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Commercial Law Centre**

**Shall we in one bound be free?**

**The European Court and European law after Brexit**

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When this lecture was being planned, the provocative title was chosen to hint at the surprising possibility that we would not through Brexit leave European Union law behind: thus those who aspire to instant “freedom” from European Law would be disappointed. I can no longer make that as a startling revelation since the government has anticipated me. But there is much to consider in the thicket of legal and regulatory and personal complexity which looks likely to exist after the UK would no longer be a Member State of the European Union.

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<sup>1</sup> Ian Forrester was appointed as Judge of the General Court of the European Union in 2015; the present remarks are a contribution to the academic debate over the resolution of future disputes about EU law. They in no way reflect the views of the Court or of other judges.

<sup>2</sup> I acknowledge the help of my spousal co-muse Dr Sandra Keegan with whom I have debated many novel legal governance theories, and of my colleagues, Mr. Pascal Berghe, Mme Aleksandra Melesko and Mr. Matthew Condliffe, as well as others unnamed.

The Prime Minister has stated that she has identified for the UK two principal concerns, two “red lines”. First, the UK must restore control over migration; and second, it must escape the jurisdiction of the European Court.

"We are not leaving the European Union only to give up control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice. That's not going to happen."<sup>3</sup>

In the James Wood Lecture at Glasgow University on November 11<sup>th</sup> 2016, I reviewed the existing state of the law governing free movement of persons in the light of the Treaty of Rome and its amending treaties, as well as the many judgements of the European Court on residence, workers, equal treatment for men and women, students, and access to social benefits.<sup>4</sup> I offered practical examples of ways in which European law had applied the rules on access to employment, discrimination, pension benefits, recognition of qualifications and other topics.<sup>5</sup> I suggested that those rights were valuable and that millions of people availed themselves of benefits in jobs, qualifications, education, pensions and access to social benefits. I suggested that, while reflecting on the next steps, the political advantage of leaving the European Union should be balanced against the disadvantage to the individuals who would lose such rights.<sup>6</sup>

In this lecture, I propose to consider the practical ways in which the decisions of the EU Courts will continue to affect UK interests even after a Brexit would have

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<sup>3</sup> Prime Minister Theresa May, 4 October 2014, Speech to Conservative Party Conference, Birmingham, *The Good that Government can do*. [Online]. Available at: <http://press.conservatives.com/post/151378268295/prime-minister-the-good-that-government-can-do> [Accessed 7 November 2016].

<sup>4</sup> Ian S. Forrester, *Free Movement of Persons – The Right We Must Leave Behind?*, U. GLASGOW, JAMES WOOD LECTURE 2016 (2016). <https://sulne.ac.uk/writings/>

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

occurred. Even after the jurisdiction of the EU courts would have technically ended, what continental lawyers call its jurisprudence will persist. That might be due to the existing influence of EU law in the shaping of our law in daily life; or due to the need to make sense of UK law in a field dominated today by EU law; or during the transitional or “implementation” period; or to deal with disputes arising in fields like justice, security and home affairs where the government reportedly wishes not to abandon cooperation between states; or to resolve disputes involving the UK and its obligations arising from the secession treaty pursuant to which the UK would leave the European Union; or to consider the compatibility of that international agreement with the Treaty of Rome and its amending treaties.

I will also consider trade matters (in some cases of real urgency) where the relevant foreign jurisdictions are the WTO as well as the ECJ, and will mention some other topics where Brexit will not remove the UK from the effect of European law, or where action will be required to avoid economic harm.

## **The Basic Situation**

For 44 years the UK has managed the regulation of the country’s affairs in collective cooperation with its European partners.<sup>7</sup>

The research, consultation and decision making are done collectively often involving expert EU agencies or committees. The topics of cooperation and regulation include access to higher education, customs, agriculture, financial services, energy, nuclear safety, security, terrorist asset freezes, mutual recognition of judgements, criminal law enforcement, fisheries and data protection.<sup>8</sup> Independent EU agencies are responsible

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<sup>7</sup> The UK acceded to the predecessor of the European Union as of January 1, 1973 pursuant to the Treaty of Accession and the passage of the European Communities Act of 1972 .

<sup>8</sup> Institutions and Bodies of the European Union, PUBLIC DATA EU, <http://institutions.publicdata.eu/>.

for regulating pharmaceuticals, food safety, security, animal feed, maritime safety, aviation and many other topics.<sup>9</sup> The agencies are located in London (medicines), Alicante (trademarks and plant varieties), Helsinki (chemical substances), Riga (telecommunications), Parma (food safety), and some twenty more cities across the EU of 28.<sup>10</sup> The extent of the responsibility of each agency varies but each of them is engaged in enforcement, investigation and other regulatory actions. These agencies employ experts from across the EU 28 and produce recommendations or opinions on such things as whether Virginiamycin is an appropriate feed additive for calves, turkeys and pigs, or whether phthalates are hazardous to babies who suck soft plastics, or whether a particular pesticide is safe to be put on general sale or should be removed from the shops.

The European Union's range of activities has broadened from agriculture, trade, free movement of workers and goods in the early years. As technology has advanced and as technical choices have become more sophisticated, an ever wider and deeper mass of regulation has emerged.<sup>11</sup> The CBI has estimated that the roles of 34 EU agencies will need to be replicated in the UK to perform for the UK the elaboration of technical regulations parallel to those currently produced under the auspices of the EU 27.<sup>12</sup>

The UK is a highly regulated society and I have no expectation that Brexit will make us more casual about workers' rights, dangerous chemicals, protection of wildlife,

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<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid*

<sup>11</sup> As of 2015 there were an estimated 11,547 regulations, 15,023 decisions from the European Courts, along with an additional 62,397 standards promulgated by specific agencies clarifying and supplementing the regulations and directives, and 18,545 decisions made by different agencies interpreting the rules, regulations and directives. It would not be surprising if these numbers increase. *Number of laws*, EUabc, EUABC.COM (2015), <http://en.euabc.com/word/2152> (a compilation developed from Eurlex).

<sup>12</sup> Kate Allen & George Parker, *UK Set to Keep EU Regulations after Brexit*, FT.COM, March 26, 2017, <https://www.ft.com/content/64d30780-10b5-11e7-b030-768954394623>.

animal feed, child abduction, access to data, competition, motor vehicles or consumer protection.

The UK will have three choices: set up a UK mechanism for adopting and enforcing UK standards, which will be stricter or less strict than those in the EU 27; follow what standards are adopted by the EU 27; or not regulate the topic. (During the referendum campaign there was talk of repealing silly laws but I have not heard of candidate topics for deregulation more specifically - there may be some.)

## **The Great Repeal Bill**

The European Communities Act 1972 incorporates the EU treaties and the law promulgated under them into UK law and charges the UK government with enforcing this law.<sup>13</sup> As part of the Brexit process, and some time after the invocation of Article 50 of the Treaty on the Functioning of the European Union (“TFEU”) but before the end of the negotiations and the implementation of the final exit, the Repeal Bill or Act (no longer entitled “Great,” due to a parliamentary convention) will be proposed to Parliament.

The (Great) Repeal Act is intended to remove EU law from its current status of primacy over the UK’s domestic law and institutions.<sup>14</sup> The Repeal Act would thus fill the void that would otherwise be left if the UK were to renounce but not replace that vast body of law, the *acquis communautaire*, which has come into being since 1957.<sup>15</sup>

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<sup>13</sup> European Communities Act of 1972 Part I, §§2(1) &(2)

<sup>14</sup> *Great Repeal Bill: All you need to know*, BBC NEWS-UK POLITICS, BBC (2017), <http://www.bbc.com/news/uk-politics-39266723>.

<sup>15</sup> Theresa May’s Conservative conference speech on Brexit’, Politics Home, 2 October 2016 ; See also HM Government, The United Kingdom’s exit from and new partnership with the European Union, Cm 9417 February 2017 para 2.3

Thus the corpus of European law as of the date of repeal would become UK law. This nationalisation will include the primary treaties, regulations, directives, guidance offered by the Commission, and the case law of the European Courts. As noted in footnote 11, the total of texts is maybe as many as 92,000 or more. The BBC, assiduous about being accurate and neutral, has mentioned at least 80,000 distinct pieces of legal text.<sup>16</sup> The texts will often have been drafted to reconcile different national interests. UK officials have been exceptionally successful in contributing UK-friendly ideas in the drafting process.<sup>17</sup> Sometimes the national interest at stake might not have included the UK, while in other cases the text may have been tweaked precisely to satisfy UK concerns.<sup>18</sup> A very small number of texts (dozens out of tens of thousands) have been adopted despite UK opposition.<sup>19</sup>

In any event, tens of thousands of EU texts will enter UK law via the (Great) Repeal Act, like a vast tangle of EU wires to be plunged into a bath of electroplating to make their nationality that of the UK. They cover the environment, animal feed, quality of drinking water, data protection, seatbelt anchorage points, power consumption of vacuum cleaners, labelling for bottled water, the conditions under which a person suffering from diabetes may be issued a driver's license if they suffer hypoglycaemic

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<sup>16</sup> *Great Repeal Bill: All you need to know*, BBC NEWS-UK POLITICS, BBC (2017), <http://www.bbc.com/news/uk-politics-39266723>; See also fn. 11 supra.

<sup>17</sup> Andrew Lilico, *Staying in the EU would see the UK facing up to economic domination*, THE TELEGRAPH (Feb. 22, 2016), <http://www.telegraph.co.uk/business/2016/02/22/staying-in-the-eu-would-see-the-uk-facing-up-to-economic-dominat/>.

<sup>18</sup> As an example of both phenomena, the Young Workers Directive (Directive 94/33/EC) was opposed by the then Conservative government in London; however, although the UK was unable to block the passage of the directive, the Government of Prime Minister Major was able to persuade its EC partners to include various opt-outs, exceptions, and implementation delays into the text. Gerda Falkner et al., *Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?*, 27 WEST EUROPEAN POLITICS 452-73, 458-59 (2004).

<sup>19</sup> *Ibid*

episodes and many more.<sup>20</sup> Often the rule as originally adopted will have been changed to respond to technical progress.

To reconcile the need for good regulation with the need to escape the reach of the European Union, the concept would be to bring the whole mass of EU law into UK law and then over the years by correcting, pruning, winnowing and discarding to arrive at a result which is that the UK has what its political leaders desire.

### **The problem of keeping regulations up to date.**

Regulation is an ongoing process, dominated by expert advice. European Union law primarily aims at the construction of a functioning common market, a process which involves the reduction or removal of national rules which impede that goal. While most EU law is economic in nature, it is necessarily technical, prescriptive and precise. General principles are insufficient. It is easy to decree that farmers shall give healthy feed to their animals. It is difficult to decide which feed additive is good, bad or uncertain. The same broadly applies to cars, pharmaceuticals, pesticides, plastics, and fire extinguishers.

I offer two current or near future issues as examples: shall UK farmers be free to use the pesticide glyphosate made by Monsanto? And what safety standards shall apply to driverless cars in the UK? What happens if the UK and the EU take different routes?

Science and industry keep discovering new techniques and technologies and creating new products. It is not practical to decide each new inclusion on a white list or a

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<sup>20</sup> See e.g. Directive 2016/1106 [2016] OJ L183/59 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences.

black list via a Parliamentary vote, still less a vote by 28 parliaments. The answer to the democratic impossibility of parliamentary voting is expert advice, followed by the adoption of secondary legislation. There are scores, probably hundreds, of technical or advisory committees staffed by national experts. The purpose of these mechanisms is to help form and implement the language of the legislation—making it work in the real world. There are thousands of individual problems that arise on subjects such as safety, customs, health, environment, data security, chemical substances, privacy, child abduction, private international law and the rest. These debates are resolved within the technical committees. They may render an opinion on the basis of which the Commission will propose or adopt action. During the debates, it often happens that a state’s scientific representative will plead for his state’s view of the issue. A Swedish national expert may favour different environmental or animal welfare standards than a Portuguese expert. Neither is right or wrong, but they are different. Reaching consensus between them has helped the market which can be served by the product to grow to 500 million people.<sup>21</sup>

The goal of these communings is the creation of a competitive market that will favour innovation, risk-taking, decent treatment, the expansion of choice to consumers through competition, prosperity and security. The process is largely unknown to the public, and is criticised for being opaque and undemocratic.

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<sup>21</sup> The importance of single standards for industry in Europe is evident. See the remarks of Mike Hawes, Chief Executive of the Society of Motor Manufacturers and Traders to the House of Commons International Trade Committee, UK trade options beyond 2019, First Report of Session 2016–17, 23 (2017): “It is essential that there is certainty and continuity through harmonization of EU and UK regulations affecting the automotive sector to support both UK manufacturing and the UK vehicle market. Government should establish appropriate, clear and non-burdensome structures that enable application and implementation of crucial EU legislation. Regulatory divergence or uncertainty in the legal framework for the automotive industry would amount to non-tariff trade barriers, increasing costs and reducing the competitiveness of both the manufacturing base and ability to sell vehicles”.

Sometimes the rule makers have been criticised for intruding into matters best left to local choice: the principle of subsidiarity. Often ministers chose to disown what they had agreed in Brussels, blaming the European bully instead of defending the merits of the action which they have helped to draft. In such conditions, truths and myths can flourish unverified so that “Europe” implies interference with improbable trivia, votes for prisoners and straight bananas.

As of the day that the UK’s exit from the EU occurs, the process of rulemaking and enforcement within these expert entities will not stop, and indeed should not stop, since new dangers will be identified, new products will be proposed, and adverse health events will be reported about specific pharmaceuticals. Pharmaceuticals are today subject to successive tests in the laboratory, then on animals, then on healthy human volunteers, then on selected patients in order to demonstrate safety and efficacy.<sup>22</sup> Once approved, the performance of the medicine is regularly monitored and apparent problems (adverse health events) reported, for corrective action to be taken.<sup>23</sup> Animal feed in line with the advice of the Scientific Committee on Animal Nutrition is subject to comparable but lighter rules, as are food additives and cosmetics.<sup>24</sup> The basic legislation will have set up a process for deciding technical controversies, but that process is ongoing. The need for action to approve or disapprove thousands of products or standards is continuous.

So, incorporating all the directives and regulations into UK national law will include incorporating the legislation governing the rule making process and the expert committees in which the UK no longer wishes to participate. These regulations set

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<sup>22</sup> See Regulation 536/2014 [2014] OJ L158/1 (clinical trials); See also Nathalie Bere, AN AGENCY OF THE EUROPEAN UNION HOW ARE MEDICINES EVALUATED AT THE EMA AN AGENCY OF THE EUROPEAN UNION HOW ARE MEDICINES EVALUATED AT THE EMA (2015).

<sup>23</sup> Regulation 536/2014 [2014] OJ L158/1 (clinical trials)

<sup>24</sup> Compare Regulation 536/2014 [2014] OJ L158/1 (clinical trials), and Regulation 882/2004 [2004] OJ L165/1 (animal feed) or Regulation 1223/2009 [2009] OJ L342/59 (cosmetic products)

forth procedures, deadlines, governing criteria and standards, dangers, precautions, freshly identified problems and adverse health events. And of course they lead to the adoption of measures which can be challenged either directly by those who are “directly and individually” affected, or indirectly by a challenge before a national court at the instance of a trader affected by the EU rule.<sup>25</sup>

The decisions taken can have serious economic consequences and require judicial oversight. A producer whose product is banned or a scientist whose advice was disregarded,<sup>26</sup> or a NGO or a consumer organisation or native hunters of seals in the Canadian Arctic,<sup>27</sup> may wish to challenge the ensuing regulation on the grounds that it is disproportionate, burdensome, inconsistent with the basic legislation, a misuse of power or manifestly erroneous.

During the initial period without a domestic counterpart yet in place, “pure” European law will need to be applied as controversies arise in these various fields.<sup>28</sup> EU regulatory agency activities will continue in the EU 27. These EU agencies’ decisions will of course be subject to judicial review in Luxembourg, either by appeal to the General Court or by reference to the Court of Justice. And the meaning of such a decision may be an issue before a Scottish judge facing a dispute between the citizen and the local authority. For example, the question might be whether the size of the fishing net has been wrongly prescribed by an EU regulation. The prosecuted fisherman says the regulation cannot apply to mackerel in light of the preamble to the

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<sup>25</sup> TFEU Art. 263. For example, the trader who is prosecuted under national law for selling a product in the manner blessed by European law: the case of Tullio Ratti (Judgment of the Court of 5 April 1979 Case 148/78. European Court reports 1979 Page 01629).

<sup>26</sup> See Case T-326/99, *Nancy Fern Oliveri v. Commission and EMEA* [2003] ECR 11-6053.

<sup>27</sup> See Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625

<sup>28</sup> Subsequently of course, the UK may decide not to regulate the sector (possible but not likely in most cases), or may decide to follow the European 27 rule, or may establish its own expert technical committee with regulatory competence.

regulation. Is he right? As the Scots judge would at this point be applying pure EU law, would the Scots judge be able to refer matters to Luxembourg to seek guidance as to the alleged discrepancy in the text? To the extent that fish conservation is a cross-border issue, consistency in the nets used by Dutch and Scots fishermen would be desirable.

In short, during the possible transitional phase which would occur between the agreement to leave and the settling of the replacement regime, there will be a need for the resolution of disputes. These might arise before the national courts of the UK, (would references to Luxembourg be a possibility?). Alternatively there could be appeals against EU actions to the General Court of the EU. Would there be parallel systems of legal review during the transitional implementation phase? Would the references come from any national court or would they be filtered and come only from the Supreme Court? A separate matter would be whether acts of the UK government were consistent with the secession treaty.

Suppose that the secession treaty provided that the EU 27 and the UK would extend to citizens outside their home country certain prescribed rights, maybe all EU rights existing as of the date of Brexit. The child of a Polish plumber in Inverkeithing is refused a local authority grant to study in Poland or is unable to get credit for a Polish high school diploma when seeking admission to a local college. The question is whether this refusal is consistent with the secession treaty. Would the dispute be finally decided in the UK Supreme Court or in the EU courts in Luxembourg? More delicate still: would the European Court be asked to opine on the consistency of the secession treaty with EU law, including the Court's role as interpreter of the Treaties?

## Existing UK Agencies

It is not my contention that EU experts will make better decisions than UK experts. Indeed, in some cases there is an existing UK agency whose powers and competence could be expanded progressively to exercise the competence reclaimed from Brussels. For example, in the field of telecommunications, the UK has led the rest of the EU since the Thatcher government liberalised the market in the 1980s.<sup>29</sup> (The ECJ played a role in an interesting Article 86 EEC (now 102 TFEU) case *Italy v. Commission*<sup>30</sup> where BT was successful in defending its right to use technology to avoid paying charges in Italy). OFCOM's role could be expanded by an increase in staff and budget. Competition policy is another field, where the UK agency, the CMA, already exists and enjoys international respect. Divergence of outcome and divergence of approach in particular cases could be a problem, but it will not be the case that competition law would cease to be applied effectively unless interim precautions were taken. NICE, responsible for the safety and efficacy and value of medicines, is another agency which might be upscaled to take over new responsibilities.

It is evident that EU law will be applicable in the UK even if it has been incorporated into UK law and rebranded as national law. This “nationalisation” may respond to the sovereignty concern. But the point I am making as to all the EU regulatory agencies and their work is that for as long as EU law is to be applied in the UK, for so long will it be necessary to think through how EU law problems will be litigated. This is especially true with respect to persons, my next topic.

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<sup>29</sup> Simon Bulmer and Peter Humphreys, (2007) *Of Phones and Planes: Policy Transfer in the Liberalization of EU Public Services*, EUROPEAN UNION STUDIES ASSOCIATION CONFERENCE, MONTREAL, CANADA 10 (2007).

<sup>30</sup> *Italy v. Commission*, C-41/83 [1985]

## The example of workers' rights

Labour law in the UK is predominantly governed by European law.

The Prime Minister has said that workers' rights will not be diminished by Brexit<sup>31</sup>. So, presumably, the so-called Acquired Rights Directive (the Business Transfers Directive) will continue to affect how the UK's Transfer of Undertakings (Protection of Employment) Regulations are implemented. TUPE (the colloquial acronym) gives effect in the UK to the Directive. The Directive is interpreted by the Court of Justice.

Suppose that a company in Hawick which employs security guards to supervise its headquarters plans to outsource their work to an independent service provider which will hire the same guards as are currently employed by the company. TUPE as of today will require the new employer to give the same benefits to the guards as they enjoyed under their old contracts. Now suppose the old employer is taken over by a larger enterprise: what about the guards under the recently-concluded contracts? One of the guards is a trainee, part time, or on a probationary contract. Assume that the legislation is not clear as to the rights she is entitled to in her precise circumstances. The dispute cannot be settled and with the help of her trade union an appeal is brought against the denial of benefits to her. Suppose that after Brexit the CJEU has produced a judgement which narrows or broadens the scope of which categories of employees can benefit from a particular collective bargaining arrangement under the

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<sup>31</sup> Theresa May, Conservative Party Conference, October 2016 - "Existing workers' legal rights will continue to be guaranteed in law - and they will be guaranteed as long as I am Prime Minister."

and

"We're going to see workers' rights not eroded, and not just protected, but enhanced under this government."

Directive. Shall UK judges ignore the new Luxembourg rule, or accord it respect and consideration, or implement it without question like French or German judges? Suppose there are two similarly situated guards in Hawick. One is Italian, one is British. Shall their rights be identical? Will the Italian have additional rights under the secession treaty?

If the European Court would have taken a broad “purposive” approach in line with what we might call modern notions of workers’ rights, would the UK court follow that teleological line or would it adopt a more narrow textual reading on the basis that the UK legislator has prescribed a more austere approach to rights which have been expanded by the European Court? I pose the question, noting that it is possible for jurisdictions to diverge or not to diverge when they look at a single original text. In the United States, in (now rare) cases where the relevant authority is English law before 1776, the US courts have looked to the then English law.<sup>32</sup>

### **Equivalence of qualifications: free movement of professionals**

I offer another example of where different doctrines of interpretation might apply, in a field which used to be close to my heart.

Professional organisations pursue – like mediaeval guilds – the goals of ensuring quality standards and the defence of the members’ economic interests. Professional bodies are intrinsically conservative and have historically favoured classical

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<sup>32</sup> In *BMW v. Gore*, Justice Stevens of the U.S. Supreme Court referred to English statutes and practices prior to the American Revolution, 1275 to 1753, to demonstrate that punitive damages needed to have some arithmetical relation to actual damages suffered—whether that be a two to one ratio or a four to one.

French and Belgian law differ in many respects despite sharing Napoleon’s Code Civil as originally.

candidacies from locally qualified people. Young people and newcomers have frequently done battle with professional bodies over the adequacy of their qualifications to enter the profession. In a previous incarnation, I challenged a New York State rule which refused admission to foreign lawyers who had passed the bar exam of the State of New York, but who did not have the right to reside permanently in the United States. In the legal profession as in others, international practice has since become entirely routine. A Scots lawyer is today quite likely to have studied or worked outside Scotland, and probably has considered working as a lawyer in England as an alternative to Scotland. The growth of large international law firms confirms that clients want multilingual cross-border advice, and that young lawyers do not stay in one place. Before I left private practice, the office where I worked had 14 nationalities. It was not always thus. In the 1970s, Belgium and France (despite the language and the civil code being mutually familiar) placed obstacles in the way of cross-border movement by foreign law graduates who had not completed all the stages in a classical national professional qualification.<sup>33</sup>

Among the questions which have arisen are length of curriculum, subjects covered, number of hours of instruction, length and nature of practical training, and the overall equivalence of the professional formation. These matters have been the subject of litigation in such cases as *Reyners* (the Court found that the then Article 49 EC had direct effect and thus did not need implementing legislation to create a right for the individual), *Klopp* (barriers based on the country of residence), *Vlassopoulou* (requiring national authority to consider equivalency of education and experience) among others.<sup>34</sup> The mutual recognition of professional qualifications for lawyers consumed

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<sup>33</sup> Case C-71/76 *Thieffry v Conseil de l'Ordre des Avocats a la Cour de Paris* [1977] ECLI:EU:C:1977:65

<sup>34</sup> Case C-2/74 *Reyners v. Belgium* [1974] ECLI:EU:C:1974:68; Case C-107/83 *Ordre des avocats au Barreau de Paris v. Onno Klopp*, [1984] ECLI:EU:C:1984:270; Case C-340/89 *Vlassopoulou v. Ministerium vur Justiz Baden Wurtemberg* [1991] ECLI:EU:C:1991:193;

an immense amount of time and effort: they are now covered by Directive 77/249/EEC (providing legal services across a frontier) and Directive 98/5/EC (practising law in another EU country).

The Professional Qualifications Directive 2005/36/EC is intended to reinforce the opportunity for qualified persons to enter professions in other European countries. Architects, hairdressers, ski instructors and doctors are among the persons who are free to move to work in another Member State than the country where they trained and got qualified.

People travel and settle down in other countries far more than was the case forty years ago. I am doubtful if the process is reversible, despite the Brexit vote. Students have for centuries travelled to study, to work and sometimes to settle down. Talent and opportunity attract candidacies and creativity. Talented people look to work in new places. Political frontiers in Western Europe are not what they were 40 years ago. That toothpaste cannot be squeezed back into the tube.

Imagine that an architect of Spanish nationality wishes to open a practice in Inverness where his wife lives. Or his Scottish trained wife wishes to open a practice in Toledo. The host authority says that she has to do a two year period of practical training and speak Spanish and Catalan. She wishes to assert that an architectural degree from the University of Glasgow is equivalent to a degree from Universidad Politécnica de Madrid. She is refused the right to practise as an architect by the Colegio de Arquitectos on the grounds that she has insufficient training on the subject of water conservation and carbon neutral construction, a vital topic for the Spanish

administration.<sup>35</sup> As the matter cannot be resolved bilaterally, litigation ensues and she challenges the decision of the Colegio before the Tribunal de Primera Instancia in Toledo and the case works its way through the appellate process. Ultimately a reference is sent by the Spanish court to the ECJ. A parallel case in Scotland proceeds at the insistence of the man.

I would expect that the dispute over equivalency of qualification would be handled by the European Court in what might be called a purposive manner: the public authority must enjoy a wide margin of discretion to pursue reasonable goals in a proportionate manner, but formalist rejections rooted in nationality or geography should not hinder the opportunity of a seriously qualified apparently competent candidate (my deliberately slippery words) to earn a living elsewhere in the European Union.

Consider how an English or Scottish court might approach the matter. One could argue that such continental, purposive sentiments should be banished after Brexit. But one could also argue that the two court hierarchies interpreting identical language should act in parallel. One could also say that as one of the Prime Minister's red lines is getting control of immigration, the UK courts should take a sceptical approach to attempts by foreign workers or independent professionals to enter the workforce in the UK. Or, one could say that since there is general agreement that politicians want not to diminish the personal rights of individual EU citizens outside their country of origin, the existing rules on mutual recognition and equivalence of qualifications should continue to be available to EU 27 nationals in the UK if they were resident there in 2019 (as children of EU 27 parents, for example), and to be interpreted generously. It could also be argued that confirming the continuing rights of EU 27

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<sup>35</sup> This is a purely hypothetical scenario. While the Colegio does have specific requirements for recognition and right to practice as an architect in Spain, the grounds which I am mentioning are not among them. I am sure the Colegio is well aware of EU law.

nationals in the UK should involve a right for children to get the help of EU legislation on recognition of educational qualifications: it is natural that the child of two nationalities, or the migrant child, would like to study in both countries. Or it could be argued that the right to remain does not mean the right to pretend Brexit had not occurred. With respect to lawyers, I note that the English Bar and Law Society has welcomed Australian, Canadian, US and South African lawyers. This has greatly expanded the allure of London as a centre for legal advice. Should they and would they extend similar a professional welcome to EU 27 lawyers? Would the Justice Secretary have a view? I wonder if after Brexit the English and Scottish Law Societies and Bars might take differing approaches?

During the implementation period, which might last for a long time, the UK will presumably continue to recognise the qualifications of foreign professionals in the UK on the basis of existing EU legislation which has been brought into UK law by the (Great) Repeal Act, and, again presumably, will continue to cooperate with EU 27 regulators on curriculum, length of studies, minimum standards and the like. It will also, probably, be helping UK nationals seeking to get recognised in the EU 27.

The then Home Secretary has said in a major speech:

“We will shortly be consulting on the next steps needed to control immigration.---- This will include examining whether we should tighten the test companies have to take before recruiting from abroad. ---- The test should

ensure people coming here are filling gaps in the labour market, not taking jobs British people could do.”<sup>36</sup>

The government will need to balance its declarations of scepticism about immigrants with the interest of young graduates from the UK wishing to work overseas: reciprocity would probably be demanded by the EU 27 countries.

One of the arguments deployed against me by the New York bar was that American law students were finding it hard to get jobs. That is an understandable preoccupation, and it might arise after Brexit. What weight to attach to the fact that there is a shortage of anaesthetists in the area or that domestically qualified architects cannot find employment in Scotland, their home country? What weight to attach to judgements of the ECJ on these issues? Suppose that the European Court, interpreting one of the Directives on mutual recognition, has decided that it is not necessary for a law student to have studied Roman law in order to satisfy the criteria for becoming a qualified lawyer? Or that it is necessary to have studied EU law? Should the Court of Session take the same view in light of the mutual commitments to respect the interests of EU 27 and UK citizens?

A different way of presenting these questions would be to note that the UK government has generally favoured the concept of the economic market and free movement of workers. After the Treaty of Lisbon, the European Union law concept has to an extent expanded to embrace the notion of rights of EU citizens, I may note that at the same time the decisions of the European Court on “health tourism” have been robust. Freedom of movement is not an absolute right. It is impossible to predict for the moment what tendency would prevail in deciding a controversy in this

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<sup>36</sup> Secretary of State for the Home Department Amber Rudd, Speech to Conservative Party Conference, Birmingham, 4 October 2016. [Online]. Available at: <http://press.conservatives.com/post/151334637685/rudd-speech-to-conservative-party-conference-2016> [Accessed 7 November 2016].

area. It will also be necessary to consider judicial structures within which these matters can be raised: parallel competence? Appeals or references during a transitional phase? Consultation between judicial entities?

My purpose is not to recommend any particular solution to these questions but to recommend that thought be given to how they should be addressed. The topic deserves to be treated in a depoliticised manner: At least four million people are affected. The need for a calm, decent, courteous discussion of their futures is evident. It is all the more necessary in light of what Archbishop Justin Welby stated in the aftermath of the Brexit upheavals:

“Through such comments were created cracks in the thin crust of politeness and tolerance of our society, through which, since the referendum, we have seen an outwelling of poison and hatred that I cannot remember in this country for very many years... It is inequality that thins out the crust of our society and raises the levels of anger, resentment and bitterness. The tools for tackling inequality are as readily available as ever. They are the obvious ones of education, public health – we should add today mental health – and housing.’

How shall EU law touching persons be interpreted and controversies about it decided when EU law has become part of the national law of the UK? This is an area where it is evident that the jurisprudence of the European Court will continue to be relevant. The jurisdiction is still uncertain. The matter is sensitive in light of the ugliness of the debate to which the Archbishop refers.

**Other areas where UK law is predominantly EU law**

In a number of fields, the courts in this country will have to decide in what spirit to approach the law drafted in Brussels then adopted into EU law. Labour law, as already noted, is one. Mutual recognition of qualifications and access to social benefits are others. Environmental protection is another. The law on environmental protection that is applied in Scotland is overwhelmingly EU law. The Scottish courts have recently considered the impact of directives and the legislation implementing them into national law in a range of areas: public procurement, data protection, and the environmental status of wind farms which may trouble birds.<sup>37</sup>

It remains to be seen whether the courts in the UK will seek to apply the EU law which will enter national UK law as of Brexit in the same manner as the EU courts would interpret it. They would presumably follow the case law or jurisprudence of the ECJ prior to Brexit. Post Brexit judgments could be regarded differently. Could the “travaux préparatoires” from the European Commission, the Parliament and Council working papers be relied upon? We know that the ECJ has on occasion taken a purposive or teleological approach to textual interpretation. It interprets a text within the spirit of the overall aims of the Union. It has on occasion made important decisions which fundamentally altered how European policy evolved (free movement of goods being one clear example from the early days). Like other courts, its judgments have sometimes been bolder than others. And like other courts some judgments have been the target of academic criticism and political grumbling.

Will it be part of a Scots court’s duty to apply EU fundamental principles on environmental protection after Brexit? Would the answer vary with the topic? Should Scottish courts apply a different standard of deference to ECJ decisions in the case of

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<sup>37</sup> *RSPB v Scottish Ministers*, (2016) CSOH 105.

environmental protection, as opposed to consumer protection, animal welfare or access to official documents?

Will the building of the Common Market and the enhancement of the four freedoms be entirely irrelevant to how the Scots courts interpret European law incorporated into national law? Or should Scots courts when applying European law endeavour to follow the lines of interpretation of the CJEU? Will judges be deemed “enemies of the people” if their interpretations align with those of the Luxembourg courts? Or will they be regarded as doing a neighbourly parallel task?

## **Trade**

The next example relates to the problems of ending an existing regime but not replacing it with another, in the field of trade. Far from being an intriguing set of hypothetical questions, trade threatens a real emergency with grave social, economic, and political risks.

It should not be thought that trade sanctions are an invention of modern times. The first Queen Elizabeth was the object of excommunication pursuant to the Bull of Pope Pius V, *Regnans in Excelsis*<sup>38</sup> proclaimed in 1570. That papal interdiction had a commercial consequence.

Good Catholic traders were expected to refrain from dealing with merchants in a country whose monarch was under such an interdiction. The English court

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<sup>38</sup> *Regnans in Excelsis* was a papal bull issued on 25 February 1570 by Pope Pius V declaring "Elizabeth, the pretended Queen of England and the servant of crime", to be a heretic and releasing all her subjects from any allegiance to her, even when they had "sworn oaths to her", and excommunicating any that obeyed her orders.

"We charge and command all and singular the nobles, subjects, peoples and others afore said that they do not dare obey her orders, mandates and laws. Those who shall act to the contrary we include in the like sentence of excommunication.

accordingly explored new markets further afield, notably the Ottoman Empire. The BBC has discovered some charmingly obsequious letters to the Sultan, by which the Queen's ministers expressed respectful confidence that great trading opportunities would emerge in Turkey. England thus pursued export opportunities with the Ottoman Empire as an alternative to trading with geographically closer Catholic kingdoms in Continental Europe. The accession of the Queen's Scottish cousin King James VI of Scotland to the English throne in 1603 was remarkably smooth. James VI was a Stuart with a French mother and a sympathy for high church practices. He was more of an internationalist than Elizabeth. In March 1604, King James VI of Scotland and I of England spoke to the English parliament for the first time.

“I have ever, I praise God, yet kept peace and amity with all ... for by peace abroad with their neighbours the towns flourish, the merchants become rich, the trade doth increase and the people of all sorts of the land enjoy free liberty to exercise themselves in their general vocations without peril or disturbance.”<sup>39</sup>

It would seem that King James's policy of seeking political peace had good mercantile consequences. In August 1604 came the signing of the Treaty of London with Spain. Local Catholic kingdoms became more accessible. Exports became immediately easier. English total exports in 1603 were £136,000 in value. By 1609 exports had reached £198,000, and by 1612 £275,000.<sup>40</sup>

It is intriguing to note that after a period of alienation from continental Europe, a Scottish leader pursued a re-entry strategy, on the basis that domestic peace and international peace were good pre-conditions for prosperity, conditions within which

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<sup>39</sup> RAPIN DE THOYRAS, VIII THE HISTORY OF ENGLAND 27 (N. Tindal, Trans., 4th Ed. 1789).

<sup>40</sup> These figures were asserted by the BBC in its programme; *BBC Two - The Stuarts, The War of the Three Kingdoms, 1603-51, James VI and I and the three Kingdoms*, BBC NEWS (2014), <http://www.bbc.co.uk/programmes/p01x8w6b>.

citizens could pursue their respective interests freely. (For the avoidance of doubt, even if I believe the foregoing historical assertions are more or less correct, I doubt that reliable lessons can be drawn for the Brexit era from them). However, I will offer some thoughts of a very practical kind about how trade arrangements might be governed as the Brexit vehicle rumbles forward.

At this moment, the UK is a member of the WTO, the successor of the General Agreement on Tariffs and Trade, based in Geneva, of which the UK was a founder in 1948. The UK promised to obey the terms of the GATT in its trade policies. For 44 years the UK has pursued the same customs and related rules as its EC and now EU partners. Trade negotiations with other countries have been collectively negotiated by the European Commission which has established preferential trade agreements with our Mediterranean neighbours, the ACP group of former dependencies and other less developed countries, as well as unilateral tariff concessions under the GSP.

Article I of the original GATT established the concept of MFN (most favoured nation) treatment: all signatories would treat others on an equal footing (thereby eliminating what used to be called “imperial preferences” whereby preferential terms applied to trade between colonies and the UK). Article XXIV permits free trade agreements between two or more countries covering substantially all their trade.<sup>41</sup> Thus a sectoral deal on free trade between a number of countries would not be acceptable if it were limited to cars or furniture or pharmaceuticals.

Each EU Member State has declared to the WTO the same MFN schedules. These schedules are the multilateral counterpart for concessions on how foreign goods and services will have access to the EU. Other, “third” countries have made different

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<sup>41</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143, Art. XXIV §8(b), (1994).

packages of MFN commitments in reliance on the burdens or benefits they will be getting when exporting to the EU. Thus Australia has undertaken to levy custom duty of 10% on matches coming from other WTO signatories, including the EU, while the EU has undertaken to levy a customs duty of 2.7% on tennis balls from other WTO signatories, including Australia.<sup>42, 43</sup> The negotiation of each multilateral “Round” of bindings to set ever-lower tariffs takes years.

The UK has stated that it will initially retain the same schedules as the EU, and will hope that other countries do not claim an impairment of the access they could formerly rely on: for example, Japan might say that access for automobile components to the UK market has become less attractive due to customs barriers to onward trade from the UK to the EU 27.<sup>44</sup> The two countries might then agree a concession for Japanese *sake* entering the UK, or a higher tariff for UK whisky entering Japan. (Japan might also claim that the EU 27 owed it compensation for the reduction in the attractiveness of the treatment by the EU of car parts from Japan since exports from Japan no longer enjoy free circulation to the UK where several Japan-based car companies have large plants).

If disputes arose they would be resolved in Geneva pursuant to the gentlemanly slow processes of the WTO, whereby a panel of selected experts render a decision which is reviewable by the Appellate Body.<sup>45</sup> One can imagine controversies about industrial

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<sup>42</sup> WTO Tariffs, Schedule I – Australia, Part 1: Most-Favoured-Nation Tariff, Section II - Other Products, Item Number 3605.00.

<sup>43</sup> TARIC measure information, §XX, Chap. 95, Category No. 9506, Item No. 61. Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table tennis) or outdoor games . . . Balls, other than golf balls and table-tennis balls . . . Lawn-tennis balls.

<sup>44</sup> John Van Reenen, *How Brexit Would Reduce Foreign Investment in the UK – and Why That Matters*, THE CONVERSATION (2016), <http://theconversation.com/how-brexit-would-reduce-foreign-investment-in-the-uk-and-why-that-matters-57909>.

<sup>45</sup> World Trade Organization, *Understanding the WTO: Settling Disputes*, WTO | UNDERSTANDING THE WTO - A UNIQUE CONTRIBUTION (2017), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

products, but they may not be too numerous or intractable, although they would probably take years to conclude. The debates over trade adaptations to follow the enlargement of the EU from 15 to 25 in 2004 took some ten years to reach resolution.<sup>46</sup> But far more controversies, and more dangerous problems, are likely to affect agricultural products.

What used to be called the GATT bound tariffs on industrial goods imposed by GATT signatories have fallen steadily since 1948.<sup>47</sup> However, agricultural products (and services) were outside the regime until the Uruguay Round in 1995.<sup>48</sup> Farmers are vulnerable to cheap imports and vocal in demanding protection, and far less able than industrial manufacturers to change their output in the face of changed circumstances.<sup>49</sup> So the advent of GATT disciplines to trade in meat, cereals and dairy products was very cautious: tariff-free quotas provided that a defined tonnage could enter the EU free of tariffs, but that the first tonne beyond the quota hit a big tariff barrier.<sup>50</sup> In some cases the EU quota is a concession favoured by one Member State (such as butter from New Zealand, which is commercially for the most part destined for the UK). The UK would need to agree with the EU 27 how many

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<sup>46</sup> E.g. *the Programme of Community aid to the countries of Central and Eastern Europe* (The Phare Program), which took effect in the mid-1990s to prepare those countries for admission to the EU. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:e50004&from=EN>

<sup>47</sup> Emran Ahmed, Sharmin Islam & Priyanka Das Dona, *The Effectiveness of the GATT through Its Major Achievements and Failures as well as the Performance of the Creation of WTO*, III INTERNATIONAL JOURNAL OF ECONOMICS, COMMERCE AND MANAGEMENT 1320–36, 1327 (2015).

<sup>48</sup> The World Trade Organization, *Understanding the WTO: The Uruguay Round*, WTO | UNDERSTANDING THE WTO – BASICS (2017), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm)

<sup>49</sup> See for instance, the effects of subsidies on meat imports from the EU to west Africa *or* the effects of industrialization on U.S. agriculture in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Heinz Strubenhoff, *The WTO's Decision to End Agricultural Export Subsidies is Good News for Farmers and Consumers*, THE BROOKINGS INST. (Blog, February 8, 2016) <https://www.brookings.edu/blog/future-development/2016/02/08/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers>; Zixuan (Yen-Yen) Gao, *The Impact of United States Agricultural Subsidies on World Trade in Context of the Brazil Cotton Dispute*, U. PENN. WARTON SCHOOL OF BUSINESS, PUBLIC POLICY INITIATIVE (September 08, 2015), <https://publicpolicy.wharton.upenn.edu/live/news/851-the-impact-of-united-states-agricultural-subsidies>

<sup>50</sup> Heinz Strubenhoff, *The WTO's Decision to End Agricultural Export Subsidies is Good News for Farmers and Consumers*, THE BROOKINGS INST. (Blog, February 8, 2016) <https://www.brookings.edu/blog/future-development/2016/02/08/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers>

tonnes of the agricultural quota for each product the UK will take with it.<sup>51</sup> The problem is that the non-quota tariff is usually crippling. Thus, lamb chops are duty free at first, then 12.8% plus 90 euros per 100 kilos once the quota is consumed; half carcasses are duty free at first, then convert to the 12.8% plus 128.80 euros after the quota is surpassed.<sup>52</sup> So if the UK were to revert to its WTO commitments after dropping out of the customs union, the UK duty on veal, pork, beef and lamb would be crippling for Irish farm exporters. As of 2015, 40% or €4.5 billion worth of Irish agricultural exports came to the UK. If there is no tariff quota governing these exports to a post-Brexit UK, the UK duty on Irish exports would revert to the standard third country rate of 12.80 % + €176.80 per 100Kg on high quality meat.<sup>53</sup> In the case of frozen bone-in hams the in quota rate is 38.9 euros/100 kilos and doubles out of quota.<sup>54</sup> Wheat exports from England to Ireland would face equally bleak treatment. Such severe treatment is not accidental; agricultural imports are often sensitive. Farmers are vocal, and governments are nervous of their legitimate protests.

With perfect good faith and goodwill on all sides, there would be much to agree. Suppose that the UK wants to give an ongoing trade preference to butter from New Zealand. The UK would then negotiate to carry off a part of the EU butter quota which otherwise would cause disruption to German dairy farmers. These subjects usually take years to agree.

It is possible to trade provisionally even if the WTO schedules have not been agreed in detail, so the multilateral controversies would not necessarily paralyse ongoing trade

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<sup>51</sup> Peter Ungphakorn, *Nothing Simple about UK Regaining WTO Status post-Brexit*, INTERNATIONAL CENTRE FOR TRADE AND DEVELOPMENT (June 27, 2016).

<sup>52</sup> UK Government, *Trade Tariff: look up commodity codes, duty and VAT rates*, GOV.UK, <https://www.gov.uk/trade-tariff/sections> (last visited May 3, 2017).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

in industrial goods, but there are two large problems which are urgent. One is Ireland and the other is intra-European trade.

There will be an urgent need to make arrangements for imports from Ireland. That is because crippling tariffs will apply to agricultural trade in both directions unless quotas have been agreed. But let me mention another Irish problem here. Suppose the UK does a bilateral trade deal with the USA. Such an agreement would be very likely to cover agricultural products. US beef is reared with hormones and US chickens are washed in a chlorine mixture for health purposes. The EU does not allow such meats to be imported.<sup>55</sup> Assume that the UK agrees to accept US meat as the price of other concessions by the US. If US meat arrives in Northern Ireland it will be cheaper than meat in the Republic. How shall it be kept out? The obvious response is by a hard border. Which everyone wants to avoid. Borders were and are a breeding ground for fraud, illegality, and violence.

I add that UK producers are able to compete in international public procurement tender processes because of the WTO's procurement agreement. The UK has a good reputation for the fairness of its public procurements rules, so access to this country will be less of a problem than access to third countries by, for example, a UK / German consortium. But it would be necessary to negotiate the terms of the UK's accession to the Government Procurement Agreement of the WTO.

A number of UK ministers have recommended reaching good trade agreements with China, Canada, India or the EU. This is a sound political aspiration. However, there is a big difference to venerable treaties of Friendship, Commerce and Navigation, or treaties settling military conflicts. In modern times such agreements deal with

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<sup>55</sup> See Directive 2003/74/EC [2003] OJ L 262/17 (concerning the prohibition on the use in stock-farming of certain substances having a hormonal or thyrostatic action and of beta-agonists).

customs duties on specific goods, regulatory obstacles to trade like phytosanitary controls, licensing and similar tests, waiving of visa requirements, observance of decent labour standards and trade in services (which is now covered by WTO disciplines).<sup>56</sup> Modern trade treaties open up economic frontiers, in both directions, and they provide mechanisms for resolving disputes of interpretation: that presents the problem of international courts once more. The workings of the WTO Appellate Body are very different to those of a true court like the CJEU.

The first WTO challenge would be to detach the UK from the customs union and get launched as an independent WTO member. That will present a crop of problems. But the challenge of establishing a trading relationship with the EU 27 will be far more urgent and more difficult. I have described the thorn of agriculture. Another thorn will be the integrated nature of the manufacturing of modern industrial goods like cars and aircraft. A modern car has between 30,000 and 35,000 components. It commonly happens that car components cross the Channel back and forth; at the moment each crossing is duty free and formality free. After Brexit each crossing risks formalities and customs duties. The difficulty will be how to encourage cross-border trade while not creating an incomplete customs union in breach of the WTO.

Before leaving the topic of trade, I invite us to remember the old days: customs barriers and customs and excise duties between UK and Ireland, France and the UK. Remember queues waiting at frontiers? Remember “smuggling” kilos of sugar or bottles of wine? Remember the huge lines at ports as passengers and cars waited for

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<sup>56</sup> The WTO agreements have as addendums approximately 27,000 pages of “schedules” that lay out specifics concerning all the topics of the negotiations where an agreement was reached. Each schedule contains four parts and lays out the following information: “Tariff item number, description of the product, rate of duty, present concession established, initial Negotiation Rights (or INR, such as main suppliers of product), concession first incorporated in a GATT Schedule, INR on earlier occasions, other duties and charges, for agricultural products special safeguards may also be defined.” World Trade Organization, WTO | SCHEDULES OF CONCESSIONS ON GOODS (2017), [https://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_e.htm](https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm); World Trade Organization, *A Handbook on Reading WTO Goods and Services Schedules 1* (2009).

the convenience of officials? The queues of trucks at crossing points between countries were regularly several miles long, and got longer if there were strikes or technical problems. Today 10,500 lorries per day pass through Dover and 6000 pass through the Tunnel smoothly as a result of being in the single market.<sup>57</sup> Today's frontier between Gibraltar and La Linea is a demonstration of what risks being reinstated at the ports of our country if there is a sudden departure with no alternative. Establishing physical border controls to collect customs duty and VAT at UK frontiers would be an extraordinary step. I very much hope that we do not revert to that regime. To conclude this section on trade, I note that for 44 years the conduct of foreign trade with the rest of the world has been governed by EU law and negotiated by European officials. It seems likely that European Union norms will continue to govern technical trade matters.

### **Freedom, Security and Justice: Justice, Liberté et Sécurité**

During the referendum campaign and previously, certain political groups (notably UKIP) expressed opposition to the European Arrest Warrant which is one element in a large cluster of measures adopted in the field of JLS (the French acronym prevailed over the English FSJ). These relate to such matters as money-laundering, asset freezes, confiscation of the fruits of crime, combating terrorism, human trafficking, preventing hooliganism at football matches and other subjects where police or prosecution authorities need to cooperate and do so regularly. The cooperation established under these pieces of legislation is far more easy than under classical

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<sup>57</sup> *To see how trade may work after Brexit, visit Dover's docks*, THE ECONOMIST (2017), <http://www.economist.com/news/britain/21720274-while-goods-european-union-pass-through-seamlessly-those-elsewhere-face-long>.

bilateral extradition treaties. It is reported that the Prime Minister and her government favours retaining cooperation in these fields, or some of them. It is difficult to criticise such a policy since the problems of fraud, organised crime, the funding of terrorist activities, violence at football games and child abduction do not respect frontiers.

The legal base for such cooperation has a long and constitutionally complicated history. Several Member States were nervous of endowing the European Community with competence for crime, law enforcement or the related public powers. However, it became clear to a number of officials, prosecutors, police and politicians that good cross-frontier cooperation was a necessary part of a Europe without economic frontiers. Some Member States, including the UK, favoured a cautious, non-ideological approach, rooted in intergovernmental cooperation. Accordingly, as early as 1976 the ministries of the interior established cooperative mechanisms for preventing illegal immigration and radical terrorism<sup>58</sup>. This regime did not create rights for individuals, nor did it imply an interpretative role for the European court. There was in those days no consensus to impose community norms as a sector of public law which was especially sensitive. So, pursuant to the Treaty of Maastricht, this “pillar” was governed by intergovernmental cooperation. There was a limited jurisdiction for the ECJ in that in matters of visas, asylum and immigration only courts of final jurisdiction could refer questions for preliminary rulings. In criminal matters the Member States individually decided if they would unilaterally accept the jurisdiction of the ECJ.

While this regime was a cautious reflection of the hesitations of several Member States, experience was positive. Accordingly, the Treaty of Lisbon brought these

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<sup>58</sup> The so called “Trevi group” chose that acronym to reflect Terrorism Radicalism Extremism and Violence Internationally.

fields fully within the ambit of European Union law: competence for the Commission to propose, European Parliament as co-legislator and jurisdiction of the ECJ to interpret the texts consistently. Thus the former unilateral acceptance of jurisdiction by the ECJ, country by country has been eliminated.

Cooperation in this field is extensive and effective; not perfect, but useful. There are many references to the ECJ to determine consistently how to interpret the mass of texts on crime, security, civil justice, and ancillary matters.

Here is one example: a Latvian fruit picker gets involved in a brawl in Carnoustie, wounds another man seriously, and flees. Thanks to good cooperation between Scottish and Baltic authorities he is arrested in Riga. He resists deportation to face trial, claiming that his family need him in Riga and that he will not get a fair trial in Scotland. While in Riga he wears an ankle tag, is subject to a curfew, and must report to the police station daily. After 7 months he is sent to the UK and is sentenced after conviction to 3 years in prison. Can the 7 months of pre-trial light detention in Riga be credited against his UK prison sentence?<sup>59</sup>.

It should be noted that two categories of legal dispute could arise here. One would relate to what is the meaning of the underlying text. Such disputes arise routinely in examining any piece of legislation, especially one which has been drafted by diplomats who may have different views of the end to be achieved. It would be necessary to give guidance to the judiciary as to the spirit in which the texts would be interpreted.

The other dispute could arise as to whether the country was violating its treaty obligations by maintaining a particular practice when applying the law. For example,

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<sup>59</sup> See judgment of the Court of Justice in case C-294/16 PPU *JZ* on whether the period during which a person was subject to a curfew and electronic monitoring in the UK counts towards the custodial sentence imposed on this person in Poland.

is the UK entitled to deport any EU 27 person sentenced to more than 18 months in prison, regardless of the circumstances of the crime?

Once again, European Union law seems likely to remain part of UK law; and the jurisdiction of the European Court would be the natural concomitant of that state of affairs. There could be other approaches. The matter deserves careful reflection.

### **Private international law: access to justice**

The EC/EU has done much to facilitate access to justice and consistency of outcome through mutual recognition, especially through consistent principles of choice of law. The first Brussels Convention of 1968 dealt with questions of proper law of the contract, forum, recognition and enforcement of judgements in civil and commercial matters. This then was superseded by the first Rome Convention on contractual obligations in 1980, then by the Brussels I Regulation, and Rome I, Rome II, Rome III and four Brussels Regulations dealing with divorce, insolvency, applicable law and a mass of other tricky, technical, important cross border problems relating to the conduct of judicial proceedings. EFTA states were brought in by Lugano I and II. The UK has played an important role in the elaboration of these texts<sup>60</sup> and I would

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<sup>60</sup> The Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Accession Conventions under the successive enlargements of the European Union.

The Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, which extends the application of the rules of the 1968 Brussels Convention to certain States members of the European Free Trade Association [1988] OH L319/9.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 012 (Brussels I).

The Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter [2009] OJ L147/5.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351.

Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1988] OH L319/9.

hope that they would not be reviled as worthlessly European. Now, interpretation of the original Brussels Convention and its successors has given rise to hundreds of references to the European Court to achieve consistency. One could imagine many questions relating to how UK judges should address a novel question relating to whether the proper law of a contract is English or Polish. It would seem highly desirable for the answer to that question to continue to be identical whether the question were asked in Inverness or in Cracow.

### **Competition Law & Privacy: Parallel Competences**

The jurisdictional reach of European competition law is well known and is no longer especially controversial. From the case of Dyestuffs in 1972 and the unsuccessful appeal of ICI against its fine for participation in what was found to be a cartel for the fixing of the price of aniline dyes, to more modern cases, it is accepted that European competition law applies to foreign enterprises whose actions have an effect within the EU.<sup>61</sup> So we can assume that companies based in the UK will be defending their interests in controversies with the European Commission in the same way as Intel, Google, Amazon and Dow Chemical in recent years. One might speculate that UK and EU interpretations of the scope of “abuse of a dominant position” might diverge in particular cases. In the field of mergers we might observe that the approval of

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See Opinion 1/03 *Re The Lugano Convention* [2006] ECR I-1145 which confirmed the subject matter to be exclusive Community competence.

Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2009] OJ L147/5.

<sup>61</sup> *Imperial Chemical Industries Ltd. v Commission of the European Communities*. C-48/69, ECLI:EU:C:1972:70 For an example of a thunderously intemperate law review article, Prof. Mann’s celebrated piece in the ICLQ, dated January 1973, on extra territorial jurisdiction. Noisy though that episode may have been, there is no longer any doubt that a company from a third country can act outside the EU so as to fall subject to EU jurisdiction. Francis A. Mann. *The Dyestuffs Case in the Court of Justice of the European Communities*. International and Comparative Law Quarterly, 22(1), 35-50 (1973).

major mergers in sensitive sectors in the UK might involve more political considerations, but that would depend on government and ministerial policy choices.

More interesting will be the nature and extent of cooperation between the CMA (or its successor) and the European Commission. Will the CMA continue to participate in the European Competition Network? Probably yes, but there might be a political sensitivity. Will the CMA work with the Commission in pursuing cross border cartels? Probably yes. Will the CMA defer to the Commission as *primus inter pares*? Probably not. Will relations be cordial? Almost certainly. Will policies diverge occasionally? Yes. Will merger policy become more prone to political guidance/oversight, depending on the government in power? Not impossible. But the CMA is a well-respected competition agency and is well equipped to expand the reach of its activities.

All that stated, a period of uncertainty seems very likely, since cooperation between competition agencies is part of the DNA of enforcement in Europe, and there are ample opportunities to present a competition case in a politicised way. Very great care will be necessary to avoid reverting to a situation analogous to the trans-Atlantic antitrust wars of the 1980's. One further practical legal problem is that under the AM & S line of cases, the advice of UK lawyers will no longer enjoy legal privilege, such that it will be susceptible to being seized and inspected by DG COMP investigators in the course of a dawn raid or otherwise.<sup>62</sup> Addressing this problem should be a priority for the legal professions of the UK.

## **Privacy and Data Protection**

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<sup>62</sup>Case 155/79 *AM & S Europe Limited v Commission of the European Communities* [1982] ECLI:EU:C:1982:157

Another area where there is a strong need for cooperation a consistent approach is privacy and data protection. The European approach and the American approach to this concern are historically very different. One European privacy law practitioner working in the US has noted that for many European privacy law professionals, it seems that the US has not any privacy protection at all, while from a US perspective the privacy laws of the EU seem crazy in their restrictions and intrusiveness.<sup>63</sup>

Directive 95/46/EC attempted to reconcile the interest of the individual in having data protected with the interests of businesses in sharing data for legitimate purposes. For many of the services that society needs to function, information must be collected and shared. For the efficient running of many businesses outside of the internet itself it is also necessary to share or move data from one entity to another, or at least from one jurisdiction to another even if it is under the control of the same entity. This is true in the banking sector, and insurance and health. Any large corporation with employees and customers around the world needs to transfer data, say the corporations.

Originally, data protection across the Atlantic was done through a “safe-harbour” agreement between the US and the EU.<sup>64</sup> This agreement allowed the transfer of data to the US so long as the entity controlling the data conformed to standards equivalent in their level of protection to what would be required in Europe.<sup>65</sup> This was ensured in the case of US companies by the publication of a privacy policy and submission to the jurisdiction of the Federal Trade Commission Act §5 prohibiting application of

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<sup>63</sup> <http://privacylawblog.fieldfisher.com/2014/how-do-eu-and-us-privacy-regimes-compare/>

<sup>64</sup> The commission implemented Decision 2000/520 under the authority granted it per Art. 25(6) of Directive 95/46. (“The Commission may find, in accordance with the procedure referred to in Article 31 (2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.”)

<sup>65</sup> Decision 2000/520, Preamble recital (5).

“unfair or deceptive acts or practices in or affecting commerce, or that of another statutory body that will effectively ensure compliance” which would make that privacy policy fully binding.<sup>66</sup>

This regime became controversial after 2013 with the revelations of Edward Snowden concerning intelligence collection efforts by the US government. The safe harbour agreement was applicable to private entities and did not take into account the “lawful” seizure of information by government entities that might seem to contravene the publicly stated privacy policies of those entities.<sup>67</sup> In response to this, Max Schrems, an Austrian student privacy activist, brought a complaint against Facebook Ireland to the Irish Data Protection Commissioner (“IDPC”) <sup>68</sup>. Ultimately the issue made its way to the Court of Justice in Luxembourg, which among other things found that the safe harbour was not adequate for the protection of EU citizens’ private data that was transferred into US jurisdiction<sup>69, 70</sup>. The decision provoked considerable excitement and gave rise to new agreements between the US and the EU with greater assurances of privacy protections for EU citizens. It also sparked the creation of a revamped directive.

In August 2016, the new agreement between the EU and the US took effect. This agreement includes monitored rather than self-declared certifications on the part of US companies; and an agreement in writing between the two powers concerning the collection of EU citizens’ data by US authorities. Most of these provisions will soon be obsolete, because the EU is finalizing its General Data Protection Regulation, applicable to any entity that handles, transfers, or monitors the personal information

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<sup>66</sup> Decision 2000/520, Preamble recital (5).

<sup>67</sup> Decision 2000/520, Annex IV (B); C-362/14, *Maximillian Schrems v. Digital Rights Ireland Ltd.* pt. 89 (2015).

<sup>68</sup> C-362/14, *Maximillian Schrems v. Digital Rights Ireland Ltd.* (2015).

<sup>69</sup> *Id.* at pt. 36;

<sup>70</sup> *Id.* at pt. 98

of an EU citizen, wherever that entity might be <sup>71</sup>. To state the obvious, it will be necessary for the UK, the EU and the US to reach consensus on a politically very sensitive topic. The UK and the EU have no interest in divergence.

## **Conclusion**

The common market, despite its curious constitutional architecture, has delivered increased prosperity, the elimination of military rivalry and the liberation of Eastern Europe from Communism. These achievements have been based on a multitude of detailed steps reached by cooperative regulation on matters which often seem obscure, in order to expand economic opportunity, competitive choice, and to deliver prosperity to those who wanted to work in a free (or less unfree) economy.

I think that the EU is the only place on earth today where (almost) a continent of states have agreed to deliver to their citizens access to healthcare, equal treatment of men and women, freedom of speech, a pension, education and a minimum wage. There are assuredly imperfections and gaps and inconsistencies. The constitutional architecture of the EU is creaky. There is no government and no opposition in the European Parliament. But the achievement of delivering decent standards by exploiting the opportunities of cross-border commerce and an open labour market is real and difficult to deny. King James was not wrong to note that when merchants get rich the people prosper, and that peaceful conditions both at home and overseas are the best basis for achieving prosperity. King James would not have been enthusiastic about judicial review of executive action. Stuart history might well have

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<sup>71</sup> <https://iapp.org/news/a/weve-got-a-finalized-privacy-shield-agreement-whats-new-2/>

been different if he had accepted that the Crown must from time to time lose in its own courts.

Those who celebrate the regaining of our nation's freedom and independence as a natural benefit of Brexit have presented EU law as interference with UK public policy and sovereignty. And indeed decisions of the European Court may have caused a Home Secretary much trouble over the years in the fields of deportation, health tourism, and access to other social services. My anecdotal impression is that the judges of the United Kingdom do not feel that they are subject to the yoke of Luxembourg rulings in such a manner or to such a degree as to encroach on their independence. It is true that individual decisions are criticized by academics and judges; but debate about important judgments is wholly desirable. It is not realistic to hope that the courts get it right every time, and I am sure that the courts of the EU do not achieve perfection. In order for the rule of law to be credible, the public authority must accept that it will from time to time lose in its own courts. It will be obvious to this audience that the least distinguished legal practice in a remote corner of the country has the power to challenge a government measure in court, and win; not often, but sometimes, frequently enough to make the government hesitate before taking a potentially important step. It is of enormous importance to build into our democracy judicial review of public actions. And the European Courts have played a necessary role in that respect: their role is even more important due to the complicated structure of the European Union.

There was a birthday celebration in March at the Court to remember the Treaty of Rome. Some 64 delegates came from the Supreme Courts of the 27, plus Scotland,

and a delegate from England. The speeches were graceful. Every language of the Union was deployed: no less than 552 interpretation combinations could have been (Lithuanian-Greek; Portuguese-Swedish) available. Brexit was barely mentioned and the working sessions touched on such matters as the anonymisation of judgments for the protection of the privacy of the individual litigant, cooperation between national courts and EU courts, and the best means of exchanging information about legal developments. There is a constant dialogue between national courts and the EU Court about many topics.

Then spoke the sharp clear voice of history. The President of the Supreme Court of Lithuania, Mr. Norkus, reminisced about where his country stood 60 years ago. He began by recollecting a melancholy anniversary which the Court honoured last year: the brutal suppression of the Hungarian uprising in 1956. And the less celebrated killing of Lithuanian partisans who aspired to freedom and independence.

He noted how in 1957:

“there were not many discussions about economy and markets in Eastern and Central Europe. Or rather, at that time many countries of this region already had a kind of single market. A market of oppression, of ideology, fake news and alternative facts, such as stating many human, political and other rights in the Constitution, but recognizing almost none of them in reality. However, there were many citizens in those countries who still had a vision. A vision which very much also drove the founding fathers of the European Union. A vision of modern democratic state, based on the rule of law, which is able to live in peace with the neighbours without building walls against them. A vision of the State protecting human rights and liberty; able to prosper by trusting, not humiliating, its citizens and neighbours. Without these citizens I doubt I would

stand here today in front of you. We — Eastern and Central Europeans first of all owe very much to our citizens, less to markets.”

“I am not sure whether we — the newcomers — share the same memories about the start of our common journey in the Union. Now we sometimes hear voices — give us our rights back. But I am not sure whether they have ever been taken away. Especially when every member can participate in creation, implementation and enforcement of them. Such judge has competence and abilities, personal strength and courage to resist choosing the easiest path and refuses to close the eyes to the law when she feels that it’s threatened. Even if later such judge is downgraded to “so-called judge” and her judgment is described as ridiculous.”

This lecture has identified a number of classes of legal and regulatory problem which would arise in the event of Brexit. In some cases, the EU supplies all the regulatory principles, procedures and institutional memory. Adopting the texts into UK law will achieve the political goal of “freeing” the UK, but EU law will continue to govern until the UK has established its own procedures and principles to govern the topics of cars, medicines, air safety, environmental protection, telecommunications or pesticides. Consistency of outcome across a continent has evident merit. Regardless of what it is said that people voted for, it will likely be necessary to accept that the EU law and courts will have a role until this country has adequate parallel arrangements for decision making and judicial resolution of disputes. That is not because European law is interfering in the UK, but because European rule-making needs judicial oversight. Until the UK has established successor mechanisms to take responsibility for the roles of many agencies and expert bodies and consultation groups within the Institutions, the substantive content of the EU rules will continue, EU agencies will

be doing their job as to the UK (through a “curtain”) and will need to be subject to judicial review.

In other cases, the wish to continue mechanisms for cooperation in the field of Justice and Home Affairs will need, presumably, to be made functional within the existing framework, which has judicial oversight.

In many other cases it will be necessary to decide in what spirit the UK courts should approach a textual interpretation, and what weight they should accord to judgements of the EU courts.

Any diplomatic agreement will be better respected if it provides a mechanism for the resolution of controversies. Two kinds of controversy can be anticipated. One is whether the existing rules were correctly applied, as in the imaginary example of the Polish child refused a grant to study in Poland. Another is whether the rules match UK obligations under the secession treaty. As to the first question, should the Scottish or UK courts apply their own interpretation to the controversy? Will consistency with EU 27 rules be a relevant consideration? Will the Court of Justice of the European Union have a role if consistency is indeed an objective? A constitutionally different question is whether the underlying rule is consistent with the UK’s obligations under the secession treaty. How shall that topic be resolved and before which forum? These matters are of immense complexity, sensitivity and importance. Persons, workers, families, access to social benefits and rights to abide may well be such. Access to a profession, equivalence of qualification and related issues touching the capacity to work would be another. There is a huge difference between having a right and having a right to request in this area. In some cases, these topics may present a tension between EU law as today established and the political or administrative goals of the UK government.

This lecture is delivered in a school of law. Brexit will not make it unnecessary to study EU law. To the contrary the brightest and the best will have plenty to work on in conditions we cannot yet enumerate. I hope the flight of LLM candidates from British universities will reverse itself as the details of constitutional and regulatory tangles become evident : legal complexity will not disappear from our shores. I hope that this text will assist in identifying areas where intelligent reflection between reasonable men and women, regardless of their political views, seems vital.