

Introduction: Making Community Law

The legacy of Advocate General Jacobs at the European Court of Justice

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Sir Francis Jacobs was the United Kingdom's Advocate General (AG) at the European Court of Justice (ECJ) from 7 October 1988 until 10 January 2006. He attended his first hearing on 9 November 1988 and delivered his first opinion on the thirtieth day of that same month.³ Sir Francis's last case hearing was on 17 November 2005,⁴ with a three-pack of final opinions delivered on 15 December 2005, in Cases C-167/04-P *JCB*,⁵ C-423/04 *Richards*⁶ and C-416/04-P *Sunrider*,⁷ followed by a final attendance in the Chamber at the *audience solennelle* on 10 January 2006 which marked his retirement.

During Sir Francis's tenure at the ECJ both the European Communities and the wider world experienced fundamental changes. When Sir Francis arrived at the ECJ, there were twelve Member States. At the time of his departure, there were twenty-five Member States, with two more (Romania and Bulgaria) about to accede. In October 1988 the iron curtain was in place, Germany was divided into two states and the Soviet Union was just beginning its process of reform. In 2006 the Soviet Union was history and three former Soviet Socialist Republics (Estonia, Latvia and Lithuania) were actually within what was now

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³ Both in Case 182/87 *Trouw & Co. BV v Hoofdprodukschap voor Akkerbouwprodukten* [1989] ECR 469 (a case about the calculation of aid for skimmed milk powder).

⁴ In Case C-416/04-P *Sunrider*, judgment 11 May 2006.

⁵ Judgment, 21 September 2006 (competition appeal from Court of First Instance; following the AG's opinion, the ECJ fined JCB €30,864,000.00).

⁶ Judgment, 27 April 2006 (pension entitlement of a post-operative male-to-female transsexual; following the AG's opinion the ECJ held that the applicant was entitled to a pension at age 60).

⁷ Judgment, 11 May 2006 (trade mark appeal from the CFI on similarity of a trade mark; following the AG's opinion, the ECJ dismissed the appeal).

the European Union. In all, no fewer than ten countries that were formerly part of the Eastern bloc were now part of the EU project, with more tied in by way of Association Agreements.

In 1988 the ECJ was an entirely single-tier institution. The years of Francis Jacobs's tenure saw the establishment of the Court of First Instance (CFI);⁸ the introduction of judicial panels⁹ and the creation of the Civil Service Tribunal.¹⁰ Thus, the Court of Justice of the European Communities went from being a single-tier institution in every case to being a two-tier Court in many cases and a three-tier Court in some.¹¹ Sir Francis's time in office spanned all these developments.

The role of the Advocate General itself underwent considerable change in the same period. Since 2000, Article 104(3) of the Court's rules of procedure has enabled it to respond to a preliminary reference by means of a reasoned order and without the opinion of an AG where the answer to such a question may be clearly deduced from existing case law or where the answer to the question admits of no reasonable doubt. The Nice Treaty, signed in 2001, amended the Statute of the Court and introduced the possibility for the Court to rule without the submission of an Advocate General's opinion where the case raised no new point of law.¹²

The same period also saw a reduction in the number of Advocates General in relation to the number of judges at the ECJ. The accession of ten new member states in May 2004 (and two more were to follow in January 2007) increased the number of judges but not the number of Advocates General at the ECJ. This resulted in a ratio of eight Advocates General to twenty-five (now twenty-seven) judges. This is in sharp contrast with the position at the Court's inception when there were seven judges and two Advocates General and with the position when Francis Jacobs arrived at the Court (and until

⁸ 1 September 1989.

⁹ 1 February 2003.

¹⁰ 6 October 2005.

¹¹ With the establishment of the Office of Harmonization for the Internal Market (OHIM) in 1999 it is arguable that in such trade mark appeals the ECJ is in fact the fourth tier, e.g.: Francis Jacobs's last case *Sunrider* (op cit) was an appeal against a judgment of the Court of First Instance upholding a decision of the First Board of Appeal of OHIM (Trade Marks and Designs) dismissing an appeal from a decision of the Opposition Division of OHIM.

¹² After hearing the AG, see Article 20 of the Statute of the Court. In another innovation since the Nice Treaty, the First Advocate General can now also propose when the ECJ should review a CFI decision in a panel appeal, see Article 62 of the Statute (the position of First Advocate General rotates amongst the AGs on an annual basis – the primary function of the First AG is to decide on the distribution of cases amongst the Advocates General).

October 2000) when there were fifteen judges to nine Advocates General. Even with the procedural changes allowing the Court to decide some cases without the submission of an opinion by the AG, the current arrangement means that there is increased pressure on the Advocates General to produce their opinions within shorter time frames in order to keep up with the rate at which the Court is able to decide its judgments.

The Court may soon find itself at a turning point at which it must decide either to increase the number of Advocates General or else to reduce yet further the cases in which the Advocates General give an opinion. It is therefore timely to reflect on the very important contribution that an AG can make in the development of the Court's jurisprudence.

It is in this context that Advocate General Jacobs's eighteen years at the Court must be appreciated. Through the contribution made by Sir Francis in over five hundred and fifty opinions¹³ in three decades, his views and arguments have helped shape EU law as it stands today. His opinions span the whole range of EU law: from milk quotas to VAT; social security to competition; free movement to fisheries; state aid to equal pay – the range of topics covered is simply too wide to list them all here, even by way of key words. The conference held by the United Kingdom Association for European Law (UKAEL) on 30 June 2006, which inspired this book, was held not only to honour Francis Jacobs the man and mark his achievements as Advocate General. It also provided an account of the state of EU law as we enter a 'post-Jacobs era'; a body of law that has been influenced by his opinions and which owes its current form to a significant degree to Francis Jacobs's thoughts and arguments. That it is possible to see a body of law through the prism of the opinions of one member of the Court is testament not merely to his professional longevity but also to the strength of his influence.

If one were to put together a complete account of EU law through the medium of Sir Francis's opinions, such an account would probably run to several volumes. Instead, this book has reduced the commentary on Sir Francis's *oeuvre* to just ten chapters, with a Preface by his predecessor as UK Advocate General, Lord Slynn of Hadley, and a Postscript by his former *Référéndaire*, Professor Anthony Arnull. Between those most distinguished of bookends, there are contributions by a judge of the Court of Appeal, four professors of law, a Cambridge fellow and three distinguished QCs, as well as one from Sir Francis's successor as UK Advocate General, Eleanor Sharpston. In Chapter 1 Professor Stephen Weatherill has addressed Francis Jacobs's particular contribution to EU law, providing a useful and entertaining

¹³ A list of opinions delivered by Sir Francis Jacobs 1988–2005 is to be found in the Annex to this book.

overview for the reader. In the subsequent chapters each author has taken one subject, highlighting the particular contribution made by Sir Francis in that field as well as commenting on the present state of the law and possible future developments. We hope therefore that this work is more than a mere personal celebration or *festschrift* and will serve as a useful reference text for academics and practitioners alike.

THE ROLE OF THE ADVOCATE GENERAL

In contrast to the role of a judge, that of Advocate General is not one that has its equivalent in the legal systems of England and Wales, or Scotland, nor is it a position found in many of the courts of the continental Member States. The result can be confusion amongst those who are not Community law specialists as to what an Advocate General is or does. The task of the Advocate General, in the case to which he or she is assigned, is to provide an independent and impartial opinion, after the parties have completed their submissions and before the judges begin their deliberations. The opinion examines the relevant law and facts, analyses the issues and concludes with a recommendation as to how the case should be decided. In the context of the ECJ, set up as a single instance court from which there is no appeal, there is great value in having each case judicially considered twice in this way, first by the Advocate General and then by the sitting judges. Even after the changes to the judicial architecture of the Court, addressed above, the ECJ will still often sit as a single-tier institution, especially in Article 234 EC references for preliminary rulings from national courts. The AG's opinion thus serves not only as a guide to the ECJ but will often provide crucial assistance to the national court in interpreting the eventual judgment of the Court.

As Francis Jacobs himself has commented extrajudicially, he was neither an advocate nor a general. The BBC website, reporting on one of Sir Francis's last opinions, delivered on 1 December 2005 in Case C-5/05 *Joustra*, described him as an 'adviser to the European Court of Justice'. Indeed, with typical understatement Sir Francis had once used that term himself in describing the role of Advocate General in the context of references to the ECJ: 'The purpose of the Advocate-General's Opinion is to advise the Court on the answers to be given to the questions referred. While the Court is at liberty to depart from it, the Advocate-General's Opinion often gives a useful pointer to the content of the eventual ruling.'¹⁴ Whilst not inaccurate, the term 'adviser'

¹⁴ Francis G. Jacobs and David Anderson, 'References to the European Court' in G. Barling and M. Brealey (eds), *Practitioners' Handbook of EC Law* (London: Trenton Publishing, Bar European Group, Bar Council, 1998) p. 131.

considerably underplays the importance of the role of someone who is a member of the Court, equal to a judge and carrying out a judicial function.

That the Advocate General is a member of the Court, equal in rank to the other judicial members, was clarified by the ECJ itself in Case C-17/98 *Emesa Sugar v Aruba*.¹⁵ In that case *Emesa* had argued that the lack of an opportunity for litigants to reply to the AG's opinion constituted a violation of the right to adversarial proceedings guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR). This gave the ECJ the opportunity to consider the role of its own AG.¹⁶ The ECJ held that:

It is ... appropriate to recall the status and role of the Advocate General within the judicial system established by the EC Treaty and by the EC Statute of the Court of Justice, as set out in detail in the Court's Rules of Procedure.

In accordance with Articles 221 and 222 of the EC Treaty, the Court of Justice consists of Judges and is assisted by Advocates General. Article 223 lays down identical conditions and the same procedure for appointing both judges and Advocates General. In addition, it is clear from Title I of the EC Statute of the Court of Justice, which, in law, is equal in rank to the Treaty itself, that the Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office, which guarantees their full impartiality and total independence.

Moreover, the Advocates General, none of whom is subordinate to any other, are not public prosecutors nor are they subject to any authority, in contrast to the manner in which the administration of justice is organised in certain Member States. They are not entrusted with the defence of any particular interest in the exercise of their duties.

The role of the Advocate General must be viewed in that context. In accordance with Article 222 of the EC Treaty, his duty is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaty, the law is observed.

Under Article 18 of the EC Statute of the Court of Justice and Article 59 of the Rules of Procedure of the Court, the Opinion of the Advocate General brings the oral procedure to an end. It does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which 'derives its authority from that of the Procureur Général's department [in the French version, "ministère public"]' (judgment in *Vermeulen v Belgium*¹⁷ [. . .]). Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself.

¹⁵ [2000] ECR I-665.

¹⁶ In the instant case contrasting it with, e.g., the role of the Procureur Général in the Belgian Cour de Cassation, which was the subject matter of the ECtHR case of *Vermeulen v Belgium* [1996] I, Reports of Judgments and Decisions 224, on which *Emesa* had relied.

¹⁷ See footnote immediately above.

The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court's judgment.¹⁸

Thus the Advocate General acts with 'complete impartiality and total independence', is 'not subordinate to any other' and gives his 'reasoned submissions' without having regard to 'any particular interest'. It is for this reason that the position of Advocate General, whether by accident or design,¹⁹ is arguably the most influential in the whole structure of EU law. Alone amongst the members of any part of the Court, the AG produces a single-authored ruling, without having to have regard (indeed, obliged not to have regard) to the views of any of the other members. By contrast, when the Court comes to give its judgment, it will be a compromise document, produced by up to twenty-seven authors with no dissenting opinions allowed. Inevitably, a judgment produced in this way may sometimes end up as the lowest common denominator; the minimum to which all the members of the collegium could agree. Being independent and free from individual (or national) interests, the AG can also attempt to move the law forward. In particular, the Advocate General may take the opportunity to reflect on the development of the ECJ's case law, suggesting a new direction that it could (perhaps should) take and even pointing out where previous case law has taken a wrong turn, something that the Court itself might find difficult to do. This dialogue between the Advocate General and the Court can lead to progressive developments of the law. As will be seen, Sir Francis has not infrequently used just this opportunity to influence the development of the ECJ's case law.

If one compares the opinions of the Advocates General to the judgments of the Court, they will immediately seem more familiar to the common lawyer: a more rigorous analysis of the facts and the law, with an opportunity to present arguments in a more discursive style before reaching a conclusion. These opinions read more like an English court's judgment than the ECJ judgments themselves. It may well be that the more 'English' style of opinions is due in no small part to the contributions of Francis Jacobs and his two UK predecessors, Gordon Slynn and Jean-Pierre Warner. It is however also the whole nature and purpose of an AG's opinion to provide a thorough analysis of this kind. The draughtsmen of the EC Treaty deliberately intended the AG not to be a final arbiter and his opinions are never binding, and there is perhaps a certain safety in knowing that the opinion is not the final judgment. On occasion it can be an opportunity to launch an idea, which may not find its way into

¹⁸ Case C-17/98 *Emesa*, *op cit*, Order at paras 10–15.

¹⁹ One suspects it is more accident.

the judgment in the instant case but which may develop and grow and come to fruition when the time is right. All these facets can be identified in the opinions delivered by Francis Jacobs between 1988 and 2006, and they provide the material which has allowed the contributors to produce this book.

In the first chapter of this book, Stephen Weatherill reflects on what it is that makes a good Advocate General. He identifies five characteristics or qualities demonstrated by those Advocates General who exploit the full potential of their role in shaping the law. These are: first, clarity of expression. Second, clarity of vision, namely a vision of the direction in which the Community legal order is or should be heading. Third, contextual richness, by which is meant that the Advocate General should explore the wider implications and broader context of the facts and issues in hand than the ruling itself could do. Fourth, leadership, in which an Advocate General may suggest the future direction of the law and challenge received wisdom where necessary. Finally, the fifth characteristic that Weatherill identifies as important is the capacity to inspire. In this first chapter, Weatherill examines whether, or rather how, Sir Francis demonstrates all of these characteristics in his opinions.

Weatherill's assessment of Sir Francis's work as Advocate General is that of an outsider, or a 'consumer', as Stephen Weatherill describes himself. He has not worked for Sir Francis or for the Court. His perceptions are derived purely from the opinions themselves. By contrast, a more informal and anecdotal look at Sir Francis's characteristics as Advocate General is given in the final chapter of this book, in the Postscript authored by Anthony Arnall, who worked as a référendaire to Francis Jacobs from 1989 until 1992. Arnall gives an insider's view of the approach that Sir Francis took to his cases, which in many ways reflects the perceptions that our outsider has noted in Chapter 1, in particular Francis's attention to the context of the issues in hand, both as concerns the facts of a given case and the relevant jurisprudence, and also his willingness to challenge existing jurisprudence and to show leadership in his arguments as to the proposed future direction of the Court's case law. According to Arnall, Francis Jacobs also found a place in his opinions for jokes. It seems to us, however, that Arnall sums up the particular quality of Sir Francis's contribution as Advocate General when he reflects on the two aspects of Francis's experience prior to becoming Advocate General which doubtless influenced his approach to that role. Arnall writes: '[Francis's] capacity to combine an academic's sensitivity to the deep rhythms of Community law with a practitioner's ability to identify the really crucial issues [I believe] played a big part in his success.'

Given the range of subject matter that Sir Francis has covered in his opinions and the long duration of his tenure as Advocate General, there is barely an area of Community law which he has not touched on. The authors of this volume deal with those aspects that seemed to us to be amongst the most

important topics of EU law and those where Francis Jacobs made some of his most notable contributions to the jurisprudence of the Court. No doubt there will be some aspects of Sir Francis's work that are not covered and that will appear like glaring omissions to certain readers. To some engaged in the implementation of directives it might perhaps be what Sir Francis had to say about the interpretation of national law according to *Marleasing* principles in criminal and non-criminal cases in Case C-456/98 *Centrosteeel N/H*;²⁰ for those dealing with discrimination issues it might perhaps be Sir Francis's careful explanation of the workings of direct discrimination, indirect discrimination and objective reasons in the context of equal treatment of men and women in Case C-79/99 *Schnorbus*,²¹ or for certain charitable bodies offering child-care services and their VAT advisers it may even be the case of *Kinderopvang Enschede*.²² There will be dozens (and probably more) of similar examples. However, we have not set out to provide an encyclopaedic guide to the opinions of AG Francis Jacobs. Rather, we hope that from these twelve studies it is possible to identify some of the ways in which Sir Francis's influence as Advocate General has been felt in the development of Community law.

HUMAN RIGHTS AND THE ECJ

In Chapter 2 Paul Craig examines the ways in which Sir Francis has contributed to the development of the fundamental rights jurisprudence of the ECJ. He also looks at the relationship as it now stands between the ECJ in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg and how far the latter Court appears to accept that the ECJ does, generally, satisfactorily protect the human rights and fundamental freedoms guaranteed by the European Convention. Craig takes his cue from the case of *Konstantinidis*,²³ which exemplifies Francis Jacobs's approach to fundamental rights, in that case the right to one's name, as being an EU law entitlement independent of other Treaty concepts (such as – for example – discrimination), summed up in the following declaration of the rights of an EU citizen: '... he is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights'.²⁴ Several authors return to this theme in subsequent chapters. In Chapter 6 Catherine Barnard sees it as

²⁰ [2000] ECR I-6007, opinion paras 31–35.

²¹ [2000] ECR I-10997.

²² C-415/04, judgment 9 February 2006.

²³ Case C-168/91, *Konstantinidis v Stadt Altensteig, Standesamt, and Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191.

²⁴ Opinion, para. 46.

an important recognition of the changing attitude towards migrants. In Chapter 7 Advocate General Sharpston points out the biblical source for that particular concept of citizenship, namely the martyrdom of St Paul.²⁵

Konstantinidis was an example of the ECJ not going as far (or not yet going as far) as its AG. Craig traces the developments of case law through the leading case of *Bosphorus*,²⁶ concluding with a thoughtful discussion of the implications if the EU were to accede to the ECHR.

Bosphorus concerned the impounding of a Turkish aircraft, and the opinion of AG Jacobs contains a rigorous analysis of the right to property as protected by Article 1 of the First Protocol to the ECHR, and thus part of fundamental EU rights. Impounding aircraft was a severe restriction on Bosphorus Airways' property rights, but there was a powerful public interest justification: stopping a civil war. Sir Francis found that in this case the actions of the authorities could not be regarded as unreasonable, particularly in the light of the aims of the UN sanctions regulation. The ECJ concurred, and in due course – and this is the particular feature of *Bosphorus* – the ECtHR approved. The *Bosphorus* case again cuts across the topics covered in this book, and Richard Plender returns to the issue in Chapter 8 on international relations, where he takes it as his cue to discuss an aspect not directly addressed in *Bosphorus*: whether UN Security Council resolutions are binding on the EU.

ACCESS TO THE COURT AND *LOCUS STANDI*

Craig also discusses the case of *UPA*,²⁷ which addressed the vexed question of standing to bring a direct action before the ECJ. This is an issue of such

²⁵ AG Jacobs may also have had in mind the stirring speech by Cicero, in 70 BC, during the trial of Gaius Verres, the corrupt governor of Sicily. The particular accusation concerned the whipping of a prisoner, despite his calling out that he was a Roman citizen and therefore entitled to due process and the protection of Roman law: see Cicero, *In Verrem* II.V, 162: 'Caedebatur virgis in medio foro Messanae civis Romanus, iudices, cum interea nullus gemitus, nulla vox alia illius miseri inter dolorem crepitumque plagarum audiebatur nisi haec, "Civis Romanus sum." Hac se commemorazione civitatis omnia verbera depulsurum cruciatumque a corpore deiecturum arbitrabatur; is non modo hoc non perfecit, ut virgarum vim deprecaretur, sed cum imploraret saepius usurparetque nomen civitatis, crux, – crux, inquam,– infelici et aerumnoso, qui numquam istam pestem viderat, comparabatur.'

²⁶ In the ECJ: Case C-84/95 *Bosphorus Hava Yollari Turizm Ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953; in the ECtHR: *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* ECHR (2005) No. 45036/98.

²⁷ Case C-50/00 P, *Union de Pequenos Agricultores v Council* [2002] ECR I-6677.

importance in the case law of the ECJ in general, and in any discussion of Francis Jacobs's contribution in particular, that it is the subject of the whole of Chapter 3 by Takis Tridimas and Sara Poli. Tridimas and Poli trace the development of what they term the 'trialogue' between AG, ECJ and CFI in *UPA* and the parallel direct access case, *Jégo-Quéré*.²⁸ Tridimas and Poli explain how AG Jacobs criticized the restrictive interpretation of Article 230(4) EC and proposed an alternative definition of 'individual concern'. *UPA* is the most celebrated example of AG Jacobs's progressive views being thwarted by a more restrictive Court. For the time being at least, the ECJ's approach to effective judicial protection and access to justice continues to prevail, an approach that dictates, in essence, that fundamental concepts of access to justice nevertheless cannot effect an express disapplication of the wording of Article 230 of the Treaty.²⁹

This is an area addressed by Francis Jacobs himself at the UKAEL conference which inspired this book. As Sir Francis pointed out (and as Tridimas and Poli remark in Chapter 3), at the time of its *UPA* judgment, on 25 July 2002, the ECJ was aware of the then ongoing review of the EC Treaty, including Article 230, in the course of the Constitutional Convention (which reported on 18 July 2003). The outcome of that review was not known in 2002, but its publication and the ratification of the resulting Treaty seemed imminent. This may go some way towards explaining the ECJ's reluctance to reinterpret the Treaty article concerned. Viewing it from the position as it was in June 2006, Sir Francis suggested that (with no relevant amendment in prospect and in view of the failure to ratify the draft Treaty establishing a Constitution for Europe) the ECJ might revisit its definition of 'individual concern' accordingly.³⁰

In an intriguing footnote to the *UPA* case, Francis Jacobs (the AG in *UPA*) and Judge Gulmann (the reporting judge in *UPA*) both retired from the Court on the same day, 10 January 2006. In the public session of the Court, the *audience solennelle*, each of them made reference to the *UPA* case and their differing views on Article 230 and 'individual concern'. Using the image of the front door (Article 230 direct action) and the back door (Article 234 refer-

²⁸ Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.

²⁹ For a restatement of the European Courts' current approach to the principle of access to the Courts and effective judicial protection, see e.g. paragraphs 55 and 56 respectively of Case T-2/04 *Korkmaz & Ors v Commission* (unrep.), order 30 March 2006; but cf. the ECJ's recent permissive use of *UPA* in its reliance upon effective judicial protection of rights derived from the Community legal order and Articles 6 and 13 of the ECHR in Case C-229/05 P *PKK and KNK v Council*, judgment 18 January 2007, paras 109 following.

³⁰ Speaking at the UKAEL conference, held at Middle Temple, London, 30 June 2006.

ence), Sir Francis, returning to the theme of his opinion, remarked that ‘the front doors of the Court are too narrow, while the back door is not always open’.³¹

As Tridimas and Poli point out, this is a chapter in the development of the jurisprudence of the Court that may not be closed, albeit that the narrow interpretation of ‘individual concern’ in *UPA* and *Jégo-Quéré* continues to apply.

LINKS WITH THE NATIONAL COURTS

In addressing Article 234 references, Sir Francis was referring to one of the safeguards for the uniform application of EU law that the ECJ relied on in *UPA* and *Jégo-Quéré*: it is intended to be part of the working of the Community legal order that it should always be possible for individual litigants to approach the ECJ via the mechanism of a reference from a national court.³²

As Sir Francis pointed out (restating the settled ECJ case law in his opinion in Case C-306/99 *BIAO*³³): ‘the procedure provided for in Article 177 [now 234] of the Treaty is a means of cooperation between the Court of Justice and national courts’.³⁴ The nature of that cooperation is addressed, from a personal perspective, by a serving member of the Court of Appeal of England and Wales, Lord Justice Mummery, in Chapter 4. Mummery sees the Article 234 procedure as a ‘dialogue’, which works well precisely because the national courts and the ECJ are not in competition with one another, each being supreme in its own sphere.

Within the Community legal order, the national courts are of course themselves Community courts, bound to ensure the uniform application of EU law. Sir Francis himself recognized this in his joined opinion in *Leur-Bloem* and *Giloy*:³⁵

³¹ (Unreported), speaking in the European Court of Justice, Luxembourg, 10 January 2006.

³² If the Community law issue is critical and the national court cannot with complete confidence resolve the issue itself, see e.g. *ex parte Else* [1993] QB 534.

³³ [2003] ECR I-1 at para. 44 of the opinion.

³⁴ Francis Jacobs’s opinion in *BIAO* provides a striking example of the AG exhorting the Court to address an area of law, where Francis had delivered two earlier opinions, in Case C-28/95 *Leur-Bloem* [1997] ECR I-4161 and Case C-130/95 *Giloy* [1997] ECR I-4291, and where in his view a failure by the Court unequivocally to resolve the issue now would continue to generate uncertainty in future cases. That question is whether the Court is competent to interpret provisions of national legislation which in effect apply Community legislation to situations to which that Community legislation is not required to be applied as a matter of Community law. The ECJ ducked the issue in *BIAO*, and the issue continues to generate uncertainty about the Article 234 jurisdiction.

³⁵ Op cit; at para. 49.

the Court's concern about . . . remote threats to the uniform application of Community law is difficult to reconcile with the fact that Article 177 [now 234] envisages that Community law will be interpreted and applied primarily by national courts. Community law is applied every day by national courts; only in the relatively small number of cases heard by final appeal courts is there an obligation to refer.

Mummery also provides a critique of the nature and workings of the ECJ and highlights what he sees as 'avoidable uncertainty and unpredictability'. The result, according to Mummery, is instability. Some of these criticisms have been addressed by Francis Jacobs in his Foreword to *Kerly's Law of Trade Marks and Trade Names*,³⁶ and in Chapter 4 Mummery sets out the cases for the prosecution and the defence.

Francis Jacobs has taken a close interest in the preliminary reference procedure under Article 234 EC, which (as Mummery points out) is unique to the ECJ and which, as we have seen, can be characterized as essentially one of dialogue between the national courts and the ECJ. Sir Francis's concern has always been to facilitate this dialogue so far as possible, encouraging national courts and tribunals of all levels to make use of the procedure where appropriate. However, he has also voiced concerns against inappropriate use, or over-use, of the reference procedure. Sir Francis's most general discussion of the power to refer came in Case C-338/95 *Wiener* [1997] ECR I-6495, a case on the customs classification of women's nightdresses. *Wiener* is sometimes relied upon by litigants to urge restraint in the making of references (and possibly contrary to the way in which Francis Jacobs intended it to be read), but is in fact a thoughtful analysis of the purpose and proper use of references, and the interplay between national courts and the ECJ. The problem identified in *Wiener* was references 'which, through the creativity of lawyers and judges, are couched in terms of interpretation, even though the reference might in a particular case be better characterized as concerning the application of the law rather than its interpretation'. Sir Francis's solution was twofold: (1) 'self-restraint' on the part of both national courts and the ECJ³⁷ and (2) an 'evolutionary approach', with national courts extrapolating from the principles already developed in the ECJ's case law.³⁸ Sir Francis said this on references from courts not of last instance:

³⁶ D. Kitchin, D. Llewelyn, J. Mellor, R. Meade, T. Moody-Stuart and D. Keeling, *Kerly's Law of Trade Marks and Trade Names* (London: Sweet & Maxwell, 14th edn, 2005).

³⁷ In the case of the ECJ this would mean a 'declaration of self-restraint' that would not lead to a decision of inadmissibility but would be couched in terms of a non-specific reply to the referring court's questions, merely recalling the principles and rules of interpretation developed by the previous case-law, and leaving it to the national court to decide the particular issue with which it is confronted (opinion, para. 21).

³⁸ Opinion, paras 59 and 60.

A reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case-law which could readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Between those two extremes there is of course a wide spectrum of possibilities; nevertheless national courts themselves could properly assess whether it is appropriate to make a reference, and the Court of Justice, even if it continued to maintain that the decision to refer was exclusively within the discretion of the national courts, could perhaps give some informal guidance and so encourage self-restraint by the national courts in appropriate cases.

And on references from courts of last instance, subject to the *CILFIT* test,³⁹ Sir Francis said this:⁴⁰

The Court thus imposed strict conditions which had to be satisfied before a final court could be absolved of its obligation to refer. But the very fact that the Court imposed such strict conditions might suggest that the Court again had in mind questions of law of general interest and the need to avoid the development of ‘a body of national case-law’ inconsistent with Community law. In *CILFIT* the Court did not consider, and had no need to consider, whether all questions of Community law, however detailed and specific, should be subject to the conditions laid down in that judgment; the substantive issue in that case was a question of general importance, namely whether a health inspection levy was payable on imported wool. If the *CILFIT* judgment were applied strictly, then every question of Community law, including all questions of tariff classification, would have to be referred by all courts of last instance.

. . . it is necessary to interpret Article 177, like all other general provisions of Community law and in particular the provisions of the Treaty, in an evolutionary way. . . .

If an evolutionary approach is adopted to the interpretation of Article 177, then it seems to me impossible to ignore a number of developments at least some of which should condition the interpretation of Article 177 today. Community legislation has recently extended to many new fields; and the volume of legislation has greatly increased. Excessive resort to preliminary rulings seems therefore increasingly likely to prejudice the quality, the coherence, and even the accessibility, of the case-law, and may therefore be counter-productive to the ultimate aim of ensuring the uniform application of the law throughout the European Union.

. . . Experience has shown that case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialized courts and tribunals – to decide many cases for themselves without the need for a reference. . . .

Moreover if the obligation to refer of courts of last instance is interpreted too strictly, then as Community law develops the incidence of that obligation will increasingly fall unevenly across the Member States, if only because their court

³⁹ Case 283/81 [1982] ECR 3415.

⁴⁰ *Ibid.*, paras 58 to 61. Downloaded from Elgar Online at 01/25/2020 08:56:31AM via free access

systems are very different. In some Member States the courts of last instance may decide tens of thousands of cases a year; in another Member State – the United Kingdom – the court which is for most purposes the sole court of last instance – the House of Lords – may decide fewer than one hundred cases a year. A vastly greater number of references will therefore come from some Member States than from others. If however only cases raising a point of some general importance are referred to the Court, then a more balanced case-law – and a more balanced development of the case-law – is likely to result.⁴¹

In recent years, Sir Francis has been concerned that the enlargement of the European Union will ultimately lead to a greatly increased number of references, with the possibility that the time taken for the Court's judgments to be handed down would be increased further, thus reducing the willingness of national courts to make references.

Building on the 'self-restraint' and 'evolutionary' approaches in *Wiener*, one solution that Sir Francis has supported extrajudicially is that national courts should be encouraged, or perhaps even required, to supply their own proposed responses to questions that they refer which could enable the Court to expedite proceedings where the national court has arrived at the correct solution. This proposal has become known as the 'green light system'.⁴² Whilst this proposed system has not yet been expressly implemented, the basic tools for at least one variation of it to be developed are in place. First, the Information Note on references from national courts for a preliminary ruling⁴³

⁴¹ NB that national courts, including courts of final appeal, are increasingly accepting of the responsibility to resolve certain issues themselves, particularly where such issues can be characterized as being within the application of EU law and within the discretion of the Member State, see e.g. the recent decision of the House of Lords in *Lonsdale v Howard & Hallam* [2007] UKHL 32 in the context of the Community law concept of 'compensation' under the Commercial Agents Directive (*per* Lord Hoffmann, at para. 40): 'the differences in opinion between the Scottish and the English courts and between various English judges show that the law is uncertain. That is true, but what is uncertain is not the meaning of the directive. It is clear that the agent is entitled to compensation for "the damage he suffers as a result of the termination of his relations with the principal" and that the method by which that damage should be calculated is a discretionary matter for the domestic laws of the Member States. It is the way in which our domestic law should implement that discretion which has been uncertain and the resolution of that uncertainty is the task of this House and not the European Court of Justice.'

⁴² Francis Jacobs (2004) 'Possibilities for further reforming the preliminary ruling procedure', *Papers from the Colloquium on the Judicial Architecture of the European Union, 15th November 2004* (CCBE), pp. 62–9; this could at some stage even become a 'red light' system, whereby the national court would issue a judgment nisi at the same time as it made its reference. The judgment would then become absolute after a certain time limit if the Court of Justice failed to respond to the reference (*ibid.* p. 67).

⁴³ OJ [2005] C-143/01.

was amended in 2005 and introduced, at point 23, an invitation to the referring court that it ‘may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling’. Encouraging referring courts to set out what is, in their view, the answer to their own question is a first step in the direction of establishing the green light procedure and the amendment of the Information Note may be seen as one result of Sir Francis’s contribution to the debate. Secondly, there already exists the possibility for the Court to deliver the answer to a preliminary reference in the form of a reasoned order.⁴⁴ If a referring court were to indicate what it considered the answer to its own question to be and the ECJ agreed, the ECJ might more readily turn to the option of disposing of the case by reasoned order. These two aspects could gradually lead to the *de facto* adoption of a green light procedure and could speed up the responses to preliminary references whilst still protecting the useful dialogue that the procedure has engendered between national courts and the ECJ. Francis Jacobs has noted in particular that one of the attractive features of a green light procedure is that the national courts would be enabled to contribute fully to the making of Community law:

the green light system would enable national courts to contribute more directly and substantially in the development of Community law by encouraging them not merely to identify and pass on the relevant questions of Community law which arise before them, but also to contribute their own analysis of those questions which might then be endorsed by the Court of Justice. That would be a particular advantage in the case of the highest national courts, which might be able to contribute substantially to the development of Community law but which may currently see themselves having the role of a judicial post-box.⁴⁵

It remains to be seen whether this change in the reference procedures and in the links between the national and European Courts will prove to be another aspect of Francis Jacobs’s legacy.

COMPETITION LAW

One area where, until relatively recently, the European Courts enjoyed an unrivalled jurisdiction is competition law. In Chapter 5 Richard Whish analyses Francis Jacobs’s influence on this field, citing examples of opinions that have had a lasting effect on EU law. Whish begins with a discussion of two competition

⁴⁴ Article 104(3) of the Court’s rules of procedure.
⁴⁵ Jacobs, *op cit*, p. 68.

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cases, *Tournier* and *JCB*, that are over sixteen years apart;⁴⁶ yet another example of the longevity and consistency of Francis Jacobs's output.

Whish then highlights for particular attention Jacobs's opinions in the cases of *Bronner*⁴⁷ and *Syfait*.⁴⁸ In both these cases, Whish considers that the impact of Jacobs's opinions has been more extensive than the impact of the judgments themselves. In *Bronner* Francis Jacobs reviewed and analysed the law of refusal to supply and the so-called 'essential facilities doctrine' under Article 82 EC. He reached the conclusion that Article 82 could lead to mandatory access to the essential facility of a competitor only in cases where there was a genuine stranglehold on a related market and that it was impossible or extremely difficult to duplicate that facility. Whish sets out the cogent and compelling nature of Sir Francis's discussion of the law and observes that although the ECJ judgment reached the same conclusion, it did so without the clarity and authority of the Advocate General. The result is a tendency to cite the opinion 'as if it were the judgment of the Court'. In *Syfait* the issue was once again refusal to supply, in that case the refusal by GlaxoSmithKline to supply certain drugs to pharmaceutical wholesalers in Greece in order to limit parallel trade from that country to other Member States where the drugs commanded higher prices. Francis Jacobs reached the view that the refusal to supply should not be regarded as abusive *per se*. On the question of objective justification, he reached the conclusion that, in the specific circumstances of the European pharmaceutical sector, there was such a justification. In its subsequent judgment, however, the ECJ did not answer these substantive questions given that the Court reached the conclusion that the Greek Competition Commission was not a court or tribunal within the meaning of Article 234 EC and that therefore the preliminary reference was inadmissible. The result, as Whish observes, was that there is no authoritative judgment by the Court and yet we have the view of a highly experienced Advocate General as to where the law stood, a view which is likely to be highly influential.

Whish also emphasizes two aspects of competition law which are not often addressed: the social dimension of competition law and the difficult concept of 'undertakings' in Community competition law. Francis Jacobs had to wrestle with both these concepts and his opinions are prime amongst the authoritative sources on the matter; opinions which must now be read with Professor Whish's commentary in Chapter 5 of this book.

⁴⁶ Case 395/87 [1989] ECR I-2521 and Case C-167/04, judgment of 21 September 2006.

⁴⁷ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint* [1998] ECR I-7791.

⁴⁸ Case C-53/03 *Syfait* [2005] ECR I-4609.

THE FOUR FREEDOMS

In Chapter 6 Catherine Barnard discusses Francis Jacobs's contribution in the context of freedom of movement for goods, services and persons, which, along with capital, constitute the four fundamental freedoms at the very heart of the European Community project. Barnard observes how, in the wake of the decision in *Keck*⁴⁹ in which the ECJ limited the *Dassonville*⁵⁰ case law, Francis's opinions must have helped to steer the Court away from any temptation of applying the *Keck* ruling in a formalistic way. In *Keck* the Court held that certain selling arrangements fell outside the scope of Article 28.⁵¹ An overly formalistic application of that principle could have risked taking outside the scope of Article 28 measures that, albeit capable of being described as such 'selling arrangements', in fact had the effect of restricting trade between Member States. Jacobs's opinions advocated a more functional approach, in order to achieve the fundamental aim of the Treaty, which in these cases was the realization of the internal market. Barnard compares this approach with the opinion in *Leclerc-Siplec*.⁵² That case concerned a prohibition in France of television advertising of petrol and other fuel. AG Jacobs, having observed that the role of advertising could be crucial in facilitating access to the market of another Member for a foreign manufacturer, proposed that the Court should not simply rule out a breach of Article 28 where a measure was non-discriminatory but should apply a test that asked whether the measure was liable 'substantially to restrict access to the market'.⁵³ The Court did not follow its AG's opinion on this occasion. Rather than apply a 'substantial restriction' test, the ECJ ruled that the measure was a selling arrangement that applied to and affected the marketing of products from domestic and other Member States in the same manner and so Article 28 was not engaged. However, in an exercise of legal detective work, Barnard follows the subsequent case law relating to restrictions on advertising and concludes that Sir Francis's opinions must have 'seeped into the pores of the Court's jurisprudence'. She observes that in *De Agostini*,⁵⁴ the Court, following AG Jacobs's opinion in that case, accepted that an outright ban on a form of promotion for a product might have a greater impact on products from other Member States. The Court concluded

⁴⁹ Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097.

⁵⁰ Case 8/74 *Dassonville* [1974] ECR 837.

⁵¹ I.e. that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

⁵² Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179.

⁵³ Para. 49.

⁵⁴ Joined Cases C-34-36/95 *De Agostini* [1997] ECR I-3843.

that if an unequal burden in law or fact was found, then the national restriction would be caught by Article 28.

In *Alpine Investments*,⁵⁵ which concerned the free movement of services rather than goods, Jacobs proposed a similar test to that which he had proposed in *Leclerc-Siplec*, namely ‘whether [the restriction] substantially impedes the ability of persons established in its territory to provide intra-Community services’. In that case, the Court followed Sir Francis’s approach, finding that the measure in question, albeit general and non-discriminatory, directly affected access to the market in services in other Member States and was thus capable of hindering intra-Community trade in services contrary to Article 49. So we see the Court steering away from a formalistic approach towards the functional approach advocated by Jacobs; the approach which is most consistent with achieving the fundamental aims of the Treaty. Also on services and the free movement of persons, Barnard emphasizes the importance of the case of *Säger*⁵⁶ and the development, inspired by Francis Jacobs, that services should be treated by analogy with goods, and that ‘non-discriminatory restrictions on the provision of services’ (and, in this context, also persons) should be approached in the same way as non-discriminatory restrictions on the free movement of goods.

It should be added that in a different field of application of the free movement of goods, Francis Jacobs was thwarted one last time in his instinctive inclination towards greater liberalization: in Case C-5/05 *Staatssecretaris van Financiën v Joustra*,⁵⁷ (in which judgment was delivered after Sir Francis’s retirement from the Court) Mr Joustra and friends had formed a ‘cercle des amis du vin’ in The Netherlands and each year he ordered a quantity of wine from France for private consumption. He also arranged for its transportation to his home by a Dutch transport company. He argued that there should be no payment of excise duty on this wine in The Netherlands, such duty having already been paid in France and this being a purchase by a private individual for non-commercial use within the single market. Mr Joustra relied on the provisions of Directive 92/12/EEC on excise duty. The ECJ held that the correct interpretation of the Directive was that the wine will be free of duty if transported across the border personally by the purchaser, but not if ordered by telephone or online and then transported by a third party. The ECJ recognized that its ruling could be a retrograde step, in that personal effects transported in the course of a removal to another Member State or small consignments of a non-commercial nature sent from one private individual to another could also be caught. The ECJ reached its conclusion by a restrictive interpretation of the

⁵⁵ Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

⁵⁶ Case C-76/90 [1991] ECR I-4221.

⁵⁷ Judgment, 23 November 2006.

phrase ‘products acquired by private individuals for their own use and transported by them’ in Article 8 of the Directive. According to the Court’s ruling in *Joustra*, ‘transported by them’ means literally transported by the individuals, rather than by a transport company hired for that purpose. Sir Francis in his opinion had managed to give the phrase ‘transported by them’ a wider definition, albeit that he called for a revised version of Directive 92/12 (which is now being drafted): ‘Whilst I have sought to derive a workable interpretation from the present wording, it seems to me that revised legislation is an urgent necessity in order to deal clearly with those problems.’⁵⁸

It is perhaps predictable that Sir Francis should have sought such a workable interpretation, at the same time giving a purposive interpretation to the provision; the purpose in this case being the free movement of goods in a single market. It is also pointed out, with respect, that (by its own admission) the solution reached by the ECJ led to a flawed result, whilst the AG’s solution would have provided greater consistency.

Barnard concludes Chapter 6 with a comprehensive analysis of derogations and justifications that may apply once a breach has been established, with reference to fundamental rights and social provisions. She explores the outer limits of the Treaty provisions, using Francis Jacobs’s opinions as her guide.

The sheer volume of case law dealt with by Barnard in Chapter 6 demonstrates the importance of at least three of the four freedoms, goods, persons and services, to the Community *acquis*. There is rather less to say about the fourth freedom, capital, always the somewhat neglected sibling to the other three. However, for the sake of completeness it should be added that when Francis Jacobs had the opportunity to comment on the free movement of capital in Case C-329/03 *Trapeza tis Ellados AE v Banque Artesia*,⁵⁹ he once again unsurprisingly followed his *communautaire* instincts in favour of the promotion of greater freedom. In the context of a case on the First Capital Movements Directive,⁶⁰ he said:

It will be recalled that the single recital in the preamble to the directive states that the attainment of the objectives of the Treaty ‘requires the greatest possible freedom of movement of capital between Member States and therefore the widest and most speedy liberalisation of capital movements’. In the light of that overriding objective, I consider that any ambiguity in the directive should be construed so as to promote such liberalisation.⁶¹

⁵⁸ Para. 92.

⁵⁹ Judgment of 27 October 2005.

⁶⁰ First Directive for the implementation of Article 67 of the Treaty (OJ, English Special Edition 1959–62, p. 49); repealed with effect from 1 July 1990 by Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

⁶¹ Opinion, 14 April 2005, para. 58.

FROM FREE MOVEMENT OF PERSONS TO CITIZENSHIP

Francis Jacobs's efforts (along with other AGs, notably Advocate General Geelhoed) to develop the Treaty provisions, particularly those introduced by the Treaty of Amsterdam,⁶² by taking freedom of movement for persons to a new level have led to a new appreciation of the concept of European citizenship. It is fitting that in Chapter 7 it falls to Sir Francis's successor, Advocate General Sharpston, to analyse the law on citizenship.

AG Sharpston takes three specific examples where citizenship rights have come into play: the right to one's own language in criminal proceedings (*Bickel and Franz*⁶³), the right to have one's income taken into account before being deprived of property (*Pusa*⁶⁴) and the right to one's own name (*García Avello, Niebuß*⁶⁵). Sharpston cites the striking passage in *Bickel and Franz* where Sir Francis describes the encapsulation of Community law rights within the concept of EU citizenship, simply and in one sentence, thus: 'The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality.' Building on these cases, Sharpston concludes that in an EU in which nationals of Member States are also citizens of the Union, then in order for that citizenship to have real meaning, administrative rules should not automatically be applied in a rigidly national way and that 'cultural diversity allied to the consequences of free movement may sometimes require greater flexibility of thought and spirit'.

Reading Chapter 7 of this book, it may be surmised that Francis Jacobs's flexibility of thought and spirit will continue to be applied at the ECJ;⁶⁶ in itself a legacy of Sir Francis's seventeen years at the Court.

THE EU AND THE WORLD: EXTERNAL RELATIONS

In Chapter 8 Richard Plender reminds us that Francis Jacobs began his professional career as a public international lawyer. The external competence of the

⁶² Signed 2 October 1997.

⁶³ Case C-274/96 [1998] ECR I-7637.

⁶⁴ Case C-224/03, judgment 29 April 2004.

⁶⁵ Case C-148/02, judgment 2 October 2003 and Case C-96/04, judgment 27 April 2006.

⁶⁶ On the subject of continuity it may be worth noting that in her first opinion, delivered on 7 March 2006 in Case C-166/05 *Heger* [2006] ECR I-7749 (a case about VAT on fishing permits), AG Sharpston relied on two of the opinions of her predecessor AG Jacobs: Case C-108/00 *Syndicat des producteurs indépendants* [2001] ECR I-2361 and Case C-315/00 *Majerhofer* [2003] ECR I-563.

EU (and more particularly the European Community⁶⁷) has been enhanced by the ECJ, which has developed the concept of implied external powers for the Community in case law stretching back to 1971.⁶⁸ Sometimes this competence is shared with the Member States and where the Community and the Member States are parties to the same international agreement, it is called a ‘mixed agreement’. Plender uses the example of Case C-89/99 *V.O.F. Schieving-Nijstad*⁶⁹ to illustrate the political sensitivity of cases where the rights of individuals may be decided by the ECJ ruling on the meaning of provisions in a mixed international agreement, even if that agreement does not itself produce direct effects. Plender goes on to trace the consequences of the *Schieving-Nijstad* ruling in the light of the cases that followed it.

Taking his cue from Francis Jacobs’s opinion in *Bosphorus*,⁷⁰ Dr Plender then goes on to make the case for UN Security Council resolutions being binding upon the Community (a consequence which the ECJ did not have to, and therefore did not, consider in *Bosphorus*). Time will tell whether this will be accepted by the Court and the Member States.

Commenting on the *Regione Friuli-Venezia Giulia* case⁷¹ (like so many important ECJ cases, a case concerning alcohol), Plender provides a critique of the arguments in that case, centring around Article 1 of the First Protocol of the ECHR proprietary right to use the name of the region in which a wine is produced. Further, commenting on Case C-171/01 *Wählergruppe Gemeinsam Zajedno*,⁷² which dealt with the delicate subject of the direct effect of the EU–Turkey Association Agreement, Plender shows how the tests of direct applicability may apply equally to agreements with international scope as they do to inner-EU instruments.

It is a sign of the development of EU law and of the jurisprudence of the ECJ that it can now be said, as Plender concludes, that ‘the judgments of the European Courts constitute an indispensable source of international law’.

INTELLECTUAL PROPERTY

The case of *Cnl-Sucal NV SA v Hag GF AG*,⁷³ known as ‘HAG II’, stands out

⁶⁷ Which has long enjoyed legal (and thus international legal) personality: Article 281 EC.

⁶⁸ See Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263.

⁶⁹ [2001] ECR I-5851.

⁷⁰ Op cit.

⁷¹ [2005] ECR I-3785.

⁷² [2003] ECR I-4301.

⁷³ Case C-10/89 [1990] ECR I-3711.

amongst the opinions of Francis Jacobs, not just as a model of legal reasoning but because it resulted in the ECJ expressly overruling a previous decision, namely *Van Zuylen Freres SA v HAG AG*⁷⁴ (now known as '*HAG I*'). In Chapter 9 Christopher Morcom sees Advocate General Jacobs as having come to the rescue of trade mark law in *HAG II*, exposing 'the fallacy, indeed the heresy, of the *HAG I* common origin doctrine'. It is instructive to read paragraphs 22 to 25 of the opinion in *HAG II* and note the way in which, in just a few paragraphs, sixteen years of errant case law are disposed of, leading to one inevitable result (at para. 26): 'The unpalatable but inescapable conclusion that emerges from the above analysis is that the doctrine of common origin is not a legitimate creature of Community law. There is no clear basis for it in the Treaty and no explanation of its necessity was put forward in *HAG I*.' So the old common origin doctrine was eliminated from the menagerie of creatures of Community law as being an illegitimate member of that species. What took its place was the notion that the trade mark owner may rely on his right against the owner of a parallel right in another Member State.

How Sir Francis dealt with the (then wholly novel) issue of the ECJ overruling its previous decision is also typical of the clarity of thought and purpose found in his opinions:⁷⁵ 'It would, I think, be healthier to recognize that *HAG I* was wrongly decided, rather than to compound that error by inventing a spurious distinction between the two cases' and 'the Court should in my view make it clear, in the interests of legal certainty, that it is abandoning the doctrine of common origin laid down in *HAG I*. . . . That the Court should in an appropriate case expressly overrule an earlier decision is I think an inescapable duty, even if the Court has never before expressly done so.' Again, viewed at the time of Sir Francis's departure in 2006, that seems unarguably correct. When Mr Francis Jacobs arrived in 1988, it had not been thought of.

In the remainder of Chapter 9, Morcom guides the reader through the full panoply of Community trade mark law (the author's specialist subject): the exhaustion of rights (Community exhaustion and international exhaustion); the registrability of trade marks; infringement of registered trade marks and the opposition to registration of trade marks. Morcom confidently asserts that the protection of trade mark rights in the EU has been greatly enhanced as a result of the work of Sir Francis Jacobs, and Morcom's explanation of the law in Chapter 9 will demonstrate the same to any reader.

⁷⁴ Case 192/73 [1974] ECR 731.

⁷⁵ At paras 66 and 67.

TEMPORAL LIMITATIONS

Advocate General Jacobs was always interested in the procedural aspects of the work of the ECJ. In Chapter 10 David Vaughan tackles the origins and future of temporal limitation in EU law, from its beginnings in Case 43/75 *Defrenne No. 2*⁷⁶ to Francis Jacobs's opinion in Case C-475/03 *Cremona*.⁷⁷ As Vaughan points out, the introduction of temporal limits, limiting the effect of judgments of the ECJ, has always been an innovative business. This was recognized by Sir Francis in *Cremona* and it is interesting to note Sir Francis, after years of innovative opinions of his own, giving a roll-call of similar cases dating from the time prior to his arrival at the Court.⁷⁸

For this Court to take such a step⁷⁹ would be a considerable innovation. Such innovations have however been made in the past. It was an innovation for example in 1976 when in *Defrenne*⁸⁰ the Court limited the retroactive effect of its interpretation of a Treaty article. There were further innovations in 1980, when in *Providence Agricole de la Champagne*⁸¹ the Court applied the second paragraph of what is now Article 231 EC by analogy in a preliminary ruling, limiting the retroactive effect of a finding that certain Commission regulations were invalid, and again in 1988, when in *van Landschoot*⁸² it went a stage further, maintaining the effects of an invalid Community provision until such time as it was replaced by a valid provision.

Since a departure from the Court's customary approach (in favour of a novel finding of incompatibility that would only come into effect at a future date to be set by the Court) had not been debated during the proceedings, the AG suggested the reopening of the oral procedure in *Cremona*, which was duly done. As Vaughan points out, after the rehearing the ECJ eventually decided *Cremona* on other grounds, so that the question of a temporal limitation did not have to be considered. So we are left with a situation similar to that identified by Whish in Chapter 5 in relation to *Syfait* in the field of competition law (see above): the innovative and authoritative opinion of an experienced Advocate General, but no ruling from the Court. It seems more than

⁷⁶ [1976] ECR 455.

⁷⁷ Opinion of 17 March 2005.

⁷⁸ Para. 87 of the opinion.

⁷⁹ The finding in question being a finding of incompatibility subject to a future date before which individuals may not rely on the incompatibility in any claims against the state, the date in question being chosen in order to allow sufficient time for new legislation to be enacted: see para. 86 of the opinion.

⁸⁰ Case 43/75 [1976] ECR 455, at paras 69 to 75.

⁸¹ Case 4/79 [1980] ECR 2823, at paras 42 to 46.

⁸² Case 300/86 [1988] ECR 3443, at paras 22 to 24.

likely that the solution suggested by Francis Jacobs in *Cremona* will fall to be reconsidered in a suitable future case.

FROM *WACHAUF* TO *RICHARDS*: MAKING COMMUNITY LAW AND THE LEGACY OF AG JACOBS

It may be concluded from the cases discussed above that Sir Francis Jacobs's legacy at the Court is not merely the body of work that he leaves behind; nor is it limited to the contents of his individual opinions, valuable though these are as a rich treasury of ideas for future cases. Sir Francis combines clarity of reasoning with a straightforward application of the law, instinctively striving for outcomes that are both workable and accord with the fundamental principles of EU law. This can be observed in the opinions that deal with free movement as much as in opinions dealing with the regulation of competition or the purpose of trade marks. In each case the relevant interest is kept clearly in view, be it the freedom to establish oneself in another Member State, the achievement of a single market or the protection of the consumer. Sir Francis's true legacy is this clarity of approach, combined with a willingness to depart from the accepted way of doing things if the justice of the case demands it.

Francis Jacobs's influence has also been felt particularly keenly in the development of the Court's jurisprudence on the general principles of Community law; that is to say those principles that fall outside the formal sources of Community law such as the Treaties and the Community legislation. In particular, Sir Francis's contribution has been notable as regards the development of the Court's jurisprudence on the protection of fundamental rights. It is fitting therefore to conclude this Introduction by looking at one of Advocate General Jacobs's first cases and one of his last: Case 5/88 *Wachauf*⁸³ (opinion delivered 27 April 1989) and Case 423/04 *Richards*⁸⁴ (opinion delivered 15 December 2005).

Wachauf was one of the earliest opinions that Sir Francis delivered. It concerned the dry and technical subject of milk quotas. However, it also raised an important underlying issue of fundamental rights. In an attempt to reduce milk production the Community legislature provided for a system of milk quotas and also enabled Member States to grant compensation to producers who discontinued milk production entirely. Germany took advantage of the latter option, but as a condition of entitlement to compensation in the case of tenant farmers, the authorization of the landlord was required. The result was

⁸³ Case 5/88 *Wachauf* [1989] ECR 2609.

⁸⁴ Judgment, 27 April 2006.

that the Community rules, if they were to be implemented in this way, could mean that a tenant farmer, who had acquired the milk quota as a result of his labours, could be deprived without compensation of the fruits of his labour by a landlord who might never have engaged in milk production. AG Jacobs argued that although it was up to the national legislature to implement the regulations in a way that balanced appropriately the interests of tenant farmers and landlords, Community law also played a role in determining how that balance should be struck. He argued that when implementing Community law it was incumbent upon Member States to have regard to the principle of respect for the right to property which was guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States and which was also reflected in Article 1 of the First Protocol to the European Convention on Human Rights. The Court agreed. It held that the requirements of the protection of fundamental rights in the Community legal order were also binding on the Member States when they implement Community rules. This was the first case in which the ECJ expressly established that fundamental rights are binding on Member States when implementing Community law. *Wachauf* was an early example of what would come to be typical in the opinions of Francis Jacobs: a simple statement of the fundamental right, followed by the self-evident conclusion that the responsible authority (in this case the Member State) must be bound by it. As was so often the case, the application of the appropriate right led to the resolution of the question referred to the ECJ.

Richards was one of the three last opinions delivered by Sir Francis on the same day in December 2005. That case dealt with the question of whether it is contrary to Directive 79/7⁸⁵ for a Member State to refuse to grant a retirement pension before the age of sixty-five to a male-to-female transsexual⁸⁶ where that person would have been entitled to a pension at the age of sixty had she been regarded as a woman as a matter of national law. Sir Francis cited two previous rulings of the ECJ on gender reassignment, *P v S* and *KB*,⁸⁷ identifying the fundamental right concerned, namely the right not to be discriminated against on grounds of sex, which is one of the fundamental human rights whose observance the Court has a duty to ensure, and the correct comparator

⁸⁵ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

⁸⁶ Quoting the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467, AG Jacobs defined transsexuals as people who were 'born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex' (opinion, para.1).

⁸⁷ Case C-13/94 [1996] ECR I-2143 and Case C-117/01 [2004] ECR I-541.

for someone in the situation of a female-to-male transsexual; that is, a male person whose identity was not the result of gender reassignment surgery. The AG then applied the relevant fundamental right to the situation in hand in a way that a scholar of Francis Jacobs's opinions over the preceding seventeen years would find wholly unsurprising (at paras 54 to 56):

It is clear from its terms that the prohibition on discrimination in Article 4(1) of Directive 79/7, which states 'that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status', is intended to be all-encompassing. The Court has ruled that the provision 'precludes, generally and unequivocally, all discrimination on grounds of sex'. . . .

In contrast, the Court has ruled that, in view of the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) must be interpreted strictly. As explained above, that provision permits the maintenance of a specific instance of different treatment of men and women, namely in the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. That type of sex discrimination is not in issue in the present case.

In the present case the conduct complained of falls within the general prohibition in Article 4(1) of the Equal Treatment Directive and outside the derogation therefrom in Article 7(1)(a).⁸⁸

The AG concluded that it was contrary to Article 4(1) of Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of sixty-five to a post-operative male-to-female transsexual where that person would have been entitled to a pension at the age of sixty had she been regarded as a woman as a matter of national law. The ECJ concurred.

In both *Wachauf* and *Richards* one finds a staunch defence of fundamental rights. In neither case however is the point made in a grandstanding or dramatic fashion; rather, the strength of the arguments is enhanced by the matter-of-fact delivery of Francis Jacobs. In both cases the innovation is framed in terms of continuity and conformity with previous case law. Another aspect of these cases is that they directly affect the rights, and thus the everyday lives, of the individual applicants: for both Hubert Wachauf and Sarah Margaret Richards these were not matters of abstract principle but issues of considerable personal and financial importance. Francis Jacobs's recourse to fundamental rights was not an arid exercise in building the *Community acquis*. In each case the end in view was justice for the individual.

⁸⁸ The question of the stage at which a transsexual person becomes entitled to equal treatment within the meaning of Directive 79/7 with persons of his or her acquired gender was discussed but it was not necessary for the AG or the Court to consider this, and so they did not do so.

As a modest man, Sir Francis Jacobs may well be appalled at the sheer volume of praise contained in this book (and in this introductory chapter). However, the authors of this work have not set out to flatter. Francis Jacobs has made a unique contribution to EU law and it is hoped that this book can go some way towards explaining and perpetuating that contribution.