

## KEYNOTE ADDRESS, FACULTY OF ADVOCATES

### BREXIT CONFERENCE, 10 MARCH 2017

#### A question of interpretation?<sup>1</sup>

#### Introduction

The art of understatement remains an important rhetorical weapon in the armoury of the advocate. Here is an example. The result of the referendum on the United Kingdom's membership of the European Union on 23 June 2016 was an important moment in history. The UK's membership of the EU, which has subsisted since 1 January 1973<sup>2</sup>, is about to be terminated, presumably for ever. The Prime Minister will notify the EU that the UK is to withdraw from its treaty obligations; the so-called triggering of Article 50.<sup>3</sup> Once the trigger, which will require Parliamentary approval in the form of legislation,<sup>4</sup> is pulled,<sup>5</sup> the treaties will cease to apply after two years, unless the European Council and the UK Government reach agreement to the contrary.<sup>6</sup>

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<sup>1</sup> I am grateful to my Law Clerk, Megan Dewart, for the preparation of the initial draft of this paper

<sup>2</sup> Originally as a member of the European Economic Community, and bound by the 1957 Treaty of Rome. The EEC became the European Community in 1993, and the European Union in 2009, following the Treaty of Lisbon.

<sup>3</sup> Art 50 EU, inserted by the Treaty of Lisbon

<sup>4</sup> *R (Miller) v Secretary of State for Exiting the EU* [2017] 2 WLR 583 at para 124

<sup>5</sup> *R (Miller) v Secretary of State for Exiting the European Union (supra)*, at para 104

<sup>6</sup> Art 50(3) EU

The UK's exit will change the existing constitutional arrangements, in which the court system plays such an important part. As re-iterated recently by the United Kingdom Supreme Court in the Brexit case, the role of the courts:

“[i]n the broadest sense ... is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case...”<sup>7</sup>

Matters of politics: the why; the when; and on what terms; are not matters for the judiciary. That is an important feature of the separation of powers; the notion of independence, separate from the other institutions of the State. The courts' role is to interpret the law as laid down by the legislature. For the last 40 years, that has included looking at the Directives and other measures of the EU as a legislative body,<sup>8</sup> either as a matter of direct effort or, more often, as they have been transposed into UK or Scottish statutory instruments.

The fundamental role of the courts will not change as a result of the UK leaving the EU. What will be altered is the detail of what the courts do, in at least two broad respects. The first relates to the substantive body of law to be applied. In this, certain areas will change more than others. The second is the manner in which the courts will interpret the substantive law. The principles of interpretation, which form a key part of EU law, may no longer apply in the post- Brexit world.

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<sup>7</sup> *R (Miller) v Secretary of State for Exiting the European Union (supra)* at para 42

<sup>8</sup> European Communities Act 1972 s 2(1)

The first part of this paper will outline the areas of EU substantive law which have been litigated recently in the appellate Divisions of the Court of Session and the settled principles of interpretation which the Court has adopted towards them. The second will consider the possible legal effects of Scotland's prospective membership of the European Free Trade Association (EFTA) and accession to the European Economic Area Agreement (EEA Agreement), which the Scottish Government has described as "the differentiated solution" for Scotland.<sup>9</sup> The third part will look at the legal consequences of the proposed Great Repeal Bill, which the UK Government intends to introduce following notification under article 50. It will highlight the need for clarity on the methods of interpretation, which the courts should apply to legislation forming part of the EU *acquis*, that is the body of common rights and obligation of the European Single Market, and which will continue to exist. This part will assume that the UK Government retains its commitment to certainty and provides for the adoption of existing EU legislation on the UK's departure from the EU.<sup>10</sup>

### **Part 1: The *Status Quo***

Litigation about rights and duties which derive from EU law has been an increasingly important part of the work of the appellate Divisions for some time. The Court's judicial review jurisdiction in respect of acts of the Scottish Government

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<sup>9</sup> Scottish Government, *Scotland's Place in Europe*, December 2016

<sup>10</sup> The United Kingdom's exit from and new partnership with the European Union (Cmnd 9417) (February 2017), Chapter 1

and its agencies has been an expanding one, especially with the transfer of title and interest into a much more open field. Traditionally, at least, the Court has tended to the view that the power of review ought properly to be restricted to the legality of the act. This approach presumes that it is not the role of the Court to consider the merits of a decision as if it were an appellate body. The Court has been inclined to restrict itself to considering whether the act was lawful, within the conventional criteria of lawfulness encompassed in the concept of reasonableness.<sup>11</sup> The Court is also entrusted with reviewing acts of the Scottish Parliament on a number of grounds, including compatibility with the European Convention and EU law, by virtue of the Scotland Act 1998.<sup>12</sup> Any Act of the Parliament, which does not comply with the requirements of EU law, is out with its competency and hence, as it is strangely put, “not law”.

Over the last 5 years, the Court has determined very significant challenges to the legality of Acts of the Scottish Parliament on the grounds of non-compliance with EU Treaty obligations.<sup>13</sup> In the minimum pricing case<sup>14</sup>, the petitioners sought to challenge Parliament’s enactment on the basis that EU manufacturers of lower cost alcohol would be disproportionately affected. The Government maintained that, whilst that might be so, the measure would reduce alcohol consumption and target

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<sup>11</sup> *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345

<sup>12</sup> s 29 (2)(d). It is unlawful for the Scottish Ministers to act in a manner which is contrary to EU law by virtue of section 57(1) of the Scotland Act 1998

<sup>13</sup> *Sinclair Collis v Lord Advocate* 2013 SC 221; *Scotch Whisky Association v Lord Advocate* 2016 SLT 1141 (1<sup>st</sup> Div.)

<sup>14</sup> *Scotch Whisky Association v Lord Advocate* (*supra*)

those individuals whose consumption was at a hazardous or harmful level. The Lord Ordinary decided that minimum pricing was justified by the legitimate objective of protecting life and health.<sup>15</sup> That decision was reclaimed. As part of the appellate process, an Extra Division made a reference to the Court of Justice of the European Union for guidance on a number of matters, including, most important, the standard of review to which a court should subject legislation.<sup>16</sup>

The CJEU focussed its answers on whether any alternative measures, such as taxation, could achieve the objectives of the legislation whilst having less impact on intra-EU trade.<sup>17</sup> It emphasised that it was for the national courts to determine whether or not legislation infringed a restriction on the free movement of goods, and whether that restriction could be justified as the most effective method of achieving legitimate health objectives. The First Division, in applying the CJEU judgment, agreed with the first instance decision that the legislation was proportionate.<sup>18</sup> It will be interesting to see how the United Kingdom Supreme Court will approach the issue; and especially, and not for the first time, how it will define, or redefine, the appropriate level of judicial scrutiny.

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<sup>15</sup> Art 34 TFEU prohibits quantitative restrictions on goods. Art 36 provides exceptions to Art 36, which includes public health protection; *The Scotch Whisky Association v Lord Advocate* 2013 SLT 776 (OH)

<sup>16</sup> *Scotch Whisky Association v Lord Advocate* [2014] CSIH 38 (Extra Div.)

<sup>17</sup> *Scotch Whisky Association v Lord Advocate* [2016] 2 CMLR 27 (CJEU)

<sup>18</sup> *Scotch Whisky Association v Lord Advocate* 2016 SLT 1141, LP (Carloway) at [166]-[205]

Scots judges are said to be EU judges for the purposes of enforcing and upholding EU law.<sup>19</sup> The petitioners in the minimum pricing challenge were able to present their case, secure in the knowledge that EU law would be applied in the same way as if it would be by the CJEU in Luxembourg, or the courts in any of the other 27 Member States. For those that wish to rely on rights which are currently enshrined in the EU Treaties, that is a practical advantage which cannot be underestimated. It means that the domestic courts can be tasked, when reviewing the compliance of the UK Government's EU treaty obligations, with securing the four fundamental freedoms. Experience of doing this has been accumulated over the last 40 years. It is unique in the field of public international law. Treaty obligations between states are not normally reviewable in domestic courts.<sup>20</sup>

Beyond the fundamental freedoms, there is a body of EU legislation which has its basis in the Treaties, principally in the form of Directives and Regulations.<sup>21</sup> Over the last two years, the appellate Divisions have heard a number of appeals concerning the Dublin II and III Regulations, which govern the processing of asylum applications across the EU.<sup>22</sup> The Dublin regime provides in general that the first country to which an application could have been made is responsible for processing it, except in situations where to do so would be, for example, to return an individual

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<sup>19</sup> European Communities Act 1972 s2(1); *N.V. Algemene Transport en Expeditie Onderneming Van Gend en Loos v Neder-Landse Tariefcommissie* (C-26/62) [1963] CMLR 105; *Da Costa en Schaake v Nederlandse Belastingadministratie* (C-28/62) [1963] CMLR 224

<sup>20</sup> *R (Miller) v Secretary of State for Exiting the EU* (*supra*) at para 55, citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 397-8

<sup>21</sup> Art 288 TFEU

<sup>22</sup> *MIAB v The Secretary of State for the Home Department* 2016 SLT 1220

in circumstances which would breach his human rights.<sup>23</sup> The Dublin regime is an important part of pan-European co-operation<sup>24</sup> on asylum claims, particularly in the circumstances of increased migration as a result of instability in parts of the Middle East and North Africa.

Unlike Regulations, EU Directives usually require to be transposed into UK legislation, although a failure to transpose timeously, or correctly, may entitle an individual to rely on the terms of the Directive itself.<sup>25</sup> Domestic legislation, whether primary or secondary, may be reviewed by the courts on the grounds that either the aim of the underlying Directive has been interpreted incorrectly or that it has not been implemented by the legislation or the courts at all. In contrast, where a Directive has been properly implemented in national law, there is generally no scope, despite repeated attempts to achieve the contrary, for giving the terms of the underlying Directive direct effect.<sup>26</sup> This is particularly so where the Directive is relied upon, as is not uncommon, to undermine or to circumvent the national legislation. The courts may of course rely on the *acquis* in the event of interpretive uncertainty, whether the domestic legislation pre- or post-dates the Directive; the so-called *Marleasing* principle.<sup>27</sup>

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<sup>23</sup> Council Regulation (EC) 343/2003 (Dublin II) and Regulation (EU) 604/2013 of the European Parliament and Council (Dublin III)

<sup>24</sup> Switzerland is part of the Dublin regime, whilst being out with both the EEA and the EU

<sup>25</sup> *Marks & Spencer v Customs and Excise Commissioners* [2003] QB 872 at para 25 *et seq.*

<sup>26</sup> *Felicitas Rickmers-Linie KG & Co v Finanzamt fur Verkehrsteuern* [1982] 3 CMLR 455, Slynn AG at paras 24-26; *Salt International v Scottish Ministers* 2016 SLT 82, LJC (Carloway) at para [43]

<sup>27</sup> *Marleasing v La Comercial Internacional de Alimentacion* (C-106/89) [1992] 1 CMLR 305

Over the last few years, the appellate Divisions have considered a number of cases which have involved a direct consideration of EU Directives and their transposition into domestic legislation. These have included the public procurement of winter grit supplies,<sup>28</sup> a number of planning and environmental (windfarm) cases<sup>29</sup> and that old favourite, data protection<sup>30</sup>. The court has also considered cases where the parties have relied upon rights emanating from an EU Directive, which have been transposed into domestic law, without considering the terms of the Directive itself. In cases where the rights are well established, such as in product liability,<sup>31</sup> Health & Safety,<sup>32</sup> and freedom of information legislation,<sup>33</sup> the court is used to applying the domestic law, usually in the form of subordinate legislation in the place of the EU source material. The volume of cases, especially when analysed as a proportion of appellate business, is a clear testament to the extent to which, on a daily basis, the Court is currently steeped in EU jurisprudence.

In interpreting both EU Regulations and Directives, the court has developed certain principles of interpretation. The incorporation of EU law as a body into domestic law, by virtue of the European Communities Act 1972, immediately limited the sovereignty of the UK Parliament. Thereafter, that Parliament was required to

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<sup>28</sup> *Salt International v Scottish Ministers* (*supra*)

<sup>29</sup> *John Muir Trust v Scottish Ministers* [2016] CSIH 61; *Royal Society for the Protection of Birds v Scottish Ministers* [2016] CSOH 105

<sup>30</sup> *Christian Institute v Lord Advocate* 2016 SLT 805

<sup>31</sup> *Renfrew Golf Club v Motocaddy* 2016 SLT 781

<sup>32</sup> *HM Inspector of Health & Safety v Chevron North Sea* 2016 SLT 561

<sup>33</sup> *Gilroy v Scottish Information Commissioner* [2016] CSIH 18

act in a manner which was compatible with EU law.<sup>34</sup> Where there was a conflict between EU law and national law, EU law, in whatever form, had to prevail.<sup>35</sup> Yet the principle of primacy was not set out in the Treaties. Rather, it was instead developed by the European Court of Justice, as recognised by the House of Lords in *Factortame*.<sup>36</sup> It is this principle which is the cornerstone of the way in which the courts must apply and interpret EU and domestic legislation.

On a more mundane procedural front, the Scottish Courts and Tribunal Service, as the body responsible for providing the justice system, require to provide procedural rules for the implementation of cross-border EU obligations, which the UK as the Member State must fulfil. In the civil sphere, the court service must make provision for the mutual recognition and enforcement of judgments, for example in family actions.<sup>37</sup> Court rules provide for the recognition of orders relating to children and in other civil and commercial matters.<sup>38</sup> The system must make provision to secure access to justice, such as enabling a party, who is litigating in the public interest, to obtain an order to protect him from prohibitive expense.<sup>39</sup> In the criminal sphere, the mechanisms for the reciprocal recognition of a European Arrest

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<sup>34</sup> *Costa v Ente Nazionale per l'Energia Elettrica* (C-6/64) [1964] ECR 585 at 593

<sup>35</sup> *International Handelsgesellschaft v Einfuhr und Vorratsstelle fur Getreide und Futtermittel* (C-11/70) [1970] ECR 1125

<sup>36</sup> *R v Secretary of State for Transport ex p. Factortame* [1991] 1 AC 603, Lord Bridge at 658-9

<sup>37</sup> EC Council Regulation 2201/2003 of 27 November 2003 (Brussels II bis); RCS chapters 88 and 106

<sup>38</sup> Regulation (EU) 1215/2012 of the European Parliament and Council (Brussels I (recast)); RCS Ch 62

<sup>39</sup> RCS Ch 58A; *R (Edwards) v Environment Agency* [2013] 1 WLR 2914; *John Muir Trust v Scottish Ministers* (*supra*)

Warrant<sup>40</sup> are an important part of the UK's obligations in that field. The High Court of Justiciary determines appeals against orders for extradition under the EAW scheme on a regular basis.

## **Part 2: A differentiated solution**

One of the Scottish Government's proposals, in the event of the UK leaving the EU, is for Scotland to become a member of EFTA, and to accede to the EEA Agreement, thus retaining access to the European Single Market.<sup>41</sup> Taking that proposal at face value, and making no comment on its "political complexities and challenges", which are recognised by the Scottish Government, a number of general points of differentiation between the current position and the proposal, from the courts' perspective, are immediately apparent.

First, areas of the substantive law may change in a number of respects. EFTA countries are party to the *acquis*, which protect and promote the four fundamental freedoms across the 31 EEA countries.<sup>42</sup> In addition, there are a number of flanking or horizontal policies to the EEA Agreement in areas such as consumer protection, the environment and social policies, including worker's rights and health and safety. The EEA Agreement does not include the Common Agricultural Policy or Fisheries Policy, nor does it include a customs union or a common policy on justice and home

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<sup>40</sup> Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States; Extradition Act 2003 Part 1; Criminal Procedure Rules Ch 34

<sup>41</sup> Scotland's Place in Europe, Ch 3 at paras 117-171. EFTA countries comprise Iceland, Norway and Liechtenstein.

<sup>42</sup> EEA Agreement Article 1

affairs. The EFTA countries are party to an agreement which implements the terms of the Dublin Regulations,<sup>43</sup> as is Switzerland, which is not party to the EEA. The EFTA countries are not party to the European Arrest Warrant Framework Decision.<sup>44</sup> Most important, the EEA Agreement provides that the EFTA countries have a right of veto over the adoption of new EU legislation.<sup>45</sup>

Many of the cases determined by the appellate Divisions, which have already been referred to, would be subject to the same substantive law under the EEA Agreement as it currently exists. This is certainly the case in areas such as health & safety, consumer protection, public procurement, and freedom of information. Challenges in planning cases based on environmental grounds,<sup>46</sup> may, however, be determined differently, as there are notable omissions in the EEA Agreement on environmental matters.<sup>47</sup> Challenges based on the free movement of goods would not be able to rely on the CAP. It would not be possible to rely on the prohibition against taxing strengths of alcohol differently in challenging a minimum pricing measure.<sup>48</sup>

Secondly, and more fundamentally, the role of the court would change significantly under the EFTA regime. The jurisdiction of the CJEU would be brought

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<sup>43</sup> 2001/258/EC: Council Decision of 15 March 2001

<sup>44</sup> Council Framework Decision of 13 June 2002 on the EAW and surrender procedures between states

<sup>45</sup> Art 102 EEA Agreement

<sup>46</sup> *Royal Society for the Protection of Birds v Secretary of State for Scotland* 2000 SLT 1272

<sup>47</sup> E.g. Council Directive 79/409/EEC (Wild Birds Directive) and Council Directive 92/43/EEC (Habitats Directive) are excluded from the EEA Agreement (Annex XX at para 6 (1) (a))

<sup>48</sup> *Scotch Whisky Association v Lord Advocate* (supra)

to an end, although membership of the EEA brings with it the supervision of the EFTA court, with, presumably, the addition of a Scottish judge to that court. The domestic courts would no longer be responsible for policing UK compliance of treaty obligations with the other EEA Member States (EU 27 plus 3 EFTA countries).

The principles of interpretation to be applied by the courts would also change. There is no doctrine of direct effect, or of primacy, in the provisions of the EEA Agreement. The EFTA court has recognised that EEA measures must be adopted and implemented in national legislation to be effective.<sup>49</sup> Where measures have been implemented in sufficiently clear and precise terms, they are capable of having a quasi-direct effect by being invoked in national courts.<sup>50</sup> There may be state liability in circumstances where an EFTA state has failed to transpose provisions which are required by the EEA Agreement into domestic law, at least if the breach is sufficiently serious.<sup>51</sup> The EFTA court based its decision on the overarching objective of homogeneity in Article 1 of the EEA. This approach was endorsed by the ECJ, which confirmed the “objective of uniform interpretation and application” which in turn informed the EEA Agreement.<sup>52</sup>

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<sup>49</sup> *Criminal Proceedings against A* (E-1/07) [2007] EFTA Ct Rep 245

<sup>50</sup> *Ravintoloitsijain Liiton Kustannus OY Restamark v Helsingin Piiritullikamari (Helsinki District Customs Office)* (E-1/94) at para 77

<sup>51</sup> *Sveinbjörnsdóttir v Iceland* (E-9/97) [1999] 1 CMLR 884 (EFTA)

<sup>52</sup> *Rechberger* (C-140/97) [1999] ECR I-3499 at para [39]

What might this mean for the Scottish courts? An online search for Scottish cases which mention the EEA Agreement reveals one unrelated result.<sup>53</sup> The interpretation of EFTA case law is not something that the Scottish courts are familiar with. They would not be able simply to apply EU doctrines to the EEA Agreement. Instead, they would have to apply the principles of quasi-direct effect, in so far as the provisions have been implemented by, and are not inconsistent with, domestic law. Reference to the EFTA court would remain possible, in the same way that the courts can refer questions to the CJEU at present. Given the historical development of the law within the UK, there may be a divergence between the Scottish courts and the courts of England & Wales on substantive law matters.

Finally, if Scotland were to be part of the European Single Market, there is the real possibility that litigation, which is currently conducted elsewhere, notably in London, but which relates to the import and export of goods to Scotland may return, perhaps for the first time in 300 years, to this jurisdiction. That would provide an opportunity for the legal profession in Scotland to develop that area of practice, as well as to be involved in the development of new jurisprudence on Scotland's emerging relationship with the EEA.

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<sup>53</sup> *D v Amec Group* 2017 GWD 3-40

### Part 3: Scotland outside of the EEA

As it currently stands, the UK Government has indicated that it intends to give notice that it wishes to withdraw from its EU Treaty obligations by the end of this month. In the absence of an agreement on a differentiated solution for Scotland, the whole of the UK will, at some stage in the future, cease to be a part of the EU. The UK Government has announced its intention to bring forward legislation which, when enacted, will repeal the 1972 Act, and preserve or “freeze” EU law as it stands on the day of the exit. The Great Repeal Bill may give the Government powers to amend the existing law to reflect the terms of any agreement between the UK and the EU following the UK’s exit. The purpose of the Bill, consistent with the Government’s stated objectives in the White Paper,<sup>54</sup> is to provide maximum certainty by maintaining EU law, wherever the UK Government regards it as appropriate to do so.

Freezing EU law as it stands is likely to be a very onerous task. EU legislation has been intertwined with domestic legislation for 40 years. In order to maintain the necessary legal certainty, any proposed bill must set out with some precision what EU law is to be retained, the status of that law, and when it is to be applied. The case law of the CJEU also forms an important part of the *acquis*. The policy of the UK Government is to end the jurisdiction of the CJEU in UK cases at the point when the

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<sup>54</sup> The United Kingdom’s exit from and new partnership with the European Union (Cm 9417) (February 2017), Ch 1

UK leaves the EU.<sup>55</sup> Technical points may arise about the status of, for example, references which have been made to the CJEU by the UK courts but not yet determined. Questions may crop up in existing litigation which pleads EU law applicable at the time of the event but no longer extant.

The policy of the UK Government is to stop the flow of new EU law into the UK legal system following Brexit.<sup>56</sup> This will presumably encompass both EU legislation and the case law of the CJEU. Government policy at the moment is that the courts in the UK will no longer be bound by CJEU precedent. At the point of exit, if the body of EU law is frozen as it currently exists, there will be a schism between EU law in the EU and EU law in the UK. There may, or may not, be a divergence between the approaches of the CJEU and the UK courts on the interpretation of pre-Brexit legislation. The two may run parallel, but at a distance, to each another. It might be thought that the extent to which the UK courts are to take cognisance of decisions of the CJEU which post-date Brexit is a matter of policy for the UK Government to determine, and not one which is appropriate for judicial comment. In the absence of clarification in the Great Repeal Bill, it may, however, be left to the courts to determine the issue; a matter which may take not a little time and judicial effort to resolve.

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<sup>55</sup> *Ibid* at Ch 2

<sup>56</sup> *Ibid* at para 2.3

The principle of the primacy of EU law and its direct effect will cease to exist when the UK leaves the EU. The legislative competence of the EU as an institution will be brought to an end. What ought to be made clear is whether, and if so how, the primacy principle is to be applied to pre-Brexit legislation which is put before the court post-Brexit. If the courts were to disregard the supremacy of EU law over domestic law in interpreting a pre-Brexit piece of legislation, this may undermine the status of the pre-Brexit law as being truly frozen at the point of exit. This is yet another mind stretching question which could take a long time, and perhaps several appellate stages, to be answered.

One final thought is that, as it currently stands, the CJEU takes a purposive approach to interpretation. It interprets the terms of the Treaties, Directives and Regulations in the spirit of the aims of the EU as a whole.<sup>57</sup> The CJEU also has recourse to *travaux préparatoires*; far more frequently than the UK courts do in the interpretation of domestic law.<sup>58</sup> It will be a fundamental policy choice for the UK Government to decide whether the courts, in interpreting pre-Brexit law, ought to maintain that principle of interpretation, given that the context in which the legislation is being interpreted may be very different from its original purpose, as a consequence of the UK's departure. Consideration must also be given to whether the fundamental principles of the EU ought to be applied post-Brexit at all. In the

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<sup>57</sup> See e.g. *Construction Danmark v Skatteministeriet* (C-174/08)[2009] ECR I-10567 at para 24

<sup>58</sup> *Pepper v Hart* [1993] AC 593

absence of a choice by the UK Government, it will be for the courts to determine how to interpret the pre-Brexit EU law *acquis*.

## Conclusion

In his characteristically lyrical language, Lord Denning described the development of EU law as *“like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward...part of our law. It is equal in force to any statute.”*<sup>59</sup> That prediction was correct. EU law has become so closely intertwined with our domestic law that separation, if that is what is to be done, will be a task of mammoth proportions. As well as changes to the substantive law, this may well involve changes to the principles of interpretation which the courts apply to legislation. If there were to be a different solution, that too would involve substantial changes to both the law that the courts are bound to apply and the manner in which they require to do so.

The UK's accession to the European Economic Community in 1973 brought about a fundamental change in the way in which the courts required to interpret legislation. It innovated on a process which had been developed incrementally over many centuries. Despite the occasional hesitation of some counsel to accept the depth of the Court's knowledge, the appellate Divisions are now, and have been for

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<sup>59</sup> *HP Bulmer v J Bollinger* [1974] Ch. 401 CA at 418F

some time, familiar with interpreting and applying the principles of EU law; even if that has not always been so. Any innovation, or renovation, which is necessary as a result of the current political process will in time become part of the standard jurisprudence of the courts.

Scotland has a strong tradition of having lawyers steeped in the Europe context. The judiciary too maintain important links with the European courts. The Scottish legal system has roots immersed in the *ius commune* of post Roman times. All of this existed long before the European Union was even thought of. There is no reason why it ought not to continue.

**Lord Carloway**  
Lord President  
10 March 2017