



Neutral Citation Number: [2021] EWCA Civ 783

Case No: C1/2020/2031 & CO/3995/2020

**IN THE HIGH COURT (DIVISIONAL) COURT &  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM Queen's Bench Division  
Mr Justice Jonathan Swift  
CO/3995/2020**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/05/2021

**Before :**

**LORD JUSTICE GREEN**  
and  
**MRS JUSTICE WHIPPLE**

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**Between :**

**Heathrow Airport Limited  
Global Blue (UK) Limited  
WDFG UK Limited  
- and -**

**Her Majesty's Treasury  
The Commissioners for Her Majesty's Revenue and  
Customs**

**1<sup>st</sup> Appellant**  
**2<sup>nd</sup> Appellant**  
**3<sup>rd</sup> Appellant**

**1<sup>st</sup> Respondent**  
**2<sup>nd</sup> Respondent**

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**Daniel Beard QC, Brendan McGurk, Lucas Bastin, Jack Williams** (instructed by  
**Freshfields Bruckhaus Deringer LLP**) for the **Appellants**  
**Eleni Mitrophanous QC, Naina Patel, Raj Desai, Stephen Donnelly** (instructed by **HMRC**  
**Solicitors Office**) for the **Respondents**

Hearing dates: Monday 22nd & Tuesday 23rd February 2021  
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**Approved Judgment**

**Lord Justice Green :**

**A. Introduction: The Issues**

***(i) The Abolition of Tax (or VAT) Free***

1. As of 1<sup>st</sup> January 2021, the Government abolished most “*tax (or VAT) free*” shopping. This affected major airports and retailers who sold tax (or VAT) free items from airport lounges, and certain high street retailers who sold popular luxury branded items often to wealthy visitors from China, South East Asia and the Gulf. The decision was taken as part of a review of fiscal and customs arrangements affected by the expiry of the transitional period governing relations between the UK and EU following the exit of the UK from the EU which occurred at 11pm 31<sup>st</sup> December 2020 (“*the Transitional Period*”). The abolition took the form of the withdrawal of two schemes. The first was the VAT RES and was statutory in form. The second scheme was ESC 9.1 and was operated under an extra-statutory concession given by the Commissioners of Her Majesty’s Customs and Excise (“*the Commissioners*”). Details are set out below.

***(ii) The Grounds of Challenge***

2. The Claimants challenge the abolition. In these proceedings they advance a number of important points of law. These are grouped under four headings below but in fact comprised nearly 25 discrete points of law and procedure.
3. The first Ground concerns the constitutional power of the Commissioners to grant tax concessions without using legislation. It also challenges the Government’s view that the grant of the concession in issue had always been and remained *ultra vires* its statutory powers of collection and management of taxes (Ground I).
4. The second Ground concerns the scope and effect of the General Agreement on Tariffs and Trade 1994 (“*the GATT*”) operated under the auspices of the World Trade Organisation (“*the WTO*”) insofar as it applies to internal taxes that affect the export of goods. The principle of non-discrimination which is found in Article I:1 GATT was relied upon by the Government to curtail the options that it considered were open to it. The Claimants challenge its analysis of the GATT and argue that because of this error of law the Government artificially and wrongly constrained the paths open to it and ignored alternatives which were favourable, or at least less damaging, to the Claimants (Ground II).
5. The third Ground arises by way of an application to amend the Grounds relating to the GATT. On 26<sup>th</sup> December 2020, the Government entered into a Trade and Cooperation Agreement (“*the TCA*”) with the EU. This free trade agreement was then implemented into domestic law by the European Union (Future Relationship) Act 2020 (“*the EU(FR)A 2020*”). It is said that at all times the Government should have factored into consideration the existence of such a free trade agreement and had it done so its analysis would have altered. When the TCA was in fact agreed this also amounted to a material change of circumstances. Even if the Government were correct that prior to expiry of the Transitional Period it would be a breach of the GATT to retain the schemes following expiry of the Transitional Period, the effect of entering into the TCA was to reverse that analysis. The existence of the TCA meant that it would no longer be unlawful to retain the schemes. The omission of the Government to take this into

account represented a serious failure to take account of a relevant consideration (Ground III).

6. The fourth shopping Ground concerns the appeal against the refusal of Mr Justice Swift dated 30<sup>th</sup> November 2020 to grant permission to challenge the decision to abolish tax free on a variety of evidential grounds. The Claimants challenge the approach taken by the Government to the collection and evaluation of evidence relating to the economic harm to business and the wider economy that it is said would arise from abolition. It is argued that when the abolition decision was taken the Government had failed to collect the relevant evidence and had failed therefore to address relevant considerations (Ground IV).
7. A fifth issue is that the Government argues that the Claimants are guilty of “*undue delay*” in bringing these challenges and this should serve to preclude the grant of *any* remedy under Grounds I – IV (Ground V).
8. The Court heard these different proceedings as a Divisional Court of the High Court (hearing the judicial review) and as the Court of Appeal (hearing the appeal against the refusal of Swift J to grant permission to seek judicial review). Despite this curiosity we heard full and seamless argument on all issues arising.
9. The Court expresses no view on the merits of the decision to abolish tax free sales which was essentially a political one for the Government to take. The challenges concern issues of law and procedure only.

**(iii) Parties**

10. The Claimants are companies engaged in businesses directly and indirectly affected by the impugned decision. Each has put detailed witness statement evidence before the Court demonstrating the adverse impact of abolition upon their businesses and upon the retail sector generally. Heathrow Airport Limited (“*Heathrow*”) is the operator of Heathrow Airport. Global Blue (UK) Limited (“*Global Blue*”) is the UK arm of Global Blue Group which operates VAT refund schemes worldwide and which has corporate headquarters in Nyon, Switzerland. WDFG (UK) Ltd (“*WDFG*”) is a major UK duty and tax-free airport retailer. It is a subsidiary of Dufry, a travel retail business based in Switzerland. The Defendants/Respondents are Her Majesty’s Treasury (“*HMT*”) and the Commissioners for Her Majesty’s Revenue and Customs (“*HMRC*”). For the sake of convenience, I also use the expression “*the Government*”, as appropriate. It is clear that the Claimants have *locus* to bring this challenge, and this is not disputed.

**B. The Facts**

**(i) The Schemes: The VAT RES and the ESC 9.1**

11. The schemes abolished were (i) the VAT Retail Export Scheme (“*the VAT RES*”) and (ii) the Extra Statutory Concession 9.1 (“*the ESC*” or “*ESC 9.1*”).
12. Under the VAT RES visitors to the UK who were resident in a non-EU country could obtain a VAT refund on leaving the UK (and the EU) on high street goods they purchased and took home with them in their luggage. The scheme allowed supplies of certain goods by VAT-registered retailers to eligible persons (non-EU travellers, to the

extent they are “*overseas visitors*”, as defined in the relevant rules) for personal use and exported as accompanied baggage within three months of purchase, to be zero-rated.

13. The VAT RES was provided for in domestic law under section 30(8) Value Added Tax Act 1994 (“*VATA*”) and Regulation 131 of the Value Added Tax Regulations 1995 [1995/2518]. These implement Articles 146(1)(b) and 147 of Directive 2006/112 of 28<sup>th</sup> November 2006 on the common system of value added tax (“*the VAT Directive*”).
14. The VAT RES was aimed at tourists and visitors who made purchases in a personal capacity. The goods could only be zero rated after they had been exported. The retailer charged VAT at the time of purchase but refunded the purchaser once in possession of evidence of export. Travellers had to obtain VAT 407 Forms endorsed by the Border Force (or the equivalent in EU Member States if exiting from the EU) at the point of exit. In practice some retailers used intermediaries to administer the process. Where an intermediary was used there was often an administrative charge to be paid, in other words a third party would take some portion of the refund as a fee for services rendered. HMRC expressed itself as a disinterested party in the use of intermediaries.
15. The geographic scope of the VAT RES was the UK. However by virtue of the Northern Ireland / Ireland Protocol (“*the Northern Ireland Protocol*”) which is annexed to the Withdrawal Agreement between the UK and the European Union (“*the Withdrawal Agreement*”<sup>1</sup>) certain provisions of EU law continue to apply to and in the United Kingdom in respect of Northern Ireland as set out in Article 8 and Annex 3 to the Northern Ireland Protocol, which includes the VAT Directive. The VAT RES will hence be maintained for the benefit of non-EU travellers from Northern Ireland after the expiry of the Transitional Period, though remaining un-extended for EU travellers.
16. I turn now to ESC 9.1. Under internationally accepted fiscal norms, sales and value added taxes are final consumption taxes usually applicable where consumption occurs. The ESC was set out in paragraph [9.1] of HMRC VAT Notice 48 (12<sup>th</sup> September 2017). This was entitled “*Extra Statutory Concessions*” and provided:

“The supplier of goods which are liable to VAT and which are supplied to intending passengers at duty-free and tax-free shops approved by the Commissioners may, for those goods which are exported directly to a place outside the VAT territory of the member states, be regarded as the exporter and zero rate the supply.”
17. The same VAT Notice explained that the ESC was introduced following the decision of the EU Council in 1991 to remove duty and tax-free sales for intra-EU supplies. The ESC was described as an “*airside*” scheme i.e. it applied after a passenger had passed through security, usually into the departure lounge of an airport. It applied to VAT otherwise charged on goods supplied to intending passengers at airside duty-free and VAT-free shops. It meant that a retailer in the UK could zero rate a supply made to a

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<sup>1</sup> “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” (2019/C 384 I/01)

non-EU destined passenger who should then declare the tax due as import tax when arriving at their destination, subject of course to any applicable personal allowances. The passengers' residence was however irrelevant. Zero rating could apply under ESC 9.1 even if the passenger was a UK resident.

18. For the purpose of ESC 9.1 the retailer was treated (or "*regarded*" to use the language in the concession) as though it were the physical exporter. It therefore needed to obtain evidence that the goods in question would be exported. This was done, in practice, by the retailer asking for sight of a customer's boarding card as evidence that the goods would be exported. As with the VAT RES the retailer did not, itself, arrange for the export; the goods in question were handed over to the consumer at the point of sale. Because of this there could be no guarantee that the export would actually occur. The goods might be consumed before export (for example food) or removed from the jurisdiction and then returned later without extra tax being paid upon reimportation (for example perfume or a camera purchased airside and tax free but returned to the UK following a holiday). The geographic scope of the Decision insofar as it related to the ESC was the whole of the United Kingdom ("*the UK*").

**(ii) *The Decision / How it was taken***

19. The decision under challenge ("*the Decision*") is recorded in a consultation response document ("*the CR*") published on 11<sup>th</sup> September 2020. This was entitled "*A consultation on the potential approach to duty and tax free goods arising from the UK's new relationship with the EU: Summary of Responses*". This set out the response of the Government to a consultation exercise initiated with the publication of a consultation paper ("*the CP*") on 11<sup>th</sup> March 2020. Stakeholders were invited to respond to a range of potential approaches that the UK Government might adopt in relation to duty and VAT free goods from the end of the Transitional Period. The CR recorded the intention to abolish the VAT RES and ESC 9.1 schemes. That intention then had to be implemented through legislation in the case of the VAT RES and a formal withdrawal of the extra-statutory concession by the Commissioners in the case of ESC 9.1.
20. The decision making process was, as matters turned out, more complex than would have appeared to the public. Following publication of the CR on 11<sup>th</sup> September 2020 various discussions occurred between the Government and stakeholders during which new evidence was submitted to HMT and HMRC, in particular addressing the adverse effects of abolition upon the claimants and industry more generally. This included a very detailed report (the Cebr Report, summarised at paragraph [49] below) setting out the substantial harm it was said would flow to industry and the economy from abolition. This report was placed before the Chancellor who duly noted it and its contents.
21. Further, the Chancellor had asked the independent Office for Budget Responsibility ("*the OBR*") to include in its normal periodic forecast report, ("*the OBR Forecast*"), due to be submitted in November 2020, a final assessment of the fiscal impact of withdrawal of the schemes. This was to include assumptions as to consumer behavioural reactions to abolition. To assist OBR the Knowledge Analysis and Intelligence unit within HMRC ("*KAI*") provided to OBR two Costings Explanatory Notes dated 18<sup>th</sup> November 2020 (covering ESC 9.1) and 19<sup>th</sup> November 2020 (covering the VAT RES). These sought to model the impact on Exchequer yields which would result from abolition of the two schemes. I return to these later (see paragraphs

[56] – [58] below) because it is argued by the Claimants that these contained significant mathematical errors (see paragraphs [294] – [309] below) which highlights the paucity of analysis which it is argued underlay the abolition decisions.

22. The OBR Forecast entitled “*Economic and Fiscal Outlook*” was published on 25<sup>th</sup> November 2020. This explained that the Government was bound by WTO rules to ensure “*alignment*” of VAT-free rules on sales as between the EU and the rest of the world. It assessed the amount of tax affected by the Decision and in particular it set out an estimate of the amount the Exchequer might gain from abolition. It recognised that there would be “*costs*” arising from a loss of trade caused by abolition but considered that the estimates based upon consumer behavioural responses were “*highly uncertain*”. Paragraphs A.22 and A.23 addressed the VAT RES and ESC 9.1:

“A.22 Abolition of the VAT Retail Export Scheme (RES): this scheme allows individuals from parts of the world other than the EU to claim back VAT on goods purchased in Great Britain. Abolishing it brings the treatment of tourists from outside the EU into line with those from the EU from the end of the transition period (as opposed to extending the scheme to EU tourists). Alignment is a requirement of WTO rules. Most VAT RES beneficiaries do their shopping in luxury stores, particularly those in London and the South East, with 90 per cent of refunds from London and Oxford (Bicester Village). Ending the scheme results in a direct Exchequer saving – around £0.5 billion was refunded through the scheme in 2019 – but there will also be costs as the UK becomes less attractive for affected tourists relative to alternative EU destinations such as Paris or Milan. Estimates of the sensitivity of tourism to price changes generally refer to tourism in general rather than those focused on luxury shopping. The costing takes one UK-specific estimate relating to tourism in general and scales it up by 50 per cent (to an elasticity of 1.9) in recognition of the likely greater responsiveness of those affected by the measure. This reduces the yield slightly, but the estimate is highly uncertain. Several studies have considered the negative consequences of this measure for affected industries. Our forecasts consider such indirect effects at an aggregate level, looking at overall changes in tax and spending (worth tens of billions of pounds at this forecast) rather than measure-by-measure.

A.23 Abolition of Tax-Free airside shopping: this measure also aligns the UK with WTO rules. Tax-free airside shopping is currently available for those travelling to destinations outside the EU, but this will be abolished at the end of the transition period. The main impact will be on the sales of beauty products (perfumes and cosmetics) that generate around half of total sales in duty free shops. The yield from this is again subject to uncertainty around the behavioural response. It is not clear how much of the tax rise will be passed through to the prices faced by consumers or the degree that any price rises will reduce sales.”

23. HMT submitted a number of advices to Ministers following publication of the CR. In particular, an advice to Ministers on 27<sup>th</sup> November 2020 sought authorisation to lay a statutory instrument before Parliament, by negative resolution, to give effect to the abolition of the VAT RES and for the Commissioners to withdraw the extra-statutory concession.
24. The Exchequer Secretary, with the authority of the Chancellor, gave approval on 3<sup>rd</sup> December 2020 for the Travellers' Allowances and Miscellaneous Provisions (EU Exit) Regulations 2020, SI 2020/1412 (*"The SI"*) to be laid before Parliament. Regulations 11(2), 11(4) and 11(5) provided for withdrawal of the VAT RES. The SI was made in the exercise of the powers conferred by section 51(1)(a) and (c) of the Taxation (Cross-border Trade) Act 2018<sup>2</sup>. The SI was signed by the Minister on 3<sup>rd</sup> December 2020, and it came into effect that same day. An SI laid under the negative resolution procedure becomes law on the day the Minister signs it. It remains law until a motion (a *"prayer"*) to reject it is agreed by either House within 40 sitting days. Certain SIs on financial matters, which included this measure, are considered only by the House of Commons. A prayer was proposed and debated on 3<sup>rd</sup> February 2021 but the motion to annul the SI was unsuccessful.
25. The VAT Notice 48: Extra Statutory Concessions was duly amended to withdraw paragraph [9.1] which had, hitherto, embodied the extra-statutory concession.
26. On 3<sup>rd</sup> December 2020 HMRC also published Revenue and Customs Brief 21 which confirmed withdrawal of the VAT RES and communicated that the Commissioners would withdraw the concession, ESC 9.1. The HMRC Brief stated:

**"Tax free shopping (extra statutory concession 9.1)"**

The tax-free shopping extra statutory concession (ESC 9.1) is published in Vat Notice 48. It allows retailers of goods sold in ports and airports to zero-rate sales to passengers departing for non-EU destinations. ESC 9.1 allows the retailer to be regarded as exporters of those goods and consequently zero rate the supply for VAT purposes. This concession will be withdrawn with effect from 1 January 2021 throughout the UK.

**VAT Retail Export Scheme (VAT RES)**

VAT RES allows non-EU visitors to the EU to recover the VAT on purchases they make on the high street which they take home with them in their luggage. This scheme will be withdrawn in

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<sup>2</sup> Section 51(1) is entitled "Power to make provision in relation to VAT or duties of customs or excise ". It provides:

"(1) The appropriate Minister may by regulations made by statutory instrument make such provision relating to— (a) value added tax, (b) any duty of customs, or (c) any excise duty, as the appropriate Minister considers appropriate in consequence of, or otherwise in connection with, the withdrawal of the United Kingdom from the EU."

Great Britain. Retailers in Northern Ireland, including those at ports or airports, will continue to be able to offer VAT RES to non-EU visitors to Northern Ireland, under the terms of the Northern Ireland Protocol.”

27. Both the VAT RES and ESC 9.1 were in fact abolished as from 11pm 31<sup>st</sup> December 2020, the point in time at which the Transitional Period came to an end.

***(iii) The Consultation Paper (“The CP”)***

28. I turn now to the consultation exercise. Chapter 1 of the CP opens with a political statement about the negotiations then ongoing between the UK and the EU over a possible future trade deal. The motivation behind the consultation was the departure of the UK from the EU but there was no certainty as to whether the UK would conclude a free trade agreement with the EU or, if it did, what it would contain. As at that date, of course, no such agreement had been concluded. In that uncertain light the Government wished to consider the “*policy*” behind the tax treatment of goods purchased by individuals for their own use and carried across borders in their luggage. Whatever solution was adopted had to be capable of withstanding the various permutations of outcome that might apply as of the expiry of the Transitional Period.
29. The Government had a number of policy objectives it wished to pursue. In paragraph [1.6] it stated:
- “1.6 The government has a number of objectives relating to passengers after the transition period, and any changes would need to take these into account:
- minimising disruption at exit and entry points.
  - minimising delivery challenges and expensive and time-consuming infrastructure changes.
  - minimising revenue loss, particularly via tax evasion or avoidance.”
30. Duty-free goods were defined as alcohol and tobacco products sold free of excise duty and VAT in duty-free and tax-free shops located beyond security control in UK exit and entry points, and on-board scheduled ships and aircraft departing from the UK or destined for the UK. Tax-free goods were defined as goods that were for personal use and not subject to excise duty (non-excise goods), sold free of VAT in tax-free and duty-free shops located beyond security control in UK exit and entry points, and on-board scheduled ships and aircraft departing from the UK or destined for the UK; and, as part of the VAT Retail Export Scheme.
31. The consultation focused on five areas: (i) allowances for passengers travelling from the EU to the UK; (ii) duty-free sales for passengers travelling from the UK to the EU; (iii) duty-free sales on-board planes, trains and ships for consumption onboard and take-away; (iv) the VAT Retail Export Scheme (VAT RES); and (v), tax-free sales for passengers travelling from the UK to the EU. Personal allowance for bringing non-



excise goods into the UK and customs processes for passengers were out of scope of the consultation.

32. The context to the issue was set out in concise terms in Chapter 2 which comprised 5 paragraphs:

“2.1 The framework for the VAT and excise treatment of cross-border movements of goods in the EU is currently set out in EU law. The international norm, consistent with OECD Guidelines and World Trade Organisation (WTO) rules, is that VAT and excise on goods should be paid in the country of consumption. The consequence is that the UK relieves excise duty and VAT on goods which are exported and consumed outside of the EU.

2.2 For passengers travelling within the EU, duty-free and tax-free sales were abolished on 30 June 1999, which meant that passengers travelling intra-EU were no longer entitled to purchase duty-free and tax-free goods. However, they could, instead, carry unlimited amounts of tax paid non-excise goods and duty-paid alcohol and tobacco across borders within the EU, subject to indicative limits. No customs duty, additional excise duty (providing the goods are for personal use and are transported by the individual) or additional VAT was due at their destination, VAT and excise duty having been paid in the EU country of purchase. These passengers may currently enter the UK by using the blue channel at airports and ports and this will remain the case during the transition period, as the UK continues to be a member of the customs union and goods may flow freely between the UK and EU.

2.3 In the case of excise goods, passengers entering the UK from a non-EU country can bring in limited amounts of alcohol and tobacco in their personal luggage without making a declaration. If they remain within the personal allowances, then they can use the green channel to declare that they are within these allowances. If the goods carried by the passenger exceed the personal allowances (or the goods are held for a commercial purpose) then the passenger must use the red channel, where they must declare goods and pay relevant taxes and duties. Duty-free shops are found at international airports and ports; duty-free sales are also made on-board some aircraft and ships.

2.4 Currently duty-free sales are only available to passengers travelling to or from non-EU countries by air or sea. Those travelling between the UK and the EU or by other means of transport, such as by car and train (the Dublin-Belfast train or on Eurostar or Eurotunnel) cannot purchase duty-free products. Existing EU law does not allow duty-free shops at land borders, including train stations. Currently there are no duty-free shops at UK ports.

2.5 At the end of the transition period EU member states will be able to offer duty-free and tax-free sales on the cross-border movement of goods to those travelling to the UK from airports, ports or on-board aircraft or ships. The decision on the application of duty-free and tax-free limits to those goods when entering the UK will lie with the UK government. It would similarly be the UK's choice whether to offer duty-free and tax-free sales to those travelling from the UK to the EU after the transition period, subject to the UK's international obligations."

33. The CP posed 16 questions for consultees summarised in Chapter 5. These mainly take the form of open questions or calls for evidence. The provisional view of Government was that the ESC schemes would be extended, not abolished (see e.g. paragraph [4.25], set out below). Nonetheless, the CP did not exclude the possibility that the schemes would be abolished (see e.g. paragraphs [4.21], [4.23] and [4.27]). Questions 11 and 13 in particular concerned abolition:

"Q11. The government would welcome any evidence or views on the impacts of abolishing the VAT RES.

Q13. The government would welcome any evidence or views on the impacts of abolishing airside tax-free sales."

34. The issue of VAT RES was dealt with in the CP at paragraphs [4.14] – [4.23]. The Government recognised the contribution that it made to international tourism in the UK (paragraph [4.5]). However, the exercise of reviewing the future of VAT RES in the light of exit from the EU included not only the benefits of the VAT RES to tourism and the high street but also how effectively the scheme met broader UK policy objectives, how any future policy could be made more effective or efficient, and how the UK could manage the risk of fraud and non-compliance (for example, goods that did not leave the country, passenger adherence to eligibility rules, and passengers not declaring goods that were liable for excise duty and VAT in the destination country). In paragraph [4.16] the following was stated:

"4.16 The government is aware that a number of claims have been made about the scale of the benefits of the VAT RES to international tourism, the high street and other businesses. Before the government considers retaining the VAT RES or extending this service to EU residents it would welcome evidence as to the scale of those benefits, and whether the current scheme is achieving its aims. While the VAT RES adheres to international tax principles, it is unclear what the impact on the high street is (particularly outside of London and other tourist destinations), whether the scheme offers value for money for the Exchequer, and whether passengers are being treated fairly (for example, some customers only receive a small proportion of their VAT refund)."

35. ESC 9.1 was dealt with at paragraphs [4.24] - [4.30]. The CP explained that following the Transitional Period the Government was minded to extend the ESC. But the Government also recognised that the ESC was applied inconsistently:

“4.25 ... following the transition period the UK is minded to extend airside tax-free sales to those travelling to the EU by air, sea and rail. As the rules for airside tax-free shopping are set out in a concession the government is aware that these rules are applied inconsistently. For example, in 2015 media coverage alleged that in some cases the tax-free element was not being passed on to consumers. And in some cases the relief is applied to tax-free sales of goods that will very likely be consumed in the airport rather than being exported. This is not consistent with international tax norms (WTO rules and OECD Guidelines), in which VAT and excise on goods should be paid in the country of consumption. Extending airside tax-free shopping to EU bound passengers travelling by air, sea, and rail would require legislation to formalise the system, and further requirements setting out how tax-free shops should operate could be included in this legislation. Alternatively, the government could remove the airside extra statutory concession and use the VAT RES - if it decides to retain the scheme - to achieve tax-free sales for passengers.”

***(iv) Evidence submitted in response to questions about possible abolition***

36. In response to the CP, 73 formal responses were received, and officials held twelve individual and roundtable meetings with relevant businesses and industry bodies. Whilst the provisional view of Government was in favour of extending the schemes, Questions 11 and 13, as observed, concerned possible abolition of the VAT RES and ESC 9.1. Heathrow expressed strong support for the provisional indication that the schemes be extended. In relation to Question 11, on possible abolition of the VAT RES, Heathrow stated “N/A” but in relation to Question 13 on possible abolition of ESC 9.1 Heathrow said:

“If airside tax-free sales were abolished, all UK airports would lose significant income. In Heathrow’s case, this would mean that commercial income would significantly reduce and under CAA regulation Heathrow would not be able to support current passenger charges to airlines. This could lead to an increase in air fares by the main airlines who operate from Heathrow and therefore impact on UK consumers negatively. As mentioned above, airports and airlines are likely to experience a relatively slow recovery, and so non-aeronautical income will become even more important for UK aviation in the years ahead.

If the implications of this question indicated that only duty-free sales would remain this would leave a small proportion of the total airside offer currently. Many retailers in airside locations in UK airports may consider closing as the value proposition would be totally undermined. Outside of the current COVID-19 impact, nearly 10,000 colleagues are employed across over 350 restaurant and retail units in Heathrow alone.”

37. Global Blue welcomed the suggestion that the schemes could be extended. In relation to Question 11, abolition of the VAT RES, it stated that this would put the UK at a severe economic disadvantage in a number of ways: reducing the attractiveness of the UK as a place to visit; increasing the attractiveness of close EU alternative shopping destinations especially Paris, Milan, Rome and Florence; dramatically reducing British retail sales and revenue by making British goods more expensive; dramatically reducing the numbers of people employed in British retail; increasing damage to the high street with more shops becoming empty; and, significantly damaging the UK tourist industry.
38. WDFG also welcomed the suggested expansion of duty-free and tax-free shopping. In relation to Question 13 it argued that abolition would lead to a “*significant reduction in the income that airports derive from duty and tax free shopping*”. Smaller airports were largely powerless to negotiate on aeronautical charges and were increasingly dependent upon retail revenues with duty and tax-free sales generating the “*biggest component*” of such revenues. Abolition of the ESC would have a “*huge impact on some airports and could call into question the viability of some small airports*”. It would “*impact*” upon the 84 million passengers (based upon 2019 CAA figures) who fly annually from the UK to non-EU destinations. It would “*be a disappointment*” to a further 179 million passengers (also based upon 2019 CAA data) who annually were expecting to be able to buy duty free when the UK left the EU. About 80% of the customers of WDFG acquired non-alcohol and non-tobacco products. There would also be a presentational issue with retailers having to explain to customers why duty free had been withdrawn. This would undermine their confidence in shopping at UK airports. It could lead to “*very difficult confrontations*” with staff. Sales would fall and airport revenue would be severely impacted overall (not just in duty free). This would feed through to lower overall revenues and to an “*unwelcome rise*” in the cost of travel at UK airports. It could “*conceivably*” affect interconnectivity.
39. Other consultees in a position equivalent to the Claimants made similar points.

**(v) The Consultation Response (“the CR”): The Decision**

40. The CR was published on 11<sup>th</sup> September 2020. It records the Decision. The text summarising consultation responses is set out in paragraphs [3.10] – [3.13] and [3.21] – [3.24]. Most respondents favoured extension of the VAT RES scheme, and, obviously, not its abolition:

“3.12 ... The main arguments against abolition were that the scheme is felt to incentivise overseas visitors to spend more during their visit and there was a feeling that sales may be displaced to other countries. One stakeholder told the government about the potential impact on jobs.

3.13 Instead, these respondents want to see the VAT RES extended to the EU in digital form. One stakeholder suggested that, as passenger numbers have dropped due to the pandemic, there is little risk of disruption from an extension of the scheme in current form. Three others had a similar view but did not reference the pandemic.”

41. The Government expressed some reservations about these claims:

“3.15 The international norm, consistent with OECD guidelines and WTO rules, is that VAT (and excise) on goods should be paid in the country of consumption. The VAT RES is only one mechanism which aims to achieve this for eligible goods which are exported in the luggage of non-EU residents and consumed outside of the UK. However, the scheme is an imperfect way to ensure that VAT is paid in the place of consumption, not least due to the risk of fraud and non-compliance.

3.16 Many stakeholders have highlighted what they see as the benefits of the VAT RES and submitted evidence about the scale of those benefits for international tourism, the high street and other businesses. The direct impact of the scheme on the high street remains unclear, particularly outside of London. For example, evidence provided during the consultation and gathered by HMRC shows that the majority of purchases are made in London and following this, Bicester Village. Other regions, and particularly smaller high streets, do not appear to benefit as much, if at all.”

42. The Government referred to the “*operational challenges*” of the current VAT RES and the practical implications of any extension of the scheme to the EU in its current paper-based form. Stakeholders wanted the current scheme to be replaced with a digital system for any extension to EU residents. The Government was also concerned at the present risk of fraud and misuse which would be exacerbated by extending the scheme such as:

“...goods that do not leave the country which are instead consumed in GB, passenger adherence to eligibility rules (GB or EU residents using non-EU passports to benefit from the scheme) and passengers not declaring goods that are liable for import tax and duty in the 13 destination country. There is a risk that these issues would significantly increase with any extension to the EU.”

43. An important point was made in paragraph [3.19] that retention of the VAT RES would be in breach of the GATT:

“This differential treatment between non-EU and EU residents will not be possible on 1 January 2021 as it is not tenable as a long-term solution, nor would it be compliant with WTO rules which broadly require the government to treat goods carried by passengers bound for different destinations equally.”

44. The conclusion was that the VAT RES was an inefficient method of seeking to achieve taxation in the place of consumption. It was also a costly system to maintain with unclear economic benefits and was burdensome for exit points. The benefits of the scheme for the high-street ignored the fact that the scheme did not benefit the whole of GB equally, with purchases largely centred in London.

45. The Government thus recorded that it would withdraw the VAT RES. Non-EU residents would no longer be able to obtain a VAT refund on items purchased in Great Britain and taken home with them in their luggage. Retailers would be able to continue to be able to offer VAT-free shopping, consistent with international principles of taxation, to non-EU visitors who purchased items in store but who then had them sent direct (by the supplier) to their overseas addresses. Following the end of the Transitional Period, this more limited facility would also be available to EU visitors.
46. In relation to ESC 9.1 the CR acknowledged that the Government had been minded to extend airside tax-free sales to those travelling to the EU by air, sea and rail, but that it had also identified concerns and the possibility that the concession might be abolished. Thirty-three respondents opposed abolition and supported extension, especially at a time when airside retailers were dealing with the consequences of the Covid-19 pandemic. Consultees argued that airside tax-free sales could offset operating costs and contribute to lower retail prices across the board. Customers expected this concession to be extended to EU travel.
47. The Claimants have focused upon paragraphs [3.25] – [3.27] of the CR which set out conclusions in relation to the ESC:

“3.25 The consultation asked whether the government should legislate for tax-free sales to be available to both non-EU and EU-bound passengers. Currently, tax-free sales to passengers travelling to non-EU countries are permitted under an HMRC extra statutory concession (ESC). The legal scope for such an ESC is very limited and the ESC for tax-free sales, as it stands, could not apply after the end of the transition period, nor could it be amended. This was made clear in the consultation document. HMRC will therefore remove the ESC for tax-free sales across the UK with effect from 1 January 2021.

3.26 The government is concerned that the current rules under the ESC are applied inconsistently (for example applied to goods for immediate consumption that are not exported) and about how this would apply if legislation were implemented to permanently allow this relief. The rules also allow for tax-free sales to UK residents who can use the scheme for goods that will likely be brought back to the UK. For example, a UK-resident passenger could purchase a camera VAT-free on departure, and then bring the camera back into the country on return for long-term use, without tax having been accounted for. This is not consistent with international tax norms, in which VAT and excise on goods should be paid in the country of consumption.

3.27 The government is also concerned that the VAT saving is not consistently passed directly on to consumers, and that this would continue to be the case. As such, the government will permanently withdraw tax-free sales from 1 January 2021.”

***(vi) The position post-CR including implementation – Evidence of harm submitted by industry***

48. Businesses adversely affected by the Decision expressed disappointment at the prospect of abolition. Evidence before the court describes the engagement between Government and business in the course of which a strong concern was expressed by industry as to the lack of detail and reasoning in the Decision, as to the omission of any reference to the adverse effects of abolition upon business and the economy more broadly, and as to the absence of any reference to such adverse effects having been weighed by the Chancellor in the overall balancing exercise of competing interests. There is, in this regard, no reference in paragraphs [3.25] - [3.27] to such matters.
49. A report prepared by the Centre for Economics and Business Research (*“the Cebr Report”*) entitled *“The Impact of Ending Tax Free Shopping in the UK (A CEBR report for the New West End Company and Global Blue)”*, dated September 2020, was submitted. This concluded that the effects of abolition of the VAT RES would be catastrophic. The conclusions, set out in Chapter 1 of the report, were as follows:

**“1.1 Introduction**

This report evaluates the costs and benefits of the proposed ending of Duty-Free Shopping for Non-EU visitors to the UK as an indirect result of the Brexit negotiations.

It compares looks at the two possible systems. First, the proposed situation where the VAT Retail Export Scheme is scrapped and secondly, the extension of the current scheme to tourists from the EU as well as from outside the EU.

The main research in Sections 2-5 use the elasticities approach where conventional elasticities from tourism and tax research by official bodies are applied. We estimate the deadweight revenue losses, the gains from tourism and spending and the net benefits in GVA and jobs and total tax revenue gains after netting off the deadweight losses.

Our calculations are based on an earlier report commissioned by Global Blue which Cebr prepared in 2017. Because of the urgency of the current report it assumes the same elasticities for the main research as were used in the earlier report.

Our normal approach would be to use data from the latest complete calendar year. For this report what would have been a standard practice has become a necessity since Covid-19 has so affected the data for 2020 as to make it atypical. Figures in this report are therefore for 2019 unless stated otherwise.

Section 2 provides background; Section 3 describes the methodology; Section 4 analyses the impact of scrapping the current scheme and Section 5 the impact of extending the current scheme to tourists from the EU.

Section 6 shows a different analysis based on Global Blue customer research. A significant proportion of the expenditure affected by the VAT Retail Export Scheme is concentrated on a small number of heavy hitters and so the behaviour of these heavy hitters is relevant. Global Blue has conducted some very up to date fieldwork on the possible behaviour of these people and the potential impact if the preferences which they state turn out to accurate in reality.

Section 7 shows the conclusions and how the options of extension and scrapping compare with each other.

## **1.2 Summary**

### **Effects of abolishing the current scheme for non-EU visitors**

We show in Section 4 the potential impact of ending the current VAT Retail Export Scheme for non-EU visitors estimated using the traditional elasticities for tourism and spending calculated by official bodies.

Even on these cautious assumptions the impacts are clearly negative:

- The number of non-EU visitors to the UK will be reduced by 7.3% or 1,168,000.
- The total decrease in spending by tourists resulting from the ending of the VAT Retail Export Scheme is estimated to be between £1.1 billion and £1.8 billion
- After taking account of knock on effects GVA is reduced by £1.8 -£2.8 billion.
- We estimate that between 27,000 and 41,000 jobs will be lost.
- And that far from gaining the theoretical £521 million, the loss of economic activity would mean that tax revenues were net reduced by £270 – 680 million.

But if the stated preferences emerging from the customer research carried out by Global Blue are correct, these estimates are far too low and the actual real-life impact will be very much higher.

- Abolition of tax free would reduce the number of visitors by 31% or 4.96 million.
- Their spending would be reduced by over £6 billion.
- GVA is £9.3 billion lower causing a reduction in employment of 138,423



- And after taking the gains from the abolition of the tax relief into account, tax revenues are £3,492 million lower.

If the survey data is anywhere near accurate, abolishing the scheme would be a massive negative for the economy at a time when this is least needed, hitting sectors that are especially vulnerable like tourism and retail.

### **Extension of the scheme to EU visitors**

We have only used the elasticities approach to estimate the impact of extending the scheme to EU visitors and the detailed calculations are in Section 5.

Again, even on the cautious assumption that this implies, the net impact is that extending the scheme raises more tax revenue than it loses.

- We estimate that extending the scheme to visitors from the EU would increase the number of EU visitors by 3.8%. This would imply an additional 948,000 visitors who themselves would spend an additional £590-£890 million.
- We estimate that the increase in GVA of extending tax free retail to visitors from the EU will be between £900 and £1,360 million. The increase in jobs from the extension would be 13,500 and 20,200 jobs.
- The theoretical loss of revenue from extending Tax Free is £312 million of VAT estimated earlier. But this is offset by the income taxes, national insurance, indirect taxes, corporate taxes and rates that will be collected as a result of the additional tourist spending.
- So, extending the scheme, far from costing money, generates between £79 and £276 million in net additional taxes.”

### **- The HMT Technical Note (12<sup>th</sup> October 2020)**

50. On 12<sup>th</sup> October 2020, HMT published a Technical Note. The main points are as follows. The Government did not consider that it had the option of maintaining the VAT RES:

“The choice was between extending the VAT RES to EU residents or removing it completely as World Trade Organization (WTO) rules specify that goods bound for different destinations must be treated the same.”

51. Many stakeholders had raised concerns that abolition of the VAT RES would “*damage both the UK high street and international tourism and retail in the UK*”. However, the scheme was “*very costly*”, and an extension (to make it non-discriminatory) would increase the cost of the scheme by c£0.9b which would “*... result in a large amount of*

*deadweight loss by subsidising spending from EU visitors which already happens without a refund mechanism in place, potentially taking the total cost up to around £1.4b per annum”.*

52. The Note addressed the possibility of an adverse impact upon demand and upon employment arising from the “*implicit*” increase in price change triggered by abolition. It recorded that the Chancellor had asked the OBR to set out an independent assessment of the fiscal impact of the intended abolition, to be provided in November.
53. In relation to ESC 9.1 the Technical Note recorded that the Decision reversed the initial view set out in the CP in favour of extension of the scheme. Following expiry of the Transitional Period the ESC would only apply to non-EU passengers and not EU passengers and this would be in breach of WTO rules “*whereby all passengers must be treated equally*”. The choice for the Government “*as a result of WTO rules*” was therefore between (i) removing the ESC but legislating to enable airside tax free sales to be made to non-EU and EU bound passengers alike; or (ii), removing it altogether.
54. If the option of extending the ESC were however to be pursued, it would have to be brought into effect via legislation, and not an extension of ESC 9.1. The scope of the legal power to create extra-statutory concessions was limited and ESC 9.1 could not therefore be extended through the mechanism of a concession.
55. The Note then repeated the reasons why the Government had decided to abolish the ESC altogether (as set out in the Decision) and referred to the evidence submitted by consultees as to the negative effects of abolition, especially as the sector sought to recover from the effects of the Covid-19 Pandemic.

**- The OBR final analysis / OBR evidence to the HC Treasury Select Committee**

56. On 25<sup>th</sup> November 2020, pursuant to the request from the Chancellor, the OBR provided its formal forecast evaluation of the effects of the abolition. The document is referred to at paragraph [22] above where the relevant paragraphs are set out. As explained at paragraph [21] above within HMRC provided analysis of costing to OBR for their consideration.
57. The first Costings Explanatory Note was dated 18<sup>th</sup> November 2020 and concerned ESC 9.1. It sets out tax base figures for 2020/21 – 2025/26. The tax base was the current estimate of how much VAT was not being paid through sales of tax free goods. The only behavioural factor taken into account in estimating the tax base was a possible reduction in spending from travellers from the rest of the world. As to this the Note stated: “*The tax base is uncertain. There is also uncertainty around any behaviour responses once the policy is implemented, especially around how much shops will react and adjust prices and, consequently, how much travellers reduce spending*”. It was acknowledged that there might be additional indirect effects. There could be “*...less sales in shops, bar and hotels etc. because of the tax-free incentive, more tax may be lost from this*”. Such losses were not however estimated or therefore taken into account. Table 1 set out a “*Costing Table*” which reflected the limited nature of the analysis described. Paragraphs [22] – [39] of the Note explained the difficulties inherent in seeking to model the estimated costings. Paragraph [31] explains in relation to the effect of the Covid-19 Pandemic that the data used 2019 as the base year but that the

economic effects of the Pandemic were factored into the costing by way of modified determinants and forecasts. It did not spell out what these variables were.

58. The second Costings Explanatory Note was dated 19<sup>th</sup> November 2020 and concerned the VAT RES. It also sets out tax base figures for 2020/21 – 2025/26. The only behavioural factor taken into account in estimating the tax base was the likely reduction in number of tourists lost to other destinations because they would be less incentivised to visit the UK. In relation to the (reduced) numbers of visitors that would still visit the UK there would be a further reduction in spending as relevant (mainly luxury) goods became comparatively more expensive without the possibility of obtaining a refund; an increase in price implied a reduction in demand. Later (*ibid* paragraph [19]) the KAI unit recognised that the reduction in visitors might also be exacerbated by the fact that other EU states still offered VAT RES schemes to customers from the rest of the world. In relation to incremental indirect effects the KAI unit stated: “*We have estimated a small impact on the APD forecast. This could also negatively affect other sectors such as hospitality and transport*”. As with the Costings Note in relation to ESC 9.1 the KAI unit set out fairly extensively the uncertainties inherent in the modelling. Adjustments were made to take account of the deterrent effects on travel of the COVID-19 Pandemic.
59. The OBR Forecast was duly published on 25<sup>th</sup> November 2020. It set out the amount of tax that the Exchequer stood to gain by virtue of abolition. In calculating this figure, it took account of the deterrent effect of a rise in tax free prices and the diversion of tourism from the UK to competing destinations such as Paris and Milan. To quantify this loss, it took a price elasticity figure of 1.28 which had been calculated as reflecting the typical rate of diversion in the tourism sector. It then added 50% in order to take account of an assumed higher price elasticity in relation to luxury goods. The effect of this would be to assume a higher than par diversion of tourists away from the UK as a result of a price increase in luxury goods. It therefore applied an increased price elasticity figure of 1.9. The OBR concluded that this would reduce tax yield. But it also observed that the estimate was “*highly uncertain*”.
60. It is common ground that the OBR did not go further and conduct an analysis of the wider, ripple, effects of abolition upon the retail sector and the economy more broadly, and upon the consequential impact for Exchequer yields. The Claimants rely upon evidence given by representatives of OBR to the Treasury Select Committee in Parliament on 1<sup>st</sup> December 2020 which covered questioning about the OBR Forecast and its conclusions on the impact of abolition of tax free sales. The Claimants say that the OBR confirmed in evidence that the question of the wider economic detriment to the economy of abolition of the VAT RES had not been taken into consideration and that it had not assessed whether there was a risk that abolition could actually lead to negative Exchequer yields.
61. Mr Richard Hughes (Chair OBR), Professor Sir Charlie Bean and Mr Andy King (members of OBR) gave evidence. They explained that OBR did consider the possibility that abolition would lead to trade being diverted from the UK. The extent of any diversion would depend upon elasticity of demand. The OBR was uncertain about its conclusions (including net benefit or detriment to the Exchequer). This was partly due to the Exchequer not having its own, internal, data on the costs of tax free shopping. The impact of the Covid-19 Pandemic on trade flows was substantial and there were uncertainties surrounding this and the point at which trade would recover. This lack of clarity was exacerbated by uncertainty relating to “*behavioural*

*response[s]*” i.e. the way in which an increase in price would trigger a reduction in spending by consumers. The OBR had assumed quite a high elasticity response but acknowledged that it could not be confident in its analysis. Mr King explained that complications for its analysis arising from the Covid-19 Pandemic were “*all before*” the OBR began to assess “*behavioural*” responses. All the estimates were hence “*highly uncertain*”. OBR was not: “*particularly confident in any specific number.*” The relevant exchange was as follows:

“Mr Andy King

...

This is obviously related to flows of tourism which during the pandemic have been hit extraordinarily hard. So in some ways we’ve linked this to the judgements we’ve made about how long it will take the air passenger duty forecast to recover. And that’s all before you get to the behavioural response. Now, the way we looked at this, there was rather more outside evidence brought to bear on this than many costings of similar size. We assumed a relatively high price elasticity response from those affected, but for the reasons you’ve set out, whether that’s going to be high enough or not is something that I don’t think we can be very confident in. I don’t think we’re going to be able to pick this apart with the benefit of hindsight either, because it’s being introduced mid-pandemic.

I think the wider question about VAT on hotels, that kind of thing, that is not reflected in the £300 million a year that you mentioned. That number just looks at the degree to which shopping on the type of goods that are covered by the scheme at the moment will be affected. When we look at how the wider economy is affected by new policy measures, we do it in the round, with all the measures that are announced in a Budget or a Spending Review. So in this instance, with the best part of £100 billion being added to public spending, a £0.5 billion at most tax takeaway is kind of swamped by that. That’s not to say that these are not important - if you were looking at this on its own, if it was the only thing that happened in this Budget, then we would have been looking at that in a slightly different way. So, that’s not to say the analysis that people have done is not relevant, but it’s not factored into that specific line of numbers.

Felicity Buchan MP:

Yeah, and I understand completely in terms of materiality, but just if you were to look at this measure on its own, do you think there’s a risk that it could actually be negative to the Exchequer, if you were to take in the losses on VAT?

Mr Andy King:

I'm afraid I haven't looked at that specifically, sorry. I don't have an answer for you."

**C. Ground I: Error of Law – Application of the Commissioners' power to issue extra-statutory concessions / The *Wilkinson* principle**

***(i) The Complaint***

62. I turn to the first Ground. This concerns *R v Commissioners of Inland Revenue ex parte Wilkinson* [2005] UKHL 30 ("*Wilkinson*"). This case examined the power of "collection and management" or "C&M" which the Commissioners enjoy. In particular it addresses the power of Commissioners to use extra-statutory concessions to remove activities or persons from the scope of taxation, or to use the judicial terminology "untax" that which Parliament intended to tax. The airside tax free scheme (ESC 9.1) was the result of the exercise by the Commissioners of this C&M power. In the CR the Government announced that it would remove ESC 9.1. An important consideration was its conclusion that following the Transitional Period, the rule in *Wilkinson* which was "very limited", meant that as it stood ECS 9.1 (i) could not continue to apply and (ii) could not be amended. It followed that ESC 9.1 had to be removed:

"3.25 Currently, tax-free sales to passengers travelling to non-EU countries are permitted under an HMRC extra statutory concession (ESC). The legal scope for such an ESC is very limited and the ESC for tax-free sales, as it stands, could not apply after the end of the transition period, nor could it be amended. HMRC will therefore remove the ESC for tax-free sales across the UK with effect from 1 January 2021."

63. The Government's position was also set out in the Technical Note:

"Following a 2005 Judgement from the House of Lords, which limited HMRC's discretion to provide tax reliefs through an ESC, the legal scope for any ESC has been very limited. As such, the ESC for tax-free airside sales, as it stands, could not be amended. The ESC, as drafted, should only apply to non-EU bound passengers and cannot be amended to apply to EU bound passengers."

64. The Claimants argue that the Government has misconstrued and misapplied *Wilkinson*. ESC 9.1 does not, properly analysed, cover activity which should otherwise be subject to tax; it does not "untax" tax free sales and therefore the conclusion that following the Transitional Period ESC 9.1 could not be retained or amended was wrong. This is because airside tax free sales fell within the scope of the exemptions set out in Article 146 of the VAT Directive and in the measures of domestic law which implemented those exemptions. In any event given the objective of Parliament as set out in the legislation, which was to set up a system the modalities of which would ensure "removal" of a product from the United Kingdom and thereby satisfy the destination principle, it was open to the Commissioners to use the C&M powers to exclude airside sales from VAT. This was especially so since removing ESC 9.1 was likely to lead to a net reduction in revenue to the Exchequer relative to retaining it and one consideration that was relevant to the exercise of the C&M power was the need to maximise

Exchequer receipts. Finally, even if ESC 9.1 fell outside of any permissible exemption the Government was *still* entitled to retain or extend the scheme *by legislation* and the Government therefore erred when it said in paragraph [3.25] CR that the inapplicability of C&M powers meant that the schemes “*therefore*” had to be withdrawn. As a result of these errors the Government misdirected itself and took into account an erroneous conclusion of law.

65. Arising out of this there are four issues to consider:

- (i) What limits are set by *Wilkinson*?
- (ii) Does *Wilkinson* apply to retention or extension of ESC 9.1 after the Transitional Period (the “*untaxing*” point)?
- (iii) Does retention or extension of ESC 9.1 amount to a lawful exercise of the Commissioners’ “*collection and management*” powers?
- (iv) Did the Government err in its application of *Wilkinson* in the Decision?

**(ii) Issue (i): What limits are set by *Wilkinson*?**

66. It is important to be clear as to the rationale behind the power to issue ESCs. In *Wilkinson* it was explained that the Commissioners were not “*the Crown*”. They were not, in constitutional terms, the owners of the consolidated fund (see *Secretary of State for Trade and Industry v Frid* [2004] 2 AC 506 at paragraph [27]). They could not therefore deal with the State’s money as they saw fit, and this included granting fiscal concessions which were inconsistent with the will of Parliament. The Commissioners were a statutory body charged with the duty to “*collect and cause to be collected every part of inland revenue*”.
67. That statutory regime did however accord the Commissioners: “... *a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.*” (per Lord Diplock in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at page [636]) (the “*Fleet Street Casuals*” case). It is this discretion which permits the Commissioners to grant extra-statutory concessions. In *Wilkinson*, the point was expressed thus:

“21. This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under section 1 of TMA. It does

not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women.”

68. The phrase “*could have granted but did not grant*” expresses the underlying constitutional premise that when Parliament decides to impose a tax it necessarily delineates the category or class of taxable person and differentiates them from those who are not subject to the tax. It is not open to the Commissioners to depart from that legislative intent and by means of an ESC which forgives the obligation to pay. The citation from *Wilkinson* also explains that the power does not enable the Commissioners to grant an ESC because, for instance, they adopt a different view of *policy* to that of Parliament. This was at the heart of the issue in *Wilkinson* where it had been argued that the Commissioners should have used their C&M powers to formulate a tax rule (in accordance with other binding legislative equality obligations) “*on grounds not of pragmatism in the collection of tax but of general equity between men and women*”. That was not a policy choice that Parliament had made, and a policy of fiscal equality between men and woman was not therefore one that Commissioners could introduce *via* an extra-statutory concession.
69. Nonetheless, the citations above from both *Fleet Street Casuals* and *Wilkinson*, recognise that there is a degree of “*pragmatism*” to be applied to this power. Ms Emily Antcliffe, Director of Indirect Tax within HMRC, explained in her evidence the position taken by the Commissioners in relation to ESCs generally and ESC 9.1 in particular. She has responsibility for VAT and environmental taxes. She explained that the present general powers of collection and management (“C&M”) were set out in section 5 of the Commissioners for Revenue & Customs Act 2005. These powers provided the Commissioners “... *with a wide managerial discretion as to how they carry out their functions*...”. She described an ESC as follows:
- “Extra statutory concession ... are the most public and formal way in which the Commissioners have exercised their C&M powers. ESCs are designed to smooth the operation of the tax system and may result in relief for certain customers in specific circumstances. They have been a feature of the UK’s tax system for decades and will continue to be made and withdrawn as necessary. As ESC is a published statement that HMRC will, in certain defined circumstances, depart from the strict position under statute and treat taxpayers as if they were entitled to some concession, such as a reduction in liability to the particular tax or duty. ESCs must be justified as an exercise of the Commissioners’ managerial discretion. Many but not all ESCs are published in the “Extra Statutory Concessions: ex-inland Revenue” booklet and in “VAT Notice 48: Extra Statutory Concessions”. As their name suggests they have no basis in statute.”
70. It is the Government’s view that airside tax free sales should (historically) always have been subject to tax and that the continued existence of ESC 9.1 was therefore *ultra vires*

and outside the permitted scope of the legislative regime. In paragraph [40] of her Statement Ms Antcliffe stated:

“...HMRC’s view has been that ESC 9.1 is, and remains, ultra vires but that the risk of challenge was minimal, and it was therefore not a high priority for review and replacement.”

The continuation of ESC 9.1 fell to be considered as part of the arrangements for EU exit after which there was no longer a basis for retaining ESC 9.1 since the EU Member States and the rest of the world had to be treated as one; the distinction between them was “*no longer relevant*”. Such policy reasons as had existed could no longer justify recourse to an exception to Article I:1 GATT under which the Government had to introduce a non-discriminatory regime and the choice was therefore limited to extension or abolition. If the ultimate policy decision was in favour of some form of retention or extension, then *Wilkinson* precluded achieving this by means of an ESC: “... *if the principle of ESC 9.1 was retained it would need to be legislated for within the other EU Exit legislative changes that my directorate was planning*”.

***(iii) Issue (ii): Does Wilkinson apply to retention or extension of ESC 9.1 after the Transitional Period?***

71. The question is whether following the Transitional Period retention or extension of ESC 9.1 would have left untaxed an activity that would otherwise have been subject to tax?<sup>3</sup> The activity is the export or shipment of goods by customers from the UK to the rest of the world (if the scheme were extended) or only to the non-EU part of the rest of the world (if the scheme had been retained but not extended). In my judgment ESC 9.1 *did* untax an activity that was within the scope of taxation.
72. The relevant domestic law derives from EU law. Article 146 of the VAT Directive concerns exemptions relating to exportation. It provides:

“Article 146

1. Member States shall exempt the following transactions:

(a) the supply of goods dispatched or transported to a destination outside the Community *by or on behalf of the vendor*;

(b) *the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory*, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of pleasure boats and

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<sup>3</sup> The decision taken by the Government was at a point in time when the Transitional Period was still operative. This meant that the law which applied was, in effect, old EU law. Since that was the law which governed the decision in dispute it remains appropriate to consider the legal position as of that date.



private aircraft or any other means of transport for private use...  
(emphasis added)”

73. According to the case law (set out below) it must be read in conjunction with Articles 14(1) and 131. Article 14(1) provides:

“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.”

74. Article 131 provides:

“The exemptions provided for in Chapters 2 to 9 [of Title IX of the VAT Directive] shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.”

75. In Case C-307/16 *Pieńkowski* (28<sup>th</sup> February 2018) the CJEU was concerned with Article 146(1)(b), which is export by a customer. This is the provision which justified the VAT RES. The Court explained what was meant by the “*supply of goods*”, which is a phrase found in both Article 146(1)(a) and (b). The Court stated that the phrase had to be read in conjunction with Article 14:

“24. It should be noted that, under Article 146(1)(b) of the VAT Directive, the Member States are to exempt the supply of goods dispatched or transported to a destination outside the European Union by or on behalf of a customer. That provision must be read in conjunction with Article 14(1) of that directive, according to which ‘supply of goods’ means the transfer of the right to dispose of tangible property as owner.

25. It follows from those provisions and, in particular, from the term ‘dispatched’ in Article 146(1)(b) that the export of goods is effected and the exemption of the supply of goods for export becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported outside the European Union and that, as a result of that dispatch or that transport, they have physically left the territory of the European Union (judgment of 19 December 2013, *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 24 and the case-law cited).”

76. In Case C-275/18 *Milan Vinš* (28<sup>th</sup> March 2019) the CJEU was concerned, on a reference from the Nejvyšší Správní Soud (Supreme Administrative Court, Czech Republic), with Article 146(1)(a). Under this provision the dispatch or transportation must be either (i) “*by*” the vendor or (ii) by a person “*by or on behalf*” of the vendor. The intention behind this was to “*ensure*” that goods were properly taxed at destination. The Court cited the approach set out in *Pieńkowski* (*ibid*):

“22 It must be recalled, in the first place, that in accordance with Article 146(1)(a) of the VAT Directive the Member States are to exempt the supply of goods dispatched or transported to a destination outside the European Union by or on behalf of the vendor. That provision should be read in conjunction with Article 14(1) of the directive, in accordance with which ‘supply of goods’ is to mean the transfer of the right to dispose of tangible property as owner (see, to that effect, judgment of 28 February 2018, *Pieńkowski*, C-307/16, EU:C:2018:124, paragraph 24).

23 That exemption is intended to ensure that the supplies of goods concerned are taxed at the place of destination of those goods, namely the place where the exported products will be consumed (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 34).

24 It follows from the provisions mentioned in paragraph 22 above, and particularly from the word ‘dispatched’ in Article 146(1)(a) of the VAT Directive, that the export of goods is effected and the exemption of the supply of goods for export becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser, the supplier establishes that those goods have been dispatched or transported outside the European Union, and, as a result of that dispatch or that transport, the goods have physically left the territory of the European Union (see, to that effect, judgment of 28 February 2018, *Pieńkowski*, C-307/16, EU:C:2018:124, paragraph 25).”

77. I would briefly also mention the judgment of the VAT and Duties Tribunal of 27<sup>th</sup> June 1995 in *Mates Vending Ltd v Commissioners of Customs and Excise* [1995] V&DR 266. The Appellant supplied vending machines some of which were located airside in airports mainly in lavatories dispensing items such as toothpaste, condoms and other personal items. The Appellant claimed that the supplies were zero rated under section 30 VATA in the light of the VAT Directive. The argument of the Appellant (ibid page [6]) was that since the goods had in actual fact been exported the exemption applied. The Tribunal, disagreeing, responded: “*even so, it was the customers and not the Appellant who exported them*”. An analogy was sought to be made by the Appellant with goods supplied in retail outlets airside under the ESC. The Tribunal distinguished those sales but added that it was not for the Tribunal to express a view as to whether the concession was rightly granted.
78. Article 146(1)(a) is implemented in the UK by section 30(6) VATA. This does not use the phrase “*vendor*” found in the VAT Directive but, instead, uses the concept of supply. Tax is due unless Commissioners are satisfied that “*the person supplying the goods ... has exported them*”:
- “A supply of goods is zero-rated by virtue of this subsection if the Commissioners are satisfied that the person supplying the goods - (a) has exported them [to a place outside the member

States<sup>4</sup>]; or (b) has shipped them for use as stores on a voyage or flight to an eventual destination outside the United Kingdom, or as merchandise for sale by retail to persons carried on such a voyage or flight in a ship or aircraft, and in either case if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are fulfilled.”

79. Section 30(6) VATA only zero-rates exports or shipments by or on behalf of the *supplier*. It does not apply where the export or transportation is carried out by the customer or on behalf of the customer. This conclusion is supported when the section is read consistently with the VAT Directive which assumes that the person carrying out the process of export or shipment is the “*vendor*”, i.e. the person selling the goods. The exemption does not zero rate exports or shipments made or arranged by the person who buys the goods i.e. the customer.
80. Article 146(1)(b) is implemented in section 30(8) VATA and Regulation 131 of the Value Added Tax Regulations 1995. These zero-rate exports by a customer who is an “*overseas visitor*”, not domiciled or habitually resident in the EU (see Regulation 117 (7A) - (7D) Value Added Tax Regulations 1995).
81. The rulings in *Milan Vinš (ibid)* and in *Pienkowski (ibid)* strongly support the Government’s analysis. *Mates (ibid)* is of more limited precedent value, in the light of more recent rulings of the CJEU. But it also favours the analysis of the Government. It is clear that the concept of a supply of goods entails the transfer of title in the goods to the customer. The exemption thus applies where (i) title has passed and (ii) it is established by the supplier that the goods have in actual fact been exported so that tax can be paid at destination. The supplier must take full responsibility for ensuring that this occurs; the obligation is on the supplier (the vendor) to establish due export. Applying Article 131 that export must be “*correct and straightforward*” and must prevent “*any possible evasion, avoidance or abuse*.”
82. ESC 9.1 was not compliant with section 30 VATA or with the VAT Directive which guided its interpretation. It applied regardless of whether the goods were actually exported or were consumed immediately or were taken out of the UK and then returned (e.g. in the case of sunglasses or a camera). There was no obligation on the supplier (the vendor) to perform the physical process of export or shipment or to employ an agent to perform these physical tasks or otherwise to “*ensure*” that the goods were exported. ESC 9.1 was a mechanism which the Government considered encouraged misuse and, this being so, it ran counter to the objective behind Article 146 read in the light of Article 131 of the VAT Directive which is concerned to eliminate “*evasion, avoidance and abuse*”.
83. The Claimants seek to circumvent this analysis by a notion of “*practical equivalence*”, equating the customer with the supplier. In their written submissions it is argued that a customer “... *who is about to board a plane taking her to a place outside the EU, is in*

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<sup>4</sup> An amendment to section 30(6) by paragraph 29(4) of Schedule 8 of the Taxation (Cross-border Trade) Act 2018 removed the words “*to a place outside the member States*” from the current section 30(6)(a) VATA.

*practice equivalent to the supplier handing the goods to a courier to be exported to the same location (to which it is clear s.30(6) lies)”. In oral argument Mr Beard QC for the Claimants also relied upon the word “establishes” in paragraph [24] of Milan Vinš (see paragraph [76] above). He argued that the retailer under ESC 9.1 did establish export by checking the boarding pass prior to sale.*

84. These arguments, which are designed to extend the provision, cannot be justified. Once the goods in issue have been sold to the customer, title in them has passed, and the act of export or shipment of those items from the territory by the customer is not as an agent for the supplier/vendor. It is an act carried out by the customer on her/his own behalf. That person is not legally, or in any other relevant way, comparable or equivalent to a supplier/vendor or a courier or shipper acting on behalf of the supplier/vendor. As the Government pointed out if it were otherwise: “... *the ESC would not be needed at all and its abolition would be of no concern to the Claimants.*” Moreover, the cursory checking of a boarding card at the point of sale does not in any way serve to “ensure” export for all of the factual reasons referred to in the CP and CR. It does not, for instance, prevent the customer of perfume opening it immediately after purchase and applying it liberally there and then, and, after the holiday, bringing the residue back into the UK. In any event the expressions “ensure” and “establishes” used in the VAT Directive, and in the case law, must be understood in the context of Article 131 (see paragraph [74] above) which the CJEU has said is relevant to interpretation. This strongly militates against a conclusion that the law extends to exempt a scheme which facilitates “abuse”.
85. The Government argues also that applying ordinary principles of interpretation legislative exemptions are to be interpreted strictly as exceptions to the general position which, here, is that all supplies should be taxed at the standard rate (eg see Case C-97/06 *Navicon SA v Administracion del Estado* at paragraphs [21]-[22]). The concept of strict interpretation of exemptions means only that an exemption should be limited to its proper purpose. But it also militates against any broad or expansive extension of the exemption, for instance to catch customers according to some principle of practical equivalence. The purpose of the exemption is not to place customers in a position whereby they can decide whether or not to pay tax.
86. Finally, the Claimants refer to section 7(7) VATA which it is said provides that goods exported by a customer should be treated as the relevant removal for the purpose of section 30(6). With respect section 7 does not assist and it does not do away with the requirement in section 30(6) that exemption arises when it is the supplier who performs the export. It does not expand that to exempt the situation where the supplier sells to a customer who might (or might not) then remove the item from the UK and if it is removed later bring it back in and doing so on his or her own behalf and might or might not then pay tax.
87. It follows in my judgment that ESC 9.1 zero rated supplies of goods which should have been subject to VAT on the basis of domestic (and at the time EU) legislation.

***(iv) Issue (iii): Does retention or extension of ESC 9.1 amount to an exercise of the Commissioners’ “collection and management” powers?***

88. The Claimants also argued that ESC 9.1 falls within the C&M powers of Commissioners. This is for two reasons. First, because the basic policy behind the

legislation is the destination principle and ESC 9.1 achieves this by setting up a system governing the modalities of *removal* of the item in question from the UK to a place where tax is then payable and paid. Secondly, and in any event, retention could give rise to a better net return for the Exchequer than abolition, and it is part of the Commissioners' C&M powers to take measures to achieve the highest net return. In this latter connection the Claimants refer to the phrase "*the highest net return that is practicable*" used in *Fleet Street Casuals* (see paragraph [67] above) and argue that the Commissioners are bound to use C&M powers to maximise revenue to the Exchequer. They contend that their evidence establishes that, on balance, retaining or even extending airside VAT tax relief would result in greater returns to the Exchequer than abolition.

89. I do not accept this analysis. I agree with the Government that retention or extension is not within C&M powers. The reasoning set out below is limited to the facts of this case. It is unnecessary to express any wider view on how the C&M power might apply in any other case.
90. First, in this case since the analysis of the relevant statutory provisions is that ESC 9.1 does untax that which should be taxed there is no residual scope for the Commissioners to exercise their C&M powers and "*untax*" the taxable by an ESC. The House of Lords in *Wilkinson* made clear that the Commissioners had a broad discretion as to the use of their powers of management but that this did not extend to untaxing the taxable by an ESC: see the citation at paragraph [67] above which sets this out as an outer limit of the exercise of the C&M power. It follows that once the Commissioners were of the settled view that airside sales should have been taxed then there was no residual power to untax.
91. Secondly, the Claimants' argument about the modalities of removal is inconsistent with the statutory language which accords an exemption where agents of the actual supplier/vendor perform the export or shipment. It would be unacceptable to extend the "*modalities*" so as to treat as acceptable the acts of a customer who owns the goods and who is not acting as an agent for the supplier/vendor. That is a modality too far.
92. Thirdly, it follows from the first point that it is not within the C&M powers of the Commissioners to take a different view of *policy* to that of Parliament. Even if the Commissioners were of the view that retaining or extending the concession would increase the net revenue to the Exchequer (which they were not), that would still not entitle them to adopt an ESC if it were contrary to the express will of Parliament. Parliament has decided that the tax should be paid on all transactions and this conclusion cannot be gainsaid by a judgment of the Commissioners that Parliament got it wrong, and the exemption should be broadened. The reference to "*obtaining the highest net return*" in *Fleet Street Casuals* (see quote at paragraph [67] above) is a reference to increasing net revenue within the parameters *set by Parliament*. It is not a consideration that operates at large.
93. In conclusion, on the facts of this case, I agree with the Government that the Commissioners' C&M powers could not be used to grant an ESC to retain or extend the concession.

***(iv) Issue (iii): Did the Government err in its application of Wilkinson in the Decision?***

94. In my view the Government did not err. I accept that some of the language used in paragraph [3.25] of the CR (see paragraph [47] above) might be said to be ambiguous and could suggest that the application, without more, of *Wilkinson* meant that airside tax-free sales had to be abolished. That impression was incorrect, as the Defendants contend. The application of *Wilkinson* meant no more than if the Government wished to retain or extend airside tax-free sales after expiry of the Transitional Period, it would have to do this by legislation, and not an ESC.

95. However, this was the position clearly set out in the CP. Paragraph [4.25] stated that:

“Extending airside tax-free shopping to EU bound passengers travelling by air, sea and rail would require legislation to formalise the system and further requirements setting out how tax-free shops should operate could be included in this legislation.”

96. It is also the position recorded extensively in internal, disclosed, documents which reflected contemporaneous thinking within HMT and HMRC. Ms Antcliffe, consistently with the CP and contemporaneous documents, also sets this out in her witness evidence. Standing back this must, in any event, have been the basic premise upon which the CP was published. The position of the Government at that point in early 2020 was that the schemes should be extended. Yet the position even then was that this could *not* be achieved by an ESC. It follows that it had to be achieved via some other means, which could only, in context, have meant legislation.

***(v) Conclusion on Ground I***

97. I would reject this ground of challenge. The Government correctly applied *Wilkinson* to the airside ESC 9.1. It was correct to conclude that the concessionary scheme was *ultra vires* as the law then stood. Had the Government wished to retain or extend ESC 9.1 it could however have done so through legislation, as it recognised. Indications in the CR which suggest that the Government saw *Wilkinson* as an impediment *per se* to retention or extension are no more than unfortunate drafting. Other documents make the correct position clear.

**D. Ground II: The Decision is flawed as it is based upon an erroneous interpretation of the Articles I:1 and III:2 GATT**

***(i) The Complaint***

98. The debate under this Ground between the parties has largely focused upon the VAT RES. The Claimants argue that the analysis applies equally to ESC 9.1. It is convenient for the purposes of analysis to focus upon the VAT RES; but the analysis is not materially different in its application to ESC 9.1.

99. The issue can be encapsulated in the following way. The Government adopted the firm position that upon expiry of the Transitional Period it was bound by the GATT to ensure that the domestic law VAT regime adhered to the non-discrimination principle in Articles I:1 and III:2 GATT. It construed these provisions as *requiring* it to ensure that

the same rules applied in domestic law as between the EU and the rest of the world. As such it concluded that the options open to it were either to extend the VAT RES or remove it altogether. Applying the GATT, it could not therefore retain the scheme or modify it in a manner which also maintained the different treatment of the EU from the rest of the world since that would be to perpetuate discrimination. The options were limited to levelling up or levelling down, and the Government chose the latter.

100. The Claimants do not contend that the present position, which treats the EU and the rest of the world the same, is unlawful under the GATT. Instead, in their very detailed written submissions, they argue that the Government misconstrued the GATT. Properly applied it did not preclude retention of the VAT RES either permanently or during an extended period to allow for adjustment after the Transitional Period. Internal taxes, such as VAT, do not fall within Article I:1 and III:2 GATT and no other provisions would apply to prevent retention or even extension. This is set out in case law under the GATT and in policy documents issued by the WTO. In any event the schemes did not give rise to any discriminatory or differential benefit which was the vice which those articles were targeted at. Moreover, the fact that the Government retained the VAT RES for Northern Ireland showed that it did not consider that it was bound in law under the GATT to remove *all* discrimination. It follows that the Government misdirected itself as to the law and artificially limited the options open to it. Had it applied the law correctly then it could well have adopted one of the solutions argued for by the Claimants. This misdirection was highly material to the analysis of the Government; it served to set tight and restrictive tramlines for any decision that could be taken. The Claimants rely upon a supporting expert report on international trade law and policy prepared by Mr Harbinson.
101. In oral submissions Mr Beard QC developed a further point in response to the Government's argument that all that had to be shown (by them) was that their interpretation of the GATT was "*tenable*". He argued that even upon the basis that the test was tenability (and not correctness) and even upon the basis that the Government's argument met this lower threshold test, the analysis in the Decision was still flawed in that there was no evidence that the Government had in any real way considered the complications arising out of the GATT and in particular the implications of Articles XIV (subsidies and countervailing measures) and XXIV (exemptions).
102. The Government rejects these arguments. Ms Patel argued the issue for the Government. She argued, in summary, that insofar as the alleged error of law was said to arise from an unincorporated treaty (the GATT) the complaint was not one that the court could adjudicate upon because rights and obligations in unincorporated treaties were non-justiciable. But even if the court did have jurisdiction the principle of non-discrimination in Articles I:1 and III:2 GATT applied to the VAT RES (and ESC 9.1) and required the discrimination to be removed upon expiry of the Transitional Period. The position in relation to Northern Ireland was irrelevant to the analysis. The test in law was only whether the Government's position was "*tenable*", which it plainly was, but even if the test was higher (i.e. the normal standard applied to issues of law) the Government's analysis of the GATT was correct. It did not err. The final point was a procedural one. The Government objected to the reliance by the Claimants upon expert evidence (in the form of the report prepared by Mr Harbinson (see paragraph [100] above)) as to the scope and effect of the GATT, which it says is a matter for submissions of law to the court and not evidence. This was not an academic point, but rather one of

principle as to the correct way in which parties and courts should approach questions of international law. As a precaution the Government served a report of Mr Tereposky which addressed the analysis of Mr Harbinson.

103. The issues identified by the parties can be summarised as follows:

- (i) Are issues concerning the scope and application of the GATT justiciable at all?
- (ii) If the issues are justiciable what is the standard of review (tenability)?
- (iii) Is an internal tax measure, such as the VAT RES, capable in principle of falling within the GATT and if so, under which Articles and provisions?
- (iv) Was the VAT RES incompatible with relevant provisions of the GATT upon expiry of the Transitional Period?
- (v) If the VAT RES was incompatible with GATT, was the Government bound forthwith to remove the VAT RES (and/or ESC 9.1)?
- (vi) Is it relevant that following the Transitional Period the VAT RES will not be removed in Northern Ireland?
- (vii) Are issues of law and practice under the GATT capable of being admitted as expert evidence or are they matters of law for submission?

***(ii) The GATT: Relevant Provisions and Preliminary Observation***

***- The WTO***

104. Before addressing the substantive issues, it is important to understand the basic structure of the World Trade Organisation ("*the WTO*") and the GATT. The WTO is an international organisation established by Article 1 of the Agreement Establishing the World Trade Organisation ("*the WTO Agreement*"). It provides an institutional framework for the conduct of trade relations among its members in relation to agreements and instruments annexed to the WTO Agreement ("*the WTO Agreements*"). These include a number of multilateral trade agreements ("*Multilateral Trade Agreements*") including the GATT 1994. This incorporates: (i) the GATT 1947 ("*the GATT 1947*"); (ii) the Agreement on Subsidies and Countervailing Measures ("*the ASCM*"); and (iii), the Understanding on Rules and Procedures Governing the Settlement of Disputes ("*the DSU*"). The UK and the European Union are both members of the WTO.
105. The GATT applies to all trade in goods. It prohibits discrimination in international trade in goods (Articles I and III) and it limits tariff charges to those agreed in Schedules of Concessions (Article II). It provides for freedom of transit for goods (Article V). It prohibits quantitative restrictions on imports and exports of goods (Article XI) but also provides for certain exceptions for matters such as public health, protection of the environment and national security (Articles XX and XXI). It works in conjunction with the system of dispute resolution in the DSU.
106. The WTO Agreement and its annexes constitute a "*single undertaking*" and a single system. The history of the WTO and the GATT 1947 was set out in detail by the Appeal



Board in *Brazil – Measures Affecting Desiccated Coconut* (AB-1996-4, 21<sup>st</sup> February 1997) at pages [12ff]. It is unnecessary to set any of that out save to record that it is the GATT 1994 that is in issue in this litigation.

107. Under Article III of the WTO Agreement the role of the WTO is to facilitate the implementation, administration and operation of the WTO Agreements. It provides a forum for multilateral trade negotiations between members on matters dealt with by the agreements. It administers the DSU. It also administers a Trade Policy Review Mechanism and cooperates with the International Monetary Fund and the International Bank for Reconstruction and Development and affiliated agencies.

**- Article I:1 GATT (Non-discrimination)**

108. Article I:1 GATT provides:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

109. Article I:1 contains the fundamental restriction on discrimination. It incorporates what has become colloquially termed the “*MFN*” or Most Favoured Nation obligation, though this language is not to be found in the article. The CP, CR and other internal disclosed documents repeatedly refer to the WTO’s “*MFN*” policy. This is a shorthand reference to Article I:1. The nub of the article provides that if a contracting member state offers preferential trading terms to another member then it must also offer them to all other members.
110. Article I refers to four different, broad, types of free-standing (monetary and non-monetary) state measures. These are the measures which follow the repeated use of the phrase “*with respect to*”. Broken down further these categories cover seven matters in total: (i) customs duties imposed on or in connection with importation or exportation; (ii) customs duties imposed on the international transfer of payments for imports or exports; (iii) charges of any kind imposed on or in connection with importation or exportation; (iv) charges of any kind imposed on the international transfer of payments for imports or exports; (v) the method of levying such duties and charges; (vi) all rules and formalities in connection with importation and exportation; and (vii), “*all matters*” referred to in Article III: 2 and 4.
111. The vice or target of Article I:1 is discrimination through the offering of some special benefit. The article refers to any “*advantage, favour, privilege or immunity granted by any contracting party*”. The use of four, alternative, broad phrases to describe a benefit strongly indicates that the form of the benefit is immaterial; it is its substance that is of

importance. The trigger for the duty is discrimination in relation to a “*product*”. It is not affected by the identity of the person who gains the benefit, and it is immaterial whether the product to which the benefit is conferred is supplied by a producer, wholesaler, retailer, etc.

112. The activity covered by Article I:1 is “*importation or exportation*”. The article also refers, more broadly, to “... *any product originating in or destined for any other country*”. This phrase “*destined for*” makes clear that the timing of the grant of the benefit for export is immaterial. So, for example, if a benefit is conferred at the manufacturing level and applies to goods *destined* at some future point in time for export then that, in principle, falls within scope. It does not matter that the export has not yet occurred<sup>5</sup>.
113. The obligation imposed by Article I:1 is the removal of the discrimination or differentiation. It imposes a duty on the member state to accord the same advantage, favour, privilege or immunity to “... *the like product originating in or destined for the territories of all other contracting parties*”. The concept of a “*like*” product includes identical products (e.g. perfume of the same brand) and products which compete (e.g. perfumes of different brands). It is a question of fact whether products are “*like*”. Though, in the case of a national measure or scheme which applies different rules to all types of product it is assumed that the products potentially subject to discrimination will be “*like*” relative to those which are benefited under the measure or scheme in dispute: See e.g. *Colombia – Indicative Prices and Restrictions on Ports of Entry* Panel Report (WT/DS366/R, 27<sup>th</sup> April 2009) at paragraphs [7.182ff] and cases cited thereat.
114. On one reading the duty in Article I:1, in the event of a breach, is to level up i.e. to grant to others the same advantage, privilege etc as the state has granted to the favoured or benefited products. But, in logic, this cannot mean that once a state has conferred an advantage or benefit it must maintain that in force in perpetuity and be compelled to extend that benefit to all others regardless of the state’s internal policy. Since the essence of the rule is non-discrimination, it is open to the Government to remove the differential treatment by levelling down. Article I:1 is not about the choices that states make in their fiscal policies, for instance whether to offer an exemption or not. It is about ensuring that whatever choice is made is *then* applied in a non-discriminatory fashion so far as international trade in goods is concerned. The Government argued, in my view correctly, that the WTO did not have any policy preferences that it encouraged its members to adopt in relation to rules of domestic taxation, including border tax adjustments. Members were free to implement measures such as border tax adjustments in accordance with their national policies as they saw fit, provided that such measures were consistent with the rights and obligations set forth in the WTO Agreements. There was no disagreement from the Claimants as to this who agreed that the WTO was not

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<sup>5</sup> See for example paragraphs [7.1021] and 7.1023] of the Panel Report in *Brazilian Taxation* set out below at paragraph [191] of the Judgment. The Panel held that a measure drafted to be imposed on firms or which related to production and process methods was capable of falling within Article III prohibiting discrimination between imported and domestic like products and Article I prohibiting discrimination between like imported products.

an institution that generated international policy. Ms Patel, who argued this point for the Government, agreed that it lay within the discretion of the Government to level down. In short there is no discernible reason of law or policy why Article I:1 should demand levelling up but preclude levelling down. What matters is the removal of the discrimination. This conclusion is consistent with the way in which the Panel and Appellate Body have routinely described the prohibition in Article I:1 as a prohibition on discrimination and that the remedy is the removal of the discrimination.

115. As to timing, if Article I:1 applies, the duty of rectification arises “*immediately and unconditionally*”.

**- Article III:2 GATT (National Treatment)**

116. As set out above Article I:1 brings within scope “*all matters referred to in paragraphs 2 and 4 of Article III*”. There is no definition of “*matters*”, but case law makes clear that it covers the type of state measure referred to in the article, which includes internal taxes. Article III concerns national treatment i.e. measures which favour domestic over imported products. It is focused upon discrimination against imports and not discriminatory export regimes. This serves only to highlight why Articles III:2 and I:1 are not mutually exclusive and why Article I:1 expressly sets out to bring within its purview the “*matters*” covered by Article III:2. The “*matters*” referred to include internal taxes. It applies (*inter alia*) to “*national treatment on internal taxation and regulation*”. Article III:2 records that contracting parties “*recognise*” that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should “*not be applied to imported or domestic products so as to afford protection to domestic production*”.

117. Article III:2 and 4 provide:

“Article III

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, *to internal taxes or other internal charges* of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

...

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential

internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”

(emphasis added)

118. This is a duty not to impose internal taxes or other internal charges of any kind upon imports in excess of those applied, directly or indirectly, to like domestic products. The prohibition is concerned with direct *and* indirect effects. If there is a breach, then the remedial duty is that in Article I:1.
119. Article III:4 is concerned with non-discriminatory “*treatment*” of imported products which must be accorded “...*treatment no less favourable than that accorded to like products of national origin*”. I will deal with this briefly because it does not concern exports, which is the activity in issue in this case. In terms of scope the prohibition extends beyond internal taxation or other internal charges. The measures subject to the prohibition are not limited to legislation and regulations but includes other “*requirements*” which would include, administrative action. The impact of the measure is only that it must have an effect (see “*affecting*”). Again, it does not matter where in the chain that effect occurs be it internal sale, offering for sale, purchase, transportation, distribution or use.

**- Article XVI GATT and the Agreement on Subsidies and Countervailing Measures (ASCM)**

120. Article XVI:4 concerns subsidies and provides so far as relevant:

“4. Further, as from 1 January 1958 or the earliest practicable date thereafter, Members shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market...”

The Ad Note to Article XVI:4 provides:

“The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.”

121. The ASCM expands upon Article XVI. It deals specifically with subsidies. Article 3 states:

“3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) ...

(b) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance,

including those illustrated in Annex I; subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.”

Annex I (referred to in Article 3.1(b)) refers to: *"(g) the exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption"*.

**- Article XXIV:5 – Derogations for free trade agreements**

122. Article XXIV is relevant to a number of arguments raised by the Claimants. It concerns derogations from the rules in GATT for trade agreements. It permits member states to provide preferential treatment to goods within a free trade agreement or customs union, without being required to extend the same treatment to the goods of all other WTO members, otherwise required by Article I:1. For present purposes it suffices to set out only Article XXIV:1, 3, 4 and 5:

“Article XXIV: Territorial Application — Frontier Traffic — Customs Unions and Free-trade Areas”

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. ...

3. The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic.

(b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”

123. Construing the language of the provision in accordance with the accepted principles of interpretation the words “*shall not prevent*” in Article XXIV:5 indicate that the GATT continues to apply save only insofar as its application would necessarily prevent the formation of a customs union or free trade agreement recognised as such under the GATT itself. The existence of such a free trade agreement or union, which might be limited in scope, does not therefore result in the wholesale disapplication of the GATT to matters not covered by the trade agreement or union. In my view this conclusion follows from the language of Article XXIV. This conclusion is consistent with case

law which suggests that a necessity test applies i.e. Article XXIV only disapplies such other GATT measures as are “*necessary*” (to be disapplied) to enable the formation of the free trade area or customs union. The Report of the Appellate Body in *Turkey – Restrictions on Imports of Textile and Clothing Products* (AB-1999-5 22<sup>nd</sup> October 1999) at paragraphs [43]-[46] makes the point:

“43. We note that, in its findings, the Panel referred to the chapeau of paragraph 5 of Article XXIV only in a passing and perfunctory way. The chapeau of paragraph 5 is not central to the Panel's analysis, which focuses instead primarily on paragraph 5(a) and paragraph 8(a). However, we believe that the chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue before us in this appeal. In relevant part, it reads: ‘Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union ...; *Provided that*’: ... (emphasis added).

44. To determine the meaning and significance of the chapeau of paragraph 5, we must look at the text of the chapeau, and its context, which, for our purposes here, we consider to be paragraph 4 of Article XXIV.

45. First, in examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 “shall not prevent” the formation of a customs union. We read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible “defence” to a finding of inconsistency.

46. Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent “the formation of a customs union”. This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.”

The Claimants argue that the necessity principle applies only to customs unions, not free trade areas, but this cannot be right. The phraseology used in Article XXIV is generic and does not differentiate between customs unions and free trade areas. It applies to both.

**- Dispute Resolution**

124. Under the DSU, WTO panels and the WTO Appellate Body settle disputes between WTO Members. Article 3.2 DSU provides:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

The Vienna Convention on the Law of Treaties applies, including therefore the principles of interpretation set out in Article 31. For example, in *United States - Standards for Reformulated and Conventional Gasoline* (AB-1996-1 20<sup>th</sup> May 1996) the Appellate Body, when disagreeing with the Panel, stated (ibid page [17]):

“A principal difficulty, in the view of the Appellate Body, with the Panel Report's application of Article XX(g) to the baseline establishment rules is that the Panel there overlooked a fundamental rule of treaty interpretation. This rule has received its most authoritative and succinct expression in the Vienna Convention on the Law of Treaties (the "Vienna Convention") which provides in relevant part:

Article 31 General rule of interpretation

‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

The "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”

125. In *Japan — Alcoholic Beverages* (AB-1996-2, 4<sup>th</sup> October 1996) the Appellate Body confirmed that Article 32 of the Vienna Convention also applied (ibid pages [11] – [13]). Article 32 provides:



“Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

**- The State’s Responsibility for the acts of its judiciary**

126. In the present case reference has been made by the parties to the principle that acts of *all* arms of the State, including therefore the judiciary, are capable of giving rise to measures subject to the GATT and that the “*member state*”, as a whole, bears responsibility for such acts. The broad principle of state responsibility was referred to in *United States - Standards for Reformulated and Conventional Gasoline* (ibid) pages [27] – [28]: “... *the United States, of course, carries responsibility for actions of both the executive and legislative departments of government*”. The Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (AB-1998-4, 12<sup>th</sup> October 1998) at paragraph [173], basing its conclusion upon ordinary principles of international law<sup>6</sup>, made clear that this principle of state attribution included the judicial arms of the state:

“The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, *including its judiciary*.”

(emphasis added)

127. A similar principle has been referred to under domestic law. In *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, Lord Steyn at paragraph [114] endorsed the principle that where the state had expressed its endorsement of a principle of international law found in an unincorporated instrument that:

“...it would have been contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United Nations Charter and under the relevant Security Council Resolutions. It follows that it would be contrary to domestic public policy to give effect to Resolution 369 in any way.”

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<sup>6</sup> The Appellate Body cited, by way of example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992) page 545; and, I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990) page 450.

***(iii) The position adopted by the Government in relation to the GATT***

128. In this case the Government explicitly set out to secure compliance in its fiscal policy, post-expiry of the Transitional Period, with the GATT. It has accepted that the GATT binds the Government. The Government proceeded throughout upon the basis that it needed to take a decision as early as feasible to give affected businesses time to adapt, should that be necessary, before the expiry of the Transitional Period. At the time, the Government did not know whether there would be a future trade agreement with the EU. It took the stance that it could not measure the legality of its *present* position under the GATT against the hypothetical possibility that some future trade agreement with the EU might, if concluded, arguably affect that analysis. It had to arrive at a decision which would be compliant with the GATT come what may; free trade agreement or not. The documents, including disclosed documents, are replete with confirmation of this. For example, the CP recognised in its first paragraph that a pivotal question for 2020 was “*whether*” the UK and EU could reach agreement on a new trade agreement.
129. The Government also made clear that it would not include in any free trade agreement that did come to be agreed measures going beyond what it considered to be typical free trade agreement measures concerning tax which, as became clear, did not extend to *rates of tax*. The Government also confirmed that it would “*uphold... international obligations*”:
- “1.1. The UK has left the European Union (EU) and entered a transition period. The question for the rest of 2020 is whether the UK and the EU can agree a deeper trading relationship on the lines of the free trade agreement (FTA) the EU has with Canada, or whether the relationship will be based simply on the Withdrawal Agreement deal agreed in October 2019, including the Protocol on Ireland / Northern Ireland. In either event the UK will be leaving the single market and the customs union at the end of this year and stakeholders should prepare for that reality.
- 1.2 The government will not agree to tax measures which go beyond those typically included in a comprehensive FTA. The government believes therefore that both parties should recognise their respective commitments to maintaining high standards in this area; confirm that they will uphold their international obligations; and agree to avoid using measures in this area to distort trade.”
130. In paragraph [2.5] the Government reiterated that at the end of the Transitional Period the UK would exercise control over tax and excise rates, including zero rating, though “*subject to the UK’s international obligations*”:

“At the end of the transition period EU member states will be able to offer duty-free and tax-free sales on the cross-border movement of goods to those travelling to the UK from airports, ports or on-board aircraft or ships. The decision on the application of duty-free and tax-free limits to those goods when entering the UK will lie with the UK government. It would similarly be the UK’s choice whether to offer duty-free and tax-

free sales to those travelling from the UK to the EU after the transition period, subject to the UK's international obligations.”

131. The CR paragraph [3.19] refers to a broad requirement under the GATT to ensure parity of treatment for goods destined for export regardless of destination:

“This differential treatment between non-EU and EU Residents will not be possible on 1 January 2021 as it is not tenable as a long term solution, nor would it be compliant with WTO rules which broadly require the government to treat goods carried by passengers bound for different destinations equally.”

132. An HMT submission to Ministers dated 17<sup>th</sup> July 2020 entitled “*Final Policy options for duty free and tax free goods*” starts by defining the “*Issue*” in the following way:

“In order to remain compliant with WTO rules following the transition period, the UK's VAT and excise rules will no longer be able to treat individuals carrying goods for personal use (passengers) to/from the EU, differently to those travelling to/from Rest of World countries.”

133. In the later Treasury Note dated 12<sup>th</sup> October 2020 it was explained that:

“The Government did not have the choice of maintaining the VAT RES as it is today. The choice was between extending the VAT RES to EU residents or removing it completely as the World Trade Organisation (WTO) rules specify that goods bound for different destination must be treated the same.”

134. A similar point was made about the ESC, namely that the choice was between extension or removal “...as a result of WTO rules”. Ms Antcliffe in her witness evidence refers to the Government having taken a decision to adhere to the GATT: “*The UK Government have taken the decision to treat all passengers the same regardless of inbound origin or outbound destination following the MFN principle*”. In relation to the VAT RES, retaining but not extending it to EU residents “...would not be compliant with the WTOs MFN principle and was therefore ruled out”.

**(iv) Issue (i): Is the issue justiciable at all?**

135. I turn now to the first substantive issue. The default position in an ordinary public law case is that if in the exercise of a power or discretion a decision maker commits an error of law which is material then the court has power to set aside the decision and remit the issue to be retaken, this time applying the law correctly.

136. The Government argues that this case is different since the decisions to abolish the tax schemes were predicated upon an unincorporated treaty, in the sense that there is no GATT Act. Accordingly, the courts have no jurisdiction to rule upon the correctness of the position adopted by the Government. They say this even though (simultaneously) the Government argues that if the Claimants are correct in their domestic law arguments and the Court is in consequence minded to grant relief restoring the concessions, it cannot (or should not) do so because this would place the United Kingdom in breach of

its duty under the GATT. To adjudicate upon that submission, of course, the court *must* rule upon the compatibility of an order restoring the concessions with the GATT which is hence directly justiciable.

137. In my judgment the issue arising *is* justiciable by this Court. Indeed, were this not so then the Court could not rule upon the Government's own case that if the Claimants are correct on domestic law issues the Court should, nonetheless, *applying the GATT*, refuse relief.
138. The case law, which is discussed below, describes two principles or propositions which delineate (a) the area where the royal prerogative to conclude international treaties and agreements operates and, as a general rule, is non-justiciable and (b) the limits of that non-justiciability. The first principle is that the exercise of the royal prerogative to conclude international treaties and agreements is non-justiciable, as a general rule, whilst it operates in the international law sphere only. The second principle (which is a corollary of the first) is that if the international law measure descends from the international plane and becomes embedded or assumes a foothold into domestic law then the Courts acquire the right and duty of supervision. Whilst easy to articulate in the abstract there are grey edges to both propositions in terms of their application in practice.
139. The UK operates under a dualist constitutional principle which governs the relationship between domestic and international law. The Executive has the prerogative to conclude international treaties, but this right cannot be used to alter domestic law and thereby impose, create or take away rights and obligations. It follows that the mere fact of ratification of a treaty by the Executive at the international level does not serve, itself, to create rights or obligations at the domestic level. The Executive has no power to alter domestic law by its unilateral action without some degree of recourse to the courts: see e.g. *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at pages [499]-[500] (per Lord Oliver) ("*Tin Council*"); *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 paragraph [55] ("*Miller I*"); and, *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 at paragraph [108].
140. The refusal of the courts to exercise jurisdiction over the formation of international treaties has traditionally been viewed as a principle of judicial restraint and abstention. Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] AC 888 ("*Buttes Gas*") at page [931G], in the single judgment of the House, stated that for a Court to "*adjudicate upon the transactions of foreign sovereign states*" was contrary to a wider principle of "*judicial restraint or abstention*". The case concerned a civil claim between private individuals which included a libel claim. A defence of justification and a counterclaim for conspiracy to defraud could, on the facts, only be decided by considering a range of contentious matters arising on the plane of international law (e.g. an allegation that the Ruler of Sharjah had back-dated a decree extending his territorial waters; a claim to sovereignty by the Government of Iran made subsequent to such decree; instructions to the ruler of Umm al Qaiwain by the UK's political agent; intervention by Her Majesty's naval, air and military forces then operating in the relevant area under treaty arrangements). This judicial restraint or abstention was "*inherent in the very nature of the judicial process*" (ibid page [932A]): Lord Wilberforce continued (ibid page [938A]). The matters in dispute:

“these considerations...have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass judgment. ... [T]here are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ..., the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law.”

141. The now most oft-cited articulation of the rationale for non-interventions is that of Lord Oliver in *Tin Council*. This concerned an attempt to rely upon rights in an international treaty to pursue a civil claim for damages. The International Tin Agreement was an agreement between member states to establish the International Tin Council. This body made contracts in its own name with third parties. It became insolvent owing monies to third parties, including the claimants. They sought to hold the member states liable upon the basis that, upon the true construction of the International Tin Agreement, the Council was acting as agent for its member states. The claim was rejected as non-justiciable because it involved a claim based upon rights contained in an unincorporated or unimplemented treaty. The Government had not in any way sought to introduce or apply those rules into domestic law, nor were they being used to take away pre-existing rights or benefits. The Court held at pages [499E] – [500D]:

“...as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament...”

142. Lord Oliver explained the rationale for judicial forbearance by reference to the explanation given by the Privy Council in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22, 75 (“*Kamachee*”) which was essentially based upon a perception (echoed later by Lord Wilberforce in *Buttes Gas* (see paragraph [140] above)) that the courts had neither the means to decide such issues nor the power to enforce any resultant judicial decision:

“The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.”

143. The dualist analysis of Lord Oliver in *Tin Council* was confirmed in *Miller I* (ibid) and described as “*the general rule*” (paragraph [55]). The Supreme Court (endorsing the judgment in *Kamachee*) stated:

“55. Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts - see *Civil Service Unions* case cited above, at pp 397-398. Lord Coleridge CJ said

that the Queen acts “throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority” - *Rustomjee v The Queen* (1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22, 75, treaties are “governed by other laws than those which municipal courts administer”. The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.”

144. This Court received extensive written and oral argument about the limits of the two central propositions and in particular (a) when executive action at the domestic level served to embed or ground an otherwise formally unincorporated treaty into domestic law thus engaging judicial supervision and (b) whether the GATT was suitable to be subject to judicial supervision in the domestic courts.
145. I turn now to consider the authorities the parties identified as of greatest relevance.
146. I start by setting out some common ground then address the main authorities chronologically. It is agreed between the parties that over the past century, and more, a variety of circumstances have been identified where the Courts will interpret and take account of international law which has neither been formally incorporated into domestic law (e.g. through legislation), or otherwise relied upon by decision makers to shape and influence domestic measures and acts. One of the most well established is in relation to customary principles of international law which can (by a form of indirect invocation) give rise to enforceable rights and obligations in the domestic courts. They will do so: (i) only indirectly as a source of guidance for domestic common law; and (ii), only if not inconsistent with other principles of domestic law: *R (Solange and others v Secretary of State for Foreign and Commonwealth Affairs)* [2020] EWCA Civ 1010 at paragraphs [141ff] citing with approval Lord Mance in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 who stated at paragraph [150]:

“Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.”

This was treated as “correct” by the Court of Appeal in *R (Freedom and Justice Party) v Foreign Secretary* [2018] EWCA Civ 1719 at paragraphs [113] - [117].

147. This case does not concern customary international law. It is a case where the state has taken the terms of a formally unincorporated treaty into account in shaping and making domestic policy and law. I turn now to the authorities most directly on point which I deal with chronologically.
148. The Government in the present case, in support of its argument that all of this was non-justiciable, relied heavily upon the judgment in *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 (“*Brind*”). There the Claimants challenged a directive issued by the Government restricting the words that could be uttered on television by persons representing what the Government considered were organisations supporting terrorism. They sought a declaration that the Secretary of State’s decision to issue the directive was *ultra vires* because the statutory power exercised by the Minister was, it was said, inconsistent with the ECHR, which had not at that point been implemented into domestic law. The House of Lords accepted that an international treaty could be used to guide the interpretation of a statutory provision such that where there were two possible interpretations of a measure the court would prefer that which avoids conflict between domestic legislation and the UK’s international treaty obligations. As Lord Goff observed: “... that “involves no importation of international law into the domestic field” (page [748C/D]); see also per Lord Ackner at page [760G-H]. Where the legislature had conferred a discretion exercisable pursuant to statute there was no presumption that it had to be exercised in conformity with the unincorporated international treaty. Lord Ackner proceeded to endorse the dictum of Lord Oliver in *Tin Council* (ibid) to the effect that unincorporated treaties could not amount to a source of rights or obligations which could be litigated in the courts (ibid page [762B-D]). This was in response to a submission that the Secretary of State had in fact taken the ECHR into account in his decision (see page [761G]).
149. The limits of non-justiciability have been explored in a series of subsequent cases where the Courts have decided that it was appropriate to have regard to the terms of a treaty that was (formally) unincorporated but which in a variety of ways, shaped and influenced domestic policy and decision-making.
150. In *R v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 (“*Launder*”) the House of Lords decided the extent of the United Kingdom’s obligations under the European Convention on Human Rights before it was given effect to in domestic law by the Human Rights Act 1998. This was an appeal against the refusal of the Divisional Court to quash a warrant under the Extradition Act 1989 by which the Secretary of State ordered the removal of Mr Launder to Hong Kong to face charges of corruption which would be tried following the transfer of sovereignty on 1<sup>st</sup> July 1997. Questions were raised about the fairness of the procedures that would be in place in Hong Kong. It was argued that extradition would violate Mr Launder’s rights under the unincorporated ECHR. The Government argued that the ECHR was irrelevant as being unincorporated, citing *Brind*. The Divisional Court had agreed. A unanimous House of Lords disagreed. Lord Hope giving the judgment of the House first observed that Convention rights were engaged (in particular Articles 2, 3, 5 and 6). A key determinant was whether the unincorporated treaty had been considered by the decision maker. Lord Hope explained that the unincorporated ECHR had been taken into account by the decision maker:

“...the Secretary of State himself ... took account of the respondent's representations that his extradition to Hong Kong would be a breach of the Convention in reaching his decision that he should be extradited.”

151. In relation to the argument that an otherwise unincorporated treaty did not bind the executive Lord Hope agreed but did not consider that this fact alone prevented judicial scrutiny:

“That is so; but the whole context of the dialogue between the Secretary of State and the respondent in this case was the risk of an interference with the respondent's human rights. That in itself is a ground for subjecting the decisions to the most anxious scrutiny, in accordance with the principles laid down by this House in *Regina v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] A.C. 151, as Sir Thomas Bingham M.R. also recognised in *Smith* at p. 554H.”

If the appellant was to have an effective remedy “... *it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that [counsel] directed his argument*”.

152. In *R v. Director of Public Prosecutions, ex parte Kebilene* [2000] AC 326 (*Kebilene*) the House of Lords also adjudicated upon the extent of an unincorporated treaty. In 1997 officers of the anti-terrorist squad arrested Mr Kebeline, Mr Boukemiche and Mr Souidi. All were Algerian nationals. They were charged with offences under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. The issue, in a nutshell, was whether the decision of the DPP to give his consent for the prosecution involved an error of law, namely an erroneous conclusion that the prosecution was compatible with Article 6(2) ECHR. The issue arose during the interim period between the enactment of HRA 1998 and the bringing into force of its main provisions and concerned the role and jurisdiction of a court in reviewing that exercise of discretion. In coming to his decision on the matter the decision maker had sought advice as to what the position would be under the ECHR. It was hence a factor that fed into the thinking leading to the final decision. As in *Launder (ibid)* it was a matter that the decision maker had taken into consideration. The DPP argued that, nonetheless, the position under the ECHR was irrelevant. Lord Steyn rejected this:

“Nevertheless, the Attorney-General and Mr Pannick strenuously argued before the House that the judgment of the Divisional Court is in conflict with the principle of parliamentary sovereignty in the context of unambiguous primary legislation, viz section 16A. They submitted that the effect of the judgment was to invite the DPP to disapply primary legislation. In my view this argument is mistaken and fails to do justice to the reasoning of the Divisional Court. The Lord Chief Justice pointed out that in the present case the Director wished to know where he stood on the issue of compatibility of the legislation. The DPP sought and relied on legal advice on that issue. The Lord Chief Justice said that if the advice was wrong, the DPP should have the



opportunity to reconsider the confirmation of his advice on a sound legal basis. As the Lord Chief Justice observed this approach is consistent with the judgment of Lord Hope of Craighead in *Reg. v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839, at 867. In *Launder* Lord Hope observed: "If the applicant is to have an effective remedy against a decision [on extradition] which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument." I respectfully agree. There was no infringement of the principle of Parliamentary sovereignty. I would reject this argument of the DPP."

153. *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883 was another case where the House of Lords had regard to the terms of an unincorporated measure of international law. Kuwait Airways sued Iraqi Airways for unlawfully exploiting for its purposes the Kuwait Airways air fleet. Saddam Hussein had by act of war removed the fleet to Iraq. Under normal principles both Saddam Hussein and the Iraqi state enjoyed state immunity. However, Iraqi Airways, who had taken possession of the fleet, had no equivalent immunity. Their defence was that Saddam Hussein had passed an Iraqi law giving them the fleet. The difficulty was that this law was in violation of Security Council resolutions under Chapter VII of the United Nations Charter and generally contrary to international law. The House of Lords held the law could not be recognised as valid, and that Iraqi Airways was liable. It applied the unincorporated treaty to defeat the defence. An important feature of the case was the provisions of the United Nations Charter and Security Council Resolutions. Lord Steyn (at paragraph [114]) rejected as "*marching logic to its ultimate unreality*" the submission of Iraqi Airways that, because these were unincorporated, they must be disregarded. This was not a case where, in the classic sense, it could be said that the UN resolution had been adopted into domestic law; but it was a case involving a matter of public policy to which the Government had publicly and strongly adhered as indicating its position: see generally the analysis and discussion at paragraph [114]. Moreover, it would place the UK in breach of its international obligations were the courts to adopt an approach contrary to the state's obligations under the United Nations Charter and under the relevant Security Council Resolutions, and this was a relevant consideration for the court.
154. The Court of Appeal also explored the boundary between justiciability and non-justiciability in *Occidental Exploration Production Co v Republic of Ecuador* [2005] EWCA Civ 1116 ("*Occidental Exploration*"). There the interpretation of an international treaty was necessary to determine the scope of an agreement to arbitrate contained in a bilateral investment treaty. The Court concluded that where the interpretation of an international instrument was relevant at the domestic legal level, domestic courts had to undertake the exercise of interpretation. The non-justiciability in relation to international treaties described in *Tin Council* and in *Brind* was not absolute and did not preclude all reliance upon the terms of such instruments. The Court identified the two guiding principles or propositions set out in *Tin Council* (see paragraphs [141] – [143] above). Lord Justice Mance described the non-justiciability of the exercise on the international plane of the royal prerogative to conclude treaties

as the “*first principle*”. The second followed from the first and was that as a matter of constitutional law, the royal prerogative, whilst embracing the making of treaties, did not extend to altering domestic law. The Judge cited with approval Lord Oliver in *Tin Council* (ibid pages [499F] – [500D]) who observed of unincorporated international treaty law:

“So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”

155. The explanation for non-justiciability was that an unincorporated treaty took effect only on the international plane and did not gain a “*foothold*” in domestic law (ibid paragraph [31]). That is why it was “*irrelevant*”. Where, however, unincorporated international law did gain a foothold it could thereby become relevant. Lord Justice Mance (ibid paragraph [28]) cited the five examples given by Lord Oliver in *Tin Council* (ibid pages [500D] – [501B]) where unincorporated treaties could be relevant. These examples (which were not intended to be exhaustive) can be summarised as follows. First, where a statute was enacted to give effect to the UK’s obligations under a treaty it could have to be considered and, if necessary, construed to resolve any ambiguity or obscurity as to the meaning or scope of the implementing statute. Secondly, where parties had entered a domestic contract in which they had chosen to incorporate the terms of an unincorporated treaty the court could interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under the contract. Thirdly, where domestic legislation, although not incorporating the treaty, nevertheless required, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation then the court could do so. Fourthly, where the exercise of the royal prerogative directly affected an extension or contraction of the jurisdiction without the constitutional need for internal legislation the court could have regard to the international law measure. Fifthly, since the conclusion of an international treaty and its terms were matters of fact the treaty could be referred to where necessary as part of the factual background against which a particular issue arose.
156. In *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 (“*Corner House*”) the House of Lords accepted that provisions of unincorporated treaties were justiciable when they formed part of the thinking of the decision maker but also recognised that there could still be some provisions of international law which by their nature lacked any intrinsic, normative, justiciability. This could be where the measure was vague and uncertain, where it was intended to be enforced only via informal international political consensus, and where there was no guidance as to how the measure should be construed or applied. In this case the DPP claimed that his decision not to prosecute, which was the decision under challenge, was consistent with Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, an unincorporated treaty. This does not lay down hard and fast rules but, as set out in its recitals, is concerned to achieve “*equivalence*” at the international level of approaches to investigation and prosecution. Article 5 identifies broad principles of independence and objectivity to be adhered to in

relation to the investigation and prosecution of bribery of foreign public officials<sup>7</sup>. It was not ultimately necessary for the House of Lords to decide whether a mistaken understanding of Article 5 could serve to found a judicial review. However, both Lord Bingham (in passing) and Lord Brown (more fully) addressed the issue. A particular feature of the Convention was that the contracting states had, under Article 12, chosen to resolve disputes *via* a working committee intended to seek consensual solutions to problems arising under the Convention. Lord Brown started by recognising that courts could decide questions of law arising from unincorporated treaties albeit that this was “generally” undesirable. There was no suggestion that *Kebilene* or *Launder* were wrongly decided. Lord Brown explained how the facts of those cases were relevant:

“43. It is common ground that had the Director ignored article 5 of the OECD Convention, an unincorporated treaty provision not sounding in domestic law, his decision could not have been impugned on the ground of inconsistency with it. But the Director publicly claimed to be acting in accordance with article 5. The claimants accordingly contend (1) that it is open to the domestic courts of this country to review the correctness in law of the Director's self-direction; (2) that our courts should themselves interpret article 5; (3) that the Director's interpretation should be held to be incorrect; and (4) that the Director's decision should be quashed. Each of these steps in the argument is, in the judgment of the House, problematical.

44. In support of step (1) in this argument reliance was placed in particular on *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 866-867 and *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 341-342, 367, 375-376. Both cases concerned decision-makers claiming to act consistently with the European Convention at a time when it had not been given effect in domestic law. The courts accepted the propriety of reviewing the compatibility with the Convention of the decisions in question. But there was in the first case no issue between the parties about the interpretation of the relevant articles of the Convention, and in the second there was a body of Convention jurisprudence on which the courts could draw in seeking to resolve the issue before it. Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the UK by fear that their

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<sup>7</sup> Article 5 (Enforcement): “Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

decisions might be held to be vitiated by an incorrect understanding.”

157. The facts of the instant case were however very different; were the Court to have intervened it would have risked undermining the process operating at the international level to obtain “*consensus*” i.e. political consensus<sup>8</sup>. This concern was heightened by the sweeping nature of the law in question and the dearth of any guiding jurisprudence. Though, significantly, it was recognised that even in such a case there could *still* be a case for a Court to adjudicate if the reasons were sufficiently “*compelling*”:

“65. Although, as I have acknowledged, there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the contracting parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge. Really this is no more than an echo of para 44 of Lord Bingham's opinion. For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons.

66. Are there such compelling reasons here? In my judgment there are not. There seem to me to be very real differences between this case and both *Launder* and *Kebilene*. In the first place, as Lord Bingham points out at para 43, there is a marked distinction between seeking to apply established Convention jurisprudence to the particular case before the court (as there) and determining, in the absence of any jurisprudence whatever on the point, a deep and difficult question of construction of profound importance to the whole working of the Convention (as here). Secondly, it seems to me tolerably plain that the decision-makers in both *Launder* and *Kebilene*, deciding respectively on extradition and prosecution, would have taken different decisions had their understanding of the law been different. In each case the decision-maker clearly intended to act consistently with the UK's international obligations whatever decision that would have involved him in taking. That, however, was not the

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<sup>8</sup> Article 12 (Monitoring and Follow-up) provided: “The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.”

position here. Although both the Director (and the Attorney General) clearly believed—and may very well be right in believing—that the decision was consistent with article 5, it is surely plain that the primary intention behind the decision was to save this country from the dire threat to its national and international security and that the same decision would have been taken even had the Director had doubts about the true meaning of article 5 or even had he thought it bore the contrary meaning. All that he and the Attorney General were really saying was that they believed the decision to be consistent with article 5. This clearly they were entitled to say: it was true and at the very least obviously a reasonable and tenable belief. Both the Director's and Attorney General's understanding of article 5 was clearly apparent from their public statements: it was implicit in these that they understood article 5 not to preclude regard being had to fundamental considerations of national and international security merely because these would be imperilled by worsening relations with a foreign state."

158. The final authority referred to in detail by the parties in this case was *R (ICO) Satellite Limited v The Office of Communications* [2010] EWHC 2010 ("ICO"). There the High Court, having reviewed the authorities, concluded that it could adjudicate upon an issue arising out of an unincorporated treaty. The claimant challenged the decision of the Office of Communications ("Ofcom") to write to the International Telecommunications Union ("the ITU") requesting the cancellation of an assignment currently recorded in its Master International Frequency Register in respect of the Claimant's mobile satellite communications system. The ITU is an international organisation established by the Convention on the International Telecommunications Union. It is responsible for the international arrangements for electronic communications systems, in particular the radio frequencies and orbits used by telecommunications satellites. The United Kingdom is one of nearly 200 member states. That regime had not been implemented into domestic law. A central argument in the case was that Ofcom had wrongly assumed that it was under a duty under the ITU regulatory regime to cancel the filing whereas it was common ground that there was no such duty under the ITU regime (ibid paragraph [48]). In other words, Ofcom, when it took its decision, had made a serious error of law relating to the scope and effect of an international law regime.
159. Was it appropriate, in these circumstances, for the court to rule on the meaning and effect of the unincorporated treaty? Having analysed the case law Lloyd Jones J (as he then was) held that it was appropriate. He stated:

"92. There are, undoubtedly, circumstances in which the courts of England and Wales will decide questions as to the extent of the obligations of the United Kingdom or, indeed, other States under treaties which have not been implemented into domestic law. (See, for example, *J H Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 AC 418 per Lord Oliver at pp. 500-501; *Occidental Exploration and Production Company v. The Republic of Ecuador* [2005] EWCA Civ 1116.) Thus, as Lord Pannick points out, in *R v. Secretary of State for*

*the Home Department, ex parte Launder* [1997] 1 WLR 839 and *R v. Director of Public Prosecutions, ex parte Kebilene* [2000] AC 326 domestic courts decided the extent of the United Kingdom's obligations under the European Convention on Human Rights before it was given effect in domestic law by the Human Rights Act 1998. In *R (Barclay) v. Lord Chancellor* [2009] UKSC 9; [2009] 3 WLR 1270 *Launder* and *Kebilene* were accepted, on the basis of a concession, to be good law. However, *Launder* and *Kebilene* were treated in *Corner House* as exceptions to the general rule (Lord Brown at paragraph 65) and justified as cases in which there was no live dispute over the provisions of international law in issue or where there was a body of Convention jurisprudence on which the national court could draw in deciding the issue before it (Lord Bingham at paragraph 44 and Lord Brown at paragraph 66)."

160. Having decided that the issue was justiciable the Judge was influenced as to the *approach* to be adopted by the vague and uncertain nature of the duties and obligations which were said to be justiciable, and the absence of guiding decisional practice. He set out in some detail in his judgment his observations and conclusions upon this. At paragraph [95] the Judge explained the approach that he would take which was that he would express his view but that it would not be a "*concluded*" view:

"To my mind, the present case provides a compelling example of the difficulties and the undesirability of a domestic court expressing a concluded view on a disputed point as to the meaning and effect of non-implemented instruments governing a regime established by an international organisation. It will be apparent from the documents referred to above that widely different views are held as to the consequences which should follow under the ITU regime in circumstances where, as in the present case, a number of years after its registration, an assignment has not been brought into regular operation in accordance with its notified specification. That is a live dispute as to the rights and duties of the 191 national administrations which participate in the ITU regime. Moreover, there is provision within the ITU regime for dispute resolution, although the question whether that would be applicable in the circumstances of the present case is itself apparently in dispute. A further difficulty in the present case is that the statements emanating from various officers of the ITU referred to above would, given their quality and characteristics, hardly be an appropriate basis for the task of resolving the issue. However, that apart, it would not be appropriate for this court to embark on such an undertaking for the policy reasons given by Lord Bingham and Lord Brown in *Corner House*. This court is not in an appropriate position to determine the issue for all those subject to the ITU scheme. Given the dispute between the parties as to the effect of the ITU regime, it would not be appropriate for

this court to go beyond the "tenable view" approach in examining the point of international law in question."

161. In assuming jurisdiction, the Judge considered the surrounding circumstances which included that there was no hard-edged rule or principle in issue and no guidance from decided cases or any other form of decisional practice. He proceeded to rule upon whether the decision maker had adopted "*a reasonably tenable view*". In forming his view the Judge nonetheless carefully analysed the relevant treaty article, the object and purpose of the ITU scheme for the allocation of frequencies, and a letter from a Director of the ITU containing a formal statement of policy on behalf of the ITU, all of which were consistent with the views of the decision maker.
162. It might be no more than a historical footnote in the context of this litigation, but this is not the first case which has concerned MFNs. The UK was an early proponent of the use of MFN clauses in international trade treaties and, on occasion, these fell to the courts to construe. In *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644 the issue concerned the applicability of an unincorporated treaty (the British-Japanese Treaty of Peace, Friendship, and Commerce). This conferred rights upon British subjects by virtue of an MFN. In 1892 a British merchant vessel collided with a Japanese imperial cruiser. The Japanese government commenced proceedings in the British consular court for damages. The case proceeded to the Supreme Court for China and Japan at Shanghai, also a consular court. It was then appealed to the Judicial Committee of the Privy Council. One issue was whether, under the unincorporated treaty, a British subject had the enforceable right to compel a Japanese claimant with a complaint to pursue that claim in courts set up by the British authorities under the treaty, or whether the Japanese litigant could invoke the Japanese courts. Under treaties concluded between Japan and the US and the Austro-Hungarian Empire, Japan had accorded to citizens of those states rights, which included the right to be sued in their own courts, and not those of Japan. The Privy Council had to decide whether, by virtue of the MFN, the same rights were to be accorded to British citizens. To answer this question the Privy Council applied the law of England including the common law, rules of equity, statute law and other law for the time being in force. The Privy Council held that under the MFN all the rights enjoyed by US American and Austro-Hungarian subjects were also enjoyed by British subjects. It was:

"...clear that art. 23 of the treaty of August 1858, which accorded to Great Britain "most favoured nation" treatment, conferred upon this country and its subjects all the privileges and immunities secured to the United States and Austro-Hungary and their respective subjects, by the treaties to which reference has been made. There cannot, therefore, be any doubt that a British subject has a right to require that when a Japanese has a complaint or grievance against him, it shall be decided, not by the Local Courts of Japan, but by the British authorities exercising in that country extraterritorial jurisdiction."

The defendant, the British citizen, had "...obtained, by virtue of a treaty made with his Sovereign, complete immunity from process in the territorial Courts which would otherwise be open to the plaintiff." The Privy Council was clear that under English law "the treaty provisions" determine "the question in controversy between the parties."

163. The judgment by Sir Robert Phillimore in *The Parlement Belge* (1879) 4 P.D. 129 is sometimes seen as the starting point for the analysis of whether an unincorporated treaty obligation is justiciable. It concerned a collision at sea between a Belgian mail packet and the vessel of a British subject. In 1876 the Crown concluded the Belgium–Great Britain Postal Convention. It was unincorporated. It purported to confer immunity on the Belgian vessel. This deprived the British subject of the right to bring proceedings against the vessel for damage. The judge held that there was “... *a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation*”. He gave as an example the case of a treaty (he referred to the Declaration of Paris in 1856) which in implementation would affect or extinguish private rights and which was justiciable.<sup>9</sup>
164. Numerous cases have emphasised that when determining justiciability context is critical (see e.g. per Mance LJ in *Occidental Exploration* at paragraph [31]); judges have cautioned that Lord Oliver’s articulation in *Tin Council* (ibid) was never intended as some inflexible and rigid diktat. The decided cases fully bear this out. Standing back two main themes emerge. The first (and most important) focuses upon the nature of the linkage between the (formally unincorporated) measure of international law and domestic law. Case law treats as a critical question whether the decision maker has taken the international law into account in its decision making. The second concerns the intrinsic justiciability of the measures in question i.e. whether it is the sort of measure that is capable of being adjudicated upon. This seems less critical to justiciability because it can be taken into account in applying the flexible tenability test which arises only in relation to a measure which is justiciable (see paragraphs [178] – [183] below) and which enables the court to adjust the test for reviewability accordingly.
165. Having reviewed the case law and the parties’ submissions about it, I now apply that case law to the facts of this case. The two main considerations which flow out of the case law are therefore: (i) the extent to which the GATT has been grounded into domestic law (“*grounding*”); and (ii) whether there is anything about the GATT which makes it unsuited to adjudication (“*intrinsic non-justiciability*”).
166. In terms of “*grounding*” relevant considerations include: the extent that the state has seen fit to endorse the GATT as governing or shaping its policy; the nature and extent to which the GATT played a part in the decision to abolish the two tax schemes; whether the resultant executive and legislative action affected the position of individuals (natural or legal) and whether that was because it created or took away rights or imposed obligations, etc. In terms of “*intrinsic non-justiciability*” relevant considerations might include: the softness/hardness of the edges to the rule or provision in question under the GATT (essentially Article I:1); the extent to which the GATT is truly justiciable or is better characterised as a statement of political intent; and, the extent to which resolution of issues of interpretation are best achieved by negotiation and consensus building on the international political plane and/or are the subject of guidance from case law or decisional practice.
167. I am not suggesting that these are the only considerations that might, in a given case, be relevant. For example, whether a party to litigation seeks to use an unincorporated

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<sup>9</sup> See generally the analysis of these cases in Bjorge “*Can unincorporated treaty obligations be part of English law*” (2017) Public Law pages [571] – [591].



or unimplemented provision of international law as a “sword” or “shield” is also relevant. By sword and shield the case law and commentators are essentially referring to two situations. A sword case is where a claimant relies upon a provision of international law that has not been incorporated or otherwise grounded into domestic law as a basis for a claim. A shield case is one where to defeat a claim a defendant relies upon a provision of unincorporated international law that, equally, has not been grounded into domestic law. *Tin Council (ibid)* was an example of a sword action (see paragraphs [141] – [142] above).

168. In this case the Claimants do not seek to enforce as a right (a sword) any obligation contained within the GATT that the Government had not in any way grounded into domestic law. Mr Beard QC also accepted that, at least in principle, it was open (constitutionally) to a Government to resile from unincorporated international law obligations. His case was that having determinedly applied the GATT to an important domestic policy the Government had deeply grounded that set of rules into domestic decision making. This was not a case therefore where any constitutional right of the Government to depart from international law that might exist was in issue.
169. What considerations are relevant in this case? In this case the GATT was, in my judgment, deeply embedded or grounded into the domestic decision making.
170. First, the Government evinced a firm intention to adhere to the GATT. It made its position on the GATT clear in the CP and has endorsed that position throughout. It was a position the Government was content to make the subject of public comment and criticism in responses to the CP, this being upon the basis that the applicability of the GATT was of materiality to the decisions it was considering taking. Further, there was no domestic common, constitutional or statute law which the GATT principles in issue (non-discrimination) collided with and which would otherwise have stood in the way of the Government’s committed adherence to the GATT.
171. Secondly, the position taken by the Government in relation to its obligations under the GATT was directly relevant to the decisions to abolish the schemes. It was taken as limiting the options available to Government which, in view of the GATT, boiled down to extend or abolish. Applicability of the GATT served to shut out serious alternative options which would have been of benefit to the Claimants. The Chancellor was given clear advice on this and it is not in dispute that he accepted that advice. The degree of grounding in this case is considerably greater than in the decided cases where the Court has also treated as justiciable otherwise unincorporated international law.
172. Thirdly, although the GATT itself has not been formally incorporated into domestic law (there is no GATT Act) it was nonetheless, necessarily, reflected in subordinate legislation (the SI) in relation to the VAT RES. It is proper to infer that Parliament adopted the reasoning which led to the laying of the SI which included the Government’s interpretation of the GATT.
173. Fourthly, abolition adversely affected the businesses of affected suppliers in that it took away a fiscal advantage of long standing and led to a new obligation to pay tax. The central justification for non-justiciability is that the unincorporated treaty remains on the international law plane and does not descend into the domestic arena to impose obligations upon or take away rights from individuals. Here the abolition decisions exerted an immediate adverse effect upon a sector of business. They have taken away

the ability to trade free of VAT and have imposed an obligation to pay tax that did not hitherto exist. The language used in the second guiding principle or proposition (see citations in paragraph [141] – [143] above) that the royal prerogative does not extend to unilaterally altering domestic law supports the conclusion that when Government does rely upon otherwise unincorporated international law to change or affect the nature of domestic rights and responsibilities or the status of individuals that the courts have a supervisory role.

174. Fifthly, in relation to intrinsic justiciability and where the GATT rules sit on the spectrum of soft to hard laws, it is far closer to the prescriptive, hard edged, end of the scale. Those rules are intended to be legally certain and predictable and have binding effect in specific situations. They are capable of being litigated and there is a copious body of guiding case law from the GATT Panels and from the Appellate Body which the parties have cited extensively from in this case. It is relevant that the EU was an early member of the GATT. When the Treaty of Rome was agreed by the founding Member States, and signed in 1957, the free trade provisions therein (including those on customs duties, other non-tariff measures, quantitative restrictions and measures of equivalent effect, subsidies and discriminatory taxes) were modelled upon, and intended to be compliant with, the GATT 1947. In the intervening period courts, including in the UK, have dealt with countless disputes about the scope and effect of these provisions. There are multiple textbooks and academic treaties providing detailed guidance. The courts have not experienced undue difficulty in resolving disputes founded upon those articles of the Treaty of Rome (and its successors) which were the counterparts to articles of the GATT. Any suggestion that the GATT is by its nature not the stuff of litigation is disproven by decades of practical judicial experience.
175. Sixthly, the Government argued that the mere existence of a dispute resolution procedure at the international level was a reason for the courts to stand back. Reliance was placed upon the judgment in *Corner House* (ibid) where Lord Brown suggested that the nature of the informal and political dispute resolution procedure at the international level was a reason for the court to refrain from intervention. I disagree. The facts of that case were extreme and a long way from the position under the GATT. There the conclusion that the international law was intrinsically non-justiciable was perfectly understandable both in terms of its nature and as to the political nature of the dispute resolution machinery set up to iron out differences between signatory states. The case sits in sharp contradistinction to the position under the GATT. In any event, proceedings at the domestic level serve a very different function to those at the international level, where the present claimants would have had no *locus*. This is a judicial review of a decision which directly affects the rights and obligations of individuals; it is not litigation which seeks to reconcile differences between states. As an aside it is hard to see how any proceedings at all could ever arise at the level of the GATT in relation to the facts of this case, given that it is common ground that the decision to align the EU with the rest of the world is lawful under the GATT.
176. Seventhly, and finally, the present case is not a sword case where a Claimant seeks to invoke unincorporated and ungrounded international law as a claim. It is, however, relevant that the Government itself seeks to rely upon the GATT as a shield. It argues that the court should rule upon the GATT under section 31(6) Supreme Court Act 1981, in the context of the principle of good administration. If (say) the Court were to find that abolition was unlawful on domestic law grounds, then the Court should *still* not

order relief because this would place the United Kingdom in breach of its obligations under the GATT. To do so would be detrimental to the principle of good administration and this should be dispositive of the exercise of the Courts discretion to grant relief. The Government argued:

“Reversion to the *status quo ante* would place the United Kingdom in breach of its WTO obligations following expiry of the transition period.”

The case law of GATT Panels and the Appeal Board makes clear that the courts of a state form a constitutional part of that member state. The act of a court which is inconsistent with the GATT can place the state in violation of its international law duties. The domestic courts have also made clear that it might be relevant in deciding whether to grant relief that a court order could place the UK in breach of international law obligations that the state has evinced an intention to adhere to: see paragraphs [126], [127] and [153] above. In the light of this to adjudicate upon the Government’s argument the Court must rule upon the premise that an order compelling restoration of the tax exemptions *would* breach the GATT. This means that the Court must rule upon the scope and effect of the GATT. The Government position is therefore that the GATT is justiciable *if* it enables the Government to win; but not otherwise. It seems to me that at the level of principle in a case such as this where the international law is thoroughly grounded into domestic law a court would at least have to pay some regard when fashioning relief to the international law obligations of the state; that is simply one facet or consequence of the measure now having become justiciable. The fact that the Government in this case seeks to invoke the GATT is an additional indication of its justiciability.

177. When set in the context of the case law these factors individually and cumulatively point strongly in favour of the issue of law being justiciable<sup>10</sup>. The next question is as to the standard or review to be applied.

**(v) Issue (ii): What is the standard of review – tenability?**

178. The Courts have introduced a test of tenability. What is meant by “*tenable*”? No case has defined it. The dictionary says that it embraces a test of reasonableness *and* a requirement that the person expressing the (tenable) position is able to defend it.
179. The tenability approach was first mooted in an article in the LQR entitled “*International law in Domestic Courts: The Developing framework*”<sup>11</sup> Lord Brown treated this as confirming his view in *Corner House* (ibid at paragraph [68]). The authors recognised that context was important:

“Adoption of a ‘tenable view’ approach would be a way—under circumstances where the proper interpretation of international

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<sup>10</sup> Lord Mance, in a speech entitled “*International law in the UK Supreme Court*”, Kings College London (13<sup>th</sup> February 2017), summarised the public law cases in the Supreme Court which had grappled with this issue and observed: “*If a domestic decision maker does decide to take an international obligation into account, he must also identify such obligations correctly, or his/her decision may be open to successful review.*”

<sup>11</sup> LQR (July 2008) Vol. 124, page 388 (Philip Sales QC and Joanne Clement).

law is uncertain, the domestic courts have no authority under international law to resolve the issue and the executive has responsibility within the domestic legal order for management of the United Kingdom's international affairs (including the adoption of positions to promote particular outcomes on doubtful points of international law)—to allow space to the executive to seek to press for legal interpretations on the international plane to favour the United Kingdom's national interest, while also providing a degree of judicial control to ensure that the positions adopted are not beyond what is reasonable.”

The authors took an approach based upon an analogy with that taken by the European Court of Human Rights to questions of international law over which the Court had no express competence. Resort to a test of tenability is not however the universal approach of that Court which does in some cases treat other instruments of international law as more or less determinative. As in domestic law the approach of the Court is influenced by the nature of the international law in issue. An example is the judgment of the Grand Chamber of the Court in *Sindicatul “Pastorul Cel Bun” v Romania* Application No. 330/09 (“*the Good Shepherd case*”) where the Court had to decide whether a group of orthodox priests in Romania were workers in an employment relationship for the purpose of Article 11 ECHR. At paragraph [142] the Court held that to decide that point it would “...*apply the criteria laid down in the relevant international instruments*”, which it had previously set out in paragraphs [56] – [61] of the judgment. These included the Convention of the International Labour Organisation on Freedom of Association and Protection of the Right to Organise. This set out criteria to be applied when determining worker and employment status. Applying those criteria to the facts the Court held (*ibid* paragraph [148]) that the priests fulfilled the characteristics of an employment relationship for the purpose of Article 11. International law was used to determine the correct application of the law to the facts.

180. Measures of international law will range from the broad and largely political or aspirational through to the rigidly prescriptive. A court must take account of these differences and adjust its approach accordingly. In the domestic cases where tenability has been in issue the international law rule or measure in dispute has been towards the softer end of the spectrum. In *Corner House* the articles of the unincorporated treaty were vague and broad brush. They were expressions of high principle not detailed rules. They had a distinctly political ring about them. It is hard to see how any court asked to rule upon whether the decision maker had acted in compliance with such principles could have construed and applied them with save a broad reasonableness brush. The Court (Lloyd Jones J, as he then was) applied the tenability test in *ICO*: see paragraphs [160] – [161] above. The Judge focused upon the measures in issue and because of their nature was unable to express a concluded view; he limited himself to applying a test of reasonable tenability. On the facts it is, once again, hard to see how the Judge could have done otherwise.
181. Ms Patel for the Government argued that whatever tenability meant it implied some lower standard of proof for the decision maker than correctness. Taken to its extreme this argument presupposes that the Government could have adopted a tenable, but ultimately wrong, position on the law in circumstances where the court was well able to decide the points arising. When this argument has been advanced in the past, albeit

outside the context of unincorporated international law, it has been met with a strong, principled, riposte and objection that if correct it would undermine the rule of law<sup>12</sup>. Ms Patel supported her argument by saying that there was no case law exactly on point, this being a factor which was considered relevant in *Corner House* and which goes to the intrinsic ability of a court to adjudicate upon the rule or measure. This is true only to the very limited extent that there is no directly comparable case on VAT exemption schemes. But there is multiple case law on the application of the GATT to indirect taxation and on every argument that was raised before the court and the court bundles were awash with copies of authorities and literature on such issues, including: what is meant by a “charge” or “rules” in Article I:1; what is meant by “matters” in Article III:2 and whether it applies to internal taxes; what is meant by a “like” product; what is meant by “discrimination” or “advantage, favour, privilege or immunity”, etc. In truth this case turns upon the application of some fairly basic principles to essentially agreed facts. This is far removed from the situation envisaged by Lord Brown in paragraph [66] of *Corner House* (see paragraph [157] above) where the court was being asked to swim in a jurisprudential void and answer “... in the absence of any jurisprudence whatever on the point, a deep and difficult question of construction of profound importance...”.

182. Standing back, if the court is able to address the issue (which it is), and is in favour of a decision maker, then it seems unsatisfactory to say only that the Government’s position was “tenable”. That risks fostering legal uncertainty at the international level; damning with faint praise. If the Government is right and a court can determine as much, then it accords with the rule of law to do so.<sup>13</sup> As already explained (see paragraphs [126], [127] and [153] above) GATT member states are responsible for the decisions of their courts. If a court found that a decision maker’s position was tenable, even though on deeper analysis it might be wrong, this could expose the state to proceedings under the GATT.
183. In my judgement, in the context of this case, the issue for the court is a clear-cut question of law upon which there is extensive jurisprudence. In my view, and for the detailed reasons set out below, the analysis of the Government was correct. This means that it is therefore tenable.

***(vi) Issue (iii): Is an internal tax measure, such as the VAT RES, capable of falling within the GATT and if so, under which articles and provisions?***

184. I turn now to the substantive merits. The issue is whether in principle the Government is correct in concluding that the VAT RES is a measure subject to Article I:1 GATT. The Claimants argued that there is “... no coherent overarching policy approach towards taxation in the WTO and no bespoke text in the WTO treaties dealing solely with tax adjustments at the border”. It was doubtful whether Article I:1 applied based upon a variety of policy documents.
185. The Claimants relied upon a survey of GATT disputes and pointed out that whilst there had been many cases involving tax (45 as of the date of this litigation) and that a number

<sup>12</sup> See for a review of authorities Fordham, *Judicial Review Handbook* (7<sup>th</sup> ed, 2020) page [211] paragraph 16.3.2. See also per Singh LJ in *EK (Ivory) Coast v SSHD* [2014] EWCA Civ 1517 at paragraph [64].

<sup>13</sup> In making this point I am not suggesting that this only applies in favour of a public body.

had concerned indirect taxes, these were mainly concerned with excise duty and taxes on alcoholic beverages and cigarettes. In relation to indirect tax cases the main issue has been the alleged favouring of domestic products over imports (national treatment falling under Article III).

186. The main substantive points taken by the Claimants can be summarised as follows: The VAT RES is not a “*customs duty or any other charge*”. WTO policy is that internal taxes are subject to review either (a) under Article XVI and/or (b) the WTO Agreement on Subsidies and Countervailing Measures, but not Articles I:1 and/or III:2. But even if the VAT RES was caught by those provisions, it did not confer any “*advantage, favour, privilege or immunity*” on products destined for non-EU states compared with EU states because under the destination principle all customers will pay tax somewhere (the destination).
187. I have set out in greater detail conclusions to be drawn about the scope of Article I:1 at paragraphs [108] - [115] above. In my judgment the VAT RES is a measure capable of falling within Article I:1. First, it relates to a “*charge*” within the meaning of the first category of measure in Article I:1. Secondly, it constitutes “*rules and formalities in connection with importation and exportation*” in the fourth category of measure caught by Article I:1. Thirdly, it is a “*matter*” referred to in Article III:2 and brought into the scope of Article I:1 by virtue of the incorporation by reference contained in Article I:1.
188. I commence with the expression “*or any other charge*”. The starting point is the language of the Treaty itself. It is evident that “*charge*” is broadly construed. A VAT rebate or refund is not a customs duty, which is a sum payable *simply* because the product crosses a border. VAT is a tax predicated upon consumption and therefore has a different rationale. The expression “*other*” suggests however that a customs duty is a species of the more generic and broader classification “*charge*”; and the word “*any*” indicates that “*charge*” is to be construed broadly. Article III refers to “*internal taxes and other internal charges*” which also, because of the word “*other*”, indicates that an internal tax is a species of “*charge*”.
189. The second way in which the VAT RES falls within Article I:1 is because it amounts to “*rules and formalities in connection with importation and exportation*”. This conclusion applies even if, to test the argument, the VAT RES did not involve a “*charge*”. By its terms Article I:1 covers four free-standing categories of state measure (see paragraph [110] above) and is not limited to monetary measures which affect imports and exports. The VAT RES is a system of rules which are plainly in connection with exportation. The concept of “*rules*” has been broadly defined: see e.g. *Argentina – Measures Relating to Trade in Goods and Services*, Panel Report [WT/DS453/R], 30<sup>th</sup> September 2015, paragraph [7.981]<sup>14</sup>. The Panel, having conducted a comparison

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<sup>14</sup> “7.981. In accordance with the usual rules of interpretation of public international law, we first explore the ordinary meaning of the words “reglamento” and “formalidad” used in the Spanish text. The Spanish Royal Academy defines “reglamento” as “[c]olección ordenada de reglas o preceptos, que por la autoridad competente se da para la ejecución de una ley o para el régimen de una corporación, una dependencia o un servicio” ([o]rdered collection of rules or precepts laid down by the competent authority for the implementation of a law or for the regulation of a corporation, agency or service) or “[n]orma jurídica general y con rango inferior a la ley, dictada por

of the phrase in different languages, held that for a measure to be considered a rule “*in connection with*” exportation, “*there must be a certain association, link or logical relationship between the measure and the exports*”: (ibid paragraph [7.984]). The Panel ruling was reversed on appeal in a number of respects but not in relation to its analysis of these key terms<sup>15</sup>. The VAT RES is a set of rules having a clear association, link or logical relationship with the exports to which it is applied. Article I:1 applies to measures which are both acts and omissions and hence covers rebates, exemptions and concessions: In *United States Customs User Fees* (L/6264 - 35S/245, 2<sup>nd</sup> February 1988) the Panel addressed the question whether exemptions provided for under certain national schemes could amount to a violation of Article I:1. The Panel expressed the conclusion that “*exemptions from the fee fell within the category of ‘advantage, favour, privilege, or immunity’ which Article I:1 required to be extended unconditionally to all other contracting parties*” (ibid paragraphs [122]-[123]).

190. Thirdly, internal taxes are “*matters*” caught by Article III:2 and brought into scope by the express operation of Article I:1. In *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (15<sup>th</sup> November 2010), Panel Report paragraphs [7.598], it was confirmed that value added taxes, and systems of exemption from such tax, were “*internal taxes*” within the definition in Article III:2. As an internal tax the VAT RES is therefore a “*matter*” referred to in Article III:2 which applies to “*internal taxes or other internal charges*”. It is accordingly subject to Article I:1.
191. In *Brazil Taxation*, Panel Report (30<sup>th</sup> August 2017) paragraphs [7.1021] - [7.1026]<sup>16</sup>, the Panel was concerned with internal taxations systems which treated like imported and domestic products differently. The Panel concluded that the “*matters*” covered by Article III:2, and hence also covered by Article I:1, included internal taxes and that since the tax “*applied*” to products it was within Article I:1:

“7.1021. The scope of application of Article I:1 of the GATT 1994 is explicitly provided in the text thereof and includes “all matters referred to in paragraphs 2 and 4 of Article III”. Article III:2 and III:4 cover, respectively, “internal taxes or other

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una autoridad administrativa” (general legal rule of lower status than a law, issued by an administrative authority). The corresponding term used in the English text of Article I:1 of the GATT 1994 is “rules”, which can be understood to mean “a principle, regulation, or maxim governing individual conduct; a principle governing scholarly or scientific procedure or method” or “a principle regulating practice or procedure; a dominant custom or habit. Also, accepted or prescribed principles, method, practice, custom”, which appears to give the word a broad meaning as compared with the more formal definition of the Spanish Royal Academy, which makes reference to a type of legal rule that elaborates on a rule of higher standing. The term chosen for use in the French version, “réglementation” (“ensemble de règles, de règlements, de prescriptions qui concernent un domaine particulier” (set of rules, regulations, requirements relating to a particular area) or “action de réglementer” (act of regulating))<sup>1249</sup> also appears to refer to instruments of a legal nature in general. In our view, the unnumbered article added after Article 18 of the LPT.”

<sup>15</sup> See WT/DS453/AB/R (14<sup>th</sup> April 2016).

<sup>16</sup> Upheld by the Appellate Body (13<sup>th</sup> December 2018) [B 2017-7 and 8]

internal charges of any kind ... applied, directly or indirectly, to ... products" and "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use" of imported products".

7.1022. The Panel notes the European Union's argument that Brazil fails to explain why a measure not falling under Article III would also escape the application of Article I. Despite Brazil's limited explanation of its argument, the Panel understands Brazil to be arguing that if a measure does not concern a "matter referred to in Article III:2 or III:4" then it is outside the scope of Article I:1. Such an understanding would accord with the plain text of Article I:1. The Panel therefore proceeds in its analysis by examining whether the tax reductions at issue under Article I:1 constitute "matters referred to in paragraphs 2 and 4 of Article III". In other words, whether the measures at issue constitute either internal taxes or other internal charges of any kind applied directly or indirectly to products; or laws, regulations, or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products.

7.1023. The Panel recalls from its discussion in section 7.2.1 above that the fact that a measure may be imposed on firms, or may relate to production and process methods, does not imply that its effects on trade in products are not covered by the disciplines of GATT Article III prohibiting discrimination between imported and domestic like products. The Panel believes that this is also true with respect to the disciplines of GATT Article I prohibiting discrimination between like imported products.

7.1024. More specifically, the tax reductions challenged under Article I:1 and discussed here are explicitly imposed on *products*. Article 21 of Decree 7,819/2012 states that "*vehicles* ... may benefit from a reduction in IPI tax rates", and Article 22(I) of the same decree states that "[t]he reduction in IPI tax rates referred to in Article 21 ... shall also apply to the *products*".

7.1025. Since the tax reductions are on their face applied directly to products, the Panel considers that such tax reductions relate to "internal taxes ... applied, directly or indirectly, to ... products", and also comprise "laws, regulations and requirements affecting the [] internal sale, offering for sale, purchase, transportation, distribution or use" of imported products.

7. 1026. The Panel therefore concludes that such tax reductions are indeed "matters referred to in paragraphs 2 and 4 of Article III" and therefore are within the scope of Article I:1 of the GATT 1994."



192. The Government points out, by reference to the *travaux preparatoire* to the GATT, that the phrase in Article I:1 “*matters referred to in paragraphs 2 and 4 of Article III*” was added to ensure that the non-discrimination obligation was sufficiently broad to capture internal taxes and internal charges otherwise covered by Article III: “... *regardless of whether national treatment [in Article III] is provided for in respect of such matters*”: See Negotiating Proposal of the United States, E/PC/T/W/146, 30 May 1947. This material is admissible to construe Article I:1 by virtue of Article 32 Vienna Convention (see paragraph [125] above). It supports the conclusion that I have arrived at.
193. The Government also supports its contention by reference to the centrality of the non-discrimination principle in Article I:1 which it says is “*fundamental*”. This is correct and is reflected in numerous decisions of GATT Panels and rulings of the Appellate Body. Given the centrality of the principle it would be wrong to construe it narrowly and restrictively. The Government cites for instance the Report of the Appellate Body in *United States – Section 21 Omnibus Appropriations Act of 1998* (AB-2001-7, 2<sup>nd</sup> January 2002). The appeal concerned an intellectual property dispute between the European Community and the US over the effect of Article 4 TRIPS<sup>17</sup>. At paragraph [297] the Appellate Body stated:

“Article 4 of the TRIPS Agreement.

Like the national treatment obligation, the obligation to provide most-favoured-nation treatment has long been one of the cornerstones of the world trading system. For more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods. Unlike the national treatment principle, there is no provision in the Paris Convention (1967) that establishes a most-favoured-nation obligation with respect to rights in trademarks or other industrial property. However, the framers of the TRIPS Agreement decided to extend the most favoured-nation obligation to the protection of intellectual property rights covered by that Agreement. As a cornerstone of the world trading system, the most-favoured-nation obligation must be accorded the same significance with respect to intellectual property rights under the TRIPS Agreement that it has long been accorded with respect to trade in goods under the GATT. It is, in a word, fundamental.”

194. The Claimants argue, to the contrary, that the VAT RES is a border tax adjustment relating to exports and Article I:1 GATT does not cover such tax adjustments. It covers only discrimination relating to the origin of the goods. The point is said to be illustrated by case law e.g. by the decision of the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (AB-1997-3, 9<sup>th</sup> September 1997) (“*Bananas*”). That case concerned the EC regime for the importation,

<sup>17</sup> The principle of non-discrimination is a priority in the General Agreement on Trade in Services (“*GATS*”) (Article 2) and is incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (“*TRIPS*”) (Article 4). Along with the GATT these three agreements cover all three main areas of trade handled by the WTO.

distribution and sale of bananas, introduced on 1<sup>st</sup> July 1993. A variety of rules were challenged as being in violation of the GATT including Article I:1. The Appellate Body upheld the Panel's finding that the activity function rules, which applied only to licence allocation rules for imports from other than traditional ACP countries, were inconsistent with Article. I:1. The Appellate Body also agreed with the Panel that the EC export certificate requirement which accorded a selective advantage to some members only was in violation of Article. I:1:

“4. The "Separate Regimes" Argument

189. It has been argued by the European Communities that there are two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas. Submissions made by the European Communities raise the question whether this is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The European Communities argues, in particular, that the non discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the Licensing Agreement, apply only within each of these separate regimes. The Panel found that the European Communities has only one import regime for purposes of applying the non-discrimination provisions of the GATT 1994 and Article 1.3 of the Licensing Agreement.

190. The issue here is not whether the European Communities is correct in stating that two separate import regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member.

191. Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of

specific provisions of the GATT 1994, such as Article XXIV. In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII, apply fully to all imported bananas irrespective of their origin, except to the extent that these obligations are waived by the Lomé Waiver. We, therefore, uphold the findings of the Panel that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more "separate regimes" for the importation of bananas."

195. It is true that on its facts this case concerned import regimes, whereas the present case concerns export regimes. But that is a distinction without a difference given that Article I:1 explicitly covers charges and rules relating to exportation and the point being expressed by the Appellate Body was not one which logically could only apply to import schemes; it was of general application.
196. The Claimants also argue that the case law on Article I:1 is overwhelmingly concerned with discrimination in relation to imports. This is true but again not to the point. Article I:1 is explicit in extending its purview to exports and must be construed in accordance with its terms. The fact that most cases concern imports is not, moreover, surprising since a state seeking to adopt a protectionist stance invariably does this by targeting imports to protect internal production. But from time to time states do introduce rules affecting exports and Article I:1 captures discrimination in such cases.<sup>18</sup>
197. Next, it is argued that Article XVI on subsidies is the main provision of application. The text is set out at paragraph [120] above. It is correct that in some limited cases Article XVI can apply. But this does not mean that it has *exclusive* application to tax rules which affect international trade, and it is not drafted as such. The article is aimed primarily at the granting of subventions to exporters to boost their sales. It is capable of applying to differentiated tax rates as the Interpretative Ad Note makes clear (see paragraph [120] above). It might apply, for instance, where tax remitted exceeded the tax payable so that, in its net effect, the tax scheme served as a subvention. It might have applied if under the VAT RES the tax refund was set at 105% of the VAT initially paid such that affected retailers received an export booster equivalent to 5% of the tax. The relevant point however is that even if Article XIV is capable, in some circumstances, of applying to measures of taxation there is nothing indicating that it is the sole measure capable of addressing taxation. It is not mutually exclusive with Articles I:1 and III:2 GATT.
198. In conclusion the VAT RES is capable in principle of falling within Article I:1 GATT. The same applies to ESC 9.1.

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<sup>18</sup>The same could be said of the equivalent provisions under the relevant EU treaties. These prohibit restrictions on imports and exports. Case law in relation to such provisions has however focused preponderantly on restrictions upon imports, not exports. This reflects the fact that commercial incentives for the imposition of state restrictions tend, by their nature, to focus upon imports and not exports. But that does not mean that restrictions on exports are not also caught by the relevant treaty provisions.

***(vii) Issue (iv): Was the VAT RES inconsistent with relevant provisions of the GATT prior to expiry of the Transitional Period?***

199. The next question is whether the maintenance of the VAT RES would have been in breach of Article I:1 had it been maintained following expiry of the Transitional Period. The Claimants argue that no advantage, favour, privilege or immunity was conferred by the schemes so that maintaining them would not have engaged Article I:1. In my judgment it is clear that there would have been discrimination contrary to Article I:1.
200. The starting point is that both the VAT RES and ESC 9.1 differentiated in the tax treatment of all products dependent upon their destination. The discrimination was *de jure*; it was baked into the schemes themselves. As such the schemes differentiated as between the same and competing products (i.e. “like” products) being exported. That differentiation affected all those in the supply chain who sold these like products; it was institutionalised and systemic. It is established law that in relation to schemes that apply to all types of products, when deciding whether there is discrimination the test is objective and determined by reference to the structure of the scheme in issue. Where like products are treated differently under the schemes then the discrimination is in effect deemed to exist; see paragraph [113] above, and also *Bananas* (ibid) at paragraph [190] (set out at paragraph [194] above) which reinforces this conclusion.
201. Following the Transitional Period, absent a corrective measure, the VAT RES would therefore have treated the EU and the rest of the world differently. This difference in treatment would have been manifest under both schemes in (i) the rate of tax and (ii) the system applied. As to the *rate* sales inside the schemes were zero rated whereas sales outside the schemes for like (identical or competing) products, were not. As to the *system* there would have been two quite different systems whereby for one category (rest of world) if the customer produced requisite proof then tax was fully refunded or not charged whereas in relation to EU states the normal tax regime applied. The “rules” were different.
202. Although economic effect is not required, in this case those suppliers and retailers who benefited from the VAT RES and ESC 9.1 have argued strenuously that the concessions amounted to a substantial commercial advantage and that they would suffer mightily without them. The Cebr Report of September 2020 (see paragraph [49] above) seeks to quantify the difference between operating under the VAT RES and operating under the normal tax regime. It therefore provides a telling indication of the effect of the “*advantage, favour, privilege or immunity*” which being inside the concessionary schemes conferred and, by parity of reasoning, the relative disadvantages of being an exporter outside the schemes. Moreover, in submissions made in response to the CP, when the provisional view of Government was that it might extend the schemes, stakeholders were largely enthusiastic because they considered that to do so would confer significant *additional* advantages. This evidence also highlights that being in the schemes conferred a relative export advantage relative to those outside of the schemes. In this light, it is hard to avoid the conclusion that exports operating under the VAT RES and ESC 9.1 schemes received substantial benefits in respect of their export business. Upon the Claimants’ own case the immunity brought about by being in the schemes conferred material advantage, favour and privilege.
203. The Claimants argued that since the jurisprudence appears to focus upon origin and not destination this should guide the analysis of benefit: “*Differential indirect taxation*

*rates, and schemes to implement those differential rates according to destination, would not seem to affect the competitive opportunities of “like” products from different origins.”* Further, like products originating from the UK, the US or Europe will also be sold in identical conditions from the same retail outlets in (say) Heathrow Terminal 5. They have “*identical competitive opportunities in this situation*” and there is therefore no discrimination. The analysis above answers this point. In my judgment the *Bananas* case referred to above (see paragraph [194]) supports the Government’s case that having two different sets of rules for comparable/like products is *prima facie* a violation of the non-discrimination rule. Moreover, even if it is true that most cases are about origin not destination that does not undermine the fact that on the Claimants’ own case, they have identified benefits which flow from being exporters under the schemes relative to being exporters outside of them.

204. The Claimants also say that there is no benefit, and therefore no breach, because all the VAT RES did was subject the customer to the duty to pay tax at the destination and this was the same regardless of whether the product in question was destined for the EU or rest of world. Either way tax was payable. As to this and setting to one side the other considerations referred to above, the underlying premise is not necessarily true because in practical terms the schemes facilitated tax abuse. This was an important element in the reasoning leading to abolition.
205. In short, maintaining the VAT RES was, as the Government set out in its written submissions, “*clearly discriminatory, with exports to the EU not benefitting from an advantage granted to exports outside the EU*”. The Government also makes the point, with which I agree, that if the Claimant’s case was correct, the cross referencing in Article I:1 to Article III:2 which brings all the matters referred to within the scope of Article I:1: “... *could be circumvented simply by presenting a discriminatory tax on group X as though it were simply a tax relief for group Y.*”
206. Finally, I would add a postscript to address the alternative argument advanced by Mr Beard QC for the Claimants which took as its starting point that the test was one of tenability, which was something short of correctness. He argued that even accepting that the Government’s position was tenable (but not therefore necessarily correct), the analysis was still irrational since tenability did not oust rationality. He pointed out: that the references to the GATT in the CP and CR were short and conclusionary; that there was no explanation as to why the Government considered that Article I:1 was engaged; that there was no reference to the possible applications of Articles XVI and XXIV GATT; and that there was no explanation as to why there was discrimination given that the VAT RES and ESC 9.1 both had as their object ensuring that tax was paid according to the destination principle which was an internationally accepted fiscal norm.
207. The difficulty with this argument is that, on the facts of this case, I have come to a firm conclusion on the law as to the correctness of the Government’s position. It is for this reason that the Government meets the flexible tenability standard. There is no daylight in this case between a finding of tenability and a finding of correctness. As such I do not agree with Mr Beard’s arguments insofar as they concern issues of substance. Insofar as the rationality challenge is as to the adequacy of the analysis and the reasoning in the CP and CR then it is true that the Government’s position under the GATT is set out in conclusionary terms. However, that conclusion was consulted over and, so far as the Court is aware, was not challenged by consultees during the consultation process. It was certainly not challenged by these Claimants. Indeed, it has

been common ground throughout that the adoption of a policy of alignment as between the EU and the rest of the world is not unlawful under the GATT. In an ideal world the Government might, perhaps, have spelled out in a little more detail what it meant when it said that it had to comply with the GATT or “MFN” policy. But in the context of this case this is not a matter that comes close to being judicially reviewable.

208. In conclusion the Government was correct to conclude that upon expiry of the Transitional Period maintenance of the VAT RES would have been in breach of Article I:1 GATT. The same applies to ESC 9.1.

***(viii) Issue (v): If the VAT RES was incompatible with GATT, was the Government bound forthwith to remove the VAT RES and/or ESC 9.1?***

209. The next question is whether the Claimants are correct to contend that as from expiry of the Transitional Period there was no impediment under the GATT in the Government maintaining the schemes even temporarily, for instance to create a transitional period. The Government argues that under the GATT the duty to secure compliance is absolute and does not permit derogations for political or pragmatic reasons.
210. In my judgment the analysis of the Government is correct. The duty of *immediate and unconditional* rectification is set out expressly in Article I:1 (see paragraph [108] above). It may well be true, from a pragmatic perspective, as the Claimants contend, that the consequences for the Government of inaction would have been minimal. But, with respect, that misses the point. Here the Government deliberately chose to adhere to international law and, that being so, it was lawful and proper for the Government to apply the law to the letter, realpolitik notwithstanding. Indeed, as the Government points out, Article XVI:4 GATT buttresses the duty of immediate rectification in Article I:1. It imposes an obligation on each Member State to “...ensure the conformity of its laws, regulations and administrative procedures with its obligation as provided in the annexed agreements”. The GATT is one such annexed agreement.

***(ix) Issue (vi): Is it relevant that following the Transitional Period the VAT RES will not be removed in Northern Ireland?***

211. The Claimants next argue that there is a contradiction between Great Britain, where VAT RES has been abolished from 1<sup>st</sup> January 2021, and Northern Ireland, where it has been retained. It is argued that if the maintenance of the VAT RES in Northern Ireland is legal under the GATT, as the Government claims, then it follows in logic that it is equally lawful under GATT to maintain the VAT RES elsewhere.
212. The Government says that the position in Northern Ireland is irrelevant. The challenge is to the Decision which relates to VAT treatment in Great Britain and excludes Northern Ireland. The Government argues: “*The Ground stands or falls on whether the Claimants can establish an error of law in the Defendants’ interpretation of Article I:1 of the GATT 1994 in the Decision.*”
213. The Government also says that any comparison between Great Britain and Northern Ireland is inapt. Significant differences exist which “*render a comparison with Northern Ireland both meaningless and inappropriate*”. The basis upon which trade is conducted between Northern Ireland and the EU is set out in the Northern Ireland Protocol under which EU law provisions on VAT continue to apply in Northern Ireland

(see Article 8 and Annex 3 of the Northern Ireland Protocol). This is not the case for the rest of the UK.

214. There is no need to address the relationship between the Northern Ireland Protocol and the GATT. The Government does not accept that there is incompatibility. Nonetheless, in their submissions, they test the Claimants argument by pointing out that the Claimant's pleaded case is that the position in Northern Ireland is *not* WTO compliant and they then argue that even if that were to be assumed, *ex hypothesi*, to be correct "*it would not warrant a decision that involves consciously taking a non-compliant position in the different setting of Great Britain.*"
215. I deal with these arguments briefly. The legality of the decision in relation to the VAT RES under GATT stands or falls by reference to the application of the GATT to the scheme as it applies in its own geographical jurisdiction, which excludes Northern Ireland. The relationship between the Northern Ireland Protocol and GATT is not in issue in these proceedings. In any event *even if*, to test the argument, the Northern Ireland Protocol was incompatible with the GATT then, to put the matter bluntly, one bad turn does not deserve another; that would not be a reason for extending the state of incompatibility. I therefore do not accept the argument that the position in Northern Ireland is relevant.

***(x) Issue (vii): Are issues of law and practice under the GATT capable of being admitted as expert evidence or are they matters of law for submission?***

216. Finally, the Government objects to the Claimant's reliance upon expert evidence (see paragraph [102] above for details). The Government says that this is a matter of principle of general significance which could have ramifications in future cases. The answer to this is clear. Issues of public international law, which therefore include the GATT, raise questions of law not fact: *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at page [569] and *Al-Jedda* [2010] EWCA Civ 212 at paragraph [65]. In the ordinary course the GATT must be construed in accordance with Articles 31 and 32 of the Vienna Convention of the Law of Treaties (see paragraphs [124] – [125] above). These require treaties to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the relevant object and purpose. This is an exercise performed by the court and is not an exercise for experts: see e.g. *R (Charles) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 1620 (Admin) at paragraph [49(i)] per Flaux LJ and Saini J.
217. Mr Harbinson's report and the responsive report of Mr Tereposky are not therefore admissible as expert evidence. On analysis they contain points about the decisional practises of GATT Panels and Appellate Bodies and as to the legal policy behind the relevant articles of the GATT. They make the same points of law that counsel were entitled to, and did, advance in the ordinary course in their written and oral submissions. We did look at the reports *de bene esse*. They are interesting and informative in providing context and in isolating issues and arguments. But for the purpose of resolving the issues arising it has been sufficient to focus upon the written and oral legal submissions of the parties.

**Ground III: The application for permission to amend – Does the entering into force of the TCA alter the analysis?**

***(i) The Application***

218. I turn now to the application to amend. This is based upon facts coming into being following the relevant decisions in this case, namely the conclusion of the TCA on 24<sup>th</sup> December 2020 which was implemented into domestic law by the EU(FR)A 2020. This received Royal Assent on 31<sup>st</sup> December 2020. It is said that this amounted to an important change of circumstance.
219. The Claimants argue that, following the coming into force of the TCA, there is a fundamental inconsistency in the Government's position. The initial position of the Government was that *prior* to expiry of the Transitional Period the VAT RES and ESC 9.1 were lawful under Article XXIV GATT due to the existence of a free trade agreement/customs union with the EU (the various EU Treaties) but unlawful as contrary to Article I:1 *following expiry* of the Transitional Period even though the Government had now concluded the TCA. They argue that: "*The result of [the TCA] ... and its express establishment of a free trade area under Article XXIV of GATT 1994*<sup>19</sup> *is that the alleged WTO impermissibility of maintaining from 1 January 2021 the VAT RES and ESC scheme as currently provided has disappeared.*" In their detailed written submission the Claimants contend further that the Government was drafting the TCA at the same time as taking the decision to abolish the schemes and did so without giving consideration to the effect of the conclusion of a future free trade agreement, and Article XXIV GATT, upon the abolition decision and the future application of Article I:1 GATT. This was a material failure to address a relevant consideration and a reason to quash the Decision.
220. The Government disagrees. It says that the TCA and EU(FR)A 2020 have nothing to do with, and do not affect, tax rates. The decisions to abolish the tax concessions were taken before the TCA or EU(FR)A 2020 were in existence. It was clearly not irrational for the Government – when it abolished the schemes - not to consider the possible ramifications of an agreement that was in negotiation and might never come into being and which did not touch upon tax rates. Moreover, it was clearly rational for Government to decline to *reconsider* retaining or reintroducing the VAT RES and ESC 9.1 in the light of the TCA since it had always been the Government's firm position that it wished, following EU exit, to retain discretion over tax rates. In any event the substantive analysis of the Claimants concerning the scope and effect of Article XXIV GATT is incorrect. Properly interpreted nothing in the TCA serves to exclude the GATT since the TCA had nothing to say about tax rates. It follows that nothing in the GATT could prevent the formation of the TCA and, this being so, it is irrelevant for that reason as well. The Government argues that the Ground is not arguable and that permission to amend should be refused; but even if permission is granted judicial review should be refused.

221. The following issues arise:

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<sup>19</sup> Article OTH.3 TOCA does provide that the TCA is an agreement under Article XXIV GATT



- i) Does the TCA and EU (FR)A 2020 cover tax matters?
- ii) What is the effect of the TCA in domestic law?
- iii) How do these principles apply in the present case?

**(ii) Issue (i): Does the TCA and EU(FR)A 2020 cover tax matters?**

222. The TCA and the EU(FR)A 2020 *do* address tax matters, including VAT. It is important however to be clear as to what is, and is not, covered. Certain tax measures set out in the TCA are implemented into domestic law by section 22 EU(FR)A 2020 on administrative cooperation on VAT and mutual assistance on tax debts. Section 22(1) and (4) incorporates by reference the “*Protocol*” contained in the TCA on administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties. (“*the Tax Protocol*”). The Tax Protocol contains detailed provisions on tax governance including in respect of the exchange of information and cooperation between competent authorities in the UK and EU. The Commissioners are the “*competent authority*” for the application of the Tax Protocol in domestic law (section 22(2)).
223. The TCA parties, in a Joint Declaration, also confirm support for the OECD Base Erosion and Profit Shifting (BEPS) Action Plan. The standards mentioned in the Plan include those concerning exchange of tax information on financial accounts, cross-border tax rulings, country-by-country reporting, potential cross-border tax planning arrangements, and rules on interest limitation, controlled foreign companies and hybrid mismatches. There are in addition provisions governing international trade and the use of “*internal taxation*” to accord national treatment / preference (which is prohibited by Article GOODS.4.). The TCA does not include provisions on rates of tax.

**(iii) Issue (ii): What is the legal effect of the TCA in domestic law?**

224. What is the legal effect of the TCA in domestic law? The TCA contains various provisions on its legal effect. COMPROV.16(1) provides that nothing in the TCA is to be construed as conferring or imposing rights or obligations “*on persons other than those created between the Parties under public international law*”. Further, the TCA precludes *direct* invocation of its terms in domestic law<sup>20</sup>. Nothing in the TCA permits it “*to be directly invoked in the domestic legal systems of the Parties*”. It is necessary in this judgment to consider what is meant by “*direct*” invocation. *Prime facie*, the TCA does not have direct effect. That of course is without prejudice to how the UK, quite separately, decides to *implement* the TCA as a matter of domestic law and as to how domestic implementing laws might then be invoked for instance as a basis for the bringing of claims in the courts and tribunals<sup>21</sup>.

<sup>20</sup> See paragraph [146] above in relation to indirect invocation.

<sup>21</sup> Whether an individual has rights depends upon ordinary domestic law principles governing rights to proceed eg *locus* (in a public law case) or the tort of breach of statutory duty (see eg *Garden Cottage Foods Ltd v Milk Marketing Board* [1984]

225. COMPROV.16(2) addresses a different situation and prevents the parties (i.e. the UK and the EU) adopting laws which enable any person to bring proceedings *against* the *other* party for breach of the TCA. Thus, domestic law in the UK cannot provide that the EU can be sued in the domestic courts for breach of the TCA and, equally, the EU cannot provide that the UK can be sued in the courts of the EU. The Article provides:

“Article COMPROV.16: Private rights

1. Without prejudice to Article MOBI.SSC.67 [Protection of individual rights] and with the exception, with regard to the Union, of Part Three [Law enforcement and judicial cooperation], nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement.”

226. Parliament has however implemented the TCA via the EU(FR)A 2020. This covers a substantial portion of the subject matter of the TCA. Where there are gaps section 29 is engaged to fill the space. This is entitled “*General implementation of agreements*”. It provides:

**“29 General implementation of agreements**

(1) Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

(2) Subsection (1) -

(a) is subject to any equivalent or other provision—

(i) which (whether before, on or after the relevant day) is made by or under this Act or any other enactment or otherwise forms part of domestic law, and

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AC130 which concerned whether the tort of breach of statutory duty would serve as a means for the civil enforcement of EU law).

(ii) which is for the purposes of (or has the effect of) implementing to any extent the Trade and Cooperation Agreement, the Security of Classified Information Agreement or any other future relationship agreement, and

(b) does not limit the scope of any power which is capable of being exercised to make any such provision.

(3) The references in subsection (1) to the Trade and Cooperation Agreement or the Security of Classified Information Agreement are references to the agreement concerned as it has effect on the relevant day.

(4) In this section—

“domestic law” means the law of England and Wales, Scotland or Northern Ireland;

“existing domestic law” means—

(a) an existing enactment, or

(b) any other domestic law as it has effect on the relevant day;

“existing enactment” means an enactment passed or made before the relevant day;

“modifications” does not include any modifications of the kind which would result in a public bill in Parliament containing them being treated as a hybrid bill;

“relevant day”, in relation to the Trade and Cooperation Agreement or the Security of Classified Information Agreement or any aspect of either agreement, means—

(a) so far as the agreement or aspect concerned is provisionally applied before it comes into force, the time and day from which the provisional application applies, and

(b) so far as the agreement or aspect concerned is not provisionally applied before it comes into force, the time and day when it comes into force;

and references to the purposes of (or having the effect of) implementing an agreement include references to the purposes of (or having the effect of) making provision consequential on any such implementation.”

227. This does not lay down a principle of interpretation (such as is found in section 3 Human Rights Act). It is more fundamental and amounts to a blanket, generic, mechanism to achieve full implementation, without the need for any further parliamentary or other executive intervention.

228. The section transposes the TCA onto domestic law, expressly and mechanistically changing it in the process. Following section 29 *domestic law* on an issue means what the TCA says. It provides that domestic law (as defined) “*has effect ... with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement*”. The phrase “*has effect*” is important. Parliament has mandated a test based upon the result or effect. The phrase “*has*” makes clear that this process of modification is automatic i.e. it operates without the need for further legislative intervention. The concept of modification is interpreted broadly in section 37(1) to “*include*” (and therefore is not limited to) amendment, repeal or revocation. Section 29 is capable of achieving any one or more of these effects.
229. “*Domestic law*” is defined broadly by section 29(4)(2) and “*existing domestic law*” is defined to include “*an existing enactment*”. “*Enactment*” is defined in section 37(1) to include orders, regulations, rules, schemes, warrants, bylaws, or other instrument made under an Act of Parliament, and Orders in Council, including those made in the exercise of the Royal Prerogative. The definition goes further and includes “*any other domestic law*”. From this it is clear that “*domestic law*” includes non-enacted law which would include the common law and case law and insofar as guidance did not fall within the expanded definition of an enactment it would also amount to domestic law.
230. The process of automatic modification in section 29 is subject to two statutory clarifications. First, it applies only so far as required i.e. it does not modify a domestic law that, otherwise, is already consistent with the TCA. This should include the provisions of the EU(FR)A 2020 intended to implement the TCA but in the case of any doubt as to this the terms of the TCA take automatic effect<sup>22</sup>. Secondly, it covers modifications “*necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement*”. This is needed because under the TCA the parties bind themselves to a variety of international law obligations beyond the TCA itself, including for instance provisions of the GATT which are incorporated by express reference<sup>23</sup>.
231. There will be many circumstances where a court or tribunal must determine the meaning of domestic law by reference to the TCA. This is recognised in section 30 EU(FR)A 2020. Parliament has instructed the courts and tribunals as to the principles of interpretation to be applied to the TCA. The Act cross-refers to the TCA which itself incorporates the Vienna Convention on the Law of Treaties. Section 30 EU(FR)A 2020 provides:

“30 Interpretation of agreements

A court or tribunal must have regard to Article COMPROV.13  
of the Trade and Cooperation Agreement (public international

<sup>22</sup> see e.g. *Lipton and Anor v BA City Flyer Limited* [2021] EWCA Civ 454 at paragraphs [73] – [83].

<sup>23</sup> By way of illustration Article GOODS.4: National treatment on internal taxation and regulation, incorporates Article III GATT into the TCA; and Article GOODS4.A: Freedom of transit incorporates Article V GATT into the TCA.

law) when interpreting that agreement or any supplementing agreement.”

232. COMPROV.13 provides:

“Article COMPROV.13: Public international law

1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.

3. For greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party.”

***(iv) Issue (iii) How do these principles apply to the present case?***

233. How does this apply to the Claimant’s application for permission to amend?

234. First, the Decision (11<sup>th</sup> September 2020), the later decision to exercise the statutory power to lay the SI (3<sup>rd</sup> December 2020), the actual laying of the SI before Parliament (3<sup>rd</sup> December 2020) which triggered its coming into force, and the decision to withdraw ESC 9.1 (3<sup>rd</sup> December 2020), all predated the TCA (24<sup>th</sup> December 2020) and the EU(FR)A 2020 (31<sup>st</sup> December 2020). The Claimants say that the *possibility* of a free trade agreement should have been taken into account when these decisions were being taken. I disagree. Whatever might or might not have been the private views of the Government as to the likelihood of a free trade agreement being concluded the fact is that no such agreement had been entered into and the negotiations on important components of a final text were being discussed and negotiated up until the last moment. There is hence a short answer to this which is that it simply cannot have been an error on the part of the Government to fail to have regard to measures which were in negotiation and might never come into force. The Government all along wanted a solution which was lawful under *any* permutation of outcome – deal or no deal. It is in this respect common ground that at all material times, including after the coming into effect of the TCA, it was not unlawful under the GATT for the Government to have aligned the VAT positions as between the EU and the rest of the world.

235. Secondly, and flowing on from the first point, insofar as the argument is that the Government failed to *reconsider* abolition in the light of the conclusion of TCA and section 29 EU(FR)A 2020 then this would have been an essentially political question for the Government. This was simply never on the cards given the Government’s earlier stance. The Government wished, as part of its EU exit strategy, to retain control over rates of taxation. This was quintessentially a political decision sitting at the most

extreme margins of anything that the courts would ever consider interfering with. There is no arguable basis for challenging the failure to revisit the issue in the light of the TCA.

236. Thirdly, under the EU(FR)A 2020, the SI and the other measures which removed the VAT RES and ESC 9.1 amount to “*domestic law*” under section 29. However, there is nothing in the TCA, or in section 22 EU(FR)A 2020, which covers *rates* of VAT including exemptions from VAT. The position of the Government throughout has consistently been that, following expiry of the Transitional Period, decisions on tax rates would be a matter for the Executive and Parliament and not governed by any possible future trade agreement with the EU. It follows that there is nothing in the TCA which the automatic read-across and modification mechanism in section 29 EU(FR)A 2020 could attach to which could have the effect of limiting the powers of the Government in relation to the VAT RES or ESC 9.1.
237. Fourthly, as to the Claimant’s argument that once the TCA had been entered into the prohibition on discrimination contained in Article I:1 no longer applied this cannot be correct. The Claimants argue that because the TCA amounted to a free trade agreement, recognised by the parties as such under Article XXIV:5 GATT (set out at paragraph [122] above), it had the effect of creating a total derogation from the principle of non-discrimination in Article I:1. In other words the prohibition on retaining the concessionary schemes no longer applied *at all*. If this argument were correct then the *mere fact* that a state concluded a free trade agreement or customs union, meeting the requirements of Article XXIV, would confer upon that state *carte blanche* to ignore the fundamental prohibition on discrimination in Article I:1 in its trade relations with the rest of the world. So, to test the proposition, if the TCA stood for “*Trade and Cheese Agreement*”, and concerned exclusively cheese, then, on the Claimants’ argument, the UK would be entitled to discriminate against other products being imports or exports from or to third countries howsoever unrelated they were to the subject matter of the Article XXIV compliant trade or customs agreement. An agreement on cheese with the EU would enable the UK, under GATT, to discriminate in relation to perfume, watches or cameras traded as between the UK and third countries. Article XXIV:5 is not however drafted in terms which support such a construction. It provides that “... *the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area ...*”. I have set out my conclusion on the implications of the phrase “*shall not prevent*” at paragraph [123] above. It does not disapply, wholesale, GATT provisions such as Article I:1; it is concerned *only* to ensure that those provisions do not prevent an Article XXIV compliant agreement or customs union coming into being. The most obvious example is rates of customs duty. If state A enters into a free trade agreement with state B under Article XXIV and grants B preferential tariffs on (say) certain agricultural produce then it would not thereafter be bound under Article I:1 GATT to offer those same, low, agricultural, tariffs to all other states on those same products. Article XXIV does not however go further than this. If it were otherwise the concurrent application of Article I:1 might deter the coming into force of the free trade agreement at all.
238. There is no logic in the mere existence of an Article XXIV compliant agreement triggering the complete, wholesale, disapplication of the GATT rules, howsoever unconnected they might be to the Article XXIV free trade agreement. Support for this conclusion is found in the Decision of the Contracting Parties of 28<sup>th</sup> November 1979

[26S/203]. This specifically permits derogation from the non-discrimination principle in relation to charging of preferential tariffs to developing countries but makes clear that this cannot serve to justify *other* restrictions or distortions of trade. Further support is found in a recital to the WTO “*Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*”. It includes a reaffirmation that the purpose of Article XXIV agreement should not be to raise barriers to trade with other members. It provides the following: “*Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories **and not to raise barriers to the trade of other Members with such territories**; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members*” (emphasis added).

239. In conclusion I do not consider the Claimants’ suggested amendment to be arguable. I would refuse permission to amend.

**E. Ground IV: Procedural grounds / failure to obtain and take into account relevant evidence of adverse effects.**

***(i) Introductory matters***

240. The fourth Ground concerns the Claimants’ rolled-up application for permission to appeal against the refusal by Swift J of permission to apply for judicial review on certain procedural grounds and for the full judicial review of those grounds if permission is granted. If the Court (sitting as the Court of Appeal) grants permission, then we (this time as the Divisional Court) proceed to determine the claim for judicial review. Because of this the Government has given full disclosure and the Claimants have had sight of the underlying evolution of relevant policy. That disclosure was supplemented by detailed witness statement evidence from senior officials from within HMT and HMRC, including from the economic and statistics arms of HMRC (the KAI unit see paragraph [21] above). This enabled the Claimants to refine the scope of their challenge which has reduced in scope (if not in complexity).
241. To understand the challenge, it is necessary to describe three different economic measures. These are: (i) the “*Fiscal Cost*” which refers to the amount of VAT not charged as a result of providing a tax relief; (ii) the “*Exchequer Impact*” which refers to the impact of a change in policy on the public finances (i.e. the tax yield), taking into account adjustments for the possible behavioural responses of consumers to the policy change; and (iii), the “*Wider Economic Impact*” which is an assessment of how a policy change might affect the wider economy. These are not however hermetically sealed measures. There can, for instance, be an overlap between Exchequer Impact and Wider Economic Impact because it is possible that if there is a serious adverse impact on the wider economy from introduction of a new policy this can lead to a downturn in economic activity in many different remote and indirect ways which might be difficult to measure but which might, in turn, lead to a reduction in (say) income tax or corporation tax which could in turn then depress the tax yield.
242. The challenge now concentrates on the fact that the Government did not conduct any analysis for itself of the Wider Economic Impact of abolition. The Claimants argue that this is a serious failure on the part of the Government to collect relevant evidence and then to weigh it in the scales alongside other relevant considerations. It is argued that

these failures duly infect the reasoning given for the decision to abolish rendering it unlawful.

243. In order to frame the issue, it is important to identify what has come no longer to be in dispute. First, under the case as originally advanced it seemed that the Claimants were arguing that the Government should have conducted a particular sort of detailed economic analysis of Wider Economic Impact. In later written and in oral submissions Mr Beard QC clarified that there was no one quantitative model that had to be performed. The decision maker had a choice as to methodology to use. Secondly, it is also accepted that it is not possible to arrive at a precise quantification of Wider Economic Impact. It is acknowledged that this would be to demand an unattainable degree of accuracy. Thirdly, it is accepted on the facts of the case that within HMT and HMRC, and in evidence fed into the OBR analysis by the specialist KAI unit from within HMRC, and also in submissions and advices provided to Ministers, there *was* at least a recognition of the industry case that abolition would cause wider harm to their sector, and to the wider economy. Fourthly, it is common ground that none of HMRC, HMT or OBR conducted any quantitative analysis of Wider Economic Impact and that the Chancellor proceeded to take the relevant decision(s) without being appraised of the outcome of such analysis.

***(ii) The Complaint***

244. In the light of this, the Claimants' case can be summarised as follows.
245. The relevant reasons are found in the CR of 11<sup>th</sup> September 2020 and in particular in paragraphs [3.15] – [3.20] and [3.25] - [3.27] (set out at paragraph [47] above). That was the place where the Government announced to the world at large the Decision to abolish most tax free sales. That was set out in clear and definitive terms. All that happened thereafter was implementation with, ultimately, the Chancellor acting upon the conclusion in the CR. It is not proper therefore to look for the justiciable reasons to events occurring after 11<sup>th</sup> September 2020. From this date onwards, until the date upon which the SI was laid before Parliament and came into effect on 3<sup>rd</sup> December 2020 and when the Government formally withdrew ESC 9.1, the Government was simply reacting to the objections of the Claimants and others. The process was following a predetermined trajectory and was driven by confirmation bias.
246. With regard to the substantive merits, in the period in the run up to publication of the CR on 11<sup>th</sup> September the analysis of the Government was inadequate. There was a failure to address evidence of the Wider Economic Impact. The limited analysis that was performed stopped well short of that needed to be carried out if a fair assessment of impact was to be had. The disclosed documents show that in December 2019 (before the consultation commenced) HMRC produced a scoping paper in which the possibility was mooted of KAI assessing the potential behavioural factors needed to estimate the Wider Economic Impact. Mr Cunningham in his statement explained that this option was not however pursued:

“22. KAI did not ultimately conduct the analysis as originally posed in the scoping paper. This was because, in my teams discussions with them, it became clear that the assumptions on which such an analysis would depend were too uncertain in this case to arrive at a ‘precise’ number for these impacts. I



understand from my teams' conversation with KAI that a significant difficulty was that any precise empirical estimates that are broader than the Fiscal Cost, including the effect on the high street, of the VAT RES or tax-free airside sales would be heavily dependent on key behavioural assumptions which were uncertain (e.g. on how it would affect purchasing decision and someone's decision to visit the UK in the first place). Making these precise behavioural judgments, alongside the difficulty in obtaining, for example, granular sales data from retailer, was a key issue with conducting this kind of 'precise' estimate."

247. The Claimants argue that this shows, first, that the need for such an exercise was recognised, and secondly, that the failure then to carry it out was therefore culpable. A refusal to conduct an analysis simply because a "*precise*" result is unattainable misses the point; ranges and estimates would have sufficed.
248. Insofar as the period following 11<sup>th</sup> September 2020 is relevant at all, the Claimants argue that the omissions which characterised the analysis prior to publication of the CR continued and were perpetuated. During this period the Claimants submitted the Cebr Report which highlighted the pressing need for the Government to grapple with the wider adverse effects of abolition of the VAT RES and the fact that such an analysis could be conducted. Whilst there might be a debate about the extent of the impact it could not be in dispute that there would be *some* significant adverse effects. Disclosed documents show that the Government accepted that some of the main conclusions in that report were indeed correct. Yet the Government persisted in its failure to perform any proper analysis of the wider ripple effects of abolition, which included likely negative effects on overall tax receipts. The Government took into account the OBR Forecast but this failed to consider Wider Economic Impact. The net effect was that the evidence base upon which the Chancellor then decided to lay the SI before Parliament was flawed. It exaggerated Fiscal Cost and Exchequer Impact and underplayed Wider Economic Impact.
249. Both the VAT RES and ESC 9.1 had been in place for very many years and entire commercial sectors had developed upon the basis of their existence. The decision to abolish the schemes would cause very major harm and disruption to those sectors, exacerbated by the effects of the Covid-19 Pandemic. Without quantifying Wider Economic Impact, even within margins of error or ranges, it was not possible for the Government to take a rational or fair decision about the relative pros and cons of abolition. The failure to conduct any sort of this analysis meant that the Chancellor, as decision maker, failed to inform himself of relevant evidence.
250. Mr Beard QC argued that at base this was a classic *Tameside* case: the Government did not have the evidence that it needed in order to take this critical and far reaching decision and it failed in its duty to conduct due inquiries needed to put itself in the position whereby it could take a rational decision. In their written submissions the Claimants argued:

"...A decision that is unsupported by evidence of probative value will be unlawful. In *R (Laws) v Police Medical Appeal Board* [2010] EWCA Civ 109, Laws LJ at [20] confirmed that judicial review was available in circumstances where there was

*“no legally sufficient evidence to justify the conclusion.”* It also demonstrates that the Defendants have failed to comply with their *Tameside* duties, as summarised in *Plantagenet Alliance* [2014] EWHC 1662 and *Balajigari* [2019] EWCA Civ 773 insofar as: *“no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision”* (*Balajigari* [70]).”

251. In a second line of attack Mr Beard QC also alighted upon what he argued was a serious mathematical error in the (limited) analysis performed by the KAI unit within HMRC which was used as an input into the analytical work conducted by OBR which then led to the OBR Forecast of 25<sup>th</sup> November which, in turn, informed the final decision of the Chancellor of 3<sup>rd</sup> December 2020.
252. Ms Mitrophanous QC for the Government rejected this analysis. In relation to identification of relevant evidence of the reasons she argued that whilst the CR did set out a Decision to abolish certain tax free sales, the reality was that this was only ever a decision subject to implementation. It could not exert any independent legal effect. Subsequently, and in response to strong representations made by stakeholders which included submission of the Cebr Report of September 2020, a review did occur of the evidence. The Cebr Report was put before the Chancellor. The OBR engaged with KAI who provided detailed Costings Explanatory Notes. OBR published its Forecast on 25<sup>th</sup> November 2020 and updated advices were put to the Chancellor which included a narrative summary of stakeholder concerns. The evidence leading up to the exercise of the statutory power to lay the SI and the formal withdrawal of ESC 9.1 on 3<sup>rd</sup> December 2020 had therefore to be taken into account in determining whether the decisions of the Government complained of were consistent with ordinary public law principles.
253. In relation to the merits, Ms Mitrophanous QC argued that in the absence of any binding legislation regulating the exercise of discretion, it was entirely a matter for the Government as to what factors were relevant to the exercise of the discretion to remove the tax concessions. She also argued that permeating through all quantitative and qualitative analysis was a deep-rooted inherent uncertainty as to the nature and extent of indirect effects. This was the consistent view of HMRC, HMT, KAI, OBR and, ultimately, the Chancellor. Any attempt to go beyond estimating Fiscal Cost and Exchequer Impact (themselves exercises of considerable uncertainty) was an exercise chasing unattainable accuracy and the generation of any figures through such an exercise would have been meaningless.
254. It followed that the extent to which the Government sought to perform any analysis of effects was a matter squarely for its discretion. It also followed that a decision as to the outer limits of any computation lay squarely within the decision-maker's broad discretion. On the facts Ms Mitrophanous QC highlighted the evidence demonstrating that an array of officials across relevant departments had all identified the limits of what was felt to be possible by way of quantification and she argued that their conclusions were rational.
255. She also pointed out that to plug any lacuna in the evidence placed before the Chancellor officials had in a variety of different reports and submissions highlighted in narrative form the case advanced by the Claimants and they had also placed before the

Chancellor the Cebr Report of September 2020 which set out what might fairly be described as the high water mark of the business case for retention or extension of the VAT RES. Ms Mitrophanous QC argued that the case put before the decision maker was accordingly fair and balanced.

256. In relation to the alleged mathematical errors Ms Mitrophanous QC submitted that, fairly described, the difference between the parties was not one of mathematical error but amounted to a difference of approach. She argued that the approach adopted by the Government was rational, even allowing for disagreement as to what the optimal way to calculate Fiscal Cost and Exchequer Impact was. But she went further and argued that taking the alleged errors into account, and modifying the KAI data accordingly, the difference in outcome was immaterial to the final balancing exercise conducted by the Chancellor. This was an area where the Government was entitled to a broad margin of discretion or judgment. The Decision was fair and rational.

***(iii) Issues to be considered***

257. There are 5 issues arising for determination:

- (i) Was the Government's discretion, as to the factors to be considered, unfettered?
- (ii) If the Government is subject to a rationality test does it enjoy a broad margin of discretion or judgment?
- (iii) What determines the scope of the relevant reasons?
- (iv) Was the decision of the Government not to conduct an analysis of Wider Economic Impact a breach of the duty to collect relevant evidence before taking a decision?
- (v) Did the Government commit mathematical errors in its calculations which tainted the Decision?

***(iv) Issue (i): Was the Government's discretion as to the factors to be considered unfettered?***

258. The Government in early submissions argued that since there were no statutory provisions governing the way in which the discretion was to be exercised there were accordingly no limits as to the considerations that the Government could take into account or, conversely, ignore. Subsequently, the Government accepted and clarified that ordinary principles of public law applied whereby decisions had to be rational. The Courts have, broadly speaking, identified three categories of consideration that decision makers must take into account. For example, in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037 at page [1049] the Court of Appeal stated:

“...[T]he judge speaks of a ‘decision-maker who fails to take account of all and only those considerations material to his task’. It is important to bear in mind, however, ... that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had.

Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.”

259. In relation to the third category the Supreme Court in *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 (“*Heathrow*”) has recently reviewed the authorities on point (*ibid* paragraphs [116] – [122]) and has confirmed that the considerations that a decision maker must take into account are governed by “*the familiar ... irrationality test*” (*ibid* paragraph [119]). In this case there is no statutory guidance on the matters the Government was bound to take into account or to preclude from consideration. Accordingly, the limits upon its powers are governed by ordinary principles of rationality.

**(v) Issue (ii): If the Government is subject to a rationality test does it enjoy a broad margin of discretion or judgment?**

260. The Government argues that it enjoys a very wide margin of discretion or judgment. It is for the decision-maker to determine what evidence it should collect and as to the intensity of the inquiry to be undertaken: see e.g. *R (Khatun) v Newham BC* [2004] EWCA Civ 55 at paragraphs [34] – [36] per Laws LJ. The Claimants argue, to the contrary, that in a *Tameside* case once it is established that the decision maker failed to arm itself with the relevant evidence it follows that the decision should be set aside. Mr Beard QC’s argument assumed a much more modest margin of discretion or judgment.
261. The application of public law principles to public law decisions is always fact and context specific (see e.g. *Taj v SSHD* [2021] EWCA Civ 1665 at paragraphs [86]-[93]). All decisions sit on a spectrum which, at one extreme, concern the position of individuals and define with specificity their rights, benefits and obligations. Frequently, the decision is the outcome of a largely non-discretionary process, such as a calculation to determine a benefit payment or the amount subject to tax. At the other end of the spectrum there are decisions based upon intrinsically political, scientific or social considerations of a broad and often uncertain nature. The present decision, albeit that it affects the financial position of individuals and companies, is towards this latter (broad) end of that spectrum. It involves the balancing and reconciling of a variety of potentially conflicting and incongruent objectives of a broad organisational, fiscal and commercial nature. These competing considerations are not readily amenable to easy or accurate quantification and compel the making of judgment calls about their nature and extent in order to balance one against the other. Such a balancing exercise, as was recognised internally, may lead to winners and losers. In my judgment the decisions which are in dispute are ones which attract a relatively broad margin of judgment or discretion for the decision-maker. None of this means that the exercise of discretion or judgment is beyond review, but it does mean that in determining what is reasonable and rational the Courts will pay close regard to the views of the many officials who agreed as to the nature and limits of the exercise to be performed and whose views the Chancellor evidently accepted.
262. I add one caveat. The Government argued that the breadth of this margin was extended by reason of the fact that the measures of abolition in dispute were part and parcel of a wider package of measures intended to address the departure of the UK from the EU.

In and of itself I consider this to be neutral. The mere fact that the challenged measures were part of a bigger package does not mean that an otherwise irrational measure, becomes rational.

**(vi) Issue (iii): What determines the scope of the relevant reasons?**

263. There is an issue between the parties as to what evidence is relevant in identifying the operative reasons. Is the Government limited to the reasons set out CR paragraphs [3.25] - [3.27] or can it also rely upon reasoning, analysis and justification set out in other internal documents leading up to the formal actions taken to bring the schemes to an end on 3<sup>rd</sup> December 2020? The Claimants contend that the Decision is reflected in the CR of 11<sup>th</sup> September 2020 and in particular in Paragraphs [3.25] – [3.27] (set out at paragraph [47] above). The reasoning there is terse, conclusionary, and in some respects plain illogical and wrong. The Claimants object to the Government relying upon internal documents, most of which post-date the Decision, in order to supplement or explain away what is alleged to be deficiencies of reasoning in the CR. The Government is unlawfully seeking to pull itself up by its bootstraps by introducing new reasons which did not feature in the Decision. It is a basic principle of public law that decisions must be justified upon the basis of the reasons given *at the time*. A decision maker cannot, after the event, in a belated attempt at self-justification, come up with a new set of different (and better) reasons.
264. The Government argues that the relevant reasons are set out in the CR but also in relevant documents post-dating the CR leading up to the decisions of the Chancellor on 3<sup>rd</sup> December 2020. But at the same time, they *also* object to the Claimants seeking to rely upon documents and evidence which they say post-date the CR and which were not adduced by them in their consultation responses to the CP.
265. I turn to my conclusions on this. Courts permit new reasoning to that contained in the challenged decision in rare circumstances: see e.g. *R v Westminster City Council ex parte Ermakov* [1995] EWCA Civ 42 pages [315g]-[316g]. There the Court of Appeal accepted that in certain circumstances it was right to admit evidence to elucidate or exceptionally correct or add to reasons but should be "very cautious" about doing so. Courts will be hostile to the receipt of new evidence "... which indicates that the real reasons were wholly different" from the actual reasoning. In *Alletta Nash v Chelsea College of Art and Design* [2001] EWHC 538 (Admin) the Court considered the position in relation to cases where (as here) there is no express statutory duty to give reasons and identified five (to some degree overlapping) factors to be assessed: (i) the consistency of the subsequent reasons with the original reasons; (ii) whether the new reasons were in fact the reasons of the actual decision maker; (iii) whether there was a risk that the later reasons had been composed as a retrospective justification for the earlier decision; (iv) the extent of the delay before the new reasons were advanced; and (v) whether the new reasons were advanced following the commencement of proceedings in which case they needed to be treated "*especiallly carefully*".
266. The duty of this court is to find the facts, and this includes making findings of fact about the *actual* reasons motivating abolition. In my judgment the relevant reasons are to be found in all documents leading up to the decisions taken by the Chancellor on 3<sup>rd</sup> December 2020. There are four considerations to be taken into account.

267. First, the Decision (in the CR) could not, by itself, alter the law and could only, legally, ever stand as a statement of intent. Between the date of the CR and the later exercise of the statutory power, the chronology shows that the Chancellor sought new evidence and analysis on a variety of matters and that new evidence was indeed submitted. The advices put to Ministers contemplated the taking of a future exercise of the statutory power (to lay the SI pursuant to the power under section 51(1)(a) and (c) of the Taxation (Cross-border Trade) Act 2018) and a formal act of withdrawal of ESC 9.1 and were provided in the light of the most up to date evidence. They were not advanced upon the basis, for instance, that the power to take both actions had already been exercised or that the Minister's discretion was otherwise fettered by the Decision set out in the CR. The Government, in written submissions, accepts that the decisions taken on 3<sup>rd</sup> December 2020 were separate decisions. It refers to: "...the subsequent decision to implement withdrawal of the schemes was taken following and informed by the OBR analysis." Moreover, constitutionally, the decision to abolish the VAT RES was that of Parliament which could in theory (under the negative resolution procedure) have opposed and rejected the SI. Under the negative resolution procedure which governed the coming into effect of the SI, it became effective as of the date of laying i.e. 3<sup>rd</sup> December 2020. It could therefore be said that, on one view, the operative decision for the VAT RES was that of Parliament and the reasons for this would at least include those expressed in documents which immediately preceded the laying of the SI. In these circumstances it is wrong to focus exclusively upon the reasoning in the CR because that simply does not reflect reality.
268. Secondly, whilst in some respects the reasoning in paragraphs [3.25] – [3.27] of the CR is conclusionary and not always consistent, it is wrong to treat these three paragraphs as continuing the full reasoning of the Government in relation to the ESC. For this it is necessary to look at the CR more broadly and as a whole in order to identify the full suite of reasons. For illustration, the Government's conclusions on its duties under the GATT are not referred to in paragraphs [3.25] – [3.27] but elsewhere, for instance in paragraph [3.19]. It is also relevant that the CR is a brief document addressed to the world at large summarising, in often sweeping and high-level terms, the Government's conclusions. A court will adopt a more holistic approach to such a document than in relation to other decisions of a more personalised nature, such as those addressed to named natural or legal persons setting out the conclusion of a regulatory enforcement procedure and imposing a sanction, or granting or denying a social benefit, or denying housing, or refusing admission to a school, or refusing planning permission to a homeowner to extend a dwelling, etc.
269. Thirdly, these same points apply to the objections made by the Government to the Claimants' reliance upon evidence that is said to be inadmissible because it was not advanced in response to the CP. On the facts of the case the Government took that new evidence (such as the Cebr Report of September 2020) into account and it was factored into fresh advice given to Ministers leading to a fresh decision. It played a material part in the on-going process leading to the decisions taken on 3<sup>rd</sup> December 2020. It would be equally artificial to exclude it.
270. Fourthly, the Government argues that the Claimants cannot rely upon evidence given by the OBR to the Treasury Select Committee in which it is said that the OBR admitted that it had not conducted a full analysis of the effects of abolition. It is said that on well-established principle it is not open to a party to litigation to rely upon evidence

given in a Parliamentary Committee or as to the view of such Committees since this would violate Parliamentary Privilege as it would call into question those proceedings in the courts. I disagree. The OBR evidence was given in the light of the publication of its Forecast on 25<sup>th</sup> November 2020 (see paragraphs [56] – [61] above). In that public document OBR acknowledged that because of the imponderables involved its estimates might not be accurate. The evidence now relied upon by the Claimants concerned that report and therefore focused upon actions taken or not taken by OBR *outside* of Parliament. Moreover, the evidence relating to those non-Parliamentary actions was given in public session. It was relayed live on Parliament TV. A video recording of the evidence is available on the Parliament website which stands as a public record of the evidence. As at the date of this Judgement it can still be viewed. There is no disagreement as to this evidence. The Claimants do not rely upon that evidence to call it into question, or as a challenge to the proceedings of the Select Committee. If the OBR had been asked in a separate letter to confirm the evidence, perhaps under a FOIA request, I have no doubt that it would have done so. No authority was cited to support reliance upon Parliamentary Privilege as an exclusionary device which stretched to this extreme. Indeed case law indicates that no privilege applies: See e.g. *Justice for Health Limited v Secretary of State for Health et ors* [2016] EWHC 2338 at paragraphs [157]-[165]; and *Stagecoach Midland Trust Ltd v Secretary of State for Transport* [2020] EWHC 1568 (TCC) per Stuart Smith J (and he then was) at paragraph [79]. In my view the Claimants are entitled to rely upon that evidence in the manner that they do.

271. In the light of these considerations in order to reflect reality and identify the *real* reasons which motivated abolition it is necessary to include evidence pre and post-dating the CR and up to the point of the decisions taken on 3<sup>rd</sup> December 2020 and to consider the full evidence, fairly and objectively, in the round.

***(vii) Issue (iv): Was the decision of the Government not to conduct an analysis of Wider Economic Impact a breach of the duty to collect relevant evidence before taking a decision?***

272. I turn now to the central issue: did the Government act unlawfully when it decided not to conduct any quantitative analysis of the Wider Economic Impact?
273. In my judgment the decisions taken by the Government in relation to (i) the evidence collected; (ii) the evidence not collected; (iii) the analysis undertaken on the basis of evidence collected; and (iv) the evidence put before the Chancellor concerning stakeholders' cases about wider economic effects and the balancing exercise conducted by him upon the basis of all the evidence, were well within the margin of his discretion and judgment. In my judgment this means that the Chancellor properly informed himself as to the information needed to take the relevant decisions and conducted a proper balancing exercise of pros and cons.
274. There is no need to set out a detailed account of all steps taken leading up to the Decision of 11<sup>th</sup> September 2020 or the later decisions taken on 3<sup>rd</sup> December 2020. I propose to set out first my broad conclusions on the way that the relevant thinking evolved. I will then address the key point which concerns the limits on the sort of analysis that can be expected of Government in a case such as the present.
275. The CP was the culmination of a good deal of internal work conducted in 2019 and early 2020 by HMRC and HMT as to the future of fiscal policy following exit from the EU. This is set out in detail in the witness statements and supporting disclosed

documents. During that work various economic reports prepared by relevant commercial stakeholders, extolling the benefits of the tax-free schemes, were considered. These included a Cebr Report from 2017 and a report from York Aviation dated March 2020. These were based upon data preceding the commencement of the Covid-19 Pandemic. They did not analyse the effects of abolition since, at that stage, this was not in contemplation. Nonetheless, the reports provided evidence of the benefits of tax (or VAT) free including of its extension following expiry of the Transitional Period, and it can be properly inferred from this material that abolition would, in the view of business, lead to significant adverse economic effects. Mr Michael Cunningham, Deputy Director at HMT, in his witness evidence to the Court, explained that HMT and HMRC were aware of and took these reports into consideration in the decision to launch a consultation. They contributed to the provisional view that the schemes might be extended. Their reliability was however questioned:

“The reports presented the Wider Economic Impact of the schemes and relied on behavioural judgements and assumptions, which officials considered to be at the very upper end of the range for this type of analysis, and not what the OBR would likely deem as ‘reasonable and central’. While stakeholders might refer to these reports as evidence of the benefits of extending the scheme, they are very clearly estimates and predictions and open to challenge. These reports also contained little discussion about the uncertainties in predicting behaviour or the impact of passenger/visitor numbers, as KAI’s initial analysis of the Fiscal Cost had done. My team also had conversations with KAI about the general findings in these reports, with the view taken that these types of analysis were significantly uncertain and the claimed outcomes very difficult to predict. ... [M]y team and KAI also held a meeting with the authors of the March 2020 York Aviation report to understand better the data used in their analysis of the Exchequer Impact of extending tax- and duty-free sales which formed part of their assessment of Wider Economic Impact. However, in short, we formed a different view to these reports on the behavioural assumptions and uncertainties that fed through into the claimed Wider Economic Impact of the schemes.”

276. The nature, and importantly the limits, of possible quantitative modelling of the impact of abolition prior to the CP was described by Mr Cunningham in witness evidence. In the run up to the Decision the Government did conduct analysis of the impact of abolition. The following categories of quantitative data were collected by HMRC and HMT teams following the launch of the consultation and over the course of the consultation period: (i) KAI analysis and research in April 2020 on the total number and value of VAT RES refunds which included data on the total value of sales for which a VAT RES refund had been received; (ii) ONS passenger numbers to the UK from both EU and non-EU countries; (iii) internal HMRC data and industry data on regional use of the VAT RES; (iv) HMRC research in 2019 on the prevalence and types of fraud found in the VAT RES; (v) HMRC research conducted from September 2019 - July 2020 on administrative fees charged to VAT RES users; (vi) HMRC survey data from May 2020 of VAT RES users’ perceptions, behaviours and decision making; (vii)



analysis of the Fiscal Cost of the VAT RES and tax-free airside sales, using data on the level of VAT RES refunds and transactions which the ESC applied to; (viii) analysis of the Fiscal Cost of extending both schemes to the EU; and (ix), analysis of consultation responses, which included industry views on the impacts of withdrawing the schemes.

277. Mr Cunningham explained how KAI had considered performing a broader Wider Economic Impact assessment but that this not been pursued because such was the uncertainty of the assumptions that would have to be made that any estimation was felt to be insufficiently precise to be reliable<sup>24</sup>:

“21. One issue was the extent to which KAI could assess the potential behavioural factors needed to build on the Fiscal Cost to produce wider analysis of the VAT RES as it currently operated and what it might be if it was extended to EU residents. Page 7 of the scoping paper posed a question about commissioning KAI to look at the tradeoff between the loss of revenue from VAT RES claims and the potential gain in high street sales from the scheme.

22. KAI did not ultimately conduct the analysis as originally posed in the scoping paper. This was because, in my team’s discussions with them, it became clear that the assumptions on which such an analysis would depend were too uncertain in this case to arrive at a ‘precise’ number for these impacts. I understand from my team’s conversations with KAI that a significant difficulty was that any precise empirical estimates that are broader than the Fiscal Cost, including the effect on the high street, of the VAT RES or tax-free airside sales would be heavily dependent on key behavioural assumptions which were uncertain (e.g. on how it would affect purchasing decisions and someone’s decision to visit the UK in the first place). Making these precise behavioural judgements, alongside the difficulty in obtaining, for example, granular sales data from retailers, was a key issue with conducting this kind of ‘precise’ estimate. However, my team had ongoing discussions with KAI from December 2019 onwards about potential ways to approach this issue and other analytical questions posed in the scoping paper.

23. In the event, KAI used a variety of data sources to initially assess the Fiscal Cost of the schemes, before the OBR forecast which would incorporate behavioural assumptions to assess the Exchequer Impact (which as explained ... was not until November 2020). KAI’s analysis of the Fiscal Cost included analysis and discussion of the current cost and the impact of extending the schemes ... and ... – for example, KAI estimated

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<sup>24</sup> “KAI” is the HMRC “Knowledge, Analysis and Intelligence” team. Its main purpose is to work with partners across HMRC, HMT and the OBR to provide relevant analysis to support tax policy.

the Fiscal Cost of the VAT RES using the total amount of VAT which refunded through the scheme, and the amount of VAT not charged to passengers travelling to non-EU countries for tax-free airside sales. This analysis also included analysis and discussion about the potential option of extending the schemes to EU residents, with uncertainties around passenger numbers and behaviours – as would be expected in any type of analysis such as this. MC5, which contained a section on the Fiscal Cost of extending the VAT RES to the EU, also included a discussion of the key behavioural factors that industry considered important (§44) and which would influence any estimate of the Exchequer Impact, subject to the limitations I have just explained. The Fiscal Cost of extending the schemes were presented to the Chancellor across the series of advices...”

278. In the CP the Government sought evidence in relation to the possible effects of abolition. Questions 11 and 13 posed questions in relation to abolition of both the VAT RES and ESC 9.1. I have set out at paragraphs [36] – [39] above the submissions made by the three Claimants in this case. The CR records the existence of these submissions. In the CR the Government expresses its reservations about this evidence (see paragraph [41] above). The position set out in the CR was not however to reject altogether the proposition that abolition would have a significant impact, rather it questioned whether the impact was as great as suggested in consultation responses.
279. In responses to the CP the Claimants did not submit detailed expert evidence on the effects of abolition. The accounts given reflect, more or less, the full narrative account of the submissions made. Nothing along the lines of the Cebr report of September 2020, which expressly addressed the effects of *abolition*, was therefore included in consultation responses.
280. Following the CR, the Government did not reject new economic evidence upon the basis that it had not been submitted during the consultation period set out in the CP. Mr Cunningham, in his evidence, acknowledges the negative response from business and industry to the Decision and refers to the complaints made to the effect that no proper analysis had been conducted of adverse effects. With regard to the Cebr Report he stated that officials felt that “*the report contained numerous stretching assumptions*”. He gave two examples. First, the report concluded that the non-EU visitors would reduce by 7.3% or 1.17m which was almost the total number of current users of the VAT RES scheme. Officials felt that it was unrealistic to think that all current VAT RES users would cease to come to the UK. The report also referred to a 4.96m reduction in visitors, a £6b spending reduction, 138,000 job losses and a £3.5b net Exchequer cost. Mr Cunningham commented that there were only 1.2m visitors who used the VAT RES in 2019 many of whom paid significant administrative fees and that it was therefore “... *difficult to see how the withdrawal of the scheme could lead to roughly four times that many visitors ceasing to visit GB*”. Notwithstanding, the Cebr Report was submitted to the Chancellor who noted its existence and contents.
281. The OBR Forecast was published on 25<sup>th</sup> November and was submitted to the Chancellor. The conclusions on the VAT RES and ESC 9.1 are set out at paragraph [22] above. In relation to the VAT RES the OBR provided a short narrative summary of adverse effects. It recorded that abolition would lead to “... *costs as the UK becomes*

*less attractive for affected tourists relative to alternative EU destinations such as Paris or Milan*". The Forecast did not proceed to measure Wider Economic Impact but did make some assumptions about the possible impact upon Exchequer Impact. These took account of a reduction in tourism attributable to the deterrent effect of a price increase in the sorts of luxury goods which were sold under the scheme. The base for the calculation was an industry wide price elasticity figure of 1.28, derived from a PWC Final Report - *"The Impact of Taxes on the Competitiveness of European Tourism"* (October 2017). The OBR then scaled the figure upwards by 50% to reflect an assumption that the elasticity of demands for luxury goods was materially higher than for tourism generally. This led to a figure of 1.9%. When this was applied it led to a reduction in the tax yield from abolition (Exchequer Impact). It was considered that the final estimates were nonetheless still *"highly uncertain"*.<sup>25</sup>

282. In relation to the ESC 9.1 no equivalent price elasticity analysis was performed. The OBR considered that the main impact would be on the sales of beauty products (perfumes and cosmetics) since these generated around 50% of total sales in duty free shops. Any exercise in evaluating the tax yield from this was *"... again subject to uncertainty around the behavioural response. It is not clear how much of the tax rise will be passed through to the prices faced by consumers or the degree that any price rises will reduce sales"*.
283. I turn now to my conclusions. Having described the evidence that was considered a central point is the margin of appreciation that must be applied to the decision-making process. As already set out this is relatively broad. In this connection it is relevant to consider the nature of the evidence needed to estimate the wider impact of abolition. Ms Mitrophanous QC argued, based upon the OBR analysis, that it reflected the view of an expert body that even a first level assessment of effects (to arrive at Exchequer Impact) was highly uncertain. It necessarily followed that the sort of secondary and tertiary indirect effects the Claimants contended should have been modelled were simply not worth performing because of the uncertainty and unreliability of the assumptions that would have been required to be made. The Court should attribute real weight to the independently formed judgment of the OBR as to the limits of any exercise in counterfactual forecasting. This was the essence of its professional stock in trade. I agree that weight should be attributed to their evaluation for the reasons given. Their assessment is not beyond judicial scrutiny, but it is entitled to considerable respect. In this case the view of OBR was that the first level estimation of Exchequer Impact was at the margin of (and possibly even beyond) that which was feasible. It followed that it was reasonable for OBR to conclude that to go further would render any resultant figure unreliable.
284. The OBR is an independent body. It was established under section 3 of the Budget Responsibility and National Audit Act 2011. In written submissions the Government describes it as *"... a central part of the UK's fiscal framework, with responsibility for*

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<sup>25</sup> A price elasticity of demand refers to how much demand changes because of a price change. Where prices increase the elasticity is generally negative reflecting the fact that higher prices tend to reduce demand. The greater the magnitude of the negative number, the higher the expected fall in demand. A price elasticity of -1.5 would indicate that an increase in price of 10% would reduce demand by 15%.

*examining and reporting on the sustainability of public finances*”. Chapter 4 of the latest version of the Charter for Budget Responsibility (*“the Charter”*) issued by HMT (Autumn 2016) contains guidance on the statutory remit of the OBR within the framework of Government fiscal policy. The OBR has the task of providing *“independent scrutiny and certification”* of Government’s policy costings. It must state whether it *“agrees or disagrees”* with costings and determine any resultant impact of a policy on the OBR’s economic forecast.

285. It is worth setting out how the OBR goes about making estimates. In *“Briefing paper No. 6 - Policy costings and our forecast”* (March 2014) the OBR describes how it set about estimating the effect of policy measures upon the economy and public finances. This reflects the considered, and public, view of OBR and goes to the heart of the issue. An important theme running through the discussion is the uncertain nature of the exercise of seeking to measure the ripple effects of a change in policy. In paragraph [3.4] the ability to perform robust counterfactual analysis is acknowledged as a *“key”* question for determining policy costing. In paragraph [3.15] the OBR endorses an earlier statement by the Institute for Fiscal Studies that coming up with a perfect measure requires answering *“virtually every question, theoretical and empirical, that has ever been asked in economics.”* The relevant text, in full, is as follows:

“3.2 A policy costing is an estimate of the impact on the public finances of a new policy compared with a counterfactual scenario in which the policy is not introduced (i.e. the current policy continues). This means that the first step in any approach to costing a policy change is to establish the baseline ‘no policy’ counterfactual. For example, in considering the effects of reducing the rate of beer duty it would first be necessary to forecast the quantity of beer that was expected to be purchased absent any change in policy.

3.3 The objective of costing an individual policy measure is to reflect as accurately as possible the full effects the policy change will have on the public finances. Meeting that objective would ensure that forecasts of the public finances are as accurate and unbiased as possible and allow policymakers to make informed trade-offs between different policy options. In addition, when producing a forecast of the public finances, which informs the Chancellor’s decisions about the overall fiscal policy setting, a key objective is to understand the net impact of the policy package as a whole.

3.4 A policy change can potentially affect the public finances through a variety of channels, some of which are more straightforward to quantify than others. This is because policy changes will often influence the behaviour of those affected, which can lead to a complex chain of interlinked effects on the economy and public finances. A key question when producing policy costings is to what extent these micro-level behavioural effects and macrolevel indirect effects can be robustly estimated in policy costings.

3.5 There are different ways the chain of effects of a policy measure can be broken down. For the purposes of this briefing paper, we have used the following five steps, as the effects of the policy change filter through the economy:

- The static effect of changing policy parameters such as tax rates or thresholds, before considering any behavioural response from firms or individuals;
- The immediate direct behavioural effects of firms or individuals to the policy change;
- Micro-level behavioural effects in closely-related areas that are small in relation to the whole economy;
- Macro-level behavioural effects of policy changes that are material in relation to the whole economy; and
- The overall net impact of the policy package as a whole.

3.6 The first step to costing a policy change is to consider its static effects. These are the immediate fiscal effects of a policy change, ignoring any impact on the behaviour of those affected by the change or any knock-on effects to the wider economy. In the beer duty example, that would mean applying the new beer duty rate to the baseline forecast of the quantity of beer clearances and calculating the difference in beer duty raised on the new and old basis. This calculation would be relatively simple, but the behavioural and wider effects ignored could be material. As the examples in Chapter 4 illustrate, in some cases even the static effects can be difficult to calculate where there is considerable uncertainty about the baseline forecast.

3.7 Policy changes can affect people's incentives and decisions on a range of economic behaviours, such as how much they work, the quantities and types of goods and services that they consume, and the amount they save. Indeed policymakers often change policy settings precisely in order to induce certain behavioural and economic changes. These effects may have a material impact on the public finances.

3.8 The first-round of such behavioural effects concerns the particular area of taxation or spending directly affected by the policy change. In the beer duty example, the reduction in beer duty leads to lower beer prices, which, given the price elasticity of beer consumption, would increase beer clearances relative to the baseline. This would tend to push up total beer duty receipts which would to some extent – dependent on the price elasticity – offset the simple static effect, whereby a lower rate of beer duty on each unit sold would reduce receipts.

3.9 Behavioural changes may also affect closely related areas of taxation or expenditure. For example, the cost of beer and therefore the rate of beer duty could be a factor in the consumption of cider and other types of alcohol. Therefore a reduction in the beer duty rate could lead to a reduction in the consumption of cider, assuming there was no corresponding change in cider duty. HMRC has developed a variety of cross price elasticities to model such outcomes.

3.10 This chain reaction of behavioural responses to one set of policy changes affecting other decisions theoretically continues until all prices and quantities in the economy have adjusted to the new policy landscape. In the example of reducing beer duty, these wider indirect effects include a near-term effect on inflation, since the post-tax price of alcohol makes up part of the inflation measure, with possible knock-on effects for household consumption. Changes to the forecast size or composition of the economy would have second round of effects on the public finances – for example, temporarily lower inflation would affect the amount of interest paid on index-linked gilts and could affect the uprating of tax and benefit thresholds; changes in household consumption could affect VAT receipts; and so on.

3.11 Finally, while understanding the full effects of individual policy measures is important, it is also necessary to consider the net effect of the overall policy package. In recent Budgets and Autumn Statements, a typical policy package has included around 50 to 60 policy measures. As well as the chains of effects from individual measures, there will be interactions between the measures that need to be taken into account. Approaches to costing policy measures and packages

3.12 In simple terms, costing policy measures can be approached bottom-up (from the individual measures), top-down (from the net impact of the overall package), or through some combination of the two. In choosing the best approach(es), analytical tractability and transparency of presentation are both important considerations.

3.13 As we noted earlier, the Treasury publishes a scorecard of policy measures alongside each Budget and Autumn Statement, in which it quantifies the impact of each policy measure on public sector net borrowing (the ‘costing’) over the five years of the forecast horizon. In doing so, it incorporates for each measure the first three of the five steps listed above – the static impact, the direct behavioural impact and any micro-level behavioural impact in closely related areas. Under the terms of the Charter, the Treasury is free to decide which policy measures to include in – and exclude from – the scorecard and what costs to attribute to them.

3.14 Our ultimate objective is to assess the aggregate impact of the whole policy package and thus to produce the best forecast we can of the outlook for the public finances, taking into account all the latest decisions. In doing so, we state publicly whether we believe that the individual costings in the Treasury's scorecard are central and reasonable, taking the scope of the assessment as given. We then incorporate these costings (or our preferred alternatives) into our forecast, also taking into account the impact of other policy measures that the Treasury may have omitted from the scorecard and, where material, reflecting the fourth and fifth steps identified above – namely the macro-level behavioural impact of the individual measures and the impact of the package as a whole on the aggregate balance of demand and supply in the economy, and thus the setting of monetary policy. Since the dividing line between what should be considered part of the bottom-up direct costing and what should be treated as a wider indirect effect is not clear-cut, it is important to ensure there is no double-counting of effects and to avoid any material effects being missed.

3.15 Splitting the five steps in this way – and dealing with the fourth and fifth in a top-down fashion – makes sense given the time and resources available to us during the pre-statement policy scrutiny process. In principle, we could analyse all the numerous knock-on behavioural effects of each policy measure and attribute the overall impact on the public finances to that measure, a process known as 'dynamic scoring'. Quantifying the 'general equilibrium' fiscal effects of policy changes in this way is far from straightforward. As the Institute for Fiscal Studies has noted: "The difficulty [with dynamic scoring] is that coming up with this perfect measure would require answering virtually every question, theoretical and empirical, that has ever been asked in economics."

286. The Courts are familiar with dealing with counterfactual regression analysis which seeks to predict how Government policy will affect future commercial activity. In *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture Media and Sport and others* [2014] EWHC 3236 (Admin) the claimant challenged the legislative framework introduced by the Gambling (Licensing and Advertising) Act 2014 which, in essence, changed from a system of regulation based upon place of supply to one based upon place of consumption. It was argued that the new regime would exert damaging consequences for consumers and would encourage the development of an unregulated market by incentivising operators to offer gambling services into the UK without a licence and/or in breach of the regulatory controls and will thus harm the consumer. The burden imposed by the new regime on reputable operators would provide a competitive advantage to competing but unscrupulous overseas operators. It was said that "inevitably" an element of the cost burden of the new regime would be passed on to UK consumers by licensed overseas operators. Further, the costs of the burden of the new regime would reduce the marketing spend of compliant operators decreasing the resources that could be applied to attracting and

retaining UK customers. It was then said that this would attract unscrupulous operators to the market who, not having these costs, would be able to undercut, or enjoy greater profitability than, licensed overseas operators. The Court did not accept that this calamitous chain of events would occur. The argument was premised upon a series of assumptions that were far from self-evident and, indeed, seemed economically counter-intuitive. If they were to acquire forensic "legs" they needed credible quantitative price elasticity evaluations of the sort performed in other types of case. The Court then identified all of the assumptions that were necessarily built into the claimants' argument and highlighted how speculative and unlikely they were (*ibid* paragraphs [165] – [168]).

287. A similar point was made in *British American Tobacco (UK) Ltd and others v Secretary of State for Health* [2016] EWHC 1169 (Admin) where the Court was confronted with an argument that expert regression analysis<sup>26</sup> demonstrated that the basis upon which the Government had legislated (to introduce plain packaging for tobacco products) was false. The Court rejected the argument including upon the basis that the regression evidence in question did not set out clearly the assumptions upon which it was based and that the assumptions were likely to be uncertain in their essential nature. Any form of predictive economic modelling was only as good as the accuracy of the assumptions which were its foundations<sup>27</sup>.

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<sup>26</sup> In *BAT* (*ibid*) at paragraph [487] the Court defined regression analysis as:

“... a common statistical tool used to investigate relationships between variables. The investigator will seek to ascertain the causal effect of one variable upon another. A classic illustration is the impact of a price increase upon demand. In order to conduct this inquiry the compiler assembles data on the relevant underlying variables and then employs regression to estimate the quantitative effect of the causal variables upon the variable that they influence. The inquiry will also normally assess the "statistical significance" of the estimated relationships i.e. the degree of confidence that the true relationship is close to the estimated relationship. In the present case the counterfactual being assessed is the use and prevalence of tobacco in a market where standardised packaging as mandated by the Regulations is operative. Many factors operate upon use and prevalence: tax and excise duty; prior regulatory restrictions; the pricing policies of individual tobacco companies; etc. Regression analysis seeks to disentangle these divergent and variable forces in order to measure how only one such force or impetus is working.”

<sup>27</sup> The Court cited classic literature on the uses and misuses of such analysis as evidence in judicial proceedings. At paragraphs [603]-[606]) the court considered the analysis of Professor Alan O Sykes in his classic article "*An Introduction to Regression Analysis*" (Coase-Sandor Institute for Law & Economics Working Paper No. 20, 1993). Professor Sykes explained how different types of manipulation of data fed into underpinning



288. The point made by Mr Cunningham (see paragraph [277] above) as to the view of officials, echoed in the OBR evidence to the Select Committee, that any properly reliable assessment about future impact was subject to multiple, essentially unknowable, assumptions, in my judgment, has considerable force. This is because of the difficulty of determining how an increase in price would affect demand side elasticity both in and of itself, but also in the context of the impact that the continuing Covid-19 Pandemic has exerted upon retail sales.
289. Measuring the impact on sales relies upon a series of assumptions about how travellers and consumers will react to a price increase. This begs a host of questions about the extent to which tax concessions drive retail demand and the extent to which absent the concessions retailers would absorb the price increase or pass it on and if passed on as to the extent of the pass-on and as to the extent to which consumers would be prepared to pay more or would switch and, if they did switch, as to the numbers switching, and as to which substitute products and whether that switch would be to retailers in the UK or elsewhere, etc.
290. That impact, even assuming it were measurable with any degree of validity, is then complicated by the effects of the Covid-19 Pandemic which necessitates the posing of a series of further questions to be answered with some modicum of reliability. Examples of such uncertainties include the extent to which Covid-19 has decreased demand for travel and for tax free shopping and the extent to which in the future demand will recover and at what rate and when, if ever, it will return to pre-Covid-19 pandemic rates? Answers to these questions in turn depend upon variables beyond the control of retailers and will be affected by the adoption, and success (or failure), of palliative Governmental health measures in the UK but also elsewhere in the world where travellers go to and come from; and yet further upon the extent to which the experience of shoppers during lock-down, acquiring goods on-line, causes a permanent switch in shopping habits which, in turn, also suppresses longer term demand for tax free shopping?
291. In the present case the Claimants rely, for example, upon the conclusions in the Cebr Report. A difficulty with this analysis is that the assumptions made about demand and price to determine the relevant elasticities derive from 2019, ie the period prior to the onset of the Covid-19 pandemic, even though for obvious reasons the *status quo ante* has radically altered and might never return. This is bound to lead to an exaggeration of the impact, *even if* everything else in the report were to be treated as impeccably reliable.
292. Pulling these threads together my conclusions are as follows. First, there is a relatively wide margin of judgment or discretion to be accorded to the Government as decision maker. Secondly, it applies to all stages of the process leading up to the taking of the decisions to abolish the schemes. Thirdly, in deciding which categories of evidence should be taken into account the Government correctly identified that the Wider Economic Impact of abolition was a relevant consideration. Fourthly, it would have been irrational to have ignored it altogether given that it had been raised by stakeholders, officials considered that there was at least some evidence that the wider effects of abolition could be materially damaging to the sector, and the Chancellor had

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assumptions behind modelling could distort the end result and, in effect, enable the author to generate the result that was seen as the predetermined and desired end result.

specifically requested that some analysis of behavioural effects be considered. This is all evidence supporting that conclusions that in some appropriate way it had to be a relevant matter to be factored into the overall balancing exercise. Fifthly, in deciding *how* to address that category of evidence the Government was entitled to conclude that it could not be addressed through quantitative modelling given the number and uncertainty of the assumptions that would have to be made in order to arrive at any result, and the inherent unlikelihood of being able to arrive at a reliable end figure. Officials acted rationally in limiting their analysis to Exchequer Impact, albeit that they attached a strong warning label to even that analysis about its uncertainty. Sixthly, officials were right to put the case of affected stakeholders to the Chancellor in the form of a narrative summary of it, and in submission of the Cebr Report. Seventhly, officials were perfectly entitled to include in advices to Ministers a critique of the reliability of the Claimants' case. Eighthly, the Chancellor was entitled to consider that there could be adverse effects from abolition for business and the economy *but* that these had to be balanced against rival and sometimes contradictory policy considerations. Ninthly, the Chancellor was entitled to conclude that, balancing all competing considerations, abolition was a proper decision to make notwithstanding the existence of wider adverse effects.

293. Standing back, my conclusion is that the decision-making process leading up to abolition was characterised by the Government seeking and obtaining relevant evidence and conducting a proper balancing exercise. This process and the resultant decisions were squarely within the Government's margin of judgment and discretion. Whilst the process of arriving at this conclusion has entailed considering and evaluating a very substantial body of complex material and evidence, I do not consider that the opposite conclusion is arguable. Evidential complexity and arguability are not synonymous.

***(viii) Issue (v): Did the Government commit mathematical errors in its calculation of Exchequer Impact which tainted the Decision?***

294. The final limb to the rationality challenge is the argument that the KAI, in preparing Costings Explanatory Notes for the OBR, made material mathematical errors. This argument surfaced late on. It was said to emerge from disclosure of the Notes given by the Government shortly before the oral hearing. It was nonetheless fully addressed in expert and witness evidence and was developed at some length in submissions.
295. The Claimants argue that two principal errors were made by KAI in the Costing Note dated 19<sup>th</sup> November 2020 provided to OBR shortly before it finalised and published its Forecast. It concerned the VAT RES. For ease of reference this Note is referred to as "MC 28". The purpose of MC 28 was to estimate the Exchequer Impact of abolishing the VAT RES; it was not to estimate the Wider Economic Impact. The policy behind this exercise, and the reasons for moving beyond Fiscal Costs to Exchequer Impact, was explained in the witness evidence of Ms Katharine Peters. She is the Deputy Director at HMRC, KAI, Indirect Taxes Customs and Coordination team. She explained that the extent of any evaluation of the wider impact of a policy change upon yields from other taxes would depend upon the existence of clear causal connections:

"12. Occasionally costing notes will assess the impact of a policy on other taxes and duties if there is a very clear and direct link.

...

13. Costing notes do not assess the broader impact of tax policy changes on economic variables such as Gross Value Added or Consumer Price Index. The impact of a measure on broader economic variables, and the impact of those variables on other tax revenues (such as corporation tax receipts) is included in the indirect effects process if deemed appropriate by the OBR.”

296. There is no need to go into a detailed review of the maths in order that the issue be described, and my conclusions set out. This is because the Government has adjusted the relevant analysis in MC 28 to build in the approaches that the Claimants advocate and the result, says the Government, is only marginally different.
297. The alleged errors derive out of the approach adopted to the calculations in Tables 7 and 8 of MC 28. Table 7 concerns VAT refunds as a proportion of all travel spending. It was an attempt to work out the impact of a price increase on the total number of travellers from the rest of the world who would visit the UK. Table 8 was concerned with the cost of a reduction in such visits. To this extent the two Tables were linked. The universe of travellers used in Table 8 was different however to that used in Table 7. Put shortly, and at the risk of over-simplification, the argument was that there was inconsistency in the approach taken as between the two tables, when there should have been consistency and that this amounted to a plain mathematical error which led to an underestimation of the impact of abolition.
298. Ms Peters in her witness evidence stated that “*on reflection*” if one adjusted the figures in the way that the Claimants suggest, to achieve consistency, the difference would be an increase in visitor numbers diverted away from the UK from 28,824 to 81,473:
- “26. On reflection if we did treat the elasticity as a measure of the sensitivity of VAT RES users to changes in prices, then we could have adjusted the value of VAT RES purchases as a proportion of total spending by only VAT RES users. For illustration, we have replaced the 21% with 59% (which is the proportion of VAT RES spending as a proportion of total travel spending for VAT RES users, as found in the HMRC survey referenced in MC26, Annex B paragraph 2). This would mean the 2.8% would become 7.9%. The visitor impact would change from 28,824 in Table 8 to 81,473.”
299. As to the economic impact of this adjustment upon Exchequer Impact: “*This would change the costing impact described at the end of Table 8 from £10 million to £30 million, compared to a total static cost of £525 million.*”
300. In the light of this Ms Mitrophanous QC made four main points.
301. First, she argued that the way in which the Claimants advanced their case was on the basis of a difference of approach. This was not a case where the Court had identified an error of maths or computation which was verifiable in binary right/wrong terms. She said that it was impossible, in such circumstances, for a court to conclude that the approach adopted by KAI was irrational even if it was the case that there was some merit in the alternative approach adopted by the Claimants’ expert. She pointed out that the OBR had, in the performance of its statutory duties, certified the approach

adopted by KAI as reasonable. She also pointed out by reference to the expert report adduced on behalf of the Claimants that there was acceptance by the expert there that the approach adopted by KAI was (at least) not improper. She said that in such circumstance the calculations of KAI in Tables 7 and 8 were not irrational.

302. Secondly, she argued that in any event the attack made by the Claimants wrongly assumed that the figures used were accurate and that great significance could be attached to them. She pointed out that commentary elsewhere in MC 28 emphasised the highly uncertain nature of *any* assumptions that were made about the wider effects of abolition, including upon the rates of diversion of visitors away from the UK and the extent to which spend would be reduced by those who did still visit. In these circumstances it was not credible to attach great weight to *any* conclusions about diversion rates. The Claimants' criticisms were no more than disagreements about different degrees of the highly uncertain.
303. Thirdly, she pointed out that even when the figures were adjusted, in context, they made only a marginal difference to the overall conclusions about the extent of Exchequer Impact. The Note was submitted to OBR for it to consider in its preparation of the OBR Forecast. It was clear from the Forecast as published, and as submitted to the Chancellor, that OBR treated all estimates of even Exchequer Impact as "*highly uncertain*". It did not treat as reliable its *own* conclusions about Exchequer Impact, which was the point the OBR in fact made to the House of Commons Select Committee (see paragraph [61]). It followed that the OBR was not suggesting that its own estimates of Exchequer Impact could be treated by the Chancellor, when he came to take his decision, as of great reliability.
304. Fourthly, Ms Mitrophanous QC described the Chancellor's decision as multifactorial. The OBR Forecast, with its attendant uncertainty, was itself but one of a number of pieces of evidence and analysis which went into the mix of factors that the Chancellor took into account. There was nothing in the evidence which indicated that had the adjusted figures been factored into the OBR Forecast and laid before the Chancellor they would have made any difference to that decision. It followed, she argued, in effect as a matter of causation, that this dispute about computation played only a trivial role, if it played any role at all, in the final decision.
305. In my judgment the alleged errors are not errors of maths otherwise capable of objective verification by the court; they are differences of approach. I can however see the persuasive force in the Claimants' case that consistency of approach is desirable. But even if, to test the argument, I was to conclude that the absence of consistency was irrational that is by no means the end of the story. I agree with Ms Mitrophanous QC, for the reasons she gave, that taking the Claimants' case and adjusting the data accordingly would not come close to making any difference.
306. For these reasons, I reject this particular challenge.
307. The Claimants also advanced an argument based upon Table 10 of MC 28. This focused upon estimating the Exchequer Impact of reduced spending from the rest of the world travellers who *still* visited the UK. It took the reduction in their spending set out in Tables 8 and 9 and then applied these to the average return or refund values on the VAT RES forms. The calculation incorporated an 80% adjustment to account for the 20% "*carve out*" for the impact of administrative fees. Ms Peters, in her witness

statement, “*on reflection*” accepted that Exchequer Impact would be more accurately estimated if the carve out had been excluded. Adjusting the calculation accordingly to eliminate the carve out of 20% for fees, the costing impact changed from -£118m to -£148m.

308. Again, Ms Mitrophanous QC argued that even assuming that the Claimants’ criticism was valid: (i) the adjusted estimates remained subject to very high degrees of intrinsic uncertainty; (ii) that as inputs into the analysis of the OBR when preparing its Forecast this point was far from having any real significance; and (iii), that it was remote and irrelevant to the final decision making of the Chancellor for whom *any* estimate of Exchequer Impact was treated as of significant uncertainty and was only one factor amongst many which went into the balance. In context it made no difference.
309. I agree with this analysis. Again, I can see the logic behind the Claimants’ point that the 20% carve out should have been eliminated from the initial estimation exercise. But I cannot, standing back, see that it had any impact upon the final decision, even if I had treated the carve out as irrational.

***(ix) Conclusion on Ground IV***

310. I am of the conclusion that the appeal against the judgment of Swift J refusing permission to seek judicial review should be dismissed. This means that permission to appeal is refused. I should add for the avoidance of any doubt that I have dealt in this Judgment with the arguments that formed the basis of what I have understood to be the Claimant’s case as it evolved and as presented. Many other arguments were contained in the initial claim and in early written submissions, but these fell away. None were arguable and were rightly not pursued.

**F. Ground V: Undue Delay / Effect of GATT on Grant of Relief**

311. The final matter to be determined is Ground V. As to this the Government argues that the Claimants are guilty of undue delay under section 31(6) Supreme Court Act 1981 which is a reason to refuse permission on the appeal or relief in the substantive judicial review. The grant of relief is likely to cause substantial hardship and/or substantially prejudice the rights of third persons and/or is detrimental to good administration. Accordingly, permission to seek judicial review should be refused or if granted relief should be refused in any event. The main points advanced are as follows. First, on the facts the Claimants became aware of the Decision on publication of the CR on 11<sup>th</sup> September and this included that the Decision would be implemented as from 1<sup>st</sup> January 2021, yet they still took nearly two months before issuing the claim. Secondly, the failure was compounded by the decision of the Claimants to refuse the invitation made by the Court to hold an expedited hearing to commence on 10<sup>th</sup> December with a judgment to be handed down before the end of the year, with the consequence that the hearing had to occur after implementation. Thirdly, if the Government had to unravel the scheme now, following implementation, it would cause huge inconvenience and prejudice to many third parties. Finally, reversing the legislation now would be unlawful under the GATT and therefore contrary to the principle of good administration: “*Reversion to the status quo ante would also place the United Kingdom in breach of its WTO obligations following expiry of the transition period*”.

312. I address this briefly. It is necessary to separate out arguments about undue delay from those relating to relief. In relation to relief it was agreed that this would need to be addressed fully only if the Court were minded to find in favour of the Claimants. Argument on relief would therefore await the judgment of the Court.
313. With regard to delay, I do not agree that there was undue delay. This is for a number of reasons.
314. First, the claim was served within the requisite limitation period. This is a case of real complexity, as the arguments and analysis set out in this judgment demonstrate. The case as served was immensely detailed and contained a great deal of factual and other evidence from a multiplicity of sources and parties. This was never a case that could have been compiled with great haste, as some can. Perhaps (it is impossible to say) it could have been prepared a few days or a week or so earlier but even if that were true there is no “*undue*” delay. As explained in the main body of this judgment whilst the Decision in the CR was published on 13<sup>th</sup> September 2020 in actual fact the decision-making process continued, and the Claimants were integral to it. On one perfectly feasible view the real decisions were those of 3<sup>rd</sup> December 2020 to lay the SI before Parliament, and withdraw ESC 9.1, and on another view the real decision in relation to the VAT RES was that taken by Parliament to adopt the SI, also on 3<sup>rd</sup> December 2020. All of these events were *after* the Claimants had issued proceedings.
315. Second, there has in the end been no prejudice to the Government by this course of action. By order dated 20<sup>th</sup> November 2020, Fraser J directed a hearing of the claim on 10<sup>th</sup> December 2021, granting permission on Grounds 1 (*Wilkinson*) and II (GATT) only. This was upheld by Swift J. In this way, the Court acceded to the Claimants’ request for expedition and directed a tight timetable for responsive submissions and evidence by the Government. The Claimants then sought permission to appeal the refusal to grant permission to pursue the other grounds of challenge. If the substantive hearing on all extant matters had gone ahead on 10<sup>th</sup> December 2020, the Government might have had cause to complain that it had been prejudiced by the late commencement of proceedings. However, in the event, the substantive hearing was adjourned by order of the Court from 10<sup>th</sup> December 2020, to 22<sup>nd</sup> and 23<sup>rd</sup> February 2021. One important reason for granting this adjournment was to enable the Government to have sufficient time to marshal its case on all the matters now to be determined, acknowledging that this was a significant case for all parties and that the issues were complex. Thus, the argument on prejudice caused by any alleged delay fell away.

## **G. Conclusion**

316. For all the above reasons, none of the Grounds succeed and accordingly the appeal seeking permission to seek judicial review, the claim for judicial review and all associated applications, fail.
317. I would finish by thanking the parties on all sides (solicitors, counsel, witnesses, and clients) for the enormous effort put into the preparation of this case at very short notice and to counsel for their exceptionally detailed and clear written submissions and for their focused exploration of the issues during the oral hearing.

**Mrs Justice Whipple:**

318. I agree.