

## ARTICLES

### THE APPLICATION OF EU LAW BY THE SCOTTISH COURTS: AN ANALYSIS OF CASE LAW TRENDS OVER 40 YEARS

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*This article will present the findings of a Carnegie funded project which looks at the application of EU law before the Scottish courts from UK accession in 1973.<sup>1</sup> European law produces rights and obligations which must be given effect by national courts.<sup>2</sup> Over the last 40 years the EU has been given competence in ever broader areas of substantive law which have changed the legal landscape across increasing areas of personal, social, business and economic life.<sup>3</sup> Accordingly, the Scottish courts are required to apply EU rules to a broad range of legal disputes. This is the first comprehensive study of the application of EU law by the Scottish courts. It is important to consider the extent to which EU law is considered and applied in order to assess its impact on the Scottish legal order. This research project was triggered by the Scotch Whisky Association minimum alcohol unit pricing case.<sup>4</sup> This case and the constitutional inter-relationship between EU law and Scots law that is at its core, leads to a wider inquiry about the role played by EU law in many disputes before the Scottish courts. The hypothesis is that there have been an increasing number of judgments in recent years applying EU law, demonstrating the increasing substantive reach and enhanced awareness of EU law. The article will assess different trends in the EU case law before the Scottish courts to the end of 2015.<sup>5</sup> This research is*

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<sup>1</sup> See <http://www.eulawscot.co.uk/> [Accessed 19 April 2017].

<sup>2</sup> See for instance P. Craig, "Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law" (1992) 12(4) O.J.L.S. 453.

<sup>3</sup> See for instance Wyatt and Dashwood's *European Union Law*, edited by Alan Dashwood et al, 6th edn (London: Hart Publishing, 2011).

<sup>4</sup> *Scotch Whisky Association v Lord Advocate*, see details of Court of Justice of the European Union preliminary ruling below.

<sup>5</sup> An initial objective of the project had been to map the picture of EU law before the Scottish courts to different phases in the development of the EU and EU law. However, it is difficult to map case law directly to specific dates or distinct processes in the development of the EU, such as the dates of enlargement or treaty reform. Other options considered were in relation to the adoption of important EU legal principles but these tend to be fluid and developed over periods as are specific landmarks in the judicial protection of EU rights. See, e.g. M. Dougan, "The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing EU law before the National Courts" in P. Craig and G. De Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), where he refers to three distinct periods in the jurisprudence of the European Court of Justice: 1) early period till mid-1980s, where domestic standards of judicial protection remained the rule; 2) mid-period until 1993, where there was a renewed conception and application of the principle of effectiveness; and 3)

*particularly prescient and important in the light of the recent Brexit outcome in the EU referendum, and should allow us to reflect on the significant impact Brexit is likely to have on the legal landscape in Scotland (and the UK more generally) and the potential difficulties in neatly unpicking 40 years of assimilation of EU law and principles into Scots law. These research outcomes should lead to further reflection and debate on the role of EU law and its impact on judicial decision-making and the Scottish legal system in general.*

## Introduction

The UK joined the EU in 1973 and UK legislation established that EU law had to be given effect in the UK.<sup>6</sup> Over the last 40 years it is generally accepted that the UK's membership of the EU has produced a considerable impact on the legal systems within the UK.<sup>7</sup> The central EU judicial body, the Court of Justice of the European Union, emphasised in a series of rulings that EU law could produce rights and obligations between individuals that national courts were required to enforce in any legal dispute raised before them.<sup>8</sup> Combined with the expanding substantive scope of EU law to cover vast areas of personal and business relationships between parties based in the EU (and in some cases beyond), there is evidence that EU law has had a significant impact in the way that national courts across the EU have had to exercise their judicial roles. European Union law has had to be accommodated by all legal systems in ways that have inevitably impacted on many aspects of personal and business life. As far back as 1995 and in the wake of the ground-breaking rulings by the Court of Justice in *Francovich* and *Factortame*,<sup>9</sup> there was recognition of the increasing significance of national courts as “actors in the process of ensuring the faithful implementation of Community law”.<sup>10</sup>

However, there has never been a comprehensive study in Scotland considering the impact of EU law on Scots law and decision-making by the judiciary in the Scottish legal system.<sup>11</sup> This study seeks to provide a comprehensive database of all judgments by Scottish courts in which EU law has been considered and applied since the UK's EU membership and may lead to further work on the qualitative impact of EU law on the Scottish legal system.

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the later period since 1993, “the Court's hasty retreat”. See further below regarding how the case law was examined over different periods, with the underlying assumption that case law would increase and we could also potentially observe other case law trends over those periods, albeit we could not match those directly to specific legislative or case law developments—and in any event this would be impossible given the nature of litigation as dependent upon specific private interests.

<sup>6</sup> European Communities Act 1972.

<sup>7</sup> See, e.g. Aidan O'Neill, *EU Law for UK Lawyers*, 2nd edn (London: Hart Publishing, 2011).

<sup>8</sup> See, e.g. John Temple Lang, “The Duties of National Courts under Community Constitutional Law” (1997) 22(1) E.L. Rev. 3.

<sup>9</sup> The impact of which in relation to the enforcement of EC law by the English courts was noted as “considerable” by I. Maher, “A Question of Conflict: the Higher English Courts and the implementation of European Community law” in T. Daintith (ed.), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Chichester: John Wiley, 1995), Ch.11, p.321.

<sup>10</sup> See *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (1995).

<sup>11</sup> See the very limited discussion in J. Shaw, “Scotland: 40 years of EU Membership” (2012) 8(4) *Journal of Contemporary European Research* 547.

European Union law consists primarily of the EU Treaties, together with regulations and directives (all as interpreted in light of the jurisprudence of the Court of Justice).<sup>12</sup> Over the last 40 years the EU has been given competence and adopted legal rules in broader areas of substantive law which have changed the legal landscape of rights and obligations across increasingly greater areas of personal, social, business and economic life. Accordingly EU law is part of the Scottish legal system and the Scottish courts are required to apply EU rules, either directly (treaty or regulation) or indirectly (where provisions of a directive have been implemented by primary or secondary legislation) to an increasingly broad range of legal disputes.

This research project was triggered by the consideration of EU law in the recent Scotch Whisky Association minimum alcohol pricing case, where the dispute was referred by the Inner House of the Court of Session in Scotland to the Court of Justice for a preliminary ruling during 2014.<sup>13</sup> This case and the constitutional inter-relationship between EU law and Scots law that is at its core, leads to a wider inquiry about the role played by EU law in many disputes before the Scottish courts. The central research question is to assess the extent to which EU law has influenced judicial decision-making in the Scottish civil courts in the last 40 years. The hypothesis is that there will have been an increasing number of judgments by Scottish courts in more recent years applying EU law demonstrating the increasing substantive reach of EU law and enhanced awareness of EU rights. Accordingly the hypothesis is that EU law will have pervaded many elements of private and public law disputes in the Scottish courts.<sup>14</sup> A subsidiary question will be to assess how the picture of EU law before the Scottish courts maps to different periods.<sup>15</sup> This research is particularly prescient and important in the light of the recent Brexit outcome in the EU referendum, and should allow us to reflect on the significant impact Brexit is likely to have on the legal landscape in Scotland (and the UK more generally) and the potential difficulties in neatly unpicking 40 years of assimilation of EU law and principles into Scots law.

### Methodology and limitation of cases covered

The primary research methodology involved a research assistant locating all published case law by the Scottish courts since 1973.<sup>16</sup> The initial search was

<sup>12</sup> There are, of course, other sources of EU law, e.g. the decisions of the various EU institutions, guidance/guidelines issued by the Commission or another EU executive body, but it is far less likely that these will fall to be interpreted by national courts.

<sup>13</sup> 23 December 2015, *Scotch Whisky Association v Lord Advocate* (C-333/14), EU:C:2015:845; [2016] 2 C.M.L.R. 27. See the subsequent ruling by the Inner House in the case at [2016] CSIH 77; 2016 S.L.T. 1141. See Angus MacCulloch, "State Intervention in Pricing: An Intersection of EU Free Movement and Competition Law" (2017) 42(2) E.L. Rev. 190 and "Minimum Unit Pricing in *Scotch Whisky Association v Lord Advocate*" (2017) 21(2) Edin. L.R. 217.

<sup>14</sup> For an early outline discussion of this issue, see C. Boch and R. Lane "European Community Law au Pays du tartan" in Hector MacQueen (ed.), *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (Edinburgh: W. Green, 1996).

<sup>15</sup> See discussion further below.

<sup>16</sup> There were minor feasibility issues: the first is that not all judgments of the courts are published, although it is unlikely that any case involving the application of EU law would not comprise either a

undertaken using Westlaw. The full list of Westlaw judgments from each of the Scottish courts under review for the period between 1973 and 2015 was recovered. Each case was then briefly reviewed to ascertain whether, on the face of it, it referred to EU law. This general check of all Scottish judgments published on Westlaw was complemented by searching the Scottish cases published on Westlaw against a variety of generic EU law search terms,<sup>17</sup> and the results were also cross-checked against a number of other search engines.<sup>18</sup> There is some difficulty in clearly delimiting the appropriate cases to be covered because it is evident that some EU law cases fail on a procedural issue or because of some other technical or legal hurdle and not simply because they have failed to establish the substantive EU law claim or defence to the requisite standard. However, the research extends to all cases in which an EU law aspect formed a part of the case or was relied on by either party or in the judgment, even where EU law was not a factor in the determination of the particular issue between the parties in dispute, for instance where the judgment resolved around a procedural issue and irrespective of the stage of the litigation process at which it was resolved.

### Results and analysis

A database of all potential EU law cases in the various Scottish courts was produced by the research assistant.<sup>19</sup> These were reviewed and analysed quantitatively by the author using SPSS.<sup>20</sup> At that stage a number of cases were excluded, as discussed below. The final count of judgments to the end of 2015 in all Scottish courts (including the House of Lords/Supreme Court sitting in Scottish cases) was 534 cases. This figure includes some legal disputes where there have been multiple judgments as a result of: appeals where there have been judgments at different court levels and each has been included; or disputes where there have been multiple judgments in relation to distinct aspects of the dispute: procedural or substantive. This is an attempt to provide a comprehensive study but it may be either over-inclusive or under-inclusive to some extent.<sup>21</sup>

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significant point of law or particular public interest; the second is that not all legal disputes involving EU law are litigated to the point of a court judgment but we have to simply accept that the research cannot cover cases which are settled or involve mediation or other forms of alternative dispute resolution which are not in the public domain; the third is that first instance employment tribunal rulings are not routinely published and this potential source of EU law application cannot be included, although of course appeals to the Employment Appeal Tribunal and beyond will fall within the scope of the study.

<sup>17</sup> Including "European Union", "EU", "European Community", "EC", "European Economic Community", "EEC", "TFEU", "TEC", "Directive", etc.

<sup>18</sup> Including the Land Court's website and the Employment Appeal Tribunal website.

<sup>19</sup> The database catalogues all cases in year order, in relation to the sheriff court, Court of Session and Supreme Court under name, citation, area of law, EU rule involved and a brief summary of the outcome together with a copy of the judgment. The same information was collated for cases before the Land Court and Employment Appeal Tribunal and for cases in which the Court of Justice has provided preliminary rulings to the Scottish courts.

<sup>20</sup> SPSS Statistics 22; "SPSS" is the acronym for Statistical Package for the Social Sciences, a statistical tool which helps to analyse data.

<sup>21</sup> Accordingly, when we discuss "case law" we mean judgments in cases where EU law was considered and/or applied.

The data on the 534 EU law judgments selected was input and analysed using the statistical programme, SPSS for Windows.<sup>22</sup> Frequency analysis was carried out on the EU case law sample,<sup>23</sup> in some cases represented graphically, and cross-tabulations were made between certain responses.<sup>24</sup> This has allowed us to provide detailed information about a number of aspects of the EU case law before the Scottish courts which will be considered in this article:

- Frequency of case law before different courts;
- Frequency of case law in different years;
- Frequency of case law in successive periods;
- Frequency of cases involving different subject matter;
- Frequency of cases involving the judicial review procedure;
- Frequency of cases where EU law was raised as a claim or defence;
- Frequency of “success” in EU law cases;
- Frequency of cases where EU law was determinative;
- Frequency of cases involving the “spillover” application of EU law;
- Frequency of cases involving private law relationships;
- Frequency of cases involving different types of EU law impact on private parties; and
- Frequency of cases involving different types of EU law rules.

#### *Reasons for exclusion of cases*

The focus in this research is on EU law in the civil courts and the impact of EU law on the administration of civil justice, and rights and obligations. Accordingly a number of cases involving the application of EU law in the criminal courts, primarily as a defence,<sup>25</sup> have been excluded, as has all case law involving the application of the rules on European arrest warrants.<sup>26</sup> In addition, a number of cases were excluded where they related only to the European Convention on Human Rights or where EU law was mentioned but was completely irrelevant to the case.<sup>27</sup>

<sup>22</sup> SPSS Statistics 22.

<sup>23</sup> It should be stressed that the term “frequency” here relates to the case law within the EU law sample and not to levels of litigation before the Scottish courts generally.

<sup>24</sup> See F. Clegg, *Simple Statistics, A course book for the social sciences* (Cambridge: Cambridge University Press, 1990).

<sup>25</sup> See for example *Hunter v The Caledonian Cheese Co Ltd* Unreported 19 July 2011 Stranraer Sheriff Court, in relation to the Urban Wastewater Treatment (Scotland) Regulations 1994 (SI 1984/2842) and Directive 79/923 on the quality required of shellfish waters [1979] OJ L281/47.

<sup>26</sup> Note see Crown Office European arrest warrant statistics as at 13 July 2016, <http://www.crown-office.gov.uk/foi/responses-we-have-made-to-foi-requests/38-responses2016/1373-european-arrest-warrants-13-july-2016-r013208> [Accessed 19 April 2017].

<sup>27</sup> See, for example, the early 1975 case of *Holiday Flat Co v Kuczera*, 1978 S.L.T. (Sh Ct) 47, where the sheriff made a reference to “board” under the Rent (Scotland) Act 1971 as including a continental breakfast! Subsequently, *Gavin v Lindsay*, 1987 S.L.T. (Sh Ct) 12, was initially included, and ultimately excluded, where Sheriff Kearney’s judgment included the following passage: “Counsel then referred to *Holiday Flat Co. v. Kuczera* including Sheriff Macvicar’s observation as follows: ‘I doubt whether a promise to provide board can be satisfied by less than the supply of at least one meal a day, and it may

### The impact of EU law: the factual and social context of the EU case law

“As Lord Mackenzie Stuart observed, Community law has a habit of emerging in unlikely corners.”<sup>28</sup> Indeed, the EU case law gathered over the last 40 years demonstrates the range of private and public law contexts in which EU law has been considered and had a potential impact, as exemplified by the following cases, in chronological (year) order:

Fishing and fishing quotas, see for instance *Gibson v Lord Advocate* (first case in 1975),<sup>29</sup> *Watt v Secretary of State for Scotland*<sup>30</sup>; consideration of whether an interdict to restrain a party from passing off its products as those of another whisky company contravened the EU bar on restrictions to cross-border trade, *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd (No.3)*<sup>31</sup>; sexual discrimination on the basis of sexual orientation (homosexuality) in the armed forces, *Advocate General for Scotland v MacDonald*<sup>32</sup>; football agency and whether a footballer was a consumer in that relationship for the rules on civil jurisdiction, *Prostar Management Ltd v Twaddle*<sup>33</sup>; a claim for contracting MRSA in hospital, *Miller v Greater Glasgow Health Board*<sup>34</sup>; offshore workers and the application of the

be that, in a more robust age, the law would have demanded that the meal should include at least a boiled egg. But it would probably be pedantic (particularly since the British entry into the European Economic Community) to deny the continental breakfast the status of a meal sufficient to constitute board. Accordingly, I hold that by supplying a breakfast consisting of tea or coffee, toast, butter and marmalade, the landlord was providing board.” Further examples of cases excluded from the final sample include: *Armour v Thyssen Edelstahlwerke AG*, 1986 S.L.T. 452, where there was mere reference to contractual conditions which had been notified to the High Authority (Commission) of the European Coal and Steel Community and had been published in terms of the provisions of art.60 of the European Coal and Steel Community Treaty; *Whaley v Lord Watson of Invergowrie*, 2000 S.L.T. 475, a judicial review petition regarding the Hunting Dogs Bill, where in the Inner House, Lord President Rodger stated at 481 “It is unnecessary for present purposes to consider the position where Community law rights are involved”; *Napier v Scottish Ministers*, 2005 1 S.C. 307; 2005 S.L.T. 379 concerning the treatment of prisoners, which only related to art.3 of the European Convention on Human Rights; *Groenius BV v Smith*, 2003 S.L.T. 80, which included a tangential reference to the Code of Conduct for Lawyers in the European Community adopted by the Bars and Law Societies of the European Community on 28 October 1988; *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123; 2007 S.L.T. 791, involving a background passing reference to the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) in a contractual dispute between a property developer and professional consultant; and the Inner House and Supreme Court judgments in 2012 in *Imperial Tobacco Ltd, Petitioner* [2012] CSIH 9; 2012 S.C. 297; 2012 S.L.T. 749, and [2012] UKSC 61; 2013 S.C. (U.K.S.C.) 153; 2013 S.L.T. 2 respectively, where there was no mention of EU law, unlike the earlier Outer House judgment.

<sup>28</sup> Per Boch and Lane “European Community Law au Pays du tartan” in *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (1996), referring to Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (London: Stevens, 1977), p.1.

<sup>29</sup> *Gibson v Lord Advocate*, 1975 S.C. 136; 1975 S.L.T. 134.

<sup>30</sup> *Watt v Secretary of State for Scotland* [1991] 3 C.M.L.R. 429.

<sup>31</sup> *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd (No.3)*, 1999 G.W.D. 33–1596.

<sup>32</sup> *Advocate General for Scotland v MacDonald*, 2003 S.C. (H.L.) 35; 2003 S.L.T. 1158.

<sup>33</sup> *Prostar Management Ltd v Twaddle*, 2003 S.L.T. (Sh Ct) 11.

<sup>34</sup> *Miller v Greater Glasgow Health Board* [2008] CSOH 71; 2008 S.L.T. 567 (and Inner House [2010] CSIH 40; 2011 S.L.T. 131).



EU working time rules, *Russell v Transocean International Resources Ltd*<sup>35</sup>; classroom assistants' equal pay claims, *North v Dumfries and Galloway Council*<sup>36</sup>; NHS tendering decisions, and public procurement challenges, *Elektia Ltd v Common Services Agency*<sup>37</sup>; trade mark claims by a footwear retailer, *Schuh Ltd v Shhh . . . Ltd*<sup>38</sup>; Hunterston Power Station and EU environmental law, *McGinty v Scottish Ministers*<sup>39</sup>; beer, in the context of a health and safety delict claim by a worker at Tennent's, *O'Neil v DHL Services Ltd*<sup>40</sup>; bus services to and from Glasgow Airport, *Arriva Scotland West Ltd v Glasgow Airport Ltd*<sup>41</sup>; a challenge to a Scottish Parliament Act banning tobacco vending machines on EU trade law grounds, *Sinclair Collis Ltd v Lord Advocate*<sup>42</sup>; fruit and vegetable producers' entitlements to Common Agriculture Policy payments, *Angus Growers Ltd v Scottish Ministers*<sup>43</sup>; numerous asylum related claims, for instance *MN (South Africa) v Secretary of State for the Home Department*<sup>44</sup>; Scottish winter weather and a health and safety claim by a worker for a fall on an icy path, *Kennedy v Cordia (Services) LLP*<sup>45</sup>; the application of taxi licensing rules in *Spring Radio Cars Ltd v Glasgow City Council*<sup>46</sup>; wind farms and EU environmental law, *Sustainable Shetland v Scottish Ministers*<sup>47</sup>; football TV broadcast licensing rights, *Scottish Professional Football League Ltd v Lisini Pub Management Co Ltd*<sup>48</sup>; alcohol and the challenge to the Alcohol (Minimum Pricing) (Scotland) Act, *Scotch Whisky Association v Lord Advocate*<sup>49</sup>; prisoner voting rights in the independence referendum, *Moohan, Petitioner*<sup>50</sup>; gay social networking apps, *Worbey v Elliott*<sup>51</sup>; Donald Trump, wind farms and

<sup>35</sup> *Russell v Transocean International Resources Ltd* [2009] I.R.L.R. 519 (and Inner House [2010] CSIH 82; 2011 S.C. 175; and Supreme Court [2011] UKSC 57; 2012 S.C. (U.K.S.C.) 250).

<sup>36</sup> *North v Dumfries and Galloway Council* [2009] I.C.R. 1363 (and Inner House [2011] CSIH 2; 2011 S.C. 372; and Supreme Court [2013] UKSC 45; 2013 S.C. (U.K.S.C.) 298).

<sup>37</sup> *Elektia Ltd v Common Services Agency* [2011] CSOH 107; 2011 S.L.T. 815.

<sup>38</sup> *Schuh Ltd v Shhh . . . Ltd* [2011] CSOH 123; 2011 G.W.D. 26–593.

<sup>39</sup> *McGinty v Scottish Ministers* [2011] CSOH 163 (and Inner House [2013] CSIH 78; 2014 S.C. 81).

<sup>40</sup> *O'Neil v DHL Services Ltd* [2011] CSOH 183; 2011 G.W.D. 39–806.

<sup>41</sup> *Arriva Scotland West Ltd v Glasgow Airport Ltd* [2011] CSOH 69; 2011 G.W.D. 16–379.

<sup>42</sup> *Sinclair Collis Ltd v Lord Advocate* [2011] CSOH 80; 2011 S.L.T. 620 (and Inner House [2012] CSIH 80; 2013 S.C. 221).

<sup>43</sup> *Angus Growers Ltd v Scottish Ministers*, 2012 S.L.C.R. 1 (and Inner House [2012] CSIH 92; 2013 S.L.T. 611).

<sup>44</sup> *MN (South Africa) v Secretary of State for the Home Department* [2011] CSOH 121; 2011 G.W.D. 26–592 (and Inner House [2012] CSIH 63; 2012 G.W.D. 28–581).

<sup>45</sup> *Kennedy v Cordia (Services) LLP* [2013] CSOH 130; 2013 G.W.D. 28–568 (and Inner House [2014] CSIH 76; 2015 S.C. 154; and Supreme Court [2016] UKSC 6; 2016 S.C. (U.K.S.C.) 59).

<sup>46</sup> *Spring Radio Cars Ltd v Glasgow City Council* [2013] CSOH 15; 2013 S.L.T. 491 (and Inner House [2014] CSIH 21; 2014 S.C. 529).

<sup>47</sup> *Sustainable Shetland v Scottish Ministers* [2013] CSOH 158; 2013 S.L.T. 1173 (and Inner House [2014] CSIH 60; 2015 S.C. 59; and Supreme Court [2015] UKSC 4; 2015 S.C. (U.K.S.C.) 51).

<sup>48</sup> *Scottish Professional Football League Ltd v Lisini Pub Management Co Ltd* [2013] CSOH 48; 2013 S.L.T. 629 (and Inner House [2013] CSIH 97; 2014 S.C. 300).

<sup>49</sup> *Scotch Whisky Association v Lord Advocate* [2013] CSOH 70; 2013 S.L.T. 776 (and Inner House [2014] CSIH 38; 2014 G.W.D. 17–309; and Court of Justice EU:C:2015:845; [2016] 2 C.M.L.R. 27; and Inner House again [2016] CSIH 77; 2016 S.L.T. 1141).

<sup>50</sup> *Moohan, Petitioner* [2013] CSOH 199; 2014 S.L.T. 213 (and Inner House [2014] CSIH 56; 2015 S.C. 1; and Supreme Court [2014] UKSC 67; 2015 S.C. (U.K.S.C.) 1).

<sup>51</sup> *Worbey v Elliott* [2014] CSOH 19; 2014 S.C.L.R. 573.

EU environmental law, *Trump International Golf Club Scotland Ltd v Scottish Ministers*<sup>52</sup>; gritting roads and government tenders for the gritting contract, *Nationwide Gritting Services Ltd v Scottish Ministers*<sup>53</sup>; the Scottish “named persons” legislation, *Christian Institute v Lord Advocate*<sup>54</sup>; airline passenger delay compensation scheme, *Caldwell v EasyJet Airline Co Ltd*<sup>55</sup>; Largs ferry port assistant Equality Act claims, *CalMac Ferries Ltd v Wallace*<sup>56</sup>; and discrimination against non-Catholic teachers in Catholic schools, *Glasgow City Council v McNab*.<sup>57</sup>

Court

The case law database includes any judgment by a Scottish civil court including the Supreme Court in Scottish appeals.<sup>58</sup> Judgments were coded according to whether they emanated from the sheriff court (sheriff or sheriff principal on appeal),<sup>59</sup> Court of Session Outer House,<sup>60</sup> Inner House<sup>61</sup> and the Supreme Court (in Scottish cases), in addition to EU case law before the Land Court<sup>62</sup> and Employment Appeal Tribunal sitting in Scotland.<sup>63</sup>

Table 1—Court

Court	Frequency	Percent
Sheriff Court	58	10.9
Outer House	271	50.7
Inner House	125	23.4
Supreme Court	13	2.4
EAT	55	10.3
Land Court	12	2.2
Total	534	100.0

<sup>52</sup> *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2014] CSOH 22; 2014 S.L.T. 406 (and Inner House [2015] CSIH 46; 2015 S.C. 673; and Supreme Court [2015] UKSC 74; 2016 S.C. (U.K.S.C.) 25).

<sup>53</sup> *Nationwide Gritting Services Ltd v Scottish Ministers* [2014] CSOH 151; 2015 S.C.L.R. 367 (and Inner House [2015] CSIH 85; 2016 S.L.T. 82).

<sup>54</sup> *Christian Institute v Lord Advocate* [2015] CSOH 7; 2015 S.L.T. 72 (and Inner House [2015] CSIH 64; 2016 S.C. 47; and Supreme Court [2016] UKSC 51; 2016 S.L.T. 805).

<sup>55</sup> *Caldwell v EasyJet Airline Co Ltd*, 2015 S.L.T. (Sh Ct) 223.

<sup>56</sup> *CalMac Ferries Ltd v Wallace* [2014] I.C.R. 453.

<sup>57</sup> *Glasgow City Council v McNab* [2007] I.R.L.R. 476.

<sup>58</sup> See A. Paterson, *The Final Judgment, The Last Law Lords and the Supreme Court* (London: Hart Publishing, 2014).

<sup>59</sup> T. St. J. N. Bates et al, *The Legal System of Scotland: Cases and Materials*, 5th edn (Edinburgh: W. Green, 2014); see the Courts Reform (Scotland) Act 2014 and the reforms introduced to the civil court structure in Scotland.

<sup>60</sup> See Bates et al, *The Legal System of Scotland: Cases and Materials* (2014).

<sup>61</sup> Bates et al, *The Legal System of Scotland: Cases and Materials* (2014).

<sup>62</sup> Bates et al, *The Legal System of Scotland: Cases and Materials* (2014).

<sup>63</sup> Bates et al, *The Legal System of Scotland: Cases and Materials* (2014).



Chart 1—Court

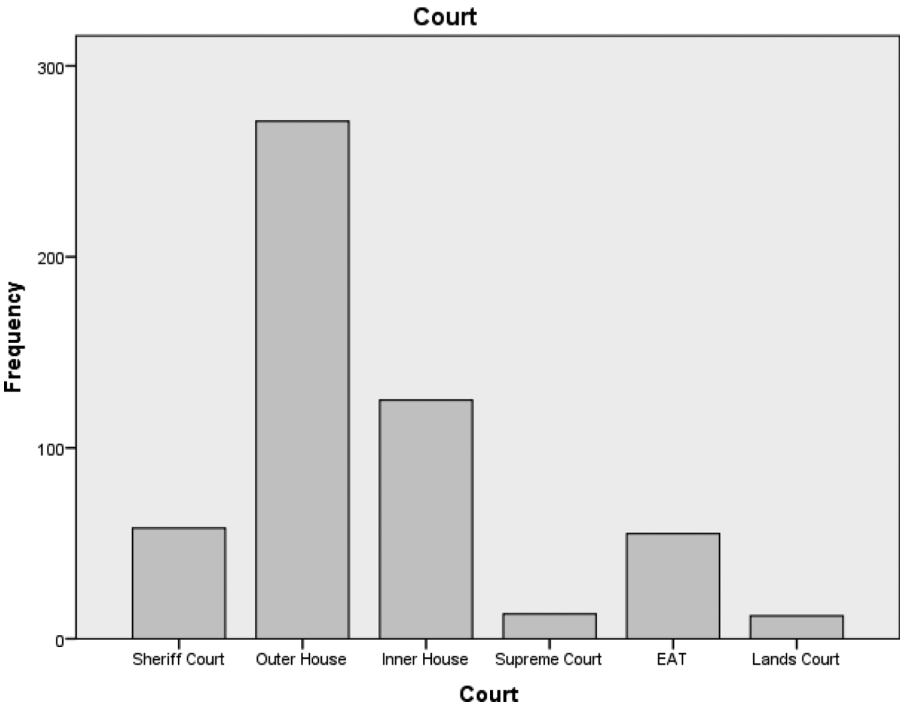


Table 2—Period/court cross-tabulation

	Court						
Period	Sheriff Court	Outer House	Inner House	Supreme Court	EAT	Land Court	Total
1974–1979	1	1	0	0	0	0	2
1980–1985	1	4	1	0	3	0	9
1986–1991	3	10	2	0	0	0	15
1992–1997	5	21	4	0	7	1	38
1998–2003	11	56	27	0	5	0	99
2004–2009	21	51	41	4	21	6	144
2010–2015	16	128	50	9	19	5	227
Total	58	271	125	13	55	12	534

The cross-tabulation between different periods and courts demonstrates that although there is an increase in case law across all courts in each period, and particularly in the last two periods (2004–2015) we see a notable increase in cases before the Supreme Court and the two specialist courts—the Employment

Appeal Tribunal and Land Court—with all 13 Supreme Court cases between 2004 and 2015.<sup>64</sup>

### Preliminary rulings by the Court of Justice

We have also located 12 Court of Justice rulings in Scottish preliminary references. It should be stressed that courts in the UK have made 589 references in total to the end of 2015, and in the same period the Irish courts have made a total of 85 references, and in the relatively short period since accession the Slovenian courts have already made 14 references.<sup>65</sup> Further study will be required to seek to understand the paucity of references by the Scottish courts.<sup>66</sup> However, in terms of the scope of this study, it is interesting to note that four of the rulings have involved consideration of the application of EU law in a criminal context<sup>67</sup> in references by the High Court of Justiciary, in the following Court of Justice rulings: 14 February 1984, *Mehlich v Mackenzie*<sup>68</sup>; 21 May 1987, *Hamilton v Whitelock*<sup>69</sup>; 13 November 1990, *Walkingshaw v Marshall*<sup>70</sup>; and 7 May 1992, *Wither v Cowie*.<sup>71</sup> Three of these related to breach of fisheries regulations while *Hamilton v Whitelock* concerned breach of rules on the use of tacographs.

Accordingly there have only been eight rulings in references by Scottish civil courts, including a cluster of three VAT cases in 2008–2010, as follows:

21 June 1988, *Brown v Secretary of State for Scotland*,<sup>72</sup> a reference from the Court of Session (Outer House) in a dispute involving judicial review of a

<sup>64</sup> Further research will be required to relate this to the level of litigation generally in the Scottish courts in that period.

<sup>65</sup> See the European Court annual report with statistics of judicial activity at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport\\_annuel\\_2015\\_activite\\_judiciaire\\_en\\_web.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf) [Accessed 19 April 2017]. See M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2010), Ch.2, “Variations in Member State Use of Preliminary References” at pp.37–58 noting a wide variation in resort to the procedure across Member States. Note at p.58: “... one overall factor stands out as almost certainly affecting the number of preliminary references, namely the number of cases before the national courts that potentially involve Community law. Therefore, the population size of each country is bound to become highly relevant.” See also B. Rodger (ed.), *Article 234 and Competition Law: An Analysis* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2008); Christopher Harding, “Who Goes to Court in Europe? An Analysis of Litigation Against the European Community” (1992) 17(2) E.L. Rev. 105.

<sup>66</sup> Indeed in a number of the 534 cases, the issue was raised but the court rejected the possibility of a reference. See R. Lane, “Article 234: A Few Rough Edges Still” in M. Hoskins and W. Robinson (eds) *A True European: Essays for Judge David Edward* (Oxford: Hart Publishing, 2004), pp.327–344.

<sup>67</sup> This is of course in itself interesting and demonstrates the scope of application and significance of EU law but not in relation to the determination of public and private law rights and obligations.

<sup>68</sup> *Mehlich v Mackenzie* (C24/83), 1984 S.L.T. 449.

<sup>69</sup> *Hamilton v Whitelock* (C79/86), EU:C:1987:246; [1987] 3 C.M.L.R. 190.

<sup>70</sup> *Walkingshaw v Marshall* (C-370/88) [1991] 1 C.M.L.R. 419.

<sup>71</sup> *Wither v Cowie*; sub nom. *Procurator Fiscal, Elgin v Wood and Cowie* (C-251/90; C-252/90) [1992] E.C.R. I-2873; 1994 S.L.T. 363.

<sup>72</sup> *Brown v Secretary of State for Scotland* (197/86), EU:C:1988:323; 1989 S.L.T. 402.

decision concerning a university student allowance and involving the interpretation of art.7 of the EEC Treaty and Regulation 1612/88<sup>73</sup>;

30 June 1988, *Brown v Rentokil Ltd*,<sup>74</sup> a reference from the House of Lords in a dispute involving equal treatment in the pregnancy-related dismissal of a woman and involving the interpretation of Directive 76/207<sup>75</sup>;

10 July 2003, *Booker Aquaculture Ltd v Scottish Ministers*,<sup>76</sup> a reference from the Court of Session in a dispute involving judicial review of decisions concerning the destruction of fish stock and involving the interpretation of art.6(2) EU and Directive 93/53<sup>77</sup>;

18 December 2008, *Royal Bank of Scotland Group Plc v Revenue and Customs Commissioners*,<sup>78</sup> a reference from the Court of Session in a dispute concerning value added tax and involving the interpretation of Directive 77/388<sup>79</sup>;

16 December 2010, *Macdonald Resorts Ltd v Revenue and Customs Commissioners*,<sup>80</sup> a reference from the Court of Session in a dispute concerning value added tax and involving the interpretation of Directive 77/388;

22 December 2010, *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH*,<sup>81</sup> a reference from the Court of Session in a dispute concerning value added tax and involving the interpretation of Directive 77/388;

6 November 2014, *Feakins v Scottish Ministers*,<sup>82</sup> a reference from the Land Court in a dispute concerning payment entitlements under the Common Agricultural Policy and involving the interpretation of Regulation 795/2004<sup>83</sup>;

23 December 2015, *Scotch Whisky Association v Lord Advocate*,<sup>84</sup> a reference from the Court of Session (Inner House) in a dispute concerning the minimum pricing of alcohol and involving the interpretation primarily of arts 34 and 36 TFEU.

<sup>73</sup> Regulation 1612/68 on freedom of movement for workers within the Community [1968] OJ L257/2.

<sup>74</sup> *Brown v Rentokil Ltd* (C-394/96), EU:C:1998:331; [1998] 2 C.M.L.R. 1049.

<sup>75</sup> Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

<sup>76</sup> *Booker Aquaculture Ltd v Scottish Ministers* (C-20/00), EU:C:2003:397; [2003] 3 C.M.L.R. 6.

<sup>77</sup> Directive 93/53 introducing minimum Community measures for the control of certain fish diseases [1993] OJ L175/23.

<sup>78</sup> *Royal Bank of Scotland Group Plc v Revenue and Customs Commissioners* (C-488/07), EU:C:2008:750; [2008] E.C.R. I-10409.

<sup>79</sup> Sixth Council Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes—common system of value added tax: uniform basis of assessment [1977] OJ L145/1.

<sup>80</sup> *Macdonald Resorts Ltd v Revenue and Customs Commissioners* (C-270/09), EU:C:2010:780; [2011] S.T.C. 412.

<sup>81</sup> *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* (C-277/09), EU:C:2010:810; [2011] S.T.C. 345.

<sup>82</sup> *Feakins v Scottish Ministers* (C-335/13), 2013 S.L.C.R. 52.

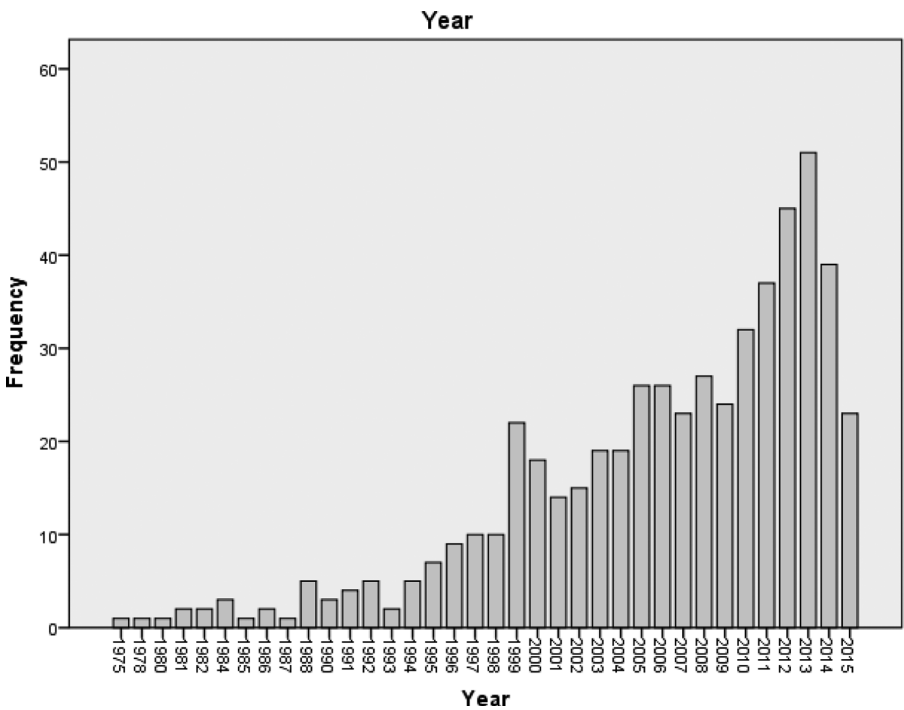
<sup>83</sup> Regulation 795/2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No.1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2004] OJ L141/1.

<sup>84</sup> *Scotch Whisky Association v Lord Advocate* (C-333/14), EU:C:2015:845; [2016] 2 C.M.L.R. 27.

Year

Chart 2 simply demonstrates the number of EU law cases each year since EU membership with the first reported judgment in 1975, until 2015.<sup>85</sup> The chart highlights, as anticipated, a general upward trend over the 40 years, although the slight downturn in 2014 and 2015 is noticeable, and further research will be required in order to understand why there has been less EU law litigation in this most recent period.<sup>86</sup>

Chart 2—Year



<sup>85</sup> Further research will be required to relate this to the level of litigation generally in the Scottish courts in that period.

<sup>86</sup> It should be noted that there has been a considerable decrease overall in the number of civil cases disposed of in the Scottish courts between 2009–10 and 2014–15, see p.54 of Scottish Government, *Civil Justice Statistics in Scotland 2014–15* (Scottish Government, 2016), available at <http://www.gov.scot/Resource/0049/00497242.pdf> [Accessed 19 April 2017]. See also Scottish Government, “Civil Justice Statistics in Scotland” (28 March 2016), <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/TrendCivil> [Accessed 19 April 2017].

Period

The seminal work on the role of the Court of Justice of the European Union (at that stage known as the European Court of Justice) in EU preliminary rulings by Stone Sweet and Brunell constructed a data set in relation to preliminary references,<sup>87</sup> utilising the following periods: 1958–1973; 1974–1979; 1980–1985; 1986–1991; 1992–1997.<sup>88</sup> The current study of Scottish EU case law adopts those periods and adds the periods 1998–2003, 2004–2009 and 2010–2015.<sup>89</sup> What Table 3 and Chart 3 clearly demonstrate, despite the downturn in 2014 and 2015, is a clear general upward trajectory in the frequency of case law in the Scottish courts involving the consideration and application of EU law. It should be noted that 69.5 per cent of the total Scottish courts’ EU case law since 1973 has been in the period since 2004, with 42.5 per cent of the total figure in the period since 2010 alone. The proceeding sections should help us, at least in a quantitative way, to drill down into that broad picture in a little more detail.

Table 3—Period

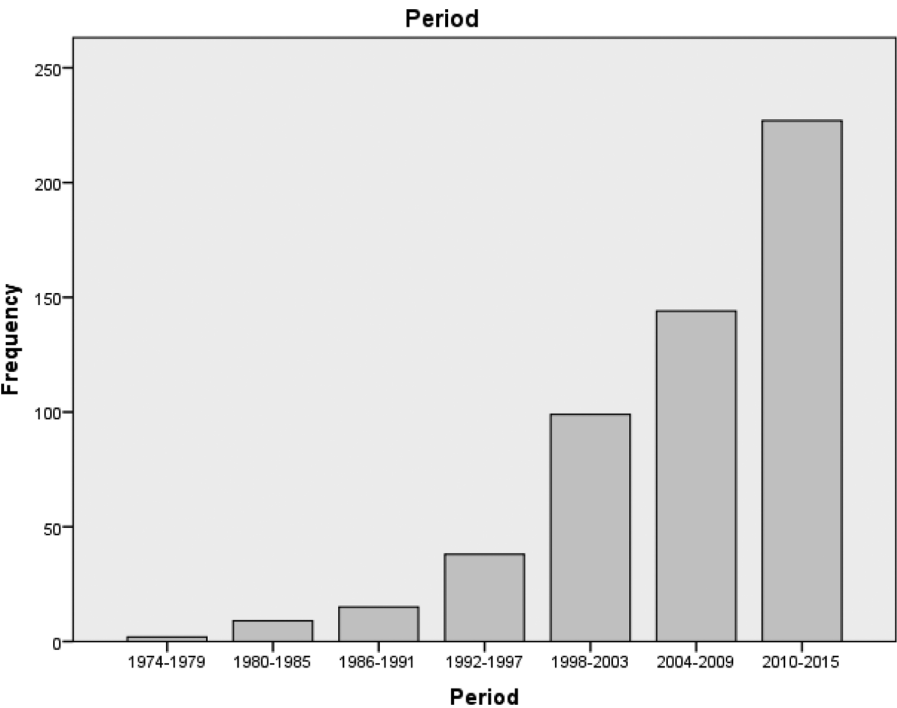
Period	Frequency	Percent	Cumulative Percent
1974–1979	2	.4	.4
1980–1985	9	1.7	2.1
1986–1991	15	2.8	4.9
1992–1997	38	7.1	12.0
1998–2003	99	18.5	30.5
2004–2009	144	27.0	57.5
2010–2015	227	42.5	100.0
Total	534	100.0	

<sup>87</sup> See A. Stone Sweet and T.L. Brunell “The European Court, National Judges and Legal Integration: A Researcher’s Guide to the Data Set on Preliminary References in EC Law 1958–1998” (Robert Schuman Centre Working Paper, 1999), based on their compiled “Data Set on Preliminary References in EC law 1958–1998” (Robert Schuman Centre, European University Institute, Italy, 1999); A. Stone Sweet and T.L. Brunell, “The European Court of Justice and the national courts: a statistical analysis of preliminary references, 1961–95” (1998) 5 *Journal of European Public Policy* 66. See also G. Tridimas and T. Tridimas, “National Courts and the European Court of Justice: A public choice analysis of the preliminary reference procedure” (2004) 24(2) *Int’l Rev. L. & Econ.* 125.

<sup>88</sup> See also *Article 234 and Competition Law: An Analysis* (2008).

<sup>89</sup> See discussion at fn.5, above.

Chart 3—Period



Subject matter

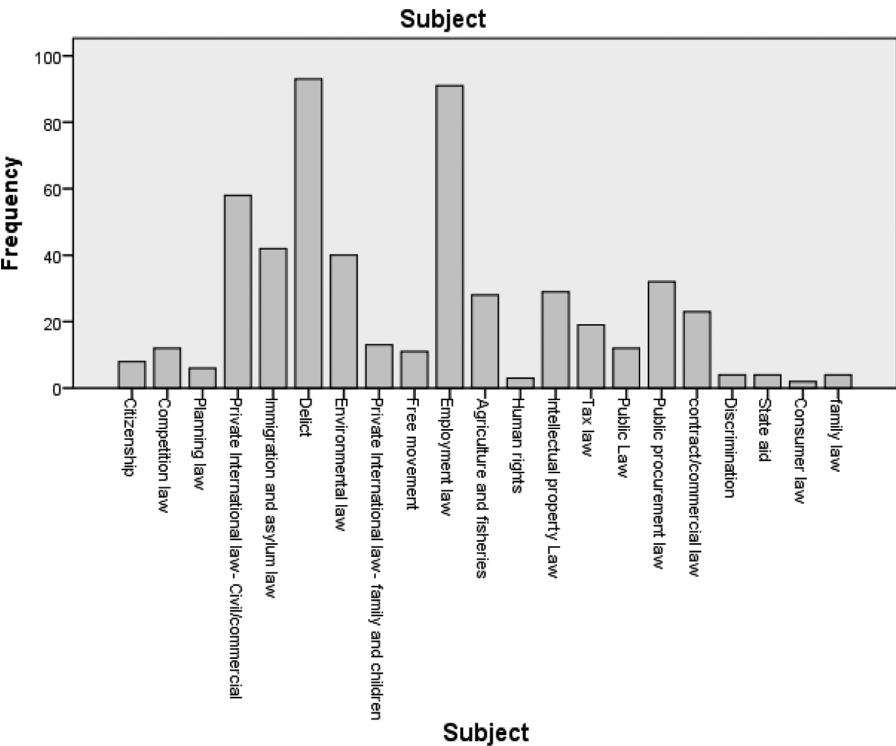
We also coded the case law on the basis of the subject matter of the case. Again it should be stressed that we excluded from the scope of the research judgments involving EU law application in a criminal context as discussed above at “Reasons for exclusion of cases”. Some of the coding of cases was difficult/problematic, with potential overlap in particular between planning/environmental and discrimination/employment law.<sup>90</sup> There were very few data protection cases, and these were coded together with intellectual property cases generally.

Interestingly, the two most frequent areas of EU case law primarily involve private law disputes: delict (including health and safety) with 93 cases (17.4 per cent

<sup>90</sup> In both instances the tendency was to code as the latter, i.e. environmental law (which tended to be the substantive EU law under consideration in a planning application context) and employment law (which includes many issues including discrimination law). Accordingly “discrimination” really only covered case law outside the employment context.



Chart 4—Subject matter



of the total) and employment law with 90 cases (17 per cent of the total).<sup>91</sup> The third most frequent subject matter also reflects the impact of EU law on private law disputes in the Scottish courts, with 58 cases (10.9 per cent of the total) concerning the civil and commercial rules of international private law.<sup>92</sup> Nonetheless, the next two most frequent case law categories are firmly set in a public law context—immigration and asylum law with 42 cases (7.9 per cent of the total) and environmental law with 40 cases (7.5 per cent of the total).

We undertook a cross-tabulation between the reference periods and the subject matter in order to seek to identify any particular trends or case law clusters.

<sup>91</sup> The latter may partly be explained by the number of Employment Appeal Tribunal rulings, and also subsequent appeals to the Court of Session and Supreme Court.

<sup>92</sup> Primarily the rules on civil and commercial jurisdiction (the Brussels Convention and its successor regulations: Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 and Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1) and the rules on choice of law in contract, the Rome Convention and its successor Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

The notable points here, for further consideration and discussion with subject matter specialists are as follows: 12 of the 18 intellectual property cases were decided in the period 1998–2003; we can witness a considerable increase in the delict and employment law case law since 1998 (post-Maastricht Treaty) with 89 of 93 in total and 62 of 91 in total cases in those two major private law categories respectively, demonstrating the increasing scope of application of EU law in private law disputes in recent years; there is a cluster of tax cases (10 of the 19 in total) in the period 2004–2009; 26 of the 32 public procurement cases were decided between 2010 and 2015; and since 2010 immigration and asylum law, involving the consideration of EU rules or context, has developed as a major area of work before the Scottish courts, with 34 of the total 42 cases in this most recent period perhaps reflecting global phenomena as much as EU law developments specifically.

Judicial review

Judicial review proceedings in the Court of Session have been the subject of considerable debate and recent reform,<sup>93</sup> and the increasing significance of judicial review before the Scottish courts has been stressed.<sup>94</sup> Moreover, the influence of European law in developing the Scottish judicial review rules in this context has also been identified.<sup>95</sup> Given the prominence of judicial review as a litigation tool, we considered it important to assess whether and to what extent EU substantive law has been the subject of consideration and application in petitions for judicial review in the Scottish courts. The data reveals that a significant minority of the Scottish EU law case law, 111 cases (20.8 per cent of the total) are set in judicial review proceedings.

We undertook a cross-tabulation between the reference periods and judicial review proceedings in order to seek to identify any particular trends.

Table 4—Judicial Review

	Frequency	Percent
Judicial Review Petition	111	20.8
Not a Judicial Review Petition	423	79.2
Total	534	100.0

<sup>93</sup> See the Courts Reform (Scotland) Act 2014 and Chris McCorkindale, Aileen McHarg and Tom Mullen, “Judicial Review at Thirty” 2015 Jur. Rev. 317.

<sup>94</sup> See, in particular, Robert Reed, “The Development of Judicial Review in Scotland”, 2015 Jur. Rev. 325. See also Tom Mullen, Kathy Pick and Tony Prosser, *Judicial Review in Scotland* (Chichester: Wiley, 1996).

<sup>95</sup> See Denis Edwards, “Thirty Years of Judicial review in Scotland: The Influence of European Law”, 2015 Jur. Rev. 399.

Chart 5—Judicial Review

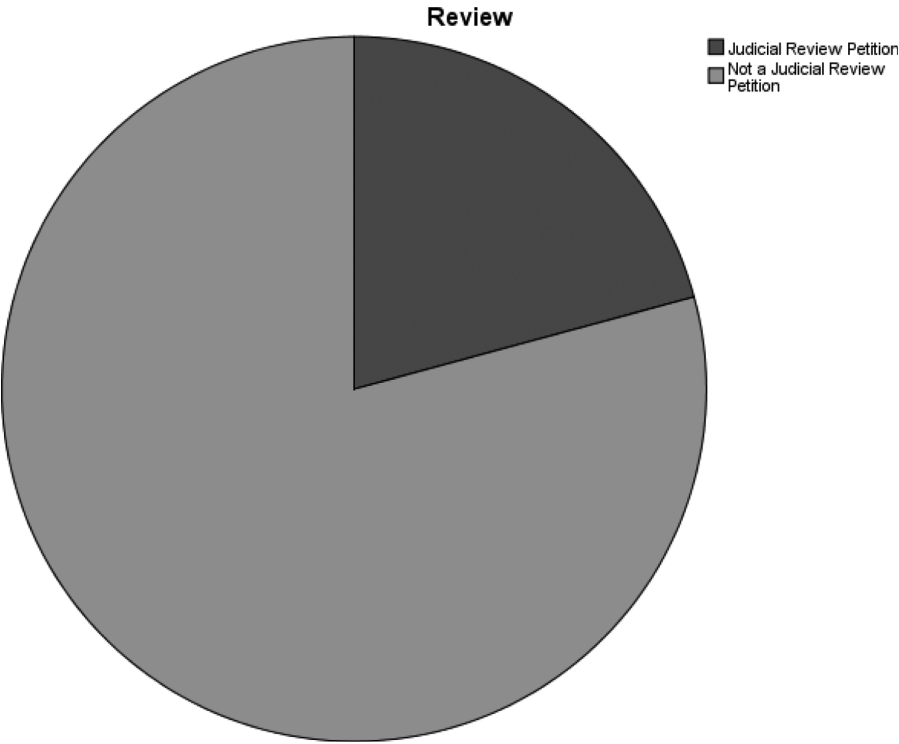


Table 5—Period/Review cross-tabulation

Period	Review		
	Judicial Review Petition	Not a Judicial Review Petition	Total
1974–1979	0	2	2
1980–1985	0	9	9
1986–1991	3	12	15
1992–1997	6	32	38
1998–2003	20	79	99
2004–2009	13	131	144
2010–2015	69	158	227
Total	111	423	534

This clearly demonstrates a trajectory towards more judicial review petitions involving EU law in particular in the most recent period 2010–2015, and judicial review proceedings also constitute a much greater percentage of all case law involving EU law in that period than in any earlier period.<sup>96</sup> Nonetheless, this also reflects a much broader resort to judicial review in Scotland in recent years,<sup>97</sup> and indeed the EU component of the overall judicial review caseload of the Court of Session is relatively miniscule given the average of 303 judicial review cases per year in the court over the years 2008–2014.<sup>98</sup>

### Claim or defence

We also coded cases on the basis of whether EU law was raised by the claim or defence<sup>99</sup> particularly given the perceived importance of the use of EU competition law as a defence to contractual claims<sup>100</sup> but in the overall context of the research very little turns on this issue and indeed as anticipated, 89.9 per cent of the Scottish EU case law involves EU law being raised by the pursuer.

### Success

We coded the cases as “successful”,<sup>101</sup> “partially successful”,<sup>102</sup> “unsuccessful”<sup>103</sup> and “N/A”.<sup>104</sup> We will not focus on this aspect of the research as the classification

<sup>96</sup> See Edwards, “Thirty Years of Judicial review in Scotland: The Influence of European Law”, 2015 Jur. Rev. 399.

<sup>97</sup> See Alan Page, “The Judicial Review Caseload: An Anglo-Scottish Comparison”, 2015 Jur. Rev. 337.

<sup>98</sup> See Reed, “The Development of Judicial Review in Scotland”, 2015 Jur. Rev. 325 and Page, “The Judicial Review Caseload: An Anglo-Scottish Comparison”, 2015 Jur. Rev. 337.

<sup>99</sup> And in some cases this is difficult where EU law merely sets the context rather than being specifically relied upon.

<sup>100</sup> See for example O. Odudu, “Competition Law and Contract: The Euro-defence” in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Oxford University Press, 2013).

<sup>101</sup> Some success cases were straightforward to code, such as a successful delict claim based fundamentally on an EU Directive, but other less clear-cut examples were also coded as successful, for instance *Vergara v Ryanair Ltd*, 2014 S.L.T. (Sh Ct) 119, involving consideration of the EU compensation regime for a passenger who suffers delays, which was coded as success although the judgment was on a preliminary time bar plea, which was linked to interpretation of the relevant EU provision. See also *WM Fotheringham & Son v British Limousin Cattle Society Ltd*, 2004 S.L.T. 485.

<sup>102</sup> The following two examples demonstrate the partially successful category coding: *Millar & Bryce Ltd v Keeper of the Registers of Scotland*, 1997 S.L.T. 1000, where the court granted an order *ad factum praestandum* but interim interdict was considered inappropriate in judicial review proceedings; and *McEwan v Lothian Buses Plc*, 2006 S.C.L.R. 592, where there was a successful claim under reg.5(1) of the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004), but the defence plea of contributory negligence was successful.

<sup>103</sup> This was a relatively straightforward category, see for example, *Elektro Ltd v Common Services Agency* [2011] CSOH 107; 2011 S.L.T. 815, where a public procurement challenge to an NHS tendering decision was unsuccessful.

<sup>104</sup> This category is the most problematic and in most cases was closely linked to the categorisation of cases in relation to their relevance, particularly where the EU law was relevant/considered. Accordingly, for instance, *Mullen v Churchill Insurance Co Ltd*, 2012 G.W.D. 8–151, involved background consideration of the European Communities (Rights against Insurers) Regulations 2002 (SI 2002/3061) and

of cases under these various categories is both difficult to analyse in the sense that objective “success” cannot be defined effectively in a way that is meaningful across the full data set. Accordingly, it is very difficult to read too much into the data here. The issue is also related to the next variable, regarding the relevance of the EU legal provision to the case. It should also be clear that success does not necessarily entail final success on the substantive merits of the action, but may for instance be at an interim stage of the litigation. Accordingly, it should be recognised that there may be degrees of success in terms of their overall significance to the developing EU law jurisprudence, dependent for instance on the stage of the litigation process and the relationship between substantive and procedural rules, which it is difficult to reflect accurately by stark figures on success. Table 6 suggests that 37.8 per cent of EU law cases were successful or partially successful, in the sense that the court preferred the overall arguments of the party pleading EU law, although these figures should be treated with caution, and may indeed tell us little, unless a detailed analysis of the legal and factual arguments in each case is undertaken.

Table 6—Success

	Frequency	Percent	Cumulative Percent
Successful	150	28.1	28.1
Partially successful	52	9.7	37.8
Unsuccessful	245	45.9	83.7
NA	87	16.3	100.0
Total	534	100.0	

When we undertook a cross-tabulation between success and periods, the success rate was slightly lower in recent years, but the picture and degree of accuracy in portraying success is too complicated and grey to draw any conclusions. Cross-tabulation did highlight that cases involving immigration and asylum law, environmental law and citizenship have relatively low success rates (27/42, 27/40 and 7/8 classified as unsuccessful respectively), particularly compared with delict and employment law (only 36/93 and 36/91 classified as unsuccessful respectively). Accordingly, at least *prima facie*, it appears that there may be a relatively higher success rate in private law disputes, as opposed to public law disputes, involving EU law though we are at least at this stage unaware of the

therefore was coded NA re success; and another complicated case for coding was *Application in respect of A and B* [2014] Fam. L.R. 137, where provision in Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L338/1 was an important context for the dispute, and accordingly it was coded relevant/considered but NA re success.

reasons for this. In this context it is also notable, as demonstrated by Table 7, that judicial review proceedings involving EU law tend to be less successful than the success rate generally for EU law cases, although we do not have success rates for judicial review petitions generally with which to compare this data.

Table 7—Review/Success cross-tabulation

Review	Success				Total
	Successful	Partially successful	Unsuccessful	NA	
Judicial Review Petition	21	3	71	16	111
Not a Judicial Review Petition	129	49	174	71	423
Total	150	52	245	87	534

Relevance

With this variable we sought to ascertain the extent to which EU law was a significant factor in the case and judgment. We coded the cases as “determinative/dispositive”; “relevant/considered” and “irrelevant”. Again, we will not focus on this aspect of the research as the classification of cases under these various categories is both problematic and to some extent inconsistent and a matter of judgment while coding and so it is very difficult to read too much into the data here. The “determinative/dispositive” category is intended to denote case law where the EU law rule or provision was a key factor in the judgment, where it was central to the resolution of the dispute, and this inevitably encompassed the majority of the case law judgments. The second category of “relevant/considered” is where the judgment did not depend on an EU law provision, although it formed an important aspect of the context or background in the case.<sup>105</sup> The third category of “irrelevant” connotes cases where EU law was raised but was deemed to be irrelevant or the case did not fall at all within the scope of the provision.<sup>106</sup> There are potential overlaps between the categories and between

<sup>105</sup> This category included cases such as *Miller v Sabre Insurance Co Ltd* [2010] CSOH 139; 2010 G.W.D. 38–774, see above re success, where the relevant EU law provision formed the background framework or context for the specific issue; and also some cases such as *MacEchern v Scottish Ministers* [2011] CSOH 135; 2011 G.W.D. 28–626, involving consideration of various EU Directives on health and safety at work in respect of a claim by a forestry worker, but the specific outcome was a proof before answer and therefore the case was coded as relevant/considered rather than determinative or dispositive.

<sup>106</sup> The irrelevant code was utilised for instance in *Brown v Rentokil Ltd*, 1996 S.C. 415; 1996 S.L.T. 839; [1995] 2 C.M.L.R. 85 where it was held that the Equal Treatment Directive did not apply in the case of an employee whose illness was attributable to pregnancy, i.e. this situation was outside the scope of the directive; similarly in *Addison v Denholm Ship Management (UK) Ltd* [1997] I.C.R. 770, where Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of



Table 8—Relevance

	Frequency	Percent
Determinative/Dispositive	379	71.0
Relevant/Considered	136	25.5
Irrelevant	19	3.6
Total	534	100.0

the irrelevant category here and some of the cases which were excluded as being of marginal EU law relevance.

Spillover

This issue is based on fascinating work by Johnston on “spillovers” from EU law into national law.<sup>107</sup> Johnson basically distinguishes between direct EU substantive rights which have their own claim to normative force by EU law, and the indirect application of EU law, where EU law has been given a presence within the national legal order without this being required by EU law itself. The latter are termed “spillover” or indirect application of EU law cases. This is indeed potentially more interesting post-Brexit, dependent on the outcome of the negotiations to leave the EU, given that we have chosen to adopt certain domestic rules and laws modelled on EU law provisions without any EU imperative or required harmonisation.

Table 9—Spillover application of EU law

	Frequency	Percent
Direct application of EU law	494	92.5
Spillover application of EU law	40	7.5
Total	534	100.0

businesses [1977] OJ L61/26, could not extend to the continental shelf which was not within the territorial scope of the Treaty. See also *Muirhead v G*, 2007 Fam. L.R. 160; 2007 G.W.D. 34–571, where the argument that a decision not to award a father contact as being contrary to EC law was deemed to be irrelevant: “... possesses no legal merit and is completely misconceived. The basis appeared to be related to the terms of art 18 of the European Community Treaty. Both of the enactments challenged, however, are legislative provisions of the Parliament of the United Kingdom, which we are bound to apply in this court. In any event, we do not consider that either of these provisions has a bearing on any issue properly arising in the present case.”

<sup>107</sup> “Spillovers” from A. Johnston, “EU Law into National law: (Un)intended consequences for Private Law Relationships” in *The Involvement of EU Law in Private Law Relationships* (2013).

The proportion of spillover to direct application cases is relatively small over the full period (only 7.5 per cent of the total case law) with the exception of 1986–1991 where a slight majority of 8 of the 15 EU law cases in the Scottish courts were “spillover” cases involving a cluster of Brussels Convention, private international law-civil and commercial cases and the application of the rules on civil and commercial jurisdiction in Sch.4 and Sch.8 of the Civil Jurisdiction and Judgments Act 1982 modelled on the Brussels Convention.<sup>108</sup> This is also confirmed by the cross-tabulation between spillover cases and subject matter which shows that 24 of the 40 spillover cases are private international law-civil and commercial cases.<sup>109</sup> There have also been four competition law cases involving the application of the domestic competition law rules in the Competition Act 1998, which are modelled on the primary EU competition law rules in arts 101 and 102 TFEU, with a requirement in the legislation to interpret the domestic rules consistently with the EU Courts’ interpretation of the Treaty provisions.<sup>110</sup> Again post-Brexit it will be interesting to follow the debate on any proposed reform of the domestic UK competition law rules.

### Private law relationships

This question was really set in order to seek to reflect quantitatively the important work by Leczykiewicz and Weatherill and their focus on the way EU law intervenes in private relationships.<sup>111</sup> That work focused on the extent to which EU law interfered with private autonomy and particularly interesting work by Freedland considered the encroachment of EU employment law in national private law relationships.<sup>112</sup> The table demonstrates that nearly two-thirds of cases (340, 63.7 per cent) concerned private law relationships, and as we have already witnessed, this supports the frequency of EU law cases in certain subjects, notably delict and employment law, and supports the thesis that EU law is producing significant consequences for decision-making in national courts in areas of private law traditionally governed by national law. There is a significant minority of cases not involving private law relationships, many of which are also judicial review petitions, but the important point here is that these statistics demonstrate clearly the impact of EU law not only in relation to state actors and

<sup>108</sup> See Gerry Maher and Barry Rodger, *Civil Jurisdiction in the Scottish Courts* (Edinburgh: W. Green, 2010), particularly Ch.2.

<sup>109</sup> The cross-tabulation between spillover cases and rules also shows that 18 of the 40 spillover cases involved “other” rules which is in virtually all cases a reference to a Convention, in this case the Brussels Convention. See for example *Courtaulds Clothing Brands Ltd v Knowles*, 1989 S.L.T. (Sh Ct) 84; *Mackie (t/a 197 Aerial Photography) v Askew*, 2009 S.L.T. (Sh Ct) 146.

<sup>110</sup> See B. Rayment, “The Consistency principle: Section 60 of the Competition Act 1998” in B. Rodger (ed.), *Ten Years of UK Competition Law Reform* (Dundee: Dundee University Press, 2010). See for example, *Arriva Scotland West Ltd v Glasgow Airport Ltd* [2011] CSOH 69; 2011 G.W.D. 16–379.

<sup>111</sup> *The Involvement of EU Law in Private Law Relationships* (2013).

<sup>112</sup> M. Freedland, “The Involvement of EU law in Personal Work Relations: A defining issue for European Private Law?” in *The Involvement of EU Law in Private Law Relationships* (2013).

rights exercisable vis-à-vis the state but the extent to which these EU law rights have pervaded the national legal systems and private law context.

Table 10—Private law relationships

	Frequency	Percent
Case involved private law relationships	340	63.7
Case did not involve private law relationships	194	36.3
Total	534	100.0

Private autonomy

Leczykiewicz and Weatherill’s focus on the extent to which EU law restricted private autonomy was analysed through five phenomena:

- Impact of fundamental freedoms on private parties;
- Scope of application of competition law to private agreements;
- Impact of EU secondary legislation (most obviously directives) on private parties;
- Impact of EU law general principles on private parties; and
- Liability of individuals to pay compensation for loss caused when they act in violation of EU law.

Accordingly, we decided to code cases based on the extent to which they fell within one of these or an additional “Other” category. The results are set out in Table 11. What is striking in this context is that 466 or 87.3 per cent of the EU law cases have involved the impact of EU secondary legislation on private parties, in all contexts, either the application of public or private law.

Table 11—Private autonomy

	Frequency	Percent
Impact of fundamental freedoms on private parties	34	6.4
Impact of competition law on private agreements	11	2.1
Impact of EU secondary legislation on private parties	466	87.3
Impact of EU law general principles on private parties	15	2.8
Liability of individuals to pay damages in violation of EU law	3	.6
Other	5	.9
Total	534	100.0

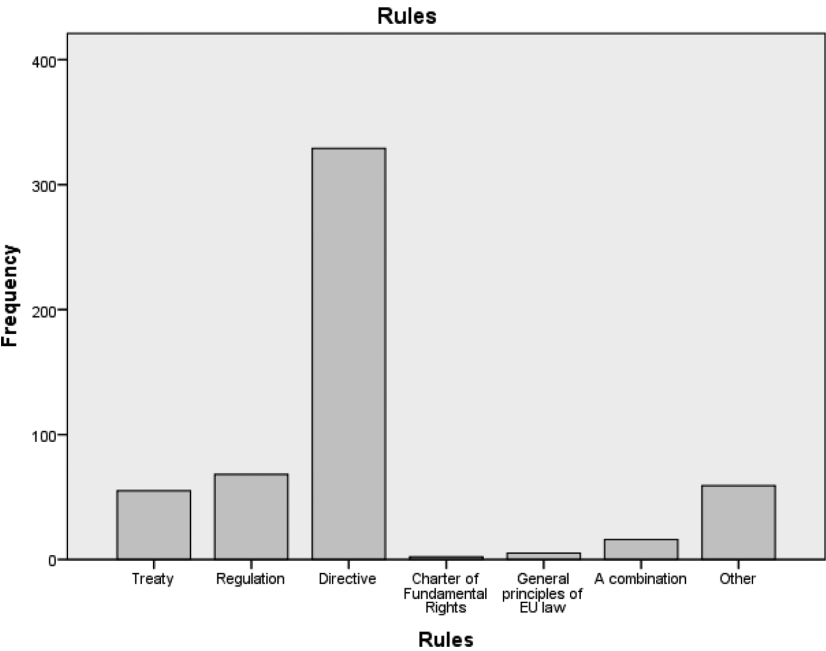
Rules

There is inevitably a close relationship between the private autonomy variable and the rules variable where we sought to analyse whether a case involved the consideration and/or application of the following types of EU law rules: Treaty; Regulation; Directive; Decision, Recommendation or soft law; Charter

Table 12—EU rules

	Frequency	Percent	Cumulative Percent
Treaty	55	10.3	10.3
Regulation	68	12.7	23.0
Directive	329	61.6	84.6
Charter of Fundamental Rights	2	.4	85.0
General principles of EU law	5	.9	86.0
A combination	16	3.0	89.0
Other	59	11.0	100.0
Total	534	100.0	

Chart 6—EU rules



of Fundamental Rights; general principles of EU law; a combination; and other. The results are set out in Table 12 and Chart 6.

Unsurprisingly notable is the focus in the case law on the application of regulations and directives in particular, with 61.6 per cent of all cases involving directives alone. These results mirror the outcomes in relation to the private autonomy variable above. There are also a considerable number of cases, 55, involving the application of the Treaty,<sup>113</sup> and the cross-tabulation with subject matter demonstrates that these are primarily free movement and competition law cases. The “Other” category of rules essentially encompasses Conventions, primarily the Brussels Convention. Cross-tabulation with the different periods shows little in the way of changing trends although cross-tabulation with judicial review identifies 22 of the 55 Treaty cases (40 per cent) as involving judicial review petitions.

### Summary and conclusions

This article has presented new and valuable data on the consideration and application of EU law by the Scottish courts since the entry of the UK into the then EEC in 1973. This is the first attempt to provide a comprehensive account of the role played by EU law in the determination of civil disputes in the Scottish legal system, including an overview of the Court of Justice’s rulings in cases which were referred from the Scottish courts. The analysis of the case law data is problematic and challenging in relation to some of the variables considered such as success/relevance. The information on the courts involved arguably tells us little, although perhaps most significant are the limited number of cases considered by the Supreme Court (or the House of Lords at all) and the paucity of Court of Justice preliminary rulings in Scottish cases. Nonetheless, there is evidence that the EU case law before the former is increasing and litigants are increasingly more likely to ask the Scottish courts to make a reference to the latter, albeit those attempts have been generally unsuccessful. The most interesting outcomes are as follows: the increasing EU case law over each period to 2015; the focus of the EU case law, with two niche public law areas and the three highest areas of EU case law involving two traditional areas of domestic private law (delict and employment law) and international private law. The relationship between the periods and the EU law subject matter before the courts is also significant. The prevalence of EU law judicial review petition proceedings is notable as is the pre-eminent position of EU Directives as the source of EU law being applied by the courts in disputes involving EU law. Clearly these broad trends need to be considered in further detail in relation to the specific cases, and also discussed and explored further with subject-matter academic and litigation experts’ help to understand the context and rationale for some of these trends in the case law. It is clear that the increase in case law is potentially explicable to some extent by three related factors: the increasing quantity and subject

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<sup>113</sup> The “combination” category frequently involved the combined consideration/application of treaty and directive provisions, particularly in employment cases.

matter coverage of EU law; greater awareness of EU law and EU law rights by parties and their legal advisers, and the increasing focus in recent years on the principle of effective judicial protection.<sup>114</sup> It is evident that EU law has had a significant and increasing impact on the civil justice system in Scotland, in both private and public law aspects. This is a timely reminder, as we consider the options post-Brexit, of the difficulties likely to be faced in any attempt to dismantle and remove EU law from the domestic context. This is indeed exemplified by the discussion on the spillover application of EU law where legislators have chosen to adopt laws applicable only in a domestic context based on an EU law, and with statutory requirements to interpret consistently with the interpretation and application of that EU model by the EU courts. In that context, the data and discussion here allows us for the first time to be aware of, observe and understand the increasingly significant role in recent years of EU law in the judicial decision-making of the Scottish courts.

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<sup>114</sup> See *Wyatt and Dashwood's European Union Law* (2011), Ch.9, "Judicial protection of Union Rights before the National Courts"; Anthony Arnall, "The principle of effective judicial protection in EU law: an unruly horse?" (2011) 36(1) E.L. Rev. 51.