art. 222, Feb. 7, 1991, O.J. 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty]. The Treaty on European Union (“TEU”), Feb. 7, 1991, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, amended the Treaty Establishing the European Economic Community (“EEC Treaty”), Mar. 25, 1957, 298 U.N.T.S. 11, which had already been amended by the Single Europe Act (“SEA”), *supra* note 2, O.J. L 169/1 (1987). The EC Treaty was, in turn, amended by the Treaty of Amsterdam, *supra* note 1, O.J. C 340/1 (1997). All of these amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated EC Treaty, *supra* note 1, O.J. C 325/33 (2002).

legislative process in order to achieve the objectives of the internal market⁴ by December 1992.⁵ The establishment of the CFI introduced an appeal structure to the European Community's judicial architecture.

During those seventeen years, Jacobs delivered over 500 opinions.⁶ Although the ECJ agreed with Jacobs' conclusions in the vast majority of cases, there were some well-documented failures to persuade the Court to take a more radical approach.⁷

Advocate General Jacobs' background was ideally suited to the role of Advocate General. He had been a Professor of Law at King's College (University of London), an occasional practitioner, and a Legal Secretary to Jean-Pierre Warner, the first British Advocate General. His opinions emulated academic papers, with serious consideration of the parties' submissions, a meticulous analysis of existing ECJ case law and relevant literature, and a reasoned, authoritative and robust conclusion. His opinions were awaited eagerly, widely read, and particularly scrutinized by the academic community.

This Article does not seek to evaluate or analyze Advocate General Jacobs' opinions.⁸ It is not even possible to consider herein all the most significant opinions delivered by Jacobs. He served during an important and exciting period in the development of the Community legal order, as the European Economic Area ("EEA") was established,⁹ certain important institutional

4. The expression "internal market" is the term used post-1988 for "common market." The expression "single European market" is also used, primarily by politicians.

5. See SEA, *supra* note 2, art. 13, O.J. L 169/1, at 9 (1987).

6. In the first few years of his mandate, the vast majority of his opinions were on matters concerning agriculture, staff regulations, taxation and social security, but, given the length of his tenure, it is not surprising that he delivered opinions on most areas of Community competence.

7. In general, the ECJ does not often disagree with the opinion of the Advocates General. One notable exception to this rule, however, was *Union de Pequenos Agricultores v. Council of the European Union*, Case C-50/00P, [2002] E.C.R. I-6677, [2002] 3 C.M.L.R. 1 [hereinafter *UPA*], where the ECJ rejected Jacobs' plea to widen the meaning of "individual concern" within Article 230 of the EC Treaty. This case is discussed further below.

8. For an account of Advocate General Jacobs' opinions in relation to the development of Community law on intellectual property rights, see generally, NOREEN BURROWS & ROSA GREAVES, *THE ADVOCATE GENERAL AND EC LAW* (Oxford Univ. Press, forthcoming 2007).

9. The European Economic Area ("EEA") consists of all twenty-five Member States of the European Union as well as Iceland, Liechtenstein, and Norway. It was created in 1992 to allow non-Community countries to benefit from the recently established inter-

changes to the Community's legislative process were introduced by amendments to the Treaty Establishing the European Community ("EC Treaty"), the European Union was created by the Treaty of Maastricht,¹⁰ and the European Community was enlarged from twelve Member States to twenty-five.¹¹

This Article seeks simply to demonstrate, by reference to carefully selected opinions,¹² Advocate General Jacobs' commitment to the establishment of the internal market (as illustrated by *HAG II*,¹³ *Leclerc-Siplec*,¹⁴ *Alpine Investments*,¹⁵ and *Silhouette*¹⁶) and to the development of a Community legal order in which individual rights are fully protected at national and Community levels (in, for example, *Konstantinidis*,¹⁷ *Vaneetveld*,¹⁸ *Unilever*,¹⁹

nal market. References to the "Community market" or the "internal market" in the context of this Article include the EEA market.

10. See TEU, *supra* note 3, O.J. C 224/1 (1992) (amending EEC Treaty, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended by* SEA, *supra* note 2, O.J. L. 169/1 (1987)). The TEU was amended by the Treaty of Amsterdam, *supra* note 1, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the TEU, and the articles of the TEU were renumbered in the Consolidated Version of the Treaty on European Union, O.J. C 325/5 (2002) [hereinafter Consolidated TEU].

11. For a comprehensive review of institutional and substantive European Union law see generally, for example, PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* (3d ed. 2003); TREVOR HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (5th ed. 2003); and STEPHEN WEATHERILL, *CASES AND MATERIALS ON EC LAW* (7th ed. 2005).

12. Almost all the selected opinions were delivered in preliminary rulings. This procedure is provided by Article 234 of the EC Treaty, which enables a national court dealing with a case that raises issues of interpretation and validity of Community law to refer such questions to the ECJ for a preliminary ruling. The national court is bound to apply the ruling on Community law when subsequently deciding the case. See Consolidated EC Treaty, *supra* note 1, art. 234, O.J. C 325/33, at 127-28 (2002).

13. Opinion of Advocate General Jacobs, *in* SA CNL-SUCAL NV v. HAG GF AG, Case C-10/89, [1990] E.C.R. I-3711, [1990] 3 C.M.L.R. 571 [hereinafter Opinion of Advocate General Jacobs, *HAG II*].

14. Opinion of Advocate General Jacobs, *in* Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, Case C-412/93, [1995] E.C.R. I-179, [1995] 3 C.M.L.R. 422 [hereinafter Opinion of Advocate General Jacobs, *Leclerc-Siplec*].

15. Opinion of Advocate General Jacobs, *in* Alpine Investments BV v. Minister van Financiën, Case C-384/93, [1995] E.C.R. I-1141, [1995] 2 C.M.L.R. 209 [hereinafter Opinion of Advocate General Jacobs, *Alpine Investments*].

16. Opinion of Advocate General Jacobs, *in* Silhouette International Schmied GmbH & Co KG v. Hartlauer Handelsgesellschaft mbH, Case C-355/96, [1998] E.C.R. I-4799, [1998] 2 C.M.L.R. 953 [hereinafter Opinion of Advocate General Jacobs, *Silhouette*].

17. Opinion of Advocate General Jacobs, *in* Christos Konstantinidis v. Stadt Alten-

and *UPA*²⁰).

I. THE INTERNAL MARKET

In this Part, two Opinions on the compatibility of national marketing rules with the internal market will be considered first. Two Opinions concerning the exercise of intellectual property rights will then be examined.

A. National Marketing Rules and the Internal Market

One of Jacobs' most interesting Opinions concerned the interpretation of Article 28 of the EC Treaty, which prohibits quantitative restrictions on imports and measures having an equivalent effect between Member States.²¹ In *Leclerc-Siplec*, Jacobs sought to persuade the ECJ to reconsider the test, adopted by a Full Court in *Keck and Mithouard*,²² for determining whether a national marketing rule is prohibited under Article 28.²³

steig-Standesamt and Landratsamt Calw-Ordnungsamt, Case C-168/91, [1993] E.C.R. I-1191, [1993] 3 C.M.L.R. 401 [hereinafter Opinion of Advocate General Jacobs, *Konstantinidis*].

18. Opinion of Advocate General Jacobs, in *Nicole Vaneetveld v. Le Foyer SA and Le Foyer SA v. Fédération des Mutualités Socialistes et Syndicales de la Province de Liège*, Case C-316/93, [1994] E.C.R. I-763, [1994] 2 C.M.L.R. 852 [hereinafter Opinion of Advocate General Jacobs, *Vaneetveld*].

19. Opinion of Advocate General Jacobs, in *Unilever Italia SpA v. Central Food SpA*, Case C-443/98, [2000] E.C.R. I-7535, [2001] 1 C.M.L.R. 21 [hereinafter Opinion of Advocate General Jacobs, *Unilever*].

20. Opinion of Advocate General Jacobs, in *Union de Pequenos Agricultores v. Council of the European Union*, Case C-50/00P, [2002] E.C.R. I-6677, [2002] 3 C.M.L.R. 1 [hereinafter Opinion of Advocate General Jacobs, *UPA*]. This opinion was delivered in the context of an appeal from a ruling of the CFI.

21. See Consolidated EC Treaty, *supra* note 1, art. 28, O.J. C 325/33, at 47 (2002).

22. Bernard Keck and Daniel Mithouard, Joined Cases C-267/91 & C-268/91, [1993] E.C.R. I-6097, [1995] 1 C.M.L.R. 101. Cases before the ECJ may be heard either in plenary session (i.e. Full Court renamed Grand Chamber after the 2004 enlargement of the EU) or in Chambers (by a lesser number of judges). See EEC Treaty, *supra* note 2, art. 165, at 106; see also Michael Scott Feely & Peter M. Gilhuly, *Green Law-Making: A Primer on the European Community's Environmental Legislative Process*, 24 VAND. J. TRANS-NAT'L L. 653, 665 (1991).

23. See Opinion of Advocate General Jacobs, *Leclerc-Siplec*, Case C-412/93, [1995] E.C.R. I-179, I-189, ¶ 28, [1995] 3 C.M.L.R. 422, 433. In *Keck and Mithouard*, decided one year earlier, the ECJ attempted to remove some of the confusion created by the contradictions in previous case law regarding the scope of Article 28 by ruling that a law prohibiting the resale of goods at a loss by retailers lay outside the scope of the treaty provision. The Court, having expressly reversed earlier case law, provided a new test, stating that certain national selling arrangements are outside the scope of the prohibition in Article 28, provided the rules apply equally, in law and in fact, to the marketing

Jacobs considered whether a national restriction prohibiting the distribution sector from advertising on television²⁴ was compatible with Article 28.²⁵ He began by stressing the importance of advertising as a proven means of penetrating markets in developed market economies.²⁶ He warned the ECJ to be “extremely vigilant when appraising the compatibility with Community law of restrictions on advertising.”²⁷ He summarized the prior, contradictory case law, and the ruling in *Keck and Mithouard*.²⁸ He then applied *Keck and Mithouard* to the facts of *Leclerc-Siplec*, concluding without hesitation that the French law prohibition fell outside the scope of Article 28.²⁹ However, he took the opportunity to criticize *Keck and Mithouard* and to propose a different test, even while admitting that, in *Leclerc-Siplec* itself, the outcome would be identical.³⁰

Jacobs found *Keck and Mithouard* unsatisfactory for several reasons, including, in particular, its reintroduction of a discrimination test that he found unacceptable.³¹ Jacobs strongly argued for the test to be based not on discrimination but on whether the measure in question substantially restricts access to the Community market.³² This would inevitably introduce a de minimis element to Article 28 where the national measure is classified as a non-discriminatory restriction. Acknowledging that the Court

of both domestic products and products from other Member States. *See Keck and Mithouard*, [1993] E.C.R. at I-6104, ¶ 16, [1995] 1 C.M.L.R. at 124.

24. Specifically, *Leclerc-Siplec* was prevented by French law from advertising its petrol stations on television. *See* Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. at I-182, ¶ 2, [1995] 3 C.M.L.R. at 427.

25. *See id.* at I-185, ¶ 12, [1995] 3 C.M.L.R. at 429.

26. *See id.* at I-186-87, ¶¶ 19-22, [1995] 3 C.M.L.R. at 431-32.

27. *Id.* at I-187, ¶ 21, [1995] 3 C.M.L.R. at 431.

28. *See id.* at I-187-88, ¶¶ 23-24, [1995] 3 C.M.L.R. at 432. This ruling had already been confirmed and applied in *Hünernmund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787, a case concerning national restrictions on advertisements. The restrictions at issue in *Hünernmund* consisted of professional rules of conduct that significantly restricted pharmacists from advertising the products they sold in their pharmacies. The ECJ held the advertising restrictions were non-discriminatory selling arrangements, applicable to all pharmacists, which did not affect the marketing of domestic and non-domestic products differently. *See* Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. at I-192-93, ¶¶ 35-36, [1995] 3 C.M.L.R. at 436-37.

29. *See* Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. at I-193-94, ¶ 37, [1995] 3 C.M.L.R. at 437-38.

30. *See id.* at I-194, ¶ 38, [1995] 3 C.M.L.R. at 438.

31. *See id.* at I-194, ¶ 39, [1995] 3 C.M.L.R. at 438.

32. *See id.* at I-195, ¶ 40, [1995] 3 C.M.L.R. at 439.

had previously rejected a de minimis test for Article 28,³³ Jacobs nevertheless robustly argued that “[r]estrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market. A discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty.”³⁴ Jacobs further noted that: “all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market.”³⁵

Jacobs undoubtedly holds very strong views on this matter, as demonstrated by the mild, but highly unusual, expressed criticism of the Court. At paragraph forty-two of the Opinion, he stated “[i]ndeed it is perhaps surprising that, in view of the avowed aim of preventing excessive recourse to Article [28], the Court did not opt for such a solution in *Keck*.”³⁶

Jacobs acknowledged that a de minimis test would necessitate careful definition of the circumstances when such a test should be applied, as the national courts would have primary responsibility for applying Article 28.³⁷ The test should be applied only where the restriction is non-discriminatory, and denial to the market must be “substantial.”³⁸ Whenever a measure prohibits the sale of goods lawfully marketed in another Member State,³⁹ a substantial impact on access to the market would be assumed, since the goods are either being totally denied access or permitted access only after modification.⁴⁰ Where a measure is applied without distinction and simply restricts certain selling arrangements, its impact will depend on other factors.⁴¹ Therefore, the scope of a barrier to market access may vary considera-

33. *See id.* at I-197, ¶ 46, [1995] 3 C.M.L.R. at 441.

34. *Id.* at I-195, ¶ 40, [1995] 3 C.M.L.R. at 439.

35. *Id.* at I-195, ¶ 41, [1995] 3 C.M.L.R. at 439.

36. *Id.* at I-195, ¶ 42, [1995] 3 C.M.L.R. at 439.

37. *See id.*

38. *See id.* at I-196, ¶ 44, [1995] 3 C.M.L.R. at 4440.

39. As, for example, in *Cassis de Dijon (Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein)*, Case 120/78, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

40. *See* Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. at I-196, ¶ 44, [1995] 3 C.M.L.R. at 440.

41. *See id.* at I-196, ¶ 45, [1995] 3 C.M.L.R. at 440.

bly, and a particular barrier's compatibility with Article 28 should be assessed by reference to the *de minimis* test.⁴²

In applying the *de minimis* test to *Leclerc-Siplec*, Jacobs observed that whether a partial ban on advertising for a certain sector of the economy falls outside the scope of Article 28 should depend on whether it creates a substantial barrier to market access.⁴³ After considering the relevant factors, Jacobs concluded that there was no substantial impact on market access.⁴⁴

Although Jacobs' approach is highly persuasive and centered on a fundamental principle of market access, the judges of the Sixth Chamber of the ECJ rejected his *de minimis* test.⁴⁵ Unsurprisingly—given that a Chamber rather than the Full Court delivered the preliminary ruling—the judges followed the ruling in *Keck and Mithouard* without reference to or comment on Advocate General Jacobs' alternative approach.⁴⁶ Fortunately for the parties, the result, as noted, would have been the same.⁴⁷

It is submitted, however, that Jacobs' *de minimis* test has much in its favor and is fully consistent with the ECJ's approach to defining the scope of Article 81 of the EC Treaty,⁴⁸ which prohibits agreements that are anti-competitive and affect inter-State trade.⁴⁹ The main common objective of Articles 28 and 81 is to integrate national markets into one single internal market that is not divided along national territorial boundaries by national laws and regulations or by private contractual arrangements.⁵⁰

42. *See id.*

43. *See id.* at I-199, ¶ 52, [1995] 3 C.M.L.R. at 442.

44. *See id.* at I-200, ¶ 55, [1995] 3 C.M.L.R. at 443-44.

45. *See Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité SA and M6 Publicité SA*, Case C-412/93, [1995] E.C.R. I-179, I-217, ¶ 21, [1995] 3 C.M.L.R. 422, 454 [hereinafter *Leclerc-Siplec*].

46. *See id.*

47. *See id.* at I-218, ¶ 24, [1995] 3 C.M.L.R. at 454.

48. The ECJ has fully accepted a *de minimis* rule in the context of Article 81. *See, e.g., Völk v. Vervaecke*, Case 5/69, [1969] E.C.R. 295, [1969] C.M.L.R. 273; *see also* Commission Notice, O.J. C 368/13, ¶ 1 (2001) [hereinafter *Agreements of Minor Importance (de minimis)*].

49. *See* Consolidated EC Treaty, *supra* note 1, art. 81, O.J. C 325/33, at 64-65 (2002).

50. The ECJ stated in *Schul v. Inspecteur der Invoerrechten en Accijnzen* that the concept of the common market involves the elimination of all obstacles to intra-Community trade "in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market." *Schul v. Inspecteur der Invoerrechten en Accijnzen*, Case 15/81, [1982] E.C.R. 1409, at 1431-32, ¶ 33, [1982] 3 C.M.L.R. 229 at 251.

While marketing rules remain governed primarily by national laws, obstacles to the free movement of goods between national markets are likely to persist. Only total harmonization of such rules will eliminate all barriers. Meanwhile, however, the denial of access to the market must be managed. The ECJ's earlier rulings on the scope of Article 28 were inconsistent, and the *Keck and Mithouard* ruling remains problematic.⁵¹

Another fundamental principle of the internal market is the right to provide services across national borders.⁵² This principle is outlined in Article 49 of the EC Treaty.⁵³ Inevitably, as questions concerning the interpretation and scope of Article 49 have arisen, analogies to the Article 28 case law have been raised.⁵⁴ One important case was *Alpine Investments*.⁵⁵ The ECJ was asked to rule on whether the Dutch law prohibiting "cold calling"⁵⁶ was a restriction on the freedom to provide services within the meaning of Article 49 EC Treaty.⁵⁷ *Alpine Investments*, established in the Netherlands, wished to market its financial services through "cold calls" to potential clients in Germany, where "cold calling" was permitted.⁵⁸

Advocate General Jacobs delivered his Opinion in *Alpine Investments* before a Full Court, a few weeks before the ruling in *Leclerc-Siplec* was delivered.⁵⁹ Both cases were similar insofar as

51. See Franz Leidenmuhler, *The Free Movement of Goods Within an EC-Wide Market: Still a Work in Progress*, 12 CARDOZO J. INT'L & COMP. L. 163, 167-69 (2004).

52. This right has gained significance since the 1980s, as unprecedented advances in technology and telecommunications have transformed the delivery of services.

53. See Consolidated EC Treaty, *supra* note 1, art. 49, O.J. C 325/33, at 54 (2002).

54. See, e.g., *Staatssecretaris van Financien v. B.G.M. Verkooijen*, Case 35/98, [2000] E.C.R. I-04071; *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberburgermeisterin der Bundesstadt Bonn*, Case 36/02, [2004] E.C.R. 09609; *Canal Satellite Digital SL Administracion General del Estado*, Case 390/99, [2002] E.C.R. I-607. *But see* *Hans Reisch v. Burgermeister der Landeshauptstadt Salzburg*, Cases 515/99, 519/99 to 524/99 and 526/99 to 540/99, [2002] E.C.R. I-02157.

55. *Alpine Investments BV v. Minister van Financiën*, Case C-384/93, [1995] E.C.R. I-1141, [1995] 2 C.M.L.R. 209 [hereinafter *Alpine Investments*].

56. "Cold calling" refers to the practice of making unsolicited telephone calls to potential clients.

57. See *Alpine Investments*, [1995] E.C.R. at I-1169, ¶ 1, [1995] 2 C.M.L.R. at 233.

58. See Opinion of Advocate General Jacobs, *Alpine Investments*, Case C-384/93, [1995] E.C.R. I-1141, I-1152, ¶ 36, [1995] 2 C.M.L.R. 209, 220. *Alpine Investments* presented a novel situation to the ECJ. Normally, in situations involving cross-border provision of services, the receiving (host) Member State imposes restrictions on the delivery of the service. In *Alpine Investments*, however, the Netherlands (the home State) had imposed the challenged restriction. See *id.* at I-1144, ¶ 1, [1995] 2 C.M.L.R. at 213.

59. The Opinion for *Alpine Investments* was issued January 26, 1995; the ECJ ruling

the Dutch prohibition was non-discriminatory and did not have the object or effect of favoring domestic service providers over those from other Member States.⁶⁰

Jacobs' approach in *Alpine Investments* resembles that which he adopted in *Leclerc-Siplec*. He stated that:

Whether a rule of the Member State of origin constitutes a restriction on the freedom to provide services should be determined by reference to a functional criterion, that is to say, whether it substantially impedes the ability of persons established in its territory to provide intra-Community services. It seems to me that that criterion is consonant with the notion of an internal market and more appropriate than the criterion of discrimination.⁶¹

The governments of the Netherlands and of the United Kingdom had submitted that the ruling in *Keck and Mithouard* should apply by analogy and that the disputed prohibition on cold calling should be classified as a selling arrangement outside the scope of Article 49.⁶² Not surprisingly, given his view of *Keck and Mithouard*, Jacobs rejected this. He agreed that there were similarities between the two freedoms, and similar principles should apply to the interpretation of Articles 28 and 49 EC Treaty, but *Keck and Mithouard* was the wrong test to apply.⁶³ Jacobs expressly referred to the difficulties in determining the effect of the ruling in *Keck and Mithouard*, as set out in his opinion in *Leclerc-Siplec*, and proceeded to highlight the differences between the two situations.⁶⁴ It would be inappropriate to apply *Keck*, he argued, since the exporting Member State in *Alpine Investments* sought to control the provision of services in the host State.⁶⁵ If both the non-discriminatory restrictions of importing and exporting Member States fell outside Article 49, the service

for *Leclerc-Siplec* was issued February 9, 1995. See generally *Alpine Investments*, [1995] E.C.R. I-1141, [1995] 2 C.M.L.R. 209; *Leclerc-Siplec*, Case C-412/93, [1995] E.C.R. I-0179, [1995] 3 C.M.L.R. 422.

60. See Opinion of Advocate General Jacobs, *Alpine Investments*, [1995] E.C.R. at I-1153, ¶ 38, [1995] 2 C.M.L.R. at 220; Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. at I-0200, ¶ 54, [1995] 3 C.M.L.R. at 444.

61. Opinion of Advocate General Jacobs, *Alpine Investments*, [1995] E.C.R. at I-1155, ¶ 47, [1995] 2 C.M.L.R. at 222.

62. See *id.* at I-1151, ¶ 32, [1995] 2 C.M.L.R. at 219.

63. See *id.* at I-1159, ¶ 60, [1995] 2 C.M.L.R. at 226.

64. See *id.*

65. See *id.*

provider would have to comply with both sets of rules.⁶⁶

The ECJ paid much less attention in its ruling to the analogy with *Keck and Mithouard* and expressly refuted Jacobs' attempt to rely on the ruling.⁶⁷ Instead, the Court—arguably unnecessarily, having rejected the analogy argument—restated the *Keck and Mithouard* test, adding by way of extra explanation that, “[t]he reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.”⁶⁸

The situation in *Alpine Investments* was totally different, as the cold calling prohibition directly affected access to the market in services in other Member States. The use of the language of “access to markets” rather than “selling arrangements” is much closer to Jacobs' reasoning.

Thus, in *Alpine Investments*, Jacobs concluded that the Dutch prohibition on “cold calling” was a non-discriminatory restriction within the meaning of Article 49.⁶⁹ The Court agreed, since the prohibition “deprive[d] the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States.”⁷⁰ Jacobs then applied the conditions for determining whether the restriction was compatible with Article 49.⁷¹ Both Jacobs and the ECJ concluded that the restriction was justified in order to protect consumers and to safeguard the reputation of the Dutch securities market.⁷²

66. *See id.* at I-1159, ¶ 61, [1995] 2 C.M.L.R. at 226.

67. *See Alpine Investments*, Case C-384/93, [1995] E.C.R. I-1141, I-1177, ¶ 36, [1995] 2 C.M.L.R. 209, 237.

68. *Id.* at I-1177, ¶ 37, [1995] 2 C.M.L.R. at 237.

69. *See* Opinion of Advocate General Jacobs, *Alpine Investments*, [1995] E.C.R. at I-1159, ¶ 62, [1995] 2 C.M.L.R. at 226.

70. *Alpine Investments*, [1995] E.C.R. at I-1176, ¶ 28, [1995] 2 C.M.L.R. at 236.

71. Specifically, Jacobs applied the three conditions that the Court had already laid down in its case law, asking whether: (1) the rules were justified by imperative reasons of public interest; (2) adequate protection of the public interest could be attained by less restrictive means; and (3) the interest in question was not protected adequately by the law of the Member State where the provider of services was established. *See* Opinion of Advocate General Jacobs, *Alpine Investments*, [1995] E.C.R. at I-1160, ¶ 64, [1995] 2 C.M.L.R. at 226.

72. *See id.* at I-1163, ¶ 78, [1995] 2 C.M.L.R. at 229; *see also Alpine Investments*, [1995] E.C.R. at I-1166, ¶ 44, [1995] 2 C.M.L.R. at 240.

B. Intellectual Property Rights and the Internal Market

One major barrier to an integrated European internal market is the protection of intellectual property rights, such as patents and trademarks, which are exclusive national property rights, granted by national laws and exercised over national territories.⁷³ The ECJ has been asked frequently by national courts to define the scope of Article 28 of the EC Treaty in the context of goods protected by intellectual property rights.⁷⁴ Article 30 of the EC Treaty provides an expressed derogation from the prohibition of Article 28 in favor of intellectual property owners.⁷⁵ Almost two years after his appointment as Advocate General, Jacobs delivered his first Opinion on the so-called “inherent” conflict between national rights of trademark owners and the EC Treaty rules on the free movement of goods,⁷⁶ in *HAG II*.⁷⁷ He successfully advised the Court to reverse its earlier ruling in *HAG I*.⁷⁸ As the ECJ rarely expressly overrules earlier decisions, this case has historical significance irrespective of its subject matter.

The ECJ in *HAG I* had adopted the “common origin” doctrine: where similar or identical trademarks were originally owned by the same natural or legal person, but later become the property of two different owners in different Member States,

73. See Hugh Laddie, *National I.P. Rights: A Moribund Anachronism in a Federal Europe*, 23 EUR. INTELL. PROP. REV. 402, 403-04 (2001).

74. See, e.g., *Administration des douanes et droits indirects v. Rioglass SA and Transremar SL*, Case C-115/02, [2003] E.C.R. 12705, [2006] 1 C.M.L.R. 12 (asking the ECJ whether Article 28 protection extends preclude customs detention of goods intended for sale in a non-member country while in transit through a member country); *Land Hessen v. G. Ricordi & Co. Bühnen- und Musikverlag GmbH*, Case C-360/00, [2002] E.C.R. I-05089, [2004] 2 C.M.L.R. 20 (considering the applicability of non-discrimination to copyrights that arose prior to the EEC Treaty’s entry into force); *Regie Nationale des Usines Renault SA v. Maxicar SpA*, Case C-38/98, [2000] E.C.R. I-2973 (asking whether Article 28 protected the intellectual property rights of an automobile body parts manufacturer).

75. See Consolidated EC Treaty, *supra* note 1, art. 30, O.J. C 325/33, at 47 (2002) (allowing derogation for “protection of industrial and commercial property”).

76. Jacobs has delivered a large number of opinions in cases involving trademark rights and Community law. In particular, after the adoption of the Trade Mark Directive, Council Directive No. 89/104, O.J. L 40/1 (1989), he played a significant role in the development of the Community’s trademark law by delivering opinions in almost all of the cases that raised issues of interpretation regarding the Directive’s various provisions.

77. *SA CNL-SUCAL NV v. HAG GF AG*, Case C-10/89, [1990] E.C.R. I-3711, [1990] 3 C.M.L.R. 571 [hereinafter *HAG II*].

78. *Van Zuylen v. HAG*, Case 192/73, [1974] E.C.R. 731, [1974] 2 C.M.L.R. 127 [hereinafter *HAG I*].

neither current owner could keep the other's trademarked goods, which had been lawfully placed on the market in a Member State, out of their respective territories.⁷⁹ Thus the EC Treaty rules on free movement of goods prevailed over nationally owned trademark rights.⁸⁰ Unfortunately, twenty years elapsed before a similar case was referred to the ECJ that would enable the Court to reconsider this heavily criticized⁸¹ doctrine.

Advocate General Jacobs' Opinion in *HAG II* is remarkable for the forthright manner in which he demolished the Court's reasoning in *HAG I*.⁸² He considered the principal fault of *HAG I* to be the ECJ's failure to explain why the mere fact that trademarks have a common origin is relevant in the absence of any market-sharing agreement.⁸³ Jacobs directly attacked the doctrine of common origin, finding no rational basis for it, and challenged the Court to justify it by reference to the EC Treaty. In fairness to the ECJ, Jacobs acknowledged, quoting from the opinion of Advocate General Dutheillet de Lamothe in *Sirena v. Eda*,⁸⁴ that twenty years earlier there had been a negative attitude towards the value of the interests protected by trademarks, by comparison to those protected by patents.⁸⁵ However, Jacobs also criticized the Court's attempt to legitimize the doctrine of common origin two years later in *Terrapin v. Terranova*.⁸⁶ According to Jacobs, the Court misunderstood "origin" in the context of the essential function of a trademark, which is to guarantee to consumers that *the product* has the same *commercial* origin, and not to guarantee the historical origin of the trademark it-

79. See *id.* at 744, ¶ 15, [1974] 2 C.M.L.R. at 144.

80. See *id.* at 744, ¶ 13, [1974] 2 C.M.L.R. at 144

81. For criticism of the common origin doctrine, see William R. Cornish, *Trade Marks, Customer Confusion and the Common Market*, 38 MOD. L. REV. 329 (1975); see also Francis A. Mann, *Industrial Property and the E.E.C. Treaty*, 24 INT'L & COMP. L.Q. 31 (1975).

82. See Opinion of Advocate General Jacobs, *HAG II*, Case C-10/89, [1990] E.C.R. I-3711, I-3733-34, ¶ 22, [1990] 3 C.M.L.R. 571, 584-86.

83. See *id.* at I-3734, ¶ 26(iv), [1990] 3 C.M.L.R. at 585-86.

84. See Opinion of Advocate General Lamothe, *Sirena S.r.l. v. Eda S.r.l.*, Case 40/70, [1971] E.C.R. 69, 87, ¶ 1, [1971] C.M.L.R. 260, 264-65. See also *Sirena S.r.l. v. Eda S.r.l.*, Case 40/70, [1971] E.C.R. 69, 82, ¶ 7, [1971] C.M.L.R. 260, 273 (citing Advocate General Lamothe's comment).

85. See Opinion of Advocate General Jacobs, *HAG II*, [1990] E.C.R. at I-3731, ¶ 16, [1990] 3 C.M.L.R. at 582.

86. See *id.* at I-3735, ¶ 24, [1990] 3 C.M.L.R. at 582 (citing *Terrapin (Overseas) Ltd. v. Terranova Industrie C. A. Kapferer & Co.*, Case 119/75, [1976] E.C.R. 1039, [1976] 2 C.M.L.R. 482).

self.⁸⁷ By the time *Terrapin v. Terranova* was decided, the Court had already recognized that trademarks have two functions: to protect the owner's goodwill, and to protect consumers from confusion or deception as to the origin of the goods.⁸⁸ Jacobs further implied that the Court should have reasoned more logically in *Terrapin v. Terranova*, instead of confirming the position adopted in *HAG I*.⁸⁹ He concluded that the doctrine of common origin "is not a legitimate creature of Community law,"⁹⁰ and reminded the Court that post-*HAG I* case law on the exercise of intellectual property rights had developed and centered around the notion of "consent."⁹¹ The doctrine of common origin was not reconcilable with the notion of consent where the property had been expropriated by the State.⁹²

The ECJ in *HAG II* abandoned the doctrine of common origin, ruling that "it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in . . . [*HAG I*] in the light of the case law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods."⁹³ It is not clear whether this reversal would have happened irrespective of Jacobs' opinion. One judge in the case, René Joliet, was familiar with intellectual property rights law and, as a former academic, was fully aware of the criticism of *HAG I* and *Terrapin v. Terranova*.⁹⁴ Nevertheless, Jacobs' Opinion is a coherent, authoritative, and robust demolition of the ECJ's reasoning in both rulings.⁹⁵

87. See Opinion of Advocate General Jacobs, *HAG II*, [1990] E.C.R. at I-3735, ¶ 24, [1990] 3 C.M.L.R. at 582.

88. See generally *Centrafarm v. Winthrop*, Case 16/74, [1974] E.C.R. 1183, [1974] 2 C.M.L.R. 480.

89. See Opinion of Advocate General Jacobs, *HAG II*, [1990] E.C.R. at I-3736-37, ¶ 26, [1990] 3 C.M.L.R. at 588.

90. *Id.*

91. See *id.* at I-3737, ¶¶ 27-28, [1990] 3 C.M.L.R. at 588-89.

92. See *id.* at I-3738, ¶¶ 31-32, [1990] 3 C.M.L.R. at 590.

93. *HAG II*, Case C-10/89, [1990] E.C.R. I-3711, I-3757, ¶ 10, [1990] 3 C.M.L.R. 571, 607.

94. For an article illustrating Joliet's familiarity with intellectual property law, see René Joliet, *Trademark Law and the Free Movement of Goods: The Overruling of the Judgment in Hag I*, 22 INT. REV. OF INDUS. PROP. & COPYRIGHT L. 303 (1991).

95. Interestingly, Jacobs criticized the Court for lack of justifications for adopting the doctrine of common origin in the *HAG I* ruling, and specifically mentioned the fact that the Court's ruling was set out only in ten short paragraphs. See Opinion of Advocate General Jacobs, *HAG II*, [1990] E.C.R. at I-3732, ¶ 21, [1990] 3 C.M.L.R. at 584. In

The case of *Silhouette v. Hartlauer*⁹⁶ raised the issue of exhaustion of trademark rights again in 1998.⁹⁷ In *Silhouette*, the national court sought clarification as to whether Community law required Member States to adopt the principle of international exhaustion.⁹⁸ The doctrine of exhaustion of intellectual property rights, developed by the ECJ in case law to resolve the conflict between the prohibition of Article 28 and the derogation in Article 30, has been primarily based on the existence or absence of “consent” on the part of the relevant right-holder.⁹⁹ If placed on the Community market by (or with the consent of) the owners of intellectual property rights, products protected by such rights are free to circulate anywhere within that market.

Community legislation now governs the matter. Article 7(1) of the Trade Marks Directive¹⁰⁰ states that: “[t]he trademark

HAG II, even though the ECJ expressly overturned a twenty year-old doctrine, the Court dealt with this whole matter in only ten paragraphs! See *HAG II*, [1990] E.C.R. I-3711, I-3757-60, ¶¶ 11-20, [1990] 3 C.M.L.R. 571, 607-09. This contrasts dramatically with Jacobs’ opinion in *HAG II*, which comprised sixty-five paragraphs. See Opinion of Advocate General Jacobs, *HAG II*, [1990] E.C.R. at I-3727-51, ¶¶ 7-72, [1990] 3 C.M.L.R. at 578-605.

96. *Silhouette International Schmied GmbH & Co KG v. Hartlauer Handelsgesellschaft mbH*, Case C-355/96, [1998] E.C.R. I-4822, [1998] 2 C.M.L.R. 953 [hereinafter *Silhouette*].

97. See Opinion of Advocate General Jacobs, *Silhouette*, Case C-355/96, [1998] E.C.R. I-4799, I-4802, ¶ 3, [1998] 2 C.M.L.R. 953, 957.

98. See *id.* at I-4809-10, ¶ 29, [1998] 2 C.M.L.R. at 962; see also *Silhouette*, [1998] E.C.R. at I-4828, ¶¶ 14-15, [1998] 2 C.M.L.R. at 975. The goods in question—trade-marked outdated models of spectacle frames—had been placed on the market outside the Community with instructions to the purchaser not to export the goods to any other country. See Opinion of Advocate General Jacobs, *Silhouette*, [1998] E.C.R. at I-4806-07, ¶ 16, [1998] 2 C.M.L.R. at 960. The goods, however, were imported into the Community by a third-party, and *Silhouette*, the trademark owner, sought to prevent the importation of the trademarked goods claiming that they were not placed on the Community market with its consent. See *id.* at I-4807, ¶¶ 17-18, [1998] 2 C.M.L.R. at 960.

99. In *Deutsche Grammophon Gesellschaft mbH. v. Metro-SB-Grossmärkte GmbH & Co. K.G.*, Advocate General Roemer proposed a criterion of dependency to reconcile the Free Movement of Goods rules with the rights of intellectual property owners. See *Deutsche Grammophon Gesellschaft mbH. v. Metro-SB-Grossmärkte GmbH & Co. K.G.*, Case 78/70, [1971] E.C.R. 487, [1971] C.M.L.R. 631. He concluded that a trademark owner exhausted his rights where the goods were placed in the territory of another Member State by the trademark owner or an undertaking dependent on the owner. See Opinion of Advocate General Roemer, *Deutsche Grammophon Gesellschaft mbH. v. Metro-SB-Grossmärkte GmbH & Co. K.G.*, Case 78/70, [1971] E.C.R. 487, 506-08, [1971] C.M.L.R. 631, 647-49. The ECJ, however, replaced the criterion of dependency by one of consent. See *Deutsche Grammophon*, Case 78/70, [1971] E.C.R. at 500, ¶ 13, [1971] C.M.L.R. at 657-58.

100. See Council Directive No. 89/104, O.J. L 40/1, at 1 (1989).

shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trademark by the proprietor or with his consent."¹⁰¹

It was clear from the legislative history of the Trade Mark Directive that Article 7(1) does not require the Member States to adopt a principle of international exhaustion, but less clear whether Article 7(1) prohibited the adoption of such a principle by a Member State.¹⁰² Jacobs conceded that the adoption of the principle of international exhaustion would be favorable to consumers and promote competition.¹⁰³ His main concern, however, was to safeguard the integrity of the internal market.¹⁰⁴ In his view, the ECJ's case law on trademarks was developed "in the context of the Community, not the world market."¹⁰⁵ He decided to interpret Article 7(1) literally, concluding that Article 7(1) provides for exhaustion only where goods are placed in the Community (that is, the EEA) market.¹⁰⁶ Thus, Member States could not adopt any other doctrine. He stated that, "[i]f some Member States practice international exhaustion while others do not, there will be barriers to trade within the internal market which it is precisely the object of the Directive to remove."¹⁰⁷

The ECJ expressed its conclusions as to the purpose of the Directive and the Member States' inability to provide for international exhaustion in substantially identical wording.¹⁰⁸

II. *RIGHTS OF INDIVIDUALS UNDER COMMUNITY LAW*

Before being appointed an Advocate General, Francis Jacobs was a well-respected expert on the European Convention on Human Rights ("ECHR")¹⁰⁹ and therefore it is not surprising

101. *Id.* art. 7(1), O.J. L 40/1, at 7 (1989).

102. *See generally* Commission of the European Communities, Amended Proposal for a First Council Directive to Approximate the Laws of the Member States Relationships to Trademarks, COM (85) 793 (Dec. 1985).

103. *See* Opinion of Advocate General Jacobs, *Silhouette*, Case C-355/96, [1998] E.C.R. I-4799, 48, ¶ 4814-15, [1998] 2 C.M.L.R. 953, 967.

104. *See id.* at I-4815, ¶ 52, [1998] 2 C.M.L.R. at 967.

105. *Id.* at I-4815, ¶ 49, [1998] 2 C.M.L.R. at 967.

106. *See id.* at I-4810, ¶ 30, [1998] 2 C.M.L.R. at 962.

107. *Id.* at I-4812, ¶ 41, [1998] 2 C.M.L.R. at 964-65.

108. *See Silhouette*, Case C-355/96, [1998] E.C.R. I-4822, I-4831, ¶ 27, [1998] 2 C.M.L.R. 953, 977.

109. Prior to his appointment, Jacobs was Professor of Law and Director of the Centre for European Law at King's College, University of London. He is also the co-

that he sought to promote individual rights. Four Opinions have been selected as typical of his efforts to persuade the ECJ to protect and extend the rights of individuals.

A. Human Rights Protected by Community Law

Jacobs' opinion in *Konstantinidis*¹¹⁰ is a rather special example of his deeply held commitment to the development of human rights principles as an essential element of the Community's legal order.

The question asked of the ECJ's Sixth Chamber was essentially whether a Member State national, established as a self-employed person in another Member State in which a different alphabet is used, is entitled, by virtue of Articles 12¹¹¹ and 43 of the EC Treaty,¹¹² to oppose the transliteration of his names in a manner that seriously misrepresented their pronunciation.¹¹³ Apart from considering the transliteration offensive to his religious sentiments, Mr. Konstantinidis also considered that his human rights would have been infringed if this distortion of his name adversely affected his right of free movement.¹¹⁴

Jacobs approached the problem by first determining whether there was discrimination on the ground of nationality, and then asking whether, even in the absence of discrimination, the treatment accorded to Mr. Konstantinidis restricted his right of establishment under Article 43 and/or breached fundamental rights protected by Community law.¹¹⁵ Jacobs concluded that there was indirect discrimination: Greek nationals living in Germany had to have their names spelled according to a system that neither respected their wishes nor considered the possibility of

author of JACOBS & WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS (3d ed. 2002, now edited and continued by Clare Ovey & Robin C.A. White).

110. *Christos Konstantinidis v. Stadt Altensteig-Standesamt und Landratsamt Calw-Ordnungsamt*, Case C-168/91, [1993] E.C.R. I-1191, [1993] 3 C.M.L.R. 401 [hereinafter *Konstantinidis*]. The dispute arose when the applicant's Greek name, Christos Konstantinidis, was transcribed into Roman characters according to German national rules which resulted in the applicant's name being rendered as 'Hrçstos Kōnstantinidçs.'

111. Article 12 of the EC Treaty prohibits discrimination on the grounds of nationality. Consolidated EC Treaty, *supra* note 1, art. 12, O.J. C 325/33, at 43 (2002).

112. Article 43 of the EC Treaty provides for the right of establishment. Consolidated EC Treaty, *supra* note 1, art. 43, O.J. C 325/33, at 52 (2002).

113. See Opinion of Advocate General Jacobs, *Konstantinidis*, Case C-168/91, [1993] E.C.R. I-1191, I-1199, I-1202, ¶¶ 5, 10, [1993] 3 C.M.L.R. 401, 405, 409.

114. See *id.* at I-1199, ¶ 5, [1993] 3 C.M.L.R. at 405.

115. See *id.*

an objectionable degree of distortion.¹¹⁶ Thus, Greek nationals were treated differently than nationals from other Member States.¹¹⁷ It had been submitted that such indirect discrimination should only be prohibited if tangible disadvantage was shown, such as loss of income or administrative difficulties. Jacobs firmly rejected this submission, arguing that:

Community law does not regard the migrant worker (or the self-employed migrant) purely as an economic agent and a factor of production entitled to the same salary and working conditions as nationals of the host State it regards him as a human being who is entitled to live in that State 'in freedom and dignity' . . . and to be spared any difference in treatment that would render his life less comfortable, physically or psychologically, than the lives of the native population.¹¹⁸

This was a remarkable assertion, given the well-documented historical foundation of the common market, whose four fundamental freedoms—goods, persons, services, and capital—are the recognized four factors of production in a market economy.¹¹⁹ Jacobs took a totally different approach, concluding that it was irrelevant whether economic loss was suffered by the transliteration of the applicant's name.¹²⁰ It was enough that documents such as birth, marriage and death certificates—"the most significant and sacred events in a person's existence"¹²¹—were written in a manner that the person found offensive.¹²² Jacobs opined that, "[e]ven as regards entries in official registers [the applicant] is entitled to the same treatment as German nationals, unless there is objective justification for treating him differently,"¹²³ which was not the case here.

Having found indirect discrimination in breach of Article 12 of the EC Treaty,¹²⁴ it was unnecessary for Jacobs to consider

116. *See id.* at I-1204, ¶ 20, [1993] 3 C.M.L.R at 411-12.

117. *See id.*

118. *Id.* at I-1204-05, ¶ 24, [1993] 3 C.M.L.R at 412, 413.

119. *See* Simone Suelzer McCormick, *ASEM: A Promising Attempt to Overcome Protective Regionalism and Facilitate the Globalization of Trade*, 10 ANN. SURV. INT'L & COMP. L. 233, 238 (2004).

120. *See* Opinion of Advocate General Jacobs, *Konstantinidis*, [1993] E.C.R. I-1191, I-1205-06, ¶¶ 25, 27, [1993] 3 C.M.L.R. 401, 413.

121. *Id.* at I-1205, ¶ 26, [1993] 3 C.M.L.R at 413.

122. *See id.* at I-1205-06, ¶¶ 26, 27, [1993] 3 C.M.L.R. at 413-14.

123. *Id.*

124. *See id.* at I-1207, ¶¶ 30, 31, [1993] 3 C.M.L.R at 415.

the issue of fundamental rights. Nevertheless, he took the opportunity to explain his deeply-held belief that there is a fundamental human right to one's own name under Community law.¹²⁵ Jacobs criticized the European Convention on Human Rights ("ECHR") for not providing a right of individuals to a name and a personal identity, and for not recognizing an individual's right to be treated with respect for his dignity and moral integrity.¹²⁶ He proceeded to review several Member State constitutions that supported his conclusion that there exists "a principle according to which the State must respect not only the physical well-being of the individual but also his dignity, moral integrity and sense of personal identity."¹²⁷ Paragraph forty is worth quoting in full:

A person's right to his name is fundamental in every sense of the word. After all, what are we without our name? It is our name that distinguishes each of us from the rest of humanity. It is our name that gives us a sense of identity, dignity and self-esteem. To strip a person of his rightful name is the ultimate degradation, as is evidenced by the common practice of repressive penal regimes which consists in substituting a number for the prisoner's name.¹²⁸

The crucial question in *Konstantinidis* was whether a person exercising his Community right of free movement was, as a matter of Community law, entitled to object to treatment that constituted a breach of his fundamental rights.¹²⁹ Jacobs reviewed the case law, concluding that Community law had developed considerably in this respect in the 1980s.¹³⁰ He also concluded that migrant Community nationals are entitled not only to enjoy the same living and working conditions as nationals of their host Member State, but also to assume that wherever they go to earn

125. *See id.* at I-1207, I-1209, ¶¶ 31, 40, [1993] 3 C.M.L.R at 415, 417.

126. *See id.* at I-1208, ¶ 36, [1993] 3 C.M.L.R at 416.

127. *See id.* at I-1209, ¶ 39, [1993] 3 C.M.L.R at 417.

128. *Id.* at I-1209, ¶ 40, [1993] 3 C.M.L.R at 417.

129. *See id.* at I-1210, ¶ 42, [1993] 3 C.M.L.R at 418.

130. *See id.* In certain situations, Community law requires national legislation to be tested for compliance with fundamental rights. These situations arise when the national legislation implements Community law and when an EC Treaty provision derogating from the principle of free movement is invoked to justify a restriction on free movement. *See, e.g.,* Cinéthèque and others v. Fédération nationale des cinémas français, Joined Cases C-60 and C-61/84, [1985] E.C.R. 2605, 2627, ¶ 26, [1986] 1 C.M.L.R. 365, 386; Demirel v. Stadt Schwäbisch Gmünd, Case C-12/86, [1987] E.C.R. 3719, 3754, ¶ 28, [1989] 1 C.M.L.R. 421, 439-40.

their living within the European Community, they will be treated in accordance with a common code of fundamental values, particularly those laid down by the ECHR.¹³¹ They are entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of their fundamental rights.¹³² Jacobs dismissed all major objections to this conclusion on various grounds.¹³³

Predictably, the Court totally ignored the human rights issue, focusing on the circumstances of when the transcription of the name of a migrant Greek national would be incompatible with Article 42, and finding that this would be so where the degree of inconvenience interferes with the migrant's freedom to exercise the right of establishment.¹³⁴ On the particular facts of this case, such interference would be established if the transliteration of the migrant's name created a risk that potential clients could confuse him with other persons.¹³⁵

B. *Horizontal Direct Effect of Directives*

The Opinions delivered in *Vaneetveld*¹³⁶ and *Unilever*¹³⁷ demonstrate Jacobs' concern with the extent to which individuals may be affected by a Member State's failure to discharge its Treaty obligations in respect of directives. In *Vaneetveld*, Jacobs argued robustly and with conviction in favor of a coherent Community legal system under which individuals should be allowed, in certain circumstances, to rely on rights intended to be conferred upon them by non-implemented or incorrectly implemented directives, not only against Member States or emanations of the State (vertical direct effect), but also in national litigation against a private party (horizontal direct effect).¹³⁸ After

131. See Opinion of Advocate General Jacobs, *Konstantinidis*, [1993] E.C.R at 1211-12, ¶ 46, [1993] 3 C.M.L.R at 420.

132. See *id.*

133. See *id.* at I-1212-13, ¶¶ 47-50, [1993] 3 C.M.L.R at 420-22.

134. See *Konstantinidis*, Case C-168/91, [1993] E.C.R. I-1191, 1218, ¶ 15, [1993] 3 C.M.L.R. 401, 424.

135. See *id.* at I-1218, ¶ 16, [1993] 3 C.M.L.R. at 424.

136. Opinion of Advocate General Jacobs, *Vaneetveld*, Case C-316/93, [1994] E.C.R. I-763, [1994] 2 C.M.L.R. 852.

137. Opinion of Advocate General Jacobs, *Unilever*, Case C-443/98, [2000] E.C.R. I-7535, [2001] 1 C.M.L.R. 21.

138. See Opinion of Advocate General Jacobs, *Vaneetveld*, Case C-316/93, [1994] E.C.R. at I-763, I-773, I-775-76, ¶¶ 26, 31, 34, [1994] 2 C.M.L.R. 852, 860, 863-64.

examining the arguments regularly raised against the horizontal direct effect of directives, he argued that there was no longer any rational justification for denying such effect.¹³⁹ At paragraph twenty-six of the Opinion, he stated:

More than [thirty] years ago in *Van Gend en Loos* [Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1, [1963] C.M.L.R. 105] the Court recognised the specific character of Community law as a system of law which could not be reduced to an arrangement between States, as was often the case in traditional international law. After the developments in the Community legal system which have taken place since then, it may be necessary to recognize that in certain circumstances directives which have not been properly implemented may confer rights on individuals even as against private bodies. Perhaps a particular contrast could be drawn in this respect between the Community legal order and the international legal order.¹⁴⁰

Jacobs denied that directives are binding only as to the result to be achieved.¹⁴¹ This was indeed the original objective, but the reality now is very different. The Community legal order is neither static nor complete, but is a continuously evolving legal system, and therefore the ECJ's interpretative rulings may require modification to reflect political and constitutional changes. In practice, Member States' discretion on how to implement directives "is severely limited by the detailed, exhaustive nature of much of the legislation now emanating from the Council in the form of directives. Many of the provisions contained in directives are, in consequence, ideally suited to have direct effect."¹⁴²

Once again, Jacobs sought a reversal of existing case law¹⁴³ when the facts did not strictly require him to do so, as confirmed by the subsequent very brief ruling of the Second Chamber of the ECJ.¹⁴⁴ However, at the time Jacobs delivered the Opinion

139. *See id.* at I-770-77, ¶¶ 18-36, [1994] 2 C.M.L.R. at 859-65.

140. *Id.* at I-773, ¶ 26, [1994] 2 C.M.L.R. at 860.

141. *See id.* at I-773-74, ¶ 28, [1994] 2 C.M.L.R. at 862.

142. *Id.*

143. *See* *Marshall v. Southampton and South-West Hampshire Area Health Authority*, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688 [hereinafter *Marshall I*].

144. *See* *Nicole Vaneetveld v. Le Foyer SA and Le Foyer SA v. Fédération des Mutualités Socialistes et Syndicales de la Province de Liège*, Case C-316/93, [1994] E.C.R. I-763, I-780-85, [1994] 2 C.M.L.R. 852, 865-68 [hereinafter *Vaneetveld*]. On the facts of

in *Vaneetveld*—the preliminary reference in *Faccini Dori*¹⁴⁵—in which the ECJ had been expressly invited to re-examine the issue of horizontal direct effect of directives, was pending before a Full Court.¹⁴⁶ Although clearly speculative, it is reasonable to suggest that Jacobs sought in *Vaneetveld* to publicize his views on this issue.

Jacobs' concern with legal certainty and the effect on individual rights of "new-style" directives, particularly in their contractual arrangements governed by national law, may also be seen in his *Unilever* opinion.¹⁴⁷ That case, before the national court concerned a dispute involving the supply of olive oil by Unilever to Central Food.¹⁴⁸ Central Food refused payment because the oil was not labeled in conformity with Italian legislation.¹⁴⁹ That legislation, however, had not received European Commission approval, as required by the relevant directive.¹⁵⁰

Previously, in *CIA Security*,¹⁵¹ the ECJ had ruled that a national court must refuse to apply, in litigation between private parties, a national technical regulation that had not been notified to the European Commission as required by the relevant directive.¹⁵² Jacobs expressly approved this ruling insofar as it provided that, in order to safeguard the effectiveness of the control mechanism established by the directive, a Member State should not be able to enforce against individuals a technical reg-

the case, the accident, which led to the civil litigation before the national court, took place before the time period for implementing the directive into national law had elapsed. See Opinion of Advocate General Jacobs, *Vaneetveld*, Case C-316/93, [1994] E.C.R. at I-763, I-768-69, ¶¶ 13-15, [1994] 2 C.M.L.R. 852, 857-58. Directives can be relied on by individuals before national courts only after the expiry of the period laid down in the directive for implementation into national law. See *Vaneetveld*, [1994] E.C.R. at I-784, ¶ 16, [1994] 2 C.M.L.R. at 867.

145. *Faccini Dori v. Recreb Srl.*, Case C-91/92, [1994] E.C.R. I-3325, [1995] 1 C.M.L.R. 665. *Faccini* confirmed that directives can have direct effect only against the State or an emanation of the State. See *id.*

146. See *id.* at I-3355, ¶ 19, [1995] 1 C.M.L.R. at 689.

147. *Unilever Italia SpA v. Central Food SpA*, Case C-443/98, [2000] E.C.R. I-7535, [2001] 1 C.M.L.R. 566 [hereinafter *Unilever*].

148. See *id.* at I-7576-77, ¶¶ 18-22, [2001] 1 C.M.L.R. at 596.

149. See *id.* at I-7576, ¶ 19, [2001] 1 C.M.L.R. at 596.

150. See *id.* at I-7576, ¶ 20, [2001] 1 C.M.L.R. at 596.

151. *CIA Security International SA v. Signalson SA and Securitel SPRL*, Case C-194/94, [1996] E.C.R. I-2201, [1996] 2 C.M.L.R. 781 [hereinafter *CIA Security*].

152. See *id.* at I-2228, ¶ 75, [1996] 2 C.M.L.R. at 807.

ulation adopted without prior notification.¹⁵³ However, the *CIA Security* ruling was sufficiently wide to be interpreted as granting, in all national litigation,¹⁵⁴ horizontal direct effect to that directive. In *Unilever*, Jacobs focused on persuading the Full Court not to extend the *CIA Security* ruling, by distinguishing the cases on their facts.¹⁵⁵ He stressed that the *CIA Security* ruling had concerned litigation between competitors on the basis of national rules prohibiting unfair trading practices.¹⁵⁶ In *Unilever*, the national litigation concerned civil litigation based on the parties' contractual relationship.¹⁵⁷

Jacobs fully acknowledged the various solutions that the ECJ had already devised to counter the problems arising from the failure of Member States to implement a directive properly within the specified period.¹⁵⁸ In earlier rulings the relevant directives were intended to confer rights on individuals.¹⁵⁹ Jacobs argued, however, that the directive in *Unilever* was of a different nature since its objective was not to harmonize laws and grant rights to individuals, but to protect the free movement of goods via a preventive control mechanism.¹⁶⁰ Jacobs concluded that, under the circumstances, "the use of concepts such as transposition into national law and failure to do so within the applicable time-limit is thus clearly not helpful,"¹⁶¹ thereby dismissing existing case law as inappropriate and proposing to consider the matter "on the basis of general principles of Community law alone."¹⁶² Thus, if the non-notified national technical regulation constituted an obstacle to the free movement of goods, individuals could rely on Article 28 without the need to refer to the directive.¹⁶³

153. See Opinion of Advocate General Jacobs, *Unilever*, Case C-443/98, [2000] E.C.R. I-7535, 7558, ¶ 92, [2001] 1 C.M.L.R. 21, 587.

154. Jacobs' reference to the Opinion of Advocate General Elmer in *CIA Security* supported this interpretation. See *id.* at I-7558, ¶ 96, [2001] 1 C.M.L.R. at 588.

155. See *id.* at I-7553-54, ¶¶ 64-71, [2001] 1 C.M.L.R. at 582.

156. See *id.* at I-7554, ¶ 71, [2001] 1 C.M.L.R. at 583.

157. See *id.*

158. Specifically, the doctrine of consistent interpretation of national law in the light of directives; the vertical direct effect of directives; and the absence of horizontal direct effect of directives. See *id.* at I-7555, ¶ 78, [2001] 1 C.M.L.R. at 584.

159. See *id.* at I-7557, ¶ 86, [2001] 1 C.M.L.R. at 586.

160. See *id.* at I-7555-56, I-7557, ¶¶ 79, 86, [2001] 1 C.M.L.R. at 584, 586.

161. *Id.* at I-7555-56, ¶ 79, [2001] 1 C.M.L.R. at 584.

162. *Id.* at I-7556, ¶ 81, [2001] 1 C.M.L.R. at 585.

163. See *id.* at I-7557, ¶¶ 85-86, [2001] 1 C.M.L.R. at 585-86.

Jacobs then highlighted the problems that would arise for individuals should the *CIA Security* ruling be applied to all types of civil proceedings, particularly legal certainty and injustice.¹⁶⁴ Regarding legal certainty, it would be very difficult for traders to be aware of whether Member States have complied with the procedural requirements under the directive.¹⁶⁵ It would also be unjust if failure to notify would render a technical regulation unenforceable in private civil litigation—an individual would lose not because of his own failure to comply with a Community law obligation, but because of a Member State's failure.¹⁶⁶

The ECJ rejected Jacobs' reasoning, expressly finding that *CIA Security* applied to all types of litigation between private parties.¹⁶⁷ The Court expressly stated that the case law providing that directives cannot themselves impose obligations on individuals—and therefore cannot be relied on as such against other individuals—did not apply where non-compliance with procedural requirements of a directive constituted a substantial procedural defect, rendering inapplicable a technical regulation adopted in breach of its provisions.¹⁶⁸

C. *Locus Standi of Non-Privileged Applicants before the ECJ*

The fourth paragraph of Article 230 of the EC Treaty provides for limited direct access to the ECJ for non-privileged applicants, namely natural and legal persons, when seeking annulment of an act adopted by a Community institution.¹⁶⁹ Individuals may only challenge the legality of a Community act of "direct and individual concern" to them.¹⁷⁰

*UPA*¹⁷¹ concerned an appeal against an Order of the CFI that had dismissed the application of an association of Spanish farmers seeking the annulment of a regulation as inadmissible.¹⁷² The CFI dismissed the case on the ground that the associ-

164. *See id.* at I-7559-60, ¶¶ 99-101, [2001] 1 C.M.L.R. at 588-89.

165. *See id.* at I-7560, ¶ 100, [2001] 1 C.M.L.R. at 588.

166. *See id.* at I-7560, ¶ 101, [2001] 1 C.M.L.R. at 588-89.

167. *See Unilever*, Case C-443/98, [2000] E.C.R. I-7535, I-7584, ¶ 49, [2001] 1 C.M.L.R. 21, 600-01.

168. *See id.* at I-7584-85, ¶ 50, [2001] 1 C.M.L.R. at 601.

169. *See Consolidated EC Treaty*, *supra* note 1, art. 230, at 126.

170. *See id.*

171. *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, [2002] 3 C.M.L.R. 1.

172. *See Opinion of Advocate General Jacobs*, *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, I-6681, ¶ 1, [2002] 3 C.M.L.R. 1, 6.

ation's members were not individually concerned by the relevant regulation, within the meaning of Article 230's fourth paragraph.¹⁷³ Jacobs' Opinion was a passionate plea to the Full Court to reverse previously strict interpretative rulings concerning the meaning of "individual concern."¹⁷⁴ Although Jacobs failed to persuade the Court,¹⁷⁵ the Opinion is a coherent, exhaustive, and thoughtful attempt to plug what many critics regard as a serious gap in the system of judicial remedies established by the EC Treaty.

The problem may be summarized as follows: The right to effective judicial protection is a recognized principle of Community law, inherent in the system of remedies established by the EC Treaty. The availability of an indirect challenge to Community acts via a preliminary reference is considered insufficient to protect this right. Jacobs examined in detail the inappropriateness of the reference procedure in the context of challenges to the validity of Community measures,¹⁷⁶ concluding that existing case law was incompatible with the principle of effective judicial protection.¹⁷⁷ That conclusion raised the question of the circumstances under which *locus standi* should be granted, enabling individuals to challenge general Community measures.¹⁷⁸ Jacobs proposed a novel but realistic interpretation of the notion of "individual concern."¹⁷⁹ In his view "a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests."¹⁸⁰

Jacobs urged the Court not to be influenced by the historical background of Article 230:

[The European Community] is now firmly established and its legislative process, to a large extent based on the adoption of measures by majority voting in the Council of Ministers and the European Parliament, is sufficiently robust to withstand

173. *See id.* at I-6683-86, ¶ 9-18, [2002] 3 C.M.L.R. at 10-12.

174. *See id.* at I-6681-82, ¶¶ 1-4, [2002] 3 C.M.L.R. at 7-8.

175. *See UPA*, Case C-50/00P, [2002] E.C.R. I-6677, I-6736, ¶ 46, [2002] 3 C.M.L.R. 1, 48.

176. *See* Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6694-95, ¶¶ 45-48, [2002] 3 C.M.L.R. at 20-21.

177. *See id.* at I-6695-96, ¶ 49, [2002] 3 C.M.L.R. at 21.

178. *See id.* at I-6682, ¶ 3, [2002] 3 C.M.L.R. at 8.

179. *See id.* at I-6698, ¶ 60, [2002] 3 C.M.L.R. at 23.

180. *Id.*

judicial scrutiny at the instigation of individuals Community law now affects the interests of individuals directly, frequently and deeply; there is therefore a correspondingly greater need for effective judicial protection against unlawful action.¹⁸¹

Another reason Jacobs advanced for reconsidering the case law on individual concern was “the Court’s evolving case law on the principle of effective protection of rights derived from Community law in national courts.”¹⁸² That case law imposes a high standard on national legal systems, which contrasts negatively with the limited access for individuals to the Community courts.¹⁸³ He also criticized the complexity and apparent inconsistency resulting from the Court’s attempts to allow access whenever the traditional approach would have led to a manifest “denial of justice,” concluding that it was “indisputable that access to the Court is one area above all where it is essential that the law be clear, coherent and readily understandable.”¹⁸⁴

The ECJ, however, reaffirmed prior case law, stating that the interpretation of “individual concern” cannot have the effect of “setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.”¹⁸⁵

Interestingly, the Court—unnecessarily for the purpose of this appeal—expressly stated that it was possible to envisage a system of judicial review of Community measures differing from that established by the founding Treaty.¹⁸⁶ However, the Court held that the Member States would need to reform the current system.¹⁸⁷

CONCLUSION

What do the above Opinions tell us about Francis Jacobs, who held the position of Advocate General for so long? It is submitted that they are the views of a jurist committed to an overrid-

181. *Id.* at I-6703-04, ¶ 77, [2002] 3 C.M.L.R. at 27-28.

182. *Id.* at I-6711, ¶ 97, [2002] 3 C.M.L.R. at 34-35.

183. *See id.* at I-6711, ¶ 98, [2002] 3 C.M.L.R. at 34-35.

184. *Id.* at I-6712, ¶ 100, [2002] 3 C.M.L.R. at 36.

185. *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, I-6735, ¶ 44, [2002] 3 C.M.L.R. 1,

48.

186. *See id.* at I-6735-36, ¶ 45, [2002] 3 C.M.L.R. at 48.

187. *See id.*

ing objective of enhancing and protecting the rights of individuals within the Community legal order, in order to achieve various goals, including the establishment of an internal market.

Certainly, there is no evidence that Jacobs felt restrained from pursuing those causes and publicizing his views, even when a particular issue was not pivotal to the final ruling (for example, *Leclerc-Siplec*, *Konstantinidis* and *Vaneetveld*). With regard to the substantive law of the internal market, Jacobs' Opinions in *Leclerc-Siplec* and *Alpine Investments* demonstrate his commitment to freedom of access to an integrated European market in goods and services, obstacles to those freedoms being tolerable only if non-discriminatory and insignificant (*de minimis*), or justified (*Alpine Investments*). Jacobs accepted that non-discriminatory national rules might nevertheless impede cross-border access to goods and services lawfully marketed elsewhere in the European Community. This was unavoidable in a Community consisting of twenty-five national markets, largely governed by national rules. His priority was apparently to ensure that such obstacles did not substantially impede the main objective of the EC Treaty (as amended), namely the establishment and maintenance of an integrated internal market.

However, where individual rights were involved, even market access became a secondary consideration. In *HAG II* and *Silhouette*, individual property rights prevailed over the free movement of goods and the benefit of consumers. This is not surprising, perhaps, given Jacobs' commitment to individual rights. He argued emotionally and passionately in favor of Community law protecting human rights (*Konstantinidis*) and consistently promoted the interests of individuals (*Vaneetveld*, *Unilever* and *UPA*). The fact that the ECJ, in the specific cases, failed sometimes to respond to such arguments (*Leclerc-Siplec*, *Konstantinidis*, *Vaneetveld*) or rejected them (*Unilever* and *UPA*) is perhaps unimportant, given that, at the very least, Jacobs' Opinions have contributed to lively and stimulating debates by academics and practitioners throughout the Community and beyond, on controversial aspects of the Community's legal order.