Case No. UKSC 2018/0080

IN THE SUPREME COURT OF THE UNITED KINGDOM

BETWEEN

HER MAJESTY'S ATTORNEY GENERAL

-and-

HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

Applicants

-and-

THE LORD ADVOCATE

Respondent

-and-

(1) THE COUNSEL GENERAL TO THE WELSH GOVERNMENT

(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Interested Parties

CASE FOR HER MAJESTY'S ATTORNEY GENERAL AND HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

INDEX TO SUBMISSIONS

(1) INTRODUCTION

1. This Case is filed in support of a reference which has been made by Her Majesty's Attorney General and Her Majesty's Advocate General for Scotland under s.33(1) of the Scotland Act 1998 ("**SA**"; "**the reference**"). Section 33(1) permits those officers to refer to the Supreme Court the question of whether a Bill passed by the Scottish Parliament, or any provision of such a Bill, would be within its legislative competence.[1]

2. The reference has been made in respect of the entirety of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ("**the Scottish Bill**") which was passed on 21 March 2018. A summary of the provisions of the Scottish Bill is contained in the reference and is repeated in Annex A to this Case.

3. The Scottish Bill purports to make provision in relation to the continued effect in Scotland of provisions of European Union ("**EU**") law upon the withdrawal of the UK from the EU. It does so in circumstances in which the UK is in ongoing negotiations with the EU as to the terms of withdrawal, and the Parliament of the United Kingdom ("**Parliament"** or "**the UK Parliament**") is in the advanced stages of consideration of legislation covering the same subject matter: the European Union (Withdrawal) Bill ("**the UK Bill**"). When enacted, the UK Bill will legislate to cover, on a UK wide basis, the retention of the body of EU law in domestic (UK) law. It makes detailed provision, *inter alia*, for the devolution aspects of that retention. It envisages and makes provision for UK-wide legislative solutions to some of the issues arising from that retention – including conferring power on UK Ministers, under Parliament's supervision, to make subordinate legislation applying to the whole of the UK. A summary of the provisions of the UK Bill is contained in the reference and is set out in Annex C to this Case.

4. In the Policy Memorandum published on introduction of the Scottish Bill, the Scottish Government explained that the Scottish Bill was being introduced in direct response to

[1] This is the first such reference made in respect of a Bill of the Scottish Parliament. References have been made in respect of Bills of the Welsh Assembly: *In re Local Government Byelaws (Wales) Bill* [2012] UKSC 53; [2013] 1 AC 792; *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622; *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016.

the UK Bill. A summary of the statements and publications made by the Scottish Government concerning the Scottish Bill prior to and during its passage through the Scottish Parliament is contained in Annex B to this Case. The introduction of the Scottish Bill followed the rejection by the House of Commons of proposed amendments to the UK Bill which the Scottish Government had promoted and the substance of those rejected amendments was incorporated into the Scottish Bill. In large part the Scottish Bill directly replicates the provisions and powers of the UK Bill, but with key powers under its provisions being exercised by the Scottish Parliament or the Scottish Ministers. Notably, it purports to render of "*no effect*" in Scots law any subordinate legislation (both of the kind provided for by the UK Bill and that provided for under primary legislation in the future) to which the Scottish Ministers have not consented (s.17).

5. Upon introduction of the Scottish Bill, the Presiding Officer made a detailed reasoned statement explaining that he had concluded that certain provisions of the Scottish Bill (those whose legal effect would be postponed by s.1(2)) would not be within legislative competence. He took the view that the purported competence deferral mechanisms in the Scottish Bill could not have the effect of altering how competence is to be assessed.

6. At the same time as the reference made in relation to the Scottish Bill, the Attorney General also made a reference to the Court under s.112(1) of the Government of Wales Act 2006 ("**GOWA**") in respect of the Law Derived from the European Union (Wales) Bill ("**the Welsh Bill**"). The reference in relation to the Welsh Bill has been withdrawn following an agreement reached with the Welsh Government concerning the terms of the UK Bill, as a result of which the Welsh Bill is to be repealed.

(2) THE JURISDICTION OF THE COURT

7. The Court's jurisdiction arises under s.33(1) SA, which provides that the Advocate General, the Lord Advocate or the Attorney General may "*refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision*". On such a reference, it falls to the Court to assess the question of competence at the point the Bill is passed and before it becomes law.

8. A Bill does not become an Act of the Scottish Parliament ("**an ASP**") until it receives Royal Assent: s.28(2). If a s.33 reference is made, the Bill cannot be submitted for Royal Assent until the reference has been decided or otherwise disposed of by the Court: s.32(2)(b).

9. In *Re Local Government Byelaws (Wales) Bill* [2012] UKSC 53; [2013] 1 AC 792, §§79-80, Lord Hope gave general guidance as to the approach the Court should take in determining whether a Bill of the National Assembly for Wales is within its legislative competence. That approach is equally applicable in a reference of a Bill passed by the Scottish Parliament under s.33 SA:

> *"79. First, the question whether a Bill of the Assembly is within its legislative competence is a question of law which, if the issue is referred to it, the court must decide. The judicial function in this regard has been carefully structured. It is not for the judges to say whether legislation on any particular issue is better made by the Assembly or by the Parliament of the United Kingdom at Westminster. How that issue is to be determined has already been addressed by the United Kingdom Parliament. It must be determined according to the particular rules that section 108 and Schedule 7 have laid down. Those rules, just like any other rules, have to be interpreted. It is for the court to say what the rules mean and how, in a case such as this, they must be applied in order to resolve the issue whether the measure in question was within competence.*
>
> *80. Second, the question whether the Bill is within competence must be determined simply by examining the provisions by which the scheme of devolution has been laid out. That is not to say that this will always be a simple exercise. But, as Lord Walker of Gestingthorpe JSC observed in Martin v Most 2010 SC (UKSC) 40, para 44 when discussing the system of devolution for Scotland, the task of the United Kingdom Parliament in relation to Wales was to define the legislative competence of the Assembly while itself continuing as the sovereign legislature of the United Kingdom. It had to define, necessarily in fairly general and abstract terms, permitted or prohibited areas of legislative activity. The aim was to achieve a constitutional settlement, the terms of which the 2006 Act was designed to set out. Reference was made in the course of the argument in the present case to the fact that the 2006 Act was a constitutional enactment. It was, of course, an Act of great constitutional significance, and its significance has been enhanced by the coming into operation of Schedule 7. But I do not think that this description, in itself, can be taken to be a guide to its interpretation. The rules to which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language, and it is proper to have regard to it if help is needed as to what the words mean."*

(3) THE LEGISLATIVE COMPETENCE OF THE SCOTTISH PARLIAMENT

The competence restrictions in the SA

10. Section 28(1) SA provides: "*Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.*" Section 28(7) provides: "*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland*".

11. The restrictions on the legislative competence of the Scottish Parliament are principally set out in s.29 SA. Section 29(1) provides that an ASP is "*not law so far as any provision of the Act is outside the legislative competence of the Parliament*".

12. Section 29(2) provides, in relevant part, that a provision is outside that competence so far as:

    (1) it "*relates to reserved matters*" (s.29(2)(b)),

    (2) it "*is in breach of the restrictions in Schedule 4*" (s.29(2)(c)), or

    (3) it "*is incompatible with […] EU law*" (s.29(2)(d)).

13. Section 29(3) provides that the question of whether a provision of an ASP "*relates to*" a reserved matter "*is to be determined … by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances*".

14. Section 30(1) introduces Schedule 5 to the SA, "*which defines reserved matters*". §1(c) of Part 1 of Schedule 5 provides that "*the Parliament of the United Kingdom*" is a reserved matter. §7(1) of Part 1 of Schedule 5 provides that international relations, "*including relations with territories outside the United Kingdom, the European Union (and their institutions)*", is a reserved matter. §7(2) provides that that reservation does not include "*observing and implementing … obligations under EU law*".

15. Schedule 4 to the SA specifies various enactments and rules of law which are protected from modification by an ASP. §1(2)(c) of Schedule 4 specifies certain provisions of the

European Communities Act 1972 ("**ECA**") which cannot be modified, including s.2(1). §2(1) of Schedule 4 provides that an ASP "*cannot modify … the law on reserved matters*", which includes "*any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter*" (§2(2)(b)). §4(1) of Schedule 4 provides that an ASP "*cannot modify*" the SA itself. §4(2) provides an exception from that prohibition for specific provisions of the SA. §7(1)(b) of Schedule 4 provides an exception to the various prohibitions in Part 1 of the Schedule, allowing the Scottish Parliament to repeal "*any spent enactment*".

16. The specific competence restrictions in s.29 cannot be circumvented: "*a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law*" (*Bribery Commissioner v Ranasinghe* [1965] AC 172, PC, 197). This principle was expressed in respect of the Scottish Parliament by the Lord President (Lord Rodger) in *Whaley v Lord Watson* 2000 SC 340 at pp.348-349 speaking of the "*… fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.*"

Other restrictions on competence

17. Section 29 SA is not exhaustive of the grounds of review of an ASP. The legislative competence of the Scottish Parliament may also be reviewed in accordance with the supervisory jurisdiction of the courts at common law, including by reference to the rule of law and fundamental values such as the principles of legality and legal certainty: *AXA General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122 at §47 (Lord Hope) and §136 and 149-153 (Lord Reed). There is a category of "*constitutional review*" of legislation in *"exceptional circumstances"* on grounds other than those specified in s.29(2) SA, including where legislation offends against "*fundamental rights or the rule of law*" (Lord Reed in *AXA* at §§149-150).

The assessment of legislative competence

18. The SA prescribes a series of controls on the limited legislative competence afforded to the Scottish Parliament. In particular, it requires – in a series of steps – that the competence of the Scottish Parliament to make law is to be assessed at the time that the relevant Bill is introduced and then passed:

    (1) The member who introduces the Bill into the Parliament must at or before that time state that in their view the provisions of the Bill would be within competence: s.31(1).

    (2) On or before the introduction of the Bill, the Presiding Officer must decide whether the provisions of the Bill would be within competence and state that decision: s.31(2).

    (3) The UK or Scottish Law Officers may refer to the Supreme Court the question of whether any of the provisions of the Bill would be within competence, in the four week period between the Scottish Parliament passing the Bill and it being submitted for Royal Assent: s.33.

    (4) An Act or provision of any Act of the Scottish Parliament is not law so far as it is outside competence: s.29(1).

Principles of interpretation under the Scotland Act

General Principles

19. The principles of interpretation to be applied in determining whether a Bill, or a provision of a Bill, passed by the Scottish Parliament is within its legislative competence were set out by Lord Hope in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153.

20. First, ordinary principles of interpretation apply to the SA: *Imperial Tobacco,* §§10—15. There is no different approach to the interpretation of the devolution statutes from that

applicable to all other statutes. Parliament is to be taken to have given effect to the policy of devolution only to the extent stated in the SA, and no further.

21. Secondly, rules laid down must be interpreted as having been intended to create a system for the exercise of legislative power by the Scottish Parliament that is coherent, stable and workable, both for Scotland and for the UK as a whole. That involves adopting an approach to the meaning of a statute that is constant and predictable: *Imperial Tobacco*, §14.

22. Thirdly, the purpose of the SA has informed the statutory language. Its concern must be taken to have been that the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that Parliament did not intend to devolve to it: *Imperial Tobacco*, §15.

23. Fourthly, there is no presumption that Bills passed by the Scottish Parliament are within competence. The fact that s.29 SA provides a mechanism for determining whether a provision of an ASP is outside, rather than inside, competence does not create a presumption in favour of competence: *Imperial Tobacco*, §15.

The "relates to" test

24. The correct approach to the application of the test under s.29(2)(b) and (3) SA, in order to determine whether a provision of an ASP "*relates to*" a reserved matter, is now well established (see *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29 at §§29-32):

    (1) The phrase "*relates to*" indicates "*more than a loose or consequential connection*": *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40 at §49 *per* Lord Walker.

    (2) Whether a provision relates to a reserved matter is determined by reference to the purpose of the provision in question, having regard (among other things) to its effect in all the circumstances: s.29(3) SA.

(3) The purpose of a provision is "*not merely […] what can be discerned from an objective consideration of the effect of the terms of the provision*": *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 at §50.

(4) The purpose of a provision is not the same thing as the long-term policy aim behind it. For example, in *Imperial Tobacco* the reason why the Scottish Parliament enacted a tobacco display ban "*could be described in the broadest terms as being to promote public health*" (§22); but the purpose of the provision, as identified by the Court, was "*to enable the Scottish Ministers to take steps which might render tobacco products less visible to potential consumers, and thereby achieve a reduction in sales*" (§39).

(5) The purpose of a provision may be found in pre-legislative materials, including the Scottish Government's Policy Memorandum (Lord Hope, *Martin* (§25)), or it may be "*clear from its context*" (*Imperial Tobacco*, §16). In the present case, there was no process of pre-legislative consideration or consultation before the Scottish Bill was introduced, and the Court should place considerable weight on the Policy Memorandum.

(6) The Court must address its attention to "*the rules that the 1998 Act lays down*", not to how problems in different federal jurisdictions have been handled (*Imperial Tobacco*, §13).

(7) The analysis of the application of the test is to be structured by means of three questions (*Imperial Tobacco*, §26):

(i) What is the scope of the subject matter of the relevant matter reserved by Schedule 5?
(ii) What is the purpose of the provision under challenge?
(iii) By reference to that purpose, does the provision under challenge relate to the subject matter?

The meaning of "modify"

25. Several of the provisions defining the legislative competence of the Scottish Parliament provide that an ASP "*cannot modify*" specified provisions or enactments. The only guidance given by the SA itself to the meaning of "*modify*" is in the general interpretation section of the SA (s.126(1)): "*modify*" includes "*amend or repeal*". The correct understanding of the term "*modify*", applicable in all the contexts in which it is used in the SA for the purpose of defining different limitations on the legislative competence of the Scottish Parliament, is to be found in the analysis contained in Lord Hope's judgment in *Imperial Tobacco*.

26. Lord Hope explained that "*modify*" does not require a direct textual amendment of a provision. He considered that the provisions under challenge in that case (sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010) could not be said to modify the Tobacco for Oral Use (Safety) Regulations 1992 or the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, "*at all*", because they did not "*seek to amend or otherwise affect anything that is set out in those Regulations*" (emphasis added). A provision which, without operating directly on the text of the regulations, affects the content or effect of them can properly be said to modify them in the sense prohibited by the SA. The question, rather than whether there is a direct textual modification of a provision, is therefore how the content or effect of the provision said to be modified will be affected by the impugned ASP.

(4) THE GROUNDS FOR THE REFERENCE

(A) The Scottish Bill as a Whole

27. As noted above, §7(1) of Part 1 of Schedule 5 provides that international relations, "*including relations with territories outside the United Kingdom, the European Union (and their institutions)*", is a reserved matter. §7(2) provides that that reservation does not include "*observing and implementing … obligations under EU law*". The reservation under §7(1) is a broad one, reflecting the central prerogative of the UK Government to conduct foreign affairs and manage the UK's relations with other states and international organisations. §7(1) also reflects that is for the UK Parliament to control

or legislate to affect that prerogative. The breadth of what is reserved by §7(1) is apparent from the existence of the §7(2) exception. §7(2) demonstrates that it was necessary to create a specific exclusion in respect of the observation and implementation of international obligations as this would otherwise fall within the broad terms of §7(1).

28. §7 of Part 1 of Schedule 5 recognises an important aspect of the constitutional framework underpinning the devolution settlement, namely that that settlement, and the devolution of power to the Scottish Parliament and Government, was founded upon the UK being a member of, and continuing to be a member of, the EU.

29. The scope of the reserved matter in §7(1) of Part 1 of Schedule 5 extends to all matters of UK policy in relations with the EU. Thus, membership and relations with the EU was a matter reserved to Parliament.

30. The Scottish Bill establishes a new and far-reaching legal framework in Scotland derived from, and relating to, the EU and EU law. It legislates as if the ECA no longer applied, for a context in which there is a new relationship between the UK and the EU, but without any understanding of what the nature of that new relationship is to be or how it is to be given effect in domestic law. The new architecture the Scottish Bill purports to create in ss.2-5 in particular is that of a new and substantial body of Scots law (as opposed to EU law) and power to fix and modify that body of law. The Scottish Bill purports to adopt powers to continue to give effect to EU law (s.13), requires the Scottish Ministers to have regard to EU law in certain areas after withdrawal including subsequent changes in that law (see s.13B), and to restrict the ability of UK Ministers to legislate (s.17). It is an ASP of unparalleled scope and seeks to create a broad framework for current and future law derived from the EU, at a time when, and in a context where, the future relationship of the UK and the EU remains under negotiation and in transition.

31. The *ratio* of *Miller* was that withdrawal from the EU is a matter for the UK Parliament. It could not be effected by the Executive alone and "*the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union*" (§130). As *Miller* holds, the devolved legislatures have no competence to withdraw from the

EU because that is part of the reserved matter of relations with the EU. It is submitted that legislating for the effects of withdrawal in the far-reaching and highly significant manner of the Scottish Bill is plainly sufficiently connected to that withdrawal to 'relate to' it in the legally relevant, and prohibited, sense. As a matter of ordinary language, the Scottish Bill relates to relations with the EU in more than a "*loose or consequential*" sense (as per Lord Walker in *Martin*, §49). The express stated purpose of the Scottish Bill, in s.1(1)(a) and the long title, is "*in connection with the prospective withdrawal of the United Kingdom from the EU*". Legislating for the effect of withdrawal in the manner that the Scottish Bill seeks to do and during the process of negotiations resulting from that withdrawal is inextricably bound up with the issue of withdrawal itself.

32. The exception in §7(2) is simply for "*observing and implementing… obligations under EU law*". Two initial points may be made on the plain language of that exception:

(1) It plainly did not cede competence to the Scottish Parliament or Ministers to legislate as it saw fit in the event of the UK leaving the EU. It is dealing with transposition of parts of EU law whilst the UK is still a member. The Scottish Government has made no suggestion that the Scottish Bill is the observation or implementation of obligations under EU law: plainly it is not.

(2) Its coverage did not even extend to all aspects of EU law – including specifically EU law that did not need transposition. That is of obvious interest in the present context because the UK Bill (and the competing Scottish Bill) makes provision for the 'return' of all EU law.

33. §7(2) is required because implementing and observing EU law would, as a matter of ordinary language and on the *Martin v Most* test, otherwise "*relate to*" relations with the EU. Even when implementing EU law, the SA prescribes a series of controls on legislative (s.29(2)(d)) and executive (s.57(2)) competence by reference to EU law. As the Court held in *Miller*, "*Parliament proceeded on the assumption that the United Kingdom would be a member of the European Union*" (§129) and, by extension, that the ECA would continue to apply, and to underpin the devolution settlement. That is the reason for

the EU law competence restrictions upon the Scottish Parliament and the Scottish Ministers.

34. The competence of the Scottish Parliament (and Government) is thus restricted to the observation and implementation of EU law. As regards other EU matters, including those of legal and constitutional policy, competence was reserved by §7(1): for example, negotiating and agreeing EU treaties, participating in the EU legislative process as a Member State within the Council (a matter for the "*UK government*": *Miller*, at §61 (emphasis added)), and negotiating with and making representations to the Commission.

35. The distinction may be emphasised in a context in which the Scottish Parliament has the greatest degree of competence: the implementation of EU directives. §7(2) gives the Scottish Parliament the competence to legislate to implement a directive in an area which is otherwise not reserved, and it may do so in a different manner to other parts of the UK. But the Scottish Parliament's implementation is constrained by the substantive content of the directive itself, which has been fixed through the EU legislative process, in which the UK Government participated and which falls within the §7(1) international relations reservation. Yet the effect of the Scottish Bill is to purport to confer upon the Scottish institutions the power to determine, as a matter of legislative policy, what the substantive content of EU-derived Scots law should be after withdrawal, trespassing across the §7 divide.

36. Moreover, it is entirely improbable to suppose that, in enacting the SA, Parliament decided that the Scottish Parliament should be competent to legislate as it saw fit in relation to a UK withdrawal from the EU, still less that the Scottish Parliament be entitled to legislate for a novel constitutional architecture during the withdrawal process and associated negotiations with the EU. There is nothing in the provisions of the SA to support any such intention. That is unsurprising given that the withdrawal of the UK from the EU is a matter of the greatest significance across and for the entirety of the UK. The approach to withdrawal is a matter of constitutional UK-wide policy. It requires legislative policy judgments of commensurate significance across a wide array of issues; and requires coherent legislative treatment across the UK.

37. Legislating for the effects of withdrawal from the EU is clearly a matter in which the UK as a whole has an interest *par excellence*. As the Supreme Court noted in *Miller*, "*an inevitable consequence of withdrawing from the EU Treaties will be the need for a large amount of domestic legislation*" which will impose a "*burden*" on Parliament, and will amount to a "*major constitutional change*": at §100. That exercise will involve important questions of policy as to how to deal with the removal of "*a source of UK law*" (emphasis added): *Miller*, at §60. It involves important questions of policy as to how to replace the regulation of the single market within the EU for the free movement of goods and services in a manner which appropriately ensures the continuation of the single market within the UK for the free movement of goods and services.

38. The importance of adopting a consistent approach to the effect of withdrawal across the UK as a whole is underlined both by the existence and detail of the UK Bill, and the close but not exact parallels adopted in the Scottish Bill. Whatever the final terms of the UK Bill, it is unquestionable that Parliament will legislate for the effects of withdrawal precisely because it is a matter of major constitutional importance in which the UK as a whole has an interest. In simple terms: legislation addressing the effect of withdrawal from the EU, in particular making provision for the continued application of established law in areas currently within the competence of the EU, is a matter for Parliament and not the devolved legislatures.

39. That is evidently the view of Parliament. It is not merely proposing to legislate on a UK-wide basis to deal with the initial stages of the effects of withdrawal. It is proposing to legislate specifically to deal with the devolution aspects of those stages, and in so proposing, the UK Bill itself has signalled that it, itself, will be a protected enactment under the SA.

40. Thus, how Parliament intended that legislating for the effects of withdrawal from the EU ought to be characterised engages, and can be answered by, the "*common theme*" of the Schedule 5 reservations. Lord Hope explained in *Imperial Tobacco* at §29 that the theme is "*that matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the UK Parliament at Westminster. They include matters which are affected by its treaty obligations and matters that are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services*". This

observation was repeated with approval by the Supreme Court in *Christian Institute* at §28. This "*common theme*" of the Schedule 5 reservations is further underlined by the prohibition on an ASP modifying Articles 4 and 6 of the Union with Scotland Act 1706 and the Union with England Act 1707 "*so far as they relate to freedom of trade*": §1(2)(a) of Part 1 of Schedule 4 SA. The prohibition on an ASP modifying the ECA in §1(2)(c) of Part 1 of Schedule 4 is also consistent with the same "*common theme*", a particularly relevant consideration when assessing the effect of those provisions of the Scottish Bill which are incompatible with EU law and which, in turn, would modify the ECA.

41. There is a clear link between those decisions of constitutional, UK-wide policy and the ongoing international relations between the UK and the EU and its institutions after exit. Current and future negotiations between the UK and the EU clearly fall within the reserved matter of international relations. Those negotiations are intended to give rise to obligations on the UK to give particular effect to aspects of what is currently EU law in domestic law. In the Scottish Bill the Scottish Parliament makes extensive provision for the place of what is currently EU law in Scots law, but without knowing what obligations the negotiations may give rise to. The Scottish Bill therefore departs from implementing and observing international obligations. It is a source of instability and uncertainty, both inside and outside the United Kingdom. It proceeds on the Scottish Parliament's speculation as to the progress and outcome of the negotiations and relates, in purpose and effect, to the UK's relationship with the EU.

42. There is a further sense in which the Scottish Bill relates to the UK's international relations with the EU: the UK Government is negotiating with the EU institutions concerning the withdrawal of the UK, the extent and terms of any transitional arrangements and the nature and terms of a future relationship with the EU. Those negotiations, at the very least, may give rise to obligations on the UK to give some degree of effect in domestic law to some aspects of EU law, be they existing Treaty requirements or *sui generis* agreements. The Scottish Bill has been passed without knowledge of the outcome of those negotiations and pre-empts them. The effect of what the Scottish Bill does is to make provision for the future relationship with the EU and EU law when that relationship is under negotiation. That is inconsistent with §7(1) and could serve to undermine the credibility of the UK's negotiating and implementation strategy in the eyes of the EU.

43. The Scottish Bill also proceeds on the plainly incorrect premise that Parliament intended by the SA to devolve to the Scottish Parliament competence to legislate in relation to matters currently governed by EU law (other than to implement EU law obligations). When Parliament came to enact the SA, the ECA was already in operation as "*a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions*" (*Miller*, §68). Parliament could not have intended in the SA to transfer to the Scottish Parliament competence in those areas for which, through the ECA and the treaties to which it gave effect, exclusive competence had already been transferred to the EU or in those areas where competence was shared with the EU and where EU law had already occupied the field. The operation of the principle of the supremacy of EU law meant that the Scottish Parliament could not lawfully legislate in those areas: Parliament would not have transferred to the Scottish Parliament a competence the UK Parliament could not exercise compatibly with EU law.

44. The effect of the UK leaving the EU and the repeal of the ECA will be to return to the sovereign Parliament the areas of competence which had been, under the treaties, assigned to the province of the EU institutions. It is accordingly for Parliament, and only for Parliament, to determine which of those areas of competence are appropriate in whole or in part for devolution, and the manner in which such devolution is to be achieved. The UK Bill seeks to make provision in this respect: clause 15 of the current version of the UK Bill (see Annex C) restricts the competence of the devolved legislatures to modify retained EU law by prohibiting any modification that is of a description specified in regulations made by a Minister of the Crown.

45. It is therefore submitted that the provisions of the Scottish Bill are fundamentally inconsistent with the underpinning and provisions of §7 of Schedule 5 and with Lord Hope's "*common theme*" of the reservations to Scottish Parliamentary competence set out in the SA.

46. The inconsistency with the division of constitutional responsibilities in an area of UK-wide policy and law-making is demonstrated in a practical sense by the process followed by the Scottish Parliament as well as by the contents of the Scottish Bill:

(1) The Scottish Bill was introduced in the full knowledge that Parliament was in the advanced stages of considering UK-wide legislation on precisely the same subject matter – how to legislate for the effects of withdrawal. The UK Bill had been introduced into the House of Commons some nine months earlier and had completed significant parts of its progress through Parliament. It was also plain from the face of the UK Bill that Parliament intended specifically to address devolution aspects of its subject matter – making specific and detailed provision for the powers it was and was not prepared to devolve in relation to retained EU law. The UK Bill was, and is, to be a UK-wide Bill.

(2) The position set out explicitly by the Scottish Government in the Policy Memorandum relating to the Scottish Bill makes clear that the Scottish Bill was introduced and passed as a negotiating tactic, to strengthen the negotiating position of the Scottish Government in respect of the UK Bill, following the rejection of its proposed amendments to the devolution provisions of the UK Bill by the House of Commons (see Annex B). Further, the Scottish Government's own expressed position is that the Scottish Bill is not the preferable solution to making provision for withdrawal from the EU and will be repealed pursuant to the power in s.37 of the Scottish Bill if the Scottish Government achieves its negotiating objectives in relation to the UK Bill. But that position recognises that legislating for the effects of withdrawal from the EU is a matter which calls for UK-wide legislation and which requires the effect of withdrawal upon the devolution settlements to be addressed within that UK-wide legislation.

(3) The legislative processes in the Scottish Parliament are being used to seek to pre-empt the UK Bill in circumstances in which the realities are undisputed: there will be a UK Act on this subject-matter, and indeed there will be subsequent UK legislation making further provision as the negotiations develop. If the UK Bill does not react specifically to deal with the now competing legislation from the Scottish Parliament, the result will be two legislative regimes, to different effects, creating confusion and ambiguity; and the potential for long and complex dispute as to the interface between them. That can only impair and not improve the government of the UK as a whole. As a result, and contrary to §137 of *Miller*,

there has indeed been "*duplication of effort*", there is disharmony between legislatures and there is challenge to the *vires* of the Scottish Parliament to pass a Bill of this type.

(4) As for its content, the Scottish Bill assumes or confers powers on the Scottish Parliament and/or the Scottish Ministers (and purportedly exclusive powers at that) over precisely the same subject matter as is dealt with in clause 15 of the UK Bill, the effect of which – together with supplementary provisions in Schedule 2 to the UK Bill - would be to retain restrictions on the Scottish Parliament's ability to make the provisions contained in the Scottish Bill by amending its legislative competence under s.29 SA.

(5) Section 17 of the Scottish Bill is a specific and clear example of the inconsistency between the Scottish and UK Bills. It purports to nullify the legal effect in Scotland of regulations made by Ministers of the UK Government pursuant to clauses 9 or 11 of the UK Bill and pursuant to any future UK statute which confers powers to amend retained EU law by subordinate legislation.

47. The Scottish Bill goes well beyond the limited role permitted by the exception in §7(2) of Schedule 5. It purports to take decisions of constitutional policy which are contrary to the Parliamentary intent expressed in the structure of the reservations in Schedule 5, contrary to the division of principle within §7, which are inconsistent with the past transfer of competence from Westminster to the EU, and which relate to the reserved matters of the withdrawal from the EU and the ongoing international negotiations and relations with the EU and its institutions. Those matters are demonstrated by both the processes leading up to the Scottish Bill and its outright inconsistency, both in premise and detail, with the UK Bill. By virtue of s.29(2)(b), the Scottish Bill as a whole is accordingly outside of competence.

(B) Section 17 of the Scottish Bill

48. Section 17 makes no positive provision for the content of Scots law. It imposes a requirement in relation to certain subordinate legislation to be made by a Minister of

the Crown. Unless the consent of the Scottish Ministers to that legislation is obtained in advance, the subordinate legislation is "*of no effect*".

49. Section 17 thereby purports to have a constitutionally extraordinary effect. Legislation made by a Minister of the Crown in a manner decided upon by Parliament will be of no effect unless a precondition purportedly imposed by the Scottish Parliament is satisfied. Its premise is that the Scottish Parliament have a free hand to legislate in these areas; and are entitled in effect to overrule the effect of whatever powers Parliament might choose to confer on UK Ministers.

(a) Prohibited modification of ss.28(7) and 63(1) SA and the law on reserved matters

50. The general rule in §4(1) of Schedule 4 SA is that an ASP "*cannot modify*" the SA. §§4(2) to (5) except specific provisions from that rule. Neither s.28(7) nor s.63 is excepted by §§4(2) to (5). They are accordingly provisions of the SA which are protected from modification by an ASP.

51. Section 28(1) of the SA provides: "*Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.*" But s.28(7) provides: "*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*"

52. Section 28(7) is no more than a reiteration of the trite rule of law that Parliament is sovereign. That rule of law is plainly part of "*the law on reserved matters*" for the purposes of §2(a) of Schedule 4, because it is a rule of law which relates to the reserved matter of Parliament. Section 17 is a naked attempt to limit the continuing effect of, and thus modify, the law on reserved matters in the form of that rule of law by restricting the power of the UK Parliament to legislate for Scotland, including by permitting UK Ministers to make secondary legislation to do so. It is inconsistent with the power of the sovereign Parliament to require that pre-conditions must be met when it legislates to provide powers which affect Scotland. It is inconsistent with the power of the sovereign Parliament for any provision enacted by a devolved legislature to require Parliament to legislate in a particular manner or form (such as requiring it expressly to depart from the rule purportedly enacted in s.17 of the Scottish Bill). Such a limitation on Parliament's freedom to legislate in whatever terms it chooses is

therefore both a modification of the law on reserved matters and a modification of s28(7), contrary to §§2(1) and 4(1) of Schedule 4.

53. Further, Parliament has recognised in s.63 SA that it will sometimes be appropriate for functions of a Minister of the Crown which are exercised in relation to Scotland to be made subject to the requirement of consent from the Scottish Ministers. Section 63 provides:

> "*(1) Her Majesty may by Order in Council provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable –*
>
> *…*
>
> *(c) by the Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers.*"

54. Although s.63 is headed "*Power to transfer functions*", an Order in Council made under s.63(1)(c) does not transfer the function of the Minister of the Crown to the Scottish Ministers; rather it permits the creation of a consent hurdle before the Minister of the Crown may exercise that function. But the designation of such functions as subject to prior Scottish Ministerial agreement is not a matter for the Scottish Parliament. It is ascribed to Her Majesty by Order in Council, and it is a requirement that the Order be laid before and approved by resolution of both Houses of Parliament, and by the Scottish Parliament: see s.115 and Schedule 7 to the SA (s.63 being a Type A procedure).

55. Section 63 is a clear statutory recognition that it is for the UK Government and the UK Parliament, with a role for the Scottish Parliament (but not Scottish Ministers), to decide what limits are to be placed on the functions of Ministers of the Crown. This is consistent with s.53 SA, under which Parliament transferred to the Scottish Ministers functions of Ministers of the Crown which are exercised under the prerogative, are conferred on a Minister of the Crown by a prerogative instrument, or had been conferred on a Minister of the Crown by a "*pre-commencement enactment*", i.e. under legislation passed or made (or to be treated, by virtue of an Act of Parliament, as passed or made) before the SA: s.53(2)-(3). The combined effect of s.53 and s.63 is that functions of Ministers of the Crown within Scottish devolved competence created under the authority of primary legislation were allocated by Parliament to Scottish Ministers if they pre-dated the SA, but made subject to the s.63 procedure if their

creation post-dated the SA. This is further reinforced by the power in s.106(1) SA to make subordinate legislation facilitating the exercise of ss.53 and 63 powers, which are by s.115 and Schedule 7 to the SA, a matter for oversight by the UK Parliament alone (because the s.106 power is governed by the Type G procedure).

56. Section 17 ignores and circumvents these restrictions, which the Scottish Parliament is given no power in the SA to amend or modify. Section 17 expressly applies only to subordinate legislation made under an enactment of the UK Parliament after s.17 comes into force: there is no room for the application of the pre-commencement transfer rule in s.53(2)(c). It removes the protection that the UK Parliament carefully provided through the inclusion of an affirmative resolution procedure within both Houses before any powers of UK Ministers are made subject to the consent of the Scottish Ministers. Section 17 therefore enacts a procedure which is fundamentally inconsistent with the statutory scheme of the SA. Had Parliament intended in the SA that the Scottish Parliament would have competence to create its own veto power, it is hard to see why the SA would have framed ss.53 and 63 in the way that it did. Where Parliament has expressly provided for a mechanism by which UK Ministerial functions could be rendered subject to the consent of the Scottish Ministers, and has prohibited the Scottish Parliament from having competence to amend or modify that mechanism (in §4(1) of Schedule 4), the Scottish Parliament cannot have the competence to enact a provision having the same substantive effect but without the restrictions and protections Parliament provided for.

(b) Relating to the reserved matter of the Parliament of the United Kingdom

57. Section 17 of the Scottish Bill is also outside the legislative competence of the Scottish Parliament because it "*relates to*" the reserved matter of "*the Parliament of the United Kingdom*" set out in §1(c) of Schedule 5.

58. The Notes on Clauses for the Scotland Bill indicate that that reserved matter was intended to be of broad scope. It encompasses all of Parliament's "*powers, memberships and privileges*". No aspect of those powers, memberships and privileges is the subject of any of the exceptions under §§2-5 of Schedule 5.

59. As far as the purpose of s.17 of the Scottish Bill is concerned, it is clear that the Scottish Government's policy objective behind s.17 is to achieve what it has thus far failed to achieve in the UK parliamentary process. It has been made clear that s.17 is a response to the refusal of Parliament to pass the amendments proposed by Scottish National Party MPs at the behest of the Scottish Government to insert in clauses 7-9 of the UK Bill a requirement that the consent of the Scottish Government be obtained to subordinate legislation affecting matters devolved to Scotland (see §§68-69 of the Policy Memorandum). The effect of s.17 would be to give the Scottish Ministers power to prevent subordinate legislation made by a Minister of the Crown from having effect in Scotland by withholding their consent to that legislation.

60. The combination of the policy objective behind, and the effect of, s.17 makes clear that its "*purpose*" is to make the exercise by a Minister of the Crown of a power conferred by Parliament, in legislation enacted after the Scottish Bill, subject to a veto by the Scottish Ministers, which Parliament itself has omitted or refused to grant, either generally or by reference to the specific power under exercise. By reference to that purpose, it is clear that s.17 "*relates to*" the reserved matter. It seeks to impose on a power to be granted by the sovereign Parliament a limitation that Parliament itself has chosen, in the exercise of its legislative powers, not to impose. The Scottish Parliament is purporting to constrain a power to be granted by Parliament in a materially unconstrained form.

(C) Section 33 of and schedule 1 to the Scottish Bill

61. Section 33 of and schedule 1 to the Scottish Bill are outside the competence of the Scottish Parliament because they purport to modify those provisions of the SA which they specify and are accordingly in breach of the restriction in §4(1) of Schedule 4, falling under s.29(2)(c) SA.

62. The general rule in §4(1) of Schedule 4 is that an ASP "*cannot modify*" the SA. §4(2)-(5) except specific provisions from that rule. Of the provisions which s.33 and schedule 1 would repeal, only ss.12(4)(a) and 82(1) SA (repealed by §§3 and 10, respectively, of schedule 1) are covered by an exception (in §4(2)). The remainder are provisions of the

SA which are protected from modification by an ASP. A repeal is, obviously, a modification (s.126(1) SA).

63. The fundamental objection to the steps taken in s.33 of, and schedule 1 to, the Scottish Bill is a simple one: it is for Parliament to amend the terms of the devolution settlement in the SA and not for the Scottish Parliament to do so by way of an ASP. That is the very purpose of §4(1) of Schedule 4. It is an obvious recognition of the subordinate role of the Scottish Parliament *vis-à-vis* the sovereign Parliament (as *per* Lord Reed in *AXA*). The Scottish Parliament has carefully and deliberately not been given the power unilaterally to determine or amend its own competence.

64. The approach adopted in the Scottish Bill does exactly that, and it does so in circumstances where – as set out above – the UK Bill is to make precisely the sorts of changes to the devolution settlement that s.33 and schedule 1 set out. The political motivation for that approach has been made clear but the political position of the Scottish Government cannot affect the reservations in Schedule 4 SA which are sought to be amended: it is not for the Scottish Parliament unilaterally to alter the limits of its competence set in primary legislation.

65. The provisions that would be repealed by s.33 and schedule 1 fall into two broad categories: (i) references to "*EU law*" and (ii) provisions of the SA which operate by reference to EU law and are only capable of having any practical effect while the ECA is in force, such as s.34 SA (repealed by §5 of schedule 1), which provides for references to the Court of Justice of the European Union in the context of a s.33 reference, or parts of s.12(4)(a) SA (repealed by §3 of schedule 1), which enables the Scottish Ministers to make provision about European Parliamentary elections.

66. The references in the SA to "*EU law*" which s.33 and schedule 1 would repeal take their meaning from the definition of that term contained in s.126(9) SA and s.1(4) of the Scottish Bill:

> *"(a) all those rights, power, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and*

(b) all those remedies and procedures from time to time provided for by or under the EU Treaties".

67. This category includes amendments to the competence restrictions on the Scottish Parliament in s.29 (s.33(1)), on Scottish Ministers in s.57 (s.33(2) and §7 of schedule 1) and in the Schedule 4 list of protected enactments (§15 of schedule 1).

68. The modifications made by s.33 and Schedule 1 are not saved by §7(1)(b) of Schedule 4 to the SA, because the provisions which they repeal are not "*spent enactments*".

69. In the absence of any statutory definition of a "*spent enactment*", the definition given in the *Shorter Oxford Dictionary* provides a good indication of its meaning: a provision is "*spent*" if it is "*consumed, exhausted, used up completely*". But the key principle that the Scottish Parliament cannot determine its own competence (see: s.28(7); *AXA*; *Miller*; *Ranasinghe*) means that this Court should be very slow indeed to conclude that a provision of the SA which defines the limits of the Scottish Parliament's competence is or will be "*spent*" such that the Scottish Parliament itself could remove that limit.

70. For so long as the ECA itself is not repealed, it is plain from the definition of "*EU law*" that the references to "*EU law*" are not "*spent*". That is itself implicit in s.33(3) of the Scottish Bill, which refers to the provisions being repealed as "*spent*" provisions, only "*as a consequence of the UK's withdrawal from the EU*". Indeed, although the references to "*EU law*" will on one view inevitably (absent any further legislative provision) be deprived of meaning by virtue of repeal of the ECA on withdrawal from the EU, that is not the position currently. Indeed, §20 of Schedule 8 to the UK Bill seeks to amend the definitions of "*the Treaties*" or the "*EU Treaties*" in the Interpretation Act 1978 in a way which would carry through to the devolution statutes and which would effectively save the pre-exit meaning of "*EU law*".

71. The effect of s.33 is not suspended or limited by s.1(2), even if s. 1(2) were effective, because it would not be incompatible with EU law *per se* to repeal any of the relevant provisions of the SA. Nor can the fact that s.33 and schedule 1 might not be commenced until the ECA is repealed save them. The mere fact that a provision has not been brought into force does not save it from being outside legislative competence

(*Christian Institute*, §109, where the provisions found to be outside legislative competence were not yet in force).

72. The position is also clear in relation to the second category of provisions which schedule 1 would repeal. Once the ECA is repealed, the words "*EU law*" in the SA may, unless saved by the proposed amendment of the Interpretation Act 1978 in the UK Bill, become "*spent*" because they will become references which, by virtue of the definition of "*EU law*", are literally meaningless. But even then, the same would not be true of provisions such as s.34 SA, which addresses references to the CJEU. Section 34 may become redundant by virtue of the repeal of the ECA, so that it has no operative effect in law; but it will not be literally meaningless. It and the other provisions in the second category may require to be repealed as a consequence of the repeal of the ECA (as Part 2 of Schedule 3 to the UK Bill does), but not because they are "*spent*" enactments.

73. Section 33 of and schedule 1 to the Scottish Bill are accordingly outside the legislative competence of the Scottish Parliament.

(D) The provisions of the Scottish Bill that are incompatible with EU law are outside the competence of the Scottish Parliament by virtue of s.29(2)(c), s.29(2)(d) SA and contrary to the rule of law

The assessment of legislative competence is undertaken at the time when a Bill is introduced and passed

74. As noted in §18 above, the SA prescribes a series of controls on the limited legislative competence afforded to the Scottish Parliament and requires competence to be assessed at the time that the relevant Bill is introduced and then passed.

75. The role of the courts, including on a devolution reference, is to "*ensure regularity in executive and subordinate legislative activity and so compliance with the rule of law*": *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1; [2018] 2 WLR 357 at §56 *per* Lord Mance. Neither the Scottish Parliament nor the Scottish Ministers have the power

to "*frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation*": *Miller*, at §51.

76. The question of whether the Scottish Parliament is competent to make a law must, therefore, be determined at the time when the Scottish Parliament passes the Bill in question. The critical control mechanisms of the Scottish Parliament's legislative competence set out in the SA revolve around assessing that competence prior to and upon passage of any given Bill. They assume that the Scottish Parliament will be able to satisfy itself that it is legislating within competence.

77. In that regard, and as this Court has recognised, the Scottish Parliament is in a different position from, and the scope of its legislative competence cannot be compared to, the UK Parliament. As Lord Reed held in *AXA* (at §137, citing and referring to the Lord President (Lord Rodger) in *Whaley*), "*the Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited. It is the function of the courts to interpret and apply those limits, and the Scottish Parliament is therefore subject to the jurisdiction of the courts*". Lord Reed emphasised the difference between the UK Parliament and the Scottish Parliament again at §146: "*The Scottish Parliament is subordinate to the United Kingdom Parliament: its powers can be modified, extended or revoked by an Act of the United Kingdom Parliament. Since its powers are limited, it is also subject to the jurisdiction of the courts.*" Necessarily, therefore, where the Scottish Parliament is subject to pre-existing restrictions on its legislative competence as outlined above and – pending the enactment of the UK Bill and potentially other relevant legislation as well - cannot know what the scope of its legislative competence will be upon exit, it cannot legislate in advance for the impact of exit from the EU. The same does not to apply to the UK Parliament, which has no such similar restrictions on its legislative powers and has sovereign power to act at any time to lay the ground for the UK's withdrawal from the EU.

78. That competence assessment exercise is one grounded in the provisions of the Bill in question. Competence is not to be assessed by reference to hypotheses, as this Court has emphasised in a devolution reference concerning the competence of the Welsh Assembly to legislate. "*Either the Welsh Assembly has competence to do what it proposes, or*

it does not. It cannot confer competence on itself by hypothesising (however accurately) that it might legitimately have chosen a different route": *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, §32 *per* Lord Mance. If the competence question cannot be clearly answered by reference to the provisions of the Bill itself – without hypothesising what might have been done or what might be done in the future – then it cannot be lawfully answered at all.

79. Were that not a correct statement of the law, the result would be a surprising one. The Scottish Parliament would be entitled to pass legislation at will purporting to do any manner of things which are plainly prohibited by the SA but rendering them lawful by the insertion of a commencement provision that the Act shall not have effect until the Scottish Parliament would have competence to do those things. It would be surprising if Parliament had intended through the SA to permit the Scottish Parliament to fill the statute books with impermissible legislation sitting in cryostasis pending a day which may never come when the relevant barrier to competence is no more. The unreality of this approach is only underlined by the existence of the UK Bill proceeding through Parliament which is to address the appropriate effects of withdrawal upon competence under the devolution settlements.

80. The attempted circumvention in the Scottish Bill adopted for ss.2-5 by reference to the definition of "*exit day*" in s.28 is a related breach of the constitutional structure of the devolution settlement. Sections 2-5 do not come into force upon Royal Assent being given to the Scottish Bill, but must be brought into force by regulations made by Scottish Ministers: s.36. Their effect is governed by reference to "*exit day*", but s.28 does not define "*exit day*" as a particular date. It defines it in a manner which may be unclear and difficult to apply. "Exit day" means "*the day the United Kingdom leaves the EU*" (s.28(1)). However, s.28(4) defines leaving the EU as the time when the Treaties on European Union and on the Functioning of the European Union cease to apply to the UK as a consequence of UK withdrawal. That may or may not be on 29 March 2019 depending upon the terms of any transitional arrangements which are negotiated by the UK with the EU. In circumstances where the UK's future relationship with the EU, and what parts of the core Treaties, if any, directly or indirectly, it remains a party to after exiting the EU, and for how long, is a matter for continued negotiation, the Scottish Parliament has (a) made an unwarranted assumption that the Treaties will

cease to apply to the UK in their entirety on the day that the UK ceases to be a member of the EU and (b) at the least, has left the application of critical provisions of the Scottish Bill in the hands of Scottish Ministers, who may have to delay the coming into force of those provisions until such times as the EU Treaties have indeed ceased to apply to the UK.

81. Thus the approach to "*exit day*" demonstrates the impossible position that this Court is placed in if, as the Scottish Government suggests, it must be asked to consider the competence of the Scottish Parliament by reference to the future legal effect of a provision. But it also constitutes a more specific problem by reference to the commencement provision in s.36(2), which permits the Scottish Ministers to make regulations which are subject to no scrutiny provisions. The Scottish Parliament has purported to confer upon the Scottish Ministers powers when it cannot know the limits or scope of those powers, and has sought to exercise no control over them.

82. The constitutional structure of the SA includes not only that the Scottish Parliament is a legislature of limited competence, but also that the Scottish Government both has limits to its executive competence and is subject to scrutiny and oversight by the Scottish Parliament. The approach adopted in the Scottish Bill is not compatible with that structure.

Identification of the provisions that are incompatible with EU law: ss.3-11, 13, 13A-16, 18-19, 21, 22-26, 34 and 36A of, and schedule 2 to, the Scottish Bill

83. The admitted premise of s.1(2) and of the definition of "*exit day*" (in s.28) is that various provisions of the Scottish Bill are incompatible with EU law, if – as they must be - their effect is judged at the time that the Scottish Bill was passed.

84. The particular provisions that are incompatible with EU law are as follows:

(1) Sections 3 to 5 and 13 of the Scottish Bill are incompatible with EU law because they incorporate into Scots law directly applicable EU law, or, in the case of s.13, provide a power for the Scottish Ministers to do so. The CJEU has repeatedly held that it is contrary to EU law to duplicate the provisions of directly

applicable EU law in national law (see, for example, Case 34/73 *Variola* [1973] ECR 981, §§9-10).

(2) Sections 6 to 8 and 10 of the Scottish Bill are obviously incompatible with EU law because they disapply mandatory principles and rules of EU law. Sections 9 to 9B are parasitic on those sections.

(3) Section 11 is incompatible with EU law because its only purpose is to enable the Scottish Ministers to make regulations modifying "*retained (devolved) EU law*" in a manner that is incompatible with EU law.

(4) Sections 13A to 16, 18-19, 21, 22 and 36A are, at least in part, parasitic on ss.11 and 13.

(5) Sections 23 to 26 and 34 and schedule 2 are, at least in part, parasitic on ss.3 to 5.

85. On 21 March 2018, when the Scottish Bill was passed, the above provisions were incompatible with EU law.

Prohibited modification of the effect of s.2(1) ECA

86. Section 2(1) ECA provides:

> *"all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."*

87. The above provisions of the Scottish Bill that are incompatible with EU law are outside legislative competence by virtue of s.29(2)(c) SA. They purport to give the Scottish Ministers power to make regulations before exit day which change or otherwise have an impact on the effect of EU law in Scotland. They, thus, seek to modify the effect of

ss.2(1), which is, further, in breach of the restriction in §1(2)(c) of Part I of Schedule 4 SA and, in turn, outside legislative competence by virtue of s.29(2)(c) SA.

88. The essence of the vice of the Scottish Bill provisions in this respect is easily stated: they seek to achieve an effect which could only lawfully be achieved by the Scottish Parliament by and upon the repeal of the ECA. Provisions of the ECA are protected from modification by the Scottish Parliament. The very protection of the ECA is a further powerful indicator that the Scottish Bill seeks to legislate in a manner contrary to the intention of Parliament in passing the SA.

89. That some measure of repeal and/or modification of the ECA will be required is undisputed. An important purpose of the UK Bill is, broadly, to repeal the ECA and to make equivalent provision in domestic law. Although the Scottish Bill does not formally seek to repeal the ECA, it proceeds upon the assumption that the ECA will be repealed and assumes a legal context which has not been reached. By covering the same ground as protected provisions of the ECA, the Scottish Bill affects their content and effect and therefore modifies them in the *Imperial Tobacco* sense (see §26 above). Moreover, it does so in a way that cannot be saved by s.1(2) of the Scottish Bill, even if s.1(2) were effective.

Prohibited incompatibility with EU law

90. The above provisions of the Scottish Bill that are incompatible with EU law are outside the competence of the Scottish Parliament by virtue of s.29(2)(d) SA. By the Scottish Bill, the Scottish Parliament has acted outside its devolved legislative competence as enjoyed at the point when the Bill was passed; but has, at the same time, sought to defer the taking effect of certain of its provisions either until "*exit day*" (e.g. ss.2-5), or to the "*relevant time*" (s.1(2)), being the time at which the provision of EU law with which the provision being tested would be incompatible ceases to have effect in Scots law as a consequence of the withdrawal of the UK from the EU.

91. Both the mechanisms of s.1(2) and the definition of "*exit day*" have clearly been included in an attempt to defer that judgment until an unspecified and uncertain later date. The competence of the Scottish Parliament, and of the Scottish Ministers

purporting to exercise powers provided by the Bill, at that unspecified and uncertain later date cannot be known until that point. For the purposes of the Scottish Parliament in passing the Bill and this Court in reviewing it, legislative competence can only be assessed with any degree of certainty at the date of passing of the Bill: 21 March 2018.

92. Properly understood, the approach taken in the Scottish Bill is illegitimate. It cannot avoid the effect that those provisions of the Scottish Bill that are incompatible with EU law remain within the prohibition in s.29(2)(d) SA. The very attempt to do so impermissibly seeks to circumvent the carefully constructed controls on the Scottish Parliament's competence to legislate which are fundamental to the overall scheme of the SA and the devolution settlement.

93. As noted above (see the example of the *Christian Institute* case), the fact that a provision of devolved legislation has not been brought into force does not save it from being held to be outside the competence of a devolved legislature. This necessarily follows from the Scottish Parliament being a legislature of limited competence: as outlined above, the SA establishes certain mechanisms to test whether or not a provision of a Bill is within the Scottish Parliament's competence, expressly before any such provision is capable of having legal effect. To hold otherwise would undermine the fact of the limits on the Scottish Parliament's competence and the controls set out in the provisions of the SA that provide for the legislative competence issue to be tested before the provision in question has legal effect.

94. For example, considering ss.3 to 10 and 13 of the Scottish Bill, these are stated not to come into force on Royal Assent, but rather are to come into force by regulations made by the Scottish Ministers (under s.36). Yet, what is being tested by this reference to this Court are the powers of the Scottish Parliament. It would be surprising if the limits of competence of the Scottish Parliament could be effectively determined by an act of the Scottish Government in deciding when to commence certain legislative provisions which are, clearly on their face, outside the competence of the Scottish Parliament.

95. Necessarily, therefore, the Scottish Parliament could not, when it passed the Scottish Bill, know precisely what its competence would be at the intended time when certain of its provisions are deemed to take effect. Various factors might affect its competence in the near future, including the passage and coming into force of the UK Bill and of future legislation dealing, for example, with the terms of a Withdrawal Agreement.

96. Accordingly, the Scottish Parliament has purported to exercise a competence which it presently does not have, and cannot predict so therefore cannot presently assess, thus frustrating the effect of the scheme of the SA.

Contrary to the rule of law

97. For the Scottish Parliament to legislate in this manner is also contrary to the rule of law and, in particular, to the principles of legal certainty and legality. As a devolved legislature, it has no competence so to do. The Presiding Officer was right to take the view that the purported competence deferral mechanisms in the Scottish Bill could not have the effect of altering how competence is to be assessed.

98. As was held by Lord Reed in *AXA* at §§118-119, referring to the Council of Europe, the Venice Commission (the Council of Europe's advisory body on constitutional matters) and Lord Bingham's definition, the concept of the rule of law is of "*fundamental importance*", and legal certainty as an aspect of the rule of law requires that law be accessible and foreseeable in its effects. Legislating on the basis of a competence purportedly enjoyed today for laws to take effect at a future time when competence will be different, and in a way which is not currently certain, is contrary to the principle of legality requiring law to be adequately accessible and sufficiently foreseeable in its effects.

99. The uncertain application of the definition of "*exit day*" in s.28 of the Scottish Bill – and the attendant uncertainty resulting from the power of the Scottish Ministers to commence provisions based upon that definition – has already been discussed. Where oversight provision is made in the Scottish Bill, the Scottish Parliament would have to consider whether it is content for the Scottish Ministers to make regulations based on an assessment not of what the Scottish Ministers' current competence is, but what it

might be at the point the Scottish Ministers have decided to bring the relevant regulations into force. Such regulations could be very significant indeed, not least because they could make any provision that could be made by an ASP (see, e.g., s.11(5), subject to certain express limitations). That is anathema to the rule of law, as well as to the allocation of responsibilities between the organs of the devolution settlement.

100. Furthermore, the intended s.1(2) mechanism, as a means of saving any provision in the Scottish Bill which would otherwise be incompatible with extant obligations upon either the Scottish Parliament or the Scottish Ministers to act compatibly with EU law, is a further example of legal uncertainty. The Scottish Bill itself does not identify to which provisions s.1(2) is capable of applying, rendering it lacking in clarity and precision, and uncertain for that reason.

101. The Scottish Bill creates further uncertainty by seeking, through s.1(2), to defer the question of whether any provisions of the Bill or provisions made under it by the Scottish Ministers would be incompatible with EU law when there is a present obligation to act compatibly. The s.1(2) mechanism recognises present incompatibility but unwarrantedly seeks to defer the decision as to compatibility to an uncertain future point. Further, the Scottish Bill does not explain how that decision will be taken or manifest itself. This is likely to lead to a situation where different parties adopt different views as to whether or not a provision of the Scottish Bill or of subordinate legislation made under the Bill would or would not be incompatible with EU law and would therefore require 'saving' under s.1(2) by way of deferring its taking effect. This impossible situation in which the Scottish Bill places future law-makers and the people of Scotland whose rights and obligations it would affect forms the basis of the Presiding Officer's statement upon introduction of the Scottish Bill that it fell outside legislative competence.

102. For example, under s.11 of the Scottish Bill, the Scottish Ministers are empowered to make regulations dealing with deficiencies arising from UK withdrawal where they "*consider*" there is or would be a failure of retained (devolved) EU law to operate effectively, or other deficiency in retained (devolved) EU law, and "*as they consider appropriate*" for the purpose of preventing, remedying or mitigating the failure or other

deficiency (s.11(1)). A particular example given of such a deficiency is where the Scottish Ministers have "*reasonable grounds to consider that*" retained (devolved) EU law would contain anything that has no practical application in relation to Scotland. If the Scottish Ministers were to make regulations in advance of exit day removing a provision which they considered had no practical application in relation to Scotland, and also took the view that giving effect to those regulations in advance of exit day would not be incompatible with EU law, then, it would be the Scottish Ministers who would be asserting the power to determine whether or not the Scottish Parliament's competence had altered, or would be likely to alter, by the coming into force date that those Ministers would provide. Similar points may be made as regards ss.12 and 13 of the Scottish Bill.

103. By way of further example, suppose the Scottish Ministers make regulations under s.11 to fix deficiencies arising from "*exit day*". The purpose of the Scottish Bill is to enable them to do so in advance of that day (s.11 comes into force upon Royal Assent: s.36(1)). Such regulations will be incompatible with EU law, and as a result, not law. They could only, supposedly, be saved by the operation of s.1(2) or the fact of deferred commencement. The consequence of this mechanism in the context of such secondary legislation would, correspondingly, be a repetition in microcosm of the problems described above in relation to the reference procedure: the courts would either be precluded from assessing competence before coming into force or would be faced with an impossible predictive task in working out what future competence might in fact look like, and possibly trespassing into areas of Parliamentary privilege as they sought to do so. How far into the future they would have to look would be a matter for the Scottish Ministers in deciding when to make the regulations and when to bring them into force. The courts would therefore have the entirely novel, and constitutionally improper, task of assessing lawfulness by reference to an uncertain legal position on some future date chosen by that public authority itself.

104. Furthermore, a private party directly affected by those regulations could take a different view, both as to the decision that regulations are, in the first instance, required in order to remedy any deficiency in retained (devolved) EU law arising out of withdrawal and, further, as regards the issue of whether the immediate taking effect

of those regulations would be compatible with EU law. There would, in short, be uncertainty as to the legality of those regulations.

105. It is an elementary aspect of legal certainty – and particularly for law which is not primary legislation of the sovereign Parliament – that a law should be clear on its face as to when it comes into effect. That is generally achieved by a date of commencement, or by tying commencement to another certain event. It cannot be achieved by making commencement depend upon a legal judgment as to whether the law has ceased to be incompatible with overriding legal norms.

106. That approach runs contrary to the rule of law principle set out by Lords Neuberger and Toulson in *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453, §47 that:

> "*The courts have no more important function than to ensure that the executive complies with the requirements of Parliament as expressed in a statute. Further, particularly where the statute concerned envisages regulations which will have a significant impact on the lives and livelihoods of many people, the importance of legal certainty and the impermissibility of sub-delegation are of crucial importance. The observations of Scott LJ in* Blackpool Corpn v Locker *[1948] 1 KB 349, 362 are in point: "John Citizen" should not be "in complete ignorance of what rights over him and his property have been secretly conferred by the minister", as otherwise "For practical purposes, the rule of law … breaks down because the aggrieved subject's legal remedy is gravely impaired".*"

107. The Scottish Parliament has legislated through the Scottish Bill to provide for uncertainty rather than certainty, and in a manner – using provisions which purport to delay the effect of its content – which frustrates the competence assessment provisions set out in the SA. The Scottish Bill violates the rule of law.

108. The defects in any of these provisions cannot be rectified by relying on s.101 SA which provides for the "reading down" of an ASP or of subordinate legislation made, confirmed or approved, or purporting to be made, confirmed or approved, by a member of the Scottish Government as narrowly as is required for it to be within competence, if such a reading is possible, and for the provision to have effect accordingly, a technique which was used by the application of s.154(2) of the Government of Wales Act 2006 by this Court in *Re Local Government Byelaws (Wales) Bill* at §§60-64 per Lord Neuberger.

109. In his judgment, Lord Neuberger considered it permissible to invoke that statutory provision to limit what he considered to be the apparently unlimited and general effect of s.9 of the Bill under consideration and to read that provision so that it would not permit the Welsh Assembly to confer a wider power on Welsh Ministers than the Assembly had itself. Lord Neuberger considered such an interpretation to be consistent with the thrust of the Bill as a whole and not in conflict with any other provision in the Bill. However, Lord Neuberger considered that the position would be otherwise, and that s.154(2) of the Government of Wales Act 2006 could not be invoked, if the "read down" interpretation was "inconsistent with the plain words" of s.9 of the Bill under consideration (at §64).

110. Here, the position is, indeed, otherwise and calls instead for the approach taken by this Court in *Salvesen v Riddell* [2013] UKSC 22; 2013 SC (UKSC) 236. The proponents of those provisions in the Scottish Bill that are incompatible with EU law considered, and expressly stated, that those provisions could give rise to regulations that are incompatible with EU law. The only lawful "read down" interpretation in those circumstances is one which would prohibit the Scottish Ministers from making regulations that are incompatible with EU law, which would "*go against the underlying thrust*" of what the incompatible provisions provide for (*Salvesen*, §46) and would be "*inconsistent with the plain words*" of the incompatible provisions. This is made patent by the express inclusion of s.1(2) purporting to save any such incompatibilities with EU law. However, that provision does not prohibit the Scottish Ministers from making such regulations, but rather seeks to prevent such regulations from having effect until such time as they would no longer be incompatible with EU law, and by delegating that decision to the Scottish Ministers themselves. The competence deferral mechanism contained in s.1(2) is not an effective delay to assessment, and if it were it would breach the rule of law. Such postponement and delegation are contrary to the principles of legal certainty and legality.

111. Finally, at the heart of the s.1(2) mechanism is an assertion by the Scottish Parliament that anything in the Scottish Bill that is currently outside its competence – and expressly so in certain instances – should be deemed to be within competence on the assumption that at some future date it will be within competence (a highly

questionable assumption which is subject to a number of uncertainties). By this, the Scottish Parliament is seeking to modify its own competence, contrary to the carefully drawn scheme in the SA itself, and contrary to those constitutional principles which necessarily underpin the exercise by the UK Parliament and other devolved institutions of their powers, and the carefully balanced relations between them.

(5) CONCLUSION

112. It is respectfully submitted that the answer to the questions referred is that the Scottish Bill is, or alternatively the relevant provisions of the Scottish Bill are, outside the legislative competence of the Scottish Parliament for the following amongst other **REASONS**:

(1) The whole of the Scottish Bill is not law because it relates to the reserved matter of international relations as defined in §7(1) of Schedule 5, and is therefore outside of competence by virtue of s.29(2)(b) SA.

(2) Section 17 of the Scottish Bill is not law because it modifies certain provisions of the SA as prohibited by §4(1) of Schedule 4, and is therefore outside of competence by virtue of s.29(2)(c) SA; and/or because it relates to the reserved matter of Parliament as defined in §1(c) of Schedule 5, and is therefore outside of competence by virtue of s.29(2)(b) SA.

(3) Section 33 of and schedule 1 to the Scottish Bill are not law because they modify certain provisions of the SA as prohibited by §4(1) of Schedule 4, and are therefore outside of competence by virtue of s.29(2)(c) SA.

(4) Various provisions of the Scottish Bill are not law because they are incompatible with EU law and are therefore outside of competence by virtue of s.29(2)(d) SA; and/or because they modify the ECA as prohibited by §1(2)(c) of Schedule 4, and are therefore outside of competence by virtue of s.29(2)(c) SA; and/or because they are contrary to the rule of law.

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8 June 2018

ANNEX A

The Provisions of the Scottish Bill

1. The Scottish Bill purports to do three main things: it (i) retains, in domestic law, EU law as applicable in Scotland; (ii) gives the Scottish Ministers powers in relation to the operation of devolved law retained in that way after withdrawal; and (iii) gives the Scottish Ministers powers in relation to devolved law retained in that way, in order to ensure that it remains consistent with EU law, in light of any developments in EU law after withdrawal. Much of the provision in the Scottish Bill deliberately corresponds to provision contained in the UK Bill.

2. Section 1 of the Scottish Bill is a statement of its purpose and effect. Section 1(1) provides that the purpose of the Scottish Bill is to make provision in connection with the prospective withdrawal of the UK from the EU, for ensuring "*the effective operation of Scots law (so far as within devolved legislative competence) upon and after UK withdrawal*".

3. Section 1(2) provides that, so far as any provision of the Scottish Bill would, if it were in effect before the relevant time, be incompatible with EU law, the provision is to have "*no effect until the relevant time*". For that purpose, the "*relevant time*" is defined in s.1(3) as the time at which the provision of EU law with which the provision being tested would be incompatible ceases to have effect in Scots law as a consequence of the withdrawal of the UK from the EU.

4. Part 2 of the Scottish Bill contains provisions by which existing EU law is to be retained in Scots law "*on and after exit day*". The term "*exit day*" is defined in s.28(1) as being "*the day that the United Kingdom leaves the EU*". Section 28(3) provides that for that purpose the UK leaves the EU "*when the Treaty on European Union and the Treaty on the Functioning of the European Union cease to apply to the United Kingdom as a consequence of UK withdrawal*".

5. Within Part 2, the main provisions intended to save and incorporate EU law as applicable in Scotland are ss.2-5. The term "*retained (devolved) EU law*" (defined in

s.10(9)) is used to refer to "*anything which, on or after exit day, continues to be, or forms part of, Scots law*" by virtue, principally, of those provisions.

(1) Section 2 provides that devolved EU-derived domestic legislation, as it has effect in Scots law immediately before exit day, continues to have effect in Scots law on and after exit day. The effect of this provision is that existing domestic devolved legislation which implements EU obligations remains on the domestic statute book after the withdrawal of the UK from the EU. This provision corresponds to clause 2 of the UK Bill.

(2) Section 3 provides that devolved direct EU legislation, so far as operative immediately before exit day, forms part of Scots law on and after exit day. The effect of this provision is to incorporate into Scots law directly applicable EU law that has effect in the UK by s.2(1) ECA and (ignoring any legislation enacted by Parliament) would otherwise not have effect after withdrawal. This provision corresponds to clause 3 of the UK Bill.

(3) Section 4 provides that any devolved rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day, are recognised and available in Scots law and enforced, allowed and followed, by virtue of s.2(1) of the ECA, continue on and after exit day. The effect of this provision is to retain other aspects of EU law not covered by ss.2 and 3, such as rights conferred directly on individuals by the EU Treaties or multilateral agreements to which the EU is a party. This provision corresponds to clause 4 of the UK Bill.

(4) Section 5 provides that the general principles of EU law and the Charter of Fundamental Rights are part of Scots law on or after exit day so far as they have effect in EU law immediately before exit day and relate to anything to which ss.2-4 apply. This differs from corresponding provision in clause 5(4) of, and Schedule 1, to the UK Bill.

6. Part 2 of the Scottish Bill further contains a series of exceptions to the savings and incorporations effected by ss.2-5:

(1) Section 6 provides that the principle of the supremacy of EU law does not apply to any devolved enactment or rule of law passed or made on or after exit day; but continues to apply on and after exit day so far as relevant to the interpretation, disapplication or quashing of any devolved enactment or rule of law passed or made before exit day. The effect of this provision is that legislation made after exit day which is inconsistent with EU law retained by the Scottish Bill will take precedence over earlier legislation; but where there is a conflict between pre-exit Scots law and retained EU law, the retained EU law takes precedence. Similarly, the obligation to interpret domestic law in accordance with EU law will continue in relation to pre-exit devolved law but not in relation to Scots law that is passed or made on or after exit day. This provision corresponds to clause 5(1) to (3) of the UK Bill.

(2) Section 7 provides that there is no right in Scots law on or after exit day to challenge any retained (devolved) EU law on the basis that immediately before exit day an EU instrument was invalid. Section 7(2) provides an exception from that rule for a challenge "*of a kind described, or provided for, in regulations made by the Scottish Ministers*". This provision corresponds to §1 of Schedule 1 to the UK Bill.

(3) Section 8 provides that there is no right in Scots law on or after exit day to damages in accordance with the rule in *Francovich*, except in relation to any right of action accruing before exit day. This differs from corresponding provision in §3 of Schedule 1 and §37 of Schedule 8 to the UK Bill.

7. Part 3 of the Scottish Bill confers regulation-making powers on the Scottish Ministers (each of which, as a result of the SA, is limited in the same way as the legislative competence of the Scottish Parliament):

(1) Section 11 gives the Scottish Ministers power to make regulations where they consider that there is or would be a failure of retained (devolved) EU law to operate effectively, or any other deficiency in retained (devolved) EU law, arising from the withdrawal of the UK from the EU; and that it is necessary to

make provision to prevent, remedy or mitigate the failure or other deficiency. This provision corresponds to clause 7 of the UK Bill. The power expires two years after exit day.

(2) Section 12 gives the Scottish Ministers power to make regulations where they consider that there is or would be a breach of the international obligations of the UK arising from withdrawal; and that it is necessary to make provision to prevent or remedy the breach. The power expires two years after exit day.

(3) Section 13 gives the Scottish Ministers power by regulations to make provision corresponding to provision in EU law after withdrawal. The purpose of the power is to allow devolved law to keep pace with developments in EU law after withdrawal. The power expires three years after exit day, although the Scottish Ministers may extend that period.

8. Section 17 is the final provision of Part 3. It applies to subordinate legislation made, confirmed or approved by a Minister of the Crown or any other person (other than the Scottish Ministers) if it contains devolved provision which modifies or otherwise affects the operation of retained (devolved) EU law or anything that would be, on or after exit day, retained (devolved) EU Law; and is made under a function conferred or modified by an Act of Parliament enacted after the date on which s.17 comes into force. Section 17(2) provides that such subordinate legislation, to the extent that it contains provision that would be within the legislative competence of the Scottish Parliament, "*is of no effect*" unless the consent of the Scottish Ministers is obtained in advance.

9. Part 6 of the Scottish Bill contains various general provisions, including, in particular:

(1) Section 33, which provides for the repeal of spent references to EU law etc. in the SA and is summarised in more detail below.

(2) Section 36, which provides that ss.1, 11, 12, 14 to 22, 27 to 32 and 35-38 come into force on the day after Royal Assent; all other provisions come into force on a day to be appointed by the Scottish Ministers;

(3) Section 37, which allows the Scottish Ministers to repeal the entire Act, subject to affirmative procedure in the Scottish Parliament. This is another highly unusual feature of the Scottish Bill.

10. Section 33 provides for the repeal of the words "*or with EU law*" in ss.29(2)(d) and 57(2) of the SA. Those repeals remove the restrictions on the Scottish Parliament's legislative competence and the Scottish Ministers' devolved competence which require compatibility with EU law. Section 33(3) introduces Schedule 1 which contains further repeals of provisions in the SA "*which are spent as a consequence of the UK's withdrawal from the EU*". The Scottish Government's Explanatory Notes state that these repeals "*tidy up*" what will, when the UK withdraws from the EU, be spent references to EU law (§128).

ANNEX B

The Parliamentary Passage of the Scottish Bill

The Parliamentary timetable

1. Contrary to established practice, the Scottish Government did not provide the Office of the Advocate General for Scotland with a copy of the draft Scottish Bill prior to its introduction. Such a process has been established in order that any concerns over the Scottish Parliament's competence to pass a Bill can be resolved, or sought to be resolved, by discussion between the Scottish Government and the UK Government. This is the only occasion on which the Scottish Government has not followed this practice.

2. The Scottish Bill was introduced and passed on an emergency basis. It appears that this was done in an attempt to seek to obtain some perceived political advantage as a result of the Scottish Bill having been passed in advance of the enactment of the UK Bill.

3. On 27 February 2018, the Scottish Bill was introduced in the Scottish Parliament by the Deputy First Minister and Cabinet Secretary for Education and Skills. He made a statement, in accordance with s.31(1) SA, that in his view the provisions of the Scottish Bill would be within the legislative competence of the Scottish Parliament.

4. On the same date, the Presiding Officer made a statement, as required by s.31(2) SA, of his position on whether or not the provisions of the Scottish Bill would be within the legislative competence of the Scottish Parliament. He concluded that provisions of the Scottish Bill whose effect would be postponed by s.1(2) would not be within legislative competence. This is the only occasion on which a Scottish Government bill has been introduced to the Scottish Parliament with a negative statement of legislative competence by the Presiding Officer.

5. On 28 February 2018, the Lord Advocate made an (unprecedented) oral statement to the Scottish Parliament confirming that, as required by the ministerial code, he had

cleared the Deputy First Minister's statement of competence, and explaining why the Scottish Government considered that the Scottish Bill was within legislative competence.

6. On 1 March 2018, the Scottish Parliament decided that the Scottish Bill should be treated as an Emergency Bill under its standing orders. Thereafter, the Scottish Bill passed through parliamentary procedure as follows:

(1) On 7 March 2018, the lead committee, the Finance and Constitution Committee, heard evidence. Because the Scottish Bill was an Emergency Bill, the committee did not report on the Scottish Bill's general principles.

(2) On 7 March 2018, the Scottish Parliament held the Stage 1 debate on the general principles of the Scottish Bill.

(3) On 13 March 2018, the Scottish Parliament held a "pre-Stage 2" debate.

(4) On 13 and 14 March 2018, the Finance and Constitution Committee held its Stage 2 consideration and made various amendments to the Scottish Bill.

(5) On 21 March 2018, the Scottish Parliament held the Stage 3 debate. It made various amendments and passed the Scottish Bill.

The Presiding Officer's statement on legislative competence

7. Upon introduction of the Scottish Bill, the Presiding Officer made a detailed reasoned statement explaining why he had concluded that certain provisions of the Scottish Bill (those whose legal effect would be postponed by s.1(2)) would not be within legislative competence. His reasoning was as follows:

> "*In my view the Scotland Act provides that the legislative competence of the Parliament is to be assessed at the point at which legislation is passed. The Parliament and the Scottish Ministers will remain bound to act compatibly with EU law until such point as the Treaties cease to apply. In my view this prevents the Parliament from exercising legislative power now, even though it assumes it will be legally able to act in the future.*

It is a familiar concept that the limitations on competence set out in section 29(2) will fluctuate over time. The devolution settlement was designed to adapt and change within the legislative scheme set out in the Scotland Act. The consistent approach to interpreting the powers of the Parliament has been that legislation cannot seek to exercise competence prior to that competence being transferred. In my view, postponing the exercise of powers until a future date, may change the legal effect of a Bill but does not resolve the question of its legal validity."

The Policy Memorandum

8. The Scottish Government's Policy Memorandum which accompanied the Scottish Bill made clear that it was being presented as a direct response to the UK Bill. It explained that, on the introduction of the UK Bill (§8):

"*the First Ministers of Scotland and Wales issued a joint statement indicating that their governments considered the approach of the EUWB to the devolved settlements to be an attack on the founding principles of devolution and that neither government would be able to recommend that legislative consent be given.*"

9. The Scottish Government explained, however, that the introduction of the Scottish Bill did not mean that it had "*resolved to reject the EUWB and rely instead on this Bill*" (§6):

"*If the necessary changes are made to the EUWB, then this Bill can be withdrawn and a legislative consent motion lodged by the Scottish Ministers. But until those changes are made, this Bill will be progressed through the Scottish Parliament so that on any scenario there is a legislative framework in place for protecting Scotland's system of laws from the shock and disruption of UK withdrawal from the EU.*"

10. Although the Scottish Government's preferred option remained "*being able to consent to an amended [UK Bill]*" (§12), it explained (§§13-14):

"*If the UK Government will not support the changes to the EUWB which would allow it to be given consent then the Scottish Government recognises that the consequence is that it and the Scottish Parliament must take responsibility themselves for preparing devolved law in Scotland for UK withdrawal. … While there is a realistic prospect of consent being withheld, the Scottish Government considers that introducing this Bill is a necessary and responsible step. Having a viable alternative statute will ensure that, on all scenarios, the Scottish Government and Parliament have the tools necessary to prepare Scotland, within their devolved responsibilities, for the legislative consequences of leaving the EU*".

11. The Policy Memorandum also explained that the Scottish Government had promoted amendments to the UK Bill in the House of Commons (§9):

> *"Proposed amendments to the [UK Bill] were jointly prepared with the Welsh Government and published on 19 September, in advance of Committee Stage of the [UK Bill} in the House of Commons. In a joint letter to the Prime Minister the two First Ministers explained that these amendments "if made, would make the Bill one which we could consider recommending to the Scottish Parliament and the National Assembly for Wales"".*

12. The effect of the proposed amendments would have been to insert in what are now clauses 9 and 11 of the UK Bill a requirement that the consent of the Scottish Government be obtained to subordinate legislation affecting matters devolved to Scotland. Corresponding amendments had been tabled in the House of Commons but none had been accepted by the UK Government at either Committee Stage or at Report Stage (§10).

Supplementary Legislative Consent Memorandum

13. Subsequent to the passage of the Scottish Bill, in April 2018, the Scottish Government produced a Supplemental Legislative Consent Memorandum. It recommended that the Scottish Parliament withhold its consent to the UK Bill: at §3. It maintained the position previously expressed that the purported preference of the Scottish Government was for the UK Bill to make provision for the effects of withdrawal from the EU: at §§5 and 18. However, because the UK Parliament had not amended the UK Bill in a manner approved by the Scottish Government (see §§14-17), consent was proposed to be withheld in respect of the UK Bill.

14. On 15 May 2018 the Scottish Parliament voted not to consent to the UK Bill.

ANNEX C

The Provisions of the UK Bill

1. The UK Bill was introduced in the House of Commons on 13 July 2017. At the date of this Case, the UK Bill is before the House of Commons for consideration of Lords amendments.[2] Subject to the will of Parliament, the UK Bill is expected to receive Royal Assent by the summer recess.

2. The principal purpose of the UK Bill is "*to provide a functioning statute book on the day the UK leaves the EU*": Explanatory Notes to the UK Bill, §10. §2 of the Explanatory Notes provides the following overview of what the UK Bill will achieve:

> "*The Bill ends the supremacy of European Union (EU) law in UK law and converts EU law as it stands at the moment of exit into domestic law. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal.*"

3. Clause 1 of the UK Bill provides that "*The European Communities Act 1972 is repealed on exit day*". The term "*exit day*" is defined in clause 19(1) to mean "*such day as a Minister of the Crown may by regulations appoint*". As the Explanatory Notes to the UK Bill explain, the repeal of the ECA is "*to reflect the end of supremacy of EU law in domestic law and to remove the mechanism which enabled the flow of new EU law into UK law*": §74.

4. In order to provide that, as a general rule, the same rules and laws will apply on the day after the UK leaves the EU as before, the UK Bill:

   (1) Preserves all the laws which have been made in the UK to implement EU obligations (clause 2);

[2] The following summary relates to the UK Bill as it was returned to the House of Commons by the House of Lords on 16 May 2018.

(2) Converts directly applicable EU law (such as EU regulations) into UK law (clause 3);

(3) Incorporates any other rights which are currently available in domestic law by virtue of s.2(1) ECA, including the directly effective rights conferred by EU Treaties, that can currently be relied on directly in national law without the need for specific implementing measures (clause 5), with certain specified exceptions for the principle of supremacy of EU law, the Charter of Fundamental Rights, challenges for invalidity of EU law, and damages claims under the *Francovich* rule (clause 6 and Schedule 1); and

(4) Provides that pre-exit case law of the Court of Justice has the same binding, or precedent, status in UK courts as decisions of this Court or the High Court of Justiciary in Scotland (clause 6).

5. The UK Bill provides powers to Ministers of the Crown to make regulations, including:

(1) To prevent, remedy or mitigate a failure of retained EU law to operate effectively, or any other deficiency arising from withdrawal, for a period of two years after exit day (clause 9);

(2) For the purposes of implementing the withdrawal agreement, if such provision should be in force on or before exit day (clause 11). This power is expressly subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal, and it may not be exercised after exit day. A "*withdrawal agreement*" is defined in clause 19(1) as an agreement between the UK and the EU under Article 50(2) TEU setting out the arrangements for withdrawal, whether or not it has been ratified.

6. In relation to the devolution settlement, the UK Bill makes provision to amend the SA, GOWA and the Northern Ireland Act 1998 to give the devolved legislatures legislative competence to modify retained EU law, unless it is a modification of a description specified in regulations made by a Minister of the Crown. The restriction arising from

any such regulations is a transitional position pending decisions as to whether common, UK-wide policy approaches are or are not needed in particular areas. Any regulations expire five years after they are made (if they are not revoked earlier).

7. This approach "*allows for the UK Government to work with the devolved administrations to establish areas where a common approach is or is not required, to help determine where UK frameworks might need to be kept after exit*": §41 of the Explanatory Notes to the UK Bill.

8. Clause 14 introduces Schedule 2, which "*confers powers to make regulations involving devolved authorities which correspond to the powers conferred by sections [9 and 11]*". The devolved authorities are the Scottish Ministers, the Welsh Ministers and any Northern Ireland department. Parts 1 and 2 of Schedule 2 confer on the devolved authorities broadly the same powers as those conferred on Ministers of the Crown in clauses 9 and 11. However, the Schedule 2 powers are subject to important limitations. The devolved authorities may not make regulations: (i) which modify any EU law retained by clauses 3 or 5 in areas covered by regulations made under the amendments to the SA, GOWA and the Northern Ireland Act 1998 made by clause 15; or (ii) which, when made, are inconsistent with any modification (whether in force or not) of any EU law retained by clauses 3 or 5 made by the UK Bill or a Minister of the Crown under the UK Bill, unless the modification could be made by the devolved authority itself: §§3 and 14 of Schedule 2.

9. Clause 15 amends the legislative competence provisions of the devolution legislation to prohibit the modification of retained EU law in areas specified in regulations, save where the modification would, immediately before exit day, have been within the legislative competence of the devolved legislature. The scope for the devolved legislatures to amend retained EU law where regulations are in force is accordingly restricted to cases, for example, of devolved legislation which implemented an EU directive.

10. In relation to the SA, clause 15(1) amends section 29(2)(d) SA by substituting, for the words "*with EU law*", the words "*in breach of the restriction in section 30A(1)*". Clause 15(2) then inserts the following new section:

*"**30A Legislative competence: restriction relating to retained EU law***

(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Parliament.

(3) A Minister of the Crown must not lay for approval before each House of the Parliament of the United Kingdom a draft of a statutory instrument containing regulations under this section unless –

> *(a) the Scottish Parliament has made a consent decision in relation to the laying of the draft, or*
>
> *(b) the 40 day period has ended without the Parliament having made such a decision.*

(4) For the purposes of subsection (3) a consent decision is –

> *(a) a decision to agree a motion consenting to the laying of the draft,*
>
> *(b) a decision not to agree a motion consenting to the laying of the draft, or*
>
> *(c) a decision to agree a motion refusing to consent to the laying of the draft;*

and a consent decision is made when the Parliament first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

(5) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (3) must –

> *(a) provide a copy of the draft to the Scottish Ministers, and*
>
> *(b) inform the Presiding Officer that a copy has been so provided.*

(6) See also paragraph 6 of Schedule 7 (duty to make explanatory statement about regulations under this section including a duty to explain any decision to lay a draft without the consent of the Parliament).

(7) No regulations may be made under this section after the end of the period of two years beginning with exit day.

(8) Subsection (7) does not affect the continuation in force of regulations made under this section at or before the end of the period mentioned in that subsection.

(9) Any regulations under this section which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to any Act of the Scottish Parliament which receives Royal Assent after the end of that period.

(10) Subsections (3) to (8) do not apply in relation to regulations which only relate to a revocation of a specification.

(11) In this section –

> *"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the Scottish Ministers,*

and, in calculating that period, no account is to be taken of any time during which the Parliament is dissolved or during which it is in recess for more than four days."

11. Schedule 3 to the UK Bill makes corresponding changes to the provisions governing the executive competence of the devolved authorities, and other amendments to the devolution statutes which are required as a result of the UK's withdrawal from the EU.