NUCLEAR ENERGY (FINANCING) BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Nuclear Energy (Financing) Bill (the "Bill"). This memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (the "Department"). On introduction of the Bill, in the House of Commons, the Minister of State (the Rt Hon Greg Hands MP) 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

Climate change commitments

2. The UK is committed to the legally-binding target of "net zero" greenhouse gas emissions by 2050[1] and, earlier this year, the new target to reduce emissions by 78% by 2035 was enshrined in law.[2] This will require rapid, significant decarbonisation in the energy sector, whilst responding to the challenge of rising consumer demand. Analytical modelling by the Department suggests that the electricity system is likely to need to at least double in size between now and 2050 as, for example, the heat and transport sectors rely increasingly on electricity for their own decarbonisation.

3. A significant amount of the required growth in capacity will need to come from renewables and increased energy storage. However, in order to minimise overall electricity system costs, low-carbon, non-intermittent power is required to limit expensive over-deployment of intermittent power sources and the associated network costs. Large-scale nuclear power plants are the only proven technology we have available today to provide continuous, reliable and low carbon electricity. But our existing nuclear fleet will be almost completely retired by 2030, and Government analysis shows that we are likely to need nuclear generation beyond the new plant being constructed at Hinkley Point C.

4. For these reasons, a central commitment in the recent Energy White Paper (December 2020) is that the Government will aim to bring at least one new large-scale nuclear project to the point of a final investment decision (**"FID"**) by the end of this Parliament (subject to clear value for money and all relevant approvals). In parallel, the Government will continue rapidly exploring the development of new nuclear technologies beyond conventional large-scale plants.

Financing new nuclear projects

[1] Climate Change Act 2008 (2050 Target Amendment) Order 2019.
[2] Carbon Budget Order 2021.

5. The latest nuclear project to reach FID in Great Britain is the Hinkley Point C (**"HPC"**) project, currently under construction in Somerset. The project was financed solely by its owners under a "contract for difference" (**"CFD"**) model using the framework set out in the Energy Act 2013. A CFD provides a generator a specific price (the **"Strike Price"**) in relation to the electricity that the plant produces once operational.[3] This is designed to provide increased certainty around revenue levels during operations in order to encourage investment in electricity generation, whilst retaining the need for the generator to sell its electricity in the commercial market.

6. The deal agreed on HPC by the Government was considered the most appropriate for that project at that time. However, it was criticised by the National Audit Office (**"NAO"**) and the Public Accounts Committee (**"PAC"**) on the grounds that "investors' required rate of return could have been lower if consumers or taxpayers had shared some of the construction risks". The NAO therefore recommended that the Government consider whether alternative funding models for future new nuclear projects could improve value for money and reduce cost to consumers.

7. Since agreement of the HPC deal, the Government has continued to engage with prospective nuclear developers in relation to other projects. However, progress has been challenging. In 2018, Toshiba announced the winding up of NuGen (its subsidiary which had been pursuing a new nuclear project at Moorside in Cumbria); and Hitachi suspended the Wylfa project on the Isle of Anglesey in January 2019 (and wound it up entirely in September 2020), after being unable to reach agreement on a deal during negotiations with the Government.

8. Following the experience with the projects on Wylfa and Moorside, it has become apparent that reliance on oversees developers to finance new projects alone under the contract for difference model may frustrate efforts by the Government to secure new capacity. This is largely due to the significant up-front costs required for construction of a new nuclear plant under a CFD model (which fall on the developer's balance sheet) before any revenue can be generated.

Nuclear RAB model

9. This legislation supports the Government's commitment to build a clean, resilient and affordable energy system by establishing a statutory framework for a nuclear regulated asset base (**"RAB"**) model as a new funding model for new nuclear projects, as well as tackling other obstacles to private investment in the nuclear sector. This framework is set out in Parts 1 and 2 of the Bill, which extend to England and Wales and Scotland.[4]

10. It is intended that the use of the RAB model will facilitate private sector investment into new nuclear projects (and thereby make such projects viable) by creating an investment proposition that is comparable to other types of infrastructure projects.

[3] When the market price for electricity is below the Strike Price set out in the CfD, a "top-up" payment is made to the generator (funded through a levy on electricity suppliers) in order to make up the difference. Conversely, if the market price rises above the Strike Price, the generator repays the difference to suppliers.

[4] Electricity generation is regulated separately in Northern Ireland.

It should also enable nuclear projects to be delivered at a cost of capital which is as efficient as possible, thereby reducing the total costs of projects to consumers.

11. The Government consulted on a RAB model for new nuclear in July 2019 and published its response in December 2020, which confirmed its assessment that the model is a credible basis for financing large-scale nuclear projects.[5] A RAB model is a type of economic regulation which is typically used in the UK for monopoly infrastructure assets such as water, gas and electricity networks. The company who owns the relevant assets is given the right to charge a regulated price to users in exchange for construction and provision of the infrastructure in question. A RAB model has successfully been applied to single asset construction projects, such as the Thames Tideway Tunnel sewerage project.

Part 1: Economic Regulatory Regime

12. In order to implement a nuclear RAB model, the framework for an economic regulatory regime (**"ERR"**) needs to be established in statute. Under the ERR, the Secretary of State will designate a nuclear project company (a **"designated nuclear company"**) that holds an electricity generation licence in respect of a nuclear energy generation project.[6] Following designation, the Secretary of State will modify[7] the company's licence in order to incorporate a new set of special conditions for economic regulation (**"RAB Conditions"**) and amend the existing licence terms.[8]

13. The RAB Conditions will, among other things, provide for the calculation of an "allowed revenue" in respect of the company's activities throughout the construction and operation of the project, which will be used as the reference point against which the company's right to "top-up" payments will be determined (see further below). The conditions will also provide for an appropriate allocation of risks between investors, consumers and taxpayers (e.g. by way of appropriate incentivisation and penalty mechanisms in relation to cost or time overruns). The terms of the licence will be modified in order to, for example, tailor the standard revocation terms to reflect the specific requirements of the RAB funding model (e.g. to make certain of Ofgem's normal rights of revocation subject to Secretary of State approval).[9]

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[5] The Department's own internal analysis suggests that the model could also be used for emerging nuclear technologies (such as so-called "small modular reactors"), depending on individual project requirements, with the result that the legislation is not limited to large-scale nuclear.

[6] Such a licence would have been awarded by Ofgem under section 6(1)(a) of the Electricity Act 1989.

[7] By virtue of the definition of "modify" in subsection (8) of clause 8, modifications made using the power in clause can involve adding new conditions as well as amending existing ones. For the most part, the RAB model will involve the addition of new special conditions (as discussed below).

[8] An electricity licence usually comprises two parts: the licence "terms" and the licence "conditions". The "terms" are generally quite short; they include basic information regarding the licensee, the terms on which the licence can be revoked (in a "Revocation Schedule") and give effect to the licence conditions. The "conditions" are much lengthier than the terms and set out the detailed provisions that the licensee must comply with in relation to the regulated activity.

[9] The Gas and Electricity Markets Authority ("GEMA" or the "Authority") regulates the electricity market in Great Britain. It is supported by an executive arm, the Office of Gas and Electricity Markets ("Ofgem"). For ease of exposition, this memorandum will generally refer to Ofgem. However, this should be read in the context that all powers and duties in legislation are conferred on GEMA.

14. Once a designated nuclear company's generation licence has been modified and the company has entered into a revenue collection contract, its designation comes to an end and the company is thereafter referred to as a **"relevant licensee nuclear company"**. The result of the designation ceasing to have effect is that the Secretary of State no longer has a broad power to modify the company's generation licence (given that the power can only be exercised in relation to a "designated nuclear company"). Ofgem, as the existing independent electricity regulator in Great Britain, then regulates the relevant licensee nuclear company in accordance with its modified licence.

15. After a nuclear company's designation expires, the only circumstances in which the Secretary of State will be able modify its licence under the ERR measure will be where the total expenditure likely to be incurred by the company in completing the construction of the relevant nuclear project is expected to exceed any cap on such expenditure included in its licence, with the result that an adjustment to the calculation of its allowed revenue is required. This limited scope for the Secretary of State to modify the licence after designation provides additional certainty to the relevant licensee nuclear company and its investors (thus supporting private sector investment), as well as upholding Ofgem's position as the independent electricity regulator.

16. The measures in the Bill would:

    (a) Create a power for the Secretary of State to designate a company in relation to a proposed nuclear energy generation project (clause 2). The Secretary of State would only be able to exercise the designation power if they are of the opinion that the project's development is sufficiently advanced to justify designation and that designating the company is likely to result in value for money.

    (b) Create a procedural framework around the exercise of the Secretary of State's designation power (clauses 3, 4 and 5). This would include the Secretary of State being required to publish a statement setting out the procedure to be followed and how the Secretary of State intended to determine whether the criteria mentioned above had been satisfied. Before making a designation, the Secretary of State would also be required to prepare draft reasons and consult a list of statutory consultees (including the company that they proposed to designate). A designation would be time-limited (subject to extension by the Secretary of State) and could also be revoked by the Secretary of State or lapse if any conditions attached to it failed to be satisfied (clauses 4 and 5).

    (c) Create a power for the Secretary of State to modify the conditions and terms of the electricity generation licence of a designated nuclear company in order to implement a nuclear RAB model for the company (as discussed above) (clauses 6(1)-(6) and 7). The Secretary of State would be able to exercise the power only for the purpose of facilitating investment in the design, construction, commissioning and operation of nuclear energy generation projects. They would also be required to have regard to a list of specified matters when exercising the power, including interests of existing and future electricity

consumers regarding relation to the cost and security of supply and the reduction of greenhouse gas emissions. Examples of the types of modifications that the Secretary of State may make under the power are set out in subsections (5) and (6) of clause 6.

(d) Create a power for the Secretary of State to modify the standard conditions incorporated into electricity licences, and associated industry codes, for consequential, incidental or supplementary purposes (clauses 6(7)-(8) and 7). Where the Secretary of State made modifications under this power, Ofgem would be required to mirror them in the standard conditions incorporated into electricity licences granted after that time (clause 8(6)).

(e) Create a power for the Secretary of State to modify the conditions of the electricity generation licence of a relevant licensee nuclear company during the construction phase of the nuclear project where it is considered that the total expenditure likely to be incurred to complete construction would exceed a cap included in the licence, resulting in it being necessary to make an adjustment to how the licensee's allowed revenue is to be calculated (clauses 7 and 8). In exercising the power, the Secretary of State would be required to have regard to the same matters as when exercising the licence modification power under clause 6.

(f) Enable a relevant licensee nuclear company to appeal to the Competition and Markets Authority (the **"CMA"**) any decision made by Ofgem appealable under its licence conditions which relates to its allowed revenue (clause 10). At present, section 11C of the Electricity Act 1989 provides that an appeal to the CMA only lies in relation to a decision by Ofgem which results in a licence condition modification (which will not always be the case under the RAB model).

(g) Impose a duty on a company to provide information to the Secretary of State where reasonably required to enable him or her to determine whether the company meets the criteria for designation (clause 11).

(h) Enable Ofgem to provide and request information from regulatory bodies and other specified persons where necessary in connection with Ofgem's regulation of the relevant licensee nuclear company (clause 12). This includes, for example, the exchange of information with the Office for Nuclear Regulation (the **"ONR"**) as the regulatory body responsible for nuclear safety and security in the UK.[10]

Part 2: Revenue Stream

17. To the extent that, in a given period, the relevant licensee nuclear company is unable to generate the allowed revenue calculated under its modified licence from selling electricity into the market or related activities, it will receive top-up payments (both in construction and operations) funded through a levy on electricity suppliers.

[10] In order to install or operate a nuclear reactor in the UK a "nuclear site licence" is required. Such a licence can only be granted by the ONR, whose responsibilities then include the ongoing monitoring of licensed sites and licensed operators.

Suppliers are expected to pass these additional costs onto consumers through an increase to their electricity bills (albeit this will not be mandatory). In contrast, where Ofgem calculates that the relevant licensee nuclear company's forecasted market revenues will exceed the allowed revenue for a given period, the company will be required to pay the difference back to suppliers (who can, but will not be obliged to, factor those amounts into their consumer charging). Not mandating in the legislation that suppliers pass costs (or monies received) onto their consumers allows greater scope for competition and the operation of market forces in relation to the levy. By way of example, some suppliers may choose to pass any reimbursements onto consumers in order to reduce tariffs and attract more customers; whereas others may prefer to retain the funds in order to develop their consumer offering in other ways.

18. This flow of payments between electricity suppliers and the relevant licensee nuclear company is referred to as the "revenue stream" and will be administered by an intermediary body (a revenue collection counterparty). An illustrative diagram of the revenue stream mechanics is included as an Annex to this Memorandum. The Secretary of State will be able to direct a revenue collection counterparty to offer to enter into a contract with a designated nuclear company (a **"revenue collection contract"**), which would set out the terms relating to the payment and receipt of the top-up payments discussed above. The revenue collection counterparty will fulfil its payment obligations under any revenue through a levy on electricity suppliers, the detailed mechanics of which will be set out in secondary legislation.

19. The measures in the Bill would:

(a) Create a power for the Secretary of State to make regulations about revenue collection contracts between a revenue collection counterparty and a designated nuclear company (clause 15). This would include provision in relation to, for example, the duties and activities of the revenue collection counterparty (clauses 17 and 21), payments from and to electricity suppliers in relation to the revenue mechanism discussed above (clauses 19 and 20), the request and receipt of information and advice between the various participants in the revenue stream (clause 23), and the functions of, and enforcement by, Ofgem (clauses 22 and 24).

(b) Create a power for the Secretary of State to designate a company or public authority as a revenue collection counterparty (clause 16)

(c) Create a power for the Secretary of State to be able to direct a revenue collection counterparty to offer to contract with a designated nuclear company on specified terms (clause 18).[11]

[11] The regulations described at paragraph 19(a) above may include provision about the circumstances in which a direction may or must be given, and the terms that may or must be specified in a direction (clause 18(2)).

(d) Create a power for the Secretary of State to make schemes for the transfer of property, rights or liabilities from a former revenue collection counterparty to a new counterparty (clauses 26 and 27).

(e) Create a power for the Secretary of State to modify the conditions of a particular transmission or distribution licence, standard conditions incorporated into such licences, or associated industry codes for the purpose of implementing certain aspects of the revenue stream (clause 29).[12]

Other measures facilitating new nuclear

20. The other measures in the Bill are not specifically required for the implementation of the nuclear RAB model. Instead, they sit alongside the RAB model, or address obstacles to attracting private investment to nuclear projects.

Part 3: Special administration regime

21. Part 3 of the Bill creates a special administration regime (**"SAR"**) for relevant licensee nuclear companies. In the event of such a company becoming insolvent, the Secretary of State or the Authority with the Secretary of State's consent, may apply to the court for a "RLNC administration order". The objective of an RLNC administration order would be to secure that electricity generation commences, or continues, until the company in RLNC administration is rescued or its business is transferred to one or more companies as a going concern.

22. Normal insolvency procedures aim to maximise returns for creditors of insolvent companies, but that may not ensure that electricity generation commences or continues in the event that a relevant licensee nuclear company is subject to such procedures. Consequently, there is a risk that if a relevant licensee nuclear company enters a normal insolvency procedure, the intended benefit for consumers derived from funding a plant in this way (e.g. long-lasting, stable nuclear power)may be lost.

23. The measures in the Bill would:

a) Create a power for the Secretary of State or the Authority, with the Secretary of State's permission, to apply to the court for the appointment of a nuclear administrator (section 156 of the Energy Act 2004, as applied by clause 33). A court may make a RLNC administration order where a relevant licensee nuclear company is:
   i) is unable to pay its debts;

[12] Electricity is conveyed from generating stations to final customers through transmission and distribution networks. Distribution networks form the final part of the journey to the customer and comprise the wires from a substation (an interface with the transmission system) to the final premises. There are 14 distribution networks in Great Britain covering discrete regions, each operated by a licensed distribution network operator. The transmission network carries electricity at high voltage from generating stations to substations feeding distribution networks. There is one national transmission system operator (National Grid ESO) who is responsible for operating the system as a whole, and three transmission owners who are responsible for the build and maintenance of the transmission assets.

ii) is likely to be unable to pay its debts;
iii) on a petition from the Secretary of State under section 124A of the Insolvency Act 1986 it would be just and equitable (aside from the objective of RLNC administration) to wind up the company in the public interest.

b) Provide that a nuclear administrator must be qualified to act as an insolvency practitioner and is both an officer of the court and, in the exercise and performance of functions required in the role, an agent of the relevant licensee nuclear company. Moreover, a nuclear administrator must exercise and perform functions in that role in a manner which best protects the interests of the creditors as a whole, and subject to those interests, the interests of the members of the company as a whole, so far as is consistent with achieving the objective of a RLNC administration order (section 158 of the Energy Act 2004 as applied by clause 33).

c) Require the Secretary of State and the Authority to be put on notice in relation to other insolvency procedures taken in respect of a relevant licensee nuclear company. Further, restrictions will be imposed on a relevant licensee nuclear company being subject to other insolvency procedures whilst a RLNC administration is in force (sections 160 to 164 of the Energy Act 2004, as applied by clause 33);

d) Conferring the power in section 411 of the Insolvency Act 1986 to make insolvency rules on the Secretary of State in relation to the SAR for relevant licensee nuclear companies (section 159 of the Energy Act 2004, as applied by clause 33).

e) Create a power for the Secretary of State to make grants, loans, indemnities and guarantees where an RLNC administration order has been made in relation to a relevant licensee nuclear company (sections 165 to 167 of the Energy Act 2004, as applied by Clause 33).

f) Create a power for the Secretary of State to modify the conditions and terms of the electricity generation licence of a relevant licensee nuclear company which is the subject of a RLNC administration order (clause 35). The Secretary of State would be able to exercise the power only for the purpose of furthering the objective of the RLNC administration order. The Secretary of State would also be required to have regard to a list of specified matters when exercising the power, including the need to protect the interests of existing and future electricity consumers with regard to the cost and the security of supply of electricity and the reduction of greenhouse gas emissions. Examples of the types of modifications that the Secretary of State may make under the power are set out in subsections (4) and (5) of clause 35.

g) Extending the power of modification or application conferred on the Secretary of State by sections 248 and 277 of the Enterprise Act 2002 (which provide for consequential amendments and for application of insolvency law to foreign

companies) to include the power to make such consequential modifications to the SAR provisions set out in these Bill clauses, and to Chapter 3 of Part 3 of the Energy Act 2004 as applied by clause 4 of this Bill, as the Secretary of State considers appropriate in connection with any other provision made under those sections (clause 37).

h) Create a power to provide for insolvency legislation to apply to and to make such modifications of insolvency legislation (including Part 3 of the Bill) as is considered appropriate in relation to any provision made by or under the SAR provisions set out in the Bill (clause 38).

Part 4: Miscellaneous

24. Clause 40 amends a particular aspect of Chapter 1 of Part 3 of the Energy Act 2008 in relation to funded decommissioning programmes (**"FDPs"**). Under the 2008 Act, anyone intending to build a nuclear power station on a site must submit an FDP to the Secretary of State setting out the site operator's costed plans for dealing with its future liabilities in relation to decommissioning, waste management and waste disposal, and how the operator will make financial provision to meet those liabilities. It is a criminal offence for an operator to start construction work on any buildings with nuclear safety significance without an approved FDP in place. The Secretary of State has the power to unilaterally modify an FDP, both at the time of its original approval and at any point thereafter, to impose obligations on bodies corporate which are "associated" with the site operator.[13] An amendment to the definition of "associated" is required in order to clarify that the Secretary of State should not be able to modify an FDP to impose decommissioning obligations on entities solely by virtue of them holding or exercising certain security rights under a financing structure for a new nuclear project.

ECHR Issues

25. The table below shows where the Government considers ECHR issues arise in the Bill. All references to "Articles" in the memorandum are to the articles of the ECHR unless provided otherwise.

Nuclear Energy (Financing) Bill: Clause	*Article 1 of Protocol 1*	*Article 6*	*Article 8*
Part 1 – Nuclear Energy Generation Projects: Regulated Asset Base Model			
6 Licence modifications: designated nuclear companies	x	x	
7 Licence modifications: relevant licensee nuclear companies	x	x	

[13] By way of example, if the Secretary of State formed the view that a change of circumstances meant that an approved FDP no longer made prudent provision for a nuclear power station's estimated future decommissioning costs, they could decide to amend the FDP to require bodies corporate "associated" with the operator to contribute additional amounts to the relevant FDP fund.

11 Provision of information to the Secretary of State			x
12 Provision of information to or by the Authority			x
Part 2 – Revenue Collection Contracts			
15 Regulations about revenue collection contracts	x		x
29 Licence modifications	x	x	
Part 3 – Special Administration Regime			
31 to 34 Introduction of a special administration regime	x		
35 License modifications: relevant licensee nuclear company administration	x	x	

Article 1 of Protocol 1: Protection of property

26. Article 1 of the First Protocol to the ECHR ("A1P1") provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. A1P1 includes the qualification that it should not impair the right of a State to enforce such laws as it deems 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).

Engagement and interference

Licence modifications: clauses 6, 7, 29 and 35

27. The powers for the Secretary of State to modify the conditions and terms of electricity licences under these clauses are discretionary and so do not engage any Convention rights directly. However, their exercise by the Secretary of State has the potential to interfere with A1P1 (right to property).

28. The economic benefit of carrying out activities under an electricity licence is likely to constitute a possession of the relevant licensee for the purposes of A1P1: *Tre Traktörer Aktiebolag v Sweden*.[14] On the assumption that it does, the Department considers that any licence modifications made using these powers will be a control of use rather than a deprivation of property.

29. Whilst the modifications made using these powers may differ, they would not prevent a licensee from benefitting from the activity authorised by that licence. The ECtHR has consistently found that the revocation or withdrawal of a licence relating to the running of a business activity will amount to a control of use rather

[14] [1989] ECHR 15

than a deprivation of property.[15] It follows that the *modification* of a licence (which necessarily falls short of revocation) must, to the extent that it involves an interference with A1P1, fall within the same category and fall to be considered under the second paragraph of that Article.

Power to make regulations about revenue collection contracts: clause 15

30. Clause 15(1) creates a power for the Secretary of State of State to make regulations about revenue collection contracts, as defined in clause 15(2). Subsequent clauses provide further details of the types of matters that such regulations may (or must) cover. The most relevant for present purposes are those relating to payments from electricity suppliers in relation to the revenue mechanism (clause 19), and the request and receipt of information and advice between the various participants in the revenue stream (clause 23).

31. For the most part, the regulation-making provisions are discretionary and do not therefore directly engage any ECHR rights (although such rights could potentially be engaged when regulations are made). However, clause 19(1) imposes a *duty* on the Secretary of State to include provision in regulations for electricity suppliers to pay a revenue collection counterparty for the purpose of enabling the counterparty to make payments under revenue collection contracts. The regulation-making power in clause 15(1) must be exercised to achieve that result and this therefore could engage ECHR rights at the level of the primary legislation.

Introducing an alternative to normal insolvency proceedings: clauses 31 to 34

32. The continued operation of the relevant licensee nuclear company in RLNC administration – with the possible increased losses to creditors – might engage A1P1.

33. The enforcement of securities and contractual rights has been held to be a "possession" within the meaning of Article 1 of Protocol.[16] The right protected by A1P1 is likely to be the right to recover the creditor's debt from the relevant licensee nuclear company, rather than the choice of insolvency proceedings. The imposition of a SAR does not itself take away the right to the debt, rather it changes the way the debt may be dealt with if a RLNC administration order is in force.

34. It is the Department's view that there will be no deprivation of property as such, but there may be a "control of use" of property. In *Luordo v Italy*,[17] the ECtHR held that the interference took the form of a control of use of property where the claimant was made the subject of a bankruptcy order. There was no deprivation of property, but the right to administer and deal with possessions was affected, as the responsibility for administering those possessions was assigned to the trustee in bankruptcy. By analogy, whilst it would be the relevant licensee nuclear company

[15] See, for example: *Tre Traktörer Aktiebolag v Sweden* [1989] ECHR 15; *Rosenzweig and Bonded Warehouses Ltd v Poland* [2005] ECHR 552; *Bimer S.A. v Moldova* (No. 15084/03, Judgment of 10/07/2007); and *Megadat.com SRL v Moldova* (No. 21151/04, Judgment of 08/04/2008).
[16] Wilson v Secretary of State for Trade and Industry [2003] UKHL 40 at 44.
[17] [2003] ECHR 372

which is the subject a RLNC administration order, such an order will not ultimately deprive creditors of their contractual rights or entitlement to the debt. The statutory moratorium will however place a control on the right of creditors to pursue legal proceedings in relation to the debt whilst a RLNC administration order is in force.

Energy transfer schemes: section 159 of, and Schedule 21 to the Energy Act 2004, as applied by clause 33

35. Clause 33 of this Bill applies section 159 of and schedule 21 to the Energy Act 2004, with necessary modifications, in respect of a relevant licensee nuclear company. During a RLNC administration order, the nuclear administrator may prepare an energy transfer scheme in respect of the relevant licensee nuclear company's assets as a means of securing that electricity generation commences or continues at the relevant nuclear installation. This transfer may take place even though a third party, including creditors, would otherwise have been able to object to that transfer. This might engage A1P1 and may involve a greater risk of a deprivation of property from third parties, such as creditors.

36. The same energy transfer scheme is used in relation to the SARs for network (Schedule 21 of the Energy 2004), supply (section 96 of the Energy Act 2011, which applies section 159 of and Schedule 21 to the Energy Act 2004) and smart meter (section 4 of the Smart Meters Act 2018, which applies section 159 of and Schedule 21 to Energy Act 2004) companies. The SAR for further education bodies also contains a transfer scheme (section 25 of the Technical and Further Education Act 2007).

Compatibility

37. The Department considers that the provisions of the Bill are compatible with Article 1 of Protocol 1. The justification for this assessment is set out below.

Justification

License modifications: clauses 6,7, 29 and 35

38. In each case, the Department considers that any interference with A1P1 can be justified as being in the public interest on the basis that the licence modification powers are central to the implementation of the nuclear RAB model and the special administration regime. Nuclear power has an important role to play in delivering a clean, resilient and affordable energy system and in meeting our legally binding climate change targets. Any control of use will also be proportionate given that the powers can only be exercised for specific purposes which are tied to the above objectives. The Secretary of State will be required to consult the relevant parties in relation to any proposed modification before the exercise of that power.

39. For these reasons, the Department considers that each of the licence modification powers in clauses 6, 7 29 and 35 is capable of being exercised in a way which is compatible with A1P1. As a public authority within the meaning of the Human Rights Act 1998, the Secretary of State will be under a duty to act compatibly with ECHR rights when making the licence modifications. Any interference would also

be in accordance with national law by virtue of the modification powers being enshrined in primary legislation.[18]

Power to make regulations about revenue collection contracts: clauses 15

40. The imposition of an obligation on electricity suppliers to make compulsory payments to a revenue collection counterparty may be an interference with the possessions of those suppliers . The supplier obligation is therefore likely to fall within the second paragraph of A1P1, as the revenue collection counterparty will be a public sector body (because of the controls that can be exercised over it), the monies levied can only be used for the purposes set out in regulations and those amounts are ultimately being levied in order to fund the public need for new nuclear energy infrastructure.

41. A comparison can be drawn with the decision of the European Commission of Human Rights in *X v Austria*,[19] which related to a charge imposed by the municipality of Vienna on all employers (of 10 Shillings per employee per week) to be allocated to the financing of the construction of an underground railway. Although not the primary focus of the decision, it is clear that the Commission regarded this as falling under the second paragraph of A1P1. A levy imposed on a specific group of people with a goal related to the financing of a construction project in the public good is analogous to the clause 15.

42. The imposition of a charge of the nature envisaged by clause 15 can, in principle, be an interference with the right guaranteed by the first paragraph of A1P1 since it deprives the person concerned of a possession, i.e. the amount of money which must be paid (see e.g. *Burden v UK*).[20] However, such measures are treated differently to other interferences because of the second paragraph of A1P1.

43. The State is generally afforded a wide margin of appreciation in the context of measures of economic or social strategy. In particular, the ECtHR will respect the legislature's assessment in such matters unless it is "devoid of reasonable foundation" (*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*).[21] This is in view of the fact that ECHR Member States are better placed than the Court to make complex assessments regarding how to address political, economic and social problems.

44. A measure may be devoid of reasonable foundation where it imposes an "individual and excessive burden" on the person concerned or where a measure is so harsh that it amounts to an arbitrary confiscation of assets or fundamentally interferes

[18] For an example of a case where the revocation of a licence to conduct a business was found by the ECtHR to be lawful and pursued in the general interest, see *Tre Traktörer Aktiebolag v Sweden* [1989] ECHR 15 (Swedish social policy of restricting the consumption and abuse of alcohol).?//
[19] Eur. Comm. H. R., decision of 13 May 1976, No. 6087/73, DR 5.
[20] [2008] ECHR 357.
[21] [1995] ECHR 7. See also *National & Provincial Building Society and Others v United Kingdom* [1997] ECHR 87.

with his financial position (*Ferretti v Italy*;[22] *Wasa Liv Ömsesidigt v Sweden*;[23] *Buffalo S.r.l. in liquidation v Italy*[24]). The Department's view is that this will not be the case for the supplier obligation under the revenue stream. The obligation of an individual supplier will relate to the proportion of the electricity retail market it has supplied in the period for which the obligation is due. The addition of the supplier obligation is likely to increase the costs for each supplier of their supply business, but they will not be prevented from passing such costs through to their customers .

Introducing an alternative to normal insolvency proceedings: clauses 31 to 34

45. The Department considers that any interference with A1P1 can be justified as being in accordance with the general interest given the contribution that consumers will have made to any nuclear project funded by a RAB model. A relevant licensee nuclear company entering insolvency may have a secondary impact on the security of the energy market and compound the negative effects experienced by consumers. The sudden loss of electricity generation from a nuclear power plant may increase the demand for electricity generation from other sources, such as gas fired power stations. The loss of diversity in electricity generating assets may make the energy sector and consumers more vulnerable to other external factors, such as short term increases in the wholesale price of gas. The continued operation of a nuclear power plant owned by a relevant licensee nuclear company is therefore important to protect consumers.

46. Whilst the extent to which a creditor may suffer loss (over and above what they would usually suffer in a normal insolvency) in any particular case will be important in assessing whether the application of the regime was proportionate, the Department does not consider that clauses 31 to 34 themselves breach rights protected by the Convention. In assessing proportionality, the importance of securing the generation of electricity is likely to be given considerable weight, especially given the likely adverse consequences for consumers and the energy industry if generation was to cease. The fact that creditors are aware that they are lending into a regulated environment may well also be relevant, particularly as SARs in regulated environments are generally seen as a credit enhancement by ratings agencies. A nuclear administrator must exercise and perform functions in that role in a manner which best protects the interests of the creditors as a whole, and subject to those interests, the interests of the members of the company as a whole, so far as is consistent with achieving the objective of a RLNC administration order. Given the likely role consumers will have in any nuclear project which is the subject of a RAB model, it is considered that this strikes a fair balance between the interest of those consumers and creditors.

47. The Department considers that clauses 31 to 34 can be operated in a way that is compliant with Convention rights. There are several key decision points set out in clauses 31 to 34 of this Bill, all of which require decisions to be taken by the

[22] No. 25083/94, Commission decision of 26 February 1997.
[23] No. 13013/87, Commission decision of 14 December 1988.
[24] [2003] ECHR 333.

Secretary of State or the Authority, with the consent of the Secretary of State. These include whether to apply to the court in the first place for a RLNC administration order and applying to the court to bring a RLNC administration to an end. All of these decisions will need to be compliant with the Convention, and clauses 31 to 34 gives the Secretary of State the flexibility that is necessary to ensure compliance at those junctures.

48. In addition to this, the court has various powers under section 157(2) of the Energy Act 2004 (which is applied by virtue of clause 33 of the Bill) in relation to an application for a RLNC administration order, one of which is to dismiss the application. Given the court's obligations under section 6 of the Human Rights Act 1998 to act in a way which is compatible with a Convention right, the Bill incorporates a further safeguard to ensure that clauses 31 to 34 are operated in a way which is compliant with rights under the Convention.

Energy transfer schemes: section 159 of, and Schedule 21 to the Energy Act 2004, as applied by clause 33

49. Although there may be a deprivation of property from third parties, such as creditors, the Department considers that any such deprivation would be in the general interest given the importance of securing the generation of electricity and protecting consumers, not least because of the likely contribution that consumers will have made. In the event that a RLNC administration order is sought by the Secretary of State or the Authority, and subsequently made by the Court, it is likely that securing the generation of electricity will be imperative to ensure the protection of consumers and the stability of the energy market.

50. In addition, we consider that there are sufficient safeguards for third parties, such as creditors, to ensure that any interference with rights under A1P1 is justified. The Secretary of State – in approving any energy transfer scheme - will be required to exercise the powers given under the relevant clauses in accordance with Convention rights. Furthermore, these clauses require the Secretary of State to take the interests of third parties into account. Consequently, when approving the scheme, the Secretary of State will have to be satisfied that any transfer scheme which results in a deprivation of property is necessary and proportionate to the aim to be achieved. In such a case, the Secretary of State will have to consider the need for compensation. The court also appoints the time at which a transfer scheme takes effect. Combined with the court's obligations under section 6 of the Human Rights Act 1998, this should act as a further safeguard.

Article 6: Right to a fair trial

51. Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him.

Interference

Licence modifications: clauses 6, 7, 29 and 35

52. The modification by the Secretary of State of licence conditions may constitute a determination of the licence holders' civil rights. In *Ringeisen v Austria (No 1)*,[25] the European Court of Human Rights (**"ECtHR"**) recognised that the concept of civil rights and obligations could extend to proceedings between a private party and a public body the result of which is decisive for private rights and obligations. The modification of licence conditions is determinative of a licensee's rights and obligations under the licence, and these are rights of a private and economic nature. There may consequently be an argument that licence modifications under this provision will engage Article 6 and the Department have therefore considered whether there is any interference with that Article.

53. The Department considers that sufficient safeguards are in place to satisfy the requirements of Article 6 in respect of the power in clauses 6, 7, 29 and 35, such as the fact that the Secretary of State must carry out appropriate consultation before exercise of the respective power and that any decision to modify licences will be amenable to judicial review.

54. The Department considers that the exercise of these powers can be distinguished from the case of *Tsfayo v UK*,[26] where the ECtHR concluded that judicial review by the High Court was not sufficient to avoid a violation of Article 6. That case concerned a challenge by the appellant to the procedures for deciding her appeal against a council's refusal to pay backdated housing benefits. The Court distinguished the case from previous cases on the basis that those previous cases involved "a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims". In contrast, in Tsfayo's case, the Housing Benefit Review Board was deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim. In such circumstances, the fact that the High Court was unable to rehear the evidence or substitute its own views for those of the original decision-maker led to a violation of Article 6 as there was never the possibility that the central issue would be determined by an independent tribunal. The case is therefore far removed from the types of legal challenge that might be brought in respect of the Secretary of State's exercise of the licence modification powers in clauses 6, 7 29 and 35.

55. For these reasons, the Department's view is that, to the extent that the modification of licence conditions and terms pursuant to the powers in clauses 6,7, 29 and 35 is determinative of civil rights and obligations, there are sufficient safeguards to ensure that there is no actual interference with Article 6 rights.

Compatibility

56. The Department considers that the provisions of the Bill are compatible with Article 6.

Article 8: Right to a private life

[25] [1971] ECHR 2
[26] [2007] ECHR 656.

57. Article 8 of the ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence.

Interference

Provision of information to the Secretary of State: clause 11

58. Clause 11 imposes an obligation on a company to provide information to the Secretary of State if it is reasonably required to determine whether the designation criteria set out in clause 2(3) are met in relation to that company. Under clause 11(2), the information requested must be provided in such form and manner, at such time and place, and be accompanied or supplemented by such explanations, as the Secretary of State may reasonably require.

59. A company would be obliged to comply with a request for information from the Secretary of State, provided the information was reasonably required for the purpose set out in clause 11(1). Such a requirement to provide information could engage Article 8, which is capable of extending to a company's information in certain contexts. By way of example, in the case of *Bernh Larsen Holding AS and Others v Norway*,[27] there was found to be an interference (albeit a justified one) with the "home" and "correspondence" of three companies for the purposes of Article 8 where they were under an obligation to enable tax auditors to access and copy all data on their shared server.

Provision of information to the Authority: clause 12

60. Clause 12(4) enables Ofgem to request information from the entities listed in clause 12(2) where Ofgem considers this to be necessary in connection with the performance of its regulatory functions in relation to relevant licensee nuclear company. Under section 12(4), any information requested must, so far as reasonably practicable, be provided in accordance with Ofgem's reasonable requirements as regards timing and form.

61. Ofgem is not obliged to exercise the power to request information under section 12(4) and so the clause does not itself engage any ECHR rights directly. However, if the power is exercised, it has the potential to interfere with Article 8.

62. Certain entities listed in clause 12(2), such as the ONR and the Environment Agency, would be regarded as emanations of the State and so could not be victims for the purposes of the ECHR. But others, such as the national system operator, are private entities (albeit sometimes exercising public functions). Therefore, there therefore remains a possibility that a requirement to provide information under clause 12(4) could engage Article 8.

Revenue collection regulations: clause 23

63. Regulations made under clause 23 may interfere with the Article 8 rights of those subject to requirements to provide information in relation to the revenue stream.

[27] [2013] ECHR 220.

Compatibility

64. The Department considers that the provisions of the Bill are compatible with Article 8.

Justification

Provision of information to the Secretary of State: clause 11

65. Article 8 is a qualified right and the Department considers that, in this case, an obligation to provide information will be capable of being justified and proportionate in accordance with the provisions of Article 8(2).

66. The Department considers that the provision of information envisaged under clause 11 will be necessary in the interests of the economic well-being of the country. There is a strong legitimate interest in ensuring that the Secretary of State has all of the information that is required in order to assess whether the criteria set out in clause 2(3) are satisfied for a given company. RAB Conditions which are incorporated into a designated nuclear company's generation licence by virtue of clause 6 will provide the company with the right to a regulated revenue, with top-up payments being funded through a levy on electricity suppliers (the costs of which will ultimately be borne by consumers). It is therefore essential that the Secretary of State has access to all information that is reasonably required in order to make an accurate assessment of how advanced the proposed nuclear project is and whether designation would be value for money. If the Secretary of State does not have access to all relevant information, there is clearly a risk that his or her decision to designate a company may not be in the best interests of consumers and taxpayers.

67. The requirement created by clause 11 is also proportionate given that it is limited to information which the Secretary of State may "reasonably" require for the purpose of determining whether the conditions in clause 2(2) are met. Clause 11(3) also makes explicit provision to the effect that a company will not be required to disclose information that would normally be protected on grounds of legal professional privilege. Finally, the Department notes that the Secretary of State will be subject to the duty in section 6 of the Human Rights Act 1998 when making information requests under clause 11 and so will need to ensure that any information requests are proportionate and that the information is dealt with in a proportionate manner.

Provision of information to the Authority: clause 12

68. The Department considers that an obligation to provide information by virtue of Ofgem exercising the power in clause 12(4) will be capable of being justified and proportionate in accordance with the provisions of Article 8(2). Again, the provision

of information envisaged will be necessary in the interests of the economic well-being of the country. Ofgem will need the information in order to ensure that it is in possession of all relevant facts before making any decisions connected with the regulation of a relevant licensee nuclear company. If Ofgem does not have access to all relevant information, there is a risk that its decisions may be unfair to the relevant licensee nuclear company or not adequately protect the interests of electricity consumers.

69. The power created by clause 12(4) is proportionate given that any information that Ofgem requests must be "necessary" in connection with Ofgem's exercise of its regulatory functions in respect of a relevant licensee nuclear company. Further, clause 12(5) provides that the recipient of an information request must comply with Ofgem's reasonable requirements regarding timing and form, but only to the extent that this is "reasonably practicable". Similar to the point made in paragraph 67 above, Ofgem will also be subject to the duty in section 6 of the Human Rights Act 1998 when making information requests under clause 12(4) and so will need to ensure that any information requests are proportionate and that the information received is dealt with in a proportionate manner.

Revenue collection regulations: clause 23

70. Clause 23 is intended to enable information to be provided for the purpose of ensuring generally that the revenue stream is running effectively but will also be used specifically to enable payments to flow between relevant licensee nuclear companies, electricity suppliers and the revenue collection counterparty effectively.

71. The Department considers that, in this case, an obligation to provide information will be capable of being justified and proportionate in accordance with the provisions of Article 8(2). The provision of information envisaged will be required in the interests of the economic well-being of the country, namely, to ensure that electricity suppliers, relevant licensee nuclear companies who are party to revenue collection contracts and the revenue collection counterparty are able to discharge their payment obligations and be sure that other parties are correctly discharging their obligations. More specifically, information sharing is needed to establish and confirm financial entitlements and liabilities of electricity suppliers and nuclear RAB licenses and the information sought will be decisive as to the allocation of sums raised by way of the supplier obligation. Information may also need to be shared with third parties, such as any settlement agent who will manage payments in the system. It is our intention to ensure that suitable controls are placed upon the use of such information in the regulations.[28] It is unlikely that any of the information required will amount to personal data.

Department for Business, Energy and Industrial Strategy

2 November 2021

[28] An illustrative example of the types of controls that we envisage is provided by regulation 8 of the Electricity Market Reform (General) Regulations 2014.