EUROPEAN UNION (FUTURE RELATIONSHIP) BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM BY THE CABINET OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the European Union (Future Relationship) Bill ("the Bill"). The memorandum has been prepared by the Cabinet Office.

2. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary of the Bill

3. The Bill implements the "future relationship agreements" (the Trade and Cooperation Agreement, the Nuclear Cooperation Agreement and the Agreement on Security Procedures for Exchanging and Protecting Classified Information and other agreements envisaged under the main agreement) between the UK and the EU and makes other provision in connection with the UK's future relationship with the EU, for example in the areas of trade and customs. The Trade and Cooperation Agreement was agreed between the UK and the EU on 24 December 2020. The UK and EU have agreed to provisionally apply the Agreements as necessary from the end of the Transition Period ahead of ratification.

4. On 30 December 2020 the European Union (Future Relationship) Bill was introduced to Parliament.The Bill is required to implement the Trade and Cooperation Agreement for it to have domestic legal effect and to enable the UK to ratify the Trade and Cooperation Agreement and other future relationship agreements. The Bill also aims to ensure a smooth transition to the UK's status outside the EU at the end of the transition period which began when the Withdrawal Agreement came into force at 11.00pm (UK time) on 31 January 2020 and ends at 11.00pm (UK time) on 31 December 2020 (the "Transition Period").

The Bill has four parts:

Part 1: Security

5. Many of the provisions in Part 1 relate to the processing and sharing of information in relation to security matters. For example, clauses 1 to 6 and Schedule 1 provide for the exchange of criminal records. Clause 7 and Schedule 2 make provision in relation to the processing and use of passenger name record data, whilst 8 makes provision for vehicle registration data. Clause 9 and Schedule 3 make provision in relation to evidence and customer information orders in relation to safe deposit boxes. Clauses 11, 12 and 13 relate to extradition.

Part 2: Trade and other matters

6. Part 2 makes provision in relation to other subject areas, namely: market surveillance, use of relevant international standards, customs and tax, transport, social security, privileges and immunities and energy. Many of the clauses in Part 2 relate to the disclosure of information, including the disclosure of non-food product safety information clauses 14 to 18 . Provision is also made in relation to a number of offences related to disclosure. For example, clause 20 inserts new sections 8A(4) and 8B(4) into the Customs and Excise Management Act 1979 so that where information is received by a person as a result of sections 8A or 8B of that Act and disclosed without the consent of the Commissioners[1], this will be a criminal offence. Clause 27 would amend existing powers in the International Organisations Act 1968 regarding the grant of privileges and immunities to international organisations.

Part 3: General implementation

7. Part 3 makes provision for the general implementation and functioning of the Trade and Cooperation Agreement, the Nuclear Cooperation Agreement and the Agreement on Security Procedures for Exchanging and Protecting Classified Information through the "general implementation of agreements clause" (clause 29). The clause is accompanied by a general implementation power (clause 31) and by a power to make further provision in relation to the functioning of the future relationship agreements contained in clause 33. Clause 32 contains a power to deal with certain matters that might arise as a result of the provisional application of the Agreements by the UK and EU where relevant. Part 3 also includes a general financial provision clause 35 which permits expenditure to be incurred by virtue of any future relationship agreement. There

[1] *HMRC currently has five Commissioners who are responsible for the collection and management of revenue, the enforcement of prohibitions and restrictions and other functions.*

is an additional clause which permits funding in relation to the Peace Plus programme 34. Clause 36 disapplies section 20 of the Constitutional Reform and Governance Act 2010 ("the CRaG") for the Trade and Cooperation Agreement, the Nuclear Cooperation Agreement and the Agreement on Security Procedures for Exchanging and Protecting Classified Information. This will allow those agreements to be ratified without completing the CRaG requirements.

Part 4: Supplementary and final provisions

8. Part 4 of the Bill and associated Schedules include consequential and transitional provision as well as provision in relation to interpretation, further provision on regulations made under the Bill, extent and commencement. This part does not raise any ECHR issues.

9. Further details on the provisions outlined above and on the other clauses of, and Schedules to, the Bill are set out in the Explanatory Notes that accompany the Bill.

General approach to consideration of Convention rights in this Memorandum

10. This Memorandum analyses Convention issues that derive from the Bill so far as Convention rights are engaged and potentially interfered with. Where there is no Convention issue, no mention is made of the provision.

11. The Bill is considered to be compatible with the ECHR. Whilst the Bill is considered to engage a number of ECHR Articles, namely Articles 5, 6, 8, 14 and Article 1 of Protocol 1, it is not considered to interfere with these rights such as to result in a breach.

Part 1: Security

Criminal records

Article 8

Article 8 is engaged by clause 1 - Duty to notify member States of convictions, Schedule 1 - Information to be included with notification of conviction, clause 4 - Requests for information from Member States, clause 5 - Requests for information made by Member states, clause 2 - Retention of information received from member States, clause 3 - Transfers to third countries of personal data notified under section 2.

12. The exchange of criminal records data engages the concept of "private life" in Article 8(1), as held by domestic courts and the ECtHR (see *MM v United Kingdom* (Application No. 24019/07) and *R(L) v Commissioner of Police of the Metropolis* [2009] UKSC 3*).* Notwithstanding that an individual's convictions may be a matter of public record, information about a person's convictions, systematically collected and stored in police central records and which are available for disclosure long after the events have receded into the past can fall within the scope of private life.

Interference

13. The types of information being exchanged (and stored by the UK) include an individual's name, date of birth, gender and nationality, information on the nature of the offence and conviction etc. That information may be used in criminal investigations or proceedings, or for other law enforcement purposes including public protection (such as employment vetting), and so may impact on individuals' private lives[2]. In the majority of cases, convictions will be recent (the notification obligation applied on handing down of convictions) the degree of interference will therefore be limited. The information exchanged pursuant to requests may be less recent, but such information can only be used for the purpose or purposes for which it was requested limiting the degree of interference.

Justification

14. Article 8 is a qualified right and interference is justified if in accordance with the law and necessary in a democratic society. Any interference with that right can be justified under Article 8(2).

15. To be "in accordance with the law", the legal power must be "accessible to the person concerned and foreseeable as to its effects"[3]. The Bill, together with the DPA 2018 and HRA 1998 as well as guidance published on the intended designated UK authority's website (ACRO[4] Criminal Records Office) will, prescribe with sufficient certainty, in an accessible form, the circumstances and purposes for which criminal records data will be exchanged between the UK and EU Member States, as well as the circumstances in which such notified or requested data may be used domestically and/or transferred onwards to third countries.

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[2] *See Jackauskas v. Lithuania (No.2) (Application No. 50446/09), where the Court held restrictions on registration with certain professions as a consequence of disclosure of a conviction for professional misconduct fell within the sphere of an individual's private life.*

[3] *See The Christian Institute and others v The Lord Advocate (Scotland) [2016] UKSC 51, at paragraph 79.*

[4] *The intended UK designated authority is ACRO Criminal Records Office, a National Police Unit acting under the authority of the Chief Constable of Hampshire Constabulary (who is, technically, the UK designated authority). ACRO have been operating the criminal records exchange process with the EU and third countries (to date), and have clear guidance on their website – see: https://www.acro.police.uk/Guidance-on-international-criminal-conviction-exch.*

16. The exchange of criminal records pursues the legitimate aims of public safety and the prevention of disorder and crime. In relation to notifications, ensuring that the UK and EU Member States hold a full conviction history for their nationals, ensures that individuals who pose a risk to the public cannot evade such risk being identified, or escape the consequences of their previous convictions, by moving across borders. It also enables appropriate public safety measures to be put in place, such as placing an individual who has been convicted of a sexual offence in an EU Member State on the sex offenders register.

17. Similarly, information may only be requested for law enforcement purposes (with the exception of EU nationals requesting their own criminal convictions record), such as for use in criminal proceedings or for employment vetting or firearms licensing, where there is a public protection purpose. This enables the UK to enhance public safety and prevent crime. For example, once an individual is known to the police, their criminal record can be sought and used for public protection policing measures. If the individual is subsequently convicted of a crime in the UK, the conviction history can be used at each decision point throughout the criminal justice system ensuring decision makers can fully assess the risks they pose to the public, for example at a bail hearing or sentencing. Criminal data can also be used to assess the suitability of EU nationals who are seeking employment to work with children in the UK. The domestic courts have recognised the clear public interest in police information exchange with overseas law enforcement partners and that criminal records disclosure serves vital and legitimate public interest aims which help safeguard the vulnerable[5].

18. There are significant safeguards to ensure that the interference with Article 8 rights is "necessary in a democratic society", i.e. that it is proportionate to the aim pursued and meets a pressing social need. As outlined, requests must be made and responded to for "law enforcement purposes"[6] only (with the exception of a request made to the state of nationality to fulfil a UK or EU nationals' own request). The DPA 2018 and the HRA 1998 will apply to the designated UK authority (as a public authority) when making/responding to such requests, ensuring examination of whether there is a proper law enforcement purpose and whether disclosure is necessary and proportionate[7] The legislation mandates that requested data can only be used for the purpose for which it was requested or, exceptionally, to prevent an immediate and

[5] See *R(T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2015] AC 49.

[6] Defined in Article.LAW.Gen.1 of the LECJ chapter of the CFTA as "*the prevention, investigation, detection and prosecution of criminal offences and to the prevention of and fight against money laundering and terrorist financing.*". This definition will be replicated in the clauses.

[7] See *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 and *R (Bridges) v Chief Constable of South Wales Police (Information Commissioner and others intervening* [2020] [EWCA Civ 20158. The Court recognised the role of the DPA 2018 in enabling the proportionality of interference with Article 8 rights to be examined.

serious threat to public security. In responding to requests other than for criminal proceedings or determining the suitability of the individual to work with children, spent convictions will not be communicated (in accordance with the Rehabilitation of Offenders Act 1974 and Rehabilitation of Offenders (Northern Ireland) Order 1978 (S.I. 1978/1908). Additionally, the UK may only onwards transfer notified data to third countries (i.e. conviction information from EU Member States on UK nationals) where the authority has law enforcement functions, and the designated UK authority is satisfied appropriate data protection safeguards are in place (via. adequacy or an assessment of appropriate safeguards).

Article 14

Article 14 is engaged by clause 1 - Duty to notify member States of convictions, Schedule 1 - Information to be included with notification of conviction, clause 4 - Requests for information from Member States, clause 5 - Requests for information made by Member states.

19. It may be argued that Article 14 (prohibition on discrimination) is engaged, parasitic on Article 8 rights. The new regime applies to exchange of criminal records with EU Member States. Consequently, EU and UK nationals may be treated less favourably than third country (i.e. non-EU) nationals in their enjoyment of Article 8 rights.

Interference

20. EU nationals' state of nationality will be more likely to know of UK convictions and the UK will be more likely to know about EU nationals' full conviction history. This may disproportionately impact such an individual's right to enjoyment of private life if, for example, it leads to rejection from employment (when disclosed in an employment vetting request) or an increased penalty (sentence) in criminal proceedings. Whilst the UK does also exchange criminal records data with a number of third countries (such as Albania, Antigua, Barbados, Jamaica amongst others[8]) for similar purposes, more data is held in respect of EU nationals than non-EU nationals.

Justification

21. Article 14 will not be infringed by the policy. As identified above, the exchange of criminal records data pursues the legitimate aim of public safety and prevention of disorder and crime. The difference in treatment has an objective and reasonable justification: it arises directly from the fact that the UK has

[8] The UK has agreements for the exchange of criminal convictions data with Albania, Antigua, Barbados, Jamaica, Trinidad and Tobago, Anguilla, Bermuda, Cayman Islands, Montserrat, Turks and Caicos and St Helena.

secured an international, legally binding, agreement for this type of exchange with the EU (and has not, for example, an agreement of this scale with other third countries[9]). This reflects the UK's geographical proximity to and close law enforcement and criminal justice co-operation with the EU.

Passenger name record data

Article 8

Article 8 is engaged by clause 7 - Passenger name record data

22. The processing of passenger name record (PNR) data by the Passenger Information Unit ("PIU") engages the concept of "private life" in Article 8(1), given the systematic collection of individuals' personal data. PNR data comprises of information collected from passengers by carriers when processing travel reservations, such as passengers' names, contact details, payment method and baggage information.

Interference

23. PNR data is comprised of passengers' personal data collected by carriers and processed primarily by the PIU for the purposes of preventing, detecting, investigating and prosecuting terrorist offences or serious crime, or, in exceptional cases, to protect the vital interest of any individual (such as in the event of a significant public health risk). As such, the processing of PNR data by the PIU may impact on individuals' private lives.

24. However, a number of data protection safeguards will limit interference with individuals' Article 8 rights. The PIU may only process PNR data for a limited number of specified purposes and must disclose such data to the other authorities involved in the investigations for serious crime if strict conditions are met including that only the minimum amount of data necessary for the required purpose is disclosed. The PIU may not process special categories of personal data. Also, PNR data may not be retained for more than 5 years and the data of passengers who have departed the UK must be deleted by the PIU, unless the need to retain such data is indicated by a risk assessment based on objective evidence from which it may be inferred that certain passengers may present a risk in relation to terrorism or serious crime. The data must be depersonalised after 6 months by the PIU by masking out data elements that could directly identify any individual and may only be unmasked where it is necessary to carry out investigations for the purposes outlined above. Such

[9] The UK exchanges criminal records information with third countries pursuant to Memorandums of Understanding and, for certain countries, Article 13 of the European Convention on Mutual Assistance in Criminal Matters and to Article 4 of its Additional Protocol of 17 March 1978.

unmasked PNR data may only be accessed by a limited number of specifically authorised officials.

Justification

25. Article 8 is a qualified right, and as such interference is justified if in accordance with the law and necessary in a democratic society. The Department considers any interference with that right can be justified under Article 8(2).

26. The regime will be "in accordance with the law" as clearly and plainly prescribed in legislation. Article 8(2) provides that a public authority may interfere with individuals' Article 8 rights, where this is necessary in the interests of public safety, for the prevention of disorder or crime, or for the protection of health.

27. The regime pursues these legitimate aims and is necessary, as well as proportionate, for the achievement of those aims. The processing of PNR data is a key law enforcement tool in relation to the prevention, detection, investigation and prosecution of terrorist offences and serious crime. The regime aims to ensure that the processing of the data is limited to what is strictly necessary and that effective safeguards are in place to protect passengers' personal data.

28. Furthermore, passengers would be able to exercise their rights under the DPA 2018 to request access to, or the rectification or erasure of, their PNR data. The processing of PNR data by the PIU will also be subject to the oversight of the Information Commissioner.

Disclosure of vehicle registration data

Article 8

Article 8 is engaged by clause 8 - Disclosure of vehicle registration data

29. The exchange of vehicle registration data ("VRD") information engages the concept of "private life" in Article 8(1), insofar as it relates to the transfer of data about individuals. For the purposes of investigating, preventing and detecting crime, states would be able to search databases held in other states using a vehicle registration number or chassis number, and receive VRD data that is linked to the relevant vehicle. Given that the same categories of data will be exchanged in response to each request, Article 8 would be engaged by all transfers under this mechanism. For clarity, the UK will not be participating in the exchange of VRD data in the immediate future, until such time as it has completed the evaluation process required by the Agreement before data exchanges can begin.

Interference

30. The types of information being exchanged include an individual's name, date of birth, gender and place of birth. That information may be used for the investigation, prevention and detection of crime and for use in criminal proceedings, and so may impact on individuals' private lives.

Justification

31. Article 8 is a qualified right and interference is justified if in accordance with the law and necessary in a democratic society. In respect of exchange of VRD data, any interference with that right can be justified under Article 8(2).

32. To be "in accordance with the law", the legal power must be "accessible to the person concerned and foreseeable as to its effects"[10]. The Bill, together with the Future Relationship Agreement. The DPA and HRA 1998 will prescribe with sufficient certainty, and in an accessible form, the circumstances in which VRD data will be exchanged (including the purposes for which it may be exchanged) between the UK and EU Member States, the types of information which will be exchanged, and the purposes and circumstances in which such notified or requested data may be used domestically and/or transferred onwards to third countries.

33. The exchange of VRD data via this mechanism is carried out in furtherance of the legitimate aims of the investigation and prevention of crime, and the prosecution of offences. Information may only be requested for those purposes and may only be supplied to law enforcement authorities in Member States, who will be bound by the Future Relationship Agreement when making requests, including the need to undergo an evaluation process to ensure that systems and procedures in each Member State are sufficiently robust to allow this exchange to commence. Data exchange must be between "competent law enforcement authorities" who are "authorised" to carry out tasks for the purposes for which this data can be exchanged.

<u>Article 14</u>

Article 14 is engaged by clause 8 - Disclosure of vehicle registration data

34. The power to exchange VRD data only applies to exchange of VRD between EU Member States and the UK. Although the measure does not apply solely to the EU and UK nationals, it is more likely that the VRD processed by each

[10] See *The Christian Institute and others v The Lord Advocate (Scotland) [2016] UKSC 51,* at paragraph 79.

participating state would consist predominantly of data relating to its own nationals. Consequently, EU and UK nationals may be treated less favourably than third country (i.e. non-EU) nationals in their enjoyment of Article 8 rights. On that basis, Article 14 (prohibition on discrimination) may be engaged.

Interference

35. Under this mechanism, a requesting state will be able to obtain information about any national, provided that he or she is the registered owner or user of a vehicle registered in one of the participating states. It is more likely that the VRD processed by the UK would consist predominantly of data relating to its own nationals, and potentially more likely that it would hold data in respect of EU nationals than in respect of third country nationals due to the greater likelihood of EU nationals residing in the UK and owning or using motor vehicles. It follows that it is more likely that the UK would share data relating to UK nationals under this provision and arguably more likely that the UK would be more likely to share data concerning an EU national than it would a third country national. This would mean that it is more likely that those nationals would be exposed to investigation or further action by law enforcement authorities in the requesting state.

36. By way of comparison, it is possible for VRD held by the UK concerning UK and EU nationals to be exchanged with the law enforcement authorities of third countries. The distinction is that this would be achieved through Mutual Legal Assistance ("MLA") or police to police cooperation, on a case by case basis. There is no equivalent automated infrastructure for these exchanges.

Justification

37. As identified above, the exchange of VRD data is authorised under this power for the legitimate purposes of the prevention and investigation of criminal offences. The difference in treatment arises directly from the fact that the UK has secured an international, legally binding, agreement for this type of exchange with the EU, where no equivalent mechanism for automated exchange with other third countries has been agreed. This reflects the UK's geographical proximity to the EU and the close security and justice co-operation the UK has with the EU. It has an objective and reasonable justification.

Evidence

<u>Article 8</u>

Article 8 is engaged by Schedule 3 - Mutual assistance in criminal matters, Freezing and Confiscation - Customer information.

38. Where a customer information order is granted by the court, it entails an intrusion into the Article 8 rights of the person who is the subject of the order since it reveals details of their private financial affairs. Expanding the "customer information" definitions that apply in England and Wales and Scotland to include safe deposit box information means that there is increased potential for more private financial information to be provided to the police and customs officers, increasing the degree of intrusion into the person's privacy.

Interference

39. While expanding the "customer information" definitions in the POCA Orders and CICA 2003 in England and Wales and Scotland to include safe deposit box information leads to the potential for greater intrusion when a customer information order is granted by the court compelling the provision of that information, these amendments are expected to have limited practical effect. For freezing and confiscation they go no further than the legal status quo in England and Wales and Northern Ireland, where the POCA Order powers currently permit safe deposit box data to be obtained under order and for wider MLA, the CICA powers currently permit safe deposit box information in Northern Ireland. In all jurisdictions, an order will only be granted if a judge is satisfied that various statutory tests are met. This judicial role represents a significant safeguard against unnecessary and disproportionate intrusions into a person's Article 8 rights.

Justification

40. As well as depriving criminals of the benefits of their criminal conduct, the use of powers to freeze and confiscate the proceedings of crime are designed to serve as a deterrent, to demonstrate that crime does not pay. Such powers, and ancillary asset-location powers such as customer information orders, thus serve the legitimate aim of preventing crime. The crime prevention objective is sufficiently important to justify the increased potential for Article 8 interferences that are occasioned by these amendments. There is no less intrusive means of achieving the objective without compromising its achievement (for example, the introduction of a power to request safety deposit box information without compulsion would not be likely to yield the required information). The interference is proportionate (and is safeguarded by judicial involvement) because when it is balanced against the importance to society of the crime prevention objective, that importance outweighs the effects of the interferences on the individual. Similar arguments apply to the parallel amendments made to the customer information order powers in CICA 2003, which allow for banking and safe deposit box information to be obtained to further Member States' criminal investigations, thus assisting in the prevention and detection of crime.

Extradition

Article 5

Article 5 is engaged by clause 11 - Member States to remain category 1 territories

41. The clause would designate the Member States as territories to which Part 1 of the Extradition Act 2003 ("the 2003 Act") applies. The Member States would otherwise become territories to which Part 2 of the 2003 Act applies by the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 at the end of the Transition Period (on "IP completion day"), but the effect of clause 11 is to move the Member States immediately back to being subject to the provisions in Part 1. Proceedings under Part 1 of the 2003 Act follow an established procedure which is governed by time limits, confers particular safeguards and which is overseen exclusively by the Courts. It may therefore, be argued that a person who is requested by a country which the Secretary of State has designated as a Part 1 country, which is included in the list on clause 11, will face extradition proceedings which are less protracted and more predictable and which therefore mitigate the risk of longer periods of detention, or longer periods of being subject to extradition proceedings, therefore engaging rights under Article 5.

Interference

42. The engagement or interference of failing to include the EU Member States in clause 11 would be longer time spent in custody or longer time spent subject to extradition proceedings that exist under Part 1 of the 2003 Act.

Justification

43. The UK is unable to legislate for territories that are not EU Member States to be territories under Part 1 of the 2003 Act because currently there is no international agreement with those countries that would support them being subject to Part 1. Part 1 of the Act implements an agreement which is based on the exchange of warrants between the judicial authorities of other countries who have committed in international law to implement the same agreement . It is not possible to designate countries with whom there is no such agreement to undertake the same system. Extradition proceedings under Part 2 of the 2003 Act are assessed to be compatible with ECHR Rights.

Article 8

Article 8 is engaged by clause 11 - Member States to remain category 1 territories

44. Individuals who are subject to extradition proceedings under Part 2 of the 2003 Act are not subject to the same safeguards or procedural efficiencies, including time limits, that proceedings under Part 1 of the are subject to. (see above). Failing to include EU Member States in this clause could result in longer periods of detention, or longer periods of being subject to extradition proceedings, for a person requested by a country that is not an, thereby engaging rights under Article 8.

Interference

45. Failing to include clause 11 may result in interference with the right to a private and family life, due to longer court proceedings, including the potential for the separation of a person from their family, for a person subject to proceedings under Part 2 of the 2003 Act.

Justification

46. The UK is unable to legislate for territories that are not EU Member States to be territories under Part 1 of the 2003 Act because currently there is no international agreement with those countries that would support them being subject to Part 1. Part 1 of the Act implements an agreement which is based on the exchange of warrants between the judicial authorities of other countries who have committed in international law to implement the same agreement. It is not possible to designate countries with whom there is no such agreement to undertake the same system. Extradition proceedings under Part 2 of the 2003 Act are assessed to be compatible with ECHR Rights.

Part 2: Trade and other matters

Information about non-food product safety

Article 6

Article 6 is engaged by clause 16 - Offence relating to disclosure under section 14(4)(b)

47. Clause 16 creates a new criminal offence for improper disclosure of information received from the EU (where that reveals the identity of a person – an individual or business). This engages Article 6.

Interference

48. Clause 16 does not interfere with Article 6, as it does not affect the individual's right to a fair trial. The creation of the criminal offence will be subject to the ordinary safeguards set out in our criminal justice system, including as regards the burden of proof. The level of sanction is comparable, with reference to other similar offences such as those under s245 Enterprise Act 2002 ("EA 2002"). The provision sets out defences and will be subject to a safeguard that provides

that prosecution in England and Wales and in Northern Ireland can only be brought with the consent of the relevant Director of Public Prosecutions.

49. Therefore, this clause is assessed as being compatible with Article 6 ECHR.

Article 8

Article 8 is engaged by clause 14 - Disclosure of non-food product safety information from Europe within the United Kingdom, clause 15 - Disclosure of non-food product safety information to Commission, clause 16 - Offence relating to disclosure under section 14(4)(b), clause 17 - General provisions about disclosure of non-food product safety information, clause 18 - Interpretation of sections 14 to 17.

Interference

50. The majority of information disclosed under this provision will not contain personal data. However, it is possible that it is necessary to disclose some personal data (subject to what is agreed with the EU and the relevant requirements in national data protection law being met), for instance when it relates to the business activities of a sole trader which is required for market surveillance.

51. Given that it is anticipated that there will be very little personal data exchanged, that this information will be primarily personal data received about an individual's business activities and this information will not be sensitive personal data (save in the case of exchange of officials), the severity of any interference with Article 8 will be low.

52. On confidential information, the CFTA will provide that all information shared must be treated as confidential (irrespective of whether the information would itself be considered confidential). Some of the information shared may of itself be confidential, for instance because it is commercially sensitive, e.g. relating to market surveillance on particular products. This information is more likely to relate to businesses than individuals. There is a question about whether Article 8 of Article 1 Protocol 1 would be engaged here; Article 8 might not apply if it is business information and confidential information may not constitute property under A1P1. Depending on the nature of information shared, the sharing of confidential information might potentially interfere with Article 8 or A1P1. The severity of such interference will depend on the information exchanged.

Justification

53. The justification for the potential interference with Article 8 will primarily be public safety and the protection of health. The need to protect consumers, in

particular, from unsafe products is sufficiently important to justify the limitation of Article 8 here. The TBT chapter requires that information can only be used for the purpose of protection of consumers, health, safety or the environment and that is reflected for information received from the EU in clause 16.

54. For personal data, any transfer must be in accordance with domestic data protection law. Given the restricted purpose and the safeguards set out in the relevant data protection legislation, it is considered that any interference with Article 8 rights in respect of personal data would be proportionate.

55. For confidential information, similar justifications apply. Information provided to the EU under the TBT chapter, RAPEX Annex and Annex provided under Article 4.9(5) TBT will be treated as confidential and the provisions in clauses 14, 16 and 17 provide restrictions on how such information can be used and passed on in the UK. In practice, if confidential information is exchanged under these clauses it is likely to enable the identification and (potential) removal of unsafe products from the market for market surveillance. The very nature of market surveillance will mean that the information handled is potentially commercially sensitive precisely because it is about a product that poses risk. It is therefore considered that any interference with Article 8 rights (and for similar reasons, A1P1) in respect of confidential data would be proportionate.

Custom and tax

Article 6

Article 6 is engaged by clause 20 - Disclosure of information and co-operation with other customs services

Interference

56. Clause 20 inserts new sections 8A(4) and 8B(4) of the Customs and Excise Management Act 1979 ("CEMA") so that where information is received by a person as a result of sections 8A or 8B and disclosed without the consent of the Commissioners[11], this will be a criminal offence. The offence is set out in section 19 of the Commissioners for Revenue and Customs Act 2005.

Justification

[11] HMRC currently has five Commissioners who are ultimately responsible for the collection and management of revenue, the enforcement of prohibitions and restrictions and other functions. They exercise these functions in the name of the Crown. The way in which the Commissioners conduct their business is governed by the Commissioners for Revenue and Customs Act 2005.

57. The prohibition on onward disclosure without consent is necessary in order to protect sensitive information such as personal data or confidential tax information. Furthermore, the imposition of a criminal offence when disclosure without consent identifies a person is an additional safeguard that reflects the seriousness of wrongful disclosure in these circumstances. These provisions are not retrospective, and a person charged with a criminal offence will have the right to a fair and impartial trial in the UK criminal courts and will have the opportunity to make any case known. The clause builds in safeguards and mitigations. The Article 6 protections are therefore satisfied.

Article 8

Article 8 is engaged by clause 22 - Administrative co-operation on VAT and mutual assistance on tax debts, 20 - Disclosure of information and co-operation with other customs services, 21 - Powers to make regulations about movement of goods

Interference

58. Clause 20 inserts new sections 8A(1) and 8B(1) of CEMA. The new sections 8A(1) and 8B(1) of CEMA will permit the Commissioners for Revenue and Customs ("the Commissioners") to disclose information relating to HMRC's customs functions and co-operate with other customs services. This may include sensitive personal information capable of identifying individuals. The disclosure of personal information engages Article 8 and may in certain circumstances interfere with it.

59. Clause 21 provides for a power to make regulations about the movement of goods (it inserts a new section 166A of CEMA). The new section 166A of CEMA will enable the Commissioners to make regulations for the purposes of monitoring and controlling the movement into or out of or within the UK of goods that pose, or might pose, a risk of harm to human health, safety or security or of harm to the environment (including the health of animals or plants). This is likely to be done by requiring the provision of electronic information in advance so that high risk cargo and transport conveyances can be identified. This may include personal information. The disclosure of personal information engages Article 8 and may in certain circumstances interfere with it.

60. Clause 21 also provides for a power to make regulations about Authorised Economic Operators ("AEO") (it inserts a new section 166B of CEMA). New section 166B provides that regulations made under inserted sections 166A and 166B can be made about AEOs, including setting out requirements as to how a person can be authorised. An AEO is an economic operator who, by satisfying certain criteria, is considered to be reliable in their customs related operations and is therefore entitled to certain benefits, such as easier access to certain

customs simplifications, or certain facilitations from customs security and safety controls. Authorisation as an AEO will require the provision of personal information which will engage Article 8 and may arguably interfere with it.

61. Clause 22 enables the exchange of personal information which could engage the right to privacy. The provision of information is limited to the extent permitted by domestic law. The VAT and debt protocol shall impose no obligation to have enquiries carried out or to provide information on a particular case if the laws or administrative practices of the State which would have to supply the information do not authorise that State to carry out those enquiries or collect or use that information for its own purposes (paragraph 2 of Article 15 of the protocol).

Justification

62. Clause 20 constitutes a necessary and proportionate interference with Article 8 and one that is in accordance with the law and capable of being made by the UK within its margin of discretion. Sharing information relating to HMRC's customs functions is necessary to administer the customs regime and ensure adequate controls over goods moving into and out of the UK; the provision made by these clauses is proportionate to that aim. In particular, by limiting the type of information that may be disclosed (only information held by HMRC in connection with its customs functions) and the purposes for which it can be disclosed (for purposes that are connected with, or otherwise incidental to, HMRC's customs functions in its capacity as a customs service and in particular its functions relating to the movement of goods into or out of the UK) and limiting the use of the information by the recipient (to the purpose it was disclosed for). Furthermore, these provisions are not retrospective

63. Regarding clause 21, no provision on the face of the Bill would interfere with Article 8, but provision made under this power might. The question of the compatibility of regulations with Convention rights will be considered when the power is exercised. However, it is anticipated that such provision would constitute a necessary and proportionate interference with Article 8 and one that is capable of being made by the UK within its margin of discretion. Furthermore, the objective of granting AEO status is likely to be the simplification and disapplication of customs requirements which will speed up formalities and customs operations, which in turn protect the economic well-being of the country. Therefore, if there is interference, it is justifiable on these grounds.

64. In relation to clause 22, the interference is justified by the fact the right to privacy is subject to paragraph 2 of Article 8, which permits interference by a public authority in accordance with the law and in the interests of the economic well-

being of the country. The exchange of information enables the recovery of taxes, duties and associated payments to the State.

Article 1 Protocol 1

A1P1 is engaged by clause 21 - Powers to make regulations about movement of goods, clause 22 - Administrative co-operation on VAT and mutual assistance on tax debts.

Interference

65. Clause 21 provides for a power to make regulations about the movement of goods (it inserts a new section 166A of CEMA). The new section 166A of CEMA will enable the Commissioners to make regulations for the purposes of monitoring and controlling the movement into or out of, or within, the UK of goods that pose, or might pose, a risk of harm to human health, safety or security or of harm to the environment (including the health of animals or plants). It is arguable that A1P1 is engaged, and may be interfered with, because this power could be used to make provision that would result in a person's goods being seized and detained.

66. Necessary interference by clause 22 with the entitlement to peaceful enjoyment of possessions is permitted to secure the payment of taxes or other contributions or penalties. The VAT and debt protocol enables the recovery of claims (paragraph 2 of Article 25 of the Protocol). Under that Article, there has to be an instrument permitting enforcement of the debt in the state of the authority making the request for recovery of the debt.

Justification

67. Regarding clause 21, no provision on the face of the Bill would interfere with A1P1, but provision made under this power might. The question of the compatibility of Regulations made under this provision with Convention rights will be considered when the power is exercised. However, to the extent that A1P1 is engaged by Regulations made under this power, it is anticipated that the exercise of this power would be necessary to achieve the legitimate aim of protecting the public interest.

68. Interference by clause 22 is justified as states are permitted to enforce such laws as they deem necessary to control the use of property in accordance with the general interest, or to secure the payment of taxes or other contributions or penalties (see in particular James v UK (1986) EHRR at para 46 and 50 and PCC v Wallbank [2001] UKHL 37 at 66).

Social Security

Article 6

Article 6 is engaged by clause 26 - Social Security Co-ordination

69. **Healthcare:** Article 6 is only engaged if there is a determination of a "civil right". Questions arise as to whether providing funding for healthcare abroad is a "civil right", refusal of which gives rise to a right of action by virtue of Article 6 ECHR.

70. This depends on how eligibility for (state funded) healthcare is to be determined. In cases where entitlement to state funded healthcare does not follow 'automatically' upon the fulfilment of certain criteria but depends on the evaluation of criteria, it will not be a "civil right" for Article 6 purposes . This might apply to applications for authorisation for planned treatment. In contrast, where the right is one that depends only on fulfilment of certain, essentially non-discretionary, criteria, the right will likely be a "civil right" . This might apply to the EHIC scheme and the equivalent of what is currently known as the S1 scheme for pensioners.This analysis considers the position as if the healthcare provisions involved civil rights, without reaching a firm conclusion that they do.

Interference

71. **Healthcare**: Insofar as Article 6 is engaged, it may potentially be interfered with insofar as the Bill does not provide for a right of appeal in respect of decisions made pursuant to the healthcare provisions.

Justification

72. **Healthcare**: Insofar as entitlements to healthcare under the healthcare provisions give rise to a "civil right", the availability of judicial review should satisfy Article 6 if the relevant determinations were dependent on discretionary criteria or clinical judgment but is less likely to be adequate to the extent that eligibility is determined by questions of simple fact.

73. But in assessing whether judicial review is a sufficient remedy it is relevant to consider its application in the context of the dispute process in the round and the means of appeal overall. There are several mechanisms in UK domestic law for challenging decisions taken by NHS bodies and/or the NHS Business Services Authority (who determine entitlement to reciprocal healthcare and issue relevant forms). These mechanisms will continue to be available and have functioned in relation to healthcare under Regulation (EC) 883/2004. In practice the vast majority of complaints are resolved through these processes.

Article 8

Article 8 is engaged by clause 26 - Social Security Co-ordination

74. **Social security benefits:** The primary aim of Article 8 is to protect individuals from arbitrary State interference, in part by creating positive State obligations to protect the right to private and family life. Article 8 does not generally impose any positive obligation on a State to provide welfare support. Even if there was found to be an exception to the general rule that Article 8 does not impose a positive obligation on a State to provide welfare benefits, Article 8 would not be engaged by the provisions of the Bill. Any positive obligation would extend only to the jurisdiction of the State in question and not to any claim of a benefit outside of the State whose legislation is applicable.

75. Access to benefits within the UK and the entitlement to export outside the periods permitted under domestic law is not an isolated consequence of the provisions of the Bill; but is a combined effect of both the repeal of retained EU law and the ending of free movement which has been implemented by separate statutory means.

Interference

76. **Social security benefits**: Article 8 is not engaged. However, if it were found to be, claimants who have an existing benefit claim of Long Term Care (LTC) cash sickness benefits, invalidity benefits and family benefits who will not be permitted to export this under the Trade and Cooperation Agreement may potentially argue that their rights under Article 8 have been interfered with. For example, if a person decides that because they cannot export a benefit they will not move to live with their family.

Justification

77. **Social security:** even in the event of Article 8 engagement and interference, any interference is justified. The decision not to carry forward all of the provisions contained in retained EU law is a legitimate policy objective and aligns the UK's social security arrangements with EU Member States more closely with arrangements in place for the rest of the world. It strikes a proper balance between the interests of a person affected and the wider public interest by securing the economic well-being of the UK, and aligning with the rest of the world in light of the end of free movement and new social security coordination arrangements with EU member states.

Article 14

Article 14 is engaged by clause 26 - Social Security Co-ordination

78. **Healthcare**: Article 14 read with Article 8 is engaged insofar as entitlements to healthcare under the healthcare provisions are limited to persons meeting certain criteria only. Article 8 is engaged insofar as the protection of private life encompasses a person's physical integrity. A person's body is an intimate aspect of their private life.

79. **Social security benefits**: Article 14 taken with A1P1 may be engaged on the basis of nationality or other status. A person could argue that their status is a person who moved into a cross border situation after the end of the transition period (so is in scope of the Agreement) and that they are in an analogous position but are being treated differently to a person who moved into a cross border situation prior to the end of the transition period (so is in scope of the Withdrawal Agreement).

80. In cases where a UK national and an EU national are both resident in the UK at the end of the TP, the EU national would, after the end of the transition period, be able to export winter fuel, sickness, invalidity, unemployment and family benefits, whereas the UK national would not. However, this is not a valid comparison because the EU national in such a case has acquired EU law rights but the UK national has not. In addition, any difference in treatment arises out of the personal scope of the Withdrawal Agreement and the repeal of retained EU law, rather than the provisions of the Agreement.

Interference

81. **Healthcare:** Articles 8 and 14 are potentially interfered with insofar as persons not covered by the healthcare provisions may receive no or less favourable access to free healthcare as compared to those who are in scope.

82. **Social security benefits**: While there will be a difference in treatment between those to whom the social security coordination provisions implemented by clause 26 of the Bill applies and those in scope of the Withdrawal Agreement on the basis of their residence before and after the end of the transition period, this is again a cumulative effect of the UK's withdrawal from the EU, the ending of free movement and the repeal of retained EU law at the conclusion of the transition period. A person living in a country outside the UK where the UK's social security coordination arrangements do not cover access to certain benefits is not in a comparable position to a person living either in a country that does have such coordination or in the UK.

Justification

83. **Healthcare:** Articles 8 and 14 are qualified rights. Any interference will be in accordance with the law as it will be permitted by the Bill. Any difference of treatment is justified on the basis that affordability and resources necessarily mean it is reasonable for arrangements to be put in place where there is considered to be the most need and reciprocity. As regards charges for NHS treatment for those resident outside the UK, the European Court of Human Rights (ECtHR) has consistently made clear that the ECHR does not provide any right to free medical care and that States have a wide margin of appreciation in relation to issues such as healthcare funding and provision, involving as they do an assessment of priorities in the context of limited State resources.[12] The Protocol also represents an objective distribution of the benefits that meets the legitimate aims of social security coordination between the UK and EU member States, and, in its terms, draws objective and reasonable distinctions and is not discriminatory.

84. **Social security benefits**: Any difference in treatment is justified on the basis that these changes are a corollary of the ending of free movement after the end of the transition period and a court is likely to respect the legislature's policy choices as part of these international negotiations. These changes would not be considered to be manifestly without reasonable foundation particularly when taking into account that the Government is entitled to change benefit systems, a line has to be drawn somewhere in order to effect such a change and these changes have been communicated to people who may be impacted in advance of the changes taking effect.

Article 1 of Protocol 1

A1P1 is engaged by clause 26 - Social Security Co-ordination

85. **Applicable legislation:** The modifications to domestic law required to give effect to the Agreement would result in workers and/or their employer coming from Member States to the UK, from 1 January 2021, being required to pay National Insurance contributions ('NICs') in accordance with domestic legislation.

86. **Social security benefits:** The benefits covered by the Trade and Cooperation Agreement include both contributory and non-contributory benefits, both of which have been considered by the ECtHR as being capable of constituting property for the purposes of A1P1[13]. Awards of benefit already in payment may therefore constitute a possession.

87. The social security coordination provisions implemented by clause 26 of the Bill have the effect that only a limited number of benefits can be exported when a

[12] See, amongst other authorities, Pentiacova v Moldova (2005) 40 EHRR SE23.

[13] *Stec v UK (2006) 43 EHRR 1017; Moskal v. Poland 10373/05; Béláné Nagy v Hungary 53080/13 [2016] ECHR 1114.*

beneficiary leaves the UK and becomes resident in an EU Member State after the end of the transition period. The benefits that were previously exportable under EU social security regulations that can no longer be exported by a person in a cross-border situation after the end of the transition period are:

i. Winter Fuel Payment[14]
ii. JSA-C
iii. ESA-C
iv. Attendance Allowance
v. Carer's Allowance
vi. Personal Independent Payment (daily living component)
vii. Disability Living Allowance (care component)
viii. Child Benefit
ix. Guardian's Allowance
x. Child Tax Credit

88. Of those benefits listed above, JSA-C and ESA-C are contributory benefits; the remaining benefits are non-contributory.

89. A1P1 may be engaged in respect of a group of claimants who are already in receipt of one or more of the above benefits, who move between the UK and EU after the end of the transition period and are prevented from exporting their benefit.

90. The Trade and Cooperation Agreement does not permit first claims for most UK benefits from a Member State. This means that people will not be able to make any new claims for UK unemployment, invalidity or sickness benefits from outside the UK, even when they have made sufficient contributions to qualify for the benefit. A1P1 does not confer a right to **acquire** property and A1P1 would not be engaged for people who have made qualifying UK contributions but do not have an existing benefit claim before they leave the UK.

91. The Trade and Cooperation Agreement which the Bill gives effect to makes provision relating to the aggregations of invalidity benefits, where the benefit of periods of employment, self-employment, insurance or residence in one State is limited to meeting minimum contribution or other relevant periods, and not to the calculation of the rate of benefit payable in States where the amount of benefit is dependent on the length of relevant qualifying periods. Where a person has made contributions in one State, they will still benefit from aggregation, albeit to a limited extent.

[14] *And in Scotland, Child Winter Heating Allowance.*

92. A1P1 is not engaged in this situation. ECtHR case law confirms that where a person does not satisfy, or ceases to satisfy, conditions in a State's domestic legislation for granting a benefit award, there can be no interference with A1P1[15]. Although both contributory and non-contributory benefits can constitute property for the purposes of A1P1, there must be (a) a direct link between contributions paid and the benefits awarded and (b) the claimant must satisfy domestic legislative criteria for a benefit award. There is no such link between social security contributions made in one State and access to benefits in another in cross-border situations arising after the end of the transition period.

93. A1P1 rights would only be engaged if contributions paid and the relevant benefit were confined to an intra-State situation. Therefore, the payment of contributions in one State cannot give rise to an A1P1 right to a benefit in another State.

Interference

94. **Applicable legislation:** The obligation of workers and/or their employer to make contributions from their funds would be regarded as an interference with the right to peaceably enjoy their possession.

95. **Social security benefits:** There is no interference of A1P1 rights as a consequence of clause 26 of the Bill.

96. Claimants who have an existing benefit claim of LTC cash sickness benefits, invalidity benefits and family benefits who will not be permitted to export this under the Trade and Cooperation Agreement may potentially argue that their rights under A1P1 have been interfered with. This potential interference with A1P1 will only be relevant for a narrow group who are already in receipt of benefits, are not in a UK/EU cross-border situation at the end of the transition period, move between the UK and EU after the end of the transition period and are prevented from exporting their benefit.

97. Any potential interference with A1P1 rights in respect of people who are no longer able to export existing claims of certain benefits from the UK to EU Members States is not a consequence of the Bill giving effect to the Trade and Cooperation Agreement, but a combined consequence of the repeal of retained EU social security regulations and the ending of free movement as a result of the UK's Exit from the EU and the transition period coming to an end; this has been implemented by other statutory means and not by the Bill.

Justification

[15] *Richardson v United Kingdom* 26252/08 [2010] ECHR 1816*; Bellet, Huertas and Vialatte v. France* 40832/98.

98. **Applicable legislation:** The measure is generally justified by the exception at art. 2 of A1P1 which provides that it shall not impair the right of a state to enforce laws it deems necessary to control the use of property in accordance with the general interest to secure the payment of taxes or other contributions. NICs are considered to fall within the ambit of 'taxes or other contributions'.

99. In assessing whether a fair balance is struck there is a wide margin of appreciation in relation to social security matters, including contributions, and the courts have consistently respected a state's policy choice unless it is 'manifestly without reasonable foundation'. Any interference is not manifestly without reasonable foundation given that it strikes a proper balance between the interests of the person affected and the wider public interest by securing the economic well-being of the UK by coordinating social security provision with EU member states on a reciprocal basis. EU member states are also subject to the same legal constraints under the ECHR and it is reasonable to infer that they have not agreed to a system of coordination in breach of those constraints.

100. **Social security benefits**: In the event that there was any interference with A1P1 rights, this is justified on the same basis as the analysis above.

Privilege and Immunities

Article 6

Article 6 is engaged by clause 27 - The EU and Euratom and related organisations and bodies

101. Immunity from suit and legal process in respect of official acts is one of the privileges and immunities (P&Is) habitually granted to international organisations (IOs). Immunity in respect of official acts is also habitually granted to officials of IOs and certain high-level officials may also have personal immunity. The amended power under section 4B of the International Organisations Act 1968 (IOA) is likely to be used to grant IOs and certain officials limited immunity of this sort and to the extent that the power is used to grant immunity from criminal jurisdiction the same considerations below apply.[16]

102. The power to confer P&Is on an IO does not itself engage Article 6 of the ECHR. Rather, it is the *exercise* of the power to confer immunity from suit and legal process on the IO and certain officials that may engage Article 6. However, to the extent that the power to grant such immunity could be said

[16] This would also apply in respect of F4E, which is, as noted above, essentially an organ of Euratom.

to engage Article 6, it is compatible with that Article. This necessarily follows from the fact that the grant of immunity from suit and legal process is itself compatible with Article 6, for the reasons set out below.

Interference

103. Article 6(1) of the ECHR secures the right to have any claim relating to a person's civil rights and obligations brought before a court or tribunal.[17] A right of access to a court to determine a dispute is an inherent part of this.[18]

104. An IO's immunity from suit and legal process potentially interferes with this right, since it may bar a person's access to a court or tribunal to hear claims against the IO. Similarly, an official of an IO who benefits from immunity may not be subject to the jurisdiction of the UK courts in respect of a civil or criminal complaint, depending on the scope of their immunity.

Justification

105. The right under Article 6 is a qualified right. Interference is justified where it pursues a legitimate objective by proportionate means and does not impair the essence of the right.[19]

106. It is widely accepted that P&Is pursue a legitimate objective. In respect of P&Is granted to an IO, the ECtHR recognised in *Waite and Kennedy* that: "the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments", with the result that "the rule of immunity from jurisdiction […] has a legitimate objective".[20]

107. It is also accepted that the grant of immunity in respect of an IO may be a proportionate interference with the right under Article 6 which does not interfere with the essence of that right.[21] This was expressly recognised in *Entico v UNESCO* [2008] EWHC 531, where the High Court indicated that "compliance with obligations owed in international law is of itself pursuit of a legitimate aim" and, to the extent that an order made under the IOA "reflects generally recognised rules of public international law on organisational

[17] *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para. 50.

[18] [See, for example, *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, para. 14]

[19] *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para. 59; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, para. 14.

[20] *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para. 63.

[21] *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para. 73.

immunity, […] it cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)".[22]

108. It follows that exercise of the powers under section 4B of the IOA (as amended) to grant an IO, or certain officials of the IO, immunity from jurisdiction would, in principle, be compatible with Article 6 of the ECHR.

Energy

Articles 6, 8 and Article 1 Protocol 1

Articles 6, 8 and A1P1 are engaged by clause 28 – Nuclear Cooperation Agreement

109. The combination of reporting requirements, potential ONR enforcement activities and the potential offences resulting from non-compliance results in potential interaction with Article 6 (right to a fair trial), Article 8 (right to privacy) and Article 1 of Protocol 1 (right to the peaceful enjoyment of property) ("A1P1") of the ECHR.

Interference

110. Adding the UK-Euratom NCA as a "relevant international agreement" for the purpose of the Energy Act 2013 ("EA 2013") extends the remit of the regulation making power in section 76A(1)(b) of the EA 2013, to include giving effect to provisions of the UK-Euratom NCA. The extension of that power to include the UK-Euratom NCA does not itself interfere with Convention rights, and any regulations made under that power would already need to appropriately account for any inference with such rights and will continue to do so.

111. The inclusion of the UK-Euratom NCA within the definition of "specified international agreement" under regulation 49 of the Nuclear Safeguards (EU Exit) Regulations 2019 ("NS Regulations") engages obligations on nuclear operators to provide information as set out under Part 13 of those regulations. The addition of the UK-Euratom NCA here does not, however, alter the nature of the obligations themselves.

112. Including the UK-Euratom NCA as a "specified international agreement" also switches on offences already set out in regulation 43 of the NS Regulations

[22] *Entico v UNESCO* [2008] EWHC 531, para. 26. The ECtHR has stated in similar terms in relation to State immunity: "It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)" (*Fogarty v UK* (2002) 34 EHRR 12, para. 36).

- insofar as these relate to the UK-Euratom NCA. The change does not, however, alter the offences themselves.

113. The amendment to "specified international agreement" also switches on the Office for Nuclear Regulation's enforcement powers in respect of the NS Regulations which are provided for in the EA 2013. Those enforcement powers are not altered by this clause and have already been considered as compatible with Convention rights.

Justification

114. Nuclear safeguards are at the heart of the amendments in clause 28. The UK's international treaties on nuclear safeguards and the domestic nuclear safeguards regime have legitimate and internationally important aims: to contribute to the global non-proliferation regime (to prevent nuclear materials intended for civil nuclear purposes being used by non-nuclear weapons states to develop nuclear weapons) and to facilitate international trade in the nuclear sector.

115. When making any nuclear safeguards regulations under section 76A of the EA 2013, the Secretary of State must do so in compliance with the HRA 1998 and ensure that any interference with ECHR rights is both in the public interest and proportionate.

116. In terms of the ONR's nuclear safeguards purposes and the engagement of Part 13 of the NS Regulations, it is important to note that the ONR is a public authority for the purposes of the HRA 1998.

117. In respect of the ONR's enforcement powers, the interference must be proportionate in order to be lawful and as explained above, the relevant enforcement powers have already been considered as compatible with Convention rights.

118. The focus of the nuclear safeguards regulatory regime is on reporting and verification. The purpose and consequences of failure of that regime are significant. The imposition and enforcement of the obligations referred to above will be proportionate when balanced against that purpose and is necessary in the interests of national security, public safety and the protection of public health.

Parts 3 and 4: General implementation and supplementary and final provisions

119. Part 3 makes provision around general implementation**.**

120. Clause 29 provides that domestic law is to have effect with such modifications as are required for the purposes of the implementing international obligations under the agreements. In principle, the modifications could interfere with convention rights however we consider that this is unlikely. The approach of the Bill is to ensure that where detailed implementation is required, it is achieved through implementation of the face of the Bill, using the implementation power or through the exercise of existing powers. In the areas where implementation is achieved through the general modification we consider that there is a low risk that convention rights are engaged.

121. Clause 31 provides a power to implement the agreements or issues that arise from the future relationship agreements. The power will be exercised to ensure that more detailed implementation of the agreements is achieved and to ensure that the UK can implement obligations under the agreement going forward. Further equalities analysis will be carried out when the power is exercised.

122. The other provisions in parts 3 and parts 4 of the Bill are general in nature and do not interfere with convention rights.

CABINET OFFICE
30/12/2020