# Coronavirus (COVID-19), A1P1 and compensation under the European Convention on Human Rights

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**Governments across Europe, including the UK, have introduced 'targeted' State relief for the economic consequences of measures to halt the spread of coronavirus (COVID-19). But what about those who sustain loss, but are excluded from such schemes? Gordon Nardell QC and Angharad Parry of Twenty Essex examine potential claims under Article 1 of the First Protocol to the European Convention on Human Rights (A1P1).**

## What are governments doing to respond to COVID-19?

The COVID-19 pandemic has seen State authorities across Europe imposing swingeing restrictions on economic activity unprecedented in peacetime, with lockdowns and social distancing measures bringing much of society to a standstill in an effort to halt the spread of infection. Some of the measures are targeted at specific sectors identified with greatest social risk, including transport, hospitality and retail. But these measures have knock-on effects on the supply chain and other interdependent businesses, and in any event the breadth of the restrictions means few sectors can hope to retain pre-existing levels of trade.

Governments have announced compensation or support schemes for those whose jobs and businesses are threatened by the economic shock. Some—like the restrictions themselves—are targeted at particular sectors while others are much broader; and all at potentially enormous cost to the State as risk is systematically reallocated from the private to the public sector on a scale not seen for many years. In France, a package of direct payments, tax breaks and loans has been rolled out, and the government has indicated that it is willing to nationalize large companies if necessary. Spain has also set up a system of loans and guarantees to ease cash flow difficulties for companies.

Italy, the European nation to date suffering the most severe incidence of the pandemic, has also introduced a range of measures, aimed at cushioning businesses from the COVID-19 lockdown. Loan and mortgage payments have been suspended for companies (as well as for individuals and families). Certain tax payments have been suspended. A stimulus package for the economy is agreed, though the figures publicly available for this have been continually rising since 10 March 2020. There has been public speculation that Italian banks may have to be bailed out in order to survive the crisis. In the UK, the government has announced an array of measures to support companies and employees. Measures include deferral of tax and VAT payments; job retention schemes; twelve-month relief of business rates for all retail, hospitality, leisure and nursery businesses in England and grant funding for certain sub-categories within retail, hospitality and leisure; loan schemes and other grants.

No doubt there is a powerful political imperative to relieve the economic burden of the restrictions. But is there a legal imperative to do so? Naturally in a time of crisis, when society as a whole is expected to shoulder the burden of a common problem, special pleading for State largesse does not look especially attractive. But what happens when the burden falls much more heavily on one group than another? Or when some groups are treated as deserving of support while others (facing apparently similar losses) are not? There has, for example, been criticism of the UK government's response for not covering all segments of the economy. In particular, the government was considered not to have treated the self-employed on parity with employees, leaving this large cohort of the workforce with extremely limited assistance. Public pressure has led to a change in approach, with

announcement of assistance measures for the self-employed and not merely companies and employees. So put simply, the question is: how far is this evident political sense of fair play underpinned by legal rules about the way compensation schemes should operate?

## A1P1—'fair balance' and compensation

The pan-European legal standard for compensation for State interference with economic interests is found in A1P1 to the European Convention on Human Rights (ECHR). This provision reads:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the con-ditions provided for by law and by the general principles of international law.
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> The preceding provisions shall not, however, in any way 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.'

In the hands of the European Court of Human Rights (ECtHR), A1P1 is interpreted as conferring a right to protection of extant economic rights against arbitrary or unjustified interference by the State. Once the claimant has established that a measure interferes with a property right, the ECtHR examines whether the measure respects the 'fair balance' required, in a democratic society, between the rights of individuals and the 'general interest'. Over the years, the ECtHR has accreted a complex and nuanced body of case-law on the question whether the absence of compensation for an interference with property results in the measure failing the 'fair balance' test. For present purposes, though, the key principles can be roughly sketched as follows.

The court has parsed the two paragraphs of A1P1 as comprising three 'rules' into which a measure may fit (see: *James and Others v UK* (1986) 8 EHRR 123 [1986] ECHR 8793/79, *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 [1982] ECHR 7151/75): is the measure a 'deprivation of possessions', a 'control of use of property', or a generic 'interference with peaceful enjoyment of possessions'? As a general rule, a deprivation of possessions carries a virtually automatic right to payment of compen-sation 'reasonably related' to the market value of the asset taken (see: *Pincová and Pinc v Czech Re-public* (App. 36548/97) not reported by LexisNexis®). At the other end of the scale, a control of use of property may, but does not usually, require compensation (see: *Baner v Sweden* (App. 11763/85) not reported by LexisNexis®). The extent to which a generic interference with peaceful enjoyment requires compensation is more context-specific, turning on a range of factors.

The ECtHR is reluctant to characterise as a 'deprivation' of possessions anything short of an outright expropriation of property by the State. As in other strands of public international law, a measure may be recognised as a de facto expropriation if tantamount to destruction of property rights. But the ECtHR reserves such a finding to rare and extreme situations (see: *Papamichalopoulos v Greece* (1993) 16 EHRR 440 [1993] ECHR 14556/89). Moreover, the ambit of a 'control of use' is surprisingly broad, extending to a measure which on the face of it may appear to extinguish the claimant's rights but which in reality represents the application of legitimate rules for regulating property interests (see: *J.A. Pye (Oxford) Ltd v UK* (2007) 46 EHRR 1083 [2007] ECHR 44302/02—adverse possession of registered land). Confiscation of proceeds of crime also falls within this rule (see: *Honecker and Others v Germany* (App. 37595/97) not reported by LexisNexis®). A measure not obviously falling within either the 'deprivation' or 'control' rule is likely to be regarded as a generic 'interference with peaceful enjoyment' of possessions, and it is here that the court has developed the bulk of its thinking about the circumstances in which an uncompensated interference will upset the requisite fair

balance. Much of that thinking applies similarly to regulatory measures amounting to a 'control of use'. The ECtHR has emphasised, among other things:

- there must be a 'reasonable relationship of proportionality' between the measure employed and the aim pursued (see: *Sporrong and Lönnroth v Sweden* 5 EHRR 35 [1982] ECHR 7151/75)
- the State has a broad 'margin of appreciation' in choosing the precise measures required to promote a particular social goal or to respond to a particular situation. The ECtHR will only intervene where the State has clearly overstepped the mark, particularly so where the measure is enacted by the elected legislature (see: *James and Others v UK* (1986) 8 EHRR 123 [1986] ECHR 8793/79)
- the margin of appreciation is more generous in some areas of law than others. For example, in fields such as social security entitlement, incidence of taxation, and other areas involving high-level decisions about economic policy and allocation of public resources, the court is especially reluctant to second-guess national choices (see: *Lithgow v UK* (1986) 8 EHRR 329, [1986] ECHR 9006/80)
- however, a fair balance will not be struck where the measure imposes an 'individual and excessive burden' on the affected persons, or 'singles out' a particular group for adverse treatment (see: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 [1982] ECHR 7151/75; *Hentrich v France* (1994) 18 EHRR 440, [1994] ECHR 13616/88)
- similarly the court will examine closely a measure that is discriminatory in the sense of operating differently between categories of people in ostensibly similar positions, or involves arbitrary distinctions—even where the subject-matter otherwise attracts a wide margin of appreciation. Where a measure within the ambit of A1P1 discriminates on the ground of individual status or characteristics (gender, ethnicity, disability, etc.), it may violate Article 14. But in several cases the ECtHR has found a breach of A1P1 alone as a result of the discriminatory operation of a measure. For example, in *Asmundsson v Iceland*, alterations to the law governing disability pensions to resolve financial pressures on the scheme resulted in a small group of pensioners losing their entire entitlement. The ECtHR found a violation of A1P1 without the need to consider Article 14 separately (see: *Asmundsson v Iceland* (2004) 41 EHRR 927 [2004] ECHR 60669/00)
- it is also necessary to consider the duration of the measure imposed (see: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 [1982] ECHR 7151/75). Is it temporary or permanent? In the current pandemic crisis, it is not known how long certain measures will be in place, as lockdowns are extended on a rolling basis
- are there sufficient procedural safeguards to protect against arbitrary treatment? In particular, is there an opportunity to make representations to the authorities on the application of measures in an individual case? Can individual circumstances taken into account at all, or is the measure an inflexible "bright line" rule? (See: *AGOSI v UK* (1987) 9 EHRR 1 [1986] ECHR 9118/80, *Air Canada v UK* (1995) 20 EHRR 150, [1995] ECHR 18465/91)

Significantly, some of the ECtHR case-law concerns measures taken in response to an emergency or similar situation. This is a further category of case in which the State enjoys a particularly broad margin of appreciation, though subject once more to the possibility that a measure will operate arbitrarily or single out a particular group. Thus in SA Bio d'Ardennes v Belgium, a measure requiring slaughter of cattle infected with brucellosis was held a "control of use", and the absence of compensation lay within the State's margin of appreciation (see: *SA Bio d'Ardennes v Belgium* (App.

44457/1) not reported by LexisNexis®). Similarly the ECtHR dismissed a series of challenges to austerity measures imposed following the 2007/8 financial crisis, including a challenge by creditors of Greece to a 'haircut' diminishing the value of their bondholdings (see: *Mamatas and Others v Greece* (App. 63066/14) not reported by LexisNexis®). However, even these unprecedented financial pressures did not mean the State's discretion was unlimited. Hungary was found in breach of A1P1 for introducing new tax rules targeting employees' severance payments, at a rate vastly exceeding that applicable to ordinary income and in effect retrospectively taxing periods of employment served before the measure came into force (see: *N.K.M. v Hungary* (2013) 62 EHRR 1082 [2013] ECHR 66529/11).

## A1P1 and COVID-19 measures—is there scope for a claim?

Against that background, in what circumstances might those affected by measures taken to address the COVID-19 pandemic have a claim for violation of A1P1?

In general terms, the ECHR is incorporated into the legal systems of all its contracting States. A claimant must exhaust domestic remedies before making an application to the ECtHR. The measures adopted by the UK are a useful working example for examining the kinds of A1P1 pitfalls governments are likely to encounter. The Human Rights Act 1998 (HRA 1998) enables a litigant to challenge an act of a public authority as incompatible with a Convention right, and to claim damages in circumstances where the ECtHR would award just satisfaction. The UK domestic courts generally follow established ECtHR jurisprudence.

The Coronavirus Act 2020 (CA 2020) gives government ministers sweeping powers to prevent or restrict business operations and to control the free movement and assembly of individuals, while the mitigation measures adopted by the government are a combination of generalised, cross-sector relief (such as a commitment to meet 80% of the salary payable to furloughed employees, up to a monthly cap), an approximation of which has been extended to self-employed individuals; and more targeted reliefs and support measures focused on public-facing sectors such as retail, hospitality and leisure. The CA 2020 contains a 'sunset' clause providing for expiry of most of its provisions after two years, and Parliament is to vote at six-monthly intervals on its continuation.

On the principles considered above, restrictions on operation of businesses in the face of a highly infectious and virulent pathogen are unlikely be regarded as a 'deprivation' of possessions. Even if many businesses would be unlikely to survive the pandemic (and numerous individuals would face real and severe hardship) without some assistance, these are essentially temporary regulatory measures taken in the face of a national emergency threatening potentially hundreds of thousands of lives. They are likely, therefore, to be regarded as a 'control of use' of property—or at most a generic 'interference' with peaceful enjoyment. So, while we are not in the position of having to speculate on what might have been the position had government simply refused to introduce mitigation measures, it is far from self-evident that would in itself violate the A1P1 rights of those sustaining economic harm. But as things stand, the focus will be on much finer-grained issues of fairness and equality of treatment.

The issue of targeting is likely to prove complex. How does the law treat the knock-on effects on dependent businesses that do not qualify for the same relief, eg from business rates? The UK courts have already responded to this issue in other situations. For instance, in the wake of the Dunblane massacre, a ban was imposed on certain handguns and ammunition. In *R v Secretary of State for the Home Dept, ex parte Howitzer Products Ltd* [2000] 2 WLUK 714 (not reported by LexisNexis®), the Court found no breach of A1P1 in failing to extend compensation to firearms traders no longer able to use ammunition presses. There was no requirement to interpret the term 'ancillary equipment'

in the Firearms (Amendment) Act 1997 (for which compensation would have been payable) as including that equipment. Analogies can be seen to situations arising from the COVID-19 pandemic. For instance, sports events advertisers or broadcasters may struggle to establish an A1P1 claim to the same business rates relief as the event organisers, particularly as they benefit from other more generalised relief available to businesses.

The complexity of the rules governing entitlement to some of the proposed relief means that there are bound to be cases at the margins, where individuals and companies who share the essential characteristics of those who benefit from support are, nevertheless, disentitled from claiming it. Any compensation scheme must draw the line of entitlement somewhere. However, 'bright line' rules that fail to respond to individual circumstances, resulting in significant (and probably unintended) exclusion of certain categories of claimant, risk producing arbitrary results that offend A1P1. In *R (Kelsall) v Secretary of State for Environment, Food and Rural Affairs* [2003] EWHC Admin 459, the High Court had to examine a scheme introduced following the ban on fur farming, for compensating breeders of animals traditionally reared for their pelts. The court found that compensation under the Fur Farming (Compensation Scheme) (England) Order 2002 failed to reflect the loss sustained by certain businesses because of its failure to recognise differences in value between particular breeds, and other attributes of stock. The Court noted that a compensation scheme is allowed a reasonable margin of approximation to ensure workability, but this scheme produced arbitrary effects and thus lay outside that margin.

Difficult cases arising from the COVID-19 pandemic are likely to test the courts. One immediate example comes to mind. It is reported that the Chancellor Rishi Sunak has declined to create a specific support package for the aviation industry, but is prepared to discuss the situation with individual firms when they have 'exhausted all other options'. Airlines may seek to argue that they should be granted some form of relief, particularly when leisure and hospitality sectors (with which they are obviously related) have received sectoral relief. While case-by-case flexibility avoids the 'bright line' problem apparent in Kelsall, eschewing industry-wide rules in favour of open-ended discretion based on closed-door discussion with individual players risks creating a different kind of arbitrariness—and may also trigger problems under EU State aid law, despite the extra headroom the European Commission has given to dispense COVID-19 related assistance.

## What about the impact on overseas investors? Could they rely on A1P1?

In principle an overseas-based owner or operator of a UK business asset is entitled to rely on A1P1 in much the same way as their UK-based counterpart. There may be some interesting questions of potential discrimination so far as measures directed at particular sectors lay down some specific UK status or connection as a qualifying condition—as appears to be the case with the UK's Coronavirus Business Interruption Loan Scheme. There may be some justification for confining some grants of public aid to UK taxpayers, but less obviously so in the case of a repayable loan.

Overseas investors may additionally be able to take advantage of rights under a bilateral or multilateral investment treaty, in particular the right to fair and equitable treatment, which generally incorporates (among other things) a prohibition on discriminatory treatment. The extent to which arbitral tribunals determining investment claims are bound to allow the State a margin of appreciation or analogous area of discretion is a hotly contested issue in investor-State dispute settlement (ISDS) law. Where a 'fork-in-the-road' provision applies to an ISDS claim, the investor will have to choose between the A1P1 and treaty claims, since the ECHR rule on exhaustion of domestic remedies makes national court proceedings an essential prerequisite to a claim in the ECtHR.

## Conclusions on COVID-19 and A1P1

The scale of the challenge posed by COVID-19 is unprecedented. Governments are having to respond with measures of a scale and nature unknown in peace time (and some going beyond measures known in war time). Frameworks put in place may be legally novel and, indeed, may turn out not to fit comfortably within even the generous legal parameters set by A1P1.

Gordon Nardell QC FCIArb and Angharad Parry are members of Twenty Essex. Further COVID-19 analysis is available on the website of Twenty Essex.

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