FINANCIAL SERVICES BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

ECHR MEMORANDUM FOR THE BILL AS BROUGHT FROM THE HOUSE OF COMMONS

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Financial Services Bill. The memorandum has been prepared by HM Treasury.

2. Lord Agnew of Oulton, Minister of State at HM Treasury, 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

3. Financial services is a heavily regulated sector, due to the need to maintain confidence in the financial system and to promote financial stability and consumer protection. Many of the measures in the Bill impact on the way in which financial services firms conduct their business and therefore in principle could raise ECHR issues, in particular Article 1 of Protocol 1 to the ECHR (A1P1) which extends not just to full 'deprivation' of possession but also to control of their use. However, the rights under A1P1 are not absolute. Interference may be justified and in assessing whether there has been a breach of A1P1 it is well established that contracting States have a wide margin of appreciation in balancing property rights against the wider public interest. However, the majority of provisions in this Bill do not raise significant, novel or controversial ECHR issues and this memorandum addresses only those provisions potentially interfering with the contractual or property rights of individuals and legal persons; in the case of the account freezing and forfeiture provisions, it also addresses the additional ECHR issues raised by the retrospective elements of those provisions.

4. HM Treasury has taken the Convention rights into account in preparing the Bill and including safeguards and considers that the Bill is a justified and proportionate addition to financial services regulation.

Benchmarks

5. Following the end of the implementation period, the FCA continues to be the regulator of UK benchmark administrators. The FCA has a number of existing powers under the UK Benchmarks Regulation (UK BMR) which are aimed at appropriately managing the risks posed by critical benchmarks, given their sudden cessation would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the United Kingdom.

6. New powers contained in the proposed legislation are considered necessary to deal with gaps in the UK BMR regime, with the aim of providing a more coherent and robust regime for managing the risks identified above.

7. The proposed legislation will provide the FCA with a set of new powers under the UK BMR that will enable it to manage the orderly cessation of a critical benchmark (such as LIBOR), if it no longer represents (or is at risk of no longer representing) the underlying market or economic reality that it purports to, and where it is not possible or desirable to attempt to restore and maintain its representativeness.

8. Clauses 9, 10 and 12-16 engage A1P1. They allow the interference with the property rights of an administrator of a critical benchmark[1] (the 'possession' in this case being the assets of the business[2]), interference with the property rights of parties to contracts which reference that critical benchmark (the 'possessions' being enforceable rights under the contracts[3]) and interference with the property rights of contributors to critical benchmarks (again the "possession" being the assets in their business). It is considered that any such interference amounts to 'control of use'.

Effect on the A1P1 rights of a critical benchmark administrator

9. The proposed legislation will empower the FCA to:

   (a) require changes to the way in which a critical benchmark is determined where it is no longer representative or at risk of no longer being representative of the underlying market or economic reality measured by the benchmark, and where it is not possible or desirable to restore and maintain its representativeness; and

   (b) compel a benchmark administrator to continue to produce a critical benchmark for a period of a year at a time, up to a maximum period of 10 years. The FCA already has the power to compel an administrator of a critical benchmark to continue to produce a benchmark for a period of up to 5 years; the legislation extends this to a maximum of 10 years.

Effect on the A1P1 rights of parties to contracts which reference a critical benchmark

10. Where the FCA determines that a critical benchmark no longer represents the underlying market or economic reality (or is at risk of not doing so), and that it is not possible or desirable to restore and maintain its representativeness, use of that benchmark is prohibited, except in relation to specific 'legacy' uses of the benchmark that may be permitted by the FCA.

11. Where the FCA exercises its power to change the way that a critical benchmark is determined, this will impact existing contracts which reference that benchmark and which continue using the benchmark where they are permitted by the FCA to do so. Interference with contracts in this way will constitute an interference with A1P1 rights of the parties.

Effect on the rights of contributors to a critical benchmark

12. Contributors to critical benchmarks may at present be required by the FCA to continue contributing for a period of up to 4 weeks after notifying their intention to cease

[1] Critical benchmark is defined in Article 3 of the Benchmarks Regulation (EU 2016/1011). The Benchmark Regulation has become retained EU law following the end of the implementation period and is referred to here as the UK BMR).

[2] "Possessions" has been drawn widely in ECHR caselaw, and has been described as the equivalent of "assets", and includes the "goodwill or economic interests connected with the running of a business or exercise of a profession" (see for the latter: Tre Traktorer Aktiebolag v Sweden (1989) 13 EHRR 309, ECtHR) and in this case would include the financial and other resources of IBA which it will be necessary to direct towards the continued production of LIBOR.

[3] A1P1 does not guarantee a right to acquire property. However, enforceable claims under a contract have been found to constitute a possession for the purposes of A1P1: see Wilson v First County Trust Ltd (No 2) - [2004] 1 AC 816 (L Nicholls at para 39)

contributing. Clause 11, subsection (2) replaces this with a mandatory minimum notice period of 15 weeks which potentially interferes with the A1P1 rights of contributors.

Assessment of compatibility with ECHR

13. Interference with A1P1 rights is only lawful if it is in the public interest and subject to the conditions provided for by law. The European Court of Human Rights (ECtHR) has applied a 'fair balance' test to the consideration of whether interference is lawful. Any interference must not be arbitrary, must be designed to achieve a proper aim, must use proportionate means to achieve that aim and must strike a proper balance between the interests of the person affected and the wider public interest in the interference. HM Treasury has considered each of these aspects of legitimate interference with the rights of those affected in producing the legislation on Benchmarks introduced in this Bill.

Legitimate Aim

14. HM Treasury considers that the policy aim of minimising the scope of widespread contractual frustration and market instability which might result from the sudden cessation of a critical benchmark is a 'legitimate aim' for the purposes of the interference in A1P1 rights. Critical benchmarks are those that are recognised as being highly important, so that their failure or cessation could cause financial instability, impact the real economy and cause losses to consumers and investors. As such HMT consider that the proposed interference falls within the economic sphere. When this issue has been considered by the ECtHR, the ECtHR will only question a legitimate aim in the economic sphere if it is "manifestly without reasonable foundation" which HM Treasury does not consider to be the case in this instance.

Is the interference proportionate?

15. Any interference with A1P1 rights must be no more than necessary to achieve the policy intention. As part of producing the legislation in the Bill, HM Treasury has considered alternative approaches, but none would deliver the policy objective.

Is the scope of the proposal limited so that it does no more than is necessary?

16. HM Treasury considers that the measures introduced in the Bill are a proportionate response to the issue of a critical benchmark where it no longer represents the underlying market or economic reality (or is at risk of not doing so) and where its representativeness cannot or should not be restored and maintained:

    (a) the powers are to be used as a 'last resort'. The FCA's power to change the way the critical benchmark is determined will only be able to be used as a 'last resort' when it is clear that the representativeness of the benchmark:

        (i) cannot reasonably be restored and maintained; or

        (ii) there are good public policy reasons for not restoring and maintaining representativeness.

    The legislation sets out in clause 15 that the FCA can only use this power where the methodology change advances either one (or both) of two specific 'operational objectives' of the FCA (the "consumer protection objective" and the "integrity objective", which are contained in sections 1C and 1D of the Financial Services and Markets Act 2000).

Although the FCA will have a broad discretion as to what substitute methodology to impose, it will be bound by public law principles to act reasonably and rationally and comply with the ECHR. It will have to demonstrate that it has taken all relevant considerations into account, that its approach is reasonable and rational, and that a 'fair balance' is struck between the general public interest in the measure and the effect on the benchmark administrator.

(b) the powers for the FCA to compel the administrator to continue the benchmark are time limited, requiring review by the FCA at least every 12 months for a maximum period of 10 years. As noted above, the FCA already has a power to compel the continued production of a critical benchmark for a period of up to 5 years and this is now being extended to a maximum 10-year period. However, the 10-year period is only a maximum and is not determined at the outset. The period of compulsion must be reviewed on at least a 12-monthly basis by the FCA to determine whether the criteria for continued compulsion are met and whether the continued compulsion is still reasonable in public law terms.

(c) The legislation includes additional safeguards on use of the power. These include requirements for the FCA to publish and review policy statements on the use of its powers and to engage with the benchmark administrator before exercising certain of its powers, and provision is made for an appeals process for the benchmark administrator to challenge an "Article 23A designation"[4].

The Fair Balance Test

17. HM Treasury considers that the proposal strikes a fair balance between the interests of the persons affected and the wider public interest.

18. As regards the A1P1 rights of parties to contracts which reference a critical benchmark, we consider that there is a compelling wider public interest in minimising widespread contractual frustration (which may have a detrimental impact on the parties to the contracts themselves) and instability in the financial services markets which could have a wider adverse impact on the global economy.

19. As regards the A1P1 rights of the administrator of a critical benchmark, we consider that the proposals strike a fair balance; where the benchmark administrator is required to continue to produce the critical benchmark in circumstances outlined above, it will continue to be able to generate revenue from the licensed publication of that benchmark. The yearly review of the use of its power by the FCA, along with its duty to act compatibly with the ECHR and in accordance with public policy principles, will ensure that the impact on the benchmark administrator and its revenue generation will be considered each year to ensure the fair balance test is still met.

20. As regards the A1P1 rights of contributors to the critical benchmark, we consider that the introduction of a 15-week notice period (in place of a 4-week one) strikes a fair balance between the needs of contributors with the need to appropriately manage the orderly wind down and cessation of that benchmark, which might include the transition to a new method of determining that benchmark. The extension is necessary to ensure

[4] This is a declaration by the FCA under its new powers that a critical benchmark is unrepresentative (or at risk of becoming so) and its representativeness cannot (or should not) be restored and maintained.

that the process of making the Article 23A designation and the potential need to change the way the benchmark is determined is not disrupted by the early departure of contributors. This provision allows a less onerous alternative approach to the management of the cessation of a critical benchmark than the use of the FCA's existing power to compel contributors to continue to contribute to the benchmark for a further significant period of time (of up to 5 years).

Account freezing and forfeiture

21. Clause 32 and Schedule 12 amend the Proceeds of Crime Act 2002 ('POCA') and the Anti-terrorism, Crime and Security Act 2001 ('ATCSA'). These amendments extend the existing account freezing and forfeiture powers to accounts maintained with e-money and payment institutions. Currently, these powers are only exercisable in respect of accounts maintained with banks, building societies, and certain other limited deposit-takers.

22. The exercise of account freezing and forfeiture powers engages and interferes with people's A1P1 rights. Account freezing represents a control of use by the state; account forfeiture represents deprivation.

23. The extension of these powers to e-money and payment institution accounts is aligned with the underlying intention of the existing legislation. It is a largely technical amendment that does not alter the nature or purpose of the powers or their interference with A1P1 rights. For that reason, the prospective use of these powers does not represent a novel or controversial ECHR issue.

24. These amendments will also apply retrospectively to any account freezing orders, administrative forfeitures, or forfeiture orders made since these powers came into effect in 2018 in respect of accounts maintained with e-money or payment institutions, in purported compliance with the powers available to law enforcement and the courts. This aspect of the provisions engages people's Convention rights in a different way.

Purpose

25. At present, law enforcement databases suggest that there are numerous account freezing orders in place in respect of accounts maintained by e-money or payment institutions, and that funds in some accounts maintained by e-money and payment institutions have also been forfeited under POCA. It is important that these orders and forfeitures be safeguarded.

26. The civil freezing and forfeiture powers under Chapter 3B of Part 5 of POCA and Part 4B of Schedule 1 to ATCSA are important tools in disrupting criminal and terrorist activity, as well as depriving those persons of the benefits of those activities. All the money in e-money and payment institution accounts either frozen or forfeited using these powers will have been so frozen or forfeited on the basis of a relevant court being satisfied that there were reasonable grounds for suspecting that money held in that account was:

    - obtained through unlawful conduct;
    - intended by any person for use in unlawful conduct;
    - intended to be used for the purposes of terrorism;
    - comprised of resources of an organisation which is a proscribed organisation; or
    - earmarked as terrorist property.

27. The Government considers it reasonable to make this aspect retrospective in order to protect the public from the potential risk of any money falling back into the hands of criminals or terrorists.

Nature of interference

28. The retrospective aspect of this amendment will engage the rights of a limited number of persons in respect of rights conferred by A1P1 and Article 6 (the right to a fair hearing). At the point of commencement, such peoples' rights to legally challenge an order or forfeiture on the basis of it having been issued in respect of an account at an e-money or payment institution will be extinguished.

Justification

29. A determination by a court will already have been made in respect of these peoples' property being in certain ways related to crime or terrorism. As the overall amendment represents a technical change to the legislation to keep pace with changes in financial technology and does not represent a departure from the purpose and nature of the existing powers, the Government considers that this aspect is reasonable.

30. The Government considers this reasonable legislative amendment to be a proportionate interference with the rights of a limited number of persons in respect of property which has been judged by the relevant courts to be related to criminal or terrorist activity. It will bring the legislation in-line with the position as it is currently thought to be by many respondents to these orders and forfeitures, as well as the courts and law enforcement. Moreover, and most importantly, it will serve to protect the public.

Debt Respite Scheme

31. Clause 34 amends a regulation-making power in section 7 of the Financial Guidance and Claims Act 2018 ("FGCA") to enable regulations that establish a debt respite scheme (the "scheme") to be made which can (i) allow a statutory debt repayment plan ("SDRP") to be imposed on a creditor and (ii) deduct sums from repayments being made to creditors in order to fund the scheme

32. The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 implement the first part of the Government's breathing space policy - a breathing space to engage with debt advice whilst protected from enforcement action, fees and certain interest.

33. The amendments being made in the Bill will enable the second part of the policy, concerning the SDRP, to be implemented via regulations – a statutory agreement that will enable a person in problem debt to repay their debts to a manageable timetable, with the same legal protections from creditor action as in breathing space and for the duration of their plan.

34. The way in which the regulation-making power is being amended will allow regulations to be made which can compel creditors to accept (1) an SDRP which could change the amount, frequency and duration of the debt repayments due for up to 10 years and pause enforcement action, fees and certain interest for its duration, and (2) an amount to be taken from the repayments to contribute to the scheme costs.

35. Contractual rights and rights to enforce debt security have been found to be "possessions" for the purposes of A1P1[5]. A possible argument may be that the amendments would engage A1P1 because they create an imbalance between the parties which result in one party (the creditor) being arbitrarily or unjustly deprived of his possession for the benefit of the other (the debtor)[6]. The government considers that any such interference would constitute a control of use, rather than a total deprivation of property.

Justification

36. The legitimate aim being pursued is to incentivise more people to access professional debt advice and to access it sooner, helping them to reach sustainable debt solutions. There are substantial benefits from the provision of professional debt advice which fall across society, including to creditors who receive higher repayments, to employers who benefit from higher employee productivity and to individuals in problem debt.

37. The view of HM Treasury is that the interference with creditors' A1P1 rights will be proportionate because (i) creditors have had a substantial period of notice of the Government's intention (since the 2017 manifesto, the Call for Evidence[7] and Consultation in 2018[8] and the Government's response in 2019[9]) and the Government will carry out a technical consultation on the future SDRP regulations; (ii) it is intended that the future SDRP Regulations will contain many safeguards which ensure that they cannot be misused by debtors including strict eligibility criteria, an obligation on debtors to continue to pay ongoing liabilities (such as rent or utility payments), and an objection mechanism for creditors; (iii) higher returns for creditors are expected and there will be no debt write-off.

38. The case of Back v Finland[10] is relevant. This involved a debt adjustment scheme. Ultimately, the Court went on to find that the margin of appreciation for implementing social and economic policies is a wide one and that the debt adjustment legislation clearly served legitimate social and economic policies and was not an infringement of A1P1.

39. HM Treasury considers that, overall, any alleged interference in creditors' rights created by the amendments in this Bill is similarly justified by a public or general interest in a debt respite scheme and that the interference is proportionate to achieve the aim of incentivising more people to access professional debt advice and to access it sooner, helping them to reach sustainable debt solutions. This should lead to better outcomes for creditors rather than resorting to existing insolvency solutions which usually result in debt write-off.

Article 6: the right to a fair hearing

Nature of interference

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[5] *Mellacher v Austria [1990] 12 EHRR 391* and *Wilson v Secretary of State for Trade and Industry [2003] UKHL 40* respectively.

[6] See *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, at paragraphs 42 and 43 (and *Bramelid v Sweden* (1983) 5 EHRR 249 at 256.

[7] Breathing space: Call for Evidence, 24 October 2017 and Government's response, June 2018.

[8] Breathing space scheme: Consultation on a policy proposal, 29 October 2018

[9] Government response, June 2019.

[10] *Back v Finland [2004] ECHR 37598/97.*

40. The amendments in Clause 34 will allow debt advice providers to impose an SDRP on a creditor and compel them to accept less than full repayment, as a deduction will be made to fund the scheme. In some circumstances where a creditor has objected to a plan, debt advice providers and, where relevant, the Insolvency Service, will make decisions that impact the ability of creditors to exercise their civil rights to enforce debt, such as pursuing debtors through court action, and their right to charge interest and other fees related to debts.

41. As set out in the consultation, it is intended that a plan may be imposed where (i) creditors owed 25% or less of the total amount of debt in a plan make an objection to the plan or (ii) where creditors owed more than 25% of the total debt make an objection to the plan and the Insolvency Service has carried out an assessment and decided that the plan is fair and reasonable.

Justification

42. The decision-makers in this case will either be debt advice providers or the Insolvency Service. It is intended that the debt advice providers will be required to be authorised under the Financial Services and Markets Act 2000 to carry out the regulated activity of debt-counselling or debt adjusting. Some other types of adviser (e.g. local authorities) may also be able to offer the SDRP. Such persons will take steps to ensure that (i) their decision-making process implementing an SDRP is fair, and (ii) they follow the statutory provisions and associated departmental guidance, which would be issued. In the case of the Insolvency Service carrying out the fair and reasonable assessment, it will be following any statutory provisions and associated guidance that would be issued at the relevant time.

43. In addition, judicial review ("JR") could be available to claimants where there are no other remedies. HM Treasury consider that JR is sufficient to comply with Article 6 because it is acceptable that any claim should be limited to consideration of the way the professionals, who will be operating within clear statutory parameters and informed by published departmental guidance, have made their decisions. It is also important to note that any person carrying out a function that is regarded as a function of a public nature must not act in a way which is incompatible with a Convention right (see section 6, Human Rights Act 1998).

44. HM Treasury considers that this legislation will, and the future SDRP regulations are likely to, satisfy Article 6**.**

45. In addition, the Government is minded to include a further mechanism for creditors to object to the creation of the plan and is considering providing that creditors will have the right to apply to a court or tribunal, as appropriate for permission to take certain steps which would otherwise be prohibited and which would strengthen the arguments that the provisions will be Article 6 compliant.

Her Majesty's Treasury

14th January 2021