

FINANCIAL SERVICES AND MARKETS BILL 2022

EUROPEAN CONVENTION ON HUMAN RIGHTS

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED IN THE HOUSE OF COMMONS

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Financial Services and Markets Bill 2022. The memorandum has been prepared by HM Treasury.
2. Nadhim Zahawi, the Chancellor of the Exchequer, 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.
4. The majority of provisions in this Bill do not raise significant, novel, or controversial ECHR issues. Each provision has been considered in detail; however, this memorandum addresses only those provisions potentially interfering with the rights of individuals and legal persons in a novel or significant manner. These are the “cash access services”, “wholesale cash distribution”, “insurers in financial difficulties” and “central counterparties in financial difficulties” measures, as set out below.
5. HM Treasury have taken the ECHR rights into account in preparing the Bill and included safeguards where appropriate. They therefore consider that the Bill is a justified and proportionate addition to financial services regulation.

Access to Cash Services

Cash Access Services

6. The Cash Access Services measure set out in clause 47 and Schedule 8 enables HM Treasury to designate banks and building societies, as well as cash coordination arrangement bodies if it is considered to be significant for the purposes of ongoing cash access (which includes deposits and withdrawals). HM Treasury is further required to set out a policy statement on the Government’s views on access to cash. The measure also enables the FCA to have oversight over the persons that are designated by HM Treasury to ensure that there is a reasonable provision of cash access facilities in the UK or any part of the UK. The FCA will have regard to HM Treasury’s policy statement and consider whether there are any significant deficiencies in the provision of cash access when exercising its powers. Article 1 Protocol 1 is potentially engaged. Article 6 is also potentially engaged.

Article engaged and potentially interfered with

Article 1 Protocol 1

7. A1P1 is a qualified right and interference with A1P1 rights can be lawful if it is in the public interest and subject to the conditions provided for by law. The 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.
8. New sections 131R (designation) potentially interferes with A1P1. Section 131R enables HM Treasury to issue a direction to a designated person under the cash access services regime. For example, HM Treasury can designate a relevant current account provider or a cash coordination arrangement body such that the designated entities have to comply with any rules or directions imposed by the FCA. HM Treasury can also designate just to provide cash access in GB or NI (new section 131R(3)) due to the fact that certain banks do not operate in either GB or NI markets. In those circumstances, it would not be proportionate to require them to provide access in those areas.
9. New section 131W (power to direct designated persons) also potentially interferes with A1P1 as it will enable the FCA to control how designated persons operate the business. This may require directing a firm to manage their business in certain ways. For example, the FCA could require designated entities to provide new cash facilities if it was considered necessary to maintain cash access at a national level or to address local issues in a particular city. In certain cases, it could even require the banks to keep branches open when they would prefer to close it and/or reopen a branch that has been closed on a temporary basis until another solution has been found.
10. New section 131Y (information gathering and investigations) and section 131Z (disciplinary measures) extend offences which exist under FSMA to apply for cash purposes and may engage Article 6 in the same manner as the existing FSMA offences. Equally, disputes about directions issued by the FCA may also engage Article 6.

Legitimate aim

We consider that the policy aims of preventing widespread decline of cash access facilities to ensure those members of society who are largely dependent on cash continue to be able to have access is a "legitimate aim" for interference with A1P1 rights.

Is the interference proportionate?

11. Any interference with A1P1 rights must be no more than necessary to achieve the policy intention. HM Treasury has considered alternative approaches for a less onerous approach.
12. The current provision of facilities nationally is such that 99% of the population has access to cash facilities within a reasonable distance of where they reside. Where facilities are proposed to be removed, the banks will be required to carry out an assessment to ensure that there will be no significant deficiencies in the provision of cash. The focus of the legislation is not to stop bank branch closures but to ensure that there are enough cash access facilities; bank branches are only one of many solutions, which include placing an ATM or having arrangements in place with third parties such as the Banking Framework Agreement which 30 banks have with the Post Office.

13. The government's policy is to provide maximum flexibility to the banks designated for the purpose of ensuring that cash facilities are located around the UK for withdrawal and deposit of cash. In most cases, it is expected that the designated banks will use existing shared services as solutions (e.g., LINK ATMs, Post Office branches or shared bank hubs). Furthermore, the policy has been designed such that HM Treasury will set out high-level expectations in a policy statement which the FCA has to have regard to when setting its rules.
14. As a general point, the FCA is a public body and is subject to the Human Rights Act 1998, and so must consider A1P1 (and issues of proportionality) when determining whether and how to exercise its powers.

Article engaged and potentially interfered with

Article 6

15. Article 6 right is an absolute right to a fair hearing. This measure extends offences which exist under FSMA to apply for cash purposes. All accused persons will have an opportunity to defend themselves in the same way they would do if they were accused under the existing regulatory regime and will therefore be accorded the right to a fair hearing.
16. Insofar as a dispute about a designation by the FCA amounts to the determination of a civil right, designated entities will have the right of appeal to the Upper Tribunal where they disagree with the decision of the FCA.

Wholesale cash distribution

17. The use of cash for transactions has been in long term decline and has made it relatively more expensive for firms to maintain the existing infrastructure of sorting, storing and distribution of cash. Cash remains a critical payment method that the public rely on in the event of wider disruption to the financial system. Clause 46 and Schedule 9, therefore, create a new Part 5A of the Banking Act 2009 to establish a wholesale cash distribution oversight regime that gives HM Treasury powers to recognise firms for the purposes of the Bank of England's oversight.
18. Given the risks to the system, the aim of this regime is to ensure the wholesale cash distribution infrastructure remains resilient and sustainable and can continue to effectively support access to cash into the future. The regime provides the Bank of England with the powers to oversee firms for the purposes of market and, in certain circumstances, prudential oversight. Under new section 206D (inserted by paragraph 1 of Schedule 9), the Bank of England is required to publish a policy statement before exercising its power.

Articles engaged and potentially interfered with

19. Article 1 Protocol 1 and Article 6 are engaged. New sections 206M and 206U potentially interfere with A1P1. Section 206M allows the Bank of England to issue directions to persons recognised under the regime. This may include directions requiring firms to manage their businesses in certain ways by requiring or prohibiting the taking of specified actions, or by setting standards to be met in the performance of specified functions. Section 206U enables the Bank of England to require a person recognised as

having systemic significance to cease certain functions in relation to wholesale cash distribution activities in cases of compliance failure by that person.

21. Insofar as a dispute about a designation by the Bank of England amounts to the determination of a civil right, designated entities also have the right of appeal to the Upper Tribunal where they disagree with the decision of the Bank of England.

Central counterparties in financial difficulties

22. Clause 50 of, and Schedule 11 to, the Bill make provision for an expanded resolution regime for central counterparties (CCPs). The UK has an existing recovery and resolution regime for CCPs, which confers a limited set of powers on the Bank of England. These powers are not considered to be sufficient for the Bank of England either to resolve a CCP efficiently or to effectively mitigate the possible risk of a CCP failure, including risks to financial stability and public funds.

Article engaged and potentially interfered with

Article 1 Protocol 1

23. Some of the CCP provisions will engage A1P1 as they allow the Bank of England to impose rules and requirements on CCPs, and (in some cases) compel or prevent the CCP from dealing with its property in particular ways. Additionally, some of these measures enable HM Treasury to require the Bank of England to treat a CCP's assets or property in particular ways, where there are implications for international agreements or public finances. However, the main provisions giving rise to any significant or novel interference are set out below.

Actions prior to the use of stabilisation options

24. The powers for the Bank of England to address impediments to resolution and the power to restrict or prohibit discretionary payments will potentially interfere with the way in which a CCP can use its property (including requiring the CCP to dispose of its property), and (in relation to the prohibition on payments) could prevent a third party from acquiring property (money or shares) which would otherwise be transferred at the CCP's discretion.

The stabilisation options

25. The stabilisation options allow the Bank of England to exercise control over the way in which a CCP can use its property, or ultimately to require the CCP to dispose of its property.

Removal of Directors and Senior Managers

26. Whether or not A1P1 is engaged and interfered with would depend on the facts of each particular use of this power, but caselaw has held that company shares can amount to a "possession" for A1P1. Similarly, although A1P1 does not create a right to acquire property future income can amount to a possession if it has been earned or an enforceable claim to it exists. A1P1 may therefore be engaged, and interfered with, depending on the extent to which the particular individual is entitled to shares or future income.

Enforcement provisions

27. The enforcement provisions provide a range of options for the Bank of England to ensure that resolution tools are given full effect. These provisions could impact upon a CCP's (or a clearing member's) ability to deal with property.

Legitimate aim

28. The aim of Schedule 11 to the Bill is to expand the CCP resolution regime to ensure that the Bank of England is able to (i) effectively stabilise a CCP so that it can continue to provide critical clearing services, using the "stabilisation options" set out in the legislation; (ii) prevent contagion spreading across the financial system and (iii) ensure losses are allocated fairly across CCPs and clearing members (and not to taxpayers).

Is the interference proportionate?

29. A1P1 is a qualified right. Any such interference arising from the measures to be taken before the stabilisation options are exercised, or from the stabilisation options themselves, are in pursuit of a legitimate aim and proportionate to the circumstance in which they will be used.

30. Furthermore, the Bank of England is a public body and is subject to the Human Rights Act 1998, and so must consider A1P1 (and issues of proportionality) when determining whether to exercise these powers.

Actions prior to the use of stabilisation options

31. For the removal of impediments to resolution power (paragraph 2), the Bank of England is required to consult the relevant authorities and have regard to the impact on the CCP, the wider financial services market and the financial stability of the United Kingdom. The purpose of exercising the power is to facilitate the use of a stabilisation option – such use is itself subject to the special resolution objectives and will be covered by a code of practice. The impact of a CCP failing without an effective resolution procedure being imposed would, potentially, be extremely serious, with significant risk to the stability of markets and the UK's wider financial system – accordingly, any interference resulting from the removal of impediments power would arise in pursuit of a legitimate aim. Additionally, paragraph 3 provides some specific safeguards which apply when the Bank of England is making a direction under paragraph 2 and ensure that the power is approached proportionately.

32. The power to restrict or prohibit discretionary payments (paragraph 13) is subject to the conditions in sub-paragraphs (3) and (4). Sub-paragraph (3) requires that there is (or is soon likely to be) a significant deterioration in the financial situation of the CCP (meaning essentially that the CCP is failing or is likely to fail), there is a real risk for the CCP's ability to maintain critical clearing services (and thus a risk to the markets it covers) or the operation of the CCP poses a risk to the financial stability of the United Kingdom. Sub-paragraph (4) then requires that the exercise of the power is necessary or desirable having regard to the public interest in the stability of the financial system of the United Kingdom, or the continuity of critical clearing services.

The stabilisation options

33. The failure of a CCP would, in the absence of an effective resolution plan, be likely to give rise to severe financial consequences. The failure of a CCP could cause considerable disruption to the market it serves, with these markets potentially needing to

close. The powers given to the Bank of England by these provisions can be justified on the basis that clear and effective action is vital to ensure that either a CCP can be stopped from failing, or where that is impossible that the impact of its failure can adequately be managed and contained. The exercise of these powers is, in the government's view, clearly in pursuit of a legitimate aim.

34. The policy is underpinned by a general safeguard that the exercise of these powers should not lead to a result where any creditor is worse off than they would have been, had the CCP entered into insolvency. Furthermore, the circumstances in which, and the manner in which, a stabilisation power can be exercised are restricted by the legislation.

Removal of Directors and Senior Managers

35. As with other provisions, the power to remove a director or senior manager is only available in extreme circumstances – and there are safeguards in the legislation to prevent the disproportionate use of the power. Paragraph 7(1) requires that there must either be a significant deterioration in the financial situation of the CCP (meaning that the CCP is at risk of being classifiable as failing or likely to fail – paragraph 7(6)) or a serious infringement of the rules (statutory, and under its rulebook) under which the CCP operates. In addition, under paragraph 7(2) it must also not be reasonably likely that the deterioration would be reversed, or the infringement ended by the Bank of England using the powers listed in paragraph 7(3) (these are powers in FSMA for the regulator to issue directions (sections 296 and 296A) and the power in this Bill to impose a temporary restriction on remuneration).
36. The objective in using the power is ultimately to stabilise the CCP, and so where these safeguards are met and the power is exercised, the impact on the individual's A1P1 rights is to be balanced against the legitimate aim of preventing the wider financial consequences of a CCP failure. Subject to the facts of a particular case, the interference is in principle justified on that basis.

Enforcement provisions

37. These provisions are largely identical to the enforcement provision in Chapter 4 of Part 1 of the Banking Act 2009 (which apply to banks, but not to CCPs by virtue of section 89B(1ZA)). In terms of the policy justification for any interference, the arguments set out above apply; it is necessary for the Bank of England to have the appropriate means to ensure that requirements it imposes under the stabilisation powers are complied with, in order to meet the Bank's special resolution objectives.

Article engaged and potentially interfered with

Article 6

38. HM Treasury considers that the actions prior to the use of the stabilisation options, the power to remove directors and senior managers, and the enforcement provisions (as identified above) will all engage Article 6. It is arguable that the use of these powers affects the right to carry on business, which constitutes a civil right within scope of Article 6. The power for the Bank of England to remove directors and senior executives within a CCP, and to appoint temporary managers (paragraphs 5 to 7), will also engage Article 6, as the decision to remove a person from their role would constitute the determination of a civil right. Article 6 is engaged in relation to the termination of (what would otherwise be) a continuing employment relationship.

39. Article 6(1) requires that a civil right or criminal charge is determined by (i) an independent and impartial tribunal established by law, (ii) in a fair and public hearing, and (iii) within a reasonable time. Article 6(2) and (3) then provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty, and that certain minimum rights apply to individuals charged with those offences.
40. Paragraph 132 creates criminal offences for falsifying or concealing documents relevant to an investigation under paragraph 121, 122 or 123, for providing false information and for intentionally obstructing the execution of a warrant under paragraph 130. In respect of the criminal provisions, HM Treasury do not consider that there is an interference with the rights of an individual under Article 6. The offences will be subject to due process at the charging stage and during proceedings, as set out in the criminal procedure rules and the PACE codes, which ensure compliance with Article 6.
41. The power to direct the removal of impediments to resolution (paragraph 2) is subject to a number of procedural safeguards, including the right for a CCP to refer the matter to the Upper Tribunal, and the Bank is also required to explain this to the CCP, and indicate the procedure for such a referral paragraph 3). As this power applies before a CCP has entered into resolution, and so before the CCP has reached the thresholds for the use of the stabilisation options, it is appropriate for there to be a right of appeal to the Tribunal.
42. The power to restrict remuneration (paragraph 13) is a temporary power and is subject to a requirement for the Bank to review any direction made and to revoke it immediately if (at any time) they become aware that the conditions to impose it would no longer apply. Although there is no route of appeal to the Tribunal in respect of this power, as the Bank is a public body its actions are susceptible to judicial review. HM Treasury consider that judicial review is an appropriate remedy, as it will involve a consideration of how the Bank's officials have made their decision (by reference to clear statutory criteria). The Bank will also have an obligation under section 6 of the Human Rights Act 1998 to ensure it does not act in a way which is incompatible with a Convention right.
43. The stabilisation options are also subject to judicial review. Where a CCP has reached the threshold for their use, events will unfold very quickly and the successful resolution of a CCP will depend on the Bank being able to exercise the necessary powers quickly and with certainty. Furthermore, given the nature of any dispute (and in particular the fact that any such dispute is unlikely to turn on the determination of facts) judicial review is considered to be an appropriate means of complying with Article 6.

Article engaged and potentially interfered with

Article 8

44. The majority of the provisions in Schedule 11 apply to businesses, though some will also apply directly to individuals. The ECHR has previously found that Article 8 extends to businesses in certain contexts, including confidential information, sensitive financial information and information relating to personal investors.
45. In respect of the information and investigation powers in paragraphs 2(2)(c), 119, 120 and 121 to 129, any interference would arise to the extent that the CCP was compelled to provide information that fell within scope of the narrow categories of information to which Article 8 applies in a business context. Where the information contains sensitive

personal data relating to an individual, there will also potentially be an interference with that individual's rights under Article 8.

46. Article 8 is also engaged by the power to remove directors and senior executives, on the basis that, although Article 8 does not confer a right to employment, a person's employment can fall within scope of the definition of "private and family life".
47. The power to remove directors would, if exercised in respect of a particular individual, potentially interfere with his or her rights under Article 8, for example where that action had the effect of impugning the individual's reputation or interfering with the network of relationships he or she had developed through work.
48. However, Article 8(2) provides that an interference may be justified if it is in accordance with the law and necessary in the interests of, for example, the economic well-being of the country or the protection of the rights and freedoms of others. In broad terms, the aim of the CCP resolution measures is clearly in the interest of the economic well-being of the country.
49. The power to request information is only available in relation to information or documents "reasonably required in connection with the exercise by the Bank of England of functions under this Part"; the power to require a report applies in relation to a matter where the relevant power has been exercised. The power is restricted to information "specified" in the Bank of England's notice. Accordingly, the interference is balanced by restrictions which prevent disproportionate requests, and the power is restricted to the exercise of the resolution regime; the justifications set out above in terms of the importance of that regime and the legitimacy of its aims will apply here. Where an individual fails to comply with such a request, the Bank of England has a power to impose regulatory sanctions, but the exercise of that power is subject to appeal in the Tribunal, ensuring that there is appropriate judicial oversight.
50. The same principles apply to the powers to commence investigations and to the associated power of entry. These powers are fairly typical for both law enforcement and regulators and are largely identical to sections 83ZA to 83Z2 of the Banking Act 2009. By virtue of section 89B(1ZA) of that Act, the existing enforcement provisions do not apply to CCPs, but they do apply in the banking regime. There are no reasons why CCPs should not be subject to the same broad powers, and HM Treasury consider that the powers are necessary in order to generate information necessary to enable the Bank of England to effectively exercise its resolution (and pre-resolution) powers, and to ensure that it does so in an appropriate manner.
51. While the provisions have the potential to interfere with Article 8, both in respect of individuals and to the extent that it applies to businesses, any such interference is justified in light of the importance of ensuring effective resolution of CCPs.

Insurers in financial difficulties

52. The UK's current insolvency arrangements for insurers are effective and sufficient to manage the vast majority of potential failure scenarios in an orderly manner. However, the Government has identified areas where changes would make the UK's insurance insolvency arrangements more robust.

53. Section 377 FSMA currently provides a power for the court to reduce the value of one or more of the contracts of an insurer which has been ‘proved to be unable to pay its debts’, instead of making a winding-up order. The provisions in the Bill clarify and extend that power.
54. The provisions also introduce a moratorium on certain types of legal process while an insurer is undergoing a write-down (preventing creditors from taking legal action to recover debts) (the “legal-process moratorium”).
55. With particular significance for the analysis below, the provisions also introduce restrictions on the distribution, by an insurer that is subject to a write-down, of funds/assets (e.g., to employees as bonuses or to shareholders as a dividends) (the “distribution moratorium”).
56. The Bill also Introduces a temporary moratorium on contractual termination rights which arise because an insurer is in financial difficulties (the “contractual-termination moratorium”) and a temporary moratorium on the exercise of surrender rights, above a set value, in life insurance policies (the “surrender moratorium”).

Article engaged and potentially interfered with

57. Article 6 is engaged and potentially interfered with by the legal-process moratorium.
58. Article 14 is engaged and potentially interfered with by the surrender moratorium.
59. Article 1, Protocol 1 is engaged and potentially interfered with by:
- a. the write-down power;
 - b. the legal-process moratorium;
 - c. the distribution moratorium; and
 - d. the surrender moratorium.

Article 6 – legal process moratorium

60. Article 6 protects the right to a fair trial. It 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”. Article 6 is engaged by the legal-process moratorium because each of the processes restricted by the moratorium (set out in para. 2 of new Schedule 19B FSMA) can be seen as processes to determine civil rights. In coming to this conclusion HM Treasury notes, in particular, that the processes are not interim (*Ringeisen v Austria* (No. 1) (1971) 1 E.H.R.R. 1 (at [94])) and they each address a “genuine and serious dispute” (*Alaverdyan v. Armenia* (at [35])).
61. The moratorium will apply only in the limited circumstances set out in para. 1 of new Schedule 19B FSMA and only for a default period of six months. The moratorium also mirrors existing moratoria in insolvency legislation. Para. 2 of new Schedule 19B FSMA provides that the court can consent to a person commencing a legal process, providing an effective judicial remedy enabling a creditor to assert its civil rights.

Article 14 – surrender moratorium

62. Article 14 provides that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” In other words, when a

legislative measure falls within the ambit of another convention right, Article 14 provides that the measure must not discriminate.

63. The words “other status” has generally been given a wide meaning (Carson and Others v. the United Kingdom [GC], 2010, § 70). In particular, the ECtHR has recognised that age constituted “other status” for the purposes of Article 14 of the Convention (Schwizgebel v. Switzerland, 2010, § 85; Carvalho Pinto de Sousa Morais v. Portugal, 2017, § 45).
64. Article 14 does not make an explicit distinction between direct and indirect discrimination. The ECtHR has recognised a breach of Article 14 where a policy or measure has a disproportionate effect on individuals belonging to an identifiable group or with an identifiable status even where the policy is not specifically aimed at that group (see, for example, Hugh Jordan v UK (2003) 37 EHRR 2 at [154]; McShane v UK (2002) 35 EHRR 23 at [135]).
65. The surrender moratorium falls within the ambit of another convention right (see elsewhere in this analysis). It also potentially indirectly discriminates on the basis of age because it has the potential to have a disproportionate effect on over 50s who are most likely to be life insurance policy holders. For these reasons, the moratorium potentially interferes with Article 14.
66. Differential treatment under Article 14 may be justified if it is objective and reasonable. The reasons justifying discrimination need to be weighty although the legislature is generally given a wide range of appreciation in social and economic policy.
67. The surrender moratorium is intended to promote a legitimate aim, which is sufficiently important to justify limiting a fundamental right: i.e., protecting an insurer in financial difficulty in order to promote continuity of cover, reduce value destruction and maintain and enhance confidence in the UK insurance sector.
68. The moratorium is rationally designed to achieve the aim. In particular, the following provisions help ensure the restrictions are no more than necessary to achieve the aim: a number of parties can consent to surrenders; only surrenders which exceed the specified threshold (5% of the total surrender value of the contract per 12-month period) are affected; and the moratorium will last for a default period of only six months (or the period the insurer is in administration).
69. Overall, the moratorium strikes a fair balance between the rights of the individual policyholders and the interests of the community.

Article engaged and potentially interfered with

Article 1, Protocol 1

70. In summary, A1P1 provides that there should be no interference with the peaceful enjoyment of possessions and no deprivation of property except lawfully and proportionately in the public interest.
71. The **write-down power**: the meaning of “possession” under A1P1 is not limited to ownership of physical goods. It also covers contractual rights, including under a lease (Mellacher v Austria [1990] 12 EHRR 391). A sum due under a contract (including a life

insurance contract) is likely to fall within “possession”. It follows that the reduction in the value of contracts/liabilities under the write-down power represents an interference with the A1P1 rights of the contractual counterparties.

72. The **legal-process moratorium**: a right under which action can be taken to enforce a contractual entitlement can constitute a possession. For example, a contractual right to enforce debt security is a possession (*Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40). It follows that the restrictions on the enforcement of security, for example, introduced by these provisions represent an interference with the holder’s A1P1 rights.
73. The **distribution moratorium**: this moratorium prevents the insurer distributing its funds/assets (which constitute possessions) as it sees fit, which represents an interference with the firms A1P1 rights. Further, to the extent a person has an enforceable right to a distribution (e.g., a shareholder has an enforceable right to a dividend), the distribution can constitute a possession (*Ian Edgar (Liverpool) Limited v United Kingdom* - 37683/97 [2000] ECHR 700) and the effect of the moratorium (preventing the distribution) would, therefore, be to interfere with that person’s A1P1 right.
74. The **surrender moratorium**: the surrender value of a life insurance policy is likely to satisfy the definition of ‘possession’ given that the sorts of interests which have been found to be covered by A1P1 include, for example, pension rights under a contributory scheme (*Klein v Austria* (57028/00)). By preventing the surrender, this moratorium would therefore interfere with a policyholder’s A1P1 rights.

Justification

75. The **write-down power**: the write-down will be provided for by law and is intended to achieve an aim in the public interest (promoting continuity of cover; reducing value destruction; unlocking additional loss absorbency; and maintaining and enhancing confidence in the UK insurance sector). The write-down is proportionate, including because:
- a. a range of liabilities are excluded under new section 377B FSMA;
 - b. the court is required to apply a statutory test in new section 377A (that no creditor be worse off) before making a write-down order; the court is able to vary and terminate the order under new section 377I; and
 - c. a new role of write-down manager will be created (new section 377G) to ensure the write-down remains in creditors’ interests.
76. **Legal-process moratorium**: the moratorium will be provided for by law and is intended to achieve an aim in the public interest (i.e., promoting continuity of cover; reducing value destruction; and maintaining and enhancing confidence). The moratorium is proportionate, including because the court can consent to exemptions (i.e., the court can consent to steps otherwise subject to the moratorium being taken – e.g., the court can consent to a landlord exercising a right of forfeiture, which the landlord would otherwise be prevented from doing) and because the moratorium will last for a default period of only six months (or the period the insurer is in administration).
77. **Distribution moratorium**: the moratorium will be provided for by law and is intended to achieve an aim in the public interest (i.e., prevent individual employees and shareholders

from inappropriately obtaining personal benefit from a write-down). The moratorium is proportionate, including because the PRA will be able to consent to distributions.

78. **Surrender moratorium:** the moratorium will be provided for by law and is intended to achieve an aim in the public interest (i.e., promoting continuity of cover; reducing value destruction; and maintaining and enhancing confidence). The moratorium is proportionate, including because: a number of parties can consent to surrenders; only surrenders which exceed the specified threshold are affected; and the moratorium will last for a default period of only six months.
79. Finally, in terms of further safeguards, before making an order, the Court must always consider the facts of the case and act compatibly with the Convention rights (s.6 HRA).