Michaelmas Term
[2018] UKSC 64

JUDGMENT

THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL - A Reference by the Attorney General and the Advocate General for Scotland (Scotland)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Kerr
Lord Sumption
Lord Carnwath
Lord Hodge
Lord Lloyd-Jones

JUDGMENT GIVEN ON

13 December 2018

Heard on 24 and 25 July 2018

Applicants
(The Attorney General and the Advocate General for Scotland)
Lord Keen of Elie, Advocate General for Scotland
Sir James Eadie QC
Jason Coppel QC
Margaret Gray
BJ Gill
Christopher Knight
(Instructed by The Government Legal Department)

Lord Advocate
W James Wolffe QC, Her Majesty's Advocate
James Mure QC
Christine O'Neill
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Counsel General for Wales
Michael Fordham QC
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Attorney General for Northern Ireland
John F Larkin QC, Attorney General for Northern Ireland
(Instructed by Office of the Attorney General for Northern Ireland)

LADY HALE, LORD REED, LORD KERR, LORD SUMPTION, LORD CARNWATH, LORD HODGE AND LORD LLOYD-JONES:

1. Does the Scottish Parliament have power to legislate for the continuity of laws relating to devolved matters in Scotland which are now the subject of European Union ("EU") law but which will cease to have effect after the United Kingdom ("UK") withdraws from the EU? That is the principal subject matter of a reference by the Attorney General and the Advocate General for Scotland ("the UK Law Officers") to this court under section 33 of the Scotland Act 1998 as amended ("the Scotland Act").

2. This is the judgment of the court.

Factual background

3. On 29 March 2017 the UK Government notified the European Council of its decision that the UK would withdraw from the EU in accordance with article 50 of the Treaty on European Union ("article 50" and "TEU"). Subject to the judgment of the Court of Justice of the European Union ("CJEU") on the reference by the Inner House of the Court of Session on the revocability of article 50 or unless a withdrawal agreement were to provide otherwise or there were to be unanimous agreement of the member states of the EU to an extension of the time limit for withdrawal set out in article 50, the UK will cease to be a member of the EU on 29 March 2019.

4. So long as the UK is a member of the EU, EU law governs matters within its sphere in each of the jurisdictions of the UK without differentiation. When the Scotland Act was enacted, the power to amend EU law, the body of rights and obligations which are binding on all EU member states, resided with the EU institutions. It still so resides. But on the UK's withdrawal from the EU ("UK withdrawal"), and subject to any agreement to the contrary, EU law will cease to bind the UK and its constituent jurisdictions.

5. Many of our laws are the product of EU legislation through directly applicable EU Regulations, decisions and tertiary legislation, or are derived from EU law, for example by the implementation in our domestic legal systems of EU obligations such as those contained in EU Directives. To achieve legal continuity and to promote legal certainty it is considered necessary to incorporate direct EU legislation into domestic law and to preserve the effect of EU-derived domestic legislation after UK withdrawal.

6. On 13 July 2017 the UK Government introduced in the House of Commons the European Union (Withdrawal) Bill ("the UK Bill") to repeal the European Communities Act 1972 and to achieve legal continuity within each of the jurisdictions of the UK after withdrawal from the EU. That Bill was not passed by both Houses of Parliament until 20 June 2018. It received Royal Assent on 26 June 2018, becoming the European Union (Withdrawal) Act 2018 ("the UK Withdrawal Act").

7. Both before and during the passage through Parliament of the UK Bill, the UK Government discussed its terms with representatives of devolved institutions in the UK. After proposed amendments to the UK Bill, which the Scottish Government supported, were defeated in the House of Commons, the Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ("the Scottish Bill") in the Scottish Parliament on 27 February 2018. In accordance with section 31 of the Scotland Act 1998 both the Deputy First Minister of the Scottish Government (John Swinney MSP), who introduced the Bill, and the Presiding Officer of the Scottish Parliament (Rt Hon Kenneth Macintosh MSP) issued statements on the legislative competence of the Scottish Bill when it was introduced to the Scottish Parliament. The Scottish Government expressed the view that the Bill would be within the legislative competence of the Scottish Parliament. The Presiding Officer expressed the view that it would not, because the Bill, which would be enacted before the UK withdrew from the EU, would not be compatible with EU law *at the time when the Scottish Parliament passed the legislation*. In short, the Presiding Officer opined that the Scottish Parliament could not seek to exercise competence before that competence had been transferred to it and that provisions in the Bill, which postponed the legal effect of the legislation until UK withdrawal, did not alter the Parliament's competence at the time when the legislation was passed.

8. The Scottish Parliament passed the Scottish Bill on 21 March 2018. This resulted in the reference to this court under section 33(1) of the Scotland Act 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". The reference was made within four weeks of the passing of the Scottish Bill in accordance with section 33(2) of the Scotland Act. The Lord Advocate has responded to the reference and has submitted that the Scottish Bill would be within the legislative competence of the Scottish Parliament.

9. The Scottish Parliament was not the only devolved legislature that sought to pass legislation to provide for domestic legal continuity after the UK's withdrawal from the EU on exit day. After the UK Parliament did not accept amendments to the UK Bill which the First Minister of Wales supported, the Welsh Assembly passed legislation to similar effect as the Scottish Bill in the Law Derived from the

European Union (Wales) Bill ("the Welsh Bill"). This resulted in a reference by the Attorney General to this court under section 112(1) of the Government of Wales Act 2006 in relation to the Welsh Bill. But, after agreement was reached between the Welsh Government and the UK Government on 24 April 2018 which resulted in amendments to clause 11 of the UK Bill (now section 12 of the UK Withdrawal Act) and the Welsh Assembly gave legislative consent to the UK Bill, the Attorney General has withdrawn that reference. The Law Derived from the European Union (Wales) Act 2018 received the Royal Assent on 6 June 2018 and came into force on the following day by virtue of section 21.

10. Nonetheless, the questions which this reference raises have implications not only for the Scottish Parliament but also for the other devolved legislatures of the UK. The Counsel General to the Welsh Government and the Attorney General for Northern Ireland have therefore appeared as interveners and have addressed the court. We are very grateful to them for their assistance.

The role of this court

11. Withdrawal from the EU will result in legislative powers, which are currently vested in EU institutions, being transferred to institutions in the UK. There has been and is a political debate as to which institutions within the UK should best exercise those powers in the public interest. It is not the role of this court to form or express any view on those questions of policy, which are the responsibility of our elected representatives and in which the wider civil society has an interest. Our role is simply to determine as a matter of law whether and to what extent the Scottish Bill would be within the legislative competence of the Scottish Parliament. That question is answered, as we explain below, by analysing the provisions of the Scotland Act.

The Scotland Act

12. Since the Scottish Parliament commenced its work on 2 July 1999, the courts have had occasion to interpret the law by which it is governed. The main principles may be summarised as follows. The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act. The Scotland Act must be interpreted in the same way as any other statute. The courts have regard

to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.

13. These statements of the law can be found in *Whaley v Lord Watson* 2000 SC 340, 348-349 per the Lord President (Lord Rodger); *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40, para 52 per Lord Walker of Gestingthorpe; *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122; [2012] 1 AC 868, paras 45-46 per Lord Hope of Craighead, paras 146-147 per Lord Reed; *Imperial Tobacco Ltd v Lord Advocate* 2012 SC 297, para 58 per Lord Reed, [2012] UKSC 61; 2013 SC (UKSC) 153, paras 6 and 12-15 per Lord Hope; *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53; [2013] 1 AC 792, paras 78-81 per Lord Hope; and *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622, para 66 per Lord Reed and Lord Thomas of Cwmgiedd CJ.

14. Section 28 of the Scotland Act provides that, subject to section 29, the Scottish Parliament may make laws. Section 29 delimits the legislative competence of the Scottish Parliament. It provides, so far as relevant:

> "(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply - …
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Schedule 4,
>
> (d) it is incompatible with … EU law, …
>
> (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4),

> by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. …"

15. There are therefore three principal restrictions which are relevant to this reference. First, a provision is outside competence if "it is incompatible with … EU law" (section 29(2)(d)). This restriction is what caused the Presiding Officer of the Scottish Parliament to express his view which we discussed in para 7 above. Secondly, a provision is outside competence if "it relates to reserved matters" (section 29(2)(b) and (3)). Section 30 and Schedule 5 define reserved matters, which include "foreign affairs etc", including relations with the EU, in paragraph 7 of Schedule 5. Thirdly, a provision is outside competence if "it is in breach of the restrictions in Schedule 4" (section 29(2)(c)). Schedule 4 lists enactments and rules of law which are protected from modification by an Act of the Scottish Parliament or by subordinate legislation created on its authority.

16. It is necessary in this overview of the Scotland Act also to mention three other provisions. First, section 101 governs the approach to the interpretation of Acts of the Scottish Parliament or subordinate legislation which could be read as to be outside competence. Section 101(2) provides

> "Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly."

17. Since the cases to which we referred in para 13 above were decided, the UK Parliament, in the Scotland Act 2016, has enacted two important amendments to the Scotland Act, which are designed to entrench the role of the Scottish Parliament and Scottish Government in the UK constitution. Thus, secondly, it is provided in section 63A (inserted by section 1 of the 2016 Act):

> "(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
>
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
>
> (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be

> abolished except on the basis of a decision of the people of Scotland voting in a referendum."

18. Thirdly, in the same Act the UK Parliament has given statutory recognition to the Sewel convention by inserting into section 28 of the Scotland Act (by section 2 of the 2016 Act), immediately after the subsection preserving the power of the UK Parliament to make laws for Scotland, the following subsection:

> "(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

19. In *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] UKSC 5; [2018] AC 61 (paras 136-137) this court explained that, although the Sewel convention cannot be enforced by the courts, it nonetheless plays an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. The Convention is embodied in a Memorandum of Understanding between the UK Government and the devolved governments which, in para 14 of the current memorandum (published in October 2013), states:

> "the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."

The mechanism in Scotland for agreeing to such legislation by the UK Parliament is by a legislative consent motion which is put to a vote in the Scottish Parliament.

20. As Lord Hope stated in *Imperial Tobacco* para 6, disputes between the Scottish Parliament and the UK Parliament as to legislative competence have been avoided, partly by the use of legislative consent motions passed by the Scottish Parliament and partly by the care which officials within the Scottish Parliament have taken to ensure that measures which the Scottish Parliament passes are within competence. On this occasion the Scottish Government opposed the enactment of the UK Bill without the amendments which it had supported and on 15 May 2018 the Scottish Parliament voted to refuse a legislative consent motion in relation to it.

That vote does not affect the legal validity of the UK Withdrawal Act. But there is now a conflict between that Act and the Scottish Bill.

21. This is the first occasion in the 19 years since the Scottish Parliament commenced its work that there has been a challenge by Law Officers of the UK Government to a Bill of the Scottish Parliament on the ground that it is outside legislative competence.

The reference and the structure of this judgment

22. The reference poses four principal questions, together with subordinate questions. The enactment of the UK Withdrawal Act poses two further questions. In this judgment we address those questions in the following manner:

(1) We consider the UK Law Officers' submission that the Scottish Bill in its entirety is outside competence principally because it "relates to" the reserved matter of relations with the EU (paras 23-36).

(2) We address the challenge that section 17 of the Scottish Bill, which seeks to make the consent of the Scottish Ministers a pre-condition for the legal effect of certain future subordinate legislation by Ministers of the Crown containing devolved provision which affects the operation of retained EU law, is outside competence (paras 37-65).

(3) We consider whether section 33 of and Schedule 1 to the Scottish Bill, which purport to repeal references to EU law in the Scotland Act on the ground that they are spent after UK withdrawal, are outside competence (paras 66-79).

(4) We address the challenge that various provisions of the Scottish Bill are outside competence because (i) they are incompatible with EU law, (ii) modify the European Communities Act 1972, and/or (iii) are contrary to the rule of law (paras 80-90).

(5) We consider whether it is competent for this court to consider the effect of the UK Withdrawal Act on the legality of the Scottish Bill in the context of this reference (paras 91-97).

(6) Finally, we address the extent to which the UK Withdrawal Act has put provisions of the Scottish Bill outside the legislative competence of the Scottish Parliament (paras 98-124).

(1) Whether the Scottish Bill as a whole is outside the legislative competence of the Scottish Parliament

23. The first question referred is stated in the Reference as follows:

> "Whether the Scottish Bill as a whole is outside the legislative competence of the Scottish Parliament because:
>
> (a) It is contrary to the constitutional framework underpinning the devolution settlement; and/or
>
> (b) It 'relates to' the reserved matter of 'relations with … the European Union' set out in paragraph 7(1) of Part 1 of Schedule 5, falling under section 29(2)(b) of the Scotland Act; and/or
>
> (c) It is contrary to the rule of law principles of legal certainty and legality."

24. Paragraph 7 of Part 1 of Schedule 5 provides:

> "7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.
>
> (2) Sub-paragraph (1) does not reserve -
>
> (a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

(b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies."

25. We begin by explaining the scope of this question as it was developed in argument, and its relationship to other referred questions. The Scottish Parliament is a legislature of unlimited legislative competence subject to the limitations in sections 28 and 29 of the Scotland Act, and in particular the five exclusions from its competence specified in section 29(2). The most significant of these exclusions are (b), (c) and (d). They are very different in nature. Exclusions (c) and (d) are concerned with specific inconsistencies, in the case of (c) with specified UK legislation or rules of law identified in Schedule 4, and in the case of (d) with the Human Rights Convention or EU law. By comparison, the effect of case (b) is to prevent the Scottish Parliament from legislating about reserved matters at all, even if there is no inconsistency between its proposed legislation and any of these UK-wide sources of law. The UK Law Officers attack the Scottish Bill at two levels, one general and the other particular. The general attack, which is the subject of Question 1, is based mainly on the contention that the entire Scottish Bill "relates to" international relations. As a result, it is said to be beyond the competence of the Scottish Parliament quite apart from any specific inconsistency between its terms and any UK-wide source of law. The UK Law Officers seek to reinforce this point by arguing that a broad view must be taken of the nature of the relationship between the Scottish Bill and relations with the EU which will serve to bring it within section 29(2)(b). This is, first, because under section 29(3) the question whether a provision of a Scottish Act "relates to" a reserved matter must be determined "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances". The purpose, it is said, of the Scottish Bill is to deal with relations with the EU in a manner specific to Scotland, whereas the assumption underlying Schedule 5, Part 1, paragraph 7 is that they will be dealt with on a UK-wide basis, necessarily by the UK Parliament. Secondly, so it is submitted, it is because the Scottish Bill is open to review on more general grounds than those set out in section 29 of the Scotland Act, including its alleged inconsistency with the "constitutional framework underpinning the devolution settlement" or with the "rule of law principles of legality and legal certainty". The argument is that the Scottish Bill cuts across the attempts of the UK Parliament and government to deal in a way that applies coherently and consistently across the whole of the UK with a matter within their reserved competence, namely the legal consequences of withdrawal from the EU. It is also said that the existence of parallel legislation on the same subject-matter in Scotland and in the UK as a whole, undermines legal certainty.

26. The starting point in considering these arguments is the proper scope of a reference under section 33 of the Scotland Act. There is a difference between a want of legislative competence and more general grounds for judicial review on public law grounds. The result of a want of legislative competence is that a Scottish enactment is a nullity ("not law"): see section 29(1) of the Scotland Act. A Scottish

enactment which is held by a court to be unlawful on more general public law grounds is not necessarily a nullity. In *AXA General Insurance Ltd v Lord Advocate* Lord Hope at para 47 and Lord Reed at paras 149-153, with whom the rest of the court agreed, observed that since the Scottish Parliament is a statutory body owing its powers and duties to an Act of the UK Parliament, section 29 is not exhaustive of the grounds on which its legislation may be reviewed. Other grounds of challenge such as inconsistency with fundamental rights may in principle be available. They were, however, dealing with proceedings by way of judicial review on appeal from the Court of Session. It is clear, in particular from the observations of Lord Hope, that that was the context of these particular statements. A reference to this court under section 33 of the Scotland Act is concerned only with the extent of the Scottish Parliament's "legislative competence": see section 33(1). This is a term of art in the Scotland Act. It refers back to section 29, which provides that a provision is outside the legislative competence of the Scottish Parliament in the five cases specified in subsection (2). For the purposes of a reference under section 33, they are exhaustive. It follows that the only relevant issue under Question 1 is whether the Scottish Bill "relates to reserved matters", specifically relations with the EU, within the meaning of section 29(2)(b). Consistency with the rule of law or the constitutional framework underpinning the devolution settlement is relevant only so far as it assists in resolving that issue. They are not independent grounds of challenge available in these proceedings.

27. In order to "relate to" a reserved matter, a provision of a Scottish bill must have "more than a loose or consequential connection" with it: *Martin v Most* at para 49 (Lord Walker). In *Imperial Tobacco Ltd v Lord Advocate* at para 26, Lord Hope observed that the question required one first to understand the scope of the matter which is reserved and, secondly, to determine by reference to the purpose of the provisions under challenge (having regard among other things to their effect in all the circumstance) whether those provisions "relate to" the reserved matter. The purpose of an enactment for this purpose may extend beyond its legal effect, but it is not the same thing as its political motivation.

28. There can be no doubt about the purpose of the Scottish Bill or its effect if valid. It is accurately stated in section 1(1):

> "(1) The purpose of this Act is to make provision -
>
> (a) in connection with the prospective withdrawal of the United Kingdom from the EU in consequence of the notification given under section 1 of the European Union (Notification of Withdrawal) Act 2017 ("UK withdrawal"), and

(b) for ensuring the effective operation of Scots law (so far as within devolved legislative competence) upon and after UK withdrawal."

The decisive issue in these proceedings is accordingly the scope of the reservation for international relations.

29. Before broaching that issue, it is necessary to say something about the legal context of the reservation for international relations. Three broad points need to be made about it:

(1) In the eyes of the outside world a state is a subject of international law and as such a unitary entity. Other states or international organisations are not concerned with its internal distribution of powers, duties or competences. The UK is a member state of the EU and has all the international rights and obligations attaching to that status. Scotland is not as such a member state. It participates in the EU as an integral part of the UK. The UK is of course free to provide domestically for the observation and implementation of its EU and other international obligations by the devolved administrations and legislatures. But they remain the UK's international obligations, and the UK remains responsible at the international level for their proper discharge.

(2) As a matter of domestic law, the conduct of the UK's international relations is a prerogative power of the Crown. It requires legislative authority only insofar as statute so provides, expressly or by implication. Ministers of the Crown cannot alter the law of any part of the UK by the exercise of that prerogative power. For that reason, where a treaty requires changes to the law of the UK, the long-standing practice of Her Majesty's Government has been to obtain legislative authority for those changes before ratifying any international engagement and thereby committing the UK internationally.

(3) Reserved matters as defined in Schedule 5 are excluded from the legislative competence of the Scottish Parliament by virtue of section 29(2)(b), and also by virtue of section 29(2)(c), since Schedule 4, Part 1, paragraph 2 prevents it from legislating to modify the law on reserved matters. But it is important to appreciate that the statutory provisions for reserved matters are not only a limitation on the competence of the Scottish Parliament. Reserved matters are also excluded from the devolved competence of the Scottish Ministers by virtue (primarily) of section 54. Under section 54(3), the Scottish Ministers cannot exercise any function which it would not be competent for the Scottish Parliament to confer on them by legislation. The effect of this last provision is that the transfer from

> Ministers of the Crown to the Scottish Ministers of the function of exercising the prerogative powers of the Crown, which is effected generally by section 53, does not extend to the prerogative power to conduct international relations. This feature of the statutory scheme is particularly important in the case of the reservation for international relations, since the conduct of international relations is a matter for the executive, in which legislation generally plays an ancillary or implementing role.

30. Schedule 5, Part 1, paragraph 7, distinguishes between (i) international relations, including relations with the EU, which are reserved; and (ii) the observation and implementation of international obligations and obligations under the Human Rights Convention and EU law, which are not reserved. For this purpose, EU law means "all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties" and "all those remedies and procedures from time to time provided for by or under the EU Treaties": section 126(9). The observation and implementation of EU law is accordingly within the domestic competence of the Scottish Parliament and the Scottish Ministers unless it falls within another reserved matter, but subject always to the provisos that under section 29(2)(d) the legislature has no competence to legislate incompatibly with EU law and that under section 57(2) the Scottish Ministers have no competence to act incompatibly with EU law.

31. The Scottish Bill is not within the carve-out from the reserved matter for the observation or implementation of obligations under EU law. It has nothing to do with the observation or implementation of those obligations. If the Scottish Bill becomes law, its provisions will not affect the law of Scotland until after withdrawal, ie at a time when the UK has no EU law obligations. This point is more fully addressed at paras 80 to 90 below. The Scottish Bill is concerned with the purely domestic rules of law which at that point will replace EU law. The fact that those domestic rules may be substantially the same as the rules which previously applied as a matter of EU law does not make them obligations under EU law. Their juridical source is purely domestic.

32. If the Scottish Bill is not within the carve-out for the observation or implementation of EU law, does it fall within the general reservation for relations with the EU? The distinction between the observation or implementation of obligations under EU law and other aspects of relations with the EU means that the reservation in Schedule 5, Part 1, paragraph 7 is in practice likely to be relevant mainly to acts of the Scottish Ministers. There is relatively little scope for Scottish legislation to "relate to" international relations other than by way of implementation of international obligations, unless such legislation were to purport to deal with the power of Ministers of the Crown to exercise its prerogative in foreign affairs, or to create a state of law in Scotland which affected the effectual exercise of that power. An example might perhaps be the purported imposition of sanctions in Scotland on

foreign countries for political purposes. It is particularly difficult to envisage Scottish legislation relating to relations with the EU other than by way of implementation of EU law obligations. This is because for as long as the UK remains in the EU they are comprehensively regulated by provisions of the European Communities Act 1972 which are protected enactments under Schedule 4, Part 1, paragraph 1(2)(c).

33. In our judgment, the Scottish Bill does not "relate to" relations with the EU. It will take effect at a time when there will be no legal relations with the EU unless a further treaty is made with the EU. The Bill does not purport to deal with any legal rule affecting the power of Ministers of the Crown to negotiate such a treaty or otherwise to conduct the UK's relations with the EU. It does not purport to affect the way in which current negotiations between the UK and the EU are conducted. It simply regulates the legal consequences in Scotland of the cessation of EU law as a source of domestic law relating to devolved matters, which will result from the withdrawal from the EU already authorised by the UK Parliament. This is something that the Scottish Parliament is competent to do, provided (i) that it does it consistently with the powers reserved in the Scotland Act to the UK Parliament, and with legislation and rules of law protected under Schedule 4, and (ii) that its legislation does not relate to other reserved matters. Parts of the argument of the UK Law Officers appear to suggest a wider objection that separate Scottish legislation about the consequences of withdrawal is legally untidy, politically inconvenient or redundant in the light of the corresponding UK legislation. But we are not concerned with supposed objections of this kind, which go to the wisdom of the legislation and not to its competence.

34. Different considerations may arise if and when further legislation is required to implement any agreement which Ministers of the Crown may negotiate with the EU governing the terms of withdrawal or the subsequent relations of the UK with the EU. But that is a matter which will have to be addressed when that legislation comes to be proposed.

35. The UK Law Officers' case on these points is not assisted by reference to the constitutional framework underlying the devolution settlement or the principles of legal certainty and legality. The constitutional framework underlying the devolution settlement is neither more nor less than what is contained in the Scotland Act construed on principles which are now well settled. And there is nothing legally uncertain or otherwise contrary to the rule of law about the enactment of legislation governing the domestic legal consequences of withdrawal at both the UK and the Scottish level, provided that they do not conflict, a question which is addressed below.

36. Accordingly, the answer to Question 1 is "No", subject in the case of Question 1(a) to the remaining questions referred.

(2) Whether section 17 of the Scottish Bill is outside the legislative competence of the Scottish Parliament

37. The second question is stated in the reference as follows:

> "Whether section 17 of the Scottish Bill is outside the legislative competence of the Scottish Parliament because:
>
> (a) It modifies sections 28(7) and 63(1) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act; and/or
>
> (b) It 'relates to' the reserved matter of 'the Parliament of the United Kingdom' set out in paragraph 1(c) of Part 1 of Schedule 5, falling under section 29(2)(b) of the Scotland Act."

38. Section 17 of the Bill is headed "Requirement for Scottish Ministers' consent to certain subordinate legislation". Subsection (1) defines the subordinate legislation to which the section applies:

> "(1) This section applies to subordinate legislation made, confirmed or approved by a Minister of the Crown or any other person (other than the Scottish Ministers) if -
>
> (a) it contains devolved provision (whether or not it also contains other provision),
>
> (b) the devolved provision modifies or otherwise affects the operation of -
>
> (i) retained (devolved) EU law, or

(ii) anything that would be, on or after exit day, retained (devolved) EU law,

(c) it is made, confirmed or approved under a function -

(i) conferred, or

(ii) modified in accordance with subsection (3),

by or under an Act of the Parliament of the United Kingdom enacted after the date on which this section comes into force, and

(d) it does not apart from this section require the consent of the Scottish Ministers before it is made, and

(e) it is made by statutory instrument."

39. Subsection (3) explains what is meant in subsections (1)(b) and (1)(c)(ii) by "modifies" and "modified":

"(3) A function is modified in accordance with this subsection if it is modified in a way that enables or requires the subordinate legislation to contain devolved provision that it could not previously contain."

Subsection (4) defines the expression "devolved provision":

"(4) For the purposes of this section, 'devolved provision' means provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament."

40. Subsection (1) having defined the ambit of section 17, and subsections (3) and (4) having defined some of the expressions employed, the operative provision of the section is set out in subsection (2):

> "(2) The subordinate legislation, to the extent that it contains devolved provision, is of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved."

41. Section 28(1) of the Scotland Act confers on the Scottish Parliament the power to make laws known as Acts of the Scottish Parliament, subject to section 29. Section 28(7) provides:

> "(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

That provision makes it clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved.

42. Section 29(1) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. Section 29(2) provides that a provision is outside that competence so far as, inter alia:

> "(c) it is in breach of the restrictions in Schedule 4."

Schedule 4 provides, in paragraph 4(1):

> "(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, this Act."

Subsequent provisions in paragraph 4 create a number of exceptions to that general prohibition, but there is no exception relating to section 28(7). It follows that a provision in an Act of the Scottish Parliament is outside legislative competence in so far as it purports to modify section 28(7). Section 17 of the Bill, if it received Royal Assent, would therefore be outside legislative competence in so far as it purported to do so.

(a) Would section 17 of the Bill modify section 28(7) of the Scotland Act?

43. It is submitted on behalf of the UK Law Officers that section 17 of the Bill would modify section 28(7) of the Scotland Act, since it would impose a condition limiting the power of the UK Parliament to make laws for Scotland in relation to devolved matters. Any law which the UK Parliament makes, conferring on Ministers of the Crown or other persons the power to make subordinate legislation falling within the scope of section 17, would be of no effect unless the Scottish Ministers consent to the subordinate legislation in question in accordance with that section. That would be inconsistent with the sovereign power of the UK Parliament to legislate for Scotland. Section 17 would therefore limit the continuing effect of, and thus modify, section 28(7) of the Scotland Act, in breach of the limit on legislative competence imposed by section 29(2)(c) of the Scotland Act, read together with paragraph 4(1) of Schedule 4.

44. In response, the Lord Advocate advances a number of arguments. First, he submits that a distinction should be drawn between a provision which expressly or implicitly alters a provision in a protected enactment, and so modifies it, and one which merely adds further provision in the same field of law. Similar arguments are also advanced by the Attorney General for Northern Ireland and on behalf of the Counsel-General for Wales. Counsel for the Counsel-General submits that where the UK Parliament passes legislation for Wales, there is no reason in principle why the Welsh Assembly cannot legislate to the effect of adding a requirement (for example, for consultation), although no such requirement appears in the legislation enacted by Parliament. The devolution legislation recognises this, and deals with the situation by giving the UK Parliament the option of entrenching legislation by protecting it from modification. It is, he submits, inconsistent with that structure to say that legislating to add to or detract from what Westminster had enacted (or might wish to enact in the future) was itself outside legislative competence.

45. In support of his submission, the Lord Advocate cites *Martin v Most* at para 110, where Lord Rodger of Earlsferry in his dissenting judgment described a provision in an Act of the Scottish Parliament which enabled sheriffs to impose a maximum sentence of imprisonment of 12 months on persons convicted on summary complaint as superseding, and so modifying, a provision in UK road traffic legislation which stipulated that the maximum term of imprisonment for a specified conviction on summary complaint was six months. The UK provision was not amended or repealed, but it was superseded in its application to Scotland, and so modified, by a provision which was inconsistent with it.

46. The Lord Advocate also cites the judgments of the Inner House, and of this court, in *Imperial Tobacco Ltd v Lord Advocate*. The relevant issues in that case arose under paragraph 2(1) of Schedule 4 to the Scotland Act, which provides that

an Act of the Scottish Parliament cannot modify "the law on reserved matters", an expression which is defined in paragraph 2(2) as meaning any enactment or rule of law the subject-matter of which is a reserved matter. One question which arose was whether provisions in an Act of the Scottish Parliament which restricted the display of tobacco products, and prohibited their sale by vending machines, modified existing UK Regulations which prohibited the sale of tobacco for oral use and the sale of cigarettes with high tar yields. The creation of additional offences was held not to modify the existing Regulations. In the Inner House, Lord President Hamilton distinguished at para 17 between "a provision which, expressly or implicitly, alters another provision and one which adds a further specific restriction or restrictions to existing specific restrictions, albeit in the same field of law". The latter, he said, did not modify an existing enactment. In this court Lord Hope stated at para 44:

> "[The provisions in question] do not seek to amend or otherwise affect anything that is set out in those Regulations. In that sense they cannot be said to modify them at all. As Lord Reed said [in the Inner House] the Regulations continue in force as before."

47. Proceeding on that basis, the Lord Advocate advances three reasons why section 17 would not modify section 28(7) of the Scotland Act. First, he submits, Parliament's power to make laws for Scotland would remain unaffected. The subordinate legislation to which section 17 of the Bill would apply would not be made by Parliament itself, but by Ministers and other persons. To similar effect, the Attorney General for Northern Ireland submits that section 17 would not touch, far less modify, Parliament's power to enact: all it would affect was what Ministers of the Crown and other persons might do pursuant to a power that Parliament might give them.

48. Secondly, the Lord Advocate submits that section 17 of the Bill would not modify section 28(7) of the Scotland Act because it would remain within the power of the UK Parliament - subject, he submits, to the Sewel convention, set out in section 28(8) of the Scotland Act - to disapply section 17 of the Bill, or to repeal it altogether.

49. Thirdly, the Lord Advocate submits that since section 17 would not prevent the UK Parliament from conferring powers on Ministers to make subordinate legislation for Scotland, and would not affect the formal validity of any subordinate legislation made in the exercise of such powers, but is directed merely at the legal effect of such legislation, it follows that section 17 would not affect the UK Parliament's power to make laws for Scotland, and therefore would not modify section 28(7) of the Scotland Act. In that regard, the Lord Advocate draws an

analogy with the distinction between a law's being on the statute book and its being in force.

50. Considering first the meaning of modification, the expression "modify" is defined in section 126(1) of the Scotland Act as follows:

> "'modify' includes amend or repeal."

This clearly strikes at the express amendment or repeal of any provision which is protected against modification. The Lord Advocate accepts, however, that it is not confined to express amendment or repeal: a provision may also be held to modify another provision if it has the effect of amending or repealing it. He submits that, where there is no express amendment or repeal, the issue can be tested by asking whether there is an inconsistency between the provision under consideration and the protected enactment or rule of law.

51. As appears from the authorities cited by the Lord Advocate, one enactment does not modify another merely because it makes additional provision in the same field of law. If it did, the important distinction between the protection of enactments from modification under Schedule 4 to the Scotland Act, and the inability of the Scottish Parliament to legislate in relation to reserved matters under Schedule 5, would become obscured. When the UK Parliament decides to reserve an entire area of the law to itself, it does so by listing the relevant subject-matter in Schedule 5. When it has not taken that step, but has protected a particular enactment from modification by including it in Schedule 4, it is not to be treated as if it had listed the subject-matter of the enactment in Schedule 5. Where the only relevant restriction on the legislative power of the Scottish Parliament is the protection of an enactment from modification under Schedule 4, the Parliament has the power to enact legislation relating to the same subject-matter as the protected enactment, provided it does not modify it. Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.

52. Applying that approach, we are unable to accept the Lord Advocate's submission that section 28(7) of the Scotland Act would not be modified by section 17 of the Bill. As the Lord Advocate acknowledges, the power of the UK Parliament to make laws for Scotland includes the power to make laws authorising the making

of subordinate legislation by Ministers and other persons. An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect. The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power. Thus, in order for section 17 of the Bill and section 28(7) of the Scotland Act to operate concurrently, the former would have to be treated as impliedly amending the latter, so that it read:

> "(7) Subject to section 17 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018, this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

53. That conclusion is not altered by the other arguments advanced by the Lord Advocate. In relation to the first argument (para 47 above), a provision which made the effect of laws made by the UK Parliament for Scotland conditional on the consent of the Scottish Ministers, unless it disapplied or repealed the provision in question, would for that very reason be inconsistent with the continued recognition of its unqualified sovereignty, and therefore tantamount to an amendment of section 28(7) of the Scotland Act. In relation to the second argument (para 48 above), the question before the court is whether, if the Bill were to receive Royal Assent, section 17 would be law. If not, there would be no question of its having to be disapplied or repealed by the UK Parliament: it would be of no legal effect whatsoever ("not law", in terms of section 29(1) of the Scotland Act). It is therefore no answer to an argument that section 17 of the Bill would be outside legislative competence, to say that it could be disapplied or repealed. In relation to the third argument (para 49 above), this submission resembles the Lord Advocate's first argument, and for similar reasons we are unable to accept it. A provision which imposes a condition on the legal effect of laws made by the UK Parliament, in so far as they apply to Scotland, is in conflict with the continuation of its sovereign power to make laws for Scotland, and is therefore equivalent to the amendment of section 28(7) of the Scotland Act. The suggested analogy reinforces the point. If a provision of a Bill passed by the Scottish Parliament were to prevent legislation enacted by the UK Parliament from coming into force without the Scottish Ministers' consent, that provision would undoubtedly limit the UK Parliament's power to make laws for Scotland.

54. For these reasons, we conclude that section 17 of the Bill would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c) and paragraph 4(1) of

Schedule 4. Having reached that conclusion, it is unnecessary for us to consider whether section 17 of the Bill would also breach the restriction in paragraph 4(1) of Schedule 4 by modifying section 63(1).

(b) Does section 17 relate to the reserved matter of Parliament?

55. The remaining question, in relation to section 17 of the Bill, is whether it "relates to" the reserved matter of "the Parliament of the United Kingdom", set out in paragraph 1(c) of Part 1 of Schedule 5 to the Scotland Act, to which effect is given by section 29(2)(b).

56. Reserved matters are set out in Schedule 5. Paragraph 1 is headed "The Constitution", and provides:

> "The following aspects of the constitution are reserved matters, that is -
>
> (a) the Crown, including succession to the Crown and a regency,
>
> (b) the Union of the Kingdoms of Scotland and England,
>
> (c) the Parliament of the United Kingdom,
>
> (d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,
>
> (e) the continued existence of the Court of Session as a civil court of first instance and of appeal."

Paragraph 1 is qualified by paragraphs 2 to 5, but none of the qualifications affects paragraph 1(c).

57. It is submitted on behalf of the UK Law Officers that section 17 of the Bill relates to the reserved matter of "the Parliament of the United Kingdom". Its purpose is to achieve what the Scottish Government failed to achieve during the passage of

the UK Withdrawal Act through Parliament, namely the enactment of a requirement that subordinate legislation made under the Act, affecting matters devolved to Scotland, would be subject to a requirement that the consent of the Scottish Government must be obtained. That purpose is made plain by the Scottish Government in the Policy Memorandum which was published to accompany the Bill, at paras 68-69:

> "68. While it may prove efficient or beneficial to be able to make provision on a UK-wide basis, the Scottish Government considers that this should only be possible with the consent of the Scottish Ministers. Amendments to the [European Union (Withdrawal) Bill] to this effect were jointly proposed by the Scottish and Welsh Governments but were not accepted by the UK Government.
>
> 69. In order to ensure the involvement of devolved Scottish institutions in devolved Scottish law-making, the Bill therefore creates a default procedural requirement under which UK Ministers must obtain the consent of the Scottish Ministers before they make, confirm or approve secondary legislation relating to devolved matters which modifies, or would modify, any retained (devolved) EU law. …"

58. The effect of section 17 is consistent with that purpose. It would give the Scottish Ministers the power to prevent subordinate legislation made by a Minister of the Crown from having effect in Scotland by withholding their consent. Section 17 thus seeks to impose on a power to be granted by Parliament a limitation that Parliament itself had chosen not to impose. It is inconsistent with the power of a sovereign Parliament.

59. In response, the Lord Advocate submits that the reservation of "the Parliament of the United Kingdom" is narrower in scope than the argument advanced on behalf of the UK Law Officers assumes. It comprises such matters as the existence of Parliament, its composition and its procedures. Section 17 of the Bill has no impact on any of these matters, or on the powers of Parliament. The argument advanced by the UK Law Officers fails to recognise that it is not, in general, outside the legislative competence of the Scottish Parliament to amend or repeal legislation enacted by the UK Parliament. Similar submissions are also made on behalf of the Counsel-General for Wales and by the Attorney General for Northern Ireland.

60. We are not persuaded that section 17 of the Bill relates to the matter reserved by paragraph 1(c) of Schedule 5. In deciding what that provision is intended to reserve, it is necessary to take account of its statutory context, including the heading of paragraph 1: *Imperial Tobacco,* para 17. As we have mentioned, paragraph 1 is headed "The Constitution". It reserves five aspects of the constitution. They are all fundamental elements of the constitution of the UK, and of Scotland's place within it: the Crown, the Union, the UK Parliament, and the existence of Scotland's higher civil and criminal courts.

61. Considered in that context, the reservation in paragraph 1(c) encompasses, amongst other matters, the sovereignty of Parliament, since that is an attribute of Parliament which is relevant - indeed, fundamental - to the constitution. On the other hand, the reservation in paragraph 1(c) cannot have been intended, ordinarily at least, to protect legislation enacted by Parliament from the effects of legislation passed by the Scottish Parliament, since that purpose is effected by other provisions of the Scotland Act, which reserve matters to the UK Parliament and thereby prevent the Scottish Parliament from legislating on those matters, or which protect enactments made by the UK Parliament from modification by legislation passed by the Scottish Parliament.

62. It follows that, if the Scottish Parliament legislates in order to give effect in Scotland to a policy which has been rejected by the UK Parliament, it does not, as a general rule, thereby infringe the reservation created by paragraph 1(c). Neither the purpose nor the effect of such legislation impinges upon the constitutional functions, powers or privileges of Parliament. The point can be illustrated by the case of *In re Agricultural Sector (Wales) Bill* which concerned a Bill passed by the Welsh Assembly, as emergency legislation, in order to establish a scheme for setting minimum wages for agricultural workers in Wales, shortly after the previous scheme, covering England and Wales, had been abolished by an Act of Parliament. The Bill was challenged by the Attorney General on the ground that it did not relate to the devolved matter of agriculture, and was therefore outside the legislative competence of the Assembly. No challenge was brought on the ground that, since the Bill gave effect to a policy which had been rejected by the UK Parliament, the Bill therefore related to the reserved matter of the UK Parliament. Nor was there any suggestion in the judgment that such a challenge might have been brought. Similarly in the present case, the fact that section 17 of the Bill gives effect to a policy rejected by the UK Parliament does not mean that it relates to the reserved matter of Parliament.

63. Nor are we persuaded that section 17 impinges upon the sovereignty of Parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17

became law. It could amend, disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures.

64. The preferable analysis is that although section 17, if it became law, would not affect Parliamentary sovereignty, it would nevertheless impose a condition on the effect of certain laws made by Parliament for Scotland, unless and until Parliament exercised its sovereignty so as to disapply or repeal it. It would therefore "affect the power of the Parliament of the United Kingdom to make laws for Scotland", and so modify section 28(7) of the Scotland Act.

Conclusion in relation to section 17

65. For the foregoing reasons, the answer to Question 2(a) is "Yes". Section 17 of the Bill would not be within the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c). The answer to Question 2(b) is "No".

(3) Whether section 33 of and Schedule 1 to the Scottish Bill are outside the legislative competence of the Scottish Parliament

66. Section 33 of the Scottish Bill purports to repeal spent references to EU law in the Scotland Act. It provides:

> "(1) In section 29(2)(d) of the Scotland Act 1998 (no competence for Scottish Parliament to legislate incompatibly with Convention rights or EU law) the words 'or with EU law' are repealed.
>
> (2) In section 57(2) of that Act (no power for members of the Scottish Government to act incompatibly with Convention rights or EU law), the words 'or with EU law' are repealed.
>
> (3) Schedule 1 contains further repeals of provisions in that Act which are spent as a consequence of the UK's withdrawal from the EU."

Schedule 1 provides for the repeal of provisions in the Scotland Act concerning EU parliamentary elections, references to the Court of Justice of the EU ("CJEU"), obligations under EU law, and EU law.

67. The UK Law Officers submit that these provisions are outside legislative competence because they modify provisions of the Scotland Act which Schedule 4 to that Act prohibits the Scottish Parliament from modifying. Paragraph 4 of Schedule 4 states:

> "(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, this Act."

That prohibition is subject to exceptions listed in the remaining sub-paragraphs of paragraph 4; but, as the UK Law Officers submit, of the provisions which Schedule 1 to the Scottish Bill would repeal, only sections 12(4)(a) and 82(1) fall within the listed exceptions. The other provisions, it is submitted, are protected from modification.

68. The UK Law Officers' fundamental objection to section 33 and Schedule 1 is that it is for the UK Parliament to amend the terms of the devolution settlement in the Scotland Act; it is not for the Scottish Parliament to determine its own competence. They refer to the statement of the Judicial Committee of the Privy Council in *Bribery Comr v Ranasinghe* [1965] AC 172, 197:

> "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."

The UK Law Officers point out that the repeals in section 33(1) and (2) would alter provisions (sections 29 and 57(2)) which define the competence of the Scottish Parliament and the Scottish Government.

69. The UK Law Officers advance a second argument addressing paragraph 7 of Schedule 4 to the Scotland Act, which contains another exception to the prohibition against modification of the Scotland Act. It provides that Part 1 of Schedule 4 (which includes paragraph 4 of that Schedule) "does not prevent an Act of the Scottish Parliament - … (b) repealing any spent enactment, or conferring power by subordinate legislation to do so." The UK Law Officers submit that the statutory references to EU law in the Scotland Act cannot be "spent" until the European Communities Act 1972 ("the 1972 Act") has been repealed. They submit that the effect of section 33 is not suspended by section 1(2) of the Scottish Bill. That section provides:

> "In so far as any provision of this Act, or any provision made under it, 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."

Section 1(3) defines "relevant time" in section 1(2) as the time when the relevant provision of EU law ceases to have effect in Scots law as a consequence of the withdrawal of the UK from the EU. Because the repeals to be effected by section 33 of and Schedule 1 to the Scottish Bill would not by themselves be incompatible with EU law, section 1(2), it is argued, cannot have the effect of postponing the repeals until after UK withdrawal. Further, the fact that a provision has not been brought into force does not prevent it from being outside legislative competence: reference is made to the judgment of this court in *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29, para 109, in which this court held that legislation, which was not within the legislative competence of the Scottish Parliament, could not be brought into force.

70. Finally, and in any event, the UK Law Officers submit that even if references to "EU law" were to be seen as "spent" because they were meaningless after UK withdrawal, there are other provisions which are not. They refer to section 34 of the Scotland Act, which enables the Scottish Parliament to reconsider a Bill if the Supreme Court, on considering a reference under section 33, decides to make a reference to the CJEU for a preliminary ruling. Such a provision would be rendered redundant by the repeal of the European Communities Act 1972 and might then require to be repealed. But because the provision was not rendered meaningless, it could not be treated as "spent".

71. We are not able to accept those submissions. The constitutional principle in *Ranasinghe* is not breached if there is a provision in the Scotland Act which allows the Scottish Parliament to repeal provisions in that Act which regulate its competence. The Lord Advocate submits that paragraph 7 of Schedule 4 is such a provision, arguing that the provisions of the Scotland Act, which section 33 of and Schedule 1 to the Scottish Bill would repeal, will be spent on UK withdrawal and that it is within the competence of the Scottish Parliament to provide in advance for UK withdrawal. The central question therefore is whether he is correct in that submission. We have concluded that he is.

72. We do not accept that the power in paragraph 7 of Schedule 4 to repeal "any spent enactment" is restricted to a statutory provision which is literally meaningless, as the UK Law Officers suggest. Synonyms for the adjective, "spent", include "exhausted", "finished", "used up", and "no longer active". Something is "spent" if it has been used and is unable to be used again. In a legal context of paragraph 7 of Schedule 4 to the Scotland Act, the adjective "spent" means a statutory provision which has no continuing legal effect.

73. "EU law" is defined in section 126(9) of the Scotland Act as "(a) all those rights, powers, 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". The constraints which EU law, so defined, place on the competence of the Scottish Parliament and the Scottish Government under sections 29(2)(d) and 57(2) of the Scotland Act will cease to have effect on UK withdrawal. Similarly, the provisions of the Scotland Act which refer to elections to the European Parliament and to procedures available to the Scottish Parliament when this court makes a reference to the CJEU under article 267 of the Treaty on the Functioning of the EU ("TFEU") will cease to have legal effect on UK withdrawal.

74. The UK Law Officers do not suggest that it would be incompatible with EU law for the Scottish Parliament now to enact section 33 of and Schedule 1 to the Scottish Bill. On the contrary, they submit that, because that would be compatible with EU law, section 1(2) of the Scottish Bill does not protect those provisions by postponing the repeal of the provisions of the Scotland Act until after the UK has withdrawn from the EU. We agree with that submission. But there is another mechanism by which the Scottish Parliament has provided for the postponement of the coming into force of section 33 and Schedule 1.

75. Section 36(1) of the Scottish Bill provides that specified provisions of the Bill come into force on the day after Royal Assent. Those provisions do not include section 33. That section falls under section 36(2), which provides that the other provisions of the Bill come into force "on such day as the Scottish Ministers may by regulations appoint". If read in isolation, section 36(2) would allow the Scottish Ministers to bring section 33 into force before the UK withdraws from the EU. But a statutory provision should not be interpreted in such isolation from its statutory context.

76. As we have seen, section 1(1) of the Scottish Bill provides:

> "The purpose of this Act is to make provision -
>
> > (a) in connection with the prospective withdrawal of the United Kingdom from the EU in consequence of the notification given under section 1 of the European Union (Notification of Withdrawal) Act 2017 ('UK withdrawal'), and

> (b) for ensuring the effective operation of Scots law (so far as within devolved legislative competence) upon and after UK withdrawal."

This provides the context both for the interpretation of section 33 and for the exercise by the Scottish Ministers of the section 36(2) power. The provisions which section 33 and Schedule 1 would repeal would not be spent until UK withdrawal.

77. The power of the Scottish Ministers in section 36(2) to make regulations to bring section 33 of the Scottish Bill into force is therefore restricted by the terms of section 33. If the Scottish Ministers were to make regulations to bring section 33 into force before UK withdrawal, they would be acting in excess of their powers as section 33 repeals provisions "which are spent as a consequence of the UK's withdrawal from the EU", and those provisions will not be spent until the UK withdraws from the EU. Furthermore, if it were necessary in order to avoid a breach of paragraph 4(1) of Schedule 4 to the Scotland Act, section 101(2) of the Scotland Act, which we have set out in para 16 above, requires the court to read section 36(2) narrowly so that the apparently general power of the Scottish Ministers to bring into force provisions of the Scottish Bill can be exercised in relation to section 33 only when it is competent to do so, that is to say once the UK has withdrawn from the EU and the provisions to be repealed have become spent.

78. Finally, we do not accept the submission that this court's judgment in *Christian Institute* points to the conclusion that the legislative competence of a devolved legislature must always be assessed by reference to an impugned provision of a Bill which has been passed whether or not that provision has been brought into force. In that case this court held that the information sharing provisions in Part 4 of the Children and Young People (Scotland) Act 2014 were incompatible with the rights of children, young persons and parents under article 8 of the European Convention on Human Rights both because they were not "in accordance with the law" as that article requires and because they might result in a disproportionate interference with those persons' article 8 rights. The case was not concerned with legislation which was addressing a contingency outside the control of the Scottish Parliament which would occur on a future date. The timing of the bringing into force of the impugned provisions of the 2014 Act was irrelevant to the challenge mounted in *Christian Institute*. By contrast, the Scottish Bill makes provision for the contingency of UK withdrawal, which will occur on 29 March 2019 unless steps are taken by the UK Government and, through the European Council, the governments of the other 27 member states of the EU to extend the period before the UK exits the EU. It enables the Scottish Ministers to bring into force the relevant provisions from the date when that contingency occurs.

79. We therefore conclude that section 33 of and Schedule 1 to the Scottish Bill would not be outside the legislative competence of the Scottish Parliament under section 29(2)(c) of the Scotland Act on the ground that they breach paragraph 4(1) of Schedule 4 to that Act. But this does not mean that those provisions of the Scottish Bill, if it were to receive Royal Assent, would be within the legislative competence of the Scottish Parliament. This is because we have yet to consider the application of section 29(2)(c) in the light of the enactment of the UK Withdrawal Act which, in paragraph 21(2)(b) of Schedule 3, has amended Schedule 4 to the Scotland Act by adding the UK Withdrawal Act to the statutes which the Scottish Parliament cannot modify. We address this matter in paras 98-124 below.

(4) Whether various provisions of the Scottish Bill are outside competence because (i) they are incompatible with EU law, (ii) modify section 2(1) of the European Communities Act 1972, and/or (iii) are contrary to the rule of law

80. It is argued on behalf of the UK Law Officers that provisions of the Scottish Bill are not law because they are incompatible with EU law and therefore outside the competence of the Scottish Parliament by virtue of section 29(2)(d) of the Scotland Act or because they entail a prohibited modification of section 2(1) of the European Communities Act 1972 ("the 1972 Act"), contrary to section 29(2)(c) of and Schedule 4 paragraph 1(2)(c) to the Scotland Act. The UK Law Officers further submit that those provisions are contrary to the rule of law. The provisions which are said not to be law on those grounds are those (i) which incorporate or empower the Scottish Ministers to incorporate into Scots law directly applicable EU law (sections 3-5 and 13), (ii) which disapply mandatory principles of EU law (sections 6-8 and 10), (iii) which empower the Scottish Ministers to make regulations to modify retained (devolved) EU law (section 11), or (iv) which are in whole or in part parasitic upon one or more of the previously mentioned provisions (sections 13A-16, 18-19, 21, 22 and 36A in relation to sections 11 and 13, and sections 23-26 and 34 and Schedule 2 in relation to sections 3-5).

81. These submissions rest on the premise that the Scottish Parliament does not at present have legislative competence to pass an Act containing provisions which cannot be brought into effect until current restraints on legislative competence are removed at a future date. If the provisions had come into effect on the date when the Bill was passed by the Scottish Parliament they would be outside that competence. Postponement of the coming into effect of such provisions, it is argued, does not affect legislative competence as legislative competence and legal effect are separate questions. It is submitted that the court would be placed in an impossible position if it had to assess the competence of the Scottish Parliament by reference to the future legal effect of a provision.

82. Similar arguments that the Scottish Bill by legislating for the removal of the obligations (i) to legislate compatibly with EU law and (ii) prohibiting the modification of section 2(1) of the 1972 Act, wrongly assumes that the Scottish Parliament can make provision now for the exercise of powers which it is possible the Parliament will acquire in the future, influenced the Presiding Officer when he made his careful statement on legislative competence.

83. The Lord Advocate in reply submits that the impugned provisions are not incompatible with EU law because they will not come into force until the TEU and the TFEU cease to apply to the UK, thereby removing the supremacy of EU law. He submits that it is not contrary to EU law and it is consistent with legal certainty for a member state, such as the UK, to pass anticipatory legislation to address the consequences to its statute book of the proposed withdrawal from the EU, provided that that is done in a way which respects the supremacy of EU law until withdrawal. A devolved legislature, such as the Scottish Parliament, may likewise enact such legislation consistently with EU law.

84. In addressing this challenge we refer to the purpose of the Scottish Bill which is stated in section 1(1), which we have quoted in paras 28 and 76 of this judgment: it is to make provision in connection with the prospective UK withdrawal and to ensure the effective operation of Scots law so far as within devolved competence on or after that withdrawal. Section 1(2) is a critical provision. As we have seen, it provides:

> "(2) In so far as any provision of this Act, or any provision made under it, 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."

Subsection (3) defines "the relevant time":

> "(3) In subsection (2), 'the relevant time', in relation to any provision of this Act or any provision made under it, means the time at which the provision of EU law with which it would be incompatible ceases to have effect in Scots law as a consequence of UK withdrawal."

The effect of these provisions is that none of the sections of the Bill to which we have referred in para 80 above can have legal effect until the provision of EU law with which it is incompatible has ceased to have effect as a consequence of the UK

withdrawal. Absent such legal effect, there is no incompatibility with EU law. The challenge under section 29(2)(d) of the Scotland Act therefore fails.

85. Similarly, the postponement of the legal effect of the impugned provisions prevents there being any modification of section 2(1) of the 1972 Act, which incorporates EU law into our domestic laws, because the UK withdrawal, which is the precondition of the bringing into legal effect of the provisions, will involve the repeal of section 2(1) of the 1972 Act. Prospective legislative provision for the consequences of the repeal of the 1972 Act, which has no legal effect until such repeal, entails no modification of that Act. The challenge under section 29(2)(c) of the Scotland Act therefore fails.

86. The residual challenge based on the rule of law is, with respect, misconceived. The principles of legal certainty and legality when applied to the competence of the Scottish Parliament operate within the statutory framework of the Scotland Act. The rule of law in relation to the legislative competence of the Scottish Parliament is maintained through the operation of section 29 of and Schedules 4 and 5 to the Scotland Act and the scrutiny by this court under section 33 of that Act relates to the application of those provisions. That scrutiny involves an assessment whether legislation by the Scottish Parliament complies with the limitations imposed by section 29 of the Scotland Act. As we have stated (para 35 above) there is nothing legally uncertain or contrary to the rule of law about the enactment of legislation by both the UK Parliament and the Scottish Parliament, provided that they do not conflict. The remit of this court under section 33 of the Scotland Act to scrutinise Bills of the Scottish Parliament does not extend to addressing arguments which are either complaints about the quality of the drafting of a Bill or seek to raise uncertainties about the application of a Bill's provisions in future circumstances which may or may not arise and which, should they occur, may require amending legislation. In our view, the Lord Advocate is correct in his submission that the possibility of the need to amend legislation to take account of changed future circumstances does not alter the competence of that legislation now.

87. While that is a complete answer to this challenge, it is appropriate briefly to discuss one more detailed argument under this heading. The UK Law Officers assert that the mechanism by which sections 2-5 of the Scottish Bill, which are concerned with the retention of devolved EU law and devolved EU rights after "exit day", may be brought into effect by regulations made by the Scottish Ministers under section 36 of the Bill involves "a … breach of the constitutional structure of the devolution settlement". The argument appears to be that there is uncertainty as to when the entirety or parts of the TEU and TFEU will cease to apply to the UK because that will depend on any transitional arrangements which are negotiated by the UK and the EU. The retention of existing EU law by those sections takes effect only on "exit day" and there is no provision for the scrutiny of the decision by the Scottish

Ministers to bring those provisions into effect using their regulation-making power under section 36 of the Scottish Bill.

88. Again, we are not able to accept this submission. Section 28 of the Scottish Bill defines "exit day" as follows:

> "(1) In this Act, 'exit day' means the day that the United Kingdom leaves the EU.
>
> (3) [sic] Where the United Kingdom leaves the EU at a specific time on exit day, references in this Act to before, after or on that day, or to beginning with that day, are accordingly to be read as references to before, after or at that time on that day or (as the case may be) to beginning with that time on that day.
>
> (4) [sic] For the purposes of this section, the United Kingdom leaves the EU when the Treaty on the 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."

This provision, which when introduced into the Scottish Parliament empowered the Scottish Ministers to specify by regulations what was "exit day" but which was subsequently amended, was enacted on the understanding that it was expected that the UK would cease to be a member of the EU at 11 pm on 29 March 2019 in accordance with the timescale set down in article 50(3) of the TEU, an understanding which was later enacted in the definition of "exit day" in section 20 of the UK Withdrawal Act. But it was recognised that the date could change depending on the outcome of any negotiations between the UK and the European Council.

89. In our view, it is possible that the definition of "exit day" may have to be amended if, for example, in the light of negotiations between the UK and the EU, transitional arrangements were put in place so that not all of the provisions of the TEU and the TFEU ceased to have effect at the same moment. But that is of no consequence. The same may be true of the definition of "exit day" in the UK Withdrawal Act. What is relevant is that any power of the Scottish Ministers under section 36 of the Scottish Bill to bring into effect sections 2 to 5 will be overridden by section 1(2), which we have quoted in para 84 above. The legal validity of such subordinate legislation, if it failed to respect the restriction imposed by section 1(2), would be open to challenge by judicial review and thus subjected to the scrutiny of

the courts. So also would subordinate legislation under sections 11 and 12 of the Scotland Bill to which the UK Law Officers referred in their submissions. There is no question of having to "read down" these provisions under section 101 of the Scotland Act. As discussed below however, there are other grounds for concern about section 11 of the Scottish Bill.

90. Finally, the UK Law Officers assert that at the heart of the section 1(2) mechanism the Scottish Parliament is seeking to modify its own competence by making an assumption that at some future date its competence will be altered. This is said to breach constitutional principle. We do not accept that this is the effect of the Scottish Bill. Legislation by the UK Parliament has empowered the UK Government to serve a notice under article 50 of the TEU. The service of that notice currently has the consequence that the requirement that the Scottish Parliament legislate compatibly with EU law in section 29(2)(d) of the Scotland Act will cease on 29 March 2019. That will be the result of the article 50 notice unless future political decisions, such as the extension of the time limits of article 50, are made to alter the time limit. When the Scottish Parliament passed the Scottish Bill, the prospective removal of the restriction in section 29(2)(d) requiring its legislation to be compatible with EU law would enhance the legislative competence of the Scottish Parliament on 29 March 2019, unless supervening circumstances intervened. The Scottish Parliament has sought to provide for the continuity of Scots law on the UK withdrawal, by enacting provisions which can take effect only after that withdrawal thereby respecting the supremacy of EU law while it continues. That breaches no constitutional principle.

(5) Whether this court can consider the effect of the UK Withdrawal Act in the context of this reference

91. A question has arisen as to whether this court, in addressing the reference under section 33 of the Scotland Act, can have regard to the amendments made to the Scotland Act after the date on which the Scottish Parliament passed the Scottish Bill. The Attorney General for Northern Ireland submits that this court must examine both the Scottish Bill and the Scotland Act as each of them stood on 21 March 2018, when the Scottish Parliament passed the Scottish Bill. The repeated assertion by the UK Law Officers in their written case and supplementary case that the legislative competence of the Scottish Bill must be assessed as at that date is consistent with that submission. But the Advocate General for Scotland in his oral submissions presented an alternative case when he invited this court to address the effect of the UK Withdrawal Act on the Scottish Bill.

92. We are satisfied that, when addressing the questions in the reference as to whether the Scottish Bill would be within legislative competence, this court must have regard to how things stand at the date when we decide those questions.

93. Section 33 of the Scotland Act provides for the reference of "the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament". The use of the conditional mood ("would be") is significant as it points to the incomplete nature of a Bill as legislation until it receives Royal Assent. In our view, it is implicit in section 33 that this court is required to consider the competence of a Bill if it were to receive Royal Assent. In other words, section 33 instructs this court to decide whether a Bill or any provision of a Bill *would be* within legislative competence *if the Bill were to receive Royal Assent*.

94. This interpretation is consistent with the legislative process set out in the Scotland Act. Legislation of the UK Parliament takes the form of Acts of the Crown in Parliament: Royal Assent is a necessary step in the legislative process. Section 28 of the Scotland Act uses a similar model. Subsection (2) provides:

> "Proposed Acts of the Scottish Parliament shall be known as Bills; and a Bill shall become an Act of the Scottish Parliament when it has been passed by the Parliament and has received Royal Assent."

95. Section 33 enables a reference to be made in the four weeks after the Scottish Parliament has passed the Bill. The Presiding Officer of the Scottish Parliament may not submit a Bill for Royal Assent at any time within that period or when a reference has been made to this court but has not been decided or disposed of: section 32(2)(a) and (b). He may not submit a Bill in its unamended form for Royal Assent if this court has decided that the Bill or any provision of it would not be within the legislative competence of the Parliament: section 32(3)(a).

96. Section 29, which defines the legislative competence of the Scottish Parliament, governs the legality of an Act of the Parliament or a provision in such an Act and not a Bill, which in section 28(2) is a "proposed Act". When this court applies section 29 in a section 33 reference, it assesses the legality of the Bill if it were to become an Act.

97. The task of this court when deciding a question in a reference under section 33 is therefore to determine whether the Bill or provision of the Bill would be within legislative competence if it were to receive Royal Assent at the time of our decision. In the rare circumstance in which there is supervening legislation by the UK Parliament which amends the Scotland Act and thereby changes the legislative competence of the Scottish Parliament after the Scottish Parliament has passed a Bill, this court's decision may be different from what it would have been if the Scotland Act had not been so amended. The amendment of the Scotland Act by the UK Withdrawal Act is such a circumstance.

(6) The effect of the UK Withdrawal Act on the legislative competence of the Scottish Parliament in relation to the Scottish Bill.

98. It is submitted on behalf of the UK Law Officers that the entirety of the Scottish Bill would modify the UK Withdrawal Act. The Scottish Bill, which addresses matters within devolved competence, is modelled on the form of what became the UK Withdrawal Act and heavily overlaps with that Act. But the intention of Parliament was to create a single body of retained EU law across the UK on withdrawal from the EU and, it is submitted, the UK Parliament did not contemplate that there would be separate bodies of retained EU law governed by separate legal regimes. In their supplementary case the UK Law Officers state: "The whole and evident purpose of inserting an enactment into paragraph 1(2) of the Schedule 4 [to the Scotland Act] list is so that the Scottish Parliament is not permitted to create its own version of the same regime".

99. We are not able to accept these contentions. We agree with the submission of the Lord Advocate that they conflate the mechanism of paragraph 1 of Schedule 4 with that under Schedule 5 to the Scotland Act. As we have stated (in para 51 above) when the UK Parliament decides to reserve an area of law to itself, it lists the relevant subject-matter in Schedule 5 as a reserved matter. Parliament has not done so in relation to the subject matter of the UK Withdrawal Act. Instead, by adding the UK Withdrawal Act to the list of provisions, in paragraph 1(2) of Schedule 4 to the Scotland Act, which are protected against modification, the UK Parliament has chosen to protect the UK Withdrawal Act against subsequent enactments under devolved powers which would alter a rule in the UK Withdrawal Act or conflict with its unqualified continuation in force. As we have stated, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part.

100. It is necessary therefore to examine the individual provisions of the Scottish Bill to see whether they have that effect on provisions of the UK Withdrawal Act. To that end, we invited parties to produce a schedule setting out their contentions in relation to the provisions of the Scottish Bill. We are grateful to the UK Law Officers, the Lord Advocate and their legal representatives for cooperating in the production of that schedule which has greatly assisted our work. It is not necessary for this court to refer to the many provisions of the Scottish Bill which merely replicate provisions in the UK Withdrawal Act and which therefore involve no modification of the latter. We can confine our attention to those provisions which we are persuaded do amount to modifications and which are therefore "not law" in terms of section 29(1) and (2)(c) of the Scotland Act. In our view, the following provisions of the Scottish Bill would not be within legislative competence if the Scottish Bill were to receive Royal Assent.

101. Section 2(2): Section 2 of the Scottish Bill would maintain the effect in Scots law of EU-derived domestic legislation on and after exit day. Subsection (2) defines "EU-derived domestic legislation" as including "any enactment so far as … relating otherwise to the EU or the EEA". Unlike section 2(2) of the UK Withdrawal Act, section 2 of the Scottish Bill does not exclude from its definition the 1972 Act. By contrast section 1 of the UK Withdrawal Act repeals the 1972 Act on exit day. This inconsistency is not removed by section 2(3) of the Scottish Bill, which defines "devolved" EU-derived domestic legislation as EU-derived legislation "if and to the extent that it makes provision that is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament". That is because paragraph 1(2)(c) of Schedule 4 to the Scotland Act protects from modification only specified provisions of the 1972 Act with the result that the Scottish Parliament has power to maintain in effect in Scots law the remaining provisions of the 1972 Act.

102. Section 5: This section would provide that the general principles of EU law and the Charter of Fundamental Rights ("the Charter") would be 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 EU law which sections 2, 3 and 4 would save or incorporate into Scots law. The Lord Advocate correctly conceded that this section was a modification of the UK Withdrawal Act. This is because section 5(4) of that Act provides that the Charter is not part of domestic law on or after exit day and paragraph 3 of Schedule 1 provides that there is to be no right of action based on a failure to comply with any of the general principles of EU law and no power to quash any enactment or conduct on the basis of incompatibility with any of such principles. This inconsistency, whether analysed as an implied repeal or a disapplication of those provisions of the UK Withdrawal Act, clearly amounts to a modification and section 5 therefore would not be law.

103. Section 7(2)(b) and (3): Section 7(1) would provide 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. This subsection is in identical terms to paragraph 1(1) of Schedule 1 to the UK Withdrawal Act except that it is confined to retained devolved EU law. As such, it involves no modification of the UK Withdrawal Act. But subsection (2)(b) empowers the Scottish Ministers to make regulations to describe or provide for challenges to the validity of retained (devolved) EU law to which the abolition in subsection (1) will not apply. Further, subsection (3) provides that, subject to provisions made by regulations under section 32, the abolition in subsection (1) does not apply in relation to any right of action accruing before exit day.

104. Section 7(2)(b) of the Scottish Bill is inconsistent with and may be seen as an implied repeal or disapplication of paragraph 1(2) of Schedule 1 to the UK Withdrawal Act in which the abolition of the right of challenge in paragraph 1(1) is

disapplied so far as (a) the European Court has decided before exit day that the instrument was invalid, or (b) a Minister of the Crown has made regulations to disapply the abolition in relation to a specified kind of challenge. Section 7(3) of the Scottish Bill also is similarly inconsistent with paragraph 1 of Schedule 1 to the UK Withdrawal Act, which does not preserve accrued rights of action. The Lord Advocate, correctly, conceded that these subsections were modifications because they provided for qualifications to the abolition of the right to challenge which were not contained in paragraph 1 of Schedule 1 to the UK Withdrawal Act.

105. Section 8(2): Section 8(1) of the Scottish Bill would provide that there was no right in Scots law on or after exit day to damages in accordance with the rule in *Francovich* (see *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722; [1991] ECR I-5357). This provision is materially identical to the provision in paragraph 4 of Schedule 1 to the UK Withdrawal Act. But subsection (2) disapplies the abolition of the rule in *Francovich* in relation to any right of action accruing before exit day, subject to provision made by regulations under section 32. This disapplication of the abolition has no equivalent in paragraph 4 of Schedule 1 to the UK Withdrawal Act and is therefore a modification of that provision. Again, the Lord Advocate correctly conceded this point.

106. Section 9A: This section provides for the scrutiny of regulations made under section 7(2)(b). As such it is ancillary to a subsection which would not be law (paras 103 and 104 above), and it therefore itself would not be law.

107. Section 9B: This section provides for consultation on draft proposals under section 7(2)(b) and would not be law for the same reason as section 9A.

108. Section 10(2), (3)(a) and (4)(a): Section 10 would be concerned with the interpretation of retained (devolved) EU law. Subsection (2) provides that a court or tribunal exercising devolved jurisdiction *must*, where it considers it relevant for the interpretation of retained (devolved) EU law, have regard to (a) any principles laid down, or any judgments made, on or after exit day, by the European Court, and (b) anything done on or after exit day by another EU entity or the EU. The Lord Advocate correctly concedes that this, by creating a duty, is a modification of section 6(2) of the UK Withdrawal Act which makes similar provision but creates a power.

109. Section 10(3)(a) provides: "Any question as to the validity, meaning or effect of any retained (devolved) EU law is to be decided, so far as they are relevant to it - (a) in accordance with any retained (devolved) EU case law". The equivalent UK provision in section 6(3)(a) of the UK Withdrawal Act provides for the decision to be taken "in accordance with any retained case law *and any retained general principles of EU law*". The omission of reference to the retained general principles

of EU law mandates a different approach to interpretation and amounts to an implied repeal of that part of section 6 of the UK Withdrawal Act. It is therefore a modification and would not be law.

110. Section 10(4)(a) provides that subsection (3) is subject to "(a) section 11(7)", which permits the Scottish Ministers to provide by regulations that section 10(3) does not apply to any provision made by the regulations. This would enable the adoption by regulations of different rules of interpretation and would modify section 6 of the UK Withdrawal Act.

111. Section 11: This section would empower the Scottish Ministers to remedy by regulations deficiencies in retained (devolved) EU law arising from the withdrawal of the United Kingdom from the EU. It is similar to section 8 of the UK Withdrawal Act but empowers the Scottish Ministers rather than a Minister of the Crown to make the regulations. The UK Withdrawal Act, in section 11 and Schedule 2, also confers powers on devolved authorities to make regulations. But Schedule 2 of the UK Withdrawal Act contains conditions and restrictions in paragraphs 3(4), 5(4), 6(1) and 7(2) on what devolved authorities may provide in regulations under those powers. Those conditions and restrictions are not mirrored in section 11 of the Scottish Bill which is prima facie the equivalent of an amendment or disapplication of Schedule 2 to the UK Withdrawal Act.

112. The Lord Advocate submits that section 11 of the Scottish Bill would create a parallel regulation-making power, which operates according to its own terms and does not modify the UK Withdrawal Act. He submits that the powers in section 11 of the Scottish Bill could, if necessary, be read down by the application of section 101(2) of the Scotland Act, which provides that a provision of an Act of the Scottish Parliament be read "as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly". The Lord Advocate points out that section 30A of the Scotland Act, which was introduced by section 12 of the UK Withdrawal Act, prevents an Act of the Scottish Parliament from modifying or conferring 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. If such regulations were made to limit the competence of the Scottish Parliament, they would limit the powers which the Scottish Ministers could exercise under section 11 of the Scottish Bill.

113. Ministers of the Crown now have power under section 30A of the Scotland Act to curtail the modification of retained EU law by the Scottish Parliament or Scottish Ministers. But the difficulty with the Lord Advocate's position is that unless a Minister of the Crown were to exercise that power, the Scottish Ministers would be able to exercise the parallel regulation-making power in section 11 of the Scottish Bill free from conditions and restrictions which the UK Withdrawal Act has

imposed. The existence of a power in a Minister of the Crown to neutralise a provision of the Scottish Bill does not alter the nature of that provision as a modification of the UK Withdrawal Act.

114. Section 13B: This section would require the Scottish Ministers, in making provision in regulations under section 11(1), 12 or 13(1), to have regard to the guiding principles on the environment and animal welfare which are set out in subsection (3). In so far as this provision would be applied to section 11(1), which as a modification of the UK Withdrawal Act is not law, it must also be a modification but only to that extent.

115. Section 14: This section would provide for the scrutiny by the Scottish Parliament of regulations made under sections 11, 12 and 13 of the Scottish Bill. In so far as the section would relate to regulations made under section 11 of the Scottish Bill, which as a modification is not law, it is ancillary to section 11 and itself is a modification of the UK Withdrawal Act but only to that extent.

116. Section 14A: This section would require additional scrutiny by the Scottish Parliament of regulations made under sections 11, 12 and 13 of the Scottish Bill if the Committee on Delegated Powers and Law Reform of the Scottish Parliament so recommended. Again, in so far as the section would relate to regulations made under section 11 of the Scottish Bill, it is ancillary to the invalid section 11 and itself is a modification of the UK Withdrawal Act but only to that extent.

117. Section 15: This section would require the Scottish Ministers to consult on the regulations which they proposed to make in response to a recommendation under section 14(5). Again, in so far as the section would apply to proposed regulations to be made under section 11 of the Scottish Bill, it is ancillary to the invalid section 11 and itself is a modification of the UK Withdrawal Act but only to that extent.

118. Section 16: This section would require the Scottish Ministers to make explanatory statements when laying before the Scottish Parliament a Scottish statutory instrument or draft instrument containing regulations under section 11(1), 12 or 13(1) of the Scottish Bill. Again, only to the extent that the section would apply to regulations under section 11, it is ancillary to that section and is itself a modification of the UK Withdrawal Act.

119. Section 17 does not involve a modification of the UK Withdrawal Act. But as we have explained in paras 37-65 above, this section is a modification of section 28(7) of the Scotland Act and is not law.

120. Section 19(1): Section 19 would empower the Scottish Ministers to make regulations to provide for the charging of fees for functions which a Scottish public authority has as a result of provision made under sections 11(1), 12 and 13. Again, only to the extent as the section would apply to regulations under section 11, it is ancillary to that section and is itself a modification of the UK Withdrawal Act.

121. Section 22: This section would provide that Part 4 of the Scottish Bill, which relates to financial matters, does not affect the power under section 11, 12 or 13 to require payment of or make other provision in relation to fees and charges. The reference to section 11 falls along with that section.

122. Section 26A(6): Section 26A would impose a duty on the Scottish Ministers to prepare proposals on how regard is to be had to the guiding principles on the environment and on how to ensure that there continues to be effective and appropriate governance relating to the environment after the UK withdraws from the EU. Subsection (5) lists the familiar principles, such as the precautionary principle and that the polluter should pay to rectify environmental damage. Subsection (6) states:

> "Those principles are derived from the equivalent principles provided for in article 191(2) in Title XX of the Treaty on the Functioning of the European Union and *accordingly they are to be interpreted, so far as appropriate, in a manner consistent with the interpretation of those equivalent principles by the European Court from time to time*." (Emphasis added)

The words emphasised, by imposing a duty to give effect to the jurisprudence of the European Court, are inconsistent with section 6(1) of the UK Withdrawal Act which provides: "A court or tribunal - (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, …". The emphasised words amount to an implicit amendment of section 6(1)(a) of the UK Withdrawal Act as they disapply it in relation to the application of the environmental principles by Scottish public authorities, and as such are a modification of that section of the UK Withdrawal Act.

123. Section 33 and Schedule 1 paragraphs 11(a) and 16: Section 33 would repeal spent references to EU law in the Scotland Act. Subsection (1) would remove the words "or with EU law" in section 29(2)(d) of the Scotland Act, so as to remove the existing restriction on the competence of the Scottish Parliament that it cannot legislate incompatibly with EU law. Subsection (2) would repeal the same words in section 57(2) of the Scotland Act which currently restricts the power of members of the Scottish Government by preventing them from acting incompatibly with EU law.

Subsection (3) would refer to Schedule 1 which contains further repeals of spent provisions in the Scotland Act. Paragraph 11(a) of that Schedule would repeal the words "or an obligation under EU law" in section 106(5) of the Scotland Act. Section 106 is concerned with the power by subordinate legislation to facilitate the transfer of functions to the Scottish Ministers and provides in subsection (4) that the Scottish Ministers are to be consulted about such legislation if it modifies a function of observing or implementing an international obligation or an obligation under EU law to achieve a result by reference to a quantity which relates to the UK. Paragraph 16 of Schedule 1 to the Scottish Bill would repeal the words "or with EU law" in paragraphs 1(d) and (e) of Schedule 6 to the Scotland Act. Schedule 6 of the Scotland Act provides for the handling of devolution issues in legal proceedings and paragraph 1 of that Schedule defines "devolution issue".

124. These provisions involve modifications of the UK Withdrawal Act and therefore are not law. Section 33(1) of the Scottish Bill would be inconsistent with section 12(1) of the UK Withdrawal Act which not only removes the reference to EU law in section 29(2)(d) of the Scotland Act but replaces it with the words "in breach of the restriction in section 30A(1)" (ie the prohibition against modification of retained EU law so far as the modification is of a description specified in regulations by a Minister of the Crown). Section 33(1) could have effect only if it were brought into force before section 12(1) of the UK Withdrawal Act and would in effect be disapplying that provision of the UK Withdrawal Act in not inserting those replacement words into the Scotland Act. Section 33(2) similarly would not replace the repealed words in section 57 of the Scotland Act with the provisions set out in paragraph 1 of Schedule 3 to the UK Withdrawal Act which insert subsections (4)-(15) into section 57 of the Scotland Act. Paragraphs 11(a) and 16 of Schedule 1 to the Scottish Bill (and therefore section 33(3) in giving Schedule 1 effect) also disapply provisions of the UK Withdrawal Act. Paragraph 11(a) does not replace the repealed words in section 106 of the Scotland Act with the words, "a retained EU obligation" which paragraph 17(2) of Schedule 3 to the UK Withdrawal Act inserts in their place. Paragraph 16 similarly does not insert into Schedule 6 to the Scotland Act the words which paragraph 23(2) and (4) of Schedule 3 to the UK Withdrawal Act insert as substitutes.

Conclusion

125. We therefore answer the reference as follows:

(i) The Scottish Bill as a whole would not be outside the legislative competence of the Scottish Parliament because it does not relate to reserved matters. (paras 23-36 above)

(ii) Section 17 of the Scottish Bill would be outside the legislative competence of the Scottish Parliament because it would modify section 28(7) of the Scotland Act. (paras 37-65 above)

(iii) Section 33 of and Schedule 1 to the Scottish Bill would not be outside the legislative competence of the Scottish Parliament on the basis that they would modify provisions of the Scotland Act. (paras 66-79 above)

(iv) the specific provisions of the Scottish Bill listed in para 80 above would not be outside the legislative competence of the Scottish Parliament because (i) they are not incompatible with EU law, (ii) they do not modify the European Communities Act 1972, and (iii) they are not contrary to the rule of law. (paras 80-90 above)

(v) As a result of the enactment of the UK Withdrawal Act the following provisions of the Scottish Bill would at least in part be outside the legislative competence of the Scottish Parliament: sections 2(2), 5, 7(2)(b) & (3), 8(2), 9A, 9B, 10(2), (3)(a) and (4)(a), 11, 13B, 14, 14A, 15, 16, 19(1), 22, 26A(6), 33(1), (2) & (3) and Schedule 1 paragraphs 11(a) and 16. (paras 98-124 above)